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VALUATION AND CONDEMNATION PROBLEMS INVOLVING TRADE FIXTURES

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I. INTRODUCTION

A. The Problem and Its Solution

WHEN HAMLET spoke his famous "to be or not to be" soliloquy, he evoked a continuing debate through the centuries as to its meaning. Admittedly, to compare the search for its meaning with the continuing legal search to determine a "fixture" may be stretching the point. Nonetheless, in few areas in the law has there been more wordiness and confusion than in 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 "[t]here is a most embarrassing conflict in the adjudged cases."[1]

Presently there is confusion and uncertainty in the appellate courts 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 the confused decisional law to the complexities of the law of eminent domain has not made for easy solutions.

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 the question of when such fixtures were, or were not, condemned. The common law tests of intent, adaptability, and annexation, being verbal tools utilized 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

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1. State Savings Bank v. Kercheval, 65 Mo. 682, 686 (1877). *Accord,* Helms v. Gilroy, 20 Ore. 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."

place value upon severance, would be easily administered, consistent with the constitutional requirement of the payment of "just compensation", and otherwise equitable. It is a test that comports with the economic realities of the condemnor-condemnee relationship. As will be shown, the underlying policy consideration in the condemnor-condemnee relationship is "mainly economic."[2]

B. The Common Law

At the outset, it should be remembered in determining whether items are 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, afford greater insight into what the courts do, or should do, than does the futile effort to build "a solid pathway across this veritable slough of despond."[3] Generally, the fixture concept has three purposes: (1) To determine which heir takes what property when realty and personalty pass 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 the above situations is which party should prevail in its claim to the disputed items. This is *not* the same issue that arises in a condemnation proceeding.[7]

Under the common law, everything attached to the freehold was considered a part of it.[8] 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 upon land in which they had an interest less than a fee.

The case of *Teaff v. Hewitt*[9] is the leading American case formulating the test for the determination of a fixture:

> [T]he united application of the following requisites will be found the safest criterion of a fixture.
>
> 1st. Actual annexation to the realty, or something appurtenant thereto.

2. Singer v. Oil City Redevelopment Authority, 437 Pa. 55, 261 A.2d 594 (1970). Gottus v. Allegheny County Redevelopment Authority, 425 Pa. 584, 588, 229 A.2d 869, 872 (1967).

3. Bingham, *Some Suggestions Concerning the Law of Fixtures*, 7 COLUM. L. REV. 1 (1907).

4. Lawton v. Salmon, 126 Eng. Rep. 151 (K.B. 1782).

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

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

7. *See* note 24 *infra* and accompanying text.

8. KENT'S COMMENTARIES 467 (12th ed. 1873).

9. 1 Ohio St. 511 (1853).

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 from 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.[10]

1. Annexation

The concept 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 cases held that an article would be deemed to be "annexed", and therefore a fixture, only where severance would occasion material injury to the freehold.[11] Even when this rule was relaxed, it was still said that slight annexation was required, even if the item could be easily detached.[12] The adherents of the annexation doctrine feared that if the requirement of physical attachment was removed completely, domestic animals on a farm, or other loose and unattached implements, traditionally not a "part of" the realty could be considered fixtures.[13]

2. Adaptation

The annexation test gradually gave way to the continuing process of industrialization. Thus, in *Lawton v. Salmon*[14] 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 reasoned that the salt spring was a valuable inheritance, but that no profit arose from it unless there was a salt work, which consisted of a building for the purpose of containing

10. *Id.* at 529–30.

11. *See, e.g.,* Hill v. Wentworth, 28 Vt. 428 (1856).

12. Walker v. Sherman, 20 Wend. 636 (N.Y. 1839).

13. *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 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 sunk in ground); Roderick v. Sanborn, 106 Me. 159, 76 A. 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). *But cf.* Big Beaver Creek Corp. v. Beaver County, 37 Pa. Super. 350 (1908) (County claimed it condemned 10,000 feet of oak lumber when it condemned a bridge. *Held,* that since the lumber was not attached to the bridge, it was not condemned).

14. 126 Eng. Rep. 151 (K.B. 1782).

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,[15] that any item, fixed or loose, could now be deemed a fixture.[16] Nevertheless, in the landmark decision of *Voorhis v. Freeman*[17] it was held that detachable rolls in a rolling mill passed with the land to a real estate mortgagee. The court noted that almost any sort of machinery, however complex in 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 that the machinery of a manufacturing plant, without which it would not be a manufacturing plant, 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 had levied upon the machinery in an iron rolling mill. The court fashioned what was to become the "Assembled Industrial Plant Doctrine," when it stated: "Whether fast or loose, therefore, all the machinery of a manufactory 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."[18] 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."[19] 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 to be a fixture passing to the real estate mortgagee.[20]

3. *Intention*

Annexation and adaptation are now said to be only circumstances bearing upon the intention of the parties, which is deemed the con-

15. *See* pp. 30–33 *infra*.

16. Walker v. Sherman, 20 Wend. 636 (N.Y. 1839).

17. 2 W. & S. 116 (Pa. 1841).

18. *Id.* at 119.

19. Commonwealth v. Haveg Indus., Inc., 411 Pa. 515, 519, 192 A.2d 376, 378 (1963).

20. *See* Annot., 41 A.L.R. 601, 608–14 (1926); Annot., 88 A.L.R. 1114, 1115–17 (1934); Annot., 99 A.L.R. 144, 145 (1935). Courts have 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 somewhere else other than on the mortgaged premises. Metropolitan Life Ins. Co. v. Kimball, 163 Ore. 31, 94 P.2d 1101 (1939); Annot., 109 A.L.R. 1424 (1937).

trolling factor in determining whether an item is a fixture.[21] 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 removable by the tenant upon the expiration of the leasehold, or, permanent improvements passing to the landlord has been the subject of much litigation. The rule is that since it is the usual intention of the tenant to remove all trade fixtures installed upon the freehold upon the expiration of the term, he generally 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.[22] On the other hand, items which if installed by a tenant, would be considered removable personal property may be deemed fixtures, if installed by an owner, since an owner's addition to his property is normally intended to be permanent.[23] The presumed intention between an industrial mortgagor and mortgagee is that all machinery of a manufacturing plant, without which the plant would not be such, is realty.[24] Conversely, it has been held that the giving of a chattel mortgage on fixtures and equipment by a real estate mortgagor indicated an intention that such items were not intended to be part of the realty.[25]

In *Murdock v. Gifford,*[26] the intention of the owner in fastening looms to the floor of a building 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 real estate. On the other hand, it was held in *Potter v. Cromwell*[27] that a portable gristmill was intended to be a permanent part of the realty. Hence,

21. Phipps v. State, 69 Misc. 295, 297, 127 N.Y.S. 260, 262 (Ct. Cl. 1910).

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

23. Tyler v. Hayward, 235 Mich. 674, 209 N.W. 801 (1926); *In re* Mayor of the City of New York, 39 App. Div. 589, 595, 57 N.Y.S. 657 (1899); Blake-McFall Co. v. Wilson, 98 Ore. 626, 193 P. 902 (1920).

In *In re* Mayor of the City of New York, the Appellate Division of the New York Supreme Court stated:

> But 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.

24. *See* pp. 469–70 *supra.*

25. Ford v. Cobb, 20 N.Y. 344 (1859).

26. 18 N.Y. 28 (1858).

27. 40 N.Y. 287 (1869).

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 "rules" created by the specific facts of each holding. The chaos referred to by the Missouri judge in 1877 remains.

