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under the peculiar fact situation of each new case whether a particular spectator's claim is foreseeable or not.³¹

Underlying the *Dillon* decision there appears to be an additional factor contributing to the finding for the plaintiff. It should be obvious that Mrs. Dillon would not have been permitted to recover if her daughter had not been killed or otherwise seriously injured. Since the cause of the harm to the plaintiff was from shock at the apprehension of an injury to another, it would not be reasonable to permit a plaintiff to recover if the injury threatened or incurred by the victim was only slight or superficial. Indeed, there is authority advancing this argument as a basis for denying recovery.³² Therefore, to the three criteria advanced in *Dillon* this fourth one should be added when considering future cases.³³

JAMES JULIUS WINN, JR.

EFFECT OF LEASE TERM UPON RATE OF DEPRECIATION IN TRADE FIXTURE CONDEMNATION AWARDS

When the government seeks to condemn rented commercial real estate, the necessary eminent domain proceedings present very complex legal and evaluation problems.¹ Disputes frequently arise as to the nature and amount of compensation due a business tenant for his

³¹We are not now called upon to decide whether, in the absence or reduced weight of some of the above factors [set out in note 29 *supra*], we would conclude that the accident and injury were not reasonably foreseeable and that therefore defendant owed no duty of due care to plaintiff. In future cases the courts will draw lines of demarcation upon facts more subtle than the compelling ones alleged in the complaint before us.

Id. at 921, 69 Cal. Rptr. at 81.

³²*Edwards v. Miranne*, 11 So. 2d 271 (La. Ct. App. 1942) (recovery denied to husband suing for mental distress where injury to his wife was slight); see *Williamson v. Bennett*, 251 N.C. 498, 112 S.E.2d 48 (1960); W. PROSSER, TORTS § 55 (3d ed. 1964).

³³Prosser suggests that the serious injury to the victim need be only threatened, but case authority seems to indicate that the injury must have in fact occurred. Compare W. PROSSER, TORTS § 55 at 354 (3d ed. 1964) with *Edwards v. Miranne*, 11 So. 2d 271, 272 (La. Ct. App. 1942).

¹See generally Horgan, *Some Legal and Appraisal Considerations in Leasehold Valuation (Under Eminent Domain)*, 5 HASTINGS L.J. 34 (1963); Kizer, *Valuation of Leasehold Estates in Eminent Domain*, 67 W. VA. L. REV. 101 (1965); Polasky, *The Condemnation of Leasehold Interests*, 48 VA. L. REV. 477 (1962).

trade fixtures.² In general, a trade fixture is a chattel annexed to realty by a lessee to further the trade or commercial purposes for which the premises were rented.³ Since the removal of trade fixtures often result in their destruction, severe damage or substantial loss of market value, such losses are usually compensable.⁴ Where trade fixtures have an economic life extending beyond the term of a leasehold, a serious question is raised as to the proper depreciation rate to be used in computing compensation for condemnation. See Figure 1, page 79.

Recently in *United States v. Certain Property, Borough of Manhattan*,⁵ the Court of Appeals for the Second Circuit established a new rule for valuation of removable trade fixtures on leased premises subject to condemnation proceedings. The Government sought to take a certain parcel of land for use as a United States Post Office site. Situated on the land were several buildings with thirteen business concerns as tenants, all on short-term leases without renewal options. Seven leaseholds had expired prior to the taking, four expired within six months thereafter and two expired nineteen months after the taking. Condemnation commissioners awarded compensation for trade fixtures to the several tenants on the following basis:

²See generally Sackman, *Fixtures in Condemnation*, SW. LEGAL FOUNDATION 6TH ANN. INST. ON EMINENT DOMAIN 1 (1964); Note, *Compensation for a Lessee's Trade Fixtures in Condemnation Proceedings*, 1966 WIS. L. REV. 1215.

³Trade fixtures are a special class of fixtures generally removable by a tenant at any time during his lease since they have not been sufficiently annexed or attached to have become merged in the realty through the doctrine of accession. *State Highway Comm'n v. Superbilt Mfg. Co.*, 204 Ore. 393, 281 P.2d 707 (1955). In New York the test is removability without material damage to the freehold and severe damage of the article itself or loss of substantially all of its value on severance. *United States v. Certain Property, Etc.*, 306 F.2d 439 (2d Cir. 1962); *Marraro v. State*, 12 N.Y.2d 285, 189 N.E.2d 606, 239 N.Y.S.2d 105 (1963). In New Jersey a trade fixture is any chattel annexed for a trade purpose. *Handler v. Horns*, 2 N.J. 18, 65 A.2d 523 (1949). See BLACK'S LAW DICTIONARY 766 (4th ed. 1951).

⁴See *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *United States v. Certain Property, Etc.*, 344 F.2d 142 (2d Cir. 1965); *United States v. Certain Property, Etc.*, 306 F.2d 439 (2d Cir. 1962); *United States v. Bobinski*, 244 F.2d 299 (2d Cir. 1957); *United States v. Bechtold Co.*, 129 F.2d 473 (8th Cir. 1942); *Marraro v. State*, 12 N.Y.2d 285, 189 N.E.2d 606, 239 N.Y.S.2d 105 (1963); *In re Whitlock Ave.*, 278 N.Y. 276, 16 N.E.2d 281 (1938); *In re Allen St. & First Ave.*, 256 N.Y. 236, 176 N.E. 377 (1931); *Jackson v. State*, 213 N.Y. 34, 106 N.E. 758 (1914); *In re Seward Park Slum Clearance Project*, 10 App. Div. 2d 498, 200 N.Y.S.2d 802 (1960).

⁵388 F.2d 596 (2d Cir. 1968). Other recent Second Circuit eminent domain cases of confusing similarity in style are cited in footnotes to this comment. When any of these cases are encountered, confusion can be minimized by a comparison of full citations.

TRADE FIXTURE DEPRECIATION METHODS

in *United States v. Certain Property, Borough of Manhattan*, 388 F.2d 596 (2d Cir. 1968).

