may be exercised without the intermediation of a fictitious agent. *Steffen v. Little*, 2 Wis. (2d) 350 (1957). [Bill 172-S]

30.76 History: 1959 c. 505; Stats. 1959 s. 30.76; 1961 c. 495; 1965 c. 617; 1967 c. 276 s. 39; 1969 c. 255 s. 65.

30.77 History: 1959 c. 505; 1959 c. 641 s. 7; Stats. 1959 s. 30.77; 1961 c. 87; 1969 c. 276 s. 588 (4).

Editor's Note: Ch. 505, Laws 1959, repealed 30.06, on safety regulations for boats; subsection (7) of that section was applied in Madison v. Tolzmann, 7 W (2d) 570, 97 NW (2d) 513.

30.78 History: 1959 c. 505; Stats. 1959 s. 30.78.

Comment of Interim Boating Committee, 1959: Restates 30.061 of the statutes. [Bill 172-S]

The failure of a town board to hold a public hearing prior to adoption of an ordinance under authority of 30.061 (1), Stats. 1947, is jurisdictional, and an ordinance so adopted is void. 38 Atty. Gen. 519.

30.79 History: 1959 c. 505; Stats. 1959 s. 30.79; 1961 c. 455; 1969 c. 276 s. 588 (4).

30.80 History: 1959 c. 505; Stats. 1959 s. 30.80.

30.81 History: 1961 c. 8; Stats. 1961 s. 30.81; 1969 c. 394.

30.90 History: 1961 c. 66; Stats. 1961 s. 30.90; 1969 c. 276 s. 588 (4).

CHAPTER 31.

Regulation of Dams and Bridges Affecting Navigable Waters.

Editor's Note: For changes made in ch. 31 by ch. 441 (Bill 1-A), Laws 1959, see preface to ch. 30, which shows the conversion table annexed to Bill 1-A.

31.01 History: 1915 c. 380 s. 3; Stats. 1915 s. 1596—1; 1917 c. 474 s. 2; Stats. 1917 s. 31.01; 1961 c. 568; 1965 c. 614 s. 57 (2g); 1969 c. 276 s. 588 (6).

On taking private property for public use see notes to sec. 13, art. I; on legislative power generally and on delegation of power see notes to sec. 1, art. IV; on internal improvements see notes to sec. 10, art. VIII; and on navigable waters see notes to sec. 1, art. IX, and notes to 30.10.

Wisconsin law of waters. Kanneberg, 1946 WLR 345.

Judicial criteria of navigability in federal cases. Laurent, 1953 WLR 8.

31.02 History: 1915 c. 380 s. 3; Stats. 1915 s. 1596—2; 1917 c. 474 s. 3; Stats. 1917 s. 31.02; 1923 c. 410; 1935 c. 198; 1937 c. 379; Stats. 1937 ss. 31.02, 31.36 (6), (8), (9), (11); 1939 c. 368; 1941 c. 219; 1949 c. 125; 1951 c. 712; 1957 c. 528; 1959 c. 441 s. 4; 1961 c. 35, 191; 1965 c. 163; 1965 c. 614 ss. 10, 18, 57 (2g) and (2r); Stats. 1965 s. 31.02; 1969 c. 276 ss. 228, 229, 230, 588 (4), (5).

Editor's Note: In Water Power Cases, 148 W 124, 134 NW 330, the supreme court awarded a writ of injunction restraining the railroad commission, the attorney general and others from acting under or attempting to enforce the provisions (with one exception) of ch. 652, Laws 1911, on the ground that it was in conflict with the constitution.

Ch. 380, Laws 1915, announces a general policy applicable to all the navigable waters of the state, and grants ample and broad powers to the railroad commission to regulate and control such waters and fix maximum and minimum levels. The powers so granted are administrative, not legislative, and the act granting them was valid. Chippewa & Flambeau I. Co. v. Railroad Comm. 164 W 105, 159 NW 739.

