

#36

7/22/65

Memorandum 65-49

Subject: Study No. 36(L) - Condemnation Law and Procedure (Machinery, Equipment, and Fixtures)

Because of the limitations on the award of moving expenses (even if moving were allowed in all eminent domain proceedings), it is important to consider how machinery, equipment, and fixtures should be treated in an eminent domain proceeding.

Attached is a research study on "Machinery, Equipment, and Fixtures."

Existing California law. As the attached research study indicates, Code of Civil Procedure Section 1248(1) requires that the condemnor pay for all improvements that are a part of the realty. The courts have adopted a liberal definition of fixtures in order to require payment for machinery, equipment, and fixtures when property is condemned.

In addition, Code of Civil Procedure Section 1248b provides:

1248b. 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.

For further discussion, see the attached research study and also

California Condemnation Practice 54-56.

The research study points out that more often than not, the condemnee-owner of manufacturing, industrial, or commercial property finds that equipment located thereon is of greatly limited utility and value, if not altogether useless, in a new site. He points out that Section 1248b should be extended to include "commercial" as well as manufacturing and industrial purposes. He further suggests that the condemnee should have an election to treat the designated equipment either as realty (enabling him to be paid its value) or as personalty (enabling him to be reimbursed to a degree for removal

costs under the existing or proposed moving expense statute).

The Pennsylvania provisions. The Pennsylvania statute provides a scheme that is generally consistent with the consultant's recommendations;

Section 603. Fair Market Value.--Fair market value shall be the price which would be agreed to by a willing and informed seller and buyer, taking into consideration, but not limited to, the following factors:

* * * * *

(3) The machinery, equipment and fixtures forming part of the real estate taken.

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Section 607. Removal of Machinery, Equipment or Fixtures.--In the event the condemnor does not require for its use machinery, equipment or fixtures forming part of the real estate, it shall so notify the condemnee. The condemnee may within thirty days of such notice elect to remove said machinery, equipment or fixtures, unless the time be extended by the condemnor. If the condemnee so elects, the damages shall be reduced by the fair market value thereof severed from the real estate.

Section 608. Removal Expenses.--The person having legal possession of machinery, equipment or fixtures on the condemned property, not forming part of the realty, including a tenant not entitled to any proceeds of the condemnation, if under the lease the tenant has the right to remove said machinery, equipment or fixtures, shall be entitled, as damages, to the reasonable expenses of the removal, transportation and reinstallation of such machinery, equipment or fixtures. Reasonable expenses under the provisions of this section shall not exceed twenty-five thousand dollars (\$25,000) and in no event shall such expenses exceed the market value of the machinery, equipment and fixtures.

Section 610. Moving Expenses.--The person having legal possession shall be entitled to, as damages, the reasonable moving expenses for personal property other than machinery, equipment or fixtures, not to exceed five hundred dollars (\$500), when personal property is moved from a place of residence and not to exceed twenty-five thousand dollars (\$25,000) when personal property is moved from a place of business. Receipts therefor shall be prima facie evidence of reasonable moving expenses. A tenant shall be entitled to recover these moving expenses even though he is not entitled to any of the proceeds of the condemnation. In no event shall such expenses exceed the market value of such personal property.

The Wisconsin provisions. The Wisconsin scheme for dealing with this

problem is somewhat different:

32.09. In all matters involving the determination of just compensation in eminent domain proceedings, the following rules shall be followed:

* * * * *

(5) In the case of a total taking the condemnor shall pay the fair market value of the property taken and shall be liable for the items in s. 32.19 if shown to exist.

(6) In the case of a partial taking, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist:

(a) Loss of land including improvements and fixtures actually taken.

* * * * *

(e) Damages resulting from actual severance of land including damages resulting from severance of improvements or fixtures and proximity damage to improvements remaining on condemnee's land.

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(7) In addition to the amount of compensation paid pursuant to sub. (6), the owner shall be paid for the items provided for in s. 32.19, if shown to exist, and in the manner described in s. 32.20.

* * * * *

32.19. The following items shall be compensable in eminent domain proceedings where shown to exist:

(1) REALIGNMENT OF PERSONAL PROPERTY. The cost of realigning personal property on the same site in partial takings or where realignment is required by reason of elimination or restriction of existing used rights of access.

