

to a refund under 78.14, Stats. 1935. 25 Atty. Gen. 293.

An original invoice for the sale of motor fuel which does not on its face give the name of the seller so as to clearly identify the one who made the sale will not support a claim for refund under 78.75, Stats. 1955. 44 Atty. Gen. 345.

Under 78.75, Stats. 1955, the refund to a motor fuel wholesaler consuming its entire receipt for nonhighway use is limited to the amount of tax it has paid thereon. 46 Atty. Gen. 30.

**78.76 History:** 1953 c. 510; Stats. 1953 s. 78.76.

A deputy oil inspector, appointed under ch. 168, has no power as such to stop a vehicle transporting more than 20 gallons of gasoline into Wisconsin, examine documents covering shipment, inspect gasoline and then report the origin and destination of shipment; but such duties may be conferred on him for performance of duties under 78.09, Stats. 1939. 28 Atty. Gen. 342.

**78.77 History:** 1953 c. 510, 631; Stats. 1953 s. 78.77; 1967 c. 270; 1969 c. 9; 1969 c. 276 s. 590 (4).

**78.78 History:** 1953 c. 510; Stats. 1953 s. 78.78.

**78.79 History:** 1953 c. 510; Stats. 1953 s. 78.79.

A written directive of the department of taxation, instructing its auditors that any shortage or shrinkage in nontaxable Class 2 motor fuel over and above one per cent of the amount purchased should be deemed to have been blended with taxable Class 1 motor fuel and sold as Class 1 motor fuel when delivered by tank truck with 2 or more compartments, with a single pump and meter, and that the excess of over one per cent of shortage should be assessed as taxable motor fuel, was a rule or regulation, within 78.13, 78.24, and 227.01 (2), Stats. 1947, which was required by 227.03 to be filed in the office of the secretary of state before becoming effective, and hence, if otherwise valid, it was not effective and could not be applied until so filed. *Mondovi Co-op. Equity Asso. v. State*, 258 W 505, 46 NW (2d) 825.

**78.80 History:** 1953 c. 510; Stats. 1953 s. 78.80; 1955 c. 613.

The provisions of 78.13 (3), Stats. 1951, according confidential status to records of the department of taxation, extend to all records relative to administration of ch. 78. 41 Atty. Gen. 78.

**78.81 History:** 1953 c. 510; Stats. 1953 s. 78.81; 1961 c. 495.

**78.82 History:** 1953 c. 510; Stats. 1953 s. 78.82.

**78.83 History:** 1953 c. 510; Stats. 1953 s. 78.83.

## CHAPTER 79.

### Department of Transportation.

**79.01 History:** 1969 c. 157; Stats. 1969 s. 79.01.

**79.02 History:** 1969 c. 157; Stats. 1969 s. 79.02.

## CHAPTER 80.

### Laying Highways.

**Editor's Note:** Extensive notes on ch. 334, Laws 1943, revising the highway laws, are set forth on pages 1296 to 1300, Wis. Statutes, 1943.

**80.01 History:** 1869 c. 152 s. 85, 86; 1874 c. 50; R. S. 1878 s. 1295; 1882 c. 253; 1885 c. 102; Ann. Stats. 1889 s. 1294, 1294a, 1295; Stats. 1898 s. 1294, 1295; 1901 c. 132 s. 1 to 3; Supl. 1906 s. 1299j to 1299L; 1909 c. 91; 1911 c. 663 s. 150; 1949 c. 70; 1913 c. 525; 1923 c. 108 s. 3, 4, 76 to 78; Stats. 1923 s. 80.01, 80.63; 1931 c. 295 s. 2; 1943 c. 334 s. 16, 17; Stats. 1943 s. 80.01; 1949 c. 70; 1951 c. 380, 520.

1. Validation of highways, recorded and worked.
2. Validation of highways, unrecorded and worked.
3. Use and protection of abutting lands.
4. Defective proceedings; dedication.

#### 1. Validation of Highways, Recorded and Worked.

Under sec. 1295, R. S. 1878, in order that a road may become a public highway by having been worked for 3 years, there must at least be an order laying out such highway, made by the proper officers and filed in the office of the town clerk where such highway is situated. *Beyer v. Crandon*, 98 W 306, 73 NW 771.

Defects in proceedings to lay out a highway across a railroad right-of-way are not cured by opening and working such highway, if within 3 years the railroad company fences across the same and puts in gates. *Hunter v. Chicago, St. P., M. & O. R. Co.* 99 W 613, 75 NW 977.

A highway laid out by irregular order and then abandoned under 80.32 (2) does not become a public highway thereafter by being worked for 3 years under the provisions of 80.01, Stats. 1921. The maintenance of gates across the line of travel is inconsistent with the existence of a public highway. *State v. Halvorson*, 187 W 611, 205 NW 426.

The highway validated by sec. 86, ch. 152, Laws 1869, is not a highway by user but a highway laid out by the supervisors of a town, and the language "so far as they have been so opened and worked", in sec. 86, does not limit the width of the highway to that part actually worked and traveled, but the width of the highway is as determined by the order of the supervisors laying it out. *Jacobosky v. Ahnapée*, 244 W 640, 13 NW (2d) 72.

On highways by user as distinguished from laid highways see *Barrows v. Kenosha County*, 8 W (2d) 58, 98 NW(2d) 461.

#### 2. Validation of Highways, Unrecorded and Worked.

Where there is a continuous line of road used by the public and work has been done on a portion thereof under direction of the authorities for more than 10 years it is a public highway. *Schribner v. Blute*, 28 W 148.

The use by the public for the requisite period, in the absence of proof to the contrary, must be presumed to have been under claim of right, without proof of any act of the town authorities upon the particular land in dispute. Where a highway is established by user over a tract of land of the usual width of a highway, the right of the public is not limited to the traveled path, but such user is evidence of a right in the public to use the whole tract as a highway by widening the traveled path, or otherwise, as the increased travel and the exigencies of the public may require. *Bartlett v. Beardmore*, 77 W 356, 46 NW 494.

Where the evidence showed that no gates had been placed across a highway for at least 16 years and that for the last several years certain gates were used but only to keep stock from straying at certain seasons of the year, and it appeared that the road was worked as a public highway by the town authorities for a period of 10 years, a highway was established. *Rhodes v. Halvorson*, 120 W 99, 97 NW 514.

A logging road originally built on public land did not become a highway either under sec. 1294, Stats. 1898, or by 20 years' use by the common law, where the user was interrupted and the road blocked for months and even years at a time, and there was no expenditure of public funds thereon, and no working thereof by highway officers. *Rolling v. Emrich*, 122 W 134, 99 NW 464.

Sec. 1294, Stats. 1911, does not abrogate the common-law rule that a highway may be created by user alone for 20 years. A highway or street used and useful as such need have no particular form or structure, and a wharf at the end of a street which connects the street with a river that is also a highway, which affords transit from street to river and from river to street, became a part of the street by 25 or more years of continuous public use, even though the wharf and street had been used to some extent by adjoining owners for storage purposes and the city had never expended any money in repairs or maintenance. *Nuthals v. Green Bay*, 162 W 434, 156 NW 472.

Statutory provisions describing methods for the dedication of street or highway are not exclusive. Public user for a considerable length of time constitutes an acceptance by the public of a common-law dedication. A municipality may accept land offered to it for street purposes at any time before the offer is withdrawn. *Galewski v. Noe*, 266 W 7, 62 NW (2d) 703.

Where the county established a public highway by user or prescription, the county did not acquire a full legal title to the land comprising the highway, but acquired merely an easement for public travel, and the fee remained in the abutting owners. The easement extends only to the width laid out and as used for highway purposes. *Walker v. Green Lake County*, 269 W 103, 69 NW (2d) 252.

Where a driveway is not maintained other than by snow plowing done sporadically at the request of owners and not along a fixed route, 80.01 (2) does not apply. *Sichio v. Alvey*, 10 W (2d) 528, 103 NW (2d) 544.

A roadway maintained as a way of necessity by a city was not a highway not recorded, under 80.01 (2), and did not become a public

highway. *Bino v. Hurley*, 14 W (2d) 101, 109 NW (2d) 544.

While an entry in the town minute book was insufficient to establish validation of a road as a highway under 80.01 (1), Stats. 1963, such entry and other probative evidence substantiated the trial court's finding that the road was a public highway by virtue of 80.01 (2), having been so worked for 10 years or more, where the record established that the town cleared the entire roadway, to a width of 50 feet, 32 years before the controversy, partially graveled the road about 2 years later, expended town funds for maintenance of the entire road continuously for at least 21 years, made later extensive repairs thereto, certified it was a public road for state highway aid, and in a prior litigation resisted a claim that it was a private road. *Muehrcke v. Behrens*, 43 W (2d) 1, 169 NW (2d) 86.

A public highway is presumed to have been laid out 4 rods wide; that presumption can be disputed. 16 Atty. Gen. 567.

A road laid out and constructed by the state on hospital grounds owned by the state is not a public highway even though within the past 7 years the town in which it is located resurfaced same and it has been used generally by those going to and from the hospital. 28 Atty. Gen. 289.

A town highway may be created by grant from the owner and acceptance by the town board or town meeting through resolution adopted and filed with the town clerk under 80.01 (2), Stats. 1943. Such a resolution need not be drawn with legal nicety, but it should fairly indicate an intention to accept the particular grant. 34 Atty. Gen. 35.

### 3. Use and Protection of Abutting Lands.

80.01 (3), Stats. 1959, which was designed to prevent land acquired for highway purposes after June 23, 1931, from reverting back to private ownership, is inapplicable where, as hence, it appears that the property was so acquired prior to that date. *Grunwaldt v. Milwaukee*, 35 W (2d) 530, 151 NW (2d) 24.

Under 80.01 (3), Stats. 1963, an easement for highway purposes is not abandoned as long as the land is contiguous to other land held for highway purposes. 52 Atty. Gen. 161.

### 4. Defective Proceedings; Dedication.

Lands cannot be dedicated by any person but the owner or his agent, and acts which would amount to a dedication if performed by a person authorized do not bind such person on his subsequently becoming the owner of such lands. *Bushnell v. Scott*, 21 W 451.

