PUBLIC BUILDINGS: Law relating to fixtures.

March 1, 1950

3/2/50

FILED
2

Honorable Fred Appleton
Director
Division of Public Buildings
Jefferson City, Missouri

Dear Mr. Appleton:

This is in reply to your request for an opinion which reads as follows:

> "I would appreciate having your opinion in reference to the rights of the present owners or lessee in removing certain fixtures and appurtenances from the buildings under condemnation proceedings on the proposed site for the new state office building, more particularly described as plumbing fixtures and furnaces, also the gasoline pumps, tanks and hydraulic lift located on the site of the Cities Service Service Station.
>
> "If the State has the right to claim the above mentioned items, it will of course add to the sale value of buildings involved."

In the case of State vs. Haid, 59 S.W. (2d) 1057, the law in Missouri relative to the removal of fixtures on property involved in condemnation proceedings is set out as follows, l.c. 1059:

> "In the case at bar, the house, barn, and fences, being fixtures to the land condemned, would pass to the condemner unless there was an agreement between the parties that such fixtures would be reserved by the owner and not taken into consideration in the condemnation proceeding. City of St. Louis v. St. Louis, I.M. & S. Railway Co., 266 Mo.

> 694, 182 S.W. 750, 754, L.R.A. 1916D, 713, Ann. Cas. 1918B, 881. Evidently such an agreement was made, because the opinion of the Court of Appeals states that the house, barn, and fences were not condemned. Such a thing could not have happened except by agreement of the parties because the fixtures were a part of the realty and could not be separated therefrom except by agreement. City of Kansas v. Morse, 105 Mo. 510, 519, 16 S.W. 893. Absent an agreement between the parties, the highway department would have been required to pay for the fixtures and remove them from the highway at its own expense. But where, as here, by agreement between the parties, the landowners reserve the fixtures and remove them from the highway, the cost of such removal is governed by the agreement between the parties, either express or implied, and not by the law governing the assessment of damages in condemnation. In this situation the landowner could not recover the cost of removing the fixtures from the condemned land unless the agreement between the parties so provided. * * *."

We understand the facts to be that there has been no agreement between the State and the interested parties, with respect to the removal of fixtures. Therefore, we turn to the general law to determine whether or not the specific fixtures mentioned in your request have become a part of the realty so as to pass title. Since your request is concerned with several different items we will consider them in order.

1) Plumbing Fixtures--Furnaces--.In the case of Manufacturers Bank & Trust Co. vs. Lauchli, 118 Fed. Rep. (2d) 607, the rule in Missouri is set out as follows at l.c. 611:

> "The tests to determine whether a thing is a fixture are, in Missouri, stated thus: 'If there be a question * * * as to an agreement that it shall become a fixture, the tests have been said to be: (1) Real or

constructive annexation of the property in question to the soil; (2) adaptation of the property in question to the ordinary use or purposes of the land to which the alleged fixture is annexed; and (3) the intention of the party making the annexation to make the property in question a permanent accession to the freehold. * * * And of these three unities the question of intention is said to be controlling.' Hatton v. Kansas City, C. & S. Ry. Co. 253 Mo. 660, 162 S.W. 227, 233. The same measure is more concisely stated as 'annexation, adaption, and intent, with the latter ordinarily of paramount inportance.' Matz v. Miami Club Restaurant, Mo. App., 127 S.W. 2d 738, 741. Also see American Clay Machinery Co. v. Sedalia Brick & Tile Co., 174 Mo. App. 485, 160 S.W. 902.

"Applying these tests, we need spend little effort upon the 'adaptation' test because it is clear that all of them were adapted to and were used in the operation of the plant although some of them were not necessary therefor. Also, the 'intention' test is not difficult because, with one exception ('1 Winch and Hoist Tower with Motor'), they were brought for and intended to be used permanently in connection with the operation of or with the business of the plant. Also, the mortgage was expressly upon, 'the packing plant and property and office' of the mortgagee and was to cover 'all the * * * * machinery, tools, fixtures, equipment and appliances erected on or used as part of said plant, or which may hereafter be so erected or used.'

"The 'test' requiring most attention is that of 'annexation' to the realty. We think the application of this test should be governed by the two practical considerations of (1) character of physical annexation (attachment) to the plant having permanent usage in view,

> and (2) the effect upon the plant as a complete unit of the presence or absence of the particular thing. Such application will eliminate all purely personal property and will include all attached property reasonably necessary to operation of the complete plant as it was being operated as a unit. * * * ."

Applying the tests of annexation, adaptation and intention, we believe that the plumbing and furnaces have become a part of the realty. Most of these items are located in the hotel property and it is obvious that they are necessary for the operation of a hotel business.

In the case of Frederick v. Smith, 111 So. 847, noted in 81 A.L.R. 1442, the Court said:

> "* * * 'While it is possible for a family to use a dwelling house which contains neither bathtub nor kitchen sink, it cannot be contended with reason that the owner of a dwelling house who has installed therein such articles would have the right to remove the same upon a sale of the property without reservation.'"

In the case of Ferdinand vs. Earle, 134 N.E. 603, the Court held that a steam boiler installed in a building, on premises subject to a mortgage, as an auxiliary heating plant for the building in which it was installed and for the purpose of heating a garage on adjoining property, was a part of the realty on which it was installed and passed therewith to a purchaser at a sale on foreclosure of the mortgage. The Court reached its conclusion after considering the purpose of the installation of the boiler, its great weight, and its connection with the water pipe. The furnaces in the situation before us have been installed recently as a means of furnishing a central heating system for the hotel building. Applying the test, we believe that the furnaces have become a part of the realty and that title thereto has passed to the State.

2) Trade Fixtures--. We approach the problem of the removal of trade fixtures in two ways. If there

is an agreement between the owners of the property and the Cities Service Oil Company that certain items should remain personalty, it is clear that they have not been compensated for in the proceedings, and that they may be removed from the property by the oil company. (See Pile vs. Holloway, 107 S.W. 1043, 129 Mo. App. 593). However, absent such an agreement, we must determine whether or not such items of personal property have become a part of the realty so as to pass with the realty. Referring again to the test as set out in Manufacturers Bank & Trust Co. vs. Lauchli, supra, we must determine the status of the particular items. Since we are without facts to determine the intention of the party making the annexation, we cannot consider that test and must turn to the annexation and adaptation tests. As to the annexation, it seems clear that the hydraulic lift and gasoline pumps may be removed without substantial injury to the freehold. However, in the case of the tanks, the removal thereof would result in a substantial injury to the freehold and, therefore, must be held to have been so annexed that they have become a part of the realty.

CONCLUSION

Therefore, it is the opinion of this department that the gasoline pumps, tanks and hydraulic lift may be removed by the owners thereof, but that plumbing fixtures and furnaces have become so annexed to the realty that title thereto passed to the State in condemnation proceedings, and, therefore, are no longer the property of the former owners.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JRB:ir