NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM
REPORT 94

VALUATION AND CONDEMNATION PROBLEMS INVOLVING TRADE FIXTURES

HIGHWAY RESEARCH BOARD
NATIONAL RESEARCH COUNCIL
NATIONAL ACADEMY OF SCIENCES—NATIONAL ACADEMY OF ENGINEERING

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VALUATION AND CONDEMNATION PROBLEMS INVOLVING TRADE FIXTURES

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NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM

Systematic, well-designed research provides the most effective approach to the solution of many problems facing highway administrators and engineers. Often, highway problems are of local interest and can best be studied by highway departments individually or in cooperation with their state universities and others. However, the accelerating growth of highway transportation develops increasingly complex problems of wide interest to highway authorities. These problems are best studied through a coordinated program of cooperative research.

In recognition of these needs, the highway administrators of the American Association of State Highway Officials initiated in 1962 an objective national highway research program employing modern scientific techniques. This program is supported on a continuing basis by funds from participating member states of the Association and it receives the full cooperation and support of the Bureau of Public Roads, United States Department of Transportation.

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This report was prepared by the contracting research agency. It has been reviewed by the appropriate Advisory Panel for clarity, documentation, and fulfillment of the contract. It has been accepted by the Highway Research Board and published in the interest of an effectual dissemination of findings and their application in the formulation of policies, procedures, and practices in the subject problem area.

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FOREWORD

By Staff
Highway Research Board

In the acquisition of commercial properties questions and disputes often arise between condemnor and condemnee as to the obligation of the condemning authority to take and pay for trade fixtures or equipment. There is need to establish a sound test as to whether an owner's fixtures have been condemned as part of the real estate. This is one of the factors that must be considered in determining the amount of compensation the owner receives and the public must pay. Because it deals with the legal aspects of this complex problem, this report will be of primary interest to highway lawyers, right-of-way engineers, appraisers, and other highway personnel engaged in the acquisition of property for highway purposes.

There is confusion and uncertainty in the appellate courts as to when trade fixtures are condemned and, if so, how they are to be valued, and apportioned, between lessor and lessee. This confusion and uncertainty is reflected in the administrative programs of many highway agencies. The condemning authority frequently takes the position that because the fixtures or equipment are movable, and hence not affixed to the freehold, they are personal property and may be removed by the owner. The courts have also recognized a different rule than exists between landlord and tenant and mortgagor and mortgagee in regard to such fixtures.

This report presents a test of compensability for trade fixtures that is dependent not solely on whether such fixtures were intended to become part of the realty and were affixed and adapted thereto, but whether such fixtures were condemned because modern appraisal techniques would indicate it to be a denial of just compensation to hold otherwise. This test of compensability (whether fixtures have been condemned as part of the real estate) can be applied to owner's fixtures as well as tenant's fixtures. Such test is considered to be easily administered by condemnors and should remove much of the confusion and uncertainty that now exists.

The research attorney, Edward L. Snitzer, reviewed and analyzed all appellate trade fixture cases as well as pertinent legal and appraisal articles and manuscripts. The report comments on differences between condemnation law and fixture law between mortgagor-mortgagee and lessor-lessee.

The legal practitioner, appraiser, and right-of-way agent will find this document of practical use. References and citations are given to all legal literature, and published and known unpublished material on the subject.

CONTENTS

VALUATION AND CONDEMNATION PROBLEMS INVOLVING TRADE FIXTURES

CHAPTER ONE

INTRODUCTION AND RESEARCH APPROACH

THE PROBLEM AND ITS SOLUTION

In few areas in the law has there been more wordiness and confusion than the effort to determine "fixtures." The statement by a Missouri Judge in 1877 that "the law in regard to fixtures is in a somewhat chaotic state," is as true today as when he wrote "there is a most embarrassing conflict in the adjudged cases." [1]

There is present confusion and uncertainty in the appellate courts, reflected in the administrative programs of many condemnors, as to when trade fixtures and equipment are condemned, and, if so, how they are to be valued, and apportioned, between lessor and lessee. This confusion and uncertainty exists, in part, because of the relative paucity, until recently, of condemnations in urban areas. Also, the courts have found that the application of decisional law "in a somewhat chaotic state" to the complexities of the law of eminent domain has not made for easy solution.

What follows is a suggestion that the common law tests of when trade fixtures and equipment became a part of the realty, for purposes, inter alia, of a mortgagor-mortgagee, lessor-lessee, or buyer-seller relationship, have limited application to when it is claimed that such fixtures were, or were not, condemned. The common law tests of "intent," "adaptability," and "annexation," being verbal tools used by the courts to resolve conflicting *status* claims in trade fixtures, should now be (and already have been by a few courts) supplanted by more pragmatic tests available as a result of modern appraisal techniques. A rule of law providing that trade fixtures and equipment are deemed to be "realty," and therefore condemned, when they lose substantially all of their in place value upon severance, would be consistent with the constitutional requirement of the payment of "just compensation," easily administered, and otherwise equitable. It is a test that comports with the economic realities of the condemnor-condemnee relationship. As is shown herein, the underlying policy consideration in the condemnor-condemnee relationship, is "mainly economic." [2]

[1] State Savings Bank v Kercheval, 65 Mo. 682, 686 (1877); See also, Helm et al v Gilroy et al, 20 Or. 517, 522, 26 P. 851, 853 (1891), stating the law of fixtures to be "one of the most uncertain titles in the entire body of jurisprudence"

[2] Gottus v Allegheny County Redevelopment Authority, 425 Pa 584, 588 229 A 2d 869, 872 (1967).

THE COMMON LAW

Before discussing briefly the rules of the common law, it should always be remembered in analyzing whether items are, or are not, fixtures, that who is suing whom, for what, is of critical importance. The relationship of the parties, and the interest for which legal protection is sought, affords greater insight to what the courts do, or should do, than a futile effort to build "a solid pathway across this veritable slough of despond." [3] Generally, the fixture concept had three purposes: (1) To determine which heir took when realty and personalty passed to different heirs; [4] (2) to determine the rights of competing creditors in a debtor's property, [5] and (3) to determine the competing rights of landlord and tenant concerning items attached to the land or building by the tenant.[6] The issue in each of these situations is which party should prevail in its claim to the disputed items. It is not the same issue that arises in a condemnation proceeding. (See Chapter Two.)

Under the common law, everything attached to the freehold was considered a part of it.[7] As the feudal system of land tenure gave way to the continuing process of industrialization, fixture law developed to protect those who had made or financed improvements on land in which they had an interest less than a fee.

The case of *Teaff* v. *Hewitt* [8] is the leading American case formulating the test for the determination of a fixture.

> . . . the united application of the following will be found the safest criterion of a fixture.
>
> 1st, Actual annexation to the realty or something appurtenant thereto 2d, Appropriation to the use or purpose of that part of the realty with which it is connected 3d, The intention of the party making the annexation, to make the article a permanent accession to the freehold—this intention being inferred fom the *nature* of the article affixed, the *relation* and *situation* of the *party* making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.

[3] Binghman, *Some Suggestions Concerning the Law of Fixtures*, 7 COLUM L REV 1 (1907)

[4] Lawton v Salmon, 1 H Black 259, n. (1782)

[5] Voorhis v Freeman, 2 W &S 116 (Pa 1841)

[6] Mott v Palmer, 1 N Y 564 (1848)

[7] *Kent's Commentaries* (12th ed) 467

[8] 1 Ohio St 511, 529-530 (1853)

Annexation

The idea of an item "being" real estate because it was "a part of, or annexed to," the real estate, remains an oft-stated part of the test to determine whether disputed items are fixtures Early law held that an article would be deemed to be "annexed" and therefore a fixture only where severance would occasion material injury to the freehold.[9] Even when this rule was relaxed, slight, ever so slight, annexation was said always to be required, even if the item could be easily detached [10] The adherents of the annexation doctrine feared that if the requirement of physical attachment were removed, a fixture could even be domestic animals on a farm, or other loose and unattached implements, traditionally not a "part of" the realty.[11]

Adaptation

The "annexation" test gradually gave way to the continuing process of industrialization. Thus, in *Lawton* v. *Salmon*,[12] it was held that salt pans affixed with mortar to the brick floor of a salt works were real estate passing to the heir. The court held that the salt spring was a valuable inheritance, but no profit arose from it unless there were a salt work, which consisted of a building for the purpose of containing the pans. The case recognized that the *adaptation* of the pans for use in the manufacturing plant would render illogical any holding that the pans were not "part of" the plant. The concept of an item being deemed a "fixture" because of its adaptation raised the specter, present in modern condemnation law (see Chapter Three), that any item, fixed or loose, could now be deemed a "fixture." [13] Nevertheless, in the landmark decision of *Voorhis* v. *Freeman*,[14] it was held that detachable rolls in a rolling mill passed to a real estate mortgagee with the land. The court noted that almost any sort of machinery, however complex in its structure, may with care and trouble be broken down and removed without injury to the building. Yet, just as the easily removable doors and windows of a dwelling are fixtures, for without them the dwelling would be unfit for use, so it was held the machinery of a manufacturing plant, without which it would not be a manufacturing plant at all, must pass as part of the freehold. The contest in *Voorhis* was between a purchaser at a mortgage foreclosure sale, and a creditor of the mortgagor who levied upon the machinery in an iron-rolling mill The court, by its holding, fashioned what was to become the Assembled Industrial Plant Doctrine, when it stated at page 119, "Whether fast or loose, therefore, all the machinery which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold." This holding was "based, first and foremost, upon the intention of the parties that the lien of the mortgage on an industrial plant should extend to the machinery and equipment therein and, second, on consideration of a public policy to encourage financing of industrial plants." [15] The holding in *Voorhis* is now hornbook law. In an overwhelming majority of the modern decisions, machinery indispensable to the functioning of an industrial plant is deemed a fixture passing to the real estate mortgagee.[16]

Intention

Annexation and adaptation are now said to be only circumstances bearing on the intention of the parties, which is deemed controlling in determining whether an item is a "fixture." [17] The relationship of the parties, therefore, is of particular importance in determining whether an item is deemed a "fixture." For example, whether items installed by a tenant are deemed to be removable by the tenant on the expiration of the leasehold, or, permanent improvements passing to the landlord, has been the subject of much litigation. The rule is that inasmuch as it is the usual intention of the tenant to remove all trade fixtures installed on the freehold on the expiration of the term, he normally will be permitted to do so where removal will not cause material injury to the realty, and where the lease does not restrict or prohibit such removal.[18] On the other hand, items that would, if installed by a tenant, be considered removable personal property, may, if installed by an owner, be deemed fixtures, inasmuch as normally an owner's addition to his property is intended to be permanent.[19] The presumed "intention" between an industrial mortgagor and mortgagee for purposes of resolving conflicting claims between the mortgagee and other creditors is noted previously.[20] Conversely, if a real estate mortgagor gave a chattel mortgage on fixtures and equipment, it was held that

[9] Hill v Wentworth, 28 Vt 428 (1856)

[10] Walker v Sherman, 20 Wend 636 (N Y. 1839)

[11] *Id* at 654 As long ago as 1522, however, it was held that if a mill owner took the millstone out of his mill to make it grind better, even though it was actually severed from the mill, it remained a part thereof as if it had always been lying upon the other stone Accordingly, it passed by lease of conveyance of the mill Wistow's Case of Gray's Inn, 14 Hen VIII, f 25b (1522), In Liford's Case, 11 Coke 46b (1514), it was stated that a house key passed as part of the freehold This concept of "constructive annexation" gave effect to the obvious intention of the parties, regardless of the absence of actual physical annexation Smith v. Carroll, 4 Greene 146 (Iowa 1853) (farm fence not fastened to ground), Roderick v Sanborn, 106 Me 159, 76 Atl 263 (1909) (storm windows and storm doors stored in barn), Byrne v Werner, 138 Mich 328, 101 N W 555 (1904) (building material on site of partially completed building) *Cf*, however, Big Beaver Creek Corporation v Beaver County, 37 Pa Super 250 (1908) (County claimed it condemned 10,000 ft of oak lumber when it condemned a bridge Held, that because the lumber was not "attached" to the bridge, it was not condemned)

[12] I H Black 259, n (1782)

[13] Walker v Sherman, 20 Wend 636 (N Y 1839)

[14] 2 W &S 116 (Pa 1841)

[15] Commonwealth v Haveg Industries, 411 Pa 515, 519, 192 A 2d 376, 378 (1963)

[16] See 41 A L R 601, 608, 88 A L R 1114, 99 A L R. 144, 145 Courts have even dispensed with the annexation requirement altogether where the items in question are highly adapted to use in the freehold, even though the item is useful elsewhere than on the mortgaged premises. Metropolitan Life Ins Co v Kimball, 163 Ore 31, 94 P 2d 1101 (1939), 109 A L R 1424

[17] Phipps v State of New York, 69 Misc 295, 297, 127 N Y S 260, 262 (1910)

[18] Lindsay Bros v Curtis Publishing Co, 236 Pa 229, 84 A 783 (1912), Carver v Gough, 153 Pa 225, 25 A 1124 (1893) *Cf* Niles, *The Intention Test in the Law of Fixtures*, 12 N Y U L Rev 66 (1934)

[19] "Where the improvements were put upon the land by the owner, and it was evident that they were so placed there to enable him to better use his own land for the purposes for which he intended it, there could have been on his part no intention to remove these improvements, and justice did not require that the common law rule should be limited for his protection For that reason it has always been held that, so far as the owner is concerned, the law of fixtures would be rigorously limited, and that whatever had been put upon the premises under such circumstances that it would become a part of the freehold, or essential for the purposes for which the freehold was used, would be, so far as the owner was concerned, regarded as a fixture between him and any person to whom he proposed to transfer the land" Matter of the Mayor, 39 App.Div 589, 57 N.Y S 657 (1899), Tyler v Hayward, 235 Mich 674, 209 N.W 801 (1926), Blake-McFall Co v Wilson, 98 Ore 626, 193 Pac. 902 (1920)

[20] See "Adaptation," *supra*

having done so indicated an intention that such items were not intended to be part of the realty.[21]

In *Murdock* v. *Gifford*,[22] the intention of the owner in fastening looms to the floor of the realty was only to steady them during their operation, and not, the court held, permanently to affix them to the realty. Hence, the looms passed as personalty to a judgment creditor of the owner rather than as realty to the mortgagee of the realty. On the other hand, it was held in *Potter* v. *Cromwell*[23] that a portable gristmill was intended to be a permanent part of the realty. Hence, it passed to the buyer of the factory and was not personal property subject to attachment by a judgment-creditor of the seller.

