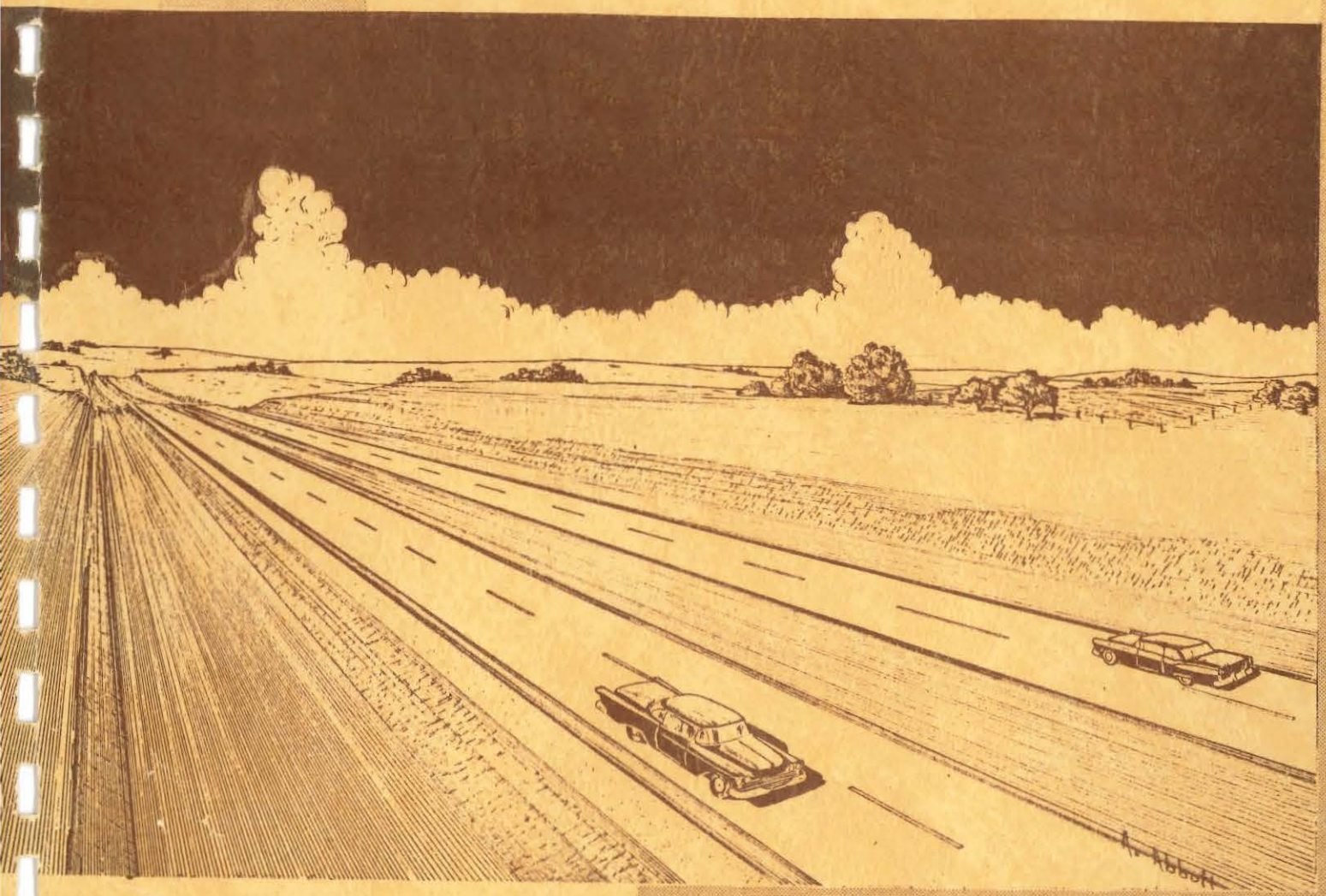
EMINENT DOMAIN



In Iowa

PREFACE

Today highway expansion occupies the dominant and leading role in the law of eminent domain. With the increased highway expansion in Iowa as in the entire United States, encouraged by numerous Federal Aid Highway Acts, it is necessary to reappraise and review the law of eminent domain in Iowa.

This work is not intended to be a full and complete survey of the field of eminent domain. It is intended to cover elementary materials and "common problems" in Iowa eminent domain proceedings. The majority of cases cited and considered are Iowa cases, and rightly so because this work was prepared primarily for Iowa practice.

The reader is cautioned that the law of eminent domain is not reduced to a fixed and crystallized formula. This review is prepared as an aid to the trial attorney and not as an authority unto itself.

The nucleus of this work came from material gathered by the Honorable Henry N. Graven, now U.S. District Judge for the Northern District of Iowa, who served as Special Assistant Attorney General and Counsel to the Iowa State Highway Commission (1936-1937). That material along with additional research was correlated and compiled by Merle L. Royce, now a practicing attorney in Marshalltown, Iowa.

Using the original study as a foundation this office has undertaken to review and reappraise many areas in the law of eminent domain in Iowa and to set it down in a concise and orderly fashion. The task of research and compilation was assigned to Wayne Johnson of the Iowa and Harvard Law Schools, now with the law firm of Ross, McGowan & O'Keefe, Chicago, Illinois. All work was reviewed and edited by this office and by

staff attorneys James E. Thomson, John L. McKinney and Hugh V. Faulkner. It was further reviewed and edited by Donald L. Beving, Keith E. McWilliams, and Donald C. Swanson, practicing attorneys in Des Moines, Iowa.

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THE POWER OF EMINENT DOMAIN AND ITS CONSTITUTIONAL AND STATUTORY LIMITATIONS

INTRODUCTION

The power of eminent domain is based on the sovereignty of the State over all property within its dominion as distinguished from a property right, or an exercise by the State of an ultimate ownership of the soil.[1] It is an inherent power necessary to the very existence of the government.[2] Any statutory provision declaring that certain property shall not be subject to the power of eminent domain is invalid.[3] This rule applies with equal force to municipal and private corporations to whom the legislature has granted the power of eminent domain,[4] and their authorities cannot lawfully contract with any person or group of persons that the power will not be exercised in a particular manner.[5] When the power of eminent domain has been expressly granted, its extent will be construed strictly against the grantee, and the grantee will not be allowed to take the lands of another unless such right comes clearly and unmistakably within the limits of the authority granted.[6]

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1. Nichols, On Eminent Domain, Sec. 1.13(4) (3d ed. 1950). See also Lowden v. Star, 171 Iowa 528, Dickinson Ct. v. Pause, 112 Iowa 21.
2. Reter v. Davenport, R.I. & N.W. Ry. Co., 243 Iowa 1112, 54 N.W.2d 863, 866 (1952); Liddick v. Council Bluffs, 232 Iowa 197, 5 N.W.2d 361, 371 (1942); Sisson v. Board of Supervisors, 128 Iowa 442, 104 N.W. 454 (1905); Noll v. Dubuque R. Co., 32 Iowa 66 (1871).
3. Nichols, Ibid. Section 1.141(3) (3d ed. 1950).
4. Cf. Reter v. Davenport, R.I. & N.W. Ry. Co., 243 Iowa 1112, 54 N.W.2d 863 (1952).
5. Nichols, Ibid. Section 1.141(4) (3d ed. 1950); Herman v. Board of Park Commissioners, 200 Iowa 1, 206 N.W. 35 (1925) (A contract made by park commissioners not to appropriate any more of the grantor's land by eminent domain proceedings is absolutely void.)
6. Nichols, Ibid. Section 3.213(1) (3d ed. 1950); Gilbride v. City of Algona, 237 Iowa 20, 20 N.W.2d 905 (1945); Gano v. Minneapolis Ry. Co., 114 Iowa 713, 87 N.W. 714 (1901).

However, it has been held that where a statute clearly and plainly confers the power of eminent domain, the strict rule is inapplicable and a liberal and reasonable construction should be adhered to so as to effectuate the statutory purpose.[7] In acting pursuant to a conceded power of eminent domain, the grantee's procedure is strictly construed in the light of the authorizing statute.[8]

SECTION 1. PROPERTY TAKEN MAY BE PUBLIC AS WELL AS PRIVATE.[9]

It is within the power of the General Assembly to make the same property subservient to different public uses, or even to take it from one public use and devote it to another. This rule has been universally accepted by the courts of the United States and England.[10] Thus, a city may extend its streets across the depot grounds of a railroad company,[11] or the state may authorize the construction of a highway in lieu of a railway on the same land.[12] However, in the absence of expressed language by the legislative body, such power will not be implied when it tends to substantially interfere or defeat the prior use or is inconsistent with the continuance of such use.[13] For illustration, in Town of Alvord v. Great Northern

7. Nichols, Ibid. Section 3.213(1); Warren v. Highway Commission, ____ Iowa ____, 93 N.W.2d 60 (1958); cf. Butterworth v. Highway Commission, 210 Iowa 1231, 232 N.W. 760 (1930).
8. Nichols, Ibid. Section 3.213(3) (3d ed. 1950); Finke v. Zeigelmiller, 77 Iowa 253, 42 N.W. 183 (1889).
9. See Comment, 43 Iowa Law Review 290 (1958); 3 Iowa L. Bul. 185 (1917).
10. Nichols, Ibid. Section 351 (2d ed.); Albia v. Chic. Ry. Co. 102 Iowa 624, 71 N.W. 541; St. Paul & N.D. R. Co. v. State, 34 Minn. 227, 25 N.W. 345.
11. Chi. M. & St. Paul Ry. Co. v. Starkweather, 97 Iowa 159, 66 N.W. 87; Diam. Jo. Line v. Davenport, 114 Iowa 432, 87 N.W. 399 (1901); Chic. etc. Ry. v. Mason City, 155 Iowa 99, 135 N.W. 9.
12. Toledo A.A. & N.M. Ry. Co. v. Detroit, 62 Mich 564, 29 N.W. 500.
13. 29 C.J.S. Section 74; Connolly v. Des Moines & Cent. Iowa Ry. Co., 246 Iowa 874, 68 N.W.2d 320 (1955); Lage v. Pottawattamie County, 232 Iowa 944; 5 N.W.2d 161 (1942).

Ry. Co., 179 Iowa 465, 161 N.W. 467 (1917), the town was denied the right to condemn a twenty foot strip from the railroad's three hundred foot wide depot grounds for the purpose of running an alley parallel to the railroad, the court saying that such alley would substantially impair the present and future use of the grounds for depot purposes and would be inconsistent with such use.[14] None of the Iowa cases cited in the discussion above deal with attempts by the state to condemn land already devoted to a public purpose. It is believed that a different principle applies to the sovereign than is applicable to private agencies with authority to condemn or inferior political bodies such as municipalities or county boards of supervisors, and that the sovereign may condemn land already devoted to a public purpose for another public purpose which will totally destroy the first.[15] Private agencies have no governmental powers except those specifically delegated to them, and inferior governmental agencies are creatures of the state by definition. Therefore,

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14. The court emphasized the difference between the implied power to build across railroad tracks bottomed on necessity, and the right to extend streets and alleys parallel to the tracks which may destroy loading platforms and other facilities, and greatly impair the use of the depot grounds.

15. 29 C.J.S. Section 74. Both Connolly v. Des Moines & Cent. Ry. Co., 246 Iowa 874, 68 N.W.2d 320 (1955) and Lage v. Pottawattamie County, 232 Iowa 944, 5 N.W.2d 161 (1942) quote the general rule from C.J.S. that public property may not be condemned for an inconsistent use. However, they stop before the exception to that rule is stated in the following language, "However, the general rule does not ordinarily apply where the power of eminent domain is being exercised by the sovereign itself, such as the state or federal government, for its immediate purposes, rather than by a public service corporation or a municipality." Apparently this exception was not stated because neither case involved a party, such as the state, which would have a superior right. However, the court in Connolly did state at 326 of 68 N.W.2d, "The city of Des Moines has no superior right of eminent domain over the right possessed by the defendant railroad", which would seem to imply that the court might recognize a superior right in a proper case. Also see State v. Superior Court, 44 Wash 2d 607, 269 P.2d 560 (1954).

the superior right of the sovereign would appear to permit the condemnation by it of property already devoted to a public use by a private agency or an inferior political body even though the use by the sovereign would destroy the existing use.[16]

It should be noted that Iowa Code Section 471.1 (1958) which gives the state the authority to condemn land speaks only of private property and makes no mention of public property. While this omission in the statute does not seem to have been employed as a defense to condemnation in any case, the possibility of its use may still exist. It can have no application to the condemnation of land for controlled access highways because Iowa Code Section 306A.5 (1958) gives authority to take both public and private land for such purposes. Moreover, it is suggested that the omission in Iowa Code Section 471.1 (1958) would not be a bar to the state in any event, since the Iowa courts have twice held that "public" property may be called "private" property for condemnation purposes.[17] Consequently, it would appear that the state has authority to condemn public as well as private property for all public purposes, provided, of course, that compensation is paid.

Even in the case of expressed grant, there is some limitation on the power. It is firmly established that property of a private corporation devoted to one public purpose cannot be condemned by another for the same purpose and used in the same

16. It would seem that the biggest weakness in this position may be the possibility that an express statute would have to be shown. No authority seems to exist one way or another on this subject.

17. State ex rel. Board v. Stanolind Pipe Line Co., 216 Iowa 436, 249 N.W. 366 (1933) (held that state highways were private property within the meaning of the Fifth Amendment for which compensation must be paid where a taking occurs); Ferguson v. Illinois Cent. R. Co., 202 Iowa 508, 210 N.W. 604 (1926) (held that a railroad's property was private in the sense that it could not be taken without compensation.) Also see Plattsmouth Bridge Co. v. Globe Oil & Refining Co., 232 Iowa 1118 7 N.W.2d 409 (1943).

power of eminent domain to purposes involving a public use.[26] Once a private use is demonstrated, the statute or the governmental action, as the case may be, is held invalid.[27] Condemnation of property is also disallowed where the necessity of the property for public use is not demonstrated.[28] Article I, Section 9, providing that ".... no person shall be deprived of life, liberty, or property, without due process of law" is also available as a defense to a taking where no compensation is given,[29] or where the proper procedures are ignored.[30] It is probably also available

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26. Bankhead v. Brown, 25 Iowa 540 (1868); accord, Emmetsburg v. Central Iowa Telephone Co., ____ Iowa ____, 96 N.W.2d 445, 451 (1959). DePenning v. Iowa Power & Light Co., 239 Iowa 950, 33 N.W.2d 503 (1948); Heinz v. City of Davenport, 230 Iowa 7, 296 N.W. 783 (1941); Wertz v. City of Ottumwa, 201 Iowa 947, 208 N.W. 511, 513 (1926). This requirement has also been explained in terms of the unwritten constitutional doctrine that the state may not take property from A and give it to B. Stewart v. Board of Supervisors, 30 Iowa 9, 19 (1870).
27. Ferguson v. Ill. Cent. R. Co., 202 Iowa 508, 210 N.W. 704 (1926) (state regulation of rents of property located on railroad right-of-way involved since coal shed involved was of a private character); Richards v. Wolf, 82 Iowa 358, 47 N.W. 1044 (1891) (road established was essentially private because it went only to one person and that individual already had a means of access); Bankhead v. Brown, 25 Iowa 540 (1868) (statute held invalid which authorized mining companies to acquire roads to connect mines to public roads but apparently the company was to have title to the roads.)
28. Hoover v. Iowa State Highway Commission, 230 Iowa 1069, 300 N.W. 287 (1941) (apparent intent of condemnation was to prevent erection of filling station abutting the highway); Creston Waterworks v. McGrath, 89 Iowa 502, 56 N.W. 680 (1893).
29. Stoner McCray System v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956); Witke v. State Conservation Commission, 244 Iowa 261, 56 N.W.2d 582 (1953); Plattsmouth Bridge Co. v. Globe Oil & Refining Co., 232 Iowa 1118, 7 N.W. 2d 409 (1943)
30. Taylor v. Drainage District #56, 167 Iowa 42, 148 N.W. 1040 (1914); in re Bradley, 108 Iowa 476, 79 N.W. 280 (1899); Fleming v. Hull, 73 Iowa 598, 35 N.W. 673 (1887).

where arbitrary action is taken.[31] Although no case seems specifically to have turned on the Federal Constitution, the provisions of the 14th Amendment are also available to the property owner.[32]

b. Judicial Review of Constitutional Determinations

Basically the review which is available is of two different types of actions: (1) the determination made by the Legislature that a certain purpose is public; and (2) the determination made by the condemning authority that a particular use fits within the general area approved by the Legislature and the manner in which this determination is arrived at and carried out. The general rule which prevails with regard to determinations made by the Legislature itself is that the determination by that body as to the necessity of the project, which is the key issue in determining whether or not the project is actually of a public character is fundamentally the province of that body.[33] However, where there is a manifest absence of public purpose, the courts will review even a determination by the Legislature.[34] However, judicial intervention in the legislative process is solely in the constitutional sense and would not occur at all but for the constitutional provisions discus-

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31. Cf. Pederson v. Town of Radcliffe, 226 Iowa 166, 284 N.W. 145 (1939) (no basis for decision given but presumably it was constitutional).

32. Carroll v. City of Cedar Falls, 221 Iowa 277, 261 N.W. 652, 656 (1935); Ferguson v. Ill. Cent. R. Co., 202 Iowa 508, 210 N.W. 604 (1926).

33. Reter v. Davenport, R.I. & N.W. Ry. Co., 243 Iowa 1112, 54 N.W.2d 863, 867 (1952) (legislature has "... the initial duty of determining what constitutes a public use"); Sisson v. Board of Supervisors, 128 Iowa 442, 104 N.W. 454, 460 (1905); Bennett v. City of Marion, 106 Iowa 628, 76 N.W. 844 (1898); Stark v. Sioux City & Pac. R. Co., 43 Iowa 501 (1876).

34. Ermels v. Webster City, 246 Iowa 1305, 71 N.W.2d 911 (1955); Reter v. Davenport, R.I. & N.W. Ry. Co., 243 Iowa 1112, 54 N.W.2d 863 (1952).

sed above.[35] Acting in this capacity, the court has held statutes invalid which involved a taking of property for private use.[36]

However, the Legislature usually designates a broad area as involving a public purpose and delegates to various state agencies, local governments, and private concerns the power to determine the necessity for specific actions within the designated area. When such subordinate bodies condemn, the courts have said that their actions are the same as if the state itself were condemning the land.[37] Great discretion is allowed to such grantee,[38] whether it be a state agency,[39] a county board of supervisors,[40]

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35. Reter v. Davenport, R.I. & N.W. Ry. Co., 243 Iowa 1112, 54 N.W.2d 863 (1952).
36. Bankhead v. Brown, 25 Iowa 540 (1868); accord. Ferguson v. Ill. Cent. R. Co., 202 Iowa 508, 210 N.W. 604 (1926).
37. Connolly v. Des Moines & Cent. Iowa Ry. Co., 246 Iowa 764, 57 N.W.2d 320 (1955); Bennett v. City of Marion, 106 Iowa 628, 76 N.W. 844 (1898). The language apparently refers to state agencies and not the Legislature.
38. Minear v. Plowman, 197 Iowa 1188, 197 N.W. 67 (1924).
39. Porter v. Iowa State Highway Commission, 241 Iowa 1208, 44 N.W.2d 682 (1950); Hoover v. Iowa State Highway Commission, 230 Iowa 1069, 300 N.W. 287 (1941). In the latter case the court held no necessity existed for the taking while in the former the opposite result was reached. It is felt that these two cases are not inconsistent in that in Porter a compelling need existed, and a definite standard in the form of federal regulations existed. In the Hoover case the impression existed that the condemnation was only a thinly disguised attempt to prevent the establishing of a filling station abutting the right-of-way. See also Warren v. Highway Commission, ____ Iowa ____, 93 N.W.2d 60 (1958).
40. Denny v. Des Moines County, 143 Iowa 466, 121 N.W. 1066 (1909); Temple v. Hamilton County, 134 Iowa 706, 112 N.W. 174 (1907). However, the action of such a body was overturned in Richards v. Wolf, 82 Iowa 358, 47 N.W. 1044 (1891) where a private use was involved.

a municipality,[41] township trustees,[42] or a private organization, such as a railroad.[43] However, since such bodies and organizations are essentially subordinate, their exercise of the powers granted to them is subject to review by the courts.[44] Thus, actions taken by subordinate bodies are subjected to one additional type of review than are the determinations of the legislature.

c. Standards for Determining What Is A Public Use

The problem of laying down a standard for determining what is a public use has been a very perplexing one for the courts. This is reflected in the following statement by the court in Sisson v. Board

41. Mook v. Sioux City, 244 Iowa 1124, 60 N.W.2d 92 (1953); Brush v. Town of Liscomb, 202 Iowa 1155, 211 N.W. 856 (1927); Cent. Life. Assur. Soc. v. City of Des Moines, 185 Iowa 573, 171 N.W. 31 (1910); Chicago, G.W. Ry. Co. v. Mason City, 155 Iowa 99, 135 N.W. 9 (1912); Kemp v. City of Des Moines, 125 Iowa 640, 101 N.W. 474 (1904); Dewey v. City of Des Moines, 101 Iowa 416, 70 N.W. 605 (1897). However, the discretion of a city council was interfered with in Pederson v. Town of Radcliffe, 226 Iowa 166, 284 N.W. 145 (1939) where the action of the council was clearly arbitrary.
42. Minear v. Plowman, 197 Iowa 1188, 197 N.W. 67 (1924); Barrett v. Kemp, 91 Iowa 296, 59 N.W. 76 (1894).
43. Connolly v. Des Moines & Cent. Iowa Ry. Co., 246 Iowa 764, 57 N.W.2d 320 (1955); Town of Alvord v. Great Northern R. Co., 179 Iowa 465, 161 N.W. 467 (1917); Stark v. Sioux City & Pac. R. Co., 43 Iowa 501 (1876).
44. Cent. Life Assur. Soc. v. City of Des Moines, 185 Iowa 573, 171 N.W. 31 (1919) (containing the best discussion of this principle in the Iowa cases); accord. Town of Alvord v. Great Northern Ry. Co., 179 Iowa 465, 161 N.W. 467 (1917); Sisson v. Board of Supervisors, 128 Iowa 442, 104 N.W. 454 (1905) (containing the implication that the general declaration of a public use does not guarantee that each particular use will be of the same character); Bennett v. City of Marion, 106 Iowa 628, 76 N.W. 844 (1898).

of Supervisors, [45]

> "It must be confessed that there is no standard by which to determine in all cases what is a public use or what can fairly be regarded as a public benefit, and therefore conducive to the public health, welfare, etc.. The Constitution contains no words of definition, and it seems to remain for each act which is brought forward, aided, of course, by the disclosed purpose and object thereof, and by the conditions stated or well known, upon which it is to operate, to furnish an answer to the test."

Perhaps it is this perplexity which has led the court at one time to declare that "public convenience" is enough to justify condemnation,[46] and at others to say that "mere public convenience" is not enough.[47] It is clear, however, that absolute necessity need not be shown nor need it be demonstrated that everyone will be benefitted.[48] In fact, a spur track may be laid to one industry[49] or a road established which leads to only one farm.[50] It has also been

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45. 128 Iowa 442, 104 N.W. 454, 459 (1905). This language was also quoted in Ferguson v. Ill. Cent. R. Co., 202 Iowa 508, 210 N.W. 604 (1926) indicating that the problem of finding a standard has been a continuing one.
46. Minear v. Plowman, 197 Iowa 1188, 197 N.W. 67 (1924).
47. Bennett v. City of Marion, 106 Iowa 628, 76 N.W. 844 (1898); Creston Waterworks v. McGrath, 89 Iowa 502, 56 N.W. 680 (1893).
48. Minear v. Plowman, 197 Iowa 1188, 197 N.W. 67 (1924); Sisson v. Board of Supervisors, 128 Iowa 442, 104 N.W. 454 (1905)
49. Reter v. Davenport, R.I. & N.W. Ry. Co., 243 Iowa 1112, 54 N.W.2d 863 (1952) (containing an excellent discussion of public use and railroads).
50. Pagel v. Oaks, 64 Iowa 198, 19 N.W. 905 (1884); Johnson v. Supervisors of Clayton County, 61 Iowa 89, 15 N.W. 586 (1883). The opposite result was reached in Richards v. Wolf, 82 Iowa 358, 47 N.W. 1044 (1891), but in that case the beneficiary of the road owned land which already abutted on a road.

a long-accepted principle that the use is not rendered private simply because private profit is derived from it.[51] The statement which probably best harmonizes the conflicting positions taken by the courts and provides the most flexible guide for making these determinations is found in Sisson v. Board of Supervisors,[52]

> "Perhaps no nearer approach to accuracy in the way of a general statement can be had than to say that the mandate of the Constitution will be satisfied if it shall be made reasonably to appear that to some appreciable extent the proposed improvement will inure to the use and benefit of parties concerned, considered as members of the community or of the state, and not solely as individuals. While, however, the benefit must be common in respect of the right of use and participation, it cannot be material that each user shall not be affected in precisely the same manner or in the same degree."

SECTION 3. COMPENSATION MUST BE SECURED.

Article I, Section 18 of the Iowa Constitution requires that private property shall not be taken for public use without just compensation first being made or secured to the owner thereof.[53] The landowner is not required to rely on the personal solvency of the condemnor. Insolvency or solvency is not an issue.[54] On the failure of the company or governmental agency which is already in possession and use of the premises for a right-of-way to pay the amount assessed, it may be restrained by injunction from further use

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51. Carroll v. Cedar Falls, 221 Iowa 277, 261 N.W. 652 (1935); Stewart v. Board of Supervisors, 30 Iowa 9 (1870).
52. 128 Iowa 442, 104 N.W. 454, 459 (1905).
53. Nichols, Ibid. Section 4.8 (3d ed. 1950) Due process under the Constitution insures the right of compensation to the property owner when his property is taken by eminent domain. Dinwiddie v. Roberts, 1 Greene 313 (Iowa); DeCastello v. Cedar Rapids, 171 Iowa 18, 153 N.W. 353.
54. Griffith v. Drainage District, 182 Iowa 1291, 166 N.W. 570; Scott v. Price Bros., 207 Iowa 91, 217 N.W. 75.

of the right-of-way.[55] In fact, both injunction and ejection seem to be available to enforce the landowner's rights.[56] The purpose of these drastic remedies is to coerce payment, and the court gives a reasonable time to the company or governmental agency to pay compensation before the decree becomes effective.[57] The fact that the owner permitted the company to enter on the land and construct the improvement does not estop him from maintaining an action of ejectment or securing an injunction writ.[58]

However, if an appeal is taken by the condemnor, the constitutional provision is not violated by Iowa Code Section 472.25 (1958) permitting the condemnor to enter upon the land pending the appeal if the damages first assessed have been deposited with the sheriff. Under the laws of the 58th G.A. (1959), the court may direct disposition to persons entitled thereto of such part of the damages on deposit as the court finds just and proper.[59] But if on appeal the amount of the original assessment is increased, the condemnor may be enjoined from further prosecuting the work or use of

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55. Scott v. Price Bros., 207 Iowa 91, 217 N.W. 75; Gates v. Colfax Northern Ry. Co., 177 Iowa 690, 159 N.W. 456 (1916).
56. Henry v. Dubuque, 10 Iowa 540; Richards v. D.M. Valley R. Co., 18 Iowa 259; Irish v. B.S.W. Ry. Co., 44 Iowa 380; Hibbs v. C. & W. Ry. Co., 39 Iowa 340; Holbert v. St. L., K.C. etc. Ry. Co., 45 Iowa 23; Conger v. B. & S.W. Ry. Co., 41 Iowa 419.
57. Conger v. B. & S.W. R. Co., 41 Iowa 419, 422 (a railway company appropriated a right-of-way without compensating the owner therefor, although damages had been assessed. Held: that ejectment would lie but that execution for possession should not issue until the company had been granted a reasonable time fixed by the court in which to pay the assessed damages and interest thereon); Scott v. Price Bros., 207 Iowa 191, 217 N.W. 75 (injunction subject to the condition that in the absence of payment of the award to the landowner, the injunction should take effect).
58. Hibbs v. C. & W.R. Co., 39 Iowa 340; Conger v. B. & S.S. Ry. Co., 41 Iowa 419.
59. Section 1, Chapter 318, 58th G.A. (1959).

the premises until the increased amount is paid.[60]

If an appeal is taken from the award and the damages awarded are greater than those allowed by the commissioners, the condemnor must deposit the new amount with the sheriff if he desires to appeal to the Supreme Court; he is not relieved from this obligation by giving a supersedeas bond.[61]

A rather difficult problem arises when the compensation is deposited with the sheriff and possession is taken, but the condemnor immediately thereafter abandons the land. In Hasting v. B. & M. R. Co., 38 Iowa 316, it was held that the condemnor in such instances could not recover the deposit. His only remedy or recourse is by an appeal showing this fact as a justification for reducing the damages. If on appeal the amount of the sheriff jury's assessment is not reduced, it is an adjudication that the landowner is entitled to that much for the temporary occupancy. However, the jury is unwarranted in finding a conditional judgment as to the amount in case of reoccupancy. An abandonment, once made, is permanent and precludes a re-entry.[62]

The effect of depositing the compensation with the sheriff is to give the condemnor immediate right to possession,[63] but bestows

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60. Peterson v. Ferreby, 30 Iowa 327; Richard v. D.M. Valley R. Co., 18 Iowa 259.

61. Downing v. D.M.N.W. R. Co., 63 Iowa 177, 179, 18 N.W. 862. The law requires money "and it is not within the power of the corporation to substitute bonds where the law requires money and thus compel the landowner to resort....to an action on the bond". A warrant deposited by public authorities is sufficient. See Iowa Code Section 472.30 (1958).

62. Note that where the sheriff's jury allows no damages for the appropriation of land for a street, the owners are entitled to an injunction pending the appeal. Connelly v. Creswold, 7 Iowa 416; Iowa College v. Davenport, 7 Iowa 213.

63. White v. Wabash Ry. Co., 64 Iowa 281, 20 N.W. 436; Beal v. Highway Commission, 209 Iowa 1308; 230 N.W. 302. Also see Iowa Code Section 472.25 (1958).

on him no greater right. Such deposit is merely security for the obligation to pay for the land taken. Although in the early case of Ruppert v. C.Q. & St. J. Ry. Co.[64], it was intimated that title passed to the condemnor on depositing of the amount of the commissioners' award with the sheriff, this holding has been substantially repudiated by White v. Wabash Ry. Co.[65] and Burns v. Fort Dodge & Des Moines Ry. Co.[66] These later decisions enunciated the rule that the sheriff is the condemnor's agent and that the owner is not divested of title until he receives actual payment. However, the landowner has a definite interest in the deposit, and the sheriff is bound to retain it. If he returns such fund to the condemnor, the landowner may sue him for the surrender of it.[67]

Compensation must be paid in money, and an offer to grant

64. 43 Iowa 490, 494. "It is further claimed by the appellee that the subsequent partition of the premises was good ground for dismissing the appeal. But the right-of-way was acquired when the damages were paid to the sheriff. All conveyances made afterwards were made subject to the right-of-way so acquired. Nothing remained to be determined except the question as to whether the damages assessed should be increased or diminished."

65. White v. Wabash Ry. Co., 64 Iowa 281, 20 N.W. 436 (holding that the payment of the assessment to the sheriff did not extinguish the landowner's title, that it merely allows the condemnor to take possession of the land, that if the sheriff converts the fund, it is the condemnor's loss, and the landowner can recover possession for non-payment.)

66. Burns v. Railway Co., 110 Iowa 385, 387, 81 N.W. 794 (1900). "We are not inclined to open for further consideration the question determined in White v. Railroad Co. .... It was there held that money paid to the sheriff in ad quod damnum proceedings was by way of security to the landowner and was not payment to him, and that the latter's title and right to possession can be extinguished only by the payment of the damages assessed."

67. Bannister v. McIntire, 112 Iowa 600, 84 N.W. 707 (sheriff is bound to retain the money for the landowner and may be sued for the failure to do so); Northwestern Mfg. Co. v. Basset, 205 Iowa 999, 218 N.W. 932; Lower v. Miller, 66 Iowa 408, 23 N.W. 897.

certain privileges or to build something for the owner to replace a convenience that he has lost cannot be the basis of mitigating damages.[68] However, an owner may lose his right to compensation by release or by agreement not to claim the same.[69] A parol release or agreement not to claim compensation has been held valid.[70]

In case of fire, war, or other great calamities, private property may be taken or destroyed without compensation.[71]

SECTION 4. WHAT CONSTITUTES A "TAKING"

a. The Basic Concept of A "Taking"

At the outset of an examination of this rather confusing area of condemnation law, it would be well to discuss briefly the background of the present Iowa position as to what actions by a condemnor constitutionally require compensation to the property owner. State constitutions providing for compensation when the power of eminent domain is exercised are traditionally categorized into those providing for compensation where a "taking" has occurred and those which allow compensation for "damages" as well as for a taking. Originally the state constitutions allowed recovery only for a taking, but some states felt that a more liberal rule was necessary and added "or damages" to their constitutions. Even at that time it was not at all clear that the concept of a taking did not embrace"damages" as well.[72] In addition, over the years the interpretations by the courts of both "taking" and "damages" have varied so much from state to state that what is a taking in one state may not be in another, and that what is a taking under

68. Nichols, Ibid. Section 205 (2d ed.); Kemmerer v. Highway Commission, 214 Iowa 136, 241 N.W. 693; DePenning v. Iowa Power & Light Co., 239 Iowa 950, 33 N.W.2d 503 (1948).
69. 20 C.J. 868; Chic. etc. Ry. Co. v. Snyder, 120 Iowa 532, 95 N.W. 180; Burlington v. Gilbert, 31 Iowa 356.
70. 20 C.J. 869; Pratt v. Des Moines Ry. Co., 72 Iowa 249, 33 N.W. 666; Wapsipincon Power Co. v. Waterhouse, 186 Iowa 524, 167 N.W. 623 (1918).
71. Field v. Des Moines, 39 Iowa 575 (destruction to prevent spread of fire).
72. See discussion on pp. 369, 370 of 5 N.W.2d in Liddick v. Council Bluffs, 232 Iowa 197, 5 N.W.2d 361 (1942).

one constitution may not even be a damage under another.[73] Consequently, the traditional categorization of the states into two groups depending on their constitutional phrase is apt to be misleading.

As previously noted, the Iowa Constitution provides in Article I, Section 18, that, "private property shall not be taken (emphasis supplied) for public use without just compensation....", which seems to put Iowa in the category of states which limit recovery to the situation in which there has been a taking. Indeed, for a great many years the Iowa court in denying compensation often based its reasoning on the statement that there had been no actual taking and therefore there was no constitutional damage.[74] However, even during this period there were indications that certain types of injury suffered by property owners would be compensable even though there was no actual physical taking of the land.[75] In the landmark case of Liddick v. Council Bluffs, 232 Iowa 197, 5 N.W.2d 361 (1942), the court seems to have taken a new position. In that case and the Anderlik case which clarified and reaffirmed it,[76] the court re-examined the early Iowa cases. Three cases denying recovery because no "taking" had occurred were overruled,[77] and a

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73. See Orgel, Ibid. Section 6.
74. Lingo v. Page County, 201 Iowa 906, 208 N.W. 327 (1926); Pillings v. Pottawattamie County, 188 Iowa 448, 176 N.W. 314 (1920); Higgins v. Board of Supervisors, 188 Iowa 448, 176 N.W. 268 (1920); Hubbell v. Des Moines, 173 Iowa 55, 154 N.W. 337 (1915); Talcott Bros. v. Des Moines, 134 Iowa 113, 109 N.W. 311 (1906).
75. Nalon v. Sioux City, 216 Iowa 1081, 250 N.W. 166 (1933) (loss of access); Watson v. Mississippi River Power Co., 174 Iowa 23, 156 N.W. 188 (1916) (concussion damage from blasting); Borghart v. Cedar Rapids, 126 Iowa 313, 101 N.W. 1120 (1905) (loss of access); Long v. Wilson, 119 Iowa 267, 93 N.W. 282 (1903) (loss of access).
76. Anderlik v. Highway Commission, 240 Iowa 919, 38 N.W.2d 605 (1949); the Anderlik case also dispels any doubt that the discussion of "property" and "taking" in Liddick is pure dictum.
77. The overruled cases were: Lingo v. Page County, 201 Iowa 906, 208 N.W. 327 (1926); Pillings v. Pottawattamie County, 188 Iowa 448, 176 N.W. 314 (1920); Talcott Bros. v. Des Moines, 134 Iowa 113, 109 N.W. 311 (1906). In addition on pp. 376 and 377 of 5 N.W.2d the court severely criticizes the language in Hubbell v. Des Moines, 173 Iowa 55, 154 N.W. 337 (1915) which appears to base that decision on the fact that no "taking" occurred.

considerably broader view of the constitutional clause was introduced into Iowa constitutional law. The court discusses the distinction between a taking and damages and indicates that some courts have felt that "taking" includes "damages". Throughout the opinion, the court takes a broad view of "taking" and hence it is possible to argue that "taking" in Iowa now extends to "damages", although the court has never explicitly taken position. The more likely conclusion concerning the effect of the Liddick case is that the court by its suggestion that the taking clause might include damages, intended simply to bolster its decision to reject the strict taking cases which had for some time confused Iowa law. The main emphasis of the opinion seems to be placed on a broad concept of "property" embodying the bundle of rights theory. Property is viewed not as a material object but rather as a series of rights, no one of which may be appropriated by the state without compensation. Although the court did not enumerate all the rights involved, they must certainly include the right to undisburbed possession, the right of access, the rights to air and light, the right of lateral support, the right to unaltered flow of surface water across one's land, the right to continuation or riparian interests, as well as every other right with which the state may interfere in a substantial manner.[78]

Consequently, it would appear that the Iowa court has rejected a strict view of "taking" and adopted a broad view of what constitutes "property". Decisions subsequent to the Liddick case seem to indicate that the court did not intend to hold that any damage constitutes a "taking". Thus alleged damages resulting from loss of anticipated profits,[79] alteration of traffic patterns,[80] obstruction of a

78. It is clear that the interference must be a material one. Liddick v. Council Bluffs, 232 Iowa 197, 5 N.W.2d 361,380 (1942). (dictum); Randall v. Christiansen, 76 Iowa 169, 40 N.W. 703 (1888).
79. Nedrow v. Michigan-Wisconsin Pipe Line Co., 245 Iowa 763, 61 N.W.2d 687 (1954); Korf v. Fleming, 239 Iowa 501, 32 N.W. 2d 85,96 (1948)(dictum).
80. Wilson v. Highway Commission, 249 Iowa 994, 90 N.W.2d 161 (1958); Highway Commission v. Smith, 248 Iowa 869, 82 N.W. 2d 755 (1957).

road during construction,[81] and vacation of non-abutting highways,[82] have been rejected. It is noteworthy, however, that this argument was not made by counsel in arguing any of these cases.

In conclusion, it may be seen that the distinction which has often been insisted upon between states whose constitutions allow recovery only for takings and those whose provisions go beyond to damages is now of considerably less importance than at one time believed. Before comparing decisions of various jurisdictions, it is still of the utmost importance to determine the scope of the constitutional requirement for compensation; however, it is now clear that this determination must be based on an examination of the judicial interpretations of the constitutional phrase, whether it be broad or narrow, rather than upon an arbitrary division of the states according to the constitutional language involved.

b. Types of Estates for Which Compensation Must Be Paid When Rights Appurtenant Thereto Are Appropriated

(1) Fee Simple

The great majority of the cases involving condemnation deal with property held in fee and there apparently never has been the slightest doubt that the constitutional protections were designed to safeguard the interests of the fee holder. This protection extends to one whose title is derived from adverse possession as well as by conveyance or original grant.[83]

(2) Leasehold Interests

Leasehold interests have received recognition by the courts for sometime as estates for which compensation must be paid when

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81. Wilson v. Highway Commission, 249 Iowa 994, 90 N.W.2d 161 (1958).
82. Warren v. Highway Commission, ___ Iowa ___, 93 N.W.2d 60 (1958).
83. Independent School District v. Timmons, 187 Iowa 1201, 175 N.W. 499 (1919).

their use is appropriated by a condemnor.[84] It is also clear that the rights appurtenant to ownership for which a fee holder would be entitled to recover are also deemed to be property of the leaseholder for which appropriate compensation must be paid.[85]

(3) Easements

Although regarded in property law as a servient estate, an easement is another of the types of estates which may not be taken except on payment of just compensation.[86] This is the case even where access to an easement is cut off.[87]

(4) Vested Interest in a Business

Another type of compensable interest is the vested interest in a business, which may be composed of several different types of property interests but which has a special character as a business because of governmental recognition. Thus in Stoner McCray System

84. Des Moines Wet Wash Laundry v. Des Moines, 197 Iowa 1082, 198 N.W. 486 (1924); Werthman v. Mason City & Ft. Dodge Ry. Co., 128 Iowa 135, 103 N.W. 135 (1905); Renwick v. Davenport & N.W. R. Co., 49 Iowa 664 (1878). See also Division IV, infra, Compensation to Lessees.

85. Highway Commission v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957) (leasehold interest must also be compensated for loss of access).

86. Licht v. Ehlers, 234 Iowa 1331, 13 N.W.2d 688 (1944) (plaintiff had an easement for a cattle pass under a county road). Dawson v. McKinnon, 226 Iowa 756, 285 N.W. 258 (1939); cf. State ex rel Board of Railroad Commissioners v. Stanolind Pipe Line Co., 216 Iowa 436, 249 N.W. 366 (1933) cert. den. 290 U.S. 684 (intimating that compensation would have to be paid for crossing an easement owned by the state). Also see 1928 Report of the Attorney General, p. 112 and cases cited therein to the effect that the holder of an easement has a compensable interest.

87. Prymek v. Washington County, 229 Iowa 1249, 296 N.W. 467 (1941) (road abandoned to which plaintiff had only access to his easement).

v. City of Des Moines,[88] 247 Iowa 1313, 78 N.W.2d 843 (1956), the court held that the business of maintaining advertising signs had become vested because of permits issued by the city and that an ordinance which rendered established billboards non-conforming uses without compensation to the owners was unconstitutional.

c. Property Rights Appurtenant to Estates in Land for Which Compensation Must Be Paid

(1) Right of Undisturbed Possession

The right of undisturbed possession is probably the most basic right which attaches to the concept of property. Any direct taking of property, of course, deprives the landowner of this right and compensation must be paid. This is true although the injury to the land results from flooding of the property rather than through establishment of a public facility thereon.[89] Even though there is no physical encroachment on the land, the right of undisturbed possession may be taken by actions or conduct which interfere with the use of the property.[90] The right to possession also includes the

88. This is a difficult case to analyze because although specifically designated properties were involved, it was the business of outdoor advertising against which the ordinance was directed. The court does not make clear just what type of "vested interest or property right" was involved but the court's discussion seems to indicate that the protected right is the business of advertising, composed as it would be of fee simple properties, leaseholds, personal property, etc..

89. Lage v. Pottawattamie County, 232 Iowa 944, 5 N.W.2d 161 (1942); Iowa Power Co. v. Hoover, 166 Iowa 415, 147 N.W. 858 (1915). However, a flooding in time of heavy rain is not a taking where no facility could have handled the water. Grimes v. Polk County, 240 Iowa 228, 34 N.W.2d 767 (1948).

90. Cf. Wilson v. Mississippi River Power Co., 174 Iowa 23, 156 N.W. 188 (1916) (action at law for damages). Also see United States v. Causby, 328 U.S. 256 (1946) (flights of government owned airplanes over plaintiff's chicken farm at low altitude held to be a taking within the terms of the Fifth Amendment, which,through the Fourteenth Amendment, would also apply to state actions).

right to receive the income therefrom, and this interest in property may not be appropriated without compensation.[91]

(2) Riparian Rights

Two questions are presented in connection with the taking of land adjoining a river or lake. The first deals with the ownership of the land upon which the improvement is to be located. The state has undoubted title to the land from the bed of the river or lake to the high water mark.[92] The difficulty arises in determining the state of the title to land at a given time as a result of the constant shifting of river boundaries. Thus the state apparently may be divested of title where the high water is altered, even though the new bank is established artifically by a third party; in such a case the riparian owner takes title to the newly accreted land, which may not be taken from him without compensation.[93] However, where the boundaries of the river are clear, it would seem that the state may erect facilities on it without compensation to riparian owners.[94] However, there may be some question as to whether the state may erect facilities not in aid of navigation upon the land it owns below high water mark.[95]

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91. Grant v. City of Davenport, 18 Iowa 179 (1865).
92. State v. Dakota County, ___ Iowa ___, 93 N.W.2d 595 (1958); Solomon v. Sioux City, 243 Iowa 634, 51 N.W.2d 472 (1952); State v. Betz, 232 Iowa 84, 4 N.W.2d 872 (1942); Peck v. Alfred Olsen Constr. Co., 216 Iowa 519, 245 N.W. 131 (1932).
93. Solomon v. Sioux City, 243 Iowa 634, 51 N.W.2d 472, 476 (1952).
94. Cf. Peck v. Alfred Olsen Constr. Co., 216 Iowa 519, 245 N.W. 131 (1932).
95. A typical statement of the nature of the state's interest in this land describes it as a "trust for navigation and commerce". State v. Dakota County, ___ Iowa ___, 93 N.W.2d 595, 599 (1958). Query whether this extends to cover such facilities as highways and railroads. Clearly a great many railroad tracks have been laid on such lands, apparently based on the authority of Iowa Code Section 1328 (1860), now repealed. See C.B. & Q. R. Co. vs Porter, 72 Iowa 426, 34 N.W. 286 (1887). However, if construction of improvements on such land is limited to navigational facilities, it is doubtful if anyone would have standing to contest the use of land which is admittedly the state's.

It has been held that the construction of an artificial embankment by a railroad to protect its tracks laid on state land below high water mark cuts off accretion, and the landowner can take no interest in the land,[96] otherwise the embankment would presumably constitute a new high water mark, thus divesting the state of title to the land and giving the abutting owner title to the highway.

A more difficult question arises in connection with the riparian owners'[97] so-called "right of access". It was originally held that an owner had no right of access to a river where a railroad was constructed on land lying between the high and low water marks which by law belongs to the state.[98] However, Iowa Code Section 477.3 (1958) specifies certain types of facilities to which access cannot be cut off without paying compensation as required in Iowa Code Section 477.4 (1958).[99] Presumably, however, if these facilities do not exist, the landowner has no right of access to the river where high and low water marks are involved. This view receives support from Peck v. Alfred Olsen Constr. Co.,[100] which appears to hold that the

96. C. B. & Q. R. Co. v. Porter, 72 Iowa 426, 34 N.W. 286, 289 (1887).
97. It should be noted that the term riparian owner is property used to describe only one whose property abuts on a river; property around a lake is held by a littoral owner. Apparently the distinction is only one of terminology and is without legal effect. See Peck v. Alfred Olsen Constr. Co., 216 Iowa 519, 245 N.W. 131, 137 (1932).
98. Tomlin v. The Dubuque, Bellevue & Miss. R. Co., 32 Iowa 106 (1871). See discussion of this case in Peck v. Alfred Olsen Constr. Co., 216 Iowa 519, 245 N.W. 131, 137 (1932).
99. Accord, Renwick, Shaw & Crossett v. The D. & N.W. R. Co., 49 Iowa 664 (1878) aff'd 102 U.S. 180. It should be noted, however, that this statute covers only the rights of railroads.
100. 216 Iowa 519, 245 N.W. 131 (1932). On its facts, this case need only have held that reasonable access to the lake was not denied.

right of the state to further navigation is paramount to any "property" which an abutting owner may have in the right of access; presumably the same policy would be applied to highways cutting off access even though they are not technically in aid of navigation.

(3) Right of Access[101]

At the outset it should be noted that although change of grade and right of access cases are closely related and although some change of grade cases are considered herein, the bulk of them are considered in Division VII which deals specifically with change of grade.

First of all, the legal concept of the right of access should be understood. The best view seems to regard it as an easement.[102] However, this easement exists only to roads which, at the time of their establishment, were not designated as controlled access roads. Where a new highway or a section of relocated highway is designated as a controlled-access facility at the time of its construction, no right of access vests and no compensation should be allowed therefor.[103] The landowner may, of course, still recover damages to his land caused by the fact that the road separates two tracts which are now divided; however, he may not recover for loss of access to the highway itself.

However, once a right of access vests in the landowner, it is regarded as one of the rights appurtenant to ownership which may not be appropriated by the state without compensation. This is the case where access to a road is cut off,[104] a road is vacated or

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101. On this general subject, see note, Controlled Access Highways in Iowa, 43 Iowa L. Rev. 258 (1958); Cunningham, The Limited-Access Highway from a Lawyer's Viewpoint, 13 Mo. L. Rev. 19 (1948); Note, Freeways and the Rights of Abutting Owners, 3 Stanford L. Rev. 298 (1951); Clarke, The Limited-Access Highway, 27 Wash. L. Rev. 111 (1952).

102. State v. Burk, 200 Ore. 211, 265 P.2d 783 (1954).

103. State v. Burk, 200 Ore. 211, 265 P.2d 783 (1954); Carazalla v. Wisconsin, 269 Wis. 593, 70 N.W.2d 208, rehearing 71 N.W.2d 276 (1955). Lehman v. Hwy. Comm., (Opinion November 17, 1959).

104. Highway Commission v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957).

abandoned,[105] lateral support is destroyed,[106] a river channel is straightened,[107] a public square is sold to private interests,[108] a viaduct is erected,[109] or a bus stop is created,[110] so long as access to the property by means of a road, street, or other publicly owned property is cut off or substantially impaired. Recovery may also be allowed where plaintiff's business is cut off from the free course of trade.[111]

However, only those persons who suffer a special damage apart from injury shared by the public as a whole are entitled to receive compensation for interference with their rights of access. The issue usually arises in connection with what is known as "circuity of travel" and landowners are denied compensation unless they can show that their damages are special and not shared by the general public. Thus

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105. Prymek v. Washington County, 229 Iowa 1249, 296 N.W. 467 (1941) (access to an easement cut off); Magdefrau v. Washington County, 228 Iowa 853, 293 N.W. 574 (1940); Hubbell v. Des Moines, 173 Iowa 55, 154 N.W. 337 (1915) (dictum); McCann v. Clarke County, 149 Iowa 13, 127 N.W. 1011 (1910) (also abolishing a distinction which had formerly existed between closures in a city and those in the country); Ridgway v. City of Osceola, 139 Iowa 590, 117 N.W. 974 (1908); Long v. Wilson, 119 Iowa 267, 93 N.W. 282 (1903).
106. Cf. Hathaway v. Sioux City, 244 Iowa 508, 57 N.W.2d 228 (1953).
107. Nalon v. Sioux City, 216 Iowa 1041, 250 N.W. 166 (1933).
108. Borghart v. Cedar Rapids, 126 Iowa 313, 101 N.W. 1120 (1905).
109. Anderlik v. Highway Commission, 240 Iowa 919, 38 N.W.2d 605 (1949) (the extent to which this case deals with right of access is questionable; in its statement of facts the court says that plaintiff had to travel further to get to town but does not discuss that fact at any point in the opinion.).
110. Gates v. City of Bloomfield, 243 Iowa 671, 53 N.W.2d 279 (1952).
111. Cf. Young v. Rothrock, 121 Iowa 588, 96 N.W. 1105 (1903); Platt v. C.B. & Q., 74 Iowa 127, 37 N.W. 107 (1888); Ewell v. Greenwood, 26 Iowa 377 (1868). All of these cases involved actions to abate nuisances; however, they were cited by the court in Bryan v. Petty, 162 Iowa 62, 143 N.W. 987 (1913), which was a condemnation type case. Since the decision in Warren v. Highway Commission, ___ Iowa ___, 93 N.W.2d 60 (1958), they must be regarded with some suspicion however.

the fact that plaintiff must make a slight detour in going to a nearby town[112] or to his business interest;[113] or pass over a road which is less desirable[114] has been held insufficient to give plaintiff a special interest. The Iowa position on the matter seems to have been rather clearly spelled out by Warren v. Iowa State Highway Commission,[115] which reconciles conflicting precedents and establishes the rule that compensability hinges on whether or not the plaintiff's access to the highway is cut off as a result of the vacation. If plaintiff still has access to the general road system, he has suffered no legal injury even though it may be more inconvenient for him to use such system as a result of the vacation. Although his damage may be greater in degree than that suffered by the general public, it is not different in kind; and hence, under the test employed by the court, the injury is non-compensable.

In addition to showing that he is damaged specially, plaintiff must show that he is deprived of more than reasonable access. The qualification imposed on the right of access that it extends only to "reasonable" access seems to have been first introduced into Iowa

112. Hansell v. Massey, 244 Iowa 969, 59 N.W.2d 221 (1953); Heery v. Roberts, 186 Iowa 61, 170 N.W. 405, rehearing 172 N.W. 161 (1919); Chrisman v. Brandes, 137 Iowa 433, 112 N.W. 833 (1907); Lorenzen v. Preston, 53 Iowa 580, 5 N.W. 764 (1880); Brady v. Shinkle, 40 Iowa 476 (1875).

113. Accord, Highway Commission v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957) (landowner argued in his brief that he was damaged by virtue of the fact that access from his home to his business across the street was impaired by virtue of the erection of "jiggle bars" in the middle of the street requiring considerable circuity of travel; however, the court rejected this contention); cf. Livingston v. Cunningham, 188 Iowa 254, 175 N.W. 980 (1920) (plaintiff hauled ice for his business by means of the road in question from an adjacent river; however, the court said plaintiff had no vested interest in the ice.

114. Bradford v. Fultz, 167 Iowa 686, 149 N.W. 925 (1914); Bryan v. Petty, 162 Iowa 62, 143 N.W. 987 (1913).

115. ___ Iowa ___, 93 N.W.2d 60 (1958).

law by Wegner v. Kelly,[116] although there are indications of such a position in earlier Iowa cases.[117] This rule was firmly adopted by Iowa State Highway Commission v. Smith,[118] and it is now necessary to determine what constitutes "reasonable" access. It is clear that the determination of this question is regarded by the courts as a question of fact,[119] although sometimes the court has made the determination itself.[120] One test of reasonable ingress and egress is prior existence of an exit which was used in connection with the normal operations of the business of the property.[121] Also, it seems to be established that one entrance is the minimum reasonable access for a residential property[122] and that two are required for a filling station.[123] Future decisions will no doubt spell out in greater detail the content of "reasonable access" in specific fact situations.

The area of protection afforded by the "reasonable access" doctrine is still largely undetermined. The court has, for example, expressly reserved its decision as to whether a service road, as

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116. 182 Iowa 259, 165 N.W. 449 (1917). The action in this case was for an injury caused by a sagging telephone wire. The case turned upon the extent of the duty of defendant to allow access to the farm free of sagging wires, and the court held that the plaintiff was entitled only to reasonable access to his land at which points only defendant owed him a duty.
117. Louden v. Starr, 171 Iowa 528, 154 N.W. 336 (1915); Ridgway v. City of Osceola, 139 Iowa 590, 117 N.W. 974 (1908).
118. 248 Iowa 869, 82 N.W.2d 755 (1957).
119. Wilson v. Highway Commission, 249 Iowa 994, 90 N.W.2d 161 (1958); Highway Commission v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957); accord, Ridgway v. City of Osceola, 139 Iowa 590, 117 N.W. 974 (1908).
120. Wilson v. Highway Commission, 249 Iowa 994, 90 N.W.2d 161 (1958).
121. Perkins v. Palo Alto County, 245 Iowa 310, 60 N.W.2d 562 (1953).
122. Highway Commission v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957).
123. Wilson v. Highway Commission, 249 Iowa 994, 90 N.W.2d 161 (1958); Highway Commission v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957).

authorized by Iowa Code Section 306A.8 (1958), would constitute reasonable access.[124] A major problem exists as to what point in time the doctrine of reasonable access refers. If plaintiff is to be cut off from any possibility of acquiring access in the event that future developments of his use would make ingress reasonable at that time, then his claim for damages would seem to be a much stronger one. In the Smith case, supra, a Des Moines city ordinance provided a procedure for obtaining additional access if such should be required by the future development of the property; consequently the issue was not raised in this case. The court has thur far refused to rule on the question of whether or not prospective damages may be recovered;[125] future loss of access may well fall within this category when the decision is made. There have been several cases, however, which shed some light on the problem. In Hubbell v. Des Moines,[126] the court determined damages by reference only to the present use of the property. Thus it would appear that damages for loss of access may be measured only in terms of the present use; this does not preclude the possibility that an action might be allowed for additional damages in the future when the use of the property was changed. The general presumption, of course, is that condemnation is total, and that future actions will not lie. However, in Liddick v. Council Bluffs[127] the court held this presumption would not apply where "unusual or out of the ordinary changes or improvements" were made by the condemnor.