II. 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 upon 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.[28]

What follows is a recapitulation of a modern fixture appraisal of two business establishments.[29] The first is a bar. The second is an industrial plant engaged in processing raw cotton into cotton felt. The economic effect upon 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 on the premises as of the date of the condemnation. The second column represents the "sound value", the "in-place value", or the "fair market value in-place" of the described items as of the date of the condemnation. This is the price which a willing and informed seller and buyer would agree on for each item as installed and being

28. The Pennsylvania Supreme Court stated in 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).

Further, the Supreme Court of New Jersey, State v. Gallant, 42 N.J. 583, 202 A.2d 401 (1964), and the United States Court of Appeals for the Second Circuit, United States v. Certain Property, 306 F.2d 439 (2d Cir. 1962), have both recognized that the economic effect of the condemnation is controlling.

29. The tables are from two condemnation cases in which the author was involved. The full text of the Appraisals, presented as exhibits to the National Research Council, are omitted from this article.

TABLE I

THE BAR

RECAPITULATION	*Cost of Reproduction New* (1)	*Value Before Taking (In-Place Value)* (2)	*Liquidation Value* (3)	*Removal and Reinstallation* (4)
1. Sink, stainless	$ 155.	$ 110.	$ 15.	$ 60.
2. Steam Table	195.	125.	10.	80.
3. Gas Stove	135.	50.	0.	50.
4. Fan, 18"	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	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.
TOTALS	$15,685.	$11,385.	$835.	$8,390.

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 that the appraiser often takes the "cost of reproduction new" figure in the first column, and then reduces it by depreciating the item for physical, economic, and functional obsolescence.[30] 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 for which the item would sell on the open market. (There is usually a market for used equipment with price quotes available.) By securing this price, and then

30. *See* United States v. Certain Property, 388 F.2d 596 (2d Cir. 1968); United States v. Becktold Co., 129 F.2d 473 (8th Cir. 1942); Mayor of Baltimore v. Himmel, 135 Md. 65, 107 A. 522 (Ct. App. 1919); Marraro v. State, 12 N.Y.2d 285, 189 N.E.2d 606, 239 N.Y.S.2d 105 (1963).

TABLE II

THE MANUFACTURING PLANT

RECAPITULATION	*Cost of Reproduction New* (1)	*Value Before Taking (In-Place Value)* (2)	*Liquidation Value* (3)	*Removal and Reinstallation* (4)
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	24,053.	14,431.	750.	14,431.
29. Mechanical Piping	763.	614.	0.	614.
TOTALS	$210,508.	$139,650.	$ 8,035.	$100,555.

determining the cost to install the item in-place, the fixture appraiser can check whether his reproduction cost approach is reasonable.[31]

31. In United States v. Certain Property, 306 F.2d 439, 448-49 (2d Cir. 1962), the court of appeals noted that the figures of the fixture appraiser purported to reflect: "present day sound market value for similar and comparable used equipment, delivered, 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. Thus the court rejected the argument that appraiser Shulman had proceeded on an erroneous theory.

The third column represents the amount of money which could be realized from a liquidation sale of the item, as is, and where it is; i.e., the cost to someone who would be willing to buy the article, and then incur the additional expense of dismantling and removing the item. The column has relevance only in determining the amount of money that could be recovered by the condemnor upon the sale of such items by it. It has no relevance to determination of the damages to which a condemnee is entitled.

The fourth column represents the reasonable cost of dismantling, moving, and reinstalling each item at 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.[32]

III. CONDEMNATION OF AN OWNER'S FIXTURES

It has long been held that items deemed "fixtures" are condemned along with the realty.[33] As is 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*,[34] the state condemned a building containing machinery, shafting, elevators, and conveyors. Judge Cardozo noted that "[t]he 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."[35] 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 secondhand articles; attached to a going plant, it may produce an enhancement of value as great

32. Chapter 5 of the Federal-Aid Highway Act of 1968, 23 U.S.C. §§ 501-11 (Supp. V, 1968), provides that the distance of the move shall be reasonable not to exceed fifty miles.

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

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

35. *Id.* at 35, 106 N.E. at 758.

> 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.[36]

Cardozo indicated, therefore, two bases for holding the items "a part of the condemned realty." First, the items would be "fixtures" between buyer and seller under the common law and would 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.[37] Thus, in the early New York case of *In re Mayor of New York*,[38] the City contended that although a large portion of the machinery used by a gas company in the condemned buildings were so affixed to the realty as to be conveyed as fixtures between buyer and seller, nonetheless, the fixtures were not condemned since they could have been "removed without such injury to the machinery itself as would practically result in its destruction for the use for which it was intended."[39] The City also suggested, strange as it may sound now, that all removal costs to a new location would be the measure of damages. The court rejected this argument, stating that it was ordinarily the intent of an owner placing improvements upon 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 stated in *In re Lincoln Square Slum Clearance Project*:[40]

> 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 con-

36. *Id.* at 35, 36, 106 N.E. at 758.

37. 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* Aloi & Goldberg, *A Re-examination of Value, Good Will and Business Loss in Eminent Domain*, 53 CORNELL L. REV. 604, 607, 614 (1968). Despite language to that 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.

38. 39 App. Div. 589, 57 N.Y.S. 657 (1899).

39. *Id.* at 593, 594, 57 N.Y.S. at 660.

40. 24 Misc. 2d 190, 201 N.Y.S.2d 443 (Sup. Ct. 1960), *aff'd*, 15 App. Div. 153, 222 N.Y.S.2d 786 (1961), 12 N.Y.2d 1086, 190 N.E.2d 423, 240 N.Y.S.2d 30 (1963).

> demnee satisfies the test by the same evidence as would be determinative against him as vendor. . . .[41]

In *Phipps v. State*,[42] the owner constructed a factory for the manufacture of fertilizer. Used in connection therewith was an engine-house in which there were a ten horse-power, double cylinder, single drum engine and a derrick. The engine rested upon a foundation of concrete, four and one-half feet thick, sunk into the earth, and connected by six three-quarter-inch bolts four feet six inches 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, and the lower end of the derrick 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, and, like the building could not be removed *except with such depreciation in value as would amount to an appropriation of the property without just compensation.*[43]

In *Kansas City Southern Railway Co. v. Anderson*,[44] a plant manufacturing finished lumber and mill products was condemned. The plant was built solely for the purpose of housing the machinery, which was securely fastened to the building. The owner intended to continue in business at the plant 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, "[t]he rules that are to guide us in reaching a conclusion . . . are not in dispute, and are practically

41. 24 Misc. 2d at 196, 201 N.Y.S.2d at 452.

42. 69 Misc. 295, 127 N.Y.S. 260 (Ct. Cl. 1910).

43. *Id.* at 300, 127 N.Y.S. at 264 (emphasis added). 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.

44. 88 Ark. 129, 113 S.W. 1030 (1908).

universal throughout the United States. It is in the application of these tests that conflicts are found in the decisions of the courts."[45]

In *White v. Cincinnati,*[46] a paper mill was condemned. Machinery in the buildings, used in the manufacture of paper, included: six boilers, sixteen feet long and sixty to seventy-two inches in diameter, each on a separate brick foundation made especially for that purpose; three engines of eighteen, eighty, and three-hundred horse power; refining engines and suction pumps; a rotary boiler sixteen feet long; other machines, one weighing forty to fifty 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 that this instruction was erroneous, since it made the manner of annexation the controlling test, rather than giving "united application" to the three requisites. In *In re Post Office in Borough of The Bronx,*[47] 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 had 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 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. . . .[48]

45. Los Angeles v. Klinker, 219 Cal. 198, 205, 25 P. 826, 829 (1933).

46. 34 Ind. App. 287, 71 N.E. 276 (1904).