The effort of the courts to establish the "intention" of the parties readily lends itself to endless litigation in search of the purposes and motives of those installing fixtures and equipment upon the freehold. There is no end to such cases and the particular "rules" determined by the specific facts of each holding. The chaos referred to by the Missouri Judge, in 1877, remains.

[21] Ford v Cobb, 20 N Y. 344 (1859)
[22] 18 N Y 28 (1858)
[23] 40 N Y 287 (1869)

CHAPTER TWO

THE FIXTURE APPRAISAL

The illusive tests of annexation, adaptability, and intention are used to establish rules that hopefully foster desired policy results. Hence, to protect the trade fixtures of tenants on the expiration of the term an item may be deemed to be "personalty," whereas, to encourage financing of industrial plants, the same item installed by the owner may be deemed "realty." These rules attempt to resolve conflicting claims to disputed items. In a condemnation proceeding, the issue is not who should prevail as to disputed items, but whether the condemnor or condemnee should bear the economic consequences upon the fixtures of the condemnation proceeding. The issue is not ownership or status, but economics.[24]

Table 1 is a recapitulation of a modern fixture appraisal of two business estabilshments.[25] The first is a bar. The second is an industrial plant engaged in processing raw cotton into cotton felt. The economic effect on the machinery, equipment, and fixtures is described by the appraisals.

The appraiser has divided his appraisal into four columns. The first, "cost of reproduction new," represents the cost of the described items fully installed in the premises as of the date of the condemnation.

The second column represents the "sound value," the "in-place values," or the "fair market value in place" of the described items as of the date of the condemnation. This is the price that would be agreed to by a willing and informed seller and buyer for each item as installed and being so used in the premises. There is little literature or other evidence available describing the manner in which this price is determined by the fixture appraiser. The cases suggest, however, that the appraiser often takes the reproduction cost new figure in the first column, and then reduces it by depreciating the item for physical, economic, and functional obsolescence.[26] By so doing the fixture appraiser, on a reproduction cost basis, has arrived at a figure which is intended to represent the fair market value in place of each item. There is some authority, however, and personal experience confirms, that the fixture appraiser should (and the better appraisers do) consider the price that the item would sell for on the open market. There is usually a market for used equipment with price quotes available. By securing this price, and then determining the cost to install the item in place, the fixture appraiser can check whether his reproduction cost approach is reasonable.[27]

The third column represents the amount of money that could be realized from a liquidation sale of the items, as is, and where is—the cost, in other words, to someone who would be willing to buy the article, and then incur the addi-

[24] Gottus v Allegheny County Redevelopment Authority, 425 Pa. 584, 588 229 A 2d 869, 872 (1967) "We recognize that the underpinnings of the [fixture] doctrine in its various applications stem from different policy considerations In the mortgage cases we have one consideration and in eminent domain cases there are still other underlying considerations, *mainly economic*" (Emphasis added) See also State v Gallant, 42 N J 583, 202 A 2d 401 (1964) where the Supreme Court of New Jersey, and United States v Certain Property, etc, 306 F 2d 439 (1962) where the Court of Appeals for the Second Circuit, both recognized that the economic effect of the condemnation is controlling

[25] The full text of the appraisals appears as Appendix A of this report

[26] United States v Certain Property, 388 F 2d 596 (1968), Marraro v State, 12 N Y 2d 285, 189 N E 2d 606 (963), United States v Becktold Co, 129 F 2d 473 (1942), Baltimore v Himmel, 135 Md 65, 107 A 522 (1919)

[27] In United States v Certain Property, etc, 306 F 2d 439, 448, 449 (1962) the court noted that the figures of the fixture appraiser purported to reflect " 'present day sound market value for similar and comparable used equipment, severed, installed and connected in good operating condition' Yocum did this by obtaining costs new and deducting estimated percentages of depreciation; Shulman did it by taking second-hand prices as installed We see no reason why the court was required to find the value of the machinery *in situ* to be higher than the cost of buying and installing similar machinery there or elsewhere" The court rejected the argument, therefore, that appraiser Shulman had proceeded on an erroneous theory

TABLE 1

MODERN FIXTURE APPAISAL—RECAPITULATION

FIXTURE	COST OR VALUE ($) OF REPRODUCTION NEW	BEFORE TAKING	LIQUIDATION	REMOVAL AND REINSTALLATION
(*a*) THE BAR				
1 Sink, stainless	155	110	15	60
2 Steam table	195	125	10	80
3. Gas stove	135	50	0	50
4. Fan, 18 in	130	90	10	70
5. Kooler-Keg cabinet	1,500	975	50	475
6. Bar, semicircular	1,950	1,375	0	1,375
7. Cabinet, steel	50	35	10	25
8. Liquor compartment	115	80	15	55
9. Sinks, stainless	310	220	30	120
10. Draft beer dispenser	580	435	50	250
11. Carbonated water and soda supply unit	600	480	100	75
12 Bottle cooler box	1,425	1,075	150	925
13 Bottle cooler	1,050	735	100	150
14 Fan, wall ventilating	160	120	20	75
15. Fan, ceiling ventilating	240	155	0	155
16. Air-conditioning system	6,750	5,075	250	4,275
17 Public address and music system	215	150	25	75
18. Television antennae	125	100	0	100
Total	15,685	11,385	835	8,390
(*b*) THE MANUFACTURING PLANT				
1 Air conditioner	374	187	20	102
2 Drier and sterilizer	2,590	1,554	50	1,554
3 Wash tank	910	546	50	546
4. Baling press	6,400	3,840	450	2,800
5. Platform scale	2,675	1,605	25	475
6. Bale breaker	7,795	4,680	300	1,800
7. Willow machine	4,715	3,300	150	850
8. Willow machine	3,815	1,908	75	750
9 Blower and condenser	10,900	7,630	0	7,630
10 Garnett machines	38,250	30,600	2,000	18,000
11. Garnett machines	57,350	34,425	2,250	29,000
12 Delivery aprons	17,270	12,089	850	10,400
13. Baler	3,500	2,450	300	450
14. Baler	4,425	3,098	300	300
15. Air compressor	1,135	568	75	125
16. Air compressor	842	253	25	125
17. Bins	60	42	0	42
18. Bins	45	32	0	32
19. Platform scale	2,675	1,880	50	475
20. Time card recorder	375	338	75	22
21. Water cooler	305	218	35	80
22. Burglar alarm system	250	250	20	66
23. Fire alarm system	725	725	35	176
24. Vacuum system	13,237	9,266	100	7,250
25. Cyclone	1,125	675	0	675
26 Cyclone	2,356	1,649	50	1,057
27. Cyclones	1,593	797	0	728
28. Electrical transformers	24,053	14,431	750	14,431
29 Mechanical piping	763	614	0	614
Total	210,508	139,650	8,035	100,555

tional expense of dismantling and removing the item elsewhere (This column has relevance only in determining the amount of money that could be recovered by the condemnor on the sale of such items by it. It has no relevance in the damages to which the condemnee is entitled.)

The fourth column represents the reasonable cost of dismantling, moving, and reinstalling each item in another location. "Reasonable expenses" of removal obviously cannot exceed the market value of the item in place. In addition, in ascertaining the reasonableness of the removal expenses, the distance of the move has to be considered. Usually, a move within the metropolitan area is considered reasonable.[28]

[28] The Federal Aid Highway Act of 1968, Chap 5, Title 23 U.S C, provides that the distance of the move shall be reasonable, not to exceed 50 miles

CHAPTER THREE

CONDEMNATION OF AN OWNER'S FIXTURES

It has long been held that items deemed "fixtures" are condemned along with the realty.[29]

As in the case with the common law determination of a fixture, the problem has been to decide when an item is, or is not, a fixture, and, hence, condemned or not condemned. The problem has not been easily solved.

In the leading case of *Jackson* v. *State*,[30] the state condemned a building containing machinery, shafting, elevators and conveyors. Judge Cardozo noted [31] that "the form in which these articles were annexed to the freehold, and the purpose of the annexation, were such that, as between vendor and vendee, they would have constituted fixtures." He further stated·

> Condemnation is an enforced sale, and the state stands toward the owner as buyer toward seller. On that basis the rights and duties of each must be determined. It is intolerable that the State, after condemning a factory or warehouse, should surrender to the owner a stock of second-hand machinery and in so doing discharge the full measure of its duty. Severed from the building, such machinery commands only the prices of second-hand articles, attached to a going plant, it may produce an enhancement of value as great as it did when new. The law gives no sanction to so obvious an injustice as would result if the owner were held to forfeit all these elements of value.[32]

Cardozo indicates two bases, therefore, in holding the items "a part of the condemned realty." First, the items would be "fixtures" under the common law between buyer and seller and pass with a sale of the real estate. Second, if the items had to be removed by the condemnee, they would "command only the prices of second-hand articles." Until recently, most courts have used only the common law tests, and have ignored the more pragmatic test of economic loss.[33]

Thus, in the early New York case of *Matter of the Mayor*,[34] the City admitted that although a large portion of the machinery used by a gas company in the condemned buildings was so affixed to the realty as to be conveyed as fixtures between buyer and seller, nonetheless, the fixtures were not condemned, because they could have been removed without "injury to the machinery itself as will practically result in its destruction for the use for which it was intended." [35] The City also suggested, strange as it may now sound, that all removal costs to a new location would be the measure of damages. The court rejected this argument, stating that it was usually the intent of an owner placing improvements on the freehold to make them permanent additions. It held that if the items were fixtures between buyer and seller, they were fixtures, and therefore condemned, between condemnor and condemnee. As the court states in *Matter of City of New York* (*Lincoln Square Slum Clearance Project*): [36]

> Much greater proof of intention to make a permanent annexation is required as against a tenant, or a chattel mortgagee, or a conditional vendor. But such intention is readily presumed in the case of an owner where [as here], he installs machinery in a building which is especially suited for that purpose, and with the object of carrying on his business therein Correlatively, a condemnee satisfies

[29] Allen v Boston, 137 Mass 319 (1884), Phipps v State of New York, 69 Misc 295, 127 N.Y S. 260 (1910); White v Cincinnati, R. & M R R, 34 Ind App 287, 71 N E 276 (1904), City of Los Angeles v Klinker, 219 Cal 198, 25 P 2d 826 (1933), Jackson v State, 213 N Y 34, 106 N E 758 (1914), United States v Certain Property, etc, 306 F 2d 439 (1962)

[30] 213 N Y 34, 106 N E. 758 (1914)

[31] *Id* at 758

[32] *Id* at 35, 36, 106 N E at 758

[33] When Cardozo stated in *Jackson* that the machinery "attached to a going plant . may produce an enhancement of value as great as it did when new," he referred to the *measure of damages* of the condemned *realty* if the fixtures were held to be a part thereof It has been suggested that his statement serves as the basis for the award of damages to a "going plant," *as* a going plant, so as to permit recovery for loss of business value in excess of the fair market value of the realty with the machinery and equipment attached thereto. See *A Reexamination of Value, Good Will and Business Loss in Eminent Domain*, 35 CORNELL L Q 604, 607, 614 (1968) Despite language to such effect in Banner-Milling Co v State, 240 N Y 533, 148 N E 668, cert denied, 269 U S. 582 (1925), no court has yet so held

[34] 39 App Div 589, 57 N.Y Supp 657 (1899)

[35] *Id* at 593, 594

[36] 24 Misc 2d 190, 196 201 N Y S.2d 443, 452 (1960), *aff'd*, 222 N Y S 2d 786 (1961), 190 N.E 2d 423 (1963).

the test by the same evidence as would be determinative against him as vendor. . . .

In *Phipps* v. *State*,[37] the owner constructed a factory for the manufacture of fertilizer. Used in connection therewith was an engine-house in which there were a ten horsepower, double-cylinder, single-drum engine and derrick. The engine rested on a foundation of concrete, 4½ ft thick, sunk in the earth, and connected by six ¾-in. bolts 4 ft 6 in. long with metal bars laid on the bottom of the concrete. The derrick was set in the earth and was supported by five metal guys, the lower end of which was anchored to a beam buried in the ground. Both the engine and derrick were used for a number of years in connection with the manufacture of fertilizer. The issue of the case was whether the engine and derrick were "fixtures" and therefore condemned. The court stated:

> In this case I think there was such an annexation and adaptability of the property as to constitute the engine and derrick real estate in this proceeding. They were securely attached to the freehold and were used in connection with the business of manufacturing fertilizer. They were a part of the plant, as essential to its operation as the building, could not be removed *except with such depreciation in value as would amount to an appropriation of the property without just compensation.*[38] (Emphasis added).

In *Kansas City Southern Ry. Co.* v. *Anderson*,[39] a plant manufacturing finished lumber and mill products was condemned The plant was built only for the purpose of installing the machinery, which was securely fastened to the building. The owner intended to continue in business there for his life and thereafter to pass it on to his sons. The court held that the evidence established an intent permanently to affix the machinery to the condemned realty.

There have been numerous other cases in which the courts have applied the common law tests of intent, annexation, and adaptability, and, in so doing, have held that the items in question were attached to, and formed part of, the condemned realty. As was stated by the California Supreme Court, however, "the rules that are to guide us in reaching a conclusion . . are not in dispute, and are practically universal throughout the United States. It is in the application of these tests that conflicts are found in the decisions of the courts "[40]

In *White* v. *Cincinnati, R. & M.R.R* ,[41] a paper mill was condemned. Machinery in the buildings was used in the manufacture of paper. The machinery included. 6 boilers, 16 ft long and 60 to 72 in. in diameter, each on a separate brick foundation made especially for the purpose; three engines, 18, 80, and 300 horsepower; refining engines and suction pumps; a rotary boiler 16 ft long, other machines, one weighing 40 to 50 tons, set on a separate stone and cement foundation, bolted to sills, steam pipes and other appliances necessary in the manufacture of paper. The jury was instructed that the machinery was permanently attached to the building if "it could not be detached and removed without material injury to the real estate. . . ." The court held this instruction error, because it made the manner of annexation the controlling test, rather than the "united application" of the three requisites. In *Re Post Office in Borough of The Bronx*,[42] a building containing machinery of an engraving plant was condemned. The condemnor argued that the entire plant could readily be removed without damage to the machinery or the freehold, and that no evidence established that when the machinery was placed in the building it was with the intent that it should remain there permanently. The court then described the machinery at page 834 as follows:

> The motor is set up on a wooden platform about seven feet above the floor, bolted through two walls with a heavy wooden column supporting the corner of it. The motor is bolted to the platform The Prentiss lathe is fastened to three concrete pillars which are built up through the floor. These pillars rest upon ground beneath the floor. The machine weighs about 3,500 pounds. The Royle special cylinder router weighs about 300 pounds and rests upon the floor to carry the weight. The machine is bolted through the floor into the beams. Power is transmitted to these machines by a belt on a pulley. This machine was specially constructed for this building and this work. The lathe milling machine is 6 feet long, 2 feet wide, and 4 feet high and weighs about 800 pounds. It is bolted to the floor and is likewise fastened overhead to the ceiling The planer milling machine is 8 feet long, 4 feet wide, and 4 feet high Its weight is about 700 pounds. It is built into the floor with angle irons, bracing it, in order to give it rigidity. It is operated by power from the shaft in the same way as the others. . .