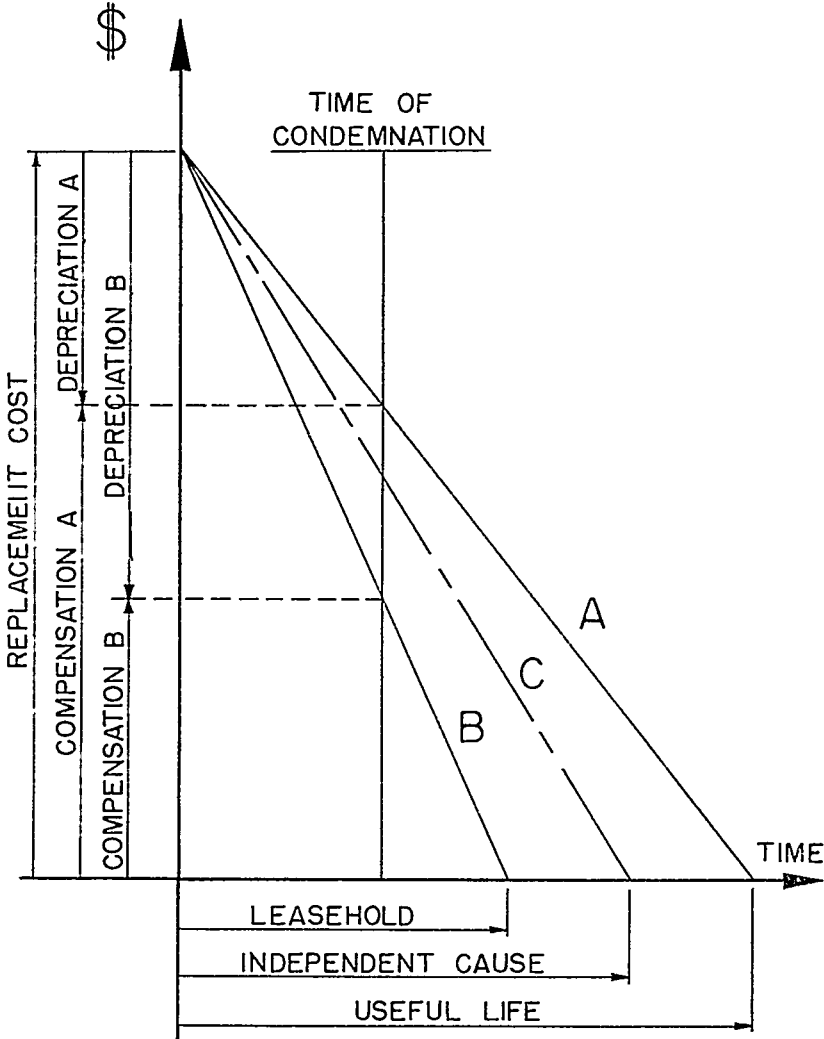


FIGURE I

Compensation equals (Replacement Cost⁶ less Accrued Straight Line Depreciation⁷ over Useful Life⁸) minus (Resale Value after Removal) plus (Disassembly and Reassembly Costs)⁹

The district court confirmed these awards.¹⁰ The Government appealed asserting that, in the case of short-term leases without renewal options, it is unreasonable for a lessee to expect to derive benefit from his fixtures beyond the term of his lease since he has no legal assurance of remaining on the premises;¹¹ and therefore, the compensation for trade fixtures should be calculated using a depreciation rate determined by the length of the current lease. A majority of a three judge panel agreed with the Government's contentions and held that, as a matter of law for trade fixture compensation, a reasonable depreciation rate is that fixed by the length of the lease when the tenant is unable to show an enforceable right to remain longer.¹² See Curve B, Figure I, page 79. The minority judge noted that more than half of these very tenants were at the time of the taking hold-

⁶In eminent domain cases replacement cost generally is used interchangeably with reproduction cost and is synonymous with current cost or value of similar property on the open market.

⁷Straight line depreciation is the simplest and most widely used form of depreciation. Total loss in value is spread uniformly over the entire period of depreciation. E. GRANT & W. IRESON, *PRINCIPLES OF ENGINEERING ECONOMY* 168 (4th ed. 1960); H. GUTHMAN & H. DOUGALL, *CORPORATE FINANCIAL POLICY* 488 (3d ed. 1955); P. SAMUELSON, *ECONOMICS* 101 (4th ed. 1958); G. SMITH, *ENGINEERING ECONOMY* 210 (1968).

⁸In eminent domain cases useful life is used interchangeably with service life to mean the period of time within which an item has value as determined by considerations of deterioration from age and use and of functional obsolescence.

⁹In the words of the court:

The commissioners arrived at compensation allowances by starting with the "new value" of the fixtures; from that valuation depreciation on a twenty year straight line basis was first deducted and then, from that remainder, there was deducted "what a willing buyer would pay a willing seller" for the fixtures after their removal "and after allowing for the cost of disassembly and reassembly."

388 F.2d at 598.

¹⁰These awards were confirmed in an unreported memorandum opinion of July 1, 1965 of the same court involving the same case as *United States v. Certain Property in Borough of Manhattan*, 225 F. Supp. 498 (S.D.N.Y. 1963). The unreported memorandum opinion adopted the recommendations of condemnation commissioners appointed to implement the findings in the earlier reported and cited opinion.

¹¹The Government also appealed on the issue of whether it should be required to compensate for fixtures that were excepted in the declaration of taking. The court held: "The Government cannot deny compensation for fixtures by simply writing an exception into the declaration of taking excluding from compensation property which is in fact taken." 388 F.2d at 598, *citing as authority* *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

¹²388 F.2d at 598-99.

over tenants continuing to derive benefits from their trade fixtures beyond the expiration of their leases.

The tenants then petitioned the court of appeals for a rehearing en banc. The court rejected the holding of the panel and ruled that depreciation should be computed from the useful life of trade fixtures without consideration of lease length. It reasoned that "[r]esort to depreciated cost in the evaluation of tenants' fixture claims is simply a means to an end;"¹³ namely, just compensation, which it had viewed in earlier trade fixture cases as "what a purchaser would pay for [fixtures] for use in the premises being condemned."¹⁴ It found that this purchase price would be no "more than the current cost of comparable new fixtures less an appropriate allowance for deterioration from use and obsolescence."¹⁵ The court concluded that such an allowance is the same as depreciation at a rate determined by useful life and, as such, is unrelated to lease length. See Curve A, Figure I, page 79.

Findings in a related case¹⁶ involving the fee owners of the same realty raised the possibility that even if condemnation proceedings had not ensued, these particular lessees might have been forced to vacate their premises because of alleged plans by the landlords to raze some or all of the buildings. Taking notice of that case, the court recognized that in such a situation "because of a factor altogether independent of the condemnation, the tenant could not reasonably expect either to continue in possession throughout the useful life of the fixtures or to sell them at an earlier date to the landlord or a successor for use *in situ*."¹⁷ To prevent a windfall of excessive compensation, an alternative schedule of depreciation accelerated from useful life to the time of an independent cause was provided. See Curve C, Figure I, page 79. The opinion makes it clear, however, that to justify compensation under an accelerated depreciation rate the condemnor must successfully sustain the burden of showing both the existence of some cause completely independent of condemnation and that this independent cause would reasonably reduce the tenant's ability to benefit from the entire useful life of his fixture. But the court emphasizes that the mere fact that there is a short-term lease without a renewal option or that there is an occupancy in hold-over status

¹³*Id.* at 600.

¹⁴United States v. Certain Property, Etc. 306 F.2d 439, 448 (2d Cir. 1962).

¹⁵388 F.2d at 600.

¹⁶United States v. Certain Property, Borough of Manhattan, 374 F.2d 138 (2d Cir. 1967).

¹⁷388 F.2d at 602.

alone, without other objective evidence of reasonable knowledge by the lessee that he could expect no further benefits from his trade fixtures beyond the current lease term, is not sufficient to warrant use of an accelerated depreciation rate.¹⁸

The right of a business tenant to receive compensation for the loss of his trade fixtures in a public taking of his leasehold interest has long been recognized in American law.¹⁹ It generally has been held that, while a tenant may not recover for mere personalty unattached to the realty,²⁰ he is entitled to compensation for the destruction, damage, and depreciation of his fixtures as caused by the taking of his leasehold.²¹ The fact that a lessee is free to remove his fixtures at any time during the term,²² absent agreement to the contrary or absent substantial injury to the premises,²³ does not deny his right to compensation when they are in fact taken or moved under an impending taking. A right to trade fixture compensation is also recognized even where the tenancy is at will²⁴ or in mere hold-over status.²⁵ Although a condemnation clause in the lease acts to cut off a tenant's claim for loss of the unexpired portion of his leasehold, it is ineffective as to

¹⁸Two judges dissented with one pointing out the possibility of another form of windfall. He argued that absent condemnation a lessee unwilling or, in fact, unable to extend his occupancy by lease renewal or holding-over, would rarely obtain from a purchaser a sales price reflecting a depreciation rate over the useful life of a fixture. 388 F.2d at 602. The other dissent indicated that the lease term cannot be disregarded since it is "quite clear that fixtures owned by a tenant under a lease with twenty years to run are worth more than fixtures belonging to a tenant who has no lease." *Id.* at 603.

¹⁹*In re Water Front*, 192 N.Y. 295, 84 N.E. 1105 (1908); *In re Appointment of Park Comm'rs*, 17 N.Y.S.R. 371, 1 N.Y.S. 763 (Super. Ct. 1888).

