

1964

# Metals Manufacturing Co. v. Bank of Commerce : Brief of Appellant

Utah Supreme Court

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## Recommended Citation

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IN THE SUPREME COURT  
OF THE STATE OF UTAH D

JUL 16 1964

METALS MANUFACTURING  
COMPANY, a Utah corporation,  
*Plaintiff and Appellant,*

— vs. —

BANK OF COMMERCE,  
a Utah corporation,  
*Defendant and Respondent.*

Clerk, Supreme Court, Utah

Case  
No. 10116

APPELLANT'S BRIEF

Appeal From a Judgment of the Third Judicial  
District Court of Salt Lake County,  
HONORABLE STEWART M. HANSEN, *Judge*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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METALS MANUFACTURING  
COMPANY, a Utah corporation,  
*Plaintiff and Appellant,*  
— vs. —

BANK OF COMMERCE,  
a Utah corporation,  
*Defendant and Respondent.*

} Case  
No. 10116

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## APPELLANT'S BRIEF

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### NATURE OF CASE

This is an appeal from a Judgment dismissing appellant's Complaint and holding that appellant was not entitled to recover for construction, addition to, alteration, or repair to a building, structure, or improvement upon land under Utah Bond Statute 14-2-1 and 14-2-2.

### DISPOSITION BY THE TRIAL COURT

The case was submitted to the Court, sitting without a jury. The trial court ruled that an aluminum rail-

ing made to order and fabricated for installation in a building at the instance and request of the defendant and affixed to the floor and walls of a building was personal property and was not an addition to, alteration, or repair of a building and structure within the meaning of Utah Code Annotated 14-2-1.

## RELIEF SOUGHT

Appellant seeks to reverse the decision of the court below.

## STATEMENT OF FACTS

During May of 1963, Arnold Drews, of Modern Ornamental Iron Works, ordered three sections of aluminum railings and three gates from the appellant, fabricated to order, in accordance with plans and specifications, for installation in a building located in Magna, Utah, (R. 21, 22, 23, 41) and leased by respondent for a commercial banking business. (R. 33)

Appellant fabricated said railings and gates and delivered them to Arnold Drews. (R. 21, 22, 23) Drews in turn installed and affixed the railings and gates to the floors and walls in the bank building (R. 31, 32, 35, 41) leased by the respondent and was subsequently paid by the respondent bank in full (Dep., 5, 6), but thereafter refused to pay the appellant the agreed contractual price for the labor, materials and profit involved in the fabrication of said railings and gates. (Dep. 6)

There was no issue over the fact that the installation of the railings and gates was made on leased prem-

ises. (Pre-Trial Order) Under the terms of respondent's Lease, the respondent lessee agreed with lessor to make said improvements to the building. (R. 38) (Plaintiff's Exhibit 10) Accordingly, this case involves improvements made to a leasehold interest and is within the Bond Statute 14-2-1. See *Buchner Block Company v. Glezos*, 6 Utah 2d 226, 310 P. 2d 517 (1957).

Respondent bank did not secure from its contractor, Arnold Drews, a Performance or Payment Bond as required by 14-2-1. (Pre-Trial Order) (Dep. 6).) After the railings and gates were fabricated to order and installed, both Drews and the respondent bank refused to pay appellant (Dep. 6), and accordingly, appellant brought this action for payment of the reasonable value of the railings and gates fabricated to order for the respondent bank.

## A R G U M E N T

### POINT I.

#### THE COURT ERRED IN REFUSING TO GRANT RELIEF TO THE APPELLANT UNDER UTAH STATUTES 14-2-1 AND 14-2-2.

Utah Code Annotated 14-2-1 clearly states:

“The owner of *any interest* in land entering into a contract, involving \$500.00 or more, *for the construction, addition to, or alteration or repair of, any building, structure or improvement upon land* shall, before any such work is commenced, obtain from the contractor a bond in a sum equal to the contract price . . . and any person who has furnished materials or performed labor for or upon any such building, structure or improvement, pay-

ment for which has not been made, shall have a direct right of action against the sureties . . . ”  
(Emphasis supplied)

Utah Code Annotated 14-2-2:

“Any person subject to the provisions of this chapter, who shall fail to obtain such good and sufficient bond . . . shall be personally liable to all persons who have furnished materials or performed labor under the contract for the reasonable value of such materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon.”

Respondent did not secure a bond as required and now argues the Statute is inapplicable because it merely purchased an item of personal property.

The railings and gates were made to order and fabricated specifically to fit into this particular building and were affixed to both the walls and the floors of the building. Mr. Charles I. Canfield, on page 4 of his deposition, in answer to a question, stated:

“So I asked him if he would have them come out and contact me relative to the *construction and delivery* of these railings. A Mr. Drews called on me and I told him what I wanted. He said he would take it and take the measurements, figure what he could do the job for, and would submit a bid. This he did, and I authorized him to go ahead and prepare the railings for us.” (Emphasis supplied)

This statement of fact by Mr. Canfield clearly shows that the railings and gates were an addition, alteration,



or repair, to a building, structure, and improvement upon land. And then at page 9 of the deposition, in answer to a question by Mr. Mecham, Mr. Canfield further stated:

“MR. MECHAM: Did you prepare a scale drawing of this?