Without otherwise indicating why such machinery would have passed between buyer and seller, the court then held at page 835, "though not without some doubt, that the award rightly treated the machinery as fixtures for which the United States should pay." In *City of Los Angeles* v. *Klinker*,[43] the building of the daily newspaper, *The Los Angeles Times*, was condemned. The building had been specially built to house the seven printing presses of the paper, each weighing from 80 to 147 tons, and other equipment necessary to print a daily newspaper. The condemnee argued that the equipment was permanent fixtures. The condemnor maintained that the equipment was personal property, had been so assessed for tax purposes with condemnee's consent for years; that, prior to the condemnation, the condemnee had negotiated with the public authorities on a basis which contemplated the salvaging and removal of the equipment to another location, and, finally, that the equipment could be removed without injury to it or to the realty. The court held that the condemnee's intent to make such equipment a permanent part of the real estate could be determined from the physical facts which showed that:

> . . . massive concrete foundations were constructed which, although independent, were connected both with the ground and with the foundation of the building itself. These foundations were especially designed to accommodate the presses, which were themselves especially designed and built to be used in this particular building The presses were supported by and, in the main, embedded in these

[37] 69 Misc 295, 127 N Y Supp 260 (1910)

[38] *Id* at 300 Although the court devoted most of its opinion to the application of the common law determination of "fixtures," its awareness of the economic loss on removal presages the modern development of the law

[39] 88 Ark 129, 113 S.W 1030 (1908)

[40] City of Los Angeles v Klinker, 219 Cal 198, 25 P 2d 826 (1933)

[41] 34 Ind App 287, 71 N E 276 (1904)

[42] 210 F 832 (1914)

[43] 219 Cal 198, 25 P 2d 826 (1933)

> concrete foundations. Such acts as these on the part of an owner cannot be overthrown by equivocal circumstances from which a different purpose might be suspected.[44]

Apparently, no effort was made to determine the economic effect of the condemnation. The case was decided on the presumed intent of the condemnee.

In *State* v. *Dockery*,[45] condemnee was a manufacturer of paint, enamel, and varnish.

> The equipment . . consists of mixing, grinding, thinning and filling machines, storage tanks and rack and labeling and packaging devices. The third floor was constructed to withhold the weight of the materials Holes are cut in the third (balcony), second and first floors to permit the materials to pass downward through conduits and conveyors as they go through the various stages of manufacture. The machinery, much of it heavy, is affixed to the building. Some of it is "lagged" into the floor; other machines are recessed in or bolted to the floor. Belts and pulleys used in the operation of the motor-driven machinery extend from floor to floor through openings provided therefor. These machines, storages, tanks, conveyors, etc, are either connected with each other or are permanently affixed to the building Some of these machines weight 10,000 to 12,000 pounds. Hoisting and conveying apparatus is suspended from heavy timbers installed in the ceilings for that purpose.[46]

Without any evidence regarding the economic effect on the machinery if it were to be removed, the court approved the instruction of the lower court. The machinery was found by the jury and court below to be part of the realty. This court approved the instruction of the lower court that "if the machinery and equipment . . . were installed in and attached to defendant's factory building for use and were used in the manufacture of its products and that defendant intended such machinery and equipment to become a permanent part of the realty, they then became realty. . . ." There apparently was no evidence regarding the economic effect of the condemnation on the machinery. No testimony was introduced concerning the possibility, or the cost, of removing and reinstalling the equipment elsewhere.[47] On the other hand, if the item "is not a fixture, it does not go with the land." [48]

If "it does not go with the land," not only is the condemnee not entitled to be paid "in-place value" (Table 1, Column 2), it is generally held that the cost of removal of the items (Table 1, Column 4) must be borne by the condemnee.[49]

Evidence of the cost of removal is generally held inadmissible for any purpose, being irrelevant to the damage occurring to the condemned realty [50] It is clear, therefore, that the standard judicial solution to the determination of whether items are, or are not, fixtures, and, therefore, condemned or not, has been to apply common law rules of property, without any evidence whatsoever on the economic effect of the condemnation. By so doing, the courts have used rules developed to resolve matters of status in property, to solve the problem of who should bear the expense when property is condemned. A few courts, however, have realized that the main policy consideration posed for decision in these cases is economic, and have begun to fashion rules of law accordingly.

In *Gottus* v. *Allegheny County Redevelopment Authority*,[51] the condemnees conducted a retail cleaning business on the condemned premises, which included a retail front for the collection and distribution of clothes, clothes racks, pressing equipment, and machinery for the washing and cleaning of clothes. The last machinery was housed in a building specially constructed for this purpose. After the condemnation, the condemnees left behind the cleaning and washing machinery. This machinery was "merely" bolted to the floor, but, through the installation of piping and special electrical wiring, the condemned premises was adapted to its use. (The machinery included two washers, three dryers, a filter, an extractor, two reserve tanks, a water repellant machine and three pumps.) The condemnees' witnesses first fixed the fair market value of the realty as a cleaning plant in operation, without consideration for good will, and deducted therefrom the value of the equipment removed and taken to the new business location. The court below charged the jury that machinery and equip-

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[44] *Id* at 210 Cal, 831, P 2d

[45] 300 S W 2d 444 (1957, Mo)

[46] *Id* at 447

[47] For additional cases in which the courts hold that the items in dispute are "fixtures" and therefore condemned by applying the common law rules, and without any further evidence of the economic effect of the condemnation upon the fixtures, see State of Utah v Papanikolas, 19 Utah 2d 153, 427 P 2d 749 (1967) (machinery to prefabricate houses), Wilmington Housing Authority v Parcel of Land, 219 A 2d 148 (1966, Del), Schreibman v State, 31 Misc 2d 392, 223 N Y S 2d 670 (1961) (elevator feed elevator, and hoist, heating cables, thermostats, switches, fans, shutters, roosts used in egg production held attached Automatic feeders, waterers, nests, shell hoppers, dropping frames, held not part of realty), State v Allen, 135 So 2d 350 (1961, La) (walk-in freezer and cooler), Sunnybrook Realty Co v State, 182 N Y.S 2d 983 (1959) (underground gasoline tanks), State v Peterson, 134 Mt 52, 328 P 2d 617 (1958) (gasoline storage tanks and service pumps), *In re* East River Drive, Borough of Manhattan, 289 N Y S. 433, 449 (1936)

[48] People v Isaac G Johnson & Co, 219 App Div. 285, 219 N Y S 741 (1927), *aff'd*, 245 N Y 627, 157 N E 885 (1927), *cert denied*, 275 U S 571 (1927), see also, *In re* Oakland Street, City of New York, 213 N Y S 2d 973 (1961) (fence, signs, wiring and gratings held not fixtures), Williams v State Highway Commission, 252 N C 141, 113 S E 2d 263 (1960) (stock in trade), United States v Certain Land, etc, 69F Supp 815 (1947) (items that could be removed, but were not because it was uneconomical to do so, were held "personal property" and not compensable), Futrovsky v United States, 66 F 2d 215 (1933) (refrigeration equipment used with a meat business held not compensable because no evidence to show that its removal would cause injury either to the realty or the fixtures)

[49] Utah Road Commission v Hansen, 14 Utah 2d 305, 383 P 2d 917 (1963), Port of New York Authority v Howell, 59 N J Super. 343, 157 A 2d 731 (1960), *aff'd*, 68 N J Super 559, 173 A 2d 310 (1961), State v Vaughan, 319 S W 2d 349 (1958, Texas), State v Hansen, 80 Idaho 201, 327 P 2d 366 (1958), *In re* appropriation for Highway Purposes, 167 Ohio St 463, 150 N E 2d 30 (1958), City of LaMesa v Tweed & Gambrell Planing Mill, 146 Cal App 2d 762, 304 P 2d 803 (1956), State v Superbilt Manufacturing Co, 204 Or 393, 281 P 2d 707 (1955), American Salvage Company v Housing Authority of Newark, 14 N J 271, 102 A 2d 465 (1954), Kansas City Southern Ry Co v Anderson, 88 Ark 129, 113 S W 1030 (1908), Becker v Philadelphia Reading Terminal, 177 Pa 252 (1896) 1 ORGEL, VALUATION UNDER EMINENT DOMAIN, § 69, at 306, 69 A L R 2d 1453 A few New York cases have suggested that even if the items in question are not deemed "fixtures" and appropriated, the cost of their removal (Column 4) can nonetheless be considered to the extent that such cost enhanced the value of the realty In Banner Milling Co v State, 240 N Y 533, 148 N E 668 (1925) the court be ow awarded damages to machinery and fixtures "not appropriated." The State appealed from the award, but did not raise the propriety of this award *Cf.* 28, *Supra* In Glen & Mohawk Milk Association v State, 2 App Div 2d 95, 153 N Y S 2d 725 (1956) an allowance was made for the difference between the value of the machinery and equipment excluded from the appropriation, if removed, and the value which such machinery and equipment added to the real property *Contra* Matter of City of New York (Lincoln Square Slum Clearance Project) 24 Misc 2d 206, 198 N Y.S 2d 260 (1960), *aff'd*, 15 App Div 2d 153, 222 N Y S 2d 786 (1961)

[50] Becker v Philadelphia & Reading Terminal R R Co, and State v Superbilt Manufacturing Co, *supra*, note 49 There are a few cases to the contrary Mackie v Miller, 5 Mich App 591, 147 N.W 2d 424 (1967); DelVecchio v New Haven Redevelopment Agency, 147 Conn 362, 161 A 2d 190 (1960), Harvey Textile Co v Hill, 135 Conn 686, 67 A 2d 851 (1949), see also 1 ORGEL, *supra*, § 70, at 311

[51] 425 Pa 584, 229 A 2d 869 (1967)

ment which were (1) necessary to the operation of the business, and (2) placed therein for permanent use, became fixtures, regardless of whether they were physically attached to the realty. Consequently, their in-place value (Column 2 heretofore referred to) could be considered in determining the value of the condemned real estate. The Supreme Court of Pennsylvania affirmed. It recognized that, in eminent domain cases, the underlying issue as to whether items are, or are not, fixtures, is "mainly economic" (*Gottus* at 588). After quoting from Judge Cardozo's opinion in *Jackson* v. *State*, it stated at page 589·

> This language imports that the *economic integrity* of the individual whose property is condemned should be preserved and that, as a matter of justice, the Assembled Industrial Plant Doctrine should be applied to the facts presented in this case. We agree with the court below that the evidence warranted the conclusion that the machinery involved was vital to the business operation and was a permanent installation (Emphasis added)

In *State* v. *Gallant*,[52] the condemnee installed 12 looms in the condemned realty in 1917, and used them therein until 1961, when the property was condemned. One of the looms was 9 ft long, several were 15 ft long, and four were 18 ft long Their average weight was 8,000 lb They were attached to a central power unit by a shaft and belt system and were bolted to the floor with 3-in lag screws only. Because of their age, however, the only safe way to move them would be to dismantle them at the old location and reassemble them at a new location, which would give rise to complicated engineering problems. Nonetheless, they could be so moved. Their "in-place" value was $52,000. The cost of moving would be $39,600 for dismantling and reassembling, plus transportation costs. The trial court held that the looms were not "fixtures" under *Teaff* v. *Hewitt*, and, consequently, being personal property, no moving costs were recoverable. The Supreme Court of New Jersey reversed. It first asked at page 404 "whether the concept of just compensation . . . may require that condemnee receive an award for their looms. We believe it may. . . ." It held that whether the condemnee should be compensated for the looms does not depend on their being fixtures in other contexts of the law, stating at page 405

> Where . . . a building and industrial machinery housed therein constitute a functional unit, and the difference between the value of the building with such articles and without them is substantial, compensation for the taking should reflect that enhanced value. This, rather than the physical mode of annexation to the freehold, is the critical test in eminent domain cases.

