

"Where a certain jurisdiction is duly conferred, duties assigned and powers granted to a board or commission, such board or commission cannot confer upon itself further jurisdiction or add to its powers by the adoption of rules under authority granted to adopt rules of procedure."

It appears to me that this principle is applicable here. The legislature has stated that a cigarette license must be obtained for each "place of business." The courts have construed this language. Any rule, modifying this construction, made by your commission would be clearly unwarranted under your power to make procedural rules. I therefore feel that such a regulation is invalid in so far as it conflicts with the right of a vending machine company to have two vending machines covered by one license, just as other persons who sell cigarettes at retail by means of stands, under the facts and circumstances set forth in the court decisions referred to herein.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

2571.

FIXTURE—STEAM BOILER AND STATIONARY ENGINE INSTALLED
 IN POWER HOUSE AND FACTORY BUILDING FIXTURES WHEN—

SYLLABUS:

Steam boilers and a stationary engine installed in a power house and factory building, respectively, which have been annexed to the realty in such manner as to show the intention of the owner to make such boilers and engine a part of the realty in such way as to be adapted to the use and purpose of generating motive power for the operation of such machinery as might be installed in the factory building, are fixtures and, as such, pass to the grantee as a part of the realty upon a conveyance of the same by deed.

COLUMBUS, OHIO, April 25, 1934.

HON. O. W. MERRELL, *Director, Department of Highways, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of your communication of recent date, requesting my opinion as to the ownership of a battery of steam boilers and of a Corliss engine of the Simplex type now located in certain buildings on a ten-acre tract of land at or near the City of Delaware, Ohio, recently purchased by the state in certain foreclosure proceedings against the Rainbow Tire and Rubber Company in a case then pending against said company in the Common Pleas Court of Delaware County, Ohio. The deed of the Sheriff of Delaware County, Ohio, which conveyed this tract of land to the State of Ohio, described the same by metes and bounds, and conveyed to the state the property thus described "together with all privileges and appurtenances thereunto belonging." There is no express mention in the deed of the steam boilers or of the stationary engine above referred to either by way of inclusion or exclusion from the operation of the deed. In

this situation, the question presented in your communication requires a determination of the more immediate question as to whether the title to this property passed to the state as fixtures and as a part of the buildings and real property which were conveyed to the state by the sheriff's deed above referred to.

It appears from the information at hand that the buildings on said tract of land are a large brick factory building and a separate power house building originally erected and constructed by the Rainbow Tire and Rubber Company as a factory and plant for the making and fabrication of automobile tires. The steamboilers here in question are set in and upon a foundation therefor and are housed and encased in brick and other masonry work apparently constructed in such way as to be a permanent improvement to the property for the purpose of encasing the boilers and thereby confining the heat engendered within the same. These boilers and the masonry encasing the same are in a substantial brick power house building which has ample interior room for such work as may be necessary for firing and in otherwise operating such boilers by the use of coal as a fuel therefor. The stationary engine above mentioned is in the south end of the factory building and is an engine of a size and type which is capable of developing probably four-hundred horse power or more. The same is bolted and otherwise secured and fixed in a concrete foundation which has been sunk into the ground in such a way as to make a pit in which the engine rests and was intended to operate.

The boilers are so constructed that it will be impossible to remove the same without cutting the tubes in the boilers and without tearing down and otherwise dismantling the masonry work by which the boilers are encased. With respect to the engine, it may be observed on this point that unless the same is cut up as old iron and steel by a blow torch or other suitable means, the same can hardly be removed without removing a part of the interior wall of the room in the factory building in which the engine is located, or without removing a portion of the glass front in the south end of the factory building.

The factory building and the power house building on this tract of land are, of course, appurtenances of the real estate and as such are a part of the same. I am likewise quite clearly of the opinion that the same is true of the steam boilers and of the stationary engine here in question. The boilers, as well as the engine, have been annexed to the realty in such manner as to show the intention of the Rainbow Tire and Rubber Company to make these a part of the realty in such way as to be adapted to the use and purpose for which they were installed, to wit, the generation of motive power for the operation of such machinery as might be installed in the factory building.

