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LEASE, PORTION OF AIRPORT — RIGHTS OF LESSOR, LESSEE, WHERE MUNICIPALITY EXECUTED FIVE YEAR LEASE, USE, NOT TO EXCEED 14 DAYS IN EACH YEAR, OPTION TO RENEW — LESSEE GIVEN RIGHT TO ERECT STRUCTURES AND BUILDINGS — REMOVAL — FIXTURE — TRADE FIXTURE — LESSEE PERMITTED TO MAKE ADDITIONS, ALTERATIONS, SUBSTITUTIONS, SUCH STRUCTURES ON PREMISES — TITLE REMAINS IN LESSEE — WHERE REMOVAL UPON ORDER OF LESSOR, SALVAGE VALUE BELONGS TO LESSEE — PERIOD OF TIME — LIMITATION.

SYLLABUS:

Where a municipality enters into a five-year lease of a portion of an airport owned by it for use during a period of not to exceed fourteen days in each of such years, with an option to renew the lease, giving to the lessee the right to erect structures and buildings thereon and to remove the buildings or structures within thirty days after such period of use and, in default thereof, granting to the lessor the right to use such property during the time when not in use by the lessee upon responding

to the lessee for any damage to such structures from such use, and further covenants that the lessee may make additions to, alterations in or substitutions for such structures on the premises, the title to such structures, when erected, remains in the lessee; and, when removed by the lessee upon order of the lessor, the salvage value belongs to such lessee, whether removed during the period of such original lease or a renewal thereof or within a reasonable time thereafter.

Columbus, Ohio, January 31, 1942.

Bureau of Inspection and Supervision of Public Offices,
Columbus, Ohio.

Gentlemen:

Your request for my opinion reads as follows:

> "We are submitting herewith a letter from our Chief Examiner of Cleveland, together with certain memoranda prepared by the Law Department of Cleveland and lease contracts between the City and National Air Races of Cleveland, Inc., all of which pertain to the removal of certain structures and buildings from the City of Cleveland Airport property and the ownership of the salvage value or cash receipts from salvage, now in dispute.
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> Inasmuch as the State Examiner is now engaged in making an examination of the City Airport accounts, may we request that you review the inclosures and give us your formal or informal opinion as to the proper disposition of the salvage receipts amounting to $3750.00, and any other advice you may deem appropriate to the examiner's information, necessary in the preparation of his report of examination."

From an examination of the documents enclosed with your request, the following facts may be deduced:

1. In 1929 the predecessor of the present lessee leased the use of a portion of the Cleveland airport for the purpose of conducting an aeronautical show or races for a period of consecutive days during each of the next three years. The indenture of the lease gave to the lessee the right to construct certain buildings or structures throughout a specified area on such lands and gave to the lessee the right to remove the buildings erected by it within sixty days after the show conducted by it.

2. Under date of March 6, 1931, a new lease was entered into, conveying to the lessee the right or concession of holding air races or shows at the Cleveland airport for not to exceed fourteen consecutive days during each of the years 1931 to 1935, both inclusive, at a percentage rental therein reserved. The lease further authorized the lessee to erect upon such premises structures and buildings for its use and occu-

pancy during such periods, and contained the following provisions with reference to the removal of such improvements:

> "The lessee is hereby given the right to enter and remove any and all structures erected by it during any calendar year, provided such removal be within thirty (30) days after the expiration of the period selected for each year; and all buildings or other structures not so removed within thirty (30) days shall become the property of the City of Cleveland; provided, however, that the lessee shall have the right without additional rental, other than the annual rental above provided for, to reoccupy and use said structures so erected by it and allowed to remain upon said premises, during the period selected by the lessee for each of the subsequent years during the term of this lease. The City of Cleveland is given the right to use said building or structures so permitted to remain upon said leased premises at the expiration of said thirty-day period, upon condition that the City of Cleveland will be responsible to said lessee for, and shall make repairs of, any damage done to said structures by said City of Cleveland, its agents, employes or lessees or any damage resulting from the negligence of the City, its agents, employes or lessees. Said lessee agrees to make such repairs and alterations to said structures so erected by it as may be necessary to be made from year to year during this lease, excepting only repairs which are to be made by the City as above provided."

Such lease contained a provision for the renewal of such lease for an additional term of five years.

3. On October 26, 1935, a new lease was entered into, granting to the lessee similar rights to hold aeroplane races and shows for periods of fourteen days each year during the years 1936 to 1940, both inclusive, but at a flat rental of $500.00 per day. Similar provisions were contained with reference to the lessee's right, at its own expense, "to make alterations in, or substitutions for the improvements, buildings and structures heretofore erected by Lessee, or which may be hereafter erected, and may erect such additional structures as the Lessee hereunder may elect for use and occupation hereunder." Item 6 of such indenture of lease was identical with paragraph 7 of the earliest lease, except for the addition of the following sentence at the end thereof:

> "Provided, further, that nothing in this Section shall preclude the right of the City to permanently remove any such building or structure from the airport."

