Date of Meeting: July 18-19, 1958

Date of Memo: July 9, 1958

Memorandum No. 6

Subject: Study No. 36 - Condemnation.

Attached is a copy of each of the following:

1. The research consultant's study on Moving Expenses.

2. A copy of a letter from the research consultant relating to the study.

3. A copy of a letter received by the research consultant from the Division of Contracts and Rights of Way of the State Highway Department commenting on the statutes proposed in the Moving Expenses study.

I recommend that we consider these items at the July meeting.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

Law Offices
HILL, FARRER & BURRILL
411 West Fifth Street
Los Angeles 13, California
Madison 6-0581

July 2, 1958

Professor John R. McDonough
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Dear Professor McDonough:

We are enclosing mimeographed stencils of our study on moving expenses. Will you kindly let us have a half dozen copies of the study when it has been run.

A copy of the study draft was forwarded to the attorneys handling condemnation matters for the City of Los Angeles, for the County of Los Angeles and the State Division of Highways. We received a reply only from the attorneys for the Division of Highways. A copy of the letter of Mr. Emerson W. Rhyner is enclosed.

We have the following comments to make with respect to the points raised by Mr. Rhyner:

(1) We do not believe the claim for moving costs need prevent the condemnation judgment from becoming final. The language of the proposed statute contemplates that the claim may be filed after the condemnation judgment is final. We believe reimbursement for actual expenses to be preferable to an allowance made by the court, in the interest of avoiding dispute and litigation.

(2) We believe that an attempt should not be made to define the words "removal" and "relocation" in detail. It would not be possible to cover all contingencies which might arise, and we feel a partial definition might be productive of greater difficulty than none at all.

We do not feel that reimbursement for the costs of packing, transporting and unpacking is a sufficient reimbursement within the intent of a moving expense statute. For example, the expense of dismantling and reassembling complicated machinery might well be held to be a proper moving expense.

(3) We do not feel that the statute should exclude the moving expenses of tenants at will. These tenants are inconvenienced as much as any others by a condemnation of their premises, and it does not seem that their right to reimbursement for moving expenses should depend upon the accident of their agreement with the landlord. Making oneself subject to the landlord's termination of the tenancy is not the same as consenting that the State can terminate it, without the payment of moving expenses.

(4) It is conceded that payment of moving expenses would increase the costs of administration of a condemnation program. It appears, however, that if the reimbursement were limited to costs actually incurred and the time for filing the claim extends to 90 days after date of removal from the premises (as in the proposed statute) some of the objections raised by Mr. Rhyner would be obviated.

(5) With respect to the use of a fixed sum as a limitation on moving expenses, we make reference to our comments in the study itself. A fixed limitation of $200 would make administration easier, to be sure. This amount could be included in the condemnation payment without much investigation or dispute. However, we believe it to be essentially unfair, since it does not reimburse the owner or tenant who suffers most by a condemnation--the man who is forced to incur heavy moving expenses.

(6) We realize that the payment of moving expenses will increase the cost of public acquisitions. It may well be that if moving expenses are to be paid they would have to be assumed by the State under the Federal Highway Program. But this is, of course, a matter for the legislature--to determine whether the cost of public improvements shall be spread over the members of the public body as a whole, or whether they shall be borne in part by each citizen whose property is taken for eminent domain, as one of the obligations of citizenship.

It is the recommendation of this office that reimbursement for moving expenses be allowed. We have not further detailed our reasons for our recommendation as we believe that the reasons in favor of such legislation have been set out in the study itself and in this letter. If you feel that a further or additional statement of our reasons for recommending adoption of moving expense legislation is necessary, will you please let us know.

Sincerely,

S/ Robert Nibley

RN/ec
Encls.

ROBERT NIBLEY
of HILL, FARRER & BURRILL

STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC WORKS
Division of Contracts and Rights of Way
(Legal)

Public Works Building
1120 N Street
(P.O.Box 1499)
Sacramento 7, California

May 16, 1958

Messrs. Hill, Farrer & Burrill
Attorneys at Law
411 West Fifth Street
Los Angeles 13, California

Attention Mr. Robert Nibley

Gentlemen:

Your letter of April 18, 1958, addressed to Mr. George C. Hadley and regarding proposed statutes for the payment of moving costs in connection with eminent domain proceedings has been referred to us for reply.

We have examined the statutes in detail. As you know, the first statute would permit the jury to assess the expenses of removal or relocation of personal property without any limitation, while the second statute would authorize the court to allow such costs upon the filing of a memorandum of costs. In the latter instance, the costs would be limited to those actually incurred and could not exceed 25% of the sums paid for acquisition of the real property.

It seems to us that the long form of statute is more sound procedurally and has more certain standards than the short form. We are wondering, however, if the provision limiting the reimbursable costs to those actually incurred is too restricted. This would mean that the judgment would not become final until at least 90 days after the property owner had left the premises. Quite often the Division of Highways leases the property back to the former owner after condemnation proceedings have been completed and that owner remains in possession until the highway is constructed. Under the statute as it is presently drafted, the judgment would not become final until the property was vacated, and this could be over a term of years. It would seem more appropriate to broaden the reimbursable costs to those actually incurred or as allowed by the court and to restrict the filing of the claim for reimbursement to within 90 days of the date of judgment.

However, it is our opinion that both of these statutes are so uncertain that it would make the right of way acquisition program of the Division of Highways extremely difficult to administer and considerably increase the costs thereof. We have been unable to find any cases which adequately define the words "removal" or "relocation". As the statutes are written, we see no reason why an Appellate Court could not interpret these words to include loss of business due to the relocation, inconvenience of the property owner due to the relocation, redecorating of the new premises made desirable by reason of the new location, and other innumerable items that might be remotely connected with the relocating of the property owner to his new premises.

It has always been my understanding that the intention of the so-called moving expense bills was to reimburse the property owner for packaging and unpackaging of his personal property together with costs of transportation thereof and that the other more remote items above enumerated were not considered to be included. It would, therefore, seem proper to specify with certainty in the bill what items of expense are reimbursable and perhaps exclude others where there is doubt as to the meaning of the words used. Not only would this aid a court in determining the scope of the statute, but it would also be of great benefit to governmental agencies in administering the law.