47. 210 F. 832 (2d Cir. 1914).

48. *Id.* at 834.

Without otherwise indicating why such machinery would have passed between buyer and seller, the court then held that "though not without some doubt, that the award rightly treated the machinery as fixtures for which the United States should pay."[49] In *Los Angeles v. Klinker*,[50] 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 eighty to one-hundred and forty-seven 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; that it 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 upon 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 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.[51]

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*,[52] the 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

49. *Id.* at 835.
50. 219 Cal. 198, 25 P.2d 826 (1933).
51. *Id.* at 210, 25 P.2d at 831.
52. 300 S.W.2d 444 (Mo. 1957).

> 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 weigh 10,000 to 12,000 pounds. Hoisting and conveying apparatus is suspended from heavy timbers installed in the ceilings for that purpose.[53]

Without any evidence regarding the economic effect upon the machinery upon removal, 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 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 upon the machinery. No testimony was introduced concerning the possibility, or cost, of removing and reinstalling the equipment elsewhere.[54] On the other hand, it has been held that if the item "is not a fixture, it does not go with the land."[55]

If "it does not go with the land", not only is the condemnee not entitled to be paid "in-place value",[56] it is generally held that the cost of removal of the items,[57] must be borne by the condemnee.[58]

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53. *Id.* at 447.

54. For additional cases in which the courts held 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* Wilmington Housing Authority v. Parcel of Land, 219 A.2d 148 (Del. 1966); State v. Allen, 135 So. 2d 350 (La. 1961); State v. Peterson, 134 Mont. 52, 328 P.2d 617 (1958); *In re* East River Drive, Borough of Manhattan, 159 Misc. 74, 289 N.Y.S. 433 (Sup. Ct. 1936); Schreibman v. State, 31 Misc. 2d 392, 223 N.Y.S.2d 670 (Ct. Cl. 1961); Sunnybrook Realty Co. v. State, 15 Misc. 2d 739, 182 N.Y.S.2d 983 (Ct. Cl. 1959) (underground gasoline tanks); State v. Papanikolas, 19 Utah 2d 153, 427 P.2d 749 (1967) (machinery to prefabricate houses).

55. 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* Futrovsky v. United States, 66 F.2d 215 (D.C. Cir. 1933) (refrigeration equipment used with a meat business held not compensable because no evidence established that its removal would cause injury either to the realty or the fixtures); United States v. Certain Land, 69 F. Supp. 815 (S.D.N.Y. 1947) (items that could be removed, but were not because it was uneconomical to do so, were held personal property and not compensable); *In re* Oakland Street, 13 App. Div. 2d 668, 213 N.Y.S.2d 973 (1961) (fence, signs, wiring and gratings held not fixtures); Williams v. State Highway Comm'n, 252 N.C. 141, 113 S.E.2d 263 (1960) (stock in trade).

56. *See* tables, pp. 473–74 *supra*, col. 2.

57. *Id.* at col. 4.

58. Kansas City S. Ry. Co. v. Anderson, 88 Ark. 129, 113 S.W. 1030 (1908); La Mesa v. Tweed & Gambrell Planning Mill, 146 Cal. App. 2d 762, 304 P.2d 803 (1956); State v. Hansen, 80 Idaho 201, 327 P.2d 366 (1958); American Salvage Co. v. Housing Authority of Newark, 14 N.J. 271, 102 A.2d 465 (Sup. Ct. 1954); Port

Evidence of the cost of removal is generally held inadmissible for any purpose, being irrelevant to the damage occurring to the condemned realty.[59] 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 regarding the economic effect of the condemnation. By so doing, the courts have used rules developed to resolve matters of status in property, in order 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 involved in these cases is economic, and have begun to fashion rules of law accordingly.

In *Gottus v. Allegheny County Redevelopment Authority*,[60] the condemnees conducted a retail cleaning business on the condemned

of New York Authority v. Howell, 59 N.J. Super. 343, 157 A.2d 731 (Super. Ct. App. Div. 1960), *aff'd*, 68 N.J. Super. 559, 173 A.2d 310 (1961); *In re* Appropriation for Highway Purposes, 167 Ohio St. 463, 150 N.E.2d 30 (1958); State v. Superbilt Mfg. Co., 204 Ore. 393, 281 P.2d 707 (1955); Becker v. Philadelphia & Reading Terminal R.R. Co., 177 Pa. 252, 35 A. 617 (1896); State v. Vaughan, 319 S.W.2d 349 (Tex. 1958); Utah Road Comm'n v. Hansen, 14 Utah 2d 305, 383 P.2d 917 (1963). *See also* ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 69, p. 306 (2d ed. 1953); Annot., 69 A.L.R.2d 1453 (1939). A few New York cases have suggested that even if the items in question are not deemed fixtures and therefore appropriated, the cost of their removal, 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, 205 N.Y.S. 911 (1925), the lower court awarded damages to machinery and fixtures "not appropriated." The state appealed from the award, but did not review the propriety of this award. *Cf.* note 32 *supra*. In Glen & Mohawk Milk Assoc. 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, In re* Lincoln Square Slum Clearance Project, 24 Misc. 2d 206, 198 N.Y.S.2d 260 (Sup. Ct. 1960), *aff'd*, 15 App. Div. 2d 153, 222 N.Y.S.2d 786 (1961).

59. State v. Superbilt Mfg. Co., 204 Ore. 393, 281 P.2d 707 (1955); Becker v. Philadelphia & Reading Terminal R.R. Co., 177 Pa. 252, 35 A. 617 (1896). There are a few cases to the contrary. Del Vecchio 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); Mackie v. Miller, 5 Mich. App. 591, 147 N.W.2d 424 (1967). *See also* ORGEL, *supra* note 58, at 311.

60. 425 Pa. 584, 229 A.2d 869 (1967). *Gottus* preceded Singer v. Oil City Redevelopment, 437 Pa. 55, 261 A.2d 594 (1970). In *Singer* the condemnee owned a grocery store in which were installed forty-one items traditionally used in such a store: *i.e.*, dairy cases, display units, counters, walk-in cooler, meat and produce cases, etc. The in-place value of such items was stipulated to be $26,175; their fair market value removed, $3,320; and the cost of removal transportation and reinstallation elsewhere, $17,725. The condemnee testified that he did not relocate his business elsewhere; that he sold most of the equipment to others; that such equipment was removed; and that the equipment could have all been located elsewhere in order to do business. The Supreme Court of Pennsylvania, in fashioning a new doctrine to determine when fixtures are condemned as part of the realty, held that the forty-one items were not so condemned. The court first abolished the distinction between industrial and other business establishments in determining whether machinery and equipment were condemned as part of the realty. It held that an "Assembled Economic Unit Doctrine" applies for all business condemnees. The doctrine is as follows:

1. [W]hen such a portion of the assembled economic unit is not removable from the condemned property that that which is so removable will not constitute a comparable economic unit in a new location, then *all* machinery, equipment and fixtures, whether loose or attached, which are vital to the economic unit

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 latter 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 equipment 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 could be considered in determining the value of the condemned real estate. The

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and a permanent installation therein, will be considered a part of the realty under the Assembled Economic Unit Doctrine, so as to entitle the condemnee to compensation therefor under §§ 601, 602 and 603(3).

Id. at 66–67.