“A. Yes.

“MR. MECHAM: Where is the scale drawing?

“A. I don't where, Mr. Mecham. We have another one my boy made the other day, which would be just the same as this. It was just the layout, but I did put it to scale so I knew how much footage I needed for each.

“MR. MECHAM: For each of the areas?

“A. Yes.

“MR. MECHAM: You drew this, of course, to fit this particular building?

“A. That is right, to fit the building.

“MR. MECHAM: That is all.”

The special construction of the railings and gates shows they were intended to constitute a part of the building.

“The fact that the article was specially constructed or fitted with a view to its location and use on the particular land or in the particular building, it being consequently less readily susceptible of use elsewhere, tends to show that it was intended to constitute a part of the land.” *Knoff Woodwork Company v. Zotalis*, 213 Minn. 204, 6 N.W. 2d 264, 266 (1942).

In addition, the desirability of the railing as a part of the finish of the building for the purpose for which it is desired, indicates the railings and gates are a part of the land and, therefore, an improvement. See *New York Life Insurance Company v. Allison*, 107 F. 179, 46 C.C.A. 229 (1901), Cert. Denied 21 S. Ct. 923, 181 U.S. 618; *Southern California Telephone Company v. State Board of Education*, 12 Cal. 2d 127, 82 P. 2d 422 (1938).

And, on page 11:

“MR. MECHAM: How are the partitions fixed to the building?

“A. They were just nailed to the floor. All we have to do is to take one side out and two nails right out.”

The fact that the railings and gates are removable without material injury to the freehold does not defeat the nature of the railing and gates as fixtures. C.J.S., Sec. 5, page 610.

The Court, in *Helms v. Gilroy*, 20 Or. 517, 26 P. 851, 853 (1891), held machinery was a part of the fixture. In a suit to foreclose a mortgage, the Court said:

“It is true the screws and bolts with which it was annexed could have been taken out, and the machinery removed, without serious damage to it or the building, but so, no doubt, could have been the doors and windows. It was, in its very nature, adapted to the business for which the land was used. The party making the annexation must have intended that it should remain as long as it continued serviceable. . . .”

In relation to permanency, it appears to be sufficient that the railing is intended to remain where placed as long as the building to which it is annexed may be used for the same banking purpose. See *Trabue Pittman Corp., Limited v. Los Angeles County*, 29 Cal. 2d 385, 175 P. 2d 512 (1946).

Mr. Canfield further recognized the fact that the railings were in fact fixtures at page 14 of his deposition. In answer to a question, Mr. Canfield stated:

“Q. Did you contemplate the possibility of such a move when you planned the furniture and equipment in the Bank of Commerce?

“A. Not for ten years because our lease runs ten years. Unless some development came that would make it financially feasible to sub-lease these quarters and move some place else.

“MR. MECHAM: You provided that in your lease?

“A. Yes.

“MR. MECHAM: So that any of these fixtures could be taken out?

“A. Yes, or moved to any place we want to at our convenience.”

And, on Page 16, Mr. Canfield stated:

“Q. I call your attention to paragraph 10 of the lease, which is on page 2. Did you have anything to do with the specific negotiation of this paragraph in the lease?

“A. Yes, I did.

“Q. Will you explain that, please?

“A. The original lease was drawn by Mr. John Rokich and he sent the form over to me for my approval and also a copy to Mr. Paulos, I think Mr. Ernest Paulos for his approval.

“After I read it he had left out this provision relative to removing items that we would put in. Remodeling, changing the interior and so forth is outlined in this paragraph 10. That had been left out.

“I sent the lease back to him and told him what we wanted, we wanted that provision put in the lease. I also explained Mr. Paulos was agreeable to it.

“Mr. Rokich then rewrote the lease with this paragraph 10 in.

“Q. Why did you want it in?

“A. So we could remove these fixtures and equipment . . .”

Under the ruling of the lower court, any railing or gate affixed to a structure and made to order which is an alteration, addition, or repair to an existing structure, but which could be unbolted and removed is not such an addition, alteration, or repair within the meaning of Utah Code Annotated 14-2-1. Under the ruling of the lower court, it is apparent also that the plaintiff and appellant did not have a lien right to secure its payment for the fabrication and construction of the railing added to and secured to the said Bank building. The Supreme Court of Utah has on many occasions announced the fact that “the Statute of Utah now under review is

auxiliary to our mechanic's lien law, and just as much in aid of it as if it had been made part of it and incorporated in the same chapter." *Rio Grande Lumber Company v. Darke*, 50 Utah 114, 124, 167 P. 241 (1917).

