KANSAS JUDICIAL COUNCIL BULLETIN

JULY, 1933 PART 2—SEVENTH ANNUAL REPORT

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PRINTED BY KANSAS STATE PRINTING PLANT
W. C. AUSTIN, STATE PRINTER
TOPEKA 1933
15-162

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KANSAS JUDICIAL COUNCIL BULLETIN

Published Quarterly by the KANSAS JUDICIAL COUNCIL, Topeka, Kansas

JULY, 1933

FOREWORD

We devote this issue of the BULLETIN to a synopsis of the decisions of the supreme court respecting the right of eminent domain and the exercise of that right by condemnation proceedings. This includes all of the decisions on that question of the supreme court of our state since its organization. It was compiled for the Judicial Council by Mr. Franklin Corrick, assistant to A. Harry Crane, revisor of statutes. For more than a year the Judicial Council has given quite a little attention to this subject, and previous articles concerning it have appeared in our BULLETINS. We had compiled and previously published a synopsis of the sections of our statute dealing with this subject. That, together with the present compilation, will prove of valuable assistance to the members of the bar and the legislators in an effort to simplify and make more general, uniform and effective our statutes on this important subject.

The Judicial Council is continuing its study of a revision of laws pertaining to estates and procedure in probate courts. We are compiling, and hope to have prepared in time for our next BULLETIN, a synopsis of our decisions pertaining to those matters similar to the one relating to eminent domain we are now publishing. At the recent meeting of the Northwestern Kansas Bar Association at Ellsworth, and of the Southwestern Kansas Bar Association at Scott City, our statutes relating to estates, probate courts and procedure therein formed the principal basis of discussion.

We are compiling data received from the clerks of the district courts and of the supreme court of business transacted in those courts within the year ending July 1, 1933, and pending on that date. These reports are reaching us with unusual promptness, and those received appear to be more than usually complete and accurate. Synopses and tables will be prepared from these reports for publication in our December BULLETIN.

A Synopsis of the Kansas Supreme Court Decisions Relating to Eminent Domain and Condemnation Procedure

By FRANKLIN CORRICK

(JULY, 1933)

I. DEFINITIONS OF POWER OF EMINENT DOMAIN

SEC. 1. *Definitions.* The right to take private property for public use or to authorize such taking inheres in a sovereign state, and any property within its jurisdiction may be taken for the public good. The right to take property under the right of eminent domain is statutory, and it is fundamental that "no man can be divested of his land, or any part thereof, or interest therein, through the exercise of the power of eminent domain, or of any other power, except under the provisions of express and positive constitutional or statutory law; and he cannot be divested through the exercise of such power of any more or greater interest in his land than the constitution or statutes expressly provide for." (*Shawnee County v. Beckwith,* 10 Kan. 603; see, also, *Martin v. Lown,* 111 Kan. 752, 208 Pac. 565; *Chicago R. I. & P. Rly. Co. v. Public Utilities Commission,* 111 Kan. 805, 208 Pac. 576.) As defined by Justice Brewer, the power or right of eminent domain inheres in every state by virtue of its sovereignty and may be exercised whenever the public necessities require, in such manner as the legislature prescribes, subject to the constitutional restrictions as to the time, kind and amount of compensation. The legislature may provide for a jury trial of the damages or may leave it to any commissioners or court, and may make the award of the commissioners final and conclusive, giving to neither party the right to appeal or review, as was done by Laws 1864, chapter 124. (*Central Branch Union Pac. R. Co. v. A. T. & S. F. R. Co.,* 28 Kan. 453.)

The Kansas statutes relating to condemnation procedure now provide for the right of appeal from the award, but such an appeal, unless the statute provides otherwise, is not an ordinary action at law or a suit in equity, but is quasi judicial and governed by the statute prescribing the methods of exercising the right of eminent doman (*Todd v. Atchison T. & S. F. Rly. Co.,* 134 Kan. 459, 7 P. 2d 79); and "Where a statutory procedure has been marked out, it is exclusive, and resort can be had to no other" (Johnston, J., in *Union T. Rld. Co. v. Rld. Comm'rs,* 54 Kan. 360, 38 Pac. 290). The person having the power and desiring to exercise it must proceed as the statute provides, such as application to the court or county commissioners for appointment of appraisers, and while the landowners have no right to have the land appraised or condemned, a statute may so provide (see Laws 1870, ch. 76); but, even so, such remedy will not exclude other remedies, such as trespass (*Atchison, T. & S. F. Ry. Co. v. Weaver,* 10 Kan. 344).

During the first two or three decades of the history of Kansas statehood the line where the right of a private citizen to hold and enjoy his property ended and the right of a corporation to appropriate it for its purposes began was more closely guarded then than in later years. (*Howard v. Schwartz,* 77 Kan. 604, 95 Pac. 559, 18 L. R. A., n. s., 356, 59 A. L. R. 21.)

SEC. 2. *Same; taxation distinguished.* The power of eminent domain is clearly distinguishable from taxation. As, for example, dogs not licensed according to law, although property, may be summarily destroyed without compensating the owner. (*State v. Topeka,* 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529; Nichols on Eminent Domain, pp. 50, 283.)

SEC. 3. *Same; police power distinguished.* The true distinction between the police power and eminent domain is that under the police power private

property, or the use thereof, may be limited, controlled or destroyed in the protection of public morals, health, or safety, without compensation; while under the power of eminent domain property cannot be taken for public or private use without compensation. (*Balch v. Glenn,* 85 Kan. 735, 119 Pac. 67, 43 L. R. A., n. s., 1080, Ann. Cas., 1913A 406.)

In a condemnation proceeding by a drainage district which made it necessary for a gas company to lower its pipe lines because of the deepening of the watercourse under which the pipe lines were laid, it was held that the pipe lines could not be treated as an obstruction so as to authorize their removal under the police power without compensation. (*Cities Service Gas Co. v. Riverside Drainage Dist.,* 137 Kan. 410, 20 P. 2d 520.) In this case, Mr. Chief Justice Johnston said: "Property cannot be appropriated without compensation under the guise of the police power. If the requirements are unreasonable and arbitrary and operate to deprive an owner of his property within the purview of the law of eminent domain, they will not be upheld." It has been held that the Public Service Commission may order improvement in intrastate telegraph service without power of eminent domain, as such is not a taking of property without compensation. (*Chicago, B. & Q. R. Co. v. Reed,* 114 Kan. 190, 217 Pac. 322.) Recent decisions have held that zoning laws do not violate constitutional provisions forbidding the taking of private property without compensation. (*Ware v. City of Wichita,* 113 Kan. 153, 214 Pac. 99.)

SEC. 4. *Same; public use defined.* It is difficult to define what is a public use. The words *ex vi termini* imply the interest of the public therein. Necessity is not definitive of a public use. As to the relative powers of courts and legislatures it has been said that courts determine what is a public use, and the legislature when the power of eminent domain may be exercised in its promotion. (*Lake Koen Irrigation Co. v. Klein,* 63 Kan. 484, 65 Pac. 684.) In the case just cited the question was as to whether or not an irrigation company could use the right of eminent domain in aid of a private use. It was held that it could, if such private use was only incidental to the public use. The public use must always remain the principal purpose of the corporation.

The courts do not attempt to give a conclusive definition of the term "public use." Changing conditions may make a different decision necessary from the one originally given. The trend of court decisions is away from any general or exact definition of the term. Nor is the fact that the public may be benefited the proper test, since public use and public benefit are not synonymous terms. In short, the public must have an exceptional and peculiar interest, and one which it might, on proper occasion, control and manage in the interest of the public. (See 54 A. L. R. 7.) The legislature may itself determine whether a use is public, or it may delegate the power to some tribunal. When the action of the legislature or its agency is challenged, the question becomes one of law as to whether it is actually a public use. (*State, ex rel., v. Kemp,* 124 Kan. 716, 261 Pac. 556, 59 A. L. R. 940; affirmed, 278 U. S. 191, 49 S. Ct. 160, 73 L. Ed. 259.) The court, in holding the early statute relating to condemnation for mill dams valid, questioned the public use but preferred to be in line with the action of other courts in holding it valid. The court held that it did not include the right to overflow or obstruct a highway. (*Vernard v. Cross,* 8 Kan. 248.) The main use of the property taken must be for the public good, and if the principal use is a public one, the fact that part of the land taken will incidentally be used for a private purpose, such as ingress and egress to private property of another affected by the proceedings, will not destroy the public use. (*Smouse v. Kansas City S. Rly. Co.,* 129 Kan. 176, 282 Pac. 183.)

II. CONSTITUTIONALITY

SEC. 5. *Kansas constitution, article 12, section 4.* Where the taking is by a corporation for right-of-way purposes, full payment of security by deposit is required before the taking, and benefits accruing to remaining portion of the land not taken cannot be deducted in such cases. However, the right of

eminent domain is not granted by this section, but is only a restriction upon such right (*Challis v. A. T. & S. F. Rly. Co.*, 16 Kan. 117); and it has been held not to apply to roads and highways, but only to canals, railroads and other similar cases in which some corporation takes a use or benefit in the proposed way other than that enjoyed by the general public (*Comm'rs of Pottawatomie Co. v. O'Sullivan*, 17 Kan. 58).

A railroad company obtains no rights in the land until payment or deposit is made and has not the right of possession until full compensation or deposit is made. (*Atchison, T. & S. F. Ry. Co. v. Weaver*, 10 Kan. 344; *St. Joseph & D. C. Ry. Co. v. Callender*, 13 Kan. 496.) Likewise a deposit after tresspasses are committed does not bar an action thereon. (*Missouri, etc., Ry. Co. v. Ward*, 10 Kan. 352.) "Just compensation" is not limited to property actually taken, but means damage (*Atchison, T. & S. F. Ry. Co. v. Blackshire*, 10 Kan. 477); and compensation for a right of way includes not only property taken, but also the loss sustained in value of property by being deprived of a portion of it (*Reisner v. Union Depot & Rld. Co.*, 27 Kan. 382).

The constitutional provision says nothing as to right of possession. A statute (now R. S. 66-901 to 907) giving railroad right of possession pending appeal was held valid. (*Central Branch U. P. Ry. Co. v. A. T. & S. F. Ry. Co.*, 28 Kan. 453.)

A city ordinance authorizing the construction of a railroad over a street or highway without providing compensation for property owners does not violate this section or the fifth amendment to the United States constitution, which declares that property shall not be taken without compensation. The reason is that the land is not directly taken, as the fee was already in the public and the injury to private property is indirect or remote. (*Ottawa O. C. & C. G. Ry. Co. v. Larson*, 40 Kan. 301, 19 Pac. 661, 2 L. R. A. 59.)

This section of our constitution was held not to apply to municipal corporations acting in behalf of the state in condemnation proceedings, consequently a city may take possession before assessing the damages (*St. Joseph, etc. Ry. Co. v. City of Hiawatha*, 95 Kan. 471, 148 Pac. 744), or even without condemnation proceedings or making compensation or providing assessment of damages (*Sullivan v. City of Goodland*, 110 Kan. 359, 203 Pac. 732).

SEC. 6. *Same; notice to landowner.* No notice to the landowner is required by any provision in the Kansas constitution, and where the statute relating to procedure does not require it, no notice is necessary. The landowner is entitled to full compensation, but this does not mean that he must be notified, so far as the constitution is concerned. (*Buckwalter v. School District*, 65 Kan. 603, 70 Pac. 605, 4 L. R. A., n. s., 170n.; Ann. Cas. 1913A 1256.)

SEC. 7. *Same; deduction of benefits.* As to railroad rights of way the commissioners must appraise the land, irrespective of benefits (*Hunt v. Smith*, 9 Kan. 137), and the court has always held that damage to lands taken by a railroad for a right of way must be paid for irrespective of any benefits or set-offs resulting from such improvement (*Le Roy & W. Rld. Co. v. Ross*, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217), and that the constitutional restriction (Kan. cons't., art. 12, sec. 4) as to deduction of benefits extends to the residue of the land damaged by the taking (*Inter-State Consolidated Rapid Transit Ry. Co. v. Simpson*, 45 Kan. 714, 26 Pac. 393). But the constitutional provision does not apply to additional grounds outside of railroad right of way condemned for shops and terminal facilities, and the benefits should be deducted from damages to lands not actually taken. (*Smith v. Mo. P. Ry. Co.*, 90 Kan. 757, 136 Pac. 253.)

Benefits to land not actually taken for roads may be deducted. (*Commr's of Pottawatomie Co. v. Sullivan*, 17 Kan. 58.) Article 12, sec. 4, of the Kansas constitution was said in the above case not to apply to roads but only to certain corporations taking a way other than that enjoyed by the general public.

SEC. 8. *United States constitution, amend.* 5. The drainage act of 1897 (R. S. 24-201 to 15) was held valid, the court saying that "it seems to have

been the intention to place it under the police power." (*Griffith v. Pence,* 9 Kan. App. 253, 59 Pac. 677.) The contention was made that it violated amendment 5 of the federal constitution. However, the fifth amendment is not a limitation upon the states in regard to taking property under eminent domain. (*State, ex rel., v. Kansas City,* 125 Kan. 88, 90, 262 Pac. 1062.)

III. GENERAL RIGHTS AND LIABILITIES IN CONDEMNATION PROCEEDINGS

SEC. 9. *Scope.* No attempt is made under this heading to give all the Kansas decisions relating to rights and liabilities arising under condemnation proceedings. Only a brief outline is herein given of a few of the Kansas supreme court decisions which appear to have general application to the various eminent domain statutes. The decisions construing the law of eminent domain in this state are separately grouped, under the main headings or chapters immediately following, into the different governmental subdivisions, such as cities, drainage, etc., as well as railroads and other private corporations and individuals authorized by statute to exercise the right of eminent domain. It is hoped that this plan will prove of some value in the task of eliminating the confusing diversity of present methods of condemnation procedure. The reason for this method of approach is mainly due to the fact that there are in Kansas more than eight special methods of condemnation procedure and one general method authorized. The general method (R. S. 26-101 to 2) was meant to apply to all corporations, except railroad and interurban-railway corporations. Special methods are provided for cities (R. S. 26-201 to 10), land of historical interest (R. S. 26-301 to 6), railroads (R. S. 66-901 to 11), milldams and power-plant dams (R. S. 59-101 to 16), right to take water (R. S. 42-109 to 18), roads (R. S. 1931 Supp. 68-102 to a; R. S. 68-103 to 10), road materials (R. S. 68-137 to 8), township drainage works (R. S. 24-201 to 16 and 24-301 to 17), and other statutes setting up procedure such as change of street grade in cities of first class (R. S. 13-1020 to 2). In several instances the condemnor has a choice of one of two methods. (See *Knox v. Great Lakes Pipe Line Co.,* 135 K. 170, 9 P. 2d 650.) A synopsis of the statutory provisions relating to eminent domain and condemnation procedure in Kansas has already been prepared by the writer (see October, 1932, BULLETIN, Kansas Judicial Council, pp. 72 to 87.) For an excellent collection of judicial statistics on condemnation procedure in all the states, by Roy Robert Ray, see the First Report of the Judicial Council of Michigan, Jan. 1931.

SEC. 10. *Nature of condemnation proceedings.* It has been said in railroad cases that condemnation proceedings are essentially *in rem.* (*Kansas & C. P. Ry. Co. v. Phipps,* 4 Kan. App. 252, 45 Pac. 926; affirmed, 58 Kan. 142, 48 Pac. 573.) They cannot be used to quiet title or compel specific performance of contracts already owned or entered into. (*Florence, etc., Rld. Co. v. Selders,* 4 Kan. App. 497, 44 Pac. 1012.)

The proceedings in Kansas are what are sometimes referred to as the judicial type as distinguished from the administrative type. Under the administrative method the proceedings are *ex parte* so far as the taking of the land and awarding damages, and the landowner is not a party, but if dissatisfied with the award may institute proceedings in court for a new award, and a personal judgment is rendered, and there can be no abandonment of the proceedings by the condemnor. (Nichols, Em. Dom., secs. 369, 370.) Under the judicial method, as used in Kansas, the corporation or other party having power of eminent domain first complies with the statutory preliminaries, then institutes proceedings in court or before a governing body, such as the board of county commissioners, and the landowners are served with notice of the petition or proceeding and a hearing is had. The land is appraised by commissioners appointed either by the court or governing body, as the statute provides. The value of the land is determined and assessed and award of damages to the landowners made in the report of the appraisers. Except where the statute provides (see R. S. 26-102; *Stewart v. Marland Pipe Line Co.,* 132 Kan. 725, 297 Pac. 708) a personal judgment cannot be rendered on

appeal from the award. Therefore the proceedings may be abandoned by the condemnor, even after judgment rendered, if the condemnor has not taken possession and title has not passed. The proceedings on appeal are quasi-judicial since the condemnation procedure is special and in the nature of an inquest (*State Highway Commission v. Griffin,* 132 Kan. 153, 155, 294 Pac. 872) unless, as above stated, the statute providing for the appeal from the award makes it an ordinary action under the code of civil procedure.

SEC. 11. *Notice to landowner.* Since no provisions of the constitution requires notice to the landowner, if the statute does not provide for it no notice need be given. (*Buckwalter v. School District,* 65 Kan. 603, 70 Pac. 605; 4 L. R. A., n. s., 170n; Ann. Cas. 1913A, 1256.) Where a statute (now R. S. 66-906) was silent as to who should give notice, it was held as sufficient for the appraiser to give it. (*Clement v. Wichita & S. W. Ry. Co.,* 53 Kan. 682, 37 Pac. 133.) If there are two sections of the statute providing for different kinds of notice, one notice is sufficient if intended as a substitute for the other. (*Harrison v. Newman,* 71 Kan. 324, 80 Pac. 599.) It has been held that where the notice fails to fix the time when the commissioners will commence to condemn, the proceedings are void. (*Missouri Pac. Rly. Co. v. Houseman,* 41 Kan. 300, 304, 21 Pac. 284.)

SEC. 12. *Validity of the proceedings.* Condemnation statutes and the proceedings thereunder are void unless compensation to the landowner is provided for. (*Carbon Coal & Mining Co. v. Drake,* 26 Kan. 345.) To acquire rights under a condemnation statute setting out the complete steps as to procedure, the act must be complied with. (*Atkins v. Davis,* 11 Kan. 580.) The question as to which procedural statute is applicable often arises. Indefinite words, such as "according to law" or "so far as applicable," are frequently used. The words "so far as applicable" used in the statutes (see R. S. 17-618) relating to procedure under a different statute than the one granting the power has been interpreted as meaning that a definite width or extent of land taken for a pipe line need not be determined the same as required for railroad right of ways. (R. S. 66-901 *et seq.*; *Love v. Empire Natural Gas Co.,* 119 Kan. 374, 239 Pac. 766.) So far as questioning the validity of the proceedings is concerned it would seem that in all cases it is waived if the parties go to trial on the merits on an appeal from the award (See *Commis. of Lyon Co. v. Kiser,* 26 Kan. 279; *Atchison T. & S. F. Ry. Co. v. Patch,* 28 Kan. 470); or they may agree to waive all defects in the proceedings (*Allen County Commis. v. Boyd,* 31 Kan. 765, 3 Pac. 523); also, the filing of a claim for damages would seem in all cases to waive right to notice and other irregularities in the proceedings (*Meehan v. Barber Co. Commis.,* 108 Kan. 251, 194 Pac. 916).

SEC. 13. *Enjoining the proceedings.* A proper way to test right to take property is a suit to enjoin the taking, since under the statutes an appeal is a waiver of the validity of the proceedings. (*A. T. & S. F. Ry. Co. v. K. C. M. & O. Ry.,* 67 Kan. 581, 73 Pac. 899.) This is true when no other adequate remedy at law is available to protect the landowner's rights, especially where there is a special injury and statutory provisions are not strictly complied with. (*Euler v. Rossville Drainage District,* 118 Kan. 363, 235 Pac. 95.) Abutting property owners usually may enjoin the vacation or closing of roads or streets in such cases. At to who, other than abutting owners, may enjoin, see 68 A L. R. 1285n; see, also, *Bolmar v. City of Topeka,* 122 Kan. 272, 252 Pac. 229.

An injunction will not lie because of irregularities in the proceedings unless the landowner is deprived of right to compensation (*Brookings v. Riverside Drainage Dist.,* 135 Kan. 234, 9 Pac. 2d 656); but it is a proper remedy when the landowner's land is being taken ostensibly for a lawful purpose but in reality for an unlawful one, such as a private use (*Smouse v. Kansas City S. Rly. Co.,* 129 Kan. 176, 282 P. 183).

The state is undoubtedly vested with the power to enjoin the taking of public and private property where same is done without a contract or condemnation proceedings. (*State, ex rel., v. Drainage District,* 123 Kan. 46, 393, 254 Pac. 366.)

SEC. 14. *Partial reports by the commissioners.* The commissioners or appraisers may make a partial report of their findings on the view and still retain jurisdiction to hear claims and make awards for lands subsequently taken. (*Sicks v. Allen County Commissioners,* 126 Kan. 643, 270 Pac. 607.) An appeal from such partial reports of the commissioners, if made within the statutory time, is valid and will not be set aside, even though a final report is afterwards filed. (*Lotz v. Kansas City,* 108 Kan. 25, 193, Pac. 1051.)

SEC. 15. *Appeal from the award.* An appeal from the award of damages allowed by the appraisers has been held to be limited to property shown in the commissioners' report, and that other property will not be affected on the appeal. (*Chicago, K. & W. Ry. Co. v. Grovier,* 41 Kan. 685, 21 Pac. 779); but the landowner may appeal from the award, even though he is not named in the report of the commissioners making the award. This is true where the statute does not make the landowners party to the proceedings.

Usually the sole question on the appeal from the award is the amount of damages (*Briggs v. Labette County Commis.,* 39 Kan. 90, 17 Pac. 331); but the statute may give the right to inquire into other questions, such as title as affecting right to compensation (R. S. 24-445); or the burden may sometime be on the person claiming as owner to show title or adverse possession (*Chicago, K. & N. Ry. Co. v. Cook,* 43 Kan. 83, 22 Pac. 988). The landowner who does not have title to the land may recover only for the damage to his particular interest in the land. (*Chicago, K. & W. Ry. Co. v. Hurst,* 41 Kan. 740, 21 Pac. 781.) Written pleadings upon appeal are discretionary with the judge under most of the statutes. Of course, the court under those statutes does not render a personal judgment, but only an award of damages and costs. (*Kansas City W. & N. W. Rld. Co. v. Kennedy,* 49 Kan. 19, 30 Pac. 126.)