The commission's power to control reservoirs must be exercised to accomplish both the purpose of maintaining uniform flow and the purpose of improving navigation for log driving under the provisions of ch. 640, Laws 1911, the act under which the Chippewa and Flambeau Improvement Company was organized. The court is not authorized to determine the quantity of water reasonably necessary for log driving, or the proper times for releasing water from the reservoirs. As against power owners, lumbermen are entitled to sufficient quantities of water to make the river navigable for driving logs, but this right should be exercised reasonably so as not to unnecessarily injure the power industry. Flambeau River L. Co. v. Railroad Comm. 204 W 524, 236 NW 671.

"Property", as used in 31.02, does not include property that would be damaged by normal flowage resulting from ordinary operation of such dam, but means property that would be damaged by failure of such dam or by flooding of cities or villages. New Lisbon v. Harebo, 224 W 66, 271 NW 659.

This section authorizes the commission to regulate the level and flow of water by requiring the power company to operate the Prairie du Sac dam in a specified manner, even though this dam was built before enactment of the section and under special legislation. Private persons may petition for such regulation. Wisconsin P. & L. Co. v. Public Service Comm. 5 W (2d) 167, 92 NW (2d) 241.

The public service commission has power under this section to make an order changing the minimum water level to be maintained by a reservoir storage dam at Rest Lake. 27 Atty. Gen. 424.

The public service commission has power under this section to establish a higher minimum pond elevation for Big Eau Pleine water storage reservoir than the minimum fixed by ch. 478, Laws 1933, in order to preserve the fish therein. 29 Atty. Gen. 472.

31.04 History: 1915 c. 380 s. 3; Stats. 1915 s. 1596—4, 1596—5; 1917 c. 474 s. 5; Stats. 1917 s. 31.04; 1925 c. 222.

The meaning of the term "dam", as used in 31.04 and 31.34, Stats. 1953, is not limited to the structure directly across the river bed, but includes a canal which carries the water through the generating plant and back to the river bed; and the public service commission may grant a permit to construct a dam which includes such a canal. Luening v. Public Service Comm. 267 W 537, 66 NW (2d) 190.

See note to 94.26, citing 45 Atty. Gen. 36.

31.05 History: 1915 c. 380 s. 3; Stats. 1915 s. 1596—6; 1917 c. 474 s. 6; Stats. 1917 s. 31.05; 1925 c. 222; 1961 c. 568; 1965 c. 614 s. 57 (2g).

A river improvement company, although having the power of eminent domain and the right to maintain dams and reservoirs, is liable for wrongful acts in exercising or in exceeding its authority. Flambeau River L. Co. v. Chippewa & F. I. Co. 204 W 602, 236 NW 679.

One owning and operating a dam across a stream does not owe to riparian owners a duty to guard against floods of such unusual and extraordinary proportion as not to have been anticipated by a man of ordinary prudence and experience. Trout Brook Co. v. Willow River Power Co. 221 W 616, 267 NW 302.

A city is required to obtain a permit from the public service commission to construct a dam as a condition precedent to condemnation proceedings to acquire land for such dam, artificial lake and adjacent public park, so as to prove authorized public purpose of such condemnation. New Lisbon v. Harebo, 224 W 66, 271 NW 659.

Where half of a hydroelectric dam proposed to be constructed by a power company on a river in this state would be located outside the boundaries of a national forest and the remainder would be located on federal lands in such national forest, a license issued to the company by the federal power commission under federal statute, 16 USC, sec. 797 (e), for the construction of such dam, and providing that nothing in such license should be construed as determining whether such river is a navigable water at the site of the proposed project, is an exercise only of the commission's power to authorize the construction of dams on public lands of the United States and not of the commission's power in respect to navigable waters, and in such situation, since part of the proposed dam would be located outside of public lands of the United States, a state permit as well as a federal license was necessary to erect the dam, and the federal license did not affect the state permit so as to render moot the issues raised in the state supreme court on an appeal contesting the state permit. Luening v. Public Service Comm. 261 W 516, 53 NW (2d) 525.