We also note that the statutes seem to permit the payment of relocation expenses to tenants who are on the property on a tenancy at will arrangement. In the latter case, of course, the tenants have entered upon the property with the realization that they must move at the will of the owner.

Even assuming that the courts would interpret the statutes to restrict reimbursement to the actual cost of transportation, the lack of sufficient standards would make it difficult for this Department to administer the program. Approximately 97% of our acquisitions are made voluntarily and without court judgment. At the time the right of way contract is signed, the property owner has not moved and we have no way of knowing where he is going. Obviously, he could claim a cross-country trip by the most expensive means of transportation. In view of the lack of standards, this would mean either that the demanding property owner could get a sizable item for moving expenses while his more docile neighbor would receive a more nominal amount or that, in order to treat all property owners equally, they would all be paid the maximum amount. The restriction of 25% of the acquisition price, as set forth in the long statute, will be of little effect in the case of residential acquisitions. In the latter instance, I believe that

moving costs usually do not exceed $200 where the move is made in the same area. Accordingly, we suggest for your consideration that a fixed sum be used as the ceiling inasmuch as it would appear that the property owners might well receive the full amount in nearly all cases. For instance, such a sum could be in the amount of $200.

We appreciate the opportunity to comment on these proposed statutes. We do not wish, however, that such comment be taken as an approval in principle of the reimbursement for moving expenses, as such reimbursement is not approved by the federal government in highway acquisitions (see Policy and Procedure Memorandum 21-4.1 of the Bureau of Public Roads) and could well have a very adverse effect on the highway program.

Very truly yours,

S/ Emerson W. Rhyner
EMERSON W. RHYNER
Attorney

July 8, 1958

A STUDY TO DETERMINE WHETHER THE OCCUPANT OF REAL PROPERTY TAKEN BY EMINENT DOMAIN SHOULD BE REIMBURSED FOR HIS EXPENSES OF MOVING

This study was made at the direction of the Law Revision Commission by the law firm of Hill, Farrer and Burrill, Los Angeles.

SHOULD THE OCCUPANT OF REAL PROPERTY TAKEN BY EMINENT DOMAIN BE REIMBURSED FOR HIS EXPENSES OF MOVING?

1. Introduction

The entire field of eminent domain law is becoming one of increasing importance to the people of California. New populations need new school sites, playgrounds, parks and other facilities. Expanding governmental activities require new offices and public buildings. Existing streets and highways are being widened and broad freeways are being created where none existed before. As a result, the power of condemnation is being exercised more and more frequently, and its effect is being felt by increasing numbers of citizens. Some affected persons have felt that present laws did not operate justly as to them, and they have sought relief from their representatives in the Legislature. Senators and Assemblymen are thus being called upon to weigh the interests of their constituents as individuals on the one hand against the interests of the same individuals collectively, as a body politic, on the other.

This study is respectfully submitted to assist in a consideration of one aspect of the problem--whether or not an owner should be reimbursed for the cost of removing personal property from land condemned.

2. Present Law - Cost of Moving Personal Property

Article 1, Section 14, of the California Constitution and the Fifth Amendment to the United States Constitution guarantee to every property owner whose property is taken by condemnation for public use "just compensation". Historically, in most jurisdictions the term "just compensation" has not been interpreted to include payment for moving personal property.

a. California Rule

In cases of a permanent taking, of either a fee or some lesser estate such as an easement, the California courts have

universally held that neither owners nor tenants are entitled to the cost of removing or relocating their personal property.[1]

In Central Pacific Railroad Company, an early leading authority, the court reasoned that a property owner is only entitled to recover such damages, over and above the value of the property taken, as are specified by statute. Since no statutory authority existed the court held that the owner was not entitled to recover for the removal or relocation of personal property. This holding was applied to a tenant in County of Los Angeles vs. Signal Realty Co.,[2] where the court held:

> As the title to all property is held subject to the implied condition that it must be surrendered whenever a public interest requires it, the inconvenience and expense incident to the surrender of the possession are not elements to be considered in determining the damages to which the owner is entitled. (pg. 712)

The most recent expression by the California courts upon this point is found in People vs. Auman.[3] There the owner had improved his property with a cyclone dust collecting system, a large steel tank, various gas, water and air pipes, grinding and polishing lathes, large silver and gold plating tanks and extensive electrical and air compressing machinery and equipment. From the majority opinion it appears that all parties conceded that the machinery and equipment were removable fixtures. Based upon a finding to this effect the appellate court held that the cost of removing and relocating these fixtures was not a compensable item. An additional import of this decision, as hereinafter discussed, is its apparent conflict with other California cases wherein machinery and equipment of essentially the same nature have been held to be a part of the realty for which the condemnor must pay fair market value.

b. Other Jurisdictions - Majority Rule

The weight of authority in other jurisdictions is that an owner or tenant whose property is permanently taken cannot recover the cost of moving or relocating his personal

property.[4] This result is premised upon the proposition that necessarily incurred removal costs do not enhance the value of the property taken and that such costs are speculative.[5] In the case of a lessee, an additional argument is suggested to the effect that since the lessee must stand the cost of removal at the end of his term, the taking only changes the time when the expense is incurred.[6]

c. Other Jurisdictions - Minority Rule

However, there is a considerable body of authority to the effect that costs of removal and relocating personal property occasioned by a permanent taking are allowable either as a factor to be considered in determining market value or as a separate element of compensation.

