

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

The Reimbursement for Moving Expenses
When Property Is Acquired
for Public Use

October 1960

LETTER OF TRANSMITTAL

To HIS EXCELLENCY EDMUND G. BROWN
Governor of California
and to the Members of the Legislature

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study to determine whether the law and procedure relating to condemnation should be revised in order to safeguard the property rights of private citizens. The Commission herewith submits its recommendations on a portion of this subject relating to the reimbursement for moving expenses when property is acquired for public use and a study prepared by its research consultant, the law firm of Hill, Farrer and Burrill of Los Angeles.

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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to Reimbursement for Moving Expenses When Property Is Acquired for Public Use

The California Constitution provides that private property shall not be taken for public use without "just compensation" having first been made. The statutes and decisions implementing this provision provide that the person whose land is taken for public use is entitled to be paid only for its market value. As a result, no compensation is provided for the expense of moving to another location when land is permanently taken for public purposes.*

In some states, the courts have held that the cost of moving is to be considered in determining the market value of the land taken. Courts in other states, taking a more direct approach, have held that "just compensation" is not made unless the owner is compensated for his moving expenses. Neither of these judicial solutions to the problem is satisfactory. The first is unsatisfactory because the concept of market value correctly interpreted does not include moving expenses. Neither is administratively feasible because frequently the property owner does not move before the trial of the eminent domain proceeding, and it is, therefore, difficult if not impossible to determine the amount of moving expenses he will necessarily incur when the amount of his compensation is determined. Moreover, these judicial solutions place no limit on the amount of moving expense that must be reimbursed. The federal government and several states have enacted legislation providing for the payment of moving expenses in order to recognize the property owner's right to be reimbursed for such expenses, to place limitations on the amount of moving expenses that may be reimbursed and to provide a procedure for claiming such reimbursement.

The Commission believes that, subject to reasonable limitations, the owner of property acquired for public use should be reimbursed for the expense of moving his personal property. Inasmuch as this expense must be incurred because the land is taken for the public's benefit, the public should bear at least a substantial part of the burden imposed by reimbursing a person for moving expenses. Such a change in the law would more nearly effectuate the constitutional objective of "just compensation." Moreover, in some instances out-of-court settlement may be facilitated, for the condemning agency will be able to reimburse a property owner for an element of damage that cannot be compensated at the present time.

* The United States Supreme Court has held that the moving and storage expenses of a tenant should be considered in determining the value of his interest when property subject to a lease is taken temporarily for public use and the tenant has an obligation to return to the property at the end of the public occupancy. *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945). There is no reported decision of a California court involving this problem. Thus, it is uncertain at present whether a tenant would be entitled to compensation for moving expenses under these circumstances under California law.

Accordingly, the Commission recommends:

1. When land is taken for public use, the owners should, subject to certain limitations discussed below, be reimbursed for the actual and reasonable costs necessarily incurred in moving their personal property, *i.e.*, dismantling, removing, packing, loading, transporting, temporarily storing, unloading, unpacking, reassembling, and installing such personal property.

2. Reimbursement for moving expenses should be subject to the following limitations:

(a) Total reimbursement should not exceed the value of the property moved.

(b) Reimbursement for the transportation element of moving expense should be provided only for the first 25 miles traveled. If the person moving desires that the property be moved a greater distance, he should bear the additional mileage costs himself. However, packing, unpacking and other costs of moving should be borne by the public no matter how far the property is moved, for these expenses must be incurred whether the property is relocated within the same general area or not.

(c) Reimbursement for the installation element of moving expense should not include the cost of any construction or improvement at the new location that is the equivalent of property for which compensation was made in the condemnation award.

These limitations should not apply, however, to negotiated settlements. The condemning agency may be relied upon to protect the public interest, and settlement may be facilitated if there are no such limitations on negotiated settlements.

3. When land is taken for public use for a term only, an occupant who has to move and who has a right to reoccupy the property at the end of the term should be reimbursed not only for expenses incurred in moving his personal property off the land, but also for the actual and reasonable costs necessarily incurred in storing his personal property and moving it back to the land at the end of the term.

4. Where the parties cannot agree on the amount to be paid, the amount of reimbursement to be made for moving expenses should be determined as a part of the condemnation proceeding in a manner similar to that used to determine costs. Such a procedure would permit the determination of moving expenses separately from the determination of compensation for the real property, but would not require the commencement of a distinct judicial proceeding for that purpose.

5. Evidence of moving expenses should be expressly made inadmissible in an eminent domain proceeding upon the issue of the compensation to be paid for the property to be taken. Such a provision is necessary to preclude the possibility that a person might be compensated twice for the same loss.

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to add Chapter 2 (beginning with Section 1270) to Title 7 of Part 3 of, and to add Section 1248.5 to, and to amend Section 1248.3 of, the Code of Civil Procedure, relating to the payment of compensation and damages when property is acquired for public use.

The people of the State of California do enact as follows:

SECTION 1. Chapter 2 (beginning with Section 1270) is added to Title 7 of Part 3 of the Code of Civil Procedure, to read:

CHAPTER 2. REIMBURSEMENT FOR MOVING EXPENSES WHEN
PROPERTY IS ACQUIRED FOR PUBLIC USE

1270. As used in this chapter:

(a) "Acquirer" means a person who acquires real property or any interest therein for public use.

(b) "Acquisition" means the acquiring of real property or an interest therein for public use either by the consent of the owner or by eminent domain.

(c) "Person" includes a natural person, corporation, association, partnership, joint venture, receiver, trustee, executor, administrator, guardian, fiduciary or other representative of any kind, the State, or a city, county, city and county, district or any department, agency or instrumentality of the State or of any governmental subdivision in the State.

(d) "Public use" means a use for which property may be taken by eminent domain.

(e) "Moving" means dismantling, removing, packing, loading, transporting, unloading, unpacking, reassembling and installing personal property.