2. [W]here all or most of the machinery, equipment and fixtures of the economic unit are removable without significant injury to them, such that the economic unit is susceptible of continuance, as a comparable economic unit, in a new location, *only* those items of machinery, equipment and fixtures *not removable* from the condemned structure are to be considered a part of the realty taken by the condemnor.

Id. at 65–66.

3. [W]hen the nature of the business requires a unique building for its operation, such that no other building within a reasonable distance is adaptable to the functioning of this business, then the condemned building, itself, will be considered an essential part of any meaningful economic unit in this industry. In this situation, even though all or most of the machinery, equipment and fixtures are removable, since no new site is available, condemnee cannot maintain his economic position by relocating. Therefore, *all machinery,* equipment and fixtures which are vital to the economic unit and a permanent installation therein will be considered a part of the real estate of the condemned property under the Assembled Economic Unit Doctrine.

Id. at 67.

The court held, therefore, that the doctrine did not apply to *Singer,* since almost "all of the forty-one items of machinery, equipment and fixtures were removable and capable of being adapted and reinstalled in another location as a comparable unit." *Id.* at 68. It also there stated that in the absence of any evidence showing no other building within a reasonable distance in which the condemnee's business could have been reestablished, even those items specially constructed to conform to the condemned realty, but nonetheless susceptible to removal and reinstallation elsewhere, would not be considered as being within the Assembled Economic Unit Doctrine.

The court has placed particular emphasis on removability. If machinery is removable without significant injury, *Singer* appears to require that it *must* be removed. The test, therefore, of whether fixtures are part of the condemned realty, is whether they are removable elsewhere so as to be an economic unit at the new location. This holding and rationale has a distinctly familiar ring. *See* Teaff v. Hewitt, 1 Ohio St. 511, 529–30 (1853). *Singer,* by again introducing the concept of removability as being determinative of whether items are condemned, does not appear designed to resolve the basic problems presented.

Supreme Court of Pennsylvania affirmed. It recognized that in eminent domain cases, the underlying issue as to whether items are fixtures is "mainly economic."[61] After quoting from Judge Cardozo's opinion in *Jackson v. State,* the court stated that:

> 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.[62]

In *State v. Gallant,*[63] the condemnee installed twelve looms in the condemned realty in 1917, and used them therein until 1961, when the property was condemned. One of the looms was nine feet long, several were fifteen feet long, and four were eighteen feet long. Their average weight was 8,000 pounds. They were attached to a central power unit by a shaft and belt system and were bolted to the floor with three inch 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, dismantling and reassembling, plus transportation costs would be $39,600. The trial court held that the looms were not fixtures under *Teaff v. Hewitt,*[64] and consequently, being personal property, no moving costs were recoverable. The Supreme Court of New Jersey reversed. It first asked "whether the concept of just compensation . . . may require that condemnee receive an award for their looms. We believe it may. . . ."[65] It then stated that the question of whether the condemnee should be compensated for the looms does not depend on their being fixtures in other contexts of the law. The court said that:

> 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.[66]

61. 425 Pa. at 588, 229 A.2d at 872.
62. *Id.* at 589, 229 A.2d at 872 (emphasis added).
63. 42 N.J. 583, 202 A.2d 401 (1964).
64. 1 Ohio St. 511 (1893).
65. 42 N.J. at 589, 202 A.2d at 404.
66. 42 N.J. at 590, 202 A.2d at 405.

In *United States v. Certain Property, etc.*,[67] 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 finding the building to be an encumbrance on the land warranting demolition. The trial court, therefore, found the building to be antiquated and obsolete as a newspaper plant. 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 apparently held the items taken because they were used for business purposes; because they would lose substantially all of their value after severance even though their removal would not damage the realty; and because 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'* ".[68]

In *Wilmington Housing Authority v. Parcel of Land*,[69] the Supreme Court of Delaware, after holding that the test of whether items are fixtures depends upon 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."[70]

The above 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 whether 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.[71] The cases

67. 306 F.2d 439, 446 (2d Cir. 1962).
68. *Id.* at 448 (emphasis added).
69. 219 A.2d 148 (Del. 1966).
70. *Id.* at 153.
71. As stated more elegantly by Judge Lehman in *In re* Allen Street & First Avenue, 256 N.Y. 236, 244-45, 176 N.E. 377, 380 (1931):

> Question 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

cited indicate a growing judicial recognition that the dominant issue in eminent domain cases is who bears the economic consequences of the condemnation. An effort, therefore, is being made to introduce evidence bearing upon this issue. Instead of "annexation", "intent" and "adaptability" being controlling, the controlling factor now becomes the difference between the in-place value and the removal and reinstallation expenses. (These amounts are listed in columns 2 and 4, respectively, in the charts at pages 473-474 *supra*). If the difference is "substantial," the courts of New York, Pennsylvania, New Jersey, and Delaware now appear to hold that the items are "fixtures" and condemned. Consequently, in such a case, the condemnee would be paid the in-place value. 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,"[72] 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'."[73]

It should be noted that in all of the above cases, the supreme court of each 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 & Co.*[74] would (and for reasons hereinafter noted should) occur even under the test suggested above. In *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

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?

72. United States v. Certain Property, 306 F.2d 439, 448 (2d Cir. 1962).

73. *Id.* at 448. In December 1969, section 608 of the Pennsylvania Eminent Domain Code was amended so that "in-place" damages were recoverable for fixtures when they "cannot be moved without substantially destroying its value." PA. STAT. tit. 26, § 1-608 (1964) (*as amended* 1969).

74. 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).

and was easily movable. It was argued that the in-place value should be paid 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. The court reversed the award, stating that:

> 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.[75]

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 for having been condemned. What is being suggested here is not a repudiation of 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 for this approach. First, to have the courts now repudiate their virtually unanimous holdings that mere personal property is not condemned would be a judicial reversal of great proportion, with little likelihood of occurrence. There were compelling reasons why the courts refused to hold that personal property was condemned.[76] Whether any change in such policy should now occur is beyond the scope of this paper.[77] Second, the concept of "intent to make a permanent installation" is not being discarded, but merely implemented by easily understood facts; *i.e.,* the in-place value and removal and reinstallation expense figures. These figures, 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 *In re Slum Clearance, City of Detroit,*[78] the condemnee was in the business of electrolytic plating of tin

75. 219 App. Div. at 288, 219 N.Y.S. at 744.
76. *See* ORGEL, *supra* note 58, at §§ 69, 70.
77. It should be noted that those states that have statutorily provided for payment of the removal costs of personal property have either imposed dollar limits or provided that in no event shall such expenses exceed the market value of such property. *See, e.g.,* PA. STAT. tit. 26, § 1-610 (1964); WIS. STAT. ANN. § 32.19(2) (1964) ($2,000).
78. 332 Mich. 485, 52 N.W.2d 195 (1952).

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 *In re Civic Center in City of Detroit,*[79] the Supreme Court of Michigan 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 supreme court upheld the refusal of the lower court to consider these removal costs. It stated that:

> 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.[80]

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 little or no doubt as to their legal status, can physically be located elsewhere, and if so, the cost of such relocation. 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.

IV. 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 there be a determination of whether the tenant's fixtures were condemned as part of the realty, but also of whether the landlord or the tenant is entitled to recover.

79. 335 Mich. 528, 56 N.W.2d 375 (emphasis added).

80. 335 Mich. at 537–38, 56 N.W.2d at 376 (emphasis added). *Cf.*, however, State v. Fevers, 228 Ore. 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 that:

> 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.

Id. at 282, 365 P.2d at 101. Hence, beds, coffee tables, etc., were not real property and condemned.