In Blincoe vs. Choctaw O. & W. R Co.[7] the action was by a railway company to condemn a lumber yard. The owner sought compensation, in addition to the value of the property taken, for the cost of removal of lumber stored thereon. The court, after carefully discussing the holding of the California Supreme Court in Central Pacific R.R. Co. vs. Pearson[8] held that it was error to refuse such recovery. The court distinguished the Pearson case upon the grounds that the California statute provided compensation only for the land sought to be appropriated whereas the Oklahoma statute provided that the commissioners shall ". . . consider the injury which such owner may sustain by reason of such railroad, and they shall assess the damages which said owner will sustain by such appropriation . . ." Based upon this statutory provision the court held:

> * * * If damages to personal property is incident and necessarily caused by the exercise of the power of eminent domain in taking land, then the 'owner' is injured 'by reason of such railroad'. That the owner 'by reason of such railroad' has been put to the expense of removing the stock of lumber then on hand is not disputed; neither can it be denied that the

> cost of such removal was made necessary by the condemnation of the real estate, and is an injury and damage to the owner to the extent of the cost of such removal.[9]

To the same effect is Oil Fields & S.F. Ry. Co. vs. Treese Cotton Co.[10]

A similar result was reached in Connecticut in the case of Harvey Textile Co. vs. Hill.[11] In that case the statute provided that the owner of the property taken should be ". . . paid by the State for all damage . . ." The court held that the phrase "all damage" included the cost of disassembling, moving and reassembling factory machinery. This cost was not to be determined as a separate item but as a part of the just compensation. In this connection the court said:

> A simple illustration will bring out the application of these principles to the case at bar. An owner would demand a higher price for a factory containing complicated and valuable machinery than he would for the same building idle and empty, because he would be faced with the necessity of moving his machinery to save it. His willingness to sell would be affected by this consideration which would thus enter into the fixing of a fair market value.[12]

Likewise, in City of Richmond vs. Williams[13] the court held that the statutory phrase "or other property" taken and damages to "adjacent or other property of the owner" required the allowance of moving costs. The court reasoned that the words "other property" must of necessity be construed as embracing personal property and consequently if the taking necessitated the removal of certain lumber stored upon the property, this was a burden imposed upon the owner for which he was entitled to compensation.

Although the foregoing cases based their decisions upon the particular wording of their applicable statutes, other courts have, without statutory authority, permitted recovery for costs of moving. In Metropolitan West Side El. R. Co.

vs. Siegel[14] the court, without reliance upon a statute, held that a tenant was entitled to the costs of removal of certain personal property. The court said:

> * * * This court and many others have often said that the measure of damages is the market value of the property condemned, and that, in arriving at such value, it is competent to prove any use, the highest and best use, for which it is adapted; and this is undoubtedly the general rule, but this court has never held that the rule is without exception, and that cases may not arise where a proper observance of the constitutional provision that private property shall not be taken or damaged for public use without just compensation may not require the payment of damages actually sustained other than those measured by the value of the property taken.
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> * * *
>
> But may not cases arise where the cost of removal of personal property from the premises taken, and injury thereto, would exceed the value of the property taken? Let it be conceded that, as contended by appellant, the owner of a leasehold interest would have no greater right to recover such damages than the owner of the fee; might not a case arise where the owner of the fee would be entitled to such damages? Let it be supposed that the fair market value of a certain piece of real estate sought to be condemned is of itself of but small value, but that the property is occupied by the owner as the site of a costly manufacturing plant, is covered with valuable and complicated machinery, and that such machinery could not be removed except at an expense greater than the value of the premises; must the owner accept the value of the premises, and expend the amount received and an additional sum in removing and repairing his machinery? [15]

Also, in James McMillin Printing Co. vs. Pittsburgh C. & W. R. Co.[16] the court rejected the standard of market value and held that a tenant was entitled to consider, in determining the bonus value of his lease, the cost of removal of machinery.[17]

Another interesting case, because of its reasoning, is In Re Gratiot Avenue.[18] The court allowed the cost of severing, reassembling and reattaching the trade fixtures of a drug store

and jewelry store and the machinery and equipment in a manufacturing plant. The cost of transporting these items from the old location to the new location was not allowed upon the grounds that it was speculative. The court rejected the argument of the condemnor that the tenant would have to move at the termination of the lease, and in this connection held:

> We cannot assume that the tenancy would have sooner terminated. Nor are we dealing strictly with the personal property as the term is legally understood. The machinery must be regarded as fixtures, and, in order that the business could be carried on, as it was when plaintiff's [property owner] property was taken, these or similar machines and equipment were needed. The City did not want the machinery, could not use it, and, if taken by the City for just compensation, the City would have to sell or give it away.[19]

The English and Canadian law generally allows the cost of removal and relocation of personal property. This includes the cost of removing furniture, goods and fixtures, the cost of dismantling and reaffixing machinery and other light items.[20]

d. Temporary Takings

The preceding citations relate to the law applicable to permanent takings of the fee or lesser permanent estates in property. During World War II there came into use what has been denominated the temporary taking of a limited estate in the nature of a leasehold. By this device the condemnor seeks to acquire, for a limited period of time, the use of the property. As an outgrowth of these temporary takings there has evolved a rule of law, in the Federal Courts, that where a portion of a tenant's estate is taken so that he must move out during the period of the condemnor's occupancy and, upon its termination, move back in, he is entitled to have considered as part of the market value of his lease the cost of moving out, the cost of storing his goods during the condemnor's occupancy and the cost of moving back at its termination. In

United States vs. General Motors Corp.[21] the court summarized the method of evaluating these temporary takings as follows:

> * * * The value of such an occupancy is to be ascertained, not by treating what is taken as an empty warehouse to be leased for a long term, but what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier . . .
>
> 2. Some of the elements which would certainly and directly affect the market price agreed upon by a tenant and a sub-lessee in such an extraordinary and unusual transaction would be the reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant. That cost would include labor, materials, and transportation. And it might also include the storage of goods against their sale or the cost of their return to the leased premises. Such items may be proved, not as independent items of damage but to aid in the determination of what would be the usual---the market---price which would be asked and paid for such temporary occupancy of the building then in use under a long term lease. The respondent offered detailed proof of amounts actually and necessarily paid for these purposes. We think that the proof should have been received for the purpose and with the limitation indicated.[22]

The rule of the General Motors case was reaffirmed and defined in United States vs. Petty Motor Co.[23] However, the Court pointed out that in order for the tenant to secure his cost of removal and relocation as part of the market value of the leasehold interest, there must be a carving out of only a portion of the estate so that the tenant would be under the obligation to return to the premises at the end of the Government's occupancy. If the taking, although temporary, was of such nature and extent as to exhaust the tenant's leasehold estate, then the costs of removal and relocation were not to be considered because, in that situation, the condemnation of the entire leasehold interests was analogous to the condemnation of all interests in fee.

