

Chapter 35

Eminent Domain Procedure

Chapter 35

NOTES OF DECISIONS

Statutes authorizing the condemnation of private property for a public use are wholly in invitum, and since they are in derogation of vested rights, must be strictly construed. *Huddleston v. Eugene*, (1899) 34 Or 343, 55 P 868; *Portland v. Kamm*, (1930) 132 Or 317, 285 P 236.

ATTY. GEN. OPINIONS: Paying tax liens from award, 1960-62, p 208.

LAW REVIEW CITATIONS: 46 OLR 125-158, 482.

35.225

NOTES OF DECISIONS

Under former similar statute, upon return of the verdict, the plaintiff was entitled to the entry of a judgment adjudicating the award as the amount to be paid before the property could be taken. *Oregon R.R. & Nav. Co. v. Taffe*, (1913) 67 Or 102, 107, 134 P 1024, 135 P 332, 135 P 515; *Skelton v. City of Newberg*, (1915) 76 Or 126, 148 P 53.

Under former similar statute, a corporation could not appropriate a highway, already dedicated to the public use, to its exclusive use and occupation. *Oregonian Ry. v. Portland*, (1881) 9 Or 231.

Under former similar statute, acting under a mere color of eminent domain would be enjoined. *Stafford v. Multnomah County Drainage Dist. No. 1*, (1922) 103 Or 197, 204 P 158.

FURTHER CITATIONS: *In Re Morgan's Estate*, (1904) 46 Or 233, 77 P 608, 78 P 1029; *Re Water Rights of Hood R.*, (1924) 114 Or 112, 227 P 1065; *United States v. Ore. Ry. & Nav. Co.*, (1883) 16 Fed 524; *Northern Pac. Terminal Co. v. Lowenberg*, (1883) 18 Fed 339; *Eastern Ore. Land Co. v. Willow R. Land & Irr. Co.*, (1912) 201 Fed 203; *United States v. Bauman*, (1943) 56 F Supp 109.

35.235

NOTES OF DECISIONS

Under former similar statute, although the requirement of negotiation in the statute was mandatory, compliance was excused where such negotiations would be futile. *State Hwy. Comm. v. Hurliman*, (1962) 230 Or 98, 368 P2d 724.

Under former similar statute, the adoption of a condemnation resolution was a condition precedent to filing an eminent domain proceeding. *Id.*

Under former similar statute, when the defendant took the position that the condemnor had no right to condemn, the question of inability to agree as to compensation thereafter was immaterial. *Id.*

FURTHER CITATIONS: *State Hwy. Comm. v. EFEM Whse.*, (1956) 207 Or 237, 295 P2d 1101.

ATTY. GEN. OPINIONS: Procedure when person owning

property is public officer or employe, 1954-56, p 176; authority of commission to comply with Highway Beautification Act, 1964-66, p 336; authority to donate state park to federal agency for a monument, (1970) Vol 35, p 56.

35.245

CASE CITATIONS: *State v. Cerruti*, (1950) 188 Or 103, 214 P2d 346; *State Hwy. Comm. v. Deal*, (1951) 191 Or 661, 233 P2d 242; *Tomasek v. Ore. Hwy. Comm.*, (1952) 196 Or 120, 248 P2d 703; *State Hwy. Comm. v. Ralston*, (1961) 226 Or 143, 359 P2d 529; *State Hwy. Comm. v. Kromwell*, (1961) 226 Or 235, 359 P2d 907; *State Hwy. Comm. v. Oregon Inv. Co.*, (1961) 227 Or 106, 361 P2d 71, 96 ALR 2d 1137; *State Hwy. Comm. v. Hewitt*, (1962) 229 Or 582, 368 P2d 346; *State Bd. of Higher Educ. v. Stewart*, (1963) 236 Or 386, 388 P2d 113.

LAW REVIEW CITATIONS: 36 OLR 182.