Where defective proceedings have been had for laying out a highway and the landowner accepts the damages awarded his act may be regarded as a dedication. *Karber v. Nellis*, 22 W 215; *Moore v. Roberts*, 64 W 538, 25 NW 564.

If the owner of land assists in laying out a highway over it, adjusts his fences to suit the same and with others does work thereon from year to year, he unequivocally dedicates it to the public use. The public use of the road after such dedication need not be for a very long time to establish it; and the fact that there may have been several tracks traveled makes no difference, if the owner of the land

fenced out one general route, intending it to be a dedication as a highway. *Witter v. Damitz*, 81 W 385, 51 NW 575.

If the open and known acts of the owner of land are of such a character as to naturally induce the belief in the public mind that he intended to dedicate away to the public use, and there is nothing to explain or qualify such acts, and the public acts upon such appearance and will lose valuable rights if the owner is allowed to reclaim the land, it may be held that there is a dedication, notwithstanding his secret intention not to dedicate. But the acts from which such dedication may be inferred must be unequivocal and unexplained and be those of the owner or be authorized by him. A private way can be converted into a public highway by only 2 methods: (1) by dedication by the owner to the public use and the acceptance by the public; (2) by user and working the locus in quo as a public highway for 10 years. If there has been no dedication the expenditure of highway taxes upon a private way by the unauthorized acts of the town officers will not make it a public highway. If a way was private in its inception nothing less than a clear, unmistakable user will operate to enlarge the private easement to a public one. *State ex rel. Lightfoot v. McCabe*, 74 W 481, 43 NW 322; *Cunningham v. Hendricks*, 89 W 632, 62 NW 410.

The mere nonworking or nonuser of a portion of a street does not operate as a surrender or abandonment of the same for the purposes of a public street. *Madison v. Mayers*, 97 W 399, 73 NW 43.

A city was not estopped to claim that certain streets had not been vacated by irregular proceedings of its council, as against a railroad company which had not erected any structure or incurred any considerable expense in reliance upon the proceedings. *Ashland v. Northern P. R. Co.* 119 W 204, 96 NW 688.

Prior to the amendment of sec. 1294 by ch. 525, Laws 1913, an oral acceptance by a town board of a dedication of a public highway was lawful and binding. The mere furnishing of funds by a town board for work upon a strip of land could not convert a private easement into a public one, as to owners who had not joined in an attempted dedication. A private right of way cannot be converted into a public highway by dedication by the owners of only a part thereof. *Minocqua v. Neuville*, 174 W 347, 182 NW 471.

The dedication of lands for a public highway to be complete must be accepted in some form. *Whitehead & Matheson Co. v. Jensen*, 203 W 12, 233 NW 546.

Proceedings to lay out a town highway in 1858 were ineffective because abandoned. Only the existence of a highway by user with the defendants' fence as one boundary was established under the facts shown as to actual use of certain land as a highway for 80 years, and as to possession by the defendants and their predecessors in title of additional land now claimed by the plaintiff town as part of the highway, and as to existence of the defendants' fence for over 50 years. Where acts relied on by a town to show the dedication of land to a highway are of a doubtful character and the use and possession of that land over a period of years by a private individual is ac-

quiesced in by the town, the private use is considered conclusive as against the dedication for public purposes. *Buchanan v. Wolfinger*, 237 W 652, 298 NW 176.

After 5 years from the making and filing of an order of a town board laying out a highway, the order is not subject to invalidation for not being accomplished by an assessment of damages or releases, but such highway must then be treated as a lawfully established highway so far as the portion thereof worked and used is concerned, with the duty in the town board to maintain the roadway in a condition proper for travel. *Zblewski v. New Hope*, 242 W 451, 8 NW (2d) 365.

Where the proprietors, after platting land and recording the plat, sold lots with reference to the streets therein described, such proprietors and their grantees are estopped to deny the legal existence of such streets, and hence will not be heard to assert that the village board committed a trespass on their premises in improving an abutting street at the request of another lot owner. *Kennedy v. Barnish*, 244 W 137, 11 NW (2d) 682.

In an action in ejectment to recover possession of land occupied by an allegedly private road, a recorded resolution of the town board purporting to establish such road as a town highway which, although not adequately describing the course of the highway, definitely fixed the 2 ends thereof so that a surveyor could find the starting point and follow the course of the highway to its end and mark the side limits of its use, together with the jury's finding that the road had been worked by the town for 3 years between certain dates, together with the curative provisions of this subsection, warranted a dismissal of the complaint on the ground that the road was a legal town highway. *Lauerman v. Pembine-Miscauno Pond Asso.* 251 W 122, 28 NW (2d) 453.

Defects, if any, in regard to the certificate of the city clerk attached to the recorded plat as to the approval of the plat by the city council were cured under 80.01 (4) by the opening of the alley for use by the public. *Williams v. Larson*, 261 W 629, 53 NW (2d) 625.

Where the evidence clearly showed that the road in question had been opened and worked for 3 years as a legal highway, the fact that the order laying it out could not presently be found would not invalidate the highway. *Lowentine v. Land O' Lakes*, 11 W (2d) 500, 105 NW (2d) 837.

Recording of a plat without the required approval of the governing body is void and does not constitute a completed dedication, since the failure to approve the plat meant that there was no acceptance. This does not preclude acceptance by opening or repairing the streets or by user. 43 Atty. Gen. 75.

**80.02 History:** R. S. 1858 c. 19 s. 53; 1869 c. 48 s. 1; 1869 c. 152 s. 90, 97, 134; 1874 c. 93; R. S. 1878 s. 1265; Stats. 1898 s. 1265; 1901 c. 388 s. 1; Supl. 1906 s. 1265; 1909 c. 115; 1911 c. 370, 605; 1911 c. 664 s. 139; 1917 c. 640; 1919 c. 679 s. 59; 1923 c. 108 s. 5; Stats. 1923 s. 80.02; 1925 c. 84; 1927 c. 37; 1935 c. 428; 1943 c. 334 s. 18; 1967 c. 26; 1969 c. 500 s. 30 (2) (e).

To defeat an order laying out a highway it may be shown that the facts stated in the order are not true or that the proceedings prior

to it were irregular. *Roehrborn v. Schmidt*, 16 W 519.

In altering a highway the supervisors are not confined to the exact line stated in the application. They may exercise a reasonable discretion; if the public interests require a variation from the line proposed they should make it. *Neis v. Franzen*, 18 W 537.

A petition is sufficient if the line of the proposed highway is so described that it may be located without difficulty by reference to the data furnished by it. Sec. 1265, R. S. 1878, does not require that the width and length of the proposed highway shall be stated. If the petition asks for an extension of an existing highway and gives the termini of the line it need not more specifically designate the direction. If it also asks that such highway be declared to be a public highway the request does not affect the other parts of the petition. *State ex rel. Milwaukee, L. S. & W. R. Co. v. O'Connor*, 78 W 282, 47 NW 433.

An entirely new highway cannot be laid out under an application to alter an existing highway. *State ex rel. Funke v. Burgeson*, 108 W 174, 84 NW 241.

Jurisdiction to lay out, alter, etc., can be obtained and retained only by strict compliance with the statutes. *State ex rel. Hewitt v. Graves*, 120 W 607, 98 NW 516.

Where the application for a highway proposed that it be laid out over three 40-acre tracts, a considerable variation in the middle 40 will be presumed to have been reasonable and within the power of the supervisors and not to constitute the highway as actually laid out a materially different one from that named in the application. *State ex rel. Limmix v. Clyde*, 130 W 159, 109 NW 985.

For sufficient description of a line of highway and tracts through which it was to pass see *Schillock v. Jones*, 147 W 119, 132 NW 908.

Where an application was for laying out a new highway and discontinuance of an old one, but the practical effect of granting it would be merely to change the course of the existing road, the proceeding must be treated as one for the alteration of the existing road and the laying out of the highway on the proposed course would, of itself, operate to discontinue the portion of the old road so altered. *State ex rel. Schroeder v. Behnke*, 166 W 65, 162 NW 443.

The finding of the highway commission as to the cost of the bridge necessitated by an order laying out a highway is a ministerial act, not subject to review by certiorari. Proceedings to lay out a highway by a town board are subject to review by certiorari to ascertain whether the board had jurisdiction, kept within it, acted according to law and on evidence warranting their conclusions. *State ex rel. Peart v. Highway Comm.* 183 W 614, 198 NW 753.

The fact that certain landowners might be deprived of access to a public highway will not prevent the abandonment of an existing highway upon which their lands abutted, where their title was acquired solely to prevent the discontinuance. *Cunneen v. Kalschuer*, 188 W 448, 206 NW 917.

Where discontinuance of a highway by a town board would deprive an owner of lands of access to a public highway, a town board has no power to discontinue the highway, and should be commanded to remove barriers, un-

less protection of the traveling public requires that barriers be maintained. *State ex rel. Wollner v. Schloemer*, 200 W 350, 228 NW 487.

Injunction will not lie to restrain a town board from hearing and acting on an application for laying out a highway, because, until the board has acted and has ordered a highway to be laid out, no injury or harm can be said to be threatened, since the board might in its discretion decide against the application, and equity should not interfere with the duties of the board to decide on the application. *Florsheim v. Patterson*, 208 W 590, 243 NW 759.

Ch. 80, Stats. 1949, so far as directing the procedure to be followed in altering town highways, contemplates alterations which change the boundaries of the highway, not alterations resulting from work done within the established highway limits. *Zache v. West Bend*, 268 W 291, 67 NW (2d) 301.

Town boards have the right to discontinue highways which are part of a plat dedicated to the public. 2 Atty. Gen. 127.

Supervisors of a town may lay out highways over vacant state lands, and the commissioners of public lands have no voice in the matter. 7 Atty. Gen. 480; 10 Atty. Gen. 744.

Proceedings to relocate a town highway which is on the ground of a state institution should be commenced by petition under sec. 1265, Stats. 1921, and carried on as required by this and succeeding sections. Upon relocation of a highway the abandoned part is vacated by operation of law. 10 Atty. Gen. 763.

A town road does not cease to become such by becoming a state or county trunk highway so that if the state or county trunk highway is relocated the road again becomes merely a town road and may be discontinued on application to the town board. 24 Atty. Gen. 51.