A city in Minnesota has no authority to erect a dam on the St. Croix river, and, being a foreign corporation, cannot be granted a permit therefor by the railroad commission under the provision of ch. 31, Stats. 1921. 11 Atty. Gen. 689.

31.06 History: 1915 c. 380 s. 3; Stats. 1915 s. 1596—7; 1917 c. 474 s. 7; Stats. 1917 s. 31.06; 1929 c. 523 s. 1; 1947 c. 124; 1953 c. 627; 1961 c. 568; 1965 c. 252; 1965 c. 614 ss. 12, 57 (2g); 1969 c. 276 s. 588 (5).

31.28, Stats. 1949, providing that "orders" of the public service commission shall be subject to review in the manner provided in ch. 227, and 196.41 providing that any "order of determination" of the commission may be so reviewed, and 227.15 providing for the judicial review of "administrative decisions," must be construed together, and so construed, together with 227.20 permitting a review of the findings of an administrative board or commission as an incident of the review of an administrative decision, they make findings of the public service commission—made pursuant to 31.06 (3) as a condition precedent to the issuing of a permit for the construction of a dam in a navigable stream, and constituting a final decision or determination by the commission—subject to judicial review under 227.15, although, such findings are not in the form of an "order" and 31.06 (3) provides that when favorable findings are made "a permit is hereby granted." Muench v. Public Service Comm. 261 W 492, 53 NW (2d) 514.

Public rights to the enjoyment of our navigable streams for recreational purposes are recognized by the provision in 31.06 (3) that the public service commission, as part of its findings authorizing a permit to construct a dam in a navigable stream, shall find that the proposed dam will not materially obstruct existing navigation "or violate other public rights." Public rights to the enjoyment of scenic beauty, in relation to navigable streams, are recognized by the provision in 31.06 (3), that "the enjoyment of natural scenic beauty is declared to be a public right" to be considered by the public service commission in making findings as to whether a permit for a proposed dam on a navigable stream shall be issued. Muench v. Public Service Comm. 261 W 492, 53 NW (2d) 514.

The public service commission is an administrative agency and not a court; and in conducting hearings upon applications made under ch. 31, Stats. 1949, it acts only in a quasi-judicial capacity. Muench v. Public Service Comm. 261 W 492, 53 NW (2d) 514, 55 NW (2d) 40.

See note to sec. 22, art. IV, citing Muench v. Public Service Comm. 261 W 492, 53 NW (2d) 514.

See note to 227.16, citing Muench v. Public Service Comm. 261 W 492, 53 NW (2d) 514.

An order of the public service commission, dismissing a company's application for a permit to construct a dam, is reviewable exclusively under and in the manner provided in ch. 227, but the place of review can be circuit court for Lincoln county, rather than Dane county, under ch. 497, Laws 1939. Wisconsin Valley I. Co. v. Public Service Comm. 7 W (2d) 120, 95 NW (2d) 767.

Under 31.06 (3), Stats. 1959, harm to the property to be normally overflowed as a result of erection of the proposed dam is not an element to be considered by the commission in passing on the application for a permit. Wisconsin Valley I. Co. v. Public Service Comm. 9 W (2d) 606, 101 NW (2d) 798.

31.07 History: 1915 c. 380 s. 3; Stats. 1915 s. 1596—8; 1917 c. 474 s. 8; Stats. 1917 s. 31.07; 1965 c. 614 s. 57 (2g).

31.08 History: 1915 c. 380 s. 3; Stats. 1915 s. 1596—9; 1917 c. 474 s. 9; Stats. 1917 s. 31.08; 1961 c. 568; 1965 c. 614 s. 57 (2g).

31.09 History: 1915 c. 380 s. 3; Stats. 1915 s. 1596—9m; 1917 c. 474 s. 10; Stats. 1917 s. 31.09; 1925 c. 222; 1965 c. 614 s. 57 (2g).