1270.1. A person whose real property or interest therein is acquired for public use by eminent domain is entitled as a part of the payment therefor to reimbursement from the acquirer as provided in this chapter for the reasonable costs which he actually and necessarily incurred as a result of the acquisition in:

(a) Moving personal property from the real property acquired or from the larger parcel from which the part acquired is severed.

(b) Temporarily storing such personal property until the real property at which the personal property is to be relocated for use is available for occupancy by such person, but not in any event in excess of 30 days.

1270.2. (a) A person is entitled to reimbursement under this section only if:

(1) He is lawfully occupying real property when such property or any interest therein is acquired for public use by eminent domain for a term only; and

(2) He has, at the time of the acquisition, the right to the possession of the real property immediately after the term acquired for public use.

(b) In addition to any reimbursement to which he may be entitled under Section 1270.1, a person covered by this section is entitled, as part of the payment for the real property or interest therein, to reimbursement from the acquirer as provided in this chapter for the reasonable costs which he actually and necessarily incurred as a result of the acquisition in:

(1) Storing the personal property that was removed from the real property acquired or from the larger parcel from which the part acquired was severed during the time the real property was occupied by the acquirer.

(2) Moving such personal property back to the real property acquired after the expiration of the term for which the real property was acquired for public use.

1270.3. Whenever a person is entitled to reimbursement under Section 1270.1 for the cost of moving personal property, that portion of the reimbursement attributable to transportation may not exceed the cost of transporting such property 25 miles.

Whenever a person is entitled to reimbursement under Section 1270.2 for the cost of moving personal property, that portion of the reimbursement attributable to transportation may not exceed the cost of transporting such property 25 miles.

Reimbursement under this chapter may not exceed the value of the property moved.

Reimbursement under this chapter may not include the cost of providing at the real property to which the personal property is moved the equivalent of any property for the taking or damaging of which compensation was or may have been included in the award in the eminent domain proceeding.

1270.4. A person who claims reimbursement under Section 1270.1 shall serve upon the acquirer and file in the eminent domain proceeding affecting the real property from which the personal property was moved a verified memorandum of his moving and temporary storage costs. The memorandum shall be filed within 90 days after removal of the personal property from such real property has been completed and shall state:

(a) The date the removal was completed.

(b) The location from which and the location to which the property was moved.

(c) If the property was stored temporarily, the location where the property was stored and the duration of such storage.

(d) An itemized statement of the costs incurred.

(e) The amount of reimbursement claimed.

(f) That the costs for which reimbursement is claimed are reasonable and were necessarily incurred.

1270.5. A person who claims reimbursement under Section 1270.2 shall serve upon the acquirer and file in the eminent domain proceeding affecting the real property from which the personal property was moved a verified memorandum of his moving and storage costs. The memorandum may be filed at any time after the costs are incurred but shall be

filed not later than the ninetieth day after the term for which the real property was acquired for public use expires and shall state:

(a) The location where the property was stored and the duration of such storage.

(b) An itemized statement of the costs incurred.

(c) The amount of reimbursement claimed.

(d) That the costs for which reimbursement is claimed are reasonable and were necessarily incurred.

1270.6. The acquirer may, within 20 days after service of a memorandum claiming reimbursement under this chapter, serve and file a notice of motion to have the amount of reimbursement determined by the court. Not less than 10 days' notice of the hearing on the motion shall be given to the claimant, and the notice shall state the acquirer's objections to the amount claimed in the memorandum or other basis for the motion. Upon the hearing the court shall determine the reimbursement to which the claimant is entitled, if any, and shall order the acquirer to pay such amount within 30 days from the date of such order. If the acquirer does not file a notice of motion to have the amount of reimbursement determined by the court, the court shall order the acquirer to pay the amount claimed in the memorandum within 30 days after the date of such order.

1270.7. The acquirer and the person whose real property or interest therein is acquired for public use may by agreement determine the amount of reimbursement to be made for moving and storage costs whether the acquisition is by consent or by eminent domain. The limitations contained in Section 1270.3 do not limit the amount the acquirer may agree to reimburse a person for moving and storage costs under this section.

1270.8. In lieu of reimbursing a person for moving and storage costs under this chapter, the acquirer may provide for the moving and storage of the personal property at its own expense by serving on such person and filing in the proceeding a notice of its election to do so. If the acquirer so elects, such person is not entitled to reimbursement under this chapter except to the extent that such costs are incurred prior to the receipt of the notice.

SEC. 2. Section 1248.5 is added to the Code of Civil Procedure, to read:

1248.5. Notwithstanding any other provision of law, the opinion of a witness as to the amount to be ascertained under subdivision 1, 2, 3 or 4 of Section 1248 is inadmissible if it is based, wholly or in part, upon the cost of dismantling, removing, packing, loading, transporting, storing, unloading, unpacking, reassembling or installing personal property.

SEC. 3. Section 1248.3 of the Code of Civil Procedure as proposed by Senate Bill No. ____ is amended to read:

1248.3. Notwithstanding the provisions of Section 1248.2, the opinion of a witness as to the amount to be ascertained under subdivision 1, 2, 3 or 4 of Section 1248 is inadmissible if it is based, wholly or in part, upon:

(a) The price or other terms of an acquisition of property or a property interest if the acquisition was made for a public use for which property may be taken by eminent domain.

(b) The price or other terms of any offer made between the parties to the action to buy, sell or lease the property or property interest to be taken or injuriously affected, or any part thereof.

(c) The price at which an offer or option to purchase or lease the property or property interest to be taken or injuriously affected or any other property was made, or the price at which such property or interest was optioned, offered or listed for sale or lease, unless such option, offer or listing is introduced by a party as an admission of another party to the proceeding. Nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 1248.1.

(d) The value of any property or property interest as assessed for taxation purposes.

(e) An opinion as to the value of any property or property interest other than that to be taken or injuriously affected.

(f) The influence upon such amount of any noncompensable items of damage or injury.

(g) The capitalized value of the income or rental from any property other than the property to be taken or injuriously affected.