Neither a town board, nor a county board in a county of less than 150,000 population, has authority to vacate, abandon, or discontinue existing public highways which each has a duty to maintain, except in compliance with statutory procedures which must be initiated by the prescribed number of resident freeholders. 57 Atty. Gen. 224.

**80.025 History:** 1969 c. 295; Stats. 1969 s. 80.025.

**80.03 History:** R. S. 1858 c. 67 s. 15; 1869 c. 152 s. 54; 1872 c. 128 s. 1; R. S. 1878 s. 1263; Stats. 1898 s. 1263; 1899 c. 140 s. 1; Supl. 1906 s. 1263; 1919 c. 343; 1923 c. 108 s. 6; Stats. 1923 s. 80.03; 1941 c. 110; 1943 c. 334 s. 19; 1963 c. 5.

A road cannot be laid out so as to deprive the owner of an orchard, either in whole or in part, of the beneficial enjoyment of it. The owner of a garden cannot be required to surrender a small strip of grass or walk along his fence. *Seymour v. State*, 19 W 240.

The owner of a ferry is entitled to an injunction restraining the laying out of a public road through grounds adjoining his dock and necessarily used by him in connection with his ferry privilege. It makes no difference that such grounds are not inclosed. *Flanders v. Wood*, 24 W 572.

Where town authorities are threatening to enter upon land and permanently occupy a portion of it for a highway against the will of the owner and without having acquired a

right so to do he is entitled to an injunction. *Uren v. Walsh*, 57 W 98, 14 NW 902.

The express naming of the grounds and kinds of property enumerated in sec. 1263, R. S. 1878, raises the implication that all other kinds may be taken for highway purposes. *Smith v. Gould*, 59 W 631, 18 NW 457.

A cow stable, wagon shed and chicken house are buildings or fixtures, and an attempt to lay out a highway through them without the owner's consent will be restrained by injunction. *Smart v. Hart*, 75 W 471, 44 NW 514.

A farm building used for the drying and curing of tobacco is not a building used for the purposes of trade or manufacture within sec. 1263, Stats. 1898, as amended. *Sharpe v. Hasey*, 134 W 618, 114 NW 1118.

Sec. 1263, Stats. 1917, applies only to towns. *Mueller v. Erotz*, 169 W 526, 173 NW 219.

An attempt to lay out a highway through a state tuberculosis camp was void. *State v. Town Board*, 192 W 186, 212 NW 249.

**80.04 History:** 1869 c. 152 s. 75, 136, 137; R. S. 1878 s. 1266, 1305; Stats. 1898 s. 1266, 1305; 1923 c. 108 s. 7; Stats. 1923 s. 80.04; 1943 c. 334 s. 20.

**80.05 History:** 1869 c. 152 s. 56; R. S. 1878 s. 1267; 1889 c. 266 s. 1; Ann. Stats. 1889 s. 1267; Stats. 1898 s. 1267; 1919 c. 343; 1923 c. 108 s. 8; Stats. 1923 s. 80.05; 1935 c. 428; 1943 c. 334 s. 21; 1953 c. 600; 1961 c. 40; 1965 c. 252; 1969 c. 276.

The fact that occupants of lands are not entitled to notice does not prevent them from taking advantage of the lack of notice to the public. The proper notice should be served upon all the occupants through whose lands the proposed highway passes. *Austin v. Allen*, 6 W 134.

A notice that the supervisors will meet "to make an examination and survey" is not a compliance with the statute and not equivalent to notice that they will "meet and decide upon such application". *Austin v. Allen*, 6 W 134.

A notice that they will meet and take into consideration is not a compliance. *Babb v. Carver*, 7 W 124.

An occupant not served with notice does not waive service by merely being present at the meeting held to decide upon the application. He must expressly consent, accept the award, or otherwise adopt the acts of the supervisors in order to waive notice. *State v. Langer*, 29 W 68; *Roehrborn v. Schmidt*, 16 W 519; *State v. Castle*, 44 W 670.

The notice need not be signed by the supervisors, but may simply be given by their authority. *Williams v. Mitchell*, 49 W 284, 5 NW 794.

If the owners or occupants of lands to be affected are petitioners notice need not be served upon them. *State ex rel. Supervisors v. Nelson*, 57 W 147, 15 NW 14.

Notice is sufficient even though it does not specify the year in which the meeting will be held or state affirmatively that the place of meeting is within the town. *State ex rel. Supervisors v. Nelson*, 57 W 147, 15 NW 14.

The notice is sufficient though it does not specify the tracts of land through which the highway may pass by an enumeration of government subdivisions if the description of the

proposed line is such that the tracts intended can be ascertained easily. *Jackson v. Rankin*, 67 W 285, 30 NW 301.

A failure to give the required notice to each occupant of land through which a proposed highway is to run invalidates the proceedings. *State v. Langer*, 29 W 68; *State v. Logue*, 73 W 598, 41 NW 1061.

For the purposes of a service of the notice the station agent at a railway depot on the grounds through which a highway is proposed to be laid is the occupant of such grounds, and the service upon such agent is also valid if it would be valid were it a summons in an action against the railway company. A notice is good which describes the only tract of land included in the proposed highway as a part of the railway depot grounds and gives the government subdivisions of which it forms part. The fact that the petition calls for the extension of a street which is presumably a highway and requests that the street and the proposed extension shall be declared a public highway does not make it necessary that the notice should specify the tracts of land abutting on such street nor that the notice should be served upon their occupants. *State ex rel. Milwaukee, L. S. & W. R. Co. v. O'Connor*, 78 W 282, 47 NW 433.

Occupants of lands abutting upon a portion of the highway not sought to be discontinued are entitled to have notice served upon them equally with the owners of lands abutting on the portion of the highway sought to be discontinued, and failure to so serve is fatal to the proceeding. *Schroeder v. Klipp*, 120 W 245, 97 NW 909; *Morris v. Edwards*, 132 W 91, 112 NW 248.

Where, by reason of a failure to give the notices required, a town board has no jurisdiction to act on the day fixed for its meeting to decide upon an application for the laying out of a highway, it may, unless its power has otherwise been exhausted, proceed ab initio, order the service of new notices in the manner required by law, and thereby acquire jurisdiction for future valid action. *State ex rel. Loehr v. Hanson*, 168 W 497, 170 NW 725.

The provision that a notice of a meeting of the town board to decide on an application to have a highway laid out shall fix the time and "place" of the meeting, was satisfied by a notice designating the "Ed Sippy residence" as the place, especially where it appeared that all interested parties, including the person bringing certiorari to review the proceedings, were present at the meeting at the house known as the Ed Sippy residence. *State ex rel. Sippy v. Nee*, 253 W 423, 34 NW (2d) 121.

**80.06 History:** 1869 c. 152 s. 57; 1876 c. 376; R. S. 1878 s. 1268; Stats. 1898 s. 1268; 1923 c. 108 s. 9; Stats. 1923 s. 80.06; 1929 c. 250; 1943 c. 334 s. 22.

Proceedings to lay out a highway must be in substantial conformity to the statute. No consent of the parties can authorize an adjournment beyond 30 days from the first meeting. The decision must be made and filed within 10 days after the last adjournment of the hearing. *Ruhland v. Hazel Green*, 55 W 664, 13 NW 877.

After the supervisors have acted upon the merits of a petition the presumption is that

they were satisfied by affidavit or otherwise that the notices were duly posted. *State v. Nelson*, 57 W 147, 15 NW 14.

The fact that the supervisors acted upon a petition upon its merits will sustain a finding that the notice was duly given. *Jackson v. Rankin*, 67 W 285, 30 NW 301.

Sec. 1268, Stats. 1898, does not authorize a joint meeting of town boards and if 2 boards acted together as one board upon application for a highway which was to run in different towns, it would be doubtful whether the decision could be sustained, but where it appears that the 2 boards met together to consider the application but does not show that the action was taken by the joint board, the decision will be good. *State ex rel. Limmix v. Clyde*, 130 W 159, 109 NW 985.

The fact that the supervisors sought shelter for convenience in a house 10 or 12 rods from the point of meeting described in the notice could mislead no one and the meeting at the house was in substantial accord with the notice. *State ex rel. Wills v. Larkin*, 155 W 549, 145 NW 181.

An affidavit of service under sec. 1268, Stats. 1913, in the following form was sufficient: "Henry Jackering, being first duly sworn, on oath says that on the 22d day of October, 1913, he personally served the within notice upon the following named persons, the occupants of the lands the description whereof is set opposite their respective names." *State ex rel. Maughan v. Boerner*, 159 W 201, 149 NW 766.

The proof of service of the notice need not be filed in the office of the town clerk before the meeting of the supervisors; and notice of adjourned meetings, other than that given at the time of the first meeting, is not required. A meeting by the supervisors in the door-yard of a man's house at 10:30 a. m. was a sufficient compliance with a notice for the meeting at 10 o'clock a.m. at the same man's "home." *Marlatt v. Chipman*, 160 W 193, 151 NW 249.

**80.07 History:** 1869 c. 152 s. 58; 1876 c. 376; R. S. 1878 s. 1269; Stats. 1898 s. 1269; 1923 c. 108 s. 10; Stats. 1923 s. 80.07; 1941 c. 277; 1943 c. 334 s. 23; 1955 c. 207.

A majority of the supervisors may order a road opened, but one cannot sign the name of another to such order without his immediate assent and direction. *State ex rel. Evans v. James*, 4 W 408.

When the order purporting to lay out a highway does not intelligibly describe the line thereof, or refer definitely to any proper instrument on file in the town clerk's office, it is void. *Isham v. Smith*, 21 W 32.

The supervisors are the judges of the necessity or utility of a highway laid out and established by them. *Moll v. Benckler*, 30 W 584.

The failure to make and file a decision within 10 days after the time fixed in the notice for decision deprives the board of all jurisdiction. No waiver or agreement of parties can confer or restore such jurisdiction. *Ruhland v. Hazel Green*, 55 W 664, 13 NW 877.

Where proceedings in laying out highways are void they do not constitute a justification for a threatened occupation of lands for highway purposes, and an injunction restraining the supervisors from so occupying them will be granted. *Ruhland v. Jones*, 55 W 673, 13 NW 689.

