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# PUBLIC NEEDS AND PRIVATE RIGHTS: EMINENT DOMAIN AND LAND CONDEMNATION IN NORTH DAKOTA

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## INTRODUCTION

The field cultivated by the topic of condemnation is particularly productive. It is of importance to the practitioner who is concerned with adequately representing his client. It is of importance to the legislator who is responsible for determining public policy. Finally, it is important, in a more estoteric manner, to the legal savant who is concerned with the many problems, both legal and inter-disciplinary, arising from the action. There exists in our contemporary American society an ever increasing need for additional space and property devoted to the purpose of the public interest. Urban settlement areas are expanding, acquiring sizable acreage each year. This is true also of service areas including rights-of-way of railroads, highways, and roads, and airports. Parks, playgrounds, and recreational areas are also rapidly increasing in both number and size.[1]

The rapid increase of imperative public needs and the acquistion of private property is not limited to the more urban areas of our society. Within rural areas there is a rapidly increasing spread of urban conveniences and services and resulting land use condemnation which minimize urban-rural distinctions. This phenomenon is particularly true in North Dakota where 93.3 per cent of the total land area of the state is in farm land.[2] Within the state there is an ever increasing pattern of acquisition of property by various agencies of the federal, state, and county governments. This property acquisition is a reflection of the growing necessity for conserving

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1. For discussion of these patterns of condemnation see Marschner, **Land Use and Its Patterns in the United States,** Agriculture Handbook No. 153, United States Department of Agriculture (1958).

2. **United States Census of Agriculture—North Dakota** (1959), State Table 1 at 3.

water, soil, and other resources, for driving and parking space to accomodate an annual increase in motor vehicles, for federal military defense reservations, and other diverse but important public needs.[3]

All of these public needs emphasize the need for increased attention to the proper rule of the vaguely familiar power of eminent domain. Condemnation is one means for dealing with the various problems suggested. Its results are often drastic. "The problems engendered by the endless effort to reconcile imperative public needs with the preservation of private rights are the special responsibility of lawyers in our system."[4] The legal profession must be properly informed if it is to perform its proper function in devising solutions for the diverse problems arising from eminent domain and land condemnation. This is the hopeful intent of this article.

## EMINENT DOMAIN

> "Eminent Domain is an attribute of sovereignty. It is as enduring and indestructible as the state itself. It exists outside of the Constitution for no state can exist without it."[5]

Eminent domain traditionally is considered as superior to all private rights.[6] It is exercised by the governmental authority for the common good and general welfare of all the citizens. The right of eminent domain arises from the necessities of government and is a necessary and inseparable part of the government.[7]

While governmental power to acquire private property for public use has existed since the Roman era,[8] the term used to denote such power is of comparatively recent origin. The term "dominium eninens" (eminent domain) seems to have been originated in 1625 by Hugo Grotius who wrote of this power in his work *De Jure Belli et Pacis* stating:

> ". . . the property of subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property, not

3. See Governor's Message to 37th Legislative Assembly, House Journal, State of North Dakota (1961) at 31.
4. Kennedy, **Forward—A Symposium,** 43 Ia L. Rev. 168 (1958).
5. JAHR, LAW OF EMINENT DOMAIN at 3 (1953).
6. U. S. v. Certain Parcels of Land in City of San Diego, 44 F. Supp. 936 (D.C., Cal. 1942).
7. Paine v. Savage, 126 Me. 121, 136 Atl. 664 (1927); Board of Regents v. Palmer, 356 Mo. 946, 204 S.W.2d 291 (1947); New York Housing Authority v. Muller, 270 N.Y. 333, 1 N.E.2d 153 (1936).
8. ANNUALS OF TACITUS, Bk. 1 at 75.

> only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the state is bound to make good the loss to those who lose their property . . ."[9]

While the authors of our constitution were familiar with the definitions and discussions of the political writers of the seventeenth and eighteenth centuries, the phrase "eminent domain" has been accepted in common use in this country only a little more than a hundred years.[10]

The taking of property by eminent domain is referred to as condemnation, and the proceeding whereby the land is taken is termed a condemnation proceeding. The state, its representative, or the private corporation to whom the power of eminent domain has been delegated is called the condemnor, and the owner whose property is acquired is normally referred to as the condemnee.

In North Dakota eminent domain is defined by statute as ". . . the right to take private property for public use."[11] The purpose of this study is to examine the rights of both the acquiring agency and the property owner, and some of the problems therein, under law governing eminent domain in North Dakota. Rather than speculating on what should be done, we are attempting to present the conclusions of the courts in North Dakota in this area.

There is an intelligible increase today of the right of eminent domain. It is conspicuous in North Dakota since the creation of the Interstate Highway program, and the substantial improvement of state roads, the relocation of airports, and the augmentation of projects of reclamation on the conservation of natural resources. Because of the diversity of statutory law among the jurisdictions both state and federal and within the states themselves, at present there is no clearly established uniform body of law within the United States upon which to base decisions in condemnation proceedings. It has been observed that:

> "In those cases where there is no stare decisis to cast

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9. Lib III, C. 20.
10. JAHR, op. cit. **supra**, at 4, see also NICHOLS, THE LAW OF EMINENT DOMAIN, Vol. 1 at 7 (1950).
11. N. D. Cent. Code § 32-15-01 (1961).

> its light or shadow, the courts must hammer out new rules that will respect whatever values of the past have survived the tests of reason and experience, and anticipate what contemporary values will best meet those tests. The task is not easy—human relations are infinitely complex, and subtlety and depth of spirit must enter into their regulation. Often legal problems elude any final solution, and the courts then do no more than find what Cardoza called the least erroneous answers to insoluble problems."[12]

The legislature, even by a special enactment, cannot clothe the property of an individual or a corporation with immunity from subsequently authorized condemnation.