35.255

NOTES OF DECISIONS

Under former similar statute allegation in condemnation complaint as to value of property need not agree with amount tendered the defendants before commencing the action. *State Hwy. Comm. v. EFEM Whse.*, (1956) 207 Or 237, 295 P2d 1101; *State Hwy. Comm. v. Helliwell*, (1961) 225 Or 588, 358 P2d 719; *State Hwy. Comm. v. Assembly of God, Pentecostal*, (1962) 230 Or 167, 368 P2d 937.

The complaint did not need to show whether plaintiff sought to acquire a fee simple title or an easement. *Pacific Live Stock Co. v. Warm Springs Irr. Dist.*, (1921) 270 Fed 555.

Defendant was entitled to have the complaint made more certain, as damages awarded could vary according to whether an exclusive or an ordinary right of way was sought. *Oregon Mesabi Corp. v. Johnson Lbr. Corp.*, (1947) 166 F2d 997.

FURTHER CITATIONS: *Skelton v. City of Newberg*, (1915) 76 Or 126, 148 P 53; *United States v. Aho*, (1943) 51 F Supp 137.

35.265

NOTES OF DECISIONS

Under former similar statute income was constructively received by taxpayer-condemnee when deposited with the court subject to his demand. *Carpenter v. Dept. of Rev.*, (1970) 4 OTR 125.

FURTHER CITATIONS: *State Hwy. Comm. v. EFEM Whse.*, (1956) 207 Or 237, 295 P2d 1101.

ATTY. GEN. OPINIONS: Owner of interest earned by deposit, (1970) Vol 35, p 286; authority to exact fee for performance of duties of clerk, (1971) Vol 35, p 454.

35.285

NOTES OF DECISIONS

Income is constructively received by taxpayer-condemnee being deposited with the court subject to his demand. *Carpenter v. Dept. of Rev.*, (1970) 4 OTR 125.

ATTY. GEN. OPINIONS: Owner of interest earned by deposit, (1970) Vol 35, p 286; authority to exact fee for performance of duties of clerk, (1971) Vol 35, p 454.

35.295

NOTES OF DECISIONS

I. Under former similar statute

The defendant could plead any matter to defend against being compelled to yield the property, including facts in abatement or perpetually barring plaintiff. *Oregon Central R. Co. v. Wait*, (1869) 3 Or 92.

The value of improvements made by plaintiff who entered on the land by permission of the person in possession thereof could not be recovered. *Oregon Ry. & Nav. Co. v. Mosier*, (1887) 14 Or 519, 13 P 300, 58 Am Rep 321.

The defendant could unite in his answer any legal defense and a claim for damages. *Bridal Veil Lumbering Co. v. Johnson*, (1893) 25 Or 105, 34 P 1026.

The qualification and status of the petitioner to exercise the power of eminent domain, the liability of the particular property to be condemned, the amount of the compensation and the necessity for the taking could all, or any of them, be made issues by the answer. *Oregon R. & Nav. Co. v. Taffe*, (1913) 67 Or 102, 134 P 1024, 135 P 332, 135 P 515.

The owner could show the true value and the damage and the city could show the special benefits. *Schmid v. Portland*, (1917) 83 Or 583, 591, 163 P 1159.

A counterclaim for damages for the wrongful detention of property was properly stricken. *State v. Mohler*, (1925) 115 Or 562, 237 P 690, 239 P 193.

The statute allowing the plea of nul tiel corporation to be pleaded at same time as defense on merits applied to condemnation actions only. *Multorpor Co. v. Reed*, (1927) 122 Or 605, 260 P 203, 55 ALR 504.

A counterclaim could be stricken from an answer in a condemnation case. *United States v. Aho*, (1943) 51 F Supp 137.

If necessity is made an issue it should be settled by the court before the jury is impaneled. *State Hwy. Comm. v. Hurliman*, (1962) 230 Or 98, 368 P2d 724.

The necessity for the taking is a question of law for the court. *Id.*

The statute referred only to consequential damages to the real property. *California-Pac. Util. Co. v. Barry*, (1969) 254 Or 344, 460 P2d 847.