3. Present Law - Condemnation of Fixtures

It is believed by the authors of this study that

legislation relating to reimbursement for the moving of personal property should also concern itself with reimbursement for the moving of fixtures severed from the realty.

At the present time, under California law, property affixed to the realty must be taken and paid for by the condemnor. Code of Civil Procedure Section 1248 provides that the court, jury or referee must ascertain and assess:

> 1. The value of the property sought to be condemned and all improvements thereon pertaining to the realty, . . . "(Emphasis supplied)

Civil Code Section 660 provides:

> A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws; except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods.

Perhaps the leading California case upon this question is City of Los Angeles vs. Klinker.[24] In that case the main building of the Los Angeles Times was especially designed and constructed to accommodate the permanent installation of the large presses and related machinery necessary to the operation of a newspaper. Upon appeal it was held that the large newspaper presses, a large auto-plating machine, composing equipment (consisting of 40 linotype machines complete with electrical conduits, water and drainage system), proof presses, saw trimmers, imposing tables, steel cabinets and cases, engraving equipment and other items, were within the meaning of CCP Sec. 1248, improvements pertaining to the realty. In rendering this decision the court not only considered the doctrine of "fixtures" which is to be determined by the method of

annexation, the intention of the person making the annexation and the purpose for which the property is used, but also the doctrine of "constructive annexation". In this connection the court said:

> Here we have not only the manner of annexation of the fixtures and the purpose for which the premises were used, but we have the acts and the conduct of the owner in installing these fixtures and, when viewed as a whole, we are unable to escape the conclusion that so much of the fixtures as are denoted in the record by the term 'processing equipment' are, actually or constructively, an improvement of the real property. [25]

Although the Klinker case involved the property of an owner, the Supreme Court of California in People vs. Klopstock[26] held that trade fixtures, regarded as personalty between the tenant and the landowner, may, as between the tenant and the condemning body, be regarded as part of the realty for the purpose of compensation.[27]

There is a similarity of reasoning between taxation and condemnation cases.[28] In Southern California Telephone Company vs. State Board of Equalization,[29] a taxation case, the court held that even such items as the telephone operators' head sets, breast sets, and stools, although not physically attached to the realty, were under the doctrine of constructive annexation a part of the realty for the purposes of taxation. The court cited and relied upon City of Los Angeles vs. Klinker.[30]

Although there is a considerable body of persuasive authority to the effect that trade fixtures, machinery and equipment are a part of the realty for the purposes of condemnation, it is also true that each case turns upon its specific facts, and consequently no uniform rule may be laid down. In People vs. Church[31] the court held that gasoline pumps and an auto lubrication hoist were not real property. The court, although recognizing the doctrine of constructive annexation as set forth in the Klinker case, reasoned that here the controlling consideration

was whether the property could have been removed without damage to the freehold or substantially impairing its value. This appears to be a similar rationale to that contained in People vs. Auman, supra.[32]

During the 1957 session of the legislature, Section 1248b of the Code of Civil Procedure was enacted and provides:

> Equipment designed for manufacturing or industrial purposes and installed for use in a fixed location shall be deemed a part of the realty for the purposes of condemnation, regardless of the method of installation.

This section, although affording some relief from the uncertainties of the case law, is not a complete answer. In the first place it appears limited to equipment designed for manufacturing or industrial purposes. It does not cover commercial establishments such as restaurants, bars, motels or ordinary residential type property. In addition it is, by its terms, limited to equipment installed for use in a "fixed location" and thus does not consider the doctrine of constructive annexation.

The question of what constitutes a fixture or improvement pertaining to the realty is relevant to the question of whether the costs of removing and relocating personal property should be allowed in condemnation cases. Under the existing law the condemnor must take and pay for all improvements pertaining to the realty.[33] Because an owner or tenant is not entitled to any moving expenses it is generally to his advantage to contend that all fixtures, trade fixtures, machinery and equipment are real property. Even though he may be able to use the fixtures or equipment in another location, if he cannot recover for the expenses of moving and relocating them he suffers a pecuniary loss by the condemnation which can only be avoided by "selling" them to the condemnor. On the other hand, it is generally true that the condemning body has no need for the fixtures or equipment. However, if the court rules that they are

fixtures, it must pay for them and salvage whatever it can by selling them to the highest bidder.

4. Is a Modification of the Law Desirable?

There is much to be said in favor of legislation which would compensate an owner for his moving expenses. The hardships arising from the present law are becoming increasingly apparent.

The moving costs faced by a home owner whose house is condemned may be relatively small. However, because of the great numbers of owners who have been affected by condemnation, the problem is one of considerable over-all importance.

Such an owner is forced to move at a time not chosen by him. An outlay of $200 or $300 to pay for the costs of a move, never an inconsequential item to most home owners, may be unusually onerous following a condemnation. If the proceeds of the condemnation have not been realized at the time of the move, the owner often has all his ready funds tied up in the dwelling bought to replace the one condemned. Even if the owner has been paid for the taking, in a rising market such as that experienced in the last few years the replacement of the condemned property with equivalent accommodations may cost more than the proceeds from the condemnation. While the foregoing are problems outside the immediate scope of this paper, they are mentioned here because the existence of the problems does tend to intensify the hardship which an outlay for moving expenses imposes upon a home owner.

Much greater expense is, of course, incurred in moving an industrial or commercial establishment. A manufacturer may have to move a substantial number of machines. Merchants with inventories of heavy materials (such as the proprietor who stocks refrigeration equipment, pumps, compressors and insulated walk-in cabinets), or inventories of many small items (such as the typical hardware merchant) normally have very costly

moves upon their hands.