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124. Highway Commission v. Smith, 248 Iowa 869, 82 N.W.2d 755, 761 (1957). California seems to have taken the position that such roads do represent a taking of the right of access. People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943). This case is highly criticized in 3 Stanford L.Rev. 298, 306 (1951). However, this article also indicates that juries have repeatedly found no damages in such cases with the result that the new rule has cost the state very little. However, see Gilmore v. State, 208 Misc. 427, 143 N.Y.S.2d 873 (1955) denying damages where a service road was provided.

125. Hathaway v. Sioux City, 244 Iowa 508, 57 N.W.2d 228 (1953).

126. 173 Iowa 55, 154 N.W. 337, 340 (1915). "At the present time, there are no means provided for ingress or egress from the alley... The vacation of this alley does not, as this record disclosed, substantially interfere with the full enjoyment of all means of access which have been provided, or were in existence at the time the ordinance was passed." (Emphasis supplied).

127. 232 Iowa 197, 5 N.W.2d 361 (1942). Also see Kucheman & Hinke v. C.C. & D. Ry. Co., 46 Iowa 366 (1877).

The fact situation in Liddick is, of course, distinguishable in that Liddick involved a change of use of the road by the condemnor while the problem under consideration involves a change of use of the abutting property by the landowner. However, the general principle of the Liddick case is available to the court should it wish to decide that the original condemnation was not total and that a landowner whose use of the land has expanded is entitled to additional access or compensation for the absence thereof. Whether or not the court could develop a workable rule for handling the innumerable cases which would arise involving allegations of enlarged use of the land is another matter; perhaps the court could content itself with reviewing cases involving allegations of an abuse of discretion on the part of the appropriate state officials in denying access because of the expanded use. It would seem to be open to the condemnor to argue that on analogy to the cases involving original construction of non-access highways, the landowner had no easement to the highway other than that which was previously reasonable, and therefore is not entitled to damages or further access.[128]

(4) Right to Air and Light[129]

Recognition of the right of air and light as one of the rights appurtenant to property has come only recently in Iowa law. For a long time the court denied recovery on the grounds that there was no actual taking of property,[130] although apparently in certain circumstances plaintiff's witnesses might take into account the loss of air and light where such was necessary to the prosecution of the business.[131]

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128. See second paragraph of this subsection, p. 24.

129. Also see Division VII, infra, dealing with change of grade.

130. Lingo v. Page County, 201 Iowa 906, 208 N.W. 327 (1926); Pillings v. Pottawattamie County, 188 Iowa 567, 176 N.W. 314 (1920); Talcott Bros. v. Des Moines, 134 Iowa 113, 109 N.W. 311 (1906); Also see Callahan v. City of Nevada, 170 Iowa 719, 153 N.W. 188 (1915) where the court held that a property owner had no legal right to the maintenance in the sidewalk of a window illuminating his basement. Dictum to the effect that the situation was analogous to private law in which one landowner may cut off the light and air of another by his building.

131. Western Newspaper Union v. Des Moines, 157 Iowa 685, 140 N.W. 367 (1913).

However, in Liddick v. Council Bluffs,[132] the court squarely held that an abutting property owner has a right to air and light which may not be taken without compensation. Any indications to the contrary in prior cases were expressly rejected.[133] In Anderlik v. Iowa State Highway Commission,[134] the court reaffirmed the Liddick case and held that recovery for loss of air and light might be had for property located in the country as well as in the city. Both of these cases involved the construction of viaducts in front of an abutting owner's property. The court seems never to have dealt with a situation where a non-abutting owner sought to claim compensation for loss of light and air, although where the loss was severe enough, it would seem that recovery would be allowed.

(5) Right to Natural Flow of Surface Water

The courts have declared that where in completing a project of one type or another a condemnor diverts the natural flow of water across plaintiff's land, plaintiff is entitled to recover damages for a taking within the meaning of the Iowa Constitution.[135] However, the Highway Commission may acquire a prescriptive right in the altered drainage course if no complaint is made by the landowner.[136]

(6) Right of Lateral Support

Although there are indications that the right of lateral support was previously recognized,[137] the only case in Iowa awarding damages for deprivation of such support is Hathaway v. Sioux City,[138]

132. 232 Iowa 197, 5 N.W.2d 361 (1942).
133. The cases overruled insofar as they conflict with Liddick are those cited in footnote 130, supra, with the exception of Callahan v. City of Nevada.
134. 240 Iowa 919, 38 N.W.2d 605 (1949).
135. Beers v. Gilmore City, 197 Iowa 7, 196 N.W. 602 (1924); McCord v. High, 24 Iowa 336 (1868). See also Section 39, infra.
136. Grimes v. Polk County, 240 Iowa 228, 34 N.W.2d 767 (1948).
137. Talcott Bros. v. Des Moines, 134 Iowa 113, 109 N.W.311 (1906) (dictum).
138. 244 Iowa 508, 57 N.W.2d 228 (1953).

which allowed compensation for depriving the landowner of right of access when the street, upon which plaintiff had an easement, collapsed due to the withdrawal of lateral support. The court indicated that the right pertains to the property itself as well as to the easement in the street but awarded no compensation for damage to the property itself because no injury had yet occurred.[139] However, recovery of damages has been allowed as part of a showing of injury to adjoining property when land for a street which would necessitate excavation was originally condemned.[140]

d. Extent of Original Taking

The contention was made by the condemnor in Liddick v. Council Bluffs[141] that no compensation need be made for deprivation of the rights of access, air, and light because the property owner had been fully compensated therefor when the roadway was originally condemned, purchased, or dedicated. However, the court held that these rights were reserved to the landowner at the time of the original acquisition of the street and that these rights ran with the land for the benefit of all future owners even though not mentioned in the granting instrument. The court viewed the fee interest held by the city in the street as subject to easements running to the abutting owners of way, light and air. The construction of the viaduct represented an interference with these rights as represented by easements for which compensation need be paid. The Liddick case is apparantly the only Iowa decision dealing directly with this problem,[142] and the court relied solely on foreign authority. However, there is some authority in the related area involving questions concerning the extent of the condemnor's ownership of a condemned easement.[143]

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139. However, the existence of such a right was clearly recognized by dictum in Liddick v. Council Bluffs, 232 Iowa 197, 5 N.W.2d 361, 383 (1942).

140. Kukkuk v. Des Moines, 193 Iowa 444, 187 N.W. 209, 214 (1922).

141. 232 Iowa 197, 5 N.W.2d 361, 380 (1942).

142. Cf. Lage v. Pottawattamie County, 232 Iowa 944, 5 N.W.2d 161 (1942).

143. See Section 39, infra, and especially those sections dealing with additional servitudes in Subsection (b).

e. No Recovery for Rights Common to Public

The basic theory behind denying recovery in this situation is that where the loss suffered by plaintiff is not peculiar to himself but is simply the loss of a right shared by the public generally, there can be no recovery because the public interest requires that the improvement be made. This is the theory behind the cases denying recovery for alleged impairment of the right of access as a result of circuity of travel.[144] The same theory has also been applied in totally different cases. Thus, it has been held that where the ice on the Des Moines River was the property of the city, it might prohibit the taking of ice in order to allow skating on the river without "taking" any property right within the meaning of the Iowa Constitution.[145] Neither is the enlargment of the boundaries of a city a taking even though as a citizen of the new city, the landowner may be subject to the general taxes of the city;[146] there is authority to the effect that the inclusion of a landowner within a drainage district or other similar entity which can impose a tax for the very purpose of the creation of the entity may be objected to if the landowner is not accorded due process of law.[147]

f. Exercise of Police Power Not A Taking

The role of the police power in American jurisprudence is an extraordinarily large and complex one. The present inquiry, however, is directed primarily to one small facet of that problem, i.e. the interrelationship between the police power and the power of eminent domain, subject as it is to prescribed state and federal constitutional inhibitions.

Basically, the term "police power", when it is used in opinions, seems to contain two fundamental elements which, although distinct, frequently prove difficult to separate: (1) the concept of the police power as a justification for action by the State, and (2) the concept of the police power as rendering that act non-compensable.

Judicial inquiry concerning the first element will basically in-

144. See Section 4(c)(3), supra.
145. Board of Park Commissioners v. Diamond Ice Co., 130 Iowa 603, 105 N.W. 203 (1905).
146. Wertz v. City of Ottumwa, 201 Iowa 947, 208 N.W. 511 (1926).
147. Browning v. Hooper, 269 U.S. 396 (1926); Beebe v. Magoun, 122 Iowa 94, 97 N.W. 986 (1904)(no provision for notice).

volve the question of whether initially such action may be taken by the state. The limits of the police power have never been specifically delineated by the Iowa court; in fact, the limits have deliberately been kept vague in order to provide for the unforeseen situations of the future. Thus, in Des Moines v. Manhatten Oil Co.,[148] the court said:

> "We shall not undertake any comprehensive definition of the police power of the state. No such definition has yet been accomplished by any court, nor is it possible or desirable that it should be accomplished. With the changing conditions necessarily attendant upon the growth and density of population and the ceaseless changes taking place in method and manner of carrying on the multiplying lines of human industry, the greater becomes the demand upon that reserve element of sovereignty which we call the police power for such reasonable supervision and regulation as the state may impose, to insure observance of the individual citizen of the duty to use his property and exercise his rights and privileges with due regard to the personal and property rights and privileges of others."

In condemnation law, the issue usually arises in connection with the question of whether a purpose allegedly justified by the police power is public or private. This problem is discussed at some length in Section 2, supra.

The second concept above assumes that the action itself is proper but involves the question of whether damages must be paid. The latter question seems to be more clearly a question of whether a taking has occurred within the meaning of the law on eminent domain than a question of deciding that a certain exercise of the police power is non-compensable. At best, the second concept involves only a residual area into which fall actions of the state which the courts have first determined do not constitute takings. Once in this residual area, any damage is non-compensable, but the key factor in the decision is whether a compensable right of the landowner has

148. 193 Iowa 1096, 184 N.W. 823, 826 (1921) (zoning case).

been taken, which is an eminent domain and not a police power concept. Therefore, the most effective answer of the state to an allegation of a taking is the defense that the plaintiff has been deprived of no compensable right; it is not the very general contention that the state's action is an exercise of the police power. Until the condemnor has shown that no legal right exists in the landowner, the latter position is essentially irrelevant.[149]

The Iowa case law lends considerable support to the view outlined above that the police power concept does not lie at the heart of the compensability issue but is instead subordinate to the eminent domain issue of whether a taking of a legal right has occurred. Perhaps the most instructive case is Warren v. Highway Commission.[150] This case seems to say that the distinction between the police power and the power of eminent domain is in the initial sense procedural. Thus, the state may elect to base its action on its police powers or on the power of eminent domain. However, the state's choice of method is not necessarily conclusive upon the courts. If the state proceeds under the police power, its action must be: (1) "a proper and reasonable one" (this is apparently a reference to element one discussed above), and (2) "must not amount to taking of property without due process". The latter quotation is presumably a reference to Article I, Section 18 of the Iowa Constitution. Since the power of eminent domain is an inherent power of the state,[151] and since this constitutional provision is in essence nothing but a limitation upon that power, it would seem that the decision as to compensability will depend upon the nature of the power of eminent domain and not on the police power. This conclusion is made abundantly clear by the method of analysis employed by the court in deciding the Warren case, supra.

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149. In Hohfeldian terms the answer to an argument that a "right" exists, e.g. a right appurtenant to property, must always be a "no-right" argument. The use of the concept of the police power is not on its face a denial of the existence of a legal right but instead an argument based on a "power", which will be essentially irrelevant to the real area of controversy.

150. ___ Iowa ___, 93 N.W.2d 60 (1958).

151. See Section 1, supra, and cases cited therein.

Following its discussion of the above principles, the court refers the reader to Division II of its opinion which deals exclusively with the question of whether plaintiff suffered a compensable damage, which is an eminent domain and not a police power concept. The only reference to the power of the state comes after the court has decided that plaintiff's damage is no different than that of the general public and hence is not compensable. Clearly then, it is the determination of whether or not plaintiff has a legal right which determines the issue of compensability and not the existence of a police power.

Other decisions of the Iowa court indicate a similar view. Thus in Lacey v. City of Oskaloosa,[152] the court held that the police power was validly exercised because the objecting parties could acquire no vested property interest in hitching racks erected under a "mere license" on the street fronting the city square. In the Smith[153] and Wilson[154] cases the contention was made by the highway commission that its action was simply an exercise of the police power. The court agreed insofar as the regulations were reasonable because to that extent there was no taking.[155] However, where reasonable access was denied, there was a taking; and the action of the state was held to fall without the immunity afforded by the police power doctrine. Also in the Smith case, supra, the condemnor urged the doctrine of police powers as a defense to plaintiff's claim of damages for traffic alteration. The court said on p. 762 of 82 N.W.2d,

> "They (plaintiffs) have no vested right (emphasis supplied) to the continuance of existing traffic past their establishment."

This concentration on "right" again illustrates the use of eminent

152. 143 Iowa 704, 121 N.W. 542 (1909).
153. Highway Commission v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957).
154. Wilson v. Highway Commission, 249 Iowa 994, 90 N.W.2d 161 (1958).
155. It will be remembered that the right of access in Iowa extends not to unlimited access but only to "reasonable access". See Section 4(c)(3), supra.

domain and not police power concepts in the actual process of decision-making. The same sort of judicial reasoning seems to be present in the foreign cases which uphold as valid the designation by the state of a new or relocated highway as a controlled-access facility; these courts take the position that since no prior right of access existed, the state may regulate access as it chooses.[156] Consequently, it would appear that although the court may sometimes choose to state its conclusion in terms of the immunity furnished by the police power, it will decide the case in terms of whether a legal right has been destroyed whenever the issue of compensability is at issue.

g. Common Law Dedication Not A Taking

The law seems to be clear that where a common law dedication can be shown, compensation need not be paid. Common law dedication is regarded as a donation to the public and therefore does not constitute a taking.[157] Consequently, in an appropriate situation, a condemnor should attempt to show that a common law dedication has occurred. The dedication may be either express or implied,[158] but in any event the prime requisite is a manifestation of intent to so dedicate.[159] Since the arrangement is essentially a gift, the usual requirements for a completed gift apply; thus there must be an

156. State v. Burk, 200 Ore. 211, 265 P.2d 783 (1954); Carazalla v. Wisconsin, 269 Wis. 593, 70 N.W.2d 208, rehearing 71 N.W.2d 276 (1955).

157. Sioux City v. Tott, 244 Iowa 1285, 60 N.W.2d 510 (1953); DeCastello v. Cedar Rapids, 171 Iowa 18, 153 N.W. 353 (1915).

158. Dugan v. Zurmuehlen, 203 Iowa 1114, 211 N.W. 986 (1927); DeCastello v. Cedar Rapids, 171 Iowa 18, 153 N.W. 353 (1915); Louden v. Starr, 171 Iowa 528, 154 N.W. 336 (1915).

159. Sioux City v. Tott, 244 Iowa 1285, 60 N.W.2d 510 (1953); Dugan v. Zermuehlen, 203 Iowa 1114, 211 N.W. 986 (1927); DeCastello v. Cedar Rapids, 171 Iowa 18, 153 N.W. 353 (1915); Davis v. Town of Bonaparte, 137 Iowa 196, 114 N.W. 896, 898 (1908) ("the intention of the owner to set apart the lands for the use of the public as a highway--the animus dedicandi--is the fundamental principle, the very life of dedication").

intent to give which may be inferred from the conduct of the owner,[160] and a present setting aside of the property.[161] The doctrine of dedication has also been analogized to that of contract with the requirement that an offer by the owner must occur and that this offer must be accepted by the public.[162]

As to problems of proof, the burden of proof, of course, rests on the public.[163] Parol evidence may be used by the party seeking to assert the public's right even though such is not ordinarily the case when an interest in land is involved;[164] the Statute of Frauds is also inapplicable.[165] The key to the defense against a dedication is a showing that use by the public was permissive and that the owner retained some control over the property by

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160. Dugan v. Zurmuehlen, 203 Iowa 1114, 211 N.W. 986, 988 (1927) ("long acquiescence in user by the public may, under certain circumstances, operate as a dedication of land to the public use"); DeCastello v. Cedar Rapids, 171 Iowa 18, 153 N.W. 353 (1915).

161. DeCastello v. Cedar Rapids, 171 Iowa 18, 153 N.W. 353 (1915). The analogy to gift is somewhat inappropriate in that no specific grantee need be in esse at the time of the dedication. See DeCastello, supra, at pp. 354-355 of 153 N.W.

162. Dugan v. Zurmuehlen, 203 Iowa 1114, 211 N.W. 986 (1927); DeCastello v. Cedar Rapids, 171 Iowa 18, 153 N.W. 353 (1915); Bradford v. Fultz, 167 Iowa 686, 149 N.W. 928 (1914). This analogy to contract would not seem to be particularly felicitous in view of the rather uncertain identity of the public which must "accept" and the period of time over which such "acceptance" must be demonstrated.

163. Sioux City v. Tott, 244 Iowa 1285, 60 N.W.2d 510 (1953); Dugan v. Zurmuehlen, 203 Iowa 1114, 211 N.W. 986 (1927); DeCastello v. Cedar Rapids, 171 Iowa 18, 153 N.W. 353 (1915); Bradford v. Fultz, 167 Iowa 686, 149 N.W. 925 (1914).

164. DeCastello v. Cedar Rapids, 171 Iowa 18, 153 N.W. 353, 355 (1915).

165. Dugan v. Zurmuehlen, 203 Iowa 1114, 211 N.W. 986 (1927).

gates,[166] payment of taxes,[167] signs[168], etc.. Mere use by the public in reaching or dealing with the owner is not sufficient to establish a dedication to public use.[169] In general, it should be noted that the burden of proving an implied dedication is a very heavy one and can be met only by a clear showing of intent to dedicate and long and continuous use by the public under a claim of right of which the owner has notice.

SECTION 5. STATUTORY LIMITATIONS ON THE POWER OF EMINENT DOMAIN

In addition to the constitutional restrictions imposed on condemning authorities, the Legislature has created certain statutory restrictions upon the exercise of the power of eminent domain. In the absence of repeal or specific statutory exemption, they are binding upon a condemnor, and an injunction will lie to compel conformance with such statutory requirements.[170]

a. Trees--Ingress or Egress--Drainage

Under Iowa Code Section 314.7 (1958) officers, employees, and contractors in charge of highway work are forbidden to cut down trees standing in front of town lots, farmyards, orchards, or feed lots which do not materially obstruct the road or work on it. Neither may they destroy or injure reasonable access to turn the natural drainage of the surface water to the injury of adjoining owners.

One of the tests for determining what constitutes reasonable

166. Culver v. Converse, 207 Iowa 1173, 224 N.W. 834 (1929); Bradford v. Fultz, 167 Iowa 686, 149 N.W. 926 (1914); State v. Green, 41 Iowa 693 (1875).
167. Sioux City v. Tott, 244 Iowa 1285, 60 N.W.2d 510 (1953); Culver v. Converse, 207 Iowa 1173, 224 N.W. 834 (1929);
168. Sioux City v. Tott, 224 Iowa 1285, 60 N.W.2d 510 (1953).
169. Sioux City v. Tott, 224 Iowa 1285, 60 N.W.2d 510 (1953); Bradford v. Fultz, 167 Iowa 686, 149 N.W. 925 (1914).
170. Reed v. Highway Commission, 221 Iowa 501, 266 N.W. 47 (1936); Hicks v. Highway Commission, 221 Iowa 509, 266 N.W. 51 (1936); Butterworth v. Highway Commission, 210 Iowa 1231, 232 N.W. 760 (1930); Hoover v. Highway Commission, 207 Iowa 56, 222 N.W. 438 (1928).

access is prior use.[171]

b. Cemeteries

Construction of roads through cemeteries without consent is forbidden under the terms of Iowa Code Section 306.14 (1958). The same is true of Iowa Code Section 471.7 (1958) forbidding construction of railroads through cemeteries or burial grounds.

c. Dispossession of Owner

Under Iowa Code Section 472.26 (1958), "a landowner shall not be dispossessed, under condemnation proceedings, of his residence dwelling house, outhouse, orchard, or garden, until the damages thereto have been finally determined and paid.....".

The term "dwelling house" has been construed to mean a house capable of habitation and not just a house.[172] Certainly it does not apply to a temporary building, especially where its erection is under circumstances indicating bad faith.[173] The statutory protection of buildings and plantings of the type specified in the statute extend, of course, only to those put in place by good faith acts of the owner. Where the statutory protection is used as a "sword instead of a shield", its benefit is lost as a consequence of the bad faith of the owner.[174] A garden within the meaning of this section refers to an actual cultivated growing garden, and not merely to a garden spot.[175]

An orchard also within the interpretation of this section means

171. Perkins v. Palo Alto County, 245 Iowa 310, 60 N.W.2d 562 (1953). Also see Section 4(c)(3), supra, as to what constitutes "reasonable access".
172. Oelwein v. Walrath, 162 Iowa 667, 144 N.W. 600 (1913).
173. Hartley v. Board of Supervisors, 179 Iowa 814, 162 N.W. 48 (1917).
174. Hartley v. Board of Supervisors, 179 Iowa 814, 162 N.W. 48 (1917); Ballou v. Elder, 95 Iowa 693, 64 N.W. 622 (1895).
175. 20 C.J.S. 856-8, 18 AmJur 718-719.

something more than three or four scattered fruit trees.[176] However, an orchard within the meaning of the statute need not be a perfect or idealistic orchard but only an "Iowa" orchard.[177]

176. Ballou v. Elder, 95 Iowa 693, 695, 64 N.W. 622; Hubel v. McAdon, 190 Iowa 677, 180 N.W. 994 (1921).
177. Junkin v. Knapp, 205 Iowa 194, 217 N.W. 834 (1928).

DIVISION II

GENERAL STATUTORY PROVISIONS AND PRACTICE

SECTION 6. NOTICE OF APPEAL

a. Statutory Requirement

In Iowa the original assessment of compensation for the taking of property under the power of eminent domain is left to an informal body of six freeholders known as the sheriff's jury, condemnation jury or condemnation commission. The procedure for the appointment of the sheriff's jury or commission and the proceedings to be conducted by such body are set forth in the Iowa Code (1958), Sections 472.1 through 472.17 inclusive.

Iowa law provides a statutory method for perfecting an appeal from the findings of this group. Section 472.18 of the Iowa Code (1958) provides that:

> "Any party interested may, within thirty days after the assessment is made, appeal therefrom to the district court, by giving the adverse party, his agent or attorney, and the sheriff, written notice that such appeal has been taken."

Iowa Code, Section 472.19 (1958) which deals with the Highway Commission and appeal,[1] states that:

> "Such notice of appeal shall be served in the same manner as an original notice. In case of condemnation proceedings instituted by the state highway commission, when the owner appeals from the assessment made, such notice of appeal shall be served upon the attorney general, or the special assistant attorney general acting as counsel to said commission, or the chief engineer for said commission. When service of notice of appeal

1. See Crawford v. Highway Commission, 247 Iowa 736, 76 N.W.2d 187 (1956). See subsequent discussion in this section.

> cannot be made as provided in this section, the district court of the county in which the real estate is situated, or a judge thereof, on application, shall direct what notice shall be sufficient."

b. Time Limitation

The statute provides for a thirty day limitation on the right to institute an appeal. The period is not computed from the date when the premise is viewed by the jury, but from the time when the assessment is actually made, reduced to writing, and made public or in some legitimate manner brought to the knowledge of the parties involved. Whether such time may precede the filing or placing of the assessment in the hands of the sheriff has not been determined,[2] but by practice the time is figured from the date of assessment of damages.[3] The court has held that where the sheriff received notice within the thirty day period, but no notice was given to the adverse party until after the expiration of the period, the appeal failed for failure to comply with the statute.[4] Iowa Rule of Civil Procedure 49, which allows service on the sheriff to toll the time requirement where an original notice is involved, was held inapplicable because the court viewed the case as an appeal and not as an original action.

c. Who May Appeal

As a general rule the district court has no jurisdiction to try or determine an appeal taken by a stranger to the initial appraisement, even though he be the real owner of the condemned lands. In order to have a right to appeal, a party must either be served with notice of the meeting of the sheriff's jury or must voluntarily appear before

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2. Jamison v. Burlington R.R. Co., 69 Iowa 670, 672, 29 N.W. 774, 775.
3. Mazzoli v. City of Des Moines, 245 Iowa 571, 63 N.W.2d 218 (1954).
4. Mazzoli v. City of Des Moines, supra; it should be noted, however, that the decision was 5-4 with a strong and well-reasoned dissent by Smith, J..

such body and have an interest in the result.[5] Thus if a transfer of title is made and afterwards the condemnor mistakenly serves notice on the grantor instead of the grantee, the latter, not being served with notice, may acquire the right to appeal by coming in and declaring himself owner before the commissioners and rectifying the error,[6] but if he fails to assert his ownership until after the award has been determined, an appeal will be denied him.[7] In this latter instance, he may persuade his grantor to appeal and then enter his appearance as an intervenor,[8] or may bring an action for trespass, or may enjoin the condemnor from taking possession of the land, forcing an entirely new condemnation.[9] However, it is clear that the district court may enter an order joining a co-owner who was not a party to the original proceedings before the sheriff's jury if necessary for the prompt determination of the litigation,

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5. Cedar Rapids, etc. R. Co. v. Chic., etc. R.Co., 60 Iowa 35, 14 N.W. 76; Jahr, Em. Dom., p. 422, Sec. 277, Gibson v. Union County, 208 Iowa 314, 223 N.W. 111; Birge v. Chicago, etc. R. Co., 65 Iowa 440; Gammel v. Potter, 2 Cole 562; Connable v. C. M. & St. Paul Ry. Co., 60 Iowa 27; Pingery v. Cherokee & Dakota Ry. Co., 78 Iowa 438, 43 N.W. 285; Burns v. Chic. etc. R. Co., 110 Iowa 385, 81 N.W. 794. But see Eggleston v. Town of Aurora, 233 Iowa 559, 10 N.W.2d 104 (1943), in which co-owner who had not been a party to the sheriff's jury proceeding joined in an amendment to the petition for appeal to the district court. The court seems to have allowed the co-owner to join in the appeal, at least to the extent of holding that such action waived the right to object to faulty joinder of the original condemnation proceedings before the sheriff's jury.
6. Connable v. C.M. & St. Paul Ry.Co., 60 Iowa 27, 14 N.W. 75 (1882).
7. Connable v. C. M. St. Paul Ry. Co., 60 Iowa 27, 14 N.W. 75 (1882).
8. Connable, supra, p. 28.
9. Birge v. Chic. etc. Ry. Co., 65 Iowa 440.

even over the objections of the party brought in.[10]

Further, purchasers or grantees who acquire an interest in the condemned property after the instituting of the sheriff's jury proceeding have no right to appeal.[11] If their grantor or vendor appeals, they may intervene but not otherwise.[12] It should be noted that a condemnation proceeding begun before sale by the vendor will be binding upon privies.[13] However, where the condemnor's obligation to pay is not finally determined at the time of sale due to failure to deposit the compensation, the purchase price must be paid to the vendee.[14]

If the land is actually appropriated, that is, the award has been deposited with the sheriff and possession taken[15] before the grantee acquires the tract from which the condemned portion is taken, the grantee has no interest in the award in the absence of a special agree-

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10. Eggleston v. Town of Aurora, 233 Iowa 559, 10 N.W.2d 104 (1943). The present provision, I.R.C.P. 25(c), appears to be even stronger in its authorization of joinder over objection than the statutory provision at the time of the Eggleston case.
11. 30 C.J.S. 40, Section 356; Cedar Rapids etc. Land Co. v. Chic. etc. R. Co., 60 Iowa 35, 14 N.W. 76 (Where an award of damages has been assessed for a right of way over a tract of land, and a stranger to the proceedings afterwards purchases a portion of the tract, he cannot sustain an appeal from the award, nor a part thereof); Connable v. Chic. etc. R. Co., 60 Iowa 27, 14 N.W. 75.
12. Connable v. Chic. etc. R. Co., supra.
13. 30 C.J.S. 22, Section 344; Plumer v. Wausau Boom Co., 49 Wis. 449, 5 N.W. 232; Forney v. Ralls, 30 Iowa 559 (in this case it was held that a sale and transfer of a mill during the pendency of a proceeding to assess the damages caused to the property of adjacent landowners by reason of heightening the mill dam did not abate the proceeding, and that the purchaser might be substituted for the original owner).
14. Griffeth v. Drainage District, 182 Iowa 1291, 166 N.W. 570, 571 (1918).
15. Ruppert v. Railway Co., 43 Iowa, 490,494.

ment with the grantor, and an appeal will be denied him.[16]

d. Who Must Be Joined

On the problem of joinder, Chicago etc. Ry. Co. v. Hurst, 30 Iowa 73, laid down the basic principle that where damages for the taking of certain property are assessed jointly to two (or more) persons as owners, an appeal cannot be taken or prosecuted by one of them without uniting the other (or others) or making him (or them) a party thereto by notice.[17] However, where plaintiff's petition alleges that he is the sole owner of property and hence that notice to additional parties who were holders of record was not necessary, the petition has been held sufficient to withstand attack on a motion to dismiss because the allegations were deemed to be admitted by the motion.[18]

The principle requiring joint appeal by co-owners has been modified by two later decisions, Ruppert v. St. Paul R. Co., 43 Iowa 490, holding that when the condemnor had settled with one of the owners of an undivided half of the land, the owner could appeal from the half going to him without joining the co-owner who had settled;[19] and Lance v. C. M. & St. Paul Ry. Co., 57 Iowa 636, 11 N.W. 612, enunciating the rule that where compensation had been jointly awarded to the owner and the mortgagee of the land upon notice to both of them, the owner

16. 20 C.J. 858, Flichinger v. Omaha Bridge Co., 98 Iowa 358, 67 N.W. 372; Stewart v. O'Hara, 273 N.W. 566 (Mich.); Griffeth v. Drainage District, 182 Iowa 1291, 166 N.W. 570, 571; see language of Pratt v. Des Moines R. Co., 72 Iowa 249, 33 N.W. 666.
17. Accord, 20 C.J. 1108, Section 481; Simmons v. Ry. Co., 128 Iowa 139, 142, 103 N.W. 129 (although holding on its facts that a tenant and a landowner could prosecute separate appeals, it intimated by way of dictum that if the award had been joint, the other claimant should be served with notice and be brought into court. On misjoinder, see Application of Longstreets, 205 N.W. 343, 200 Iowa 723; Genco v. Northwestern Mfg. Co., 203 Iowa 1390, 214 N.W. 545, when the condemnor and the landowner both appeal, the suits should be consolidated and tried as a single action. Where the condemnation concerns both military personnel and civilians, see Gilbride v. City of Algona, 237 Iowa 20, 20 N.W.2d 905.
18. Bales v. Highway Commission, 249 Iowa 57, 86 N.W.2d 244 (1957).
19. Accord, Hanrahn v. Fox, 47 Iowa 102 (holding that a joint owner who has taken the appeal may be permitted to introduce evidence showing the damages to the entire tract and will be entitled to his proportion thereof).

may maintain an appeal from the award without making the mortgagee a party thereto.[20] An additional exception exists in the peculiar situation where a landlord and tenant are involved, either of whom may appeal separately.[21]

e. Manner of Service

As to the manner of giving notice of an appeal, personal service on the adverse party, his agent or attorney[22] is contemplated by the statute, but an exception is now grafted on it for those instances of attempted evasion of service by the adverse party. Using the statute with regard to appeals to the Supreme Court as a model, the law presently states,

> "When service of notice of appeal cannot be made as provided in this section, the district court of the county in which the real estate is situated, or a judge thereof, on application, shall direct what notice shall be sufficient."[23]

f. Notice Jurisdictional

Although the written notice of appeal need not meet the strict re-

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20. Accord, Dixon v. Rockwell Ry. Co., 75 Iowa 367, 39 N.W. 646 (this rule may be attacked as unsound in principle and is excusable, if at all, on the grounds of the extreme indulgence shown to the mortgagor when the security is adequate and encumbrance is small).
21. Wilson v. Fleming, 239 Iowa 718, 32 N.W.2d 393, 402 (1948); Simons v. Ry. Co., 128 Iowa 139, 143, 103 N.W. 129,131.
22. Hahn v. Chic. etc. Ry. Co., 43 Iowa 333 (service on the president of the condemning company sufficient); Robertson v. Eldora, etc. R., 27 Iowa 245 (service on a director of the condemnor may be proper); Jamison v. Burlington etc. Ry., 69 Iowa 670, 29 N.W. 774 (a civil engineer of a railroad company is a proper agent upon whom to serve notice where he transacted business connected with the procuring of the right of way and had a local office in the county. See also Iowa Code Section 472.19 (1958), supra, p. 1.
23. Iowa Code Section 472.19 (1958). This section applied in Gilbridge v. City of Algona, 237 Iowa 20, 20 N.W.2d 905, 908 (1945).

quirements of the statute relative to original notice, and although O'Neal v. State, 214 Iowa 977, 243 N.W. 601, holds that a very informal one will do,[24] still service of such notice is absolutely necessary to obtain jurisdiction.[25] However, jurisdiction over a party not joined in the proceeding before the sheriffs jury may be obtained by court order if his presence is necessary to finally determine the outcome of the controversy.[26] It is true that a party may be brought into court by the notice of the adverse party, but unless he served his own notice of appeal, he has no remedy against a subsequent dismissal at any state of the trial, if the other party finds it advantageous to reinstate or abide by the original award.[27]

g. Notice to Sheriff

Another absolute essential to the perfection of an appeal is serving notice on the sheriff.[28] Although he is in no true sense a party to the proceedings and not disqualified from serving notice in these cases,[29] a notice must be directed to him and served on him, presumably for the reason that he is under a duty to file with the clerk of the district court at once when the appeal is taken, a copy of the part of the assessment

24. See also In re Dugan, 129 Iowa 241, 105 N.W. 514; Searles v. Lux, 86 Iowa 61, 52 N.W. 327; Geyer v. Douglas, 85 Iowa 93, 52 N.W. 111.
25. Mazzoli v. City of Des Moines, 245 Iowa 571, 63 N.W.2d 218 (1954); Maxwell v. LaBrune, 68 Iowa 689, 28 N.W. 18; Ellis v. Carpenter, 89 Iowa 521, 56 N.W. 678; Hanley v. Iowa Electric Co., 187 Iowa 594, 174 N.W. 345.
26. Eggleston v. Town of Aurora, 233 Iowa 559, 10 N.W.2d 104 (1943). The modern provision for joinder in this circumstance would appear to be I.R.C.P. 25(c).
27. Hanley, supra, (the condemnor may dismiss his appeal in the district court even after trial has begun, and the landowner who has not exercised his right of appeal cannot complain.
28. Thorson v. City of Des Moines, 194 Iowa 565, 188 N.W. 917,918; Buckmiller v. Creston R. Co., 164 Iowa 502, 146 N.W. 447.
29. C.R.F. etc. R. Co. v. C. M. & St. Paul R. Co., 60 Iowa 35, 14 N.W. 76; Buckmiller v. Creston R. Co., 164 Iowa 502, 146 N.W. 447; Waltmeyer v. Wisconsin & Nebraska Ry. Co., 64 Iowa 688, 21 N.W. 139 (whether giving notice to the deputy would be sufficient--query).

appealed from.[30] However, where the defendant is the Highway Commission, notice to the sheriff is not required under Iowa Code Section 472.19 (1958).[31]

The following form is an example of an appropriate notice of appeal:[32]

FORM FOR NOTICE OF APPEAL

IN THE DISTRICT COURT OF IOWA, IN AND FOR _____ COUNTY
_____TERM 19___

_____ :

PLAINTIFF, :

VS :

_____ :

DEFENDANT. :

* * * * * * * * *

TO: _____, Defendant and to _____, Sheriff

of _____ County, Iowa:

30. Iowa Code Section 472.20 (1958); Buckmiller v. Creston R. Co., 164 Iowa 502, 146 N.W. 447. However the failure of the sheriff to perform his duty and file with the clerk all papers pertaining to the appeal at the time required by the statute does not prejudice the rights of a party who has properly given notice of appeal. Robertson v. Eldora Ry. Co., 27 Iowa 245; (Simmons v. Ry. Co., 128 Iowa 139, 103 N.W. 129; Thorson v. Des Moines, 194 Iowa 565, 188 N.W. 915, 919; O'Neal v. State, 214 Iowa 977, 243 N.W. 601 (does not deprive the court of jurisdiction.).
31. Crawford v. Highway Commission, 247 Iowa 736, 76 N.W.2d 187 (1956).
32. The notice of appeal is held not to be an original notice and is not in any sense the commencement of an original action in the district court. Mazzoli v. City of Des Moines, 63 N.W. 2d 218, 245 Iowa 571 (1954); O'Neal v. State, 214 Iowa 977, 243 N.W. 601.

You and each of you are hereby notified that _____ as owner of the following described real estate situated in ____ County, Iowa, to-wit:_____has appealed and does appeal to the District Court in and for _____County, Iowa, from the award of damages made by the condemnation commissioners on the _____ day of _____, 19____, in the sum of _____ dollars for the taking by the Defendant _____ for _____ purposes that part of the above described real estate, specifically designated as follows: _____containing _____ acres.

Said appeal will come on for hearing and trial at the _____ Term of said District Court of _____ County, Iowa, to be held at _____, Iowa, commencing on the _____ day of _____, 19___.

Dated this ____ day of _____, 19____.

_____

(address)

Attorney for Plaintiff

SECTION 7. PLEADINGS

a. Who Are Plaintiff and Defendant

By statute the owner of the land is classified as plaintiff and must file a petition and the condemnor is designated as defendant and must

file an answer,[33] irrespective of which party appeals, and the burden of allegation and proof is placed upon the landowner in these cases.[34] When the condemnor appeals and names itself plaintiff in the notice and files a petition instead of an answer, the error may be corrected on motion.[35] But when the court omits to tell the jury that the burden of proof is on the landowner, it is reversible error.[36]

b. Necessity of Filing Petition

Although Iowa Code Section 472.22 (1958) specifies that the petition should be filed on or before the first day of the term to which the appeal is taken, this requirement has been held directory only and a failure to file by the time designated by the statute is not fatal to the right of appeal.[37]

c. Damage Should Be Set Out

According to the last cited enactment and recent decisions, the items of damage should be specifically set out in the petition but the amount of damages is only to be set out in lump sum which represents the difference in the fair and reasonable market value of the property as a whole immediately

33. Iowa Code Section 472.21, 472.22 (1958). See Section 9(e), infra, for an examination of this statute in the federal courts.
34. Nichols, Eminent Domain, 2d ed., Section 432, p. 1138; Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685, 688, "the legislature by its act aforesaid clearly placed the burden of proof as well as the pleadings on the plaintiff (landowner)". Meyers v. Chic. & N.W. Ry. Co., 118 Iowa 312, 324; 51 N.W. 1076; Millard v. N.W. Mfg. Co., 200 Iowa 1063, 205 N.W. 979.
35. Wilcox v. City of Omaha, 220 Iowa 1131, 264 N.W. 5.
36. Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685.
37. Wilcox v. City of Omaha, 220 Iowa 1131, 264 N.W. 5, 7; O'Neal v. State, 214 Iowa 977, 243 N.W. 601, 604.

mediately before and immediately after the taking.[38] However, a failure to limit the jury to a consideration of the elements of damages specifically alleged in the pleadings is no error.[39]

d. Amendments and Additional Pleadings

Amendments and additional pleadings may be filed, and the claimant may increase the amount of his prayer for damages as in other actions.[40]

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38. Iowa Code Section 472.22 (1958); Welton v. Highway Commission, 211 Iowa 625, 638, 233 N.W. 876, 884; Kemmerer v. Highway Commission, 214 Iowa 136, 241 N.W. 693; Dean v. State, 214 Iowa 143, 233 N.W. 36; Maxwell v. Highway Commission, 223 Iowa 159, 265 N.W. 889, 905, 506, 271 N.W. 883, 884, 885, 886 (1937) (leading case).
39. Maxwell v. Highway Commission, 223 Iowa 159, 271 N.W. 883, 884-86 (1937), "it is contended that the trial court erred in not limiting the jury to a consideration of the element of damages specifically alleged in the pleadings as to the measure of damages, and that an instruction to that effect was required by the provisions of Section 7841-cl of the Code (1935)(now Iowa Code Section 472.22 (1958))...we find no error in the court's failure to limit the jury to the specific elements of damage pleaded".
40. Kemmerer v. Highway Commission, 214 Iowa 136, 241 N.W. 693 (in this case the amount asked was changed from $5000 to $9676 and it was held no error). See also Ball v. Keokuk, 71 Iowa 306; Wapsipinicon Power Co. v. Waterloo, 186 Iowa 524, 167 N.W. 623; DePenning v. Iowa Power & Light Co., 239 Iowa 950, 33 N.W. 2d 503 (1948).

FORM FOR PETITION ON APPEAL FROM AWARD OF DAMAGES

IN THE DISTRICT COURT OF IOWA, IN AND FOR _____COUNTY

_____TERM_____

_____, :

PLAINTIFF, :

VS : PETITION AT LAW

_____, :

DEFENDANT. :

* * * * * * * *

Comes now the Plaintiff _____ and for cause of action against the Defendant _____ states:

1. That he is now and for _____ years has been the owner in fee of _____.

2. That each portion, part, and parcel of said land has been used together as one complete tract or unit for farm purposes and exclusively devoted to the said one actual and permanent use.

3. That on the ____ day of _____, 19____, the Defendant _____ by eminent domain proceedings did condemn for _____ _____purposes a part of said land, specifically and particularly designated as follows:

_____

4. That immediately before said condemnation the fair and reasonable market value of said farm as a whole was the sum of $_____.

5. That immediately after said condemnation the fair and reasonable market value of said farm as a whole was the sum of $_____.

6. That the items of damage to said farm as a whole by reason of said condemnation are particularly specified as follows:[41]

(a) The injury to the remaining farm consisting of _____ acres of well developed and improved lands;

(b) The taking of approximately _____ acres by _____ for _____ purposes;

(c) The destruction of a well located upon said condemned land, the main well and only water supply on said farm;

(d) The appropriation of said land shortens the barnyard and feed lot upon which cattle and straw stacks are kept and will make said feed lot so small an area that it will be of no practical value.

7. That on account of all items hereinbefore set forth the appropriation of said land by _____would cause this Plaintiff substantial damage.

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41. Iowa Code Section 472.22 (1958) requires that specific items of damages must be set forth. Moran v. Highway Commission, 223 Iowa 936, 274 N.W. 59 (1937).

WHEREFORE, the Plaintiff prays that the damages sustained by him by reason of the taking and appropriation of said land for said purposes be assessed in the sum of _____ dollars with interest from the ____ day of _____, 19___, and that the Plaintiff have judgment against the Defendant for the costs of this action, including a reasonable attorney fee for the Plaintiff as provided by statute.[41a]

_____

(address)

Attorney for Plaintiff

FORM FOR DEFENDANT'S ANSWER

IN THE DISTRICT COURT OF IOWA, IN AND FOR _____COUNTY

_____TERM _____

_____, :

PLAINTIFF, :

VS : ANSWER

_____, :

DEFENDANT. :

* * * * * * *

Comes now the (condemnor) and by way of answer to Plaintiff's Petition herein filed states:

41a. Iowa Code Section 472.33 (1958).

1. That he admits that _____, Plaintiff, owns the real estate described in the Petition.

2. That he admits that the Defendant appropriated and condemned the land described in Plaintiff's Petition, to-wit: _____ at the time therein designated.

3. That he admits that a fence along Plaintiff's property has been destroyed but that specific damages for construction of new fencing as contained in Plaintiff's Petition may not lawfully be recovered.[42]

4. That he admits that Plaintiff was temporarily inconvenienced by construction of the highway on the land condemned but that no damages may lawfully be recovered for such inconvenience.[42]

5. That he denies for lack of information the loss of profits alleged to have occurred in the operation of Plaintiff's farm by virtue of the condemnation of the land in question but that in any event such loss of profits does not constitute a legally compensable damage.[42]

6. That he admits the removal of borrow dirt from land adjoining the property condemned, but that such removal was rightfully

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42. The defenses relating to points of law may be raised in the answer under the provisions of I.R.C.P. 72, but in some situations defendant might prefer to raise this issue by a motion to strike.

made under the terms of a binding contract between Plaintiff and Defendant, which is attached hereto.

7. That he denies each and every allegation contained in Paragraph (7) of Plaintiff's Petition.

8. That he denies Paragraph (8) of Plaintiff's Petition for lack of information.

WHEREFORE, the Defendant prays that Plaintiff's action be dismissed or that in the alternative the Plaintiff be held to strict proof and that his damages be determined as provided by law.[43]

_____

(Address)

Attorney for Defendant

SECTION 8. TRIAL ON APPEAL

a. As an Ordinary Proceeding

The trial on appeal is conducted as an ordinary civil proceeding,[44] with the right of change of venue,[45] the right of a continuance,[46] and

43. Iowa Code Section 472.22 (1958) requires that the defendant shall file a written answer to the plaintiff's petition or other pleadings as may be proper.
44. Iowa Code Section 472.21 (1958).
45. Whitney v. Atlantic Southern Ry. Co., 53 Iowa 651, 6 N.W. 32.
46. Wilcox & Son v. City of Omaha, 220 Iowa 1131, 264 N.W. 5.

the right to a jury of twelve men.[47] In the court to which the appeal is taken, trial is de novo, and indeed all the proceedings so far as concerns the trial are conducted as if the condemnation had been commenced or originated in that court.[48] Thus, the amount of the original assessment,[49] or errors and illegalities in computation of the same[50] are not to be considered on appeal.

b. Jury Assessment Not A Judgment

In the district court no judgment is rendered except for costs. The finding of the jury merely fixes the price at which, upon actual payment or tender of payment, the condemnor may take the property assessed.[51] It does not pass title to the condemnor, nor compel him to pay for or accept such property.

c. Dismissal By Condemnor

Condemnor may dismiss the proceedings at any time on the payment of the cost.[52] No damages for the loss of a favorable lease or the like

47. Thorp v. Witham, 65 Iowa 566, 22 N.W. 677; Campbell v. Highway Commission, 222 Iowa 544, 269 N.W. 20, 21 (1936); Kirby v. Chic. N.W. R. Co., 106 Fed. 551.
48. Mississippi etc. Co. v. Rosseau, 8 Iowa 373; Wolf v. Iowa etc. Ry. Co., 173 Iowa 277, 155 N.W. 324; Holn v. Chic. etc. Ry. Co., 43 Iowa 333; Hall v. Wabash Ry. Co., 141 Iowa 250, 119 N.W. 927.
49. Simmons v. Mason City etc. Ry. Co., 128 Iowa 139, 103 N.W. 129.
50. Signafous v. Talbot, 25 Iowa 214; Cedar Falls etc. Ry. Co. v. N.W. Ry. Co., 64 Iowa 694, 21 N.W. 141.
51. Iowa Code Section 472.23 (1958); Richardson v. Centerville, 137 Iowa 253, 114 N.W. 1071.
52. DePenning v. Iowa Power & Light Co., 239 Iowa 950, 33 N.W.2d 503 (1948); Gear v. Des M. & S. Ry. Co., 20 Iowa 553; Iowa Electric Co. v. Scott, 206 Iowa 1217, 220 N.W. 33; Burrow v. Woodbury County, 200 Iowa 787, 205 N.W. 460 (1925); B & M.R. Co. v. Slater, 1 Iowa 421; Klopp v. Railroad Co., 142 Iowa 474, 119 N.W. 373 (can dismiss even after the verdict). See Iowa Code Section 472.34 (1958) and discussion in Section 11, infra.

are allowed to the owner for such abandonment if possession of the property has not been taken.[53] However, an action of tresspass will lie if the facts pleaded constitute a wrong.[54] It is the tender of the amount of the assessment that passes title,[55] and if there has been a great advance in price between the time of the appraisement and such tender, the owner may have a right to demand a reappraisement.[56]

d. Effect of Such Dismissal

However, the finding of the trial jury has the binding force of a judgment in the sense that it prevents the condemnor from instituting subsequent eminent domain proceedings with a view of obtaining an award that would meet his personal satisfaction.[57] But an abandonment of an entire project or plan in good faith by the condemnor does not preclude the prosecution of a new condemnation for a different public work.[58]

53. Mathiason v. State Conservation Comm., 246 Iowa 905, 70 N.W.2d 158 (1955); Ford v. Board of Commissioners, 148 Iowa 1, 126 N.W. 1030 (lapse of three months); contra, Gear v. Railway Co., 20 Iowa 523,529.
54. Eord v. Bd. of Park Commissioners, 148 Iowa 1, 126 N.W. 1030 (1910) (dictum).
55. Mathiason v. State Conservation Comm., 246 Iowa 905, 70 N.W.2d 158 (1955).
56. Gear v. Railway Co., 20 Iowa 523,532; Ruppert v. B. & M. R. Co., 38 Iowa 316, 318.
57. Robertson v. Hortenbower, 120 Iowa 410, 94 N.W. 857; Nichols On Eminent Domain, Sec. 418 (2d ed.); Hupert v. Anderson, 35 Iowa 578. See also Mason v. Iowa Central R. Co., 131 Iowa 468, 108 N.W. 1096.
58. Corbin v. Cedar Rapids, 66 Iowa 73, 23 N.W. 270; Robertson v. Hortenbower, supra.

e. Acceptance of Deposit by Landowner

Prior to the Laws of the 58th General Assembly (1959) an acceptance by the condemnee of the damages awarded by the commissioners barred his right of appeal. Such acceptance after an appeal abated the appeal.[59] These provisions were repealed by the 58th General Assembly, and by amendment to Iowa Code Section 472.25 (1958) the district court may, after appeal, direct that part of the damages deposited with the sheriff as it finds just and proper be paid to the persons entitled thereto.[60]

However, where the landowner has accepted the full amount of the commissioners award either prior to or after the institution of his appeal, condemnor should urge that an appeal is barred or abated.[61]

SECTION 9. REMEDIES IN CONDEMNATION PROCEEDINGS

a. Appeal

(1) Generally

Basically, the method of introducing condemnation issues into the court system is through the statutory remedy of appeal. While collateral remedies are available and are examined herein, nearly all issues should be raised by appeal. Appeal is the exclusive remedy for in-

59. Iowa Code Section 472.29 (1958) repealed by Chapter 318 of the Laws of the 58th General Assembly (1959).

60. Chapter 318, 58th General Assembly (1959).

61. Hayes v. Chicago, R.I. & P. R. Co., 239 Iowa 149, 30 N.W.2d 743 (1948); Marling v. Burlington etc. Ry. Co., 67 Iowa 331, 25 N.W. 268 ("an owner who accepts the compensation awarded cannot object to the amount of the award or claim that the condemnation proceedings were irregular"); Mississippi & M. R. Co. v. Burlington, 14 Iowa 572. See also Burrow v. County, 200 Iowa 787, 205 N.W. 460; Miller v. Iowa Power and Light, 239 Iowa 1257, 34 N.W.2d 627 (1948); Burns v. Ry. Co., 102 Iowa 7, 70 N.W. 728.

creasing the amount of the sheriff's jury award.[62]

(2) Lack of Power to Condemn

On appeal, the landowner may and should litigate the power to condemn. However, when the problem hinges on whether the condemnor lacks statutory authority or power to condemn, a question of law, such problems may be raised by certiorari;[63] in fact, where a legal issue is involved and no problem of valuation is present, certiorari seems to be the preferred method for raising the matter.[64]

(3) Inadequacy of Public Purpose

Once it is established that the condemnor has power to condemn land, the issue is sometimes raised that the condemnation proceedings are illegal because the condemnor is acting beyond his statutory powers.[65] This, of course, will be basically a question of fact and therefore appropriate for a jury on appeal and not for other remedies.[66] The most frequent question raised is whether or not the property in question is needed for the project authorized. The courts have held that the question of the necessity of a taking of property in condemnation proceedings cannot be raised in an independent suit to enjoin

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62. Iowa Code Section 472.17 (1958); Mazzoli v. City of Des Moines, 245 Iowa 571, 63 N.W.2d 218, 219 (1954); Hagerla v. Mississippi R. Co., 202 Fed. 776.
63. Jenkins v. Highway Commission, 205 Iowa 523, 218 N.W. 258 (1928); Rockwell v. Bowers, 88 Iowa 88, 55 N.W. 1 (1893).
64. Reter v. Davenport, R. I. & N.W. Ry. Co., 243 Iowa 1112, 54 N.W.2d 863, 870 (1952)(dictum). Certiorari will not lie in an action against the commissioners for improper assessment. Forbes v. Delashmutt, 68 Iowa 164, 26 N.W. 56,57 (1885).
65. See Section 5, supra.
66. Heinz v. City of Davenport, 230 Iowa 7, 296 N.W. 783,786 (1941). But see dictum to the effect that only the issue of valuation may be raised on appeal in Stellingwerf v. Lenihan, 249 Iowa 179, 85 N.W.2d 912 (1957). This and related cases are discussed in Section 9(b), infra.

condemnation.[67] This is also the case where the allegation is made that the purpose for which the land is being condemned is actually private instead of public,[68] or for a different purpose than that for which it was condemned.[69] In such cases the courts hold that plaintiffs must be denied equitable relief because they have an adequate remedy at law in the statutory remedy of appeal.[70]

(4) Error in Sheriff's Jury Proceeding

The problem of what remedy, if any, is available in case of error in the sheriff's jury proceeding is a difficult one, and it is a problem for which the Supreme Court has never provided a complete rationale. Nevertheless, the cases seem to fall into certain patterns. The most basic determination which has to be made is whether there is a remedy at all for error committed by the sheriff's jury. Where the alleged error goes to the procedure in picking particular jurors, influence exercised during the proceeding, etc., no remedy is provided apparently, because these errors deal solely with the determination of a valuation figure by the sheriff's jury.[71] Since the issue of valuation will be raised and

67. Ermels v. Webster City, 246 Iowa 1305, 71 N.W.2d 911 (1955); Connolly v. Des Moines & Central R. Co., 246 Iowa 874, 68 N.W. 2d 320 (1955); Heinz v. City of Davenport, 230 Iowa 7, 296 N.W. 783 (1941); Davis v. Des Moines & Ft. Dodge Ry. Co., 155 Iowa 51, 135 N.W. 356 (1912); LaPlant v. Marshalltown, 134 Iowa 261, 265, 111 N.W. 816 (1907); Carlile v. Des Moines & K.C. Ry. Co., 99 Iowa 345, 68 N.W. 784 (1896)(collateral action was trespass); Waterloo Water Company v. Hoxie, 89 Iowa 317, 56 N.W. 499 (1893).
68. Reter v. Davenport, R.I. & N.W. Ry. Co., 243 Iowa 1112, 54 N.W.2d 863, 870 (1952); Heinz v. City of Davenport, 230 Iowa 7, 296 N.W. 783 (1941).
69. Davis v. Des Moines & Ft. Dodge Ry. Co., 155 Iowa 51, 135 N.W. 356 (1912).
70. Heinz v. City of Davenport, 230 Iowa 7, 296 N.W. 783 (1941); Minear v. Plowman, 197 Iowa 1198, 197 N.W. 67 (1924); Town of Alvord v. Great Northern Ry. Co., 179 Iowa 465, 161 N.W. 467 (1917); Waterloo Water Co. v. Hoxie, 89 Iowa 317, 56 N.W. 499, 501 (1893); Keokuk & N.W. R. v. Donnel, 77 Iowa 221, 42 N.W. 176 (1889) (issue raised sua sponte).
71. Mill v. City of Denison, 237 Iowa 1335, 25 N.W.2d 323 (1946); Gray v. Iowa Cent. Ry. Co., 129 Iowa 68, 105 N.W. 359 (1905) (error in description of property); Cedar Rapids, I.F. & N.W. R. Co. v. Whelan, 64 Iowa 694, 21 N.W. 141 (1884) (jury met at improper time); Phillips v. Watson, 63 Iowa 28, 18 N.W. 659 (1884) (alleged partiality of appraisers and undue influence upon them); The M. & M. R. Co. v. Rosseau, 8 Iowa 373 (1859)(improper selection of jury members and bias by the members).

tried de novo on appeal, no real need exists for review of errors in arriving at the first valuation figure.[72] Consequently, there is no remedy in the sense that no procedure exists for reversing an error committed by an inferior body or tribunal by an appeal or collateral proceeding; however, when the alleged error goes to the jurisdiction of the sheriff's jury, then the issue may be raised by specified remedies, principally appeal and certiorari. Error involving the jurisdiction of the sheriff's jury over subject matter may be raised on appeal if no waiver of the issue has occurred.[73] Also, where a valuation issue is appealed along with a legal issue, the legal issue may be raised and decided on appeal.[74] For a discussion of certiorari and this problem, see Section 9(d), infra.

b. Injunction

Very difficult issues are presented when the question of the propriety of an injunction is raised. Two conflicting lines of authority are available, and both have received support in recent decisions of the court. The stakes involved may be high, since an improperly granted injunction, although it may be reversed on appeal, will in the interim cause long delays in construction resulting in heavy losses due to idling of expensive machinery, interruption of the continuity of certain types of projects, dispersal of the contractor's labor force,

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72. Cedar Rapids, I. F. & N. W. R. Co. v. Whelan, 64 Iowa 694, 21 N.W. 141 (1884); Phillips v. Watson, 63 Iowa 28, 18 N.W. 659 (1884); the M. & M. R. Co. v. Rosseau, 8 Iowa 373 (1859).
73. Slough v. Chicago & N.W. Ry. Co., 71 Iowa 641, 33 N.W. 149 (1887). Query whether this would be the result today in view of the fact that certiorari has been given broader scope. See Section 9(d), infra.
74. Reter v. Davenport, R.I. & N.W. Ry. Co., 243 Iowa 112, 54 N.W. 2d 863, 870 (1952). But see Runner v. City of Keokuk, 11 Iowa 543 (1861) (holding that only the issue of damages could be tried on appeal.

etc.[75] There seems to be little doubt that the necessity of a taking of property in condemnation proceedings cannot be raised in an independent suit to enjoin condemnation.[76] It is also clear that where a clear case of fraud, illegality, or want of power is demonstrated, an injunction may be obtained.[77] It should be noted in passing that where a purely legal issue involving illegality or want of power is present, the

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75. Where a temporary injunction is sought, a bond in the amount of 125% of the probable damages must be posted. I.R.C.P. 327. It would seem to be open to counsel for the condemnor to contend that this figure would be a rather high one. However, once the injunction is made permanent, though improperly so, bond is not necessary pending appeal, and no damages may be recovered for the resultant interruption of work.