An invalid order is not admissible in evidence as a foundation for showing that a certain place is a highway by user if it does not describe such place as an intended highway and it is made to appear that there was no purpose to establish a highway at such place. *Bartlett v. Beardmore*, 74 W 485, 43 NW 492.

Where the order extended the line of the highway about 20 rods beyond the point designated in the petition, and this was done at the request of the owner of the land affected thereby, who released his claim for damages; the effect was merely to accept a right of way dedicated by him; the order was not invalidated. *State ex rel. Milwaukee, L. S. & W. R. Co. v. O'Connor*, 78 W 282, 47 NW 433.

The language of sec. 1269, R. S. 1898, includes a highway laid out pursuant to 80.13. If an applicant under that section neglects for more than 10 days after it has been determined to lay out a highway to pay the sum assessed against him as advantages, and thus secure the filing within that time of the order, it will be deemed that his application has been denied. *Baier v. Hosmer*, 107 W 380, 83 NW 645.

The order must contain an intelligible description of the road, as altered. *State ex rel. Funke v. Burgerson*, 108 W 174, 84 NW 241; *Blair v. Milwaukee, L. H. & T. Co.* 110 W 64, 85 NW 675.

Jurisdiction can be obtained and retained only by a strict compliance with the statute. *State ex rel. Hewitt v. Graves*, 120 W 607, 98 NW 516.

Where supervisors have no jurisdiction because of the insufficiency of the notice, a refusal to lay out the highway did not amount to a decision against the application. *State ex rel. Limmix v. Clyde*, 130 W 159, 109 NW 985.

Failure to file an order for laying out a highway within the 10 days rendered it inoperative and of no effect. *Morris v. Edwards*, 132 W 91, 112 NW 248.

Where application for a highway has been denied by failure to make an award, the application cannot be withdrawn so as to enable the proceedings to be renewed within a year. *Schillock v. Jones*, 147 W 119, 132 NW 908.

The provision that the supervisors of a town shall be deemed to have decided against an application for laying out a highway where an order and accompanying award of damages is not filed, does not prevent the operation of the curative section, 80.01 (4), where an order laying out a highway, defective for not being accompanied by an award of damages or releases, has been filed. The effect of the amendment made to 80.07 by ch. 277, Laws 1941, is to create the presumption of a release which will entitle the municipality to the full width of the road without further compensation to the present owners. *Zblewski v. New Hope*, 242 W 451, 8 NW (2d) 365.

Under the statutes then existing and applicable to validate a highway laid out and opened in 1871 under an order of a town board of supervisors duly filed but not accompanied by an award of damages, and under the facts as to the opening and working of and public travel on such highway, it became a legal highway after 3 years, and the town was entitled to open it to its full width as deter-

mined by the order laying it out, as against landowners who had erected fences encroaching on it. (Buchanan v. Wolfinger, 237 W 652, distinguished.) Jacobosky v. Ahnapee, 244 W 640, 13 N W(2d) 72.

Where the town board filed an order laying out a highway within 10 days, but failed to file an award of damages within the 10 days, it lost jurisdiction, so that the proceedings and order were void. Where the proceedings are void, a landowner may bring an action in equity to have the town officers restrained from opening such highway through his land, not being required in such case to proceed under 80.17, Stats. 1947. Roberts v. Jeidy, 256 W 603, 42 NW (2d) 280.

**80.08 History:** R. S. 1849 c. 16 s. 70; R. S. 1858 c. 19 s. 74; 1869 c. 152 s. 74; R. S. 1878 s. 1264; Stats. 1898 s. 1264; 1923 c. 108 s. 11; Stats. 1923 s. 80.08; 1943 c. 334 s. 24.

If the survey shows the center line of the highway the report of the commissioners is not insufficient because it does not state its width. State v. Hogue, 71 W 384, 36 NW 860.

The limits of a highway by user are determined by the limits of the use, but the traveled track does not necessarily determine the limits of the user, and the highway by user includes such portion as goes with the traveled track for the purposes of a highway. Nicolai v. Wisconsin P. & L. Co. 227 W 83, 277 NW 674.

A county highway committee when relocating a highway is not bound by sec. 1264, Stats. 1921. 10 Atty. Gen. 973.

Rights-of-way over lands that may be determined to be reasonably necessary for approaches to bridges and for other highway purposes may be acquired by public authorities by deed or condemnation without limitation as to maximum width. 16 Atty. Gen. 490.

**80.09 History:** 1869 c. 152 s. 55, 60; R. S. 1878 s. 1270; 1889 c. 266 s. 2; Ann. Stats. 1889 s. 1270; Stats. 1898 s. 1270; 1911 c. 370; 1923 c. 108 s. 12; Stats. 1923 s. 80.09; 1939 c. 476; 1943 c. 334 s. 25.

On taking private property for public use and just compensation see notes to sec. 13, art. I.

A release conditioned that it should not be binding if the proceedings to establish a highway should be adjudged invalid only expresses what the law would imply. Williams v. Mitchell, 49 W 284, 5 NW 798.

Where the former owner of land and his grantee have acquiesced for a number of years in the validity of an order laying out a highway thereon and have accepted the line made thereby, and during that time there has been a large increase in the value of the land and large sums have been expended upon the highway, the grantee cannot be heard to allege that such order was invalid because the award did not state the names of the owners upon whose land the highway was laid out or that their names were unknown. State v. Wertzel, 62 W 184, 22 NW 150.

Acceptance of the damages assessed for laying out a highway over the land of the owner will estop him and those who claim under him from denying the legal existence of the highway. Moore v. Roberts, 64 W 538, 25 NW 564.

If the supervisors do not award damages to the landowner or obtain a written release thereof from him their proceedings are in-

valid, and any person interested in defeating the highway may take advantage of their irregularity. A parol promise by the landowner to allow a road to be laid through his land and not to claim damages is a mere license which he may revoke at any time before the road is actually opened for public use and does not estop him from claiming damages. A release of damages should be filed in the office of the town clerk. McKee v. Hull, 69 W 657, 35 NW 49.

By taking an appeal from the award the landowner waives his right to object to the mode in which his damages were assessed. If on such appeal the damages awarded are increased he is as fully estopped from questioning the regularity of the award as if he had accepted the amount fixed by the supervisors. State ex rel. Jenkins v. Harland, 74 W 11, 41 NW 1060.

To constitute a lawfully laid out highway there must be proof or a presumption that damages have been awarded, or that a release of damages or a dedication was procured. State ex rel. Jarman v. Root, 175 W 188, 184 NW 685.

Where proceedings in laying out a highway through a town were in conformity with the statute requiring an assessment of damages, adjoining lot owners in the same plat were not entitled to damages for taking part of a lot in which they had a property right. Fuller v. Town Board, 193 W 549, 214 NW 324.

The provision that the town board in awarding damages for the taking of property for a highway shall make a written award specifying the sum awarded to "each owner," is satisfied, when a piece of land is owned by several persons as heirs or jointly, by a lump-sum award to the group, in this case an award to "the heirs of Ed Sippy, deceased." State ex rel. Sippy v. Nee, 253 W 423, 34 NW (2d) 121.

Both the vendor and the vendee under a contract for the sale of land are "owners." The award should be made to cover the damages of both. 2 Atty. Gen. 71.

**80.10 History:** 1869 c. 152 s. 88; R. S. 1878 s. 1271; 1889 c. 266 s. 3; Ann. Stats. 1889 s. 1271; Stats. 1898 s. 1271; 1923 c. 108 s. 13; Stats. 1923 s. 80.10; 1943 c. 334 s. 26.

**80.11 History:** 1869 c. 152 s. 57, 67, 68, 69; R. S. 1878 s. 1272, 1273; 1883 c. 236; 1889 c. 266 s. 4; Ann. Stats. 1889 s. 1272, 1273; 1893 c. 126; Stats. 1898 s. 1272, 1273; 1911 c. 340, 362, 499; 1923 c. 108 s. 14; Stats. 1923 s. 80.11; 1927 c. 98; 1927 c. 473 s. 24; 1943 c. 275 s. 34; 1943 c. 334 s. 27; 1947 c. 569; 1951 c. 592; 1965 c. 252; 1967 c. 26.

Where a section of the altered road lies wholly within one of the towns the supervisors may determine what part of that section shall be kept in repair by each town and what part of the damages shall be paid by each. A joint order of the supervisors of 2 towns altering a town line road which states that applications for that purpose were made by six freeholders of each town is prima facie evidence that such applications were regularly made. Neis v. Franzen, 18 W 537.

There may be a valid parol apportionment concerning the liability of each town for defects in that part of road assigned to it. Where such apportionment is made, each town, in re-

lation to the part assigned to it, becomes subject to the same liability as if it were wholly in such town. *Montgomery v. Scott*, 34 W 338.

If a highway, in places, is widely variant from the town line it will be presumed to have been laid out as near thereto as the situation of the ground admitted and that the variation was deemed necessary. The right to apportion the expense of making a highway includes the right to apportion the expense of making and keeping a necessary bridge in repair. If a town refuses to keep its agreement concerning repairs the other town may make them and recover the proper proportion of the expense thereof from the town which refused. *Waupun v. Chester*, 61 W 401, 21 NW 251.

A town to which a part of a town line highway has been apportioned to make and maintain under sec. 1273, Stats. 1898, has jurisdiction throughout the entire width thereof for that purpose, no exception being made as to territory in the adjoining town which is given for such highway. *State v. Childs*, 109 W 233, 85 NW 374.

Increase of territory of one of the towns does not relieve it from liability for injuries which occurred after the change but before a new apportionment. *Wolfgram v. Schoepke*, 119 W 258, 96 NW 556.

A road which had become a public highway by user and working was situated as near the town line as the nature of the ground would permit, and had been kept in repair by the adjacent towns for a number of years. It appeared that the maintenance of a bridge on the highway devolved on the towns, without showing that requisite steps had been taken to lay out the highway as a town line road. *State ex rel. Shawano County v. Sexton*, 124 W 352, 102 NW 24.