See note to sec. 1, art. I, on limitations imposed by the Fourteenth Amendment, citing Fox River Paper Co. v. Railroad Comm. 274 US 651.

31.095 History: 1929 c. 327; Stats. 1929 s. 31.095; 1965 c. 614; 1969 c. 276 s. 588 (5).

31.10 History: 1915 c. 380 s. 3; Stats. 1915 s. 1596—10 sub. 2; 1917 c. 474 s. 11; Stats. 1917 s. 31.10.

31.11 History: 1905 c. 521 s. 1, 2; Supl. 1906 s. 1775c; 1915 c. 380 s. 3; Stats. 1915 s. 1596—10 sub. 1, 1775c; 1917 c. 474 s. 11; Stats. 1917 s. 31.11; 1965 c. 614 s. 57 (2g).

31.12 History: 1915 c. 380 s. 3; Stats. 1915 s. 1596—11; 1917 c. 474 s. 12; Stats. 1917 s. 31.12; 1965 c. 614 s. 57 (2g).

The public service commission may not deny approval of a satisfactory map, profile and plans for a dam under this section on grounds that the same were not prepared by a professional engineer registered under 101.31 (1), Stats. 1945. Possible violations of this section should be referred to the state registration board of architects and professional engineers. 35 Atty. Gen. 351.

31.13 History: 1915 c. 380 s. 3; Stats. 1915 s. 1596—12; 1917 c. 474 s. 13; Stats. 1917 s. 31.13; 1961 c. 568; 1965 c. 614 s. 57 (2g).

Under 31.13, Stats. 1927, the railroad commission possessed the administrative power to make orders permitting the raising or enlarging of existing dams, the court being confined to determining whether the findings of the commission are supported by proof, and whether its orders are reasonable and lawful. Baraboo v. Railroad Comm. 195 W 523, 218 NW 819.

The exclusion of proof that in 1875 the height of the dam was 14 feet was not error, since such proof would not establish the right of the city to maintain that head at the time the present water power act was passed, in the absence of proof that it was maintained under any grant or right procured by prescription. Baraboo v. Railroad Comm. 195 W 523, 218 NW 819.

31.14 History: 1961 c. 568; Stats. 1961 s. 31.14; 1965 c. 614 s. 57 (2g).

31.18 History: 1849 c. 62 s. 1, 2, 12; 1849 c. 98; 1874 c. 165 s. 1, 2, 6; 1877 c. 125; R. S. 1878 s. 1601, 1602, 1605; 1881 c. 239 s. 1, 2, 3; Ann. Stats. 1889 s. 1601, 1602, 1605; Stats. 1898 s. 1601, 1602, 1605; 1915 c. 380 s. 3; Stats. 1915 s. 1596—17, 1601, 1602, 1605; 1917 c. 339; 1917 c. 474 s. 18, 18a; Stats. 1917 s. 31.18; 1925 c. 337; 1927 c. 506; 1951 c. 712; 1953 c. 380; 1965 c. 614 s. 57 (2g); 1969 c. 276 s. 588 (5).

Where it was alleged that the channel of the river was so obstructed by a bridge that no boats or rafts could pass in safety without guide booms extending up the river from each end of the main span; that such booms were not maintained, and that in consequence plaintiff suffered damage, that a cause of action was stated, though there was no allegation that the channel span of the bridge had been designated in accordance with sec. 1605, R. S. 1878, or that sec. 1837 had been violated. Sweeney v. Chicago, M. & St. P. R. Co. 60 W 60, 18 NW 756.

The power company's reduction of the water level in the millpond in connection with substituting cement for wooden flashboards in its dam was not unlawful as involving a "substantial alteration or addition" to a dam without the required authorization of the public service commission under 31.18 (3), Stats. 1947. Jones v. Wisconsin Michigan P. Co. 252 W 280, 31 NW (2d) 574.

