Attorneys' Fees in Condemnation Proceedings

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ATTORNEYS' FEES IN CONDEMNATION PROCEEDINGS

Introduction

Both the United States Constitution\(^1\) and the California Constitution\(^2\) provide that private land shall not be taken for public use without the payment of “just compensation.” “Just compensation” is generally defined as “market value.”\(^8\) Yet in practice, it is not infrequent that a condemnor initially will offer a condemnee a price which is less than the fair market value of his property.\(^4\) Often in such cases the

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\(^1\) U.S. Const. amend. V: “[N]or shall private property be taken for public use, without just compensation.”

\(^2\) Cal. Const. art. I, § 14: “Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner . . . which compensation shall be ascertained by a jury, unless a jury be waived . . . .”

\(^3\) “The ‘just compensation’ which is [constitutionally] guaranteed to the owner whose property is to be taken or damaged for public use is its market value . . . .” Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 536, 28 P. 681, 683 (1891) (concurring opinion); accord, Metropolitan Water Dist. v. Adams, 16 Cal. 2d 676, 680, 107 P.2d 618, 620 (1940); see United States v. Miller, 317 U.S. 369, 373 (1942); Pacific Gas & Elec. Co. v. Chubb, 24 Cal. App. 365, 267, 141 P. 36 (1914); 4 P. Nichols, The Law of Eminent Domain §§ 12.1[5], 12.31[2] (rev. 3d ed. 1962) [hereinafter cited as Nichols].

\(^4\) Berger & Rohan, The Nassau County Study: An Empirical Look into the Practices of Condemnation, 67 Colum. L. Rev. 430 (1967) [hereinafter cited as the Nassau County Study]. This study found that in Nassau County, New York, only 15.7 percent of the negotiated settlements that were investigated were for an amount equal to or greater than the lower of the county's two appraisals. This is a result “that an impartial observer might consider a sine qua non for ‘just’ compensation.” Id. at 442. Of the negotiated settlements, 56.9 percent were for an amount less than 90 percent of the amount of the county's low appraisal. Id. at 443. In spite of New York's constitutional guarantee of “just compensation,” N.Y. Const. art. I, § 7(a), the county's negotiators were instructed to settle at amounts which the authors concluded were not to exceed 60 percent to 85 percent of the county's lower appraisal. Nassau County Study at 445.

The study contrasts the results found in Nassau County with awards in federal condemnation cases settled by negotiation. An Army Corps of Engineers study found that one-fifth of the settlements were for less than the Corps' appraisal, two-fifths were for more than the appraisal, and where differences occurred, they generally were not very large. Id. at 458 n.60, citing Hearings on Real Property Acquisition Practices and Adequacy of Compensation in Federal and Federally Assisted Programs Before the Select Subcomm. on Real Property Acquisition of the House Comm. on Public Works, 88th Cong., 1st Sess., 368-81, 383-90 (1963); see Hearings on S. 1351 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. 26, 37-38 (1968) (testimony of Forrest Cooper and Gordon Ramstead) [hereinafter cited as Hearings on S. 1351].
The greater the difference in the parties' respective valuations of the land, the greater the likelihood that the condemnee's attorney will render substantial services—and thereafter present a sizeable bill to his client.6

Attorneys' fees generally have been allowed in condemnation proceedings only in accordance with statutory provision.7 Unfortunately, the legislatures of the various states and the federal government have been reluctant to provide for reimbursing a condemnee for his costs of litigation, even where the court's award is substantially greater than the condemnor's highest pre-trial offer. The great majority of states have no legislation at all.8 Of those states that have

5 La Mesa—Spring Valley School Dist. v. Otsuka, 57 Cal. 2d 309, 317, 369 P.2d 7, 12, 19 Cal. Rptr. 479, 484 (1962) (dictum). In the Nassau County Study, supra note 4, 57.5 percent of the landowners were represented by an attorney. Of those represented, two-fifths were self represented; thus, of every hundred lay condemnees, nearly 45 percent retained attorneys.


7 La Mesa—Spring Valley School Dist. v. Otsuka, 57 Cal. 2d 309, 313, 369 P.2d 7, 10, 19 Cal. Rptr. 479, 481 (1962); 6 Nichols § 26.45, at 321-22, where it is stated that "in the absence of bad faith or unreasonable delay upon the part of the [condemnor] ... the owner is not constitutionally entitled to recover [attorneys' fees and other expenses], and, when the statutes are silent on the subject, [none] will be awarded him." See also, CAL. CODE CIV. Proc. § 1021: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation ... is left to the agreement ... of the parties ... ."

8 Hearings on S. 1351 at 57, where it is indicated in Appendix III that 34 states have no legislation at all on attorneys' fees in condemnation proceedings, and of the remaining 16 states, 11 deal only with abandonment.

APPENDIX III.—COMPARATIVE ANALYSIS OF STATES STATUTES ON PAYMENT OF COSTS AND EXPENSES

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1 Alaska, Arizona, California, Michigan, Minnesota, Missouri, Montana, Nevada, North Dakota, Ohio, Pennsylvania, Wyoming.
2 Maryland.
3 Alabama, Washington.
4 Florida, Iowa, Louisiana, Massachusetts, Mississippi, New Mexico, New York, Oregon, Texas, Wisconsin.
5 Minnesota, Missouri, North Dakota, Pennsylvania, Wyoming.
made an effort, recovery of attorneys' fees is generally limited to only a few specified expenses, and then only under some circumstances. For example, California has made provision for the payment of attorneys' fees only in the event of a statutory abandonment by the condemnor; no provision has been made regarding attorneys' fees in condemnation cases carried through to completion.

Consequently, following the announcement of the condemnor's intent to condemn and the initial offer to purchase, the condemnee will be prejudiced during any subsequent negotiations due to a fear of incurring substantial litigation expenses in the event that he and the condemnor are unable to reach a settlement. It is this fear that compels many landowners to settle out of court for less than just compensation: they wish to avoid what may be a greater loss occasioned by a jury award of the fair market value, from which is to be deducted the costs of the litigation. It is axiomatic that "just compensation" less the costs of litigation no longer equals "just compensation." It follows that any landowner who is forced into court

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6 Iowa, Nebraska.
7 Alabama, California, Hawaii, Iowa, Mississippi, Maryland, Nevada, New Jersey, New York, North Dakota, South Carolina.
8 Oregon, Iowa.
9 California, Missouri, Minnesota, North Dakota.
10 Alabama, California, Hawaii, Iowa, Michigan, Mississippi, Nevada, New Jersey, New York, North Dakota, Ohio, South Carolina.
11 Florida, Iowa, Oregon.
12 Michigan, Missouri, North Dakota.
13 Alabama, California, Hawaii, Maryland, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New York, North Dakota, Ohio, South Carolina.
14 Florida, Oregon.
15 Missouri, Pennsylvania.
16 Hawaii, Maryland, New Jersey, Ohio.
17 New York.
10 Cal. Code Civ. Proc. § 1255a. See also, id. § 1255.
12 Hearings on S. 1351 at 10 (testimony of Senator Wayne Morse).
to obtain a fair award is penalized the amount of his expenses of litigation.\textsuperscript{13}

This discrepancy between practice and constitutional edict will be the basis of an examination of California's law relating to attorneys' fees in condemnation proceedings. The areas wherein the greatest injustices occur will be emphasized. Then the analysis will turn to proposals for future legislation and the remedial effects that can be expected should the proposed legislation be enacted.