## EMINENT DOMAIN IN NORTH DAKOTA

Any department, political subdivision or agency of the state[13] as well as a person, firm, or private corporation can[14] take property through eminent domain in North Dakota. The acquisition of the property must be necessary for a public use. An early North Dakota decision held that the legislature had seen fit to take the question of necessity out of the power of the condemnor, and had trusted the determination of this issue to the judicial branch of government.[15] Although other jurisdictions are contrary,[16] the rule is still in existance as indicated by recent decisions.[17] It is true, however, that a great deal of latitude is given to the acquiring agency vested with the right to property by eminent domain in determining the extent of property necessary to be taken.[18]

Power companies,[19] railroads,[20] special school districts,[21] telephone companies,[22] and the highway department,[23] among

12. SOUTHWESTERN LEGAL CENTER, PROCEEDINGS OF THIRD ANNUAL INSTITUTE ON EMINENT DOMAIN at iv (1961).
13. N.D. Const. § 14.
14. N. D. Cent. Code § 32-15-01 (1961).
15. Bigelow v. Draper, 6 N.D. 152, 69 N.W. 570 (1896).
16. City of Oakland v. U. S. 124 F.2d 959 (1942); Sibley v. Volusia County, 147 Fla. 302, 2 So. 2d 578 (1941); Reter v. Davenport, R.I.&N.W. Ry. Co., 243 Ia. 1112, 54 N.W.2d 863 (1952).
17. Otter Tail Power Cpy. v. Malme, 92 N.W.2d 514 (N.D. 1958); Kessler v. Thompson, 75 N.W.2d 172 (N.D. 1956); Pembina Co. v. Nord, 78 N.D. 473, 49 N.W.2d 665 (1951).
18. Northern Pac. Ry. Co. v. Kreszeszewski, 17 N.D. 203, 115 N.W. 169 (1908).
19. Otter Tail Power Co. v. Malme, **supra** note 17.
20. Northern Pac. Ry. Co. v. Kreszeszewski, **supra,** note 18.
21. Board of Education of City of Minot v. Park District, 70 N.W.2d 899 (N.D. 1955).
22. Northwestern Telephone Exch. Co. v. Anderson, 12 N.D. 585, 98 N.W. 706 (1904); Donovan v. Allert, 11 N.D. 289, 91 N.W. 441 (1902).
23. State Highway Commission v. State, 70 N.D. 673, 297 N.W. 194 (1941).

numerous others have the right to condemn property in North Dakota.

### RIGHTS OF THE CONDEMNING AGENCY

The state and its political subdivisions, departments and agencies, have a superior right over private property, stemming from the state. The power of an individual, a firm or a private corporation in North Dakota is a delegated power of the state commissioned through the legislature.

The type of estate or aggregate of rights acquired by the condemnor in North Dakota is governed by statute.[24] The classification of the estates and rights in lands subject to condemnation are:

> 1. A *fee simple,* when taken for public buildings or grounds, or for permanent buildings, for reservoirs, and dams and permanent flooding occasioned thereby, or for an outlet for a flow or a place for the deposit of debris or tailings of a mine, or for the construction of parking lots and facilities for motor vehicles;
>
> 2. An *easement,* when taken for highway purposes or for any other use except, upon a proper allegation of the need thereof, the court shall have the power to order that a fee simple be taken for such other use;
>
> 3. The *right of entry* upon and occupation of lands and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for public use.

A 1960 North Dakota decision stated that eminent domain statutes must be strictly construed.[25] Judge Strutz commented:

> "In eminent domain, therefore, that construction must be adopted which leaves the owner with the greatest possible estate, in the event of uncertainty or indefiniteness in the statute."

It would appear that the above quoted statutory provision would be strictly construed against the condemning agency.

Generally, the condemning agency has unlimited rights in the selection of the property to be condemned. The highway commissioner may, when acting within his perogative in condemning property, secure material or the land necessary to secure such material, which is necessary "to provide ways and

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24. N. D. Cent. Code § 32-15-03 (1961).
25. Wallenstein v. Williams County, 101 N.W.2d 571 (N.D. 1960).

access thereto . . ."[26] However, recent legislation has provided that no condemning agency will acquire any interest in gas, oil, or fluid minerals by the eminent domain procedure.[27]

## EXERCISE OF THE RIGHT OF EMINENT DOMAIN

Right of eminent domain may be exercised when condemning property for *any* public use. In North Dakota, it is unnecessary to prove the public necessity for the property condemned.[28] The only proper question that the court may decide, is whether the particular property sought to be condemned is *necessary* for such public use. Before property is taken, however, it must appear:

1. That the use to which it is to be applied is a use authorized by law;

2. That the taking is necessary to such use; and

3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.[29]

## RIGHT TO SURVEY BY CONDEMNING AGENCY

In all cases, when land is required for public use in North Dakota, it may be surveyed and located.[30] The land of the property owner is open to examinations and surveys, and maps, if needed, may be made. A cause of action in favor of the land owner will result only for injuries from negligence, wantoness, or malice on the part of the condemning party.[31]

In North Dakota the condemning agency has a great deal of latitude in selecting the site or location when necessity for the exercise of power of eminent domain is proved or admitted.[32] The court will not interfere if the selection of the property has been in good faith and after careful consideration.[33]

## THE CONDEMNATION PROCEEDING IN NORTH DAKOTA

Since the 1956 Amendment to Section 14 of the Constitu-

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26. N. D. Cent. Code § 24-01-18 (1961).
27. See the "oil, gas, or other fluid minerals" exception in N. D. Cent. Code §§ 24-01-18, 32-15-03.
28. City of Grafton v. St. Paul, 16 N.D. 313, 113 N.W. 598 (1907).
29. N. D. Cent. Code § 32-15-05 (1961).
30. N. D. Cent. Code § 32-15-06 (1961).
31. **Ibid.**
32. Northern States Po. Co. v. Effertz, 94 N.W.2d 288 (N.D. 1958).
33. Northern States Po. Co. v. Effertz, **supra,** note 33; Otter Tail Po. Co. v. Maine, **supra,** note 16; Northern Pac. Ry. Co. v. Kreszeszewskis, **supra,** note 17.

tion of North Dakota,[34] condemnation procedure for the state and its political subdivisions, agencies and departments is comparatively simple. Most governmental departments use the "quick take" procedure. This procedure is authorized by Section 14 of the Constitution and Section 24-01-22.1 of the North Dakota Century Code. The procedure as used is:

1. An offer by the acquiring agency to the property owner to purchase the property in question.

2. Upon refusal of the offer, deposit of such offer with the Clerk of the District Court in and for the county in which the property is located.