SEC. 16. *Same; appeal bond.* The fact that an appeal bond does not include all the lands damaged will not prevent recovery of damages thereon on appeal. (*Chicago, K. & W. Rld. Co. v. Brunson,* 43 Kan. 371, 23 Pac. 495.) A defective appeal bond is not void where the owners have joined in it (*Wood v. School District,* 102 Kan. 78, 169 Pac. 555); but where only the surety signs, it is void and the appeal fails (*St. L. K. & S. W. Ry. Co. v. Morse,* 50 Kan. 99, 31 Pac. 676; see, also, *Lotz v. Kansas City,* 108 Kan. 25, 193 Pac. 1051). Practically all the cases as to defective appeal bonds are reviewed in a late decision in which it was held that a single bond filed by the owner of separate lots, on appeal from condemnation award, will give a court jurisdiction, even though lots were separately set out in the petition and separate appraisement values put thereon. (*Burke v. Missouri-K.-T. Rld. Co.,* 132 Kan. 625, 296 Pac. 380.) In a later case in which only a part of the owners who were tenants in common signed the appeal bond, it was held that the bond gave the court jurisdiction and the ruling of the district court allowing amendment of the bond so as to include all the tenants in common was upheld. (*Sinclair v. Missouri Pac. Rld. Co.,* 136 Kan. 764, 18 P. 2d 195.) Mr. Justice Harvey, speaking for the court in the case just cited, said: "Perhaps in the light of the authorities above mentioned it could have been determined for the benefit of all under that bond (the original bond), but we do not need to decide that question."

A bond is void so as to destroy a court's jurisdiction on appeal if it runs to an entire stranger (*Lovitt v. Wellington & W. Rld. Co.,* 26 Kan. 297); but if the context describes the condemnation proceedings and obligates the maker to pay judgments and costs on appeal, it is not void and may be amended. (*Sheridan v. Phillips Pipe Line Co.,* 134 Kan. 260, 5 P. 2d 817.) The fact that an appeal bond was not double the amount of the award according to statutory requirement has been held not to destroy the court's jurisdiction. (*Chicago, K. & W. Ry. Co. v. Abilene,* 42 Kan. 97, 104, 21 Pac. 1112.)

SEC. 17. *Statutes applicable.* Where the condemnor may proceed under more than one statute, he should indicate in his petition which one he is proceeding under; and if he fails to do so the landowner may effect an appeal under any one of the available statutes. (*Knox v. Great Lakes Pipe Line Co.,* 135 Kan. 170, 9 P. 2d 650.) It should be under one or the other, since a judg-

ment rendered under two different statutes would be questionable, said the court in the case just cited. Unless two statutes are in irreconcilable conflict with each other, a later statute will not repeal a former one. It has been held that R. S. 26-101 to 2 did not repeal other corporation condemnation statutes, where the only difference is in the place of filing report or time of effecting appeal, etc. (*Brookings v. Riverside Drainage District,* 135 Kan. 234, 9 P. 2d 656.)

SEC. 18. *Nature of judgment rendered on appeal.* In an appeal from an appraisement of land for state highway purposes it was questioned whether a personal judgment could be rendered under R. S. 26-101 to 2, as prior to this statute, passed in 1923, such personal judgment could not be rendered on an appeal taken. The court indicated that it could not, but found it unnecessary to decide the question, since the appeal had not been taken within the statutory 30-day period from date of filing of the appraisement. (*In re Condemnation of Land for State Highway Purposes,* 132 Kan. 153, 294 Pac. 872.) It has since been held, however, that a personal judgment is rendered where the appeal from the award is under R. S. 26-102, since the appeal is the same as any other action under the code of civil procedure. (*Stewart v. Marland Pipe Line Co.,* 132 Kan. 725, 297 Pac. 708.)

It is said that the reason the statutes did not provide for a personal judgment on appeal from the award is that an owner of land would not want to take a judgment against an irresponsible and insolvent person as payment for his land; nor would the condemnor want to pay an enormously excessive award. (*St. L. & D. Rld. Co. v. Wilder,* 17 Kan. 239; see, also, *Lawrence & T. Ry. Co. v. Moore,* 24 Kan. 323; *Florence, etc., Ry. Co. v. Lilley,* 3 Kan. App. 588, 43 Pac. 857.)

SEC. 19. *Damages, elements and measure of.* The owner's right to damages to his property taken under eminent domain is not questioned. Even though only an easement is taken, it has been held that the owner may recover the full value of the land (*Dethample v. Lake Koen Irrigation Co.,* 73 Kan. 54, 84 Pac. 544); but the purpose of the taking is not to be considered by the jury in determining the damages (*Atchison T. & S. F. Ry. Co. v. Blackshire,* 10 Kan. 477).

While owners are entitled to the right to be compensated for injuries resulting from property taken, it has been held that the fact that a statute makes no provision for a suit for consequential damages does not give the owner the right to enjoin the proceedings. (*Mayfield v. Board of Education,* 118 Kan. 138, 233 Pac. 1024.) Whether or not consequential damages can be recovered on appeal from award would depend upon the circumstances concerning such damages. It has been held that an owner is not entitled to consequential damages to the entire tract where part of it is separated by another railroad. (*Kansas C. M. & O. Ry. v. Littler,* 70 Kan. 556, 79 Pac. 114.) Where damages are speculative, as the extra care required for live stock liable to be frightened by trains, they cannot be considered. (*Atchison & D. Rly. Co. v. Lyon,* 24 Kan. 745; *Florence, E. & W. V. Rld. Co. v. Pember,* 45 Kan. 625, 26 Pac. 1; *St. Louis, K. & S. W. Ry. Co. v. Hammers,* 51 Kan. 127, 32 Pac. 922; *Southwestern M. Rly. Co. v. Harvey,* 8 Kan. App. 489, 57 Pac. 550.) A rule for measuring damages is said to be "the difference, if any, between the value of the lands before and immediately after they were appropriated." (*Wood v. School District,* 108 Kan. 1, 193 Pac. 1049.) That is, any legitimate use to which it may be applied, including that most advantageous to the owner, may be considered. In an early case relating to milldams it was held that the measure of damages is the difference between the value of property without the dam and the value with the dam (*Harding v. Funk,* 8 Kan. 315); but what is perhaps the standard rule for the measure of damages in condemnation cases is to the effect that the measure was the value of the land actually taken, and the difference in value of the remainder of the tract immediately before and after the taking (*Emery v. Riverside Drainage District,* 132 Kan. 98, 294 Pac. 888); and where there is depreciation in value of the remainder of a tract of land taken, the court, in instructing

the jury as to the damages to the land actually taken and as to the difference in value of the entire tract before and after the taking, should make reference as to damages to the entire tract, that the "entire tract" means the remainder, so that the land actually taken will not be assessed twice. (*Laptad v. Douglas County Commr's,* 130 Kan. 564, 287 Pac. 255.)

Sometimes on appeal the question arises as to whether or not the jury should be permitted to view the premises. This is in the discretion of the trial judge. The supreme court has said that there is no abuse of such discretion when the trial court refused a view of the premises because the property had been improved in part by the creation of a filling station. (*Fitch v. State Highway Comm.,* 137 Kan. 584, 21 P. 2d 318.)

In the same case above cited the owner claimed that the most advantageous use to which his land could be put was truck farming and gardening. For this reason it was held that the admission of evidence in regard to the amount of earth fill required for bringing the land to highway levels was erroneous.

As to the elements that go to make up the damages to the property taken, there are many different kinds, depending more or less upon what use the property has been and is to be put. These will be given under the particular heads, such as railroads, etc. An example of what evidence is not competent, the court has held that fear in the minds of prospective purchasers of the possible breaking and falling of high-tension wires used for transforming electrical power is not a proper element as to the remainder of the tract in determining its market value. (*Yagel v. Kansas Gas & Electric Co.,* 131 Kan. 267, 291 Pac. 768.) Nor is evidence as to a mere offer to purchase proper to prove value. (*St. Joseph & D. C. R. R. Co. v. Orr,* 8 Kan. 419.) The court, in a later decision, said that such an offer could not be much evidence of value unless the court went behind the motive to find the elements prompting the offer. (*State v. Nelson,* 126 Kan. 1, 266 Pac. 107.)

SEC. 20. *Tort action not maintainable, when.* Where the property is not taken by condemnation proceeding an action in tort cannot be maintained against the governmental agency in the absence of a statute giving such right of action. (*Isham v. Montgomery County Commr's,* 126 Kan. 6, 266 Pac. 655.) But where an action is founded upon a quasi-contractual obligation and no trespass or wrongful taking is alleged, the landowner may recover from the county the reasonable value, even though the taking is without condemnation proceedings. The real reason for the distinction appears to be in that the county is not liable for the tortious conduct of its agents. (*Webb v. Crawford County Commr's,* 127 Kan. 547.)

SEC. 21. *Deduction of benefits to remainder of land.* The only restriction on the deduction of benefits arising from the constitution (Kan. const., art. 12, § 4) is as to rights of way appropriated to the use of any corporation. (*Lee v. Missouri Pac. Rld. Co.,* 134 Kan. 227, 5 P. 2d 1122.) This restriction as to deduction of benefits extends to the residue of the land damaged by the taking. (*Inter-State Consolidated Rapid Transit Ry. Co. v. Simpson,* 45 Kan. 714, 26 Pac. 393.)

Where special benefits may be deducted, an instruction stating that all benefits that are the direct and special result of the improvement, that will increase the actual and usable value of the land as well as the market and sale value, may be considered as proper if there is a further instruction that those benefits must be peculiar to such land and not common to the lands generally affected by the improvement. (*Emery v. Riverside Drainage District,* 132 Kan. 98, 294 Pac. 888.) To this effect it was early held, under the milldam act, that the general benefits to the public in the vicinity could not be deducted from the damage caused by the overflowing of the land. (*Marcy v. Fries,* 18 Kan. 353.)

SEC. 22. *Damage in the nature of interest.* Statutes providing for damages are broad enough to include interest from date of condemnation (*Calkins v. Salina N. Ry. Co.,* 102 Kan. 835, 172 Pac. 20); the general rule being that the landowner is entitled to damages in the nature of interest between the time of the appropriation and the time of rendition of judgment (*Flemming v. Ellsworth County Commr's,* 119 Kan. 598, 240 Pac. 591). However, interest

is not proper where, on appeal, the landowner recovers less than the award of the appraisers. (*Lee v. Missouri Pac. Rld. Co.,* 134 Kan. 225, 5 P. 2d 1102.)

SEC. 23. *Extent of right or title taken by the condemnor.* The rights and easement acquired by the condemning party must be definitely and specifically shown in the proceedings. The condemnation proceedings must show what is taken and what the landowner parts with. In other words, nothing will be taken by implication or intendment under the eminent-domain statutes (*State v. Armell,* 8 Kan. 288) was a holding in one of our earliest decisions relating to this subject (but, see *Cowan v. St. Louis & S. F. Ry. Co.,* 51 Kan. 451, 460, 33 Pac. 99). It has been held that in the case of a city condemning land for parks, parkways and boulevards, under R. S. 26-204, that the unqualified fee-simple title vests in the city immediately upon the condemnation. This is because of the special provisions of the statute. (*Skelly Oil Co. v. Kelly,* 134 Kan. 176, 5 P. 2d 823.) The fee in lands condemned for a gravel pit does not pass to the county under R. S. 68-107. (*Kingman County Commr's v. Hufford,* 126 Kan. 106, 266 Pac. 932.)

SEC. 24. *Additional servitudes.* A street-car track in a city street is not an additional servitude so as to give lot owner action for damages. (*Phillips v. Arkansas V. Interurban Ry. Co.,* 89 Kan. 835, 133 Pac. 429.) And it was also held that the placing of telephone lines on highways is not an additional burden for which the landowner may recover (*McCann v. Telephone Co.,* 69 Kan. 210, 76 Pac. 870); but where an easement is granted to lay pipes, the digging of a ditch in lieu thereof cannot be done without condemnation or paying for same (*Ralens v. City of Hutchinson,* 83 Kan. 618, 112 Pac. 129). As to railroads, it is held that they cannot close up valuable crossings left at the time of the condemnation proceedings without becoming liable in damages. (*Atchison, T. & S. F. Ry. Co. v. Davenport,* 65 Kan. 206, 69 Pac. 195.)

SEC. 25. *Abandonment of the proceedings.* The statutory provisions for abandonment must be compiled with, such as the passing of a resolution as required in R. S. 26-206. (*State v. Nelson,* 126 Kan. 1, 266 Pac. 107.) The condemnor has the right under most statutes to abandon the proceedings at any stage. And where the appeal is from the award and the jury acts as appraisers, the proceedings may be abandoned after their verdict, since such verdict is not a personal judgment. So, in cases appealed under R. S. 66-906, where title has not passed under the provisions of other sections of that act, and the statute only provides that an appeal may be taken, the result of the action is not construed as a personal judgment so as to prevent abandonment of the proceedings. (*Todd v. Atchison, T. & S. F. Rly. Co.,* 134 Kan. 459, 7 P. 2d 79.) But where the appeal is under R. S. 26-102, which provides that on appeal the action shall be tried and docketed like other actions, and the title has passed to the condemnor under R. S. 26-101, it is held that such condemnor cannot abandon the proceedings after the case has been submitted to the court or jury on an appeal from the award. The reason for this is that under R. S. 26-102, the case is tried under the general code of civil procedure and the action cannot be dismissed without prejudice after final submission to the court or jury. (R. S. 60-3105; *Stewart v. Marland Pipe Line Company,* 132 Kan. 730, 297 Pac. 708.)

SEC. 26. *Statute of limitations.* Before the limitations statute begins to run, the judgment of award must become final on appeal. (*Schmick v. M. K. & T. Ry. Co.,* 87 Kan. 152, 123 Pac. 887.)

SEC. 27. *Exhaustion of the power.* A railroad has been held not to exhaust its power to further condemn land to straighten its right of way by the first exercise of its power (*Ritchie v. A. T. & S. F. Ry. Co.,* 128 Kan. 637, 279 Pac. 15); and the fact that a city has previously exercised the right in condemning for water purposes does not preclude it from again using the right where the public interest so requires it (*Wallace v. City of Winfield,* 98 Kan. 651, 159 Pac. 11; see, also, same, 96 Kan. 35, 149 Pac. 693).

SEC. 28. *Order of condemnation.* The title will be transferred by the

condemnation proceedings themselves in the absence of express statutory provision as to the order of condemnation. (*Dye v. Midland V. Rld. Co.*, 77 Kan. 488, 94 Pac. 785.)

SEC. 29. *Writs of assistance.* There is no provision in any of the condemnation statutes for writs of assistance for compelling the owner to surrender possession of the property after condemnation. An act (Laws 1897, ch. 82, § 12) providing that upon application of the condemning city, "writs of assistance shall be granted by said district court directing the sheriff of the county to put such city into possession," was held void because of defect in title of the act. (*City of Enterprise v. Smith,* 62 Kan. 815, 62 Pac. 324.)

SEC. 30. *Nonuser by condemnor.* Nonuser of the property by the condemning party will not of itself work as an extinguishment of the right in absence of statute (*Hamlin v. Kansas Rly. Co.,* 73 Kan. 565, 85 Pac. 602); and if the statute provides that the unqualified fee-simple title shall vest in the condemnor, as in the case of parks, parkways and boulevards in cities, under R. S. 26-204, it is of no concern to the landowner what use is made of the land in the absence of bad faith on the part of the condemnor. In such cases the condemnor may sell the property, there being no possibility of reverter to the original owner. (*Skelly Oil Co. v. Kelly,* 134 Kan. 176, 5 P. 2d 823.)

IV. CITY CONDEMNATIONS

(For eminent domain statutory provisions relating to cities, see: R. S. 1931 Supp. 3-115; R. S. 12-622 to 3; R. S. 12-632 to 4; R. S. 1931 Supp. 12-635; R. S. 12-663, 12-809 to 10, 12-811, 12-820, 12-844 to 7, 12-1306, 12-1401, 12-1633 to 4, 13-404, 13-414, 13-443, 13-1014 to 6; R. S. 1931 Supp. 13-1018 to 13-1018d, 13-1018f; R. S. 13-1020 to 2, 13-1023; R. S. 1931 Supp. 13-1025a to 13-1025j; R. S. 13-1045 to 53, 13-1055, 13-1060, 13-1311; R. S. 1931 Supp. 13-1353; R. S. 13-1354; R. S. 1931 Supp. 13-13a13; R. S. 13-1903, 13-2501; R. S. 1931 Supp. 13-2502a, 13-2502c; R. S. 13-2504 to 5, 13-2519, 13-2527 to 9, 13-2536, 14-423, 14-428, 14-435, 14-607, R. S. 1931 Supp. 14-701 to 14-701j, 14-1007a; R. S. 15-427, 15-439, and 26-201 to 10.)

SEC. 31. *Methods of procedure in cities.* A number of special procedural methods for condemning property by cities are authorized, as a glance at the statutes will reveal. In the 1923 revision it was the intention to combine all the methods into one. (See Report of Commission to Revise the General Statutes, Dec. 1922, page 11.) Chapter 86 of the Session Laws of 1913 was revised in part to make the procedure therein applicable whenever the governing body of any city deems it necessary to condemn private property or easements therein for the use of the city for any purpose whatsoever. (R. S. 26-201.) However many of the statutes granting the power still provide for the various steps in the procedure.

SEC. 32. *Constitutionality.* Article 12, section 4, of the state constitution does not apply to municipal corporations acting as agencies of the state, and consequently a city need not assess the damages before placing a sewer on the land (*St. Joseph etc. Ry Co. v. City of Hiawatha,* 95 Kan. 471, 148 Pac. 744); and it has been held property may be appropriated without condemnation proceedings and without first making compensation or providing for assessment of damages (*Sullivan v. City of Goodland,* 110 Kan. 359, 203 Pac. 732). A zoning ordinance passed under R. S. 12-701 to 6 is a valid exercise of the police power and does not violate any constitutional provision as to taking property without compensation. (*Ware v. City of Wichita,* 113 Kan. 153, 214 Pac. 99.)

SEC. 33. *Public use.* The courts will not sit in judgment on the motives of city authorities in appropriating property to public use. Where mayor and councilmen pass an ordinance and afterwards repeal it and pass a new ordinance to meet later statutory amendments (L. 1917, ch. 108), the proceedings will be considered as an entirety. (*De Priest v. City of Salina,* 101 Kan. 810, 168 Pac. 872; see, also, sec. 4 above, for definitions of public use.)

It has been held that injunction will lie to prevent interference or encroach-

ments upon land condemned for public use, even though the city has allowed some buildings on such land. In such case it will be presumed that there was a necessity for appropriating the land. (*City of Hutchinson v. White,* 117 Kan. 622, 233 Pac. 508.)

The fact that private property is the principal beneficiary of a flood-control project (see R. S. 1931 Supp. 12-635) does not render such project one of mere private concern nor forbid the power of eminent domain to accomplish it. (*Putnam v. City of Salina,* 136 Kan. 637, 17 P. 2d 827.) In such instances the court in the Putnam case said, both private and public property must be fairly charged and assessed for the benefits and burdens accruing thereto. For other cases on public use see section 4 above.

SEC. 34. *Notice to landowner.* A notice to the landowner was required under condemnation proceedings generally (L. 1903 ch. 122 sec. 161a) and a different notice by the appraisers (same, sec. 160). It was held that the notice by the appraisers was sufficient if it appears that such notice was intended to be a substitute for the other. (*Harrison v. Newman,* 71 Kan. 324, 80 Pac. 599.) Where under Laws 1887, ch. 102, sec. 4 (now superseded by R. S. 12-623) it was held that if the known resident riparian owner has not been notified, he may recover damages for pollution of water from sewers. (*Long v. Emporia,* 59 Kan. 46, 51 Pac. 897.) For other cases concerning notice, see section 11 above.

SEC. 35. *Statutes applicable.* If more than one condemnation statute is applicable (see *Evel v. City of Utica,* 103 Kan. 567, 175 Pac. 635) the condemnor or petitioner must choose the act under which the proceedings are to be brought. (*Enterprise v. Smith,* 62 Kan. 815, 62 Pac. 324.)

If statutes are not in irreconcilable conflict with each other the later act will not repeal the former. (*Brookings v. Riverside Drainage Dist.* 135 Kan. 234, 9 P. 2d 656.) It has been held that there is no conflict where an ordinance of legislative character is passed which also provides for condemning private property for widening streets and payment of costs. (*State v. Jacobs,* 135 Kan. 513, 11 P. 2d 739.)

A condemnation statute, unless it so expressly provides, will not exclude a city from paying part of the cost of an improvement under other statutes giving it the right to issue bonds, and it was held that R. S. 12-1633 is not an exclusive method of constructing viaducts and tunnels, etc. (*State v. Atherton,* 127 Kan. 449, 273, Pac. 905.) It has been held that R. S. 3-110 (now repealed) was not broad enough to authorize the condemnation of land for an airport beyond the city limits, but a city could, under R. S. 12-1301, acquire same for parks and use a portion of it for airports and maintain it out of city funds under R. S. 1931 Supp. 13-1353. (*City of Wichita v. Clapps,* 125 Kan. 100, 263 Pac. 12.)

SEC. 36. *Appeal bonds.* It the bond given on an appeal from the award is not absolutely void it may be amended, and the court's jurisdiction is not lost. (See cases cited under sec. 16.)

Even though the surety does not sign the body of the bond, but qualifies as a surety by signing an affidavit, the district court's jurisdiction is not defeated if the city does not object. (*Lotz v. Kansas City,* 108 Kan. 25, 193 Pac. 1051.) Under Laws 1907, ch. 115, sec. 42 (now R. S. 26-205 as revised), an undertaking on appeal, running to the park board instead of to the city, may be amended. (*Kelchner v. Kansas City,* 86 Kan. 762, 121 Pac. 915.) It was held that under a statute (now R. S. 14-423) which did not require bond to be approved by the city clerk, that the appraisers acted as a "justice of the peace," and it was their function to approve the bond, that the bond was valid even though the appraisers did not assemble formally and approve the bond. (*Epstein v. City of Caney,* 87 Kan. 329, 124 Pac. 421.)

SEC. 37. *Damages, elements and measure of.* Damages to individuals sometimes occur where the land is taken without condemnation proceedings. There are certain conditions precedent to an action for damages against a city where such is done. (See R. S. 12-105.) In such cases, where a city takes property, such as obstructing ingress and egress without condemnation, the statute re-

quires the claimant to file a written statement of the injuries within three months after the taking. (*Nelson v. City of Ottawa,* 125 Kan. 482, 264 Pac. 1049.)

A city may not make a contract to compensate the owner except as provided by statute. So a contract to maintain a bridge as partial compensation for lands for drainage, under R. S. 13-1055, is void. (*Mathewson v. City of Wichita,* 117 Kan. 455, 232 Pac. 233; see, also, *Haucke v. Morris County,* 115 Kan. 659, 224 Pac. 64.) A city is not liable to a lot owner for permitting a railroad in a street under a statute (now R. S. 14-434) which allows it "to provide for the passage of railways through the city." (*Hedrick v. Olathe,* 30 Kan. 348.)