76. See cases cited under footnote 67, supra.

77. Rhodes v. Highway Commission, ___ Iowa ___, 94 N.W.2d 97 (1959)(dictum); Porter v. Board of Supervisors of Monona County, 238 Iowa 1399, 28 N.W.2d 841 (1947); Mill v. City of Denison, 237 Iowa 1335, 25 N.W.2d 323 (1946); Heinz v. City of Davenport, 230 Iowa 7, 296 N.W. 783 (1941). An injunction may also be used where the conduct in question is illegal. Butterworth v. Highway Commission, 210 Iowa 1231, 232 N.W. 760 (1930) (attempt to round a corner which would isolate a farmhouse in violation of statute). Hoover v. Highway Commission, 207 Iowa 56, 222 N.W. 438 (1928); Scott v. Price Bros. Co., 207 Iowa 191, 217 N.W. 75 (1927) (injunction will issue to protect statutory or constitutional remedies); Cf. Plattsmough Bridge Co. v. Globe Oil & Refining Co., 232 Iowa 1118, 7 N.W.2d 409 (1943); Reed v. Highway Commission, 221 Iowa 501, 266 N.W. 47 (1936); Hicks v. Highway Commission, 221 Iowa 509, 266 N.W. 51 (1936); Grant v. Cowan Township, 190 Iowa 1188, 181 N.W. 637 (1921) Injunction has also been used to restrain a fraudulent condemnation. Forbes v. Delashmutt, 68 Iowa 164, 26 N.W. 56 (1885). Also see Ermels v. Webster City, 246 Iowa 1305, 71 N.W.2d 911, 913 (1955) (dictum); Mook v. Sioux City, 244 Iowa 1124, 60 N.W.2d 92,99 (1952)(dictum); Heinz v. City of Davenport, 230 Iowa 7, 296 N.W. 783,786 (1941) (dictum); Davis v. D.M. Ft. D. R. Co., 155 Iowa 51, 135 N.W. 346, 360 (1912) (dictum); LaPlant v. Marshalltown, 134 Iowa 261, 111 N.W. 816,818 (1907) (dictum).

issue could also be raised by certiorari.[78] Furthermore, the enforcement of an ordinance which constitutes a taking without just compensation may be enjoined where the property owner is threatened with criminal proceedings which would result in irreparable injury and multiplicity of suits.[79]

An area of considerable doubt has risen where the facts are alleged to justify an injunction do not fall into either of these categories. The situation which is ordinarily present is an alleged want of power, illegality, or fraud which does not present a clear violation of statute, but instead will be determined by disputed facts, statutory interpretation, inferences to be made from facts, or the application of non-statutory legal principles. On the one hand it has been held that the only issue which may properly be raised on appeal is the item of damages and consequently that plaintiff is entitled to equitable relief since at any moment the condemnor may pay the money into court and take possession of the property.[80] On the other hand, there is a long line of cases to the effect that where a non-damage issue is presented, the question may be tried out on appeal along with the issue of .

78. See Section 9(d), infra.
79. Stoner McCray System v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956).
80. Stellingwerf v. Lenihan, 249 Iowa 179, 85 N.W.2d 912 (1957) (dictum) (court's holding went only to the issuance of a temporary injunction, but the court declared that plaintiff was entitled to equitable relief because on appeal the only issue triable would be damages; at issue was plaintiff's assertion that a private use of property to be condemned for a public purpose was threatened); Longstreet v. Town of Sharon, 200 Iowa 723, 205 N.W. 343 (1925); Witham v. Union County, 198 Iowa 359, 196 N.W. 605 (1924); Cowan v. Grant Township, 190 Iowa 1188, 181 N.W. 637 (1921); Burgess v. Bremer County, 189 Iowa 168, 178 N.W. 389 (1920).

damages.[81] The former view is certainly subject to a great deal of criticism. It certainly is incorrect to say, as the court did in Stellingwerf v. Lenihan, 249 Iowa 179, 85 N.W.2d 912 (1957), and other cases,[82] that the only issue on appeal is the item of

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81. Ermels v. Webster City, 246 Iowa 1305, 71 N.W.2d 911 (1955) (the dismissal by district court of an action based on alleged unconstitutionality upheld; case illustrates the trying of non-damage issues on appeal); Reter v. Davenport, R.I. & N.W. Ry. Co., 243 Iowa 1112, 54 N.W.2d 863, 870 (1952) (issue of alleged private instead of public use tried on appeal; issue tried as a separate question of law under R.C.P. 105); Heinz v. City of Davenport, 230 Iowa 7, 296 N.W. 783 (1941) (holding the issue of alleged private instead of public use should be tried on appeal, and no injunction should issue); Minear v. Plowman, 197 Iowa 1188, 197 N.W. 67 (1924) (holding that the issue of necessity of a taking may be tried on appeal); Town of Alvord v. Great Northern Ry. Co., 179 Iowa 465, 161 N.W. 467 (1917) (court stated that issue of necessity of taking should be raised by appeal); Davis v. Des Moines & Ft. Dodge Ry. Co., 155 Iowa 51, 135 N.W. 36 (1912) (leading case holding that issue of alleged private instead of public use should be raised by appeal, and therefore injunction should be denied); Waterloo Water Co. v. Hoxie, 89 Iowa 317, 56 N.W. 499 (1893) (defense that property was already devoted to a public use should be raised on appeal and not by injunction; Keokuk & N.W. Ry. Co. v. Donnel, 77 Iowa 221, 42 N.W. 176 (1889) (issue of plaintiff's ownership for a public purpose as against defendant's condemnation for public purpose could be raised on appeal, and therefore injunction would not lie).
82. Longstreet v. Town of Sharon, 200 Iowa 723, 205 N.W. 343 (1925); Witham v. Union County, 198 Iowa 359, 196 N.W. 605 (1924); Burgess v. Bremer County, 189 Iowa 168, 178 N.W. 389 (1920).

damages.[83] An examination of the authorities usually cited for the issuance of an injunction shows that they fall into two categories, and that when understood in the context of these categories, they do not support the position that only the damages may be raised on appeal. A number of the cases are ones in which a clear breach of a specific statute was involved instead of situations in which conduct might be found illegal or fraudulent in the light of evidence and application of non-statutory principles;[84] moreover, it seems clear that in these

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83. See cases cited in footnote 81, supra, which cover a wide variety of non-damage issues which were declared to be proper for an appeal including the issue of alleged private instead of public use, which was the problem in Stellingwerf v. Lenihan, supra. However, on appeal to the Supreme Court in this case, the condemnor in preparing its brief was content to rely on the contention that the trial court's discretion in dissolving the temporary injunction should not be disturbed and did not advance the contention that other remedies should be employed. Consequently, none of the authority cited in footnote 81 was called to the attention of the court, and it simply accepted the contention in Division V of plaintiff's brief that he had no remedy at law as only the issue of damages could be raised on appeal.

84. Plattsmouth Bridge Co. v. Globe Oil & Refining Co., 232 Iowa 1118, 7 N.W.2d 409 (1943) (taking of property without holding condemnation proceedings of any kind); Reed v. Highway Commission, 221 Iowa 501, 266 N.W. 47 (1936); Hicks v. Highway Commission, 221 Iowa 509, 266 N.W. 51 (1936) (both this case and the Reed case involved attempts to round a corner by taking a dwelling house in clear violation of a statute expressly forbidding such action. Butterworth v. Highway Commission, 210 Iowa 1231, 232 N.W. 760 (1930) (attempt to round a corner which would isolate a farmhouse in violation of statute; Hoover v. Highway Commission, 207 Iowa 56, 222 N.W. 438 (1928)(construction of a highway through an orchard in plain violation of a statute expressly forbidding such construction); Grant v. Cowan Township, 190 Iowa 1188, 181 N.W. 637 (1921)(this case comes closer than any other to supporting the decision in Stellingwerf; however, the facts of the case involved an action of township trustees which the court held clearly went beyond their statutory authority. Thus, the case may still fit into the category of those in which a clear and readily apparent violation of an express statutory provision has been shown).

cases the fact that the violation is a plain one is a significant factor in those decisions.[85] The cases which specifically declare that damages are the only issue on appeal are ones in which the court was faced with error in the sheriff's jury proceeding and the intent of the court was apparently to hold that such error was not reviewable on appeal.[86] Consequently, it would appear that the line of cases represented by the dictum in Stellingwerf v. Lenihan, supra, is particularly vulnerable to attack, and that in view of the serious consequences to the condemnor whenever an injunction is issued, every effort should be made to attack it by showing the availability of other remedies, such as appeal, certiorari, or mandamus.

The position which probably should be adopted is that all issues may be raised on appeal except those which might go up on certiorari;

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85. "So, where individuals, composing a commission or board or other arm of the state, violate the clear provisions of the state Constitution or statute, and attempt to appropriate private property for public use without authority, the rights of the owner may be protected by the courts through the agency of an injunction or some other suitable means.....Clearly the power of the courts to restrain state officials from violating plain provisions of the statute and Constitution is in no way derogatory to the general and well- recognized rule that the state cannot be sued without its consent." (Italics Added). Hoover v. Highway Commission, 207 Iowa 56, 222 N.W. 438,440 (1928). "To deny the appellee the right to injunctive relief, in view of the plain language of the statute, would be to in effect repeal the statute by judicial pronouncement." (Italics Added) Butterworth v. Highway Commission, 210 Iowa 1231, 232 N.W. 760 (1930). It would seem then that injunctions ought to be confined solely to the situation where a plain violation of statute is involved; such was not the case in the Stellingwerf case, supra, where further facts and interpretation of an additional statute were necessary.

86. Longstreet v. Town of Sharon, 200 Iowa 723, 205 N.W. 343 (1925); Witham v. Union County, 198 Iowa 359, 196 N.W. 605 (1924); Burgess v. Bremer County, 189 Iowa 168, 178 N.W. 389 (1920). For a discussion of this type of case, see Section 9(a)(4), supra.

such an appeal would try all issues, damage and non-damage, at one time and would avoid multiplicity of suits. Injunctions should be available only for clear violations of statute, manifest fraud, etc.,[87] and a heavier burden of proof should be placed on the plaintiff in an action for injunction.[88] If a suitable case for injunction arises, it would seem that the proper time for issuance is the time at which the condemnor pays over the money because only on the occurrence can any damage result to the plaintiff; until such time, any damage would be purely conjectural. The acceptance of this position would enable the condemnor to defer taking the land until the issue can be tried on appeal and thus void an injunction which might tie his hands for a much longer period of time.

Although there is some doubt that a permanent injunction may be granted in the situation where a fact determination must be made, it is clear that a temporary injunction or a stay may be obtained pending a hearing on the issuance of an injunction.[89] Such a temporary injunction may be necessary in order to prevent the issue from becoming moot, since once the land has been taken, adjudication on the issue of injunctive relief is terminated.[90] Of course, once a determination is properly

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87. The following language from Beidenkopf v. Des Moines Life Ins. Co., 160 Iowa 629, 142 N.W. 434,438 (1913) is noteworthy, "Even where the technical right to injunctive relief is otherwise clearly established, it will be denied where the issuance of the writ may occasion inconvenience to the public and serious loss to the defendant, while the injury to the plaintiff can readily be compensated in damages." Also see Browneller v. Natural Gas Pipe Line Co., 233 Iowa 686, 8 N.W.2d 474,481 (1943).
88. This view is suggested by the discussion of the court in Porter v. Board of Supervisors of Monona County, 238 Iowa 1399, 28 N.W.2d 841 (1947) and Heinz v. City of Davenport, 230 Iowa 7, 296 N.W. 783 (1941).
89. Stellingwerf v. Lenihan, 249 Iowa 179, 85 N.W.2d 912 (1957); Porter v. Board of Supervisors, 238 Iowa 1399, 28 N.W.2d 841 (1947).
90. Porter v. Board of Supervisors of Monona County, 238 Iowa 1399, 28 N.W.2d 841 (1947); Welton v. Highway Commission, 208 Iowa 1401, 227 N.W. 332 (1929).

made in a suit for injunction, the matter is res judicata.[91]

c. Mandamus

When the condemnor fails to hold a preliminary assessment, as outlined by Chapter 472 of the Iowa Code (1958), the landowner cannot institute eminent domain proceedings but must resort to mandamus or injunction when the condemnor takes possession of his property.[92] Mandamus will lie to compel the institution of condemnation proceedings where there has been a taking of private property for public use without compensating the owner.[93] Such cases usually arise in situations in which there is a question of whether a taking within the meaning of the Constitution has occurred and consequently the condemnor fails to institute condemnation proceedings. However, mandamus will not lie to compel the state to determine an alleged debt owed by it.[94]

d. Certiorari

As a general rule, certiorari is not available to review mere

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91. Hoover v. Highway Commission, 201 Iowa 1, 230 N.W. 561 (1930).
92. Hunting v. Curtis, 10 Iowa 152; Nichols, Ibid, Section 468 (2d ed.). Under Iowa Code Section 306 (1958) appeal is the exclusive remedy on establishment of roads. Thorp v. Witham, 65 Iowa 28, 18 N.W. 659; Gibson v. Union County, 208 Iowa 314, 223 N.W. 111. See Slough v. Chic. & North Western Ry. Co., 71 Iowa 641, 33 N.W. 149.
93. Anderlik v. Highway Commission, 240 Iowa 919, 38 N.W.2d 605 (1949); Baird v. Johnston, 230 Iowa 161, 297 N.W. 315 (1941); Dawson v. McKinnon, 226 Iowa 756, 285 N.W. 258 (1939).
94. Bachman v. Highway Commission, 236 Iowa 778, 20 N.W. 2d 18 (1945); Long v. Highway Commission, 204 Iowa 376, 213 N.W. 532 (1927).

irregularities or technical lack of compliance with the law.[95] However, as noted in Section 9(a)(4), supra, certiorari is one of the remedies available for an error which goes to the jurisdiction of the condemnation proceedings. The feeling is that where the error is basic, the landowner is entitled to two "days in court"; (1) a properly constituted evaluation proceeding, and (2) a right to appeal.[96] Certiorari also lies in the situation where an appeal has not been taken and thus allows review of issues of law raised by the sheriff's jury proceedings.[97] Iowa Rules of Civil Procedure 308 has abolished the requirement that no other plain, speedy and adequate remedy exists as a prerequisite to the issuance of certiorari, and the court has held that the elimination of this requirement indicates a purpose to broaden the scope of review by certiorari.[98] However, where a valuation issue is presented along with a legal issue, then appeal is apparently the preferred remedy.[99]

e. State Condemnation in the Federal Courts

Although the remedy has not often been utilized in Iowa, the

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95. Jacobs v. City of Chariton, 245 Iowa 1378, 65 N.W.2d 561 (1954); Massey v. City Council, 239 Iowa 527,535, 31 N.W.2d 875,880 (1948); Jenney v. Civil Service Commission, 200 Iowa 1042,1046, 205 N.W. 958 (1925).
96. Miller v. Palo Alto Board of Supervisors, 248 Iowa 1132, 84 N.W. 2d 38 (1957) (failure to properly swear jurors); Abney v. Clark, 87 Iowa 727,730, 55 N.W. 6,7 (1893)(failure to appoint jurors at the proper time).
97. Miller v. Palo Alto Board of Supervisors, 248 Iowa 1132, 84 N.W. 2d 38 (1957).
98. Miller v. Palo Alto Board of Supervisors, 248 Iowa 1132, 84 N.W. 2d 38 (1957); Massey v. City Council, 239 Iowa 527, 31 N.W.2d 875 (1948).
99. Reter v. Davenport, R.I. & N.W. Ry. Co., 243 Iowa 1112, 54 N.W.2d 863,870 (1952).

federal courts are available for the trial of condemnation issues.[100] Federal Rules of Divil Procedure 71A[101] provides a complete procedure to be followed for trial of condemnation cases in the federal courts. This procedure is to be uniformly followed except that if the state law provides that trial shall be by jury or by jury and commission, that provision shall be followed.[102] For some time it has been accepted law that the federal courts may try a state condemnation case even though the state is the condemnor, provided, of course, that the necessary jurisdictional requirements are fulfilled.[103] Two possibilities for bringing a condemnation into federal court exist: (1) removal to federal court from state court, and (2) commencing an original action in the federal district court. Removal to federal court has been upheld even after a valuation by commissioners appointed under state law has been made and the award has been appealed to the state court for trial de novo under a statute almost identical to Iowa's.[104] However, the removing party must comply with the federal statute on removal,[105] which requires

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100. Some of the advantages which might result from use of the federal courts are: (1) the greater control over the jury possessed by a federal judge, (2) the greater power of the federal courts in directing verdicts, (3) the possibility that a federal court may have a superior class of jurors, (4) the possibility that the federal docket may not be as congested, (5) the greater consideration given to motions because of the requirement of written briefs; (6) the availability of better tested discovery procedures. Federal interpleader might also be advantageous in securing a nation-wide service of process.

101. See Paul, Condemnation Procedure under Federal Rule 71A; 43 Iowa L. Rev. 231 (1958); Comment, 38 L. Rev. 575 (1953).

102. F.R.C.P. 71A(k).

103. Mississippi & R. River Boom Co. v. Patterson, 98 U.S. 403 (1878)(the state contended unsuccessfully that condemnation was a state function and that no agency of the federal government, in cluding the federal courts, might interfere therewith).

104. Madisonville Traction Co. v. St. Bernard Min. Co., 196 U.S. 239 (1905).

105. 28 U.S.C. Section 1441(a)(1952).

that the moving party be a non-resident defendant. In spite of Section 472.21 of the Iowa Code (1958) which declares that the condemnor shall be defendant, the federal statute has twice been interpreted by the U. S. Supreme Court to mean that the condemnor is the plaintiff, not the defendant.[106] Although there is some reason to doubt the correctness of this position,[107] it would seem that, barring a somewhat unlikely reversal of the present position, a condemnor may not remove to federal court. As far as possibility (2), supra, is concerned, the validity of commencing an original action in the federal district court is still an

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106. Chicago, R. I. & P. R. Co. v. Stude, 346 U.S. 574 (1954); Mason City & Ft. D. R. Co. v. Boynton, 204 U.S. 570 (1907). The reasoning of Holmes, J. in Boynton was that the condemnor was responsible for the initiation of the action, and therefore, should be regarded as plaintiff.

107. In the Boynton case the court took the position that federal substantive law must take precedence over what apparently was regarded as the substantive law of Iowa on labeling plaintiffs and defendants and fixing burden of proof; the decision seems to be an effort to utilize state procedural law but follow federal substantive law under the then-prevailing doctrine of Swift v. Tyson. However, since Erie Railroad Co. v. Thompkins, 304 U.S. 64 (1938) and the adoption of the Federal Rules of Civil Procedure, this doctrine has been completely reversed. Therefore, it would certainly be open to contend that, since in the Boynton case the court apparently treated the Iowa law as substantive, it should be regarded as substantive today and hence should control the action. This position would be analagous to that taken by the federal courts on the Iowa contributory negligence rule, which is given substantive treatment and therefore is applied in actions in federal court. This argument does not seem to have been advanced in the Stude case, however; consequently some attack on the present position of the court is probably still possible. It is worthy of note that the dissents of Frankfurter and Black, J.J., did not object to the majority opinion on the removal question. Consequently, it would appear somewhat unlikely that the present doctrine is headed for early reversal.

open question in federal law.[108] In the Stude case, the court upheld the dismissal of an action which, in conformity with Iowa practice, had been labeled an appeal instead of an original action as would have been proper in federal court in spite of well-reasoned dissents by Gardner, C.J., in the court of appeals[109] and Frankfurter and Black, J.J., in the Supreme Court. The dissenters seemed confident that an original action correctly labeled would succeed and should be treated as a suit for declaration of money owed;[110] however, the majority of the court explicitly left the question open, although indicating a preference for a count in declaration of money owed.

SECTION 10. SETTING ASIDE THE VERDICT

Generally the rule in condemnation proceedings is that verdicts of the district court jury will not be reversed unless there is a showing of passion or prejudice.[111] A number of Iowa cases have taken the posi-

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108. Chicago, R.I. & P. R. Co. v. Stude, 346 U.S. 574 (1954).

109. 204 F.2d 116.

110. The assumption of the dissent was that since an original action in federal court would lie, the mislabeling of the action as an appeal should not be a bar to the relief sought.

111. "Where there is a disputed fact question as to the value of the property taken by eminent domain and there is competent evidence from which the jury could reach the verdict it did, this court will not interfere." Miller v. Iowa Elec. Light & Power Co., 239 Iowa 1257, 34 N.W.2d 627,630 (1948); Not excessive: Hostert v. Highway Commission, ___ Iowa ___, 93 N.W.2d 773 (1958); Danker v. Iowa Power & Light Co., 249 Iowa 327, 86 N.W.2d 835 (1957); Cutler v. State, 224 Iowa 686, 278 N.W. 327 (1938); Cory v. State, 214 Iowa 136, 241 N.W. 693 (1932); Wheatley v. City of Fairfield, 213 Iowa 1187, 240 N.W. 629 (1932) (same rule applied to a valuation by trial court without jury); Kerry v. Tysseling, 239 N.W. 233 (no Iowa report); Besco v. Mahaska County, 200 Iowa 684, 205 N.W. 459 (1925); Longstreet v. Town of Sharon, 200 Iowa 723, 205 N.W. 343; Koster v. Sioux County, 195 Iowa 214, 191 N.W. 993; City of Albia, 140 Iowa 196; Dudley v. Minnesota & N.W. Ry. Co., 77 Iowa 408, 42 N.W. 359; Hempstead v. Des Moines, 52 Iowa 303, 3 N.W. 123 (change of grade case); Sherwood v. Reynold, 213 Iowa 539, 239 N.W. 137; Not too small: Trachta v. Highway Commission, 249 Iowa 374, 86 N.W.2d 849 (1957); Neddenmeyer v. Crawford County, 190 Iowa 883, 175 N.W. 339; Ideal Cream Separator Co. v. Des Moines, 167 Iowa 517, 149 N.W. 640 (change of grade); U.S. v. Foster, 145 F.2d 873 (1945).

tion that a "condemnation case is one in which the amount allowed is peculiarly within the province of the jury;"[112] thus going one step beyond the rule normally applied for reversing an excessive verdict. While the Iowa court has never discussed the reasons why a more rigorous rule should be applied to a jury verdict in a condemnation case, the reason would appear to be the fact that, within the discretion of the trial court, the jury may examine the land condemned in person.[113] However, in spite of the strong presumption in favor of the reasonableness of a jury award in condemnation cases in Iowa, it is clear that where passion

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112. "A condemnation case is one in which the amount allowed is peculiarly within the province of the jury, and unless the same be shown to be so extravagant as to be wholly unfair and unreasonable, this court has repeatedly refused to interfere with the verdict of the jury." Longstreet v. Town of Sharon, 200 Iowa 723, 727, 205 N.W. 343, 344 (1925); Korf v. Fleming, 239 Iowa 501, 32 N.W. 2d 85 (1948); Stoner v. Highway Commission, 227 Iowa 115, 287 N.W. 269 (1939).

113. Cf. 29 C.J.S. Section 310, p. 1342. The merit in this reasoning is not entirely apparent as it would seem that actually seeing the land in a condemnation case is no more valuable than hearing the individual witnesses in a negligence case, in which a lower standard would seem to be applied. Since the principal function of a jury in a condemnation case is to place a value on the land and since ordinarily the jury must rely heavily on expert appraisers, it would seem that the testimony of the witnesses rather than the visual appearance of the land would ordinarily be the determining factor. Under this assumption, the condemnation case takes on a strong resemblance to the negligence case, and it would appear that the condemnor might well contend that the same standard for overturning a jury verdict on grounds of excessiveness ought to be applied to condemnation verdicts as is applied to negligence verdicts. Remittiturs in negligence verdicts are, of course, familiar to Iowa law.

or prejudice clearly exists, the award will be found excessive.[114] Such a finding may be made either by the trial court in directing a remittitur[115] or by the Supreme Court on appeal.[116] In the case of

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114. "It is the well-settled rule of law in this state that if the verdict appears to be so excessive as to indicate passion and prejudice in ordinary negligence cases, the verdict should be set aside. The same rule applies to condemnation proceedings." Luthi v. Highway Commission, 224 Iowa 678, 276 N.W. 586 (1937); Stortenbecker v. Iowa Power & Light Co., ___ Iowa ___, 96 N.W.2d 468,473 (1959) (award excessive even though within the testimony of the witnesses); Campbell v. Highway Commission, 222 Iowa 544, 269 N.W. 20 (1936); Jenkins v. Highway Commission, 208 Iowa 620, 224 N.W. 66 (1929); Parrott v. Chicago Great Western Ry. Co., 127 Iowa 419, 103 N.W. 352 (1905). The inadequacy of an award has also been held to be grounds for reversal. Adkins v. Smith, 94 Iowa 759, 64 N.W. 761 (1895); Walter v. Houck, 7 Iowa 72 (1858). It is suggested that there is no conflict between these cases and the decisions holding awards not excessive. As discussed above, the meaning of the Iowa standard has never been thoroughly discussed by the court, but as a practical matter, where the award is somewhere between the amount of damage testified to by plaintiff and defendant's witnesses, the court will generally not interfere with the jury verdict. However, in the Luthi, Jenkins, and Campbell cases, supra, the verdicts were within the range of testimony and yet they were reversed. It is clear that valuation splitting, while not encouraged by the courts, is not reversible error. Cory v. State, 214 Iowa 222, 242 N.W. 100 (1932).

115. Nicks v. Chicago & St. Paul Ry. Co., 84 Iowa 27, 50 N.W. 222 (trial court reduced the damages from $1500 to $1000).

116. Cases cited in footnote 114, supra.

Hall v. City of West Des Moines (1953)[117] the trial court ordered a new trial on the assumption that the verdict, while it might not show evidence of passion or prejudice, was still so large as to indicate that the jury had failed to comprehend the issues involved, and therefore justified an order for a new trial. It would seem that this decision would furnish the condemnor, or the condemnee in the case of a grossly inadequate award, a new line of attack in the form of a motion for a new trial on a verdict which appears to be out of line but which is not necessarily so excessive as to indicate passion or prejudice. It is clear that, in deciding whether there is passion or prejudice, each case must be considered separately and that comparison with prior cases in which the verdict has been found excessive is improper.[118]

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117. 245 Iowa 222, 62 N.W.2d 734. At 738 of 62 N.W.2d, the court says,"....but the trial court has the right to scan the course of the trial and the verdict returned; and if for any reason which may be supported by the record,he thinks justice has not been done, he has the unquestioned right to order a new trial, even though such reason may not in itself amount to reversible error." See also Wilson v. Highway Commission, 249 Iowa 994, 90 N.W.2d 161 (1958). The allegedly excessive verdict may have been a contributing factor in granting a new trial in Maxwell v. Highway Commission, 223 Iowa 159, 271 N.W. 883,888 (1937). An inadequate award may also be the basis for granting a new trial. See Steensland v. Iowa-Illinois Gas & Electric Co., 242 Iowa 534, 47 N.W.2d 162 (1951) (inadequate award constituted one ground for granting a new trial by trial court but while the order for new trial was affirmed, the court on appeal did not reach the inadequacy argument). See also Stortenbecker v. Iowa Power & Light Co., ___ Iowa ___, 96 N.W.2d 468,473 (1959).

118. Hall v. City of West Des Moines, 245 Iowa 458, 62 N.W.2d 734 (1954); Schoonover v. Fleming, 239 Iowa 539, 32 N.W.2d 99 (1948).

SECTION 11. COSTS, ATTORNEY FEES, AND INTEREST

a. Costs

The condemnor must, of course, pay all costs incurred in the assessment by the condemnation commissioners.[119] This is also the case as to the costs on appeal unless on the trial of the appeal the same or a less amount of damages is allowed than was allowed below.[120] However, if the award remains the same or is decreased, the assessment of costs is apparently left to the discretion of the court.[121] Where the condemnor appeals, the court has apportioned the award in order to avoid the inequity of destroying the award through the assessment of costs.[122] However, in a similar case the court allowed the assessment of all costs to the landowner.[123] If the landowner appeals and the award is decreased, apparently the court may tax all the costs of the appeal to him.[124] Where both parties appeal, the discretion of the court seems to remain the same as in the ordinary case in which both parties appeal.[125] Where the plaintiff appeals to the district court and the defendant files an offer to confess judgment for a stated sum, and the plaintiff fails to recover a larger sum, the cost accruing sub-

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119. Iowa Code Section 472.33 (1958).
120. Iowa Code Section 472.33 (1958).
121. Strange Bros. Hide Co. v. Highway Commission, ___ Iowa ___, 93 N.W.2d 99, 102 (1958); Jones & Price v. Mahaska County Coal Co., 47 Iowa 35,41 (1877).
122. Jones & Price v. Mahaska County Coal Co., 47 Iowa 35,41(1877); accord, Noble v. Des Moines & St. L. R. Co., 61 Iowa 637, 17 N.W. 26 (1883).
123. Strange Bros. Hide Co. v. Highway Commission, ___ Iowa ___, 93 N.W.2d 99,102 (1958)(landowner cross-appealed but in other sections of the opinion this cross-appeal was treated as a nullity and only the condemnor's appeal was regarded as relevant. It is important to note that this decision, while discussing the prior cases of apportionment extensively, does not involve true apportionment. Although the court does divide the costs of the separate appeals, there is no apportionment of costs in the one case in which the award was decreased; instead all costs are assessed to the landowner for that appeal).
124. Jones & Price v. Mahaska County Coal Co., 47 Iowa 35,41 (1877) (dictum)(apparently the court might also apportion the costs in such a situation).
125. Strange Bros. Hide Co. v. Highway Commission, ___ Iowa ___, 93 N.W.2d 99,102 (1958).

sequent to such offer should be taxed to the plaintiff.[126] This result follows from the application of Iowa Code Sections 677.4, 677.5, and 677.10 (1958) to condemnation appeals.[127] Where the allowance of an amendment by the defendant may reduce the amount of damages allowed on appeal, the defendant must contribute to the costs if the amount allowed is less as a result of the amendment.[128]

b. Attorney Fees

(1) Liability for Attorney Fees

No distinction in the awarding of attorney fees with regard to which party appeals has been made.[129] Basically there are two Code provisions, Iowa Code Sections 472.33 and 472.34 (1958), which affect the awarding of attorney fees. Section 472.33 (1958) provides that reasonable attorney fees shall be awarded unless on trial of the appeal the same or a less amount of damages is awarded than was allowed by the sheriff's jury.[130] Where two trials are necessary and the amount received on appeal is greater, in both cases than the amount awarded by the sheriff's jury, attorney fees may be recovered for both trials.[131] The fees allowed may be incurred only in the preparation and prosecu-

126. Tilton v. Iowa Power & Light Co., ___ Iowa ___, 94 N.W.2d 782 (1959); Draker v. Iowa Electric Co., 191 Iowa 1376, 182 N.W. 896, 900 (1921); Harrison v. Iowa Midland R. Co., 36 Iowa 323 (1873).

127. Tilton v. Iowa Power & Light Co., ____ Iowa ___, 94 N.W.2d 782 (1959).

128. DePenning v. Iowa Power & Light Co., 239 Iowa 950, 33 N.W. 2d 503 (1948).

129. The position taken by the court on costs was rejected by it as applied to attorney fees in Wormely v. Mason City & Ft. D. R. Co., 120 Iowa 684, 95 N.W. 203, 204 (1903).

130. Wormely v. Mason City & Ft. D. R. Co., 120 Iowa 684, 95 N.W. 203 (1903); accord, Mellichar v. Iowa City, 116 Iowa 390, 90 N.W. 86 (1902). It should be noted that the clause which formerly excepted the State from payment of attorney fees has been removed by Acts 1955, 56 General Assembly, Chapter 226, Section 1.

131. McCaskey v. Ft. Dodge, D.M. & So. Ry. Co., 154 Iowa 652, 135 N.W. 6 (1912).

tion of the appeal.[132] Moreover where the appeal from the sheriff's jury does not involve the issue of valuation, attorney fees are not allowed.[133] Attorney fees are not recoverable for the preparation and prosecution of an appeal to the Supreme Court.[134] A different rule is followed where the plaintiff declines to accept an offer to confess judgment made by the condemnor and the jury awards damages in an amount smaller than the rejected offer. In such a case, attorney fees incurred after the offer is rejected may not be recovered. This result follows from a two step reasoning process: first, the confession of judgment sections of the Iowa Code which tax the "costs" of the action from the time of the offer to the defendant, Iowa Code Sections 677.4, 677.5 and 677.10 (1958); secondly, for this purpose, attorney fees are treated as "costs".[135] In this manner the Draker[136] rule as to costs, as understood in its ordinary meaning, can be applied to attorney fees where an offer to confess judgment is made and rejected. Iowa Code Section 472.34 provided until 1955 that in the event of abandonment of the condemnation by the condemnor after final determination of the appeal, attorney fees should be allowed to the plaintiff; however, this provision has had little effect on the courts in limiting the recovery of attorney fees on abandonment to the situation where the appeal has finally been determined, and the court consistently allowed recovery of attorney fees

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132. Hall v. Wabash R. Co., 133 Iowa 714, 110 N.W. 1039 (1907); Wormely v. Mason City & Ft. D. R. Co., 120 Iowa 684, 95 N.W. 203 (1903). Accord, Iowa Electric Co. v. Scott, 206 Iowa 1217, 220 N.W. 333 (1928); Mellichar v. Iowa City, 116 Iowa 390, 90 N.W. 86 (1902).

133. Reter v. Davenport, R.I. & N.W. Ry. Co., 243 Iowa 1112, 54 N.W.2d 863 (1952).

134. Wilson v. Fleming, 239 Iowa 918, 32 N.W.2d 798 (1948); Iowa Electric Co. v. Scott, 206 Iowa 1217, 220 N.W. 333 (1928). But See exception under Iowa Code Section 472.34 (1958) to be discussed subsequently.

135. Tilton v. Iowa Power & Light Co., ___ Iowa ___, 54 N.W.2d 782 (1959).

136. Draker v. Iowa Electric Co., 191 Iowa 1376, 182 N.W. 896, 900 (1921).

even where abandonment took place before the appeal was tried.[137] In 1955 the statute was amended by eliminating the provision referring to final determination of the appeal by allowing recovery where abandonment occurs "at any time after the appeal is taken..."[138] However, in spite of or because of this statute, two problems still exist in this area which perhaps should be approached with some care: (1) whether recovery of attorney fees in the event of abandonment is still limited to those fees incurred in the appeal only,[139] and (2) whether in the event of abandonment after an appeal in which the damages awarded by the

137. The initial case allowing attorney fees on abandonment appears to be Mellichar v. Iowa City, 116 Iowa 390, 90 N.W. 86 (1902) in which fees were allowed although the appeal had not yet been tried. No mention was made of the predecessor of Iowa Code Section 472.34 (1958) which then limited recovery to the situation where abandonment took place after "final determination of the appeal". Instead recovery was allowed under the predecessor of Iowa Code Section 472.33 (1958) apparently as a matter of justice and equity. In Ford v. Board of Park Commissioners, 148 Iowa 1, 126 N.W. 1030 (1910) the court for the first time considered the predecessor of Iowa Code Section 472.34 (1958) but made no mention of the clause limiting recovery to cases in which a final determination of the appeal had been made and went on to allow attorney fees although the appeal had not yet been tried at the time of abandonment. Iowa Electric Co. v. Scott, 206 Iowa 1217, 220 N.W. 333 (1928) discusses both cases and reaches the same result.

138. Acts 1955, 56th General Assembly, Chapter 226, Section 2.

139. It would appear that the amendment of Iowa Code Section 472.34 (1958) was designed to make the statute conform to the cases discussed in footnote 137, which had no statutory basis. However, the statute, as it now stands, does not explicitly limit recovery to those fees attributable to appeal alone, which the prior cases did. Insofar as the statute is deemed to supersede the cases, it would seem to be open to argument that all attorney fees might be recovered in the event of abandonment. However, the general principle of allowing recovery only for fees on appeal where there is no issue of abandonment would seem to be so well established as to prevent recovery in the abandonment situation for fees other than those relating to appeal. See cases cited in footnote 82.

sheriff's jury are decreased, attorney fees may still be awarded.[140] It does seem clear, however, that fees may be recovered for an appeal to the Supreme Court when abandonment occurs after such appeal.[141]

(2) Determination of the Amount of Attorney Fees

Iowa Code Section 472.33 (1958) provides that reasonable attorney fees are "to be taxed by the court". In making its determination, the court is not required to hear testimony concerning the value of the attorney services rendered; however, admission of such evidence is within the sound discretion of the court, and it is not error to hear such testimony.[142] In Kelly, Shuttleworth & McManus v. Central Nat. Bank & Trust Co., 217 Iowa 724, 248 N.W. 9,15 (1933) the court, in discussing the factors which should be employed in valuing an attorney's services, stated:

> "In fixing the compensation for attorneys on a quantum meruit basis, there are certain elements that should be taken into consideration. First, the amount involved; second, the character of the

140. Iowa Code Section 472.33 (1958) as interpreted by the Wormely case, supra, disallows recovery of attorney fees where the amount of the award is reduced on appeal. No such provision is contained in the abandonment statute, Iowa Code Section 472.34 (1958). Iowa Electric Co. v. Scott, 206 Iowa 1217, 220 N.W. 333 (1928) discusses the Wormely case as though it applied in the abandonment situation, although no reason is given for so doing. Since the amendment specifically allows recovery at any time after the appeal is filed, a point at which the fact of an increase or a decrease could not possibly be known, it would seem that the statute may well allow recovery of attorney fees regardless of the amount of recovery on appeal where abandonment occurs.

141. Wheatley v. City of Fairfield, 221 Iowa 66, 264 N.W. 906 (1936).

142. Wilson v. Fleming, 239 Iowa 718, 31 N.W.2d 393 (1948); Hall v. Wabash Ry. Co., 133 Iowa 714, 110 N.W. 1039 (1907).

> question in the case and the standing of the attorneys; third, the time occupied; and fourth, the result accomplished."[143]

The local practice of the bar may also serve as a guide in determining a proper figure. The decreased purchasing power of money is also an item which may properly be considered in arriving at a figure for attorney fees.[144] The evidence of services rendered may include an item for preparation not required by statute but which is nevertheless in accordance with sound legal practice.[145] There is doubt, however, as to whether expenses of attorneys such as meals, travel expense, etc. may properly be introduced into evidence.[146] If proper and improper evidence are intermingled by the court, the condemnor is entitled to a reversal.[147] On the other hand, where the award of fees by the trial court is manifestly less than the evidence indicates, the court will reverse.[148] It is clear that in allocating attorney fees, the

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143. Accord. Tilton v. Iowa Power and Light Co., ___ Iowa ___, 94 N.W.2d 782 (1959); Danker v. Iowa Power and Light Co., 249 Iowa 327, 86 N.W.2d 835 (1957); Wilson v. Fleming, 239 Iowa 718, 31 N.W.2d 393 (1948); In re Dehner's Estate, 230 Iowa 490, 298 N.W. 656 (1941). For a discussion of the factors involved in such a determination, see Annotation, 143 A.L.R. 672.
144. Wilson v. Fleming, 239 Iowa 718, 31 N.W.2d 393 (1948).
145. Mellichar v. Iowa City, 116 Iowa 390, 90 N.W. 86 (1902).
146. Although all expenses are allowed in stockholder's suits, see Graham v. Machine Works, 138 Iowa 456; State ex rel Weede v. Becktel, 244 Iowa 785, it can be reasoned that these suits are peculiarly liberal actions in the allowance of attorney fees and expenses. See Swinehart v. Highway Commission, No. 12620 Dist. Ct. Adair County, Iowa (1958).
147. Iowa Electric Co. v. Scott, 206 Iowa 1217, 220 N.W. 333 (1928).
148. In re Dehner's Estate, 230 Iowa 490, 298 N.W. 565 (1941); accord. Tilton v. Iowa Power & Light Co., ___ Iowa ___, 94 N.W. 2d 782 (1959) (court recognized the principle but held that the fees allowed, while smaller than the maximum amount which would have been upheld, were not manifestly inadequate in amount).

court determines the value of such services without the intervention of a jury.[149]

c. Interest

In those instances where the amount of the appraisement on appeal is as large or larger than the initial assessment by the sheriff's jury, interest is allowed as a part of the cost from the time when the condemnor took possession of the property.[150] This same rule applies even though the amount be decreased, if the condemnor prosecuted the appeal.[151] However, when the landowner appeals, and the original award is reduced, he can recover no interest on such reduced amount.[152] When the condemnor appeals and the landowner subsequently appeals, the court has held that the cross-appeal is of no effect, and the condemnor must pay interest from the date of the original award even though the subsequent award is lower.[153] When interest is allowable, the court should fix the time from which such interest should be computed

149. Richardson v. Centerville, 137 Iowa 253, 114 N.W. 1039.

150. Harris v. Green Bay Levee & Drainage Dist., 246 Iowa 416, 68 N.W.2d 69 (1955); Hayes v. Chic. etc. Ry. Co., 64 Iowa 753, 19 N.W. 245; Guinn v. Iowa etc. Ry. Co., 131 Iowa 680, 109 N.W. 209; Welton v. Highway Commission, 211 Iowa 625, 233 N.W. 876; Daniel v. Chicago etc. Ry. Co., 41 Iowa 52, Beal v. Highway Commission, 209 Iowa 1308, 230 N.W. 302; Hartshorn v. Burlington C. R. & N. R. Co., 52 Iowa 613; Lough v. Minneapolis & St. Paul Ry. Co., 116 Iowa 31, 89 N.W. 77 (overruled in part in Harris v. Green Bay Levee & Drainage Dist., supra); Also see Note, Attorney fees as an element of just compensation, 12 Iowa L. Rev. 286 (1927).

151. Noble v. Burlington & W. R. Co., 61 Iowa 637, 17 N.W. 26.

152. Hayes v. Chicago, R.I. & P. R. Co., 239 Iowa 149, 30 N.W.2d 743 (1948); Welton v. Highway Commission, 211 Iowa 625, 233 N. W. 876. See also Noble v. Burlington, 61 Iowa 637, 17 N.W. 26. No interest is allowed in such a situation by established practice.

153. Strange Bros. Hide Co. v. Highway Commission, ___ Iowa ___, 93 N.W.2d 99 (1958). This case leaves unanswered the question of whether an appeal by the landowner followed by a cross-appeal by the condemnor in a case in which the award is decreased would require interest. It is suggested that the court's decision seems to turn on the original cause for impounding the money; if the original cause was the landowner's appeal, he should have no right to interest just as in the ordinary case of a single appeal by the landowner.

by a proper order.[154] The amount of interest to be awarded should be fixed by the court and not by the jury.[155]

SECTION 12. LIMITATIONS OF ACTIONS

The general statute of limitations cannot be interposed as a bar or defense to an appeal. It is the accepted rule that an action to assess damages for a taking can be brought long after the general statutory period.[156] However, this proves of little aid to the injured landowner for if the party who illegally appropriated the land chooses to remain in possession, eminent domain is no remedy to dislodge or remove him, and resort must be had to ordinary civil remedies within

154. Reed v. C. M. & St. Paul Ry. Co., 25 Fed. 886.
155. Harris v. Green Bay Levee & Drainage Dist., 246 Iowa 416, 68 N.W.2d 69 (1955); Hayes v. Chicago, R.I. & P.R. Co., 239 Iowa 149, 30 N.W.2d 743 (1948); Beal v. Highway Commission, 209 Iowa 1308, 230 N.W. 302 (1930).
156. Hartley v. K. & N. W. Ry. Co., 85 Iowa 455, 52 N.W. 352 (1892); Gates v. Colfax & Northwestern Railway Co., 177 Iowa 690, 159 N.W. 456 (1916).

the time prescribed by law.[157] Further, under the provisions of Chapter 472, Iowa Code (1958), the landowner cannot institute eminent domain proceedings except by mandamus,[158] and therefore, the question whether time has barred redress for the wrongful act is invariably presented in a common law action instituted by the landowner.

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157. Adverse possession is a defense to ejectment and injunction. Mosier v. Vincent, 34 Iowa 478; Baldwin v. Herbst, 54 Iowa 168, 6 N.W. 257; Onstatt v. Murray, 22 Iowa 457; Ewell v. Greenwood, 26 Iowa 377; Sherman v. Hasting, 81 Iowa 372; Hanger v. City of Des Moines, 109 Iowa 481; Whetstone v. Hill, 130 Iowa 637, 105 N.W. 193; Kensinger v. Hanler, 195 Iowa 651, 192 N.W. 264; Hann v. Missler, 132 Iowa 709, 109 N.W. 211; Davis v. Town of Bonaparte, 137 Iowa 197; where a public work of a permanent character is erected without condemnation proceedings by a party vested with the power to appropriate private property for a public use, the right of action accrues when the work is constructed, and an action to recover damages for the injury on the theory of a permanent trespass is barred after the statutory period as in the ordinary civil cases. Fowler v. Des Moines Ry. Co., 91 Iowa 553, 60 N.W. 116; Nichols, Ibid., Section 345 (2d ed.); New York Ins. Co. v. Clay County, 221 Iowa 966, 267 N.W. 79, held that a mortgagee's action against the county for removal of gravel from the mortgaged property without the consent of the mortgagee, being an action for the impairment of security, was therefore barred by the five year statute of limitations. Special enactments which limit the time to a much shorter period than provided in the general statute of limitations in specified types of condemnation have been held constitutional. Taylor v. Drainage District, 167 Iowa 42, 148 N.W. 1040; Pratt v. Des Moines R. Co., 72 Iowa 249, 33 N.W. 666.

158. See Section 9(c), supra.

DIVISION III

COMPENSATION

SECTION 13. GENERAL RULE AS TO THE MEASURE OF DAMAGES

In determining the value of the land actually taken, the measure of damages is the market value thereof.[1] However, the taking of land may have a broader impact on a tract as a whole, and in this situation the measure of compensation is the difference between the fair and reasonable market value of the whole tract before the taking and the fair and reasonable market value of what remains after such appropriation[2] disregarding any benefit which may result by reason of the taking or use of the condemned parcel.[3] In short, the question is how much less is the tract as a whole worth with a piece taken out of it than it was worth before the dismemberment, excluding all considerations of possible benefits.

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1. See Section 14(a), infra.
2. Hall v. City of West Des Moines, 245 Iowa 458, 62 N.W.2d 734 (1954); Wilson v. Fleming, 239 Iowa 918, 31 N.W.2d 393 (1948); Maxwell v. Highway Commission, 223 Iowa 159, 271 N.W. 883 (1937); Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685 (1932); Gregory v. Kirkman Ind. School Dist., 193 Iowa 579, 187 N.W. 553 (correct and concise instruction as to the measure of compensation); Walter v. Platt, 168 N.W. 808, 184 Iowa 203; Klopp v. Chic. etc. Ry. Co., 142 Iowa 474, 119 N.W. 373; Watkins v. Wabash Ry. Co., 137 Iowa 441, 113 N.W. 924 (an instruction which limits recovery to the value of the land actually taken and ignores a depreciation in value of the farm as a whole where there is competent evidence of such depreciation is erroneous). Actually nearly every condemnation opinion begins with a restatement of the rule as stated and only representative modern cases have been cited in this footnote.
3. Iowa Constitution, Article I, Section 18.

a. Time of Measurement of Damages

General speaking, the damages are to be determined as of the time of the taking,[4] but in these cases the term "taking" is used in a rather broad and inaccurate sense.[5] A more critical and careful analysis appears to be that damages are to be assessed as of the time when the sheriff's commissioners make their appriasement if the condemnor proceeds under the assessment with reasonable diligence, and the values as they existed at that time are to control on appeal.[6] However, it has been held that when the land is not subject to marked fluctuation, it is not error to admit evidence of the value of such property at the time of trial, although the sheriff's jury appraisement occurred over two years previous to that date.[7]

b. Benefit Excluded

Article I, Section 18, of the Iowa Constitution expressly excepts from consideration any benefit that might be derived from the improvement. This prohibition has been construed with extreme liberality so

4. Millard v. Mfg. Co., 200 Iowa 1063, 205 N.W. 979; Welton v. Highway Commission, 211 Iowa 625, 233 N.W. 302 (1930). Orgel, On Valuation Under Eminent Domain, Section 63, p.210; Nichols, On Emiment Domain, Sections 436 and 437 (2d ed.).
5. "Taking" means in its proper usage the actual appropriation of the land by the condemnor. This may occur long after the appeal or it may never occur. Grear v. Des Moines etc. Ry. Co., 20 Iowa 523; Iowa Electric Co. v. Scott, 206 Iowa 1217, 220 N.W. 33; Ford v. Board of Park Commissioners, 148 Iowa 1, 126 N.W. 1030.
6. Ellsworth etc. v. Ry. Co., 91 Iowa 386, 389, 59 N.W. 78 (1894); accord, 20 C.J. 832.
7. Koster v. Sioux County, 195 Iowa 214, 191 N.W. 993 (1923). See also Maxwell v. Highway Commission, 223 Iowa 159, 271 N.W. 883, (1937) (no error although trial a month after sheriff's jury appraisement); Ellsworth etc. v. Ry. Co., 91 Iowa 386, 59 N.W. 78 (1894) (evidence at time of trial held prejudicial).

as to prevent the setting off of benefit in allotting damages to the whole tract when only a part thereof has been taken. In other words, the Supreme Court of Iowa has made no distinction between the exclusion of benefit whether with reference to the land actually taken or damages to the remainder.[8]

SECTION 14. WHAT CONSTITUTES SEPARATE PARCELS

a. A Jury Question

The rationale for the rule as to the measure of damages is that one who owns a thing is entitled to it unimpaired. Those who take from it must respond in damages for the injury. The taking, in some instances, may not diminish the value of the whole beyond the value of the portion appropriated.[9] However, in the usual case the injury to the property as

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8. Deaton v. Polk County, 9 Iowa 594; Isreal v. Jewett, 29 Iowa 475; Frederick v. Shane, 32 Iowa 254; Gist v. Castner, etc. Drainage Dist., 137 Iowa 711, 115 N.W. 474; Bland v. Herenbaugh, 39 Iowa 532; Britton v. Des Moines, 59 Iowa 540, 13 N.W. 710; Haggard v. Algona School Dist., 113 Iowa 486, 85 N.W. 777; Slater v. Mount Pleasant Plank Road, 1 Iowa 386; Gregory v. Kirkman Ind. School Dist., 187 Iowa 553, 193 N.W. 579; Neddermeyer v. Crawford County, 160 N.W. 330; see also Witt v. State, 223 Iowa 156, 272 N.W. 419 (1937) (where it was held that the omission of the phrase that the benefit shall not be considered from one specific instruction was not prejudicial error when such phrase occurred three times in the instruction). Some jurisdictions permit benefits to be set off against damages to the remainder but not against the value of the land taken under a constitutional provision like the one in Iowa.
9. Nichols, Ibid. Section 238 (2d ed.) "The burden of proof is on the landowner to show that the taking of a part of his property will cause damage to the remainder." In re Platte Valley Irrigation Dist., 275 N.W. 593 (Nebr. 1937) (tract of 46,000 acres of contiguous land. Point in this case is reached where damages to remainder becomes remote, speculative, and inconsequential).

a whole is far in excess of the value of the part taken, and therefore damages must be allotted for injury to the entirety to effectuate full and complete redress.[10]

Thus, in eminent domain proceedings when a parcel of land is condemned, it becomes important to determine the size and kind of entity which will be affected thereby. There are few definite rules that can be laid down.[11] Under the Iowa decisions, the question of whether an entire tract should be considered as a whole or a portion of it separately is a question of fact which in disputed cases should be submitted to the jury.[12]

Although the landowner in his appeal only describes a portion or part of his land, such description does not preclude him from proving and recovering damages to his whole farm because of the appropriation

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10. See Walter v. Platt, 184 Iowa 203, 168 N.W. 808.
11. Nichols, Ibid., Section 241 (2d ed.), Elliott, On Roads and Streets, Section 288.
12. Ellsworth v. Chic. etc. Ry. Co., 91 Iowa 386, 59 N.W. 78, (1894); Paulson v. Highway Commission, 210 Iowa 651, 231 N.W. 296 (1930) (whether non-contiguous tracts used for stock raising should be considered together in estimating damages for changing location of the road held for the jury); Hoyt v. C. M. & St. Paul Ry. Co., 117 Iowa 296, 300, 90 N.W. 724 (distance of forty rods between an eighty acre plot and a forty acre plot raised a jury question of whether the tracts constituted one farm. Yet, when one witness testified that the lands were used together as a unit and his testimony was stricken out because of improper estimate, it was not reversible error to confine the consideration to the eighty acre tract alone); Hoeft v. State, 221 Iowa 694, 266 N.W. 571 (1936) (properties had different uses, separate sets of buildings and separate mortgages); Westbrook v. Ry. Co., 115 Iowa 106, 88 N.W. 202; Paulson v. Highway Commission, 210 Iowa 651, 231 N.W. 296.

manner,[18] even though the legislature has expressly provided. Such an act may be said to be unconstitutional because no public use is and no public necessity can be subserved by the transfer. This limitation, however, has no application when the state takes over the enterprise.[19]

When an easement is taken over, land already devoted to public use, unless actual damage is shown by the abutter, only a nominal damage is awarded to him since there is no presumtpion that the two easements are conflicting. The rule has been enforced even in the case of the crossing of a railroad by a highway or another railroad, and is frequently applied when a telegraph company acquires the right to lay its wires along a railroad location.[20]

Different problems are involved when an easement crossing is involved. The great weight of authority is that where there is a natural way or where a highway already exists and is crossed by a railroad company under its general license of building a railroad, and without any specific grant by the legislature to obstruct the highway or waterway, the railroad company is bound to make and keep its crossing at its own expense in such condition as shall meet all the reasonable requirements of the public as changed conditions and increased use may demand.[21] This duty may require the building of an overhead crossing or underpass when it is the only feasible and reasonable type under the circumstances, and such duty

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18. Nichols, Ibid. Section 352 (2d ed.)
19. Nichols, Ibid. Section 364, Section 353 (2d ed.) Diamond Jo Line v. Davenport, 114 Iowa 432, 87 N.W. 399.
20. Nichols, Ibid. Section 242 (2d ed.)
21. M.C. & Q.R. Co. v. Board of Supervisors, 144 Iowa 10, 121 N.W. 39; C. & N.W. Ry. Co. v. Drainage District 142 Iowa 607, 121 N.W. 193; Chicago B. & Q. R. Co. v. People, 200 U.S. 561; Lake Erie & W. Ry. Co., 28 N.W. 3 (Minn.) (1886); Elliott, Roads & Streets (4th ed.) Sections 1010-1014.

may be enforced by mandamus.[22]

However, if the railroad company has built its line prior to the establishment of the highway, the rule is different. In the absence of express legislation, the railroad company cannot be required to construct a crossing over its right-of-way in order to prolong or connect a street established after the location and acquisition of the right-of-way.[23] In this latter instance, the extent of its statutory duty in Iowa is to construct a grade crossing,[24] or pay its proportionate share of the cost of a viaduct if the city proceeds to have one built under Iowa Code Section 387 (1958).