In *United States* v. *Certain Property*, etc ,[53] a condemned building erected and used since 1878 as a newspaper printing plant contained special equipment useful only for newspaper publishing. The trial court made no allowance for the building, because it found the building to be an encumbrance on the land, warranting demolition. As a newspaper plant, therefore, the trial court found the building to be antiquated and obsolete. Nonetheless, it allowed the condemnee $178,050 for the in-place value of the equipment. The Court of Appeals for the Second Circuit rejected the argument that the equipment was not "taken." Applying what it conceived to be the law of New York, it appeared to hold the items taken because they were used for business purposes, would lose substantially all of their value after severance even though their removal would not damage the realty, and other evidence established their installation to be permanent. The court noted that the condemnee's damages could not be limited to the market value of the equipment after removal and before installation elsewhere, a "figure reflecting a large discount for the heavy removal and installation costs a buyer would have to incur . . *it is this very factor of large loss of value through removal that constitutes a principal reason why New York regards such machinery as 'real estate.'* "[54]

In *Wilmington Housing Authority* v. *Parcel of Land*,[55] the Supreme Court of Delaware, after holding that the test of whether items are fixtures depends on the intent with which they are installed, noted that if the items were not deemed fixtures, and hence, condemned, "the consequences to [the condemnee] might be [removal] expenses equal to the value of the machinery "

The previous cases suggest a new approach to the determination of whether items are or are not fixtures, and, hence, are or are not condemned. In the past, the courts engrafted upon the consequences of an eminent domain proceeding the property rule of fixtures. As seen, the effort to define with any precision when an item is a fixture was not notably successful in real property law. The policy considerations underlying the fixture problem in real property law and eminent domain law are not the same. The issue in eminent domain cases is: who pays. The issue in real property cases is. who wins.[56] The cases cited indicate a growing judicial recognition of the dominant issue in eminent domain cases—who bears the economic consequences of the condemnation—and an effort, therefore, to introduce evidence bearing on this issue. Hence, instead of "annexation," "intent," and adaptability" as being controlling, what now becomes controlling is the difference between the amounts in Column 2, and the amounts in Column 4 heretofore referred to. If the difference is "substantial," the courts of New York, Pennsylvania, New Jersey and Delaware now seem to hold that the items are "fixtures" and condemned. Consequently, in such a case, the condemnee would be paid the total of Column 2. (Or

[52] 42 N J 583, 202 A 2d 401 (1964)
[53] 306 F 2d 439, 446 (1962)

[54] *Id* at 448, emphasis added
[55] 219 A 2d 148, 153 (1966, Del)
[56] As stated more elegantly by Judge Lehman in *Allen Street*, 256 N Y 236, 176 N E 377, 380 (1931)

> Questions as to the ownership of, or succession to, structures or fixtures annexed to the land have arisen in many forms between landlord and tenant, vendor and vendee, heirs and personal representatives In each case the problem presented is the proper division, if any, which is to be made between the owner of the real property, his assigns, privies, or successors, who base their claim of ownership upon the assertion that the fixtures or structures have become a part of the real property, and other parties who base their claim of ownership upon the assertion either that the structures or fixtures have never been so annexed to the realty as to lose their quality of personal property or that they have been so severed, actually or constructively, as to gain or regain the quality of personal property In each case the underlying question may be formulated Do the structures or fixtures constitute real or personal property between rival claimants of title?

such part thereof as a fact finder would find accurately to reflect the in-place value of such items.) It will no longer be necessary for the fact finder to determine the illusive "intent" by examining the myriad of facts that may or may not be relevant to such intent. It will only be necessary for the condemnee to establish (or for the condemnor to refute) such intent by asserting that when Column 4 indicates "a large discount for the heavy removal and installation costs a buyer would have to incur," [57] such discount establishes the intent of the condemnee to install such items permanently upon the real estate. Consequently, "it is this very factor of large loss of value through removal that constitutes a principal reason why [the law] regards such machinery as real estate." [58]

It should be noted that in all of the previously mentioned cases, the Supreme Court of the respective state made special note that the fixtures involved had otherwise been permanently installed and suffered large economic loss. In no case did the condemnee attempt to recover for, nor did the court permit the recovery of, either the in-place value or removal costs of merely "personal property." Hence, the result occurring in the case of *People* v. *Isaac G. Johnson* [59] would, and for reasons hereinafter noted, should, occur even under the test previously suggested. In *People* v *Isaac Johnson*, the condemnee was awarded $117,526.68, which represented the difference between the in-place value ($152,000) of tools and other unattached equipment, raw materials, and supplies, and their salvage value ($34,473.32) It was conceded that the property was not fixtures and was easily movable. It was argued, however, that because the property was intended for use in connection with a going concern, could not be used elsewhere unless removed, and, on such removal, would be of little or no value over the cost of removal, in-place value should be paid. The court reversed the award, stating at page 73:

> The rule is that the court is to determine whether the article taken is personal property or is a fixture. If it is a fixture, it is taken as part of the real estate. If it is not a fixture, it does not go with the land.

It is not suggested here, nor is it reasonable to expect, that the courts will abandon completely the concept that only fixtures that form part of the condemned real estate (as distinguished from movable personal property) can be compensated as having been condemned. What is being suggested here is not to repudiate the *idea* that only fixtures are condemned, but that the *basis* of determining such fixtures be changed from real property considerations to considerations of economic loss.

There are a number of reasons supporting this approach. First, now to have the courts repudiate their virtual unanimous holdings that mere personal property is not condemned would be a judicial reversal of great proportion, and has little likelihood of occurrence. There were compelling reasons why the courts refused to hold that personal property was condemned.[60] Whether any change in such policy should now occur is beyond the scope of this report.[61] Second, the concept of "intent to make a permanent installation" is not being repudiated, but implemented by easily understood facts; i.e., the figures in Columns 2 and 4. These however, cannot, in and of themselves, *conclusively* establish that the intent of placing such items upon the realty was to make a permanent installation. If other evidence is available that the items were not intended to be permanent installations, notwithstanding the great economic cost in removal to another location, the fact finder should be free to find that the items are "personal property" and are not condemned. For example, the State of Michigan is very liberal in determining what fixtures are condemned with the real estate. In *Re Slum Clearance, City of Detroit*,[62] the condemnee was in the business of electrolytic plating of tin and other metals. The metal was immersed in various chemical solutions kept in huge tanks. The condemnee offered to prove that 21,000 gallons of chemical solution could not be moved at all, or, if moved, would be at an expense greater than its in-place value. The Supreme Court of Michigan held the chemical solutions to be trade fixtures, constructively attached to the freehold. Nevertheless, in *Civic Center in City of Detroit*,[63] the Supreme Court reached a contrary conclusion. There, waterfront property was condemned. Moored to the condemned property were four passenger vessels. The evidence indicated that the cost of removal was between $59,000 and $121,000. The court upheld the refusal of the lower court to consider these removal costs. It stated at page 376:

> No showing has been made that the vessels were moored at the docks on the condemned parcels with any intention of making them *permanent accessions* to the freehold. It may be assumed that they were moored there with the intention of storing them until such time as they would be put back in use, sold or disposed of in some way. It clearly appears that the vessels fail to meet the test, namely, the intention of the [condemnee] to make the vessels a permanent accession to the freehold.[64]

It is clear that raw material, inventory, work tools, and most unattached property are "personal property." Nonetheless, fixture appraisers are well equipped to determine whether items over which there is no doubt as to their legal status, or, at worst, some doubt as to this status, can physically be located elsewhere, and, if so, the cost of doing so In most cases, if the cost of removal is "substantial," the probabilities are that the items were never intended to be moved by the condemnee.

[57] United States v Certain Property, etc, 306 F 2d 446, 448 (1962).
[58] *Ibid*
[59] Note 48, *supra*

[60] See 1 ORGEL, *supra*, note 49, §§ 69, 70
[61] It should be noted that those states that have statutorily provided for payment of the removal costs of personal property have imposed dollar limits. See, for example, 26 P S.A § 1-610 ($25,000), WIS STAT ANN § 32 19 (2) ($2,000)
[62] 332 Mich 485, 52 N W 2d 195 (1952).
[63] 335 Mich 528, 56 N W 2d 375 (1953)
[64] *Cf.*, however, State v Fevers, 228 Or 273, 365 P.2d 97 (1961) A furnished apartment building was condemned The court found the refrigerators and gas ranges "personal property" and not condemned, even though it was stipulated that similar apartment buildings usually sold with such items included The court stated at 101, "the argument proves too much because while there is room for the contention that the ranges and refrigerators are fixtures, this can hardly be said with respect to the other items of personal property involved" Hence, beds, coffee tables, etc, were not "real property" and condemned

CHAPTER FOUR

CONDEMNATION OF A TENANT'S FIXTURES

The problems of a tenant are even more complex than those of an owner. When a tenant makes improvements to the realty, not only must it be determined whether the tenant's fixtures were condemned as part of the realty, but, as between landlord and tenant, which party is entitled to recover.

Under the common law, all improvements to the freehold inured to the benefit of the fee holder.[65] A tenant, however, was permitted to remove all *trade fixtures* installed upon the freehold upon the expiration of the term, where removal did not cause material injury to the realty, and where such removal was permitted by, or at least not barred by, the lease or the common law.[66] "The law of fixtures was evolved out of a desire on the part of the courts to protect those who, having an estate less than a fee in the land, had made improvements upon it which, if they could not retain, would be lost to them. . . ." [67] Because the common law rule was fashioned by the courts to protect those who made improvements to the freehold for business purposes:

> As a general rule, an article may be regarded as a "trade fixture" if annexed for the purpose of aiding in the conduct by the tenant of a trade or business exercised on the demised premises for the purpose of pecuniary profit, it being accessory to the enjoyment of his term [68]

Between landlord and tenant, therefore, trade fixtures are deemed to be the "personal property" of the tenant.[69] If the fixtures had been installed by the owner, however, traditional concepts easily deemed them to be part of the freehold. If the additions to the freehold are not deemed "trade fixtures," but merely "fixtures," the common law rule is that all such additions inure to the holder of the freehold. The application of these rules to the problems arising in condemnation proceedings has been vexing. When improvements installed by a tenant are condemned, three issues arise:

1 Between tenant and landlord, who should receive condemnation damages, if any?

2. Were the improvements condemned with the realty?

3. If the improvements were condemned with the realty, what is the measure of damages?

The courts have applied the rules of property law, without general awareness of the differences posed by these issues, with resultant confusion and disorder.

BETWEEN TENANT AND LANDLORD

If the tenant does not have the right to remove the improvement, being barred from doing so by provisions of the lease [70] or by operation of law,[71] the cases are uniform in holding that condemnation proceeds for such improvements belong to the landlord.

Conversely, the tenant having the right to remove fixtures prevails as against the landlord for condemnation damages for such fixtures.[72]

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[65] See "The Common Law," Chap One of this report

[66] Lindsay Bros v Curtis Publishing Co, 236 Pa 229, 84 A 783 (1912), Carver v Gough, 153 Pa 225, 25 A 1124 (1843), State v Superbilt Manufacturing Co, 204 Ore 393, 413, 281 P 2d 707, 716 (1955), 22 AM JLR 775, *Fixtures,* § 61, SACKMAN, FIXTURES IN CONDEMNATION—CONCEPTS OLD AND NEW, at 8, 11, Inst on Eminent Domain (1964) Southwestern Legal Foundation

[67] Matter of the Mayor, 39 App Div 589, 594 57 N Y Supp. 657 (1899)

[68] Handler v Horns, 2 N J 18, 24, 25, 65 A 2d 523, 526 (1949)

[69] "As between the landlord and tenant, the placing of machinery by the tenant upon the leased premises for the purposes of trade or manufacture does not make the property so affixed a part of the freehold, but it still remains personalty to such an extent at least that the tenant retains the right to remove it The trade fixtures of a tenant remain personal property in the eye of the law so far as the right of removal is concerned" Matter of City of New York (Conron v Glass), 192 N Y 295, 301, 84 N E 1105, 1107 (1908)

[70] State v State Highway Commission, 411 S W 2d 174 (1967, Mo), Tenant built and improved restaurant Lease provided that, upon its termination, all buildings shall become the property of lessor Value of improvements inured to lessor, Select Lake City Theatre Operating Co v Central National Bank in Chicago, 277 F 2d 814 (1960) Lessee theater installed chairs, seats, carpeting, draperies, vacuum cleaner machine, box-office equipment, and agreed that title thereto shall vest in lessor Tenant not entitled to recover damages for such items Jones v Gonzales, 344 S W 2d 745 (1961, Texas), Bodnar Industries Inc v State, 19 Misc 2d 720, 187 N Y S 2d 359 (1959), Marfil Properties v State, 9 Misc 2d 878, 168 N Y S 2d 234 (1957) The improvements were held relevant, however, to the value of the unexpired leasehold, City of Beverly Hills v Albright, 184 C A 2d 562, 7 Cal Rptr 706 (1960) Held that the tenant had assigned to lessor all condemnation damages for trade fixtures The lease read, "Lessee hereby assigns to lessor his rights to any and all damages for property taken in ay such proceeding and all such damages shall be payable to lessor" No mention of trade fixtures was otherwise made *Cf* Jones v New Haven Redevelopment Agency, 21 Conn Supp 140, 146 A 2d 921 (1958) A clause terminating the leasehold did not bar tenant from asserting claim for trade fixtures, *accord,* Roffman v Wilmington Housing Authority, 179 A 2d 99 (1962), *In re* John C Lodge Highway, 340 Mich 254, 65 N W 2d 820 (1954), in United States v Certain Parcels of Land, etc, 250 F Supp 255 (1966) the court, denying tenant recovery on other grounds, held that a clause providing "all alterations, improvements, additions or fixtures shall become the property of lessor " did not give the lessor rights in the tenant's trade fixtures upon a condemnation *Accord,* United States v Certain Property, etc, 306 F 2d 439, 449, 451 (1962), *In re* Howard Laundry Co, 203 F 445, 447 (1913), Century Holding Co v Pathe Exchange, Inc, 200 App Div 62, 192 N Y S 380 (1922), State v Olsen, 76 Nev 176, 351 P 2d 186 (1960) Under the terms of the lease, wiring installed by a gas station tenant inured to the lessor An award for the wiring to the tenant was improper Because the tenant had the right to remove the gas pump and tanks as business fixtures, they occupied "a different status" and compensation was permitted, *In re* New York (Triborough Bridge), 249 App Div 579, 293 N Y S 223 (1937), *aff'd* 274 N Y 581, 10 N.E 2d 561 (1937) Tenant agreed to remodel building pursuant to lease which provided that all such alterations were to remain upon the realty upon the termination of the lease Held, tenant not entitled to award for such improvements, Corrigan v City of Chicago, 144 Ill 537, 33 N E 746 (1893) Tenant erected building under a lease which provided that on the expiration of the lease the building belonged to the landlord

[71] *In re* Horace Harding Expressway, City of New York, 164 N Y S 390 (1951) "In the absence of any reservation of title in the tenant, the building belonged to the owner and it is entitled to an award for its taking," United States v Certain Lands in Jo Daviess County, 120 F 2d 561 (1941) Failure of tenant to remove buildings prior to expiration of term barred right to do so, see 3 A L R 2d 286, 305 for additional cases See also, St Louis v Nelson, 108 Mo App 210, 83 S W. 271 (1904).

[72] Hopper v Davidson County, 206 Tenn 393, 333 S W 2d 917 (1960), Allyn v State, 11 A D 2d 831, 202 N Y S 2d 385 (1960), where tenant had an express reservation of title in trade fixtures, the right of removal is a necessary implication thereof, State v DeLay, 114 Ohio L Abs 2d 272, 181 N E 2d 706 (1959), Queensboro Farm Products v State, 161 N Y S 2d 989 (1956), *aff'd,* 171 N Y S 2d 647 (1958), Antonowsky v State, 14 Misc 2d 689, 180 N Y S 2d 966 (1958), People v Klopstock, 24 Cal App 2d 897, 151 P 2d 641 (1944), United States v. Seagren, 50 F 2d 333 (1931), annotated in 75 A L R 1941, Matter of Willcox, 165 App Div 197, 151 N Y S 141 (1914), Matter of City of New York (North River Water Front), 118 App Div. 865, 103 N Y.S. 908 (1907), *aff'd,* 189 N Y 508, 81 N E 1162 (1907) See also 3 A L R 2d 286, 302.