3. Notice by the Clerk of the District Court to the property owner of such deposit.

4. An appeal by the property owner to the District Court within 30 days after receiving Notice from the Clerk.[35]

This procedure is examined in *Koecks v. Cowell*[36], a 1959 case, involving a condemnation proceeding by the Highway Department. It has been stated regarding this "quick take" procedure that:

> "This procedure has been a tremendous benefit to the Highway Department in its highway program. As can be seen, it permits the highway program to go ahead with construction work prior to the time when the actual trial regarding the issue of just compensation is held."[37]

The method used by a private corporation, firm or an individual is quite similar, and is governed by Section 14 of the Constitution of North Dakota and Chapter 32-15 of the North

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34. The following was added to the original test:
"That when the state or any of its departments, agencies, or political subdivisions seeks to acquire right of way, it may take possession upon making an offer to purchase and by depositing the amount of such offer with the Clerk of the District Court wherein the right of way is located." Laws of North Dakota, 1957, Ch. 397

Section 14 of the North Dakota Constitution now reads:
"Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for the owner. No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, provided however, that when the state or any of its departments, agencies or political subdivisions seeks to acquire that right of way, it may take possession upon making an offer to purchase and by depositing the amount of such offer with the clerk of the district court of the county wherein the right of way is located. The clerk shall immediately notify the owner of such deposit. The owner may thereupon appeal to the court in the manner provided by law, and may have a jury trial, unless a jury be waived, to determine the damages.

35. Letter from Mr. David L. Milhollan, Special Assistant Attorney General, State of North Dakota, October 30, 1961.

36. Kuecks v. Cowell, 97 N.W.2d 849 (N.D. 1959).

37. **supra,** note 35.

Dakota Century Code. Highway condemnation proceedings are governed by Charter 24-01 of the North Dakota Century Code.

When an offer by the condemnor is refused under Chapter 32-15, the condemning agency is required to draw a complaint[38] which requires the name of the condemning agency, name of the owner of the property, a statement of the right of plaintiff, the location and general route of the right of way together with a description of each piece of land sought to be taken. The complaint need not allege that provisions for payment of award have been made.[39]

The amount of the offer is deposited with the Clerk of the District Court,[40] who immediately notifies the property owner. Any person who claims an interest in the land may defend.[41] After the entry of final judgement by the court, the plaintiff must, within 30 days pay the sum of money assessed, unless the action involves condemned school or public land.[42] If the money is not deposited, the property owner may have execution as in civil motions.[43] When the property owner accepts the amount deposited by the condemnor, he abandons all defenses interposed by him, except his claims for greater compensation.[44] If the property owner is dissatisfied with the judgment, he may, of course, appeal.[45] While this is the general condemnation procedure as prescribed by North Dakota law, slight variations may exist from county to county.

## RIGHTS OF THE PROPERTY OWNER

1. RIGHT TO APPEAL AND TRIAL.—Section 14 of the North Dakota Constitution gives the property owner the right to appeal after receiving the Notice of Deposit from the Clerk of District Court, when the condemnor is the Highway Department, the State, or one of its subdivisions. Section 24-01-22.1 of the code, which has been held complete in itself,[46] gives the land owner thirty days in which to appeal, after receiving the Notice. A 1961 North Dakota case held that notice from the District Court to attorneys who had corresponded with

38. N. D. Cent. Code § 32-15-18 (1961).
39. City of Lidgerwood v. Michalek, 12 N.D. 348, 97 N.W. 541 (1903).
40. N. D. Const. § 14.
41. N. D. Cent. Code § 32-15-20 (1961).
42. N. D. Cent Code § 32-15-25 (1961).
43. N. D. Cent. Code § 32-15-20 (1961).
44. N. D. Cent. Code § 32-15-29 (1961).
45. N. D. Cent. Code § 32-15-34 (1961).
46. Kuecks v. Cowell, **supra,** note 36.

the Highway Department was not sufficient.[47] The Court interpreted the statute as providing that written notice of the deposit may not be given to anyone except the landowner.

A private person, firm, or corporation must file a complaint[48] which is prescribed by law, if the property owner refuses their offer. The issues arising may be tried at any term of District Court in the county in which the property is located.[49] The condemnor must serve the property owner notice of trial at least seven days in advance of the hearing. A motion for a new trial and appeal from the decision of the trial court is available to the property owner.[50]

2. RIGHT TO JURY—Under the laws of North Dakota, the issue of compensation for private property taken or damaged for public use must be tried to a jury, unless a jury is waived. A 1951 case implies that both parties must waive the right, and each party may individually demand a jury trial, if they so desire.[51] All other issues are triable without a jury. *Kessler v. Thompson*,[52] a highway condemnation case, refers to two statutes in reference to appeal and trial by jury.[53] There is no provision for a waiver. The second statute refers to the District Court, and declares that the issues shall be submitted to a jury unless the parties otherwise agree.[54] This infers that both parties would have to agree to waive, and that each individually may demand the same.

Section 32-15-01 of the North Dakota Century Code states that "compensation in all cases shall be ascertained by a jury, unless a jury be waived." It does not say who may waive. Section 32-15-13 is more distinct and proclaims that the plaintiff may demand a jury trial.

These statutes taken collectively seem to infer that either party to condemnation proceedings may demand a jury trial to decide the issue of compensation.

3. RIGHT TO DAMAGES—Under North Dakota Law, the property owner is entitled to a certain amount of damages when land is condemned.[55] He is entitled to:

47. Cowl v. Wentz, 107 N.W.2d 697 (N.D. 1961).
48. N. D. Cent. Code § 32-15-18 (1961).
49. N. D. Cent. Code § 32-15-17 (1961).
50. N. D. Cent. Code § 32-15-34 (1961); see Northern States Power Co. v. Teigen, 80 N.W.2d 110 (N. Dak. 1956).
51. Pembina County v. Nord, **supra**, note 17.
52. 75 N.W.2d 172 (N.D. 1956).
53. N. D. Cent. Code § 24-07-25 (1961).
54. N. D. Cent. Code § 24-07-26 (1961).
55. N. D. Cent. Code § 32-15-22 (1961).

1. The value of the property sought to be condemned. (All Parcels are separately assessed.)

2. The damages which will accrue by reason of severance of a part of a larger parcel.

3. The damages resulting from construction of the proposed improvement, even though no part of the property is taken.

Compensation should be assessed separately for the property actually taken and for the damages to property not taken.

Although no property is taken, consequential damages may arise from injury to property, such as by a construction of a public improvement.[56]

## RIGHTS OF TENANTS

The word "owner" should not be construed in any restricted sense. Ownership of property may be severed. A tenant for life or a lessee is within the meaning of the term owner. It is evident that the life tenant or lessee are entitled to recover compensation for damages or injury sustained by them.