When the division of a town line road for the purpose of maintenance has been abrogated by the creation of a new town out of a part of the territory of one of the former adjoining towns, a new division for the same purpose should be made by a joint meeting of a majority of the supervisors of each town, if they can agree, or, failing that, by the alternative method provided by sec. 1273, Stats. 1907. No board action by either town is contemplated, nor need the meeting be upon notice specifying the purpose. The meeting is a joint meeting with authority to bind both towns, and an oral agreement carried out for several years by the expenditure of money, is valid so far as executed. *Seif v. Eaton*, 153 W 657, 140 NW 319.

The supervisors of 2 adjoining towns had divided a highway on the line between them into the parts each undertook to maintain. Nothing was said about a bridge wholly within one of the parts. It was thereafter maintained for several years by the town to which such part was assigned. The town that had so maintained the bridge had the duty to replace it after its destruction by a flood. *Pella v. Larabee*, 164 W 403, 160 NW 161.

Town boards have no implied powers to apportion town line highways. 80.11, Stats. 1929, furnishes the only authority which they have to apportion such highways. *Whitewater v. Richmond*, 204 W 388, 235 NW 773.

The status of a town line road not legally laid out, but having its origin in user and be-

coming a public highway by virtue of 80.01 (2), and the relationship existing for more than 55 years between 2 towns respecting the maintenance of parts thereof and the bridges thereon, may not be disturbed by the court. Towns have implied or inherent power, recognized by 80.11 (7) and (8), to arrange for the convenient maintenance of such a highway. A town may ratify the contract of commissioners respecting such maintenance if such ratification is with full knowledge of the facts, and it may be ratified formally at a town meeting or by acquiescence. *Eau Galle v. Waterville*, 207 W 389, 241 NW 377.

80.11 (5) and (6) confer no jurisdiction on the circuit court but on the person who fills the office of the circuit judge of the county. The power is conferred on the judge, not on the court, and although the proceeding is before a judge, it is not a proceeding in court. Where, after a petition properly addressed to a circuit judge for the appointment of commissioners, the parties stipulated that the circuit court on an agreed set of facts could adjudicate the issue of law of whether the road involved was a town-line road within the meaning of 80.11, the adjudication of this issue was within the jurisdiction of the circuit court, such a procedure being authorized by 269.01. *Muskego v. Vernon*, 19 W (2d) 159, 119 NW (2d) 474.

The history of this section indicates a legislative intent to deal with town-line roads laid out as such by the joint action of the majority of supervisors of the towns, town-line roads which had their origin in user, and town-line roads part of which was laid out as such and part whose origin was in user, and it is only those roads that fall within the purview of the statute so as to entitle the supervisors to apply for the appointment of commissioners thereunder. A town road, not laid out as a town-line road, did not become one merely because a small segment thereof was widened by user beyond its laid-out boundaries and was thereafter partly on the town line. *Muskego v. Vernon*, 19 W (2d) 159, 119 NW (2d) 474.

Where a bridge upon a highway extending from a city into a town becomes out of repair, each municipality is to repair that portion within its boundaries. Liability for damages for injuries received by reason of the lack of repairs of such bridge rests upon that municipality within whose boundaries such injuries are received. 3 Atty. Gen. 101.

Under orders made pursuant to statute by supervisors of adjoining towns dividing a town-line highway and assigning certain parts thereof to be maintained by each town, in which there is no provision for joint maintenance of a bridge in one of the parts so assigned, reconstruction of such bridge devolves upon the town to which the part of the highway in which it was located was so assigned. The county in which such town is located may aid in such reconstruction; whether it can be compelled to do so is governed by the same conditions as apply to a bridge wholly within a town. 13 Atty. Gen. 162.

In the absence of statutory provision therefor the town board has no power to spend money on a road or bridge lying wholly with-

in the limits of another town. 19 Atty. Gen. 483.

Where 2 boards have met and taken necessary steps under 80.11, Stats. 1935, to lay out a town-line highway, construction may proceed though no further action has been taken for 2 years. 24 Atty. Gen. 359.

A maintenance agreement made by 2 towns for a town-line road laid out pursuant to statute must be made in accordance with statutory requirements. In the absence of valid agreement each town in which a bridge on a town-line highway is located should contribute to the expense thereof in proportion to the last assessment of taxable property within each town under 80.11 (8), Stats. 1935. Provisions of 80.11 relating to county aid for construction or repair of town bridges apply to bridges jointly maintained by adjoining towns on a town-line highway. 26 Atty. Gen. 234.

The cost of rebuilding a bridge on a highway between the town of Dovre, Barron county, and the town of Auburn, Chippewa county, should be apportioned between respective towns and counties pursuant to 80.11 and 81.38, Stats. 1937. 27 Atty. Gen. 53.

**80.12 History:** 1869 c. 152 s. 138 to 140; 1876 c. 166; R. S. 1878 s. 1274; 1885 c. 380; 1887 c. 133; 1889 c. 266 s. 5; Ann. Stats. 1889 s. 1274, 1274a; Stats. 1898 s. 1274; 1923 c. 108 s. 15; Stats. 1923 s. 80.12; 1939 c. 416; 1943 c. 334 s. 28; 1957 c. 560; 1961 c. 550.

**80.125 History:** 1965 c. 229; Stats. 1965 s. 80.125.

**80.13 History:** 1873 c. 267; 1875 c. 286; R. S. 1878 s. 1275; 1887 c. 212; Ann. Stats. 1889 s. 1275; Stats. 1898 s. 1275; 1907 c. 129; 1915 c. 94; 1923 c. 108 s. 16; Stats. 1923 s. 80.13; 1925 c. 87; 1943 c. 334 s. 29; 1957 c. 579; 1965 c. 252, 433.

The order under sec. 1275, R. S. 1878, need not state that the highway it provides for connects with another highway. If it be proved that the highway laid out connects with a commonly used and traveled highway it need not be shown, in order to sustain the validity of the former, that the latter is a legal highway. The fact that a portion of it has not been continuously used does not operate to discontinue the remainder. Moore v. Roberts, 64 W 538, 25 NW 564.

Within 10 days after it has been determined to lay out a highway the applicant must pay the sum assessed as advantages and thus secure the filing of the order, otherwise it will be considered that the decision was against his application. State ex rel. Giblin v. Union, 68 W 158, 31 NW 482.

Where the damages assessed against the applicant were not paid to the town treasurer until 13 days after the hearing the supervisors are deemed to have decided against his application. It is not a substantial compliance to pay to the chairman of the town board. Baier v. Hosmer, 107 W 380, 83 NW 645.

Under 80.13, Stats. 1927, the town board may lay out a public highway or widen an existing way only when the applicant cannot reach a public highway over his own lands. State ex rel. Guse v. Zubke, 200 W 227, 227 NW 947.

The statute vests the town board with discretion to deny or grant an application to lay

out a highway to premises excluded from highways. Backhausen v. Mayer, 204 W 286, 234 NW 904.

See note to sec. 1, art. I, on exercises of eminent domain, citing State ex rel. Happel v. Schmidt, 252 W 82, 30 NW (2d) 220.

When a person presented to the board an "affidavit satisfying them" that he is the owner of land shut out from all public highways, the filing of an affidavit complying with the statute in all respects gave the board jurisdiction over the subject matter. The board's order, determining that the land in question was landlocked and laying out a road across adjoining land, made after due hearing at which the adjoining owner was present, was not void even if erroneous; hence, where the adjoining owner elected to bring certiorari under 80.34 (2) and the court affirmed the proceedings, the adjoining owner, after the time specified in 80.34 (2), could not maintain an action to set aside the order on the alleged ground that in fact the owner who obtained the road had always had a right of way to a public highway, there being no fraud on the part of such latter owner or of the board. Error within jurisdiction, which does not render the order void, is subject to attack only within the period specified in 80.34 (2). Wilusz v. Witek, 258 W 397, 46 NW (2d) 337.

The only sum which an applicant is required to pay is the amount assessed as advantages, and this amount is to be paid to the town treasurer, but, under 80.30 (1), the damages assessed are to be paid by the town to the landowner whose land is taken when the highway is opened, such highway being a public highway. 80.34 (2) applies to an order made in proceedings before town supervisors under 80.13 and, in the instant mandamus action against the supervisors, precluded the raising of certain claimed irregularities and the dispute about them in the proceedings had before the supervisors prior to their making the order laying out the highway. Larsen v. Town Supervisors, 5 W (2d) 240, 92 NW (2d) 859.

A highway laid out to lands shut off from a highway is a public highway and must be maintained by the town. 5 Atty. Gen. 165; 6 Atty. Gen. 517.

Upon refusal of the town board to lay out a highway to excluded lands the applicant may appeal. 6 Atty. Gen. 517.

Supervisors cannot condemn a right of way to a controlled access highway authorized by 84.25. 42 Atty. Gen. 320.

**80.14 History:** 1903 c. 287 s. 1; Supl. 1906 s. 1275b; 1923 c. 108 s. 17; Stats. 1923 s. 80.14; 1943 c. 334 s. 30.

**80.15 History:** 1895 c. 348; Stats. 1898 s. 1275a; 1923 c. 108 s. 18; Stats. 1923 s. 80.15; 1943 c. 334 s. 31.

**80.16 History:** 1909 c. 318; Stats. 1911 s. 1275m; 1923 c. 108 s. 19; Stats. 1923 s. 80.16; 1943 c. 334 s. 32.

**80.17 History:** 1869 c. 152 s. 77, 78; 1876 c. 297; R. S. 1878 s. 1276; 1881 c. 323; Ann. Stats. 1889 s. 1276; Stats. 1898 s. 1276; 1911 c. 572; 1915 c. 106; 1923 c. 108 s. 20; Stats. 1923 s. 80.17; 1943 c. 334 s. 33; 1945 c. 105.

By taking an appeal the landowner waives

his right to object to irregularities in the assessment of his damages by the supervisors. State ex rel. Jenkins v. Harland, 74 W 11, 41 NW 1060.

Sec. 1276, R. S. 1878, was borrowed from New York and prior to its adoption here had been there construed to give the right of appeal to any freeholder of the town who considers himself aggrieved by the action taken though he may not own any land affected by the highway or have any special interest in the latter. State ex rel. Rogers v. Wheeler, 97 W 96, 72 NW 225.

Where a notice has been served upon a person under 80.05 he may take an appeal under 80.17, although he is not a resident of the town. State ex rel. Curtis v. Town Board, 107 W 1, 82 NW 550.