(h) The cost of dismantling, removing, packing, loading, transporting, unloading, storing, unpacking, reassembling or installing personal property.

SEC. 4. Section 3 of this act shall become operative only if Section 1248.3 of the Code of Civil Procedure as proposed by Senate Bill No. _____ is enacted by the Legislature at its 1961 Regular Session, and in such case Section 3 shall become operative at the same time this act becomes operative, at which time Section 1248.5 of the Code of Civil Procedure as added by Section 2 of this act is repealed.

SEC. 5. This act shall become operative on July 1, 1962. This act does not apply to any proceeding in eminent domain commenced prior to its operative date.

A STUDY RELATING TO THE REIMBURSEMENT FOR MOVING EXPENSES WHEN PROPERTY IS ACQUIRED FOR PUBLIC USE *

INTRODUCTION

The acquisition of private property for public purposes has become a matter of increasing importance in recent years, particularly in California because of the unprecedented population increase.¹ New residents 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.² Because of the increasing need for public facilities, the power of condemnation is being exercised more frequently, and its effect is being felt by an increasing number of citizens. Some persons, believing that the present laws do not operate justly, have sought relief through their representatives in the Legislature. Senators and Assemblymen are thus being called upon to weigh the interests of their constituents as individuals on the one hand against the interests of the same individuals collectively, as a body politic, on the other.

This study is concerned with one aspect of the problem—whether or not an owner should be reimbursed for the cost of removing his personal property from the land condemned.

THE PRESENT LAW

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

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*: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

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

¹ From 1950 to mid-1953 the estimated population increased from 10,587,000 to 14,752,000. A population of 31,000,000 persons is anticipated for 1980. REP'T CAL. DEPT OF PUB. WORKS, DIV. OF HIGHWAYS, THE CALIFORNIA FREEWAY SYSTEM, 14 (1958) (report to the Joint Interim Committee on Highway Problems of the California Legislature).

² As of June 30, 1953, 1,732 miles of freeway had been completed, was budgeted for construction or was under construction. For 1980 a system of 12,250 miles of freeway has been recommended by the State Department of Public Works. REP'T CAL. DEPT OF PUB. WORKS, *supra* note 1, at 5, 25.

³ Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 (1957).

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.⁴

The same article points out that in England, however, where the acquisitions involved highly developed industrial and commercial areas and the takings caused considerably more damage to the condemnees, the courts adopted the practice of awarding compensation for incidental losses.⁵

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

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 . . . 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 [on Eminent Domain] . . . 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 conse-

⁴ *Id.* at 65.

⁵ *Id.* at 66.

quence of condemnation. It is apparent, therefore, that the majority rule applicable to fee owners evolved from earlier decisions denying removal costs to lessee condemnees.⁶

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

California Rule on Moving Expenses

California follows the majority rule. In cases involving a permanent taking, of either a fee or some lesser estate such as an easement, the California courts have consistently held that neither owners nor tenants are entitled to reimbursement for the cost of removing or relocating their personal property.⁷

In *Central Pac. R.R. v. Pearson*,⁸ an early leading authority, the Supreme Court reasoned that a property owner is entitled to recover only the damages over and above the value of the property taken that 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. In *County of Los Angeles v. Signal Realty Co.*,⁹ the District Court of Appeal denied a tenant compensation for his moving expenses in reliance on the *Pearson* case. The court stated:

As the title to all property is held subject to the implied condition that it must be surrendered whenever the 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. A landowner is not entitled to the expense of removing personal property from the land taken.¹⁰

The most recent expression by the California courts on this point is found in *People ex rel. Dept. of P.W. v. Auman*.¹¹ In this case the owner had improved his property with a cyclone dust collecting system, a large steel tank, a system of gas, water and air pipes, grinding and polishing lathes, large silver and gold plating tanks and extensive electrical and air compressing machinery and equipment. The parties conceded that the machinery and equipment were removable fixtures. Basing its decision 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 facet of this decision, as hereinafter discussed, is its apparent conflict with other California cases in which machinery and equipment of essentially the same nature have been held to be a part of the realty for which the condemnor must pay the fair market value.

⁶ Comment, 36 ORE. L. REV. 180 (1957).

⁷ *Central Pac. R.R. v. Pearson*, 35 Cal. 247 (1868); *People ex rel. Dept. of P.W. v. Auman*, 100 Cal. App.2d 262, 223 P.2d 260 (1950); *County of Los Angeles v. Signal Realty Co.*, 86 Cal. App. 704, 261 Pac. 536 (1927).

⁸ 35 Cal. 247 (1868).

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

¹⁰ *Id.* at 712, 261 Pac. at 539.

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

Moving Expenses in Other Jurisdictions

Majority Rule

The majority of jurisdictions apply the rule that an owner or tenant whose property is permanently taken cannot recover the cost of moving or relocating his personal property.¹² This rule is derived from the proposition that necessarily incurred removal costs do not enhance the value of the property taken and that such costs are speculative.¹³ In the case of a lessee, the additional argument is made that, since the lessee must stand the cost of removal at the end of his term, the taking does not cause the lessee to incur moving expenses but only changes the time when such expenses are incurred.¹⁴

Minority Rule

Notwithstanding the reluctance of most courts and legislative bodies to change long established rules of compensation, there is a growing body of judicial authority which holds 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 v. Choctaw O. & W. R.R.*,¹⁵ 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 removing the lumber stored on the property. The Oklahoma court, after considering the holding of the California Supreme Court in *Central Pac. R.R. v. Pearson*,¹⁶ held that it was error to refuse such compensation. The court distinguished the *Pearson* case on the ground 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.*" [Emphasis by the court.]¹⁷ Relying upon this statutory provision the court held:

If damage 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.¹⁸

To the same effect is *Oil Fields & Santa Fe Ry. v. Treese Cotton Co.*,¹⁹ another Oklahoma case.

¹² 4 NICHOLS, EMINENT DOMAIN § 14.2471(2) (3d ed. 1951); 1 ORGEL, VALUATION UNDER EMINENT DOMAIN § 69 (2d ed. 1953).