Various jurisdictions have judicially established that lessees for years[57] as well as lessees from year to year are[58] entitled to share in the condemnation award according to their respective interests. Under North Dakota law all persons claiming interest in the property, even though not named by the condemnor, may appear.[59] The Court may require all parties to be joined.[60]

If the lease is entered into after the Condemnation Notice or Complaint, the lessee is not entitled to share in the compensation since he was not the owner of any estate or interest when the taking or injury occurred. It is presumed that the parties to the lease took the injurious effect of the condemnation into consideration when the lease was made and amount of rent agreed upon.

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56. Little v. Burleigh County, 82 N.W.2d 603 (N.D. 1957): King v. Stark County 67 N.D. 260, 271 N.W. 771 (1937).

57. Regina v. Great Northern R. R. Co., 2 QBD 151; Pewee Coal Co. v. U. S., 161 F. Supp. 952 (1958); Pasadena v. Porter, 201 Cal. 381, 257 Pac. 526 (1927); Department of Public Works and Buildings v. Bohne, 415 Ill, 253, 113 N.E.2d 319 (1953); Barchellor v. Iowa State Hway. Comm., 251 Ia. 364, 101 N.W.2d 30 (1960).

58. Georgia Power Co. v. Brooks, 207 Ga. 406, 62 S.E.2d 183 (1950); Farrell v. Manhatten Ry. Co., 43 App. Div. 143, 59 NYS 401 (1899).

59. N. D. Cent Code § 35-15-20 (1961).

60. N. D. Cent. Code § 35-15-19 (1961).

### RIGHTS OF ABUTTING PROPERTY OWNERS

Although very little case law exists regarding this problem, it is generally conceded that, as a matter of interpretation, when it is expressly provided by law that damage to land from public improvements shall be paid for, the destruction of an abutter's peculiar rights in a public way comes within the scope of such provision. Where access of abutting lands is obstructed in North Dakota by a change of grade on the road, the owner is entitled to compensation under the "damage" provision of the Constitution.[61] A more recent decision has stated that it is essential that the property owner show that permanent improvements were made before the taking, and that the actual damages resulted from the condemnation.[62]

### WHEN MUST THE PROPERTY OWNER YIELD POSSESSION?

Prior to the 1956 Amendment to Section 14 of the North Dakota Constitution, the courts generally held that the property owner retained title to his property during the process of appeal.[63] He did not have to give possession until he was paid. This placed a burden on the condemning agency, since often it was a period of a year or more before the issue of compensation was resolved by the courts. The condemnor could not touch the property during this time.

The Constitution now provides that the state or any of its departments, political subdivisions or agencies may take possession of the right of way upon making an offer to purchase and depositing the amount with the Clerk of the District Court in the county wherein the right of way is located.[64] This is commonly known as the "quick take" law previously discussed.[65] However, if a condemning agency attempts to take possession before it has acquired a legal rights, an owner may take legal action to stop the entry.

### COMPENSATION TO PROPERTY OWNER

It is well settled law in all jurisdictions in the United States that when private property is taken by eminent domain, the

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61. Cummings v. Minot, 67 N.D. 214, 271 N.W. 421 (1931).
62. Keener v. City of Minot, 98 N.W.2d 901 (1959).
63. Kessler v. Thompson, **supra,** note 6.
64. N. D. Const. § 14.
65. Kuecks v. Cowell, **supra,** note 16.

owner of the property is constitutionally entitled to compensation.[66] The inhibitory effect of this constitutional provision is applicable to proceedings initiated by either the state or a municipal corporation in North Dakota.[67] The right to claim compensation in North Dakota is not dependent upon the particular mode of appropriation.[68]

Most states do not ordinarily prescribe the medium by which compensation should be paid. However, that the compensation must be made in money, is a qualification that has been determined by all the courts in which the question has arisen.[69]

North Dakota holds that private property cannot be taken for a public use without "just compensation".[70] Since the term "just compensation" is not constitutionally defined, the North Dakota Supreme Court has stated that damages must be ascertained and assessed pursuant to the provisions of Section 32-15-22 of the North Dakota Century Code.[71] An award of damages in a condemnation case will be sustained if it is within the limits of damages testified to by the witnesses.[72] An exception to the above rule is that if the verdict "so flagrantly against the weight of evidence that it appears that the jury was affected by bias or prejudice, the verdict will be set aside."[73] The term "value of the property" as used in Section 32-15-22 of the Code has been defined as market value of the property.[74] Market value is construed as:

> ". . . the highest price for which property can be sold in the open market by a willing seller to a willing purchaser, neither acting under compulsion and both exercising reasonable judgment."[75]

Damages have been assessed for many causes in condem-

66. U. S. v. 44 Acres of Land, 121 F. Supp. 862 (1959); Creasy v. Stevens, 160 F. Supp. 404 (1958); Podesta v. Linden Irrigation Dist., 296 P.2d 401 (Cal. 1956); State v. Adams, 251 Minn. 521, 89 N.W.2d 661 (1958); Becker County S.&G. Co. v. Wosick, 62 N.D. 720, 245 N.W. 454 (1932); Equitable Life Ass. Society v. Lickness, 63 S.D. 618, 262 N.W. 206 (1935).
67. Messer v. Dickinson, 71 N.D. 568, 3 N.W.2d 241 (1942).
68. Donaldson v. Bismarck, 71 N.D. 592, 3 N.W.2d 808 (1942).
69. **E. g.,** Schwartz v. City of New London, 20 Conn. Sup. 21, 120 A.2d 84 (1955); Hellen v. Medford, 188 Mass. 42, 73 N.E. 1070 (1905).
70. Williams v. City of Fargo, 63 N.D. 183, 247 N.W. 46 (1933).
71. Little v. Burleigh County, **supra,** note 56; Minnkota Power Co-op v. Bacon, 72 N.W.2d 880 (N.D. 1955); Wishek Investment Co. v. McIntosh County, 77 N.D. 685, 45 N.W.2d 417 (1950); Lineburh v. Sandven, 74 N.D. 364, 21 N.W.2d 808 (1946).
72. Bigelow v. Draper, **supra,** note 14.
73. Waterman v. Minneapolis, St. Paul Ry. Co. 26 N.D. 540, 145 N.W. 19 (1914); Carpenter v. Village of Dickey, 26 N.D. 176, at 185, 143 N.W. 964 (1913).
74. Little v. Burleigh County, **supra,** note 56.
75. **Ibid.**

nation proceedings in North Dakota, examples of which are water drainage ditches,[76] railroad tracks,[77] severance of land by a highway,[78] power transmission lines[79] and telephone lines.[80] Damages are not awarded for increased business expense as a result of property being condemned, although if the market value of the owner's land is depreciating by condemnation, such evidence would become material on that issue alone.[81]

### EVIDENCE OF VALUE

Expert witnesses are allowed to testify for both the condemnor and property owner concerning the issue of value. The jury may also view the premises; not an absolute right, but with the discretion of the court.