SECTION 2. USE FOR CONDEMNED PROPERTY MUST BE PUBLIC NOT PRIVATE[25]

a. Constitutional Requirement

Article I, Section 18 of the Iowa Constitution provides that "private property shall not be taken for public use (emphasis supplied) without just compensation....." This provision in the Constitution has been held to limit acquisitions of property by the

22. Fort Dodge v. M. & St. Paul Ry. Co., 87 Iowa 389, 54 N.W. 243; Newton v. Chi. R.I. & Pac. Ry. Co., 66 Iowa 422, 23 N.W. 905; in the Albia case, 102 Iowa 624, 71 N.W. 51, it was conceded that if the highway had been established before the building of the railroad track and that an overhead crossing was the only kind safe and feasible, the railroad company would be bound to construct and maintain such overhead crossing. 51 C.J. 657, Section 347; Elliott, Roads & Streets (4th ed.) Section 1011-1014; Nichols, Ibid. Section 5.4(2) (3d ed. (1950)
23. Albia v.C.B. & Q.R. Co., 102 Iowa 624, 71 N.W. 51. See also M. & St. L. Ry. Co. v. C.R.G. & N.W. Ry. Co., 114 Iowa 502, 87 N.W. 410.
24. Albia v. C.B. & Q. R. Co., supra at 628.
25. Also see Section 4(f), infra.

of the right-of-way.[13] Further, the fact that the condemnor omits a portion of the claimant's land which will be affected by the appropriation in the sheriff's jury proceedings does not prevent the claimant on appeal from recovering for injury to his entire tract,[14] but such misdescription in the condemnation notice or commissioners' return of the tract that will be damaged by the taking will not invalidate the assessment, and such appraisement will stand unless the complaining

13. "The land described in the petition and notice is one hundred twenty acres and the plaintiff's farm consisted of 318 acres, and on the trial, plaintiff was allowed to prove the damages to the entire farm. The defendant, the railway company, assigned this as error and insisted that the inquiry should be limited to the premises described in the notice of appeal. Held: no error." Dudley v. Minn. etc. Ry., 77 Iowa 408, 42 N.W. 359. "We think it is immaterial that the defendant gave notice of the appraisement of damages to part only of a tract of land. If the tracts specified are merely parts of a body of land which should be treated as an entirety, the commissioners are appointed by the sheriff to determine the damages to the whole, and the same rule should be followed in the district court." Ellsworth v. Ry. Co., 91 Iowa 386,390, 59 N.W. 78.

14. Cook v. Boone Suburban Electric Ry. Co., 122 Iowa 437, 98 N.W. 293, "The fact that a railroad in condemnation proceedings described only that portion of a farm which was north of another railroad previously constructed across it from the east to west could not deprive the owner of the farm, on her appeal from the award of sheriff's jury, of her right to establish and recover damages to her entire farm, when in fact such northern portion was a part of the whole." McCall v. Highway Commission, 217 Iowa 1054, 252 N.W. 546 (1934). Although the condemnor describes and has damages assessed by the sheriff's jury on property to which the claimant has record title, the claimant may on appeal show equitable ownership of other lands which compose the whole farm, and thus recover on the basis of injury to the entire farm.

party corrects such an error by an appeal.[15]

On appeal, it is error to allow evidence as to damages per acre without definite proof as to the number of acres in the several tracts or to allow evidence of damages to certain tracts indefinitely referred to without showing their bearing or connection with the case.[16]

b. Physical Separation and Separate Ownership

In the case of a partial taking where two or more parcels of land are involved, separately owned by different persons, yet used together as a farm, such tracts are not to be combined in the assessment of damages. Parcels may be considered together in assessing damages only when there is unity of ownership,[17] and when the claimant has the same estate

15. Where notice by the owner of adjacent tract to the sheriff demanding the appointment of commissioners to assess damages as an entirety, and the notice to the defendant railroad and the commissioners' return described both tracts, and it was shown that the plaintiff never acquired title to one of the tracts, it will be presumed that the sheriff's jury in estimating the damages considered only the tract owned by the plaintiff; but if more was included, the error could be corrected on appeal. Hall v. Wabash Ry. Co., 141 Iowa 250 119 N.W. 927.
16. Ball v. Railway Co., 71 Iowa 306, 32 N.W. 354.
17. "We have had our attention called to no case, nor have we been able to find one where a court has squarely held that where two or more tracts of land are involved separately owned by different persons, they may be combined in one condemnation proceeding. It is quite apparent that the larger the tract of land involved, the greater the damage will be; and it is our opinion that where different tracts are involved and owned by different persons, and the improvement touches or affects only one tract, it would be wholly inequitable to allow other parties owning individual different tracts to attach their land to the tract through which the improvement runs and thereby secure damages to which they are not entitled, or thereby share in the damages suffered by the tract of land through which the improvement runs." Duggan v. State, 214 Iowa 230, 242 N.W. 98,99. Nichols, Eminent Domain, Section 241, p. 744.

or interest in all the land under consideration. Thus, if the claimant owns a life estate or a one-third interest in tract A and the fee in tract B, the parcels cannot be considered together in assessing damages;[18] but if he is the owner of a life estate or one-third interest in both tract A and B, they may be so considered.[19] Further, it is improper to permit the jury in assessing damages to tract A owned by the claimant to consider advantages to such tract by reason of an adjoining tract B owned by the claimant and another.[20] However, in Cutler v. Highway Commission,

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18. Duggan v. State, 214 Iowa 230, 242 N.W. 98,99 (in this case 80 acres were owned jointly in fee by Wm Duggan and Mary Duggan. Mary Duggan was the owner in fee of an 80 acre tract lying contiguous to the first tract. The tracts were used together as a farm. Held, that they could not be considered together in assessing damages); Nichols, Ibid., Section 241 (2d ed.) ("also it is sometimes held necessary that an owner hold the entire tract by the same estate or interest"). Tellman v. Lewisburg, etc. Ry. Co., 133 Tenn. 554, 182 S.W. 597 (a wife when a railroad condemned a way through land owned by herself and husband as tenants by the entirety could not recover damages to a tract of land owned by her individually lying across a turnpike from the other tract and used in connection with it); Conness v. Indiana R. R. Co., 193 Ill. 464, 62 N.E. 221; Glendenning v. Stahley, 173 Ind. 674, 91 N.E. 234; Westbrook v. Muscatine North, etc. Ry. Co., 115 Iowa 106, 88 N.W. 202; Cutler v. State, 224 Iowa 686, 278 N.W. 327.
19. Westbrook v. Muscatine North etc. Ry. Co., 115 Iowa 108, 88 N.W. 202.
20. Cutler v. Highway Commission, 224 Iowa 686, 278 N.W. 327 (1938). See Gorgas v. Phil. H. & P. Ry. Co., 20 Atl. 715; Medina Irrigation Dist. v. Seekatz, 237 Fed. 805; Gray's Harbor Boom Co. v. Lownsdale, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267; in Westbrook v. Muscatine North Ry. Co., 115 Iowa 108, 88 N.W. 202, the fact that one of the life tenants owned the land between the tracts under consideration and therefore had control over a private way located thereon was held admissible on the question whether the tracts constituted one farm.

224 Iowa 686, 278 N.W. 327 (1938), it was held that the admission of such testimony was not prejudicial error.

Even where unity of ownership exists, the problem is still complex. The physical location of the land should first be examined.[21] Political boundary lines have little weight in these cases.[22] Actual physical separation by intervening space between the parcels is a very important factor although it is not necessarily a conclusive test.[23] Further, the fact that parts of the property were acquired at different times will not defeat recovery for injury to the whole.[24]

c. Different Uses

Under the Iowa cases unity of use has been one of the chief

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21. Ham v. Wisconsin, etc. Ry. Co., 61 Iowa 716, 17 N.W. 157.
22. 20 C.J. 739; Elliott, On Roads & Streets, Section 288 (4th ed.); Duggan v. State, 214 Iowa 230, 242 N.W. 98; Hall v. Wabash, 141 Iowa 253, 119 N.W. 928; Cook v. Railroad Co., 122 Iowa 437, 98 N.W. 293; Peden v. Ry. Co., 78 Iowa 131, 42 N.W. 625.
23. Fleming v. Chic. etc. Ry. Co., 34 Iowa 353 (separated by a street, the decision appears to have laid down a stricter rule than is now followed by the Iowa authorities. Quoting at p. 357, "The rule established by these cases then is to ascertain the fair market value (leaving out of view all the time any benefit resulting from the improvement) of the premises over which the road passes, and the like value of the same premises in their condition after the right of way is taken. It is not within the rule to consider the value of other premises belonging to the same party, not touched by the road at all"). 20 C.J. 737 (If the several parcels have no relationship except that which arises out of common ownership, the necessary unity does not exist).
24. Cox v. Mason City Ry. Co., 77 Iowa 20, 41 N.W. 475.

criteria.[25] Thus, two parcels physically distinct and separated by a highway,[26] or a street or alley,[27] or by a railway right of way,[28] or by intervening land,[29] but devoted to one actual and permanent use have been held to constitute a single tract within the meaning of the rule.

Where an owner actually uses parts of what would constitute a single tract for different or separate purposes, the parts may be held to be independent though they are not physically separated.[30]

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25. 20 C.J. 737. The following rather verbose rule is laid down in Hoyt v. C.M. & St. P. R. Co., 117 Iowa 296,300, 90 N.W. 724 (to constitute unity of property between two contiguous tracts but prima facie distinct parcels of land, there must be such connection or relation of adaptation, convenience, and actual permanent use as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left in the most advantageous and profitable manner in the business for which it is used.) Ellsworth etc. v. Ry. Co., 91 Iowa 386, 59 N.W. 78 (rather large tract of unimproved land).
26. Ham v. Wisconsin R. Co., 61 Iowa 716, 17 N.W. 157.
27. Haggard v. Ind. School District of Algona, 113 Iowa 486, 85 N.W. 777; Renwick v. Railroad Co., 49 Iowa 664, 672.
28. Cook v. Boone Ry. Co., 122 Iowa 437, 98 N.W. 293.
29. Paulson v. Highway Commission, 210 Iowa 651, 231 N.W. 296 (where space intervening was about one-half mile, held question for jury whether the land should be considered as one tract); Hoyt v. C.M. & St. P. Ry. Co., 117 Iowa 296,300, 90 N.W. 724; Westbrook v. M.N. & S. Ry. Co., 115 Iowa 106, 88 N.W. 202.
30. Hoeft v. State, 221 Iowa 694, 266 N.W. 571 (1936) (properties had different uses, separate sets of buildings and separate mortgages); Haines v. St. Louis Ry. Co., 65 Iowa 216, 21 N.W. 573 (city line divided property and affected uses of the land); Westbrook v. Muscatine, etc. Ry. Co., 115 Iowa 106, 88 N.W. 202.

d. Contemplated Use

Where the owner of property has not actually made a division although such a division would most advantageously utilize the land, the property will not be considered as separate in law.[31] Even a contemplated plan of division and offering for sale of parcels in lots will not destroy its character as a single tract if it continues to be used by the owner as a single tract.[32] However, where the property is separate but the landowner shows a possibility of combining the damaged property with the separate property, it is correct to consider this possibility in determining damage although damage to the separate property may not be considered.[33]

e. Several Tenements

Where there are several tenements or buildings leased to different tenants on one lot, the estate may be considered as one parcel,[34] but this principle does not apply when the buildings leased are upon

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31. Doud v. Mason City, etc. Ry. Co., 76 Iowa 438, 41 N.W. 65; Fleming v. Chic. D. & M. Ry. Co., 34 Iowa 353,354,357,358; Gray v. Ry. Co., 129 Iowa 68, 105 N.W. 359. The fact that part of the land is river bottom and that different parts of it might be used more advantageously for different purposes does not preclude its being regarded as one tract if the owner has treated the land as an entity. 20 C.J. 738.
32. Cummins v. Des Moines R. R. Co., 63 Iowa 397, 19 N.W. 475; Walter v. Platt, 184 Iowa 203, 168 N.W. 809; Gray v. Iowa Cent. R. Co., 129 Iowa 68, 105 N.W. 359.
33. Cutler v. State, 224 Iowa 686, 278 N.W. 327 (1938)(landowner wished to combine 80 acres of the damaged tract with 80 acres of abutting property and the jury was allowed to consider this possibility).
34. Whitney v. Boston, 98 Mass. 312 (The fact that the estate was occupied by several distinct buildings or tenements, each leased to different parties was held not to so sever it that the premises were to be regarded as separate estates disconnected from each other). Cooper v. Manhattan Ry. Co., 85 Hun 217 (N.Y.), 32 N.Y.S. 1054; White v. Fifth Avenue Bridge Co., 189 Pa. 500, 42 Atl. 136; 20 C.J. 738, Section 190. The fact that there are two buildings on a tract does not preclude it from being regarded as one parcel, but two buildings on adjoining lots cannot be regarded as one, although both are operated as a hotel under a single management.

separate lots.[35]

f. Unoccupied Land Not Devoted to Use of Any Character

When land is unoccupied and so not devoted to use of any character, and especially when it is held for purposes of sale in building lots, a physical division into blocks by roads and streets creates independent parcels as a matter of law.[36] However, in case the complainant is the owner of the whole block, he may recover for the injury to such tract, and is not confined to the damages to the lots actually touched or appropriated for the public improvement.[37]

SECTION 15. ITEMS OF DAMAGE

a. Recovery for the Actual Parcel Condemned

(1) Distinction Between Items of Value and Items of Damage

In orderly procedure to establish just compensation, the landowner should first introduce evidence showing the value or worth of his property as a whole before the appropriation. The rule of admissibility is extremely liberal. Broadly speaking, the true rule seems to permit the proof of all the varied elements of value, that is, all the facts which the owner would properly and naturally press upon the attention of a buyer to whom he was negotiating a sale, and all other facts which would naturally influence a person of ordinary prudence to purchase.[38] With the items of value before the jury, the landowner should then proceed to show how the property was damaged or depreciated by the taking.

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35. Minn. etc. Ry. Co. v. Doran, 15 Minn. 230; Hoeft v. State, 221 Iowa 694, 266 N.W. 571 (1936); Nichols, Ibid., Section 241 (2d ed.).
36. Nichols, Ibid., Section 241 (2d ed); 20 C.J. 739; Fleming v. Chic. etc. Ry. Co., 34 Iowa 353.
37. Cox v. Mason City Ry. Co., 77 Iowa 20, 41 N.W. 475; see also Cummins v. Des Moines Ry. Co., 63 Iowa 397, 19 N.W. 268. Contra; Wilcox v. St. Paul Ry. Co., 35 Minn. 439, 29 N.W. 148.
38. Koster v. Sioux City, 195 Iowa 214, 191 N.W. 993; Ranch v. Cedar Rapids, 134 Iowa 563, 111 N.W. 1027; Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685 (1932).

But as will be seen, in the actual cases the distinction between items of value and items of damage has not been retained. They have been grouped indiscriminately together as pertinent factors pertaining to the condition of the property as a whole before and after the taking.

(2) Mineral Deposits

Where the market value of the land condemned is increased by the presence of mineral deposits, the landowner is entitled to consideration of this added value.[39] However, as indicated subsequently in subsection (c) only market value figures may be made the basis for damage and not the estimated profits from the removal of the deposits.[40]

(3) Buildings and Improvements on the Premises

Even though the strip condemned is vacant land, the owner may introduce evidence of the existence of buildings and improvements on the remaining property, and he is entitled to recover compensation for the property taken on the basis that it is a part of an improved tract.[41] However, it is not error to exclude the value of a house not located on the premises.[42]

When structures and permanent fixtures are located on the parcel sought, the rule is that the condemnor in the absence of agreeement with the landowner must take them as incidental to it.

39. Nedrow v. Michigan-Wisconsin Pipe Line Co., 245 Iowa 763, 61 N.W.2d 687 (1954); Hall v. City of West Des Moines, 245 Iowa 458, 62 N.W.2d 734 (1954); Doud v. Mason City & Ft. Dodge Ry. Co., 76 Iowa 438, 41 N.W. 65 (1888).
40. Nedrow v. Michigan-Wisconsin Pipe Line Co., 245 Iowa 763, 61 N.W.2d 687 (1954).
41. Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685 (1932). Orgel, On Valuation Under Eminent Domain, Section 51 (principle is universally accepted); Illinois etc. Ry. Co. v. Humiston, 208 Ill. 100, 69 N.E. 880 (1904).
42. Hayes v. Chicago, R.I. & P. R. Co., 239 Iowa 149, 30 N.W.2d 743 (1948).

with the landowner must take them as incidental to its appropriation.[43] Although the early decision of Hollingsworth v. Des Moines & St. Louis Ry. Co., 63 Iowa 443, 19 N.W. 325 (1884) contained language that may have occasioned some doubt on this score, the principle has not been seriously questioned since that opinion. In Ranck v. Cedar Rapids, 134 Iowa 563, 111 N.W. 1027 (1907) and Cutler v. State, 224 Iowa 686,

43. 20 C.J. 799, 800; Nichols, Ibid., p. 693 (2d ed.); Lewis, on Eminent Domain, Section 726 (3d ed.); Orgel, Ibid., p. 151; Moran v. Highway Commission, 223 Iowa 936, 274 N.W. 59 (1937) (holding compensation must cover total loss of a well located in the right-of-way); Kemmerer v. Highway Commission, 214 Iowa 136, 241 N.W. 696 (1932) (appellee (the landowner) was under no legal obligation to consent to the removal of his improvements to some other point on the farm, nor should his refusal to do so be made as a basis for denying him damages resulting from a separation of such improvements from the rest of the farm); State v. Miller, 92 S.W.2d 1073 (Texas 1936) (condemnation proceedings are in the nature of enforced suit in which the agency appropriating land stands in position of buyer and consequently must either take and pay for land with permanent improvements thereon or reject the land in toto, and cannot insist on removing the improvements to other land and pay simply for land appropriated. In determining what improvements pass with title to condemned land, the same rule applies as governs between ordinary vendor and vendee. The state could not, over condemnee's protest, remove residence building from the land condemned for highway purposes onto another portion of condemnee's farm and pay condemnee solely for the land taken, together with costs and damages occasioned in moving building, but was required to pay condemnee for the building); City of Los Angeles v. Klinker, 25 P.2d 826 (1934); City of Kansas v. Morse, 105 Mo. 510, 16 S.W. 893 (1891); Finn v. Providence Gas & Water Co., 99 Pa. 631, (1882); Forney v. Fremont E. & M. V. R. Co., 36 N.W. 806, 23 Neb. 465 (1888); Matters of William, 202 App. Div. 738, 195 N.Y.S. 82 (1922); U.S. v. Seagren, 50 F2d 333, 75 A.L.R. 1491 (1931); Jackson v. State, 213 N.Y. 34, 106 N.E. 758; Matter of City of New York, 256 N.Y. 236, 176 N.E. 377 (1931); City of Detroit v. Loula, 227 Mich. 189, 198 N.W. 837; Highway Commission v. Haid, 59 S.W.2d 1057 (Mo. 1934).

278 N.W. 327 (1938) the rule appears to have been conceded by the taker. In Des Moines Wet Wash Laundry Co. v. Des Moines, the court paid lip-service to this general proposition although its consideration was in no way necessary for the determination of that case.[44]

The proper measure of damages is the market value of the land with the building upon it, and the owner, therefore, receives nothing for the building unless it increases the market value of the land. Accordingly, evidence of the structural value of the building is not admissable as an independent test of value. When, however, it is shown that the character of the building is well adapted to the location, the structural cost of the building, after making proper deductions for depreciation by wear and tear, is a reasonable test of the amount by which the building enhances the market value of the property.[45] As in other cases of determining market value, not only the character and condition of the building but also the uses to which it might be put are

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44. 197 Iowa 1082, 198 N.W. 486 (1924), "It is generally held in condemnation proceedings, the property being taken in invitum that the controlling principle is analogous to vendor and vendee--if fixtures pass to the condemnor, they must be paid for, but if the owner elects to take the fixtures, a different rule must obtain." See also 1930 Attorney General Reports 184, "We are therefore of the opinion that where a tract of land is taken for highway purposes under eminent domain statutes of this state, and there are buildings erected and fixed to the real estate so as to be a part of it, the value of the buildings must be considered in determining compensation to be awarded the owner in the absence of an expressed agreement with the owner to the contrary."

45. Evidence of cost of the building is admissible as an aid to the jury in arriving at its present value and the value of the entire property. Corcoran v. Des Moines, 205 Iowa 405, 215 N.W. 948 (1927); Faust v. Hosford, 119 Iowa 97, 93 N.W. 58 (1907); Ranck v. City of Cedar Rapids, 134 Iowa 563,569, 111 N.W. 1027 (1907) (evidence as to the material used and the durability of the structure is admissible); cf. Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685 (1932).

matters for consideration.[46]

Where the owner of the land that is about to be taken by condemnation proceedings commences the erection of structures, it may be in such bad faith that the court will regard such structures as personal property and not allow compensation for them.[47]

Portable buildings, not affixed to the soil, need not be considered in determining damages.[48]

(4) Trees, Shrubbery and Crops

The value of trees on the land has been considered a proper element to take into consideration in determining the market value of the strip condemned.[49] Also, the value of the crops lost by the condemnation is an item for the jury to weigh in arriving at the correct valuation of the land taken.[50] The general accepted rule both in Iowa and other jurisdictions seems to be that the value of crops or trees destroyed in a taking is provable not as separate and distinct items

46. Nichols, Eminent Domain, Vol. I, Section 227, p. 695; Ranck v. City of Cedar Rapids, 134 Iowa 563,571, 111 N.W. 1027 (1907) (showing the purpose for which the building is adapted and its potentialities).
47. Nichols, Ibid., p. 696; 20 C.J. Sec. 248, p. 302; Elliott, On Roads and Streets, Vol. I, Section 294 (4th ed.).
48. Nichols, On Eminent Domain, p. 694; Whitely v. Baltimore, 113 Md. 541, 77 Atl. 882; Kansas City, etc. Ry. Co. v. Second Imp. Co., 256 Mo. 386, 166 S.W. 296.
49. Kukkuk v. City of Des Moines, 193 Iowa 444,456, 187 N.W. 209; Maxwell v. Highway Commission, 265 N.W. 899 (no Iowa report as opinion withdrawn); Adkins v. Smith, 94 Iowa 758, 64 N.W. 761; Ranck v. Cedar Rapids, 134 Iowa 563,566, 111 N.W. 1027 (1907).
50. Bracken v. City of Albia, 194 Iowa 596, 189 N.W. 972; Lance v. C.M. & St. P. R. Co., 57 Iowa 636, 11 N.W. 612.

of damage, but merely as tending to show the market value of the land taken.[51]

(5) Fencing

The Iowa decisions hold that the owners of premises taken should not be allowed a fence as a fence in the assessment of damages, and that it would not do to say that a proprietor would have to fence his land, and therefore, he would be allowed some definite price for some particular kind of fence. However, if by the establishment of the road, the land is thrown open and left in a mere unfenced consition, this fact should be considered in arriving at the depreciated value of the remaining premises.[52] Further, the need of additional fence which would be required after the appropriation and the fact that such fence will require repair and replacement in the future is admissible to show the additional burden on the remaining property which has a tendency to diminish its market value.[53] In both of the situations where the property has been

51. In regard to crops, 20 C.J. 798; Bracken v. City of Albia, 194 Iowa 596, 189 N.W. 972; Lance v. C. M. & St. P. R. Co., 57 Iowa 636, 11 N.W. 612. In regard to trees, Adkins v. Smith, 94 Iowa 758, 64 N.W. 761; Ranck v. City of Cedar Rapids, 134 Iowa 563, 111 N.W. 1027; Maxwell v. Highway Commission, 265 N.W. 899 (no Iowa report as opinion withdrawn), "The appellant also objects to the admission of the testimony as to the value of timber or trees cut and destroyed from the appropriated strip. Such testimony is always admissible to prove one of the elements of damage...The value of trees growing on the land has been considered a proper element to take into consideration in such cases."
52. Dean v. State, 211 Iowa 143, 233 N.W. 36, 38; Henry v. Dubuque R.R. Co., 2 Iowa 288; Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685 (1932).
53. Maxwell v. Highway Commission, 223 Iowa 1591, 271 N.W. 883; Dean v. State, 211 Iowa 143, 233 N.W. 36,38; Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685,693.

left open and unfenced, or where additional fence will be required by reason of the condemnation "what a hypothetical fence desired by the owner would cost is, therefore, out of the question and cannot be admitted in evidence.[54] But the cost of removal and replacing an existing fence is admissible.[55] However, such cost cannot be recovered as a separate and distinct damage. It is merely a factor to consider in determining the extent of the landowner's injury.[56]

(6) Condemnation Is Regarded as Total

It should be noted that the courts recognize a vital distinction between introducing evidence of the possible or actual constructed improvements as bearing on the conditon of the remaining property and the introduction of such evidence for the purpose of diminishing damages on a theory that certain revocable privileges are given to the landowner in the condemned parcel. In the former instance such evidence is admissible, but in the latter it is not.[57]

The rule is well settled in most jurisdictions that if the condemnor takes the property, he takes it as it is.[58] In the absence of consent

54. Dean v. State, 211 Iowa 43, 233 N.W. 36,38; Kennedy v. Dubuque R.R., 2 Iowa 51; Hanrahan v. Fox, 47 Iowa 102; Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685, 692 (1932) (where it is said that evidence of the value of a hypothetical additional fence probably necessitated by condemnation of a strip for highway is inadmissible as speculative, indefinite, and mere guess-work).
55. Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685,690 (1932).
56. Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685,691 (1932).
57. Moran v. Highway Commission, 223 Iowa 936, 274 N.W. 59,61 (1937).
58. Orgel, On Valuation Under Eminent Domain, p. 151; 22 C.J. 768, "The possibility that the appropriator will not exercise or the fact that there is no present intention of exercising to the full extent the rights acquired should not be considered in the reduction of damages since the presumption is that the appropriator will exercise his rights and use and enjoy the property taken to the full extent." Nichols, Ibid., Section 226 (2d ed.), "Privileges which are merely permissive and subject to revocation by the condemning party at any time cannot be availed of in reduction of damages." In re State Highway Commission, 256 Mich. 165, 239 N.W. 317 (1931).

of the landowner, he cannot confine his appropriation to just that portion of the owner's assets which are useful for the proposed improvement and allow the remaining assets of the landowner to remain on the condemned land unpaid for. It has been held in Cummins v. Des Moines & St. Louis Ry. Co., 63 Iowa 397,403, 19 N.W. 268, that the condemnor cannot have damages assessed on the theory that it will in fact use but part of the condemned land, and therefore that the possession and occupancy of the building situated on the right-of-way will not be disturbed. In Moran v. Highway Commission, 223 Iowa 936, 274 N.W. 59 (1937) it was held that evidence of the actual precaution taken by the highway commission to preserve a well on the right-of-way for the use of the adjacent owner was inadmissible and that damages should be assessed on the assumption that the well was appropriated by the commission.[59]

However, where a specific reservation is made, the condemnor is entitled to a reduction in damages.[60] This principle, as correctly understood and applied, merely permits the condemnor, by stipulating against future changes, to avoid a present assessment for possible or potential injuries to the remaining property because of future and likely alterations in the construction or operation of the improvement.[61]

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59. Accord, De Penning v. Iowa Power & Light Co., 239 Iowa 950, 33 N.W.2d 503 (1948).
60. DePenning v. Iowa Power & Light Co., 239 Iowa 950, 33 N.W.2d 503 (1948) (reservation allowed even by amendment on appeal); see also Moran v. Highway Commission, 223 Iowa 936, 274 N.W. 59,62 (1937) (dictum).
61. Orgel, On Valuation, Section 59, p. 198, "A number of courts have held that a taker may avoid liability for potential damages resulting from future change in the construction or operation by stipulating against such changes thereby making him liable in a new action in case he later violates this stipulation." Leading case McKelvey v. Allegheny County, 238 Pa. 580, 86 Atl. 521 (1913); East Side Levee District v. Jerome, 306 Ill. 577, 138 N.E. 192.

It is in no way intended to abrogate the doctrine that the condemnor must take the property as it is, nor does it obligate the landowner to accept offers by the appropriator of certain privileges or rights in the condemned land in reduction of damages.[62]

What has heretofore been said does not apply to voluntary agreements between the condemnor and landowner whereby some rights or privileges are granted or reserved with reference to the condemned property. Such binding stipulations may be properly considered in the trial.[63]

Statutory provisions that the condemnor may take less than full possession and thus minimize damages are not repugnant to the constitution.[64]

b. Recovery for Damages to the Property as a Whole

In determining the amount of damages it is proper for the jury to

62. Orgel, On Valuation, P. 151 (1936); 20 C.J. 768, "Nor can the landowner be compelled to accept...offers by the appropriator to allow him certain rights and privileges...in the condemned land ...in payment or reduction of damages"; Kemmerer v. Highway Commission, 213 Iowa 1313, 241 N.W. 696 (1937) ("appellee is under no legal obligation to consent to the removal of his improvements to some other point on the farm". See also Jeffery v. Chic. Ry. Co., 138 Wis. 1 120 N.W. 847; Toledo A.A. & N. R. Co. v. Munson, 57 Mich. 42, 23 N.W. 455; Nichols, Ibid., Section 205 (2d ed.)(compensation must be paid in money for the land actually appropriated).

63. 20 C.J. 767; Bartel v. Woodbury County, 174 Iowa 86, 156 N.W. 303 (cattle pass offered by the supervisors and accepted by the landowner as a part of the damages); Agne v. Seitsinger, 85 Iowa 305, 52 N.W. 228 (privilege of attaching fence to bridge being reserved to the grantor of an easement cannot be subsequently revoked without compensation).

64. Draker v. Iowa Electric Co., 191 Iowa 1376, 183 N.W. 896; Taylor v. Hudson, 147 Mass. 609, 18 N.E. 582; Sixth Ave. R. Co. v. Kerr, 72 N.Y. 592; Washington Cemetery v. Prospect Park, 68 N.Y. 592; McGregor v. Equitable Gas Co., 131 Pa. 522 19 Atl. 933.

take into consideration all pertinent factors pertaining to the condition of the property as a whole before and after the taking of the condemned strip.[65] Some of the factors to be considered are: (1) noise, air contamination, and deprivation of privacy,[66] (2) proximity of the improvement,[67] (3) increased danger of injury or destruction of property,[68] (4) the burden of additional fence,[69] (5) added difficulty of transporting stock across the right-of-way,[70] (6) the statutory duty on the

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65. For a general discussion of the problems in this area see Cromwell, Some Elements of Damage in Condemnation, 43 Iowa Law Review 191 (1958); Note, Methods of Proving Land Value, 43 Iowa Law Review 279 (1958).
66. Schoonover v. Fleming, 239 Iowa 539, 32 N.W.2d 99,101 (1948); Wilson v. Fleming, 239 Iowa 718, 31 N.W.2d 393 (1948); Ham v. Wis. I. & N. Ry. Co., 61 Iowa 716, 17 N.W. 157; Dimmick v. C. B. & St. L. Ry. Co., 58 Iowa 637, 12 N.W. 710; Simmons v. M. C. & Ft. Dodge Ry. Co., 128 Iowa 139, 103 N.W. 129.
67. Richardson v. Centerville, 137 Iowa 253, 114 N.W. 1071; Cummins v. D.M. & St. L. Ry. Co., 63 Iowa 397, 19 N.W. 268; Haggard v. Ind. School Dist., 113 Iowa 486, 85 N.W. 777.
68. Schoonover v. Fleming, 239 Iowa 539, 32 N.W.2d 99,101 (1948); Wilson v. Fleming, 239 Iowa 718, 31 N.W.2d 393 (1948); Small v. C. R. I. & P. Ry. Co., 59 Iowa 599, 13 N.W. 754; Dudley v. Mand. N. W. Ry. Co., 77 Iowa 408, 42 N.W. 359; Fleming v. C.D. & M. Ry. Co., 34 Iowa 353.
69. Nichols, Ibid., p. 734 (2d ed.). See Dean v. State, 211 Iowa 43, 233 N.W. 36,37; Maxwell v. Highway Commission, 271 N.W. 883, (Iowa 1937); Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685; Wilson v. Fleming, 239 Iowa 718, 31 N.W.2d 393 (1948).
70. The factor of transporting cattle across a highway may be considered as an element of damage, but estimated costs of such transportation are too speculative to be admitted in evidence. Trachta v. Highway Commission, 249 Iowa 374, 86 N.W.2d 849 (1957); Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85,93 (1948); Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685 (1932). See also Neddermeyer v. Crawford County, 190 Iowa 883, 175 N.W. 339.

abutting owner to destroy weeds along a highway,[71] (7) annoyance and inconvenience,[72] (8) evidence of a general advance in price of property in the immediate neighborhood, although attributable to the very public improvement for the use of which the condemnation is being made,[73] (9) the distance of the farm from market and the kind of road to market,[74] (10) the destruction of springs or wells as a result of the construction of the public work for which the land is taken,[75] (11) the cost and expense of equipping a new location,[76]

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71. Randell v. Highway Commission, supra, note that no cost figure for performing such duty may be shown however.
72. Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85 (1948); Schoonover v. Fleming, 239 Iowa 539, 32 N.W.2d 99 (1948); Haggard v. Ind. School Dist., 113 Iowa 486, 85 N.W. 777; Maxwell v. Highway Commission, 271 N.W. 883, , "One of the elements of the damages is the trouble and expense and inconvenience in crossing the highway in the operation of the farm". Besco v. Mahaska County, 200 Iowa 684, 205 N.W. 459 (1925).
73. In Ranck v. Cedar Rapids Ry. Co., 134 Iowa 563,572, 111 N.W. 1027, and also in Snouffer v. Chic. & N.W.Ry. Co., 105 Iowa 681, 75 N.W. 501, it was stated that evidence of a general advance in price of property at the date of the condemnation in the immediate neighborhood of that sought to be condemned although attributable to the very public improvement for the use of which the condemnation is being made is admissible on the question of the owner's damage. But see Section 15(c)(6), infra.
74. Welton v. Highway Commission, 211 Iowa 625, 233 N.W. 876 (1931); see however Moran v. Highway Commission, 223 Iowa 936, 274 N.W. 59,62 (1937) where the exclusion of such evidence was held no error.
75. Nichols, Eminent Domain, Section 238; Winkleman v. Des Moines Ry. Co., 62 Iowa 11, 17 N.W. 82 (the spring in this case was on the right-of-way and was destroyed by the building of an embankment thereon. See Moran v. Highway Commission, 223 Iowa 936, 274 N.W. 59 (destruction of well).
76. Des Moines Wet Wash Laundry v. Des Moines, 197 Iowa 1082, 198 N.W. 486,490 (1924) (leasehold case); contra, Fiorini v. City of Kenosha, 208 Wis. 496, 243 N.W. 761 (Wis. 1932); U.S. v. Inlot, 26 Fed. 482, 489 (1873); Chicago v. Cunnea, 329 Ill. 288, 160 N.E. 559 (1928) (holding that the cost of securing or renting a new location could not be considered).

(12) the fact that one tract is cut off from convenient access to another,[77] (13) the possibility of water damage as a result of the new facility,[78] (14) the danger of hunting in the condemned property,[79] (15) the danger to crops and occupants by construction of electric line,[80] (16) the loss of lateral support.[81]

c. Valuation Factors Which May Not Be Considered

(1) Specific Items of Damage May Not Be Introduced

While as pointed out in the two previous subsections almost innumerable items of damage may be introduced in order to show the effect which condemnation will have on the market value of the property, witnesses may not assign specific cost figures of those items of damage.[82] The rationale for this rule, which is rather strictly enforced, appears to be the fear that such costs are entirely too specu-

77. Bell v. Chic. etc. Ry. Co., 74 Iowa 343, 37 N.W. 768; Wilson v. Fleming, 239 Iowa 718, 31 N.W.2d 393 (1948).
78. Wheatley v. Fairfield, 213 Iowa 1187, 240 N.W. 628; Trachta v. Highway Commission, 249 Iowa 374, 86 N.W.2d 849 (1957).
79. Wheatley v. Fairfield, 213 Iowa 1187, 240 N.W. 628.
80. Evans v. Iowa Southern Utilities Co., 205 Iowa 283, 218 N.W. 66.
81. Kukkuk v. Des Moines, 193 Iowa 444, 187 N.W. 209; accord, Hathaway v. Sioux City, 244 Iowa 508, 57 N.W.2d 228 (1953).
82. Trachta v. Highway Commission, 249 Iowa 374, 86 N.W.2d 849 (1957); Nedrow v. Michigan-Wisconsin Pipe Line Co., 245 Iowa 763, 61 N.W.2d 687 (1954); Hayes v. Chicago, R. I. & P. R. Co., 239 Iowa 149, 30 N.W.2d 743 (1948); Wilson v. Fleming, 239 Iowa 718, 31 N.W.2d 393 (1948); Maxwell v. Highway Commission, 223 Iowa 159, 271 N.W. 883 (1937); Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685 (1932); Dean v. Highway Commission, 211 Iowa 143, 233 N.W. 36; Welton v. Highway Commission, 211 Iowa 625, 233 N.W. 876; Kosters v. Sioux County, 195 Iowa 214, 191 N.W. 993; Ranck v. City of Cedar Rapids, 134 Iowa 563, 111 N.W. 1027.

lative to constitute the basis of the award.[83] In addition, they are apt to lead the jury to simply add up figures which, when totaled, may have no relation to the market value of the condemned property. The only exception to the rule appears to be where a fence, including the same posts, wire, etc., is bodily moved to the new location; in this case, the cost of the operation may be introduced.[84]

(2) Contingent, Remote and Speculative Items

Contingent, remote and speculative items of damage or value should be excluded from the jury's consideration,[85] and the trial court's admission of such unallowable matter may be reversible error.[86] However, it often happens that in spite of the judge's diligence, matters of such evidence filter into the trial of the case. Under such circumstances, the jury should be instructed to disregard such testimony.[87] However, the inclusion of a large number of items of damage in an instruction has not been regarded as emphasizing speculative items

83. Trachta v. Highway Commission, 249 Iowa 374, 86 N.W.2d 849 (1957); Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685 (1932); Dean v. Highway Commission, 211 Iowa 143, 233 N.W. 36.
84. Trachta v. Highway Commission, 249 Iowa 374, 86 N.W.2d 849 (1957); Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685 (1932).
85. Trachta v. Highway Commission, 249 Iowa 374, 86 N.W.2d 849 (1957); Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685 (1932); Koster v. Sioux County, 195 Iowa 214, 191 N.W. 993; Pingery v. Cherokee, 78 Iowa 438, 43 N.W. 285; Simons v. Ry. Co., 128 Iowa 139,152, 103 N.W. 129.
86. Maxwell v. Highway Commission, 223 Iowa 159, 271 N.W. 883 (1937); Randel v. Highway Commission, 214 Iowa 1, 241 N.W. 685 (1932); Koster v. Sioux County, 195 Iowa 214, 191 N.W. 993.
87. Wilson v. Highway Commission, 249 Iowa 994, 90 N.W.2d 161 (1958); Duggan v. State, 214 Iowa 230, 242 N.W. 98,99; Welton v. Highway Commission, 211 Iowa 625, 233 N.W. 878, 883.

of damage.[88] As a general rule, the trial court has a high degree of discretion in admitting evidence as to various items of damage and appellate courts are reluctant to reverse because of inclusion or exclusion of individual items of damage.[89]

In addition, the condemnor may not introduce evidence as an indication of plaintiff's damage showing that the plaintiff has purchased land to replace the condemned land because of the presence of so many additional and speculative factors in the purchase of land.[90]

(3) Interference with Trade or Business

Although an owner is permitted to show that he is running a lucrative business and that the property is adaptable to such business as elements bearing on the market value of the premises,[91] it is a well settled rule that the owner is not entitled to recover the anticipated profits of his business which are lost by the taking of his land and according to the prevailing rule, he is not entitled to recover even for the loss of profits during the period necessary for the removal of his business to a new location. The loss of profits is an item that

88. Kemmerer v. Highway Commission, 214 Iowa 136, 241 N.W. 693 (1932).
89. Trachta v. Highway Commission, 249 Iowa 374, 86 N.W.2d 849 (1957); Hayes v. Chicago, R.I. & P. R. Co., 239 Iowa 149,152, 30 N.W.2d 743 (1948) and citations; Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685 (1932); Ranck v. City of Cedar Rapids, 134 Iowa 563, 111 N.W. 1027.
90. Schoonover v. Fleming, 239 Iowa 539, 32 N.W.2d 99,105 (1948).
91. Maxwell v. Highway Commission, 223 Iowa 159, 265 N.W. 899, 904, 271 N.W. 883; Ranck v. Cedar Rapids, 134 Iowa 563, 111 N.W. 1027.

is too remote and speculative and authorities quite universally so hold.[92] However, an exception appears to exist where agricultural land is involved.[93] Losses occasioned by the temporary obstruction of the highway incident to the construction of the improvement may not be considered.[94] Damages to the business property resulting from

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92. Nedrow v. Michigan-Wisconsin Pipe Line Co., 245 Iowa 763, 61 N.W.2d 687 (1954); Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85, 96 (1948); Des Moines Wet Wash Laundry v. Des Moines, 197 Iowa 1082, 198 N.W. 486; Nichols, Eminent Domain, Section 133, p. 244; 20 C.J. 799, 764; Orgel, On Valuation Under Eminent Domain, Section 72, p. 321; but cf. cases involving special problems in determining market value, e.g. leases (discussed in subsection (d)(3), infra.); Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85 (1948); Des Moines Wet Wash Laundry v. Des Moines, 197 Iowa 1082, 198 N.W. 486.

93. Wilson v. Highway Commission, 249 Iowa 994, 90 N.W.2d 161, 169 (1958)(dictum); Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85, 96 (1948); Maxwell v. Highway Commission, 223 Iowa 159, 265 N.W. 899, 904, 905 (1936) rehearing 271 N.W. 883 (1937); Ranck v. Cedar Rapids, 134 Iowa 563, 111 N.W. 1027 (1907).

94. Wilson v. Highway Commission, 249 Iowa 994, 90 N.W.2d 161, 169 (1958); 20 C.J. 780; Orgel, On Valuation Under Eminent Domain, Section 77; Pemberton v. City of Greensboro, 208 N.C. 466, 181 S.E. 258 (loss of anticipated business profits occasioned by temporary closing of business street for the purpose of making public improvement held not property within the constitutional provision prohibiting the taking of property without compensation); Oldfield v. City of Tulsa, 41 P.2d 61 (Okla.); Sheeley v. Chippewa County, 258 N.W. 373 (Wis.); Graham v. Sioux City, 219 Iowa 594, 258 N.W. 902 (testimony of increased rent in securing another location inadmissible); United States v. Inlots, 26 Fed. Cas. 482,489; Fiorini v. City of Kenosha, 208 Wis. 496, 243 N.W. 760 (1932); Louisiana Highway Commission v. Bourdiaux, 19 La. App. 98, 139 So. 521 (1932).

an alteration in the flow of traffic are also not compensable.[95] Furthermore, losses arising from competition of the condemning party do not constitute an element of damage.[96]

Similar to the rule excluding recovery of profits is the nearly universally accepted principle that good will is not property in the constitutional sense, and hence payment need not be made.[97] However, he is permitted to show that the property is more valuable because of the presence of a long-established business.[98]

(4) Past Negligence or Illegal Conduct

Anticipated or past negligence of the taker in the construction or

95. Wilson v. Highway Commission, 249 Iowa 994, 90 N.W.2d 161 (1958); Highway Commission v. Smith, 248 Iowa 869, 82 N.W. 2d 755 (1957).
96. Prosser v. Wapello County, 18 Iowa 327.
97. Nichols, Ibid., Section 1331 (2d ed. 1950) "An established business or what is called "good will" has never been held to be property in the constitutional sense." Orgel, On Valuation, Section 75, "there is a general agreement in these American cases that the owner may not receive compensation for the loss of good will apart from the market value of the land taken even though there is no doubt that the good will has been substantially damaged." Jahr, On Eminent Domain, Section 115. Accord, Des Moines Wet Wash Laundry v. Des Moines, 197 Iowa 1082, 198 N.W. 486, 489. For a discussion of the reasons behind denying recovery for good will, see Kimball Laundry Co. v. U.S., 338 U.S. 1, 93 L. R. 1765, 69 S. Ct. 1434, 7 A.L.R.2d 1281 (1949).
98. Ranck v. Cedar Rapids, 134 Iowa 563, 571,572, 111 N.W. 1027 (witness permitted to testify that the business had been established for over 16 years, and that long establishment increased the value of the property); Kafka v. Davidson, 135 Minn. 369, 160 N.W. 1021,1023 (competent for plaintiff to prove that the market value of the premises for use as a cigar store had been enhanced by their long use for that purpose).

maintenance of the improvement, or trespasses on adjacent property, or improper or unlawful uses of the condemned strip are inadmissible items of damages in these proceedings.[99]

(5) Removal of Personal Property; Exception - Fixtures

A taking of real estate does not affect the ownership of personal property kept on the premises taken, and the owner is entitled to remove such property.[101] Further, the owner may not recover the cost of removing or damages to such property resulting from its removal, since such loss is not a constitutional taking.[101a] This rule is accepted in

99. Bennet v. Marion, 106 Iowa 628, 76 N.W. 844 (1878); Kukkuk v. Des Moines, 193 Iowa 444, 187 N.W. 209 (cannot recover for possible negligence of the taker); Doud v. Mason City Ry. Co., 76 Iowa 438, 41 N.W. 65 (nor trespasses on adjacent land); Fleming v. Chic. R. Co., 34 Iowa 352; Grear v. Ry. Co., 43 Iowa 83 (obstruction of a public highway should not be considered in the estimation of the damages to which the owner of adjacent land is entitled for the appropriation of right-of-way by a railroad company). See also Miller v. Ry. Co., 63 Iowa 680, 685, 16 N.W. 567; King v. Ry. Co., 34 Iowa 459; Guinn v. Ry. Co., 125 Iowa 301, 101 N.W. 94; Bracken v. City of Albia, 194 Iowa 596, 89 N.W. 972; Duggan v. State, 214 Iowa 230, 242 N.W. 98; Welton v. Highway Commission, 211 Iowa 625, 233 N.W. 876 (1930); Riddle v. Lodi Telephone Co., 175 Wis. 360, 185 N.W. 182, 20 C.J. 778.

100. See also Compensation to Lessees, Sections 21 and 22, Division IV, infra.

101. Nichols, Ibid., Section 228 (2d ed.).

101a. See Section 21(b), infra, for a discussion of statutory changes in Iowa affecting personal property. Sec. 3, Chapter 318, 58th G.A. (1959) added the following to Iowa Code Section 472.14 relating to appraisement and assessment of damages by condemnation commissioners: "in assessing the damages the owner or tenant will sustain, the commissioners shall consider and make allowance for personal property which is damaged or destroyed or reduced in value."

most jurisdictions in the United States.[102]

There have been cases, in which purely personal property has been involved, where removal expenses have been allowed under broad con-

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102. Cases in support of this proposition are: Kansas City Southern Ry. Co. v. Anderson, 88 Ark. 129, 113 S.W. 1030, 16 Ann. Cas. 784 (1908); Colorado M. Ry. Co. v. Brown, 15 Colo. 193, 25 Pac. 87 (1870); United States v. Inlot, 26 Fed. Cas. 482, Cas. No. 15, 441 (1873); in re Post Office Site in Borough of Bronx, 210 Fed. 832 (1914); Edmonds v. Boston, 108 Mass. 535 (1871); Springfield So. Western Ry. Co. v. Schweitzer, 173 Mo. App. 650, 158 S.W. 1058 (1913); Central Pac. R. Co. v. Pearson, 35 Cal. 247 (1865); Matter of N.Y. West Shore & Buffalo Ry. Co., 35 Hun 633 (N.Y. 1885); Blecker v. Phil. & Reading R.R. Co., 177 Pa. 252, 35 Atl. 617 (1896); Braun v. Met. West Side El R.R. Co., 166 Ill. 434, 46 N.E. 974 (1897); Girshorn Bros. Co. v. U.S., 284 Fed. 849 (1922); Newark v. Cook, 99 N.J. Eq. 527, 133 Atl. 875, aff'd 100 N.J. Eq. 582, 135 Atl. 915 (1927); St. Louis v. Railroad Co., 266 Mo. 694, 182 S.W. 750 (1916); Matter of New York & Hudson R.R. Co., 35 Hun 306 (N.Y. 1885); Matter of People v. Johnson & Co., 219 App. Div. 285, 219 N.Y.S. 751 (1927); Aff'd 245 N.Y. 627, 157 N.E. 885 (1927) cert. denied 275 U.S. 571; In re Smith St. Bridge, 234 App. Div. 583, 255 N.Y.S. 801 (1932); Kalfa v. Davidson, 135 Minn. 389, 160 N.W. 1021; In re New York etc. Bridge, 4 N.Y.S. 222; Ranlet v. Concord R.R. Corp., 62 N.H. 561 (1883); Pause v. City of Atlanta, 98 Ga. 92, 26 S.E. 489 (1895); Fiorini v. City of Kenosha, 208 Wis. 496, 243 N.W. 761 (1932); U.S. v. Meyer, 190 Fed. 688; Cobb v. Boston, 109 Mass. 438; William v. Commonwealth, 168 Mass. 364, 47 N.E. 115; Emery v. Boston Terminal Co., 178 Mass. 172, 59 N.E. 763; New York etc. Ry. Co. v. Blacker, 178 Mass. 386, 59 N.E. 1020; Missouri Pacific Ry. Co. v. Porter, 112 Mo. 361, 20 S.W. 568; St. Louis etc. R. R. Co. v. Knapp-Stout, 160 Mo. 396, 61 S.W. 300; Fitzhugh v. Chesapeake etc. Ry. Co., 107 Va. 158, 59 S.E. 415; North Coast R.R. Co. v. Kraft Co., 63 Wash. 250, 115 Pac. 97; See Nichols, Ibid., Section 288 (2d ed.); 20 C.J. 782.

stitutional provisions, affording compensation for taking or damaging property;[103] even under such broad provisions, however, compensation has been generally denied.[104]

The decisions allowing recovery for removal of personal property have been based mostly on statutory grounds. The leading case of Blincoe v. Chocta O. & W. R. Co., 160 Okla. 286, 83 Pac. 903, 4. L. R. A. (N.S.) 890 is illustrative. A railroad company condemned a lumber yard. Evidence of the cost of removal of such lumber was excluded by the trial court. The appellate court agreed that the constitutional provision did not include such consequential damage, but in this case the applicable statute directed the "commissioners to consider the injury which such owner may sustain by reason of such railroad". In view of this statute, the court held that removal costs should have been allowed. The constitutional provision in this case was in the form of the Fifth Amendment in terms requiring compensation only for property taken. In City of Richmond v. Williams, 114 Va. 698, 77 S.E. 492, the same result was reached. In upholding an allowance for the cost of removal of lumber when a lumber yard was involved, the court based its conclusion on reasonable statutory construction, although the Constitution of Virginia forbade the taking or

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103. Nichols, Ibid., Section 228 (2d ed.) These constitutions apply to the "taking or damaging" of property, damaging being a much broader concept than taking.

104. E.G. Blecker v. Phila. & Reading R.R., 177 Pa. 252, 258, 35 Atl. 617; see also St. Louis Ry. Co. v. Knapp-Stout, 160 Mo. 396, 61 S.W. 300; Orgel, On Valuation Under Eminent Domain, Section 69. States having such constitutional provisions are: Alabama, Arizona, Arkansas, California, Colorado, Georgia, Illinois, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Washington, West Virginia, and Wyoming.

or damaging of property without just compensation.[105]

In St. Louis R.R. Co. v. Knapp-Stout Co., 160 Mo. 396, 61 S.W. 300, precisely the same question was before the court as in the Oklahoma and Virginia cases, that is, whether the owner whose land was taken for public use could recover the expense necessarily incurred in removing lumber lying on the premises. The court denied this item despite the fact that the Missouri Constitution provided compensation for damaging of property.

Damages for the removal of personal property have been denied on two grounds; first, that the owner's necessity of incurring removal costs does not enhance the value of the property taken, that is, such costs have no perceptible bearing on the market value;[106] and secondly, that such damages are speculative, uncertain

105. "Our statute requires the commissioners to ascertain what will be just compensation for the land and other property proposed to be condemned...." The words "other property" which are added must apply to something other than land or they are wholly superfluous. 114 Va. 702, 703.