¹³ *In re Postoffice Site in Borough of the Bronx*, 210 Fed. 832 (1914); *St. Louis v. St. Louis, I.M. & S. Ry.*, 266 Mo. 694, 182 S.W. 750 (1916); 1 ORGEL, VALUATION UNDER EMINENT DOMAIN § 69 (2d ed. 1953).

¹⁴ *United States v. Inlots*, 26 Fed. Cas. 482 (No. 15,441) (C.C.S.D. Ohio 1873).

¹⁵ 16 Okla. 286, 83 Pac. 903 (1905).

¹⁶ 35 Cal. 247 (1868).

¹⁷ *Blincoe v. Choctaw O. & W. R.R.*, 16 Okla. 286, 296, 83 Pac. 903, 907 (1905).

¹⁸ *Ibid.*

¹⁹ 78 Okla. 25, 187 Pac. 201 (1920).

A similar result was reached in the Connecticut case of *Harvey Textile Co. v. Hill Co.*²⁰ The Connecticut statute provided that the owner of the property taken should be "paid by the state for all damages."²¹ In the *Hill* case the court held that the phrase "all damages" includes the cost of disassembling, moving and reassembling factory machinery. This cost was not to be determined as a separate item but as a part of the just compensation. In this connection the court said:

A simple illustration will bring out the application of these principles to the case at bar. An owner would demand a higher price for a factory containing complicated and valuable machinery than he would for the same building idle and empty, because he would be faced with the necessity of moving his machinery to save it. His willingness to sell would be affected by this consideration, which would thus enter into the fixing of a fair market value.²²

Likewise, in *Richmond v. Williams*,²³ 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 necessarily be construed to embrace personal property and, consequently, if the taking necessitated the removal of certain lumber stored upon the property, a burden was imposed upon the owner for which he should be compensated.

Although the courts in the foregoing cases based their decisions upon the particular wording of the applicable statutes, other courts have, without statutory authority, permitted recovery for costs of moving. In *West Side Elevated R.R. v. Siegel*,²⁴ an Illinois case, the court, without reliance upon a statute, held that a tenant is 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 . . . 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

²⁰ 135 Conn. 686, 67 A.2d 851 (1949). And see the discussion of this case in 24 CONN. B.J. 111 (1950).

²¹ See CONN. GEN. STAT. § 13-145 (1958).

²² *Harvey Textile Co. v. Hill Co.*, 135 Conn. 686, 689, 67 A.2d 851, 852 (1949).

²³ 114 Va. 698, 702-03, 77 S.E. 492, 494 (1913).

²⁴ 161 Ill. 638, 44 N.E. 276 (1896).

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? ²⁵

Also, in *McMillin Print'g Co. v. Pittsburg C. & W. R.R.*,²⁶ the Pennsylvania court rejected the standard of market value and held that a tenant is entitled to have the cost of removal of machinery considered in determining the bonus value of his lease.²⁷

Another interesting case, because of its reasoning, is *In re Widening of Gratiot Ave.*,²⁸ a Michigan case. The court allowed reimbursement for the cost of severing, reassembling and reattaching the trade fixtures of a drug store and jewelry store and the machinery and equipment of a manufacturing plant. However, the cost of transporting these items from the old location to the new location was not allowed because the court considered such costs too 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, stated:

We cannot assume that the tenancy would have sooner terminated. Nor are we dealing strictly with 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.²⁹

As recently as 1958, the Florida Supreme Court, in *Jacksonville Express. Auth. v. Henry G. Du Pree Co.*,³⁰ although recognizing that the strong weight of authority is to the contrary, also allowed reimbursement for moving costs despite the absence of statutory authority. The court relied almost entirely upon the state constitutional guarantee of "just compensation," and asserted that moving costs (and inferentially *all* incidental losses) fall within the scope of that constitutional mandate. The court further asserted that the market value standard cannot be used to bar the condemnee from receiving such compensation that is "just" even though it is not within the market value formula:

Although fair market value is an important element in the compensation formula, it is not an exclusive standard in this jurisdiction. Fair market value is merely a tool to assist us in determining what is full or just compensation, within the purview of our constitutional requirement.³¹

A question related to the above case and involved in the *Hill* case is whether the market value formula, correctly interpreted, actually in-

²⁵ *Id.* at 647-48, 44 N.E. at 280.

²⁶ 216 Pa. 504, 65 Atl. 1091 (1907).

²⁷ And see *Patterson v. Boston*, 40 Mass. (23 Pick.) 425 (1839).

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

²⁹ *Id.* at 576, 293 N.W. at 758.

³⁰ 108 So.2d 289 (Fla. 1958).

³¹ *Id.* at 291.

cludes moving expenses.³² The *Hill* case and other cases discussed elsewhere in this study³³ take the position that such expenditures should be included in the market value formula. These cases reason that a "willing seller" confronted with moving expenses would demand (and by implication receive) such costs from the buyer.

The fallacious reasoning of the *Hill* case, however, has been pointed out by a number of authorities. Most recently, the Oregon Supreme Court, in an extensive discussion of the matter, suggested that the court in the *Hill* case failed to consider the demands of the buyer and his reluctance to assume such costs in the price he would pay for the property.³⁴ Furthermore, the concept of market value as arrived at in the market place does not reflect moving costs in those many instances where the seller does not incur any such costs, *e.g.*, where he liquidates his business before selling or sells his personal property as well as his land to the buyer.³⁵ The Florida court, recognizing that moving costs should be given directly if given at all, appears to be on sounder ground than the court in the *Hill* case.

Legislation

The reluctance of the majority of courts to grant reimbursement for moving costs is being overcome by the enactment of legislation in a growing number of jurisdictions. Although some of this legislation is of general application, some moving expense legislation that has been adopted provides relief only in connection with particular types of acquisitions. For example, in 1915 Rhode Island enacted a statute relating to the water supply of the City of Providence.³⁶ This act provided that if a mill were located upon the land to be 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 statute permitted the owner to move it within a reasonable time and provided reimbursement for the expense 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 provided for the determination of damages for the taking of the land.