Special damages to the property directly flowing from the construction of the project had to be plead. *Id.*

Where the United States, as plaintiff, stated one value in the complaint and another in the reply concerning the same property, it was guilty of departure and no issue was formulated. *United States v. Zellerbach Corp.*, (1945) 60 F Supp 853.

FURTHER CITATIONS: *Oregonian R. Co. v. Hill*, (1881) 9 Or 377; *Skelton v. City of Newberg*, (1915) 76 Or 126, 148 P 53; *State Hwy. Comm. v. Bailey*, (1957) 212 Or 261, 319 P2d 906.

CASE CITATIONS: *State Hwy. Comm. v. Vella*, (1958) 213 Or 386, 323 P2d 941; *State Hwy. Comm. v. Kromwell*, (1961) 226 Or 235, 359 P2d 907; *State Hwy. Comm. v. Blau*, (1962) 231 Or 216, 371 P2d 972; *State Hwy. Comm. v. Northwestern Ice and Cold Storage Co.*, (1963) 233 Or 497, 378 P2d 995; *Wassom v. State Tax Comm.*, (1964) 1 OTR 468; *Willoughby*

v. State Tax Comm., (1964) 1 OTR 484; *Miller v. State Tax Comm.*, (1964) 1 OTR 488; *Grell v. State Tax Comm.*, (1964) 1 OTR 493; *State Hwy. Comm. v. Dumas*, (1964) 238 Or 449, 395 P2d 424; *State Hwy. Comm. v. Callahan*, (1966) 242 Or 551, 410 P2d 818; *State ex rel. Nilsen v. Adams*, (1967) 248 Or 269, 433 P2d 831.

LAW REVIEW CITATIONS: 37 OLR 68; 40 OLR 240; 4 WLJ 1.

35.305

I. Under former similar statutes

Special benefits could not be set off against the value of the land actually seized, but could be set off against injury to the residue of the tract. *State Hwy. Comm. v. Bailey*, (1957) 212 Or 261, 319 P2d 906; *State Hwy. Comm. v. Hooper*, (1970) 2 Or App 450, 468 P2d 540, Sup Ct review allowed.

Burden of proof for just compensation in condemnation proceeding was on the defendant. *State Hwy. Comm. v. Nelson*, (1960) 222 Or 458, 353 P2d 616; *State Hwy. Comm. v. Kliks*, (1964) 238 Or 281, 393 P2d 763.

Offers to buy and sell comparable property were not admissible to establish the value of the land under condemnation. *State Hwy. Comm. v. Morehouse Holding Co.*, (1960) 225 Or 62, 357 P2d 266; *State Hwy. Comm. v. Fisch-Or, Inc.*, (1965) 241 Or 412, 399 P2d 1011.

The price paid recently for similar parcels was admissible on the question of value. *State Hwy. Comm. v. Parker*, (1960) 225 Or 143, 357 P2d 548; *State Hwy. Comm. v. Parker*, (1960) 225 Or 324, 358 P2d 274; *State Hwy. Comm. v. Fisch-Or, Inc.*, (1965) 241 Or 412, 399 P2d 1011.

Capitalization of income when properly employed was an acceptable method of arriving at the value of property. *State Hwy. Comm. v. Nunes*, (1963) 233 Or 547, 379 P2d 579; *State Hwy. Comm. v. Nunes*, (1964) 237 Or 257, 391 P2d 381.

The so-called multiplication method was a form of capitalizing profits to arrive at value. *State Hwy. Comm. v. Nunes*, (1963) 233 Or 547, 379 P2d 579; *State Hwy. Comm. v. Jones*, (1964) 237 Or 372, 391 P2d 625; *State Hwy. Comm. v. Nunes*, (1964) 237 Or 257, 391 P2d 381.

A witness testifying as to value of land containing sand, gravel or other merchantable soil materials could be questioned as to the details of his computation. *State Hwy. Comm. v. Nunes*, (1963) 233 Or 547, 379 P2d 579; *State Hwy. Comm. v. Nunes*, (1964) 237 Or 257, 391 P2d 381.