Item 13 of such indenture of lease contains the following language:

> "The Lessee shall, at its own expense, carry fire insurance on all permanent improvements erected by said Lessee on the

> premises herein leased, provided that the policy of said fire insurance shall be in a form acceptable to the Director of Law of the City of Cleveland on behalf of the City of Cleveland and the Lessee."

The structures erected thereon, I am informed, were removed by the lessee at the direction of the lessor, resulting in a salvage value realization of $3,750. The question is as to whether the lessor or lessee is entitled to such moneys.

It is elemental that at early common law the owner of the fee to land was the owner of not only the land itself, the minerals thereunder and the growing plants thereon, but also all buildings and structures attached thereto with such degree of permanency that they might not be removed without permanent injury to the land. There developed in the law, as civilization progressed, a type of property which is referred to or denominated in textbooks as a "fixture." Such term is defined in the first paragraph of the syllabus of Holland Furnace Company v. The Trumbull Savings and Loan Company, 135 O.S., 48, as follows:

> "A fixture is an item of property which was a chattel but which has been so affixed to realty for a combined functional use that it has become a part and parcel of it."

At early common law an object which came within the term "fixture" as above defined was a part of the real estate and belonged to the owner of the land, it being immaterial by whom it was so attached. The test as to whether a particular article is a fixture has been established in Ohio by the case of Teaff v. Hewitt, 1 O.S., 511, which was reiterated in the syllabus of Holland Furnace Company v. The Trumbull Savings and Loan Company, supra, as follows:

> "The true criterion of a fixture, is the united application of the following requisites, to wit: 1st. Actual annexation to the realty, or something appurtenant thereto. 2d. Application to the use, or purpose, to which that part of the realty with which it is connected, is appropriated. 3d. The intention of the party making the annexation, to make a permanent accession to the freehold."

As I have above indicated, at early common law, if a tenant affixed personal property to the freehold in such manner that it became a "fixture," it could not be removed thereafter by the tenant but became the property of the owner of the fee simple estate or of the freehold

estate. Foote v. Gooch, 96 N.Car., 265; Overman v. Sasser, 107 N.Car., 432.

However, there has developed in the law of property a classification of fixtures called "trade fixtures." Trade fixtures may be defined as personal property attached by the tenant to the freehold for the especial purpose of his tenancy use and not for the general improvement of the property.

I believe it may be generally stated that, in the absence of an express covenant in the indenture of lease to the contrary, "trade fixtures" may be removed from the leased premises at any time during the term of the lease, or, in most jurisdictions, within a reasonable time thereafter. Bates v. Neski, 6 O.Dec.Rep., 1064; Wittenmeyer v. Board of Education, 10 O.C.C., 119; Silver v. Globe Window Glass Company, 21 O.C.C., 284; Dunkel v. Hedges, 15 O.App., 259.

It has further been held that where a tenant attaches fixtures while in possession under one lease and remains in possession under subsequent leases, he may remove such trade fixtures during the combined terms or renewal thereof or within a reasonable time thereafter. Dunkel v. Hedges, 15 O.App., 259; Wittenmeyer v. Board of Education, 10 O.C.C., 119.

It is also generally held that where one party affixes personalty to the freehold in such manner as to cause it to be a fixture or a part of the realty of another, nevertheless the lessor and lessee may agree that such fixtures shall retain their chattel nature, in which case they may be removed by the tenant during his tenancy or within a reasonable time thereafter. Under such circumstances, no intention to make them a part of the realty ever existed and thus the principal criterion of a fixture would be lacking. See 2 Tiffany, Landlord and Tenant, 1592, Section 242.

In 2 Tiffany, Landlord and Tenant, the author discusses the effect of an express stipulation in an indenture of lease granting to the tenant the right to remove articles affixed by him to the freehold, and on page 1598 stated the then law to be as follows:

> "A stipulation giving rights of removal (of structures affixed by the tenant) has been assumed to displace entirely the commonlaw rights of the tenant in this regard, so that if the

> stipulation gives a right to remove only at a certain time or under certain conditions, the tenant cannot assert a right to remove the article as a trade, domestic, or agricultural fixture, without reference to such restriction. * * *
>
> If there is a stipulation clearly giving the tenant the right to remove annexations of a certain character, the fact that the removal will result in injury to the premises is necessarily immaterial."

In view of the authorities above cited and the provisions in the indentures of the lease, it would seem that the structures in question at the time of their affixation did not, as between the city and its lessee, become a part of the freehold and were removable by the tenant under the limitations and restrictions imposed by the indenture. We must therefore consider whether under the terms of the leases and by reason of the conduct of the parties the lessee had the right to remove the structures at the time of their removal or whether it had prior to such date relinquished such right.

It is an elemental rule applicable to the interpretation of written contracts that the contract must be construed as a whole and not from isolated passages. German Fire Insurance Company v. Roost, 55 O.S., 581; Cincinnati, S. and C. R. Co. v. Columbus, S. and C. R. Co., 44 O.S., 287; Gibbons v. Metropolitan Life Insurance Company, 62 O.App., 280.