Some tenant-installed improvements have, nevertheless, been held not to be trade fixtures because they became a structural part of the building. Here, some courts have held that the installed improvements are "distinctively realty," and any condemnation damages for such improvements inure to the benefit of the landlord.[73] The distinction between trade fixtures belonging to the tenant and fixtures "distinctively realty" belonging to the landlord is also "anything but bright."[74] Because the purpose of the trade fixture rule is to protect the tenant, courts have generally taken a generous view of what may be removed without substantial injury to the freehold.[75]

Whether improvements are "trade fixtures" or "distinctively realty" does not appear to have been a serious problem in the apportionment of condemnation damages. Usually, the matter is either expressly covered by lease agreement, or the item in question has otherwise been clearly delineated by past decisions.

WERE THE IMPROVEMENTS CONDEMNED?

A much more serious problem has been the determination of whether the improvements were condemned with the realty. To make this determination, the courts have used two conceptual legal doctrines, both of which have been very difficult to apply. On the other hand, some courts have approached the matter simply as a question of property law. If the fixtures, though removable by the tenant, had been installed by the landlord, would they have been part of the realty? The issue so posed is then "what has the condemnor taken?" In making this determination, the same problems of annexation, intent, and adaptation occurring with an owner are present. Other courts, however, have treated the problem not as being what has the condemnor taken, but what has the condemnee lost?[76] By so doing, they consider the contractual relationship between landlord and tenant to determine whether the improvements were condemned. To these courts, *because* the tenant has the right to remove the fixtures establishes that the fixtures *cannot* be part of the realty, although, as already noted,[77] all courts hold that, unless the tenant has this right, the improvements belong to the lessor. Clauses eliminating the leasehold become controlling, whereas courts holding the matter to be what has the condemnor taken deem such clauses irrelevant.[78]

What Has the Condemnor Taken?

In *Matter of City of New York (Allen Street)*,[79] the premises occupied by a tenant-butcher was condemned. It was admitted that trade fixtures installed by the tenant would have been considered part of the realty if installed by the owner. The tenant had the right to remove the fixtures, and the condemnation occurred only a few months before the lease term expired. The lease contained a clause which provided that, on the condemnation of the freehold, the lease term ended. Previously, the courts of New York had held that buildings, machinery, and fixtures installed by a tenant were condemned if the tenant had an unexpired term at the time of condemnation.[80] The City argued that because the lease agreement provided that the fixtures were the personal property of the tenant, could be removed, and did not belong to the landlord, the fixtures consequently were not condemned. Therefore, being the personal removable property of the tenant, the tenant should remove them at his expense. The result the City sought, therefore, was to compel the tenant to remove the fixtures at his cost without any payment from the condemnor at all.

The court saw the issue as being "whether the tenant's fixtures were 'real property.'" Consequently, the lessee's loss, being the remainder of the unexpired term, which the lessee had bargained away, and the possibility of renewal, were held to be irrelevant. It stated at page 248:

> The City appropriated the real property in the condition in which it was at the time it took title, and then the fixtures were part of the real property. . Perhaps severance at the expiration of the tenant's term . . might have destroyed some of the value of the property; perhaps the parties might have chosen to preserve that value either by renewal of the lease or by transfer of title to the fixtures from the tenant to the owner . . Choice lay with the tenant and the landlord, and how that choice would have been exercised rests in speculation which does not concern the courts in this jurisdiction.[81]

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[73] Matter of City of New York (Seward Park Slum Clearance Project), 10 App Div 2d 498, 200 N Y S 2d 802 (1960), Marraro v State of New York, 12 N Y 2d 285, 239 N Y S 2d 105, 189 N E 2d 606 (1963), *In re* New York (Triborough Bridge), 249 App Div 579, 293 N Y S 223 (1937), Century Holding Co v Pathe Exchange, Inc, 200 App Div 62, 192 N Y S 380 (1922), Matter of City of New York (Delancey St) 120 App Div 700, 105 N Y S 779 (1907)

[74] United States v Certain Property, 344 F 2d 142, 146 (1965)

[75] Antonowsky v State, 14 Misc 2d 689, 180 N.Y S 2d 966, 970 (1958) "Removal . could be accomplished with only superficial damage ", Matter of City of New York, 192 N Y 295, 302, 84 N E. 1105 (1908), Century Holding Co v Pathe Exchange, Inc, 200 App Div 62, 192 N Y S 380 (1922) See note 70, *supra*. In Century Holding Co v Pathe Exchange, *supra*, the court concluded that if the removal would "deface or injure the walls, ceilings, or floors," the improvements belonged to the lessor On the other hand, the court in United States v Certain Property, 344 F 2d 142, 149 (1965), *supra*, stated that asphalt cemented to the floor by the tenant belongs to the owner only if "the asphalt became the only floor or integral with it, but we see no good reason for distinguishing a covering of asphalt tiles, removable without damage to the basic structure, or a false ceiling similarly removable, from the partitions held to belong to the tenant in the Century Holding case "

[76] City of Beverly Hills v Albright, 184 Cal App 2d 562, 7 Cal Rptr. 706 (1960) is a good case illustrating the confusion of the court in applying these various doctrines

[77] Notes 70 and 71, *supra*

[78] Once it is held that the fixtures form part of the condemned realty, however, the *measure of damage* of the tenant's fixtures is "what has the condemnee lost," not "what has the condemnor taken" See United States v Certain Property, 344 F 2d 142, 146 (1965), Boston Chamber of Commerce v City of Boston, 217 U S 189, 195 (1910)

[79] 256 N Y 236, 176 N E 377 (1931)

[80] The tenant was held to be "entitled to what that property in use in connection with his leasehold is reasonably worth" at the time of its condemnation Matter of City of New York (North River Water Front), 118 App Div 865, 867, 103 N Y Supp 908 (1907), *aff'd*, 189 N Y 508, 81 N E 1162 (1907) See also, Matter of Willc x, 165 App Div 197, 151 N Y Supp 141 (1914), Matter of City of New York, 192 N Y. 295, 84 N E 1105 (1908), Matter of City of New York (Avenue A), 66 Misc 488, 122 N Y Supp 321 (1910)

[81] *Accord*, Roffman v Wilmington Housing Authority, 179 A 2d 99 (1962, Del), State v Delay, 87 Ohio L Abs 449, 181 N E 2d 706 (1959), Gilbert v State, 85 Ariz 321, 338 P 2d 787 (1959); Tinnerholm v State, 15 Misc 311, 179 N Y S 2d 582 (1958), Greensboro Farm Products v State, 161 N Y S 2d 989, *aff'd*, 171 N Y S 2d 647 (1958), Burkhart v United States, 227 F 2d 659 (1955), People v. Klopstock, 24 Cal App 2d 897, 151 P 2d 641 (1944), United States v Seagren, 50 F 2d 333 (1931) In *Klopstock* and *Gilbert*, *supra*, the condemnors argued that *because* the condemnee had the right to remove the fixtures, they remained the personal property of the tenant, and no compensation should be awarded The courts answer this argument by stating that the right of removal between landlord and tenant does not convert what is otherwise "real prop-

Deciding, however, that the agreement between the landlord and tenant does not bar the fixtures from being "taken" as part of the realty, does not determine in any particular case whether the fixtures otherwise are condemned as part of the realty. In *Allen Street, supra,* it was stipulated that the fixtures were so annexed to the real estate that they would have become part of the real property if they had been installed permanently by the owner of the fee. Those courts that follow the *Allen* decision, therefore, still have to determine whether the fixtures "formed part of" the condemned realty. In *Allen,* the court stated at page 240 that the term " 'fixtures' as used in this opinion is confined to articles so affixed to the realty that they would have become part of the realty if they had been installed permanently by the owner of the fee. It excludes 'goods affixed to the realty which . . . would not have' 'become part thereof.' " The difficulties with this test are apparent. The items must be "enough" realty so as to become condemned as a part thereof, but not so much as to become "distinctively realty." [82] On the other hand, if the items are deemed personal property, they are not condemned at all.[83]

If they are not condemned, the tenant is not entitled to their cost of removal.[84]

The case law indicates that the courts have had as much difficulty establishing when a tenant's fixtures are part of the realty, and then some, as they have had in making such a determination for an owner. In the leading case of *Matter of City of New York (Whitlock Avenue),*[85] a tenant silk-ribbon manufacturer was awarded $45,000 for machinery, looms, and loose extra parts used in connection with the looms. The spare parts were standard articles bought from dealers. The harnesses were interchangeable on the looms and were not affixed to the building. The looms were attached to the floor by screws and bolts "to keep them from vibrating or shifting." They could be removed without any injury to themselves or to the freehold. The looms had been moved by the condemnee several times before as it moved its business. Some of the tenant's machines had steam and water connections, which could easily be disconnected. Another tenant, in the same case, had been awarded damages for machinery, equipment, and many items not attached to the realty. The court easily found that steel lockers, cabinets, trucks, racks, tables, spare parts, etc., were "personal property" and not condemned. As for the looms and other machinery,

> . . . much of this, despite its size and weight, was readily removable and was not installed in a permanent manner. Most, if not all of this machinery, had been removed from the claimant's place of business. Only such machinery as cannot be removed without injury to it, or to the freehold,[86] or concerning which there may be other evidence of an installation of a permanent nature, should be held to constitute a fixture [87]

On the other hand, it has been easy for the courts to hold that buildings,[88] diners,[89] outdoor advertising signs,[90] and machinery installed in a building especially constructed for it [91] are condemned as being part of the realty. The real problem, with tenants as well as with owners, has been to determine the nature of those improvements between "personalty" and "real property." [92] Here again, as with owners, a few courts have begun to realize that the solution to the problem lies with formulating a test that reflects the economic realities of a condemnation proceeding.

In *Matter of the City of New York (North River Water Front),*[93] a tenant installed machinery built into the building or constructed upon foundations built into the ground, and connected with shafting which was connected with either steam or water pipes "Some" of the machinery could have been removed without serious injury to the freehold. The court stated at pages 866 and 867 that "it would be manifestly unjust to treat such property as

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erty" between condemnor and condemnee into persoal property See 2 NICHOLS, THE LAW OF EMINENT DOMAIN (3d ed) § 581(2)

> It frequently happens that the tenant erects buildings upon the leased land or puts fixtures into the building for his own use It is well settled that, even if the buildings or fixtures are attached to the real estate and would pass with a conveyance of the land, as between landlord and tenant they remain personal property, and, in the absence of a special agreement to the contrary, may be removed by the tenant at any time during the continuation of the lease provided such removal may be made without injury to the freehold This rule is, however, entirely for the protection of the tenant and cannot be invoked by the condemning party If the buildings or fixtures are attached to the real estate, they must be treated as real estate in determining the total award, but in apportioning the award they are treated as personal property and credited to the tenant

[82] See United States v Certain Property, etc , 306 F 2d 439, 445 (1962) in which the Second Circuit divided tenant improvements into three categories under New York law Items "distinctively realty" belonging to the landlord, items "clearly" personal property, and items "which are removable without material injury to the freehold (which) remain the property of the tenant even though they are classified as realty because they are severely damaged or lose substantially all their value on severance " "The lines marking the boundaries of the 'middle category' are anything but bright, and views on cases near the boundaries will necessarily differ " United States v Certain Property, 344 F 2d 142 (1965)

[83] Belinsky v State, 24 A D 908, 264 N Y S 2d 401 (1965), Rossi v State, 223 N Y S 2d 139 (1961), Bodnar Industries, Inc v State, 19 Misc 2d 720, 187 N Y S 2d 359 (1959), Antonowsky v State, 14 Misc 2d 689, 180 N Y S 2d 966 (1958), Matter of City of New York (Whitlock Avenue), 278 N Y 276, 16 N E 2d 281 (1938), in Matter of City of New York (Fulton Street) 255 App Div 855, 7 N Y S 2d 391 (1938). *Cf* note 28, *supra*

[84] For a collection of the cases, see 3 A L.R 2d 312, § 13

[85] 278 N Y 276, 16 N E 2d 281 (1938)

[86] The inconsistency of the rules is apparent For the fixtures to inure to the benefit of the tenant vis-à-vis the landlord, the fixtures must be removable *without* material injury to the freehold For the tenant to recover against the condemnor, the fixtures must be such as *wou'd* cause material injury to the freehold

[87] *Id* at 283 In Matter of City of New York (Fulton Street), Bodnar Industries, Inc v State, and Belinsky v State, *supra,* all at note 83, *supra,* the courts, citing *Whitlock,* and without further analysis, denied the tenants claim that the fixtures in question were condemned as part of the realty In *Whitlock* and *Belinsky,* however, and again without further discussion, "office partitions and electric wiring," and a "flatwork iron," respectively, were deemed condemned fixtures

[88] United States v Seagren, 50 F 2d 333 (1931)

[89] Tinnerholm v State, 179 N Y S 2d 582 (1958)

[90] City of Buffalo v Michael, 16 N Y 2d 88, 262 N Y.S 2d 441 (1965), Rochester Poster Advertising Co v State, 27 Misc 2d 99, 13 App Div 667, 213 N Y S 2d 819 (1961), George F Stein Brewery v State, 200 Misc 424, 103 N Y S 2d 946 (1951)

[91] Matter of City of New York (Lincoln Square Slum Clearance Project), 24 Misc 2d 190, 201 N Y S 2d 443 (1959), *modified,* 15 App Div 2d 153, 222 N Y S 2d 786 (1961), *aff'd,* 12 N Y 2d 1086, 190 N E 2d 423 (1963)

[92] In Schreibman v State, 31 Misc 2d 392, 223 N Y S 2d 670, 679 (1961) the court found that

> . the following equipment was permanently attached to the realty or fixture itself elevators, feed elevator, and hoist, heating cables, all thermostats except those in the egg room, switches, fans, shutters, rocsts All other equipment including the automatic feeders, waters, nests, shell hoppers, dropping frames, etc , we find were not permanently installed so as to become part of the realty Moreover this equipment was easily removable without damage to itself or to the buildings We also find that there was a local market for such equipment, so that it has a market separate and apart from the buildings, rather than mere salvage value

There was no other indication why some items were, or were not, part of the realty There was no indication of the economic effect on the equipment having a market "separate and apart from the buildings "

[93] 118 App Div 865, 103 N Y.S. 908 (1907), *aff'd* 189 N Y 508, 81 N E 1162 (1907)

personal property *when its value after it was severed from the building would be a very small percentage of its value as a part of the building for the use of the tenants in the business which they were conducting.*" (Emphasis added.) It went on to state at page 867 that "as to such personal property as can be readily removed and *would have a substantial value disconnected from the building* this rule would not apply. . . ." (Emphasis added.) Notwithstanding this early understanding by this New York court of the crucial importance of the economic effect of the condemnation on the fixtures, it is only recently that New York courts have clearly and broadly applied this rule in behalf of tenant-condemnees.[94]

In *Matter of City of New York* (*Seward Park Slum Clearance Project*,[95] the court held that "an award in condemnation may also be made for property, albeit readily removable without damage to the freehold, if such property were used for business purposes and would lose substantially all of its value after severance. . . ."