It was not error to charge that the jurors could take into consideration the increase in value of the land touching the condemned property in assessing the value of the property condemned. *Oregon Cent. R. Co. v. Wait*, (1869) 3 Or 428.

Where the court had jurisdiction of the parties and the subject-matter, the judgment was not absolutely void because the measure of damages was incorrect. *Schmid v. Portland*, (1917) 83 Or 583, 163 P2d 1159.

The damages recoverable were controlled, not by the extent of the present use by condemnor or present intention of condemnor to use, but by the right to use that was acquired. *Coos Bay Logging Co. v. Barclay*, (1938) 159 Or 272, 79 P2d 672.

There was no "taking" of an easement of access when a new nonaccess highway was established by condemnation. *State Hwy. Comm. v. Burk*, (1954) 200 Or 211, 265 P2d 783.

If it was not a manifest abuse of its discretion the court could permit the defendant to open and close the case. *State Hwy. Comm. v. Superbilt Mfg. Co.*, (1955) 204 Or 393, 281 P2d 707.

Special benefits could be set off to reduce damages as to uncondemned remainder of owner's property. *State Hwy. Comm. v. Bailey*, (1957) 212 Or 261, 319 P2d 906.

Not necessary to plead special benefits. *Id.*

Measure of damages in a condemnation proceeding was the actual cash market value of land taken and depreciation in market value (severance damages) of portion of tract not taken. *State Hwy. Comm. v. Vella*, (1958) 213 Or 386, 323 P2d 941.

Loss of trade or business was not an element of severance damages. *Id.*

In condemnation cases, the nature and adaptability of the machinery and the manner of its installation practically control the question of whether certain items of property were fixtures. *State Hwy. Comm. v. Feves*, (1961) 228 Or 273, 365 P2d 97.

The rule that an owner was regarded as qualified to testify as to value of the property did not extend to corporate agents of a corporation owner. *State Hwy. Comm. v. Assembly of God, Pentecostal*, (1962) 230 Or 167, 368 P2d 937.

Proof of value was limited to showing the present condition of the property and the use to which it was at the time naturally adapted. *Id.*

The trier of facts was not bound by the opinion of experts on value, even though it be uncontradicted. *Portland v. Ruggers*, (1962) 231 Or 624, 373 P2d 970.

It was the true market value of property not its cost that was protected. *State Hwy. Comm. v. Anderson*, (1963) 234 Or 328, 381 P2d 707.

Cost of improving land for general use in no wise reflected true cash market value. *Id.*

In evaluating a leasehold, testimony regarding income from various possible uses of the premises was not more speculative than most evidence of value. *State Hwy. Comm. v. Ernest*, (1963) 234 Or 253, 380 P2d 988.

An opinion as to the value of a leasehold would be admissible in evidence only if it were grounded upon some knowledge of the demand for leases of property of the kind in question and the rentals which such property ordinarily bring. *State Bd. of Higher Educ. v. Stewart*, (1963) 236 Or 386, 388 P2d 113.

Assessed value was not competent direct evidence of value for purposes other than taxation. *State Hwy. Comm. v. Anderegg*, (1965) 241 Or 31, 403 P2d 717.

If an expert witness on value stated the ground on which his opinion was based, including hearsay testimony of the sale price of comparable property, his explanation was not proof of the facts which he says he considered. *State Hwy. Comm. v. Fisch-Or, Inc.*, (1965) 241 Or 412, 406 P2d 539.

Evidence of the probability of a zone change was admissible as proof of special benefits to the remaining property. *State Highway Comm. v. Oswalt*, (1970) 1 Or App 449, 463 P2d 602.

It was proper to limit appraisal evidence solely to the value of property taken when the land taken was a self-contained unit and no damages were claimed to the remainder. *State Hwy. Comm. v. Hooper* (1970) 2 Or App 450, 468 P2d 540, Sup Ct review allowed.