²⁰*Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668 (1923); *Foster v. United States*, 145 F.2d 873 (8th Cir. 1944); *Kansas City S. Ry. v. Second Street Improvement Co.*, 256 Mo. 386, 166 S.W. 296 (1914); *Marraro v. State*, 12 N.Y.2d 285, 189 N.E.2d 606, 239 N.Y.S.2d 105 (1963); *In re Whitlock Ave.*, 278 N.Y. 276, 16 N.E.2d 281 (1938).

²¹*United States v. General Motors Corp.*, 323 U.S. 373 (1945); *United States v. Bobinski*, 244 F.2d 299 (2d Cir. 1957); *United States v. Certain Parcels of Land, Etc.*, 102 F. Supp. 854 (S.D.N.Y. 1952); *Marraro v. State*, 12 N.Y.2d 285, 189 N.E.2d 606, 239 N.Y.S.2d 105 (1963).

²²*United States v. City of New York*, 165 F.2d 526 (2d Cir. 1948); *United States v. Block*, 160 F.2d 604 (9th Cir. 1947); *United States v. Seagren*, 50 F.2d 333 (D.C. Cir. 1931); *People v. Ganahl Lumber Co.*, 10 Cal. 2d 501, 75 P.2d 1067 (1938); *In re Allen St. & First Ave.*, 256 N.Y. 236, 176 N.E. 377 (1931).

²³*Corrigan v. City of Chicago*, 144 Ill. 537, 33 N.E. 746 (1893); *In re Allen St. & First Ave.*, 256 N.Y. 236, 176 N.E. 377 (1931); *In re Seward Park Slum Clearance Project*, 10 App. Div. 2d 498, 200 N.Y.S.2d 802 (1960).

²⁴*In re Gratiot Ave.*, 294 Mich. 569, 293 N.W. 755 (1940); *In re Seward Park Slum Clearance Project*, 10 App. Div. 2d 498, 200 N.Y.S.2d 802 (1960).

²⁵*Finney v. City of St. Louis*, 39 Mo. 177 (1866).

trade fixtures.²⁶ Thus, a tenant "retains the right to compensation for his interest in any annexations to the real property which, but for [condemnation], he would have had the right to remove at the end of his lease."²⁷

The traditional and most widely used method for valuation of condemned real estate with trade fixtures is the so called "unit rule."²⁸ The rule requires a determination of the market value of the premises as a whole, inclusive of all fixtures and improvements.²⁹ Each tenant who owns trade fixtures is then entitled to share with the landlord in the total award by an amount equal to that contributed to the overall market value of his fixtures.³⁰ Under this rule the value of fixtures and of the unexpired term of the leasehold are not viewed separately but are merged by following the "undivided fee"³¹ concept,

²⁶*United States v. Seagren*, 50 F.2d 333 (D.C. Cir. 1931); *Roffman v. Wilmington Housing Authority*, 179 A.2d 99 (Del. 1962); *Marraro v. State*, 12 N.Y.2d 285, 189 N.E.2d 606, 239 N.Y.S.2d 105 (1963); *In re Allen St. & First Ave.*, 256 N.Y. 236, 176 N.E. 377 (1931); *Gristede Bros. v. State*, 11 App. Div. 2d 580, 200 N.Y.S.2d 755 (1960).

²⁷*In re Allen St. & First Ave.*, 256 N.Y. 236, 243, 176 N.E. 377, 379 (1931).

²⁸*A. W. Duckett & Co. v. United States*, 266 U.S. 149 (1924); *Meadows v. United States*, 144 F.2d 751 (4th Cir. 1944); *United States v. Beckettold Co.*, 129 F.2d 473 (8th Cir. 1942); *United States v. Seagren*, 50 F.2d 333 (D.C. Cir. 1931); *City of Los Angeles v. Hughes*, 202 Cal. 731, 262 P. 737 (1928); *El Monte School Dist. v. Wilkins*, 177 Cal. App. 2d 47, 1 Cal. Rptr. 715 (Dist. Ct. App. 1960); *In re Allen St. & First Ave.*, 256 N.Y. 236, 176 N.E. 377 (1931); *Stanpark Realty Corp. v. City of Norfolk*, 199 Va. 716, 101 S.E.2d 527 (1958).

²⁹*United States v. Beckettold Co.*, 129 F.2d 473 (8th Cir. 1942); *Pause v. City of Atlanta*, 98 Ga. 92, 26 S.E. 489 (1896); *Brackett v. Commonwealth*, 223 Mass. 119, 111 N.E. 1036 (1916); *Tinnerholm v. State*, 15 Misc. 2d 311, 179 N.Y.S.2d 582 (Ct. Cl. 1958). *See also* *Marraro v. State*, 12 N.Y.2d 285, 189 N.E.2d 606, 239 N.Y.S.2d 105 (1963) (rejecting the "unit rule" as to trade fixtures of a lessee but describing its operation).

³⁰*See generally* *Marraro v. State*, 12 N.Y.2d 285, 189 N.E.2d 606, 239 N.Y.S.2d 105 (1963) which rejects the "unit rule" as to trade fixtures of a lessee but describes its operation.

³¹The "undivided fee" concept is used in evaluation of condemned land subject to claims of multiple ownership. The realty is appraised as if in single ownership to establish an absolute maximum award for the parcel. This award is then apportioned among the several claimants in accord with their proportionate interests. *See* *Eagle Lake Improvement Co. v. United States*, 160 F.2d 182 (5th Cir. 1947); *Mayor v. United States*, 147 F.2d 786 (4th Cir. 1945); *Lambert v. Griffin*, 257 Ill. 152, 100 N.E. 496 (1912); *Commercial Delivery Serv. v. Medema*, 7 Ill. App. 2d 419, 129 N.E.2d 579 (1955); *New Jersey Highway Authority v. J. & F. Holding Co.*, 40 N.J. Super. 309, 12 A.2d 25 (Super. Ct. 1956); *In re Allen St. & First Ave.*, 256 N.Y. 236, 176 N.E. 377 (1931); *Pomeroy v. State*, 18 Misc. 2d 377, 191 N.Y.S.2d 84 (Ct. Cl. 1959); *Sowers v. Schaeffer*, 155 Ohio St. 454, 99 N.E.2d 313 (1951); *Moulton v. George*, 208 Tenn. 586, 348 S.W.2d 129 (1961); *Stanpark Realty Corp. v. City of Norfolk*, 199 Va. 716, 101 S.E.2d 527 (1958). Only in rare cases where the sum of the values of the separate interests exceeded the unencumbered fee value have the courts allowed separate valuation and compensation. *Mayor of Balti-*

used in valuing estates of more than one person in land itself.

Typically, in an eminent domain proceeding governed by the "unit rule," the entire premises including all fixtures are appraised and a market value is estimated without regard to lease arrangements or ownership of fixtures.³² The amount so derived is the total condemnation award.³³ Next occurs computation of the market value of a particular tenant's leasehold as enhanced by the presence of his trade fixtures.³⁴ The ratio of the latter market value to the former determines the particular tenant's prorated share of the condemnation award.³⁵

Since World War II there has been evidence of judicial doubt as to the adequacy of the "unit rule" to cover all situations and of the growth of a judicial feeling that its universal use may lead to inequities.³⁶ Where fixtures are custom built or are of unique design or configuration, it may be almost impossible to show their market value much less their contribution to the market value of the premises as a whole. In 1945 the United States Supreme Court, commenting upon the use of market value in a trade fixture compensation case,

more v. Latrobe, 101 Md. 621, 61 A. 203 (1905). See also *City of St. Louis v. Rassi*, 333 Mo. 1092, 64 S.W.2d 600 (1933). In rented real estate the landlord receives compensation for his reversionary interest in the fee. *E.g.*, *United States v. Delaware, L. & W. R.R.*, 264 F.2d 112 (3d Cir. 1959); *In re Gratiot Ave.*, 204 Mich. 569, 293 N.W. 755 (1940); *In re Delancey St.*, 120 App. Div. 700, 105 N.Y.S. 779 (1907). The tenant is compensated for the loss of his leasehold. *E.g.*, *A. W. Duckett & Co. v. United States*, 266 U.S. 149 (1924); *City of Los Angeles v. Hughes*, 202 Cal. 731, 262 P. 737 (1927); *In re Triborough Bridge Approach*, 159 Misc. 617, 288 N.Y.S. 697 (Sup. Ct. 1936).