In *Marraro* v *State of New York*,[96] the court stated that

> . . . although it is true that electric and plumbing connections would ordinarily be an integral part of the real estate . . . in this instance it has been found . . . that these connections were easily removable and had been put in by the tenants solely to service fixtures installed for the individual purposes of their several occupancies.

It therefore sustained an award for such connections on behalf of the tenant.[97]

In *Matter of City of New York* (*Brooklyn Bridge Southwest Urban Renewal Project*),[98] the tenant did not claim that machinery and equipment formed part of the condemned realty. It was claimed, however, that wiring, piping, connections and attachments needed to make the machines function were not useable elsewhere except with the loss of all or substantially all their value after severance. The City admitted that the wiring, piping and connections were compensable to the tenant. It contended, nevertheless, that attachments such as bolt, skids, platforms, belts, controls and similar equipment were not "part of the realty" and therefore not condemned. The court stated at page 726 that "the definition of a fixture is satisfied by the fact that *some* annexation to the building is involved and that the item in question would *lose all or substantially all its value* after severance." (Emphasis added.)

In *Matter of City of New York* (*Brooklyn Bridge Southwest Urban Renewal Project*),[99] the City admitted that the special electric wiring, plumbing, water lines, and ductwork of tenants' air-conditioning systems were compensable, but contested an allowance for the units themselves and their water towers. At page 721, the court stated the applicable rule to be as follows:

> The mere fact of removability is not the criterion for distinguishing between a fixture compensable in eminent domain and a non-compensable item of mere personalty. Almost all trade fixtures are removable, some with relative ease and others with some difficulty. So long as it is annexed or connected in some fashion to the structure, it may well be within the definition of a fixture if it meets the more important tests of use and adaptability to the premises and a disproportionate loss in value upon enforced severance therefrom.

Applying this test it found that the water towers, affixed to the roof, burdened with heavy moving expenses, subject to rust and corrosion—fixtures.

> The owner must be deemed to have reasonably expected to realize its value through use during the term of his occupancy at those premises and to have intended it as a permanent affixation at that place for the period of its useful life. It would, of course, also be subject to substantial loss of value upon severance.[100]

The air-conditioning unit, however, ranging in size from 2 to 20 tons, easily movable elsewhere, was held not compensable unless it was shown:

> . . . that the unit together with its special equipment was intended as an integrated air-conditioning system to be a permanent installation for its useful life . . . and would lose a large part of its value if removed for use in other premises which might present some variant factor or layout, size, type of structure, exposure to sun, ingress, egress, etc.[101]

This case vividly illustrates the ease with which a court could find that items were, or were not, part of the condemned realty, by applying a test that seeks an economic, rather than a verbal, answer.[102]

For all of the reasons set forth in the discussion regarding an owner's fixtures, the evolving tenant law in New York affords a good example of the ease, simplicity, and fairness of the test of compensability being suggested here.

What Has the Condemnee Lost?

Those courts that adopt a rule of law that seeks to determine not what has the condemnor taken, but, instead, what has the condemnee lost, arrive at a very dramatic distance from the results just observed.[103] To them, the issue is not a question of property law, but, rather, a determina-

[94] See note 82, *supra*

[95] 10 App Div 2d 498, 500,200 N Y S 2d 802, 804 (1960)

[96] 12 N Y 2d 285, 189 N E 2d 606, 612, 613 (1963)

[97] *Accord*, Morganthal v State of New York, 15 A D 712, 223 N.Y S 2d 558 (1962).

[98] 51 Misc 2d 1005, 274 N Y.S.2d 724 (1966)

[99] 51 Misc 2d 1008, 274 N Y S 2d 719 (1966)

[100] *Id* at 722

[101] *Id* at 723

[102] See also, in Matter of City of New York (Tompkins Square Urban Renewal Project) 27 App Div 810, 278 N Y S 2d 33 (1967) The in-place value of installed machinery was stipulated to be $47,222. After severance, and before any allowance for dismantling, removal and reassembly, the value of the machinery was $9,466 " . the city thus does not challenge the . . contention that the sound value of the items, if severed, would be nominal or nil " *Id* at 35 The court held the items to be condemned fixtures *Cf* the dissent

> Nor is the difference between the value of the article installed and its value when removed a determining factor Many machines, though regular articles of commerce, do not move with frequency in the market, and transactions are limited to those with a specialized interest Such articles cannot be readily sold except at a substantial sacrifice Nor can they be moved without considerable expense These factors may reduce their detached value in the hands of the claimant to practically nothing and, at the same time, they could have considerable value in the hands of a dealer who is equipped to seek out a buyer and is prepared to store the machine until he does

One is reminded of the words of Judge Cardozo in Jackson v. State, *supra*, at 14, "It is intolerable that the State, after condemning a factory or warehouse, should surrender to the owner a stock of second-hand machinery and in so doing discharge the full measure of its duty. . . ."

[103] How dramatic the result can be is seen in Southern California Fisherman's Ass'n v United States, 174 F 2d 739 (1940) where the court adopted both theories in the same case The tenant erected improvements removable on 30-day notice After the notice was given, but before the

tion of what would have been the result between landlord and tenant if the condemnation had not occurred. If the fixtures could be removed, the tenant is entitled only to have them considered in connection with the value of his remaining unexpired term, and, in doing so, the cost of their removal may be relevant to such valuation. If there is no remaining unexpired term at the time of condemnation, the cost of removal of the fixtures is irrelevant, and not recoverable.

A lessee upon a condemnation can recover the fair market value of his unexpired interest. Trade fixtures installed by the lessee were considered in determining such fair market value, inasmuch as the condemnation "did not deprive the [lessee] of the ownership of or the right to remove the property. . . . The appropriation . . . did not take the fixtures and machinery placed upon the demised premises." [104]

If the fixtures were not condemned, how were they considered in determining the lessee's damages? As was stated in *Consolidated Ice Co:* [105]

> The value of the leasehold proper for the unexpired term would be what the premises would be worth for any purpose for which they could reasonably be used over and above the rental and other charges by the lessee. To this must be added the use value of the machinery and fixtures until the expiration of the lease. These are not substantive elements of damage but are for the consideration of the jury in estimating the [condemnee's] loss by being deprived of the residue of the term [106]

In arriving at the fair market value of the fixtures, however, inasmuch as they were not condemned, and had to be removed, consideration was given only to their value as severed from the freehold. As was stated in *Iron City Auto Co.* v *Pittsburgh* [107]

> If a purchaser had appeared upon the scene to take over the lease, the fact that the holder thereof would be obliged to remove the business with the machinery to another location would, of course, cause the prospective lessee to diminish its bid for the balance of the term accordingly; hence, the cost of removal and the depreciation in value of the machinery were proper elements for consideration and deduction in measuring the value of the lease.

Merely to state this rule is to expose its difficulty of practical application If a lessee under a 99-year lease installed heavy machinery and trade fixtures costing $100,000 to remove, a condemnation in the fifth year of the leasehold was to the tenant's great detriment. The lessee's right to remove these fixtures at the termination of the lease was obviously not seriously considered in the business judgment of their installation. If the same lessee, however, was condemned in the 97th year of the lease, the removal and depreciation cost of the machinery and fixtures would bear no relation to the value of the remaining unexpired term. Such costs, in addition, would be irrelevant to the possibility, or probability, of having the lease renewed. The greatest problem presented, however, is when there is no unexpired leasehold to value. A favorite device of landlords is the use of a "condemnation clause" which terminates the leasehold as of the date of the condemnation.[108] Here, the question is: When a condemnation clause terminated the leasehold, was the removal and depreciation cost of a tenant's trade fixtures recoverable by the tenant? The answer has been, generally, no.[109]

Courts have justified this harsh result on the theory that the tenant is in the same position as he would have been if the lease had expired normally at the end of its term For example, in *United States* v. *1.357 Acres of Land,*[110] a condemnation clause terminated a lease which gave the tenant the right to remove tenant-installed improvements concerning a bowling alley. It was undisputed that the fixtures were so attached or so uniquely designed for their particular location in the condemned building that they could not be removed without destroying all but a negligible salvage value. The court upheld a denial of recovery, stating:

> . . we agree with the Lessor that Lessee was in the same position when the property was taken as it would have been in at the end of the term of the lease. Its right under the lease at the end of the term was to remove the trade fixtures This right would be of no more value at the end of the term than it proved to be upon the taking under condemnation.[111]

This argument, however, ignores the probabilities of the tenant renewing the lease if the term came to a natural end, and compares such probability with the unforeseen

removal had occurred, the condemnation occurred and the condemnor took possession of the land and improvements The court held that the tenant's measure of damage was the reasonable value of the improvements removed from the land The fair market value of the improvements, of course, was vitally affected by the requirement that they be removed in 30 days "Appellants' position that because the Government did in fact receive both land and improvements and should therefore compensate for land and improvements as a unit *shifts the basis of evaluation to what the taker gained rather than what the owner lost*" *Id* at 740 (Emphasis added) See also, State v Pahl, 257 Minn 177 100 N W 2d 724 (1960)

[104] Consolidated Ice Co v Pennsylvania R R , 224 Pa 487, 494 (1909), see also Korengold v City of Minneapolis, 254 Minn 358, 95 N W 2d 112 (1959), Emery v Boston Terminal Co , 178 Mass 172, 59 N E 763 (1901), Baltimore v Gamse & Bro , 132 Md 290, 104 A 429 (1918), Metropolitan West Side Elevated R R Co v Siegel, 161 Ill 638, 650, 651, 44 N E 276 (1896), some courts are fond of noting that the fixtures were not condemned because the tenant had the right to remove them as against the landlord United States v 1 357 Acres of Land, 308 F 2d 200 (1962), People v Auman, 100 Cal App 2d 262, 223 P 2d 260 (1950), Los Angeles County v Signal Realty Co , 86 Cal App 704 261 P 536 (1927), Korengold v City of Minneapolis, and Baltimore v Gamse & Bro , *supra* See text *supra,* accompanying notes 67, 70, 71, where other courts hold that *unless* the tenant has the right to remove, no recovery can be had against the condemnor and all damages inure to the landlord for the improvements

[105] 224 Pa 487, 494 (1909)

[106] *Accord,* United States v Certain Parcels of Land, 250 F Supp 255 (1966), United States v 1 357 Acres of Land, 308 F 2d 200 (1962), People v Auman, 100 Cal.App 2d 262, 223 P 2d 260 (1950), United States v 425,031 Square Feet of Land, 187 F 2d 798 (1949), Minneapolis St Paul Metropolitan Airports Commission v Hedberg-Freidheim Co , 226 Minn 282, 32 N.W 2d 569 (1948), see also, 3 A L R 2d 315, 317

[107] 253 Pa 478, 486 (1916)

[108] The purpose being to deprive the tenant from carving his claim for a remaining unexpired leasehold claim from the owner's claim for the condemnation of the freehold

[109] State v Willey, 91 Ariz 322, 372 P 2d 327 (1962); for a collection of the cases, see 34 A L R 1523 and 3 A L R 2d 312, United States v Certain Parcels of Land, 250 F Supp 255 (1966), United States v 1 357 Acres of Land, 308 F 2d 200 (1962), People *ex rel* Dept. of Public W rks v Rice, 185 Cal App 2d, 8 Cal Rptr. 706 (1960), City of Beverly Hills v. Albright, 184 Cal App 2d 562, 7 Cal Rptr 706 (1960), Williams v State Highway Commission, 252 N C 141, 113 S E 2d 263 (1960), removal costs of "personal property," of course, are held not relevant to leasehold value, or, compensable directly See Williams v State Highway Commission, *supra,* and 34 A L R 1523 and 3 A L R 2d 312 *Cf* Southern California, Fisherman's Ass'n v United States and State v Pahl, note 103, *supra.*

[110] 308 F 2d 200 (1962)

[111] *Id* at 203 See also, Emery v Boston Terminal Co , at note 104, *supra*

development of having the term abruptly ended by operation of a condemnation clause. The economic consequences occurring to the tenant because of governmental action are, therefore, borne by the tenant, even though these consequences were not bargained for between the landlord and tenant. In short, the condemnor is securing the benefit of a lease clause inserted into the lease through the bargaining process to protect the landlord in *its* claim against the condemnor. There seems little justification for such benefit inuring to the condemnor.[112]

CHAPTER FIVE

MEASURE OF DAMAGES: ENHANCEMENT OF VALUE AND THE UNIT RULE

FEE OWNER

The previous analysis suggests that the test for determining whether fixtures form part of the condemned real estate should turn on the extent to which the fixtures substantially lose their value if severed from the realty. Assuming the fixtures, under the test suggested, do form part of the condemned realty, what is the condemnee to be paid for them?

The Unit Rule

Can the condemnee be paid the separate value of his fixtures, measured by their in-place value, plus the separate value of the buildings?

It is generally stated that the valuation of a condemned property is not to be made by adding up the separate value of its component parts, and that evidence thereof is not to be admitted.[113]

This is the so-called unit rule test which has strong verbal support in the cases.[114] Nevertheless, as is stated in 1 A.L.R.2d 884:

> . . it is to be observed that reasoned analyses of the theoretical arguments for and against separate valuation of land and improvements in condemnation cases is notably lacking in the decisions. In the rare instances where deliberate analysis has been attempted, considerable doubt as to the complete universality of the prohibition against separate valuation has been expressed.

Thus, in *United States* v. *City of New York,*[115] Judge Learned Hand stated at page 528:

> Indeed, we think it is an undue simplification to extract from the books any "Unit Rule" whatever, in the sense of general authoritative directions. What has happened, so far as we can see, is that, as different situations have arisen, the courts have dealt with them as the specific facts demanded. One of these situations has been when a parcel of land has been improved, and when—as is substantially always the case—it is impossible to separate the improvements so as to transfer them independently.