Under the common law, all improvements to the freehold inured to the benefit of the fee holder.[81] 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.[82] 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. . . ."[83] Since 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.[84]

Between landlord and tenant, therefore, trade fixtures are deemed to be the "personal property" of the tenant.[85] If the fixtures had been installed by the owner, however, traditional concepts 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 the above issues, with resultant confusion and disorder.

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81. *See* pp. 468–72 *infra*.

82. 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 Mfg. Co., 204 Ore. 393, 281 P.2d 707 (1955).

83. *In re* Mayor of the City of New York, 39 App. Div. 589, 594, 57 N.Y.S. 657, 660 (1899).

84. Handler v. Horns, 2 N.J. 18, 24, 25, 65 A.2d 523, 526 (1949).

85. *In re* City of New York, 192 N.Y. 295, 301, 84 N.E. 1105, 1107 (1908), the court stated:

> As between 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.

A. 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[86] or by operation of law,[87] 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 against the landlord for condemnation damages for such fixtures.[88]

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86. State v. State Highway Comm'n, 411 S.W.2d 174 (Mo. 1967) (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). *See also* Select Lake City Theatre Operating Co. v. Central Nat'l Bank, 277 F.2d 814 (7th Cir. 1960) (lessee theatre 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 for damages for such items); Beverly Hills v. Albright, 184 Cal. App. 2d 562, 7 Cal. Rptr. 706 (1960) (held that the tenant had assigned to lessor all condemnation damages for trade fixtures. The lease read "[L]essee hereby assigns to lessor his rights to any and all damages for property taken in such proceeding and all such damages shall be payable to lessor." No mention of trade fixtures was otherwise made); Bodnar Industries, Inc. v. State, 19 Misc. 2d 720, 187 N.Y.S.2d 359 (Ct. Cl. 1959); Marfil Properties v. State, 9 Misc. 2d 878, 168 N.Y.S.2d 234 (Ct. Cl. 1957) (the improvements were held relevant, however, to the value of the unexpired leasehold); Jones v. Gonzales, 344 S.W.2d 745 (Tex. 1961). *Cf.* Jones v. New Haven Redevelopment Agency, 21 Conn. Supp. 140, 146 A.2d 921 (1958) (clause terminating the leasehold did not bar tenant from asserting claim for trade fixtures). *Accord,* Roffman v. Wilmington Housing Authority, 179 A.2d 99 (Del. 1962); *In re* John C. Lodge Highway, 340 Mich. 254, 65 N.W.2d 820 (1954).

In United States v. Certain Parcels of Land, 250 F. Supp. 255, 257 (E.D. Pa. 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, 306 F.2d 439 (2d Cir. 1962); *In re* Howard Laundry Co., 203 F. 445, 447 (2d Cir. 1913); Corrigan v. Chicago, 144 Ill. 537, 33 N.E. 746 (1893) (tenant erected building under a lease which provided that upon the expiration of the lease the building belonged to the landlord); 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 only the gas pumps and tanks as business fixtures, as they occupied "a different status" and compensation was permitted); *In re* Triborough Bridge, 249 App. Div. 579, 293 N.Y.S. 223 (1937), *aff'd,* 274 N.Y. 581, 10 N.E.2d 561, 293 N.Y.S. 219 (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. The court held tenant not entitled to award for such improvements).

87. United States v. Certain Lands, 120 F.2d 561 (7th Cir. 1941) (failure of tenant to remove buildings prior to expiration of term barred right to do so); *In re* Horace Harding Expressway, 4 App. Div. 2d 683, 164 N.Y.S.2d 389 (1957) (in the absence of any reservation of title in the tenant, the building belonged to the owner who is entitled to an award for its taking). For additional cases, *see* Annot., 3 A.L.R.2d 286, 305 (1948). *See also* St. Louis v. Nelson, 108 Mo. App. 210, 83 S.W. 271 (1904).

88. United States v. Seagren, 50 F.2d 333 (D.C. Cir. 1931), Annot., 75 A.L.R. 1495 (1931); People v. Klopstock, 24 Cal. App. 2d 897, 151 P.2d 641 (1944); *In re* Wilcox, 165 App. Div. 197, 151 N.Y.S. 141 (1914); *In re* 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); Antonowsky v. State, 14 Misc. 2d 689, 180 N.Y.S.2d 966 (Ct. Cl. 1958); Queensboro Farm Prods. v. State, 6 Misc. 2d 445, 161 N.Y.S.2d 989 (Ct. Cl. 1956), *aff'd,* 11 Misc. 2d 363, 171 N.Y.S.2d 646 (Sup. Ct. 1958); State v. DeLay, 114 Ohio L. Abs. 2d 272, 181 N.E.2d 706 (1959); Hopper v. Davidson County, 206 Tenn. 393, 333 S.W.2d 917 (1960) (where tenant had an express reservation of title in trade fixtures, the right of removal is a necessary implication thereof). *See also* Annot., 3 A.L.R.2d 286, 302 (1948).

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.[89] The distinction between trade fixtures belonging to the tenant and fixtures "distinctively realty", and therefore belonging to the landlord, is also "anything but bright."[90] Since 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.[91]

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.

B. Were The Improvements Condemned?

A much more serious problem involves 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 one 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 question then becomes "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 the condemnor has taken, but what has the condemnee lost?[92] By so

89. Marraro v. State, 12 N.Y.2d 285, 239 N.Y.S.2d 105, 189 N.E.2d 606 (1963); *In re* Seward Park Slum Clearance Project, 10 App. Div. 2d 498, 200 N.Y.S.2d 802 (1960); *In re* 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); *In re* Delancey Street, 120 App. Div. 700, 105 N.Y.S. 779 (1907).

90. United States v. Certain Property, 344 F.2d 142, 146 (2d Cir. 1965).

91. Antonowsky v. State, 14 Misc. 2d 689, 180 N.Y.S.2d 966 (Ct. Cl. 1958); *In re* 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). In *Century Holding* 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 (2d Cir. 1965), 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."

92. Beverly Hills v. Albright, 184 Cal. App. 2d 562, 7 Cal. Rptr. 706 (1960), illustrates the confusion of the court in applying these various doctrines.

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,[93] *all* courts hold that unless the tenant has this right, the improvements belong to the lessor. Clauses eliminating the leasehold become controlling under the second approach, while courts holding the matter to be a question of what the condemnor has taken, deem such clauses irrelevant.[94]

1. What has the condemnor taken?

In *In re Allen Street & First Avenue*,[95] 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 upon 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 the condemnation.[96] 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 which 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 he had bargained away, and the possibility of renewal, were held to be irrelevant. It stated:

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93. *See* notes 86 & 87 *supra* and accompanying text.

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

95. 256 N.Y. 236, 176 N.E. 377 (1931).

96. 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. *In re* 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* Matter of Willcox, 165 App. Div. 197, 151 N.Y.S. 141 (1914); *In re* Water Front On North River, 192 N.Y. 295, 84 N.E. 1105 (1908); *In re* Avenue A, 66 Misc. 488, 122 N.Y.S. 321 (Sup. Ct. 1910).

