Date of Meeting: January 16-17, 1959

Date of Memo: January 8, 1959

Memorandum No. 8

Subject: Study #36 - Condemnation

Attached is a copy of a letter of December 10, 1958 from Mr. Robert Nibley of the firm of Hill, Farrer & Burrill raising certain questions as to how the condemnation study should be carried forward. We discussed this letter preliminarily at the December meeting and determined that no decision should be taken until the matter could be more thoroughly discussed at the January meeting with both Senator Cobey and a representative of Hill, Farrer & Burrill present. This is being arranged.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

Law Offices

HILL, FARRER & BURRILL

411 West Fifth Street

Los Angeles 13, California

December 10, 1958

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

Dear Professor McDonough:

We are correcting some typographical errors which we discovered in our recent study, and corrected copies will be in the mail to you shortly.

In the revised study we attempted to incorporate the suggestions contained in your letter of July 22, 1958. With respect to your paragraph No. 3 and also with respect to Senator Cobey's comments, I would like to direct your attention to the article cited in the study which appeared in the Yale Law Journal, Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses, 67 Yale Law Journal 61. This is an excellent discussion of those incidental expenses which today are usually not subject to reimbursement in condemnation proceedings.

The authors comment upon the efforts of some courts to award incidental expenses by finding that they are reflected in market value. However, it is apparent that the authors, like the member of the commission mentioned in paragraph 3 of your letter, question this concept. It seems that the selling price of property is essentially a compromise reflecting the relative bargaining strength of the buyer and seller. In many cases the seller in the open market may be unable to recover for the incidental losses he suffers because of competition from other sellers, weakness of market demand, and similar factors.

The real problem seems to be whether to compensate owners for incidental losses suffered in condemnation, whether or not these losses would be factors in a voluntary sale, merely because the condemnation taking is not voluntary. There is a difference between a loss suffered involuntarily, for the public good, and one which the owner assumes voluntarily when he sells.

Senator Cobey's comments also relate to this problem. However, if the legislature determines to compensate the owner for such incidental losses, it becomes unnecessary to determine whether a consideration of them plays a part in bargains made upon the open market. It is probably within the power of the legislature to decide that, in determining just compensation in condemnation cases, consideration should be given to such items as moving expenses, loss of profits, inconvenience or other items, now generally excluded from consideration.

Senator Cobey's desire that the condemnation study be oriented on a basis of economic as well as legal principles is a facet of a problem which has been concerning us for some time. The scope of the condemnation problem facing the legislature is one much greater than we had at first realized in this office. I am sure our progress on even our limited field of inquiry has not been rapid enough to satisfy you. Yet it now seems to us that perhaps many more aspects of condemnation law should be scheduled for study.

The time which we have been able to devote to the study has been unexpectedly limited by various factors, and we believe that some way must be found to have substantial portions of the work done by others. Yet we feel that we can make a contribution to the study that others might be unable to supply, because we practice in the condemnation field.

We are not concerned with the matter of compensation. We are happy to contribute our services toward the Commission's objective of a just and workable condemnation law. What we are concerned with is getting the job done, certainly more rapidly than we have been doing it and preferably even more rapidly than our initial thinking contemplated.

We would appreciate any suggestions you might have in this connection, and if you are planning to be in Los Angeles soon, we would like to visit with you. Perhaps something could be worked out whereby a person or persons could be employed, under our supervision if the Commission so desired, to gather the necessary legal and economic data and get it into form for incorporation into the study. (In view of the extent of the condemnation field it would seem that one person could be kept busy full time on this project for several months.) We could participate, if desired by you, in suggesting areas for investigation, supplying sources of material, assisting in the preparation of the final study and in drafting recommended legislation.

Sincerely,
S/ Robert Nibley
ROBERT NIBLEY
of
HILL, FARRER & BURRILL

December 3, 1958

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

(Revised)

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

Study #36(L)

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

1. Introduction

The acquisition of private property for public purposes has become a matter of increasing importance in recent years, particularly in California, because of this State's unprecedented population increases. (From 1950 to mid-1958 the estimated population increased from 10,587,000 to 14,752,000. A population of 31,000,000 persons is anticipated for 1980.[1])

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 of June 30, 1958, 1732 miles of freeway had been completed, were budgeted for construction or were under construction. For 1980 a system of 12,250 miles of freeway has been recommended by the State Department of Public Works.[2]) As a result of the need for public facilities, 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 constituent 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 in the United States the term "just compensation" has not been interpreted to include payment for moving personal property.