\textbf{California's Code of Civil Procedure Section 1255a}

Section 1255a of the Code of Civil Procedure is the only California statute allowing the condemnee to recover his attorneys' fees in condemnation proceedings. Under its terms, recovery is limited to instances of statutory abandonment.\textsuperscript{14} Section 1255a then continues:

Upon . . . abandonment . . . a judgment shall be entered dismissing the proceeding and awarding the defendants their recoverable costs and disbursements. Recoverable costs and disbursements include (1) all expenses reasonably and necessarily incurred in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action and (2) reasonable attorney fees . . . where such fees were reasonably and necessarily incurred to protect the defendant's interests in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action, whether such fees were incurred for services rendered before or after the filing of the complaint.\textsuperscript{15}

The rationale behind section 1255a was best expressed in the leading case of \textit{Los Angeles v. Abbott}.\textsuperscript{16} The court stated that before the enactment of section 1255a in 1911, condemnors who felt that the jury award in a particular case was excessive or unsatisfactory "would abandon the action, pay the nominal [court] costs, retry the action, and repeat this process until a satisfactory award was arrived at."\textsuperscript{17} The court suggested that "[i]t was to remedy the evils connected with a situation which permitted the condemnor to resort to an action without seriously intending to prosecute it to a conclusion that section 1255a was enacted."\textsuperscript{18}

The condemnor's liability for the condemnee's expenses of litigation upon abandonment has been steadily broadened, both by amendment to section 1255a\textsuperscript{19} and by judicial decision.\textsuperscript{20} In 1968 the statute

\textsuperscript{13} Id.
\textsuperscript{14} The abandonment must be in accordance with the terms of the statute. CAL. CODE CIV. PROC. § 1255a(a). See note 37 infra.
\textsuperscript{15} CAL. CODE CIV. PROC. § 1255a(c).
\textsuperscript{16} 217 Cal. 184, 17 P.2d 993 (1932).
\textsuperscript{17} Id. at 200, 17 P.2d at 998.
\textsuperscript{18} Id.
\textsuperscript{19} Cal. Stats. 1911, ch. 208, § 1, at 377; (the original enactment of section 1255a); Cal. Stats. 1933, ch. 254, § 1, at 790; Cal. Stats. 1961, ch. 1613, § 9, at
was amended to eliminate the requirement that the action be aban-
doned less than 40 days before trial in order that attorneys' fees
could be allowed.\textsuperscript{21} Section 1255a now provides that attorneys' fees
are recoverable upon abandonment any time after the filing of the
complaint.\textsuperscript{22} The justification for this change was offered in the re-
port of the California Law Revision Commission which initiated the
amendment.\textsuperscript{23} It suggested that

Section 1255a itself states the explicit policy that abandonment will
not be permitted if the condemnee “cannot be restored to substan-
tially the same position as if the proceeding had not been com-
menced.” \ldots To effectuate [this policy] the Commission recom-
mands that the 40-day limitation be deleted. That arbitrary limitation
should be replaced by a general requirement that, to be recov-
erable, any expense must be reasonably and necessarily incurred.\textsuperscript{24}

One unfortunate omission from both the Commission's recom-
mandation and the 1968 amendment is a provision allowing recovery
of attorneys' fees, upon abandonment, for litigation that is collateral
to but prior to the condemnation trial, e.g., an action for immediate
possession. As amended in 1968, section 1255a provides for attorneys' fees
incurred “in preparing for the condemnation trial, during the
trial, and in any subsequent judicial proceedings in the condemnation
action \ldots.”\textsuperscript{25} \textit{Inglewood v. O. T. Johnson Corp.}\textsuperscript{26}
construed section 1255a, prior to its 1968 amendment,\textsuperscript{27} as allowing recovery of attor-
neys' fees incurred in defending an action for immediate possession
where the condemnation was subsequently abandoned.\textsuperscript{28} The court
justified its holding by reasoning that the action for immediate posses-
sion was “part and parcel of the condemnation action.”\textsuperscript{29} It is sug-
gested that a provision allowing expenses in “related judicial proceed-

\textsuperscript{20} See, e.g., Pacific Gas & Elec. Co. v. Chubb, 24 Cal. App. 265, 141 P. 36
(1914); Los Angeles v. Clay, 126 Cal. App. 465, 14 P.2d 926 (1932); Inglewood
v. O.T. Johnson Corp., 113 Cal. App. 2d 587, 248 P.2d 536 (1952); La Mes-
479 (1962); Orange County Mun. Water Dist. v. Anaheim Union Water Co.,
\textsuperscript{21} Cal. Stats. 1968, ch. 133, § 1, at 227 (the version of section 1255a presently
in force).
\textsuperscript{22} CAL. CODE CIV. PROC. § 1255a.
\textsuperscript{23} CAL. LAW REvision Comm’n, Reports, Recommendations & Studies
1365 (1967) [hereinafter cited as LAW REvision Comm’n Report].
\textsuperscript{24} Id. at 1366.
\textsuperscript{25} CAL. CODE CIV. PROC. § 1255a(c) (emphasis added).
\textsuperscript{26} 113 Cal. App. 2d 587, 248 P.2d 536 (1952).
\textsuperscript{27} As effective in 1952, section 1255a provided for recovery of “all neces-
sary expenses incurred in preparing for trial and reasonable attorney fees.”
Cal. Stats. 1933, ch. 254, § 1, at 790. Compare id. with CAL. CODE CIV. PROC.
§ 1255a.
\textsuperscript{28} 113 Cal. App. 2d at 592, 248 P.2d at 539.
\textsuperscript{29} Id. at 591, 248 P.2d at 538.
ings" would be less troublesome and more just than the present provision. The statute as presently worded discloses neither legislative approval nor disapproval of the Johnson holding. The ambiguity of the more narrowly worded statute can accomplish little more than a relitigation of the point.

Special Problems in California Condemnation Practice

Attorneys' Fees in Inverse Condemnation

In Frustuck v. Fairfax activity by a public agency was sufficiently damaging to constitute inverse condemnation, but such activity was discontinued after the filing of a complaint. The plaintiff-landowner then sought attorneys' fees under section 1255a of the Code of Civil Procedure. The Frustuck court denied attorneys' fees to the landowner upon discontinuance of the trespass, i.e., upon "abandonment" of the inverse condemnation.