> 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.[97]

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* 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 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.' "[98] The difficulties with this test are apparent. The items must be "enough" realty so as to become condemned as a part thereof, but not

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97. 256 N.Y. 236, 248, 176 N.E. 377, 381. *Accord,* Burkhart v. United States, 227 F.2d 659 (9th Cir. 1955); United States v. Seagren, 50 F.2d 333 (D.C. Cir. 1931); Gilbert v. State, 85 Ariz. 321, 338 P.2d 787 (1959); People v. Klopstock, 24 Cal. 2d 897, 151 P.2d 641 (1944); Roffman v. Wilmington Housing Authority, 179 A.2d 99 (Del. 1962); Tinnerholm v. State, 15 Misc. 311, 179 N.Y.S.2d 582 (Ct. Cl. 1958); Queensboro Farm Prods. v. State, 6 Misc. 2d 445, 161 N.Y.S.2d 989 (Ct. Cl. 1956), *aff'd,* 11 Misc. 2d 363, 171 N.Y.S.2d 647 (Sup. Ct. 1958); State v. Delay, 87 Ohio L. Abs. 449, 181 N.E.2d 706 (1959).

In *Klopstock* and *Gilbert* 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 property into personal property. P. NICHOLS, THE LAW OF EMINENT DOMAIN § 581(2) (3d ed. 1950):

> 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 condenming 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.

98. 256 N.Y. 236, 240, 176 N.E. 377, 380 (1931).

so much as to become "distinctively realty".[99] On the other hand, if the items are deemed personal property, they are not condemned at all.[100]

If they are not condemned, the tenant is not entitled to their cost of removal.[101]

The case law indicates that the courts have had at least as much difficulty establishing when a tenant's fixtures are part of the realty, as they have had in making such a determination for an owner. In the leading case of *In re Whitlock Avenue*,[102] 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,[103] or concerning which

99. *See* United States v. Certain Property, 306 F.2d 439, 445 (2d Cir. 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 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 (2d Cir. 1965).

100. Belinsky v. State, 24 App. Div. 908, 264 N.Y.S.2d 401 (1965); Rossi v. State, 31 Misc. 2d 205, 223 N.Y.S.2d 139 (1961); Bodnar Indus., Inc. v. State, 19 Misc. 2d 720, 187 N.Y.S.2d 359 (Ct. Cl. 1959); Antonowsky v. State, 14 Misc. 689, 180 N.Y.S.2d 966 (Ct. Cl. 1958); *In re* Whitlock Avenue, 278 N.Y. 276, 16 N.E.2d 281 (1938); *In re* Fulton Street, 225 App. Div. 855, 7 N.Y.S.2d 391 (1938).

101. *See* Annot., 3 A.L.R.2d 312 (1948).

102. 278 N.Y. 276, 16 N.E.2d 281 (1938). Pennsylvania, by amending section 608 of its Eminent Domain Code in December 1969, has solved by statute many of the problems here discussed. That section enables a tenant to recover in-place damages of its fixtures if they cannot be moved without substantially destroying their value. PA. STAT. ANN. tit. 26, § 1-608 (1969).

103. The inconsistency of the rules is apparent. In order 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. In order for the tenant to recover against the condemnor, the fixtures must be such as *would* cause material injury to the freehold.

there may be other evidence of an installation of a permanent nature, should be held to constitute a fixture."[104] On the other hand, it has been easy for the courts to hold that buildings,[105] diners,[106] outdoor advertising signs,[107] and machinery installed in a building especially constructed for it[108] 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.[109] 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 *In re North River Water Front*,[110] a tenant installed machinery which was built into the building or constructed upon foundations built into the ground, and connected with shafting which was itself connected with either steam or water pipes. Some of the machinery could have been removed without serious injury to the freehold. The court stated that "it would be manifestly unjust to treat such property as 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.*"[111] It went on to state that "as to such personal property as can be readily removed and *would have a substantial value discon-*

104. *Id.* at 283. In *In re* Fulton Street, 255 App. Div. 855, 7 N.Y.S.2d 391 (1938), Bodnar Indus., Inc. v. State, 19 Misc. 2d 720, 187 N.Y.S.2d 359 (Ct. Cl. 1959), and Belinsky v. State, 24 App. Div. 908, 264 N.Y.S.2d 401 (1965), the courts, citing *Whitlock*, and without further analysis, denied the tenant's 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 were deemed condemned fixtures.

105. United States v. Seagren, 50 F.2d 333 (D.C. Cir. 1931).

106. Tinnerholm v. State, 15 Misc. 2d 311, 179 N.Y.S.2d 582 (Ct. Cl. 1958).

107. Buffalo v. Michael, 16 N.Y.2d 88, 209 N.E.2d 776, 262 N.Y.S.2d 441 (1965); Rochester Poster Advertising Co. v. State, 27 Misc. 2d 99, 213 N.Y.S.2d 819 (App. Div. 1961); George F. Stein Brewery, Inc. v. State, 200 Misc. 424, 103 N.Y.S.2d 946 (Ct. Cl. 1951).

108. *In re* Lincoln Square Slum Clearance Project, 24 Misc. 2d 190, 201 N.Y.S.2d 443 (Sup. Ct. 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).

109. In Schreibman v. State, 31 Misc. 2d 392, 400–01, 223 N.Y.S.2d 670, 679 (Ct. Cl. 1961), the court found that:

> the following equipment was permanently attached to the realty . . . elevators, feed elevator, and hoist, heating cables, all thermostats except those in the egg room, switches, fans, shutters, roosts. 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 value 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 value separate and apart from the buildings.

110. 118 App. Div. 865, 103 N.Y.S. 908 (1907), *aff'd*, 189 N.Y. 508, 81 N.E. 1162 (1907).

111. *Id.* at 866–67, 103 N.Y.S. at 909 (emphasis added).

nected from the building this rule would not apply. . . ."[112] Notwithstanding the early understanding by this New York Court of the crucial importance of the economic effect of the condemnation upon the fixtures, it is only recently that New York courts have clearly and broadly applied this rule in behalf of tenant-condemnees.[113]

In *In re Seward Park Slum Clearance Project,*[114] 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. . . ."[115]

In *Marraro v. State of New York,*[116] 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."[117] It, therefore, sustained an award for such connections on behalf of the tenant.[118]

In *In re Brooklyn Bridge Southwest Urban Renewal Project,*[119] 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 bolts, skids, platforms, belts, controls, and similar equipment were not part of the realty and therefore not condemned. The court stated that "[t]he 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."[120]

In *In re Brooklyn Bridge Southwest Urban Renewal Project,*[121] a distinct though similarly entitled case, the city admitted that the special electric wiring, plumbing, water lines, and ductwork of tenants'

112. *Id.* at 867, 103 N.Y.S. at 909 (emphasis added).
113. *See* note 99 *supra.*
114. 10 App. Div. 2d 498, 200 N.Y.S.2d 802 (1960).
115. *Id.* at 500, 200 N.Y.S.2d at 804.
116. 12 N.Y.2d 285, 189 N.E.2d 606 (1963).
117. *Id.* at 296–97, 189 N.E.2d 612–13.
118. *Accord,* Morganthal v. State of New York, 15 App. Div. 2d 712, 223 N.Y.S.2d 558 (1962).
119. 51 Misc. 2d 1005, 274 N.Y.S.2d 724 (Sup. Ct. 1966).
120. *Id.* at 1007, 274 N.Y.S.2d at 726 (emphasis added).
121. 51 Misc. 2d 1008, 274 N.Y.S.2d 719 (Sup. Ct. 1966).

air-conditioning systems were compensable, but contested an allowance for the units themselves and their water towers. 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 fall 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.[122]

Applying this test it found that the water towers were fixtures, since they were affixed to the roof, burdened with heavy moving expenses, and subject to rust and corrosion. "[T]he 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."[123] The air-conditioning units, however, ranging in size from two to twenty tons, easily movable elsewhere, were held not compensable unless it was shown that each 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 of layout, size, type of structure, exposure to sun, ingress, egress, etc."[124]

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.[125]

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122. *Id.* at 1009, 274 N.Y.S.2d at 721–22.