The Connecticut Legislature in 1957 enacted a measure concerning the relocation of persons displaced by highway improvements.³⁷ This act, too, is limited in scope. Basically it authorizes a municipality to expend funds to relocate occupants of dwellings in the path of a trunk-

³² See note 20 *supra*.

³³ See notes 20-29 *supra* and accompanying text.

³⁴ *Highway Comm'n v. Superbilt Mfg. Co.*, 204 Ore. 393, 420-21, 281 P.2d 707, 719-20 (1955). And see 1 ORGEL, VALUATION UNDER EMINENT DOMAIN § 68, p. 306 n.2 (2d ed. 1953).

³⁵ Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 77-78 (1957).

In the case of sales by lessors, of course, removal costs are likely to be absent. Hence, only the deflating effect of the buyer's expenses would remain. Another reason advanced to show that the market value formula does not include remuneration for incidental expenses is that the market value of property is largely determined by the value set for vacant or about-to-be-vacant property; therefore, since the sellers of such property do not have to bear removal expenses, such costs are not reflected in market value. . . . At least in one case a third contention has been raised. In *St. Louis v. St. Louis, I.M. & S. Ry.*, 266 Mo. 694, 707, 182 S.W. 750, 753 (1916), the court found no need to compensate for removal expenses in eminent domain, since in voluntary sales "ordinarily" neither party considers the costs of removal in determining the price of the property. *Id.* at 77 n.71.

³⁶ R.I. ACTS & RESOLVES 1915, ch. 1278, § 12.

³⁷ See CONN. GEN. STAT. § 13-114 (1958).

line highway; and such expenditure includes reimbursement to occupants for their actual moving expenses. The municipality is then entitled to reimbursement from the highway commissioner in an amount not to exceed \$250 per dwelling unit.

The Public Housing Law of New York contains a provision for reimbursement of displaced persons and business concerns which 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 hundred dollars for any business or commercial tenant. Removal costs so paid by an authority shall be included in the project cost.³⁸

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

In 1959, shortly after the Minnesota court in *Korengold v. City of Minneapolis*³⁹ reaffirmed its position that moving costs were not compensable, the Minnesota Legislature took "remedial" action. It enacted a provision that *in the discretion of the court* a homeowner may receive up to \$200 and the owner of business property up to \$500 for moving expenses.⁴⁰ (The statute also permits as taxable costs two appraisal fees not to exceed \$150 each "after a verdict has been rendered on the trial of an appeal."⁴¹ This latter provision, being outside the scope of this study, is not discussed further.)

The above statute (as it relates to moving costs) appears to have at least two questionable provisions. First, compensation for moving expenses apparently can be given only at the discretion of the court. Although this provision was inserted possibly to prevent "windfalls" (in those instances, for example, where the condemnee had planned to move and would have incurred moving costs regardless of the condemnation), the provision is unwisely worded. If only the court can grant moving expenses, moving expenses may be denied to condemnees who negotiate out-of-court settlements with the condemnor. If such costs are to be allowed, they should be allowed in all public acquisitions, whether by judgment or by out-of-court settlement.

The second questionable provision is the limitation on the amount of payment that a condemnee may receive. Such a limitation often may be inequitable, particularly in cases where the property owner incurs extensive moving costs.

³⁸ N.Y. PUB. HOUSING LAW § 153, subd. 1.

³⁹ 95 N.W.2d 112 (Minn. 1959).

⁴⁰ Minn. Ex. Sess. Laws 1959, ch. 41, § 2, subd. 8(d), p. 1492.

⁴¹ *Ibid.*

Nebraska, too, now grants reimbursement for moving costs, but without limitations like those in the Minnesota statute. In 1959 the Nebraska Legislature enacted the following statute:

Where any condemner shall have taken or attempts to take property for public use, the damages for taking such property shall be determined according to the laws of this state irrespective of whether the condemner may be reimbursed for a part of such damage from the federal government and such damages shall include the reasonable cost of any necessary removal of personal property from the real estate being taken.⁴²

The only major question this statute raises is what is meant by the term "reasonable." In all probability it will be interpreted to mean *actual* costs to the extent that they do not exceed what a reasonable man would incur. The determination of such costs may often be difficult, for frequently the condemnee will not have incurred any moving expenses at the time of the trial, if litigation proves necessary. Nevertheless, courts and administrators in the vast majority of cases should be able to ascertain the approximate amount of the necessary moving costs before an actual expenditure. It might be preferable, however, to establish a percentage limitation as a safeguard against the allowance of excessive moving costs.⁴³

And the State of Wisconsin, in the course of making major revisions in its condemnation law in 1959, joined the states allowing some compensation for moving costs.⁴⁴ Its statute permits compensation up to \$150 for removals from a residence and up to \$2,000 for moving from nonresidential sites upon a bona fide showing that the owner has incurred or will incur such costs.⁴⁵

England and Canada also have statutes that allow compensation for 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.⁴⁶

The majority of the statutes that provide for partial or full compensation to condemnees for their moving expenses permit compensation to be given to tenants at will and lessees as well as to fee owners. Connecticut allows compensation up to \$250 for the cost of relocating occupants of dwelling units under its statute relating to highway takings.⁴⁷ An 1895 Massachusetts statute allowing for compensation for incidental business losses caused by the condemnation of property for a reservoir on the Nashua River did not distinguish between a fee owner and a lessee;⁴⁸ it merely provided that the amount of compensation to be paid should include (separately assessed) damages and reasonable necessary expenses proximately resulting to any established business. Case law in Massachusetts also fails to make any distinction

⁴² NEB. REV. STAT. § 76-710.01 (Cum. Supp. 1959).

⁴³ See discussion of federal percentage limitations *infra* at C-21 *et seq.*

⁴⁴ See WIS. STAT. § 32.09(5)(k) (1959).