106. Orgel, On Valuation Under Eminent Domain, Section 67, "We recognize the pain and necessity of removing might stimulate the owner to hold out and secure a better price. His very reluctance to sell may increase his success as a negotiator, but neither a court nor an expert appraiser would be likely to be influenced by such subtle physchological factors in the bargaining process. Whether the reluctance of the buyer to move to a new premise offsets this factor is a problem for economic theorists who are interested in the long run "normal" values. For the court and the appraisal experts it is a question of no professional interest, since the effect of these counter-balancing forces is reflected in the prices actually established in the real estate market." St. Louis v. St. Louis Ry. , 266 Mo. 694, 182 S.W. 750 (1916), "If he whose land is condemned had voluntarily sold his land to a private purchaser, ordinarily no thought would occur to either one...that the seller should be compensated by the buyer for the removal from the premises of personal goods and chattels. That one is a voluntary sale and the other an involuntary sale does not peculiarly detract from the force of the argument."

ly, that such damages are speculative, uncertain and contingent.[107]

A closely related problem is that of attempted assessment of costs of removing property to an owner who abandons property on the condemned premises. In this situation the owner is at liberty to abandon such property as he chooses and need not pay for the resulting removal by the condemnor; however, the owner of the property must pay for removal where the abandoned property is delivered to him at his direction.[108]

(6) Necessities of Public May Not Be Considered

It is clear that the measure of value must be the market value to an ordinary purchaser and not the peculiar value which the property may have to the condemnor. Thus, in United States v. Foster, 131 F.2d 3 (8th Cir.)(1942), the court held that the value of Iowa land acquired for the Burlington Ordnance Plant could not be computed by taking into account the necessities of the public but rather that the value of the land was the value to the owner or the loss caused to him by its taking.

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107. In re Post Office Site, 210 Fed. 832 (2d Cir.)(1914); St. Louis v. St. Louis Ry., Ibid., "At first glance it is to be conceded that there exists a difficulty in finding a reason for not compensating the owner of personal chattel who is compelled to remove them to a point at least beyond the edge of the right of way. It is equally clear, on the other hand, there is no logical reason that can be found for compensating him for the expense of removal beyond such point. This is so for the reason that A might desire to move his chattel only into the next adjoining house while B might desire to have his taken several blocks or even several miles, and C on the other hand, his business being broken up, may desire to remove his goods to some other place or city. No logical reason, therefore, can be found for the condemnor paying more than sufficient to move the personal property off the right-of-way. A rule which would require the condemnor to do more than this would be variant and indefinite and consequently speculative.. the removal just to the boundary of the premises would be a cost de minimus".

108. American Salvage Co. v. Housing Authority, 14 N.J. 271, 102 A.2d 465 (1954).

d. Recovery for Special Factors in Land Valuation

(1) Most Advantageous or Potential Use by Owner[109]

In determining the market value of a piece of real estate for the purpose of taking by eminent domain, it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration, but the possibility of its use for all purposes, present and prospective, for which it is peculiarly adapted and to which it might reasonably be applied. Prospective uses can be considered even though the owner had no present intention of devoting it to such uses.[110] In Kukkuk v. Des Moines, 193 Iowa 444,457, 187 N.W. 209, the owner was allowed to testify that his place was properly located for city lots. He was permitted to testify as to what would be the value of an ordinary size city lot locat-

109. See also Section 14(d), supra.

110. Walters v. Platt, 184 Iowa 203, 168 N.W. 808 (availability for cemetery lots); Fleming v. C.D. & M. R. Co., 34 Iowa 353; Ranck v. Cedar Rapids, 134 Iowa 563, 566, 111 N.W. 1027; Doud v. Mason City, 76 Iowa 438,439, 41 N.W. 65 (although no attempt by the owner had been shown to mine the coal underneath the land, its uses for mining could be shown). 20 C.J. 769; McLean v. Chicago, Iowa & S. Dak., 67 Iowa 568, 25 N.W. 782 (owner allowed to state the land was adapted to use for residential purposes, but after the condemnation, was unfit for that use); Hubbell v. Des Moines, 183 Iowa 715, 167 N.W. 619; Lough v. Minn. & S.P.R. Co., 116 Iowa 31, 89 N.W. 77 (error to limit witnesses to consideration of one special use); Orgel, On Valuation, Section 29, "The fact that the owner may have been ignorant or too uninterested in money values to take advantage of the full possibilities of his property would be treated by the court as entirely irrelevant"; Sherman v. St. Paul R. Co., 30 Minn. 227, 15 N.W. 239; Omaha So. Ry. Co. v. Beeson, 36 Neb. 361, 54 N.W. 557 (adaptability of the land for city lots shown although at the time used exclusively as farm land); Nichols, Eminent Domain, Section 217, p. 661, Section 219, p. 665; Preston v. City of Cedar Rapids, 95 Iowa 71, 63 N.W. 590 (witness testified to market value for commercial purposes. Held no error since premises were adapted for use as stores or offices).

ed on his tract.[111] The rule recognized in most jurisdictions is that a witness may not himself translate the adaptability of the land for a specific purpose into a statement of its money value if devoted to that use. The measuring stick is the market value of the land, not its value for the best use possible, and such guesses, predictions, and prophesies registered in terms of dollars and cents tend to confuse the jury as to the true standard of measurement.[112] In Doud v. Railroad Company, 76 Iowa 438, 41 N.W. 65, it was held that it was proper for the owner to prove the presence of undeveloped mineral deposits in the land taken by eminent domain.[113] Fitness of the land for raising a certain crop may be shown, although such crop has never been raised on the land, and a large outlay would be necessary to devote it to such use. For illustration, in Belle Fourche Valley Ry. Co. v. Belle Fourche Land and Cattle Co., 28 S.D. 289, 133 N.W. 261, the court said that the owner should be allowed to show the peculiar fitness of the property for the growing of apples, although no orchard existed on the place, and it would involve a considerable amount of capital to change its use. Of course, such an argument may defeat

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111. See Everett v. Union Pac. Ry. Co., 59 Iowa 243, 246, 13 N.W. 109, which held similar evidence incompetent, but probably excluded it on the grounds that there was no evidence that neighboring land had been laid out in lots and, therefore, it was too remote and speculative a use; LaMonte v. St. Louis, D.M. & N. R. Co., 62 Iowa 192, 17 N.W. 465 (evidence of value as residential property too remote to be considered; land located 2 miles beyond the city limits of Des Moines).

112. Orgel, Valuation Under Eminent Domain, Section 30, "It has been held in most cases that a witness may not himself translate that adaptability into a statement of its money value. E.g., a properly qualified witness may express an opinion that the property has a fair market value of $10,000.00, and he may explain both on direct and on cross-examination, the peculiar qualities of the property, which led him to conclude that it is worth this amount. But he is not ordinarily permitted to testify that the property has a value of $10,000.00 for building lot purposes or for the best use. See also in this particular, Sacramento R. R. v. Hulborn, 156 Cal. 408, 104 Pac. 979 (1919); Tracy v. Mt. Pleasant, 167 Iowa 435, 146 N.W. 78, 83; (Everett v. Union Ry. Co., 59 Iowa 243, 13 N.W. 109; State v. Oklahoma Ry. Co., 153 Okla. 76, 4 P.2d 1009 (1932).

113. See also Section 15(a)(2), supra.

itself because of the cost involved.

Inasmuch as compensation awarded when land is taken by eminent domain is the market value of the land for any use to which it is adapted or for which it is available, its peculiar adaptability for public as well as private use may be shown and be taken into consideration.[114]

A use for which a piece of property is available need not be excluded from consideration merely because the availability depends upon extrinsic conditions, the continuance of which is not within the control of the owner. Thus, a lot near a railroad station may be especially valuable for the site of a retail store, although the company, if it saw fit, might move the station away. In fact, it is not necessary that the extrinsic improvement which will make the property especially available for a particular purpose be in existence when the land is taken, if the possibility of its being constructed in the immediate future is so strong as to have an effect upon its present market value.[115]

(2) Illegal Uses and Zoning Restrictions

Although a landowner is entitled to have the highest and most profitable use to which his land may reasonably be adapted considered in determining its market value, this general rule is subject to the qualification that value may not be based on an illegal use of the property.[116] However, a use which is presently illegal may be considered in determining the value of the property if the restrictive law is malum prohibitum rather than malum in se, and if there is a reasonable probability

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114. Lacy v. Mt. Pleasant, 165 Iowa 435, 146 N.W. 78. But see United States v. Foster, 131 F.2d 3 (8th Cir. 1942).

115. Nichols, Ibid., Section 219 (2d ed.).

116. Jahr, Law of Eminent Domain, Section 79; Nichols, The Law of Eminent Domain, Section 12.3143(2) (3d ed. 1950); Orgel, Valuation Under the Law of Eminent Domain, Sections 33, 34 (2d ed. 1953).

that the presently illegal use will be made legal in the future.[117] Since zoning regulations fall within the malum prohibitum category, the value of the property for other uses than that to which it is presently zoned may be shown if a likelihood of a change in the existing zoning regulations is indicated.[118] This is especially true where the existing zoning regulations represent an attempt by the condemnor to acquire land cheaply by limiting its potential uses through fraudulent zoning.[119]

(3) Potential or Prospective Use by the Condemnor

One of the most important elements which may be considered in fixing the market value of the condemned property is the potential or prospective use of such land by the condemnor, and the effect of that use upon the adjacent property.[120] Although the proposed improvement will only occupy a small portion of the condemned strip and the greatest burden will be on other lands, still the abutting owner is entitled to damages on the basis of general inconvenience and depreciative effect of the whole improvement on his property. In other words, in Iowa apparently no distinction has been made between structures on the condemned strip and those just outside in allocating damages for

117. Nichols, Ibid., at Sections 12.3143(2), 12.322 (3d ed.1950); See also, McMahon v. City of Dubuque, Iowa, 225 Fed 2d 154, certiorari denied, 358 U.S. 833, 79 S. Ct. 53, 3 L.Ed.2d 70.

118. Hall v. City of West Des Moines, 245 Iowa 458, 62 N.W.2d 734 (1954). Also see cases cited in Comment, Evidence of Prospective Change in Zoning Ordinance, 43 Iowa Law Review 299 (1958), footnote 8.

119. See cases cited in Comment, 43 Iowa Law Review 299 (1958) in footnotes 10 and 11 therein.

120. Hostert v. Highway Commission, ___ Iowa ___, 93 N.W.2d 773 (1958); Ranck v. Cedar Rapids, 134 Iowa 563, 111 N.W. 1027 (1907); Nichols, Eminent Domain, Section 237, p. 724; Orgel, On Valuation Under Eminent Domain, Section 59, p. 123; see also Lewis v. Omaha & C.B. Ry. Co., 138 N.W. 1092, 158 Iowa 138; Randell v. Highway Commission, 214 Iowa 1, 241 N.W. 685.

potential or prospective use by the condemnor.[121]

In estimating the damages, the assumption should not be made that the use most disadvantageous to the owner will necessarily be adopted. The true rule seems to be that the jury should consider only such uses as are reasonably likely to have a perceptible effect upon the present market value.[122]

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121. Haggard v. Independent School District, 113 Iowa 486, 85 N.W. 777 (1901); Minn. etc. Tractor Co. v. Harkins, 108 Minn. 478, 122 N.W. 450. But cf. Kucheman v. Chic. etc. Ry. Co., 46 Iowa 366.

122. See Henry v. Mason City Ry. Co., 140 Iowa 201, 118 N.W. 311, (additional tracks laid in the street not contemplated in the original assessment); Chicago etc. Ry. Co. v. Kline, 220 Ill. 334, 77 N.E. 229 (1906) (it was held that the trial court erred in admitting testimony that a right-of-way on which the railroad company had proposed to lay two tracks might be later used for the construction of six tracks. The trial court had instructed the jury to estimate the damages for the most injurious use which might be reasonably possible and lawfully made of the right-of-way, consistent with evidence. On this point the appellate court said, "this instruction was erroneous in calling upon the jury to assess prospective damages upon the presumption that the right-of-way would be put to the use most injurious to the owners of the farm, in not confining the jury to such damages as might reasonably be expected to incur in the intended use of the property. The jury was authorized to include all such remote and speculative damages as might result from the most injurious use to which the right-of-way could be lawfully put, although there was nothing from which the jury could infer that anything was intended except the construction and operation of the double track railway". The possibility of future injuries should not be given any more consideration by the jury than the weight accredited to such evidence by a willing buyer or seller. Orgel, On Valuation Under Eminent Domain, Section 59; Maxwell v. Highway Commission, 271 N.W. 883 (evidence of the amount of travel contemplated is a necessary and proper element for consideration); Nichols, Ibid., Section 237 (2d ed.), Pierce v. Chic. etc. Ry. Co., 137 Wis. 550, 119 N.W. 297 (court informed the jury that they should not consider any remote or speculative or improbable users, but were to confine their consideration to the actual facts of the case); Riddle

(continued on following page)

v. Lodi Tel. Co., 175 Wis. 360, 185 N.W. 182; Missouri Power & Light Case, 32 S.W.2d 783 (Mo. App. 1930); McDougal v. Southern Pac. R. Co., 162 Cal. 1,3, 120 Pac. 766 (1912), "for such injuries the plaintiff may recover in one action not only the damages occasioned up to the time the action was begun, but also all that she can show with reasonable certainty that she will suffer in the future. But all is necessarily given to her if she receives as damages the difference between the value of the entire parcel as it was just before the defendant took permanent possession and its value immediately after the works of the defendant were completed and put in operation, taking into consideration all the injurious consequences to the part of the land taken reasonably probable from such work and operation"; Taft v. Commonwealth, 158 Mass. 526, 33 N.E. 1046 (1893) where Holmes, J. said at p. 549, "there was no evidence that such a building was to be expected and certainly a jury should not be told to increase the damages by considering what would be the most disagreeable use to which the land lawfully could be put by the condemnor"; Nichols, Ibid., Section 154 (2d ed.), "as a practical matter, however, damages are given only for such use of the highway as is probable, and if a landowner is damaged by the unanticipated rails and wires of a modern street, he is much more compensated by the rise of land value due to the increase in population that such improvement indicates."

In Iowa there is one line of cases that allows damages for injury to the remaining land on the basis of the most disadvantageous use conceivable under the easement taken. In them all evidence of how the improvement will be constructed and its present or immediate effect on adjacent property is excluded.[123] Stoner v. Highway Commission, 227 Iowa 115, 287 N.W. 269 (1939) is a modern Iowa case demonstrating a rather liberal approach in allowing evidence concerning the most disadvantageous use to which the condemned property might be put. In that case plaintiffs showed evidence of loss of peace and quiet by the conviviality of various types of passers-by who were attracted by trees left in the right-of-way.

(4) Damages for Trespass to Property

Where a party having power and authority to proceed under eminent domain proceedings, appropriates land without condemnation or grant from the owner and then subsequently institutes proceedings under the statute to perfect its title and assess damages, the measure of damages is the value of the land at the time of the seizure or ap-

123. Klopp v. C.M. & St. Paul Ry. Co., 119 N.W. 373, 142 Iowa 474 (1909) (a railroad company condemning land for a right-of-way cannot reduce the damages by showing a present intention not to use more than one track. The material point affecting the damages being the right of the company to maintain as many tracks as it saw fit); Accord, Purdy v. Waterloo C.F. & N.R. Co., 172 Iowa 676, 154 N.W. 881; Lewis v. Omaha & C.B. & Q. Ry. Co., 158 Iowa 137, 138 N.W. 1092. See Orgel, On Valuation Under Eminent Domain, p. 196, where the author stated in regard to the Klopp case that the court apparently conceived the basis of compensation as the sale price of the right to inflict the injury caused by the most damaged use permissible to the taker, and seemed to abandon depreciation in market value as the measure of damage to the remainder); see also, East St. Louis Ry. Co. v. Illinois Trust Co., 248 Ill. 559.

propriation with interest thereafter.[124] However, such a rule does not preclude a subsequent purchaser of the premises from instituting and recovering damages for a continuing trespass.[125] This latter rule concerning the right of subsequent purchasers is unfair inasmuch as it gives such purchasers in the usual case a gratuity since one who purchases a tract of land with a railroad or other structures in actual public use standing on it would naturally take the structures into consideration in fixing the price.[126]

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124. Van Husen v. Omaha B. & T. Ry. Co., 118 Iowa 366,382, 92 N.W. 47; Daniel Chic. Ry. Co., 41 Iowa 52. Upon the condemnation of land for railroad purposes damages should be allowed as of the time of entry by the company on the land plus statutory interest. The Iowa rule is misconstrued in Nichols, Ibid., Section 438 (2d ed.).

125. Donald v. St. Louis etc. Ry. Co., 52 Iowa 411, 3 N.W. 462, "The defendant insists that the right of action accrued to Gregory, plaintiff's grantor, when the land was first taken, the trespass first committed and that as the right of action has not been assigned to the plaintiff, he cannot maintain the suit; but as the railroad company was a trespasser when the plaintiff acquired the land and continued to occupy it as such, the defendant is liable in this action for its trespass upon the plaintiff's property after he becomes owner. Plaintiff may recover under the cases cited for the value of the land appropriated and other damages. These damages are for injuries sustained by plaintiff's grantor. It is not important to inquire what were the rights of plaintiff's grantor. They are not involved in this action." See also, McGinnis v. Wabash R. Co., 137 Iowa 376, 114 N.W. 1039 (1908); Clark v. Railroad Co. 132 Iowa 11, 109 N.W. 309 (interest allowed only from the time the grantor received title). The grantor may also bring suit for damages while he was owner. Clark v. Ry. Co., supra.

126. Nichols, Ibid, Section 443 (2d ed.) is contra to Donald v. St. Louis Ry. Co., 52 Iowa 411. See also Pomeroy v. Chic. etc. Ry. Co., 25 Wis. 641.

In these cases of illegal taking the courts have held that the condemnor should be exempted from the strict enforcement of the principle of the law applicable to private trespassers, and should not be obligated to pay the additional value which its own improvement conferred on the land.[127] This result is probably reached on a theory that public welfare and convenience should override common law penalties for private gain.[128]

SECTION 16. DUTY OF LANDOWNER TO REDUCE DAMAGES

At the outset it is important to realize that there are two distinct theories for allowing damages in condemnation cases: (1) the constitutional theory requiring that damages be paid for an actual taking and that benefit of the improvement to the landowner be ignored as provided in Article I, Section 18 of the Iowa Constitution; and (2) the ordinary tort theory of damages which takes into account any benefit to the plaintiff and which includes, of course, a duty to mitigate damages. In the ordinary condemnation case the constitutional theory is, of

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127. Daniel v. Chic. etc. Ry. Co., 41 Iowa 52; Chic. etc. Ry. Co. v. Des Moines Union Ry., 165 Iowa 35, 144 N.W. 54; Van Husen v. O.B. & T. R. Co., 118 Iowa 366, 92 N.W. 47; Titus Loan and Investment Co., v. Natural Gas Co., 223 Iowa 944, 274 N.W. 68 (1937).

128. Nichols, Ibid., Section 320 (2d ed.)(taking a critical view of this point); see Elliott, On Roads and Streets, Section 294; See also Atchinson & W.R. Co. v. Livingston, 238 N.Y. 300, 14 N.E. 589; 34 A.L.R. 1082; Lewis, Eminent Domain, Section 759; Orgel, Ibid., Section 93; on failure of the company which is already in possession and use of the premises for right-of-way to pay the amount assessed, it may be restrained by injunction from further using the premises. Henry v. Dubuque and P.R. Co., 10 Iowa 540; Richards v. D.M. Valley R. Co., 18 Iowa 259; Irish v. Bond S.W. R. Co., 44 Iowa 380.

course, applied and in such cases there is no duty to mitigate damages.[129] However, in cases involving a change of grade, in which the courts have rejected the constitutional theory of damages and required that benefit to the landowner be considered in offsetting damages,[130] the landowner is required to mitigate damages.[131] The key factor in distinguishing the cases on the duty to mitigate damages seems to be whether or not benefit to the landowner is to be considered.[132] Thus, in summary, where the constitutional theory

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129. Schoonover v. Fleming, 239 Iowa 539, 32 N.W.2d 99 (1948); Wilson v. Fleming, 239 Iowa 718, 31 N.W.2d 393 (1948)(plaintiff had no duty to move buildings to lower damage, and it would be error to admit such evidence); Kemmerer v. Highway Commission, 214 Iowa 136, 241 N.W. 693 (1932) (holding that the landowner had no duty to contract with the Highway Commission to move his buildings to another location in order to reduce damages).

130. See Division VII, infra, dealing with change of grade.

131. Corcoran v. City of Des Moines, 205 Iowa 405, 215 N.W. 948 (1927) (plaintiff not allowed to recover the cost of building a new house to replace a house torn down as a result of a change of grade but was required to take reasonable steps to prevent damage to the old house).

132. "Defendants appear to argue that the rule should be the same as in tort cases, but in condemnation cases there is a contitutional provision that benefits cannot be considered, which is not the case as to damages in tort cases." Schoonover v. Fleming, 239 Iowa 539, 32 N.W.2d 99,105 (1948). This case gives strong support to Kemmerer v. Highway Commission, 214 Iowa 136, 241 N.W. 693 (1932). It also dismisses as irrelevant certain dictum in Des Moines Wet Wash Laundry v. City of Des Moines, 197 Iowa 1082, 198 N.W. 486 (1924) which might have indicated support for the doctrine that a landowner had a duty to mitigate damages. The Des Moines case is also strictly limited by Wilson v. Fleming, 239 Iowa 718, 31 N.W.2d 393 (1948). However, in the Wilson case counsel's brief failed to call the Corcoran case, supra, to the attention of the court. Consequently, it may still be open to dispute this rule on the basis of the Corcoran case, although the latter case may readily be distinguished on the basis set out in the text above.

is employed, benefit to the landowner is ignored; and hence, there is no duty to mitigate damages; however, where the tort theory is utilized, benefit must be considered, and the landowner must mitigate damages.

SECTION 17. PERSONS ENTITLED TO COMPENSATION

(Note: Among those generally entitled to compensation are lessees. Because of the breadth of the subject matter involved in Compensation to Lessees, it is treated separately in Division IV of this Work.)

a. Compensation to Lienholders

In Iowa the rule is firmly established that the mortgagee is entitled to notice and compensation in eminent domain proceedings.[133] If he has not been joined in such proceedings, he may later, in case the mortgagor defaults on the mortgage, assert his right against the condemned land[134]

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133. See Section 6(d), supra.

134. The weight of authority seems to be in accord with this proposition. 20 C.J. 856; Nichols, Section 122 (2d ed.); Sever v. Cole, 38 Iowa 463 (1873); Jackson v. Ry. Co., 64 Iowa 292, 20 N.W. 442; Titus Loan & Investment Co. v. Natural Pipe Line Co., 274 N.W. 68, 223 Iowa 944 (1937); Birk v. Jones County, 221 Iowa 794, 266 N.W. 553 (1936); Vein v. Harrison County, 209 Iowa 580, 228 N.W. 19; Kellogg v. Illinois Central Ry. Co., 204 Iowa 368, 213 N.W. 253, 215 N.W. 258; Rieck v. Omaha, 73 Neb. 600, 103 N.W. 283; Northwestern Mutual Life Co. v. Nordhues, 129 Neb. 379, 261 N.W. 687. If the error is discovered prior to the payment of the award to the mortgagor, the condemnor may secure permission to pay the award into court. Calumet Ry. Co. v. Brown, 136 Ill. 322, 26 N.E. 501. See also, Phil. etc. R. Co. v. Penn. etc. Ry. Co., 151 Pa. 569, 25 Atl. 177 (1892). On the general topic see "Protection of Right of Mortgagee in Eminent Domain," 110 A.L.R. 542.

or the award if it still remains in the hands of the sheriff.[135]

Prior to default on the mortgage, if the condemnor's possession involves excavation, fills, appropriations of gravel, soil and materials from the premises, or other acts that impair or damage the mortgagee's security, he may maintain an action for such if he has had no notice.[136]

In case of foreclosure when only a part of the mortgaged property is taken, the condemnor is entitled to require the mortgagee to look to the remaining land as first and primarily liable for the debt. The decree of foreclosure should direct the sale of the remainder or that being insufficient to pay the mortgage debt, then the sale of the condemned portion either with the remainder or independent of it as shall be most advantageous.[137] Still a sale of the condemned land pursuant

135. In both Shaefer v. Shaefer, 75 Iowa 349, 39 N.W. 697, and Sawyer v. Landers, 56 Iowa 422, 9 N.W. 341, the mortgagor was in default. Sawyer v. Lander, Ibid., holds that the mortgagee who is not made a party to the proceedings for condemnation of a right-of-way for a railroad over the mortgaged property may waive the omission and assert his claim to the award in the hands of the sheriff, and such claim, where it is shown that the property is insufficient to pay the mortgage debt and the mortgagor is insolvent, constitutes a lien thereon superior to that of a prior attachment levied by a creditor of the mortgagor.

136. New York Ins. Co. v. Clay County, 221 Iowa 966, 267 N.W. 79; Kulp v. Trustee of Iowa College, 217 Iowa 310, 251 N.W. 703, 20 C.J. 1187; ordinarily a mortgagee not in possession has no such interest in the mortgaged property as entitles him to sue. Aggs v. Shackeford County, 85 Tex. 145, 19 S.W. 1085 (1892); Rieck v. Omaha, 73 Neb. 600, 103 N.W. 283 (1905); Jackson v. Ry. Co., 64 Iowa 292,296, 20 N.W. 442 ("The original entry under the mortgagor's interest was lawful. After the execution of the sheriff's deed, the railroad was a mere trespasser"). 41 C.J. 652; Atlantic Coast Line Ry. Co. v. Rutledge, 165 So. 563, 122 Fla. 154 (good case on impairment of security); Bates v. Humboldt County, 277 N.W. 715, 224 Iowa 841 (1938).

137. Sever v. Cole, 38 Iowa 463 (1873); Jackson v. Ry. Co., 64 Iowa 292,296, 20 N.W. 442; Titus Loan & Investment Co. v. Natural Pipeline Co., 223 Iowa 944, 274 N.W. 68 (1937); Orgel, Ibid., Section 113; Morgan v. William, 318 Mo. 151, 1 S.W.2d 151.

to such judgment does not pass title to the improvements erected by the condemnor, and the condemnor may remove them.[138]

In some jurisdictions the court has allowed the condemnor to avoid foreclosure by paying the amount of the original award over again.[139] But the general rule appears to require him to redeem or condemn again. If he fails to do either, he will be liable to ejectment.[140] Portionate redemption by the condemnor has been both affirmed[141] and denied.[142] When the condemned portion has been sold independently of the remainder as most advantageous to the interest of the mortgagee, then portionate redemption should be allowed. On the other hand, when the remainder and the condemned parcel are lumped together and sold as one entire tract, recondemnation seems to be the only method of determining how much the mortgagee was injured by the appropriation or taking. In Titus Loan & Investment Co. v. Natural Pipe Line Co.[143]

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138. Titus Investment & Loan Co. v. Natural Pipe Line Co., 223 Iowa 944, 274 N.W. 68 (1937); Accord, St. Louis K. & S.W. Ry. Co. v. Nyce, 61 Kan. 394, 59 Pac. 1040. There appears to be a conflict on this point. Orgel, Ibid, Section 113, p. 389; contra, Phil. etc. Ry. Co. v. Bowman, 23 App. Div. 170, 48 N.Y.S. 901, 57 N.E. 1122.
139. Orgel, Ibid., Section 113.
140. Jackson v. Ry. Co., 64 Iowa 292, 20 N.W. 442; Sever v. Cole, 38 Iowa 463 (1873).
141. See 42 C.J. 351; Dows v. Congdon, 16 How. Pr. 571 (N.Y.).
142. New York Mut. Life Ins. Co. v. Easton, etc. Ry. Co., 38 N.J. Eq. 132; see Jackson v. Ry. Co., 64 Iowa 292,296, 20 N.W. 442 (where a railway company took a voluntary conveyance from the mortgagor, and it was intimated that the company's right of redemption after foreclosure was the same as the mortgagor); First Trust Joint Stock Land Bank v. Ulch (Clay County No. 10464) (it was held that the condemnor must redeem the whole tract or institute condemnation proceedings).
143. 223 Iowa 944, 274 N.W. 68 (1937); also see Douglas v. Bishop, 27 Iowa 214.

this contention was conceded by the condemnor.

On revaluation it has been held in some states that the appraisal should be made as of the date of the original taking rather than the date of the foreclosure.[144] However, in these cases the foreclosure was checked by the court before the sale of the condemned parcel. Once the sale has been consummated, correct principle requires that damages should be assessed to the foreclosure purchaser as of the time of the issuance of the sheriff's deed.[145] Iowa goes further than most jurisdictions and holds that the holder of a certificate of tax sale is entitled to notice of proceedings to condemn the land embraced in his certificate, and cannot be deprived of his interest without compen-

144. Orgel, Ibid., Section 113; Seaboard All-Florida Ry. Co. v. Leavett, 105 Fla. 600, 141 So. 886 (1930); Kennedy v. Milwaukee & St. Paul Ry. Co., 22 Wis. 581.

145. Rieck v. Omaha, 73 Neb. 600, 103 N.W. 283; Lehigh Coal Co. v. Central R. Co., 25 N.J. Eq. 379; Aggs v. Shackelford County, 85 Tex. 145, 19 S.W. 1085 (1892) (prior to default on the mortgage, the mortgagee has no claim against the condemnor who has paid the owner); Accord, Jackson v. Ry. Co., 64 Iowa 292, 296, 20 N.W. 442 (while the original entry upon the premises by the railway company was lawful, its occupancy of them after the execution of the sheriff's deed was without right. From that time it was a mere trespasser, and the rightful owner of the premises had the right to maintain is action for possession). In Titus Loan & Investment Co. v. Natural Pipe Line Co., 223 Iowa 944, 274 N.W. 68 (1937) the damages to the holder of the sheriff's deed were not assessed as of the time of the taking. A purchaser at a foreclosure sale is not entitled to compensation for damages caused by the condemnation of the property previous to his purchase. 20 C.J. 863. See also, Donald v. St. L. K.C. Ry. Co. 52 Iowa 411, 3 N.W. 462 (a purchaser may maintain an action for damages occasioned by the trespass of the condemnor since his purchase.

sation.[146]

Yet, when the condemnor has failed to join the holder of the certificate of tax sale, it acquires the right to redeem the land from such sale, and when it has not been served notice of the expiration of the period of redemption, the tax deed does not operate to extinguish that right.[147] Whether the right of redemption extends to all the land embraced in the certificate or is confined to the land condemned or appropriated has not been judicially determined.[148]

b. Compensation to Judgment and Tax Lienholders

Although the rights and interests of a judgment holder in eminent domain proceedings have not been considered by the Supreme Court of Iowa, it is thought that the court will regard the lien created by a judgment as merely pertaining to the remedy and hold that it may be cut off by condemnation without compensation. The general rule is that the holder of a judgment lien has no proprietary interest in the land which would entitle him to be made a party to the proceedings or to recover compensation from the condemnor. However, it has been customary in this state to serve notice on holders of large judgments

146. Cochran v. Ind. School Dist., 50 Iowa 663, 665. Accord, Garmoe v. Sturgeon, 65 Iowa 147, 21 N.W. 493; Vien v. Harrison County, 209 Iowa 580, 228 N.W. 19; contra, 20 C.J. 855.
147. Garmoe v. Sturgeon, 65 Iowa 147, 21 N.W. 493.
148. Garmoe v. Sturgeon, supra.

as a precautionary and expeditious practice.[149]

In condemnation proceedings the status of a tax lien has been held to be analogous to that of a judgment lien.[150] This is true when a governmental agency exercises the power of eminent domain.[151] The leading decision on this point is Gasaway v. Seattle, 52 Wash. 444, 100 Pac. 991 (1909).[152] In this case the city of Seattle condemned

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149. Authorities holding that judgment holders are not entitled to compensation under eminent domain: 20 C.J. 855, Section 290; Elliott On Roads and Streets, Section 245, p. 404; Orgel, Ibid., Section 114, p. 394; Watson v. N.Y. Cent. R. Co., 47 N.Y. 157 (1872); Gembel v. State, 59 Ind. 446,452 (1877). In Sherwood v. Lafayette 109 Ind. 411, 10 N.E. 89 (1886) the court said, "There is a clearly defined distinction between a mortgage and a judgment lien; the one is a specific lien created by contract and protected as a contractual obligation, while the other is a statutory lien, general in its character and subject to legislative control". School Dist. v. Werner, 43 Iowa 643, holds that a judgment lien on land constitutes no property in the land itself, and the judgment debtor has a right, previous to levy, to cut timber and firewood, which, if not removed, are his personal property and do not pass by execution sale.

150. 20 C.J. 855; Nichols, Ibid., Section 122 (2d ed.).

151. Ind. School Dist. v. Hewitt, 105 Iowa 663, 75 N.W. 497 (In this decision land was condemned for a school site. Prior to the acquisition a lien for taxes had attached and the premise was sold for taxes to the defendant nearly two months prior to said condemnation. Two years later the defendant procured a tax deed. He claims title under this deed. The court held that title could be quieted against the defendant's interest.

152. Alexander v. Plattsmouth, 30 Neb. 117, 46 N.W. 213. This case is probably the only one presenting facts similar to the Washington decision. But in this Nebraska case it was unnecessary to pass on the merits of the action. The suit was based on impairment of security, not foreclosure of a tax lien. The court dismissed the action on two grounds: first, the value of the part of the lot not taken by the city exceeded the amount of the tax lien; secondly, the suit was barred by the statute of limitations.

certain lands. At the time of instituting such proceedings, there had been levied by the county certain taxes which were then due, delinquent and unpaid. The county in the proceedings was not made a party, and so far as the record shows, it had no actual notice of the condemnation suit. Thereafter, the county brought an action to establish and foreclose its lien for taxes, and after the usual proceedings the treasurer of the county deeded the several tracts of land to the plaintiff's grantor. The plaintiff, on acquiring all interests in the tax deed, sought to establish them as superior and paramount to the rights of the city in the condemned land. The Supreme Court dismissed the plaintiff's action, holding that the tax lien was cut off by eminent domain despite the fact that the Washington statute provided for notice to all persons having an interest in the land so far as known by the city officers or appearing from the records in the office of the county auditor.

However, the taxes may be paid out of the award even though the holder of such lien was not made a party to the proceedings.[153]

When a private corporation, possessing the power of eminent domain, acquires the property, it has been held that the lien for taxes of the state is property and compensation must be paid for the taking of such interest.[154]

c. Compensation to Purchasers

Where the vendor had agreed to sell and the purchaser to buy under a binding contract, and title is to be transferred at a future date, the purchaser is a proper party to the condemnation proceedings even though title has not passed and entitled to the award subject to the

153. Nichols, Ibid., Section 122 (2d ed.); In re Sleeper, 62 N.J.Eq. 67, 49 Atl. 549; 20 C.J. 855; Carpenter v. New York, 44 App. Div. 230, 60 N.Y. Supp. 633, 51 App. Div. 633, 64 N.Y. Supp. 839; Phil. R. Co. v. Penn. S.V. R. Co., 25 Atl. 177, 151 Pa. 569.

154. State v. Missouri Pac. Ry. Co., 75 Neb. 4, 105 N.W. 983.

lien of the vendor.[155] However, the holder of an option has been held not to have an interest in the land which will entitle him to compensation.[156]

If one who is an owner at the time the proceedings to condemn are commenced and when damages are assessed, subsequently parts with his title without reservations before the title to the condemnor becomes vested by actual payment of the damages, the right to damages passes to the succeeding owner as an incident to the land, and the one who owns the land at the time when the title to the easement therein becomes vested is entitled to the assessed damages.[157] Where the vendee of the land under an executory contract is in possession and having made the payments agreed upon is entitled to a deed although he has not yet received one, it is generally held that he is the owner in respect to eminent domain proceedings.[158]

d. Compensation to Life Tenants and Remaindermen[159]

Where a life estate is vested in one and a fee in another, compensation must be made to both in proportion to the damages suffered to

155. Wolfe v. Iowa Ry. Co., 173 Iowa 277, 178 Iowa 1, 155 N.W. 324; 20 C.J. 860; Cotes v. Davenport, 9 Iowa 227; Millard v. N.W. Mfg. Co., 200 Iowa 1063, 205 N.W. 979.

156. 20 C.J. 849; Taggart Paper Co. v. State, 187 App. Div. 843, 176 N.Y.S. 97; Wolfe v. Iowa Ry. Co., Ibid., (discusses the distinction between an option and a contract to purchase).

157. Griffeth v. Pocahontas County Drainage Dist., 182 Iowa 1291, 166 N.W. 570,571 (1918); Obst v. Covell, 93 Minn. 30, 100 N. W. 650 (1940); Nichols, Ibid., Section 5.21 (3d ed. 1950).

158. Nichols, Ibid., Section 5.21(4)(3d ed.)(1950); Cotes v. Davenport, 9 Iowa 227.

159. See Stoyles, Condemnation of Future Interests, 43 Iowa L. Rev. 241 (1958).

the respective parties.[160] In other words, the life tenant is compensated for his life estate, and the remainderman for his remainder.[161]

When the duration of the present estate is impossible of ascertainment as in the cases of determinable or conditional fees, the courts usually disregard completely the contingent interest of possibility of reverter.[162]

However, in cases of contingent remainder after a life estate, the problem is not so easily solved. When such contingent remainders are contingent as to event, that is, when the persons who shall take are designated, but their possibility of taking is dependent on extrinsic features or happenings, they may be deemed such "owners" as

160. Elliott, On Roads & Streets, Section 302; 20 C.J. 854; Nichols, Ibid., Section 5.22(1)(3d ed. 1950).

161. Iowa has two decisions involving life estates: Gates v. Colfax Northern Ry. Co., 177 Iowa 690, 159 N.W. 456, and Westbrook v. M.N. & S. Ry. Co., 115 Iowa 106, 88 N.W. 202.

162. Orgel, Ibid., Section 117; 30 C. J. 854; Lyford v. Laconia, 75 N.H. 220, 72 Atl. 1085 (1909); Fifer v. Allen, 288 Ill. 507, 81 N.E. 1105 (1907); Dutch Church v. Croswell, 210 App. Div. 294, 206 N.Y.S. 132 (1924); Cincinnati v. Bobb, 4 Ohio Dec. 463 (1893); Lancaster School Dist. v. Lancaster County, 295 Pa. 112, 144 Atl. 901 (1929); Joint School Dist. v. Bosch, 219 Wis. 181, 262 N.W. 618 (1935)("Where land was dedicated to a school district, which had exclusive right to use of the property for school purposes and which had no intention of abandoning property, was condemned for highway purposes, damages were payable to the school district for entire value of the land as improved, the value of the fee owner's contingent remainder being nominal"). In Chicago W.D. Ry. Co. v. Metropolitan Ry. Co., 152 Ill. 519, 38 N.E. 736,738, the land sought to be condemned was under a lease of 999 years, and the court held that the lessor's interest was entitled to only nominal damages. The American Law Institute has suggested that a distinction be drawn between the cases where the termination of the present estate is improvable within a reasonably short period of time and those where such termination is likely. Restatement of the Law of Property, Tentative Draft No. 2 (1930), Sections 61,73; see also Nichols, Ibid., Section 119 (2d ed.).

are entitled to compensation.[163] In certain cases, the likelihood of the fortuitous event occuring may be so remote that such interest may deserve no greater consideration than the mere possibility of reverter, in which case no notice or joinder as a party is required.[164]

When the interests are contingent as to person, as in the case of a gift over after a life estate to a person or a class not yet in being, such interests may be recognized by impounding the award as a substitute for the realty and subjecting it to like charges and trust. There is one decision which sanctions the view here advocated. In Miller v. Ashwell, 122 N.C. 759, 16 S.E. 763, a will was involved which gave to Mrs. E.A. Smith a life estate and remainder to such children of hers or their children that survived her. The court rendered judgment awarding the life tenant the present value of her interest and required the residue to be invested by the clerk of the court to be distributed on the death of the life tenant.[165]

f. Compensation for Contracting Parties

Where the condemnor appropriates property which is the subject of a contract between itself and the property owner, it has been held that compensation is due to the contracting party for the value of the remainder of the contract.[166] This is also the case where the con-

163. Nichols, Ibid., Section 5.22(2) (3d ed. 1950); a contingent remainderman is entitled to compensation for the value of the contingent interest at the time of the taking with interest. Charles etc. Ry. Co. v. Reynolds, 69 S.C. 481, 48 S.E. 476; but see Chesapeake etc. Ry. Co. v. Bradford, 6 W.Va. 220 (holding that it was an error to award compensation on the theory that they had a vested fee in remainder).

164. Nichols, Ibid., Section 5.221 (3d ed. 1950).

165. In this case the court said that the money becomes the equivalent of the land and is subject to like trust and charges.

166. Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897).

demnor expropriates one party's rights under the contract and enforces the former owner's rights against the other party to the contract.[167] However, where the performance of a contract between two independent parties is frustrated indirectly through the actions of the condemnor, no damages to the contracting party are allowed on the theory that the injury is too remote.[168]

f. Compensation to Holders of Right of Redemption

The rule recognized in this jurisdiction is that the right of redemp-

167. Brooks-Scanlon Corp. v. United States, 265 U.S. 106 (1924).

168. Omnia Commercial Co. v. United States, 261 U.S. 502 (1923) (property owner had a favorable contract entitling it to steel from a mill whose total production was seized by the United States); accord, Mullen Benevolent Corp. v. United States, 290 U.S. 89 (1933) (the federal government took land on which improvement assessments had been made and paid the assessments; however, such assessments were insufficient to retire the improvement bonds and an additional assessment was prevented because title to the land had passed to the federal government. Held, no taking); cf., Peck v. Chicago Railway Co., 270 Ill. 34, 110 N.E. 414 (1915)(no recovery for loss of rents where tenants moved out due to severe damages to property); Burt v. Merchants' Insurance Co., 115 Mass. 1 (1874) (compensation is not to be based on contracts affecting the land but upon the value of the land as a whole; query whether this case is valid in Iowa where a separate valuation of interests in land is allowed).

tion is not property within the purview of Article I, Section 18 of the Iowa Constitution. In Wissmath v. Mississippi River Power Co., 162 Iowa 846, 162 N.W. 846, it was held that when the appropriation or taking occured during the period of redemption, the plaintiff could not recover damages for injury to such right when he failed to redeem. The court, however, by way of dictum stated that if he had exercised his right, he would be entitled to compensation for such wrong.

g. Compensation to Easement Holders

When a private easement of passage is taken by the public authorities for a street or highway, the owner of such easement is entitled to no more than nominal damages.[169] This same rule has generally

169. Nichols, Ibid., Section 121 (2d ed.), "If however the public use does not interfere with the enjoyment of the existing prior easement as is usually the case when a private way is taken for a public street, the owner of the right-of-way is not entitled to more than nominal damages." Orgel, Ibid., Section 109, p. 370, footnote 24, "The courts are in accord... that where land is taken for street purposes the easement owner sustains no damages and is entitled to no compensation." Appeal of Sowers, 175 Minn. 168, 220 N.W. 419 (in this case the plaintiffs had an easement of way one rod wide over the land of another. The easement was taken for a public highway and widened to four rods wide. It was held that the plaintiffs had no cause for complaint. The court viewed the public appropriation as of no injury to the plaintiff's right saying, "In this case all the appellant had in this strip of land was the privilege of using it. The inclusion of this strip in the public road did not take from them the right to use this strip of land. Their privilege now extends to four rods instead of one. The broadening of the easement to the public generally did not in law destroy or take away their privilege. They did not own the property, nor could they appropriate it for any use other than a right-of-way. Now they will not have the burden of maintenance.").

been applied to the owner of the fee.[170] However, it has been held that where a city is denied the use of a useful street to which it has an easement,[171] compensation is due.

h. Compensation to Holder of Dower Rights

The accepted rule is that if property has been taken pursuant to condemnation proceedings, the inchoate dower right of the other spouse is thereby cut off without notice, and such other spouse is not entitled to compensation.[172] In Caldwell v. City of Ottumwa, 198 Iowa 666, 200 N.W. 336,337, the court held that even if the husband forged his wife's name to the deed conveying the land to the city for park purposes, the city could take the land without any allowance for the wife's dower right saying that the voluntary conveyance was the legal equivalent of condemnation proceedings.[173] However, after the husband's or wife's death, the inchoate interest materializes, and if the property

170. Orgel, Ibid., Section 109, 18 C.J. 115; U.S. v. Certain Parcels of Land, 54 F. Supp. 667 (D. Md. 1944); Cossey v. State, 43 N.Y.S.2d 908 (1943).

171. U.S. v. Wheeler Township, 66 F.2d 977 (8th Cir. 1933); Town of Bedford v. U.S., 23 F.2d 453 (1st Cir. 1927).

172. Nichols, Ibid., Section 120 (2d ed.); Orgel, Ibid., Section 115; Lewis, Eminent Domain, Section 522.

173. Iowa cases having some bearing on this general proposition: Jocimsen v. Johnson, 173 Iowa 553, 156 N.W. 21 (A dedication of a street or alley vests in the city a mere easement, and the wife of the grantor need not be joined); Chicato & S. R. Co. v. Swinney, 38 Iowa 182 (A husband can convey a right-of-way over the homestead without the concurrence and signature of the wife to the deed). Involves Iowa Code Section 561.13 (1958). See also, Stokes v. Maxson, 113 Iowa 122, 84 N.W. 949; Maxwell v. Mc Call, 145 Iowa 687; 124 N.W. 760; Bower v. Walker, 182 Iowa 804, 166 N.W. 269; Ottumwa C. F. & St. P. Ry. Co. v. McWilliam, 71 Iowa 164, 32 N.W. 315.

is taken, although no definite assignment is made to the surviving spouse, she or he has such a proprietary interest in the condemned land as to entitle her or him to compensation and notice of the proceedings.[174]

j. Compensation for State Property

The property of a state is protected by the Constitution and the federal government cannot take such property for the uses for which Congress may authorize the power of eminent domain without compensation to the state.[175] This limitation also applies to all private or municipal corporations and extends to easements as well as property held in fee by the state.[176]

k. Compensation for Separate Interests

In determining compensation for separate interests the nearly universal rule is to ascertain the entire compensation as though the property belonged to one person, and then apportion this sum among

174. Nichols, Ibid., Section 120 (2d ed.).
175. Nichols, Ibid., Section 130 (2d ed.).
176. State ex rel. Board of Railroad Comm'rs v. Stanolind Pipe Line Co., 216 Iowa 436, 249 N.W. 366 (property of a state such as a highway, although defined as public rather than private, and although only an easement, is within the protection of the constitutional clause forbidding the taking of private property for public use without just compensation). Nichols, Ibid., Section 130 (2d ed.); "Public highways are the property of a state for public uses of its people, and a state may therefore collect compensation from a corporation using them under authority of Congress for the telegraph poles of an interstate line".

the different parties according to their respective rights.[177] The Iowa court so far has neither approved or discountenanced such method of measurement, but from the result reached in Simmon v. Mason City Ry. Co., 128 Iowa 139, 103 N.W. 129, a different rule applies in those cases involving a landlord and tenant relationship, namely to first appraise the value of the separate interests if possible[178], and then by combining them, arrive at the value of the whole.[179] The chief objection to this latter mode of allocating damages is that it leads to the plying on of false valuations by multiplying interests through contracts so that the final payment is in excess of what the property is actually worth.[180]

177. Orgel, Ibid., Section 107; Nichols, Ibid., p. 707; State v. Anderson, 176 Minn. 525, 223 N.W. 924; Fiorinie v. City of Kenosha, 208 Wis. 496, 243 N.W. 761,762 (1932) (the total amount of recovery in the case of condemnation is the difference between the value of the land affected considering it as a whole before and after the taking. This measure must cover both the owner's interest and the lessee's interest).
178. Ruppert v. Chic. etc. Ry. Co., 43 Iowa 490 (damages ought to be awarded separately if an owner's interest can be ascertained).
179. 20 C.J. 998.
180. Orgel, Ibid., Section 116, 118 (2d ed.).

DIVISION IV

COMPENSATION TO LESSEES

SECTION 18. GENERAL RULE AS TO LESSEES

It seems clear that the lessee is ordinarily recognized by the courts as an "owner" whose interest is guarded by the constitutional prohibitions against taking property without just compensation.[1] The basic problems seem to arise in determining the method of evaluating the damages to a lessee. It is apparent from the cases that the lessee's damages are not to be confined to the amount of his rental obligation on the property condemned.[2] The ordinary rule where the entire property is taken is that the damage to the lessee is equal to the rental value of the property less the rent reserved.[3] Where only a part of the leased property is condemned, the rule is that damages are equivalent to "... the net value of the annual use of the premises before the defendant appropriated the right-of-way and took the land and what it was worth afterwards".[4]

The principal difficulty in employing the market value conceptions as the key factor in determining the amount of compensation to be

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1. Des Moines Wet Wash Laundry v. Des Moines, 197 Iowa 1082, 198 N.W. 486 (1924); Cheisa & Co. v. Des Moines, 158 Iowa 347, 138 N.W. 922 (1912); Werthman v. Mason City & Ft. Dodge Ry. Co., 128 Iowa 135, 103 N.W. 135 (1905); Storm Lake v. Iowa Falls & S. C. R. Co., 62 Iowa 218, 17 N.W. 489 (1883); Renwick v. Davenport & N.W. R. Co., 49 Iowa 664 (1879); Batcheller v. Highway Commission, ___ Iowa ___, ___ N.W.2d ___ (Opinion February 9, 1960).
2. Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85,94 (1948); Des Moines Wet Wash Laundry v. Des Moines, 197 Iowa 1082, 198 N.W. 486 (1924); Werthman v. Mason City & Ft. Dodge Ry. Co., 128 Iowa 135, 103 N.W. 135 (1905).
3. Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85,94 (1948); Des Moines Wet Wash Laundry v. Des Moines, 197 Iowa 1082, 1088, 198 N.W. 486 (1924).
4. Werthman v. Mason City & Ft. Dodge R. Co., 128 Iowa 135,138, 103 N.W. 135,136 (1905); Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85,94 (1948); Wilson v. Fleming, 239 Iowa 718, 31 N.W.2d 393,402 (1948); Batcheller v. Highway Commission, ___ Iowa ___, ___ N.W.2d ___ (Opinion February 9, 1960).

awarded to the lessee is that market value of leaseholds is frequently difficult to determine. The Iowa court, at least, has been inclined to maximize the difficulties inherent in evaluating a leasehold. In Des Moines Wet Wash Laundry v. Des Moines[5] the court allowed the introduction of evidence as to the cost of removal of machinery located on the premises as an indication of market value and stated that the strict rules as to market value should be departed from in evaluating leaseholds. In Korf v. Fleming,[6] the court went so far as to allow the introduction of evidence concerning profits to aid in the determination of the value of the lease.

Another basic element of the Iowa position on compensating lessees is the procedure followed in awarding damages. Most jurisdictions allow the condemnor to proceed against the fee holder and then provide for a right of action against the fee holder by the lessee to recover the latter's share of the total damage to the estate condemned. However, the Iowa court has upheld trial court instructions allowing separate valuation by the jury where the case is tried on the theory

5. 197 Iowa 1082, 1088, 198 N.W. 486 (1924). This case is examined in detail in relation to the position which it seems to have taken on removal costs in Section 22(b), infra. It is submitted that the determination of market value is by no means as difficult as the court has thought; certainly a carefully planned case for the condemnor composed of expert opinion based on the conventional factors in determining the market value of the fee would go a long way toward minimizing the court's tendency to admit evidence of factors which are excluded in determining damages to a fee.
6. 289 Iowa 501, 32 N.W.2d 85, 94 (1948). See also, Highway Commission v. Wilson, 249 Iowa 994, 90 N.W.2d 161, 169 (1958).

of separate evaluation of the interests involved.[7] In both of the cases upholding the separate award instructions, the court pointed to the fact that the whole trial had been conducted on the basis of separate awards and consequently the instruction was in accord with the manner in which the case had been tried. As a result, it would still seem possible to try the cases jointly if the proper procedure were followed from the outset of the trial. The Iowa joinder rules appear to be inapplicable as they apply only to multiple defendants. However, the interpleader rules, as set forth in Iowa Rules of Civil Procedure 35 and Iowa Rules of Civil Procedure 36 would seem to furnish a method for accomplishing a single condemnation of the separate interests. In an interpleader action the liability of the condemnor for the entire legal interest in the land would be determined in the first stage of the proceedings. The condemnor would then be dismissed from the action, and in the second state the holders of interests would contest the division of the total award. It would seem that this procedure would have several advantages for the condemnor. In the first stage of the proceedings the only issue would be the value of the land when viewed as a fee simple estate; and therefore, the issues would be exactly the same as in any other type of condemnation action. Under separate condemnation, however, each party is free to exaggerate the value of his interest without causing any resulting dimunition in the value of the other interests; as a consequence the sum of the separate awards is likely to be in excess of the award for a fee simple estate. Secondly, when interpleader is used, the condemnor will not be involved in the highly complicated issues as to the value of the separate estates. These issues, as the remainder of this chapter indicates, are very difficult, and it is not at all clear that they would be resolved favorably to the condemnor. However, in separate condemnation, the condemnor must oppose every theory which would increase the value of an estate. For example, he would be forced to enter the complex question of what fixtures are compensable as far as the lessee is concerned. In interpleader, such

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7. Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85, 93, 99 (1948); Wilson v. Fleming, 239 Iowa 718, 31 N.W.2d 393 (1948). See also, Simons v. Mason City & Ft. Dodge R. Co., 128-139, 103 N.W. 129 (1905). Batcheller v. Highway Commission, ___ Iowa ___, ___ N.W.2d ___ (Opinion February 9, 1960).

issues would be raised in the second stage when the lessor and lessee are disputing the proportionate share of the total award which each should receive. Consequently, these parties, not the condemnor, will have the responsibility of developing the Iowa law in the area. All in all, it would seem that the sanction by the Supreme Court of the interpleader procedure for dealing with separate interests in land would be highly desirable, at least from the condemnor's point of view.