In *United States* v. *City of New York, supra,* the issue was whether separately owned improvements located on a 53-acre improved tract owned by the City of New York could be separately valued. The division of ownership, together with the size of the tract, made the unit rule totally inapplicable and the court so held. Nevertheless, the reasoning of Judge Hand is relevant to the problem presented here It is unquestionably true that the value of a stairwell, plus the value of an antique fireplace, plus the value of a bathtub, etc., do not add up to the value of the entire house.[116] Nor does the real estate appraiser, in the accepted practice of his profession, value such items, separately.[117] With fixtures and improvements, however, it is possible not only to "separate the improvements" for valuation purposes, but, as noted, it is commonly accepted

[112] As was stated in United States v Certain Property, 388 F 2d 596 601, 602 (1968)

> Lessors do desire, after all, to keep their properties leased, and an existing tenant usually has the inside track to a renewal for all kinds of reasons—avoidance of costly alterations, saving of brokerage commissions, perhaps even ordinary decency on the part of the landlord Thus, even when the lease has expired, the condemnation will often force the tenant to remove or abandon the fixtures long before he would otherwise have had to, as well as deprive him of the opportunity to deal with the landlord or a new tenant—the only two people for whom the fixtures would have a value unaffected by the heavy costs of disassembly and reassembly (While these possible purchasers might seek to take advantage of the tenant's need to sell an attempt to forecast the terms of a bargin that might never have had to be made is altogether too speculative, as Judge Lehman indicated " . it is fairer that the cost of any error in approximation should fall on the person who brought the problem about ") The condemnor is not entitled to the benefit of assumptions, contrary to common experience, that the fixtures would be removed at the expiration of the stated term. As Judge Lehman also wrote in Allen Street, 256 N Y at 249 "Choice lay with the tenant and landlord, and how that choice would have been exercised rests in speculation which does not concern the courts in this jurisdiction."

[113] For a collection of the cases, see 1 A L R 2d 878 Notwithstanding the rule, and as indicated at 1 A L R 2d 902, 903, there are scores of cases in which the court, in fact, did separately assess the damage to land, buildings and improvements.

[114] See 1 A L R 2d 878

[115] 165 F 2d 526 (1948)

[116] Nor, generally, does the separate value of growing crops, trees, shrubs, etc, add up to the over-all value of the land Saathoff v. State Highway Commission, 146 Kan 465, 72 P 2d 74 (1937). See also, 1 A L R 2d 887

[117] In most jurisdictions, a separate reproduction cost value of buildings, less depreciation, is permitted *In re* Blackwell's Island Bridge Approach in City of New York, 198 N Y. 84, 91 N.E. 278 (1910); 2 ORGEL, *supra,* Chap 16, "Reproduction Cost of Structures as Evidence of Value", 26 P S A § 1-705 (I)(iv)(Penn)

in the appraisal profession to do so. As Judge Learned Hand stated at page 528:

> The argument runs that . . . it is erroneous as matter of law ever to add together a . . . "site" value and [an] improvements value. The argument, so put, is undoubtedly a highly important caution, when the attempt is made to appraise improved land by a process of cumulation, but we question whether it has any further office than to keep before the tribunal the only relevant objective, the exchange value of the newly emerged unit.

Enhancement of Value

Assuming that the separate value of the improvements can be paid to the condemnee, and evidence thereof permitted, does it necessarily follow that the awarding tribunal should render an award by adding the value of the improvements, per se, to the value of the land and buildings? [118] The presentation of the evidence would be as follows· The fixture appraiser would testify first. He would then be followed by the real estate appraiser. Assume the fixture appraiser testifies that his in-place value is $50,000, and the real estate appraiser testifies that his fair market value, excluding the fixtures, is $100,000. Is the owner entitled to $150,000 in damages? As was stated in *State* v. *Peterson,*[119]

> The final test is the market value of the property being condemned. If improvements on the property enhance the market value then the value of those improvements is material, if improvements do not enhance the market value, they are not material.

Hence, in *Baltimore* v. *Himmel,*[120] the condemned property included land, buildings, and equipment The court charged the jury that it could consider the equipment "as part of said land and buildings . . . in estimating the damages to which the owners are entitled " The Court of Appeals of Maryland held the charge error, because it enabled the jury to value each item of equipment separately, and, thereafter, to add each separate item to its award. The charge should have been, the court held, ". . . and the jury is instructed to award the owners the present fair market value of the land taken, as enhanced by the buildings and fixtures thereon." [121] It will be the unusual case, however, in which the "enhancement in value" caused by machinery and equipment will be other than the in-place value of the fixture appraiser. The real estate appraiser can be expected in most cases to accept and adopt the conclusion of the fixture appraiser in arriving at an over-all determination of the condemned property—which will be the summation of the two appraisals. For example, in *State* v. *Dockery,*[122] witnesses testified to separate values of land, building, machinery and equipment. They testified, however, that the condemned property was enhanced to the extent of the estimated replacement cost of the improvements, less depreciation. The court stated, therefore.

> The true measure of damages . . . is the value of the property as a whole Such a value does not *necessarily* amount to the total of the separate and unrelated values of land, structures and fixtures. The true measure is . . . the extent to which they enhance the value of the land . . . but if the improvements are such as to enhance the land value to the extent of cost of replacement, less depreciation, then it is proper to arrive at the value of the whole property by totalling the separate values of each. That is true in this case.

In any event, administratively, if it is determined from the report of the fixture appraiser that the items in question do form part of the condemned realty, then the report should be given to the real estate appraiser for his determination of the extent to which the fixtures, so valued, and so forming part of the realty, enhanced the over-all value of the condemned property. The procedure would be similar administratively to that permitted in *Peoria, B & C Traction Co.* v *Vance,*[123]

> The trees were a part of the land, and the value of the land necessarily included the trees . . . the witnesses testified as to the value of the land without the trees, and also to its value with the trees In the opinions given the trees materially increased the value of the land. . . .

Similarly, in *State* v *Gallant,*[124] the Supreme Court of New Jersey stated:

> Where, therefore, a building and industrial machinery housed therein constitute a functional unit, and the difference between the value of the building with such articles and without them is substantial, compensation for the taking should reflect that enhanced value. . . .[125]

TENANT

As already noted, the courts have disagreed as to whether, and if so, on what basis, the trade fixtures of a tenant are condemned and valued. Those courts that have given effect to the lease agreement have held that the tenant is

[118] *Cf* 113, *supra*

[119] 134 Mt 52, 328 P 2d 617, 624 (1958)

[120] 135 Md 65, 107 A 522 (1919)

[121] Baltimore v Himmel at 525-526 This is the generally accepted charge in most jurisdictions Jackson v State, 213 N Y 34, 35-36, 106 N E 758 (1914), Allen v Boston, 137 Mass 318, 320 (1884) The condemnee requested the judge to charge that "in addition to the value of the building, the petitioners are entitled to recover the value of the fixtures taken with the building" This request was denied The court did charge, "the fixtures were to be taken into account as being a part of the building, and that allowance should be made for them so far, and only so far, as they enhanced the market value of the estate " City of Chicago v Farwell, 286 Ill 415, 121 N E 795 (1919), Department of Public Works and Building v Lotta, 27 Ill 2d 455, 189 N E 2d 238 (1963), Commonwealth v Stamper, 345 S W 2d 640 (1961, Ky), United States v Certain Land, etc , 69 F Supp. 815 (1947), in Marraro v State, 12 N Y 2d 285, 189 N E 2d 606 (1963) (Tenant), and United States v Certain Property, 306 F 2d 439 (1962) (Owner), however, the necessity of condemnee to establish the enhancement requirement was pointedly ignored In *United States,* it was admitted that the building detracted from the value of the land Nonetheless, the condemnee was held entitled to the in-place value of condemned fixtures because they would lose substantially all their in-place value upon severance

[122] 300 S W 2d 444, 451 (1957, Mo)

[123] 234 Ill 36, 84 N E 607 (1908)

[124] 42 N J 583, 590, 202 A 2d 401, 405 (1964)

[125] The Supreme Court of New Jersey in *Gallant* indicated that the payment of damages to an owner for the substantial loss in value of trade fixtures invoked a constitutional question See note 135, *infra,* for a similar conclusion by the United States Court of Appeals for the Second Circuit regarding a tenant's fixtures The court, after discussing the constitutional obligation of the condemnor to pay just compensation, then states at 404 and 405

> We return now to the immediate problem before us, i e , whether the concept of just compensation as outlined above may require that (condemnees) receive an award for their looms We believe it may.
>
> Before condemnation the looms were an integral and valuable part of a going business housed in [condemnees'] factory Upon a condemnation [they] could either retrieve merely the looms' second-hand value, or, if they had elected to remove them to their new premises, suffer the economic loss attendant upon the necessarily expensive and intricate removal procedures . . *The injustice of non-compensation is obvious.* (Emphasis added)

only entitled to damages for trade fixtures to the extent that such damage measures the leasehold agreement between lessor and lessee. Here, whether damages are to be awarded, and the measure of such damages, does not involve the unit rule, because the test merely determines the extent to which the removal costs of the fixtures enhanced the remainingg unexpired leasehold.[126] On the other hand, those jurisdictions, such as New York, which has long held that a tenant is entitled to be compensated for his fixtures as being part of the condemned real estate, have only recently explored the implications of such a holding insofar as the unit and enhancement rules of damages are concerned. In *Matter of City of New York (Allen Street)*,[127] the court held that the fixtures must be included as condemned and damages therefore paid to the tenant "to the extent that the value of the real property as a whole is enhanced by the fixtures annexed thereto." It was not until 1963 that the Court of Appeal of New York was faced with the implications of that holding. In *Marraro* v. *State*,[128] the condemned building housed a pharmacy, a dress cutter, a supermarket, and a dry cleaner. Each tenant was awarded the in-place value of his fixtures. The State appealed, contending that because the fee owner was not entitled to a separate award for its fixtures, the tenants were entitled to share in a total award only to the extent that it was shown that their particular fixtures enhanced the value of the entire building. The Court of Appeal of New York, after reciting the language of Judge Hand in *United States* v. *City of New York*,[129] held that the unit rule was inapplicable, stating at page 612:

> A case like the present, with a large building peopled by different tenants with individual trade fixtures, differs from a single factory or warehouse where it is entirely appropriate that the machinery should be valued according to its enhancement of the value of the building.

Having disposed of the unit rule, it then held the measure of damage to be "the rule of reproduction cost less depreciation is seemingly suited to the purpose. . . ." [130]

The United States Court of Appeal for the Second Circuit has similarly adopted the holding in *Marraro* as applying to the condemnation of real estate located in New York State by the federal government.[131] In *United States* v. *Certain Property*,[132] the government argued again that the unit rule was applicable, that the fair market value of the building as a unit, including any tenant trade fixtures, was to be determined first, and each tenant was then entitled only to the amount by which the fixtures were demonstrated to have enhanced the market value of the building. The court stated at page 146:

> Acceptance of this argument would indeed keep the word of promise to the ear and break it to the hope. In most cases [it] would effectively deny any significant compensation for the fixtures. . .

Until *Marraro* and the cases in the Second Circuit, those few jurisdictions that held the issue of a tenant's damages to be a question of property law,[133] nonetheless, still seemed to hold that the measure of damage of a tenant's condemned fixtures was the extent to which such fixtures enhanced the value of the condemned real estate.[134] Nevertheless, the holdings by the Court of Appeal of New York and the United States Court of Appeal for the Second Circuit clearly presage the desirable development of the law. To wit: A tenant will be deemed to have fixtures forming a part of the condemned realty if the fixtures would lose substantially all of their value upon severance, regardless of the terms of the lease concerning termination of the leasehold upon condemnation The tenant will be entitled to be paid the in-place value, without further proof of the extent of the enhancement of the condemned real estate, and regardless of the unit rule. This result will be easily administered and easily understood, and will bring order and a sense of fairness now absent in the law concerning the compensation by a condemnor of a tenant's trade fixtures upon the condemnation of the real estate in which the fixtures are located.[135]

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[126] See text *supra*, accompanying notes 105 and 106

[127] 256 N Y 236, 249, 176 N.E. 377, 382 (1931)

[128] 12 N Y 2d 285, 189 N E 2d 606 (1963)

[129] Note 115, *supra*.

[130] Marraro v State at 612.

[131] United States v Certain Property, etc , 306 F.2d 439 (1962).

[132] 344 F 2d 142 (1965)

[133] See "What Has Condemnor Taken?" in Chap. Four of this report

[134] Roffman v Wilmington Housing Authority, 179 A 2d 99 (1962, Del), Jones v New Haven Redevelopment Authority, 21 Conn Supp. 140, 146 A.2d 921 (1958), People v. Klopstock, 24 Cal App.2d 897, 151 P.2d 641 (1944), Kansas City v National Engineering and Manufacturing Company, 274 S.W 2d 490 (1955), *cf.* State v. Olsen, 76 Nev 176, 351 P.2d 186 (1960), United States v Seagren, 50 F 2d 333 (1931); City of New York (Brooklyn Bridge Southwest Urban Renewal Project), 51 Misc 2d 1005, 274 N Y S 2d 724 (1966), City of Buffalo v Michael, 16 N Y.2d 88, 262 N.Y S.2d 441, 209 N E 2d 776 (1965) (advertising sign); Kelder v. State, 22 App Div 2d 999, 254 N.Y.S 2d 895 (1964) (nursery stock of plants, shrubs and trees), George's Bake Shop, Inc v State, 21 App Div. 2d 423, 251 N Y 2d 385 (1964) (bakery fixtures), and Bruno v. State, 24 App Div 2d 681, 261 N Y S 2d 592 (1963) all follow *Marraro*

[135] There is recent authority that the result here suggested is constitutionally mandated In United States v Certain Property, 344 F 2d 142 (1965), the court stated

> Indeed, we are not at all sure that the issue has not been settled against the Government on a constitutional basis by the Supreme Court's statement in General Motors that "for fixtures and permanent equipment destroyed or depreciated in value by the taking," the respondent is entitled to compensation.

CHAPTER SIX

CONCLUSION

The common law tests for the determination of fixtures—intent, adaptability, and annexation—attempted to resolve conflicting status claims in disputed items of property. Nevertheless, the same tests have been applied in condemnation proceedings, where the issue is not which party should prevail, but which party should bear the economic consequences arising because of the condemnation.

The modern fixture appraisal determines the economic consequences arising because of a condemnation to machinery, equipment, and fixtures. The appraiser can determine whether the fixtures can physically be removed from the condemned premises, and, if so, whether such removal would cause them to lose substantially all their value

The test whether an owner's fixtures have been condemned as part of the real estate should be whether the fixtures will lose substantially all of their value on removal from the condemned premises. If they will, the owner is entitled to be paid their in-place value, if the value of the condemned real estate has been so enhanced. In any event, the owner is entitled to be paid the extent to which the in-place value of the fixtures has enhanced the value of the condemned real estate.