It has been suggessted that:

> ". . . only when there is agreement of the parties that specific comparable sales are both admissable and material, would the court be justified in requiring the exchange of comparable sales list."[82]

A recent North Dakota District Court case held that the landowner standing in the position of a seller, may call buyers to testify with regard to comparable sales. Conversely, the condemning agency, which stands in the position of the buyer, may call sellers to testify with regard to comparable sales. The land owner may not call sellers, nor the condemning agency buyers to testify.[83]

It has been suggested that:

> ". . . experts . . . are not permitted to testify as to the sale price of a comparable sale on *direct* examination, although they may be cross-examined as to specific sales and if the question calls for the *price* of a comparable sale, he may state it."[84]

The jury may, concerning opinions as to value, weigh the evidence of experts in the light of their own (the jury's)

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76. Ross v. Prante,17 N.D. 266, 115 N.W. 833 (1908).
77. Montana Eastern Ry. Co. v. Lebeck, 32 N.D. 162. 155 N.W. 648 (1915).
78. Olson v. Thompson, 74 N.W.2d 432 (1956); Lineburg v. Sandven, **supra,** note 71.
79. Northern States Power Co. v. Effertz, **supra,** note 32.
80. Otter Tail v. Von Bank, 72 N.D. 497, 8 N.W.2d 599 (1943).
81. Little v. Burleigh County, **supra,** note 56. The property owner was transporting farm produce across a muddy ditch.
82. Pederson, **Pre-Trial Practices in Condemnation** at 10. (Presented at the American Association of State Highway Officials Meeting, Detroit, Michigan, December 2, 1960).
83. Letter from Eugene E. Burdick, District Judge, 5th Judicial District, November 28, 1961.

examination of the property. However, the verdict must find support in some of the evidence presented. The jury cannot fix the value of the damages above the highest or below the lowest figure which is fixed by expert evidence, unless other circumstances proved in the case justify in so doing.[85] If only experts testify, the jury is restricted to the highest and lowest estimate presented.[86]

## MISCELLANEOUS PROBLEMS

1. WHO IS PLAINTIFF IN CONDEMNATION PROCEEDINGS?—In some instances, the acquiring agency will be designated as the respondent and the property owner, the appellant.[87] Section 32-15-30 of the North Dakota Century Code would indicate that the condemning agency is definitely the plaintiff. Section 32-15-20 of the Code denotes the property owner as the defendant. Although the Supreme Court has not directly ruled on this question, a 1961 case makes[88] it evident that the District Court considers the property owner the defendant, and the condemnor the plaintiff. Other cases have a like rationale.[89]

2. DOES ACQUIRING AGENCY HAVE A RIGHT TO JURY TRIAL? Forty-two states do have specific constitutional provisions requiring that the value of property taken by eminent domain be ascertained by a jury.[90] The language in Section 14 of the North Dakota Constitution and Section 24-01-22 of the Century Code is not entirely clear on the point of the right of the acquiring agency to a jury trial. District Courts have generally ruled that the acquiring agency has a right to jury trial if the acquiring agency asks for a jury trial pursuant to an existing statute. It has been suggested that:

> ". . . the plaintiff wherein may apply to the judge of the district court where the same is pending for an order requiring a jury to be summoned to assess the damages in such action."[91]

Section 32-15-01 also provides:

> ". . . Such compensation in all cases shall be ascertained by a jury, unless a jury is waived."

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84. **Ibid.** (Emphasis is that of Judge Burdick).
85. Bigelow v. Draper, **supra,** note 15.
86. **Ibid.**
87. Cowl v. Wentz, 107 N.W.2d 697 (N.D. 1961).
88. Wentz v. Pletka, 108 N.W.2d 337 (N.D. 1961).
89. **E. g.** Ottertail Power Co. v. Von Bank, **supra,** note 80.
90. NICHOLS, op. cit., vol. 1 at 355, see note 24.
91. Letter from Eugene E. Burdick, District Judge, 5th Judicial District,

It is apparent that both the property owner and condemnor have the right to a jury trial, and such right must be waived by both before the court will decide the issue of compensation.

3. ON WHAT DATES ARE DAMAGES TO BE ASSESSED?—The North Dakota Century Code deals specifically with the question of the time at which the right to damages accrues.

> ". . . For the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of the trial and its actual value at that date shall be the measure of compensation for all property actually taken . . ."[92]

Various North Dakota cases have held in accordance with the statute that the date of trial is the date of assessment.[93]

Nine states in addition to North Dakota have general condemnation statutes that fix the date of valuation.[94] In some states, the filing of the petition or the Notice to Condemn, the primary step in land condemnation, marks the point of time at which it appears to be fair and just to both parties to fix the value of the property. Seventeen jurisdictions have held that damages should be assessed either as of the date of the trial or of the award of the commissioners.

One North Dakota case held that payment is legally due to the owner as of the date of taking or damaging the property.[95]

This problem is most coeval in North Dakota in light of a greatly expanded highway program. In some instances, the Highway Department will have possession of property for two years or more prior to the date of the condemnation trial. The Highway Department asserts that it would be inconsistent to use a different date for valuing the property than the date of acquiring it.[96] They claim that since the adoption of the Amendment of Section 14 of the Constitution, Section 32-15-23 is no longer applicable to highway condemnation. This appears to be an issue peculiar to North Dakota, and, it is one that has not been ruled upon by the North Dakota Supreme Court. District Courts apparently have decided this problem in both the affirmative and negative.

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December 4, 1961.
92. N. D. Cent. Code § 32-15-23 (1961).
93. Montana Eastern Ry. Co. v. Lebeck, **supra,** note 77; Tri-State Telephone & Telegraph Co. v. Cosgriff, 19 N.D. 771, 124 N.W. 75 (1909).
94. Other states are: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, New Mexico, and Utah.
95. Donaldson v. Bismarck, **supra,** note 68.
96. **Supra,** note 35.