⁴⁵ *Ibid.*

⁴⁶ CHALIES, EXPROPRIATION 148-149, 160-161 (1954); LAURENCE, COMPULSORY PURCHASE AND COMPENSATION 82-83; 1 ORGEL, VALUATION UNDER EMINENT DOMAIN § 71, p. 321 (2d ed. 1953).

⁴⁷ CONN. GEN. STAT. § 13-114 (1958).

⁴⁸ MASS. ACTS & RESOLVES 1895, ch. 488, § 14. And see MASS. ACTS & RESOLVES 1927, ch. 321, § 5; MASS. ACTS & RESOLVES 1897, ch. 450, § 1; MASS. ACTS & RESOLVES 1896, ch. 450, § 1.

between fee owners and lessees.⁴⁹ The New York legislation in this regard is specifically limited to public housing and states: "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."⁵⁰ The 1959 Nebraska statute provides that "such damages shall include the reasonable cost of any necessary removal of personal property from the real estate being taken."⁵¹ It would appear that the Nebraska statute probably includes compensation for tenants without leases insofar as they have personal property on the real estate being taken. However, the statute is not entirely clear in this respect.

On the other hand, the Minnesota statute clearly permits moving costs to be reimbursed only when the person moving is either an owner or a lessee under a written lease.⁵² Likewise, in Florida, where moving costs are compensable by case law⁵³ a recent lower court decision limited compensation for moving expenses to owners and perhaps to lessees under a written lease.⁵⁴ Federal legislation generally is interpreted as allowing tenants applicable moving cost remuneration.⁵⁵

Federal Rule on Moving Expenses

In the case of displacements resulting from acquisitions of land for military purposes, the United States Congress has provided for reimbursement to those persons affected. Section 401(b) of Public Law No. 534 of the 82nd Congress 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

⁴⁹ *Emery v. Boston Terminal Co.*, 178 Mass. 172, 59 N.E. 763 (1901).

⁵⁰ N.Y. PUB. HOUSING LAW § 153, subd. 1.

⁵¹ NEB. REV. STAT. § 76-710.01 (Cum. Supp. 1959).

⁵² Minn. Ex. Sess. Laws 1959, ch. 41, § 2, subd. 8(d), p. 1492. See discussion in text at notecalls 39-41 *supra*.

⁵³ See *Jacksonville Express. Auth. v. Henry G. Du Pree Co.*, 108 So.2d 289 (Fla. 1958), and discussion of case in text at notecall 30 *supra*.

⁵⁴ *Romy v. Dade County*, 114 So.2d 8 (Fla. Civ. App. 1959).

⁵⁵ See notes 56, 57, 60 *infra*.

shall be delegable by the Secretary of the military department concerned to such responsible officers or employees as he may determine. [Emphasis added.]⁵⁶

A similar statute was enacted on May 29, 1958, extending compensation for moving expenses to persons displaced by acquisitions for the Department of Interior. Public Law No. 85-433 provides in part as follows:

[T]he 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.

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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 of the right-of-way occupied.⁵⁷

It should be noted that the provisions of the federal acts are somewhat limited in scope: they are applicable only to acquisitions by the Defense Department and Interior Department and reimbursement is discretionary rather than a matter of right. Also, payments for expenses, losses and damages are limited to 25 per cent of the fair value of the land condemned.

The statute applicable to the Defense Department required that application be made within one year following the date of acquisition, whereas the statute applicable to the Interior Department requires that application be made within one year from the date that the premises involved are vacated (with an additional proviso relating to lands vacated prior to the date of the act). Federal officials in Los Angeles are of the opinion that the statute applicable to the Interior Department is

⁵⁶ Act of July 14, 1952, ch. 726, § 401(b), 66 Stat. 606, 624.

⁵⁷ Act of May 29, 1958, §§ 1, 3, 72 Stat. 152.

easier to administer because the date of vacation of the premises is readily established, whereas the date of acquisition varies with the definition of the word "acquisition."

The Southern California office of the United States Army Corps of Engineers has handled approximately 200 cases since the inception of the moving cost reimbursement program. The average of resettlement payments made by that office in these cases is between three and four per cent of the acquisition cost, *i.e.*, the appraisal value of the properties acquired. This is an over-all average for farm, business, residence and industrial acquisitions. Approximately 90 per cent of the payments were less than \$500.⁵⁸ As the applicable federal statute permits moving expense reimbursement up to 25 per cent of the acquisition cost, the amounts claimed for moving expenses for condemnees have rarely equaled or approached the maximum amount permissible. There has been only one instance when the claims for moving expenses of the interestholders in the acquired property exceeded the 25 per cent limitation.

An examination of the expenses that are subject to reimbursement shows clearly that the administration of this statute under the Corps of Engineers is an exceedingly liberal one. For example, the expenses for which the condemnee is compensated are: time and travel in search of a replacement site (the condemnee may be reimbursed at \$6.25 per hour for an amount up to 56 hours in search of a replacement site); cost of food at \$1.00 per meal for the applicant during such a search and for the applicant and members of his family during any subsequent move; and, expenses for lodging, to an extent deemed reasonable, for the applicant during the search and for the applicant and members of his family during the move. In addition, the condemnee is reimbursed for: an appraisal and any survey made of the replacement site; legal services rendered for an abstract examination or title opinion in regard to the new site; costs of obtaining mortgage and title insurance when necessary; and recording fees.

The federal government also pays for the actual moving of persons, household goods, livestock and machinery, including the hire of a truck or trailer (or expenses for the use of a personally owned automobile or truck) or commercial movers' charges; reinstallment of machinery or appliances; damages sustained to household goods; and interest on any short term loan required for moving expenses. Indirect losses and losses caused by negligence are not reimbursed.