The reasoning of the Frustuck case is understandable. The right to attorneys' fees upon abandonment of condemnation proceedings is purely statutory, and the requirements of the statute must be met before recovery will be allowed. The court found that the dis-

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31 The California Law Revision Commission, in 9 LAW REVISON COMM'N REPORT 1365, makes no mention of the Johnson case. It thereby leaves open the question whether the wording of section 1255a(c) was narrowed inadvertently or with some legislative purpose in mind.
32 Inverse condemnation results when a public entity engages in activity amounting to a wrongful taking or damaging of private property without permission of the owner or effort to first compensate him, in consequence of which he has been forced to initiate condemnation proceedings. Heimann v. Los Angeles, 30 Cal. 2d 746, 185 P.2d 597, 601 (1947). See also Frustuck v. Fairfax, 230 Cal. App. 2d 413, 41 Cal. Rptr. 56 (1964).
33 230 Cal. App. 2d 413, 41 Cal. Rptr. 56 (1964).
34 Id. at 414, 41 Cal. Rptr. at 58. In Heimann v. Los Angeles, 30 Cal. 2d 746, 185 P.2d 597 (1947), there was no claim of "abandonment," nor was there an effort to recover attorneys' fees. Thus, these questions never came before the Heimann court.
35 230 Cal. App. 2d at 418, 41 Cal. Rptr. at 60. The Frustuck court, in considering the policy against construing section 1255a as allowing attorneys' fees upon the abandonment of an action in inverse condemnation, said: "[W]e do not believe that an intent of the Legislature is to be found which would necessitate the rather difficult determination whether cessation of a physical taking at various stages of an action in inverse condemnation was voluntary or not. The test in an action in direct condemnation, whether discontinuance by the plaintiff condemnor of its lawsuit was voluntary or was required by judicial decree, is relatively simple." Id.
36 La Mesa—Spring Valley School Dist. v. Otisuka, 57 Cal. 2d 309, 313, 369 P.2d 7, 10, 19 Cal. Rptr. 479, 481 (1962) (see cases cited therein); CAL. CODE CIV. PROC. § 1255.
37 CAL. CODE CIV. PROC. § 1858. See, e.g., Los Angeles v. Agardy, 1 Cal.
continuance was not an abandonment under the traditional interpretation of section 1255a of the Code of Civil Procedure. The Frustuck court noted that Title VII of Part III of the Code, in which section 1255a is contained, relates to condemnor-initiated proceedings; there is no statement relating it to inverse condemnation. Furthermore, the court noted that section 1255a speaks not in terms of condemnor and condemnee, but rather of plaintiff and defendant. Thus there was, the court concluded, provision under neither case law nor statute allowing the plaintiff her attorneys' fees. The court added: "No doubt the legislature could provide for the claimed allowances. We conclude that it has not done so . . . ."

It would be wise for the legislature to make such provision, not only to provide for the plaintiff who institutes an action in inverse condemnation, but also to encourage landowners whose property is being taken to seek relief. Referring to ordinary court costs, the California Supreme Court has said, "[i]n cases instituted by the property owner the reason for allowing him costs in case of recovery is even stronger than in [ordinary] condemnation cases . . . ." It observed that in the former there is neither offer of compensation nor a suit to condemn, but only the wrongful taking. It is suggested that this policy relating to costs in inverse condemnation should also be applied to attorneys' fees, and that provision should be made for their recovery upon the abandonment of action amounting to inverse condemnation. The justice of such a proposal is obvious: the injured landowner, once forced into court to protect his property, would have


38 See cases cited in note 37 supra.
39 "The plaintiff may abandon the proceeding . . . ." Cal. Code Civ. Proc. § 1255a(a) (emphasis added). Section 1255a(c) provides for "awarding the defendants their [expenses]." (Emphasis added). These provisions were essentially the same in the statute as effective in 1964. Cal. Stats. 1961, ch. 1613, § 9, at 3449.
40 230 Cal. App. 2d at 416, 41 Cal. Rptr. at 59.
41 Id. at 418, 41 Cal. Rptr. at 60.
42 The court could find no authority "[t]o convert the word 'defendant' to 'condemnee,' who in an action in inverse condemnation would be the plaintiff . . . ." 230 Cal. App. 2d at 416, 41 Cal. Rptr. at 59.
43 Id. at 418, 41 Cal. Rptr. at 60.
45 Id. See also Frustuck v. Fairfax, 230 Cal. App. 2d 413, 41 Cal. Rptr. 56 (1964).
46 Section 1255a, as amended in 1968, includes attorneys' fees in the term "recoverable costs." Cal. Code Civ. Proc. § 1255a(c).
the security of knowing that he would either be recompensed for his loss or recompensed for his reasonable expenses in the event of an abandonment.\footnote{47}

Attorneys' Fees When the Landowner Appears In Propria Persona\footnote{48}

Long Beach v. Sten\footnote{49} was the first California case in which an attorney-landowner, appearing on his own behalf, claimed attorneys' fees upon an abandonment under section 1255a of the Code of Civil Procedure. The Sten court refused to allow attorneys' fees to the landowner appearing \textit{in propria persona}, but allowed a reasonable attorney's fee to his co-owner, to the extent of the latter's interest in the land in question.\footnote{50} The court argued that a lay condemnee is allowed no remuneration for his time and anguish, and concluded that the statute\footnote{51} provided only for expenses \textit{paid} or \textit{incurred}, and that an attorney representing himself had incurred no expense.\footnote{52}

It has been suggested that an attorney who is made the defendant in a condemnation action "can protect himself by employing another attorney to defend the action."\footnote{53} Here issue should be taken; attorneys' fees are not allowed the successful defendant under section 1255a, but only one whose case is abandoned.\footnote{54} It is certainly no protection to an attorney-landowner to require that if his case is \textit{not} abandoned (which is the usual case\footnote{55}), he will have to pay another for work he could have done himself.\footnote{56}

\footnote{47} Regardless of the similarity between an action in tort and an action in inverse condemnation, the latter involves such an extreme violation of property rights that if the condemnor refuses to discontinue its actions until \textit{after} the landowner is driven to seek relief in court, then the putative condemnor should be required to pay the landowner's expenses if it \textit{then} chooses to discontinue its wrongful actions.
\footnote{48} \textit{In propria persona} is defined as "[i]n one's own proper person." \textsc{Black's Law Dictionary} 899 (4th ed. 1951). An example is when an attorney-landowner appears as his own counsel.
\footnote{50} 206 Cal. at 474, 274 P. at 969.
\footnote{51} Section 1255a of the Code of Civil Procedure, as effective in 1929, provided for the recovery of "costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees." Cal. Stats. 1911, ch. 208, § 1, at 388.
\footnote{52} 206 Cal. at 474, 247 P. at 969.
\footnote{53} 17 Calif. L. Rev. 423, 424 (1929).
\footnote{54} See notes 10 & 11 supra.
\footnote{55} Baggot, \textit{First Interview With Client}, in \textsc{California Condemnation Practice} § 1.31 (Cal. Cont. Educ. Bar 1960).
\footnote{56} The importance of this question may be seen from the findings of the \textit{Nassau County Study}. Of the condemnees investigated, 57.5 percent were represented by an attorney; and of those, two-fifths were self-represented. \textit{Nassau County Study}, supra note 5, at 451.
A better policy would not discriminate against an attorney-landowner appearing in propria persona, but would allow him, as other landowners, "reasonable attorney fees" upon the abandonment of a direct condemnation proceeding under section 1255a. It also may be argued that attorneys' fees are "incurred" by an attorney-landowner who devotes his professional services to a case, although it is his own. His only alternative is to pay another to represent him, and a rule encouraging the unnecessary expenditure of money cannot be said to be a desirable one. This is especially true considering the infrequency of abandonments.