FURTHER CITATIONS: *Oregon Elec. Ry. v. Terwilliger Land Co.*, (1908) 51 Or 107, 93 P 334, 93 P 930; *Pacific Ry. & Nav. Co. v. Elmore Packing Co.* (1912) 60 Or 534, 541, 120 P 389, Ann Cas 1914A, 371; *Skelton v. City of Newberg*, (1915) 76 Or 132, 135, 148 P 53; *State v. Ganong*, (1919) 93 Or 440, 184 P 233; *Moore Mill & Lbr. Co. v. Foster*, (1959) 216 Or 204, 227, 336 P2d 39, 337 P2d 810.

35.315

CASE CITATIONS: *Oregonian R. Co. v. Hill*, (1881) 9 Or 377; *Oregon R. & Nav. Co. v. Taffe*, (1913) 67 Or 102, 134 P 1024, 135 P 332; *Moore Mill & Lbr. Co. v. Foster*, (1959) 216 Or 204, 227, 336 P2d 39, 337 P2d 810.

35.325

NOTES OF DECISIONS

1. Under former similar statute

Having paid the damages, the plaintiff was entitled to judgment. *Skelton v. City of Newberg*, (1915) 76 Or 126, 148 P 53; *Portland R. Co. v. McGrath*, (1918) 88 Or 346, 348, 171 P 1181.

Upon payment into court of the damages assessed by the jury, the court was authorized to render judgment appropriating the lands. *Oregonian R. Co. v. Hill*, (1881) 9 Or 377.

The court could render no judgment other than the particular kind authorized by the statute. *Id.*

A judgment in personam against the plaintiff could not be rendered; the judgment should appropriate the land to the plaintiff's use after payment of the damages assessed by the jury. *Oregon Ry. Co. v. Bridwell*, (1884) 11 Or 282, 3 P 684.

Judgment was final and appealable though plaintiff did not make any deposit. *Oregon R.R. & Nav. Co. v. Eastlack*, (1909) 54 Or 196, 102 P 1011, 20 Ann Cas 692.

Payment of the sum assessed was a condition precedent to the judgment in favor of the plaintiff. *State v. Bradshaw*, (1911) 59 Or 279, 117 P 284.

Failure to state whether the fee or an easement was awarded to the plaintiff did not render the judgment erroneous. *Pacific Livestock Co. v. Warm Springs Irr. Dist.*, (1921) 270 Fed 555.

In rendering a judgment in condemnation proceedings the court, in the absence of a clearly expressed intent to the contrary, was required to give no greater interest than necessary to accomplish the purpose intended. *Id.*

The plaintiff having taken possession of the land, the defendant had the right to have judgment entered for the amount of the verdict and execution therefor. *Id.*

The city acquired no title until payment of damages and compensation provided for by the interlocutory decree. *Salem v. Marion County*, (1943) 171 Or 254, 137 P2d 977.

Interest was recoverable from the time that the state took possession of the property or the date of judgment. *State Hwy. Comm. v. Sauers*, (1953) 199 Or 417, 262 P2d 678.

Even though there are two or more owners of the land condemned, the court could award damages in a lump sum which would be paid by the state into the court for distribution. *State Hwy. Comm. v. Burk*, (1954) 200 Or 211, 265 P2d 783.

A tenant was generally entitled to share in a condemnation award to the extent of his leasehold interest. *State Hwy. Comm. v. Oregon Investment Co.*, (1961) 227 Or 106, 361 P2d 71, 96 ALR 2d 1137.

A tenant could by contract waive his right to participate in a condemnation award. *Id.*

A compromise of all or some of the issues relating to value was nonetheless an amount "assessed" by the court or jury. *State Hwy. Comm. v. Feves*, (1961) 228 Or 273, 365 P2d 97.

The payment into court of damages assessed transferred to condemnor all of the title and rights of the defendant to the property and litigation, save defendant's right of appeal. *State Bd. of Higher Educ. v. United Presbyterian Church*, (1966) 243 Or 352, 413 P2d 428.

If a possessor challenged the right to possession and refused to vacate, due process required an order of a court having jurisdiction of the parties to allow or disallow possession. *Harder v. Dept. of Fin. and Administration*, (1969) 1 Or App 26, 458 P2d 947.