The decision of commissioners to lay out a road, made after a landowner had given a bond for \$1,000 to the town, conditioned to build the road and a bridge thereon, is void as against public policy, notwithstanding the commissioners testified, and the trial court found, that they were not influenced by the giving of the bond. State ex rel. Dosch v. Ryan, 127 W 599, 106 NW 1093.

A private contribution or offer of aid in case a highway is laid out is not objectionable if it is so trifling compared to the cost of a proposed highway that it cannot reasonably be deemed to have been an inducement to the decision of the board. Sharpe v. Hosey, 141 W 76, 123 NW 647.

Notice of the application for the appointment of commissioners need not be given to the property owners affected by the proceeding. Marlatt v. Chipman, 160 W 193, 151 NW 249.

The "determination" from which an appeal is allowed is the written order filed in the town clerk's office as required by 80.07, and not the oral or mental decision of the supervisors, so that the 30 days run from the time of filing, not the time the supervisors meet to decide on the application. Becker v. Jones, 163 W 226, 157 NW 789.

Failure of a town board within 60 days after filing of a petition for laying out a highway to take final action is a denial of the application, regardless of interim proceedings. State ex rel. Thompson v. Eggen, 206 W 651, 238 NW 404, 240 NW 839.

**80.18 History:** 1869 c. 152 s. 79; R. S. 1878 s. 1277; Stats. 1898 s. 1277; 1915 c. 106 s. 2; 1923 c. 108 s. 21; Stats. 1923 s. 80.18; 1943 c. 334 s. 34.

Reference in the proof of service of notice of time and place for appointing commissioners as "notice of appeal" is not a misnomer. The official character of the persons upon whom notice was served is shown by the fact that they signed the order refusing to alter the highway. State ex rel. Iola v. Nelson, 57 W 147, 15 NW 14.

The inadvertent omission of the word "not" in an appeal bond under sec. 1277, Stats. 1911, which should have been conditioned to pay costs if the order appealed from "shall not be reversed," was a nonprejudicial error. Marlatt v. Chipman, 160 W 193, 151 NW 249.

A failure to serve notice as required by sec. 1277, Stats. 1913, was a failure to give jurisdic-

tion which was not cured by a subsequent voluntary appearance of the supervisors. Becker v. Jones, 163 W 226, 157 NW 789.

**80.19 History:** 1869 c. 152 s. 79, 80; R. S. 1878 s. 1279; Stats. 1898 s. 1279; 1915 c. 106 s. 4; 1923 c. 108 s. 22; 1923 c. 446 s. 1; Stats. 1923 s. 80.19; 1943 c. 334 s. 35; 1969 c. 87.

If the name of one previously acting as supervisor in the proceedings is included in the list of commissioners it may be struck off; but the objection is too late after the appeal is determined. Brock v. Hishen, 40 W 674.

Appointment as commissioner of one who petitioned for the alteration of the highway is an irregularity which is waived by not objecting at the time of appointment. State ex rel. Iola v. Nelson, 57 W 147, 15 NW 14.

Highway commissioners, appointed to review determinations of town boards relating to highways, constitute a tribunal of special and limited jurisdiction, and must act in substantial accord with the statutes or order of the judge. Commissioners so appointed can acquire and retain jurisdiction of the proceedings only by complying with the statutes. Where the commissioners, appointed to review a determination of town boards refusing to lay a certain highway across the town line, made their decision and made return thereof to the town clerks within the 20 days required they had no jurisdiction to make a second decision in the same matter 22 months after the first decision. State ex rel. Zemlicka v. Baker, 243 W 606, 11 NW (2d) 364.

**80.20 History:** 1869 c. 152 s. 80, 81; R. S. 1878 s. 1280; 1881 c. 137; Ann. Stats. 1889 s. 1280; Stats. 1898 s. 1280; 1915 c. 106 s. 5; 1923 c. 108 s. 23; Stats. 1923 s. 80.20; 1943 c. 334 s. 36; 1945 c. 105; 1947 c. 601; 1963 c. 407.

The facts which led to the appointment of the commissioners need not be recited in the order, nor a statement be made that all the requirements of the statute were complied with. The order is good if signed by 2 of the 3 commissioners. State ex rel. McCune v. Goodwin, 24 W 286.

The commissioners must be sworn "justly and impartially to discharge their duties as such." An oath which does not substantially comply with sec. 1280, R. S. 1878, does not confer jurisdiction. State ex rel. Vos v. Hoelz, 69 W 84, 33 NW 597.

The decision is not rendered ineffectual by failure to file within the designated time. State ex rel. Iola v. Nelson, 57 W 147, 15 NW 14.

If one of the commissioners fails to take the required oath to qualify him to act, a decision concurred in by all 3 or by the other 2 will be valid, under the rule prescribed by sec. 4971 (3), Stats. 1911. Rogers v. Draves, 154 W 23, 142 NW 127.

Commissioners constitute a temporary body created for a specific function and when that purpose is accomplished they cease to exist as commissioners and have no further jurisdiction. The provision that "the judge shall cause to be filed with the town clerk, etc." does not require the commissioners to file their records with the judge. In the absence of specific provision, 80.33 requires commissioners to file their records with the town clerk. Petition of Bradt, 260 W 1, 49 NW (2d) 903.

**80.21 History:** 1869 c. 152 s. 82; R. S. 1878 s. 1282; Ann. Stats. 1889 s. 1282; Stats. 1898 s. 1282; 1923 c. 108 s. 24; 1923 c. 446 s. 4; Stats. 1923 s. 80.21; 1943 c. 334 s. 37.

When commissioners, appointed by the county judge on an appeal by the owner of a private road from an order of the town board refusing to widen such private road, filed their determination that the road should be widened, the town board had no discretion. It became its duty to widen the road. State ex rel. Happel v. Schmidt, 252 W 82, 30 NW (2d) 220.

**80.22 History:** 1869 c. 152 s. 83; R. S. 1878 s. 1283; Stats. 1898 s. 1283; 1905 c. 189 s. 1; Supl. 1906 s. 1283; 1923 c. 108 s. 25; Stats. 1923 s. 80.22; 1943 c. 334 s. 38.

Where supervisors have no jurisdiction because of insufficiency of notice, refusal to act on the application does not amount to a decision against it under sec. 1283, Stats. 1898. State ex rel. Limmix v. Clyde, 130 W 159, 109 NW 985.

Where there is no determination by the supervisors as to the laying out of a highway there was no bar to a new application. State ex rel. Ronglien v. Clemenson, 148 W 268, 134 NW 403.

**80.23 History:** 1869 c. 152 s. 84; R. S. 1878 s. 1284; Stats. 1898 s. 1284; 1909 c. 57; 1915 c. 60; 1923 c. 108 s. 26; Stats. 1923 s. 80.23; 1943 c. 334 s. 39.

Where an order is made which merely widens an existing highway the method herein prescribed for the removal of fences must be pursued. State v. Clark, 67 W 229, 30 NW 122.

Notice to remove a fence from a highway within 30 days from the date of the order was sufficient where it was served on the day it was dated. The provisions of sec. 1284, Stats. 1898, do not apply to persons who are in default after notice to remove the fence. In such case the county board may remove the fence without notice or during the restricted part of the year. Morris v. Edwards, 132 W 91, 112 NW 248.

The giving of the notice required by sec. 1284, Stats. 1913, is not a condition precedent to proceedings under sec. 1330. Mineral Point v. Kealy, 164 W 351, 160 NW 63.

**80.24 History:** 1869 c. 152 s. 61; R. S. 1878 s. 1285; Stats. 1898 s. 1285; 1923 c. 108 s. 27; 1923 c. 446 s. 1; Stats. 1923 s. 80.24; 1943 c. 334 s. 40; 1945 c. 105; 1955 c. 10 s. 77; 1959 c. 640.

Appealing from the award is a waiver of all objections to the regularity of the assessment. State ex rel. Jenkins v. Harland, 74 W 11, 41 NW 1060.

The application must be in writing and must describe the premises and the notice thereof must be served as the statute prescribes, or the judge to whom application is made does not obtain jurisdiction of the subject matter. Such jurisdiction is not vested in him by the voluntary appearance of the supervisors. State ex rel. Milliren v. Varnum, 81 W 593, 51 NW 958.

The remedy of a landowner is by appeal under sec. 1285, Stats. 1898, and if he fails to exercise it he cannot bring an action in equity to enjoin the laying out of the highway. Olson v. Curran, 137 W 380, 119 NW 101.

**80.25 History:** 1901 c. 331 s. 1; Supl. 1906 s. 1286a; 1911 c. 663 s. 148; 1923 c. 108 s. 28; 1923 c. 446 s. 4; Stats. 1923 s. 80.25; 1943 c. 334 s. 41; 1945 c. 105; 1955 c. 10 s. 77; 1959 c. 640.

**80.26 History:** 1869 c. 152 s. 62; R. S. 1878 s. 1286; Stats. 1898 s. 1286; 1901 c. 331 s. 2; Supl. 1906 s. 1286b; 1911 c. 663 s. 148; 1923 c. 108 s. 29; 1923 c. 446 s. 4; Stats. 1923 s. 80.26; 1943 c. 334 s. 42.

**80.27 History:** 1869 c. 152 s. 63; R. S. 1878 s. 1287; Stats. 1898 s. 1287; 1923 c. 108 s. 30; 1923 c. 446 s. 4; Stats. 1923 s. 80.27; 1927 c. 473 s. 25; 1943 c. 334 s. 43; 1945 c. 33; 1969 c. 87.

That the jury are freeholders must affirmatively appear or their acts will be void. United States ex rel. McDonald v. Summit, 1 Pin. 566.

Where, through mistake, persons who are not freeholders are summoned to make the appraisal such mistake does not render the award void; the parties, having had due notice of the time and place of striking the jury, by failing to appear have waived that objection. State ex rel. Van Vliet v. Wilson, 17 W 687.

**80.28 History:** 1869 c. 152 s. 64; R. S. 1878 s. 1288; Stats. 1898 s. 1288; 1923 c. 108 s. 31; 1923 c. 446 s. 4; Stats. 1923 s. 80.25; 1943 c. 334 s. 44.