31.185 History: 1961 c. 568; Stats. 1961 s. 31.185; 1965 c. 614 ss. 14, 57 (2g); 1969 c. 276 s. 233.

31.19 History: 1915 c. 380 s. 3; Stats. 1915 s. 1596—18; 1917 c. 109; 1917 c. 474 s. 19; 1917 c. 538 s. 1; Stats. 1917 s. 31.19; 1965 c. 614 s. 57 (2g); 1969 c. 276 s. 588 (5).

31.20 History: 1915 c. 380 s. 3; 1915 c. 579 s. 4; Stats. 1915 s. 1596—19; 1917 c. 474 s. 20; 1917 c. 538 s. 2; Stats. 1917 s. 31.20; 1965 c. 614 s. 57 (2g).

Inspection fees under this section are payable during the period of construction of the dam as well as after its completion. 7 Atty. Gen. 643.

The owner of a dam on a nonnavigable stream must pay the engineer's fee under this section. 8 Atty. Gen. 20.

31.21 History: 1915 c. 380 s. 3; Stats. 1915 s. 1596—20; 1917 c. 474 s. 21; Stats. 1917 s. 31.21; 1961 c. 568; 1965 c. 614 s. 57 (2g); 1969 c. 276 s. 614.

31.23 History: R. S. 1858 c. 19 s. 112; 1861 c. 285 s. 1; 1866 c. 123; 1869 c. 152; R. S. 1878 s. 1598; Ann. Stats. 1889 s. 1598; Stats. 1898 s. 1598; 1901 c. 413 s. 1; Supl. 1906 s. 1598; 1911 c. 652; Spl. S. 1912 c. 17; 1915 c. 380 s. 2, 3; Stats. 1915 s. 1596 sub. 3, 1596—22 sub. 1, 1598; 1917 c. 474 s. 23; Stats. 1917 s. 31.23; 1931 c. 313; 1941 c. 331; 1959 c. 441 s. 6; 1965 c. 614 s. 57 (2g); 1969 c. 276 s. 588 (5).

On navigable waters and riparian rights see notes to 30.10.

See note to 30.15, citing Walker v. Shepardson, 2 W 384, and other cases.

Sec. 1598, R. S. 1878, does not apply to the works of a boom company the charter of which gives it the right to detain and assort running logs, when such works are located at a point where the river is not navigable in fact except for floating or driving loose logs. Edwards v. Wausau B. Co. 67 W 463, 30 NW 716.

Under this section, on appeal, issues as to defects in title, or claims adverse to the title set out in the petition, are to be determined by the court, not by the jury. Perszyk v. Milwaukee E. R. & L. Co. 215 W 233, 254 NW 753.

As used in 31.23 (1) and 31.25 the words "maintain" and "maintained" have reference to a dam which was man-made in its origin or, if the dam was not so made but was originally erected through a natural cause, such as beaver, then some affirmative act on the part of a riparian owner to assist in its maintenance is required in order that such statutes apply as to him. The act of a riparian owner of land on both sides of a navigable stream in refusing permission to employes of the state conservation commission to enter on his land to remove a beaver dam from the stream did not constitute an "affirmative act" on his part in maintaining the dam. State v. Sensenbrenner, 262 W 118, 53 NW (2d) 773.

This section applies to the driving of iron stakes into the bed of a navigable lake and leaving them projecting, and extending to a point just below the water level. 10 Atty. Gen. 99.

When beaver have lawfully been removed from a flowage area by the conservation commission, maintenance of any dam by some affirmative act renders the owner of the premises subject to the forfeiture provisions of 31.23 (1). 39 Atty. Gen. 116.

The application of 30.02 (1) (b) and 31.23 (1), Stats. 1951, to instance where an island rises in a lake due to pressure caused by weight of highway fill is discussed in 41 Atty. Gen. 107.

If the owner of lands abutting a navigable lake excavates so that the lake waters flow over his land, he cannot erect barriers to exclude the public from using such waters for navigation. He is not, however, precluded from restoring the natural condition unless the artificial condition has existed for such a period of time that it is presumed to have become the natural one under the rules of dedication. 47 Atty. Gen. 57.