4. INTEREST—Generally, there is a right to interest on the amount awarded as of the time that payment was due until it was actually made. Payment may be postponed for various reasons, the most common of which is pending appeal. A number of jurisdictions, including North Dakota, say that the right to interest does not depend upon statutory authorization or upon special agreement.

North Dakota has held that the owner of property taken or damaged by a condemnor is entitled to interest on the amount of compensation awarded from the time when property was taken or damaged.[97] If the property owner is awarded a larger sum than that deposited, he is usually entitled to interest on the increased sum.[98] However, if the property owner is awarded less upon appeal, he is not entitled to interest for the period of delay occasioned by such appeal.[99]

5. WHAT TITLE DOES THE CONDEMNING BODY ACQUIRE AND ON WHAT DATE?—The North Dakota Case of *Kessler v. Thompson*[100] held that the property owner retained title and apparent control over the property which the condemnor is attempting to acquire during the appeal. It stated that the condemning agency may not take or damage the property before the court determined the rights of the property owner. This case was reviewed under Section 14 of the North Dakota Constitution prior to its 1956 Amendments.[101] Section 14, now, as amended, provides that when the state or any of its departments, agencies or political subdivisions seek to acquire a right of way, it may take possession upon making an offer to purchase. It must thereafter deposit the amount of such offer with the Clerk of District Court in the county in which the land is located. The Clerk then immediately notifies the owner of such deposit, and he may appeal in the manner provided.

A 1959 decision under amended Section 14 of the Constitu-

97. Lineburg v. Sandven, **supra,** note 71; Donaldson v. Bismarck, **supra,** note 68.
98. Central Neb. P.P.&.I. Dist. v. Fairchild, 126 F.2d 302 (1942); Schnull v. Indianapolis Union R. Co., 190 Ind. 572, 131 N.E. 51 (1921); St. Louis Housing Authority v. Magafas, 324 S.W.2d 697 (Miss. 1959).
99. Feltz v. Central Nebr. P.P.&.I. Dist., 124 F.2d 578 (1942).
100. 75 N.W.2d 172 (N.D. 1956).
101. N. D. Const. § 14, before 1956:
"Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived."

tion held that the condemning agency could take possession upon making an offer to purchase, and following the prescribed procedure.[102] This right appears to be limited to the state or any of its political subdivisions, departments or agencies.

The general rule is that only such an estate in the property sought to be acquired by eminent domain may be taken as is reasonably necessary for the accomplishment of the purpose for which the proceedings are brought.[103] North Dakota has a statute classifying the estates in land condemned for public use.[104] The Supreme Court, in attempting to resolve this problem, held in an action to quiet title to oil, gas, and other minerals on land condemned by the Highway Department before 1953, that the title acquired by the Highway Department was more than an easement.[105] They stated, however, that it was not a fee simple absolute, but a limited or determinable fee. They concluded that:

> ". . . The title acquired by the State was subject to reverter when such land, or part thereof, or rights in land were no longer needed for highway purposes . . ."

The State, as owner of this determinable fee, could now vacate any land or part thereof which had been taken and revest the title or rights so vested in the persons, their heirs, successors or assigns in whom it was vested at the time of taking.[106] Generally, the State has the right to execute non-operating oil and gas leases so long as the estate of the State, which it acquired under the condemnation proceedings, continued.

In 1953, the legislature, recognizing this situation, amended two statutes, reserving the "oil, gas or fluid minerals" to the property owners in condemnation proceedings.[107]

### FEDERAL CONDEMNATION PROCEEDINGS

A brief discussion is proper regarding the procedures relating to condemnation of property by the federal government. Between 1956 and 1961, there were 369 condemnation cases in the United States District Court in the District of North Da-

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102. Kuecks v. Cowell, **supra,** note 36.
103. Wallentinson v. Williams County, **supra,** note 25.
104. N. D. Cent. Code § 32-15-03 (1961).
105. Wallentinson v. Williams County, **supra,** note 25.
106. **Ibid.**
107. **Supra,** note 27.

kota.[108] It is quite apparent that federal condemnation, particularly in the area of water resource programs,[109] and military defense installations[110] will cause even greater programs of federal condemnation in North Dakota in the near future.

Although the United States has for many years employed its powers of eminent domain to condemn land for federal purposes,[111] it was not until 1951 that a particular rule governing the procedure for federal condemnation of land was promulgated as part of the Federal Rules of Civil Procedure.[112] This rule is Rule 71A of the Federal Rules of Civil Procedure.[113]

Apparently the delay in formulating Rule 71A[114] was not one of neglect, but a result of the diversity of opinion relating to all aspects of such a prospective rule. The rule as adopted presents a compromise of various conflicting views pertaining to federal procedures in property condemnation cases.[115] The general procedure adhered to in United States condemnation proceedings prior to the promulagation of Rule 71A was in accordance with the provisions of a general conformity statute which provided that the federal procedure should conform with the existing procedure in the particular state jurisdiction in which the property was located.[116] Thus prior to the adoption of Rule 71A each federal department and agency formulated its own particularized rules pertaining to the methodology of condemnation of property.

One of the difficulties apparently encountered in drafting Rule 71A, was the disparity in the laws of the various states pertaining to the methods followed by the various jurisdictions, the prime conflict was between the use of court appointed appraisers, charged with the duty of establishing the value

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108. Annual Report of the Director of the Administrative Office of the U. S. Courts, United States Printing Office:
1956— 16 Cases—Table C3—p. 218
1957—130 Cases—Table Ce—p. 178
1958—127 Cases—Table C3—p. 166
1959— 59 Cases—Table C3—p. 190
1960—101 Cases—Table C3—p. 238.

109. See Message of John F. Kennedy to Congress on Economic Recovery and Growth. H. Doc. No. 81, 87th Congress, 1st Session; particularly the statement:
Our water resource program, including flood control, irrigation, navigation, watershed development, water pollution control—require priority attention.

110. Particularly the growth of Minot and Grand Forks Air Force Bases and the establishment of proposed Minuteman Missile sites.