³²See *Kinter v. United States*, 156 F.2d 5 (3d Cir. 1946); *United States v. Certain Parcels of Land*, 149 F.2d 81 (5th Cir. 1945); *United States v. Seagren*, 50 F.2d 333 (D.C. Cir. 1931); *City of Los Angeles v. Klinker*, 219 Cal. 198, 25 P.2d 826 (1933); *Pause v. City of Atlanta*, 98 Ga. 92, 26 S.E. 489 (1896); *Harmen v. Iowa State Highway Comm'n*, 251 Iowa 1351, 105 N.W.2d 660 (1960); *In re Allen St. & First Ave.*, 256 N.Y. 236, 176 N.E. 377 (1931); *Jackson v. State*, 213 N.Y. 34, 106 N.E. 758 (1914); *Tinnerholm v. State*, 15 Misc. 2d 311, 179 N.Y.S.2d 582 (Ct. Cl. 1953); *State v. Carpenter*, 126 Tex. 604, 89 S.W.2d 194 (1936); *Stanpark Realty Corp. v. City of Norfolk*, 199 Va. 716, 101 S.E.2d 527 (1958). See generally *Marraro v. State*, 12 N.Y.2d 285, 189 N.E.2d 606, 239 N.Y.S.2d 105 (1963) (rejecting the "unit rule" as to trade fixtures of a lessee but describing its operation); *Sowers v. Shaeffer*, 155 Ohio St. 454, 99 N.E.2d 313 (1951).

³³Cases cited note 32 *supra*.

³⁴Cases cited note 32 *supra*.

³⁵Cases cited note 32 *supra*.

³⁶*United States v. General Motors Corp.*, 323 U.S. 373 (1945); *United States v. Certain Property, Etc.*, 344 F.2d 142 (2d Cir. 1965); *United States v. Certain Property, Etc.*, 306 F.2d 439 (2d Cir. 1962); *United States v. City of New York*, 165 F.2d 526 (2d Cir. 1948); *Marraro v. State*, 12 N.Y.2d 285, 189 N.E.2d 606, 239 N.Y.S.2d 105 (1963).

recognized this problem in *United States v. General Motors Corp.*³⁷ "In some cases this criterion cannot be used either because the interest condemned has no market value or because, in the circumstances, market value furnishes an inappropriate measure of actual value."³⁸ In *General Motors* the condemnee received compensation for his trade fixtures and, in addition, compensation for the value of the loss of his right of occupancy under the lease. Thus, the "unit rule" idea of compensation for the leasehold value, enhanced by the value of the lessee's fixtures, was clearly disregarded.³⁹

Marraro v. State,⁴⁰ a 1963 New York case, specifically rejected the "unit rule" for use in trade fixture cases involving rented premises except in those instances where the fixtures are an integral part of or are functionally necessary to the operation of the condemned realty. The primary reason for this rejection was the almost hopelessly complicated task of evaluating the enhancement of the overall value of a large multi-tenant facility by any single tenant's fixtures. In the words of the court, "It would impose an intolerable burden upon a small store or shop owner to prove how much his shop enhanced the value of a very large and expensive building."⁴¹ Since New York is considered to be the jurisdiction with the greatest experience in eminent domain and to have the most highly developed law of condemnation,⁴² it is probable that other states will likewise abandon the "unit rule" in compensating for trade fixtures on leased land they condemn.

In the instances where unit valuation has been adjudged inappropriate, New York and some federal courts have adopted an alternative approach known as separate valuation.⁴³ Separate valuation is simply

³⁷323 U.S. 373 (1945).

³⁸*Id.* at 379.

³⁹Several years later Judge Learned Hand specifically questioned whether the unit rule has universal application by stating "[I]t is an undue simplification to extract from the books any 'Unit Rule' whatever, in the sense of general authoritative directions . . . [A]s different situations have arisen, the courts have dealt with them as the specific fact demanded." *United States v. City of New York*, 165 F.2d 526, 528 (2d Cir. 1948).

⁴⁰12 N.Y.2d 285, 189 N.E.2d 606, 239 N.Y.S.2d 105 (1963).

⁴¹*Marraro v. State*, 12 N.Y.2d 285, 292, 189 N.E.2d 606, 610, 239 N.Y.S.2d 105, 109 (1963) (quoting opinion of lower court).

⁴²*Sackman, Fixtures in Condemnation*, SW. LEGAL FOUNDATION 6TH ANN. INST. ON EMINENT DOMAIN 1, 2 (1964).

⁴³*United States v. General Motors Corp.*, 323 U.S. 373 (1945); *United States v. Certain Property, Borough of Manhattan*, 388 F.2d 596 (2d Cir. 1968); *United States v. Certain Property, Etc.*, 344 F.2d 142 (2d Cir. 1965); *United States v. Certain Property, Etc.*, 306 F.2d 439 (2d Cir. 1962); *United States v. City of New York*, 165 F.2d 526 (2d Cir. 1948); *United States v. Block*, 160, F.2d 604 (9th Cir. 1947); *Marraro v. State*, 12 N.Y.2d 285, 189 N.E.2d 606, 239 N.Y.S.2d 105 (1963).

a determination of the sound value of a trade fixture "as used equipment in place."⁴⁴ The valuation and its consequent award is for a particular lessee's trade fixtures alone; it is made in addition to any compensation for the leasehold interest itself and is completely unconnected to the value of other tenants' fixtures and leasehold interests.⁴⁵ The reasoning in cases using separate valuation is that "the appropriate measure of the value of . . . fixtures is what a purchaser would pay for them for use in the premises being condemned"⁴⁶ and that this, in turn, can be computed by deducting a reasonable depreciation from the replacement cost.⁴⁷ This yields the sound value or present worth at the time of condemnation. Specifically, separate valuation cases hold that:

The courts should not be concerned that valuation on this basis may produce a figure larger than what might be paid for the building, with all the fixtures in place, by a single purchaser who might not be interested in many of them; each owner, landlord or tenant, is entitled to the value of what the Government took from him.⁴⁸

By focusing on the loss to the individual tenant, the separate valuation approach more closely meets the Supreme Court's concept of just compensation than does the "unit rule."

Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.⁴⁹

The critical portion of the separate valuation is the rate of depreciation, which is determined by the period of time over which depreciation occurs. Compare Curves A and B, Figure I, page 79. The length of the depreciation period was the central issue of *United States v. Certain Property, Borough of Manhattan*. Until the principal case no court seems to have addressed itself to the question of what constitutes a reasonable depreciation rate in terms of lease length for trade fixture compensation. Since the "unit rule" focuses upon trade

⁴⁴*United States v. Certain Property, Etc.*, 306 F.2d 439, 453 (2d Cir. 1962).

⁴⁵*Marraro v. State*, 12 N.Y.2d 285, 189 N.E.2d 606, 239 N.Y.S.2d 105 (1963).

⁴⁶*United States v. Certain Property, Etc.*, 306 F.2d 439, 448 (2d Cir. 1962).