In the field of urban redevelopment projects, the United States Congress has provided reimbursement for moving expenses to persons or families (up to \$100) and business concerns (up to \$2,000) displaced by such projects. The Housing Act of 1956 provides:

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 con-

⁵⁸ Interview with authors and Mr. William M. Curran, Jr., Chief, Acquisition Branch, Real Estate Branch, United States Corps of Engineers, Southern California.

tract 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 good-will 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 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.⁵⁹

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 contains 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."⁶⁰

All federal legislation relating to moving costs permits reimbursement to both owners and tenants of the acquired property in the amounts indicated above; neither the statutes nor the administrators of the statutes distinguish between those tenants who are lessees and those who are not.⁶¹

⁵⁹ Housing Act of 1956, § 305, 70 Stat. 1091, 1100.

⁶⁰ Housing Act of 1957, § 304, 71 Stat. 294, 300-301.

⁶¹ See, e.g., notes 56, 57, 60 *supra*.

Temporary Takings

The preceding discussion relates to the law applicable to takings of the fee or lesser permanent estates in property. During World War II the federal government began to take property by condemnation for temporary use, taking in such cases a limited estate in the nature of a leasehold. As an outgrowth of these temporary takings a rule of law has evolved 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 the termination of the occupancy. In *United States v. General Motors Corp.*⁶² the United States 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.

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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.⁶³

The rule of the *General Motors* case was reaffirmed and further defined in *United States v. Petty Motor Co.*⁶⁴ There, however, the United States Supreme Court pointed out that in order for the tenant to secure his cost of removal and relocation as a 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 is under an obligation to return to the premises at the end of the government's occupancy. If the taking, although temporary, is of such nature and extent as to exhaust the tenant's leasehold estate, then the costs of removal and relocation are not to be considered because, in that situation, the condemnation of the entire leasehold is analogous to the condemnation of all interests in fee.

⁶² 323 U.S. 373 (1945).

⁶³ *Id.* at 382-83.

⁶⁴ 327 U.S. 372 (1946).

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 autoplating 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*, 67 YALE L.J. 61, 78 (1957).

⁶⁶ See Note, 23 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).

⁶⁸ 219 Cal. 198, 25 P.2d 826 (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 641 (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*, 29 Cal.2d 385, 175 P.2d 512 (1946).

⁷³ 12 Cal.2d 127, 82 P.2d 422 (1938).

⁷⁴ 219 Cal. 198, 25 P.2d 826 (1933).

⁷⁵ 57 Cal. App.2d Supp. 1032, 136 P.2d 139 (1943).

⁷⁶ 100 Cal. App.2d 262, 223 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.

CONSTITUTIONALITY OF A MOVING EXPENSE STATUTE

In view of the fact that little legislation providing for the payment of moving expenses has been enacted until recent years, the question of whether any statute relating to moving expenses can be adopted without a constitutional amendment is difficult to answer. The United States Constitution guarantees 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 provide for the expenditure of public funds to pay for moving costs. However, this contention was answered in *Joslin Co. v. Providence*.⁷⁸ In that case the Rhode Island statute, referred to earlier, was upheld when the United States Supreme Court held:

In respect of 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. Commonwealth*, 180 Mass. 579, 583, 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." ⁷⁹

Although the California Constitution guarantees compensation when property is taken or damaged for public use, the California Supreme Court, in *Central Pac. R.R. v. Pearson*,⁸⁰ held that an owner is en-

⁷⁷ CAL. CODE CIV. PROC. § 1248.

⁷⁸ 262 U.S. 668 (1923).

⁷⁹ *Id.* at 676-77.

⁸⁰ 35 Cal. 247 (1868).

titled to recover, over and above the value of the property taken, only those damages that are specified by statute. Since there was no statutory authority permitting recovery for moving expenses, the court held the owner was not entitled to them. By implication, however, the court indicated that had there been a statute, it would have been constitutional.

IS A MOVING EXPENSE STATUTE DESIRABLE?

There is much to be said in favor of legislation that 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 number of owners who are 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. Many times the proceeds of the condemnation have not been received at the time of the move and the owner may have 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. Although some of the foregoing problems are beyond the immediate scope of this study, they are mentioned here because their existence tends to intensify the hardship that 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 on 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, one writer 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.⁸¹

The authors of a *Yale Law Journal* article state that:

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

⁸¹ Pearl, *Review of Efforts To Minimize Losses in Condemnation*, 26 APPRAISAL J. 17, 21 (1958).

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 as 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. Nonetheless, 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, re-examination of the present system of compensation in eminent domain, particularly as it applies to incidental damages, is necessary.⁸²

The payment of moving expenses by the condemnor, in addition to relieving hardships of the kind mentioned above, may result in benefits 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 that presently is not compensable. Second, it may avoid the necessity for a condemnor to acquire fixtures attached to the realty that have no value to the condemnor. A statute permitting payment for the relocation of such fixtures might relieve the condemnor from paying a possibly greater amount for the fixtures if they were valued as part of the realty.

On the other hand there are factors in opposition to moving expense legislation that should be considered. The payment of moving expenses will undoubtedly increase the cost of public improvements to the tax-paying public as a whole. 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. And too, the payment of moving expenses will un-

⁸² Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61-64 (1957).

doubtedly 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 that they would have incurred without the condemnation. However, the number of windfall cases would be relatively small in comparison to the total number of properties acquired.

Apparently because of these latter considerations legislatures as well as courts have been reluctant to make any changes in the existing rules for compensation. The authors of the article in the *Yale Law Journal* stated in 1957 that:

The legislatures have, however, been reluctant to change the present policy. See, e.g., 88 CONG. REC. 1649, 1650, 1653, 1654, 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.⁸³

In the California Legislature several bills providing for the payment of moving expenses were introduced in 1957 but were not enacted as law.⁸⁴ However, as previously noted,⁸⁵ the trend since 1957 has been to allow moving expenses. The Florida Supreme Court in 1958 allowed

⁸³ *Id.* at 97 n.156.