It should also be noted that the allowance of attorneys' fees contra to the rule of the Sten case is not likely to increase litigation. The attorney-landowner in a direct condemnation action is involuntarily made defendant. He does not seek litigation, and asks nothing more than "just compensation" for his land. Any effort to discourage a jury trial for the purpose of determining the fair market value of the land would violate the spirit of the California Constitution.58

It is not suggested that the loss of time, the inconvenience, and the mental anguish resulting from a condemnation proceeding be made compensable upon abandonment. Not only would it be difficult to assess damages for these items, but they may be said to be "consequential" to the ownership of land.59 A rule allowing these expenses might well lead to excessive claims against the condemnor who abandons in good faith. Rather, it is suggested that the law should distinguish between items "consequential" to the ownership of land (which are suffered by the attorney-landowner and lay-landowner alike) and the "reasonable attorney fees" allowed upon abandonment under section 1255a of the Code of Civil Procedure. To hold otherwise only serves to discriminate unjustifiably against an attorney-landowner by denying him reasonable compensation for his professional services, and cannot be said to decrease litigation or achieve justice.

Attorneys' Fees in Condemnation Proceedings That Are Carried Through to Completion

Notwithstanding the constitutional guarantees of "just compensation,"60 it generally has been held that a condemnee cannot recover his attorneys' fees in a completed condemnation action whether it is concluded in favor of the condemnor,61 in favor of the condemnor but

59 Heimann v. Los Angeles, 30 Cal. 2d 746, 756, 185 P.2d 597, 603 (1947).
60 See also 4 Nichols §§ 14.24, 14.249[4].
with an increased award as per the contention of the condemnee, or in favor of the condemnee with a dismissal of the action. It is settled that "the acquisition of property by eminent domain does not involve a taking of the legal services which are needed in order to establish a claim for compensation." Furthermore, attorneys' fees generally have not been allowed under "statutory provisions for costs, expenses, or just compensation."

Still, courts have noted the injustice done when a landowner is denied his expenses of litigation. One example is the leading case of San Francisco v. Collins:

To require the defendants in this case to pay any portion of their costs necessarily incidental to the trial of the issues on their part, or any part of the costs of the [condemnor], would reduce the just compensation awarded by the jury, by a sum equal to that paid by them for such costs.

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62 Binghamton ex rel. Urban Renewal Agency v. Chenango Enterprises, 48 Misc. 2d 430, 434, 265 N.Y.S.2d 135, 140 (1965), where the court allowed the defendant 5 percent of the award for "costs" under N.Y. CONDEM. LAW § 16 (2) (McKinney 1950), but limited the allowance of costs to the amount prescribed by the statute. Reasonable attorneys' fees were not allowed.


65 Id. See, e.g., San Francisco v. Collins, 98 Cal. 259, 33 P. 56 (1893) (costs). See also note 8 supra.

66 98 Cal. 259, 33 P. 56 (1893).

67 Id. at 262, 33 P. at 57. The Collins case was decided before the enactment of section 1255a of the Code of Civil Procedure. The court dealt only with the problems of ordinary costs; the issue of attorneys' fees was not raised.

Another excellent discussion of the constitutional right to just compensation undiminished by costs is found in In re New York City, 125 App. Div. 219, 109 N.Y.S. 652, aff'd without opinion, 192 N.Y. 569, 85 N.E. 1117 (1908). The court said:

"The [New York] Constitution [article I, section 7(a)] requires that private property shall not be taken for public purposes except on the payment of "just compensation," and a man who is forced into court, where he owes no obligation to the party moving against him, cannot be said to have received "just compensation" for his property if he is put to an expense appreciably important to establish the value of his property. He does not want to sell; the property is taken from him through the exercise of the high powers of the State, and the spirit of the Constitution clearly requires that he shall not be compelled to part with what belongs to him without the payment, not alone of the abstract value of the property, but of all the necessary expenses incurred in fixing that value. This would seem to be dictated by sound morals as well as by the spirit of the Constitution . . . ." 125 App. Div. at 222, 109 N.Y.S. at 654 (emphasis added).
The policy enunciated in the Collins case has not generally been applied to attorneys' fees in condemnation cases. Only four states allow a condemnee to recover his attorneys' fees in all cases where he has not been offered "just compensation" prior to the condemnor's filing of a complaint. These states are Florida,\(^{68}\) North Dakota,\(^{69}\) Iowa\(^{70}\) and Oregon.\(^{71}\)

**Florida**

Florida's provisions regarding attorneys' fees in condemnation provisions are the most liberal found in any state. Its statutes provide:

The petitioner shall pay all reasonable costs of the proceedings in the [trial] court, including a reasonable attorney's fee to be assessed by that court.\(^{72}\)

The petitioner shall pay all reasonable costs of the proceedings in the appellate court, including a reasonable attorney's fee to be assessed by that court, except upon appeal taken by a defendant in which the judgment of the trial court shall be affirmed.\(^{73}\)

The Florida constitutional provisions regarding eminent domain\(^{74}\)

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\(^{68}\) Jacksonville Expressway Authority v. Henry G. DuFree Co., 108 So. 2d 289 (Fla. 1959).

\(^{69}\) United Dev. Corp. v. State H'way Dep't, 133 N.W.2d 439 (N.D. 1965).


Michigan allows attorneys' fees in condemnation proceedings, but a limit of $25 placed on recovery diminishes the worth of the statute. The Michigan law dealing with condemnation by state agencies and public corporations provides that "it shall be lawful for the judge in any case to order payment by the petitioner to any respondent of such reasonable attorney fee as he may deem just, not exceeding 25 dollars . . . ." Mich. COMP. LAWS § 213.37 (1967). Similar provisions deal with condemnation by municipal corporations, id. §§ 213.89-.132, and for highway purposes, id. § 213.190. See Muskegon v. Slater, 379 Mich. 466, 152 N.W.2d 652 (1967) (limiting recovery of attorneys' fees to $25). Recovery of attorneys' fees in condemnation proceedings by the county, id. § 123.781, and by power companies, id. § 486.252g, is allowed without limit, so long as the allowance is reasonable. Petition of Detroit Edison Co., 350 Mich. 606, 87 N.W.2d 126 (1958).

\(^{72}\) FLA. STAT. ANN. § 73.091 (Supp. 1965).

\(^{73}\) Id. § 73.131(2).