The payment of moving expenses by the condemnor, in addition to relieving hardship of the kind mentioned above, may very well result in benefit to the condemnor. First, it may make settlements easier by making it possible for the condemnor to reimburse an owner for an element of damage which cannot now be compensated for. Second, it may avoid the necessity of a condemnor's acquiring fixtures attached to the realty, which would have no value to the condemnor. A statute permitting payment for the relocation of such fixtures would let the condemnor avoid paying the possibly greater value of the fixtures valued as part of the realty.

On the other hand there are many factors which should be considered in opposition to moving expense legislation. The payment of moving expenses would undoubtedly increase the cost of public improvements to the taxpaying public as a whole.

Second, the payment of moving expenses will undoubtedly prove to be a windfall to the condemnee in certain instances. The home owner who has just completed his new house, or the tenant of a store building whose lease is about to expire, for example, would be reimbursed for moving costs which they would have incurred even without the condemnation. However, it seems that the number of windfall cases would be relatively small in comparison to the total number of properties acquired.

In summary, it seems that the problem is one of legislative policy in determining where the burden should fall. Unquestionably there is a herdship upon those who must move to make way for public improvements. Should this burden be spread over all the members of the public as a part of the cost of the improvement? Or, should it be borne by each citizen who may be affected, under the long standing philosophy of court cases which hold that we all own our property subject to the prior right of the public to take it when needed?

5. Remedial Legislation

Legislation has been enacted upon this subject in certain jurisdictions. Section 401 (b) of Public Law 534 provides in part as follows:

> The Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force are respectively authorized, to the extent administratively determined by each to be fair and reasonable, under regulations approved by the Secretary of Defense, to reimburse the owners and tenants of land to be acquired for any public works project of the military department concerned for expenses and other losses and damages incurred by such owners and tenants, respectively, in the process and as a direct result of the moving of themselves and their families and possessions because of such acquisition of land, which reimbursement shall be in addition to, but not in duplication of, any payments in respect of such acquisition as may otherwise be authorized by law; Provided, That the total of such reimbursement to the owners and tenants of any parcel of land shall in no event exceed 25 per centum of the fair value of such parcel of land as determined by the Secretary of the military department concerned. No payment in reimbursement shall be made unless application therefor, supported by an itemized statement of the expenses, losses, and damages so incurred, shall have been submitted to the Secretary of the military department concerned within one year following the date of such acquisition. The authority conferred by this subsection shall be delegable by the Secretary of the military department concerned to such responsible officers or employees as he may determine.

It may be noted that the provisions of the Federal act are somewhat limited in scope, being applicable only to acquisitions by the various branches of the Defense Department and are discretionary rather than a matter of right. Also, payments are limited in amount to 25% of the fair value of the land condemned. Examples of items normally allowed are railroad or bus fares for the owner or tenant and his family, transportation costs for furniture, livestock, farm machinery, office equipment, or other personal property. Indirect losses and losses caused by negligence are not reimbursed.

One comment of interest concerning the Federal Statute relates to the time allowed for payment. The statute in its

original form required application to be made within one year from the date of vacation of the premises. The present statute requires it to be made within one year from the date of acquisition. Because of the uncertainty as to what date is the actual date of acquisition, Federal officials feel that the present statute is harder to administer than the former statute.

The Connecticut Legislature in 1957 enacted a measure concerning the relocation of persons displaced by highway improvements. The act is again limited in scope. Basically it authorizes a municipality to relocate the occupants of dwellings in the path of a trunk line highway and to expend funds for such purpose, including payments to occupants, in meeting their actual moving expenses. The municipality is entitled to reimbursement from the highway commissioner in an amount not to exceed $250 per dwelling unit. The language of the act is as follows:

(Connecticut) PUBLIC ACT NO. 601

AN ACT CONCERNING THE RELOCATION OF PERSONS DISPLACED BY HIGHWAY IMPROVEMENTS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

SECTION 1. Whenever the highway commissioner shall file a map of a layout of a trunk line highway or shall give notice of the proposed relocation of any section of any state aid or trunk line highway as provided in sections 1198d and 1199d of the 1955 supplement to the general statutes and such proposed highway improvement shall require the displacement of more than twenty dwelling units in any municipality, the highway commissioner shall, when he files such map with the town clerk, file or cause to be filed a copy of the same with the chief executive officer of the municipality.

SEC. 2. Such municipality shall prepare or cause to be prepared a relocation plan showing the number of dwelling units to be displaced by the proposed improvement, the method of temporary relocation of the occupants of such dwelling units, if temporary relocation is proposed, the availability of sufficient suitable living accommodations for such occupants and the plan for relocating such occupants in such accommodations and such municipality is authorized to take such steps as may be necessary and proper to carry out such relocation, and to

expend such funds as may be necessary to accomplish the purposes of this act, including, but not limited to, payments to such occupants to aid in meeting their actual moving expenses.

SEC. 3. Upon the filing of such relocation plan with the highway commissioner, there shall be paid over to such municipality, from the highway fund, for the purpose of defraying the cost of preparing such plan and carrying out such relocation an amount equal to the cost incurred by such municipality but not more than the total number of dwelling units displaced in such municipality, multiplied by two hundred fifty dollars.

In the State of Rhode Island, in 1915, an act was adopted in connection with the provision of a supply of water power for the city of Providence.[34] (See Appendix for text.) The act provided that if a mill were located upon the land being acquired, the owner might surrender the machinery in the mill to the city of Providence and receive payment for it. In the event the mill machinery was not surrendered, the owner would be allowed a reasonable time to move it and would be paid his expenses of relocating the machinery and setting it up in a new location anywhere within the New England states. The cost of such relocation was to be determined in the same manner as provided for the determination of damages for the taking of the land.

A study of the statute books of the various states reveals no other general legislation in force for the payment of moving expenses.[35]

California appears to be in the forefront of states in the consideration of remedial measures. Inquiry was addressed by the authors of this study to the Senate and the House of each of the other state legislatures with respect to measures introduced in the 1957 sessions. No reply was received that a moving expense statute had been introduced.