When an appeal from the award is taken, unless the statute should so provide, the owner of the land need not state he is the owner, but if such owner dies and the action is revived the new party must allege and prove he is the proper person. (*Medicine Lodge v. Horner,* 7 Kan. App. 652, 53 Pac. 883.)

As to the elements and measure of the damages on appeal from the award, it was held that, under Laws 1907, ch. 115, §§ 37 to 44 (now superseded by R. S. 26-202 *et seq.*), it was not error to admit evidence of rents received in good faith within a reasonable time. (*Kelchner v. Kansas City,* 86 Kan. 762, 121 Pac. 915; but, see *Hall v. Kansas City L. & T. E. Rld. Co.,* 89 Kan. 70, 130 Pac. 664.) In condemning land to widen a drainage canal, where items enumerated in the special questions to the jury do not make up the claimant's entire damages, but are considered as a part thereof in ascertaining the ultimate damage, it is not error to submit same to the jury. (*In re Sidles,* 125 Kan. 1, 262 Pac. 550.) Where practically the entire value of land taken for a flood prevention project is composed of commercial sand and gravel, the quantity of the sand in the tract is the material factor in determining compensation, and an arbitrary finding as to the amount of sand, which is not supported by evidence, will be set aside. (*City of Wichita v. Ferriter,* 126 Kan. 648, 270 Pac. 592.) In cases where land is taken for a street from cemetery grounds, and a zoning ordinance did not specifically restrict the use of the district for an existing cemetery, it is held that damages could be based on the use of the land for cemetery purposes. (*City of Wichita v. Schwertner,* 130 Kan. 397, 286 Pac. 266.)

Under Laws 1872, ch. 100, §§ 54, 65 (now R. S. 14-423, 14-435), it was held that persons incidentally damaged by a change of an established grade are not entitled to damages, as the statute only provided for injury to property taken (*Methodist E. Church v. Wyandotte,* 31 Kan. 721, 3 Pac. 527); and under Laws 1881, ch. 37, sec. 8 (now R. S. 13-1019 to 20, as amended), the measure of damages is the difference in market value brought about by reason of the change, but when property is not injured he will not be entitled to recover anything (*Parker v. City of Atchison,* 46 Kan. 14, 26 Pac. 435). No damages allowed where grade is first established, as under G. S. 1889, par. 562; Laws 1881, ch. 37, sec. 18; it was only when the grade was changed that damages could be allowed. (*Inter-State R. T. Ry. Co. v. Early,* 46 Kan. 197, 26 Pac. 422.)

SEC. 38. *Streets and alleys.* In condemning land for widening of streets, under R. S. 26-201 *et seq.,* the commissioners may make partial reports of their awards and the landowers may appeal within the statutory time for appealing from such awards, and the validity of such appeal is not affected by the filing of a final report, because such partial reports are final as to particular lands so taken. (*Lotz v. Kansas City,* 108 Kan. 25, 193 Pac. 1051.) Where a street extends across a railroad right of way, the city may compel the railroad to construct a subway under an elevated track without compensation. (R. S. 12-1633, 13-404, 13-1903, 26-201.) But these statutes do not apply where a street has never been laid out or established across a railroad right of way. (*City of Wichita v. Wichita Union Terminal Ry. Co.,* 137 Kan. 855, 275 Pac. 171.)

A city may not obstruct access to a street by dumping soil from a drainage canal onto it. While the city has control over the streets, the closing or obstruction must be according to law. The proper proceeding would be to

acquire more land for the canal. (*Burger v. City of Wichita,* 132 Kan. 105, 294 Pac. 670.)

SEC. 39. *Same; injunction.* While injunction is a proper remedy to prevent taking of property without compensation in certain cases, it will not lie to prevent passing of an ordinance vacating an alley merely on the ground that it would cut off the owner's access to the rear of the premises, where they have reasonable means of ingress and egress to their property. (*Foster v. City of Topeka,* 112 Kan. 253, 210 Pac. 341.) As to who are entitled to injunctive relief other than abutting owner, see 68 A. L. R. 1299n. Under R. S. 13-443 a city may vacate a street without assessment and payment of damages, and such vacation makes the city liable to one thereby deprived of ingress and egress. (*Bolmar v. City of Topeka,* 122 Kan. 272, 252 Pac. 229.) A history of the case just cited shows that injunction may lie where a county attempts to vacate a street marking the city limits, since there is no provision in the act (R. S. 12-504) for damages, as counties are under no liabilitiy for vacation of roads. (See, R. S. 68-106; *Sample v. Jefferson County,* 108 Kan. 498.) Cities are, however, liable, in a proper case, for damages caused by vacation of streets. (*City of Belleville v. Hallowell,* 41 Kan. 192, 195; 13 R. C. L. 71; see, also, 68 A. L. R. 1285n as to right of nonabutting property owner to enjoin vacation of roads or streets.)

SEC. 40. *Park, parkways and boulevards.* The question as to the title or extent of interest taken arose under R. S. 26-204, where land may be taken for parks, parkways and boulevards. Under the express provision of the statute it was held that the fee simple title immediately vests in the city upon publication of the resolution of condemnation. In the absence of bad faith of the city it is of no concern to the landowner what use is made of the land, and there is no possibility of reverter. (*Skelly Oil Co. v. Kelly,* 134 Kan. 176, 5 P. 2d 823.)

SEC. 41. *Water supply and waterworks.* A city has no power to take water from a stream and sell it to inhabitants without compensating those entitled to such water rights. It may, however, use the water for ordinary purposes, and second-class cities, under R. S. 14-428, may exercise eminent domain to furnish water to inhabitants, and the fact that it has previously condemned property for that purpose does not preclude it from again using the right if the public interests so require it. (*Wallace v. City of Winfield,* 98 Kan. 651, 159 Pac. 11. See, also, same, 96 Kan. 35, 149 Pac. 693.) It has been held that a third-class city has the power to condemn land for obtaining a water supply, either under R. S. 12-809 or R. S. 15-439, and may, under R. S. 12-845, go outside of the city limits. (*Evel v. City of Utica,* 103 Kan. 567, 175 Pac. 635.) As to procedure R. S. 12-809 goes only so far as to provide for a petition to the district court. (See R. S. ch. 26, art. 2.) Under the provisions of Laws 1872, ch. 100, § 60 (now R. S. 14-428), the city condemned land on the banks of a river and attempted to divert water from the stream. The court held an injunction would lie, because the city must first condemn the water. (*City of Emporia v. Soden,* 26 Kan. 492.) Where a city makes a contract with a water company, granting it the right to furnish water for twenty years, and prescribed a certain manner in which it may acquire the plant after expiration of twenty years, and such contract is validated by the legislature (see Laws 1883, ch. 34), and later an act gives the city the right to condemn water works (Laws 1891, ch. 73, secs. 3, 4,) after a continuance of a contract for over twenty years, held, that the later act applies only to contracts made after its enactment. The city was enjoined from proceeding to acquire the plant in any other manner from that prescribed in its contract. (*Leavenworth v. Water Co.,* 69 Kan. 82, 76 Pac. 451.)

Section 12 of chapter 82 of Laws of 1897 was held unconstitutional, because the word "purchasing" in the title did not authorize condemnation proceedings. This act was repealed (Laws 1903, ch. 122, § 168), and the power is now exercised under art. 2. of ch. 26, Revised Statutes of 1923. The act of 1897, section 12, contained some interesting provisions which do not appear in the act which is now on the statute book. (R. S. ch. 26, art. 2; but see R. S. 12-811). One

provided that the judge appoint one of the three commissioners to determine the value of the property, the other two to be named by the county commissioner, all three to be nonresidents of the city. Another provision was the granting by the court of writs of assistance directing the sheriff to put the city in possession. In the case holding this act (Laws 1897, ch. 82, § 12) void because of the title it raised, but did not decide, the question of whether only a part of a waterworks system could be condemned. (*Enterprise v. Smith,* 62 Kan. 815, 62 Pac. 324.) This would seem to be taken care of by R. S. 26-201 and 26-208.

SEC. 42. *Possession pending appeal.* It was held that under Laws of 1871, ch. 60, § 65 (now R. S. 15-439, as revised) that a landowner had the right to possession pending appeal from the award. (*Kansas City v. Kansas P. Rly. Co.,* 18 Kan. 331.)

SEC. 43. *Additional servitudes.* Where an easement is granted to lay pipes, a city cannot open ditches in lieu of the pipes without condemning or paying for the additional burden, even though such ditches might prove beneficial to the landowner. (*Rolens v. City of Hutchinson,* 83 Kan. 618, 112 Pac. 129. For other cases, see section 24 above.)

V. COUNTY, TOWNSHIP AND DRAINAGE DISTRICT CONDEMNATIONS

(For statutory provisions relating to eminent domain in counties, townships and drainage districts, see: R. S. 1931 Supp. 2-135; R. S. 19-223; 19-1501, 19-1806; R. S. 1931 Supp. 19-1825; R. S. 19-2623; R. S. 1931 Supp. 19-2707, 19-2715; R. S. 24-201 to 16, 24-301 to 17; R. S. 1931 Supp. 24-407, 6th cl.; R. S. 24-438 to 46, 24-463 to 7, 24-470 to 80; 24-512, 5th cl., 24-519 to 24, 24-612, 24-705 to 6, 24-801 to 7, 24-814; R. S. 1931 Supp. 24-1017 to 18; R. S. 26-101 to 2, 80-919, and sections cited under the heading of Roads, Highways, and Bridges, chapter VI, below.)

SEC. 44. *Scope.* This chapter deals mainly with the actions arising under the laws giving the power to acquire land and rights for drainage purposes. The bulk of the decisions concerning condemnation by counties and townships are under proceedings arising out of the establishment and change of roads, highways and bridges. Since the state also has power to condemn for road purposes, the decisions relating to roads, etc. are grouped below under the head of "Roads, Highways, and Bridges." (See chapter VI.)

SEC. 45. *Constitutionality.* Article 2, chapter 24, Revised Statutes of 1923, is not unconstitutional as taking private property without just compensation under the eminent domain clause of amendment 5 of the federal constitution. The court said, however, that "it seems to have been the intention of our legislature to place our drainage act under the police power of the state." (*Griffith v. Pence,* 9 Kan. App. 253, 59 Pac. 677.) However, the fifth amendment to the United States constitution is not a limitation upon the power of the state, as was recently said by our court. (*State, ex rel., v. Kansas City,* 125 Kan. 88, 90, 262 Pac. 1062.) The state may make regulations as to waters and water courses and though such statutes (R. S. 24-105 to 6) deprive a landowner of his common-law right to repel surface waters from other land, they do not take property without compensation. (*Skinner v. Wolf,* 126 Kan. 158, 266 Pac. 926.) The court in the above case adopted the civil-law rule governing the disposition of surplus waters, as laid down by the statute, following the decision in *Martin v. Lown,* 111 Kan. 752, 208 Pac. 565. Under R. S. 24-407 (4th cl.), which gives a drainage district police power to "condemn and cause obstructions in water courses to be removed," such power does not include a direct interference with interstate commerce. Therefore it cannot require the elevation of railroad bridges without condemnation or payment of compensation. (*Kansas City S. Ry. Co. v. Kaw Valley Drainage Dist.,* 233 U. S. 75, 34 S. Ct. 564, 58 L. Ed. 857, reversing, 87 Kan. 272, 123 Pac. 991.)

SEC. 46. *Public use.* The language of R. S. 24-801 indicates that the taking

of land for levees could be sustained under the police power (see Nichols, Em. Dom., sec. 90). Under this act (R. S. 24-801 *et seq.*) the court has held the construction of a levee along a river bank is a public use, in aid of which the power of eminent domain may be invoked. (*Missouri, K. & T. Ry. Co. v. Cambern,* 66 Kan. 365, 71 Pac. 809.)

SEC. 47. *Statutes applicable.* Where the last expressions of the legislature are irreconcible with former statutes the former statutes are repealed. The question arose as to whether the general condemnation statute relating to certain corporations (R. S. 26-101 to 2) repealed a statute governing certain drainage districts (R. S. 24-438 to 46) the court held there was no such irreconcible conflict where the only differences between the two is in filing the report, payment of the money and procedure on appeal. (*Brookings v. Riverside Drainage Dist.,* 135 Kan. 234, 9 P. 2d 656.)

SEC. 48. *Enjoining the proceedings.* While injunction is a proper test by landowners of the right to take property by condemnation (*A. T. & S. F. Ry. v. K. C. M. & O. Ry.,* 67 Kan. 581, 73 Pac. 899), an individual cannot challenge the corporate existence of a drainage district but may enjoin the taking until all the statutory provisions are complied with. (*Euler v. Rossville Drainage District,* 118 Kan. 363, 235 Pac. 95.) It is very clear that the state may enjoin the unlawful construction of dikes across natural water courses, thereby diverting water upon public and private property, without contracting with owners outside the district or by condemnation proceedings, although the district has authority, under R. S. 24-407, to change the course within the district; but they cannot by dikes prevent the ordinary flow entering their district, (*State, ex. rel., v. Drainage District,* 123 Kan. 46, 393, 254 Pac. 366.) A landowner has no right to enjoin the proceedings because of irregularities in taking the preliminary steps, unless he is deprived of his right to proper compensation. (*Brookings v. Riverside Drainage Dist.,* 135 Kan. 234, 9 P. 2d 656.)

SEC. 49. *Damages, elements and measure of.* The occupant of land under an optional contract of purchase is entitled, under R. S. 24-475, to damages caused by construction of a levee. (*Dreier v. Drainage District,* 117 Kan. 403, 232 Pac. 600.) An appropriation of streets for levees, under R. S. 24-816, gives the city no right to damages, since the city has control over the streets merely as agent for the state and has no proprietary right of action. Under the above statute, however, the city is liable for benefits. (*State v. Shawnee Co. Commissioners,* 83 Kan. 199, 110 Pac. 92.)

As to the elements and measure of damages, it was held that a destruction of a private milldam by a drainage district, under R. S. 24-601 *et seq.,* must be compensated for as to its value as a going concern before and after its removal. (*Piazzek v. Drainage District,* 119 Kan. 119, 237 Pac. 1059.) It is proper on appeal to consider all of the most advantageous uses of the land, and damages to the remainder of the tract may be assessed, even though the assessment is made by the jury on the basis that it is most valuable for city-residence purposes. (*McKnight v. Wichita,* 83 Kan. 7, 109 Pac. 994.) A gas company may recover, not only for value of the land appropriated by a drainage in deepening a watercourse channel, but also the reasonable cost of lowering and relocating its pipe line. (*Cities Service Gas Company v. The Riverside Drainage Dist.,* 137 Kan. 410, 20 P. 2d 520.) An instruction setting out the standard rule applicable to condemnation cases—that the measure of damages was the value of the land actually taken, and the difference in value of the remainder of the tract, immediately before and after the taking—is proper. The jury need not be told that it was difference between the value before the taking and immediately after the dike was completed. (*Emery v. Riverside Drainage District,* 132 Kan. 98, 294 Pac. 888.)

SEC. 50. *Deduction of benefits to remainder of land.* Benefits that are direct and special, as the result of building of an embankment or dike, which increase the actual usable value as well as the market and sale value may be deducted. (*Emery v. Riverside Drainage District,* 132 Kan. 98, 294 Pac. 888.)

SEC. 51. *Title or extent of interest taken.* The fee title to land appropriated by a drainage district remains in the landowner, and he may use it in any manner that does not interfere with the drainage district. (*Raney v. North Topeka Drainage District,* 84 Kan. 688, 115 Pac. 399.)

SEC. 52. *Additional grounds for county courthouse.* Additional grounds for a courthouse may be taken under R. S. 19-1501, and this may include the landowner's homestead. The question as to whether additional grounds for the protection of county buildings could be taken was squarely before the court in 1894, and it was decided in the affirmative. (*Jockheck v. Shawnee Co. Commissioners,* 53 Kan. 780, 37 Pac. 621.) For a similar statute passed in 1931, see R. S. 1931 Supp. 32-221 to 2, relating to the acquisition of additional lands adjoining state lakes and parks. As to the constitutionality of R. S. 1931 Supp. 32-221 to 2, see section 80 below.

VI. ROADS, HIGHWAYS AND BRIDGES

(For eminent domain statutory provisions relating to roads, highways and bridges, see: R. S. 1931 Supp. 68-102 to 68-102a; R. S. 68-103 to 17, 68-137 to 8; R. S. 1931 Supp. 68-413; R. S. 68-509; R. S. 1931 Supp. 68-703, 68-730, 68-733, R. S. 68-905 and L. 1933, ch. 234, § 1 amending R. S. 68-107.)

SEC. 53. *Methods of procedure.* The county commissioners, upon application of at least twelve householders, are authorized to lay out, open or vacate roads, and constitute the tribunal having jurisdiction. Complete procedural method is provided, with right of appeal, the same as in justice-of-the-peace cases. The county commissioners may, on their own determination, condemn lands and materials for changes and improvements in roads. The State Highway Commission is authorized, under R. S. 1931 Supp. 68-413, to exercise the right of eminent domain under the procedure provided in R. S. 26-101 to 2.

SEC. 54. *Constitutionality.* The constitutionality of road-condemnation proceedings has seldom been challenged. In 1874 an act (Laws 1874, ch. 112) was passed providing for the opening of private roads by eminent-domain proceedings and for the payment of all the expense by the person for whose benefit the road was located. The act was held unconstitutional for the reason that private property could not be so taken for private use. (*Clark v. Mitchell County Commissioners,* 69 Kan. 542, 77 Pac. 284.)

Chapter 229, Laws of 1889, declaring all section lines in certain counties public highways, held constitutional, as it provides for the tribunal for assessing damages to landowners, and notice is provided for as in what is now R. S. 66-115 (*State v. Spencer,* 53 Kan. 655, 37 Pac. 174.)

SEC. 55. *Public use.* The power to determine the public utility of a proposed road is in the viewers and county commissioners, and the parties cannot by agreement confer such power upon the district court. (*Van Bentham v. Osage County Commissioners,* 49 Kan. 30, 30 Pac. 111.) It has been held that "the fact that a road has no outlet or egress at one end, and that it primarily benefits only a single individual, does not destroy its character as a public highway nor prevent the public from taking private property for it." (*Masters v. McHolland,* 12 Kan. 17, syl. ¶ 5.)

SEC. 56. *Notice to landowner.* Where no notice of the view was set up as required by Laws 1874, ch. 108, sec. 3, but the landowner presented his claim of damages to the board, appealed and recovered upon his claim, he was held to have waived notice of the meeting of the owners. (*Ogden v. Stokes,* 25 Kan. 517.) Likewise, notice and other irregularities in the proceedings is waived by filing claim for damages within the twelve months allowed in R. S. 68-106. (*Meehan v. Barber County Commissioners,* 108 Kan. 251, 194 Pac. 916.) The failure to give all the notices as required by R. S. 68-104, although jurisdictional, cannot be objected to by one who participated in all the proceedings. (*Akin v. Riley County Commissioners,* 36 Kan. 170, 13 Pac. 2.)

In an independent action it was held that a landowner may recover for damage if he had no actual notice of the view, even though the cause of action

was barred by the statute (Laws 1874, ch. 108, sec. 5). (*Board of Commissioners of Chase County v. Allen,* 25 Kan. 616.)

SEC. 57. *Freeholder.* The statute says that the petition for the road shall be signed by twelve householders. (R. S. 1931 Supp. 68-102.) It has been held that a husband living on a homestead owned by his wife is a freeholder. (*Hughes v. Milligin,* 42 Kan. 396, 22 Pac. 313.)

SEC. 58. *Validity of proceedings.* If the county commissioners go to trial on the merits of an appeal from an award, they waive the question of the validity of the establishment of the road. (*Commissioners of Lyon County v. Kiser,* 26 Kan. 279.) The parties may agree to waive all irregularities and defects in the proceedings, and on an appeal as to damages the court will presume all such prior proceedings regular. (*Allen County Commissioners v. Boyd,* 31 Kan. 765, 3 Pac. 523.) And where a county has laid out a road by statutory condemnation, under R. S. 68-106 to 7, it is estopped on an appeal from the award from saying that the road was previously dedicated by prescription over the same route. Nor can parol evidence be used to modify the records of the condemnation proceedings on file, as required by statute (R. S. 19-304 to 5; 68-106 to 7). (*Flemming v. Ellsworth County Commissioners,* 119 Kan. 598, 240 Pac. 591.)

SEC. 59. *Same; vacation of roads.* Authority to vacate roads is conferred on the county commissioners by R. S. 19-212, and any person may appeal from any decision of the commissioners under R. S. 19-223. The procedure for vacating is the same as for laying out a road, even though there is no statutory provision for an order vacating a road (R. S. 68-106). Since counties are under no liability for vacating a road (*Sample v. Jefferson County,* 108 Kan. 498, 196 Pac. 440), where there is legal objection to vacating a road because a landowner's property would be taken without compensation, the statute (R. S. 68-106) must be construed as providing for an order to vacate, and an appeal may be taken to the district court to determine the legal objection, passed upon by the county commissioners, as to whether property would be taken without compensation and without remedy of compensation. (*Heatherman v. Kingman County Commissioners,* 123 Kan. 77, 254 Pac. 321.)

SEC. 60. *Same; diversion of watercourses.* In straightening a watercourse so that it would not cross a proposed highway (R. S. 68-502, 2d cl.) gives a county power to condemn land for that purpose, under the provision that the county engineer may act for the county to do anything pertaining to rivers, streams or watercourses for which the county pays any part of the cost thereof. (*Breedlove v. Wyandotte County Commissioners,* 127 Kan. 754, 275 Pac. 379.) In such an action it would, of course, be necessary for the county to proceed under the condemnation sections. In the Breedlove case above cited the county acted under R. S. 68-703 (now R. S. 1931 Supp. 68-703). The court also cited R. S. 68-114 to 5 as giving the court power to do what is essential in the construction of the road, saying (p. 757) that "no limitation is placed on the powers of the board in respect to land over which a waterway or creek may flow."

SEC. 61. *Same; partial reports of commissioners.* Where the commissioners make only a partial report and leave for future determination claims for damages to lands not yet appropriated, they may retain jurisdiction to consider such claims, and the failure of the landowner to appeal from such partial award does not defeat a claim for land subsequently taken. (*Sicks v. Allen County Commissioners,* 126 Kan. 643, 270 Pac. 607.

SEC. 62. *Same; removal of bridge.* It has been held that the removal of a bridge, otherwise useless, except that it furnishes ingress and egress to particular land, will be enjoined, since there is no statutory authority for paying damages to the owner where his access is thus cut off (R. S. 68-117). (*Sample v. Jefferson County Commissioners,* 108 Kan. 498, 196 Pac. 440.) This is, of course, a rare circumstance, but when it arises it may become necessary for the county to maintain a costly bridge at great expense for the benefit, to all practical purposes, of only one or a few individuals.