The reason for the development of the majority rule denying payment for incidental losses including moving expenses is discussed in a recent article in the Yale Law Journal, Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses[3]:

> "Although the power of eminent domain was utilized early in this country's history, takings seldom entailed incidental losses. In fact, while the obligation to make compensation had been incorporated into constitutions of the federal government and many states, payment of any compensation was rare since loss resulting from the average taking was slight. The takings which did occur generally involved unclaimed and unimproved private property, or land governmentally owned. Takings did not assume significant proportions until well into the nineteenth century, when railroad construction became an

important factor in American life. Thus, incidental losses, which usually follow condemnation of improved commercial and industrial property, were not appreciable factors when the formulae for compensation were developed by the courts. The absence of these considerations resulted in the establishment of theories of compensation which did not include payment for incidental losses, and accounted for the lack of popular insistence that such damages were part of the 'just compensation' guarantee of the Fifth Amendment." (Page 65)

The authors point out that in England, where the acquisitions involved highly developed industrial and commercial areas and the takings brought considerably more damage to the condemnee, the English courts adopted the practice of awarding compensation for incidental losses.

Another writer suggests that the rule denying a fee owner the expenses of moving his personal property arose because of a misapplication of the rule relating to tenants. He said:

"A distinction must be made between the condemnation of land held in fee and the condemnation of land held under a lease. * * * * * * A lessee must remove his personal property from the leasehold upon the expiration of the lease. If the premises are condemned prior to the expiration of the lease, the lessee suffers no added expense on account of removing the personal

property, and, since he is awarded the fair market value of the unexpired portion of his term, he is made whole without reimbursement for removal damages. This is not so where the condemnee is the owner in fee. It follows that cases involving the condemnation of leaseholds can be of no aid in establishing a rule as to the right to recover costs of removal in cases involving the condemnation of fee estates.

"Although the treatises mentioned above cite numerous cases as authority for the majority view, there is in fact a dearth of cases directly in point. Of the thirty-three cases cited by Nichols, op. cit. supra, only one directly holds that the fee owner will be denied reimbursement for removal costs. This decision, In re Smith Street Bridge, 234 App. Div. 583, 255 N.Y. Supp. 801 (1932), cites three cases in support of its conclusion: Ranlet v. Concord Ry., 62 N.H. 561 (1883); Matter of New York, W.S. & B. Ry., 35 Hun 633 (N.Y. Sup.Ct. 1885); New York Central Ry. v. Pierce, 35 Hun 306 (N.Y. Sup.Ct. 1885). Each of these three cases stands for the proposition that, since the lessee would have been required to remove his personal property from the leasehold upon the termination of his lease, he suffered no additional damage in removing his personal property prior thereto as a consequence of condemnation. It is apparent, therefore, that the majority rule applicable to fee owners evolved from earlier decisions denying removal costs to lessee condemnees."[4]

Whatever the historical basis for the rule, the law is now firmly established in a majority of jurisdictions in this country that a condemnee is not entitled to reimbursement for moving personal property.

a. California Rule

California follows the majority. In cases of a permanen 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.[5]

In Central Pacific Railroad Company,[5] 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.,[6] 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.[7] 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.[8] 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.[9] 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 incurre

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.,[11], an Oklahoma case 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 Oklahoma court, after carefully discussing the holding of the California Supreme Court in Central Pacific R.R. Co. vs. Pearson[12] 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."[13]

To the same effect is Oil Fields & S.F. Ry. Co. vs. Treese Cotton Co. (Oklahoma).[14]

A similar result was reached in Connecticut in the case of Harvey Textile Co. vs. Hill.[15] 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 Connecticut 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."[16]

Likewise, in City of Richmond vs. Williams,[17] a Virginia case, 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,[18] an Illinois case, 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.