In the 1957 California Legislature three measures relating to moving expenses were submitted. Assembly Bill #222 provided for new sub-sections to be added to the Code of Civil Procedure, Section 1248. This section defines what the court, jury or referee must ascertain and assess in a condemnation

proceeding. Assembly Bill #222, in its original form, would have required the ascertainment of the following:

> 7. If the removal, alteration, or relocation of any personal property is necessitated by the condemnation, the cost of such removal, alteration, or relocation and the damages, if any, which will accrue by reason thereof;
>
> 8. If any fixtures or any personal property used in or about the property sought to be condemned or used in connection with a business conducted therein or thereon is rendered obsolete or of lesser value by reason of necessity of relocation of the business conducted in or on the property, the damages sustained by reason of such obsolescence or decline in value occasioned by the necessary relocation of such business;

Assembly Bill #362 proposed the addition of Section 104.4 to the Streets and Highways Code providing as follows:

> 104.4. If any property to be purchased or condemned by the department for state highway purposes contains a business establishment, the purchase price paid by the department or the compensation awarded in the condemnation proceedings shall include an amount sufficient to reimburse the owner of the business establishment for the cost of moving and reestablishing his business in another location in the same general area, but not to exceed a distance of 10 miles, if such owner desires to remain in business and so advises the department in writing.
>
> As used in this section, 'business establishment' means tangible property used primarily for, or in connection with, a business enterprise.

It should be noted that the proposed section is limited to acquisitions for state highway purposes only, and it relates only to the relocation of a "business establishment."

Senate Bill #1057, as amended March 20, 1957, provided for the amendment of sub-section 6 of the Code of Civil Procedure, Section 1248, to include language reading as follows:

> * * * If the removal of personal property from the premises condemned is made necessary by such condemnation, the court, jury, or referee shall also ascertain and assess the cost of removal of such property and its relocation at a location of the same character as its former location, including transportation costs within a 25-mile area, and physical damage to such property in moving and relocating, but not including loss of profits, goodwill, or any costs or damages compensated for under any other provision of this section;

All of the foregoing measures failed of passage.

6. Proposed Statute

A proposed statute might take either of two forms. It can be relatively brief, such as those introduced in the 1957 Legislature. On the other hand, a longer and more detailed statute, setting down the precise methods and procedures for ascertaining and paying the moving expenses, might be adopted.

It is believed that an appropriate short form of statute could be incorporated in the law by an addition to Code of Civil Procedure, Section 1248. This section, stating what items of damage are to be assessed, could contain an additional paragraph as follows:

> If the removal or relocation of any personal property is necessitated by the condemnation, the cost of such removal or relocation and the damages, if any, which will accrue by reason thereof . . .

The primary advantage of such a short form of statute is its relative simplicity. This simplicity--the lack of detailed standards--would give condemning bodies considerable latitude in administering the statute in their efforts to arrive at fair settlements. Similarly, courts would be given a considerable freedom to do justice in litigated cases.

However, the lack of specific standards might outweigh the advantages of simplicity. Some of the questions left unanswered by the short statute are the following:

What standard is to be used to measure moving costs? Are actual expenditures or are reasonable costs to be the test?

To what distance may a person displaced by condemnation proceedings move and still be entitled to reimbursement? Within his own neighborhood, within the County, or within the State?

If, at the time of trial, the owner has not moved or has not even completed his plans for relocation, how will his compensation be fixed?

These and other questions obviously will require extended judicial interpretation. The litigation which would arise would impose a substantially increased burden upon the courts and upon the parties.

It may be preferable to include in any statute more detailed standards and procedures. Such a statute, which should be separate from Code of Civil Procedure, Section 1248, should, in the opinion of the authors of this study, take the following form:

Sec. _____.

(1) When the purchase or condemnation of real property for public use requires the removal or relocation of personal property, located either upon the part taken or upon the larger parcel from which the part taken is severed, the owners of such personal property shall be entitled to compensation from the acquiring body for their actual costs necessarily incurred in removing and relocating their personal property; provided, however, that such compensation for the total of such actual costs shall not exceed twenty-five per cent (25%) of the sums paid for the acquisition. For the purposes of this section the sums paid for the acquisition shall be deemed to include the value of the part taken and the severance damages (less special benefits), but shall not include interest or other compensation paid as a result of the taking of immediate possession by the condemnor. In the event the total costs claimed exceed the twenty-five per cent (25%) limitation herein provided for, such distribution of the available fund as may be equitable shall be made among the claimants.

(2) If the real property is the subject of a condemnation action, the claim for reimbursement

shall be presented by a memorandum specifying the actual costs necessarily incurred, and verified by the oath or declaration of the party or his attorney or agent, which memorandum shall be served upon the condemnor and filed in the condemnation action. The time for filing such memorandums shall expire ninety days after the date on which the property is vacated by the last occupant. The date of vacation shall be fixed by affidavit of any party filed in the action.

(3) If the condemnor is dissatisfied with the costs claimed on any memorandum, or if the costs in the aggregate exceed the twenty-five per cent (25%) limitation hereinabove provided for, the condemnor within thirty days after the time for filing of claims has expired or after the judgment fixing the award has become final, whichever is later, shall serve and file its notice of motion for an order fixing the amount of the disputed claim or claims, or making an apportionment of the fund, or both. Thirty days' notice of the hearing shall be given to the claimants, and the notice shall specify the condemnor's objections or other basis for the motion. Upon the hearing the court shall make appropriate orders for payment to the various claimants. In the event notice of motion is not served and filed within the time specified with respect to one or more claims, the court shall make its ex parte order ordering payment of such undisputed claims within thirty days by the condemnor.