31.25 History: 1849 c. 62 s. 3 to 5; 1853 c. 73 s. 2; R. S. 1858 c. 41 s. 2; R. S. 1878 s. 1596, 1603; Stats. 1898 s. 1596, 1603; 1911 c. 652; Spl. S. 1912 c. 17; 1915 c. 380 s. 2; Stats. 1915 s. 1596 sub. 2, 1603; 1917 c. 474 s. 25; Stats. 1917 s. 31.25; 1949 c. 125; 1959 c. 441 s. 8; 1965 c. 614 s. 57 (2g).

On penalty for unlawful obstruction of navigable waters see notes to 30.15.

The fact that 31.25 declares any violation of 31.34 to be a public nuisance does not necessarily make it such, since the legislature has no right arbitrarily to declare that to be a nuisance which in fact is not such. State ex rel. Priegel v. Northern States P. Co. 242 W 345, 8 NW (2d) 350.

An obstruction in a navigable stream is in the nature of a nuisance. The word "nuisance" should be construed in the light of the applicable common-law principles relating to obstructions in streams. One cannot be said to create or maintain a nuisance where the condition or state of affairs complained of is due solely to natural causes and he has not by his own act contributed to bring about the alleged nuisance. State v. Sensenbrenner, 262 W 118, 53 NW (2d) 773.

See note to 31.23, citing State v. Sensenbrenner, 262 W 118, 53 NW (2d) 773.

See note to 30.12, citing Flamingo v. Waukesha, 262 W 219, 55 NW (2d) 24.

31.26 History: 1849 c. 62 s. 6, 7; 1874 c. 165 s. 4, 5; R. S. 1878 s. 1604, 1606; Stats. 1898 s. 1604, 1606; 1915 c. 380 s. 3; Stats. 1915 s. 1596—23, 1604, 1606; 1917 c. 474 s. 36; Stats. 1917 s. 31.26.

31.29 History: 1915 c. 579 s. 3; Stats. 1915 s. 1596—27; 1917 c. 474 s. 32; Stats. 1917 s. 31.29; 1965 c. 614 s. 57 (2g).

31.30 History: 1905 c. 460 s. 1, 2; Supl. 1906 s. 1497k; 1915 c. 594 s. 71; Stats. 1915 s. 1596m; 1917 c. 474 s. 33; Stats. 1917 s. 31.30; 1935 c. 85, 502; 1965 c. 614 s. 57 (2g); 1969 c. 276.

31.31 History: 1840 No. 48 s. 1; 1857 c. 62; R. S. 1858 c. 56 s. 1; R. S. 1878 s. 3374; Stats. 1898 s. 3374; 1901 c. 229 s. 1; 1901 c. 453 s. 1; Supl. 1906 s. 3374a; 1911 c. 533; 1911 c. 663 s. 440; Stats. 1911 s. 3374, 3374a; 1917 c. 474 s. 34; Stats. 1917 s. 31.31.

On navigable waters and riparian rights see notes to 30.10.

A plant used to generate electricity for lighting and power purposes is a "water mill," and the flooding of lands by a dam to operate such a plant is the taking of lands for a public purpose, the only remedy for which was provided by ch. 146, Stats. 1915. McDonald v. Apple River P. Co. 164 W 450, 160 NW 156.

The public service commission, in connection with approving plans for a dam under the milldam law, 31.31 to 31.33, Stats. 1927, had jurisdiction to make a finding that the stream in question was not navigable, and neither the commission's order of approval nor the finding supporting it (in the absence of any claim that the approval was fraudulently given or procured) was subject to collateral attack, to show that the dam was an unlawful structure. Navigability in the absence of legislative declaration is a question of fact. Wausaukee v. Lauerman, 240 W 320, 3 NW (2d) 362.

31.32 History: 1840 No. 48 s. 2; 1857 c. 62; R. S. 1858 c. 56 s. 2; R. S. 1878 s. 3375; Stats. 1898 s. 3375; 1917 c. 474 s. 35; Stats. 1917 s. 31.32.