\(^{74}\) "[N]or shall private property be taken without just compensation." FLA. CONST., DECLARATION OF RIGHTS, § 12. "No private property . . . shall be appropriated . . . until full compensation therefor shall be first made to the owner . . . ." Id. art. XVI, § 29.
are substantially the same as those in the California Constitution.\textsuperscript{75} Yet the Florida Supreme Court has gone so far as to suggest that the Florida constitutional provisions for “just compensation” are in fact self-executing, and has indicated that it would allow recovery of attorneys’ fees even without statutory authority.\textsuperscript{76} Thus the attitudes of Florida’s judiciary and legislature clearly suggest that, at least in that state, the measure of “just compensation” should in no instance be diminished by the necessary costs of a good-faith litigation of the question of fair market value. This is true even though the condemnee may have been offered what is later determined to be “just compensation” before the filing of the complaint.

It has been suggested that provisions far less generous than the Florida laws would lead to increased (and unnecessary) litigation.\textsuperscript{77} And, it is clear that a condemnee does not risk the enormous expenses of litigation in Florida that he does in other states. Yet the inconvenience and delay of litigation, when considered with the fact that a court cannot award more than “just compensation,”\textsuperscript{78} evidently suf-

\textsuperscript{75} CAL. CONST. art. I, § 14.

\textsuperscript{76} Jacksonville Expressway Authority v. Henry G. DuPree Co., 108 So. 2d 289, 294 (Fla. 1959).

\textsuperscript{77} See, e.g., Hearings on S. 1351, supra note 4, at 22–24; id. at 50 (letter from Warren Christopher, Deputy Attorney General, to Senator James Eastland, April 5, 1968); id. at 51 (letter from Aubrey Wagner, Chairman, TVA, to Senator James Eastland, April 18, 1968).

\textsuperscript{78} Section 12 of the Declaration of Rights in the Florida Constitution provides for “just compensation.” Under a similar provision in the New York Constitution, the researchers in the Nassau County Study found that of those cases where the award was determined by a court, 32.3 percent received an amount higher than, 49.6 percent an amount equal to, and 18.1 percent an amount less than the county’s lowest appraisal. Nassau County Study, supra note 4, at 450 (Table 13). This would indicate that the awards of a trial court would generally not exceed an offer of the county’s mean appraisal value; or, in other words, that a trial after an offer of just compensation would be a waste of time for both parties. As was noted by the authors of the Nassau County Study: “What do we derive from the trial statistics? First, that the claimant did not automatically find the Nassau County courtroom paved with gold; he who refused a ‘fair settlement’ gambled unwisely. Second, that the County had no reason to view its trial prospects glumly; to have settled much beyond a solid appraisal simply to avoid trial would have been unwarranted most of the time. Third, that the claimant who sought not a windfall but only a decent recovery was far likelier to achieve this from a court than from the County’s negotiator.” Id. at 450 (emphasis added).

The study revealed that of those cases not decided in court, 9.1 percent received an amount higher than, 6.6 percent an amount equal to, and 84.4 percent an amount less than the county’s lowest appraisal. Id. at 442 (Table 10) (figures rounded off). Comparing these results with those where the award was determined by a court, and assuming that the practices in Nassau County are not dissimilar from those of most condemners, the fairness of the Florida system, which enables a condemnee to insist on a trial without fear of burdensome litigation expenses, is manifest.
fice to discourage unjustified litigation in Florida.

There is a marked absence of criticism of this policy in the legal literature of Florida. Rather, both the judiciary and the legal writers express consistent approval of Florida's policy, and not only has the legislature continued this policy, but it has broadened its scope through successive reorganizations and amendments of the statutes. This absence of criticism and presence of praise regarding the Florida provisions can only dispel the arguments of critics who claim that such legislation would bankrupt condemnors and shift the scale too far in favor of the condemnee.

North Dakota

North Dakota allows a condemnee his reasonable attorneys' fees in the discretion of the trial court. A condemnee also may recover

79 E.g., Jacksonville Expressway Authority v. Henry G. DuPree Co., 108 So. 2d 289, 293 (Fla. 1958) (Drew, J.) (concurring opinion): "The fact that the sovereign is now engaged in great public enterprises necessitating the acquisition of large amounts of private property at greatly increasing costs is no reason to depart from the firmly established principle that under our system the rights of the individual are matters of the greatest concern to the courts. The powerful government can usually take care of itself; when the courts cease to protect the individual—within, of course, constitutional and statutory limits—such individual rights will be rapidly swallowed up and disappear in the maw of the sovereign. If these immense acquisitions of land point to anything, it is to the continuing necessity in the courts of seeing to it that, in the process of improving the general welfare, individual rights are not completely destroyed."

Though the point in issue was the allowance of moving expenses, the applicability of this dictum to attorneys' fees speaks for itself. Justice Drew joined in the supplementary opinion allowing the condemnee his attorneys' fees. Id. at 294.

80 E.g., Sheppard, Compensation in Florida Condemnation Proceedings, 14 U. FLA. L. REV. 28, 47 (1961); see id. at 44-45 (explaining the policy).


82 See, e.g., Hearings on S. 1351, supra note 4, at 50 (letter from Warren Christopher, Deputy Attorney General, to Senator James Eastland, April 5, 1968) (discussing S. 1351); id. at 51 (letter from Aubrey Wagner, Chairman, TVA, to Senator James Eastland, April 18, 1968) (discussing S. 1351).

83 Morton County Bd. of Park Comm'rs v. Wetsch, 142 N.W.2d 751, 752-53 (N.D. 1966); Morton County Bd. of Park Comm'rs v. Wetsch, 136 N.W.2d 158, 159-60 (N.D. 1965); United Dev. Corp. v. State H'way Dep't., 133 N.W.2d 439, 445-47 (N.D. 1965).

"The court may in its discretion award to the defendant reasonable actual or statutory costs or both which may include reasonable attorney's fees. In all cases when a new trial has been granted upon the application of the defendant and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him." N.D. CENT. CODE § 32-15-32 (1960).
his attorneys' fees for any subsequent judicial proceedings, except when the new trial results in an award no greater than that of the prior proceeding.84

The North Dakota provisions may be criticized in that they do not establish a simplified procedure to make the initial determination of "just compensation." However, the simplicity and the inclusiveness of the North Dakota costs statute are its most favorable aspects.