In the consideration of the question here presented, I do not deem it necessary to extend my discussion of the question to the numerous, complex and conflicting distinctions which sometimes have to be made in the determination of the questions of this kind. Aside from the facts above noted relating to the physical attachment or annexation of the boilers and engine here in question, it is sufficient, I believe, to note that the interest of the state is that of a purchaser and grantee of the property as to which relation it may be said with respect to the question at hand that chattel property which has been actually or constructively annexed to the realty is a fixture and as such passes to the grantee under his deed, unless such property is exempted from

the operation of the deed; and that such boilers and engine were installed for the purpose of supplying motive power. As to this, the Supreme Court of this state in the case of *Case Manufacturing Company vs. Garven*, 45 O. S. 289. held:

"The machinery of a manufactory that supplies the motive power, as the engine, boiler and their usual attachments, as contradistinguished from that propelled by it, where permanently annexed to foundations resting upon the freehold, is generally held to be a fixture, though susceptible of being removed without any material injury to the same or the freehold."

The court in its opinion in this case, in drawing a distinction between machinery installed for the purpose of supplying the motive power of a mill or factory, and machinery propelled by such motive power, said:

"It is a distinction generally recognized by those who run and operate mills as well as by the courts, being founded in the general character of the machinery of each class, and the mode in which it is usually placed upon the premises for use.

The machinery furnishing the motive power is generally more closely annexed to the freehold, and of a more permanent nature, as the power furnished by it may be adapted to the propulsion of the machinery of a variety of mills without any substantial change in the motive power itself or in the building other than by substituting one kind of machinery for another; whilst the machinery that is propelled, has more of the general character of personalty, is not as a rule so closely annexed to the freehold, and may be removed, and frequently is, from one mill to another, as any other article of personalty; and is more properly 'accessory to the business' carried on upon the realty than to the realty itself."

Likewise, in the leading case of *Teaff vs. Hewitt*, 1 O. S. 511, it was held that carding machines in a woolen factory which were attached to the building in such manner as to confine them to their proper places while in use, and which were subject to removal whenever convenience or business required, were not fixtures, but chattels; while a steam engine and boiler, used to supply the motive power in the operation of such machines, permanently fixed upon a foundation made in the ground, were to be regarded as realty. The same rule was applied with respect to property of this kind in the case of *Brennan vs. Whitaker*, 15 O. S. 446.

Upon the considerations above noted, I am of the opinion, by way of specific answer to your question, that the title to the boilers and engine referred to it in your communication is in the State of Ohio.

I am advised that your reason for requesting my opinion upon the question submitted by you is that you contemplate the severance of this property and the disposition of the same for the purpose of obtaining and installing a heating plant in the factory building above referred to, which building you are now using as a state highway garage. You do not in your communication to me submit or in any manner suggest any question with respect to your authority to dispose of the property in this manner and for this purpose; and no opinion is intended to be here expressed upon any question of this kind. Upon the question submitted, however, I am of the opinion, as

above stated, that the boilers and engine referred to in your communication are the property of the State of Ohio.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

2572.

APPROVAL, BONDS OF CITY OF TOLEDO, LUCAS COUNTY, OHIO
 \$40,000.00.

COLUMBUS, OHIO, April 26, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2573.

APPROVAL, BONDS OF CUYAHOGA COUNTY, OHIO—\$50,000.00

COLUMBUS, OHIO, April 26, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2574.

APPROVAL, BONDS OF CITY OF ELYRIA, LORAIN COUNTY, OHIO
 \$10,000.00.

COLUMBUS, OHIO, April 26, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2575.

APPROVAL, BONDS OF CLEVELAND HEIGHTS CITY SCHOOL DIS-
 TRICT, CUYAHOGA COUNTY, OHIO—\$57,000.00.

COLUMBUS, OHIO, April 26, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2576.

APPROVAL—BONDS OF CITY OF DAYTON, MONTGOMERY
 COUNTY, OHIO—\$14,000.00.

COLUMBUS, OHIO, April 26, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.