(2) REMOVAL OF PERSONAL PROPERTY TO ANOTHER SITE. The cost of removal from the property taken to another site of personal property of land owners, or tenants under an existing unexpired written lease, the full term of which is at least 3 years. Such costs shall not exceed \$150 for removals from each family residential unit or \$2,000 from each farm or nonresidential site.

* * * * *

Staff recommendations. The staff believes that the Pennsylvania scheme is far superior to the Wisconsin scheme. Under the Wisconsin scheme, even though the condemnee apparently is to be awarded the loss of value resulting from the required severance of improvements or fixtures and moving expenses for removal of personal property, he is not necessarily made whole (because of limitations on moving expenses) and, moreover, he may find that he has on his hands machinery, equipment, or fixtures that he can not use.

The best scheme is one that would require the condemner to take and pay for such machinery, equipment, and fixtures unless the owner elects to remove them because he can use them in a new location. The result of this scheme is that the condemner rather than the condemnee has the burden of selling such machinery, equipment, and fixtures.

Accordingly, the staff suggests that the substance of the following provisions (based on Code of Civil Procedure Sections 1248(1) and 1248b and on the Pennsylvania provisions) be included in the comprehensive statute:

The property sought to be condemned includes all improvements of such property that are a part of the realty, including machinery, equipment, and fixtures forming a part of the realty. Machinery or equipment designed for manufacturing, industrial, or commercial 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.

If the condemner does not require for its use machinery, equipment, or fixtures forming part of the realty, it shall so notify the condemnee. The condemnee may within 30 days of such notice elect to remove all or a portion of such machinery, equipment, or fixtures, unless the time be extended by the condemner. If the condemnee so elects, the damages shall be reduced by the fair market value severed from the realty of the machinery, equipment, and fixtures to be removed.

An additional provision to provide moving expenses for machinery, equipment, and fixtures that are to be removed under the provision set out

above may be needed. The policy question is: Should there be an additional allowance for the moving of such machinery, equipment, and fixtures or should the general limitations on moving expenses apply to all property to be moved (including the property here discussed)?

Maryland provision--effect of tenant's right to remove fixture. Consideration should be given to adding the following provision (taken from the Maryland statute) to the provisions set out above:

For the purpose of determining the extent of the taking and the valuation of the tenant's interest in a proceeding for condemnation, no improvement or installation which would otherwise be deemed part of the realty shall be deemed personal property so as to be excluded from the taking solely because of the private right of a tenant, as against the owner of any other interest in the property sought to be condemned, to remove such improvement or installation, unless the tenant exercises his right to remove the same prior to the date when his answer is due, or elects in his answer to exercise such right.

Requirement that entire business parcel be taken. Somewhat related to the problem of machinery, equipment, and fixtures is the problem that results when only a portion of a tract devoted to manufacturing, industrial, or commercial use is taken. What if the owner does not wish to retain the part not taken because he cannot use it for the purpose he formerly used it and has no other use which he wishes to make of the remainder? Should the condemner or the condemnee be put to the burden of disposing of the remainder? This problem was dealt with in 1965 Assembly Bill No. 3012 which contained the following provision:

In any case in which condemnation of a portion of a parcel of land on which a business is being operated would render the remainder unusable by the condemnee for the business purpose for which he has been using such land, the entire parcel must be condemned, and the condemnee must be compensated for the taking of the entire parcel.

The staff believes that this is a desirable provision. However, it should be made to apply only upon request of the condemnee. The result of enactment of this provision would be to shift to the condemner the burden of disposing of the remainder not needed for the purpose of the public improvement and not usable by the condemnee. Problems of severance damage are avoided by the proposed provision. Note the importance of determining what constitutes the "parcel"; that question is considered in connection with Memorandum 65-45.

The condemner already has a somewhat analogous authority under existing statutory provisions:

Code of Civil Procedure Section 1266 (provides that if the taking of a part would require the condemner to pay an amount "equal to the fair and reasonable value of the whole," upon adoption of a resolution providing for the taking of the whole, the taking shall be deemed necessary for the public use)

Streets and Highways Code Section 104.1 (authorizes the Department of Public Works to take an entire parcel for highway purposes if the unneeded portion would be left in such condition as to be of little value to the owner or give rise to claims involving severance or other damage) See also Streets and Highways Code Sections 104.2 and 104.3.