SECTION 19. TYPES OF LESSEES ENTITLED TO COMPENSATION[8]

a. Long Term Interests

The rule seems to be well established that the lessee from year to year, or for years, is entitled to compensation for the value of his particular leasehold interest.[9] Where a lease of the type above mentioned also contains an option for renewal, the lessee is entitled to the market value of a lease containing such an option.[10] However, where the tenant has a mere expectancy that the lease will be renewed based on past conduct of lessee and lessor, the lessee is entitled to no additional compensation over the value of the existing lease.[11] With regard to a tenant who has a leasehold for which compensation must be paid, it seems to be possible for the condemnor to wait out the lease and avoid compensating the lessees even though the condemnation proceedings are begun before the expiration of the lease.[12]

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8. On this general topic see Note, Condemnation and the Lease, 43 Iowa L. Rev. 279 (1958).
9. Des Moines Wet Wash Laundry v. Des Moines, 197 Iowa 1082, 198 N.W. 486 (1924); Cheisa & Co. v. Des Moines, 158 Iowa 347, 138 N.W. 922 (1912); Simmons v. M. C. & Ft. Dodge Ry. Co., 128 Iowa 139, 103 N.W. 129 (1905); Renwick & Shaw v. Davenport Ry. Co., 49 Iowa 664 (1879) aff'd 102 U.S. 180 (1880).
10. Nichols, Ibid., Section 5.23(4)(3d ed. 1950); see also Batcheller v. Highway Commission, ____ Iowa ___, ___ N.W.2d ___(Opinion February 9, 1960).
11. Nichols, Ibid., Section 5.23(4)(3d ed. 1950).
12. Gafney Press v. State, 206 Misc. 1079, 135 N.Y.S.2d 512 (1954); Los Angeles County Flood Control District v. Andrews, 52 Cal. App. 788, 205 Pac. 1085 (1922); City of Cincinnati v. Schmidt, 14 Ohio App. 427 (1921); Schreiber v. Chicago & E. R. Co., 115 Ill. 340, 3 N.E. 427 (1885).

b. Short Term Interests

However, a tenant by sufference, or from month to month, has no interest in the land entitling him to compensation; the same is true of a tenant at will.[13] This result is based on the theory that such a tenant has no right of action against the landlord for the disturbance of his possession of the premises.[14] Even if damages were allowed, they would inevitably be extremely small in view of the fact that the condemnor would have to pay only for the value of the unexpired term which would, of course, be extremely short and in view of the fact that he could undoubtedly wait out this short period and avoid damages altogether.[15] An expired lease, of course, is not a compensable interest even though the parties continue the relationship without lease because there is no property right present.[16] The existance of a contract for a lease is also not regarded by the courts as sufficient to establish a compensable interest in the land.[17]

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13. U.S. v. Certain Lands, 39 F. Supp. 91 (E.D.N.Y. 1941); U.S. v. Inlot, 26 Fed. 482 (1873); Petry v. Denver, 123 Colo. 509,514, 233 P.2d 867,869 (1951) (dictum); Emerson v. Somerville, 166 Mass. 115, 44 N.E. 110 (1896); Tate v. Highway Commission, 226 Mo. App. 1216, 49 S.W.2d 282 (1932); Shaaber v. Reading, 150 Pa. 402, 24 Atl. 692 (1892); Canadian Pac. Ry. Co. v. Brown Milling & Elevator Co., 18 Ont. L. Rep. 85, 15 Am.Cas. 709 (1909); but see, in re Gratiot Avenue, 294 Mich. 569, 293 N.W. 755 (1940). For a case involving admission of parol to prove that a month-to-month lease was actually intended to be for a term of years because of special circumstances, see People v. Ganohl Lumber Co., 10 Cal.2d 501, 75 P.2d 1067 (1938).
14. Nichols, Ibid., Section 5.23(3)(3d ed. 1950).
15. See cases cited in footnote 12, supra, since those cases refer to waiting out a term of years, which is clearly compensable, it would seem that the rule would extend a fortiori to a tenancy from month to month. As to the negligible amount of damages, see In re Gratiot Avenue, 194 Mich. 569, 193 N.W. 755 (1940), which implies that apart from removal costs there would be no damage at all.
16. U.S. v. Honolulu Plantation Co., 182 F.2d 172 (9th Cir. 1950) (strong case).
17. Nichols, Ibid., Section 5.23(7) (3d ed. 1950); McGrath v. Boston, 103 Mass. 369 (1869); Strickland v. Penn. R. Co., 154 Pa. 348, 26 Atl. 431 (1893).

c. Cancellation Clauses

Many times leases contain clauses permitting one or both parties to cancel the lease upon specified conditions. When such a cancellation actually occurs, it has been held that the lessee is entitled to no damages.[18] However, what happens when neither party elects to cancel? It is clear that the condemnor cannot compel either party to exercise his power to terminate,[19] and from this authority it is probably safe to infer that the power to cancel does not run from the lessor to the condemnor.[20] However, the value of a lease subject to a cancellation clause is not, of course, as great as one without such a clause. Consequently, it would seem that the estimates of the value of such a lease should be limited to market value of leases subject to similar cancellation clauses. At least one case has so indicated,[21] and it would seem that this authority presents the condemnor with a valuable opportunity for reducing the award where such a cancellation clause is present.

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18. Newman v. Commonwealth, 336 Mass. 444, 146 N.E.2d 485 (1957); cf. City of Ladue v. St. Louis Public Service Co., 168 S.W.2d 966 (Mo. 1943).
19. Syracuse Grade Crossing Comm. v. Delaware L. & W. R. Co., 197 Misc. 192, 97 N.Y.S.2d 279 (1940); Batcheller v. Highway Commission, ___ Iowa ___, ___ N.W.2d ___ (Opinion February 9, 1960).
20. See Queensboro Farm Products v. State, 161 N.Y.S.2d 989 (1956) aff'd 5 App. Div.2d 967, 171 N.Y.S.2d 646 (1958). In this case the state's contention that damages should be awarded for only a 30 day lease, which was the length of the notice required for cancellation, was rejected; in a sense, the condemnor's argument amounted to a contention that the cancellation clause was exercised as of the date of condemnation. See also Batcheller v. Highway Commission, supra.
21. Syracuse Grade Crossing Comm. v. Delaware L. & W. R. Co., 197 Misc. 192, 97 N.Y.S.2d 279, 291 (1940)(dictum); but see, Queensboro Farm Products v. State, 161 N.Y.S.2d 989 (1956) aff'd 5 App. Div.2d 967, 171 N.Y.S.2d 646 (1958). It is believed that the latter case can be distinguished from the former since the language of the court in the Queensboro case indicates that the contention of the condemnor was that compensation should be limited to the value of a leasehold equivalent to the notice period of the cancellation clause. The language of the Syracuse Grade Crossing case, however, suggests that the standard of value should be the market value of a lease subject to a cancellation clause.

d. Holders of Undivided Interests

The holders of undivided interests in the same interest in land are entitled to share in the compensation. Examples of such parties include tenants in common, joint tenants, and tenants by the entirety.[22] The condemnor has no interest in the manner in which the award is divided since this is a problem in which only the claimants are involved.[23]

SECTION 20. FIXTURES AS AN ELEMENT OF MARKET VALUE

This section will be devoted to an analysis of the value which fixtures, whether they belong to the landlord or the tenant, whether they are real or personal property, add to the market value of a leasehold. It should be observed that the law varies a great deal according to the type of property and differs a great deal from jurisdiction to jurisdiction. Ordinarily the problem arises in connection with condemnation of commercial property, which is most apt to have extensive improvements made to it in order to accomodate the lessee's business purpose. The Iowa law on fixtures is confined to the Des Moines Wet Wash Laundry case.[24] Consequently, it is necessary to examine cases arising in other jurisdictions in order to obtain a comprehensive picture of the law in this area. At the conclusion of this inquiry the Iowa law will be examined in the light of the relevant foreign precedents.

a. Where Fixtures Belong to the Lessor

This situation may arise either where improvements have been made by the lessor before the term of the lessee commences and without reference to his term, or where the improvements are made by the lessor specifically for the present lessee, in this situation there is rarely a claim by the lessee for damages. In addition, the problem may arise

22. Nichols, Ibid., Section 5.3(1-3)(3d ed. 1950).
23. Nichols, Ibid., Section 5.3(4) (3d ed. 1950).
24. 197 Iowa 1082, 198 N.W. 486 (1924).

where the tenant has made the improvements, but they are of such a type that will revert to the lessor at the termination of the lease. It seems clear that the lessee may not recover the value of improvements which will revert to the lessor.[25] However, he may recover for any increase in the market value of the lease which results from the improvement;[26] this added value may or may not be equivalent to the actual cost of the fixture. It would seem that the same rule should be applied in the first two situations where the fixtures belong to the lessor originally.

b. Where Fixtures Remain Property of Lessee

(1) By Operation of Law

This section deals with types of improvements which, when made by the lessee to the realty belonging to the lessor, will remain the property of the lessee. Generally, such improvements are known as trade fixtures.

Basically, there are three more or less distinct views as to such property. The position most favorable to the condemnor is that trade fixtures, being personal property by operation of law, are not a compensable item of damage as such.[27] The lessee is entitled to compensation for the value added to the leasehold by the improvements for the

25. In re City of New York, 250 App. Div. 197, 293 N.Y.S. 850 (1937).
26. Department of Public Works and Buildings v. Bohne, 415 Ill. 253, 113 N.E.2d 319 (1953); Marfil Properties v. State, 9 Misc.2d 878, 168 N.Y.S.2d 234 (1957); accord, Allen v. City of Boston, 137 Mass. 319 (1884).
27. Potomac Electric Power Co. v. U.S., 85 F.2d 243 (D.C. Cir. 1936) (heavy electrical generating equipment held personalty); Pause v. Atlanta, 98 Ga. 92, 26 S.E. 489 (1896); Schreiber v. Chicago & E. R. Co., 115 Ill. 340, 3 N.E. 427,430 (1885); Bales v. Wichita, Midland Valley R. Co., 92 Kan. 771, 141 Pac. 1009 (1914); Mayor of Baltimore v. Gamse & Bro., 132 Md. 290, 104 Atl. 429,431 (1918); Springfield Southwestern Ry. Co. v. Schweitzer, 173 Mo. App. 650, 158 S.W. 1058 (1913); accord, Futrovsky v. U.S., 66 F.2d 215 (D.C.Cir. 1933)(dictum at 216 framed partially in terms of the N.Y. rule); cf. Gershon Bros. Co. v. U.S., 284 Fed. 849 (5th Cir. 1922).

unexpired portion of his term.[28] The theory behind this view is that the lessee would have to remove the property at the end of the term or abandon it to the landlord; consequently, the condemnor should not be compelled to take the property and pay therefor.[29] However, the lessee, when making the improvements, contemplated that they would be of value to him for the total period of his lease; therefore, this line of cases allows him to recover for the market value of his lease, as improved, for the balance of the leasehold period. Clearly this is all the lessee expected when he entered into the lease and improved the property.

For additional cases in this area, see Section 22, dealing with the denial of removal costs where trade fixtures are involved. As explained in that section, the theory behind the allowance of removal costs is predicated on a finding as to whether the property in question has been "taken" by the condemnor; hence, the cases often are almost exactly in point.

The second view is only a variant on the basic principle of the first rule, and is the present position of the New York courts. In this regard, it is important to note that the New York position has undergone considerable change as a result of the decision in the case of In re Whitlock

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28. Pause v. Atlanta, 98 Ga. 92, 26 S.E. 489 (1896); Bales v. Wichita, Midland Valley R. Co., 92 Kan. 771, 141 Pac. 1009 (1914); Mayor of Baltimore v. Gamse & Bro., 132 Md. 290, 104 Atl. 429,431 (1918); Consolidated Ice Co. v. Penn R. Co., 224 Pa. 487, 73 Atl. 937 (1909).
29. Mayor of Baltimore v. Gamse & Bro., 132 Md. 290, 104 Atl. 429,431 (1918); accord, In re Harlem River Drive, 113 N.Y.S.2d 292,295 (1952) (this case represents the second, or N.Y. rule, but contains an excellent statement of the reasoning applicable to both first and second rules).

Avenue, 278 N.Y. 276, 16 N.E.2d 281 (1938); prior cases which do not fit into the new position should be viewed with suspicion.[30] In addition, several other jurisdictions, among them Iowa, have relied

30. The early lower court cases in New York took the view that the condemnor appropriated the entire premises, including trade fixtures and therefore must pay for all the property taken. See In re Wilcox, 65 App. Div. 197, 151 N.Y.S. 141 (1914); In re Block Bounded by Avenue A, 66 Misc. 488, 122 N.Y.S. 321 (1910); In re Appointment of Park Commissioners, 17 N.Y.S.R. 371, 1 N.Y.S. 763 (1888). However, the Court of Appeals remained silent for some time on the matter. In In re Waterfront on North River, 192 N.Y. 295, 84 N.E. 1105 (1908), that court allowed damages to a lessee for trade fixtures in an action by the lessee against the lessor. However, at 1107 of 84 N.E., the court noted that the award, which included damages for trade fixtures, might have been too high. In Jackson v. State, 213 N.Y. 34, 106 N.E. 758 (1914), a much-cited opinion for the proposition that title to trade fixtures passes to the condemnor, the court held that title to machinery, shafting, elevators and conveyors belonging to the lessee passed to the condemnor and the lessee was, therefore, entitled to compensation. This case was regarded by some courts as establishing the proposition that the condemnor took all trade fixtures; the Iowa court seems to have based its position on fixtures on the Jackson case as well; see Wilson v. Fleming, 239 Iowa 718, 31 N.W.2d 393,398 (1948). That this was not the case was indicated by the Court of Appeals in the case of In re Allen Street and First Avenue, 256 N.Y. 236, 176 N.E. 377,380 (1931). There the court dealt with the related question of a situation in which the property in question would have been realty but for an agreement between the landlord and tenant. While denying the condemnor the benefit of this agreement, the court declared that a different rule might apply where property remained personalty without any agreement between the parties. Although there was some subsequent recognition of this exception in lower court cases (see In re City of New York, 250 App. Div. 197, 293 N.Y.S. 850 (1937)); In re Triborough Bridge, 249 App. Div. 579, 293 N.Y.S. 223 (1937), aff'd without opinion, 274 N.Y. 581, 10 N.E.2d 561 (1937), the distinction was first recognized by the Court of Appeals in In re Whitlock Avenue, 278 N.Y. 276, 16 N.E.2d 281 (1938) and seems to have been followed unswervingly in subsequent cases. See Queensboro Farm Products v. State, 161 N.Y.S.2d 989 (1956); aff'd 5 App. Div.2d 967, 171 N.Y.S.2d (1958); In re Horace Harding Expressway, 151 N.Y.S.2d 946 (1956) modified 4 App. Div.2d 683, 164 N.Y.S.2d (1957); In re Harlem River Drive, 113 N.Y.S.2d 292 (1952); In re Cross-Bronx Expressway, 195 Misc. 842, 82 N.Y.S.2d 55 (1948).

to a considerable degree in establishing their own rules on fixtures upon the New York doctrine before it became fully developed by the Whitlock Avenue case, supra. Consequently, these cases should be viewed with considerable skepticism; it will be noted that most of these cases fall under the third rule which will be discussed subsequently.

The basic difference between the first view and that of the New York courts lies in the type of property which is treated as within the category of trade fixtures. The New York courts take the position that the law as to what property passes to the condemnor is governed not by the law on trade fixtures as between landlord and tenant as in the first rule, but by the law on fixtures as between vendor and vendee.[31] New York contends with considerable accuracy that a condemnation proceeding is most closely analagous to a sale, and therefore the rule as to what property passes to the condemnor should be governed by the law as to vendor-purchaser in a situation of voluntary sale.[32] The error in this reasoning seems to lie in the fact that it ignores the presence of the leasehold. This rule only provides an answer to the question what must a purchaser take as between the vendor and vendee. It does not answer the question what does the purchaser take when he purchases land subject to a lease. According to 36 C.J.S., Fixtures 18 and42(b), a lessee

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31. In re Whitlock Avenue, 278 N.Y. 276, 16 N.E.2d 281 (1938); Jackson v. State, 213 N.Y. 34, 106 N.E. 758 (1914); Queensboro Farm Products v. State, 161 N.Y.S.2d 989 (1956) aff'd 5 App. Div.2d 967, 171 N.Y.S.2d (1958); Syracuse Grade Crossing Comm. v. Delaware L. & W.R. Co., 197 Misc. 192, 97 N.Y.S.2d 279 (1940); In re Appointment of Park Commissioners, 17 N.Y.S.R. 371, 1 N. Y.S. 763 (1888); accord, U.S. v. Lot 27, 157 F. Supp. 179 (S.D.N. Y. 1958)(following the N.Y. rule); In re Post Office Site, (U.S. v. Weiner), 210 Fed. 832 (2d Cir.) (1914) (citing the New York position; this case is now somewhat in doubt in view of subsequent federal decisions); St. Louis v. St. Louis I.M. & S. Ry. Co., 266 Mo. 694, 182 S.W. 750 (1916).

32. In re Post Office Site (U.S. v. Weiner), 210 Fed. 832,834 (2d Cir. 1914) (containing an excellent statement of the reasoning on which the New York rule is based).

may assert a right to remove trade fixtures as against the transferee of the reversion, when such transferee takes with notice that the fixture was annexed by the tenant. Since on condemnation proceedings the condemnor would almost always have notice of the existence of such improvements and would surely take pains to learn of their existence, it would seem that in the absence of a contractual assumption of ownership by the condemnor the lessee would still have title. However, this argument does not seem to have been considered by the New York courts.

In any event, the New York rule still affords the condemnor several advantages over the third rule, and its adoption in Iowa would by no means represent a catastrophe to the condemnor. Even applying the vendor-vendee rule, there are many types of trade fixtures for which no compensation is allowed. The New York courts take the position that property such as shelving, office furniture, etc. which may be easily removed does not pass and if compensation is allowed at all, it is only for the value which the property adds to the unexpired term of the lease.[33] Machinery normally does not pass with the realty unless (1) it is installed in such a manner that its removal will result in material injury to it or to the realty; or (2) where the building in which it is placed was specially designed to house it; or (3) where there is evidence that its installation was of a permanent nature.[34] Mere affixation of the machinery to the floor for purposes of stability is not sufficient to render the property immovable and therefore compensable.[35]

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33. In re Whitlock Avenue, 278 N.Y. 276, 16 N.E.2d 281 (1938); In re City of New York, 250 App. Div. 197, 293 N.Y.S. 850 (1937); cf. Brazos River Conservation and Reclamation Dist. v. Adkisson, 173 S.W.2d 294 (Tex. Civ. App. 1943) (this case seems to take the position that the property, although a trade fixture, passed to the condemnor; however, it allowed the lessee only the value of the property as it increased the value of the lease for the unexpired term).
34. In re Whitlock Avenue, 278 N.Y. 276, 16 N.E.2 281 (1938); In re Horace Harding Expressway, 151 N.Y.S.2d 946 (1946) modified 4 App. Div.2d 683, 167 N.Y.S.2d 389 (1957).
35. In re Whitlock Avenue, 278 N.Y. 276, 16 N.E.2d 281 (1938).

There are thus two types of fixtures under New York law: (1) movable, and (2) immovable. When the property is classified as movable, title does not pass to the condemnor, and he pays only market value of the improved leasehold for the remaining term.[36] When the property is held to be immovable, then damages for the property itself must be paid, and the question becomes one of deciding to whom they will be paid. If they will pass to the lessor at the end of the term under the law of fixtures as between landlord and tenant, the lessor is entitled to the damages; if not, the lessee recovers their value.[37] An interesting caveat exists in New York to the effect that if the condemnation is qualified so that it covers only certain property, damages for other non-specified items such as fixtures may be avoided.[38] The third rule holds that the condemnor takes the entire property, and, with the exception of obvious items of personal property such as inventory, must pay for everything including trade fixtures. None of the cases seems to involve a square holding that trade fixtures pass to the condemnor, although as will be seen in Section 22(a), infra, a good number have allowed the recovery of damages for removal of such property. Several of the cases are old New York cases now under considerable doubt in view of later decisions.[39] See discussion of New York rule, supra,

36. Cf. Application of Bronx River Expressway, 278 App. Div. 813, 104 N.Y.S.2d 554 (1951)(improper to base market value of property on the amount of the cancellation penalty).
37. Jackson v. State, 213 N.Y. 34, 106 N.E. 758 (1914); In re Horace Harding Expressway, 151 N.Y.S.2d 946 (1956) modified 4 App. Div.2d 683, 164 N.Y.S.2d 389 (1957); In re City of New York, 250 App. Div. 197, 193 N.Y.S. 850 (1937); Accord, St. Louis v. St. Louis I.M. & S. Ry. Co., 266 Mo. 694, 182 S.W. 750 (1916).
38. Jackson v. State, 213 N.Y. 34, 106 N.E. 758 (1914).
39. Jackson v. State, 213 N.Y. 34, 106 N.E. 758 (1914)(this case might be reconciled with the present N.Y. position but almost identical items of damage were held non-compensable in In re Whitlock Avenue, 278 N.Y. 276, 16 N.E.2d 281 (1938); In re Waterfront on North River, 192 N.Y. 295, 84 N.E. 1105 (1908); In re Willcox, 65 App. Div. 197, 151 N.Y.S. 141 (1914); In re Block Bounded by Avenue A, 66 Misc. 488, 122 N.Y.S. 321 (1910).

this subsection. Other cases involve property which rather clearly seems to be realty and because of that, some can be reconciled with the present position of the New York court.[40] The Nebraska court seems to have held that all property present passes at least to the extent that the value of the property is affected by such property.[41]

(2) Effect of Agreement Between the Parties as to Fixtures

It is common practice in many metropolitan areas to insert a "condemnation clause" in leases. These clauses usually provide that the lessee shall be entitled to no apportionment of the award to the lessor for the taking of the lease in the event of condemnation. They usually cover both the value of the leasehold and of the fixtures attached thereto. Although the courts had some early doubts on the matter,[42] they seem now to quite uniformly hold that the condemnor may take advantage of the contractual arrangements and deny recovery to the lessee.[43] This is the case even though there are no contractual arrangements whatsoever between the condemnor and the lessee. The reasoning of the courts seems to be based on the assumption that the lessee has contracted away his rights to a recovery; since the rights are gone, they cannot be asserted against anyone including the condemnor.[44]

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40. Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826 (1933) (heavy printing presses fixed on special foundations; compare with Potomac Electric Power Co. v. U.S., 85 F.2d 243 (D.C. Cir. 1936) which reached the opposite result with regard to similar property); Seattle & M. Ry. Co. v. Scheike, 3 Wash. 625, 29 Pac. 217 (1892)(growing crops and buildings--no contention that trade fixtures seems to have been considered by the court nor was any authority cited).
41. Bank of Brule v. Harper, 141 Neb. 616, 4 N.W.2d 609 (1942) (court allowed introduction of evidence concerning the value of fixtures and equipment and the merchandise as proper items to be considered in determining the value of the leasehold interest, although not as independent items of damage).
42. In re Allen Street and First Avenue, 256 N.Y. 236, 176 N.E. 377 (1931).
43. E.g., U.S. v. Petty Motor Co., 327 U.S. 372 (1946); U.S. v. Advertising Checking Bureau, 204 F.2d 770 (1953); U.S. v. Fisk Building, 124 F. Supp. 259 (S.D.N.Y. 1954); U.S. v. 10,620 Sq. Ft., 62 F. Supp. 115 (S.D.N.Y. 1945); U.S. v. Improved Premises, 54 F.Supp. 469 (D.S.N.Y. 1944).
44. U.S. v. Petty Motor Co., 327 U.S. 372, 376 (1946).

However, in spite of the fact that the condemnor may take advantage of a contractual relationship between the lessee and lessor in the form of a condemnation clause, there is considerable authority that he may not do so with regard to an agreement between the parties which converts fixtures which would have become real property when installed by the tenant into personal property which he is entitled to remove at the termination of the lease. A typical agreement of this type will allow the tenant to remove buildings such as a filling station, at the termination of the lease although ordinarily the affixation of a building to the land would make it the property of the fee holder. Thus, as between the landlord and tenant the property is personal and therefore should not pass with the land upon condemnation. However, considerable authority exists for the proposition that such fixtures will remain realty and must be taken by the condemnor.[45] Various reasons have been given for refusing to treat fixtures as personalty as between lessee and condemnor. It has been argued that the statute requires the condemnor to take all real property and that an agreement between lessor and lessee cannot alter the effect of the statute.[46] The federal position seems to be that the fixtures were inherently real estate and no agreement could change its character.[47] It has also been urged that the agreement was intended to have effect only as between the actual parties and was not intended to confer any benefit on the condemnor.[48] There seems to be

45. U.S. v. Seagren, 50 F.2d 333 (D.C.Cir. 1931); Los Angeles v. Hughes, 202 Cal. 731, 262 Pac. 737 (1928) (trees and shrubbery belonging to nursery); In re Allen Street and First Avenue, 256 N.Y. 236, 176 N.E. 377 (1931); In re Triborough Bridge, 249 App. Div. 579, 293 N.Y.S. 223 (1937) (dictum) aff'd without opinion, 274 N.Y. 581, 10 N.E.2d 561.
46. In re Allen Street and First Avenue, 256 N.Y. 236, 176 N.E. 377 (1931).
47. U.S. v. Seagren, 50 F. 2d 333 (1931 D.C. Cir.).
48. In re Allen Street and First Avenue, 256 N.Y. 236, 176 N.E. 377 (1931); In re Appointment of Park Commissioners, 17 N.Y. S.R. 371, 1 N.Y.S. 763 (1888).

no indication in the reports that an attack has ever been made on this doctrine on the grounds that it is inconsistent, by analogy at least, with the doctrine that the condemnor may take advantage of a condemnation clause despite the fact that he is not a party to the agreement. Most of the cases which allow the lessee to recover in spite of the agreement were decided before the final development of the rule on condemnation clauses, and therefore there is some reason to believe that a successful attack could be made by the condemnor on the doctrine denying the condemnor the right to take advantage of agreements between lessor and lessee which convert real into personal property. It is submitted that there is no sound reason for allowing the lessee something more than he originally contracts for; he expected at the time the lease was executed that the fixtures would remain his property and that removal would be necessary; he should not receive an addition to his rights simply because the land happens to be condemned.

There is some authority for the proposition that the condemnor may have the advantage of the agreement between the parties as to the character of fixtures. There is, as observed above, the analogy to the cases allowing the condemnor to have the benefit of a condemnation clause between the parties.[49] Some cases have held that the condemnor is entitled to treat property as personalty where the parties have agreed that it should be so regarded as between themselves,[50] while one case has allowed the condemnor to take advantage of a privately imposed building restriction which decreased the market value of the property.[51]

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49. See cases cited in footnote 43, supra, this division.
50. Minneapolis-St. Paul Metropolitan Airports Comm. v. Hedberg-Freidheim Co., 226 Minn. 282, 32 N.W.2d 569 (1948); In re Harlem River Drive, 113 N.Y.S.2d 292 (1952); Consolidated Ice Co. v. Penn. R. Co., 224 Pa. 487, 73 Atl. 937,939 (1909).
51. Allen v. City of Boston, 137 Mass. 319 (1884).

SECTION 21. PERSONAL PROPERTY

a. Does Not Pass to Condemnor - No Removal Costs

Personal property of the lessee, of course, does not pass to the condemnor, and there can be no claim for compensation for such a "taking". As a consequence, the courts seem almost universally to deny recovery for removal of personal property to lessees.[52] It will be remembered that the same principle is followed with regard to owners in fee.[53] The oft-cited reason for the rule is that removal costs of personal property are too speculative because different property owners would move to locations at varying distances from the condemned site; as a consequence damages could not be uniform.[54] It should be noted that the disallowance of removal costs for personal property is not inconsistent with the allowance of such costs for fixtures. In the latter case the property actually passes to the condemnor in the view of the court; removal costs are simply in lieu of payment of full market value.[55]

b. Statutory Changes in Iowa by 58th G.A. (1959)

Section 472.14, Iowa Code of 1958, relating to the appraisement and report of assessment of damages by the commissioners was amended by Section 3, Chapter 318, Laws of 58th G.A., to add thereto the following:

> "In assessing the damages the owner or tenant will sustain, the commissioners shall consider and make allowance for personal property which is damaged or destroyed or reduced in value."

The question arises as to what is meant by and included in the phrase "personal property which is damaged or destroyed or reduced in value". This would appear not to affect fixtures which have been attached to and become a part of the real estate since such items are realty and would be included in the previous appraisal of damages.

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52. E.g. Gershon Bros. Co. v. U.S., 284 Fed. 849 (5th Cir. 1922). St. Louis v. St. Louis I.M. & S. Ry. Co., 266 Mo. 694, 182 S.W. 750 (1916); In re Cross-Bronx Expressway, 195 Misc. 842, 82 N.Y.S.2d 55 (1948); In re Smith St. Bridge, 234 App. Div. 583, 255 N.Y.S. 801 (1932); N.Y. Cent. & Hudson R. Co. v. Pierce, 35 Hun 306 (N.Y. 1885); Matter of New York, W.S. & B. R. Co., 35 Hun 633 (N.Y. 1885).
53. See 15(c)(5), supra.
54. St. Louis v. St. Louis I.M. & S. Ry. Co., 266 Mo. 694, 182 S.W. 750 (1916).
55. See Discussion in Section 22, infra.

Nor would the above terms appear to apply to chattels which are merely used or kept on the premises taken by the eminent domain proceedings.

Some other states provide that payment must be made for property taken or damaged for the purposes of public use but the cases examined seem to refer only to real estate which is taken or damaged with the particular type of damage referring to consequential injuries because of the taking or use of other real estate.

The Michigan courts have allowed damages consequential to the taking of real estate which reduced in value personal property in the nature of trade fixtures.

In re Slum Clearance City of Detroit, 52 N.W.2d 195 (1952), the court held that it was proper for the jury to have submitted to it and to award damages for removal costs of trade fixtures. Regarding trade fixtures, the court said,

> "We believe that this should also include spare motors, parts, machinery, equipment, etc., which constitute replacements specially adapted to the full enjoyment of the realty."

This case involved the taking of the premises owned by a plating company and the premises included plating tanks and solutions contained therein which were carefully compounded, were expensive, and had to be maintained at certain temperatures under strict chemical control. Some of the solutions could only be moved in glass lined or rubber lined containers, and some solutions could not be moved at all. In the furnaces and melting pots were about 50,000 pounds of molten tin and molten lead which in order to be moved would have to be cast into bars and cooled and then remelted at a new location. The owner offered to prove that its plating solutions were of two sorts: one of which could not be moved at all or which could not be moved except at an expense greater than the value, and a second type which could be moved at considerable expense. The owner also sought to show that the molten metal could not be moved except by solidifying and casting it into pigs. The owner also sought to show that its total loss and expense of removal would amount to about $28,000. The trial court excluded this evidence, and the Supreme Court said:

> "Appellant should have been allowed to have the jury consider the evidence of loss or moving expense as a part of the appellant's proof of damages for the taking."

The Michigan Supreme Court arrived at the above result without a statute such as Iowa's recent amendment. The basis for the court's thinking was that whenever private property is taken, the damages should be sufficient to put the owner in as good a condition as he would have been if the injury had not occurred. The question of the tanks and items attached to and which had become a part of the realty as ordinary fixtures was not involved. The court below instructed the jury that as to fixtures which were a part of the realty and which the owner elected to take from it could be considered by the jury as follows:

> "You may consider the value of the fixtures to have been decreased to the extent of the cost of detaching them and reattaching them elsewhere, and you should make an allowance in your award by such an amount as representing the damage to such respondents claiming compensation for the diminished value of their fixtures. You are not, however, to add the costs of transporting severed trade fixtures to a new location, as such costs are considered too speculative."

The Michigan court in allowing the dimunition in value of trade fixtures seems to permit a measure of that dimunition in value to the extent of the cost of detaching them and reattaching them elsewhere as being the amount by which their value is decreased. Costs of transportation are not included, and this rule would appear to include all personal property which is attached to or built into the realty although not a fixture technically and would include personal property which is especially adapted for use on the premises involved such as built-in items or items for which a building alteration must be made in connection with installation. This rule does not appear to include miscellaneous personal property and chattels not affixed to the realty as trade fixtures or not parts or repairs pertaining to such attached trade fixtures.

Regarding the application to trade fixtures of a tenant, the Michigan Supreme Court in Re the Laying Out, Establishing and Opening of the John C. Lodge Highway in the City of Detroit, 65 N.W.2d 820, the court quoted from In re Widening of Bagley Avenue, 226 N.W. 688, wherein it was held that while as between landlord and tenant, fixtures or trade fixtues might be stated in the lease to be personal property; nevertheless, as between landlord and tenant and third parties, including a condemnor, such trade fixtures might "properly be considered as a part of the realty". The court held in that case:

> "Since the value of the fixtures as severed will be decreased to the extent of the cost of detaching and reattaching them elsewhere, the cost of such removal is to be considered in awarding damages."

This case also held that a condemnation clause in the lease providing that in the event of condemnation the lease should be void did not prevent the tenant having the right to intervene in the condemnation and obtain damages for the decrease in value of his trade fixtures as set forth above. The reasoning was that as between the landlord and tenant their lease controlled their respective rights and obligations toward each other, but that the decrease in value of the tenant's trade fixtures was a matter in which the landlord was not concerned and no provision in the lease granted the condemnor immunity from having to pay the tenant for such decrease in value. In the quote from Widening of Bagley Avenue, supra, the following language appears:

> "Our review of the record is convincing that the 'fixtures' herein involved were not stocks of goods nor in the usual acceptance of the term, purely personal property; but that they were what is properly denominated 'trade fixtures' and which although as between landlord and tenant might be personal property, as to third parties they may be properly considered as a part of the realty."

The above statutory change by the Iowa Legislature no doubt as to tenants requires the application of the Des Moines Wet Wash case[55a] and provides that the dimunition in value of trade fixtures of tenants is an item of damage to be determined and measured by the cost of detaching and reattaching elsewhere without taking into account transportation expense.

55a. 197 Iowa 1082, 198 N.W. 486 (1924).

SECTION 22. REMOVAL COSTS

a. Foreign Authority

This section deals with the contention which is often made that the condemnor is liable in damages for the removal costs of fixtures belonging to the lessee. At the outset, it is imperative to analyze the reasoning employed by courts which have allowed removal costs to the lessee. They first determine whether or not the fixture involved would pass to the condemnor. If it would, the courts then reason that since the condemnor has no use for the fixtures, the lessee should be allowed to remove them.[56] As a consequence of such removal, the condemnor pays only the removal costs and not the value of the fixture which he would otherwise have to pay; thus, the doctrine is based essentially on a theory of minimization of damages.[57] Assuming that the doctrine is correct, its application turns on whether or not the fixtures passes to the condemnor.[58] Thus it may be seen that the reasoning and authority involved in determining the initial question, as discussed in Section 20(b), supra, will be valid in determining the removal cost issue. Likewise, the removal cost cases will be authority for the question of determining what property passes on condemnation. The cases have been separately discussed, however, in order to permit more careful analysis of the exact factors involved in determining each question.

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56. Des Moines Wet Wash Laundry v. Des Moines, 197 Iowa 1082, 198 N.W. 486 (1924); In re Gratiot Avenue, 294 Mich. 569, 293 N.W. 755 (1940).
57. Springfield Southwestern Ry. Co. v. Schweitzer, 173 Mo. App. 650, 158 S.W. 1058 (1913); See also Des Moines Wet Wash Laundry Co. v. Des Moines, 197 Iowa 1082, 198 N.W. 486 (1924); query whether this reasoning is valid in Iowa, which rejects the minimization of damages position. See Section 11, infra, which makes it clear that the minimization theory in Des Moines Wet Wash has been rejected; if so, has the rationalization of this case also been destroyed?
58. E.g., Potomac Electric Power Co. v. U.S., 85 F.2d 243 (D.C. Cir. 1936).

Since the key issue in determining whether removal costs are to be awarded is whether the fixtures would pass to the condemnor, the same three rules[59] will apply to determine whether or not removal costs are to be awarded.

The first rule is that no removal costs for trade fixtures are allowed because no property has passed to the condemnor. The majority of cases adopting this view have been tried in the federal courts. At one time it appeared that the federal courts might allow removal costs,[60] but the principal case taking this view has been rejected as a precedent in later decisions.[61] The rule now seems to be firmly established in the federal courts that removal costs of such fixtures are not allowed. Neither is recovery allowed for alleged depreciation in the value of trade fixtures as a result of the moving.[63] It should be noted, however, that the federal courts do allow removal costs where only part of the leasehold term is condemned.[64] A number of state courts have

59. See discussion in Section 20(b)(1), supra.
60. National Laboratory & Supply Co. v. U.S., 275 Fed. 218 (1921).
61. See U.S. v. Fisk Building, 124 F. Supp. (S.D.N.Y. 1954) commenting on National Laboratory & Supply Co. v. U.S., supra.
62. U.S. v. Petty Motor Co., 327 U.S. 372 (1946); U.S. v. 425,031 Sq. Ft. of Land, 187 F.2d 798 (3d Cir. 1951); Potomac Electric Power Co. v. U.S., 85 F.2d 243 (D.C. Cir. 1936); U.S. v. Fisk Bldg., 124 F. Supp. 259 (S.D.N.Y. 1954); U.S. v. 40,558 Acres of Land, 62 F. Supp. 98 (D. Del. 1945); U.S. v. 10,620 Sq. Ft., 62 F. Supp. 115 (S.D.N.Y. 1945); U.S. v. Entire Fifth Floor, 54 F.Supp. 259 (S.D.N.Y. 1944); U.S. v. Meyers, 190 Fed. 688 (D. Conn. 1911); Thermal Syndicate, Ltd. v. U.S., 81 Ct. Cl. 446 (1935); William Wrigley, Jr. Co. v. U.S., 75 Ct. Cl. 569 (1932).
63. U.S. v. Entire Fifth Floor, 54 F. Supp. 259 (S.D.N.Y. 1944).
64. U. S. v. General Motors Corp., 323 U.S. 373 (1945). There can be no doubt, however, from this opinion and from subsequent cases that this holding is confined to these facts. See discussion in Section 23(a), infra, dealing with partial condemnation.

also taken the position that removal costs may not be recovered.[65] The reasoning behind the cases supporting this rule is clear; since the lessee would have had to remove the fixtures at the termination of the lease and since he is compensated for the value of the lease for the remainder of the term, there is no injustice in compelling him to remove fixtures without compensation when condemnation occurs.[66]

The second rule, it will be remembered, is that taken by the New York courts. On the issue of what fixtures pass to the condemnor, New York takes the position that only immovable property need be taken by the condemnor; hence, it would seem that removal costs could be allowed for such property. No case has been found taking this position, perhaps because lessees found it too embarrassing in trial court to introduce evidence to the effect that the fixture was immovable and then to submit a bill for moving it. Removal costs have been allowed where the fixture would have been realty but for an agreement between the parties.[67] However, the New York courts have frequently denied recovery for removing movable property.[68]

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65. Mayor of Baltimore v. Gamse & Bro., 132 Md. 290, 104 Atl. 429 (1918); Springfield Southwestern Ry. Co. v. Schweitzer, 173 Mo. App. 650, 158 S.W. 1058 (1913); Ranlet v. Concord R. Corp, 62 N.H. 561 (1883); New Jersey Highway Authority v. J. & F. Holding Co., 40 N.J. Sup. 309, 123 A.2d 25 (1956); accord, Minsk v. Fulton County, 83 Ga. App. 520, 64 S.E.2d 336 (1951).
66. William Wrigley, Jr. Co. v. U.S., 75 Ct. Cl. 569 (1932); Mayor of Baltimore v. Gamse & Bro., 132 Md. 290, 104 Atl. 429 (1918).
67. In re Allen Street and First Avenue, 256 N.Y. 236, 176 N.E. 377 (1931). See related discussion in Section 20(b)(2), supra.
68. In re Harlem River Drive, 113 N.Y.S.2d 292 (1952); In re Cross-Bronx Expressway, 195 Misc. 842, 82 N.Y.S.2d 55 (1948); N. Y. Cent. & Hudson R. Co. v. Pierce, 35 Hun 306 (N.Y. 1885); Matter of New York W.S. & B. R. Co., 35 Hun 633 (N.Y. 1885) (disallowing damages for the removal of 413 wagon loads of property including heavy presses, lithographic stone, and machinery).

A number of courts have allowed removal costs. Some have done so on the theory that the fixture would pass to the condemnor unless removal took place.[69] Others appear to have done so in following constitutional or statutory directions that all damages are to be compensable.[70] Removal costs have also been allowed when only part of the leased property is taken with the result that a move to one extent or another is required.[71] There is some authority for the position that the consent of the condemnor to the removal by the lessee is necessary in order to justify recovery.[72] This would clearly seem to be the correct position as otherwise the condemnor might be forced to pay removal costs in excess of the value of the fixtures in cases where removal costs were high or where the market value of the machinery was low.

A closely related problem to that of allowing removal costs to the lessee is that of attempted assessment of costs of removing property to a lessee who abandons property on the condemned premises. In this situation the owner is at liberty to abandon such property as he chooses and need not pay for the resulting removal by the condemnor; however,

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69. Des Moines Wet Wash Laundry Co. v. Des Moines, 197 Iowa 1082, 198 N.W. 486 (1924); In re Gratiot Avenue, 294 Mich. 569, 293 N.W. 755 (1940); accord, James McMillin Printing Co. v. Pittsburgh, C. & C. R. Co., 216 Pa. 512, 65 Atl. 1091 (1907).
70. Chicaog, M. & St. P. Ry. Co. v. Hock, 118 Ill. 587, 9 N.E. 205, 206 (1886) citing as authority St. Louis, V. & T. H. R. Co. v. Capp, 67 Ill. 607 (1872) which is weak authority for the proposition because the recovery in that case was based on a broad damage provision of a contract between the railroad and the city of Vandalia and hence not on any general condemnation principle.
71. State v. Morrison, 83 Ariz. 363, 321 P.2d 1025 (1958); Philadelphia & R. R. Co. v. Getz, 113 Pa. 214, 6 Atl. 356 (1886).
72. St. Louis v. St. Louis I.M. & S. Ry. Co., 266 Mo. 694, 182 S.W. 750, 754 (1916).

the owner of the property must pay for removal where the abandoned property is delivered to him under instructions given by him.[73]

It is significant that some courts which allow removal costs do so only as one element tending to indicate market value.[74] Why this should be so does not seem to have been explained. Probably it is a misapplication of the general rule for treatment of items of damage in condemnation cases; individual estimates of damage are allowed only as items tending to indicate value and not as items of absolute injury. However, the reasons for applying this general rule to removal costs are somewhat obscure. Any accurate relationship between the market value of a lease and the cost of removing fixtures from it would seem to be purely fortuitous since the fixtures may be few or many according to the type of business carried on and since removal may be costly or inexpensive depending upon the location of the building, or the size of fixtures required for the particular business and a host of other highly variable factors.

b. The Iowa Position Examined

The Iowa position on removal costs is defined exclusively by Des Moines Wet Wash Laundry Co. v. Des Moines, 197 Iowa 1082, 198 N.W. 486 (1924). In that case the city of Des Moines condemned land on which a laundry was located. The lease had three and one-half years remaining of a seven year term. The trial court gave an instruction which allowed the jury to consider, among other items of damages tending to prove market value, the costs of removal of the lessee's fixtures, which

73. Accord, American Salvage Co. v. Housing Authority, 14 N.J. 271, 102 A.2d 465 (1954) (fee instead of a leasehold was condemned).

74. Des Moines Wet Wash Laundry Co. v. Des Moines, 197 Iowa 1082, 198 N.W. 486 (1924); In re Gratiot Avenue, 294 Mich. 569, 293 N.W. 755 (1940); James McMillin Printing Co. v. Pittsburgh, C. & W. R. Co., 216 Pa. 504, 65 Atl. 1091 (1907); North Coast R. Co. v. Kraft Co., 63 Wash. 250, 115 Pac. 97 (1911).

covered plumbing, steam fittings, and machinery.

The case is an extremely confusing one because it represents a combination of fragments of inconsistent doctrines and because it employs some rather strange views of the market value concept. Probably the basic error of the case and the one which makes the case most difficult to interpret in the light of subsequent developments in the law in other jurisdictions as to removal costs, is the failure of the court to analyze the type of property involved and to characterize it as fixtures, meaning property attached to the realty which retains its character as personalty. As pointed out in the preceding subsection, a determination of the character of the lessees fixtures is necessary in order to determine whether removal costs are allowable. The court recognizes the theory[75] but fails to apply it by deciding whether the property passed to the condemnor. The court says simply, "the machinery must be regarded as fixtures..."[76] The city's brief and argument[77] contained the contention that removal costs could not be allowed because the property was personalty; there was no argument, however, that the property was personalty because, as a trade fixture, it constituted an exception to the ordinary classification of fixtures as realty. Because of this omission and because of the uncertainty as to what the court meant by "fixtures"[78] it is entirely possible that a trade fixtures argument could be developed at the present time within the meaning of this case. It should be remembered that in 1924, when this case was decided, neither the New York courts nor the federal courts had yet worked out the distinctions between "fixtures" and "trade fixtures" which determine

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75. See discussion of St. Louis v. St. Louis I.M. & S.R. Co., 266 Mo. 694, 182 S.W. 750, appearing on pp. 1089-90 of 197 Iowa.
76. 197 Iowa at 1087-88.
77. State Law Library Abstract Volume 2438, p. 129.
78. See discussion of the ambiguity of the term "fixtures" in In re Allen Street and First Avenue, 256 N.Y. 236, 176 N.E. 377, 380 (1931).

whether removal costs are to be allowed.[79] Since neither of these jurisdictions recognized the significance of this characterization, it is not at all surprising that the Iowa court also failed to discuss its significance. However, it would certainly be open to argue that the time has now come for recognition of the characterization problem.

The second major failing of the case is its deficient understanding of the market value concept as applied to leasehold condemnation. First of all, it allowed removal costs only as an element of damage tending to show the market value of the lease. Although, on its face at least, this result may be favorable to the condemnor; it should be perfectly apparent that removal cost has very little relation to the value of the lease. The costs of removing fixtures from a commercial site will vary with the amount of machinery required for the business. Yet the same property would have equal value on the market regardless of how many machines the current lessee chose to employ in his particular business. Even assuming that two laundries were to occupy

79. See discussion Section 20(b)(1), supra. Compare the decision in Jackson v. State, 213 N.Y. 34, 106 N.E. 758 (1914), holding that machinery passed to the condemnor, with that of In re Whitlock Avenue, 278 N.Y. 276, 16 N.E.2d 281 (1938), which holds that what must have been similar machinery to that in the Jackson case did not pass to the condemnor. Since machinery was covered by the holding in Des Moines Wet Wash, and since it would be highly desirable from the condemnor's point of view to have machinery treated as removable, it would seem that a similar turnabout is need in Iowa. Note, however, that Jackson v. State, supra, was not reversed; instead, the court adopted new criteria and moved in a new direction. Both the steam fittings and the fixtures might come within the category of immovable property and hence be concompensable under the New York rule. See criteria set forth in In re Whitlock Avenue, supra. Unfortunately, in Des Moines Wet Wash the court simply does not seem to have been aware of the problem of characterizing property affixed by the lessee. It is interesting to note that the Iowa court regards its position on fixtures as based on the Jackson case; see Wilson v. Fleming, 239 Iowa 718, 31 N.W.2d 393,398 (1948). Note also the court's awareness of conflicting authority and its reluctance to extend the Wet Wash decision.

identical buildings and were to perform the same quantity of work, the two businesses would undoubtedly have different removal costs because the amount of equipment required would vary with the work patterns adopted, the differing efficiencies of the type of machines selected, and the varying levels of ability possessed by the management and employees of the business. Yet the value of the lease on the open market would not necessarily vary because of these factors. Consequently, it is unrealistic to relate removal costs to market value. When removal costs are correctly allowed, they are awarded in lieu of a taking of the property by the condemnor.[80] They should be allowed in toto or not at all.

Moreover, the court passed over what is undoubtedly the most realistic method of compensating the lessee for fixtures of the type here involved. The court quoted the following passage from Pause v. Atlanta, 98 Ga. 92, 26 S.E. 489 (1896) at 1088 of 197 Iowa,

> "The increased value of the premises for rent in consequence of the putting in of such fixtures and improvements may properly be considered in computing damages to the leasehold estate."

As will be seen below, this formula comports as nearly as possible with the expectation of the lessee at the time the lease was executed; however the court ignored this test and went on to use removal cost as an indication of market value.

The court also rejected the argument that removal costs should not be allowed because the lessee will have to remove anyhow at the end of the lease.[81] The court said it could not assume the lease would have terminated earlier. This objection misses the point, of course, because it overlooks the expectations of the lessee at the time the lease was executed and awards him something else. The lessee proposed to install improvements at the beginning of his term which would add to the value of the lease for the entire seven years; at the end of that period he knew he would have to remove the improvements at his

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80. See discussion in Section 22(a), supra.
81. 1087 of 197 Iowa

own expense or abandon them. His expectations were that the increased value of the lease to him would justify the cost of installing and removing them. If the court had applied the test of Pause v. Atlanta, supra, the lessee would have received exactly what he expected to receive. When the condemnation proceedings were brought, he had had three and one-half years of enjoyment of the lease as improved; under the quoted formula he would have received compensation for the remaining three and one-half years of the lease, the value of the lease being computed with recognition of the value added by the improvements. The lessee would thus receive seven full years of the enjoyment of the lease as improved. Consequently, bearing the removal costs cannot be regarded as a hardship since it is entirely in accord with the lessee's expectations.

SECTION 23. PARTIAL CONDEMNATION

a. Condemnation of Part of the Leasehold Term

A rather peculiar type of condemnation, which was used by the federal government during World War II and the Korean emergency, is condemnation of part of the term of the leasehold. The federal government frequently used this device to condemn office or warehouse space for a specified period with yearly options of renewal on the part of the government. The underlying fee interest was, of course, not disturbed. The Supreme Court allowed removal costs to the lessee where the lessee's term outlasted the termination of the condemned term.[82] It seems clear from the court's reasoning that the recovery was allowed only because the lessee would have to move back to the premises; moving out was originally contemplated by the lessee and is, therefore, non-compensable at the time of condemnation.[83] Where the term taken by the

82. U.S. v. General Motors Corp., 323 U.S. 373 (1945).

83. U.S. v. Petty Motor Co., 327 U.S. 372 (1946); U.S. v. 425,031 Sq. Ft. of Land, 187 F.2d 798 (3d Cir. 1951); U.S. v. Fisk Building, 124 F. Supp. 259 (S.D.N.Y. 1954); contra, U.S. v. Certain Parcels of Land, 102 F. Supp. 854 (S.D.N.Y. 1952) aff'd sub nom. U.S. v. Knickerbocker Printing Corp., 212 F.2d 884 (1954) (this case is clearly based on an improper interpretation of U.S. v. General Motors Corp., 323 U.S. 373 (1945).

government extended past the expiration date of the lessee's term, no removal costs were allowed.[84] The type of condemnation involved in these cases is extremely rare, but it is important to note that the General Motors case[85] is not authority for the general proposition that a lessee is entitled to removal costs and applies only in the special situation of a partial condemnation of a leasehold term.

(b) Condemnation of Part of the Leasehold Property

Sometimes the condemnor will take only a portion of the leased property. In such a case the measure of damages is the decrease in value of the leasehold property as a whole.[86] There is authority for the proposition that an issue of fact arises on partial condemnation as to whether the lessee has not been totally evicted, in which case a different measure of damages is apparently employed.[87]

(c) Severance Damages

The principle behind the allowance of severance damages is that they are to compensate the lessee for a special type of damage caused to his remaining property when a partial condemnation occurs. A typical example is a case in which a leased factory is cut off from some of its components as a result of condemnation of the land on which they are

84. U.S. v. Petty Motor Co., 327 U.S. 372 (1946); U.S. v. 425,031 Sq. Ft. of Land, 187 F.2d 798 (3d Cir. 1951); U.S. v. Fisk Building, 124 F. Supp. 259 (S.D. N.Y. 1954).
85. U.S. v. General Motors Corp., 323 U.S. 373 (1945).
86. State v. Morrison, 83 Ariz. 363, 321 P.2d 1025 (1958); Renwick, Shaw & Crossett v. D. & N. W. R. Co., 49 Iowa 664 (1879) aff'd, 102 U.S. 180 (1880). Also see cases cited in footnote 4, supra, this division.
87. Philadelphia & R. R. Co. v. Getz, 113 Pa. 214, 6 Atl. 356, (1886).

situated, resulting in over capacity of the factory, which still remains on uncondemned property. The courts seem to recognize the principle of severance damages as applied to lessees, but there are no strong cases to this effect.[88] However, it is clear that the damage will not be allowed where only consequential injury is indicated[89] or where the condemned land is leased, and the injured property is held in fee.[90]

88. See U.S. v. Honolulu Plantation Co., 182 F2d 172 (9th Cir. 1950); U.S. v. Certain Lands, 79 F. Supp. 873 (S.D.N.Y. 1948); see also, Batcheller v. Highway Commission, ___ Iowa ___, ___ N.W.2d ___ (Opinion February 9, 1960).
89. U.S. v. Certain Lands, 79 F. Supp. 873 (S.D.N.Y. 1948).
90. U.S. v. Honolulu Plantation Co., 182 F.2d 172 (1950 9th Cir.).

DIVISION V

EVIDENCE

This Division is designed to deal with specific problems of evidence relating to condemnation. It is not an attempt to restate the rules as to substantive admissibility of evidence discussed in Division III. That Division should be consulted in determining what types of damages are compensable and hence may or may not be introduced as evidence. Neither does this Division attempt to analyze the rules of Iowa evidence which apply generally to all types of cases. For such authority the general case law should be examined.

SECTION 24. EVIDENCE OF THE AMOUNT OF THE COMMISSIONERS' AWARD

The amount of the commissioners' award should not be admissible in evidence on the trial of the appeal; presumably the reason for this position is that the commissioners' award is a composite hearsay statement. However, while the rule seems to be recognized in Iowa,[1] there is considerable doubt as to the effect of admitting such testimony. Apparently the court may cure any error committed in admitting the evidence by a proper instruction to the jury not to consider the commissioners' award.[2] Also it has been held that there is no prejudicial error in instructing the jury not to consider the amount of the commissioners' award although a statement of the amount of the award accompanied the instruction.[3] Neither is it reversible error to state to the jury the amount of the award on the voir dire, although the Supreme Court has disapproved the practice.[4] A related question rises in connection with a line of questioning of a witness who was a member of

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1. Gregory v. Kirkman Consol. Ind. School Dist., 193 Iowa 579, 187 N.W. 553,554 (1922) ("The jury was not entitled to consider the award previously made in the condemnation proceeding.").
2. Gregory v. Kirkman Consol. Ind. School Dist., 193 Iowa 579, 187 N.W. 553,554 (1922).
3. Bell v. Chicago, Burlington & Quincy R. Co., 74 Iowa 343, 37 N.W. 768,770 (1888).
4. Simons v. Mason City & Ft. D. R. Co., 128 Iowa 139, 103 N.W. 129,133 (1905)(there is some dictum to the effect that this error might be prejudicial in some cases however).

the preliminary award correctly expressed his judgment as to the damages suffered. The Iowa court has held that while it is not error to disallow such questioning,[5] neither is it error to permit it.[6]

SECTION 25. EVIDENCE OF SALES BETWEEN PRIVATE PARTIES

a. Price Paid by the Landowner

The sale price for the land in question seems to be universally regarded as admissible in determining value in condemnation proceedings.[7] The basic issues in this area center around the remoteness of the sale in question. The Iowa rule allows the trial court to admit

5. Winklemans v. Des Moines N.W. R. Co., 62 Iowa 11, 17 N.W. 82, 84, 85 (1883).
6. Moran v. Highway Commission, 223 Iowa 936, 274 N.W. 59, 62 (1937). It is difficult to see what value this line of questioning would have unless it were accompanied by testimony as to the amount of the commissioners' award. In this connection it would be interesting to examine the record in the Moran case to determine whether the amount of the award was introduced; if so, the result would be a tacit abandonment of the rule against introducing the amount of the commissioners' award in evidence.
7. Nichols, Ibid. Secs. 12.311(1), 21.2 (3d ed. 1950); Hall v. West Des Moines, 245 Iowa 458, 62 N.W.2d 734, 740 (1954)(dictum); Nedrow v. Michigan-Wisconsin Pipe Line Co., 245 Iowa 763, 61 N.W.2d 687, 693 (1953) commented on in Hall v. West Des Moines, supra, at 740 of 62 N.W.2d; Millard v. Northwestern Mfg. Co., 200 Iowa 1063, 205 N.W. 979, 981 (1925); Ranck v. Cedar Rapids, 134 Iowa 563, 111 N.W. 1027, 1028 (1907); accord., Hayes v. Chicago, R.R. I. & P. Ry. Co., 239 Iowa 149, 30 N.W.2d 743, 746 (1948) (dictum); Kirkwood v. Perry Town Lot & Improvement Co., 178 Iowa 248, 159 N.W. 774 (1916); Wiley v. Dean Land Co., 171 Iowa 75, 153 N.W. 145 (1915); Beans v. Denny, 141 Iowa 52, 117 N.W. 1091, 1093 (1908).

such evidence within its discretion[8] although some guide may be obtained by analyzing the length of the intervening period in the various cases.[9] Where significant improvements have been made since the last sale, the court has held the evidence of prior sale too remote.[10]

b. Evidence of Prices Paid for Similar Land

The majority rule in this country allows the introduction of evidence as to the value of similar property.[11] This rule is known as the "Massachusetts Rule" and was adopted by the Iowa Supreme

8. Hall v. West Des Moines, 245 Iowa 458, 62 N.W.2d 734 (1954); Hayes v. Chicago, R.I. & P. Ry. Co., 239 Iowa 149, 30 N.W. 2d 743,746 (1948); Foster v. U.S., 145 F.2d 873 (8th Cir. 1944).
9. Testimony admitted. Nedrow v. Michigan-Wisconsin Pipe Line Co., 245 Iowa 763, 61 N.W.2d 687,693 (1953) (five years had elapsed--see discussion in Hall v. West Des Moines, supra); Millard v. Northwestern Mfg. Co., 200 Iowa 1063, 205 N.W. 979,981 (1925)(sale 18 months previous); Kirkwood v. Perry Town Lot & Improvement Co., 178 Iowa 248, 159 N.W. 774,778 (1916) (apparently about three years since sale); Wiley v. Dean Land Co., 171 Iowa 75, 153 N.W. 145 (1915)("What a tract of land sells for about the time of the transaction under investigation is competent evidence of its market value then..."); accord, Foster v. U.S., 145 F.2d 873 (8th Cir. 1944)(sale in question was approximately 10 years previous and had occurred during depths of depressions; the owner had constructed many improvements in the meantime. The court, which cited federal rather than Iowa cases, held these objections went to the weight and not to the admissibility of the evidence.). Testimony excluded: Hall v. West Des Moines, 245 Iowa 458, 62 N.W.2d 734, 740 (1954)(prior sale occurred 8 years previous; court said it would have been "better satisfied" if the evidence had been admitted but no abuse of discretion); Hayes v. Chicago, R. I. & P. Ry. Co., 239 Iowa 149, 30 N.W.2d 743,746 (1948)(sale had occurred 30 years previous); Beans v. Denny, 141 Iowa 52, 117 N.W. 1091,1093 (1908)(six years had elapsed and improvements had been made).
10. Beans v. Denny, 141 Iowa 52, 117 N.W. 1091,1093 (1908). But cf. Foster v. U.S. 145 F.2d 873 (8th Cir. 1944) where it was held that the fact of subsequent improvements went to the weight, and not to the admissibility of the evidence. Query whether the federal court applied the Iowa rule.
11. Orgel, On Valuation Under Eminent Domain, Section 137(2d ed. 1953).