⁴⁷*United States v. General Motors Corp.*, 323 U.S. 373 (1945); *United States v. Certain Property, Etc.*, 344 F.2d 142 (2d Cir. 1965); *United States v. Certain Property, Etc.*, 306 F.2d 439 (2d Cir. 1962); *United States v. City of New York*, 165 F.2d 526 (2d Cir. 1948); *Marraro v. State*, 12 N.Y.2d 285, 189 N.E.2d 606, 239 N.Y.S.2d 105 (1963).

⁴⁸*United States v. Certain Property, Etc.*, 306 F.2d 439, 453 (2d Cir. 1962).

⁴⁹*United States v. Miller*, 317 U.S. 369, 373 (1943) (footnotes omitted).

fixture enhancement of the value of estates in land rather than on the value of a fixture itself, depreciation is of little or no importance; consequently, courts deciding cases under the "unit rule" have given questions of depreciation little consideration.

The separate valuation cases of the past appear to have approved depreciation accrued over useful life⁵⁰ without considering the relevancy of the lease length. That this was the effect actually achieved by these courts can hardly be doubted since they employed depreciation based upon age, wear out periods, and obsolescence⁵¹—the determinants of useful life. One justification for this is that useful life is an objective standard,⁵² while a depreciation rate fixed by lease length involves speculation as to the tenant's detriment at the hands of the condemnor.⁵³

United States v. Certain Property, Borough of Manhattan, held that the proper rate of depreciation for trade fixture compensation is that fixed by useful life without regard to the length of any lease. But the court recognized the possibility that a "factor altogether independent of the condemnation"⁵⁴ might have intervened in the absence of condemnation and that this independent cause could have prevented the tenant from receiving benefit of the full useful life of his trade fixture. The court said that in such instances an alternative schedule of depreciation based on the time of the independent cause should be used to prevent a windfall to the tenant who would not otherwise have realized benefit of that useful life. However, the court made it clear that to justify the lessened compensation under such an accelerat-

⁵⁰See *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *United States v. Certain Property, Etc.*, 344 F.2d 142 (2d Cir. 1965); *United States v. Certain Property, Etc.*, 306 F.2d 439 (2d Cir. 1962); *United States v. City of New York*, 165 F.2d 526 (2d Cir. 1948); *Marraro v. State*, 12 N.Y.2d 285, 189 N.E.2d 606, 239 N.Y.S.2d 105 (1963). See also BLACK'S LAW DICTIONARY 528 (4th ed. 1951).

⁵¹See cases cited note 50 *supra*.

⁵²The most widely accepted concept of depreciation is "loss . . . in value, arising from age, use, and improvements, due to better methods." BLACK'S LAW DICTIONARY 528 (4th ed. 1951). Sometimes referred to as an "impaired serviceableness" doctrine, a reasonable depreciation rate allows for the deterioration and obsolescence to which all objects, including trade fixtures, are subject: namely, physical wear and tear as well as becoming outmoded technically. The useful life of any object, piece of equipment, or structure is simply an expert's estimate, based upon the aforementioned considerations, of the period of time within which full depreciation will occur. E. GRANT & W. IRESON, PRINCIPLES OF ENGINEERING ECONOMY 188 (4th ed. 1960). It follows logically that under an "impaired serviceableness" doctrine lease length is totally unrelated and of no possible effect.

⁵³388 F.2d at 601; *In re Allen St. & First Ave.*, 256 N.Y. 236, 249, 176 N.E. 377, 381 (1931).

⁵⁴388 F.2d at 602.

ed depreciation rate, the condemnor would have to bear the burdens of showing the existence of such an independent cause and that the independent cause would reasonably reduce the tenant's ability to benefit from the entire useful life of his fixture.

The court did not define what it meant by the term "independent cause," although, in light of the facts of the related case,⁵⁵ a landlord's plan to raze the building would clearly be such a cause. That length of lease could be such cause only in rare situations was made clear by the court when it emphasized that the mere fact that there is only a short-term lease without a renewal option or that there is only a hold-over occupancy does not establish an "independent cause" for purposes of accelerating depreciation. Other objective evidence of reasonable knowledge by the tenant that he could expect no further benefits from his trade fixtures beyond the current lease term would be required. The fact that the landlord has contracted to rent to another tenant when the condemnee's lease runs out might well meet the other objective evidence requirement.⁵⁶ But even here, if the successor tenant were in the same business as the condemnee tenant, the possibility that the condemnee could sell his trade fixtures to the successor might preclude acceleration of the depreciation since the burden is on the condemnor to prove that the independent cause will reduce the condemnee's ability to benefit from the entire useful life.

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EXPLANATION OF FIGURE I

Figure I is a graphical representation of the several depreciation methods for trade fixtures in *United States v. Certain Property, Borough of Manhattan*, 388 F.2d 596 (2d Cir. 1968). The vertical scale shows the basic formula: Compensation equals Replacement Cost minus Depreciation. The horizontal scale presents the particular points in time that determine the rate of "straight line depreciation." With the same replacement cost depreciated over different periods of time the effect upon depreciation and compensation caused by altering the time is readily seen. Since the time of condemnation is

⁵⁵*United States v. Certain Property, Borough of Manhattan*, 374 F.2d 138 (2d Cir. 1967).

⁵⁶Other objective evidence that a lessee could not expect reasonably to receive benefits from his trade fixtures beyond his current lease might be: premises to be sold to new landlord for his exclusive use, uses to change to something inconsistent with tenant's use, sale or relinquishing of option to renew lease, landlord informed tenant to move at end of term, tenant notified lease not renewable or tenancy at will or hold-over to cease, eviction proceedings begun, agreement or understanding that tenant will remove fixtures at end of current lease.

the point at which compensation is computed, it is the reference point for determining the depreciation. By reading down the condemnation line to the point of intersection with the desired depreciation rate, one merely reads along the horizontal projection of the point of intersection to the vertical cost scale to arrive at depreciation and its associated compensation.

CHANGE OF VENUE IN CRIMINAL CASES: MANDAMUS TO REVIEW A PRETRIAL ORDER

In order to obtain a fair and impartial trial in criminal proceedings, change of venue procedures are provided by statutes in most states.¹ Should all pretrial motions for change of venue be overruled, the defendant's traditional remedy has been that of attempting to show after his conviction that the trial judge abused his discretion in denying the motion for change of venue.² Most jurisdictions do not allow pretrial appellate review of the motion for change of venue as it is considered an interlocutory appeal and, therefore, properly appealable only after final judgment.³ California had previously adhered to this view⁴ but in spite of that fact, the Supreme Court of

¹*E.g.*, CAL. PENAL CODE § 1033 (West 1956); IDAHO CODE ANN. § 19-1801 (1948); N.Y. CODE CRIM. PROC. § 344 (McKinney 1958); VA. CODE ANN. § 19-1-224 (Repl. Vol. 1960); *See also* FED. R. CRIM. P. 21(a). These statutes, which are typical, provide that the defendant may apply for a change of venue after indictment. Additionally, many statutes provide for renewal of the motion after the *voir dire* examination. *E.g.*, CAL. PENAL CODE § 1033.5 (West 1956); KAN. STAT. ANN. § 62-1318 (1964); MASS. ANN. LAWS ch. 277, § 51 (Rev. Ed. 1968); MONT. REV. CODE ANN. § 95-1719 (1968); N.D. CENT. CODE § 29-15-01 (1960); ORE. REV. STAT. § 131.400 (1967); PA. STAT. ANN. tit. 19, § 551 (1964). Maine has deleted criminal cases from its venue statute. ME. REV. STAT. ANN. tit. 14, §508 (Supp. 1968).