SEC. 63. *Enjoining the proceedings.* The legislature, as a general rule, has full discretion as to opening, improving and vacating streets and highways. Equity will sometimes intervene to restrain the vacation of a road or street, as where it would interfere with a special interest of a property owner, but such interest must be directly injured by the vacation. (*Heller v. A. T. & S. F. Rly. Co.,* 28 Kan. 625); as to who, other than an abutting owner, may enjoin, see 68 A. L. R. 1298n. But the county commissioners will not be enjoined in the exercise of their discretion as to the necessity for the appropriation, in the absence of fraud, abuse of discretion or other gross impropriety. (*Breedlove v. Wyandotte County Commissioners,* 127 Kan. 754, 275 Pac. 379.)

Injunction will, of course, lie where the statute under which the county is operating is involved, as where an act (Laws 1866, ch. 103) failed to provide for compensation to the landowners and was therefore void, and the owner could enjoin the opening of the road (*Carbon Coal & Mining Co. v. Drake,* 26 Kan. 345); and where vital parts of the statutory provisions are not complied with, as where no viewers were appointed and no notice given owner of the taking of his land and opening of a road, the proceedings may be enjoined (*Hughes v. Milligin,* 42 Kan. 396, 22 Pac. 313); but, on the other hand, a landowner cannot enjoin the maintenance of an insufficient culvert unless such culvert causes his land to be flooded so as to result in substantial injury to his land (*Scott v. Glenwood Township,* 105 Kan. 603, 185 Pac. 731).

SEC. 64. *Appeal from the award.* Usually appeals from the award are taken under the provisions laid down in the condemnation statute itself. Before any road condemnation statute was passed in this state, a person aggrieved by any decision of a board of county commissioners could within 30 days thereafter appeal to the district court. (R. S. 19-223.) The question as to whether a later act allowing appeal in condemnation cases repealed this general act arose in 1877. It was held that they were not in such irreconcilable conflict, and that appeals from the award of damages in the establishing of a road may be made under either section. (*Wilson v. Cowley County Commissioners,* 18 Kan. 575.) As to who may appeal, see Ann. Cas. 1914Dn 1139. The question as to whether an appeal from the award, made under R. S. 19-223, might ripen into a personal judgment which would preclude abandonment of the proceedings seems not to have arisen. (See *Stewart v. Marland Pipe Line Co.,* 132 Kan. 725, 297 Pac. 708; *In re Condemnation of Land for State Highway Purposes,* 132 Kan. 153, 294 Pac. 872.) The question would likely never arise, since, even under R. S. 19-223, it seems necessary that claims for damages must be presented. Under a statute (now R. S. 68-106) providing that application for damages shall be made, an appeal was taken by a mortgagee who had never filed a claim for damages. It was held that there was no right of appeal under a statute (now R. S. 19-223) allowing an appeal to any person aggrieved or affected by the decision of the board of county commissioners. (*Shurtleff v. Chase County,* 63 Kan. 645, 66 Pac. 654.) It will be noted that the appeal was being attempted under the provisions of a different statute (now R. S. 19-223) from the condemnation statute (now 68-107), which itself contained practically the same words as the section under which the appeal was taken. But the court in that case based its decision on the fact that plaintiff mortgagee was not "aggrieved under the statute, since he had no interest in claims filed by the mortgagor and he had failed to file any claim himself."

Any person who has an interest in the land taken may appeal from the award under R. S. 68-107, and where the notice to the landowner is given to an agent he may appeal on behalf of himself and those he represents. (*May v. Riley County Commissioners,* 117 Kan. 57, 230 Pac. 74.) Also, the fact that the viewers allowed damages to the husband of the owner will not prevent the real owner from recovery on appeal even though she has presented no claim, where the notice of the appeal and bond refer to the proceedings of the board. (*Brown County Commissioners v. Burkhalter,* 75 Kan. 321, 89 Pac. 655.)

The State Highway Commission must appeal under R. S. 26-102. The appeal must be taken within thirty days from the date the appraisement is filed with the clerk of the district court, and if not so taken personal judgment

against the petitioner is void. The court in this case questions whether a personal judgment could be rendered on an appeal from the award, but decides it on the above point—that the appeal had not been taken within the statutory time. (*In re Condemnation of Land for State Highway Purposes,* 132 Kan. 153, 294 Pac. 872.) In a case decided in the same term of court the supreme court held that a personal judgment is rendered under R. S. 26-102 on an appeal from the award, since the appeal is "docketed and tried the same as other actions." (*Stewart v. Marland Pipe Line Co.,* 132 Kan. 725, 297 Pac. 708.)

On appeal from the award the only question the court has jurisdiction to hear and determine is the amount of damages. (*Wabaunsee County Commissioners v. Bisby,* 37 Kan. 253, 15 Pac. 241; *Briggs v. Labette County Commissioners,* 39 Kan. 90, 17 Pac. 331.) In the Wabaunsee county case, cited above, it was held that it was no defense that a public road had been previously laid out and established over the same right-of-way. And it is error on appeal from the award to permit evidence of prior establishment of a highway by act of legislature declaring all highways on section lines to be highways. (*Nelson v. Butler County Commissioners,* 82 Kan. 364, 108 Pac. 797.)

Written pleadings are discretionary with the court on appeal, and, although no petition is required on appeal, if a petition is filed and alleges facts which defeat any part of his claim, such facts are effective against the landowner who filed such petition, even though the county commissioners could not plead such facts as a defense. (*Walbridge v. Russell County Commissioners,* 74 Kan. 341, 86 Pac. 473.)

Appeal from award where road is on a county line, the appeal must be taken within the statutory time (see R. S. 68-107), and since the county commissioners of the two counties act separately, the appeal must be made without regard to the time when final action is taken by the other county commissioners. (*Rennick v. Lyon County Commissioners,* 45 Kan. 442, 25 Pac. 856.)

Where the statute (R. S. 68-502, 2d cl.) confers power to acquire land to divert a stream, the landowner's only remedy is to appeal from the award, in the absence of fraud or abuse of discretion on the part of the county commissioners. (*Breedlove v. Wyandotte County Commissioners,* 127 Kan. 754, 275 Pac. 379.)

SEC. 65. *Same; partial reports of commissioners.* The commissioners may make partial reports and adjourn from time to time, and where a partial report of the commissioners is made and the landowner is allowed damage, his failure to appeal does not prevent an appeal from a subsequent award, where such commissioners have retained jurisdiction to consider claims for lands taken after such partial awards. (*Sicks v. Allen County Commissioners,* 126 Kan. 643, 270 Pac. 607.)

SEC. 66. *Damages.* The landowner must enforce his right to compensation, pursuant to the statute authorizing the condemnation (*Masters v. McHolland,* 12 Kan. 17), and if a claim is disallowed and no appeal taken the right to damages is ended, and the county is not authorized thereafter to create an obligation, such as maintaining a passageway under the road. (*Zahn v. Ottawa County Commissioners,* 108 Kan. 741, 196 Pac. 1060.) The landowner must describe the land in his application, under R. S. 68-106, and is not entitled to damages to any land not described. (*Flemming v. Ellsworth County Commissioners,* 119 Kan. 587, 240 Pac. 591.) After a claim has been presented, under R. S. 68-107, the statutory remedy is exclusive, and the claimant must appeal from the decisions of the commissioners and cannot recover in an independant action for damages. This is true, even though he had no notice, but filed his claim within twelve months, as provided in R. S. 68-106, thereby waiving notice and irregularity on the proceedings. (*Meehan v. Barber County Commissioners,* 108 Kan. 251, 194 Pac. 916.) A landowner entitled to the compensation money deposited with the treasurer is estopped from claiming the warrant made out to him, when he submits the question to the county board as to whether he or his grantee is entitled to it. (*Lillard v. Johnson County Commissioners,* 102 Kan. 822, 172 Pac. 518; same, 106

Kan. 479, 188 Pac. 223.) Where a road statute provides a reasonable manner for making compensation, it may also provide that a failure to so seek compensation shall be deemed a waiver of all claims therefor. (*Shearer v. Douglas County Commissioners,* 13 Kan. 145.) Likewise, it is too late, on an appeal, to revoke a waiver of damages because the waiver was by parol and not binding on landowner. (*Butler v. Morris County Commissioners,* 42 Kan. 416, 22 Pac. 421.)

As to *ultra vires* contracts with the landowner, it has been held that express statutory authority must be given before a public official may make a binding contract to compensate the owner. Therefore a county board cannot agree to build and maintain a passageway for stock across a road in satisfaction of the landowner's damages. (*Haucke v. Morris County,* 115 Kan. 659, 224 Pac. 64; see, also, *Mathewson v. City of Wichita,* 118 Kan. 455.)

SEC. 67. *Same; elements and measure of damages.* The elements of damages to the landowner are whatever tends to make the land less valuable and may include additional fence and repairs, separating the land, inconvenience in going from and going to tract separated by the road and the like (*Dickinson County Commissioners v. Hagan,* 39 Kan. 606); and where laying out of highway causes landowner to build an entire new fence, he may recover full compensation therefor and for damage to hedge fence (*Shawnee County v. Beckwith,* 10 Kan. 603); also, as in case of tenants in common under a contract to furnish water for cattle, it has been held that several owners of one tract of land made less valuable by a road may have damages for such loss (*Smith County Commissioners v. Labare,* 37 Kan. 480, 15 Pac. 577); and the cost of maintaining new fences is a proper element to be considered by the jury (*Van Bentham v. Osage County Commissioners,* 49 Kan. 30, 30 Pac. 111). Improvements made, even with intent to prevent laying out road, must be compensated for. (*Briggs v. Labette County Commissioners,* 39 Kan. 90, 17 Pac. 331.)

Where a highway is widened, the cost of building a retaining wall is a proper element, although the expense of moving buildings in lieu of constructing the wall would probably not be proper. The owner is entitled to the market value of land taken and the difference in value of the remainder, before and after, which would result, excluding any enhancement in value likely to result from the improvement. (*Smith v. Wyandotte County Commissioners,* 113 Kan. 244, 214 Pac. 104.) In instructing the jury as to the damages to the land actually taken and as to the difference in value of the entire tract before and after the taking, a reference should be made as to damages to entire tract that the "entire tract" means the remainder so that the land actually taken will not be assessed twice. (*Laptad v. Douglas County Commissioners,* 130 Kan. 465, 287 Pac. 255.)

The landowner's evidence as to compensation must not be inconsistent with his claim. As, for example, if the owner claims that the most advantageous use to which his land can be put is truck farming or truck gardening, it is erroneous to admit testimony relating to the amount of earth fill necessary to bring the land to the highway level. (*Fitch v. State Highway Comm.,* 137 Kan. 584, 21 P. 2d 318.)

In the Fitch case, cited above, the question arose whether the trial court had abused its discretion in denying the jury a view of the premises. The reason for not permitting the view was that the property had been improved in part by the building of a filling station thereon. The court said that the jury in such a case might have been properly permitted to view the premises, but that it was discretionary with the trial court.

SEC. 68. *Same; tort actions and quasi-contractual obligations.* In the absence of statute an action in tort will not lie against a county for unlawfully taking property without condemnation proceedings. The landowner in such a case has no remedy against the board of county commissioners in their official capacity. (*Isham v. Montgomery County Commissioners,* 126 Kan. 6, 266 Pac. 655.) Though a county is not liable for the tortious conduct of its agents, the owner of the land taken may recover the reasonable value from

the county upon a quasi-contractual basis. That is, he must not allege trespass or wrongful taking on the part of the county officials where the land is taken without the statutory condemnation proceedings. Thus it was held that where materials were taken from another county, under R. S. 68-136 to 7, and the owner sues for the reasonable value without alleging trespass, he may recover. (*Webb v. Crawford County Commissioners,* 127 Kan. 547, 274 Pac. 249.)

SEC. 69. *Deduction of benefits to remainder of land.* Special benefits, excluding any indirect and general benefits, which result to public as whole, may be deducted from damages to portion of land not actually taken. (*Commissioners of Pottawatomie County v. Sullivan,* 17 Kan. 58.) Increased value of land caused by the location of the road, being the direct and special result thereof, is a proper set-off against the damages. (*Fabie v. Brown County Commissioners,* 20 Kan. 14.) All direct and special benefits accruing which are not in common with the whole community may be deducted from damages. (*Roberts v. Brown County Commissioners,* 21 Kan. 247.) In determining damages from a county road a direct benefit not shared by adjoining landowners may be used as a set-off. (*Trosper v. Saline County Commissioners,* 27 Kan. 391.)

Under R. S. 68-703 no benefits may be deducted from the damages where land is appropriated for an improved highway. The court, in stating its reason, said that R. S. 68-703 does not provide for any reduction for benefits, but that R. S. 68-706 provides that the cost of the road, when completed, shall be levied in part upon the property benefited. (*Anderson v. Douglas County Commissioners,* 107 Kan. 655, 193 Pac. 329.) And under R. S. 68-115 relating to drainage of a road and state highway it was held the assumption by the court in its instruction that some damage was caused was not error, because the county in its award had so admitted there was damage, where the court further instructed as to deduction of benefits. The supreme court said: "We think of such benefits only as proper to reduce plaintiff's damages, although they might in some cases reduce it to a minimum or entirely exhaust it. (*Laptad v. Douglas County Commissioners,* 130 Kan. 564, 287 Pac. 255.)

SEC. 70. *Damages in the nature of interest.* It is held that damages in the nature of interest, which in reality amounts to the same thing as interest, for the delay in payment between time of the taking and the time judgment is rendered may be allowed under the statute (R. S. 68-106 to 7) providing for the allowance of full compensation. (*Flemming v. Ellsworth County Commissioners,* 119 Kan. 598, 240 Pac. 591; see, also, section 22 above.)

SEC. 71. *Additional lands for roads.* While it is the duty of the township board to make and keep township roads safe for the public (R. S., ch. 68, art. 5), the county commissioners have the power to condemn additional land for such roads (R. S. 68-114) and such power is not limited by R. S. 68-137 providing for condemnation of road materials. (*Balliet v. Harner,* 115 Kan. 99, 222 Pac. 132.)

SEC. 72. *Extent of interest or title acquired by public.* In an early case it was held that the public acquires only an easement in roads and highways, and that the fee remains in the original owner. (*Shawnee County v. Beckwith,* 10 Kan. 603; see, also, *Martin v. Lown,* 111 Kan. 753, 208 Pac. 565.)

In a case arising after condemnation of land for gravel pits, it was held that since the fee title does not pass to the county under R. S. 68-107, therefore the landowner may continue to farm his land or use it in any other manner that does not interfere with the county's dominant right without attorning to the public board, and the county has no right to rent money. (*Kingman County Commissioners v. Hufford,* 126 Kan. 106, 266 Pac. 932; see, also, section 23 above.)

SEC. 73. *Additional servitudes.* Placing telephone poles and wires upon highway right of way on county roads does not create an additional servitude for which the landowner is entitled to compensation. (*McCann v. Telephone Co.,* 69 Kan. 210, 76 Pac. 870, 66 L. R. A. 171.) While the fee in county roads remains in the landowner, subject to the easement, the fee in city streets in theory remains in the county; but this distinction is not approved, perhaps

because the damage caused by the telephone lines on country roads is slight and in cities the damage is much greater; so, therefore, if no damage is collectable in cities, *a fortiori* none should be collected in the country. (See Nichols Em. Dom., sec. 186.) The statute (R. S. 17-903) amply provides for condemnation proceedings but, under the decision of the court, such are seldom necessary.

VII. STATE AND FEDERAL CONDEMNATION

(For statutes providing for state and federal exercise of eminent domain, see: R. S. 26-201 to 10, 26-301 to 6, 26-401 to 2; R. S. 1931 Supp. 27-101 to 2; 32-213 to 4, 32-221 to 2; R. S. 68-111 to 13; R. S. 1931 Supp. 68-413; R. S. 72-4110, 76-147; R. S. 1931 Supp. 76-2010; R. S. 76-2433; R. S. 1931 Supp. 82a-203.)

SEC. 74. *Scope.* This chapter does not include the decision as to state highway condemnations, as the same comes more logically under Roads, Highways and Bridges. (See chapter VI above.)

SEC. 75. *Patriotic and historical property.* "Public use" has been construed to include property possessing unusual historical interest to the state. The term "public use" is not capable of exact definition (see 54 A. L. R. 7 and sec. 4 above.) Public needs multiply, and it is not possible to mark the limit as to what the state may or may not take under the power of eminent domain. R. S. 26-301 extends the power to take any land that possesses unusual and historical interest. R. S. 1931 Supp. 79-2008 declares that old Shawnee Mission possesses such historical interest, and the subsequent sections provide for condemning it for the use of the state; but does not say as to what special use the property is to be put. In an appeal by the landowner from the judgment of condemnation it was held that the public use was sufficiently specified; that the state may determine the question whether a use is public, and that no special tribunal need be established for that purpose where interested parties may be heard. The question of law is, then, whether such use so declared is a public one, and it was held that the preservation of Shawnee Mission as a place of unusual historical interest was clearly a public use. (*State, ex rel., v. Kemp,* 124 Kan. 716, 261 Pac. 556; 59 A. L. R. 940; writ of error dismissed, 278 U. S. 191, 49 S. Ct. 160; 73 L. Ed., 259.)

SEC. 76. *State institutions.* It has been held that where the statute does not give the alternative right to purchase, and only the power to condemn, that those acting on behalf of the public have no power to agree as to the compensation to be given to the owner, but must proceed to condemn. (*Hornaday v. State,* 62 Kan. 828, 62 Pac. 329; same, 63 Kan. 499, 65 Pac. 656.)

The present statute (R. S. 76-147) relating to acquisition of lands for buildings, etc., does not provide for purchase, but only for the condemnation of such lands. It will be noted that in the acquisition of land adjoining the state penitentiary for mining coal, the State Board of Administration may not only condemn, but it may secure same by contract or purchase. (R. S. 76-2433.) Most likely this power is granted, or would be implied, in all the other statutes granting the right to condemn. (See R. S. 72-4701 to 2; *Nelson v. School District,* 100 Kan. 612, 164 Pac. 1075.)

SEC. 77. *Public forestries, recreational grounds, fish and game preserves, state lakes and parks.* Under R. S. 1931 Supp. 32-213 to 14 the State Forestry, Fish and Game Commission is authorized to carry out the public policy of the state in the protection and propagation of fish, bird life (other than predatory and destructive), game and fur-bearing animals of the state and to establish refuges and preserves therefor (commonly known as state lakes and parks). For these purposes the commission may condemn, as cities may do in the acquisition of land or water for waterworks. The court has held that the condemnation procedure comes under R. S. 26-201 to 10. (*State v. Nelson,* 126 Kan. 1, 266 Pac. 107.)

SEC. 78. *Same; abandonment of proceedings.* Under R. S. 26-206, providing for the abandonment of the condemnation proceedings by resolution by the

Forestry, Fish and Game Commission, it is not an abandonment within the meaning of the statute where, in the absence of such a resolution, the commission's attorney files a notice of abandonment within the statutory ten days. (*State v. Nelson,* 126 Kan. 1, 266 Pac. 107.)

SEC. 79. *Elements and measure of damages.* Testimony of an offer of purchase made to the land condemned is not admissible to prove value. The court has said that it would not be much evidence of value unless the court tried out all the elements that prompted the offer and the motive behind it. (*State v. Nelson,* 126 Kan. 1, 266 Pac. 107; see, also, *St. Joseph & D. C. R. Rld. Co. v. Orr,* 8 Kan. 419.) For other cases as to the measure and elements of damages, see section 19 above.

SEC. 80. *Additional lands for state lakes, parks and recreational grounds.* The court has not yet been called upon to pass on chapter 190, Laws 1931, (R. S. 1931 Supp. 32-221 to 2) providing for the acquisition of additional lands adjoining state lakes and parks and to resell same with a protective restriction in the deeds. As to the taking, however, the court has held that additional ground may be taken for the protection of county buildings, under section 19-1501 of the 1923 Revised Statutes (*Jockheck v. Shawnee County Commr's,* 53 Kan. 780, 37 Pac. 621); but as to the resale of the land with restrictions in the deeds (R. S. 1931 Supp. 32-222), which is in effect a zoning of the property, although there is no provision for any zoning ordinance or regulation to be made, the supreme court in this state has not yet spoken, so far as the eminent-domain question is here concerned. Whether this is a constitutional public use, even though the statute expressly says so (*Lake Koen Irrigation Co. v. Klein,* 63 Kan. 484, 65 Pac. 684), is questionable. At least it seems to be a new step in public policy in taking private property under the power of eminent domain, since present eminent-domain statutes contemplate possession, or the right to occupy, and not that it shall be resold and be in absolute possession of another person.

The resale feature of the act appears to be mandatory, so the property could not be held by the commission. Can this be done? Mr. Justice Story, speaking for the supreme court of the United States in 1829, said: "We know of no case in which a legislative act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any state of the Union. On the contrary it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced." (*Wilkinson v. Leland,* 2 Pet. 658, 7 L. Ed. 553.)

It is to be noted that the resale need not be made to the condemnee or person from whom it is taken. Such a provision in the act might cure the possibility of its being held unconstitutional; or, a provision for the taking of an easement for the purpose of protecting, adding to, and improving state lakes, parks, and recreational grounds, which will prevent the loss of large expenditures of the state's money and prevent the disfigurement of the beauty of the grounds, which seems to have been the real intention of the legislature in enacting R. S. 1931 Supp. 32-221 to 2. (See Nichols Em. Dom., sections 57 and 58; also, *Pennsylvania Mut. L. Ins. Co. v. Philadelphia,* 242 Pa. 47, 88 Atl. 904, 49 L. R. A., n. s., 1062; and *Salisbury Land & I. Co. v. Massachusetts,* 215 Mass. 371, 102 N. E. 619, 46 L. R. A., n. s., 1196.)

VIII. SCHOOL CONDEMNATIONS

(See R. S. 1931 Supp. 13-13a13; R. S. 72-503, 72-4110, and 72-4701 to 2 for statutes relating to right of eminent domain for school purposes.)

SEC. 81. *Methods of procedure.* The statute (R. S. 72-4110) providing that the State School Book Commission may condemn for additional buildings for printing textbooks makes the procedure under the railroad statute (R. S. 66-901 to 7.) With this exception, the other school condemnation statutes say that it shall be as provided by law, and with the statute concerning municipal universities (R. S. 1931 Supp. 13-13a13) saying that the procedure shall be as that vested in boards of education of cities of the same class.

As to what statute to proceed under, it was said in the arguments in a case that has been decided since the Revised Statutes of 1923 went into effect, that "a note at the beginning of chapter 72, article 47, refers us to chapter 26, R. S. 1923, eminent domain, and there is set out in detail the procedure that must be followed. Appellants admit that the appellee has proceeded according to law." (Brief of appellee in *Mayfield v. Board of Education,* 118 Kan. 138, 233 Pac. 1024.)