Water Code Section 8590.1 (gives Reclamation Board the same power)

Streets and Highways Code Sections 30405, 30410 (similar provision for acquisition of property to be used for purposes of the California Toll Bridge Authority Act)

These and similar California statutes appear to be constitutional. See People v. Garden Grove Farms, 231 A.C.A. 713 (1965).

Respectfully submitted,

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Executive Secretary

7/21/65

MACHINERY, EQUIPMENT, AND FIXTURES*

*This study was made for the California Law Revision Commission by the law firm of Hill, Farrer & Burrill, Los Angeles. This study is an extract from pages C-25--C-27 and C-35--C-36 of Recommendation and Study Relating to The Reimbursement of Moving Expenses When Property is Acquired for Public Use, 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at C-1 (1961). No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons and the study should not be used for any other purpose at this time.

A STUDY

relating to

MACHINERY, EQUIPMENT, AND FIXTURES

Note: This study is an extract from pages C-25--C-27 and C-35--C-36 of Recommendation and Study Relating to The Reimbursement of Moving Expenses When Property is Acquired for Public Use, 3 CAL. LAW REVISION COM'N, REP., REC. & STUDIES at C-1 (1961).

Moving of Fixtures Severed From Realty

In light of the pattern and policy denying moving costs in condemnation cases, the courts often adopt a method to circumvent this restriction by declaring that the properties to be moved (*e.g.*, machinery, appliances and the like) constitute permanent fixtures and, therefore, are compensable.⁶⁵ Most courts have adopted a liberal definition of "fixtures" to remedy the denial of moving costs.⁶⁶ Only a minority of the courts refuse to reimburse owners for "fixtures" that can be removed.⁶⁷

Presently, 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 added.]

and 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 on this question is *City of Los Angeles v. Klinker*.⁶⁸ 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 publication of a daily newspaper. The California Supreme Court held that the large newspaper presses, a large autoplate machine, composing equipment (consisting of 40 linotype machines complete with electrical conduits and water and drainage systems), proof-presses, saw trimmers, imposing tables, steel cabinets and cases, engraving equipment and other items were, within the meaning of Section 1248, improvements pertaining to the realty. The court considered not only the doctrine of "fixtures," which depends upon the method of annexation to the realty, 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 conduct of the owner in installing these fixtures and, when

⁶⁵ Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 87 YALE L.J. 61, 78 (1957).
⁶⁶ See Note, 28 TEXAS L. REV. 402 (1945). And see *In re John C. Lodge Highway*, 340 Mich. 254, 65 N.W.2d 820 (1954).
⁶⁷ See, *e.g.*, *Futrovsky v. United States*, 66 F.2d 215 (D.C. Cir. 1933).
⁶⁸ 119 Cal. 198, 26 P.2d 828 (1933).

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.⁶⁹

Although the *Klinker* case involved only the property of an owner, the Supreme Court of California in *People v. Klopstock*⁷⁰ subsequently 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.⁷¹

There is a similarity of reasoning between taxation and condemnation cases.⁷² In *Southern Cal. Tel. Co. v. State Board*,⁷³ 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 v. Klinker*.⁷⁴

There is a considerable body of persuasive authority in California to the effect that trade fixtures, machinery and equipment are a part of the realty for purposes of condemnation. However, it is also true that each case turns on its specific facts, and consequently no uniform rule can be laid down. For example, in *People v. Church*,⁷⁵ 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 similar to the rationale of the court in *People ex rel. Dept. of P.W. v. Auman*,⁷⁶ discussed on page C-13 *supra*.

During the 1957 Session of the Legislature, Section 1248b of the Code of Civil Procedure was enacted. It 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 case law, is not a complete answer. In the first place it is 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 condemna-

⁶⁹ *Id.* at 209-10, 25 P.2d at 831.

⁷⁰ 24 Cal.2d 897, 151 P.2d 841 (1944).