²For cases finding an abuse of discretion, see *People v. McKay*, 37 Cal. 2d 792, 236 P.2d 145 (1961); *Blackwell v. State*, 76 Fla. 124, 79 So. 731 (1918); *People v. Pfanschmidt*, 262 Ill. 411, 04 N.E. 804 (1914); *Williams v. Commonwealth*, 287 Ky. 570, 154 S.W.2d 563 (1941); *Smith v. State*, 2 Md. App. 72, 233 A.2d 371 (1967). For cases where no abuse of discretion was found, see *People v. Jacobson*, 63 Cal. 2d 319, 405 P.2d 555, 46 Cal. Rptr. 515 (1965); *Nowels v. People*, . . . Colo. . . ., 442 P.2d 410 (1968); *State v. Poulos*, 196 Kan. 253, 411 P.2d 694, *cert. denied*, 385 U.S. 827 (1966); *State v. Swiger*, 5 Ohio St. 2d 151, 214 N.E.2d 417 (1966); *Swain v. State*, 219 Tenn. 145, 407 S.W.2d 452 (1966).

³*Hoffa v. Gray*, 323 F.2d 178 (6th Cir.), *cert. denied*, 375 U.S. 907 (1963); *Stokes v. State*, 90 Idaho 339, 411 P.2d 392 (1966); *State v. Bihain*, 251 Iowa 439, 101 N.W.2d 29 (1960); *Hamilton v. Smart*, 78 Kan. 218, 95 P. 836 (1908); *Pankey v. Pound*, 428 S.W.2d 777 (Ky. 1968); *Commonwealth v. Sites*, 430 Pa. 115, 242 A.2d 220 (1968). *Contra*, *State v. Thompson*, 266 Minn. 385, 123 N.W.2d 378 (1963).

⁴*Miles v. Justice's Court*, 13 Cal. App. 454, 110 P. 349 (Dist. Ct. App. 1910).

California recently held in *Maine v. Superior Court of Mendocino County* that mandamus lies to review a pretrial order denying change of venue.⁵

In *Maine*, the petitioner faced indictments for murder, rape, kidnapping, and assault with intent to commit murder. The trial judge overruled the petitioner's motion for change of venue but with leave to renew the motion after the *voir dire* examination of the prospective jurors. Before the *voir dire* examination, the petitioner requested that the Supreme Court of California review the ruling of the trial court, and issue a writ of mandamus directing that venue be changed. The prosecution argued that the petitioner's other remedies at law were adequate since the defense could exercise its peremptory challenges on the *voir dire*, could renew the motion for change of venue after the *voir dire* examination, and could appeal the trial court's ruling after the trial. The supreme court rejected the arguments and found these remedies at law to be inadequate. It said that the right to exercise peremptory challenges does not necessarily insure that jurors are impartial; that the right to renew the motion after the *voir dire* is ineffective, since the *voir dire* itself may not reveal prejudice and partiality; and that the expense and delay of an appeal after trial offer little aid to a defendant who seeks a fair trial from the beginning of the proceedings. After finding petitioner's remedies at law inadequate and taking notice of a recent trend extending mandamus to other pretrial motions besides change of venue,⁶ the court held that mandamus would lie. In so holding, the court looked to the American Bar Association's Advisory Committee Report on Fair Trial and Free Press (Reardon Report)⁷ which suggests that mandamus may indeed be necessary in order to assure a defendant the constitutional right to a speedy and impartial trial.⁸

⁵... Cal. 2d, 438 P.2d 372, 66 Cal. Rptr. 724 (1968).

⁶Cash v. Superior Court, 53 Cal. 2d 72, 346 P.2d 407 (1959) (motion to inspect documents); Cornell v. Superior Court, 52 Cal. 2d 99, 338 P.2d 447 (1959) (motion for psychiatric examination); Funk v. Superior Court, 52 Cal. 2d 423, 340 P.2d 593 (1959) (motion for discovery of prosecution's evidence); Gomez v. Superior Court, 50 Cal. 2d 640, 328 P.2d 976 (1958) (motion to transfer case to another court); Harris v. Municipal Court, 209 Cal. 55, 285 P. 699 (1930) (motion to dismiss action not brought to trial within time required by law); Zamloch v. Municipal Court, 106 Cal. App. 2d 260, 235 P.2d 25 (Dist Ct. App. 1951) (motion to dismiss where defendant denied right to a speedy trial).

⁷ABA ADVISORY COMM. REPORT ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS, 119-128 (Tent. Draft 1966) [hereinafter cited as *Reardon Report*]. The recommendations of this report were subsequently approved by the American Bar Association's House of Delegates in 1968.

⁸U.S. CONST. amend. VI.

Determining that mandamus would lie to review a pretrial order denying a motion for change of venue was not the only new ground the court broke.⁹ It went on to reject the traditional, limited scope of review in mandamus cases which was confined only to determining if the trial court had abused its discretion. The court looked to *Sheppard v. Maxwell*,¹⁰ a post-conviction habeas corpus case, where the Supreme Court of the United States said that when an appellate court reviews a change of venue motion it should not look merely to determine if the trial judge abused his discretion, but should consider the question *de novo* and make its own determination as to whether the defendant had a fair trial. The court in *Maine* considered the *Sheppard* rule binding on it even though *Sheppard* involved post-trial review and not mandamus. Accordingly, it made an independent evaluation of the circumstances surrounding the petitioner's application, found that there was a reasonable likelihood that the petitioner could not receive a fair trial in Mendocino County, and issued the writ.¹¹

The earliest use of mandamus was in civil cases¹² but the writ has since been used in criminal cases as well in order to (1) provide a remedy where there is no other adequate remedy at law,¹³ and (2) to compel a lower court to exercise its discretion¹⁴ or to perform some

⁹Prior to *Maine*, the Supreme Court of Minnesota in *State v. Thompson*, 266 Minn. 385, 123 N.W.2d 378 (1963), reaffirmed a Minnesota pretrial mandamus procedure similar to that in *Maine*. However, *Thompson* has received very little attention. This is apparently due to its brief opinion, and the well established practice of the Minnesota courts to allow for only one change of venue in a criminal proceeding.

¹⁰384 U.S. 333 (1966).

¹¹Cited as reasons were the following: the defendants were strangers in town and had committed crimes of a very heinous nature; the local people showed sympathy for the victims who were prominent members of the community; there was substantial adverse pretrial publicity; and local politics had become involved in that the district attorney, the regular trial judge, and counsel for one of the petitioners were all running for the same political office.

¹²*See, e.g.*, *Rex v. Askew*, 98 Eng. Rep. 139 (K.B. 1768), where it is said that the writ was used as early as the time of Edward III. For early United States cases, see *Kendall v. United States*, 37 U.S. (12 Pet.) 834 (1838); *Wood v. Strother*, 76 Cal. 545, 18 P. 766 (1888).

¹³*See, e.g.*, *State v. Thompson*, 266 Minn. 385, 123 N.W.2d 378 (1963) (Minnesota statute provides for only one change of venue, therefore motion may be reviewed before trial); *Flores v. Federici*, 70 N.M. 358, 374 P.2d 119 (1962) (justice of peace has right to jury trial even though the statute did not provide for one); *State v. Hart*, 19 Utah 438, 57 P. 415 (1899) (jury impaneling statute did not provide for appeal, so mandamus provided an adequate remedy).

¹⁴*See, e.g.*, *Crocker v. Justices of Superior Court*, 208 Mass. 162, 94 N.E. 369 (1911) (trial court did not entertain motion for change of venue; ordered to do so); *State ex rel. Ricco v. Biggs*, 198 Ore. 413, 255 P.2d 1055 (1963) (trial court did

ministerial duty.¹⁵ As *Maine* pointed out, this use in criminal cases has been extended to review pretrial orders where it has been thought necessary to prevent the "failure of justice"¹⁶ or when other existing remedies were "not sufficiently speedy to prevent material injury."¹⁷ For example, mandamus has been held appropriate to direct the impaneling of a jury,¹⁸ the right to a pretrial inspection,¹⁹ the dismissal of prosecutions where undue delay was involved,²⁰ a pretrial hearing,²¹ a psychiatric examination,²² and a trial judge's disqualification of himself.²³

However, these instances are the exception and not the rule. There has been a general reluctance to allow the use of mandamus for review of any pretrial orders in criminal cases because of judicial feeling that appellate review should be postponed until after final judgment has been rendered.²⁴ There has been a special reluctance to use mandamus to review pretrial orders denying a change of venue.

not entertain motion for change of venue in misdemeanor action; appellate court held that venue statute applies to misdemeanors, and therefore the motion must be ruled on).