* * *

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?[19]

Also, in James McMillin Printing Co. vs. Pittsburgh C. & W. R. Co.[20] the Pennsylvania 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. [21]

Another interesting case, because of its reasoning, is In Re Gratiot Avenue [22], a Michigan case. 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 Michigan 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." [23]

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 like items.[24]

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.[25] the U. S. Supreme 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 sublessee 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."[26]

The rule of the General Motors case was reaffirmed and defined in United States vs. Petty Motor Co.[27] However, the U. S. Supreme Court there 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.[28] 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." [29]

Although the Klinker case involved the property of an owner, the Supreme Court of California in People vs. Klopstock[30]

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.[31]

There is a similarity of reasoning between taxation and condemnation cases.[32] In Southern California Telephone Company vs. State Board of Equalization, [33] a taxation case, the California Supreme 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.[34]

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[35], a California case, 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.[36]

During the 1957 session of the legislature, Section 1240b 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 California law the condemnor must take and pay for all improvements pertaining to the realty.[37] 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 received 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.

Various writers have commented upon the need for remedial measures. In The Appraisal Journal, the publication of the American Institute of Real Estate Appraisers for January 1958 the author states: "We find almost universal agreement, at least privately, that some means should be found by which hardship can be relieved through payments for additional consequential damages, without exposing the Government to unlimited payment or permitting former owners or occupants to obtain windfall benefits."[38]

In the Yale Law Journal article, Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses,[39] the authors state:

> "Measurement of 'just compensation' in condemnation actions has long plagued the field of eminent domain. The basic system of compensation -- fair market value -- was judicially developed in an effort to indemnify the condemnee for the property loss occasioned by condemnation. This formula, however, fails to assess what are often severe and costly losses sustained by owners and lessees of property. In theory, the market value standard is directed toward compensating the condemnee for the physical property loss suffered; thus it generally excludes recompense for incidental losses --

losses typified by damage to or destruction of good will, expenses incurred in moving to a new location and profits lost because of business interruption or inability to relocate. In denying these losses, courts have recognized that such action constitutes a derogation of the indemnity principle and makes 'harsh' law. Nontheless, the practice continues, justified by reasoning which, upon critical examination, reflects dubious wisdom and logic.

Today, more than ever before, the denial of incidental losses assumes major importance in the area of eminent domain. The scope and nature of contemporary takings have aggravated the injury which results from condemnation. Initially, the great number of takings inflicts losses on an ever-increasing multitude of people; such projects as large scale federal and state road building and mushrooming urban renewal leave few segments of the nation directly unaffected. These programs also involve taking of improved commercial and industrial property where incidental losses are necessarily more prevalent and serious. Furthermore, present takings, by tending to encompass large areas of contiguous property, make prompt relocation to mitigate losses considerably more difficult. And, as popular indignation due to the denial of these losses may seriously impede beneficial redevelopment programs, the workings of the market value formula take on an importance apart from the individual rights affected.

In light of the admitted inequities of the market value formula and because of the increasing significance of governmental redevelopment programs, reexamination of the present system of compensation in eminent domain, particularly as it applies to incidental damages, is necessary."

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.

Apparently because of these latterconsiderations legislatures as well as courts have been reluctant to make any changes in the existing rules for compensation. In the California Legislature several bills, hereinafter discussed, for payment of moving expenses have been introduced but have failed of passage. In Connecticut Senate Bill No. 610, February 1, 1955, designed to compensate condemnees for incidental losses, was not adopted. In the Yale Law Journal article referred to above, it is stated:

"* * * The legislatures have, however, been reluctant to change the present policy. See, e.g., 88 Cong. Rec. 1649, 1650, 1653, 1954, 1656 (1942), where a proposed amendment to award proximate losses in addition to fair market value was defeated. The tenor of the debates reflected a feeling on the part of Congress that the Supreme Court's position on just compensation is a firmly entrenched doctrine which the legislature, at least during a wartime period, should not upset. The debate over this measure also indicated concern over the speculative nature of incidental or 'proximate' losses."[40]

A discussion of other bills introduced in Congress relating to compensation for various incidental losses including moving expenses but which failed of passage is contained in The Appraisal Journal.[41]

In summary, it seems that the problem is one of legislative policy in determining where the burden should fall. Unquestionably there is a hardship 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

Notwithstanding the reluctance of most courts and legislative bodies to change long established rules of compensation, legislation has been enacted upon this subject in certain jurisdictions.