**80.29 History:** 1869 c. 152 s. 65; 1876 c. 334 s. 3; R. S. 1878 s. 1290; Stats. 1898 s. 1290; 1923 c. 108 s. 33; 1923 c. 446 s. 1; Stats. 1923 s. 80.29; 1943 c. 334 s. 45; 1967 c. 303.

**80.30 History:** 1869 c. 152 s. 66; 1872 c. 19; 1873 c. 34; R. S. 1878 s. 1291; 1885 c. 289; Ann. Stats. 1889 s. 1291; 1893 c. 127; 1897 c. 267; Stats. 1898 s. 1291; 1899 c. 257 s. 1; Supl. 1906 s. 1291; 1907 c. 237; 1919 c. 92, 193; 1923 c. 108 s. 34; Stats. 1923 s. 80.30; 1927 c. 473 s. 26; 1943 c. 334 s. 46.

The acceptance of damages estops the owner of land and those claiming under him from denying the legal existence of the highway on account of the laying of which the damages were paid. Moore v. Roberts, 64 W 538, 25 NW 564.

Under sec. 1290, Ann. Stats. 1889, a vote was necessary if the award of damages was \$250 or more. Where the assessment made was less than \$250 and void proceedings on appeal resulted in increasing the damages beyond that sum, a vote of the electors refusing, because of such void increase of damages, to approve and accept the highway, is not a defense to mandamus proceedings to compel the opening of the highway. State ex rel. Milliren v. Varnum, 81 W 593, 51 NW 958.

See note to 80.39, citing 37 Atty. Gen. 217.

**80.31 History:** 1923 c. 446 s. 2; Stats. 1923 s. 80.31; 1943 c. 334 s. 47.

**80.32 History:** 1869 c. 152 s. 85, 87; 1874 c. 50; 1876 c. 346; R. S. 1878 s. 1292, 1296; 1882 c. 253; 1885 c. 102; Ann. Stats. 1889 s. 1292, 1294, 1294a, 1296; Stats. 1898 s. 1292, 1294, 1296; 1913 c. 525; 1923 c. 108 s. 36 to 38; Stats. 1923 s. 80.32; 1937 c. 216; 1939 c. 209; 1943 c. 334 s. 48; 1945 c. 415.

Sec. 1294, R. S. 1878, relates to obstructions in the highway as distinguished from en-

croachments, and the failure of the supervisors to compel the removal of a fence which encroached upon a highway for 5 years is not such an abandonment of the way as relieves the adjoining owner from the duty to remove such fence. *State v. Wertzel*, 62 W 184, 22 NW 150.

Although a portion of a highway is not continuously used it does not for that reason cease to be a highway. *Moore v. Roberts*, 64 W 538, 25 NW 564.

A highway once established continues to be such until it has been discontinued. The occupation of a part of it by an individual is a nuisance and no lapse of time and no acquiescence on the part of the public affects the public rights therein. *Reilly v. Racine*, 51 W 526, 8 NW 417; *Childs v. Nelson*, 69 W 125, 33 NW 587.

Not until a new highway is laid out and made fit for travel is the old road discontinued. Until the new way is opened the old cannot be inclosed by the owner of the land and it is the duty of town authorities to keep it open. *Witter v. Damitz*, 81 W 385, 51 NW 575.

The question of abandonment arose out of the fact that 2 highways met at right angles at a section corner; owing to a hill on the line of one of them near the corner travel had diverged, and the corner and a small portion of such highway near it was unused for more than 5 years. Such unused portions were nevertheless parts of the highways. "Every public highway" does not mean that every part of the highway, however small, that has not been traveled or worked is discontinued. It is a highway as a generic term, to which the statute relates; at least enough of any public road or thoroughfare to be called in ordinary parlance a "highway," or as is meant by the statute when it provides for laying out a "highway." *Maire v. Kruse*, 85 W 302, 55 NW 389.

The portion of the road opened or traveled need not necessarily have been upon the precise route so surveyed in order to prevent the road from becoming vacant by virtue of the statute, but it should be substantially along that route. *Williams v. Giblin*, 86 W 147, 56 NW 645.

Sec. 1294, R. S. 1878, is not applicable to streets dedicated or granted by a recorded plat, operating as a statutory conveyance. Such streets are not highways. *Paine L. Co. v. Oshkosh*, 89 W 449, 61 NW 1108.

Where part of a territorial road was in form, but not legally, vacated, and a new road laid which accommodated the travel, and the vacated portion was fenced and cultivated for 27 years, during which time it was not worked or claimed to be a highway, there was a total abandonment of it, as a route of travel. *Herick v. Geneva*, 92 W 114, 65 NW 1024.

A highway once abandoned under 80.32 cannot by virtue of 80.01 be made a public highway by working the same for 4 years. While a landowner who accepts damages for the laying out of a highway over his land is estopped from attacking the validity of the highway, he is not estopped from claiming the highway has been abandoned. *State v. Halvorson*, 187 W 611, 205 NW 426.

Abandonment of a highway by virtue of

statute can occur only when it has been entirely abandoned as a route of travel and when no highway funds have been expended on it for 5 years. *State v. Maresch*, 225 W 225, 273 NW 225.

A bridge on a discontinued highway belongs to the adjoining landowners. *Carpenter v. Spring Green*, 231 W 72, 285 NW 409.

**80.33 History:** 1869 c. 152 s. 73; R. S. 1878 s. 1297; Stats. 1898 s. 1297; 1923 c. 108 s. 40; Stats. 1923 s. 80.33; 1943 c. 334 s. 49.

See note to 80.20, citing *Petition of Bradt*, 260 W 1, 49 NW (2d) 903.

**80.34 History:** 1869 c. 152 s. 59; R. S. 1878 s. 1298; Stats. 1898 s. 1298; 1923 c. 108 s. 41; 1923 c. 446 s. 2; Stats. 1923 s. 80.34; 1943 c. 334 s. 50.

The invalidity of the order may be shown by proof that the notices required were not given. *State v. Logue*, 73 W 598, 41 NW 1061.

Sec. 59, ch. 19, R. S. 1858, does not operate to make an order presumptive evidence as to the jurisdictional facts required by law, which it did not recite. *Williams v. Giblin*, 86 W 147, 56 NW 645.

A certified copy of such an order laying out a highway is admissible in evidence, and an objection to its admission on the ground that the original should be produced does not raise a question as to the form of the certificate. *Nicolai v. Davis*, 91 W 370, 64 NW 1001.

To be evidence the order must so describe the road that it can be located therefrom. *Blair v. Milwaukee L., H. & T. Co.* 110 W 64, 85 NW 675.

The presumption which is raised by the order discontinuing the highway is not conclusive but may be rebutted by evidence. *Schroeder v. Klipp*, 120 W 245, 97 NW 909.

An order laying out or discontinuing a highway is presumptive evidence of the proper service of notice and of the regularity of all prior proceedings. It is conclusive in the absence of evidence rebutting the facts stated in it. *State ex rel. Gottschalk v. Miller*, 136 W 344, 117 NW 809.

Supervisors filed an order laying out a road on January 16. On February 13 plaintiffs took an appeal to the county judge under 80.17. Commissioners filed an order affirming the supervisors' order on April 9. Plaintiffs began an action to restrain the supervisors on May 16. Action is not barred under the 3-month rule since the period from appeal to the county judge until the filing of the commissioners' order operated as a stay of proceedings. *Hedberg v. Dettling*, 198 W 342, 224 NW 109.

Action of a town board after acquiring jurisdiction by the filing of a petition for laying out a highway, however irregular and erroneous, is not void; and where the board entertains such a petition within one year after denying a former petition, notwithstanding 80.22 prohibiting it, and proceedings on appeal eventuate in an order by commissioners, fair upon its face, laying out the highway, the order can never be attacked after 3 months. (*Roehrborn v. Ladysmith*, 175 W 394, 185 NW 170, so far as in conflict overruled.) *State ex rel. Thompson v. Eggen*, 206 W 651, 238 NW 404, 240 NW 839.

A return filed before motion to quash the

writ of certiorari must be taken as a verity and the matter involved decided on the assumption that the facts stated in the return are true. A landowner cannot reach by certiorari questions as to defects, not disclosed by the return to the writ, in the proceedings to lay out a town road. *State ex rel. Paulson v. Town Board*, 230 W 76, 283 NW 360.

An order laying out a highway, filed within the 10 days required by 80.07, but without an award of damages being filed within the 10 days, was not "fair on its face" so as to be immune from attack after 3 months from the making of the order. *Roberts v. Jeidy*, 256 W 603, 42 NW (2d) 280.

It is the responsibility of the petitioner for a writ of certiorari to ascertain the person or body having legal custody of the record to be reviewed, and to cause the writ to be properly directed. A writ under 80.34 (2) should be directed to the town clerk and where such writ was misdirected, the court obtained no jurisdiction. (*State ex rel. Paulson v. Town Board*, 230 W 76, distinguished.) *Petition of Bradt*, 260 W 1, 49 NW (2d) 903.

**80.35 History:** 1869 c. 152 s. 76; R. S. 1878 s. 1299; 1881 c. 273; Ann. Stats. 1889 s. 1299; Stats. 1898 s. 1299; 1923 c. 108 s. 42; Stats. 1923 s. 80.35; 1943 c. 334 s. 51.

**80.37 History:** 1889 c. 106; Ann. Stats. 1889 s. 1269a; Stats. 1898 s. 1226a; 1923 c. 108 s. 44; Stats. 1923 s. 80.37; 1943 c. 334 s. 53; 1965 c. 252.

**80.38 History:** R. S. 1858 c. 19 s. 2, 74; 1861 c. 173 s. 1; 1864 c. 310 s. 1; 1868 c. 122 s. 1; 1869 c. 152 s. 147; 1871 c. 8; R. S. 1878 s. 1224; 1887 c. 210; Ann. Stats. 1889 s. 1224; Stats. 1898 s. 1224; 1923 c. 108 s. 45; Stats. 1923 s. 80.38; 1943 c. 334 s. 54; 1955 c. 366.