SEC. 82. *Constitutionality.* The fact that the statute (R. S. 72-4702) makes no provision for recovery of consequential damages does not make such statute unconstitutional, because the Kansas constitution does not require such payment. (*Mayfield v. Board of Education,* 118 Kan. 138, 233 Pac. 1024; see, also, *Buckwalter v. School District,* 65 Kan. 603, 70 Pac. 605.)

SEC. 83. *Same; notice to landowner.* A condemnation proceeding under Laws 1874, ch. 122 sec. 3 (now R. S. 72-503), divests the owner of title, even though no notice was given or security for compensation made, it being held that the right of appeal from the award satisfied all constitutional provision for due process of law. (*Buckwalter v. School District,* 65 Kan. 603, 70 Pac. 605; see 4 L. R. A., n. s., 170n and Ann. Cas. 1913A 1256.)

SEC. 84. *Validity of proceedings.* Boards of Education in cities were not authorized under Laws 1909, ch. 86, sec. 2 (now R. S. 72-4702 as amended), to acquire lands for teaching practical agriculture to pupils of the public schools of the city. There was no express statutory provision for it, and it could not be implied from such statute authorizing acquisition of sites, etc. for schools. (*Board of Education v. Davis,* 90 Kan. 621, 135 Pac. 604.) The power to do so was given by an amendment in 1917. (Laws 1917, ch. 273, sec. 1.) Under Laws of 1917, ch. 273 sec. 1 (now R. S. 72-4702, as revised), it was held that a school district may acquire more than one schoolhouse site where same is necessary in the district. The statute places no restriction or limit upon the amount of ground that may be acquired for sites for school buildings, playgrounds, agricultural, industrial, athletic or enlargement purposes. (*Griebel v. School District,* 110 Kan. 317, 203 Pac. 718.)

SEC. 85. *Same; statutes controlling.* School districts with third-class cities may vote to change its schoolhouse site, under R. S. 72-501, and may then proceed to condemn for a playground under R. S. 72-4702. So far as school districts in which are located cities of the third class are concerned, there is room for both laws to operate, although R. S. 72-503 says nothing about playgrounds. (*Nelson v. School District,* 100 Kan. 612, 164 Pac. 1075.)

SEC. 86. *Same; offer to purchase before condemnation.* Although a school board was apparently proceeding under a statute (now R. S. 72-4701 to 2) which did not require an offer to purchase before condemning, it was held that, without citing the statute (now R. S. 72-503) making such requirement, such offer was not necessary if the owner refused to convey or donate the land. (*Nelson v. School District,* 100 Kan. 612, 164 Pac. 1075.)

SEC. 87. *Same; appeal bond.* A defective appeal bond may be amended where the owners themselves have joined in the one given. (*Wood v. School District,* 102 Kan. 78, 169 Pac. 555.) Where, however, only the surety signs, there is no jurisdiction and the appeal fails. (*St. L. K. & S. W. Ry. Co. v. Morse,* 50 Kan. 99, 31 Pac. 676. See, also, *Lotz v. Kansas City,* 108 Kan. 25, 193 Pac. 1051; and *Burke v. Mo.-K. T. Rld. Co.,* 132 Kan. 625, 296 Pac. 380, where the decisions as to defective appeal bonds are reviewed.) See, also, section 16 above.

SEC. 88. *Elements and measure of damages.* In condemning lands (see R. S. 72-503) where there are valuable deposits of gravel, it was held proper, in the instructions, on appeal from the award, to use the words "actual," "market" and "fair and reasonable value" as equivalent, where the jury understands that they are to find the difference, if any, between the value of the lands before and immediately after they were appropriated. (*Wood v. School District,* 108 Kan. 1, 193 Pac. 1049.)

IX. PRIVATE CORPORATIONS, ASSOCIATIONS AND PERSONS AUTHORIZED TO CONDEMN

(For statutory provisions relating to private corporations and persons other than railroads, see: R. S. 17-618, 17-1315, 17-1903, 19-2623, 26-101 to 2, 42-109 to 18, 41-120 (3d cl.), 42-301 to 9, 42-317 to 20, 59-101 to 16, L. 1933, ch. 155, § 3 (future citation; R. S. 1933 Supp. 17-627); for statutory provisions granting the right to railroads, see heading "Railroad Condemnation," chapter X, below.)

SEC. 89. *Methods of procedure.* There are several special methods of procedure provided for private corporations and individuals in the exercise of the right of eminent domain. For example there are special methods for mill and power-plant dams, right to take water, and for railroad corporations. More than one method is in some cases authorized for the same purpose. (Compare, for example, R. S. 17-618 and R. S. 26-101.)

SEC. 90. *Milldams and power dams.* It has been said that not until 1868 was the right of eminent domain conferred upon any corporation other than railroads (G. S. 1868, ch. 23, sec. 88, now R. S. 17-618, as amended), except that in 1867 (L. 1867, ch. 87, sec. 1, now R. S. 59-101, as amended) any "person" could exercise the right in overflowing lands for milldams. (See *Howard Milling Co. v. Schwartz,* 77 Kan. 605, 95 Pac. 559, 18 L. R. A., n. s., 356; 59 A. L. R. 21.)

SEC. 91. *Same; public use.* It was held in the case cited in section 90, above, that under Laws of 1863, chapter 39 (repealed by the 1923 revision because no business has been transacted under it for many years), declaring "gristmills" to be public mills, that a flour- and feed-mill corporation was not such a public mill as to empower it to exercise the right of eminent domain. The court reviewed the history of the statute and showed that at the time of its passage the right of eminent domain was not intended, as at that time (1863) no corporation, other than railroads, had such a right. (*Howard Mills Co. v. Schwartz,* 77 Kan. 599, 95 Pac. 559, 18 L. R. A., n. s., 356; 59 A. L. R. 21.) The early milldam act was held not to include the right to overflow or obstruct a highway. The court rather reluctantly held the act valid, preferring to stay in line with the decisions of other courts. The court questioned the public use. (*Vernard v. Gross,* 8 Kan. 248.)

SEC. 92. *Same; validity of proceedings.* The milldam statute must be complied with to give rights thereunder, since the statute sets out the complete steps as to procedure. (*Atkins v. Davis,* 11 Kan. 580.)

SEC. 93. *Same; damages, measure and elements of.* Where the proceedings of the commissioners or persons so acting under the milldam act (now R. S. 59-101 to 16) are irregular, and no part of the award has been paid, the owners of overflowed lands may recover for injuries caused thereby. (*Atkins v. Davis,* 11 Kan. 580.)

As to the measure of damages it was held to be the difference between the value of property without the dam and the value with the dam. (*Harding v Funk,* 8 Kan. 315; see, also, cases cited in section 19 above.)

SEC. 94. *Same; res judicata.* Where lands are overflowed due to a dam erected without condemnation proceedings and the owner recovers for permanent injuries he is precluded from recovering for subsequent damages to crops. (*Hubbard v. Power Co.,* 89 Kan. 446, 131 Pac. 1182; see, also, *Marshall v. Wichita, etc., Rld. Co.,* 96 Kan. 470, 152 Pac. 634.)

SEC. 95. *Same; deduction of benefits to remainder of land.* General benefits accruing to all in the vicinity cannot be used to offset or reduce damages caused by overflowing of plaintiff's land. (*Marcy v. Fries* 18 Kan. 353; see, also, cases cited in section 21, above.)

SEC. 96. *Irrigation works.* Irrigation is a public use under the law of eminent domain, and the fact that powers of the corporation (see R. S. 17-619, 42-120) include, incidentally, a private use, does not deprive it of the right to exercise the power. It is for the courts to decide what is a public use and for

the legislature to confer the power. (*Lake Koen Irrigation Co. v. Klein,* 63 Kan. 484, 65 Pac. 684.) For other cases on public use, see section 4 above.

SEC. 97. *Same; statutes applicable.* Where there are two statutes conferring the power of eminent domain, and one limits the part of the state where such right may be exercised (R. S. 42-301) and the other act passed at a later date is state wide in scope (R. S. 17-618) the court has held the proceedings valid under the most recent enactment. (*Lake Koen Irrigation Co. v. Klein,* 63 Kan. 484, 65 Pac. 684.) It will be noted, however, that neither of these statutes prescribes the procedure in the act itself. Section 17-618 says that the procedure shall be the same as that for railway corporations, so far as applicable, and section 42-301 only says that no prior vested right shall be taken without "due legal condemnation of and compensation for the same." The question of how to proceed is further complicated, since R. S. 26-101 was enacted in 1923. It would seem that an irrigation company could proceed as provided in either sections 26-101 to 26-102, or sections 66-901 to 66-907.

SEC. 98. *Same; appeal bond.* Where the description of the lands in the appeal bond is defective it is rendered certain by express reference to commissioner's report of the land condemned. (*Lake Koen Irrigation Co. v. McLain,* 69 Kan. 334, 76 Pac. 853. See, also, *Burke v. Missouri-K.-T. Rld. Co.,* 132 Kan. 625, 296 Pac. 380, where the decisions as to defective appeal bonds are reviewed; and see section 16, above.)

SEC. 99. *Same; measure and basis for damages.* Even though only an easement is taken in the land, the basis of the owner's recovery is the same as if the fee had been taken. (*Dethample v. Lake Koen Irrigation Co.,* 73 Kan. 54, 84 Pac. 544.) For other cases see section 19, above.

SEC. 100. *Gas and pipe lines.* A gas company, acting under R. S. 17-618, may lay pipes through the streets of a second- or third-class city after condemnation proceedings, as provided in R. S. 66-901 *et seq.* (see, also, R. S. 26-101), so far as same is applicable. It has been held that no award need be made to the city, but the court did not decide whether private-property owners must be compensated. (*La Harpe v. Gas Co.,* 69 Kan. 97, 76 Pac. 448.)

SEC. 101. *Same; statutes applicable.* Under R. S. 17-618, providing that the procedure shall be the same as provided in R. S. 66-901 *et seq.,* "so far as applicable," it was held that the rule as to definiteness of width and extent of land taken does not apply, and it is sufficient if the course is surveyed and the termini of the land fixed; if an unreasonable use of the land is made the landowner may recover for damages resulting therefrom. (*Love v. Empire Natural Gas Co.,* 119 Kan. 374, 239 Pac. 766.)

A pipe-line company may, under its eminent-domain power granted by R. S. 17-618, proceed under either R. S. 26-101 to 2 or R. S. 66-906 to 7. The former statute allows thirty days for filing notice of appeal and bond; while under the latter the appeal bond must be filed within ten days. It has been held that if the condemner failed to indicate which statute he was proceeding under, and the landowner effects an appeal under R. S. 26-102, that it is then too late for the condemner, on motion to quash the appeal, to announce that he was proceeding under the other statute, which allowed less time to perfect an appeal. (*Knox v. Great Lakes Pipe Line Co.,* 135 Kan. 170, 9 P. 2d 650.)

SEC. 102. *Same; right to use highways.* A gas company incorporated under state laws has the legal right to lay pipe lines in the public highways, where it does not interfere with public travel. (*State v. Natural Gas Co.,* 71 Kan. 508, 80 Pac. 962; *Empire Natural Gas Co. v. Stone,* 121 Kan. 119, 245 Pac. 1059.)

SEC. 103. *Same; appeal bond.* Where the obligation paragraph of an appeal bond contains the name of an entire stranger, such bond is not absolutely void if the context contains a description of the condemnation proceedings and obligates the maker to satisfy any judgment or costs rendered on an appeal from the appraiser's award. (*Sheridan v. Phillips Pipe Line Co.,* 134 Kan. 260, 5 P. 2d 817.)

SEC. 104. *Same; abandonment of proceedings by condemner after verdict on appeal.* Where the proceeding is under R. S. 26-101 to 2, the company cannot escape liability by abandonment of the proceedings, where the case on appeal from the award has been finally submitted to the jury. This is true, because in an appeal under the above sections the title has passed and the appeal is an action where a personal judgment is rendered and cannot be dismissed without prejudice under R. S. 60-3105. (*Stewart v. Marland Pipe Line Co.,* 132 Kan. 725, 297 Pac. 708.) See, also, cases cited under section 25, above.

SEC. 105. *Electrical transmission lines; elements and measure of damages.* Where an easement in land is taken for the construction of an electrical transmission line, the elements and measure of damages is the value of that part of the strip to which the condemner acquired the exclusive easement by the condemnation, being the part covered by the towers and foundation; and, second, for damages to the remainder of the strip occasioned by the partial taking; and, third, for damages, if any, to the land not taken. (*United Power & Light Corp. v. Murphy,* 135 Kan. 100, 109, 9 P. 2d 658.)

The possible fears in the minds of future purchasers of the presence of electrical transmission lines on the land is not a proper element of damage. That is, the proximity of such a line is not an element that would depreciate the market value of the remaining land not taken. (*Yagel v. Kansas Gas and Electric Co.,* 131 Kan. 267, 291 Pac. 768.)

SEC. 106. *Telephone and telegraph lines; damages.* The placing of telephone poles and wires upon a highway right of way does not make the company liable for damages to the adjoining landowners, as such has been held not to create an additional servitude on the right of way. (*McCann v. Telephone Co.,* 69 Kan. 210, 76 Pac. 870.)

In case of telegraph lines it was held particular items of damages to the landowner, not supported by the evidence, will be set aside. (*Kansas Postal Telegraph Co. v. Leavenworth T. Ry. & B. Co.,* 89 Kan. 419, 131 Pac. 143.)

SEC. 107. *Water easements.* A water company that instituted proceedings to obtain an easement under Comp. Laws, 1879, ch. 23, cannot, after award of damages, claim it had no such power under the statutes. The court emphasized the fact, however, that the question was not raised in the district court, holding the award judgment valid, whether authorized by statute or not. (*Parsons Water Co. v. Knapp,* 33 Kan. 752, 7 Pac. 568.)

X. RAILROAD CONDEMNATIONS

(For statutory provisions, see: R. S. 14-435, 15-439, 68-159 to 61, 66-403 to 4, 66-501 [5th cl.], 66-503, and 66-901 to 11.)

SEC. 108. *Constitutionality.* The constitutional restriction as to taking of rights of way by corporations applies to railroads. It provides that "no rights of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation." (Kan. const., art. 12, sec. 4.) All of the private railroad-corporation condemnation proceedings must, of course, observe this provision. (See section 5, above.) Payment by security or deposit is required before the taking (see section 116, below), and there can be no deduction for benefits. (See section 134, below.)

SEC. 109. *Public use.* It has not been questioned but that the taking of land for a railroad right of way is a taking for the public use. Even bonds in aid of private railroads may be voted and taxation levied in payment for stock in a railroad corporation which the legislature (Laws 1865, ch. 12; see R. S. 66-1001 to 97) authorized counties and cities to subscribe for. (*Leavenworth County v. Miller,* 7 Kan. 479; *State v. Nemaha County,* 7 Kan. 542; *Morris v. Morris County,* 7 Kan. 576.) Justice Brewer, in dissenting, said: "that the fact that great public benefits result from the building of a railroad no one will question," but he did not think, even though it was a public use

justifying the exercise of eminent domain, that taxation could be levied in aid of a private enterprise. (*State v. Nemaha County,* 7 Kan. 549, 564.) For definitions of public use, see section 4 above.

The fact that a part of the land taken is to be used to furnish ingress and egress to a third person for private use does not make the proceedings invalid where the principal use is a public one, as for tracks and yards, and the access to such third person's property is only incidental to the public use. (*Smouse v. Kansas City S. Rly. Co.,* 129 Kan. 176, 282 Pac. 183.) A spur track, regardless of its length or the number of industries it serves, is a public use if it is subject to use by the public as of right and subject to state regulation. (*Dotson v. A. T. & S. F. Ry. Co.,* 81 Kan. 816, 106 Pac. 1045.)

SEC. 110. *Methods and nature of the proceedings.* There are at least two methods of procedure provided for in the railroad condemnation statutes. (*Huly v. Kaw Valley Ry.,* 130 U. S. 560.) Application may be either made to the board of county commissioners (R. S. 66-901), who act as appraisers, or, in lieu thereof, to the judge of the district court for appointment of commissioners to appraise and assess the damages, instead of the county commissioners. (R. S. 66-907.)

There is also provision in R. S. 66-501 (5th cl.) which says that where two railroads cannot agree as to the compensation in joining and making switch connections, etc., with each other, the same shall be determined by three commissioners appointed by the district court. Since there is no provision as to procedure or appeal thereafter, this may mean that the decision of the commissioners is final. However, R. S. 66-501 (5th cl.) and R. S. 66-906 to 7 were originally chapter 23 of G. S. 1868, but in separate articles, as they are now in the 1923 Revised Statutes. But, see Laws 1887, chapter 184 (now R. S. 66-159 to 61), which provides for an appeal from the decision of the Public Service Commission where either party is dissatisfied with the "terms" fixed in regulating crossings and intersections of railroads (R. S. 66-161), saying that the judgment shall only affect the amount of the compensation. (See *Union T. Rld., Co. v. Board of Rld. Comm'rs,* 54 Kan. 352, 38 Pac. 290.)

Condemnation proceedings are essentially proceedings *in rem.* (*Kansas, etc., Ry. Co. v. Phipps,* 4 Kan. App. 252, 45 Pac. 926, affirmed 58 Kan. 142, 48 Pac. 573; *Chicago, etc., Rld. Co. v. Selders,* 4 Kan. App. 497, 44 Pac. 1012; see section 10, above.) They cannot be used to quiet title to land already owned or to compel specific performance of a contract already entered into. (*Florence, etc., Ry. Co. v. Lilley,* 3 Kan. App. 588, 43 Pac. 857.)

SEC. 111. *Preliminary proceedings.* Where an act of congress of 1875 granted to railroads a right of way over public land, it was held that this did not take effect until the approval of the location of the road by the Secretary of Interior. And where a condemnation proceeding was commenced before such approval, a person holding a timber claim in such lands could not thereafter be denied the right to compensation. (*Chicago, K. & N. Ry. Co. v. Van Cleave,* 52 Kan. 665, 33 Pac. 472.)

SEC. 112. *Same; map, profile and notice of route.* Notice to the landowner is provided in R. S. 66-906, and as to the map and profile of the route and notice to occupants of the lands provided in R. S. 66-403 to 4, the rule is that such need not be filed or given prior to commencement of proceedings to condemn a right of way. (See *Missouri R. Ft. S. & G. R. Co. v. Shepard,* 9 Kan. 647.) Therefore, these things do not invalidate the proceedings (*Chicago, K. & W. Rld. Co. v. Abbott,* 44 Kan. 170, 24 Pac. 52) because they are no part of the condemnation proceedings (*Chicago, K. & N. Ry. Co. v. Griesser,* 48 Kan. 663, 29 Pac. 1082; *Salina N. Rld. Co. v. Allison,* 100 Kan. 472, 164 Pac. 1068).

SEC. 113. *Statutes applicable.* A railroad company cannot take a right of way under an act of congress. (12 St. at Large, 489; 13 *id.* 356.) The proceedings must be taken under state laws. The owner cannot have commissioners appointed to have land valued. His remedy is ejectment, trespass or injunction, if in time. (*Kansas Pac. Ry. Co. v. Streeter,* 8 Kan. 133.)

SEC. 114. *Commissioners; qualifications and duties.* The statute (R. S.

66-907) says that if the commissioners are appointed by the district court they shall be freeholders and residents of the county. As to who is a freeholder, it has been held that a husband living on a homestead owned by his wife is a freeholder. (*Hughes v. Milligan,* 42 Kan. 396, 22 Pac. 313.) The fact that commissioners are not freeholders cannot be shown in a collateral attack on the proceedings. (*Chicago, K. & N. Rly. Co. v. Griesser,* 48 Kan. 663, 29 Pac. 1082; *Huly v. Kaw Valley Ry. Co.,* 130 U. S. 559.)

Under Laws of 1187, ch. 184 (similar to R. S. 66-159 to 61), where the commissioners to determine necessity and damages were the board of railroad commissioners, it was held that they had no authority to reopen the case, and that their decision was final unless appealed from within the prescribed time. (*Union Term. Rld. Co. v. Board of Rld. Comm'rs,* 54 Kan. 352, 38 Pac. 290); but the commissioners may adjourn their proceedings to a definite date without losing jurisdiction; and it will be presumed that the statements in their report are right and regular (*Leavenworth, N. & S. Ry. Co. v. Meyer,* 50 Kan. 25, 31 Pac. 700. See, also, *Sicks v. Allen County Comm'rs,* 126 Kan. 643, 270 Pac. 607). If the commissioners actually abandon their proceedings by adjournment, subsequent proceedings are void unless a new notice to the landowners is given. (*Memphis K. & C. Ry. Co. v. Parsons Town Co.,* 26 Kan. 503.)

SEC. 115. *Notice to the landowners.* The provision regarding notice in R. S. 66-404 (see sec. 112, above) has been construed to be of informational purposes only and, therefore, it is not a jurisdictional defect, since it is no part of the condemnation proceedings. (*Chicago K. N. Rly. Co. v. Griesser,* 48 Kan. 663, 29 Pac. 1082; *Missouri R. Ft. S. & G. R. Co. v. Shepard,* 9 Kan. 647; *Chicago, K. & W. Rld. Co. v. Abbott,* 44 Kan. 170, 24 Pac. 52.) The notice to the landowner is sufficient if given as required by R. S. 66-906, even though no map or notice was filed under R. S. 66-403 to 4, and such notice binds a lessee of the land condemned although no compensation is given him, even though such lessee is in open and notorious possession. (*Salina N. Rld. Co. v. Allison,* 100 Kan. 472, 164 Pac. 1068); and although no notice need be given under R. S. 66-404, so far as the validity of the proceedings is concerned, an attempted condemnation of land without notice provided under section 1395, G. S. 1889 (now R. S. 66-906 as amended) was held void (*Kansas C. & S. W. Ry. Co. v. Fisher,* 53 Kan. 512, 36 Pac. 1004).

Notice by publication under Laws 1870, ch. 74, sec. 1 (now R. S. 66-906), to one who is not an actual occupant of the land is sufficient (*Hunt v. Smith,* 9 Kan. 137); and a published notice specifying the section, township and range, county and state in which it is proposed to locate the railroad is sufficient notice to a nonresident owner of land therein, and such publication is "due process of law" as applied to such a case (*Huling v. Kaw Valley Ry. Co.,* 130 U. S. 559).

Where the notice fails to fix time when commissioners will commence to condemn the right of way, the proceedings are void. (*Missouri Pac. Rly. Co. v. Houseman,* 41 Kan. 300, 304, 21 Pac. 284.) Although the statute (now R. S. 66-906) is silent as to who shall give notice, it has been held sufficient if it is given by the commission appointed to make the condemnation and embodied in their report, which is deemed *prima facie* evidence of notice. (*Clement v. Wichita & S. W. Ry. Co.,* 53 Kan. 682, 37 Pac. 133.) When the commissioners abandon proceedings by adjourning, a new notice must be given or subsequent proceedings are void. (*Memphis, K. & C. Ry. Co. v. Parsons Town Co.,* 26 Kan. 503.)