Paragraph seven of the contract, dated March 6, 1931, provides that the lessee may remove any structures erected by it within the period of thirty days after the expiration of the period in each year selected by it for the conduct of its exhibition but that "all buildings or other structures not so removed within thirty (30) days shall become the property of the City of Cleveland."

Such paragraph further specifies the rights of the parties in the event that the buildings and structures are not removed within such period of time as follows:

> "The City of Cleveland is given the right to use said building or structures so permitted to remain upon said leased premises at the expiration of said thirty-day period, upon condition that the City of Cleveland will be responsible to said lessee for, and shall make repairs of, any damage done to said structures by said City of Cleveland, its agents, employes or lessees or any damage resulting from the negligence of the City, its agents, employes or lessees. Said lessee agrees to make such repairs

and alterations to said structures so erected by it as may be necessary to be made from year to year during this lease, excepting only repairs which are to be made by the City as above provided."

As pointed out in Teaff v. Hewitt, supra, at page 533:

> "* * * inasmuch as it requires a positive act on the part of the person making the annexation, to change the nature and legal qualities of a chattel into those of a fixture, *the intention to make the article a permanent accession to the realty, must affirmatively and plainly appear; and if it be a matter left in doubt or uncertainty, the legal qualities of the article are not changed, and the article must be deemed a chattel.*"
> (Emphasis mine.)

And in 22 Am.Jur., 718, section 6, the author states the rule as follows:

> "Of the three tests previously mentioned, the clear tendency of modern authorities seems to give pre-eminence to the intention to make the article a permanent accession to the freehold, and the other tests seem to derive their chief value as evidence of such intention. This test — the intention of the party making the annexation — is made the controlling criterion by most of the authorities, and generally is considered to be the chief test."

In view of such rule it is somewhat difficult to reconcile the language of paragraph seven of such indenture of lease with the proposition that it was the intent of either the lessor or the lessee that the improvements or structures erected by the lessee during its tenancy were to become the property of the lessor even after the expiration of the stipulated removal period. The express covenant is that if such buildings are not so removed, the lessor shall have the right to use the structures during the time when the lessee, under the terms of the indenture, is not entitled to use them by assuming the liability to the lessee for any damages that might be caused by reason of such use. If the buildings or structures were intended by the parties to become the property of the lessor after the thirty day period, what liability could exist? If the owner demolished the buildings which he owned, there could exist no liability to someone else by reason of such destruction.

In paragraph five of the indenture the lessee was required to light the outside of all buildings and structures erected by it except during the time they were occupied by the lessor. In paragraph six it is provided that the lessee may make alterations in, additions to or substitutions "for

the improvements of buildings and structures" which were erected during the term of such lease or during the preceding lease.

In the lease of October 26, 1935, similar provisions are contained. However, to the language contained in paragraph seven of the earlier lease, the following language is added: "Provided, further, that nothing in this section shall preclude the right of the City to permanently remove any such building or structure from the airport." If it had been the intent of the contracting parties to consider the lessor as the owner of the structures and buildings erected by the lessee, it is difficult to perceive the reason for this proviso. Would the owner not have the right to remove its own structures from its own property, without such covenant?

In view of such provisions in the indentures of the lease it would seem to me that it was not the intention of either the lessor or the lessee that the structures or buildings erected by the lessee were to become the property of the lessor even though they were not removed within the thirty day period subsequent to the annual air race displays. Such appears to be made more evident by the fact that the parties have themselves provided that the lessor after the expiration of such period had the right to use such buildings when not occupied by the lessee without compensation other than the payment of any damage caused by such use. From the enclosures submitted it would further seem that when it became apparent that air races could not be successfully carried on during the war period, the lessor ordered the lessee to remove the improvements in question, purporting to act pursuant to the proviso above quoted from paragraph six of the indenture dated October 26, 1935, and the lessee acting pursuant thereto did remove the structures erected by it at its cost. Such conduct seems inconsistent with an intent to consider the buildings as a part of the freehold. It would, therefore, seem to me that in view of the covenants of the parties and their conduct during the term of the lease, the buildings remained the property of the lessee and when removed at the direction of the lessor the salvage value thereof is the property of the lessee.

Specifically answering your inquiry, it is my opinion that where a municipality enters into a five-year lease of a portion of an airport owned by it for use during a period of not to exceed fourteen days in each of such years, with an option to renew the lease, giving to the lessee the

right to erect structures and buildings thereon and to remove the buildings or structures within thirty days after such period of use and, in default thereof, granting to the lessor the right to use such property during the time when not in use by the lessee upon responding to the lessee for any damage to such structures from such use, and further covenants that the lessee may make additions to, alterations in or substitutions for such structures on the premises, the title to such structures, when erected, remains in the lessee; and, when removed by the lessee upon order of the lessor, the salvage value belongs to such lessee, whether removed during the period of such original lease or a renewal thereof or within a reasonable time thereafter.

Respectfully,

THOMAS J. HERBERT
Attorney General.