In the case of displacements resulting from acquisitions of land for military purposes, the United States Congress has provided for reimbursement to the persons affected. Section 401 (b) of U.S. 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."

A similar statute was enacted on May 29, 1958, extending compensation for moving expenses to persons displaced by ac-

quisitions for the Department of Interior. Public Law 85-433 provides in part as follows:

> ". . .the Secretary of the Interior is authorized, to the extent administratively determined by him to be fair and reasonable, to reimburse the owners and tenants of lands acquired for the construction, operation, or maintenance of developments under his jurisdiction for expenses and other losses and damages incurred by them in the process and as a direct result of such moving of themselves, their families, and their possessions as is occasioned by said acquisition, which reimbursement shall be in addition to, but not in duplication of, any payments that 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 its fair value as determined by the Secretary. No payment under this Act shall be made unless application therefor, supported by an itemized statement of the expenses, losses and damages incurred, is submitted to the Secretary within one year from the date upon which the premises involved are vacated or, in the case of lands acquired and vacated prior to the date of this Act but after July 14, 1952, within one year from the date of this Act.
>
> Sec. 2. The Secretary may perform any and all acts and make such rules and regulations as he finds necessary and proper for the purpose of carrying out the provisions of this Act.
>
> Sec. 3. As used in this Act, the term 'lands' shall include interests in land; the term 'acquisition' and its cognates shall include the exercise of a right-of-way upon lands subject thereto under the Act of August 30, 1890 (26 Stat. 371, 391, 43 U.S.C. Sec. 495); and the term 'fair value' shall, in the case of interests in land and of rights-of-way under the Act of August 30, 1890, mean a fair value of the interest acquired or right of way occupied.
>
> Sec. 4. * * *"[42]

It may be noted that the provisions of the Federal acts are somewhat limited in scope, being applicable only to acquisitions by the Defense and Interior Departments 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 expense items normally reimbursed 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.

It should also be noted that under the Defense Department law application must be made within one year following the date of acquisition; under the Interior Department law application must be made within one year from the date upon which the premises involved are vacated (with the additional proviso relating to lands vacated prior to the date of the act). Federal officials in Los Angeles feel that the Interior Department type of statute is easier to administer because the date of vacation of the premises is readily established, whereas the date of acquisition may vary with the definition of the word "acquisition".

Other moving expense legislation has been adopted in connection with particular types of acquisitions. In the state of Rhode Island, in 1915, an act was passed relating to the water supply of the City of Providence. The act provided that if a mill were located upon the land being acquired under the act, 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. (The text of Section 12 of the act is set out in the Appendix.)

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 field of urban redevelopment projects, the United States Congress provided for expense reimbursement to persons or families (up to $100.00) and business concerns (up to $2000.00) displaced by such projects. In the Housing Act of 1956[43] the following provision was contained:

"Sec. 305. Section 106 of such Act (the Housing Act of 1949) is further amended by adding at the end thereof the following new subsection:

"'(f) (1) Notwithstanding any other provision of this title, an urban renewal project respecting which a contract for a capital grant is executed under this title may include the making of relocation payments (as defined in paragraph (2)); and such contract shall provide that the capital grant otherwise payable under this title shall be increased by an amount equal to such relocation payments and that no part of the amount of such relocation payments shall be required to be contributed as part of the local grant-in-aid.

"'(2) As used in this subsection, the term "relocation payments" means payments by a local public agency, in connection with a project, to individuals, families, and business concerns for their reasonable and necessary moving expenses and

any actual direct losses of property except goodwill or profit (which are incurred on and after the date of the enactment of the Housing Act of 1956, and for which reimbursement or compensation is not otherwise made) resulting from their displacement by an urban renewal project included in an urban renewal area respecting which a contract for capital grant has been executed under this title. Such payments shall be made subject to such rules and regulations prescribed by the Administrator as are in effect on the date of execution of the contract for capital grant (or the date on which the contract is amended pursuant to paragraph (3)), and shall not exceed $100 in the case of an individual or family, or $2,000 in the case of a business concern.