Court in the Redfield case, a 1959 decision.[12] Previous to this case the Iowa Supreme Court had held that such evidence was not admissible for the purpose of showing the value of the condemned land.[13] The reason for the rule may have stemmed from a desire to prevent the trial from being burdened with collateral issues which would accompany such evidence as to the similarity of the various tracts of land involved, the type of sale involved, etc..[14]

The decision in the Redfield case,[15] held that evidence of the sale price of similar land was admissible on direct examination of the expert witness, if there were sufficient foundation laid to show the degree of similarity between the subject land and the similar land. Whether or not there was sufficient showing of similarity between the subject land and the similar land lay in the discretion of the trial judge.[16] If there were sufficient showing, the trial court may admit direct testimony of the selling price of similar land as substantive evidence of the value of the subject land.[17] Such evidence could

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12. Redfield v. Highway Commission, ___ Iowa ___, 99 N.W.2d 413 (1959).
13. Basch v. Iowa Power & Light Co., ____ Iowa ___, 95 N.W.2d 714,716 (1959); Wilson v. Fleming, 239 Iowa 718, 31 N.W.2d 393,398 (1948); Maxwell v. Highway Commission, 223 Iowa 159, 271 N.W. 883 (1937); Hubbell v. Des Moines, 166 Iowa 581, 147 N.W. 908 (1914) (containing a thorough discussion of the Iowa cases, foreign authority, and textual material on the subject); Watkins v. Wabash R. Co., 137 Iowa 441, 113 N.W. 924 (1907); U.S. v. Foster, 131 F.2d 3 (8th Cir. 1942).
14. Ogel, Ibid. Section 137 (2d ed. 1953); Hubbell v. Des Moines, 166 Iowa 581, 147 N.W. 908 (1914); Watkins v. Wabash R. Co., 137 Iowa 441, 113 N.W. 924 (1907).
15. Redfield v. Highway Commission, ___ Iowa ___, 99 N.W.2d 413 (1959).
16. Redfield v. Highway Commission, supra.
17. Redfield v. Highway Commission, supra.

possibly be used to rehabilitate the witness on redirect,[18] and prior to the decision in the Redfield case, the Iowa Supreme Court had held that it was not reversible error to exclude such testimony where the witness had already testified as to values generally.[19] In a proper situation, evidence of a formula used in reaching a prior sale in lieu of condemnation may be used for impeaching a witness as constituting an inconsistent prior statement.[20]

SECTION 26. EVIDENCE OF FORCED SALES

It would now appear that the Iowa rule is that the value of other neighboring lands may be introduced as direct evidence of the value of the condemned land, and not merely indicative of the basis upon which the witness formulated his opinion as to the value of land.[21] This rule, as adopted in the Redfield case, and known as the "Massachusetts Rule", destroys the old rule as found in the Maxwell case.[22] It becomes necessary to extend the principle as to whether or not there can be direct testimony of a direct witness as to sale price of other similar lands, and how to apply this rule on the sale which is essentially a "forced sale". An early Iowa decision indicated that there might be the possibility of introducing evidence of a sale between the condemnor and another private party if there were certain proofs of

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18. Stone v. Delaware R. Co., 257 Pa. 456, 101 Atl. 813 (1917) (it will be remembered that Iowa follows the Pennsylvania rule. See Hubbell v. Des Moines, 166 Iowa 581, 593, 147 N.W. 908, 917 (1914).
19. Moran v. Highway Commission, 223 Iowa 936, 274 N.W. 59 (1937).
20. Basch v. Iowa Power & Light Co., ___ Iowa ___, 95 N.W.2d 714, 716 (1959).
21. Redfield v. Highway Commission, ___ Iowa ___, 99 N.W.2d 413, (1959).
22. See Footnote 13, supra.

similarity of the land in question that had previously been sold.[23]

However, the most forceful objection is that a sale to the condemnor is essentially a "forced sale" and the price which the condemnor is willing to pay, and the landowner is willing to accept, may be above or below a realistic market appraisal, depending upon such factors as the urgency of the condemnor's need for the land, the fear of litigation by either party, etc..[24] The Iowa cases have adopted this reasoning and applied it not only to evidence of sales made to the condemnor[25] but also to "forced sales" arising from other situations which may not accurately reflect market value.[26]

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23. King v. Iowa Midland Railway Company, 34 Iowa 458,461 (1872).
24. Nichols, Ibid. Section 21.33 (2d ed. 1950).
25. U. S. v. Foster, 131 F.2d 3 (8th Cir. 1942) (appeal from S.D. Iowa); Simmons v. Mason City & Ft. D.R. Co., 128 Iowa 139, 103 N.W. 129,133,134 (1905); Basch v. Iowa Power & Light Co., ____ Iowa ___, 95 N.W.2d 714,717 (1959). Steensland v. Iowa-Illinois Gas & Electric Co., 242 Iowa 534, 47 N.W.2d 162,164 (1951) (defendant's lawyer asked how many condemnation proceedings were necessary in the county in order to show that plaintiff was the only holdout; held, sufficient grounds for new trial); Richardson v. City of Centerville, 137 Iowa 253, 114 N.W. 1071 (1908).
26. Nichols, Ibid. Section 21.32 (3d ed. 1950); accord, Dobler v. Swason, 238 Iowa 76, 25 N.W.2d 866,872 (1947) ("The price obtained for land sold on execution sale is hardly a measure of value and especially in estimating the value of other land....").

SECTION 27. EVIDENCE OF OFFERS TO BUY OR SELL

Most jurisdictions in the country have rejected evidence of offers made to the landowner for the sale of his property.[27] The reason seems to be that such offers are so easily manufactured as to make their admission dangerous.[28] The Iowa Court seems to have followed the majority rule although the issue does not seem to have arisen in a condemnation case.[29]

The general rule as to offers to sell is that such offers are admissible, not as admissions, but simply to contradict the landowner's present testimony that his land is worth more.[30] This seems to be the rule of the one Iowa case which has dealt with the problem as a condemnation issue.[31] The cases dealing with the problem in a non-condemnation situation seem to have adopted inconsistent positions.[32] One specific ground for refusing to admit a real estate listing by the

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27. Nichols, Ibid. Section 21.4(1) (3d ed. 1950).
28. Nichols, Ibid. Section 21.4(1) (3d ed. 1950). Morril v. Bentley, 150 Iowa 677, 130 N.W. 734,737 (1911).
29. Morril v. Bentley, 150 Iowa 677, 130 N.W. 734,737 (1911); But see, Faust v. Hosford, 119 Iowa 97, 93 N.W. 58 (1903). On valuation of personal property also see, Rottlesberger v. Hanley, 155 Iowa 638, 136 N.W. 776,780 (1912); Citizens National Bank v. Converse, 105 Iowa 669, 75 N.W. 506 (1898).
30. Nichols, Ibid. Section 21.4(2)(3d ed. 1950).
31. Foster v. U.S., 145 F.2d 873 (8th Cir. 1944) (no Iowa cases cited therein).
32. Admissible: Joy v. Security Fire Ins. Co., 83 Iowa 12, 48 N.W. 1049 (1891); Inadmissible: Des Moines Joint Stock Land Bank v. Danson, 206 Iowa 897, 220 N.W. 102 (1928); Pickett v. Comstock, 209 Iowa 968, 229 N.W. 249,251 (1930) (evidence of offer submitted by the offerer).

owner is remoteness in time.[33] In addition, the offer to sell must have been made by the present owner and not a predecessor in title.[34] Also, a refusal to pay a price asked is no indication of market value.[35]

SECTION 28. EVIDENCE OF OTHER VALUATIONS

a. Assessed Valuation

The general rule is that a valuation made by a public official for the purpose of taxation is not relevant to aid the jury in assessing the value of land.[36] However, there is considerable doubt as to whether this is the rule in Iowa. It has been held that the assessor's written statement of valuation may not be introduced to indicate the value of the land;[37] however, the principal objection of the court seems to have been the hearsay character of the evidence.[38] Subsequent Iowa cases have held that where the property owner has signed the assessor's valuation, it may be introduced as an admission and as contradicting his testimony as to the value of the property.[39] It would seem that the assessor's valuation figure would always be admissible as an admission because under Iowa Code Section 441.12 (1958) the property owner is required to subscribe an oath to the assessment rolls. Thus, it would appear that in appropriate cases the assessor's valuation, which is required to be at actual value by Iowa Code Section 441.13 (1958), may be used as an effective means of reducing the cost of condemnation.

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33. Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85,90 (1948).
34. Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85, 90 (1948).
35. Morrison v. Culver's Estate, 216 Iowa 676, 248 N.W. 237 (1933); Pickett v. Comstock, 209 Iowa 968, 229 N.W. 249 (1930).
36. Nichols, Ibid. Section 22.1 (3d ed. 1950).
37. Dudley v. Minnesota & N.W. R. Co., 77 Iowa 408, 42 N.W. 359,360 (1889). This case is erroneously cited by Nichols for the broader proposition that an assessor's valuation is not admissible; Section 22.1 (3d ed. 1950).
38. It is not clear why the valuation figure, even if unsigned by the owner, could not come in under the official records exception to the hearsay rule. See In re Clarke's Estate, 228 Iowa 75, 290 N.W. 13 (1940).
39. Nedrow v. Michigan-Wisconsin Pipe Line Co., 245 Iowa 763, 61 N.W.2d 687,693 (1953); Duggan v. State, 214 Iowa 230, 242 N.W. 98 (1932); Welton v. Highway Commission, 211 Iowa 625, 233 N.W. 876,882 (1930); Haggard v. Ind. School Dist., 113 Iowa 86, 85 N.W. 777,780 (1901).

b. Insurance Valuation

The value of insurance carried on the property may not be shown as substantive evidence of its value.[40] However, it may be used for impeachment purposes in disputing plaintiff's testimony as to the value of his land.[41]

SECTION 29. BUSINESS PROFITS AS EVIDENCE OF VALUE[42]

The general rule is that neither realized nor the estimated future profits of a business are admissible in evidence as to the value of the land.[43] The reason for this rule is apparently the frequent lack of correlation between value of property and such a highly variable factor as business profits; even more speculative, of course, are anticipated profits.[44] However, an exception seems to have been recognized in Iowa where income from agricultural land may be introduced to indicate the value of the land.[45] This is also the case where the court faces

40. Maxwell v. Highway Commission, 223 Iowa 159, 271 N.W. 883 887 (1937); Holmes v. Rivers, 145 Iowa 702, 124 N.W. 801, 803, (1910).
41. See Footnote 40, supra.
42. See Section 15(c)(3), supra.
43. Nichols, Ibid. Section 19.3 (3d ed. 1950); Nedrow v. Michigan-Wisconsin Pipe Line Co., 245 Iowa 763, 61 N.W.2d 687 (1954); Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85, 96 (1948); Des Moines Wet Wash Laundry Co. v. Des Moines, 197 Iowa 1082, 198 N.W. 486 (1924).
44. See excellent discussion of anticipated profits in Nedrow v. Michigan-Wisconsin Pipe Line Co., 245 Iowa 763, 61 N.W.2d 687 (1954).
45. Wilson v. Highway Commission, 249 Iowa 994, 90 N.W.2d 161, 169 (1958)(dictum); Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85, 96 (1948)(very broad statement of rule admitting evidence of income); Maxwell v. Highway Commission, 223 Iowa 159, 265 N.W. 899, 904, 905 (1936) rehearing 271 N.W. 883 (1937); Ranck v. Cedar Rapids, 134 Iowa 563, 111 N.W. 1027 (1907).

the difficult issue of valuing the damage to a leasehold estate.[46]

SECTION 30. EVIDENCE OF RENTAL VALUE

Evidence of the rent derived from real estate is admissible as showing its actual value.[47] The theory behind the acceptance of such evidence is that it indicates the highest use of the real estate.[48] However, since this does not follow automatically where the evidence is introduced by the condemnor, he must first show that the present use is the highest available.[49] Testimony is also admissible as to the rental value of the property based on the value of similar property.[50]

SECTION 31. VIEW OF THE PREMISES AS EVIDENCE

In Iowa the Court may at its discretion permit the jury to view the premises or refuse to allow them to do so. The ruling of the trial judge on this matter is final and will not be disturbed on appeal.[51] According to the rule in this jurisdiction such a view is not evidence.

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46. Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85,96 (1948); Des Moines Wet Wash Laundry Co. v. Des Moines, 197 Iowa 1082, 198 N.W. 486 (1924). See in this connection Division IV, supra.
47. Nichols, Ibid. Section 19.21 (3d ed. 1950); Orgel, Ibid. Section 179 (2d ed. 1953).
48. Nichols, Ibid. Section 19.21 (3d ed. 1950).
49. Nichols, Ibid. Section 19.21 (3d ed. 1950); Orgel, Ibid. Section 182 (2d ed. 1953).
50. Orgel, Ibid., Section 180 (2d ed. 1953).
51. Draker v. Iowa Electric Co., 191 Iowa 1376, 182 N.W. 896 (where permission to view the premises was granted); King v. Railway Co. 34 Iowa 458,462; Clayton v. Chic. etc. Ry. Co., 67 Iowa 238, 25 N.W. 150 (where it was refused).

Its sole purpose is to enable the jury to understand and properly apply the evidence and not to make them silent witnesses in the case.[52]

SECTION 32. EVIDENCE OF THE PLAN AND CONSTRUCTED IMPROVEMENTS

The numerical weight of decided cases in this jurisdiction holds that the nature of the proposed use by the taker is admissible, not to bind it to its original plan, or to modify the legal rules in regard to a taking, but to show more accurately the damages that the remainder will probably sustain by the improvement. It is under this latter principle that the Supreme Court of Iowa has held that the plans of the proposed improvement,[53] or photographs of,[54] or testimony in regard

52. Guinn v. Railway Co., 131 Iowa 680, 109 N.W. 209; Close v. Samm, 27 Iowa 503 (the purpose of the view was to enable the jury better to understand and apply the testimony and not to make them silent witnesses in the case); see also Nichols, Ibid. Sections 18.31 (3d ed. 1950); Orgel, Ibid. Section 129 (2d ed. 1953).

53. Maxwell v. Highway Commission, 223 Iowa 159, 265 N.W. 899 (1936) rehearing 271 N.W. 883 (1937) (held, no error to allow the chief engineer of the highway commission to introduce the plans of the improvement and to testify as to the width of the pavement upon similar trunk highways); Ellsworth & Jones v. Railway Co., 91 Iowa 386,391, 59 N.W. 78. See also St. Louis Ry. Co. v. Mitchell, 47 Ill. 165 (1868)(but it was held in the case of Jacksonville R.R. Co. v. Kidder, 21 Ill. 134 that in assessing damages for the condemnation of lands, the plans of the company for the construction of the road were admissible in evidence to enable the jury to fix the damage with more precision); New York Central R.R. Co. v. Domproff, 63 Misc. 211, 116 N.Y.S. 924 (where the course of a stream will be changed as a result of condemnation proceedings by a railroad company, the fact that the company is to construct a culvert in their new structure to permit water from the old channel to pass off may be considered in reduction of damages).

54. Trachta v. Highway Commission, 249 Iowa 374, 86 N.W.2d 849, 858 (1958); Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85 (1948); Maxwell v. Highway Commission, 223 Iowa 159, 265 N.W. 905 (1936) rehearing 271 N.W. 883 (1937).

to the actual finished project[55] can be properly considered by the jury. Such evidence is admissible as present matter that necessarily and proximately affects the market value of the farm or tract as a whole after the taking.[56]

SECTION 33. VALUATION TESTIMONY BY THE OWNER

Ordinarily an owner may testify as to the value of his property before and after condemnation.[57] The opposing party is left to cross-

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55. Koster v. Sioux County, 195 Iowa 214, 191 N.W. 993,994,996 (the highway had been constructed before the trial in the district court and witnesses were able to describe its condition and the condition of the farm with the highway actually thereon); Cummins v. Des Moines etc. Ry. Co., 63 Iowa 397,401,403, 19 N.W. 268 (the landowner was permitted against the condemnor's objections to prove on the trial that the track or road bed of defendant's railway as constructed through the premises is in a cut about four feet deep); Kemmerer v. Highway Commission, 214 Iowa 136, 241 N.W. 693 (evidence of an actual constructed cattle pass presented at the trial); Kukkuk v. Des Moines, 193 Iowa 444,449, 187 N.W. 209; Guinn v. Railway Co., 131 Iowa 680, 109 N.W. 209 (1909)(one of the witnesses in estimating damages took into consideration the character of the crossing which had been constructed); see also Maxwell v. Highway Commission, 265 N.W. 899,905 (1936) rehearing 271 N.W. 883 (1937). Nichols Ibid. Section 463 (2d ed.).
56. Maxwell v. Highway Commission, 223 Iowa 159, 265 N.W. 899 (1936) rehearing 271 N.W. 883 (1937).
57. Nichols, Ibid. Section 18.4 (2)(3d ed. 1950); Appeal of Dubuque-Wisconsin Bridge Co., 237 Iowa 1314, 25 N.W.2d 327,330 (1946); Olsen v. Lohman, 234 Iowa 580, 13 N.W.2d 332,339 (1944); Millard v. Northwestern Mfg. Co., 200 Iowa 1063, 205 N.W. 979,981 (1925); Kirkwood v. Perry Town Lot & Improvement Co., 178 Iowa 248, 159 N.W. 774 (1916); Leek v. Chesley, 98 Iowa 593, 67 N.W. 580 (1896); Sater v. Burlington & Mt. Pleasant Plank Road Co., 1 Iowa 386 (1855).

examination to bring out the basis on which the estimate was based.[58] Although usually the fact of ownership is sufficient to qualify the witness,[59] in some cases further proof of qualification is necessary before the owner may testify;[60] in the absence of such proof, the evidence may be excluded.[61] Where an agent of a corporate owner testifies to the value of the land, it is necessary that he qualify as to his knowledge of the value of the property.[62] Evidence of a valuation of the property made by the owner may be introduced against him for certain specialized purposes.[63]

SECTION 34. QUALIFICATION OF NON-PARTY WITNESSES

Non-party witnesses may be roughly divided into two categories, expert and non-expert, although the division is by no means clear cut. In order to qualify an expert witness, it must be shown that: (1) the witness had had dealings or information which has acquainted him with values in the vicinity of the land in question, and (2) he must be familiar with the property itself, or at least have examined it at or about the time of the taking.[64] However, testimony is not

58. Sater v. Burlington & Mt. Pleasant Plank Road Co., 1 Iowa 386 (1855).
59. Appeal of Dubuque-Wisconsin Bridge Co., 237 Iowa 1314, 25 N.W.2d 327,330 (1946)(dictum); Olsen v. Lohman, 234 Iowa 580, 13 N.W.2d 332,339 (1944).
60. Millard v. Northwestern Mfg. Co., 200 Iowa 1063, 205 N.W. 979 (1925).
61. Ryan v. Cooper, 201 Iowa 220, 205 N.W. 302 (1925).
62. Appeal of Dubuque-Wisconsin Bridge Co., 237 Iowa 1314, 25 N.W.2d 327,330 (1946).
63. See Sections 27 and 28, supra.
64. Orgel, Ibid. Section 132 (2d ed 1953); Nichols, Section 18.41 (1)(3d ed. 1950); also see Foster v. U.S., 145 F.2d 873 (8th Cir. 1944) dealing with the degree of familiarity required.

confined to the opinion of witnesses whose occupation is dealing with real estate.[65] Non-expert witnesses are usually residents in the immediate vicinity of the land in controversy; irrespective of their occupation, they are competent witnesses if they have lived in the neighborhood long enough to become familiar with land values in this area. Such witnesses are not supposed to have scientific or superior skill to that of the jurors; however, they do have a peculiar knowledge of the facts of the case which the jurors do not, and if the court is satisfied that such witnesses have enough knowledge to make a contribution of some probative force, their testimony will be admitted for what it is worth. The trial court's discretion is rarely questioned in this particular.[66] In regard to farm land, other evidence is not easily accessible.[67] However, it has been held error for the court to single out one class of valuation witnesses by occupation or residence such as neighbors or farmers, and by instructions magnify their importance to the jury as witnesses simply because of their occupation or residence.[68]

SECTION 35. TESTIMONY OF NON-PARTY WITNESSES

Certain of the evidence problems which arise with regard to the

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65. Nichols, Ibid., Section 448 (2d ed.); Orgel, Ibid. Section 130 (1st ed.); Town of Cherokee v. S. C. & J. F. Town Lot Co., 52 Iowa 279, 281, 3 N.W. 42; Evans v. Iowa Southern Utilities Co., 205 Iowa 382, 218 N.W. 66, 67; Millard v. N.W. Mfg. Co., 200 Iowa 1063, 205 N.W. 979 (barber, bookkeeper, and printer were all competent witnesses).
66. Smalley v. Iowa Pac. Ry. Co., 36 Iowa 571; see also Pingery v. Chrokee Des Moines Ry. Co., 78 Iowa 438, 43 N.W. 285; Orgel, Ibid. Section 132 (2d ed. 1953)(indicating that lack of experience goes not to the competency of the witness but to the weight of his testimony). Accord, Evans v. Iowa Southern Utilities Co., 205 Iowa 382, 218 N.W. 66, 67; Monson v. Chicago & R.I. Ry. Co., 181 Iowa 1534, 159 N.W. 679 (the rule as to the competency of witnesses on questions of value is to be liberally construed).
67. Cf. Smalley v. Iowa Pac. Ry. Co., 36 Iowa 571, 575; Nichols, Ibid. Section 18.4(4)(3d ed. 1950)(Nichols improperly cites Ball v. Keokuk & N.W. Ry. Co., 74 Iowa 132, 37 N.W. 110 (1888) as authority).
68. Simmons v. Ry. Co., 128 Iowa 139, 103 N.W. 129 (1905).

testimony of witnesses are peculiar to experts. It should be noted that the jury has the exclusive power to judge the weight which should be given to expert testimony and may, if it sees fit, disbelieve the testimony of all the experts.[69] One of the general rules of evidence permits testimony by experts in response to hypothetical questions. However, the general rule in condemnation law appears to be that the courts do not recognize any highly specialized expert in this field who may give an appraisal based on hypothetical questions without any acquaintance with the property taken.[70] But in Iowa such estimates have been admitted in evidence.[71]

The testimony of all witnesses is subject to certain basic requirements which must be observed or the testimony may be stricken. In showing qualifications and laying the foundation, the Iowa court has held that it is not error to refuse to strike out testimony of the witness of sales whose knowledge thereof was acquired by hearsay.[72]

A witness who has given his opinion as to value may state the reason for his opinion.[73] He also has the right to detail matter which he took into consideration as furnishing the basis for his estimate of damages.[74] The estimate should be rejected where the basis for a

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69. Helm v. Anchor Fire Ins. Co., 132 Iowa 177, 109 N.W. 605 (1906); Hoyt v. Chicago, M. & St. P. Ry. Co., 117 Iowa 296, 90 N.W. 724 (1902).
70. Orgel, Ibid. Section 134 (2d ed. 1953).
71. Hickey v. Webster County, 148 Iowa 337, 127 N.W. 658 (1910).
72. Winkelman v. Des Moines Ry. Co., 62 Iowa 11, 17 N.W. 82 (1883); Wiley v. Dean Land Co., 171 Iowa 75, 153 N.W. 145 (1915).
73. McClean v. Chic. etc. Ry. Co., 67 Iowa 568, 25 N.W. 782; Smalley v. Iowa Pac. Ry. Co., 36 Iowa 571,574.
74. Kukkuk v. Des Moines, 193 Iowa 44, 187 N.W. 209; Smalley v. Iowa Pac. Ry. Co., 36 Iowa 571,574.

test as to its reliability is not furnished by a statement of the facts on which it is based, or where the basis of fact does not appear sufficient.[75] However, if on cross-examination it is revealed that the witness's knowledge of land values is very limited, his testimony may not be stricken for that reason but goes to the jury for what it is worth.[76]

A witness to be qualified to testify to the market value of a property need not be shown to have been familiar with its value for all purposes; it is enough if he knows what it is worth for one or more

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75. Orgel, Ibid. Section 131 (1st ed.) "A witness even though he is qualified may nevertheless be excluded if it appears that he has mistaken the substantive value or has based his opinion on an erroneous theory of value. Accordingly estimates have been stricken out which were based on "personal value" to the owner, or value to the taker, or on value for insurance purposes rather than market value". Thornburg v. Doolittle, 148 Iowa 530, 125 N.W. 1003 (manager of corporation valuation rejected when no basis given for estimate); Neddermeyer v. Crawford County, 187 Iowa 1025, 175 N.W. 339,342 (1919)(where witnesses based their estimates of the value of the property on a consideration of benefits, the court could strike such testimony. However, a failure to do so was not prejudicial in the light of an instruction to the jury not to consider benefit by reason of the establishment of the highway); Britton v. D.M.Q. & S. Ry. Co., 59 Iowa 540, 13 N.W. 710 (1882)(where it appears on cross-examination that witnesses based their estimates of damage wholly or partially on improper grounds, the defendant should move the court to strike out the objectionable evidence before asking the Supreme Court to reverse the error); Western Newspaper Union v. Des Moines, 157 Iowa 685, 140 N.W. 367,370 (in an action to recover damages for the erection of a viaduct by the city, it was held error to permit witnesses to base their conclusion as to the amount of damage sustained on an investigation of viaducts in another city; the situation in the two cities had not been shown to be the same); Tracy v. Mt. Pleasant, 165 Iowa 435, 146 N.W. 78,82 (expert in chemistry not familiar with local values not competent to testify as to the value of the land for water supply).

76. Winkelman v. Ry. Co., 62 Iowa 11, 17 N.W. 82.

purposes, and being thus qualified he may testify to his opinion of its value on the market.[77]

If some of the bases of the opinion are legitimate and proper and a few are not, the opposing party may have the court instruct the jury as to the improper bases and their effect upon the testimony of the witness and his estimate.[78] The court may also strike the testimony once it becomes apparent that the basis for the witness's opinion was founded on improper items of damage.[79] Whether the improper bases warrant an instruction that the estimate should be totally disregarded, or one that merely limits or restricts its effect appears to be a matter which has been left largely to the sound discretion of the trial court.[80]

The witness cannot be asked the value of the property taken, or the amount of the damages sustained. Such testimony is said to ursurp the province of the jury. However, the witness may be interrogated as to the value of the entire tract before and the value of such property after the taking disregarding benefits.[81] The case of Harrison v.

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77. Tracy v. Mt. Pleasant, 165 Iowa 435, 146 N.W. 78,84,85.
78. Smalley v. Iowa Ry. Co., 36 Iowa 571, 574.
79. U.S. v. Foster, 131 F.2d 3 (8th Cir. 1942).
80. Slater v. Plank Road, 1 Iowa 386,393 (1855)(the case sanctions an instruction that such an estimate should be totally disregarded); Smalley v. Iowa Ry. Co., 36 Iowa 571; Evans v. Iowa Electric Utitlities Co., 205 Iowa 283, 218 N.W. 66,68 (1928)(approving trial court instructions that limit and restrict the effect of such estimates but that do not render them entirely nugatory).
81. On this general problem see Nichols, Ibid. Section 23.3 (3d ed. 1950); Slater v. Plank Road, 1 Iowa 386,393; Henry v. Dubuque & Pac. Ry. Co., 2 Iowa 288,310; Dalzell v. City of Davenport, 12 Iowa 437, 441; Russel v. City of Burlington, 30 Iowa 362, 365; Richardson v. Webster City, 111 Iowa 427, 82 N.W. 920; Hartley v. Railway Co., 85 Iowa 455,467, 52 N.W. 352; Renwick v. Railroad Co., 49 Iowa 674; Kukkuk v. Des Moines, 193 Iowa 444,453, 187 N.W. 209 (The first question was improper. The opinion of a witness as to the amount of damages a party has sustained is not admissible...but counsel for the appellant was evidently content with the question as propounded, and made no objection thereto. The motion to strike as incompetent, irrelevant, and immaterial was not timely, nor was it sufficiently specific. There was no prejudicial error here of which appellant can now complain.").

Iowa Midland R.R. Co., 36 Iowa 323,324, contains a very lucid statement on this important distinction.[82]

An opinion based upon what the defendant could afford to give rather than do without the land should be excluded on the grounds that the market value is the only proper standard of measuring compensation.[83] Likewise the value of the land to the condemnor must be excluded.[84]

One of the fundamental problems involved in this area is the prohibition against taking into consideration any advantage which may result to the owner as a result of the improvement (Article I, Section 18, Iowa Constitution). This provision has been interpreted as prohibiting testimony on direct examination concerning the value of the property after the taking where such testimony may include value resulting from the construction of the improvement.[85] Where the

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82. "Upon the trial plaintiff introduced several witnesses and asked them in substance the following question, 'How much less in value was the farm immediately after taking the land for right-of-way, and in consequence thereof than it was immediately before, not taking into account any supposed benefit to result from the building of defendant's railroad?' This question was objected to and excluded... also plaintiff asked a witness the following question, "State your opinion as to the damage the plaintiff sustained as the owner of that farm, by reason of the taking of the land by the defendant for the construction of its railroad, not taking into consideration any supposed benefit resulting from the building of the road?' At the instance of the defendant this question was excluded. In these rulings the court held no error. A witness, however, testified as to the value of the farm immediately before the right-of-way was taken and immediately thereafter, not taking into consideration the benefits to result from the building. The evidence the court said "is in strict accord with established authority and no error. Harley v. K. & N. W. Ry. Co., 85 Iowa 455,466."
83. Tracy v. City of Mt. Pleasant, 165 Iowa 435, 146 N.W. 78, Chic. etc. Ry. Co. v. Snyder, 120 Iowa 532, 95 N.W. 183; In re Niagara, Lockhart etc. Power Co., 133 Misc. 177, 231 N.Y.S. 72; Nichols, Ibid. Section 218 (2d ed.).
84. U.S. v. Foster, 131 F.2d 3 (8th Cir. 1942).
85. Trachta v. Highway Commission, 249 Iowa 374, 86 N.W.2d 849, 860 (1957); Neddermeyer v. Crawford County, 187 Iowa 1025, 175 N.W. 339,342,343 (1919).

testimony is given, it should be stricken, and such action by the trial court is sufficient to cure the error.[86] Objection to the question should be made at the time it is asked, and if the question clearly calls for an answer emboyding improper testimony and no objection is made, the trial court may refuse a later motion to strike the testimony.[87] However, if it is not clear at the time the testimony is given that it is improper and that the question gave no indication that such testimony would be forthcoming, then when the improper basis for the testimony is discovered on cross-examination, the court should strike the testimony.[88]

A different rule seems to apply where testimony calling for a valuation which includes the improvement as an item of value is elicited on cross-examination. The court has held that questions requiring such answers are simply to test the witness's ability as an expert and that any discrepancies could be cleared up on redirect.[89] It would seem that this holding affords the condemnor an excellent opportunity to show a jury the net effect of the condemnation and hence increase the possibilities of minimizing damages.

SECTION 36. CROSS-EXAMINATION AS TO SPECIFIC PARCELS

Although it is an extablished principle that a witness cannot be interrogated as to the value of specific parcels composing the entire tract or farm on direct examination and that such inquiry must be confined to the value of the land as a whole before and after the taking, there is no such limitation on cross-examination. A witness in such

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86. Trachta v. Highway Commission, 249 Iowa 374, 86 N.W.2d 849, 860 (1957).
87. Neddermeyer v. Crawford County, 187 Iowa 1025, 175 N.W. 339, 342, 343 (1919).
88. See Footnote 87, supra.
89. Dean v. State, 211 Iowa 143, 233 N.W. 36, 39, 40 (1930).

latter situation may be asked the value of specific parcels of the whole farm or tract in order to test his skill or knowledge of land values.[90]

SECTION 37. LIMITING THE NUMBER OF WITNESSES

The trial court may in its discretion limit the number of valuation witnesses on each side, and if this discretion be exercised within reason, the appellate court will not treat such limitation as ground for new trial. Even though some of the witnesses called under such restriction do not possess the qualification necessary to express an opinion, such witnesses are counted in computing the designated number to a side.[91]

SECTION 38. EVIDENCE OF OFFERS OF COMPROMISE OR SETTLEMENT

Evidence of offers of compromise may not be introduced into evidence as indicating an admission of value on the part of the con-

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90. Dean v. State, 211 Iowa 143, 222 N.W. 36 (1930); Welton v. Highway Commission, 211 Iowa 625, 233 N.W. 876, 881 ("To avoid confusion in this particular it may be said that a cross-examiner is privileged to enter the domain of valuation as to separate parcels of the farm. The witness here was being examined in chief by plaintiff's counsel as to his value of the farm by parcels. The law of eminent domain does not contemplate that in fixing the value of a farm the plaintiff may cut to pieces his farm and a piecemeal valuation be taken as the basis of valuation before and after the condemnation."); Lough v. Minneapolis R. R. Co., 116 Iowa 31, 89 N.W. 77 ("It was an error to allow the railway company to examine its witnesses as to the value of a part of the farm crossed by its road, separate from the other portions thereof, since the owner was entitled to have is farm valued as a whole."). See also Cherokee v. S. C. & I. F. Town Lot & Land Co., 52 Iowa 279, 281 on this problem. The analogy to the main problem in the last paragraph of Section 35, supra, should be noted.

91. Preston v. Cedar Rapids, 95 Iowa 71, 63 N.W. 577 (seven on each side); Everett v. Union Pac. Ry. Co., 59 Iowa 243, 13 N.W. 109.

demnor.[92] Such a result, of course, is in line with the strong public policy favoring settlements. However, it is necessary to show that the offer was made when the dispute was actually pending, which in condemnation seems to cover the period from the official determination to build the facility in question to the trial of the case.[93]

It has also been held prejudicial error to introduce evidence that the plaintiff is the only landowner in the county who has refused to settle with the condemnor.[94]

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92. Miller v. Iowa Electric Light & Power Co., 239 Iowa 1257, 34 N.W.2d 627 (1948).
93. See Footnote 92, supra.
94. Steensland v. Iowa-Illinois Gas & Electric Co., 242 Iowa 534, 47 N.W.2d 162 (1951); accord, Basch v. Iowa Power & Light Co., ____ Iowa ____, 95 N.W.2d 714, 717 (1959).

DIVISION VI

TITLE TO HIGHWAYS AND THE LEGAL RIGHTS ATTACHING THERETO

SECTION 39. CONDEMNED EASEMENT

a. General Rule

The general rule is that when land for a highway is condemned, the highway authorities take only an easement;[1] the underlying fee remains in the abutting owner. Compensation is made on the basis that the entire interest of the landowner is taken, since ordinarily nothing of value will remain to the landowner.[2] Consequently the failure to instruct the jury that the fee title remains in the owner is not reversible error.[3] Where mineral resources exist which may be extracted without interference with the easement, there is some authority for the proposition that some value remains in the owner; presumably in that event he would be entitled to damages only to his surface interest in the

1. Comment, 43 Iowa L. Rev. 308,310 (1958); Merritt v. Peet, 237 Iowa 1200, 24 N.W.2d 757 (1946)(condemnation of road to gravel pit under Iowa Code Section 473.4 (1950), now repealed and partially re-enacted in Iowa Code Section 306.13 (1958); State v. F.W. Fitch Co., 236 Iowa 208, 17 N.W.2d 380 (1945); Dierkson v. Pahl, 194 Iowa 713, 190 N.W. 423 (1922); Dubuque v. Maloney, 9 Iowa 450 (1859)(this case involved city streets and involves a special exception to what seems to be the general rule that a city takes a fee interest in streets; apparently the reason was the mineral wealth underlying the land around Dubuque which was of importance at the time the city was established. See Dubuque v. Benson, 23 Iowa 248 (1867). (See Sec. 306A.5 which provides for fee simple title on controlled access facilities). (See also Sec. 40 infra).
2. Smith v. Hall, 103 Iowa 95, 72 N.W. 427 (1897); Clayton v. Chicago, Iowa & Duluth Ry. Co., 67 Iowa 238, 25 N.W. 150 (1885).
3. Clayton v. Chicago, Iowa & Dakota Ry. Co., 67 Iowa 238,240, 25 N.W. 150 (1885); Cummins v. Des Moines & St. Louis Ry. Co., 63 Iowa 397, 19 N.W. 268 (1884); Hollingsworth v. Des Moines & St. Paul Ry. Co., 63 Iowa 443, 19 N.W. 325 (1884).

land.[4] However, where the easement interferes with exploitation of the resources, the mineral value of the land may be shown as an indication of its market value.[5] It should be noted, however, that the owner retains no right in underlying mineral resources when a fee is acquired; thus it has been held that an action by the city will lie for the recovery of damages for the removal of mineral deposits from land underlying a fee interest in a street.[6]

Although an offset is allowed for mineral resources where an easement is condemned, an interest remaining in the landowner purely because of the good will of the easement holder may not be shown to reduce the damage of the owner of the underlying fee.[7] Since such rights may be withdrawn at the discretion of the condemnor, they are too insubstantial for consideration. Thus, the only offset which appears to be available is that for underlying mineral resources, the extraction of which may be accomplished despite the easement.

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4. Cummins v. Des Moines & St. Paul Ry. Co., 63 Iowa 397,405, 19 N.W. 325 (1884) (dictum); Hollingsworth v. Des Moines & St. Paul Ry. Co., 63 Iowa 443, 19 N.W. 326 (1884); but see, Doud v. Mason City & Ft. Dodge Ry. Co., 76 Iowa 438, 41 N.W. 65 (1888) (this rather confusing case seems to have allowed use of value of coal as an indication of market value although no interference with the owner's right of extraction was shown).
5. Accord, Nedrow v. Michigan-Wisconsin Pipe Line Co., 245 Iowa 763, 61 N.W.2d 687 (1954); Hall v. West Des Moines, 245 Iowa 458, 62 N.W.2d 734 (1954).
6. Gilchrist Co. v. Des Moines, 128 Iowa 49, 102 N.W. 38 (1905); Davis v. Clinton, 50 Iowa 585 (1879); Clinton v. Cedar Rapids & Mo. R. Co., 24 Iowa 455, (1868); Des Moines v. Hall, 24 Iowa 234 (1868).
7. Moran v. Highway Commission, 223 Iowa 936, 274 N.W. 59 (1937). See also Sec. 16, supra, on the duty to mitigate damages.

b. Rights Retained by the Underlying Fee Holder

A railroad company enjoys full, complete, and exclusive possession of the right-of-way and may exclude an abutter from entering upon it at will.[8] The abutter, of course, retains a right of reverter, and such right runs with the land.[9] Where abandonment occurs and the easement is re-condemned, compensation must be paid to the fee holder again[10] unless a reverter to the grantor is specified in the original grant and such interest is excepted from subsequent conveyances.[11]

However, while technically the right acquired by the condemnor in a highway is the same as that in a railroad,[12] the underlying fee holder in a highway has certain rights in addition to the possibility of reverter.[13] Certain of these rights are absolute while others are only permissive. The absolute rights, which include those rights which the condemnor may not take away without paying additional compensation, will be examined first. Highway authorities may not deprive the abutting owner of the right of reasonable access,[14] the right to light and

8. Pierce v. Houghton, 122 Iowa 477, 98 N.W. 306; Smith v. Hall, 103 Iowa 95, 72 N.W. 427 (1897); Hiskett v. W. St. L. Ry. Co., 61 Iowa 647, 16 N.W. 525 (1883); Gerald v. Elley, 45 Iowa 322 (1876); Hougan v. M. & St. P. Ry. Co., 35 Iowa 558 (1872).
9. Waddell v. Board of Supervisors, 190 Iowa 400, 175 N.W. 65,68 (1919); Smith v. Hall, 103 Iowa 95, 172 N.W. 427 (1897).
10. Remey v. Iowa Cent. Ry. Co., 116 Iowa 133, 89 N.W. 218 (1902).
11. Spencer v. Wabash R. Co., 132 Iowa 129, 109 N.W. 453 (1906).
12. See distinction between city and country highways noted in footnote 1, supra; also see Kitzman v. Greenholgh, 164 Iowa 166, 145 N.W. 505 (1914) on easements in unincorporated villages.
13. As to the reversion of abandoned highways see Kitzman v. Greenholgh, 164 Iowa 166, 145 N.W. 505 (1914).
14. Iowa Code Section 314.7 (1958)(see discussion of this section in Section 5(a), supra. Also see Section 4(c)(3), supra.

air,[15] and the right to lateral support.[16] Closely related to the above rights is the right of the abutting fee owner to the unaltered flow of surface water. Iowa Code Section 314.7 (1958) forbids turning the natural drainage of the surface water to the injury of the adjoining owner. While sometimes such diversion of surface water arises with respect to an alleged constitutional taking in an attempt to secure compensation,[17] the usual object of litigation in regard to drainage problems and highways is equitable relief. Highway authorities have a duty to permit the escape of water in the natural course of drainage,[18] and an injured landowner is entitled to relief in the form of orders to establish culverts in the natural line of drainage[19] and to maintain existing drainage facilities located on highways in operating condition.[20] However, where the interference with normal drainage was reasonably to be expected at the time of condemnation in view of the construction problems involved, the court may deny relief on the theory that any damage now occurring was embodied in the original award.[21] Where it

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15. See Section 4(c)(4), supra.
16. See Section 4(c)(6), supra.
17. See Section 4(c)(5), supra.
18. Perkins v. Palo Alto County, 245 Iowa 725, 64 N.W.2d 562 (1953); Owens v. Fayette County, 241 Iowa 740, 40 N.W.2d 602 (1950); Droegmiller v. Olson, 241 Iowa 456, 40 N.W.2d 292 (1949); Nixon v. Welch, 238 Iowa 34, 24 N.W.2d 476 (1947); Jacobson v. Camden 236 Iowa 976, 20 N.W.2d 407 (1945); Astor v. Starke, 217 Iowa 166, 251 N.W. 153 (1933); Estes v. Anderson, 204 Iowa 288, 213 N.W. 566 (1927).
19. Nixon v. Welch, 238 Iowa 34, 24 N.W.2d 476 (1947); Jacobson v. Camden, 236 Iowa 976, 20 N.W.2d 407 (1945).
20. Perkins v. Palo Alto County, 245 Iowa 725, 64 N.W.2d 562 (1953); Droegmiller v. Olson, 241 Iowa 456, 40 N.W.2d 292 (1949).
21. Blunck v. Chicago & N.W. Ry. Co., 142 Iowa 146, 120 N.W. 737 (1909)(no natural channel for the surface water existed and trestle work would have been required across the entire bottom). See also cases cited in footnote 22, below.

was reasonable at the time of condemnation to expect that drainage facilities would be established, then the landowner will be entitled to additional relief if damage occurs.[22]

A related right of the fee holder is to additional compensation for the subsequent establishment of an additional servitude upon the condemned easement. The meaning of the term additional servitude is, of course, crucial in deciding whether or not compensation is required. Generally, the distinction between the compensable and non-compensable of an improvement on an existing right-of-way is thought to turn on whether the new facility is simply an expansion of the pre-existing use or is of an entirely new character; only in the latter case is compensation required.[23] Of course, the court may take a broad or narrow view of the character of the original easement; thus it is important to examine judicial treatment of specific types of original easement grants as well as the type of additional use established on the right-of-way. Thus it has been held that the location of a railroad on the right-of-way of an existing highway constitutes an additional servitude.[24] It has also been held that the erection of unusual structures which could not reasonably have been contemplated at the time of the original taking justifies the award of additional damages.[25]

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22. Albright v. Railway, 133 Iowa 644, 110 N.W. 1052 (1907); Drake v. Chicago, R.I. & P. R. Co., 63 Iowa 302, 19 N.W.215 (1884); Stodghill v. C.B. & Q. R. Co., 43 Iowa 26 (1876).
23. Nichols, Ibid., Section 9.21 (ed ed. 1950).
24. Nichols, Ibid., Section 10.31 (3d ed. 1950); McClean v. Chicago, Iowa & Dakota R. Co., 67 Iowa 568, 25 N.W. 782 (1885); Kucheman & Hinke v. C.C. & D. Ry. Co., 46 Iowa 366 (1877). But see, Barney v. Keokuk, 94 U.S. 324, 341 (1876) and citation of the early Iowa cases.
25. Anderlik v. Highway Commission, 240 Iowa 919, 38 N.W.2d 605, (1949)(note discussion of Pillings case which seems to further support the reasonable anticipation theory and to suggest that where the improvement could be anticipated, no damages are recoverable); Liddick v. Council Bluffs, 232 Iowa 197, 5 N.W.2d 361,381 (1942) (it should be noted that this was only an alternate ground for the decision; however, the Anderlik case, supra, indicates that this position will be followed by the Iowa court). Also see Rhodes v. Highway Commission, ___ Iowa ___, 94 N.W.2d 97 (1959) which distinguishes Anderlik, supra, and Liddick, supra, on the reasonable anticipation theory. It should be noted, however, that the Rhodes case involved a purchase and not the condemnation of land.

Where the public lays pipes on the easement, there is substantial unanimity that no additional servitude is thereby created since liquids may be transported more conveniently by this method than by surface travel.[26] In the majority of jurisdictions it seems to be held that telegraph and telephone poles constitute an additional servitude.[27] The Iowa courts seem to regard such poles as additional servitudes although there is considerable reason for doubt, and the problem seems never to have been directly faced.[28]

An interesting situation is presented where the city attempts to secure compensation for the use of its streets on the grounds that an additional servitude has been established. Thus far the effort has been unsuccessful in cases involving utility poles and their connecting wires.[29] The same rule has not been applied in the case of railroads.[30] However, the court in a subsequent case seems to have indicated that the state may recover damages for the construction of a pipeline across

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26. Nichols, Ibid., Section 10.4 (3d ed. 1950); Barney v. Keokuk, 94 U.S. 324,340 (1876).
27. Nichols, Ibid., Section 10.5(1) (3d ed. 1950).
28. Weierhauser v. Cole, 132 Iowa 14, 109 N.W. 301 (1906). Also see State v. Nebraska Telephone Co., 127 Iowa 194, 103 N.W. 120 (1905) where the question was passed over. But see Iowa Ry. & Light Corp. v. Lindsey, 211 Iowa 544, 231 N.W. 461,463 (1930) ("one of the inducements which led the legislature to grant the right to construct these public utilities on the highways was undoubtedly the fact that it saved them the expense of condemning and paying for a right-of-way for their lines..."). Iowa Code Sections 488.4 and 489.14 (1958) provide for condemnation of private land but do not make clear whether land subject to an easement is private property which must be condemned. Consequently, it would appear that the question is far from definitely settled in Iowa.
29. Des Moines v. Iowa Telephone Co., 181 Iowa 1282, 162 N.W. 323,327 (1917).
30. City of Clinton v. C. R. & M. R. Co., 24 Iowa 455 (1868) (however, a separate opinion by Cole, J. took the position that the city was entitled to compensation).

its highway easements.[31] Whether the distinction between the cases lies in the type of improvement constructed, the government unit involved or simply the dates of the cases is a matter of conjecture.

The next group of "rights" belonging to the landowner are significant, but they are so substantial as to be labelled permissive, the fee owner has certain rights to vegetation growing on the surface of the easement. Thus timber standing on the condemned land, other than that necessary for the construction and repair of the improvement, remains the property of the owner.[32] When the trees do not obstruct travel and their removal is unnecessary to properly improve the highway,[33] they cannot be removed in opposition to the desires of the fee holder.[34] The grass and herbage on the right-of-way likewise belong to the abutter, and he may remove such grass and herbage or pasture his animals along the untravelled portion of the highway so long as they do not interfere with travel.[35] In addition, the abutting owner may sink

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31. State ex. rel. Board v. Stanolind Pipe Line, 216 Iowa 436, 249 N.W. 366 (1933).
32. Overman v. May, 35 Iowa 89, 97 (1872); Preston v. Dubuque & D.R. Co., 11 Iowa 15 (1860); Deaton v. Polk County, 9 Iowa 594 (1859).
33. See Iowa Code Section 314.7 (1958). Harrison v. Hamilton County, 284 N.W. 456 (Iowa 1939)(no Iowa report); Rabiner v. Humboldt County, 224 Iowa 1190, 278 N.W. 612 (1938).
34. Waterbury v. Morphew, 146 Iowa 313, 125 N.W. 205 (1910); Burget v. Greenfield, 120 Iowa 432, 439, 94 N.W. 933 (1903); Chrisman v. Deck, 84 Iowa 344, 51 N.W. 55 (1892); Quinton v. Burton, 61 Iowa 471, 16 N.W. 569 (1883); Everett v. Council Bluffs, 46 Iowa 66 (1877); Bells v. Belknap, 36 Iowa 583 (1873).
35. Elliott, On Roads & Streets, Section 376.1; Deaton v. Polk County, 9 Iowa 594, 596 (1859) dictum (fee owner may maintain trespass against one who puts his livestock into the highway to graze). The right to graze livestock on the highway is severely limited by the liability imposed on the owner for damage or auto accidents caused by them. See Iowa Code Annotated, Section 188.6 (1949) and cases annotated thereunder.

a water course below the highway provided he does not interfere with public travel.[36] The general rule is that springs belong to the owner of the fee and that the owner may dig wells in the right-of-way providing he does not interfere with the easement.[37] A landowner may also bring an action against one who obstructs the highway or against one who remains upon it and refuses to depart.[38] In addition, the landowner may make reasonable use of the right-of-way for the loading and unloading of merchandise and for the temporary deposit of materials.[39] While permanent structures may not be erected on the surface even in the unused portion of the highway,[40] sub-surface structures, such as vaults and cellars, may be maintained by the fee holder.[41]

It is suggested that the "rights" enumerated in the preceding paragraph are merely permissive and that once their existence interferes with the needs of the public, they disappear. Nichols asserts that not only must an interfering private use give way to a new public use, but that the fee owner suffers no compensable damage.[42] This view seems

36. Nichols, Ibid., Section 10.211(1)(3d ed. 1950).
37. Nichols, Ibid., Section 10.22 (3d ed. 1950). However, it has been held in Iowa that the existence of the right in a landowner to continue use of a well now located in the right-of-way was actually a privilege and not a right and therefore would not mitigate damages. Moran v. Highway Commission, 233 Iowa 936, 274 N.W. 59 (1937). While this case does not constitute a rejection of the general rule, it does indicate that these "rights" of the fee owner are permissive only and consequently are somewhat insubstantial.
38. Dubuque v. Maloney, 9 Iowa 450 (1859).
39. Nichols, Ibid., Section 10.211 (3d ed. 1950); Haight v. City of Keokuk, 4 Iowa 199 (1856); cf. Sikes v. Town of Manchester, 59 Iowa 65, 12 N.W. 755 (1882)(rights of fee holders not involved). But see Chapter 319, Iowa Code (1958).
40. Nichols, Ibid., Section 10.211 (3d ed. 1950); Iowa Code Section 319.1 (1958).
41. Nichols, Ibid., Section 10.211(1)(3d ed. 1950); Dubuque v. Maloney, 9 Iowa 450 (1859).
42. Nichols, Ibid., Sections 10.211 (2), 10.34 (1, 2) (3d ed. 1950); also see Section 5.85 and following.

to be borne out by Moran v. Highway Commission[43] which held that a landowner's interest in a well left on the right-of-way after construction of a highway was only permissive; such permissive privileges cannot be considered in reduction of damages.[44] In addition, since at the time of condemnation the condemnor must pay for the property as though a fee had been granted,[45] it would seem unjust to require the condemnor to pay again. However, it must be conceded that Dubuque v. Maloney[46] seems to cut the other way in holding that the city had no right to construct a subterranean cistern below the street. This case is a rather old one and the interrelationship between the cistern and the necessity of importance of supplying water to the public does not seem to have been argued.[47]

c. Rights of the Condemnor

The condemnor also possesses some rights in the land which are absolute and some which are conditioned upon specific circumstances. The condemning authority has, of course, the right to establish a highway on the condemned easement and may locate the road on any portion of the easement without reference to the center line.[48] It (a railroad) also has the right to lay additional tracks on the original right-of-way,[49] or may condemn additional right-of-way to establish a parallel facility.[50] In addition, the condemnor has the right to use the full

43. 233 Iowa 936, 274 N.W. 59 (1937).
44. DePenning v. Iowa Power & Light Co., 239 Iowa 950, 33 N.W.2d 503 (1948); Moran v. Highway Commission, 233 Iowa 936, 274 N.W. 59 (1937).
45. See footnote 2, supra, this Division.
46. 9 Iowa 450 (1859).
47. See Nichols, Ibid., Section 10.4 (3d ed. 1950).
48. Stark v. Sioux City Ry. Co., 43 Iowa 501 (1876).
49. Hileman v. C. G. W. Ry. Co., 113 Iowa 591, 85 N.W. 800 (1901); But cf., Henry v. Ry. Co., 140 Iowa 201, 118 N.W. 310 (1908) where the original grant was construed as authorizing only one track.
50. Browneller v. Natural Gas Pipe Line Co., 233 Iowa 686, 8 N.W. 2d 474 (1943).

width of the right-of-way, and may remove obstructions located in the highway.[51] Chapter 319 of the Iowa Code (1958) provides for removal of all obstructions located within the boundaries of the highway; billboards situated on private property may also be removed if they "obstruct the view of any portion of a public highway".[52] It has also been held, however, that highway authorities must allow the location of electric transmission lines wholly within the right-of-way where a franchise has been granted by the predecessor of the Iowa State Commerce Commission.[53] However, the same case did intimate that when the public necessity demands, highway authorities may order the total removal of such facilities.[54] Highway authorities may, of course, erect signs, lights, and structures which further or promote the safety and convenience of travel on the road.[55] However, public buildings devoted to non-highway purposes may not be constructed on the highway.[56] While the highway authorities have a duty to allow water to escape in its natural course of drainage,[57] they may concentrate

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51. Quinn v. Baage, 138 Iowa 426, 114 N.W. 205 (1908); Wheller v. Ft. Dodge, 131 Iowa 566,570, 108 N.W. 1057 (1906) (city street) ("The public right goes to the full width of the street and extends indefinitely upward and downward..."); Perry v. Castner, 124 Iowa 386, 100 N.W. 84 (1904)(city street) rehearing 130 Iowa 703 (1906); Mosher v. Vincent, 39 Iowa 607 (1874). The indicated cases involve city streets which may or may not have been easements and if not, are not precisely in point.
52. Iowa Code Section 319.10 (1958).
53. Iowa Ry. & Light Corp. v. Lindsey, 211 Iowa 544, 231 N.W. 461 (1930)(5-4 decision with rigorous dissent upholding the public right in the highway as paramount).
54. 231 N.W. at 465. It would seem open to the highway authorities to deny permission at the outset if they may do so later on. However, the majority opinion takes the opposite position.
55. Nichols, Ibid., Section 10.6 (3d ed. 1950).
56. Pettit v. Grand Junction, 119 Iowa 352, 93 N.W. 381 (1903) (town hall, jail, etc. held nuisances in street).
57. See discussion in Section 39(b), supra.

the surface water at one point in the natural watercourse by means of a culvert or other device, even though such concentration may increase erosion on the servient estate.[58] Furthermore, the owner of the servient estate may not protect his land by obstructing the flow of such water where the result is to back water onto the highway.[59]

One of the most important property aspects of the public ownership of the right-of-way is its immunity from encroachment by abutters. An abutter acquires no interest in a highway through maintenance of a fence extending into the right-of-way.[60] Nor does he acquire any property rights in trees located thereon, even though such trees may not arbitrarily be destroyed by highway officials under Iowa Code Section 314.7 (1958).[61] Neither does a landowner acquire any rights in the water course formed by a highway ditch as a result of diverting water into it.[62] However, a water course along a highway may become the natural

58. Owens v. Fayette County, 241 Iowa 740, 40 N.W.2d 602 (1950); Herman v. Drew, 216 Iowa 315, 249 N.W. 277 (1933); Hayes v. Oyer, 164 Iowa 697, 146 N.W. 857 (1914); accord, Jacobsen v. Camden, 236 Iowa 976, 20 N.W.2d 407 (1945).
59. Herman v. Drew, 216 Iowa 315, 249 N.W. 277 (1933).
60. Richardson v. Derry, 226 Iowa 178, 284 N.W. 82 (1939) (see extensive list of supporting Iowa decisions cited therein); Rabiner v. Humboldt County, 224 Iowa 1190, 278 N.W. 612 (1938).
61. Harrison v. Hamilton County, 284 N.W. 456 (Iowa 1939)(no Iowa report); Rabiner v. Humboldt County, 224 Iowa 1190, 278 N.W. 612 (1938). Also see Section 5(a), supra.
62. Droegmiller v. Olson, 241 Iowa 456, 40 N.W.2d 292 (1949); accord, Wheatley v. Cass County, 239 Iowa 932, 31 N.W.2d 871(1948) (this case affirms the basic proposition but involves a change in water course made by the highway officials. The landowner had constructed improvements in reliance on the altered channel and alleged equitable estoppel; the court rejected the argument saying no damage was indicated. It would seem that it may still be possible to use this argument successfully if damage can be shown).

water course where the alteration is made by the highway officials at the request of the landowner.[63] The basis for all these decisions seems to be the principle that neither the statute of limitations or the doctrine of prescriptive right can be urged against the public.[64]

The condemnor also has certain more or less permissive rights which allow it the use of earth, gravel, timber, etc. found on the right-of-way. With respect to railroads, Iowa Code Section 471.6 (1958) specifically confers the power to use such materials for the construction and repair of the railway and its appurtenances.[65] No statute appears to make a specific grant of such power to highway officials, but the use of such materials seems to be implied in the power to construct highways.[66]

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63. Perkins v. Palo Alto County, 245 Iowa 725, 64 N.W.2d 562 (1953). Compare Wheatley v. Cass County, 239 Iowa 932, 31 N.W.2d 871 (1948).
64. Droegmiller v. Olson, 241 Iowa 456, 40 N.W.2d 292 (1949); Wheatley v. Cass County, 239 Iowa 932, 31 N.W.2d 871 (1948); Brightman v. Hetzel, 183 Iowa 385, 167 N.W. 89 (1918); Pettit v. Grand Junction, 119 Iowa 352, 93 N.W. 381 (1903). Note, however, that a condemnor may acquire a prescriptive right in a landowner's drainage system. Grimes v. Polk County, 240 Iowa 228, 34 N.W.2d 767 (1949).
65. For interpretation see Winkelmans v. Des Moines N.W. R. Co., 62 Iowa 11, 17 N.W. 82 (1883); Preston v. Dubuque & Pac. R. Co., 11 Iowa 15 (1860); Henry v. Dubuque & Pac. R. Co., 2 Iowa 288 (1855); Vermilya v. Chicago, M. & St. Paul Ry. Co., 66 Iowa 606, 24 N.W. 234 (1885), sometimes thought to constitute a restriction on the use of such materials for construction of appurtenances at a distance from the land condemned, deals only with a deed which the court regarded as more restrictive than the title acquired by condemnation.
66. Nichols, Ibid., Section 10.2(2)(3d ed. 1950). But see, Iowa Code Sec. 314.7 (1958) establishing restrictions on cutting of trees on the right-of-way.