Iowa

The Iowa provisions for attorneys' fees in condemnation cases,85 though less generous than the Florida provisions, are adequate. Iowa provides for a condemnation commission to determine the value of the land to be taken.86 It then allows a condemnee his attorneys' fees incurred in an appeal to the district court87 for a trial de novo88 if the award exceeds that of the commissioners.89 However, in exchange for the benefits of Iowa’s commission procedure, the Iowa condemnee must bear his own attorneys' fees incurred during the commission hearing.90

Oregon

The Oregon statutes dealing with attorneys' fees in condemnation proceedings are complex. There are statutes providing for condemnation by the state91 and by several of its agencies;92 but a general statute for recovery of costs applies in those cases where the special statutes do not.93 The general statute reads:

86 Id. § 472.4. The prescribed condemnation procedure is treated in id. §§ 472.1 to -.41.
87 Id. § 472.18.
88 Id. § 472.21.
91 OR. REV. STAT. §§ 281.330, 281.550, 366.380(9), 722.055 (counties, municipal corporations, state highway commission, private corporations). It should also be noted that Oregon provides for attorneys' fees upon abandonment, id. § 35.105(1), and for inverse condemnation, id. § 20.085.
92 E.g., id. §§ 281.330, 281.550, 366.380(9), 722.055 (counties, municipal corporations, state highway commission, private corporations).
The costs and disbursements of the defendant, including a reasonable attorney's fee to be fixed by the court at the trial, shall be taxed by the clerk and recovered from the plaintiff, unless the plaintiff tendered the defendant before commencing the action an amount equal to or greater than that assessed by the jury, in which case the plaintiff shall recover his costs and disbursements from the defendant, but not including an attorney's fee.\textsuperscript{94}

Contrast this with the Oregon provision dealing with condemnation by a county:

... but if it appears that the county tendered to the defendant before commencing the action an amount equal to or greater than that assessed by the jury, the defendant shall not recover costs or attorney's fee.\textsuperscript{96}

It is suggested that the latter is a more desirable provision than the former in that it does not assess the condemnee the amount of the condemnor's expenses. However, even the latter statute may well infringe upon the prohibition in \textit{San Francisco v. Collins},\textsuperscript{96} as a condemnee proceeding in good faith might be forced to bear his ordinary costs in addition to attorneys' fees.

\textbf{Attorneys' Fees in English Condemnation Proceedings}

The English law relating to attorneys' fees in condemnation cases has been summarized in Halsbury's Laws of England:

The Lands Tribunal \textsuperscript{97} may, subject to the provisions mentioned hereafter, order that the [attorneys' fees\textsuperscript{98} in] any proceedings before it incurred by any party are to be paid by any other party and may tax or settle the amount of any costs ordered to be paid or direct the manner in which they are to be taxed. Where the acquiring authority has made an unconditional offer of any sum as compensation to any claimant and the tribunal awards a sum not exceeding that offered, the tribunal must, unless for special reasons it thinks proper not to do so, order the claimant to bear his own costs and pay the costs of the acquiring authority incurred after the offer was made. ... \textsuperscript{99}

Where the claimant has made an unconditional offer ... to accept [a]ny sum as compensation and ... the sum awarded is equal to or exceeds the sum which the claimant offered to accept, the tribunal must, unless for special reasons it thinks proper not to do so, order the acquiring authority to bear its own costs and to pay the costs of the claimant incurred after the offer was made.\textsuperscript{100}

\textsuperscript{94} Ore. Rev. Stat. \textsection 35.110 (1967).
\textsuperscript{95} Id. \textsection 281.330(2).
\textsuperscript{96} See text accompanying notes 66 \& 67 supra.
\textsuperscript{97} Jurisdiction in most English condemnation cases was conferred upon the Lands Tribunal in the Land Compensation Act of 1961, 9 \& 10 Eliz. 2, c. 33, \textsection 1. \textit{See also} 10 Halsbury, \textit{The Laws of England} \textsection \textsection 424-30 (rev. 3d ed. 1955) [hereinafter cited as \textit{Halsbury}].
\textsuperscript{98} "Costs" of proceedings are defined as including attorneys' fees. 11 Halsbury \textsection 482; 34 id. \textsection 218; see cases cited note 101 infra.
\textsuperscript{99} Land Compensation Act of 1961, 9 \& 10 Eliz. 2, c. 33, \textsection 4(1)(a). This provision would violate the constitutional guarantees of "just compensation." \textit{See notes} 102 \& 103 infra.
\textsuperscript{100} Land Compensation Act of 1961, 9 \& 10 Eliz. 2, c. 33, \textsection 4(3). This
In other cases the costs of and incidental to any proceedings are in the discretion of the tribunal. 101

It is clear that the English rule under which the condemnee would pay the costs of the condemnor if the trial award did not exceed the condemnor's final offer would not be sustained under either the California 102 or Federal Constitutions. 103 With this exception, it appears that the English rules are fair and would encourage the condemnor to offer the condemnee his full measure of "just compensation," without causing frivolous litigation.

The Proposed Model Eminent Domain Code

A Model Eminent Domain Code is under consideration by the Committee on Condemnation Law of the Real Property, Probate and Trusts Section of the American Bar Association. The initial result of the Committee's deliberations was a tentative draft of the Model Eminent Domain Code. 104 Adoption of the Code would result in a considerable improvement in the condemnation law of nearly all American jurisdictions.

The Code establishes a condemnation commission in each county, 105 which the court may direct, at the request of either party, to determine the value of any property included in the declaration of taking. 106 The commission proceeding would be relatively informal, 107 and presumably less costly and more rapid than a compar-

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102 San Francisco v. Collins, 98 Cal. 259, 262-63, 33 P. 56, 57 (1893); San Diego Land & Town Co. v. Neale, 88 Cal. 50, 67-68, 25 P. 997, 981-82 (1891); Burbank v. Nordahl, 199 Cal. App. 2d 311, 18 Cal. Rptr. 710 (1962), where the court said: "Under the general rule, a condemnee may not be required to pay any part of the trial costs of the condemner. To the extent § 394 [of the Code of Civil Procedure] provides otherwise, when applied to an action in eminent domain, it is unconstitutional." Id. at 331, 18 Cal. Rptr. at 722 (citations omitted).

103 4 Nichols § 14.249; Hearings on S. 1351, supra note 4, at 23-24 (testimony of Senator Wayne Morse); id. at 34 (testimony of Forrest Cooper); id. at 42-43, 44 (testimony of Roland Boyd).


105 Model Eminent Domain Code § 401.

106 Id. § 503.

107 Id. § 701.
able trial. It could be appealed or eliminated on motion of either party. In either case the result would be a trial de novo.

Attorneys' Fees Under the Code

Section 504E of the Code is the only provision dealing with attorneys' fees. It reads:

Where the ultimate award is more than the offer of the condemnor, the Trial Judge shall have the authority to cause the condemnor to reimburse the [condemnee for his] . . . attorney's fees and other reasonable expense, but his authority shall exist only in those instances where the Trial Judge finds affirmatively that to do otherwise would invoke serious hardship on the condemnee. . . .

This provision limits the allowance of attorneys' fees to instances where the ultimate award exceeds the tender offer. The restriction is an appropriate method of preventing a condemnee from creating unnecessary litigation after once receiving an offer of "just compensation."