123. *Id.* at 1010, 274 N.Y.S.2d at 722.

124. *Id.* at 1011, 274 N.Y.S.2d at 723.

125. *See also In re* Tompkins Square Urban Renewal Project, 27 App. Div. 2d 810, 278 N.Y.S.2d 33 (1967). The in-place value of installed machinery was stipulated to be $47,722. After severance, and before any allowance for dismantling, removal and reassembly, the value of the machinery was $9,466. "[T]he city thus does not challenge the . . . contention that the sound value of the item, if severed, would be nominal or nil. . . ." *Id.* at 812 N.Y.S.2d at 35. The court held the items to be condemned fixtures. The dissent stated:

> 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 consider-

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.

2. What has the condemnee lost?

Those courts that adopt a rule of law that seeks to determine not what the condemnor has taken, but instead what the condemnee has lost, arrive at a very dramatic distance from the results just observed.[126] To these courts, the issue is not a question of property law, but rather a determination of what the result between landlord and tenant would have been 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, since 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. . . ."[127]

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able 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.

Id. at 814, 278 N.Y.S.2d at 38. One is reminded of the words of Judge Cardozo in Jackson v. State, 213 N.Y. 34, 35, 106 N.E. 758 (1914):

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. . . .

126. How dramatic the result can be is seen in Southern California Fisherman's Ass'n v. United States, 174 F.2d 739 (9th Cir. 1949), where the court adopted both theories in the same case. The tenant erected improvements removable on thirty day notice. After the notice was given, but before the 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 damages 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 thirty days.

Appellants' position that because the Government did in fact receive both land and improvements and should therefore compensate for land 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).

127. Consolidated Ice Co. v. Pennsylvania R.R., 224 Pa. 487, 494, 73 A. 937, 939 (1909). *See also* Korengold v. Minneapolis, 254 Minn. 358, 95 N.W.2d 112 (1959); Baltimore v. Gamse & Bros., 132 Md. 290, 104 A. 429 (1918); Emery v. Boston Terminal Co., 178 Mass. 172, 59 N.E. 763 (1901); Metropolitan West Side Elevated R.R. Co. v. Siegel, 161 Ill. 638, 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

If the fixtures were not condemned, how were they considered in determining the lessee's damages? As was stated in *Consolidated Ice Co. v. Pennsylvania R.R.*:[128]

> 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 payable 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.[129]

In arriving at the fair market value of the fixtures, however, since 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 Automobile Co. v. Pittsburgh*:[130]

> [I]f 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 his 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.[131]

Merely to state this rule is to expose its difficulty of practical application. If a lessee under a ninety-nine 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 property however, was condemned in the ninety-seventh year of the lease, the removal and depreciation cost of the machinery and fixtures would bear no

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them as against the landlord. United States v. 1.357 Acres of Land, 308 F.2d 200 (7th Cir. 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). 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. *See* notes 83, 86 & 87 *supra* and accompanying text.

128. 224 Pa. 487 (1909).

129. *Id.* at 494. *Accord,* United States v. 1.357 Acres of Land, 308 F.2d 200 (7th Cir. 1962); United States v. 425,031 Square Feet of Land, 187 F.2d 798 (3d Cir. 1951); United States v. Certain Parcels of Land, 250 F. Supp. 255 (E.D. Pa. 1966); People v. Auman, 100 Cal. App. 2d 262, 223 P.2d 260 (1950); Minneapolis St.-Paul Metropolitan Airports Comm'n v. Hedberg-Friedheim Co., 226 Minn. 282, 32 N.W.2d 569 (1948); *see also* Annot., 3 A.L.R.2d 315, 317 (1949).

130. 253 Pa. 478, 98 A. 679 (1916).

131. *Id.* at 486, 98 A. at 685.

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 occurs, however, 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.[132] Here, the question is: When a condemnation clause terminated the leasehold, was the removal and depreciation costs of a tenant's trade fixtures recoverable by the tenant? The answer generally has been no.[133]

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,*[134] a condemnation clause terminated a lease which gave the tenant the right to remove tenant-installed improvements in 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.[135]

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 development of having the term abruptly ended by operation of a condemnation clause. The economic consequences to the tenant due to governmental action are therefore, borne by the tenant, even though these consequences were not bargained for by him. In short, the condemnor is securing the benefit of a lease clause inserted into the lease to protect the landlord in *its* claim

132. The purpose being to prevent the tenant from carving his claim for a remaining unexpired leasehold from the owner's claim for the condemnation of the freehold.

133. State v. Chun, 91 Ariz. 317, 372 P.2d 324 (1962). *See also* United States v. 1.357 Acres of Land, 308 F.2d 200 (7th Cir. 1962); United States v. Certain Parcels of Land, 250 F. Supp. 225 (E.D. Pa. 1966); People *ex rel.* Dep't of Public Works v. Rice, 185 Cal. App. 2d 207, 8 Cal. Rptr. 76 (1960); Beverly Hills v. Albright, 184 Cal. App. 2d 562, 7 Cal. Rptr. 706 (1960); Williams v. State Highway Comm'n, 252 N.C. 141, 113 S.E.2d 263 (1960); Annot., 34 A.L.R. 1523 (1923); Annot., 3 A.L.R.2d 312 (1949). Removal costs of personal property, of course, are held not relevant to leasehold value, or compensable directly. *See* Williams v. State Highway Comm'n, *supra. Cf.* Southern California Fisherman's Ass'n v. United States, 174 F.2d 739 (9th Cir. 1949); State v. Pahl, 257 Minn. 177, 100 N.W.2d 724 (1960).

134. 308 F.2d 200 (7th Cir. 1962).

135. *Id.* at 203. *See also* Emery v. Boston Terminal Co., 178 Mass. 172, 59 N.E. 763 (1901).

against the condemnor. There seems little justification for such benefit inuring to the condemnor.[136]

V. MEASURE OF DAMAGES: ENHANCEMENT OF VALUE AND THE UNIT RULE

A. Fee Owner

The above 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 that the fixtures, under the test suggested, do form part of the condemned realty, what is the condemnee to be paid for them?

1. The Unit Rule

The question involved here is whether the condemnee can 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 evidence thereof is not to be admitted.[137] This is the so-called unit rule test which has strong verbal support in the cases.[138] Nevertheless, it has been stated:

> . . . it is to be observed that reasoned analyses of the theoretical arguments for and against separate valuation of land and im-

136. As was stated in United States v. Certain Property, 388 F.2d 596, 601–02 (2d Cir. 1967):

> 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 landlords. 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 bargain 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, 176 N.E. at 381: "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." (Footnote included in brackets.)

137. For a collection of the cases, *see* Annot., 1 A.L.R.2d 878 (1948). Notwithstanding this rule, as indicated at Annot., 1 A.L.R.2d at 902–03, there are scores of cases in which the court, in fact, did separately assess the damage to land, buildings, and improvements.

138. *See* Annot., 1 A.L.R.2d 878 (1948).