However, highway authorities may make only reasonable use of materials found on the easement.[67] With today's road construction methods it seems unlikely that materials other than earth necessary for grading purposes will be necessary, and no cases seem to exist in this area other than those connected with destruction of access under Iowa Code Section 314.7 (1958) and its various predecessors. Where gravel is needed for highway purposes, specific statutory provisions may be used to condemn gravel pits and roads leading thereto.[68]

SECTION 40. CONDEMNED FEE SIMPLE

The condemnation by the Iowa State Highway Commission of a fee simple estate was authorized by Section 5, Chapter 148, 56th General Assembly, Iowa Code Section 306A.5 (1958) which took effect July 4, 1955. Until that time only easements had been acquired as a result of condemnation. So far as is known, no case has been decided with regard to the legal relations between the condemnor and adjoining landowners where the condemnor holds a fee estate. Since the statute also authorizes condemnation of the "rights of access, air, view, and light" and since such clauses may easily be inserted in every condemnation,[69] it would seem that all the problems with regard to these rights would be eliminated where the Highway Commission condemns a fee. All of the so-called "permissive" rights of the landowner as well as his right to the underlying mineral resources would clearly seem to be destroyed as the adjoining landowner no longer has any property interest in the right-of-way, which was not the case where the state

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67. Overman v. May, 35 Iowa 89 (1872)(held that use of stone quarried from the bed of that portion of a river spanned by a highway bridge for repair of other city streets and construction of culvert was unreasonable).
68. Iowa Code Section 389.43 (1958) allows condemnation by cities and towns either within or without the city limits. Iowa Code Sections 309.63, 309.66 and Section 306.13 (1958) permits acquisition of gravel pits by highway officials. Prospecting for such gravel pits is allowed by Iowa Code Section 314.9 (1958).
69. For such a clause as inserted in a purchase agreement, see Rhodes v. Highway Commission, ___ Iowa ___, 94 N.W.2d 97 (1959).

held only an easement.[70] However, the duty which presently exists to maintain the unaltered flow of surface water would seem to apply to highway officials even though a fee title is held. This duty, unlike the relationships enumerated above, has nothing to do with the property rights arising out of condemnation but stems instead from the concept of dominant and servient estates in drainage law. Since the duties imposed upon highway officials in the easement situation are similar to those placed upon a private owner of a fee estate, there is no reason for supposing the rule is different where highway authorities hold a similar estate.

As indicated above, there is no direct authority on this problem. The only relevant cases are those dealing with city streets in cases where the city holds a fee interest. As indicated by footnote 1, supra, this Division, the type of interest held by the city in its streets varies from city to city depending upon the original dedication or the manner of platting. Unfortunately in most of the cases the courts do not seem to have indicated the state of the title to the streets involved in the litigation. This seems to indicate that as far as the court was concerned very little turned on the type of interest present. In fact Nichols asserts that the difference between an easement and a fee, both having been condemned for highway purposes, was for many years regarded as a mere technicality.[71] Consequently it is doubtful whether the limited quantity of existing authority is of much value in dealing with problems arising under the Highway Commission's new authority to acquire a fee interest by condemnation.

SECTION 41. ACQUISITION OF LAND BY PURCHASE

The general rule concerning title acquired by condemnation is that in the absence of a contrary statutory provision, the title acquired is no greater than that necessary for the purposes taken. This means that in the vast majority of the cases in which condemnation is resorted to the condemnor will take an easement and not a fee title. What right is taken when the condemnor purchases land in lieu of condemnation.

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70. See Des Moines v. Hall, 24 Iowa 234 (1868).
71. Nichols, Ibid., Section 10.22 (3d ed. 1950). See also Barney v. Keokuk, 94 U.S. 324,341,342 (1876) which discusses the Iowa cases and observes that nothing seems to turn on whether the city holds the fee or only an easement.

First of all, it should be noted that where the voluntary conveyance of the landowner is limited to an easement or to a right-of-way, the condemnor takes no greater interest than that specified in the deed.[72] Likewise, there will be no difficulty where the statute allows condemnation of a fee interest,[73] and the purchase is in lieu of condemnation. The issue of what title is acquired by purchase is raised where the deed purports to transfer a fee interest or is so interpreted by the courts, and the statute allows the acquisition of a mere easement when condemnation is employed.

The Iowa law on the subject is a rather curious blend of conflicting statutes supplemented by a small body of case law. Iowa Code Section 471.5 (1958) provides that certain persons and agencies may purchase land in lieu of condemnation but may acquire only such title to the land as would have been obtained by condemnation. To whom does this statue apply?

Clearly it does not apply to railroad corporations. This type of condemnor does not seem to be covered by the language of the statute,[74] and the case law appears to be settled that a railroad may acquire fee title by deed on an appropriate conveyance.[75]

Is the Highway Commission limited in the rights which it may acquire by Iowa Code Section 471.5 (1958)? The statute does include the word "commission" within the agencies which are controlled by the statute. However, it is suggested that the probable intention of the statute was a reference to those persons and agencies granted the power

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72. Smith v. Hall, 103 Iowa 94, 72 N.W. 427 (1897); Brown v. Young, 69 Iowa 625, 29 N.W. 941 (1886); Vermilya v. Chicago, M. & St. Paul Ry. Co., 66 Iowa 606, 24 N.W. 235 (1885). Also note interpretation of the Smith case in Watkins v. Iowa Central Ry. Co., 123 Iowa 390, 98 N.W. 910,914 (1904) which was followed in Montgomery County v. Case, 212 Iowa 73, 232 N.W. 150,154(1930).
73. Iowa Code Section 306A.5 (1958).
74. As will be discussed later, Iowa Code Section 471.5 (1958) seems to apply only to agencies and persons deriving their power to condemn under Iowa Code Section 471.4 (1958). Railroads derive their power from a separate and specific grant in Iowa Code Section 471.6 (1958).
75. Watkins v. Iowa Central Ry. Co., 123 Iowa 390, 93 N.W. 910, 914 (1904).

of eminent domain by the preceding Code provision, Iowa Code Section 471.4 (1958). The Highway Commission derives its power to condemn from a specific section of the Code, Section 306.13 (1958) which includes the authority to purchase land.[76] Unfortunately the statute uses the word "right-of-way" which in the interpretation of deeds at least has been held to grant an easement only.[77] Cutting against the easement theory, however, is Iowa Code Section 306.16 (1958) which gives the Highway Commission the authority to sell, subject to the approval of the Executive Council, "any tract or parcel of land" which is not required for highway purposes. Use of the quoted language instead of "right-of-way" would seem to indicate the sale of land to which a fee title existed. Moreover, the value of a mere easement would be of such dubious value that the reference must be to property held by the Highway Commission in fee. Since this section of the Code antedated the only provision authorizing acquisition of a fee by condemnation, Iowa Code Section 306A.5 (1958), the statute must, therefore, assume that fee title may be acquired by purchase since ordinarily only an easement is taken through condemnation.

The issue of what title is acquired by purchase where the Highway Commission is involved has probably been rendered moot, at least where land for a controlled access highway is being acquired. Iowa Code Section 306A.5 (1958) allows the acquisition of property by "gift, devise, purchase, or condemnation" and specifies that "all property rights acquired under the provisions of this chapter shall be in fee simple..." (emphasis supplied); consequently, it would seem that a fee title is taken by the Highway Commission no matter what method of acquisition is employed as long as land for a controlled access facility is involved.

However, except for the state and its agencies and railroad corporations, it would seem that in accordance with Iowa Code Section 471.5

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76. Rhodes v. Highway Commission, ___ Iowa ___, 94 N.W.2d 97, 100 (1959).
77. See Smith v. Hall, 103 Iowa 95, 72 N.W. 427 (1897) as interpreted by Montgomery County v. Case, 212 Iowa 73, 232 N.W. 150, 154 (1930) and Watkins v. Iowa Central Ry. Co., 123 Iowa 390, 98 N.W. 910, 914 (1904).

(1958) the property interest acquired by purchase may not exceed that which would be taken by condemnation.

As has been indicated by prior footnotes, where the condemnor may take a greater right in the land than he would take by condemnation, the right transferred depends upon the intent of the parties as manifested in the conveyance and interpreted by the courts. Where a "right-of-way" is conveyed, the courts have held that an easement only has been granted.[78] The language of a conveyance is also important where a right, not ordinarily present where land is acquired by condemnation, is given to the landowner in such instrument.[79]

Where the landowner has executed a voluntary conveyance, he may not thereafter institute condemnation proceedings to compel a taking of his land in that manner.[80] If the conveyance is alleged to be voidable on some grounds, it must first be set aside in appropriate proceedings.[81] However, the condemnor may not protect himself by instituting condemnation proceedings to enforce the agreement but must use specific performance or an action for damages.[82]

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78. Smith v. Hall, 103 Iowa 95, 72 N.W. 427 (1897); Brown v. Young, 69 Iowa 625, 29 N.W. 941 (1886); Vermilya v. Chicago, M. & St. P. Ry. Co., 66 Iowa 606, 24 N.W. 235 (1885); cf. Spencer v. Wabash R. Co., 132 Iowa 129, 109 N.W. 453 (1906) (grant of land was for "railroad purposes" and the case seems to suggest that only a right-of-way was conveyed).
79. E.g. Licht v. Ehlers, 234 Iowa 1331, 13 N.W.2d 688 (1944)(holding that grant requiring the establishment of a cattle pass implicitly required the county to maintain it).
80. C.B. & St. Louis Ry. Co. v. Bentley, 62 Iowa 446, 17 N.W. 668 (1883); Chicago, S.W.R. Co. v. Swinnery, 38 Iowa 182 (1874) (railway company may compel specific performance of a contract to convey a right-of-way after complying with the conditions precedent, and enjoin an assessment of damages under condemnation proceedings).
81. C.B. & St. Louis Ry. Co. v. Bentley, 62 Iowa 447, 17 N.W. 668 (1883). See also Morling v. Burlington R. Co., 67 Iowa 331, 25 N.W. 268 (1885)(railroad held entitled to equitable relief where condemnation papers had been lost and plaintiff landowner had commenced an action in trespass).
82. Burnell v. Waterloo, C. F. & N. Ry. Co., 173 Iowa 441, 155 N.W. 809 (1916).

DIVISION VII

CHANGE OF GRADE

SECTION 42. CHANGE OF GRADE AND THE IOWA CONSTITUTION

The Iowa law on change of grade involves a specialized statutory scheme dealing with the liability of municipal authorities for change of grade. Chapter 389 of the Iowa Code (1958) deals with the general establishment of streets and public grounds; the specific liability of the city for change of grade is spelled out in Iowa Code Sections 389.20 - 389.22 (1958). For years the cases have been concerned with the interpretation of these basic statutes and the results of this interpretative process are the principal subject of Division VII; however, as a result of new cases which have broadened the constitutional concept of a taking,[1] there is now reason for questioning the constitutionality of at least some parts of the underlying statutory scheme upon which the case law has been created.

One of the few cases in which the constitutionality of the change of grade statutes seems to have been raised is Taldott Bros. v. Des Moines;[2] in that case the court held that the damage which resulted was caused by bringing the street to the originally established grade, and therefore under the statute it was non-compensable. The court then turned to the plaintiff's constitutional argument that a taking had occurred by virtue of the loss of lateral support caused by the change of grade and that the statute constituted no defense to the action of the city. After extended consideration of foreign authority, the court held that the damage suffered by the plaintiff was consequential and hence non-compensable. The court saw plaintiff's damage as simply the sacrifice which a private citizen must make for the public good.

Against this background Liddick v. Council Bluffs[3] must be examined with some care. It should be noted that the first division of the opinion deals with change of grade. The court held that an

1. See Section 4(a), supra.
2. 134 Iowa 113, 109 N.W. 311 (1906).
3. 239 Iowa 197, 5 N.W.2d 361 (1942).

original grade had been established, that the proposed viaduct was a change of that grade, and therefore the city was liable under the change of grade statute for damages. However, the court did not rest with this conclusion, which would have been sufficient; it went on to hold against the city on an alternative ground.[4] The court re-examined the doctrine of consequential damage and held that the destruction or substantial interference with the rights of access, light, air or view was a "taking" within the purview of Section 18, Article I of the Iowa Constitution.[5] The court reached this result by considering property as a bundle of rights consisting of those listed above plus the right to "support of soil",[6] the interference with which results in a taking. The court observed that, on principle, loss of support and of the rights of access, light and air should be treated alike and specifically overruled such parts of Talcott as were contrary to that conclusion.[7]

What is the effect of this decision and the reasoning behind it on the change of grade statutes? It seems quite clear from Liddick, that whenever a change of grade causes substantial impairment with the rights of access, light, air, view[8] and lateral support, the statute will provide no defense to an action for damages brought by the landowner.[9] Probably the most significant issue now is the extent to which the reason-

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4. Any doubts that the second division was dictum were conclusively resolved by Anderlik v. Highway Commission, 240 Iowa 919, 38 N.W.2d 605 (1949) which followed Liddick where no change of grade issue was involved.
5. 5 N.W.2d at 379. Also see Iowa Code Section 389.23 (1958) which appears to have codified the Liddick holding on its facts.
6. 5 N.W.2d at 374.
7. 5 N.W.2d at 383.
8. These rights are now guaranteed by statute as well. See Iowa Code Section 389.23 (1958).
9. In such cases in the future it may be important whether the city proceeds under the power of eminent domain or under the change of grade statute because a different measure of damages is applied. Thus where condemnation is employed, no benefit to the landowner may be considered under Article I, Section 18, of the Iowa Constitution. However, benefit may be considered under the change of grade statute. For example, in a situation in which the city sought to establish a viaduct on a controlled-access highway, it could condemn the rights of access, air, light, etc. under Iowa Code Section 306A.3 (1958) or it could simply pay damages for

9-cont. changing the grade under Iowa Code Section 389.22 (1958). The latter might well be cheaper, and there is clearly an unresolved question as to whether the city may make an election as to the method of paying damages. A variant on this situation would be presented where city officials built the viaduct as a change of grade in order to use the offset for benefit in computing damages and where the viaduct is built at the instance of highway officials, to whom the change of grade statutes do not apply. Iowa Code Section 389.23 (1958), which to some extent codifies Liddick, is not specific on this general problem but seems to cut against allowing an offset for benefit. In view of the general constitutional rule it would seem that the exception should be specifically mentioned which it is not.

ing of Liddick, will be applied to other property "rights". It is plain that city officials may not interpose the statute as an absolute defense to an action for damages; neither may they escape liability by describing the damages as "consequential". The question will be whether or not a property right recognized by the court has been abridged. The usual damages in change of grade cases seem to be for destruction of trees, shrubbery, lawns, etc. as well as the creation of inconvenience, all of which result in depreciating the value of the property. In classifying property rights the court in Liddick declared:

> "Keeping in mind that property is not alone the corporal thing, but consists also in certain rights therein created and sanctioned by law, of which, with respect to land, the principle ones are the right of user and enjoyment, right of exclusion, right of disposition, and lesser ones, included in the right of user and enjoyment, are rights to access, light, air, view, support of soil, to be protected from unreasonable uses of neighboring property, to be protected in the natural flow of water, it is clear that the corporal thing is taken, that property is taken, pro tanto, when any one or more of these rights are taken, of which property consists."[10]

The key question for future decision will be whether damages of the type suggested above will be regarded as an interference with the right of "user and enjoyment". Since the court classified this right as primary, constitutional protection would seem to follow a fortiori if such damages do fit within "user and enjoyment". In short, it is apparent that the change of grade statutes now afford a much more limited protection than was formerly the case; the extent of this limitation is still undetermined however.

It should be noted, however, that the conclusions suggested in the paragraph above are based on the reasoning of the court in prior cases,

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10. 5 N.W.2d at 374.

particularly Liddick.[11] There has as yet been no direct holding in a fact situation involving a municipal act where the change of grade statutes would excuse liability and the Constitution would impose it.[12] In Hathaway v. Sioux City[13] the liability of the city for destroying the right of access to a street was raised on the theory that a taking of such right had occurred and also that a change of grade had taken place. The court held for the landowner on the taking theory and did not discuss the city's liability for the change of grade. In the only other post-Liddick case to consider liability of the city for a change of grade, the argument that a constitutional taking had occurred was not made.[14]

Probably the best argument available to the city is that based on Iowa Code Section 389.23 (1958). Inasmuch as that provision codifies the Liddick case on its facts, it is certainly open to argument that the intention of the Legislature was to confine recovery to that specific fact situation and none other. However, even on its face, the statute deals only with overhead crossings and therefore probably does not provide much indication of a comprehensive legislative intent to confine the scope of application of the Liddick opinion. More important, this provision is only a statute and cannot deprive a landowner of constitutional rights, if they exist. Ultimately then, it seems likely that the courts will be thrown back to an analysis of the reasoning of the Liddick case and a consideration of the relevant policy considerations in deciding how far the constitutional protection of the landowner exists in this area.

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11. However, the court's opinion at the close of Division I at 371 of 5 N.W.2d contains some rather surprising language. In referring to the statutory right to damages for a change of grade, the court said, "It is true that the right to recover damages is purely statutory and is not a 'taking' under the constitution...." In view of the holding in the following division that the city's proposed action amounted to a taking, this language is hard to explain unless it means simply that damage does not constitute a taking unless it results from the destruction of what Division II recognizes as a property right.
12. However, the overruling in Liddick of Lingo v. Page County, 201 Iowa 906, 208 N.W. 327 (1926); Pillings v. Pottawattamie County, 188 Iowa 567, 176 N.W. 314 (1920); and particularly Talcott Bros. v. Des Moines, 134 Iowa 113, 109 N.W. 311 (1906) would seem to come very close to such a holding.
13. 244 Iowa 508, 47 N.W.2d 228 (1953).
14. Tillotson v. Windsor Heights, 249 Iowa 684, 87 N.W.2d 21 (1957).

The remaining sections of this Division deal with the interpretation of the change of grade statutes. However, in view of the serious questions which now exist as to the immunity afforded municipal authorities by the change of grade statutes, a certain amount of caution about the authority cited herein should be observed.

SECTION 43. HISTORICAL DEVELOPMENT OF CHANGE OF GRADE

In Iowa the general constitutional provision affords no remedy to abutting owners for a change of grade per se.[15] Furthermore, no remedy for the landowner existed at common law.[16] Consequently it became necessary to enact a statutory provision in order to prevent what was regarded as an injustice in denying recovery to the landowner.[17] Thus it is important to remember that liability for a change of grade per se is purely statutory and that the city may avoid liability by complying with the statutory scheme; however, even a slight deviation from the specified procedure for establishing grade will result in liability.[18]

It should be noted, however, that the liability of the city may exceed that imposed by statute when, as a result of the change of grade, other property rights of the landowner, such as rights of access, air, light, etc. are damaged or destroyed. In this situation the Constitution applies and the condemnor will be required to pay damages.[19]

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15. The statutory provision is the exclusive and sole remedy for such change. Creal v. Keokuk, 4 Green 47; Cotes v. Davenport, 9 Iowa 227; Cole v. Muscatine, 14 Iowa 296; Burlington v. Gilbert, 31 Iowa 356; Cheisa v. Des Moines, 158 Iowa 343, 138 N.W. 922; Russel v. Burlington, 30 Iowa 262. But see Section 42, supra.
16. Liddick v. Council Bluffs, 232 Iowa 197, 5 N.W.2d 361 (1942); Reilly v. Ft. Dodge, 118 Iowa 633, 635, 92 N.W. 887 (1894); Russell v. City of Burlington, 30 Iowa 262 (1870); Cole v. City of Muscatine, 14 Iowa 296 (1862); Cotes & Patchin v. Davenport, 9 Iowa 227 (1859); Creal v. City of Keokuk, 4 Greene 47 (Iowa 1853).
17. Liddick v. Council Bluffs, 232 Iowa 197, 5 N.W.2d 361,370 (1942).
18. E.g., Tillotson v. Windsor Heights, 249 Iowa 684, 87 N.W.2d 21, (1957).
19. See Section 42, supra.

The general statutory provision allowing a remedy for change of grade was enacted in 1872.[20] With slight changes in phraseology to clarify its meaning it was carried into the Code of 1873.[21] This enactment, as one of the conditions to warrant recovery, required the improvements to be made "on such street or alley". In the Code of 1897[22] the statute was altered into its present form. The substitution of the word "same" for "such street or alley" was of no significance, but the insertion of the phrase "or lots abutting thereon" immediately after such word was important. In Richardson v. Sioux City[23] it was construed to give the word "on" a more literal meaning than as defined in Hempstead v. Des Moines[24] and to afford abutting owners redress for injuries to residential parking.

SECTION 44. STATUTORY REQUIREMENTS FOR COMPENSATION

The statutory remedy for change of grade provides that, "when any city or town shall have established the grade of any street or alley and any person shall have made improvements on the same, or lots abutting thereon, according to the established grade thereof, and such grade shall thereafter be altered in such manner as to damage, injure or diminish the value of such property so improved, said city or town shall

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20. Fourteenth General Assembly Chapter 40, Section 1 (1872); see Slatten v. Des Moines Ry. Co. (1870), 29 Iowa 48; Des Moines City Ry. Co. v. Des Moines, 205 Iowa 495, 216 N.W. 284. Prior to 1872 there were specific charter provisions for various cities. Davenport, Section 8 of Chapter 90 (1857); Muscatine, Chapter 50 (1855); Keokuk, Chapter 17 (1856).
21. Iowa Code Section 469 (1873).
22. Iowa Code Section 785 (1897).
23. Richardson v. Sioux City, 136 Iowa 436, 113 N.W. 928.
24. Hempstead v. Des Moines, 52 Iowa 303, 3 N.W. 123 (1879).

pay to the owner of such property the amount of such damage or injury."[25]

In Vilas v. C. M. & St. Paul Ry. Co.[26] the court stated that five elements must be present to entitle the abutter to compensation: (1) a grade must be established by ordinance; (2) the lot owner must have improved his lot with reference to the grade so established; (3) a new and different grade subsequently must have been established by ordinance; (4) the municipality must have changed the physical grade to conform to the new paper grade; and (5) in consequence thereof the owner's property must have been damaged, injured or diminished in value. This analysis, although too general to be accurate in all respects, is nevertheless helpful in hastily checking cases arising under the statute.

a. Establishment of Grade

(1) A Grade Must Be Established by Ordinance

It is well understood that the manner in which the grades of streets are established is by ordinance.[27] Establishing a grade does not mean the actual raising or lowering of the surface of the street. It means the fixing of a base line or place of reference, and certain measurements from that plane. Where that has been done by ordinance and the measurements made, the owners of property by an examination of the records of the council may readily determine the established grade of the street adjacent to their property, and improve their premises with reference thereto.[28]

The ordinance in and of itself must establish the place or reference line. An ordinance stating that a permanent grade is hereby established and that an engineer is to be employed at once to establish such grade is not sufficient. At most, it is merely a provision for establishing the

25. Iowa Code Section 389.22 (1958).
26. 174 Iowa 1244, 162 N.W. 795.
27. Iowa Code Section 389.20 (1958).
28. Kipple v. Keokuk, 61 Iowa 653,656, 17 N.W. 140.

the grade in the future.[29]

Such an ordinance must be duly passed, recorded and published in conformity with the provisions relating to ordinances of a general and permanent character contained in Chapter 366 of the Iowa Code (1958).[30] The grade cannot be established by the city by the mere acts of its officers in lowering or raising the grade,[31] or by the passing of a mere resolution by the council.[32] Further, a municipality cannot acquire a right to a grade by mere implication from the establishment of grades in connecting or neighboring thoroughfares.[33]

(2) Changing the Surface of the Street Without An Ordinance Unlawful

The consequence of changing the surface of a street without establishing a grade to which the street improvement completed should conform is very severe. The rule firmly settled in this jurisdiction is that "a city has no authority to change the grade of a street or sidewalk except upon the adoption of an ordinance fixing the grade, and in the absence of such an ordinance it is liable for any change". A right of action will lie even though the element of reliance on the established grade be lacking and even if such alterations are made prior to the es-

29. Blanden v. Fort Dodge, 102 Iowa 441, 71 N.W. 411.
30. Tillotson v. Windsor Heights, 249 Iowa 684, 87 N.W. 2d 21 (1957); Peoples Inv. Co. v. Des Moines, 213 Iowa 1378, 241 N.W. 464; Walter v. City of Ida Grove, 203 Iowa 1068, 213 N.W. 935 (1927); McManus v. Hornaday, 99 Iowa 507, 68 N.W. 812 (publication required). See Collins v. Iowa Falls, 146 Iowa 305, 125 N.W. 226. Formerly a two-thirds vote of the city council seems to have been required to adopt; see Iowa Code Section 793 (1897). Now a majority is all that is necessary, Iowa Code Section 366.4 (1958).
31. Tillotson v. Windsor Heights, 249 Iowa 684, 87 N.W.2d 21, 23, (1957); Brown v. City of Sigourney, 164 Iowa 184, 145 N.W. 478.
32. McManus v. Hornaday, 99 Iowa 507, 68 N.W. 812.
33. Morton v. Burlington, 106 Iowa 50, 75 N.W. 662.

tablishment of any fixed grade.[34] Further, an injunction will lie to restrain the city from proceeding with the work, until it has passed such ordinance.[35]

(3) Resolution Directing Work

Once the grade has been established a considerable time may elapse before any attempt on the part of the city is made to bring the surface of the street to conformity with the reference line or plane established. A resolution of council directing the work to be done is necessary to correct procedure; still, as a general rule, a failure to formally adopt such resolution in the usual case before proceeding with the work cannot give rise to a right of action to recover damages.[36]

However, the abutter may institute proceedings to enforce compliance with the law in this regard. It may be that in the case of a special injury caused by the failure to pass the required resolution an action may be maintainable. But such special interference must be alleged and proved as a separate cause of action and not as an action for change of grade.[37]

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34. Tillotson v. Windsor Heights, 249 Iowa 684, 87 N.W.2d 21 (1957); Caldwell v. Nashua, 122 Iowa 179, 97 N.W. 1000; Brown v. City, 164 Iowa 411, 145 N.W. 478; Millard v. City of Webster City, 113 Iowa 220, 84 N.W. 1044. Trustee v. Anamosa, 76 Iowa 538, 41 N.W. 313; Hunter v. Ottumwa, 150 Iowa 381, 129 N.W. 961; Eckert v. Incorp. Town of Walnut, 117 Iowa 629, 91 N.W. 929 (in this case no grade was established at the time of the excavation. After the work was completed, the city established a grade still lower than the surface excavated to. Held: the city was liable for damages); Richardson v. City, 111 Iowa 427, 82 N.W. 920. The measure of damages in such cases is "the difference between what the property was fairly worth on the market before the work was done and what it was thereafter".
35. Hunter v. Ottumwa, 150 Iowa 281, 129 N.W. 961.
36. Collins v. Iowa Falls, 146 Iowa 305, 125 N.W. 226; Reilly v. Fort Dodge, 118 Iowa 633, 92 N.W. 887; Wilbur v. Fort Dodge, 120 Iowa 555, 95 N.W. 186.
37. Reilly v. Ft. Dodge, 118 Iowa 633, 92 N.W. 887.

Furthermore, an ordinance fixing the grade is not jurisdictional and need not precede the resolution ordering the improvement. If passed so that the work is done with reference thereto and so that the owner may not be subject to damages by reason of subsequent change without compensation therefor, it is sufficient.[38]

(4) City Cannot Be Required to Bring Surface of Street to Established Grade

Where the natural surface of a street is above or below the established grade, the property owners cannot require the city to bring it to grade, nor may they sue for damages, but they can require the city when it changes the surface of the street to observe the established grade or pay damages occasioned by a change.[39]

b. Requirement that Improvements Shall Have Been Made

Another requirement for compensation is that improvements must have been made on the property in accord with the established grade. The term "improvement" has been defined as changes in the condition of property by which its value is increased. It is generally employed in the plural form and is generally used with reference to real estate.[40] But in the change of grade statute the term has been given a more confined and restricted meaning in the light of the legislative purpose sought to be subserved. In the case of Des Moines Ry. Co. v. Des Moines[41] in construing this enactment the court stated that "to improve real estate means to grade, sod, or prepare the same for the erection of sidewalks, buildings and other structures necessary for the convenience and use thereof". A lot has been held to be improved by the erection of build-

38. Peoples Inv. Co. v. Des Moines, 213 Iowa 1378, 241 N.W. 464 (1932); Allen v. Davenport, 107 Iowa 90, 77 N.W. 532.
39. Given v. City, 70 Iowa 637, 27 N.W. 803; Preston v. Cedar Rapids, 95 Iowa 71, 82, 63 N.W. 572.
40. Chase v. Sioux City, 86 Iowa 603, 53 N.W. 333.
41. Des Moines Ry. Co. v. Des Moines, 205 Iowa 495, 216 N.W. 284, 287.

ings thereon,[42] or by grading and filling same.[43] It has been intimated that the breaking of land and fitting it for crops was not an improvement within the contemplation of this statute.[44] In Des Moines Ry. Co. v. Des Moines it was held that the concept was not deemed comprehensive enough to embrace street railway tracks built and maintained on the street.[45]

c. On the Same or Lots Abutting

The Iowa statute does not extend its veil or protection to other property lying beyond the lots abutting on the street.[46] Whether recovery is limited to those cases where there is an actual change in front of the abutter's property or the statute is to be construed broad enough to entitle him to compensation for changes elsewhere along the street is a problem which has not been directly determined in this jurisdiction. Ordinarily an abutter is not entitled to damages for a change unless it is in front of his premises.[47] However, in the Pennsylvania case of Lewis v. Homestead[48] a contrary result was reached. This

42. Chiesa v. City of Des Moines, 158 Iowa 343, 318 N.W. 992; Conklin v. Keokuk, 73 Iowa 343, 35 N.W. 444.
43. Chase v. City of Sioux City, 86 Iowa 603, 53 N.W. 333 ("It is contended that as the statute uses the words 'on such street or alley' when a lot is graded down the improvement is not on the land but of the land. But that is too narrow and technical a construction of the statute.")
44. Chase v. Sioux City, 86 Iowa 603, 53 N.W. 333; Brown v. Wyman, 56 Iowa 452, 9 N.W. 344.
45. 205 Iowa 495, 216 N.W. 284.
46. Iowa Code Section 389.22 (1958). The Supreme Court of Iowa in Milan v. City of Chariton, 145 Iowa 648, 124 N.W. 766 (1910) had occasion to define the use of the term "abut" as construed in the statute relating to the assessment of abutting property for street improvements and it is therein said "by the term 'abutting property' is meant that between which and the improvement there is no intervening land".
47. Nichols, Ibid. Section 320 (2d ed.); Davenport v. Hyde Park, 178 Mass. 385, 59 N.E. 1030; Putnam v. Boston Ry. Co., 182 Mass. 351, 65 N.E. 790; Rude v. St. Louis, 93 Mo. 408, 6 S.W. 257; Fairchild v. St. Louis, 97 Mo. 85, 11 S.W. 60; Canmon v. St. Louis, 97 Mo. 92, 11 S.W. 60; Clemans v. Con. Mut. Life Ins. Co., 184 Mo. 46, 82 N.W. 1.
48. 194 Pa. 199, 45 Atl. 123.

decision holds that although the statute requires the property for which damages from a change of grade may be recovered to abut on the street, the property need not abut upon the particular portion of the street at which the grade is altered.[49]

It will be observed that the statute by its terms provides for redress to owners of such property when improvements are made by any person on the street in reliance on an established grade. This phase of the act has been construed as authorizing recovery for injuries to trees, shrubs, and other ornamental plants customarily grown by abutters for the beautification of the street and their property in that area of the street between the curb line and the sidewalk usually set apart by the city in residential sections for the use and improvement of adjacent property owners.[50] So far this doctrine has not been extended to cover owners other than abutters or to include non-residential areas or unusual residential improvements on the street. In Des Moines Ry. Co. v. Des Moines[51] it was held that street car tracks built on the street were not within the protection of this statute, and in that decision there was dictum to the effect that the statute protected only improvements located "on", as that word is defined in Hempstead,[52] the street.

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49. Cited in 44 C.J. 446. In this case a railroad company was granted permission to raise its tracks, and consequently it was necessary to raise the grade of the street adjoining the tracks. The railroad was 50 feet north of the property in question. The grade was not altered in front of the complainant's property. The court, however, held that he could recover for the depreciation in market value of his premises due to such change.
50. Richardson v. Sioux City, 136 Iowa 436, 113 N.W. 928.
51. 205 Iowa 495, 216 N.W. 284.
52. Hempstead v. City of Des Moines, 52 Iowa 303, 3 N.W. 123.

to recover for this second change.[82]

(2) Elements of Damages

In determining the depreciative effect of the change on the adjacent property, the owner usually sets forth a detailed enumeration of particular injuries to his property and improvements. The illustrations that follow are suggestive only: evidence of the destruction of the trees and sod,[83] evidence of the impairment of access to the premises,[84] evidence of the deprivation of lateral support,[85] and evidence of the existence of sidewalks and pavement which must be replaced after the change.[86]

However, injuries which might have been prevented by the exercise of reasonable care and the incurrence of moderate expense[87] and highly speculative and contingent items of damages[88] will be promptly excluded. In addition, to warrant a recovery there must be something more

82. Buser v. Cedar Rapids, 115 Iowa 683, 685, 87 N.W. 404; Meardon v. Iowa City, 148 Iowa 12, 126 N.W. 939 (instruction on this point). With reference to the latter case the work was done by the city before payment of damages and at this time was clearly illegal under Iowa Code Section 789 (1897), the predecessor of Iowa Code Section 389.27 (1946) now repealed. This provision, which prohibits the alteration of grade until damages are paid or tendered, first appeared in Iowa Code Section 789 (1897) although the Code fails to indicate when it was adopted. It does not appear in McClain's Code of 1888 in Section 635 which deals with change of grade. In any event it was not applicable in either the Conklin or Buser cases; although it was applicable in Meardon, the point does not seem to have been made. Probably the distinction made in the two preceding paragraphs should not longer exist if the statutory provisions are followed. The same result should be achieved today under Iowa Code Sec. 472.25 (1958) which under Iowa Code Section 389.24 (1958) is now the applicable section.
83. Richardson v. Webster City, 111 Iowa 427, 82 N.W. 920; Richardson v. Sioux City, 136 Iowa 436, 113 N.W. 928.
84. Richardson v. Webster City, 111 Iowa 427, 82 N.W. 920.
85. Corcoran v. Des Moines, 205 Iowa 405, 215 N.W. 948; Richardson v. Webster City, 111 Iowa 427, 82 N.W. 920.
86. Corcoran v. Des Moines, 205 Iowa 405, 215 N.W. 948.
87. Corcoran v. Des Moines, 205 Iowa 405, 215 N.W. 948.
88. Western Newspaper Union v. Des Moines, 157 Iowa 685, 140 N.W. 367, 369.

than inconvenience or slight damage.[89]

(3) Setting Off of Benefit[90]

Evidence of the benefits derived from the improvement may be introduced to lessen the recovery by the abutting owner,[91] and if such benefits are greater than the injury, no recovery can be had.[92] However, in Iowa expected benefits cannot be set off against pecuniary damages actually incurred in restoring the property to its former relative position.[93] Further, in order to set off the benefits, the advantage created must be of special benefit to the particular tract, and not something shared in common with the general public.[94]

(4) When the Action Accrues

A paper change unexecuted gives rise to no cause of action against the city.[95] To warrant the prosecution of a law action for damages the city must have authorized and made some actual physical change in the surface of the street.[96] As the damages in such cases are indivisible

89. Liddick v. Council Bluffs, 232 Iowa 197, 5 N.W. 2d 361,371 (1942).
90. See Section 42, footnote 9, supra, and Section 45, infra.
91. Morton v. Burlington, 106 Iowa 50, 75 N.W. 662.
92. Meyer v. Burlington, 52 Iowa 560, 3 N.W. 558; Stewart v. Council Bluffs, 84 Iowa 61, 50 N.W. 219; Meardon v. Iowa City, 148 Iowa 12, 126 N.W. 939 (instructions on this topic); McCosh v. Burlington, 72 Iowa 26, 33 N.W. 346; Hunter v. Ottumwa, 150 Iowa 281, 129 N.W. 961.
93. Nichols, Ibid., Section 271 (2d ed.); Western Newspaper Union v. Des Moines, 157 Iowa 685, 140 N.W. 367; Thompson v. Keokuk, 61 Iowa 187,190, 16 N.W. 82.
94. Meyer v. Burlington, 52 Iowa 560,562, 3 N.W. 558.
95. Hempstead v. Des Moines, 63 Iowa 36, 18 N.W. 676; Vilas v. C. M. & St. Paul R. Co., 179 Iowa 1244, 162 N.W. 795.
96. However, see footnote 98, infra.

it has been held that the cause of action accrues when the project is entirely completed or when the city has ceased its operations for such a time as to make it appear that the project has been abandoned.[97]

However, a change of grade as required by that statute should first be preceded by an assessment of the damages to abutting property and a payment or tender to the property owner of such amount.[98]

A change in disregard of this law imposes an obligation on the city to pay interest on the final recovery of damages as of the date of the change; even though the statute makes no mention of interest,[99] such a change is unlawful, and the abutting owner may invoke the aid of the court of chancery and enjoin the city from changing the grade, or by mandamus, compel it to appoint appraisers and have the damages assessed.[100]

The rules before outlined apply when the city fails to appoint appraisers and neglects to assess and tender the damages as prescribed by law. When the statutory procedure is followed, a right to appeal to the district court from the award of the sheriff's jury is given through utilization of the same procedure as is employed for condemnation appeals.[101]

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97. Foley v. Cedar Rapids, 133 Iowa 64, 110 N.W. 158; Buser v. Cedar Rapids, 115 Iowa 683, 685, 87 N.W. 404; Ashman v. Des Moines, 209 Iowa 1247, 238 N.W. 316, 229 N.W. 907.
98. Iowa Code Section 472.25 (1958) is now applicable under the provisions of Iowa Code Section 389.24 (1958).
99. Chamberlain v. Des Moines, 172 Iowa 500, 154 N.W. 766; Trustees of P.E. Church v. Anamosa, 76 Iowa 538, 41 N.W. 313; Gibson v. Des Moines, 156 N.W. 374 (no Iowa citation).
100. Noyes v. Mason City, 53 Iowa 418, 421, 15 N.W. 693 (intimates that both mandamus and injunction would lie); Phillips v. Council Bluffs, 63 Iowa 576, 578, 19 N.W. 672.
101. Under Iowa Code Section 389.24 (1958) the provisions of Chapter 472 govern change of grade cases. As to the interpretation of the former provision, Iowa Code Section 389.28 (1946) see Conklin v. Keokuk, 73 Iowa 343, 35 N.W. 444.

g. Who Is an Owner

In Chiesa v. Des Moines[102] it was held that a tenant for years was an owner within the meaning of the statute, and in this decision it was intimated that the scope of statutory protection should be interpreted to include all persons who would have redress if there were an actual physcial invasion or taking of property. As a general proposition, it may be stated that one must own some equitable or legal estate in the abutting land to be entitled to compensation, and that his damages will be confined to the injuries done to the estate.[103]

SECTION 45. CITY VIADUCTS

City viaducts seem to have historically been accorded different treatment than the ordinary change of grade case. While for years the damages to land occasioned by a change of grade were assessed by a committee of three appraisers appointed by the mayor and the property owner,[104] the special chapter dealing with viaducts and underpasses has prescribed that the proceedings shall be "...the same as are provided in case of taking private property for works of internal improvement".[105] This clause has been interpreted as requiring the

102. 158 Iowa 343, 138 N.W. 922 (1912).

103. Nebraska City v. Northcut, 45 Neb. 456, 63 N.W. 807; Greener v. Sigourney, 89 N.W. 1103 (no Iowa citation); Chiesa v. Des Moines, 158 Iowa 343, 138 N.W. 922,924 (1912) ("A tenant for life or for years of a city lot or other land certainly has a right or interest therein. He is, therefore, an owner of the property to the extent of that interest, and it would seem to follow of necessity that the statute which gives the right to recover damages to property includes damages to each and every estate or interest therein, legal and equitable.") In regard to mortgages, see Cotes v. Davenport, 9 Iowa 227; Moritz v. St. Paul, 52 Minn. 409, 54 N.W. 370.

104. Iowa Code Section 389.23 (1946). This provision had remained the same since its adoption. See Iowa Code Section 469 (1873).

105. Iowa Code Section 387.4 (1958).

same procedure as is employed in eminent domain.[106] However, this provision does not explicitly set forth the measure of damages to be employed in compensating a damaged landowner. If the eminent domain standard is applied, then benefits may not be considered; however, if the viaduct is to be treated as a change of grade, then benefits to the landowner may be offset against the damage. The only case which considers the problem on this basis is Western Newspaper Union v. Des Moines.[107] This case comes to the curious conclusion that while benefits may be offset against damages, they may not be considered to such an extent as to preclude recovery. This result obviously lies somewhere between the two standards and consequently the soundness of the decision would seem to be open to question. Although the vagueness of such a holding in providing a criteria for finding damages is also somewhat disturbing, the authority for the position taken is even more puzzling. The court cites Enos v. Chicago, St. P. & K.C. Ry. Co.[108] which does involve a very similar clause of a different statute. However, this clause is not even quoted in the Enos opinion, and there is no discussion in the opinion of the concept of benefit. As a matter of fact, the word "benefit" is not mentioned.

It is suggested that no great reliance may be placed in this case. Consequently, a more extended inquiry is probably necessary. It will be remembered that set-off of benefits is allowed only in cases of change of grade. No part of the statute explicitly required this result; the allowance of set-off was solely the result of interpretation by the courts of the change of grade statute. In order to determine the difference between the viaduct and change of grade statutes, it is necessary to examine some of the statutory background for the allowance of set-off for benefits in change of grade cases. The original wording for the statute in Iowa Code Section 469 (1873) provided for payments where grade was altered "... in such manner as to injure or diminish the the value of said property....". Sometime after McClain's Revised Code of 1888[109] an amendment was made,[110] so that since the Code of 1897, it has covered which "damage" as well as injure or diminish the value of the property. On the other hand, the condemnation statutes

106. Western Newspaper Union v. Des Moines, 157 Iowa 685, 140 N.W. 367,369 (1913); Globe Machinery & Supply Co. v. Des Moines, 146 Iowa 267, 136 N.W. 518 (1912).
107. 157 Iowa 685, 140 N.W. 367 (1913).
108. 78 Iowa 28, 42 N.W. 575.
109. Where it appears as Section 633.
110. There is no indication of any amendment having been adopted by the Legislature in any of the Codes. Neither is there any mention of such an amendment in any of the compilations of the various sessions of the General Assembly for theperiod 1888-1897.

appear always to have used the single word "damages" unconnected with the concept of value to describe an injury for which compensation must be paid.

As noted previously, the change of grade statutes have been held to encompass set-off for benefits. The first decision taking this point of view appears to be Meyer v. City of Burlington.[111] In that case the court referred to the "injure or diminish the value of the property" language of the statute and said it did not refer to a case in which the "value of the property on the whole is increased by it". This clearly suggests that the cited language was regarded as establishing a sort of net harm done view of the injury received. Subsequent cases appear to have followed this decision without examination of the reasons therefor and without considering the effect of the addition of the word "damages" to the last of compensable injury.[112] Such an interpretation is entirely reasonable in view of the language of the statute and the then prevailing concept that a change of grade did not involve a taking.[113] However, where the word "damage" has been used alone without mention of "value" no set-off has even been allowed.[114]

Iowa Code Section 387.3 (1958), which is the provision requiring payment for injury caused by the construction of a viaduct or underpass, refers only to "damages". The same is true of Iowa Code Section

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111. 52 Iowa 560, 3 N.W. 558 (1879).

112. Liddick v. Council Bluffs, 232 Iowa 197, 5 N.W.2d 361 (1942); Western Newspaper Union v. Des Moines, 157 Iowa 685, 140 N.W. 367; Meardon v. Iowa City, 148 Iowa 12, 126 N.W. 939 (1910); Stewart v. Council Bluffs, 84 Iowa 61, 50 N.W. 219; McCash v. City of Burlington, 72 Iowa 26, 33 N.W. 346 (1887). If "damages had been a factor in these decisions, it would be harder to distinguish the wording of the eminent domain and change of grade statutes.

113. Meyer v. Burlington, 52 Iowa 560, 3 N.W. 558 (1879). Note this view of a taking is now under a considerable cloud. See Section 42, supra.

114. It must be conceded, however, that the fact that the word was used in eminent domain statutes, to which an obvious connection with Article I, Section 18, exists, may be largely responsible for the absence of uncertainty.

389.23 (1958) requiring the payment of damages caused by injury to an owner's right of access, light, air or view where an overpass is constructed. It is suggested that this wording should probably be interpreted as excluding set-off in view of the dubious nature of the authority to the contrary and the statutory history of the sections involved.

It is also worthy of note that Iowa Code Section 389.23 (1958) requires a city to pay compensation for damages by reason of any injury to an owner's rights of access, light, air and view created by the construction of a viaduct or underpass whether or not the construction causes a change of grade. The italicized phrase would seem to indicate that the eminent domain statute is to be employed.

However, there is some law in Iowa which deals with a viaduct as a change of grade. Thus in Liddick v. Council Bluffs[115] the court held that a viaduct is a change of grade within the meaning of the change of grade statute and that abutting owners are entitled to compensation.[116] This is an interesting case because it did not follow the usual pattern for viaduct construction. The city did not proceed under Chapters 305, 381 or 404 of the Iowa Code (1958) but instead, the project was to be constructed in reliance upon the general power of the highway commission. The state and city obviously had to avoid the use of any section requiring payment of damages. The property owners apparently had to rely upon change of grade because it was evidently impossible to force the city to act under Chapter 387 (1958) since the railroad was not responsible for the cost of construction, or Chapters 381 and 404 (1958) because the city was not footing the bill.

SECTION 46. STATE VIADUCTS AND PRIMARY EXTENSIONS

The state highway commission has authority to improve, construct and maintain primary road extensions in cities and towns,[117] and the ancillary power to construct or aid in the construction of bridges, via-

115. 232 Iowa 197, 5 N.W.2d 361 (1942).
116. Since this was an action for declaratory judgment, the court did not face the issue of the measure of damages. Either the change of grade or the constitutional standard could have been used since the court also held there was a constitutional taking.
117. Iowa Code Section 313.21 (1958).

ducts, and railroad crossing eliminations on such extensions.[118] However, the right to enter on such projects is conditioned on first obtaining the approval of the city or town council in regard to the effect of the proposed improvement on sewers, waterlines, sidewalks, and established street grades.[119]

Where the city consents to such improvement made by another authority, it may be argued that the city becomes liable for a change of grade.[120] The highway commission has no authority to establish or reestablish the grade of a primary extension through any municipality.[121] By statute such authority is vested solely in the city council.[122] In Wallace v. Foster[123] it was held that the Legislature did not intend by such enactments to affect the municipality's duties and responsibilities

118. Iowa Code Section 313.27 (1958).
119. Iowa Code Section 313.21 (1958).
120. 44 C.J. 451, "under a statute authorizing the improvement of roads extending through incorporated municipalities by the county road commissioners with the consent of the municipalities, a municipality which consents to a change of grade is liable therefor as in other cases"; McMullen v. Marlborough, 163 App. Div. 73, 148 N.Y.S. 505, "under a statute imposing liability upon a village for damages occasioned by any change of grade, the change of grade need not be made by the village, but may be made by the state in the improvement of a state highway"; Marco v. Wilmerding Borough, 37 Pa. Sup. 185, 44 C.J. 435 (a lawful contract by city authorities which necessarily results in a change of grade in a highway will be construed as an ordinance of the city providing for such change). See also Nicks v. Chic. & St. Paul Ry. Co., 84 Iowa 27,31, 50 N.W. 222.
121. 1922 Attorney General Reports 204, "Neither the highway commission nor the board of supervisors have authority to establish the grade of a primary road extension."
122. Iowa Code Section 389.20 (1958).
123. 213 Iowa 1158, 241 N.W. 9.

in regard to such streets.[124] Such duties and responsibilities include the payment of damages for change of grade incident to street improvement.

This conclusion is strengthened by the statutes conferring authority on the cities to improve such extensions, and providing for proportionate reimbursement for expenses incurred out of the primary road fund when such project has been approved by the state highway commission prior to the letting.[125] In short, whether the improvement is in the first instance undertaken by the state highway commission or the city, a joint venture is contemplated by the legislature in which the city is in no way released from its civic responsibilities.[126]

If the city in no way approves of the building of the improvement and the council remains silent on the matter, it will not be liable for changes made by the state highway commission without its authority.[127]

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124. Wallace v. Foster, 241 N.W. 9,11, "The act does not make such roads or streets within a city or town a part of the primary road system. It does not purport so to do. It does give the highway commission authority to improve certain roads and streets of the municipality if the city council approves thereof. It does not appear from the statute that the legislature had any intent to affect the municipal responsibility in regard to such streets. The power conferred on the highway commission is to improve such streets, but the duties and responsibilities of the municipality in relation thereto do not appear to have been divested by the legislature".

125. 1932 Attorney General Reports 194 holding that cities and towns can receive aid from the primary road fund under the predecessor of Iowa Code Sections 391.71-.74 (1958) to assist in resurfacing streets, extensions of the primary road.

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

127. Stritesky v. Cedar Rapids, 98 Iowa 373, 67 N.W. 271, "there can be no recovery of damages for change of grade where the city has not attempted to change the physical surface of the street, and it will not be liable for such change without its authority by a street railway company"; see also Waller v. Dubuque, 69 Iowa 541, 29 N.W. 456.

However, the state highway commission under such circumstances could be enjoined from proceeding with the work.[128]

The problems heretofore considered have assumed an established grade. Where the city has the right to put a street to a certain grade without liability, it is not liable where it is done for it by someone else.[129]

SECTION 47. THE EFFECT OF FAILURE TO PAVE ON ESTABLISHED GRADE

Iowa Code Section 391.3 (1958) provides that the construction of permanent parking, curbing, paving, graveling, macadamizing or guttering shall not be done until the bed therefor shall have been graded so that such improvement, when fully completed, will bring the street up to the established grade. It was formerly held that the construction of such permanent improvement in disregard of an established grade[130] or before a grade was established[131] deprived the city of the power to assess the cost against the abutting property.

But under the recent statutory amendment as interpreted in Peoples Inv. Co. v. Des Moines[132] the abutter's remedy is to present his objections to the city council,[133] and if the error is not corrected, then to appeal to the district court.[134] If he does not pursue this remedy, his objection is waived under Iowa Code Section 391.56 (1958).

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128. In the case of Sauer v. Highway Commission, Eq. No. 11036, Jefferson County (Sept. 1937) the commission was enjoined from proceeding with the project until such commission secured the approval of the city council of Fairfield.
129. Slatten v. Des Moines R. Co., 29 Iowa 148 (1870).
130. Hubbell v. Bennett, 130 Iowa 66, 106 N.W. 375; Landis v. Marion, 176 Iowa 240, 157 N.W. 841.
131. McManus v. Hornaday, 99 Iowa 507, 68 N.W. 812; Walter v. City, 206 Iowa 244, 220 N.W. 92.
132. 241 N.W. 464, 213 Iowa 1378 (1932).
133. Iowa Code Section 391.53-.55 (1958).
134. Id.