Income was constructively received by taxpayer-condemnee when deposited with the court subject to his demand. *Carpenter v. Dept. of Rev.*, (1970) 4 OTR 125.

Where a grant was made by the landowner, it was held, in a suit to enjoin interference with the grantee's posses-

sion, that the grantor was entitled to compensation and that the grantee was owner of the fee. *Oregon R. R. & Nav. Co. v. McDonald*, (1911) 58 Or 228, 236, 112 P 413, 32 LRA(NS) 117.

Judgment gave a mere easement where the land was taken for a reservoir site and where the interest to be taken was not specified. *Pacific Live Stock Co. v. Warm Springs Irr. Dist.*, (1921) 270 Fed 555.

FURTHER CITATIONS: *State v. Bradshaw*, (1911) 59 Or 279, 117 P 284; *United States v. Bauman*, (1943) 56 F Supp 109; *Moore Mill & Lbr. Co. v. Foster*, (1959) 216 Or 204, 227, 336 P2d 39, 337 P2d 810; *State Hwy. Comm. v. Parker*, (1960) 225 Or 324, 358 P2d 274.

ATTY. GEN. OPINIONS: Whether a school district may proceed with a building before payment of damages, 1920-22, p 517; paying tax liens from award, 1960-62, p 208.

35.335

NOTES OF DECISIONS

Under former similar statute, the plaintiff in condemnation proceedings could abandon the proceedings any time prior to depositing the money to be paid. *Warm Springs Irr. Dist. v. Pac. Livestock Co.*, (1918) 89 Or 19, 173 P 265.

Under former similar statute, plaintiff could elect after the verdict whether it would pay for and take the property. *Portland R. Co. v. McGrath*, (1918) 88 Or 346, 171 P 1181.

Under former similar statute, upon a voluntary nonsuit, defendant could not be allowed attorney fees. *Multnomah County v. Burbank*, (1963) 235 Or 616, 386 P2d 444.

Under former similar statute, condemnor could not abandon the proceedings after entry but until title passed the option rested with the owner as to whether he would acquiesce in an attempted abandonment or compel performance. *State Bd. of Higher Educ. v. United Presbyterian Church*, (1966) 243 Or 352, 413 P2d 428.

35.345

NOTES OF DECISIONS

1. Under former similar statute

The state could become liable for attorneys' fees in condemnation. *State v. Ganong*, (1919) 93 Or 440, 184 P 233; *State v. Hawk*, (1922) 105 Or 319, 208 P 709, 209 P 607.

Findings of the lower court on attorney's fee would be set aside only if not supported by substantial competent evidence. *State Hwy. Comm. v. Kendrick*, (1961) 227 Or 608, 363 P2d 1078; *State Hwy. Comm. v. Glaser*, (1961) 227 Or 614, 363 P2d 1081, 363 P2d 1082, 363 P2d 1083.

Findings of the lower court on attorney's fee would be set aside only if not supported by substantial competent evidence. *State Hwy. Comm. v. Kendrick*, (1961) 227 Or 608, 363 P2d 1078; *State Hwy. Comm. v. Glaser*, (1961) 227 Or 614, 363 P2d 1081, 363 P2d 1082, 363 P2d 1083; *State Hwy. Comm. v. Zachary*, (1962) 230 Or 381, 370 P2d 237.

A tender at the trial of an amount greater than that assessed would not entitle plaintiff corporation to costs. *Oregon Central R. Co. v. Wait*, (1869) 3 Or 428.

The appeal in this case did not present for review the question of the denial of the attorney's fees. *Portland R. Co. v. Doyle*, (1917) 86 Or 206, 167 P 270, 168 P 291.

Attorney's fees were a right of the defendant in a condemnation proceeding, in the absence of stipulation, only when the amount thereof was alleged and proved. *State v. Ganong*, (1919) 93 Or 440, 184 P 233.