7. Comment on the Proposed Statute

a. Actual costs vs. reasonable costs. It will be noted that the proposed statute reimburses an owner for his costs

actually incurred, rather than reasonable costs. It is felt that actual costs are a better measure than reasonable costs for several reasons. First, an owner is made whole for expenditures he actually incurs. But he is paid for only those, and no opportunity is given to profit at the expense of the condemnor. He cannot recover for the reasonable expense of moving when perhaps his intention was to go out of business anyway. Second, actual expenditures are readily ascertainable, and extended litigation to determine what costs are reasonable and what are unreasonable is avoided. The condemnor is protected against what are in fact unreasonable costs since the statute reimburses only for costs "necessarily" incurred.

b. Personal property covered. The statute provides reimbursement for the removal or relocation of personal property whether located (1) upon the part taken or (2) upon the larger parcel of land from which the part taken is severed. It is believed that this provision is necessary to cover a certain type of partial taking, an illustration being a street widening where the front of a building is removed. Obviously, it may be necessary to remove much more personal property than that which is actually located upon the strip of land condemned, and it would seem that the moving expense statute should apply to all property which must necessarily be moved.

c. Limitations on amounts recoverable. Clearly some limitation must be imposed upon the right to recover moving expenses. The problem arises in fixing the limitation.

The allowance of expenses for removal to a reasonable distance again requires a definition of the meaning of the word "reasonable", with its consequent problems.

An area determination, such as a ten-mile limit, provides a fixed standard, but may be unfair in particular cases. For example, the owner of a dairy located in a residential area which has grown up around him may have to move considerably farther

than ten miles to find an area where dairies are permitted under current zoning ordinances.

A county-wide limitation likewise might result in inequities. A resident of a little county would have a much smaller area in which to relocate than the resident of a large county. Also, a condemnee located near a county line might thus be prevented from moving a short distance into another county.

A straight dollar limitation is similarly inflexible. If an owner is limited to moving expenses, say, of $250 (or even a much higher sum), the amount paid him may be far under his actual costs of moving. The reimbursement is unrelated to the loss suffered, and in that respect the standard is deficient.

The authors of this study believe that the limitation can best be fixed by defining it as a certain percentage of the total award, as in the case of the Federal statute. This method appears to be the most practical, although it also has disadvantages. Property of relatively low value may be condemned, and if substantial costs of moving are involved, the limitation may well be too low. Also, under this method all claimants must wait for payment until the total amount of claims has been ascertained, so that if the 25% limitation is exceeded, an apportionment can be made.

However, the percentage limitation method has been adopted in the proposed statute because of its considerable advantage to the condemnor. It enables a condemnor to predict with some accuracy the cost of a public improvement. Once it has made its appraisals of the property to be condemned, the condemnor can reasonably anticipate that moving expenses will not exceed the specified percentage of the appraisal figure.

Moreover, it is believed that there is a rough corelation between the value of property and the expenses likely to be incurred by owners in moving. That is, if there is property to be moved, there is usually a structure to house it. The greater

the quantity of property, the larger the structure. In this way, the moving expense tends to relate to the award and the owners are afforded the protection of a varying to some degree with their needs.

d. Manner of presentation of claims. It is anticipated that in negotiated purchases of real property, moving expense claims will also be settled by negotiation between the condemnor and the owners. In litigated cases the statute makes provision for the filing of claims in the action after the claimant has incurred the expenses of moving. At such time as the award is known, and the 25% limitation is thereby fixed, the condemnor may pay the claims without objection. If the condemnor objects to the amounts claimed, or if the total claims exceed the 25% limitation, the proposed statute provides for a court hearing to determine the validity of the disputed claims and the apportionment of the total award among the claimants in an equitable manner.

8. Amendment to C.C.P. 1248(b)

In addition to the proposed new statute above, it seems desirable to amend Code of Civil Procedure Section 1248(b) as follows:

> Sec. 1248(b).
>
> (1) Fixtures, trade fixtures, equipment and machinery designed for use in manufacturing, commercial or residential property and installed by the owner or tenant for use therein shall be deemed a part of the realty for the purposes of condemnation, regardless of the method of installation.
>
> (2) If at the time of filing his answer the owner of any such fixtures, trade fixtures, equipment or machinery serves upon the condemning body a written notice of his election to remove or relocate

all or part of such fixtures, trade fixtures, machinery or equipment, the owner shall be entitled to compensation for the actual cost necessarily incurred in their removal and relocation; provided, however, that such actual cost shall not exceed the fair market value, in place, of the fixtures, trade fixtures, equipment or machinery removed or relocated.

(3) Reimbursement for such actual costs shall be made in the same manner as that provided in C.C.P._____ for reimbursement for the cost of moving personal property. The compensation payable hereinunder shall not be subject to the percentage limitation specified in C.C.P. Section _____ and shall be in addition to any compensation payable under the provisions of that section.

Section 1248(b) as presently enacted by the 1957 Legislature is limited to equipment and machinery designed for and used in manufacturing or industrial plants. It is recommended that commercial and residential properties also be given the protection of this statute.

The second paragraph of the amended statute permits an owner to elect to remove fixtures, trade fixtures, machinery and equipment and to recover his actual cost of moving. It relates to those situations where fixtures or equipment upon the land condemned would continue to have value in a new location. By the amendment the owner is permitted to realize this value, and the condemnor avoids the necessity of paying for the property in the condemnation action. In those instances where the cost of moving is less than the fair market value of the property, the condemnor gains. In no event does it pay more than the amount which it would have otherwise paid in the condemnation action, since the

recovery is limited to the value of the equipment appraised as part of the realty.

Additionally, the proposed amendment tends to reduce the uncertainty which now exists prior to the time of trial as to what constitutes a fixture. This uncertainty often results in expensive and time consuming delays to obtain the court's ruling on the problem, and it requires alternative appraisals by both parties so that each can be prepared to proceed in the light of any anticipated ruling.

The proposed amendment gives the election to the owner. As noted above, the condemnor is not prejudiced by the election, and it is felt preferable to let the owner decide whether the property will or will not have value to him in the new location.