¹⁵See, e.g., *Ex parte* United States, 287 U.S. 241 (1932) (issuing of bench warrant involved no discretion; mandamus was therefore appropriate); *Benness v. State ex rel. Heflin*, 124 Ala. 97, 26 So. 942 (1899) (statute provided that arrest warrant would issue; trial judge ordered to issue warrant).

¹⁶*State ex rel. Pierce v. Slusher*, 117 Ore. 498, 244 P. 540, 541 (1926).

¹⁷*State ex rel. Ricco v. Biggs*, 198 Ore. 413, 255 P.2d 1055, 1061 (1953).

¹⁸*State ex rel. Burton v. Smith*, 118 Ohio App. 248, 194 N.E.2d 70 (1962) (trial court ordered to swear in grand jury; statutory ambiguity called for extraordinary action by appellate court).

¹⁹*Funk v. Superior Court*, 52 Cal. 2d 423, 340 P.2d 593 (1959) (in abortion prosecution, petitioner was entitled to inspect notes made of oral statements made by abortion victims).

²⁰*Zamloch v. Municipal Court*, 106 Cal. App. 2d 260, 235 P.2d 25 (Dist. Ct. App. 1951) (mandamus issued directing dismissal where postponement of trial predicated upon nonlegal grounds).

²¹*State ex rel. Corbin v. Murry*, 102 Ariz. 184, 427 P.2d 135 (1967) (mandamus appropriate to direct a pretrial hearing where trial judge asserted that he had no jurisdiction to hold a pretrial hearing).

²²*Cornell v. Superior Court*, 52 Cal. 2d 99, 338 P.2d 447 (1959) (petitioner had agreed to take psychiatric examination; trial court abused its discretion by not allowing it).

²³*Castleberry v. Jones*, 68 Okla. Crim. 414, 99 P.2d 174 (1940) (judge had admitted personal bias against the petitioner).

²⁴See, e.g., *Will v. United States*, 389 U.S. 90 (1967); *Hoffa v. Gray*, 323 F.2d 178 (6th Cir.), cert. denied, 375 U.S. 907 (1963); *State v. Poulos*, 196 Kan. 253, 411 P.2d 694, cert. denied, 385 U.S. 827 (1966); *Pankey v. Pound*, 428 S.W.2d 777 (Ky. 1968); *Pate v. State*, 361 P.2d 1086 (Okla. Crim. App. 1961). The Supreme Court has stated that "the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." *DiBella v. United States*, 369 U.S. 121, 126 (1962).

Three reasons can be cited for this reluctance. First, most appellate courts treat the petition for mandamus review as an interlocutory appeal and, thus, generally summarily dismiss it²⁵ unless "the damage of error, unreviewed before the judgment is definitive and complete, is deemed greater than the disruption caused by immediate appeal"²⁶ Such instances are relatively rare.²⁷ Second, it is usually held that, taken together, the right to exercise peremptory challenges, the right to renew the motion for change of venue after the *voir dire* examination, and the availability of post-trial appeals afford adequate remedies at law.²⁸ Third, lower court rulings on motions for change of venue are said to be wholly within the trial judge's discretion.²⁹ While appellate courts will direct that discretion be exercised,³⁰ absent an "abuse of discretion . . . clearly untenable, or to an extent clearly unreasonable"³¹ they are nevertheless hesitant to assume the functions of the trial court and actually determine how the discretion is to be exercised.³²

²⁵See, e.g., *Auerbach v. United States*, 347 F.2d 742 (5th Cir. 1965); *Stokes v. State*, 90 Idaho 339, 411 P.2d 392 (1966); *State v. Bihain*, 251 Iowa 439, 101 N.W.2d 29 (1960); *Pankey v. Pound*, 428 S.W.2d 777 (Ky. 1968).

²⁶*Yeloushan v. United States*, 313 F.2d 303, 305 (5th Cir. 1963).

²⁷See, e.g., *Crocker v. Justices of Superior Court*, 208 Mass. 162, 94 N.E. 369 (1911) (trial court asserted that it had no jurisdiction to entertain motion; pretrial mandamus review provided the only adequate remedy at law); *State v. Thompson*, 266 Minn. 385, 123 N.W.2d 378 (1963) (reaffirmed Minnesota practice of allowing pretrial mandamus review of motions for change of venue); *State ex rel. Ricco v. Biggs*, 198 Ore. 413, 255 P.2d 1055 (1953) (trial court did not entertain motion for change of venue in misdemeanor proceeding; appellate court held that venue statute applies to misdemeanors, and that the motion must be ruled on).

²⁸See *Stroud v. United States*, 251 U.S. 15 (1919); *Hoffa v. Gray*, 323 F.2d 178 (6th Cir.), *cert. denied*, 375 U.S. 907 (1963); *Wilder v. People*, 86 Colo. 35, 278 P. 594 (1929); *State v. Poulos*, 196 Kan. 253, 411 P.2d 694, *cert. denied*, 385 U.S. 827 (1966); *State v. Swiger*, 5 Ohio St. 2d 151, 214 N.E.2d 417 (1966); *Pate v. State*, 361 P.2d 1086 (Okla. Crim. App. 1961). However, in cases where the renewed motion is denied and all peremptory challenges are used, if the party on appeal shows an actual abuse of discretion, or prejudice, the appellate court will afford relief. See, e.g., *People v. McKay*, 37 Cal. 2d 792, 236 P.2d 145 (1951); *Blackwell v. State*, 76 Fla. 124, 79 So. 731 (1918); *People v. Pfanschmidt*, 262 Ill. 411, 104 N.E. 804 (1914); *Williams v. Commonwealth*, 287 Ky. 570, 154 S.W.2d 563 (1941).

²⁹*Platt v. Minnesota Mining Mfg. Co.*, 376 U.S. 240 (1964), *rev'g* 314 F.2d 369 (7th Cir. 1963); *Nowels v. People*, . . . Colo. . . . , 442 P.2d 410 (1968); *State v. Poulos*, 196 Kan. 253, 411 P.2d 694, *cert. denied*, 385 U.S. 827 (1966); *Swain v. State*, 219 Tenn. 145, 407 S.W.2d 452 (1966); *State v. Truman*, 124 Vt. 285, 204 A.2d 93 (1964).

³⁰*Crocker v. Justices of Superior Court*, 208 Mass. 162, 94 N.E. 369 (1911); *State ex rel. Ricco v. Biggs*, 198 Ore. 413, 255 P.2d 1055 (1953).

³¹*State v. Truman*, 124 Vt. 285, 204 A.2d 93, 96 (1964).

³²See, e.g., *Hoffa v. Gray*, 323 F.2d 178 (6th Cir.), *cert. denied*, 375 U.S. 907 (1963); *Stokes v. State*, 90 Idaho 339, 411 P.2d 392 (1966); *State v. Bihain*, 251 Iowa 439, 101 N.W.2d 29 (1960); *Hamilton v. Smart*, 78 Kan. 218, 95 P. 836 (1908); *Com-*

The first two reasons (the interlocutory appeal and adequate remedy at law arguments) for reluctance to use mandamus to review change of venue orders are relevant to the first part of *Maine's* holding that mandamus does in fact lie. The third reason (the limitation to finding only an abuse of discretion) is relevant to that part of *Maine* which extends the scope of review beyond a determination of whether discretion has been abused to a *de novo* consideration of all the facts.