"'(3) Any contract with a local public agency which was executed under this title before the date of the enactment of the Housing Act of 1956 may be amended to provide for payments under this subsection for expenses and losses incurred on or after such date.'"

In 1957 the payment schedule was revised to permit the payment of fixed sums up to $100 for the movement of individuals or families without relation to their actual expenses. The maximum reimbursement to business concerns was raised to $2,500. The Housing Act of 1957[44] contained the following language:

"Sec. 304. Paragraph (2) of section 106 (f) of the Housing Act of 1949 is amended by striking out the second sentence and inserting in lieu thereof the following: 'Such payments shall be made subject to such rules and regulations as may be prescribed by the Administrator, and shall not exceed $100 in the case of an individual or family, or $2,500 in the case of a business concern. Such rules and regulations may include provisions authorizing payment to individuals and families of fixed amounts (not to exceed $100 in any case) in lieu of their respective reasonable and necessary moving expenses.'."

The Public Housing Law of New York likewise contains a provision providing for reimbursement of displaced persons and business concerns. Section 153, sub-paragraph 1 of the New York

Public Housing Law reads in part as follows:

> ". . .In connection with any project, an authority may pay so much of the necessary cost of removal of families of low income, and of business or commercial tenants, from the area or buildings to be cleared for the development of the project to suitable locations in such cases and in such amounts as may be approved by the commissioner, but in no event more than two hundred dollars for any family, nor more than five hudred dollars for any business or commercial tenant. Removal costs so paid by an authority shall be included in the project cost."

The language of the act applies only to low income families and business or commercial tenants. Presumably the legislature considered these groups to be those in which cases of undue hardship would be most likely to arise. No provision for the relief of middle or high income families or the owners of business and commercial structures is made.

With respect to relief legislation of broad application, California appears to be in the forefront of states in the consideration of such 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;

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;

A statute of more limited application was also proposed. 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".

All of the foregoing measures failed of passage.

6. Proposed Statute

A moving expense 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 reimbursement from the acquiring body for their actual costs necessarily incurred in removing and relocating their personal property or, in lieu of such actual costs, such amount as may be agreed upon by the condemnor and condemnee, either before or after removal from the premises; provided, however, that such reimbursement 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. The foregoing limitation shall not apply in cases where the taking of property is for a term only or to any amounts mutually agreed upon by condemnor and condemnees.

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

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

(3) If the condemnor is dissatisfied with the costs claimed on any statement, 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 its special order after judgment 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 special order after judgment 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.

To facilitate making of settlements it has been provided that condemnor and condemnee may agree upon the amount of reimbursement to be paid even in advance of the actual move. This will permit negotiated purchases of property to be consummated in one transaction, rather than requiring negotiation for the purchase of the property, removal from the premises

and then further negotiation for moving expense reimbursement.

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 correlation 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 standard varying to some degree with their needs.

It has been provided that the limitation will not apply in cases of negotiated settlements or in cases of temporary takings. The removal of the limitation upon negotiated settlement gives the condemnor greater freedom to deal with the condemnee in cases where it might be just or desirable to exceed the statutory limitation. Temporary takings were exempted from the limitation because the award in such case is relatively low and the costs of removal--possibly both off the property and back on at the end of the taking--are likely to be high. Since temporary takings do not represent a large proportion of condemnation acquisitions, it is not believed that the removal of the limitation in these cases will impose an unwarranted liability upon condemnors.

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.

Attorneys for various condemning bodies were asked for their comments and suggestions with respect to the proposed statute. (The statute set forth above incorporates a few changes made since the form was submitted to the condemning bodies.)

The only reply was received from Emerson W. Rhyner, attorney for the Department of Public Works, Divison of Contracts and Rights of Way. Because the authors of this study feel that Mr. Rhyner's comments should be before the Law Revision Commission for its consideration, the comments are set forth below:

> "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."

With respect to the points raised by Mr. Rhyner, the authors of this study make the following comment:

1. It is not intended that the claim for moving costs will prevent the condemnation judgment from becoming final. The procedure set forth contemplates a proceeding after judgment similar to the presentation of a cost bill for costs incurred after judgment.