Streets in a plat of an unincorporated village, recorded by order of the town board and declared town highways, but not opened or worked, become highways by estoppel as between the owner of the plat and his grantees of lots therein, and the latter may sue in equity to compel the removal of fences on such streets. *McFarland v. Lindekugel*, 107 W 474, 83 NW 757.

Where an application was filed with the town clerk to have a road shown on a plat as "private" designated and maintained as a public highway, but the application on its face did not appear to be signed by 6 or more freeholders residing within the limits of the plat, as required by 80.38, Stats. 1945, and a resolution of the town board accepting the road to maintain it as other town roads was not adopted until more than 10 days after the filing of the application, there was no legal acceptance of the road by the town board. In *re Vacating Plat of Chiwaukee*, 254 W 273, 36 NW (2d) 61.

Applicability of the section is discussed in *Gogolewski v. Gust*, 16 W (2d) 510, 114 NW (2d) 776.

**80.39 History:** 1869 c. 152 s. 90, 128 to 135; 1870 c. 108; 1871 c. 78 s. 5; 1871 c. 114 s. 2, 3; R. S. 1878 s. 1300 to 1304, 1306, 1307; 1879 c. 194 s. 10; 1883 c. 85, 336; Ann. Stats. 1889 s. 1300 to 1304, 1306, 1307; Stats. 1898 s. 1300 to 1304, 1306, 1307; 1913 c. 754; 1919 c. 343;

1923 c. 108 s. 46 to 52, 79; 1923 c. 446 s. 1, 4; Stats. 1923 s. 80.39 to 80.45, 80.64 (1); 1927 c. 249; 1943 c. 334 s. 55; Stats. 1943 s. 80.39; 1953 c. 600; 1961 c. 40; 1965 c. 252; 1969 c. 276.

Resident freeholders, within the meaning of ch. 133, Laws 1863, as amended, are persons who reside in the town and own a freehold interest in lands situated therein. *Damp v. Dane*, 29 W 419.

As the county board might authorize its committee to decide the application for the change of a state road and order the change it has power to ratify such a decision and order made without authority. The provisions in relation to filing the order changing the road are merely directory. *Hark v. Gladwell*, 49 W 172, 5 NW 323.

Towns are liable for injuries on highways laid out under secs. 1300-1307, R. S. 1878. *Stilling v. Thorp*, 54 W 528, 11 NW 906.

Sec. 1300, R. S. 1878, contemplates that the committee may have all the powers of the board in viewing the proposed route and acting in the field; but such committee must report to the board and that body must make the order laying out the highway, which order must be signed and filed before a highway is legally established. *Gillett v. McGonigal*, 80 W 158, 49 NW 814.

A road laid out by a county board is, when laid, to all intents and purposes, the highway of the town through which it passes, precisely as if laid by the supervisors of the town. Hence, in laying it, the county supervisors do not act in behalf of the county, but on behalf of the town, and the county is not liable for trespasses committed by its officers. *Dodge v. Ashland County*, 88 W 577, 60 NW 830.

The county board acting through its committee may cause a highway laid out under sec. 1300, Stats. 1915, to be opened for travel where the towns refuse or fail to do so. 5 *Atty. Gen.* 437.

On appeal from denial by a county board committee of a petition under 80.39 (1) (a), seeking relocation of a county trunk highway, commissioners appointed to hear the appeal are to make an award for damages if they reverse the county board's order, the procedure specified in 80.21 for similar appeals from town board orders being incorporated by reference in 80.39 (3). 80.39 (5), rather than 80.30 (2), is controlling where damages on relocation exceed \$1,500. Commissioners on appeal from an order made under 80.39 (1) (a) may consider any matters upon which the record below was made and are not confined to the transcript of such proceedings. 37 *Atty. Gen.* 217.

A county may lay out roads wholly within a single town. 41 *Atty. Gen.* 266.

Neither a town board, nor a county board in a county of less than 150,000 population, has authority to vacate, abandon, or discontinue existing public highways which each has a duty to maintain, except in compliance with statutory procedures which must be initiated by the prescribed number of resident freeholders. 57 *Atty. Gen.* 224.

**80.40 History:** 1872 c. 152 s. 5, 6; R. S. 1878 s. 1310; Stats. 1898 s. 1310; 1907 c. 133; 1923 c. 108 s. 53; Stats. 1923 s. 80.46; 1943 c. 334 s. 56; Stats. 1943 s. 80.40.

**80.41 History:** 1959 c. 547; Stats. 1959 s. 80.41.

**80.47 History:** 1889 c. 255; Ann. Stats. 1889 s. 1296a; Stats. 1898 s. 1296a; 1923 c. 108 s. 54; Stats. 1923 s. 80.47; 1943 c. 334 s. 57.

The owner of land which abuts on a street on which a railroad has been built along the side of the street opposite his land and beyond the center thereof cannot claim that it was not legally laid down because an ordinance required that the track should be placed in the center of the street, the city not objecting on account of the noncompliance therewith. Besides sec. 1828, R. S. 1878, gives the right to construct a railroad across or along any street which its route should intersect, and the ordinance would be controlled by it if there is a conflict. Trustees F. C. Church v. Milwaukee & L. W. R. Co. 77 W 158, 45 NW 1086.

It is not sufficient that the court find that a railroad built before enactment of ch. 255, Laws 1889, was illegally "laid down," since it may nevertheless have become legally "established" and thus be within the saving proviso. The neglect of the company to restore a street to the former condition of usefulness or its use of such street without lawful authority are immaterial. Abutting owners on one side of the street may not make objection for owners on the other side, the rights of the latter being of no concern to the former. Sinnott v. Chicago & Northwestern R. Co. 81 W 95, 50 NW 1097.

The extension of the sides or eaves of a passing car over the half of an alley opposite a lot is not an obstruction or use of the alley which appreciably damages the lot, notwithstanding a few inches of filling may be necessary for the convenience of travel. Morris v. Wisconsin M. R. Co. 82 W 541, 52 NW 758.

The lawful change of the grade of a street is not a closing up or use or obstruction of the street within the meaning of ch. 255, Laws 1889. Smith v. Eau Claire, 78 W 457, 47 NW 830; Colclough v. Milwaukee, 92 W 182, 65 NW 1039.

In the absence of a statute a municipality is not liable to abutting owners for damages resulting from such a change. Walsh v. Milwaukee, 95 W 16, 69 NW 818.

Ch. 255, Laws 1889, does not vest any interest or estate in the land in an abutting owner which was not formerly possessed by him, but gives him the right to recover consequential damages in case a part of the street is taken for railway purposes. Kuhl v. Chicago & Northwestern R. Co. 101 W 42, 77 NW 155.

The construction of a railway track along the further side of a street bounding an owner's lots without taking any of his land is not a trespass for which an action at law for damages may be maintained or an injunction granted. But he is entitled to compensation, for consequential damages suffered, under sec. 1296a, Stats. 1915. Peters v. Chicago & Northwestern R. Co. 165 W 529, 162 NW 916.

As to liability of railroads on separation of grades, see note to 86.11, citing Application of Doss, 171 W 52, 174 NW 718.

An abutting owner cannot confer upon any other party any special privilege in the use or occupancy of the street in front of his premises for purposes other than travel and its incidental uses, such as a special parking priv-

ilege. The entire public is equally entitled to the use of any part of a street for travel or its incidents so long as the rights of the abutting owner are not impaired. Park H. Co. v. Ketchum, 184 W 182, 199 NW 219.

See note to 66.045, citing Hotel Wisconsin R. Co. v. Phillip Gross R. Co. 184 W 388, 198 NW 761, 200 NW 304.

A city constructing a shelter for entrance to a pedestrian subway across a street may be liable to abutting property owners for consequential damages insofar as the shelter will obstruct the street. Randall v. Milwaukee, 212 W 374, 249 NW 73.

The owner of abutting land has title to the center of the highway or street adjacent to his land subject to the public easement; and the conveyance of abutting land transfers the legal title to the land to the center of the adjacent highway or street, in the absence of a clear intent to the contrary, even where the conveyance names the highway as the boundary of the parcel conveyed; and such rule with reference to streets is also applicable to alleys. Williams v. Larson, 261 W 629, 53 NW (2d) 625.

Land "abuts" even though only the end of a dead-end street coincides with the property line. For purposes of 80.47, Stats. 1951, a lessee of land has the same status as an owner. Royal Transit, Inc. v. West Milwaukee, 266 W 271, 63 NW (2d) 62.

A lawful change in the grade of a highway is not a closing up, use, or obstruction of the highway within the meaning of 80.47, Stats. 1949. Zache v. West Bend, 268 W 291, 67 NW (2d) 301.

A city ordinance regulating heavy trucking on streets in residential districts, valid under 85.55, Stats. 1955, can be applied to trucks operating from a quarry, but when the streets designated for use lead the trucks into a blind alley because of a different designation of heavy trucking streets by an adjoining municipality, the quarry operator is denied his right of ingress and egress under 80.47, and a court of equity can designate a route. Hartung v. Milwaukee County, 2 W (2d) 269, 86 NW (2d) 475, 87 NW (2d) 799.

**80.48 History:** 1882 c. 168; Ann. Stats. 1889 s. 1299a subs. 1 to 11; Stats. 1898 s. 1299 to 1299f; 1923 c. 94; 1923 c. 108 s. 55 to 60; Stats. 1923 s. 80.48; 1943 c. 334 s. 58, 149; 1965 c. 252.

**80.64 History:** 1925 c. 233; Stats. 1925 s. 80.64 (3); 1927 c. 39; 1931 c. 303; 1943 c. 334 s. 60; Stats. 1943 s. 80.64; 1945 c. 556; 1947 c. 130; 1965 c. 252.

**80.65 History:** 1955 c. 91; Stats. 1955 s. 80.65; 1967 c. 224.

## CHAPTER 81.

### Town Highways.

**Editor's Note:** Extensive notes on ch. 334, Laws 1943, revising the highway laws, are set forth on pages 1296 to 1300, Wis. Statutes, 1943.

**81.01 History:** R. S. 1849 c. 16 s. 1, 2; R. S. 1858 c. 19 s. 1, 2; 1869 c. 152 s. 1, 2, 7 to 9, 11, 12, 22, 25, 32; 1878 c. 250; R. S. 1878 s. 1223, 1227, 1228, 1240, 1246; 1880 c. 60;