In deciding that writ would lie, *Maine* did not consider the interlocutory appeal argument other than to say that it did not foresee a flurry of mandamus petitions to review pretrial motions. But the tenor of the court's opinion and its reliance on the Reardon Report indicate that this was felt to be a weak argument where a defendant's constitutional rights are at stake, since such rights should be protected from the earliest possible moment.³³

The primary basis for *Maine's* holding is the court's finding that no other adequate remedy at law existed. The court first said that the right to exercise peremptory challenges is inadequate because failure to exhaust all peremptory challenges may, on appeal, be regarded as an indication that the jury was impartial.³⁴ Yet, it recognized that counsel may not wish to exercise all peremptory challenges due to the risk that the next juror may be more prejudiced than the juror in question.³⁵

Maine also concluded that the right to renew the motion for change of venue after the *voir dire* is in fact an inadequate remedy. The finding of inadequacy was based on the uncertainty of whether

monwealth v. Swanson, 424 Pa. 15, 225 A.2d 231 (1967). In stating the traditional function of an appellate court, *Maine* reflects the past and current attitude of most courts: "Ordinarily we are reluctant to depart from the sound principle invariably pronounced that mandate lies not to control an exercise of discretion but only to correct an abuse of discretion." 438 P.2d at 376, 66 Cal. Rptr. at 728.

³³"It is neither novel nor inappropriate, therefore, for this court to review through a mandate proceeding a pretrial order which is likely to substantially affect a defendant's right to a fair trial." 438 P.2d at 374, 66 Cal. Rptr. at 726.

³⁴See, e.g., *People v. Modesto*, 66 Cal. 2d 695, 427 P.2d 788, 59 Cal. Rptr. 124 (1967); *State v. Poulos*, 196 Kan. 243, 411 P.2d 694, cert. denied, 385 U.S. 827 (1966); *Pate v. State*, 361 P.2d 1086 (Okla. Crim. App. 1961); *Philpot v. State*, 169 Tex. Crim. 91, 332 S.W.2d 323 (1960); *Reardon Report* 127.

³⁵The Supreme Court has indicated that "failure of petitioner's counsel to exhaust [the peremptory challenges]... while not dispositive, is significant." *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 463 (1956). The Reardon Report has recognized the attorney's dilemma in exercising peremptory challenges, and has recommended that "[t]he claim that the venue should have been changed... shall not be considered to have been waived... by the failure to exercise all available peremptory challenges." *Reardon Report* § 3.2(e).

or not the *voir dire* provides an accurate indication of a juror's potential partiality in a highly publicized and well-known criminal proceeding.

While *Maine* did not consider them, there are other reasons supporting this conclusion of the inadequacy of the right to renew the motion after *voir dire*. Even though there may be uncertainty, most courts have generally held on appeal that absent "prejudice . . . so great that traditional *voir dire* procedures . . . were unavailing to ensure a fair trial,"³⁶ the *voir dire* examination and its results are determinative for a change of venue.³⁷ However, this concept has received serious criticism.³⁸ In many criminal proceedings, the nature and facts of the alleged crime are well-known, and may generate a prevailing sentiment of hostility in the community in which the trial is to take place. Due to mass pretrial publicity, and its sometimes insidious effects, many prospective jurors may not consider themselves prejudiced without realizing that news exposure has adversely affected their impartiality.³⁹ Moreover, it has been suggested that even a seemingly successful *voir dire* may not alone guarantee a fair trial in strongly prejudiced communities.⁴⁰

Finally, the court concluded that post-trial appeal may not afford a defendant sufficient protection. *Maine* asserted, as had an earlier court, that "the burden, expense, and delay involved in a trial render an appeal from an eventual judgment an inadequate remedy."⁴¹

Having established that the peremptory challenge, *voir dire*, and post-trial appeal remedies are inadequate, and that mandamus lies

³⁶*Pacheco v. State*, 82 Nev. 172, 414 P.2d 100, 103 (1966).

³⁷*See, e.g., United States ex rel. Darcy v. Handy*, 351 U.S. 454 (1956); *Stroud v. United States*, 251 U.S. 15 (1919); *Bradley v. State*, 245 Ind. 331, 198 N.E.2d 762 (1964); *State v. Swiger*, 5 Ohio St. 2d 151, 214 N.E.2d 417 (1966).

³⁸The following question the effectiveness of the "*voir dire* remedy": *Reardon Report* 126-27; Austin, *Prejudice and Change of Venue*, 68 DICK L. REV. 401 (1964); "*Free Press-Fair Trial*" Revisited: *Defendant-Centered Remedies as a Publicity Policy*, 33 U. CHI. L. REV. 512 (1966); Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349 (1960); Note, *The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury*, 42 NORTE DAME LAWYER 925 (1967).

³⁹*See, e.g., Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Reardon Report* 127.

⁴⁰"The requirement of the law is not satisfied by the mere impaneling of 12 men against whom no legal complaint can be made. The defendant is entitled to be tried in a county where a fair proportion of the people qualified for jury service may be used as a venire from which a jury may be secured to try his case fairly and impartially, and uninfluenced by a preponderant sentiment that he should be flung to the lions." *Magness v. State*, 103 Miss. 30, 60 So. 8, 10 (1912).

⁴¹*Brown v. Superior Court*, 34 Cal. 2d 559, 212 P.2d 878, 880 (1949).

to review an order denying a change of venue,⁴² *Maine* went on to reject the traditional, limited scope of review in mandamus and actually decided that venue should be changed. In so doing, it promulgated a new standard by which mandamus petitions must be judged. Relying chiefly on *Sheppard*, it agreed that where a defendant's application has merit "appellate courts must, when their aid is properly invoked, satisfy themselves *de novo* on all the exhibits and affidavits that every defendant obtains a fair and impartial trial."⁴³

Sheppard was a post-conviction habeas corpus case, and in laying down its rule there the Supreme Court may have been referring only to *post-trial* review. *Maine* never considered that there might be a distinction when it applied the *Sheppard* rule. However, when *Sheppard* stated that "reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception,"⁴⁴ it may have specifically intended to include pretrial appellate review within its rule. Even if the Supreme Court did not so intend, extending the rule to the pretrial stage as *Maine* did is entirely consistent with the purpose behind the *Sheppard* rule of expanded appellate court review. Moreover, *Maine* is not alone in its interpretation of *Sheppard*. After long study and after questioning of trial judges and trial counsel, the Reardon Report also concluded the *Sheppard* calls for a pretrial, *de novo* examination of meritorious petitions for change of venue.⁴⁵

By providing that a defendant may, by mandamus petition, test a pretrial ruling denying change of venue, *Maine* not only affords an adequate remedy at law, but also makes more readily available the constitutional safeguards requiring a fair, speedy, and impartial trial. It implements the achievement of these results by providing a new standard by which the mandamus petition is to be judged, a standard

⁴²In holding that mandamus lies, the California Supreme Court looked to the language of the *Reardon Report* which reads:

Another important question is the timing of review. If an appeal from a clearly erroneous denial of a motion for continuance or change of venue is postponed until after trial, a great deal of time and effort will have been wasted, and the appellate court may be extremely reluctant to reverse. On the other hand, frivolous appeals are time-consuming in themselves and may be used solely for purposes of delay. The Committee believes that the solution lies in allowing discretionary interlocutory appeals or in the use of an extraordinary writ such as mandamus, with a procedure for prompt disposition on the papers of cases that lack merit.

Id. at 127-28.

⁴³438 P.2d at 376, 66 Cal. Rptr. at 728.

⁴⁴384 U.S. at 363.

⁴⁵*Reardon Report* 123-24, 127-28.