⁸⁴ Assembly Bill No. 222 (1957) provided for new subdivisions to be added to Section 1248 of the Code of Civil Procedure. This is the section that defines what the court, jury or referee must ascertain and assess to determine the award in a condemnation proceeding. Assembly Bill No. 222, in its original form, would have added to the items required to be ascertained 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 No. 1057, as amended March 20, 1957, provided for the amendment of subdivision 6 of 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 in 1957. Assembly Bill No. 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 Assembly Bill No. 362 applied only to acquisitions for state highway purposes and provided compensation only for the relocation of a "business establishment."

⁸⁵ See discussion in text *supra* at C-14 *et seq.*

compensation for moving costs despite the absence of statutory authorization.⁸⁶ Connecticut in 1957⁸⁷ and Minnesota,⁸⁸ Nebraska⁸⁹ and Wisconsin⁹⁰ in 1959 provided by statute for the payment of moving expenses. Recent federal legislation also allows moving expense compensation in some cases.⁹¹

In summary, it seems that the problem is one of legislative policy in determining where the burden should fall. Unquestionably there is a hardship on 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 the cases that hold that we all own our property subject to the prior right of the public to take it when needed?

AUTHORS' RECOMMENDATIONS

Long Versus Short Form of Statute

A moving expense statute might take either of two forms. It can be relatively brief, like 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, can be adopted.

The primary advantage of 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 considerable latitude in deciding the litigated cases.

However, the uncertainties arising from a lack of specific standards might outweigh the advantages of simplicity. Some of the questions which might be left unanswered by a 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 would require extended judicial interpretation. The litigation that would arise would impose a substantially increased burden on the courts and on the parties. Therefore it may be preferable to include in a moving cost statute more detailed standards and procedures.

⁸⁶ *Jacksonville Express. Auth. v. Henry G. Du Free Co.*, 108 So.2d 289 (Fla. 1958), and discussion of case in text at notecall 30 *supra*.

⁸⁷ See CONN. GEN. STAT. § 13-114 (1958).

⁸⁸ Minn. EX. SESS. LAWS 1959, ch. 41, § 2, subd. 8(d), p. 1492.

⁸⁹ See NEB. REV. STAT. § 76-710.01 (Cum. Supp. 1959).

⁹⁰ See WIS. STAT. § 32.09(5)(k) (1959).

⁹¹ Act of May 29, 1958, §§ 1, 3, 72 Stat. 152; Housing Act of 1957, § 304, 71 Stat. 294, 300-301; Housing Act of 1956, § 305, 70 Stat. 1091, 1100; Act of July 14, 1952, ch. 726, § 401(b), 66 Stat. 606, 624.

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 Pearl, *Review of Efforts To Minimize Losses in Condemnation*, 26 APPRAISAL J. 17 (1958).

Actual Costs Versus Reasonable Costs

It is recommended that the proposed statute provide reimbursement for the costs actually incurred by the owner, rather than reasonable costs. It is believed that actual costs are a better measure than reasonable costs for several reasons. First, an owner is made whole for expenditures he actually incurs, and no opportunity is given to profit at the expense of the condemnor. An owner could not 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 if the statute reimburses only for costs "necessarily" incurred.

To facilitate settlements the statute should provide that the condemnor and the condemnee may agree upon the amount of reimbursement to be paid even in advance of the actual move. This would 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.

Personal Property Covered

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

Definition of Reimbursable Costs

No attempt should 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 to condemnee will be realized if some flexibility in the application of the statute is allowed.

Limitations on Amounts Recoverable

Clearly some limitation should be imposed upon the right to recover moving expenses. The problem arises, however, in fixing the limitation.

The allowance of expenses for the removal of personal property to a reasonable distance would require a definition of the meaning of the word "reasonable."

An area limitation, such as a ten-mile limit, would provide a fixed standard which might 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 much more than ten miles to find an area where dairies are permitted under current zoning ordinances.

A countywide limitation might also result in inequities. A resident of a small county would have a 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. It is conceded that a statute providing a fixed monetary limitation upon moving expenses, say \$200, would be simpler to administer. This amount could be included in the condemnation payment without the need for much investigation or the likelihood of dispute. The disadvantage of such 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. 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 as a certain percentage of the total award, as was done in 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 per cent limitation is exceeded, an apportionment can be made.

However, the percentage limitation method is of 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.

There should be a provision that the limitation will not apply in cases of negotiated settlements or in cases of temporary takings. The removal of the limitation upon negotiated settlements 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 should be 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 believed that the removal of the limitations in these cases will not impose an unwarranted liability upon condemnors.

Moving Expenses of Tenants at Will

The statute should not exclude the moving expenses of tenants at will. These tenants are inconvenienced as much as any other tenants by a condemnation of their premises, and it does not seem that their right to reimbursement for moving expenses should depend upon the accident of their agreement with the landlord. Consenting to the landlord's termination of the tenancy is not the same as consenting to the termination of the tenancy by the State without the payment of moving expenses.

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 should make 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 per cent 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 per cent limitation, the proposed statute should provide 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.

Since a claim for moving costs should not prevent the condemnation judgment from becoming final, the statute should provide for a proceeding after judgment similar to the presentation of a cost bill for costs incurred after judgment.

Provision should be made 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.

Moving Expenses Paid by Federal Government

There may exist a possibility of conflict between the state moving cost statute and various federal statutes presently making provision for moving costs. For example, in urban renewal cases the federal statute⁹² makes provision for defraying the condemnee's moving expenses, or at least some part thereof, even though the market value for the property is paid to the condemnee by the local state or municipal agency.

It is quite possible, and perhaps even probable, that in those areas where there is a federal statute providing for the payment of moving expenses, federal administrators will not grant such moneys if the State has provisions for defraying such expenditures. In other words, the State may pay costs that otherwise would be paid by the federal government.

To avoid this possibility, it is recommended that a proviso be inserted in the proposed statute to the effect that "No payment shall be authorized for any costs compensated for by any other governmental

⁹² See discussion in text *supra* at C-22 *et seq.*

body or agency in the absence of this section." Such an additional provision would not put any reform in this area at a peculiar and unjustified disadvantage.

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

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.⁹³ 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.

⁹³ See notes 66-76 *supra*.

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