⁷¹ And see *City of Los Angeles v. Hughes*, 202 Cal. 731, 262 Pac. 737 (1927).

⁷² *Trabue Pittman Corp. v. County of Los Angeles*, 39 Cal.2d 385, 175 P.2d 512 (1946).

⁷³ 12 Cal.2d 127, 82 P.2d 422 (1938).

⁷⁴ 219 Cal. 188, 25 P.2d 826 (1933).

⁷⁵ 57 Cal. App.3d Supp. 1022, 128 P.2d 139 (1942).

⁷⁶ 100 Cal. App.2d 262, 233 P.2d 260 (1950).

tion cases. Under the existing California law the condemnor must take and pay for all improvements pertaining to the realty.⁷⁷ 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 expense of moving and relocating them he suffers a pecuniary loss by the condemnation that can be avoided only 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 the fixtures are a part of the realty, the condemning body must pay for them and salvage whatever it can by selling them to the highest bidder.

Code of Civil Procedure Section 1248b

An additional question to be considered is whether, in view of the possibility of the enactment of a moving costs statute, Section 1248b of the Code of Civil Procedure, either as it presently exists or as it might be revised, would be superfluous.

From a practical point of view, it would be more just to retain Section 1248b and amend it to provide that a condemnee may elect to treat fixtures either as personalty or realty. Thus the condemnee could elect to remove fixtures, trade fixtures, machinery and equipment and recover his actual cost of moving when fixtures or equipment upon the land condemned would continue to have value in a new location. If the owner were permitted to realize this value, it would be unnecessary for the condemnor to pay for the fixtures in the condemnation action. In those instances where the cost of moving is less than the fair market value of the fixtures, the condemnor would gain. In no event would the payment be more than the amount that would otherwise have been paid in the condemnation action, since recovery would be limited to the value of the equipment appraised as part of the realty.

While it may well be argued that the existence of Section 1248b as revised, particularly in light of a moving cost statute, would at times enable a condemnee to force the condemnor to purchase his business equipment at the market price and thus place himself in a position to purchase brand new equipment largely at public expense, the usual situation that justifies the revision would be otherwise. More often than not, the condemnee-owner of either manufacturing or industrial property finds that equipment located thereon is of greatly limited utility and value, if not altogether useless, in a new site.

An additional reason for granting a condemnee the election to treat the designated equipment either as realty (enabling him to be paid its value) or as personalty (enabling him to be reimbursed to a degree for removal costs under the proposed moving statute), is the limitation in the proposed moving costs statute. The moving costs statute, whether it contains a 25 per cent limitation or, in the alternative, whether it contains a monetary limitation upon the amount the condemnee may recover, will on a number of occasions fail to provide full compensation to the condemnee for his moving expenses. Consequently, if a condemnee is confronted with the fact that the compensation under the moving costs statute will pay only a small part of the actual cost of removing his equipment, he might prefer to have his equipment designated as a fixture belonging to the realty. By making the latter election, he would be more fully compensated for the loss he incurs. Thus, unless a moving costs statute affords the condemnee his *entire* costs of removal, he should be granted the opportunity to make the stated election.

Section 1248b should also be revised to reduce the uncertainty that 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

⁷⁷ CAL. CODE CIV. PROC. § 1248.

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.

It may be asked whether the language of Section 1248b is too limited. Presently Section 1248b applies only to equipment and machinery designed for and used in manufacturing or industrial plants. It does not apply to commercial property.

If Section 1248b is not revised to apply to commercial property, the condemnee (under the revision to Section 1248b concerning election by the condemnee recommended above) can make an election only when the equipment involves manufacturing or industrial property. This does not appear to be a justifiable distinction. Commercial establishments often require many fixtures that are hardly different in nature from manufacturing equipment. A distinction in treatment, therefore, is not warranted. There is no distinction made between commercial and industrial property for the purpose of compensating the condemnee for loss of fixtures in any of the jurisdictions or authorities previously cited.²³ While the courts will undoubtedly have to decide what falls within the scope of "installed for use in a fixed location," no initial distinction should be made in this regard between manufacturing and commercial property.

²³ See notes 66-76 *supra*.