111. See Kohl v. U. S., 91 U.S. 367 (1875), Chappell v. U. S., 160 U.S. 499 (1896).

112. Pp. 3, U. S. Supreme Ct. Order (April 30, 1951), transmitted to Congress (H. R. Doc. 121, 82nd Cong., 1st Session. (1951). This section became effective on August 1, 1951.

113. **Ibid.**

114. The Federal Rules of Civil Procedure became effective in 1938.

115. See **Notes of Advisory Committee on Rules,** U. S. Supreme Court, 28 U. S. C. § 32072 (1952) at 4355-62.

116. 25 State 357 (1888).

of the property and the determination of the property's value by a jury in an actual judicial proceeding.[117]

Rule 71A was a compromise between the two existing points of state view by its providing both the appraiser concept and the jury concepts as a means of ascertaining the value of the property taken.[118] If Congress does not set up separate tribunals as it may,[119] either party may under Rule 71A file a demand for a jury trial.

The court may deny a jury demand and appoint a commissioner to determine the value of the award. A number of cases have arisen regarding the actual discretion reposing with the Court to deny a jury determination of damages.

It has been held that while a choice between a jury and a commission is within the proper purview of the trial court, it is possible that the use of a commission may unnecessarily prolong the proceedings and increase the expense.[120] Where the land being condemned is of exceptional location, quantity, or of unusual or complex character, the court may refuse a jury valuation and appoint commissioners in order to obtain the most fair valuation of the property.[121]

It has been stated that where a court acted with the desire "to remove all obstacles that caused delay, and bring this action to a conclusion" as the only reason for the appointment of a commission, it was in effect an abuse of discretion to deny

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117. **See Notes of Advisory Committee on Rules, supra,** note 4, at 4353.

118. "Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal, any party may have a trial by jury of the issue of just compensation by filing a demand therefore within the time allowed for answer or within further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed, it shall have the powers of a master provided in subdivision. (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court." 71A h, F.R.C.P.

119. "By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of the eminent domain, is not required to be made by a jury, but may be entrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer more than an ordinary trial." Bauman v. Ross, 167 U.S. 548, 593 (1897).

120. U. S. v. Delaware, L. & W. R. C. 264 F.2d 112 (C.A.3rd 1959).

121. **Ibid;** see also U.S. v. Certain Tracts of Land in City of Richmond **Contra Costa County, State of California,** 21 F. R. D. 389 (D.C. Cal. 1958). U. S. v. 5,677.94 Acres of Land, More or Less, of Crow Reservation, State of Montana, 162 F. Supp. 108 (D.C. Mont. 1958). An Accord case where a state proceeding was similar to the federal proceeding is Port of New York Authority v. Heming, 167 A.2d 609 (1961).

a jury.[122] However, the same Circuit Court of Appeals refused in *United States v. Waymire*[123] to disallow a United States district court holding which had appointed a commission at the request of the property owners despite a demand for a jury trial by the government. It is interesting to note that in the *Waymire* case, it was the government and not the individual demanding a jury trial.

It appears that the current trend of cases may indicate that the federal courts will grant the right to trial by jury except in complex cases wherein are involved numerous parcels of land in varied locations with diverse ownership.

Judge John Paul has stated that "trying the issues of valuation before a jury is a cumbersome and inefficient proceeding, wasteful of time and expense, and in many instances, particularly where properties of small values are involved, resulting in hardship and injustice to property owners.[124]

Opposed to the Paul position is the viewpoint that the commissioner method is costly, cumbersome, and lengthy.[125] Thus here exist varying viewpoints regarding the efficiency of both the jury and the commission methods of determining property values. It would appear that that current rationale of decisions is one of permitting jury trials to be used unless the proceedings are of unusual or complex character.

It is interesting to note that in Great Britain the former rule provided three methods of determining the value of condemned lands. These were the use of justices of the peace, by arbitration, or by a sheriff's jury.[126] The current procedure, however, is to use a Lands Tribunal[127] which is most analgous to our commission method of determining value. This Lands Tribunal is generally composed of both lawyers and surveyors.

## FEDERAL PROCEDURE

Under the provisions of Rule 71A (c) of the Federal Rules of Civil Procedure, an action is commenced by the filing of a complaint. The complaint states: 1) the use for which the

122. **U. S. v. Theimer,** 199 F.2d 501 (CAA 10th Cir. 1952).
123. 202 F.2d 550 (CCA 10th Cir. 1953).
124. Paul, **Condemnation Procedure Under Federal Rule 71A,** 43 Ia. L. Rev. 231, 1958.
125. See, Dolan, **Federal Condemnation Practice; General Aspects,** Appraisal Journal (Jan. 1959) at 15; see also Dolan, **New Federal Procedure in Condemnation Actions,** 39 Va. L. Rev. 1071 (1953).
126. Land Clauses Consolidation Act, 1845 (8 & 9 Vic. c. 18) at 21.
127. Lands Tribunal Act. 1949 (12, 13, 14 Geo. 6 C.42) at 3.

property is to be taken, 2) the authority by which the property is to be taken, 3) a short description of the property sufficient for identification, 4) the particular interest sought to be acquired, and 5) the names of the defendants as the designated owners of the property sought to be taken. A requirement exists that at the commencement of the action, only the known defendants are required to be joined. If the property records indicate any additional possible defendants, they must also be joined in the action. If the records fail to identify possible owners or claimants of interests, they can be joined as "unknown owners."[128]

After the complaint is filed, the condemning government agency must deliver to the clerk of the court notices to be directed to the named defendants and notice must also be given to any defendants subsequently named.[129] The notice advises each defendant that he may file an answer within twenty days after service of the notice and that failure to answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and determine the proper compensation.[130] The notice states that the defendant may file an answer within twenty days after service of the notice and that failure to answer constitutes a consent to the taking and to the authority of the court to hear the action and to fix the compensation. However, the defendant need not file or serve a claim or answer to preserve his right of notice and his opportunity to state his position in the trial regarding the compensation to be paid for the taking of his property.[131]

The notice may be served, as the circumstances demand, either in person on the defendant or by publication.[132] Any time before the trial on the issue of the compensation to be paid, the complaint may be amended at the option of the plaintiff, without the permission of the court. However, no amendment is permitted which would result in a dismissal of the action after title or possession has been acquired or taken.[133]