See note to 30.10, on riparian rights, citing Apfelbacher v. State, 167 W 233, 167 NW 244.

31.33 History: 1917 c. 474 s. 36; Stats. 1917 s. 31.33; 1919 c. 702 s. 25; 1921 c. 422 s. 10; 1949 c. 125; 1965 c. 614; 1969 c. 276 ss. 588 (4), (6), 614.

A power company operating a dam under a special legislative act (ch. 462, Laws 1901) may trespass with its waters upon the highways of the state, responding in damages to the town, but the court cannot enjoin the company from such trespass if it is the necessary and inevitable result of maintaining the dam. Marion v. Southern W. P. Co. 189 W 499, 208 NW 592.

31.34 History: 1933 c. 151; Stats. 1933 s. 31.34; 1965 c. 614 s. 57 (2g); 1969 c. 276 s. 588 (5).

The primary purpose of this section, requiring that a dam on any navigable stream shall be so maintained as to pass at all times a prescribed minimum of the natural flow of water of such stream, but exempting therefrom a plant or dam where the water is discharged directly into a storage pond, is to protect the rights of lower riparian owners to a reasonably adequate natural flowage of the stream against upper owners cutting off such flowage. As used in this section, the term "dam" is not limited to the structure directly across the regular river bed, but includes the millrace or canal carrying the impounded water to the powerhouse; and hence, to bring into operation the exemption of discharge of water directly into a storage pond from the requirement as to minimum natural flow of the stream the discharge need not necessarily be from the floodgates, but may be from the tailrace of the powerhouse, thence back to the regular river bed, and thence directly into the storage pond. State ex rel. Priegel v. Northern States P. Co. 242 W 345, 8 NW (2d) 350.

See note to 31.04, citing Luening v. Public Service Comm. 267 W 537, 66 NW (2d) 190.

This section does not prevent the commission from requiring the operator of a dam to

pass more than 25% of the natural flow of the stream through the dam. Wisconsin P. & L. Co. v. Public Service Comm. 5 W (2d) 167, 92 NW (2d) 241.

31.35 History: 1935 c. 212, 486; Stats. 1935 s. 31.35.

31.36 History: 1937 c. 379; Stats. 1937 s. 31.36; 1957 c. 528; 1961 c. 191; 1965 c. 163, 614; 1969 c. 276 ss. 230, 236.

31.38 History: 1959 c. 441 s. 9; Stats. 1959 s. 31.38; 1961 c. 568; 1965 c. 614 s. 57 (2g); 1969 c. 276 s. 588 (5).

CHAPTER 32.

Eminent Domain.

32.01 History: 1919 c. 571 s. 1; Stats. 1919 s. 32.01; 1947 c. 362, 581; Spl. S. 1958 c. 3; 1959 c. 639, 693; 1965 c. 238.

Drafting Committee Note, 1959: No change from 1957 statutes except reference to redevelopment authority. [Sub. Am. 1-A to Bill 483-A]

Editor's Note: For cases decided under earlier forms of this section prior to 1930, see Wis. Annotations, 1930.

32.02 History: 1919 c. 571 s. 1; Stats. 1919 s. 32.02, 927—1 part (1); 1921 c. 396 s. 95; Stats. 1921 s. 32.02; 1935 c. 421 s. 3; 1943 c. 93 s. 1; 1947 c. 362, 423, 513, 581; 1949 c. 338; 1951 c. 119; 1953 c. 61 s. 1; Spl. S. 1958 c. 3; 1959 c. 238, 639, 672, 693; 1965 c. 238; 1967 c. 27; 1969 c. 276 ss. 602 (1), 603 (3); 1969 c. 366 s. 117 (2) (b); 1969 c. 397.