> provements 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.[139]

Thus, in *United States v. New York*,[140] Judge Learned Hand stated:

> 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.[141]

In this case the issue was whether separately owned improvements located on fifty-three 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.[142] Nor does the real estate appraiser, in the accepted practice of his profession, value such items separately.[143] With fixtures and improvements, however, it is possible not only to separate the improvements for valuation purposes, but, as we have seen, such practice is commonly accepted in the appraisal profession. As Judge Hand stated:

> 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.[144]

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139. *Id.*
140. 165 F.2d 526 (2d Cir. 1948).
141. *Id.* at 528.
142. Nor, generally, does the separate value of growing crops, trees, shrubs, etc., add up to the overall value of the land. Saathoff v. State Highway Comm'n, 146 Kan. 465, 72 P.2d 74 (1937). *See also* Annot., 1 A.L.R.2d 887 (1948).
143. In most jurisdictions, a separate reproduction cost value of buildings, less depreciation, is permitted. *In re* Blackwell's Island Bridge Approach, 198 N.Y. 84, 91 N.E. 278 (1910); 2 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN §§ 188–99 (2d ed. 1953); *see, e.g.*, PA. STAT. ANN. tit. 26, § 1–705(2)(iv) (Supp. 1970).
144. 165 F.2d at 528.

2. Enhancement of Value

Assuming that the separate value of the improvements can be paid to the condemnee, and evidence thereof is 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?[145] 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:*[146]

> 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.[147]

Hence, in *Mayor of Baltimore v. Himmel,*[148] 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."[149] The Court of Appeals of Maryland held the charge to be error, since it enabled the jury to value each item of equipment separately, and to add each separate item to its award. The court found that the charge should have been: ". . . and the jury are instructed to award the owners the present fair market value of the land taken, as enhanced by the buildings and fixtures thereon."[150] 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

145. *Cf.* note 136 *supra.*
146. 134 Mont. 52, 328 P.2d 617 (1958).
147. *Id.* at 64, 328 P.2d at 624.
148. 135 Md. 65, 107 A. 522 (1919).
149. *Id.* at 73, 107 A. at 525.
150. *Id.* at 135, 107 A. at 526. This is the generally accepted charge in most jurisdictions. Allen v. Boston, 137 Mass. 319, 320 (1884); Jackson v. State, 213 N.Y. 34, 106 N.E. 758 (1914). The condemnee, in *Mayor of Baltimore,* requested the judge to charge that in addition to the value of the building, the petitioners were entitled to recover the value of the fixtures taken with the building. This request was denied. The court did charge, that 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. *See* United States v. Certain Land, 69 F. Supp. 815 (S.D.N.Y. 1947); Dep't of Public Works v. Lotta, 27 Ill. 2d 455, 189 N.E.2d 238 (1963); Chicago v. Farwell, 286 Ill. 415, 121 N.E. 795 (1918); Commonwealth v. Stamper, 345 S.W.2d 640 (Ky. 1961). 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 (2d Cir. 1962) (owner), however, the necessity of condemnee to establish the enhancement requirement was pointedly ignored. In the latter case, it was admitted that the building detracted from the value of the land. Nonetheless, the condemnee was held to be entitled to the in-place value of condemned fixtures because they would lose substantially all of their in-place value upon severance.

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 overall determination of the condemned property, which will be the summation of the two appraisals. For example, in *State v. Dockery,*[151] 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, that:

> 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 . . . [b]ut 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.[152]

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 overall value of the condemned property. The procedure would be administratively similar to that permitted in *Peoria, B. & C. Traction Co. v. Vance:*[153]

> The trees were a part of the land, and the value of the land necessarily included the trees. . . . The witnesses testified 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. . . .[154]

Similarly, in *State v. Gallant,*[155] 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.[156]

151. 300 S.W.2d 444 (Mo. 1957).
152. *Id.* at 451.
153. 234 Ill. 36, 84 N.E. 607 (1908).
154. *Id.* at 38–39, 84 N.E. at 608.
155. 42 N.J. 583, 202 A. 401 (1964).
156. *Id.* at 590, 202 A. at 405. 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 169 *infra,* for a similar conclusion by the United States Court of Appeals for the Second Circuit regarding

B. Tenant

As already noted, the courts have disagreed as to whether, and 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 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, since the test merely determines the extent to which the removal costs of the fixtures enhanced the remaining unexpired leasehold.[157] 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 *In re Allen Street & First Avenue,*[158] 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. . . ."[159] It was not until 1963 that the Court of Appeals of New York was faced with the implications of that holding. In *Marraro v. State,*[160] 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 since 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 Appeals of New York, after reciting the language of Judge Hand in *United States v. City of New York,*[161] held that the unit rule was inapplicable, stating:

> A case like the present, with a large building peopled by different tenants with individual trade fixtures, differs from a single factory

a tenant's fixtures. The New Jersey court, after discussing the constitutional obligation of the condemnor to pay just compensation, then stated:

> 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 . . . [B]efore condemnation the looms were an integral and valuable part of a going business housed in [condemnee's] 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. . . . [*T*]*he injustice of non-compensation . . . is obvious.*

Id. at 404–05 (emphasis added).

157. *See* notes 128 & 129 *supra* and accompanying text.
158. 256 N.Y. 236, 176 N.E. 377 (1931).
159. *Id.* at 249, 176 N.E. at 382.
160. 12 N.Y.2d 285, 189 N.E.2d 606 (1963).
161. 165 F.2d 526 (2d Cir. 1948).

> or warehouse where it is entirely appropriate that the machinery should be valued according to its enhancement of the value of the building.[162]

Having disposed of the unit rule, it then described the measure of damages: "the rule of reproduction cost less depreciation is seemingly suited to the purpose. . . ."[163] The United States Court of Appeals for the Second Circuit has similarly adopted the holding in *Marraro* as applying to federal government condemnation of real estate located in New York State.[164] In a later case,[165] the Government again argued 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:

> 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. . . .[166]

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,[167] 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.[168] However, the holdings of the Court of Appeals of New York and the United States Court of Appeals 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 con-

162. 12 N.Y.2d at 296, 189 N.E.2d at 612.
163. *Id.*
164. United States v. Certain Property, 306 F.2d 439 (2d Cir. 1962).
165. United States v. Certain Property, 344 F.2d 142 (2d Cir. 1965).
166. *Id.* at 146.
167. *See* pp. 491–97 *supra.*
168. *See* People v. Klopstock, 24 Cal. 2d 897, 151 P.2d 641 (1944); Jones v. New Haven Redevelopment Agency, 21 Conn. Supp. 141, 146 A.2d 921 (1958); Roffman v. Wilmington Housing Authority, 179 A.2d 99 (Del. 1962); Kansas City v. National Eng'r and Mfg. Co., 274 S.W.2d 490 (Mo. 1955). *Cf.* United States v. Seagren, 50 F.2d 333 (D.C. Cir. 1931); State v. Olsen, 76 Nev. 176, 351 P.2d 186 (1960); Buffalo v. Michael, 16 N.Y.2d 88, 209 N.E.2d 776, 262 N.Y.S.2d 441 (1965); Bruno v. State, 24 App. Div. 2d 681, 261 N.Y.S.2d 592 (1965); Kelder v. State, 22 App. Div. 2d 999, 254 N.Y.S.2d 895 (1964); George's Bake Shop, Inc. v. State, 21 App. Div. 2d 423, 251 N.Y.S.2d 385 (1964); and *In re* Brooklyn Bridge S.W. Urban Renewal Project, 51 Misc. 2d 1005, 274 N.Y.S.2d 724 (Sup. Ct. 1966), all of which follow *Marraro.*

demned real estate, and regardless of the unit rule. This result will be easily administered, 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.[169]

VI. 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 of 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 upon 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 of whether a tenant's fixtures have been condemned should also be whether the fixtures will lose substantially all of their in-place value upon 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 has been enhanced in value, since both of these rules are inapplicable in a tenant case.

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169. There is recent authority that the result here suggested is constitutionally mandated. In United States v. Certain Property, 344 F.2d 142, 146 (2d Cir. 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.