9. Constitutionality.

In view of the dearth of legislation providing for the payment of moving expenses the question of whether any statute relating to moving expenses can be adopted without a constitutional amendment is difficult of ascertainment. However, in Joslin Mfg. Co. vs. City of Providence[36] the Rhode Island statute, quoted above, was held to be valid under the Constitution of the United States. Since the Constitution of the United States, like that of California, provides for the payment of just compensation, it is believed that this decision provides authority for statutory enactments. Such a view is further reinforced by the reasoning of the Court in Central Pacific Railway Co. of California vs. Pearson,[37] which held that an owner is entitled to recover only the damages, over and above the value of the property taken, as are specified by statute. Since there was no statutory authority permitting recovery for moving expenses, the Court held the owner was not entitled thereto. However, by implication it is indicated that had there been a statute, it would have been constitutional.

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AUTHORITIES

(1) Central Pacific Railroad Company of California vs. Pearson, 35 Cal. 247 (1868)
County of Los Angeles vs. Signal Realty Co., 86 Cal. App. 704 (1927), 261 Pac. 536
People vs. Auman, 100 Cal. App. 2d 262 (1950), 223 P.2d 260

(2) 86 Cal. App. 704 (1927), 261 Pac. 536

(3) 100 Cal. App. 2d 262 (1950), 223 P.2d 260

(4) Orgel on Valuation Under Eminent Domain, Vol. 1, Sec. 69
Nichols on Eminent Domain, Vol. 4, Sec. 14.2471(2)

(5) Orgel, supra
In Re Postoffice Site in the Borough of the Bronx, 210 F. 832 (1914)
St. Louis vs. St. Louis Etc. Railway Co., 266 Mo. 694 (1916), 182 S. W. 750

(6) United States vs. Inlots, 26 Fed. Cas. 482, Case No. 15,441 (1873)

(7) 16 Okla. 286 (1905), 83 Pac. 903

(8) 35 Cal. 247 (1868)

(9) Page 907

(10) 78 Okla. 25 (1920), 187 Pac. 201

(11) 135 Conn. 686 (1949), 67 A.2d 851

(12) Page 852-853

(13) 114 Va. 698 (1913), 77 S.E. 492

(14) 161 Ill. 638 (1896), 44 N.E. 276

(15) Page 280

(16) 216 Pa. 504 (1907), 65 A. 1091

(17) See also: Patterson vs. City of Boston, 23 Pick. (Mass.) 425 (1839)

(18) 294 Mich. 569 (1940), 293 N. W. 755

(19) Page 758

(20) Orgel on Valuation Under Eminent Domain, Vol. 1, Sec. 69, page 321
Compulsory Purchase and Compensation, David M. Laurance, 1952, pages 82-83
Law of Expropriation, Chalies, pages 148 to 149, 160 to 161

(21) 323 U. S. 373 (1945), 89 L. Ed. 311

(22) Pages 320-321

(23) 327 U. S. 372 (1946), 90 L. Ed. 729

(24) 219 Cal. 198 (1933), 25 P.2d 826

(25) Page 210

(26) 24 Cal. 2d 897 (1944), 151 P.2d 641

(27) See also: City of Los Angeles vs. Hughes, 202 Cal. 731 (1927), 262 Pac. 737

(28) Trabue Pittman Corp. vs. County of Los Angeles, 29 C.2d 385 (1946), 175 P.2d 512

(29) 12 C.2d 127 (1938), 82 P.2d 422

(30) 219 Cal. 198 (1933), 25 P.2d 826

(31) 57 C.A.2d Supp. 1032 (1943), 136 P.2d 139

(32) 100 C.A.2d 262 (1950), 223 P.2d 260

(33) Code of Civil Procedure Section 1248

(34) Public Laws of R.I., 1915-1916, Chapter 1278, pgs. 309-310

(35) We are not here concerned with statutes permitting the condemnor to relocate improvements to the realty, such as California Civil Code Section 1248(6).

(36) 262 U. S. 668 (1923), 67 L. Ed. 1167

(37) 35 Cal. 247 (1868)

"PUBLIC LAWS OF THE STATE OF RHODE ISLAND, 1915, CHAPTER 1278 and ACT TO FURNISH CITY OF PROVIDENCE WITH A SUPPLY OF POWER WATER.

"Sec. 12. In case any land included in said area shown within red lines on said plat or elsewhere in said town of Scituate has a mill thereon, which is taken hereunder, the owner or owners of such mill may surrender to said city of Providence the machinery in use or set up in such mill at the time of such taking by giving to said board or other authorized representative or representatives of said city, or the city council thereof, within six months after such taking written notice of its surrender of the same to said city, whereupon said city shall be liable to pay for the machinery as surrendered and actually delivered to said city the fair value of the same at the time of such delivery, as part of the damages for such taking. In connection with any purchase of any such mill property, said city may purchase any such machinery in use or set up therein as such owner or owners may offer to sell to it, and at such fair price as may be agreed upon by said city and such owner or owners. Said board or other authorized representative or representatives of said city shall represent said city with power to make any such purchases and agreements.

"In case the owner of any mill taken by said city under the provisions of this act shall not surrender such machinery, he shall be allowed a reasonable time in which to remove the same; and, in case the city and said owner are not able to agree on what is a reasonable time for such removal, the time therefor shall, on petition in equity by said owner or said city, be determined by the superior court for Providence county, taking into consideration all the circumstances of the case and the needs of both parties, with the right to make such orders and decrees in relation to the time and manner of carrying on the work of removal or the work of the city interfering therewith as justice shall require; and, in case the necessities of said work of said city require such machinery to be removed at a time or in a manner not otherwise reasonable therefor, said court may make such allowance as it shall deem equitable to compensate said owner for the special damages, if any, suffered by him by reason of the removal of said machinery at the time and in the manner so required by the necessities of such work of said city, over and above what would have been occasioned by its removal at a time and in a manner which would have been otherwise reasonable, but for such special need of said work of said city.

"In case said owner does not surrender such machinery to said city, said city shall pay to him, as a part of his damages for the taking of said mill, the reasonable expense and cost of removing such machinery, from its old location at said mill to a new location within the New England states, of setting up such machinery in the place therein in which it is to be used by said owner. The amount of such reasonable cost and expense, if not agreed upon by the parties, shall be determined in the same manner as is provided herein for the determination of damages for the taking of lands, or interests, or rights therein."