If the action proceeded to verdict, the attorney's fee was recoverable as provided. *State v. Ganong*, (1919) 93 Or 440,

184 P 233. **But see**, *Petition of Reeder*, (1924) 110 Or 484, 222 P 724.

The amount of the attorney's fees had to be alleged, proved and tried by a jury if the other facts were so tried. *State v. Ganong*, (1919) 93 Or 440, 184 P 233.

Where more compensation than tendered was recovered by defendant, he was entitled to costs and disbursements. *State v. Hawk*, (1922) 105 Or 319, 208 P 709, 209 P 607.

Defendant could not recover reasonable attorney's fee or cost of briefs as cost on appeal from federal district to circuit court. *Oregon Mesabi Corp. v. Johnson Lbr. Corp.*, (1948) 166 F2d 1003.

In awarding attorney's fees in cases involving leased lands the court was required to take into consideration the fact that the landlord and tenant might have been entitled to separate counsel. *State Hwy. Comm. v. Burk*, (1954) 200 Or 211, 265 P2d 783.

This section did not require that the money offered be tendered into court in the event condemnation proceedings were instituted in order that the liability for costs, disbursements and an attorney's fee be avoided. *State Hwy. Comm. v. EFEM Whse.*, (1956) 207 Or 237, 295 P2d 1101.

In determining defendant's right to costs and disbursements, interest was no part of the amount of damages assessed by the jury. *State Hwy. Comm. v. Helliwell*, (1961) 225 Or 588, 358 P2d 719.

Attorney's fee in an action at law or a suit in equity was a question of law to be determined by the trier of fact upon the pleadings and evidence. *State Hwy. Comm. v. Kendrick*, (1961) 227 Or 608, 363 P2d 1078.

If attorney's fee was allowed by statute, the amount was a question of fact. *Id.*

The trial judge was not bound to allow an attorney's fee within the limits fixed by the expert testimony. *State Hwy. Comm. v. Zachary*, (1962) 230 Or 381, 370 P2d 237.

A tender for property of a given size and description could not be a tender for property materially reduced in quantity. *State Hwy. Comm. v. Lytle*, (1963) 234 Or 188, 380 P2d 811.

There was substantial evidence to support the award. *State Hwy. Comm. v. Nunes*, (1964) 237 Or 257, 391 P2d 381.

A lump sum tender to claimants was controlling on attorney fees. *State Hwy. Comm. v. Clark*, (1964) 238 Or 505, 395 P2d 146.

The legislature intended the trial judge rather than the jury to fix attorney fees. *State Hwy. Comm. v. Hursh*, (1966) 245 Or 378, 422 P2d 266.

Award of costs against defendant subsequent to a tender was error where the tender was not made before the commencement of the action. *Oregon Central R. Co. v. Wait*, (1869) 3 Or 428.

FURTHER CITATIONS: *Warm Springs Irr. Dist. v. Pac. Livestock Co.*, (1918) 89 Or 19, 173 P 265; *Moore Mill & Lbr. Co. v. Foster*, (1959) 216 Or 204, 227, 336 P2d 39, 337 P2d 810; *California-Pac. Util. Co. v. Barry*, (1969) 254 Or 344, 460 P2d 847; *City of Medford v. Bessonette*, (1970) 255 Or 53, 463 P2d 865.

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CASE CITATIONS: *Oregon Elec. Ry. v. Terwilliger Land Co.*, (1908) 51 Or 107, 93 P 334, 93 P 930; *Oregon R.R. & Nav. Co. v. Taffe*, (1913) 67 Or 102, 134 P 1024, 135 P 332, 135 P 515; *Sanders v. Portland R. Co.*, (1921) 98 Or 620, 193 P 660; *Kamin v. City of Portland*, (1930) 132 Or 311, 285 P 240; *Minton v. Coast Prop. Corp.*, (1935) 151 Or 208, 46 P2d 1029; *Coos Bay Logging Co. v. Barclay*, (1938) 159 Or 272, 79 P2d 672; *Georgia-Pacific Co. v. Miller*, (1956) 208 Or 684, 304 P2d 428, 304 P2d 440, 304 P2d 441.