Drafting Committee Note, 1959: No change from 1957 statutes except as amended in the special session, 1958 by reference to redevelopment authority, and inclusion of the state department of public welfare in sub. (1). [Sub. Am. 1-A to Bill 483-A]

On exercises of eminent domain see notes to sec. 1, art. I; on taking private property for public use see notes to sec. 13, art. I; on suits against the state see notes to sec. 27, art. IV; on property taken by a municipality see notes to sec. 2, art. XI; on municipal home rule see notes to sec. 3, art. XI; on acquisition of lands by the state and subdivisions see notes to sec. 3a, art. XI; and on rights of drainage see notes to 88.87-88.94.

An electric railway company may condemn a special easement in property, leaving vested in the owner all rights, privileges and easements not sought to be condemned. It is not necessary for the company to condemn an exclusive easement if it determines that it needs only the special easement. Milwaukee E. R. & L. Co. v. Becker, 182 W 182, 196 NW 575.

The general rule that property devoted to one public use may not be condemned for another public use does not apply if the condemnor has statutory authority, either expressly or by necessary implication, to condemn the property or if the property may be taken without destroying or materially impairing the existing public use. The city of Racine had implied authority to condemn right of way for street purposes on which no track lay or structure stood. Chicago & Northwestern R. Co. v. Racine, 200 W 170, 227 NW 859.

Where landowners voluntarily appeared and consented to condemnation proceedings, notwithstanding the condemnation petition did not allege property could not be acquired by gift or at agreed price, the court acquired jurisdiction. Pennefeather v. Kenosha, 210 W 695, 247 NW 440.

An interest in property sought to be condemned under ch. 275, Laws 1931, relating to cities of the 1st class, held by the party seeking to acquire title, is not a bar to a proceeding to acquire a fee title to the same, where its rights are clear and the necessity for a fee title has been determined. Milwaukee v. Heyer, 238 W 583, 300 NW 217.

A power company, in connection with acquiring an easement, may condemn the right to cut down trees to provide sufficient clearance for its wires; and other restrictions reasonably required for safety, such as the restriction of future buildings on the premises to 25 feet in height and fireproof construction, are likewise permissible subjects for acquisition. Klump v. Cybulski, 274 W 604, 81 NW (2d) 42.

32.03 History: 1919 c. 571 s. 1; Stats. 1919 s. 32.03; 1927 c. 70, 353; 1947 c. 423, 513; 1951 c. 235; 1959 c. 639.

Drafting Committee Note, 1959: No change in substance from 1957 statutes. [Sub. Am. 1-A to Bill 483-A]

"An examination of the legislative declarations discloses that certain kinds of property devoted to public uses may be condemned and taken for railroad purposes, but no provision of the law grants the right expressly or by necessary implication to so take lands devoted to the use of a public park. A legislative grant to subject such property to another public use is one in derogation of existing laws, and renders the rule 'Expressio unius est exclusio alterius' applicable to this subject. Whatever is embraced in the statutes giving this right leads clearly and satisfactorily to the conclusion that it was intended that the right should be confined to the particular property therein specified." In re Milwaukee Southern R. Co. 124 W 490, 502, 102 NW 401, 405.

Property of a canal company which furnishes power to the public is protected from condemnation. Wisconsin T., L., H. & P. Co. v. Green Bay & M. C. Co. 188 W 54, 205 NW 551.

A railway company cannot acquire land owned by a municipality by condemnation. Matson v. Caledonia, 200 W 43, 227 NW 298.

The state highway commission has power to condemn property owned by school districts and to condemn property of public utilities engaged in interstate commerce subject to the rights of such utilities under 86.16 and 182.017 (1), Stats. 1951. 41 Atty. Gen. 229.

A city of the fourth class does not possess the power to condemn land owned by a county as a site for construction of a city sewage disposal plant. The term "municipality" in 32.03 (1), Stats. 1957, includes a county. 47 Atty. Gen. 270.

32.04 History: 1959 c. 639; Stats. 1959 s. 32.04.

Drafting Committee Note, 1959: This legislation puts in one place the procedure for condemnation (with the exceptions hereinafter