2. The authors of this study believe that an attempt should not be made to define in great detail the costs for which reimbursement should be made. It is not possible to cover all contingencies and it is believed that the greatest benefit both to condemnor and condemnee can be accomplished by allowing some flexibility in the application of the statute.

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 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 believed that one of Mr. Rhyner's objections has been met by providing for voluntary settlements of moving expense claims prior to the time of actual removal. If the owners' demands were reasonable, settlement could be made. If the condemnor felt that the amounts claimed were not reasonable, a court determination would have to be made, just as it is now sometimes made of the market value.

It is conceded that a statute providing a fixed limitation upon moving expenses, such as the $200 suggested by Mr. Rhyner, would be simpler to administer. This amount could be included in the condemnation payment without much investigation or likelihood of dispute. The disadvantage of a fixed limitation is that it is unjust to the condemnee who most needs relief--

the one who is forced to incur heavy moving expenses.

5. 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.

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, industrial or commercial property and installed by the owner or tenant for use therein in a fixed location 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, or for such amount as may be agreed upon by condemnor and condemnee whether before or after actual removal, 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 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. The United States and California constitutions guarantee compensation only

for property taken, and many courts have denied reimbursement for incidental losses on the ground that such losses, while resulting in hardship on the owner, do not enhance the value of the interests acquired by the condemnor. Thus, it has been argued that legislatures do not have the constitutional power in condemnation proceedings to expend public funds to pay moving costs. However, this contention was answered in Joslin Manufacturing Company vs. City of Providence[45]. There the Rhode Island statute, referred to above, was upheld when the court held at page 676-677:

> "In respect to the contention that the statute extends the right to recover compensation so as to include these and other forms of consequential damages, and thus deprives plaintiffs in error, as taxpayers of the city, of their property without due process of law, we need say no more than that, while the legislature was powerless to diminish the constitutional measure of just compensation, we are aware of no rule which stands in the way of an extension of it, within the limits of equity and justice, so as to include rights otherwise excluded. As stated by the supreme court of Massachusetts in Earle v. Com. 180 Mass. 579, 583, 57 L.R.A. 292, 91 Am. St. Rep. 326, 63 N. E. 10, speaking through Mr. Justice Holmes, who was then a member of that court: 'Very likely the . . . rights were of a kind that might have been damaged, if not destroyed, without the constitutional necessity of compensation. But some latitude is allowed to the legislature. It is not forbidden to be just in some cases where it is not required to be by the letter of paramount law.'"

Such a view is further reinforced by the reasoning of the Court in Central Pacific Railway Co. of California vs. Pearson,[46] 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.

HILL, FARRER & BURRILL
411 West Fifth Street
Los Angeles 13, California

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(5) Central Pacific Railroad Company of California vs. Pearson, 35 Cal. 247 (1868).
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(13) Blincoe vs. Choctaw O. & W. R. Co., 16 Okla 286 (1905), 83 Pac. 903, at 907.

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(19) Metropolitan West Side El. R. Co. vs. Siegel, 161 Ill. 638 (1896), 44 N.E. 276, 280.

(20) James McMillin Printing Co. vs. Pittsburgh C. & W. R. Co., 216 Pa. 504 (1907), 65 A. 1091.

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

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(29) City of Los Angeles vs. Klinker, 219 Cal. 198, 210 (1933).

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

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(35) People vs. Church, 57 C.A.2d Supp. 1032 (1943), 136 P.2d 139.

(36) People vs. Auman, 100 C.A.2d 262 (1950), 223 P.2d 260.

(37) Code of Civil Procedure Section 1248.

(38) Pearl, Review of Efforts to Minimize Losses in Condemnation, 26 Appraisal Journal 21, 1958.

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(42) Act of May 29, 1958 (72 Stat. 152) Public Law 85-433.

(43) Act of August 7, 1956 (70 Stat. 1091, 1100); 25 U.S. Law Week 54.

(44) Act of July 12, 1957 (71 Stat. 294, 300); 26 U.S. Law Week 3.

(45) Joslin Mfg. Co. vs. City of Providence, 262 U.S. 668 (1923), 67 L. Ed. 1167.

(46) Central Pacific Railroad Company of California vs. Pearson, 35 Cal. 247 (1868).

APPENDIX

"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."