However, the provision then goes on to place an undesirable restriction on the discretion of the trial court. It requires an affirmative finding of "serious hardship" as a prerequisite to the allowance of attorneys' fees. Such language is vague, and provides no standards for determining what constitutes "serious hardship." There is no valid reason for including such a restriction in section 504E of the Code. The first part of the provision quoted above is intended to encourage the condemnor to offer "just compensation" to the condemnee before litigation. The substance of the second part is that if the condemnor does not, it will have to bear the burden of the condemnee's attorneys' fees, but only if the court finds the existence of something called "serious hardship." It would be better to provide that if the award exceeds the condemnor's offer, the condemnor shall pay the condemnee's expenses of litigation, unless in the opinion of

108 Id. § 504A.
109 See id. § 502 (by agreement of the parties).
110 Id. § 504A.
111 Id. § 504E.
112 The condemnor is required to make a prior effort to acquire the land in question by purchase. Id. § 302. If this effort fails, the offer price is then used to determine the party upon which the burden of the condemnee's expenses of litigation should fall. Id. § 504E.
113 COMMENTS, CRITICISMS & SUGGESTIONS ON THE PRELIMINARY DRAFT, MODEL CODE OF EMINENT DOMAIN 74 (unpublished report of ABA Committee on Condemnation Law, Real Property, Probate & Trusts Section, Aug. 1968) (comment by Hodge L. Dolle, Jr.) [hereinafter cited as Committee Comments], on file in Hastings Law Library.

John H. Champagne suggests that the provision, as it now stands, would allow the court to find "serious hardship" where the condemnee could convince the court that he is poor rather than wealthy. Id. at 75.
the court it would not be in the interests of justice to do so.\textsuperscript{114} If reworded in this manner, section 504E would not tend to defeat the very purpose for which it was created—to encourage the condemnor to make a fair offer to the condemnee before commencing litigation.\textsuperscript{115}

### Additional Criticisms of the Code

Section 504E also provides for expenses in an abandoned condemnation action: “The condemnee shall be entitled to be reimbursed for all reasonable expenses actually expended when the condemnor withdraws therefrom.” Suggestions regarding this provision are limited to its wording. To allow recovery of expenses “actually incurred” (rather than “actually expended”) would eliminate possible litigation as to the time at which expenses are “expended.”\textsuperscript{116} And to allow the expenses when the condemnor “abandons the proceeding” (rather than when he “withdraws therefrom”) would be more in line with the language of modern decisions\textsuperscript{117} and statutes.\textsuperscript{118}

The positioning of section 504E in the Code creates an additional ambiguity. Section 503, dealing with the commission hearing, is completely silent as to costs. The wording of section 504E is silent as to the extent of its scope; the language of the section does not disclose whether its provisions are meant to apply to attorneys' fees incurred during and in preparation for the commission hearing, or in appeals (under section 504H)\textsuperscript{119} subsequent to the trial de novo provided in section 504A.\textsuperscript{120} This ambiguity should be removed, and a clear position taken concerning the extent to which attorneys' fees will be allowed.

Another criticism of the Code is that it is unclear regarding the

\textsuperscript{114} It might not be in the interests of justice to allow a condemnee his attorneys' fees when, for example, the difference between the tender offer and the award is negligible, or when this difference is very small as compared with the expense of the litigation.

\textsuperscript{115} The importance of this goal can be seen from the results of the Nassau County Study, supra note 4. Only 15.7 percent of the negotiated settlements were for an amount equal to or greater than the lower of the county's two appraisals. \textit{Id.} at 442, 443 (Table 11). If it can be assumed that negotiation resulted in an improvement over the condemnor's original offer in at least some of the cases, then \textit{less than 15.7 percent} of the condemnor's offers were “fair.”

\textsuperscript{116} \textit{Committee Comments} 75 (comment of Albert J. Horrell).

\textsuperscript{117} \textit{E.g.}, La Mesa—Spring Valley School Dist. v. Otsuka, 57 Cal. 2d 309, 369 P.2d 7, 19 Cal. Rptr. 479 (1962).

\textsuperscript{118} \textit{E.g.}, \textit{Cal. Code Civ. Proc. § 1255a.}

\textsuperscript{119} “Either party may appeal to the proper appellate court . . . .” \textit{Model Eminent Domain Code} § 504H.

\textsuperscript{120} “Any party aggrieved by the decision of the Commission may appeal to the Court in which the declaration of taking has been filed . . . . The right to appeal shall be absolute and the trial shall be de novo . . . .” \textit{Id.} § 504A.
allowance of attorneys' fees in successful inverse condemnation actions. Section 505A of the Code provides that the inverse condemnation action shall be as similar as possible to the direct condemnation action. However, section 505F, the provision dealing with costs in inverse condemnation, allows "taxable costs" but fails to mention attorneys' fees. On the other hand, section 504E, the provision dealing with costs in direct condemnation, allows taxable costs but also provides specifically for attorneys' fees. A reasonable interpretation of this construction would indicate that attorneys' fees are not included within the term "taxable costs." Thus, the Code, by its own terms, has prevented the inverse condemnation action from being as close as possible to the direct condemnation action.

It is suggested that section 505F should be amended to allow attorneys' fees upon both the successful completion of an inverse condemnation action and upon an abandonment of the wrongful activity by the putative condemnor. This would be consistent with the direction of the Code in that condemnees in both direct and inverse condemnation would be accorded the same protection with respect to attorneys' fees.

**Senate Bill 1351**

On March 21, 1967, Senator Wayne Morse introduced Senate Bill 1351, a bill providing for attorneys' fees in federal condemnation actions. The bill adds section 2415 to title 28 of the United States Code. The bill is a relatively thorough one. The substantive pro-

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121 "In [inverse condemnation], the same proceeding shall be had as near as may be, as provided [for the appeal from the Commission decision in a direct condemnation action]." Id. § 505A.

122 "For the purpose of this section, all taxable costs shall be paid by the putative condemnor as provided in Section 504E unless it is found upon trial that there has been no taking. In such case, costs may be taxed to the owner as the Court in the interest of justice may allow." Id. § 505F.

123 "All taxable costs, including filing fees, jury fees, statutory witness fees and mileage, expense of preparing plans . . . the expense of transporting the Judge and jury to view the condemned property and such other costs as the Court in the interest of justice may allow shall be paid by the condemnor." Model Eminent Domain Code § 504E.

124 The provision limits the recovery of expenses to actions in which the condemnee is successful in his contention that he is being denied "just compensation." Id.

125 See note 122 supra.


127 (a) If, in any action brought by the United States for the acquisition of any interest in real property [under] eminent domain, it is determined that just compensation for such interest exceeds the maximum amount offered by the United States for such interest before the institution of that action, any judgment entered in favor of the United States . . . shall provide for the payment to the defendant . . . of (1) the amount determined to constitute just compensation
visions (1) allow expenses to the landowner if the court award exceeds the last pretrial offer of the condemnor, (2) allow the condemnor his expenses in the event of an abandonment, and (3) allow the condemnor his expenses in a successful action in inverse condemnation. Regrettably, the bill makes no provision for abandonment of an inverse condemnation by the putative condemnor; the provision allowing expenses upon an abandonment in subsection (a) (which treats direct condemnation) is not included in subsection (c) (which treats inverse condemnation). It is suggested that the addition of such a provision would be desirable. And since no speech or testimony on Senate Bill 1351 indicates any intent to deny the putative condemnor his expenses upon a discontinuance of the wrongful activity by the putative condemnor, the issue most probably was not considered.