One of the most difficult tasks for the Advisory Committee

128. Fed. R. Civ. P. 71A (c) (2).
129. Fed. R. Civ. P. 71A (d) (1). See also U. S. v. 758.72 Acres of Land in Boone and Carroll Counties, Arkansas (W.D. Ark. 1959); 2 FR Serv. 2d 60b. 21 Case 2 wherein the court held that relief could not be granted under Rule 60 (b) where record mortgageholders were not made parties.
130. Fed. R. Civ. P. 71A (d) (2).
131. **Ibid.**
132. Fed. R. Civ. P. 71A (d) (3). The provisions for publication are within the due process clause as defined in Mullance v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950).
133. Fed. R. Civ. P. 71 (a) (f) See Also U. S. v. Certain Interests in Property in Cascade County, Montana, 163 F. Supp. 518 (D.C. Mont. 1958).

on Rules was the resolving of the various methods of the trial and the ascertainment of the value of the property sought to be condemned. "Frequently the trial was conducted at a place remote from the location of the property. The acquisition by condemnation of large areas for military and related projects required and necessitated the taking of many parcels or tracts in different ownerships and presenting many dissimilar physical characteristics. In many instances several actions were instituted involving groups of parcels or a single action which consolidated all of the tracts to be acquired. Frequently, title or possession vested on different dates, with considerable time intervals, thus presenting different dates of valuation and varying and conflicting factors affecting valuation."[134] These are some of the factors which were determinative in the adoption of both the jury and the commission method of ascertaining damages as previously discussed.

The trial by the use of a commission is analgous to the trial by a Master under Rule 53 of the Federal Rules of Civil Procedure. While the finding of the commission is advisory in nature, the court will not disturb its findings where it is properly based upon evidence unless these findings are clearly erroneous.[135]

Rule 71A makes no specific provision for the viewing of the property by a commission or a jury, but allows the court to determine this within its own discretion.[136] Many states have statutes which make mandatory a view of condemned property by the judicial agency which will fix compensation. Normally inspection of the property would prove to be of positive assistance in determining adequate and fair compensation.[137] Rule 71A does not specifically provide that the commission, jury or court determining the compensation in a particular case must mandatorily view the condemned premises, but apparently allows the problem of viewing to be determined by the sound discretion of the court.[138]

Rule 71A provides that the action may be dismissed in three ways. It may be dismissed as of right without an order of the court by filing prior to a hearing, a notice of dismissal

134. Dolan, **New Federal Procedure in Condemnation Actions,** 39 Va. L. Rev. 1071 (1953).
135. U. S. v. Waymirs, 202 F.2d 550 (1953) cf. U. S. v. Buhler, 254 F.2d & 876 (1958).
136. Webb v. U. S., 256 F.2d 669, **Cert. den.** 356 U.S. 918 (1958).
137. **Ibid.**
138. See Woodland Cemetery Co. v. U. S., 110 F. Supp. 704 (1953).

in which the property is described. [139] A second way the proceeding may be dismissed is by the affected parties filing a stipulation dismissing the action order of the court, before a judgment has been rendered which vests title or possession in the government.[140] Thirdly, a proceeding may be dismissed by court order any time before compensation is determined and paid, if title to and possession of the property has not been assumed by the United States.[141]

No provision is made in Rule 71A requiring the plaintiff to deposit any amount as part of the estimated compensation as a condition precedent to an action of condemnation. Only if a specific act or statute requires such a deposit, must a deposit be made. If possession is taken prior to the vesting of title, compensation under Rule 71A is determined as of the date of the taking of possession rather than of the date of vesting of title. It must be noted that Rule 71A does not supercede the Declaration of Taking Act.[142]

Under Rule 71A only one judgment is contemplated, that judgment determining the actual compensation to be paid by the plaintiff for the property condemned. Costs in condemnation actions are not allowed to the prevailing party under the provisions of Rule 54 (d) of the Federal Rules of Civil Procedure.[143] The theory is that the federal government is normally the prevailing party and it would be inequitable to permit its costs to be taxed against the property owner.

Mention should be made of the fact that the vast majority of condemnation cases in federal courts are based upon an exercise of the federal power of eminent domain. A few cases do occur in federal courts where the exercise of the power of eminent domain of a state is involved under the diversity of citizenship concept. These cases may be governed by federal procedure, but the *Erie Railroad v. Tompkins* Rule prevails and the state laws affecting substantive rights must be given full faith and credit.[145]

References should be made to Section 1033 (g) of the Internal Revenue Code as created by the Technical Amendments Act of 1958.[146] This section dealing with involuntary conver-

139. Fed. R. Civ. P 71a (i) (1).
140. Fed. R. Civ. P 71A (i) (2).
141. Fed. R. Civ. P 71A (i) (3).
142. 40 U. S. C. §§258A—258E.
143. Fed. R. Civ. P 71A (1).
144. 304 U.S. 64 (1938).
145. Fed. R. Civ. p. 71A (k).
146. 72 Stat. 1606 (1958), 26 U. S. C. § 1033 (Supp. 1959).

sion of property states:

Condemnation of Real Property held for Productive Use in Trade or Business or for Investment:

> (1) Special rule. For purposes of subsection (a), if real property (not including stock in trade or other property held primarily for sale) held for productive use in trade or business or for investment is (as the result of its seizure, requisition, or condemnation, or threat or imminence thereof) compulsorily or involuntarily converted, property of a like kind to be held either for productive use in trade or business or for investment shall be treated as property similar or related in service or use to the property so converted.
>
> (2) Limitations—(A) Purchase of stock. Paragraph (1) shall not apply to the purchase of stock in the acquisition of control of a corporation described in subsections (a) (3) (A). (B) Conversions before January 1, 1958. Paragraph (1) shall apply with respect to the compulsory or involuntary conversion of any real property only if the disposition of the converted property (within the meaning of subsection (a) (2) occurs after December 31, 1957.[147]

It appears that under the "like kind" test of 1033 (g) real property held for productive uses or as an investment or homes which are condemned and replaced within the prescribed period with real property held for the same purpose are within the purview of the "like kind" test as set forth in 1033 (g).

## CONCLUSION

The material presented in this article relates to many of the problems and procedures of land condemnation. While all possible procedures are not delineated nor all problems fully discussed, the major problems and procedures (both state and federal) relating to land condemnation in North Dakota are presented. As has been earlier stated, the legal profession must be properly informed if it is to perform its proper function in devising solutions for the diverse problems arising from eminent domain and land condemnation. This is the hopeful intent of this article.

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147. **Ibid.**