SEC. 116. *Deposit or payment of compensation money.* Under the provision of the constitution (Kan. const., art. 12, sec. 4), until the compensation money is paid or deposited, the corporation gets no rights, unless it is the right to enter the land for the purpose of making surveys. But no right of way is obtained until the money is paid or deposited, and the railroad is a trespasser unless it does so or obtains the owner's consent. (*Missouri, K. & T. Ry. Co. v. Ward,* 10 Kan. 352; *Chicago, K. & W. Rld. Co. v. Watkins,* 43 Kan. 50, 22 Pac. 985.)

As to whom the money deposited with the county treasurer belongs,

Justice Brewer said: "We think it belongs to the company, and remains at its risk. The right of way over the land does not pass until damages, as finally ascertained, are paid in money, or secured by deposit in money." (*Blackshire v. A. T. & S. F. Ry. Co.*, 13 Kan. 515.) So, it was held in the *Blackshire* case just cited, that money deposited with the county treasurer cannot be credited to the amount recovered by the landowner on an appeal from the award, as such deposit is not a payment and remains with the treasurer at the company's risk pending the proceedings.

As to the statutory provisions in regard to the payment of the amount of the appraisement, it is provided that it shall be paid within ninety days after the filing of the commissioner's report, and the county treasurer thereupon pays it over to the parties entitled. (R. S. 66-903.)

SEC. 117. *Validity of proceedings.* A *de facto* corporation may exercise the right of eminent domain, where a number of individuals in good faith have attempted to organize it. This is true so far as the landowners are concerned, Mr. Justice Valentine saying that: "As a rule, the legal existence of a *de facto* corporation can be questioned only by the *state* in a *direct* proceeding instituted for that purpose. But we do not think that it is really necessary to determine in this case the legal *status* or power of the present depot and railroad company. Whether the company is a corporation or not, and whether it is a railroad corporation or not, we think the plaintiff has so dealt with it as to debar her from the equitable relief of injunction which she now seeks." (*Reisner v. Strong*, 24 Kan. 410, 417.)

In the case just cited the landowner had taken an appeal from the award and allowed the company to continue construction and spend many thousands of dollars; also, "it is generally true, that where a party appeals from an award of damages, he cannot, pending the trial of the appeal, question the validity of the road proceedings." (Brewer, J., in *Lyon County Comm'rs v. Kiser*, 26 Kan. 279, 281.)

The owner of the land may waive formal condemnation proceedings where the railroad has taken possession and elect to regard it as a taking under the right of eminent domain. (*Cohen v. St. Louis, Ft. S. & W. Rld. Co.*, 34 Kan. 158, 55 Am. Rep. 242; *Wichita & W. Rld. Co. v. Fechheimer*, 36 Kan. 45, 12 Pac. 362; see, also, section 133 below.) But where it does not appear that the proceedings are instituted by the railroad, or that the railroad was a party to them or even had notice of them, they will be held void. (*Junction City & Ft. K. Ry. Co. v. Silver*, 27 Kan. 741.)

The statutory condition as to prepayment to the county treasurer within ninety days (R. S. 66-903) may be waived by the landowner; the court saying that if the company relied on such waiver and spent large sums of money, the owner would be estopped to reclaim the land. (*Williams v. Railway Co.*, 62 Kan. 412, 63 Pac. 430, 84 Am. St. Rep. 408.)

A railroad has the right to rely on the public records as to who is the owner, the same as any other purchaser, and is therefore protected against secret equities. (*Phipps v. Kansas & C. P. Ry. Co.*, 58 Kan. 142, 48 Pac. 573, affirming 4 Kan. App. 252, 45 Pac. 926.) Also, it is held that irregularity or delay in certifying the amount paid in by the company to the county treasurer is cured by the landowner's acceptance thereof, so that the proceedings cannot thereafter be thereby avoided by any subsequent purchaser. (*Corwin v. St. Louis & S. F. Ry. Co.*, 51 Kan. 451, 33 Pac. 99.) In the absence of a statute, it is held that eminent domain cannot be used to acquire an interest in lands inferior to that already possessed. Thus, where a railroad has acquired the fee title by purchase, it cannot by condemnation proceedings extinguish a mortgage lien on such land. (*Chicago, K. & W. Ry. Co. v. Need*, 2 Kan. App. 492; 43 Pac. 997.)

SEC. 118. *Same; rights of way of another railroad.* The statutes (now 66-901 *et seq.*) do not authorize the taking of right of way of another railroad which is in actual and necessary use by the owner. Therefore, if any part of such right of way is included in the award, the whole proceeding is void as an entirety and may be enjoined (*A. T. & S. F. Ry. v. K. C. M. & O. Ry.*, 67 Kan. 581, 73 Pac. 899); and where the notice or petition fails to describe

the land and it appears that one railroad is attempting to condemn the right of way of another railroad already being used, the whole proceeding is void (*Union Term. Ry. Co. v. Kansas City, etc., Ry. Co.,* 9 Kan. App. 281, 60 Pac. 541).

SEC. 119. *Same; commissioners, reports of, etc.* The statute does not make the landowners party to the proceedings, and the failure of the commissioners to name the owners in their report does not prevent the landowners from appealing from the award (*Chicago, K. & W. Ry. Co. v. Grovier,* 41 Kan. 685, 21 Pac. 779); nor will mandamus lie to compel the commissioners to amend their report to include names of claiming owners whose claims are conflicting, since the commissioner's determination would not be binding and would be no protection to the treasurer if payment was not made to the real owner (*State, ex rel., v. A. T. & S. F. Ry. Co.,* 105 Kan. 548, 185 Pac. 286). Under the statute (R. S. 66-904) the failure of the company to file a certified copy of the commissioners' report within ten days does not invalidate the proceedings or prohibit occupation by the railroad (*Chicago, K. & W. Rld. Co., v. Abbott,* 44 Kan. 170, 24 Pac. 52); and under R. S. 66-907, which requires that in case of a vacancy the district judge shall appoint another, the award and report by two commissioners after resignation of the third, and without opportunity for his successor to participate, is void (*Leavenworth N. & S. Ry. Co. v. Meyer,* 58 Kan. 305, 49 Pac. 89).

It would seem that fraud or bias on the part of the commissioners would be a ground for setting aside the award, if properly pleaded, although no Kansas case under condemnation proceedings is found (see, *Downey v. A. T. & S. F. Ry. Co.,* 60 Kan. 499, 57 Pac. 101); but the question is not important, since the question on appeal from the award is tried *de novo* (see Nichols, Em. Dom., sec. 431). The Downey case above cited was not a condemnation case, but one of arbitration, where the parties agreed on appraisers to determine the value of the land desired by the railroad. The decision of the arbitrators was set aside because of bias in favor of the landowner. (See, also, *Lantry Contracting Co. v. A. T. & S. F. Ry. Co.,* 102 Kan. 799, 803, 172 Pac. 527.)

In the absence of evidence it will be presumed that the commissioners assessed the damages and performed their duty as required by law (*Union Pac. Rld. Co. v. Huse,* 127 Kan. 603, 274 Pac. 240), especially, as in the *Huse* case, where the validity of the proceedings is attacked many years after the condemnation.

SEC. 120. *Remedies of landowners.* Since the power of eminent domain is purely statutory, the remedies of the landowner are set up in the statutes granting the power, and such remedies are exclusive only because there is no action at common law which is available to the landowner. The legislature, by making lawful what would otherwise not be, excludes the common law remedies which are based upon breaches of obligations. So long as the condemner proceeds according to the statute and the constitutional requirement of payment or deposit of the compensation money, the statutory remedy is exclusive. (See Nichols, Em. Dom., sec. 468.) But this is not true where the taking is unlawful or the proceedings are defective. Other remedies are, of course, not excluded where the land is not taken under condemnation statutes. (See *Chicago, K. & W. Rld. Co. v. Willits,* 45 Kan. 112, 25 Pac. 576; see, also, section 125, below.)

SEC. 121. *Same; injunction.* Where there is no adequate remedy at law, a proper way to test the right to take property by condemnation is a suit to enjoin the taking. Under the statutes if an appeal from the award is taken, the validity of the taking cannot be questioned. Therefore, usually the only adequate remedy to test the validity is by an injunction. (*A. T. & S. F. Ry. v. K. C. M. & O. Ry.* 67 Kan. 581, 73 Pac. 899); but an individual cannot so challenge the corporate existence, as that right lies exclusively in the state (*Euler v. Rossville School District,* 118 Kan. 363, 235 Pac. 95).

Where the proceedings are taken under federal instead of state law, they may be enjoined. (*Kansas Pac. Ry. Co. v. Streeter,* 8 Kan. 133.)

Under R. S. 66-501 (1st cl.) a railroad may enter and make surveys, and injunction will not lie where the company does not take possession illegally. (*Hurd v. A. T. & S. F. Ry. Co.*, 73 Kan. 83, 84 Pac. 553.) R. S. 66-901 means such land as the railroad officials deem necessary. Where the company's good faith is questioned in a suit to enjoin, the landowner has the burden of proving bad faith or fraud; and since the principal question is the award of damage for the taking of property, injunction by the landowner is a proper remedy, when he contends that the condemning party is exceeding its powers or that it is ostensibly for a lawful purpose but in reality for an unauthorized one, such as a private use, or when an unnecessary amount is sought to be taken. (*Smouse v. Kansas City S. Rly. Co.*, 129 Kan. 176, 183, 282 Pac. 183.)

A railroad may be enjoined from maintaining an obstruction to an underground passageway where the railroad has not brought proper condemnation proceedings. (*Missouri P. Ry. Co. v. Stone,* 80 Kan. 7, 101 Pac. 666.)

SEC. 122. *Same; estoppel.* The courts will not determine the sufficiency of the proceedings, or as to whether they were absolutely void, where the landowner has stood by and permitted the railroad to build its road and where the public has become vested with an interest in such road. (*Buckwalter v. Atchison, T. & S. F. Ry. Co.*, 64 Kan. 403, 67 Pac. 831.) Likewise the landowner is estopped from saying that the security money was deposited to the wrong person when he fails to appeal from the award. (*Chicago, etc., Ry. Co. v. Selders,* 4 Kan. App. 497, 44 Pac. 1012.) But, see *St. Joseph & D. R. Co. v. Callender,* 13 Kan. 497, where, after appeal and failure of the railroad to pay or deposit the amount of award, ejectment was allowed.

SEC. 123. *Same; ejectment.* In the Callender case, cited in section 122 above, the court, in holding that the landowner may recover possession, even after he has appealed, where the railroad fails to pay the judgment, said that the imperative rule of the constitution that full compensation must be first made in money, or secured by a deposit of money, before any right of way can be appropriated to the use of a corporation, will not be relaxed because of such appeal; but usually the landowner's other remedies are waived by his taking an appeal. But the landowner may not stand by for a number of years while a track is being used for the benefit of the railroad and the public and then maintain an action in ejectment. (*Dotson v. A. T. & S. F. Ry. Co.*, 81 Kan. 816, 106 Pac. 1045.)

The rule that an action to enjoin is proper where the proceedings is under federal instead of state laws was said also to apply to ejectment. (*Kansas Pac. Ry. Co. v. Streeter,* 8 Kan. 133; section 121, above.)

As above stated in section 120 the proceedings must be according to the statute. Before lands can be legally condemned under R. S. 66-901 to 7 the nonresident owners must be notified, as required in R. S. 66-906, informing the owner of the time and place when the commissioners will commence the proceedings. Otherwise the owner may recover possession. (*Missouri Pac. Rly. Co. v. Hauseman,* 41 Kan. 300, 21 Pac. 284.)

It has been held that a plat of the city indicating that a right of way is on plaintiff's lot will not be sufficient to eject a railroad company from a street of specified width. (*Atchison & N. Ry. Co. v. Manley,* 42 Kan. 577, 22 Pac. 567.)

SEC. 124. *Same; trespass.* The landowner may maintain an action in trespass, if the land is illegally taken under federal instead of state laws (*Kansas Pac. Ry. Co. v. Streeter,* 8 Kan. 133); and in an early case it was held that trespass will lie if land is appropriated by a railroad without making full compensation or securing same by deposit of money, and the fact that the deposit is made after the trespass action is commenced will not bar its prosecution (*Missouri, K. & T. Ry. Co. v. Ward,* 10 Kan. 352).

A landowner cannot take steps to have lands appraised or condemned unless the statute so provides, and under Laws 1870, chapter 76 (now repealed), which gave the landowner through which the right of way passed the right to have land condemned and appraised, the court held that this remedy was not exclusive, but the owner could sue in trespass where the railroad had

failed to make deposit as required by article 12, section 4, of the Kansas constitution. (*Atchison, T. & S. F. Ry. Co. v. Weaver,* 10 Kan. 344.)

SEC. 125. *Damages.* "Full compensation," as used in the constitution (Kan. const., art. 12 sec. 4), means damages. It was early argued that compensation meant the price or value of the right of way or land taken, and therefore benefits to the remainder of the land could be deducted. (For deduction of benefits see section 134, below.) But article 12, section 4, was taken *verbatim* from article 13, section 5, of the Ohio constitution, which had previously been construed to mean that damages to adjoining lands to the right of way could not be offset by benefits to the same land. (*Atchison, T. & S. F. R. Co. v. Blackshire,* 10 Kan. 477.) The fair way of determining the injury is to determine the fair market value of the premises before the right of way is set apart, and then again after, and the difference will be the true measure of damages. (*id.* syl. ¶ 3.)

"The railroad always pays more in the aggregate than the land actually taken is worth—sometimes ten or twenty times more than it is worth." (Valentine, J., in *Kansas City Rld. Co. v. Jackson County Comm'rs,* 45 Kan. 719, 26 Pac. 394.)

Under the constitution a railroad company has no right to the land or possession until full compensation is made in money or secured by a deposit, and the landowner does not waive any rights by appealing from the award if the company should fail to pay or deposit the amount of the judgment rendered on such appeal. (*St. Joseph & D. C. Ry. Co. v. Callender,* 13 Kan. 496; see section 123 above.)

It has been said where land is taken without condemnation proceedings, such as excavating earth for fills, that there are various kinds of actions which the landowner may bring, such as tort, or he may waive the tort and recover the amount of the benefit received by the wrongdoer, or recover its rental value and permit its restoration to its former condition. (*Chicago, K. & W. Rld. Co. v. Willits,* 45 Kan. 110, 112, 25 Pac. 576.) Likewise a landowner may, of course, recover for taking of property and damages to remaining property, where the right of way has never been purchased or lawfully condemned. (*Kansas City & S. W. Ry. Co. v. Fisher,* 53 Kan. 512, 36 Pac. 1004.)

As to the jurisdiction of the court when the land is regularly condemned, and such land is a farm composed of an entire compact tract and located in two or more counties, the county in which the railroad actually runs may assess damages to the entire tract. (*Atchison & N. R. Co. v. Gough,* 29 Kan. 94.)

As to damages other than money judgments, where the court requires the company to do something, it may be questioned whether such is valid. The Territorial Laws of 1855, chapter 86, sections 8 and 9, authorized the court "to make such orders, and take such other steps as will promote the ends of justice between the owner of such lands and said company," and a judgment was entered, but the railroad failed to build a fence as required. It was held that the judgment cannot be attacked in an action to recover damages for cattle killed through failure to build fence. (*Union Pac. Ry Co. v. McCarty,* 8 Kan. 125.) An action for damages for breach of a condition as to a judgment obligation is personal and does not run with the land. (*Piper v. U. P. Rly. Co.,* 14 Kan. 568, 574.) The owner of the land, or one who has some interest therein, only is entitled to damages, and persons in possession without title cannot recover. (*Rosa v. M. K. & T. Rly. Co.,* 18 Kan. 124.)

A railroad is not obliged to maintain an undercrossing where same is not shown on a profile filed by the commissioners. (*Lind v. Chicago, K. & W. Ry. Co.,* 42 Kan. 552, 22 Pac. 423.) As to collateral undertakings to pay damages, as where, in 1870, a contract was entered into whereby a railroad company agreed to pay a landowner on demand all damages assessed by the county commissioners, it was held the landowner must make such demand before his right of action accrues. (*Botkin v. Livington,* 16 Kan. 39.)

SEC. 126. *Same; right of mortgagees and others.* The right of way taken is free from any claims of mortgagees, since the mortgagee is not an owner within the meaning of the statute relating to condemnation proceedings. The

mortgagee's remedy is to resort to the fund awarded for the right of way. (*Rand v. Ft. Scott, W. & W. Ry. Co.,* 50 Kan. 114, 31 Pac. 683; *Chicago, K. & W. Ry. Co. v. Nashua Sav. Bank,* 52 Kan. 467, 35 Pac. 18; *Chicago, K. & W. Ry. Co. v. Sheldon,* 53 Kan. 169, 35 Pac. 1105; *Wichita & W. Rld. Co. v. Thayer,* 54 Kan. 259, 38 Pac. 266.) Mortgagees and their assignees must intervene in the proceedings or present their claim and have no cause of action against the county treasurer and his bondsmen after the award is paid by the treasurer. (*Armstrong v. Moore,* 1 Kan. App. 450, 40 Pac. 834.)

A company, after occupying property and building improvements thereon, instituted condemnation proceedings without mentioning improvements. It was held that even though the railroad had a deed, executed after the land was mortgaged, the assignee of the mortgagor, after foreclosure, is entitled to a judgment in the nature of an award upon condemnation for the improvements. (*Briggs v. Chicago, K. & W. Rld. Co.,* 56 Kan. 526, 43 Pac. 1131.) This case has been expressly overruled, and it was held that in condemnation proceedings, after foreclosure of a mortgage lien on the right of way, the value of railroad improvements does not pass by the sheriff's deed as part of the real estate. (*St. Louis, K. & S. W. Ry. Co. v. Nyce,* 61 Kan. 394, 59 Pac. 1040, 48 L. R. S. 241; *Fernie v. Chicago, R. I. & P. Ry. Co.,* 9 Kan. App. 614; reversed, 62 Kan. 865, 61 Pac. 1131.)

The court may allow the owners not appealing to interplead to contest their rights to the damages awarded. (*Dye v. Midland V. Rld, Co.,* 77 Kan. 488, 94 Pac. 785.)

As to the compensating of third persons, it has been held that, as to the effect of manner and amount of payment to another, ordinarily it is of no concern of the owner of land taken how much the company pays another for other property taken or the manner in which payment for same is made. (*Smouse v. Kansas City S. Rly. Co.,* 129 Kan. 176, 282 Pac. 183.)

SEC. 127. *Appeal from the award.* The appeal is triable at the next term of the district court occurring ten days or more after its perfection. (*Chicago, K. & W. Ry. Co. v. Wilkinson,* 42 Kan. 337, 22 Pac. 412.)

The award is not admissible on appeal, for the reason that the case must be tried *de novo* upon new evidence. (*Chicago, K. & N. Ry. Co. v. Broquest,* 47 Kan. 571, 28 Pac. 717.) Although on appeal the report of the commissioners in the condemnation proceedings and the accompanying map are proper and legal evidence for the appellant to show what land was condemned (*Missouri River, F. S. & G. R. Co. v. Owen,* 8 Kan. 409; *St. Joseph & D. C. R. Co. v. Orr,* 8 Kan. 419; see, also, section 131, below), and in an action of trespass, where full compensation had not been made, it was held that an instruction to the jury "contained the law applicable to 'condemnation proceedings,' and the report of the commissioners, if not conclusive in this case, was good and valid evidence as to the correct amount of damages" (*Missouri, K. & T. Ry. Co. v. Ward,* 8 Kan. 352, 355), with these exceptions it seems that the award of the commissioners is not competent on an appeal.

Where an appeal is taken from the award, the appellant waives all other inquiry into the proceedings. (*Atchison, T. & S. F. Ry. Co. v. Patch,* 28 Kan. 470); but evidence as to other land damages than that included in the appeal bond may be heard on appeal (*Chicago, K. & W. Rld. Co. v. Brunson,* 43 Kan. 371, 23 Pac. 495), although evidence as to the location of another railroad along same right of way is not competent on appeal (*Chicago, K. & W. Rld. Co. v. Hoffman,* 50 Kan. 697, 32 Pac. 382). But an appeal from the award only affects the property as shown in the commissioners' report. Other property will not be affected on the appeal. (*Chicago, K. & W. Ry. Co. v. Grovier,* 41 Kan. 685, 21 Pac. 779.)

Ordinarily title to the land is not a question on appeal, but where a party not named in the award appeals from the assessment, claiming he is the owner, the burden is on him to prove title or adverse possession. (*Chicago, K. & N. Ry. Co. v. Cook,* 43 Kan. 83, 22 Pac. 988.) The appellant must show he had some interest in the land at the time of the condemnation proceedings. (*Chicago, K. & W. Rld. Co. v. Easley,* 46 Kan. 337, 26 Pac. 731.)

As to the time an appeal from the award may be taken, it is held that the report of the commissioners is not complete and final until filed with the county clerk, and an appeal may be taken within ten days thereafter. (*Kansas City & S. W. Ry. Co. v. Hurst,* 42 Kan. 462, 22 Pac. 618.)

SEC. 128. *Same; pleadings and parties on the appeal.* It is proper on appeal to make the landowner the plaintiff and the condemner railroad defendant, but if the action is not properly entitled it is not a cause for dismissing the appeal. (*Missouri River, F. S. & G. R. Co. v. Owen,* 8 Kan. 409; *St. Joseph & D. C. R. Co. v. Orr,* 8 Kan. 419.) The landowner on appeal becomes the plaintiff, and where a railroad has consolidated with another, the landowner must institute proceedings for revivor or substitution within the statutory time. (*Chicago, K. & W. Rld. Co. v. Butts,* 55 Kan. 660, 41 Pac. 948; *Kansas City, W. & N. W. Rld. Co. v. Way,* 60 Kan. 856, 56 Pac. 78.)

Either party may appeal from the award. Where the railroad company appeals, the individual landowners are proper parties, and not the county commissioners. But when the railroad voluntarily complies with the award, makes entry, accepts benefits and takes actual possession, it loses its right to appeal. (*Missouri Pac. Ry. Co. v. Gruendel,* 3 Kan. App. 53, 44 Pac. 439.) In case of a homestead, where the title is in the wife, both husband and wife may join in the appeal (*Chicago, K. & W. Ry. Co. v. Anderson,* 42 Kan. 297, 21 Pac. 1059.) A person having a life interest in the land may appeal without joining the owner of the legal title. (*Chicago, K. & N. Ry. Co. v. Ellis,* 52 Kan. 41, 33 Pac. 478; *id.* 52 Kan. 48, 34 Pac. 352.)