Nevertheless, proposed section 2415(a) incorporates many of the better features of English and American law concerning the allowance of attorneys' fees in condemnation proceedings. It allows the landowner all his reasonable expenses if he was not offered “just compensation” before being taken into court, but forces him to bear the burden of his expenses if it is found that he was tendered “just compensation” but refused to accept it.

Criticism of Senate Bill 1351

As was noted in the hearings of Senate Bill 1351, the prime objection to a provision allowing attorneys’ fees in a completed con-
demnination action appears to be that such an allowance would encourage frivolous litigation.130 This contention is often advanced by those persons representing agencies that frequently condemn land.131 These persons reason that because of the substantial likelihood that condemnees "could obtain through litigation an award that exceeds in some amount the highest offer made by the Government, they would run little risk of having to bear the burden of the proceeding."132 They claim that "juries . . . tend to regard the highest appraisal introduced in evidence by the Government as a floor, and the lowest appraisal introduced by the property owner as the ceiling, and to find for the property owner within the range of this evidence."133 And, these representatives of condemning agencies inevitably profess to have offered "the maximum amounts justified on the basis of appraisals."134 It is their claim, therefore, that the jury award usually exceeds "just compensation."

A More Objective Look at Senate Bill 1351

Proponents of Senate Bill 1351 suggest that the reason trial awards usually exceed the condemnor's offer135 is that the government usually tries to purchase land for less than fair market value.136 Practicing Oregon attorneys testified at the hearings on Senate Bill 1351 that the Oregon statutes,137 on which Senate Bill 1351 is based,138 have not raised the level of litigation but, on the contrary, have lowered it.139 What they have raised, however, is the level of the offer of the condemnor.140 The reason for this change, the proponents suggest, is that the condemnee need no longer fear the expenses of litigation if he is not first offered "just compensation." Rather, under statutes such as Senate Bill 1351, it is the condemnor that must fear the costs of the litigation in those cases where "just compensation"

130 See Hearings on S. 1351 at 22-23, 33.
131 See, e.g., Hearings on S. 1351 at 51 (letter from Aubrey Wagner, Chairman of TVA, to Senator James Eastland, April 18, 1968).
132 Hearings on S. 1351 at 51 (letter from Aubrey Wagner, Chairman of TVA, to Senator James Eastland, April 18, 1968).
133 Hearings on S. 1351 at 50 (letter from Warren Christopher, Deputy Attorney General, to Senator James Eastland, April 5, 1968).
134 Id.
135 See note 115 supra.
136 Hearings on S. 1351 at 10 (testimony of Senator Morse); id. at 36 (statement of Gordon Ramstead); see id. at 27 (testimony of Forrest Cooper); Nassau County Study, supra note 4.
138 Hearings on S. 1351 at 6, 17 (testimony of Senator Wayne Morse).
139 Id. at 31, 33 (testimony of Forrest Cooper); cf. id. at 22-23 (testimony of Senator Wayne Morse).
140 Id. at 38 (testimony of Gordon Ramstead).
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is not first offered. And, as was suggested in the hearings, the prospect of liability for his own costs would clearly deter the condemnee from requiring obviously frivolous litigation.

One very valid concern, however, was expressed during the hearings: If attorneys' fees were allowed where there is only a nominal increase in the award over the offer, frivolous litigation might be encouraged. It was suggested that Senate Bill 1351 be amended, therefore, to require a one or two percent increase in the award over the offer before expenses would be allowed. However, a more useful amendment would approach the problem directly and allow recovery of the condemnee's expenses as the court, in the interests of justice, would allow. This approach would permit the trial judge, who is aware of the facts in each case and better able to determine when litigation is frivolous, to allow or deny costs where he deems such actions appropriate. Surely this flexible concept is more desirable, as it is more likely to lead to a fair result than is a mathematical formula.

In any event, it is axiomatic that there is some price level, whatever its relation to fair market value, that will generally satisfy the condemnee while discouraging frivolous litigation. At present it is clear that the price level is below fair market value, and below the constitutionally guaranteed "just compensation." Thus, some corrective measure is needed.

Conclusions

Legislation is not easily enacted. It presumably took several cases of repeatedly abandoned condemnation proceedings before California enacted section 1255a of the Code of Civil Procedure. Fifty-seven years then passed before that section was amended to provide for the realities of preparing for eminent domain litigation.

Only four American jurisdictions allow a condemnee to receive compensation for his attorneys' fees in completed condemnation actions, even though the award may be several times as great as the condemnor's last offer. Two-thirds of the states presently allow abandonment without any liability on the part of the condemnor for the condemnee's expenses.

In short, American lawmakers have failed to recognize the dis-

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141 Id. at 33 (testimony of Forrest Cooper).
142 Id. at 22 (testimony of Senator Wayne Morse); cf. text accompanying note 133 supra.
143 Id. at 24.
144 Nassau County Study, supra note 4; see note 136 supra.
145 See text accompanying notes 16-18 supra.
146 These states are Florida, Iowa, North Dakota and Oregon.
147 See note 8 supra.
tinction between eminent domain and other civil proceedings. The language of the courts to the effect that a condemnee is not receiving “just compensation” if he has to pay any of his reasonably incurred costs of litigation, is not, in general, reflected in legislation. Factors such as attorneys’ fees often make a substantial difference between “just compensation” on the one hand and what is equivalent to extortion on the other. Legislation is badly needed.

The Model Code and Senate Bill 1351 are both steps in the right direction. Neither is all-inclusive, and both are doubtless years from enactment. Even upon enactment, the Senate bill will affect only a small fraction of the condemnation actions in California. And the Model Code faces an arduous journey between proposal and adoption by the California legislature. However, California condemnation law has progressed markedly over the past few decades. It is not unlikely, therefore, that, with the aid of the above-noted proposed legislation, California will eventually fulfill the constitutional mandate that the condemnee receive his full measure of “just compensation.”

Barry L. Friedman*

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148 In La Mesa—Spring Valley School Dist. v. Otsuka, 57 Cal. 2d 309, 316-17, 369 P.2d 7, 12, 19 Cal. Rptr. 479, 484 (1962), the court, in noting the difference, said: “It must be kept in mind that attorney’s fees in a condemnation action are in a different category from those in other actions. Eminent domain, so far as the defendant is concerned, is not based upon any activity on his part. There is no voluntary element in such an action. When the public agency announces its intention to take his property, it is telling the owner that he must sell his property whether he wants to or not.” See generally 4 Nichols § 14.249; note 67 supra.

149 See text accompanying notes 66 & 67 supra.

150 Hearings on S. 1351 at 6 (testimony of Senator Wayne Morse); id. at 40 (testimony of Roland Boyd); see id. at 55 (Resolution of the House of Delegates, ABA).

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