36 3/24/69

First Supplement to Memorandum 69-57

Subject: Study 36 - Condemnation (Litigation Expenses)

Attached is an additional letter on the problem of litigation expenses in condemnation procedure. You should consider this letter in connection with the staff suggestions contained in Memorandum 69-57.

Respectfully submitted,

John H. DeMoully
Executive Secretary

1st supp Memo 69-57 EXHIBIT I

DESMOND, MILLER, DESMOND & WEST
ATTORNEYS AT LAW
616 "J" STREET
SACRAMENTO, CALIFORNIA 95814
TELEPHONE: (916) 443-2051

EARL D. DESMOND
(1895-1958)
E. VAYNE MILLER
(1904-1968)

RICHARD F. DESMOND
LOUIS N. DESMOND
BILL W. WEST
CAROL MILLER

JOHN LIEBERT
JOHN R. LEWIS, JR.

March 19, 1969

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

Re: Litigation Expenses in Condemnation Procedure

In commenting on your letter of February 17, 1969, I would like to preface my remarks with some general observations.

There seems to be a general movement afoot to place eminent domain proceedings in their own little niche in the law with their own special evidentiary rules. The direct result of this trend is to create a highly specialized field of litigation completely forbidden to the general practitioner and overwhelmingly cumbersome and forbidding to the landowner. Even qualified judges become confused by the welter of apparently conflicting decisions and undecipherable procedural statutes. We are becoming lost in a maze of "code pleading" type rulings rather than a simple determination of just compensation upon the merits and all of the facts and probabilities.

Time was when admissible evidence included all factors reasonably considered in the market place. The Evidence Code and recent decisions have now become such a welter of artificiality that the original theories seem almost divinely inspired in their simplicity. The only recent trend toward reinstating common sense into this field was contained in the philosophies expressed in People v. Lynbar.

The courts complain endlessly of the burdens placed on their calendars by these cases and perennially seek artificial solutions. They overlook the fact that their time is really consumed by wrestling with and groping for a common sense interpretation of the law.

All of this results in increased financial burdens imposed upon the landowner, his witnesses and his counsel,

effectively preventing the litigation of controversies involving differences of opinion under $10 - $15,000. A social problem is thereby created to the injury of those landowners least able to bear the myriad financial and emotional losses suffered as a direct result of eminent domain.

The landowner must face the artificial concepts of the law and protracted litigation, financial hardships caused by the loss of business (ofter irreparable), personal property and unwanted relocation expenses, not to mention emotional distress and the costs and financial risks of litigation. He must even pay for the revenue stamps according to most interpretations. Death occurs frequently as a direct result of these impositions and I can provide you with many a case history.

All of these burdens are placed upon the most law-abiding of citizens who are bulwarks of their communities and who are entirely without fault in the litigation. By comparison they should be given every benefit of the doubt as against public agencies who can easily afford to pay even excessive costs, if you will.

I liken the situation to the adage, "Better that guilty men go free than one innocent suffer," and say, "Better that landowners be overpaid than one innocent landowner suffer $1 of financial detriment."

With these basic concepts in mind, I feel that condemnation proceedings should be treated like other litigation under ordinary evidentiary rules and that attorney fees be borne in the ordinary contractual manner. Normally these fees do not exceed the costs involved to the seller in normal transactions.

On the other hand, the expenses of trial and preparation are unusually high, are not ordinarily incurred in the private market and MUST be incurred before an attorney can even begin to evaluate a case. Litigation and trial always result from a bona fide position assumed by the landowner. The outcome, good or bad, should not result in the imposition of these expenses upon him.

Many of your comments are based upon the completely

erroneous assumption that there are ways of encouraging settlement and that this is a two way street. Nothing could be further from the truth. Certain condemning agencies uniformly REFUSE to negotiate. They offer ONLY their highest appraisal and will not base an offer upon the contingencies and costs of litigation. On the other hand, the landowner is ALWAYS forced to consider the above factors thereby driving down his price. Is it any wonder that most of the poor people settle with the right of way agents and that probably only 3% of all acquisitions follow a trial?

I give you an example. A seventy year old couple own a home free and clear in an older section of town and subsist on social security. It is taken. The State says it is worth $12,000. The property cannot be replaced for under $16,000, and the replacement property has no public transportation and is not within walking distance of necessary facilities, but the old one is. Landowners and their appraiser feel the property is worth $15,000. I will not and cannot go to trial on this case. I will take it only on the basis that we do not prepare for trial but that somehow we can negotiate upwards from the State figure. What proposed formula of yours will rectify this situation? Only guaranteed payment of ALL attorney fees and costs. Now under our artificial and encumbersome rules it will take five days to try, for, remember, we have the burden of proof. I must gross $2000 per week in my business and the appraiser will cost $1000. My time is preparation will take a week and there are depositions, photos and the builder-estimator and many other incidental expenses. Solve this problem if you will! It again is based on an actual experience.

A jurisdictional offer is not a bad idea and I think that certainly it should apply in the event possession is taken. Experience has taught me that there is no such thing as an "independent" appraiser and I have consistently avoided this apparent solution except on cases such as the example cited above where he was named by both parties and assumed a position of quasi-arbiter by mutual agreement. It was only an expedience necessitated by hard economic considerations rather than the relative merits of the case.

The enclosed questionnaire is too general to be of much value but I have filled it in for whatever assistance it might be.

Yours very truly,

Robert F. Desmond

DESMOND, MILLER, DESMOND & WEST

RFD:bk
enc.