Written pleadings are discretionary with the judge, but the court cannot render personal judgment, but only an award of damages and costs. (*Kansas City, W. & N. W. Rld. Co. v. Kennedy,* 49 Kan. 19, 30 Pac. 126.) The better practice is to file a petition, but unless the railroad makes motion to compel landowner to do so, the omission cannot be raised on objection to evidence. (*Ellsworth M. N. & S. E. Rly. Co. v. Maxwell,* 39 Kan. 651, 18 Pac. 819; *St. J. & D. C. Rld. Co. v. Orr,* 8 Kan. 419.) In condemnation proceedings the rule of law requiring specific facts constituting the fraud, cruelty or negligence to be stated, should be liberally construed when applied to the pleadings filed on appeal. The case may be tried upon the certified transcript without pleadings. (*Southwestern M. Ry. Co. v. Russell,* 7 Kan. App. 503, 54 Pac. 140.)

The petition may be amended on appeal to show the real parties in interest. (*Burlington, K. F. S. W. Ry. Co. v. Billings,* 38 Kan. 243, 16 Pac. 473.)

SEC. 129. *Same; appeal bond.* The county clerk is the proper officer to approve the appeal bond (see R. S. 66-906; *Missouri River F. S. & G. R. Co. v. Owen,* 8 Kan. 409), but where the bond is approved by the county commissioners instead of the county clerk, the court may permit the appellant to give a new bond. (*St. Joseph & D. C. R. Co. v. Orr,* 8 Kan. 419.)

The failure to file a written undertaking is fatal, and a deposit in lieu thereof is not sufficient. (*Beckwith v. Kansas City & O. Ry. Co.,* 28 Kan. 484.) The fact that the appeal bond is not in double the amount of the award, as required by statute, does not destroy the court's jurisdiction. (*Chicago, K. & W. Ry. Co. v. Abilene,* 42 Kan. 97, 104, 21 Pac. 1112.) An appeal is to secure any judgment and costs that may be rendered, and an entry upon the land before giving bond may be waived by accepting money in full payment of damages covered by the petition. (*Fitzgerald v. Chicago, K. & W. Rld. Co.,* 48 Kan. 537, 29 Pac. 703.)

The court may refuse to allow the filing of a new bond to perfect appeal where the one filed was void as made out to the wrong company. (*Lovitt v. Wellington &Western Rld. Co.,* 26 Kan. 297.) But while a bond running to a total stranger renders it void (*Lovitt v. Wellington & W. Rld. Co.,* 26 Kan. 297), yet if there is a description in the body of the bond of the condemnation proceeding and an obligation to pay the judgment and costs on appeal from the award. it is not void (*Sheridan v. Phillips Pipe Line Co.,* 134 Kan. 260, 5 P. 2d 817).

The bond must meet the requirements under the justices' act (see R. S. 1931 Supp. 61-1002 *et seq.*), and if the bond is void on its face no jurisdiction

can be acquired. (*St. Louis, K. & S. W. Ry. Co. v. Morse,* 50 Kan. 99, 31 Pac. 676; but, see *Wood v. School District,* 102 Kan. 78, 169 Pac. 555; *Lotz v. Kansas City,* 108 Kan. 25, 193 Pac. 1051, and *Burke v. Missouri-K.-T. Rld. Co.,* 132 Kan. 625, 296 Pac. 380, where the decisions as to defective bonds are reviewed.)

A single appeal bond will give the court jurisdiction where it refers to a number of entirely separate lots condemned and which belong to one owner in one strip of land, although some of the lots are isolated and separated. Such a bond is not absolutely void and could be amended to cover the separate awards. (*Burke v. Missouri-K.-T. Rld. Co.,* 132 Kan. 625, 296 Pac. 380.) This case reviews practically all of the Kansas cases to date as to defective appeal bonds.

As to the sufficiency of an appeal bond in which only a part of the landowners, who were tenants in common, joined in its execution, it has been held that such a bond gives the court jurisdiction and is not void *in toto.* (*Sinclair v. Missouri Pac. Rld. Co.,* 136 Kan. 764, 18 P. 2d 195.) Whether or not such a bond signed only by one cotenant would perfect an appeal as to the other tenants in common without amendment was not decided in the case last cited, since the district court had allowed an amendment so as to include all the tenants who had failed to sign the original bond before time for appeal had expired.

SEC. 130. *Nature of judgment rendered on appeal.* The court, on appeal from the award of commissioners, cannot render personal judgment or pass title to the property. The title does not pass until the award is paid. Some reason for this may be seen in a statement of the court; "An owner of land would not want to take a judgment against an irresponsible and insolvent railroad company as payment for his land; nor would a railway company want to pay an enormously excessive award." (*St. L. & D. Rld. Co. v. Wilder,* 17 Kan. 239; see, also, *Lawrence & T. Ry. Co. v. Moore,* 24 Kan. 323; *Florence, etc., Ry. Co. v. Lilley,* 3 Kan. App. 588, 43 Pac. 857.

SEC. 131. *Measure and elements of damages.* In some states the compensation to the landowner must be ascertained by a jury in a court of record. In the Ohio constitution (art. 13, sec. 5) provision is made for a jury trial. It will be noted that the provision in the Kansas constitution (art. 12, sec. 4) providing for the payment of damages was taken from the Ohio section (*Atchison, T. & S. F. R. Co. v. Blackshire,* 10 Kan. 477; see section 125 above), with the exception of the last sentence which provides for trial by jury. In Kansas either the board of county commissioners or commissioners appointed by the district court appraise the property and assess the damages. (R. S. 66-902, 66-907.) But on appeal to the district court the case is tried *de novo.* (R. S. 66-903; R. S. 1931 Supp. 61-1003), which means that the jury must determine the measure of damage.

On appeal from the award of damages, to what extent are the previous proceedings of the commissioners and of the railroad company legal evidence before the jury? The case is tried *de novo,* so the amount of damages allowed by the commissioners is not competent, since the effect of the appeal is to vacate the award, and testimony, or an instruction as to the amount awarded by the commissioners, is ground for reversal. (*Chicago, K. & N. Rly. Co. v. Broquet,* 47 Kan. 571, 28 Pac. 717; Nichols Em. Dom., sec. 431; see section 127, above.) As to informing the jury of the amount of the award, for the purpose of determining whether interest may be allowed, see section 135, below. The mere fact that commissioners, in laying out a right of way for a railroad, had allowed a certain item of damages, affords no evidence on the trial of an appeal from their award that such damages had in fact been sustained. (*Kansas City S. Ry. Co. v. Termier,* 85 Kan. 11, 116 Pac. 256.)

But on appeal the report of the commissioners may be received in evidence to show what land was valued by the commissioners; the court saying that there is usually no other satisfactory evidence of that fact except the report. (*St. Joseph & D. C. R. Co. v. Orr,* 8 Kan. 420; section 127, above. And while the map or profile is no part of the condemnation proceedings (see section 112, above), it may be used to explain a witness's testimony. (*Chicago,*

K. & W. Ry. Co. v. Grovier, 41 Kan. 685, 21 Pac. 779; see section 111, above.)

As in other cases, a map drawn by the witness may be referred to by him and introduced into the evidence. (*Chicago, K. W. Ry. Co. v. Dill,* 41 Kan. 736, 21 Pac. 778.) Likewise, the jury may view the premises, as provided by R. S. 60-2910. (*Coughlen v. Chicago, I. & K. Rly. Co.,* 36 Kan. 422, 13 Pac. 813.)

Where the landowner does not have title to the land in himself, he can only recover for the diminished value to his interest in the land. (*Chicago, K. & W. Ry. Co. v. Hurst,* 41 Kan. 740, 21 Pac. 781.) Also, a homesteader's right to compensation differs only in degree to that of one with full legal title. (*Burlington, K. & S. W. Rld. Co. v. Johnson,* 38 Kan. 142, 16 Pac. 125; *Ellsworth, M. N. & S. E. Rld. Co. v. Gates,* 41 Kan. 574, 21 Pac. 632.)

Where a "lot of land" consists of more than a quarter section and is cut off by the railroad fronting the quarter section through which the railroad runs, the owner may recover for damages to whole tract. (See R. S. 66-902; *Kansas City, E. & S. R. Co. v. Merrill,* 25 Kan. 421; see, also, *Burke v. Mo. K. T. Rld. Co.,* 132 Kan. 625, 630, 296 Pac. 380.) The general rule is that damages shall be limited to the "lot of land" over which the railroad runs. "Lot of land" (see R. S. 66-902) has been given a liberal construction so as to include any compact, contiguous body of land. This seems justified under the language of article 12, section 4, Kansas constitution. However, where lands are so outlying as to only corner on the tract contiguous to condemned land, the court has held no damage could be awarded for such outlying lands. (*Leavenworth, N. & S. Ry. Co. v. Wilkins,* 45 Kan. 674, 26 Pac. 16.)

It is competent to show that the railroad was built upon the land by mistake, in determining whether the appropriation was permanent or not, where the land has not been actually condemned. (*Steinbuchel v. Kansas M. Ry. Co.,* 7 Kan. App. 543, 51 Pac. 934.)

The damage is to the realty itself, and where land is taken outside the right of way the owner may recover for the depreciation in the market value of the entire tract. (*Chicago, K. & W. Rld. Co. v. Willits,* 45 Kan. 110, 25 Pac. 576.) The landowner may recover actual damages sustained to the whole property by reason of right of way so appropriated from a portion of it. (*Reisner v. Atchison Union Depot & R. Co.,* 27 Kan. 382); but he can only recover for damages resulting from the right of way and cannot recover in such proceedings for the excavation of land outside of the right of way (*Leavenworth, N. & S. Ry. Co. v. Usher,* 42 Kan. 637, 22 Pac. 734).

As to the time when compensation is to be made, the measure is the actual cash market value at the time of the taking. (*Chicago, K. & W. Rld. Co. v. Parsons,* 51 Kan. 408, 32 Pac. 1032.) Also, the value of growing crops taken is determined by the nearest market value after the usual cost of marketing, should they ripen. (*Le Roy & Western Rly. Co. v. Butts,* 40 Kan. 159, 19 Pac. 625.) In determining market value, every legitimate use of the land, including the most advantageous, may be considered. (*Kansas City O. L. & T. Ry. Co. v. Weidenmann,* 77 Kan. 300, 94 Pac. 146.)

As to the time of valuation, the compensation must be ascertained and assessed at the time the property is taken. Ordinarily such taking is when the company first took possession and occupied it as a right of way. (*Weir v. St. Louis, Ft. S. & W. Rld. Co.* 40 Kan. 130, 19 Pac. 316; *C. B. U. P. Rly. Co. v. Andrews,* 26 Kan. 702; *Cohen v. St. L. Ft. S. & W. Rld. Co.,* 34 Kan. 158; *Chicago, K. & W. Rld. Co. v. Parsons,* 51 Kan. 408, 32 Pac. 1032.) Special questions as to value of land before and after the location of right of way should be given jury. (*Chicago, I. & K. Rld. Co. v. Townsdin,* 38 Kan. 78, 15 Pac. 889.) Where the damages are limited to unplatted city lots appropriated, the measure is their value immediately before the condemnation, and, therefore, evidence as to their value if platted or of the value of other city lots is not competent. (*Kansas City & Topeka Ry. Co. v. Splitlog,* 45 Kan. 68, 25 Pac. 202.)

An instruction authorizing the jury to determine the value on the basis of the highest and best use to which the land in question was devoted and adapted, while not a precise statement of the measure of damages, is not

reversible error (*Lee v. Missouri Pac. Rld. Co.,* 134 Kan. 225, 5 P. 2d 1102); but the injury to the remainder of the land must be special to the owner and not such as affects the public in general (*Central Branch U. P. Rld. Co. v. Andrews,* 41 Kan. 370, 21 Pac. 276).

The purpose of the law is to secure to the landowner full compensation. So, where city blocks are one tract of land, and part of it fenced off from the lots actually taken, the railroad cannot insist that the entire tract be treated as a farm, even though streets and alleys are not followed in that part of the city. (*Missouri, K. & T. Ry. Co. v. Roe,* 77 Kan. 224, 94 Pac. 259, 15 L. R. A., n. s., 679.)

The fact that a county assessor testified that he assessed the land at certain valuations instead of giving his opinion was held not sufficient error to require a reversal. (*Hamilton v. A. T. & S. F. Ry. Co.,* 95 Kan. 353, 148 Pac. 648.) Testimony of an offer of purchase is inadmissible to prove value. (*St. Joseph & D. C. R. R. Co. v. Orr,* 8 Kan. 419). Such an offer could not be of much evidence of value unless the court went behind the motives and tried out the elements prompting such an offer (*State v. Nelson,* 126 Kan. 1, 266 Pac. 107.)

As to particular items that go to make up the various elements, these of course, are of many different kinds, depending somewhat upon the particular use to which the land is or may be put. It has been held that specific items of damages to the various subdivisions need not be shown by the jury in answer to special questions. (*Craig v. Salina, N. Rld. Co.,* 102 Kan. 838, 172 Pac. 21.) The jury may be interrogated as to any particular element but need not be required to state all the elements or sources of damages. (*Le Roy & W. Ry. Co. v. Harok,* 39 Kan. 638, 18 Pac. 943, 7 Am. St. Rep. 566; *Le Roy & W. Ry. Co. v. Crum,* 39 Kan. 642, 18 Pac. 944; *Le Roy & W. Ry. Co. v. Hollis,* 39 Kan. 646, 18 Pac. 947; *Chicago, K. & W. Ry. Co. v. Casper,* 42 Kan. 561, 22 Pac. 634); but it has been held that where injury is to certain items of damage, such as trees, vines, corrals, etc., the jury should answer special questions as to the value of each item (*Ottawa, O. C. & C. G. Ry. Co. v. Adolph,* 41 Kan. 600, 21 Pac. 643). Where all the elements or items are assessed by the jury at the highest possible estimate, a new trial will be granted where such is a clear indication of passion or prejudice. (*Parsons & P. Rld Co. v. Montgomery,* 46 Kan. 120, 26 Pac. 403.)

Stoppage of flow of surface water along right of way are proper elements of damages. (*Wichita & W. Rld. Co. v. Kuhn,* 38 Kan. 104, 16 Pac. 75.) So, where water will accumulate in deep borrow pits and become stagnate, such may be considered an element of damage; and injury from weeds growing on right of way from which seeds may be carried upon the owner's land, and the resulting danger from fire, may be considered. (*Schoake v. Kansas City K. V. & W. Ry. Co.,* 102 Kan. 470, 170 Pac. 804.)

In condemning a leasehold used for a furniture store it was proper to consider improvements to building made by the lessee which increased the rental value, but items of anticipated profits are inadmissable. (*Bales v. Wichita M. V. Rld. Co.,* 92 Kan. 771, 141 Pac. 1009, L. R. A. 1916C 1090.) Evidence as to rental value is competent where it is the best that can be had, but it is immaterial where numerous witnesses testify as to the value of the land. (*Hall v. Kansas City L. & T. E. Rld. Co.,* 89 Kan. 70, 130 Pac. 664; see, also, *Kelchner v. Kansas City,* 86 Kan. 762, 121 Pac. 915.) Evidence as to the cost of erecting other suitable buildings at some other place is not competent. (*Council Grove, O. C. & O. Ry. Co. v. Center,* 42 Kan. 438, 22 Pac. 574.)

Fixtures or improvements, such as mining shafts located within the right of way, may be considered in assessing damages. *Missouri, K. & N. W. Rld. Co. v. Schmuck,* 79 Kan. 545, 100 Pac. 282.) The right of the owner to remove valuable minerals below the right of way is a proper element. (*Mo., K. & N. W. Rld. Co. v. Schmuck,* 69 Kan. 272, 76 Pac. 836; see, also, *Harvey v. Mo. Pac. Rld. Co.,* 111 Kan. 373, 207 Pac. 761.)

If the embankment for the railroad tracks extends over onto other land, the owner may recover. (*Wichita & W. Rld. Co. v. Fechheimer,* 49 Kan. 643, 31 Pac. 127.) The owner of two tracts, with right of way over or under interven-

ing cattle drive, is entitled to damages to both tracts, though only part of one taken. (*Union Term. Rly. Co. v. Peet Bros.* 58 Kan. 197, 48 Pac. 860.) Where the land is used as a farm, but is situated near a city and suitable for lots and blocks such facts may be shown in determining values. (*Chicago, K. & N. Rly. Co. v. Davidson,* 49 Kan. 589, 31 Pac. 131.)

All incidental loss, inconvenience and damages, present and prospective, should be taken into consideration. (*Missouri, K. & T. Ry. Co. v. Haines,* 10 Kan. 439.) Inconvenience and disfigurement may be elements, along with other damages, even though the tract is not divided or one part rendered less easy of access. (*Mo. Pac. Rly. Co. v. Dulaney,* 38 Kan. 246, 16 Pac. 343.) Inconvenience to the farm and danger from fire, etc., upon the remainder may be considered in estimating the depreciation in value of the property. (*St. Louis, Ft. S. & W. Rld. Co. v. McAuliff,* 43 Kan. 185, 23 Pac. 102.)

Consequential damages, such as noise, smoke, offensive vapors, sparks, etc., cannot be recovered where the railroad is operated in a legal and proper manner. (*Atchison & N. R. Co. v. Garside,* 10 Kan. 552); but while noise and smoke is not a basis or grounds for awarding damages because of remoteness, they may be taken into consideration by the jury, not as basis for awarding damages but as affecting the market value of the premises. In other words, no specific damage for noise and smoke can be recovered and the jury must be so instructed. (*Omaha, etc., Ry. Co. v. Doney,* 3 Kan. App. 515, 43 Pac. 831.) The owner cannot recover consequential damages to the entire tract where part of it is separated by another railroad. (*Kansas C. M. & O. Ry. v. Littler,* 70 Kan. 556, 79 Pac. 114.) Probable injury to stock or danger from fire, so far as it affects the value or depreciation of the land itself, is proper element where such risk or damage is without the fault or negligence of the railroad. (*Le Roy & W. Rld. Co. v. Ross,* 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217; *Florence, E. D. & W. V. Rld. Co. v. Shepherd,* 50 Kan. 438, 31 Pac. 1002.) While the exposure of the remaining land to increased hazard from fire upon the ground that it depreciates the property is a proper element (see *Kansas City & E. Rld. Co. v. Kregelo,* 32 Kan. 608, 613, 5 Pac. 15), such speculative damages as may result from frightening of live stock is not a proper element of damages. (*Atchison & D. Ry. Co. v. Lyon,* 24 Kan. 745.) Therefore the court ought not to instruct the jury by saying that such speculative items cannot constitute a basis for special compensation but may be considered as tending to the general depreciation of the land, such as disinclining purchasers to pay what it would otherwise be worth. (*Chicago, K. & W. Rld. Co. v. Palmer,* 44 Kan. 110, 24 Pac 342.) As to speculative damages, the jury cannot consider the extra care necessary in the use of live stock liable to be frightened. (*Atchison & D. Rly. Co. v. Lyon,* 24 Kan. 745; *Florence, E. & W. V. Rld. Co. v. Pember,* 45 Kan. 625, 26 Pac. 1; *St. Louis, K. & S. W. Ry. Co. v. Hammers,* 51 Kan. 127, 32 Pac. 922; *Southwestern M. Ry. Co. v. Harvey,* 8 Kan. App. 489, 57 Pac. 550.)

Independent trespasses by the railroad company outside of the land sought to be appropriated are not proper elements of damages in condemnation proceedings. (*Leavenworth, N. & S. Ry. Co. v. Herley,* 45 Kan. 535, 26 Pac. 23.)

SEC. 132. *Same; railroad crossings, cattle guards, etc.* The construction of farm crossings is a proper element to be considered in the award of damages. (*Kansas City & E. Rld. Co v. Kregelo,* 32 Kan. 608, 5 Pac. 15; *Chicago, K. & W. Ry. Co. v. Casper,* 42 Kan. 561, 22 Pac. 634); also, the probable expense of constructing and maintaining farm crossings, though there is no evidence of their necessity, is proper damage (*Kansas City & S. W. Rld. Co. v. Baird,* 41 Kan. 69, 21 Pac. 227), and where the taking makes it necessary for the landowner to build and maintain a fence such is a proper subject to damages. (*Leavenworth T. & S. W. Ry. Co. v. Paul,* 28 Kan. 816.) So, also, is additional fencings and farm crossings. (*Atchison & N. R. Co. v. Gough,* 29 Kan. 94.) Under R. S. 66-301 to 3, giving an owner of a farm divided by a railroad the right to a crossing over it, the Public Service Commission has no jurisdiction (*U. P. Rld. Co. v. Utilities Commission,* 98 Kan. 667), and where full compensation has been paid before the enactment of the statute, mandamus will not lie to compel the railroad to build the crossing at its own expense

(*Chamberlain v. Mo. P. Ry. Co.,* 107 Kan. 341, 191 Pac. 261, 12 A. L. R. 224); but, under R. S. 66-230, where the construction of cattle guards tends to promote the safety of trainmen or passengers, a railroad company may be compelled to build same without compensation to the railroad (*Union Pac. Ry. Co. v. Public Utilities Commission,* 115 Kan. 545, 224 Pac. 51).

A railroad company is entitled to damages caused by the location of a public road over its right of way, such as cattle guards, etc. (*Kansas Cent. Ry. Co. v. Jackson Co. Comm'rs,* 45 Kan. 716, 26 Pac. 394; *Greenwood Co. Comm'rs v. Kansas City, E. & S. K. Ry. Co.,* 46 Kan. 104, 26 Pac. 397; *Chicago, K. & W. Ry. Co. v. Chautauqua Co. Comm'rs,* 49 Kan. 763, 31 Pac. 736, *Atchison T. & S. F. Rld. Co. v. Osage Co. Comm'rs,* 48 Kan. 576, 29 Pac. 1084.) A city cannot, under R. S. 12-1633, 13-404 or 13-1903, compel a railroad to open streets through its right of way and construct subways under elevated tracks without compensation. This applies, of course, only where a street has never been across the railroad right of way. (*City of Wichita v. Wichita Union Terminal Ry. Co.,* 127 Kan. 855, 275 Pac. 171.)