The test whether a tenant's fixtures have been condemned should also be whether the fixtures will lose substantially all of their in-place value on removal from the condemned premises. If they will, the tenant is entitled to be paid their in-place value, notwithstanding the unit rule, and notwithstanding whether the real estate had been enhanced in value, because both of these rules are inapplicable in a tenant case.

APPENDIX A

EXAMPLES OF MODERN FIXTURE APPRAISAL OF TWO BUSINESS ESTABLISHMENTS

FIXTURE	COST OR VALUE ($) OF REPRODUCTION NEW	BEFORE TAKING	LIQUIDATION	REMOVAL AND REINSTALLATION
(*a*) THE BAR				
1. Sink, stainless steel, 36″×18″×11″ over-all, 2 compartments, single drainboard, with mixing faucet, supply and drain lines.	155	110	15	60
2. Steam Table, 2 compartments, 32″ long, electric, with BX wiring	195	125	10	80
3. Gas Stove, domestic 4-burner, white enamel, single oven with broiler.	135	50	0	50
4. Fan, 18″, six-scoop blade, belt drive, ¼-hp motor with screen and painted enclosure.	130	90	10	70
5. Kooler-Keg Cabinet, 8′6″×31″×48″, galvanized insulated casing, 5″ thick, 4 doors, wood lining complete with inside circulator compressor unit driven by 1-hp motor, fin condenser, 1 approximately 2×3 single-stage air compressor, ⅓-hp motor drive mounted on 12″×24″ air receiver, 1 McKesson air pump unit, self-contained drive, complete with switch, tubing and wiring	1,500	975	50	475
6. Bar, semicircular, approximately 30 lineal ft, mahogany panel, plywood front, 2×4 back framing, 1″ thick fitted top, heavy formed edge, with panel entrance.	1,950	1,375	0	1,375
7. Cabinet, steel, liquor storage, 36″×18″×42″, double door.	50	35	10	25
8. Liquor Compartment, all stainless steel, 24″×19″×11″ chest, pipe legs	115	80	15	55
9. Sinks, stainless steel, 36″×18″×11″ over-all, 2 compartments, single drainboard, with mixing faucet, supply and drain lines.	310	220	30	120
10 Draft Beer Dispenser, stainless steel, 2 taps, 1 water faucet, refrigerated, 36″×36″×42″ over-all, with inside cooler.	580	435	50	250
11. Carbonated Water and Soda Supply Unit with 4 taps, complete with pressure gauges, hose and connections.	600	480	100	75
12. Bottle Cooler Box, stainless steel cabinet, 54″×26″×79″, 4 glass sliding doors, stainless steel lining, open wire shelves, inside diffuser with York Hermetic Remote Compressor Unit, model 3212M1, serial #50091, self-contained motor drive with Borg-Warner A1-1 Condenser.	1,425	1,075	150	925
13. Bottle Cooler, all stainless steel, chest style, 72″×27″×38″ high, slant front, double sliding door, self-contained compressor unit, with wiring.	1,050	735	100	150
14. Fan, wall ventilating, 16″ four-blade, self-contained motor drive with 2-speed switch wiring and automatic louvre	160	120	20	75
15. Fan, ceiling ventilating, 24″, self-contained motor drive, switch and wiring	240	155	0	155
16. Air Conditioning System, Westinghouse, complete with coil unit type DXF, style 493D900G01, serial #E2942, complete with filtered air intake, approximately 30′0″ galvanized duct 26″×12″ to 18″×12″, 4 outlets, 1 inlet outside condenser.	6,750	5,075	250	4,275
17. Public Address and Music System, with 1-RCA, 85 watts, 1 microphone, 1 45-rpm record player, 4 10″ cabinet speakers, with wiring	215	150	25	75
18. Television Antenna, standard model with yagi, wiring to TV set, including TV shelf.	125	100	0	100
TOTAL	15,685	11,385	835	8,390

FIXTURE	COST OR VALUE ($) OF REPRODUCTION NEW	BEFORE TAKING	LIQUIDATION	REMOVAL AND REINSTALLATION
(*b*) MANUFACTURING PLANT				
1. One (1) Carrier Air Conditioner, model #5152, single phase, 230 volts mounted through the wall, including installation Age· 8-10 years, condition fair Note See Photo #1	374	187	20	102
2. One (1) Steam Heated Air Drier and sterilizer, 8'-0"×8'-0"×8'-0", galvanized construction, including 1½" steam line, and two (2) 1-hp blowers and motors. Age. 3-4 years, condition good Note See photo #2—damages exceed value before taking	2,590	1,554	50	1,554
3. One (1) Wash Tank, steam heated, wood construction 10'-0"×6'-6"×5'-5". Two 2"-thick wood plank & tie rod construction, including one (1) galvanized dip basket, screen with angle iron construction. Age 3-4 years, condition good Note· See Photo #3—damages exceed value before taking	910	546	50	546
4 One (1) "Minnick" Up-Stroke Baling Press, model #RU6017, serial #RU6017126, 5'-0"×2'-6" bale size Bottom framing (in basement) 8'-6"×2'-6"×12'-0" heavy steel channel and angle iron construction including automatic loading chute from second floor (3'-0"×2'-0"×12'-0") of galvanized metal. Age 8-10 years, condition good Note See Photos #4 & 4A	6,400	3,840	450	2,800
5. One (1) Toledo Dormant Platform Scale, model #60-1503, serial #757511, capacity 2,250 lb including concrete pit for scale, 6'-2"×5'-0"×10" set into wood floor Scale bell size 5'-0"×4'-0". Age. 10-12 years, condition fair Note See Photo #5.	2,675	1,605	25	475
6. One (1) Saco-Lowell Bale Breaker, serial #114, including one (1) automatic feed apron (12'-0"×4'-0") slatted wood; conveyor frame #E440; one (1) 10-hp General Electric two-phase motor with six (6) vee belt drive Age 20-25 years, condition good Note: See Photo #6	7,795	4,680	300	1,800
7 One (1) Proctor & Schwartz Willow Machine, attached to and operating in conjunction with Item #6, including one (1) 10-hp G E. two-phase motor with five (5) vee belt drive pulleys including two (2) sections of 12" round duct, 45'-0" each, feeding condenser blowers ahead of hopper bins, and one (1) section 30'-0"×1'-0" from 2nd floor to condensers Age 6-8 years, condition fair Note: See Photos #7—7A & 7B	4,715	3,300	150	850
8 One (1) Stand-by Willow Machine, same as Item #7, with connecting ducts, but with a 7½-hp motor. Age: 12-15 years, condition fair. Note See Photo #7	3,815	1,908	75	750
9. Two (2) Blower and Condenser units mounted on ceiling at end of 12" ducts (100') from Willow machine, and chute leading to hoppers of Garnett machines, powered by two (2) 5-hp motors including endless belt conveyor 1'-0" wide; 100'-0" of 8" round duct, 45'-0" of 6" round ducts, and approx. 55'-0" of 6" flexible tubing, including installation Age 6-8 years, condition good. Note· See Photo #8—damages exceed value before taking.	10,900	7,630	0	7,630
10. Two (2) Proctor & Schwartz Double Doffer Garnett Machines, order #K8587T, complete with all necessary belts, pulleys, foundation mounts, ground rails, and one (1) each 10-hp 2-phase, 220-440 volt motors Age 4-6 years, condition good. Note. See Photos #9 & 9A.	38,250	30,600	2,000	18,000

FIXTURE	COST OR VALUE ($) OF REPRODUCTION NEW	BEFORE TAKING	LIQUIDATION	REMOVAL AND REINSTALLATION
11. Three (3) Proctor & Schwartz Double Doffer Garnett Machines, serial #K4693T, K5479T, K5136T, including three (3) camel back conveyors, serial #K4693T, K5479T, and K5136T, installed with necessary pulleys, belting, guard rails, foundation mounts, and one (1) each 10-hp 2-phase, 220-440 volt motors. Age· 10-12 years, condition good Note See Photos #10 & 10A	57,350	34,425	2,250	29,000
12. Two (2) Proctor & Schwartz Delivery Aprons, each 33′-0″×7′-6″ complete with lapper, rollers and trimming section with manual electric controls for length and width of trimmers. (Purchased through Klenk & Miller Inc.) powered by two (2) 3-hp Reeves 220-440 volt, 2-phase motors Age 5-7 years, condition good Note. See Photos #11 & 11A These items work in conjunction with Items #10 & 11.	17,270	12,089	850	10,400
13. One (1) Economy Baler, model #454F3, serial #43634, including one (1) 7½-hp 220-440 volt, 2-phase Howell motor. Special #9664 Age· 6-8 years, condition good. Note See Photo #12	3,500	2,450	300	450
14. One (1) Economy Downstroke Baler, model #60F31, serial #31036, 5′-0″×2′-6″ bale size, chain drive with one (1) 7½-hp 2-phase, 220-440 volt gear box motor. Age 6-8 years, condition good. Note: See Photo #13	4,425	3,098	300	300
15. One (1) Curtis Air Compressor, 3½×3 compressor pump, serial #230-5-20167S; National Board #SHB40776, horizontal tank with a 5-hp 220-440 volt, 2-phase Louis Allis motor Age. 20-22 years, condition good. Note. See Photo #14.	1,135	568	75	125
16. One (1) Stand-by Curtis Air Compressor (pump off being repaired in own shop) National Board #MER7008 with a 3-hp Century Motor. Age: 25-27 years, condition fair. Note: See Photo #14.	842	253	25	125
17. One (1) Section of Wooden Part Bins 6′-0″×1′-3″×4′-8″, consisting of fifteen (15) separate bins, five (5) per row, three (3) rows high Age: 8-10 years, condition fair. Note· See Photo #15—damage exceed value before taking.	60	42	0	42
18. One (1) section of wall-mounted wood bins, 5′-0″×6″×3′0″, containing fifteen (15) separate divisions. Age 8-10 years, condition fair Note Damages exceed value before taking.	45	32	0	32
19. One (1) Toledo Dormant Platform Scale, model #31-1541F.D, serial #157, capacity 3,125 lb., including one (1) concrete pit, 6′-2″×4′-0″×1′-6″; with bed plate 4′-0″×4′-0″ Age 6-8 years, condition good. Note. See Photo #16	2,675	1,880	50	475
20. One (1) Simplex Time Card Recorder, including two (2) wall-mounted card racks. Age 1-2 years, condition good. Note· See Photo #17.	375	338	75	22
21. One (1) Westinghouse Water Cooler, bubble type, including drain connection Age. 6-8 years, condition good. Note See Photo #18.	305	218	35	80
22. One (1) Burgular Alarm System on two (2) windows only, including one (1) Ademco photo electric eye detector with infra ray beam and mirror reflectors. (Ademco Co., Brooklyn, N.Y.) Age 1-2 years, condition good Note: See Photos #1 & 18.	250	250	20	66
23. One (1) Fire Alarm System with control centers in two (2) locations of building. Installed by A.D.T. Age: 1-2 years, condition good. Note· See Photos #17 & 17A.	725	725	35	176

FIXTURE	COST OR VALUE ($) OF REPRODUCTION NEW	BEFORE TAKING	LIQUIDATION	REMOVAL AND REINSTALLATION
24. One (1) Vacuum System, consisting of four (4) centrifugal blowers, 36", with approx 200'-0" of 6" round galvanized duct, 50'-0" of 8", 40'-0" of 12", 450'-0" of 15", connected to and including one (1) Cyclone, 10'-0"×20'-0", mounted on side of building, with two (2) caps extending higher than 4th floor roof Structural steel supports from side of building support the Cyclone, angle iron trestles and brackets support connecting duct system. Age 6-8 years, condition good Note: See Photos #19—19A & 19B All of the exhaust system has been built especially for this particular operation at this specific location	13,237	9,266	100	7,250
25. One (1) Cyclone, 2'-6"×3'-6", with 5'-0" cone extending from collecting room on 2nd floor to 1st floor and basement. (Sterilizer and washer) consisting of 10'-0" of 18" round galvanized duct; 50'-0" of 8" duct powered by a 24" centrifugal blower and 5-hp 220-440 volt, 2-phase motor. Age: 6-8 years, condition fair. Note See Photo #20. Damages exceed value before taking.	1,125	675	0	675
26. One (1) Cyclone, 5'-0" diameter × 9'-0" cone, connected to a 7½-hp 220-440 volt, 2-phase explosion-proof motor, wall-mounted at ceiling of 1st floor with a 36" centrifugal blower. Approx 75' of 15" exhaust duct through roof to cap; 70'-0" of 12" duct leading to 1st floor Age· 6-8 years, condition good. Note· See Photo #21	2,356	1,649	50	1,057
27. Two (2) Cyclones 3'-6" with 5'-0" cone, including one (1) collection room, 5'-6"×5'-8"×8'-10", galvanized steel construction with double hinged doors, loose duct work. Age: 6-8 years, condition fair.	1,593	797	0	728
28. Electrical Transformers—Service & Distribution consisting of: a. Two (2) 100-kva Transformers (oil). b. One (1) 600-amp Circuit Breaker Switch c. One (1) 50-kva Transformer d. Two (2) 400-amp Safety Switches. e Two (2) 200-amp Safety Switches. f Five (5) 100-amp Safety Switches g Eighteen (18) 60-amp Safety Switches h Eleven (11) 30-amp Safety Switches. i. Five (5) 15-amp Fuse Switches. j 1,800' of 1" and under Conduit & Conductor. k 50' of 1½" Conduit & Conductor l. 100' of 2" Conduit & Conductor. m 300' of 2½" Conduit & Conductor. n. 45' of 3" Conduit & Conductor o One (1) 12-circuit Panel Board. p 25 110- & 220-volt Wall Receptacles q Wiring all machines or blowers from safety switch to motor and connecting wires. Age: 2-20 years, condition fair Note See Photos #22, 23, 24 & 25 Damages exceed value before taking.	24,053	14,431	750	14,431
29. Mechanical Piping: a. Steam: 75' of 1½" pipe including fittings & valves. b Air: 245' of 1" pipe, fittings, valves and 75' of flexible rubber hose Age 3-7 years, condition good. Note· These lines run to various locations on 1st & 2nd floors where rubber hose is connected for extensions. Damages exceed value before taking	763	614	0	614
TOTAL	210,508	139,650	8,035	100,555

[a] Photos not included as part of this appendix

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