SEC. 133. *Streets and highways, obstruction of access to.* As a general approach to the question of whether or not a property owner may recover for an obstruction of access to his land by a railroad, it may be stated that if a railroad company in possession breaks its contract as to damages, the remedy would be ejectment, except for the public interests involved. Therefore the landowner's remedy is an action on the basis of a permanent appropriation of the land and the recovery of damages as upon a proceeding by condemnation. (*Missouri P. Ry. Co. v. Gano,* 47 Kan. 457, 28 Pac. 155; *St. Louis, etc., Ry. Co. v. Yount,* 67 Kan. 396, 73 Pac. 63.) Also, it may be said that the use of a city street for railroad purposes is not a taking of private property without compensation, within the meaning of either state or federal constitutions (Kan. const., art. 12, sec. 4; U. S. const. Amend. 5; *Ottawa, O. C. & C. G. Ry. Co. v. Larson,* 40 Kan. 301; 19 Pac. 661, 2 L. R. A. 59); but, as stated by Justice Brewer, "Where the injury springs from the manner in which the track as completed affects access to the lot, the lot owner may treat it as a permanent injury to the lot, a quasi condemnation of a certain interest in his property, and recover the consequent depreciation in value, and such recovery is an assent on his part to such manner of using the highway by the company and concludes both him and all subsequent owners of the lot" (*Central Branch U. P. Ry. Co. v. Twine,* 23 Kan. 585, 595, 33 Am. Rep. 203; *Central Branch U. P. Ry. Co. v. Andrews,* 26 Kan. 702; see *Banister v. A. T. & S. F. Ry. Co.,* 129 Kan. 302, 282 Pac. 751). Before the Twine case, cited above, it had been held that a railroad company could not be authorized to permanently block up a street or alley without liability for injuries caused thereby. (*Atchison & N. R. Co. v. Garside,* 10 Kan. 552.) "While the state may restrict its own right, it cannot restrict or take away the rights which are purely individual, even though they are intimately associated with the public right." (Cooley, Torts, p. 616.)

The decision in the Twine and Andrews cases, above cited, are only to the effect that a railroad is liable for wrongfully blocking a street, the same as any individual. The court has not gone so far as to give the lot owner damages for indirect or general injuries caused by a railroad over a street already owned by the public. (*Ottawa O. C. & C. G. Ry. Co. v. Larson,* 40 Kan. 301, 19 Pac. 661, 2 L. R. A. 59.) While the landowner may treat the taking as an appropriation and recover damages, he cannot recover from a purchaser of the railroad on a general agreement to furnish him free passes over the road. (*Missouri P. Ry. Co. v. Henrie,* 5 Kan. App. 614, 46 Pac. 976.)

An abutting lot owner to a street used for a right of way has no right to damages unless there is such an obstruction as to virtually cut off the owner's ingress and egress thereto. (*Kansas, N. & D. Ry. Co. v. Cuykendall,* 42 Kan. 234, 21 Pac. 1051, 16 Am. St. Rep. 479; *Kansas N. & D. Ry. Co. v. Mahler,* 45 Kan. 565, 26 Pac. 22; *Wichita & C. Ry. Co. v. Smith,* 45 Kan. 264, 25 Pac. 623; *Herndon v. Kansas N. & D. Ry. Co.,* 46 Kan. 560, 26 Pac. 959; *Kansas N. & D. Ry. Co. v. McAffee,* 42 Kan. 239, 21 Pac. 1053.) The cutting off of the access to an entire street gives the abutting lot owner right to damages,

even though he has access from another street. The question of the proper construction of the railroad or of how the company got title is of no import, provided the lot owner has waived none of his rights. (*Ft. Scott, W. & W. Ry. Co. v. Fox,* 42 Kan. 490, 22 Pac. 583.) A railroad put upon a street with assent of the city and by all parties considered as a permanent taking is grounds for recovery of damages by an abutting lot owner whose access has been thereby cut off. (*Atchison, T. & S. F. Rld. Co. v. Davidson,* 52 Kan. 739, 35 Pac. 787; *Atchison, T. & S. F. Rld. Co. v. Clusch,* 53 Kan. 621, 36 Pac. 979.)

It is not necessary that any portion of the lot be actually cut off, if access to the property has been cut off and he suffers special damages. (*Leavenworth, N. & S. Ry. Co. v. Curtan,* 51 Kan. 432, 33 Pac. 297; see, also, 36 L. R. A., n. s., 772, and *Banister v. A. T. & S. F. Ry. Co.,* 129 Kan. 302, 306, 282 Pac. 751.) A temporary obstruction of a street by digging holes may be grounds for special damages up to time of action, but not for permanent damages. In other words, no property is taken and the access is not permanently cut off. (*Chicago, K. & W. Ry. Co. v. Union Inc. Co.,* 51 Kan. 600, 33 Pac. 378; *Ottawa O. C. & C. G. Ry. Co. v. Peterson,* 51 Kan. 604, 33 Pac. 606.) Where a street is obstructed so as to constitute a permanent taking and cuts off the lot owner's access, the railroad company committing nuisance in the first instance should be joined with the lessee railroad in an action for damages. (*Atchison, T. & S. F. Rld. Co. v. Anderson,* 65 Kan. 202, 69 Pac. 158.) "The fact that lots are accessible through the alley in their rear does not prevent the recovery of damages for obstructing access thereto from the street." (*Stephenson v. Atchison Ry. L. & P. Co.,* 88 Kan. 794, 129 Pac. 1188, syl. ¶ 3.) Following the rule stated in the Stephenson case, just cited, it was held that a railroad grade which prevents the abutting owner from traveling in one direction does not give such owner right to damages. (*Sharp v. El Dorado & S. F. Ry. Co.,* 123 Kan. 397, 255 Pac. 1118.) In other words, access to property does not mean the privilege to approach from both directions.

Since a city may establish a street (see R. S. 13-1019) without paying damage, it may grant a street railway the right to construct its road in a street, and it is only when the grade is changed that it may be held liable for damages. (*Interstate C. R. T. Ry. Co. v. Early,* 46 Kan. 197, 200.) Also, since a city may establish a grade without incurring liability, under the law of eminent domain, a railroad company that does so under the direction of the city engineer is not liable. (*Atchison, T. & S. F. Rld. Co. v. Arnold,* 52 Kan. 729, 35 Pac. 780; *Atchison, T. & S. F. Rld. Co. v. Church,* 53 Kan. 621, 36 Pac. 621.) Unless an ordinance makes provision for damages to adjacent owners, no substantial rights are affected thereby and damages as to obstruction to the access to private property and the like cannot be measured by the broad comparison of market value before and after construction of the railroad. (*Marshall v. Wichita, etc., Rld. Co.,* 96 Kan. 470, 152 Pac. 634.) Where a city by ordinance vacates a street, the question arises: What acts of a railroad company make it liable for closing the street so as to cut off access of a property owner? Obviously it must be some act of the company, since the vacation order itself should not make the company liable. It has been held that the planting of posts within the railroad right of way across a street previously vacated by a city ordinance does not render the railroad liable in damage for "closing" the street. (*Banister v. A. T. & S. F. Ry. Co.,* 129 Kan. 302, 282 Pac. 751.) It would seem from the decisions that, even where a city has vacated a street, if the railroad construct a permanent obstruction so as to cut off the ingress and egress of a lot owner, it will be liable in damages. For a review of the cases on this point, see Banister case cited above, beginning at page 306.

SEC. 134. *Deduction of benefits to remainder of land.* The Kansas constitution (art. 12 sec. 4) conclusively provides that a railroad corporation must pay for its right of way, irrespective of any benefit to the land from the proposed improvement of the company. (*St. Joseph & D. C. R. Co. v. Orr,* 8 Kan. 419.) The commissioners must appraise the value of the land appro-

priated and assess the damages to that not appropriated, irrespective of any supposed benefits to that not appropriated. (*Hunt v. Smith,* 9 Kan. 137.) The compensation for the right of way appropriated to the company's use includes not only the value of the property actually taken, but also the loss the landowner suffers by being deprived of a portion of his land. (*Reisner v. A. U. D. & Rld Co.,* 27 Kan. 382; *Le Roy & W. Rld. Co. v. Ross,* 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217.) Similarly, it was held that the constitutional restriction as to deduction of benefits extends to the residue of the land damaged by the taking. (*Inter-State Con. Rapid Transit Ry Co. v. Simpson,* 45 Kan. 714, 26 Pac. 393.)

The constitutional provision (art. 12, sec. 4) as to no deduction of benefit for rights of way does not apply to additional land outside of the right of way which may be condemned for terminal facilities, and the benefits may be deducted from damages to lands adjoining such land taken (*Smith v. Mo. P. Ry. Co.,* 90 Kan. 757, 136 Pac. 253); nor does it apply to lands condemned for railroad purposes other than the 100 foot right of way strip. So, benefits resulting to lands for depots, sidetracks, and the like may be deducted from the award (*Lee v. M. P. R. C.,* 134 Kan. 227 5 P. 2d. 1122).

SEC. 135. *Damages in the nature of interest.* It has been held that since condemnation proceedings are not torts, interest may be allowed from the time of the condemnation to the date of judgment on appeal from the award (*Calkins v. Salina N. Ry. Co.,* 102, Kan. 835, 172 Pac. 20); and, where the railroad has taken possession, may be allowed from time of possession to time of trial (*Cohen v. St. L. Ft. S. & W. Rld. Co.,* 34 Kan. 158, 8 Pac. 138). Only the difference between the amount deposited and the amount recovered may be allowed as interest (*Craig v. Salina N. Rld. Co.,* 102 Kan. 838, 172 Pac. 21); but interest is not proper where a less amount than the original award is recovered on appeal, where the railroad has promptly paid the amount of the condemnation award as provided by statute (*Lee v. Missouri Pac. Rld. Co.,* 134 Kan. 225; 5 P. 2d 1102). The time of the deposit of the security has been held to determine the date of appropriation, so that interest may be figured from that date. (*Smith v. Mo. P. Ry. Co.,* 90 Kan. 757, 136 Pac. 253.)

Since the award of the commissioners is not proper evidence to go to the jury on the question of the amount of damage to be determined by the jury on appeal from their award (see section 131 above), there is objection to informing the jury of the amount of the award of the commissioners. Since interest may be recovered only on the amount recovered on appeal which exceeds the original award, it is held that it is not error to instruct the jury that in case they find for the plaintiff in a greater amount than a sum named that they shall allow interest on that amount. There is perhaps no other way in which the jury can be informed upon what basis they are to ascertain and allow interest. (*Wichita & W. Rld. Co. v. Kuhn,* 38 Kan. 104, 16 Pac. 75; see, also, annotation in 28 L. R. A., n. s., pp. 51, 55.)

SEC. 136. *Title or extent of interest acquired by the railroad.* The legislature may grant the right to take a fee-simple title in property to a railroad (see Laws 1864, ch. 124, now repealed), as it is the exclusive judge as to the quality of interest to be taken (*Challis v. A. T. & S. F. Rly. Co.,* 16 Kan. 117), and under that act the railroad company acquired a fee simple title and not a mere easement (Laws 1864, ch. 124; *Challis v. A. T. & S. F. Rly. Co.,* 16 Kan. 117); and where a railroad got title in fee upon a condition that the company make certain improvements and keep same in repair, with a right to demand forfeiture of the estate for failure to do so, it was held that such a right of forfeiture was not assignable (*Piper v. U. P. Rly. Co.,* 14 Kan. 568, 574).

The condemnation proceedings must show what is taken and what is parted with by the owner, as nothing is taken by implication or intendment. So, the condemnation of a 100-foot right of way does not give the company the right to enter and dig ditches through adjacent lands, even though such ditches are necessary to the proper drainage and protection of the railroad. (*State v. Armell,* 8 Kan. 288; but see, *Corwin v. St. L. & S. F. Rly. Co.,* 51 Kan. 451,

461, 33 Pac. 99.) Under R. S. 66-901 "aqueducts" means the right to lay underground pipes and conduits. (*Smouse v. Kansas City S. Rly. Co.,* 129 Kan. 176, 282 Pac. 183.)

The landowner, under R. S. 66-904, retains the fee for every purpose not incompatible with the rights of the railroad company. (*Kansas Cent. Ry. Co. v. Allen,* 22 Kan. 285, 31 Am. Rep. 190.) Under R. S. 66-906, buildings may be taken where their value is included in the award. (*Chicago, I. & K. Rld. Co. v. Knuffke,* 36 Kan. 367, 13 Pac. 582.) The petition for damages should clearly show what interest in the land has been parted with (*Wichita & W. Rld. Co. v. Fechheimer,* 36 Kan. 45, 12 Pac. 362), and the jury should be instructed that only an easement is taken, and that the fee remains in the landowner (*Phillips v. Southwest Mo. Rld. Co.,* 106 Kan. 446, 186 Pac. 197).

While the title remains in the landowner, the railroad may remove so much of the stone and dirt as is necessary for construction or repair of its roadbed. The court, however, reserved the question as to whether the company could remove material from one point of the right of way to another. (*Earlywine v. Topeka, S. & W. Ry. Co.,* 43 Kan. 746, 23 Pac 940.)

The landowner may use the property, provided such use does not interfere with the use for railroad purposes, and the question of such interference is one of fact for the jury (*Kansas Cent. Rly. Co. v. Allen,* 22 Kan. 285, 31 Am. Rep. 190); but there is no concurrent right in the landowner to occupy railroad property in actual use by it without the railroad's consent (*K. C. Ry. Co. v. Allen,* 22 Kan. 285, 31 Am. Rep. 190; *K. C. Ry. Co. v. Ireland,* 22 Kan. 296; *Dillon v. K. C. Ft. S. & M. Ry.,* 67 Kan. 693, 74 Pac. 251; *Atchison, T. & S. F. Ry. Co. v. Hamilton,* 130 Kan. 685, 288 Pac. 560). However, the fee holder may occupy and use the unused portion of the land taken, provided such use does not interfere with the railroad purposes, either present or future, but such possession cannot ripen into title by adverse possession. (*Harvey v. Mo. P. Rld. Co.,* 111 Kan. 371, 207 Pac. 761, 50 A. L. R. 300.) But the servient landowner is not entitled to an injunction to prevent the leasing of land condemned for water reservoirs. The company may lease it for a pleasure resort, so long as it causes no damage to the landowner. (*Atchison, T. & S. F. Ry. Co. v. Hamilton,* 130 Kan. 685, 288 Pac. 560.)

The portion of a street in front of a railroad's property becomes an accretion, so to speak, to such property upon its vacation by the city, therefore the owner of such property before it was taken by condemnation has no right in it after such vacation. (*Challis v. Atchison, U. D. & Rld. Co.,* 45 Kan. 398, 25 Pac. 894.) So, the landowner may, on appeal, recover the value of the reversionary land resulting from vacation of streets and alleys to the tract, even though it was not included in the condemnation proceedings nor considered by the commissioners making the award, since such interest would pass to the railroad by the condemnation. (*Burke v. Mo.-K.-T. Rld. Co.,* 132 Kan. 625, 296 Pac. 380.)

A mortgagee not in possession is not regarded as an owner in the proceedings, so an easement, procured by a railroad company through mortgaged land is not merged in a warranty deed from the mortgagor and wife to the railroad company which is subsequently executed and delivered. (*Rand v. Ft. S. W. & W. Rly. Co.,* 50 Kan. 114, 31 Pac. 683.) Likewise one who holds a judgment lien against the land before the condemnation proceedings has no title or estate in the land, such as to make him an owner within the meaning of the statute regulating such proceedings. (*Williams v. Railway Co.,* 62 Kan. 412, 63 Pac. 430, 84 Am. St. Rep. 408.)

SEC. 137. *Possession by railroad pending appeal.* The possession of the property by a railroad, pending appeal, was upheld as constitutional under the statute (now R. S. 66-901 to 7, as amended) in an opinion reviewing all of the decisions of the court up to 1882. (*Central Branch U. P. R. Co. v. A. T. & S. F. R. Co.,* 28 Kan. 453.)

SEC. 138. *Res judicata.* If the proceedings were regular and terminated, and the owner has accepted the award, the question of the necessity and

quantity of land is not open for future litigation. (*Dillon v. K. C. Ft. S. & M. Rld.*, 67 Kan. 687, 74 Pac. 251.) When damages, matured, continuing and prospective, arising from construction of a railroad, are the subject of a prior action they are *res judicata* upon the conclusion of that action, and a lessee of the company cannot be held liable therefor. (*Marshall v. Wichita, etc., Railroad Co.*, 96 Kan. 470, 152 Pac. 634; see, also, *Hubbard v. Power Co.*, 89 Kan. 446, 131 Pac. 1182.)

SEC. 139. *Additional lands.* A railroad company may proceed under R. S. 66-902 to 66-907 to condemn additional lands after road is established (*Central Branch U. P. Rld. Co. v. A. T. & S. F. R. Co.*, 26 Kan. 669), Justice Brewer saying, in the opinion, that it was reasonable to hold that the legislature, in enacting a general law, intended that it should take such additional land when, in the experience of the county, such was necessary for the growth of the railroads. So a railroad may condemn additional grounds for shops and terminal facilities under R. S. 66-901, as such power is a continuing one (*Smith v. Mo. P. Ry. Co.*, 90 Kan. 757, 136 Pac. 253); and, under R. S. 66-901, lands may be condemned separate and apart from the right of way for a water station (*Dillon v. K. C. Ft. S. & M. Rld. Co.*, 67 Kan. 687, 74 Pac. 251), and such land may be leased by the railroad for a pleasure resort where no damage is caused to the servient landowner (*A. T. & S. F. Ry. Co. v. Hamilton*, 130 Kan. 685, 288 Pac. 560). The fact that a good part of the additional lands are to be used for incidental private purposes does not destroy the public use. (See section 109 above.) So a railroad company may, in addition to land taken for tracks and yards, etc., condemn enough land to furnish a third party ingress and egress to his land for private use affected by the placing of such tracks and yards, and it is of no concern to the owner of the land sought to be taken how much or in what manner the railroad may conpensate such third person, so long as the principal use of the land taken is a public one. (*Smouse v. Kansas City S. Rly. Co.*, 129 Kan. 176, 282 Pac. 183.)

It sometimes becomes necessary for a railroad to relocate its right of way. How far can a railroad go in this? While early railroads were granted charters under special charters by special legislative acts (see Private Terr. Laws of Kan., 1859, ch. 47, secs. 2, 3), Kansas now has a general law (R. S. 66-502) which gives any railroad the privilege at any time to change its roadbed for the purpose of shortening its line or overcoming obstacles, providing that the general route or terminus is not changed. The condemnation statutes (R. S. 66-901 to 11) are silent as to alteration or relocation of roadbeds. Recently (1928) a railroad company, orginally chartered under the above-cited special act of the territorial legislature in 1859, but later in 1895 incorporated under the general law after forclosure in the federal court, brought condemnation proceedings for relocation of its route. The landowner brought suit to enjoin the entering on his land after the condemnation was consummated. The injunction was granted in the district court. On appeal the question was: the power of the railroad to relocate its road, and whether or not its power had been exhausted by its predecessor. The court held that the power had not been exhausted, and that the term "relocation" in the petition to enjoin is too indefinite to show what the railroad was actually doing; which was not a relocation of the entire road but was only an alteration authorized under R. S. 66-502. (*Ritchie v. A. T. & S. F. Rly. Co.*, 128 Kan. 637, 279 Pac. 15.)

SEC. 140. *Additional servitude.* Before the enactment of R. S. 24-105 (now R. S. 1931 Supp. 24-105), relating to the obstruction of the flow of surface water, it was held that an adjoining owner could not claim additional compensation when a railroad corporation raises an embankment upon its land so as to obstruct the flow of surface water or flood the land of such owner. (*Atchison, T. & S. F. Ry. Co. v. Hammer*, 22 Kan. 763, 31 Am. Rep. 210; *Chicago, K. & N. Rly. Co. v. Steck*, 51 Kan. 737, 33 Pac. 601.) Therefore it seems that in Kansas the company condemns and pays for the right to grade and construct its road then, or at any future time, in such manner as the public necessities may require. (See Nichols, Em. Dom., sec. 196.)

The cutting down of trees on right of way in order to erect a telegraph line

is not a ground for additional claim for damages. (*Western Union Tel. Co. v. Rich,* 19 Kan. 517, 27 Am. Rep. 159.) A street railway is not liable in damages to adjacent lot owners for construction of track in a city street. (*Phillips v. Arkansas V. Interurban Ry. Co.,* 89 Kan. 835, 133 Pac. 429.) As to valuable undergrade crossings left by the railroad at the time the land was condemned, these cannot be closed up without compensating the owner for damages. (*Atchison, T. & S. F. Ry. Co. v. Davenport,* 65 Kan. 206, 69 Pac. 195.)

SEC. 141. *Statute of limitations.* As a general principle of constitutional law, the terms of a statute of limitations are within the discretion of the legislature. (Nichols, Em. Dom., sec. 344.) The damages are limited to what have accrued within the period of limitations in ordinary civil actions, and the limitations statute does not begin to run against a suit to recover the award until the judgment establishing the award becomes final on appeal. (*Schmuck v. Missouri, K. T. Rly. Co.,* 87 Kan. 152, 123 Pac. 887.)

SEC. 142. *Order of condemnation.* Although no express statutory provision is made as to the transfer of the title or easement to the railroad company by an order of the tribunal, the proceedings themselves will effectuate a transfer of the land to the company. (*Dye v. Midland V. Rld. Co.,* 77 Kan. 488, 94 Pac. 785.)

SEC. 143. *Abandonment and nonuser.* The railroad company is the original plaintiff or petitioner in the proceedings, and upon filing a disclaimer upon the landowner's appeal from the award is liable for costs. (*St. Louis, Ft. S. & W. R. Rld. Co. v. Martin,* 29 Kan. 750.)

A railroad company may reclaim the deposit (R. S. 66-903 to 4) any time before making actual entry on the land by giving notice of such abandonment. (*Atchison, T. & S. F. Ry. Co. v. Wilson,* 66 Kan. 233, 69 Pac. 342, 71 Pac. 246.) But where it has complied with the award and accepted benefits, the money cannot be recovered. (*Missouri P. Ry. Co. v. Gruendel,* 3 Kan. App. 53, 44 Pac. 439; see, also, *Stewart v. Marland Pipe Line Co.,* 132 Kan. 725, 297 Pac. 708.) Also, under R. S. 66-901 *et seq.,* a railroad may, where it has not taken possession, abandon the proceeding, even after judgment rendered on appeal from the award. The reason is that under the statute the whole proceeding, including the appeal, is quasi judicial, and no personal judgment can be rendered as in other actions. (*Todd v. Atchison, T. & S. F. Rly. Co.,* 134 Kan. 459, 7 P. 2d 79.) This is not true where the appeal is under the provisions of the code of civil procedure (*Stewart v. Marland Pipe Line Co.,* 132 Kan. 725, 297 Pac. 708), but an appeal from the award does not become an ordinary action which would preclude abandonment after the case is finally submitted to the court or jury (R. S. 60-3105) in railroad condemnation cases.

The railroad may lease its right of way to private parties without abandoning same, if it reserves the right to cancel the lease. (*Dillon v. K. C. Ft. S. & M. Rld.,* 67 Kan. 687, 74 Pac. 251; see, also, *Atchison, T. & S. F. Ry. Co. v. Hamilton,* 130 Kan. 685, 288 Pac. 560.) In the absence of a statute, and where there is no adverse possession, nonuser does not of itself work an extinguishment of the company's right. (*Hamlin v. Kansas Rly. Co.,* 73 Kan. 565, 85 Pac. 602.)