"The purpose of the Statute is to prevent owners of land from having their lands improved with the materials and labor furnished and performed by third persons, and thus to enhance the value of such lands, without becoming personally responsible for the reasonable value of materials and labor which enhanced its value." *Liberty Coal & Lumber Company v. Snow*, 53 Utah 298, 178 P. 341, 343 (1917).

If the contractor has not reserved enough of a fund in his own hands to pay for the materials provided him by the appellant, then the respondent bank, by not requiring a bond under the Statute, incurs the risk of having to pay over again for these items.

"Because of the common purpose of these lien and contractors' bond statutes, and their practically identical language, adjudications as to what is lienable under the former are helpful in determining the proper application of the latter." *King Brothers, Inc. v. Utah Dry Kiln Company*, 13 Utah 2d 339, 341, 374 P. 2d 254 (1962).

This Court, in the case of *King Brothers, Inc. v. Utah Dry Kiln Company*, *supra*, stated:

"In order to qualify under these statutes it is necessary that there be an annexation to the land, or to some permanent structure upon it, so that the materials in question can properly be regarded as having become a part of the realty; or a fixture

appurtenant to it; and this must have been done with the intention of making it a permanent part thereof. That the addition is consistent with the use to which the property is put is often helpful in making the determination." Ibid at 342.

Other courts have perhaps laid greater stress on the requirement of adaption or appropriation to the use of the building, as has been stated by *Tiffany*:

"A consideration on which the cases usually lay great stress, in determining the character of the article as a fixture vel non, is its character, as related to the uses to which the land has been appropriated, it being regarded as a fixture only in case there is a correspondence between its character, and consequently its prospective use, and the use to which the land is devoted." *Tiffany*, Real Property, 3rd Ed., Vol. 2, Sec. 610, p. 571.

In the instant case, we have the fabrication and manufacture of railings and gates to the order of the respondent lessee; these said railings and gates were affixed to the floor and walls of said structure: under the terms of the Lease Agreement, it was the intention of the respondent and lessee that these railings and gates be the permanent part of said structure until such time as the lease expired and the lessee decided to remove same from the building. The addition of the railings and the gates was consistent with the use to which the property was put. The Agreement and the intention to remove was an agreement between the lessor and the lessee, and the appellant in this case had no knowledge or understanding, or information with reference to the

agreement between the lessor and the lessee to remove these said railings and gates.

In other words, the appellant was a third party and not a party to the agreement between the respondent and the landlord. Therefore, since there is no privity, the agreement is not binding upon the appellant. This point is well stated by the Supreme Court of California :

“It is well stated, however, that such a contract, whether express or implied, is not effective against those not bound by the agreement; for example, innocent third persons. In such cases the intent that is material is that reasonably manifested by outward appearances.” *Trabue Pittman Corp., Limited v. Los Angeles County*, 29 Cal. 2d 385, 175 P. 2d 512, 529 (1946).

Although there is no arbitrary standard to be applied, the appellant in the case at hand was a third party not bound by the agreement. The plaintiff, through representations made to it by the non-paying contractor, was led to believe the railings and gates were to be used in a bank in Idaho, and, therefore, had no notice, actual or constructive, of the lease agreement.

“Apart from statute, it is usually held or stated, as a general rule, that, although the parties may, as between themselves, agree that chattels to be annexed to realty shall remain personalty or be subject to a right of removal . . . such agreements cannot ordinarily affect the rights of innocent third persons without notice thereof. . . .” C.J.S., Sec. 17, pp. 638-639.

The Supreme Court of Utah has recognized the necessity of notice between the parties to the agreement



and the third party, i.e., the appellant in the case at hand.

“Where a structure is placed upon the land of another with an agreement before attachment that it is to be, and remain, personal property, and not to become a part of the realty, and that it may be removed by the builder, the authorities are in unison to the effect that such an agreement will prevail as against a subsequent purchaser or mortgagee of the realty who has notice, actual or constructive, of the agreement.” *Workman v. Henrie*, 71 Utah 400, 406, 266 P. 1033 (1928).

In accord with the leading cases on the subject, the intention of the annexer to make a permanent addition to the land is of paramount importance. See *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634 (1853); *Workman v. Henrie*, *supra*.

However, the controlling intent is the apparent intent of the parties outwardly manifested to the appellant, the apparent intent being the annexation of the railings and gates as an improvement to land.

“Of course, it is true . . . that generally the intent of the parties is a controlling criterion in ascertaining whether property is permanently attached to the land or retains its identity as personalty. This applies between the immediate parties to a transaction, such as mortgagor and mortgagee, vendor, and vendee, etc., and their successors in interest. But where, as here, the rights of a person unconnected with that transaction are concerned, and who is without actual or constructive notice concerning the intent of the parties responsible for annexing the personalty to the land, the question is not so much the intent of the parties as the ap-



parent intent as it would reasonably appear to such third persons." *Hammond Lumber Co. v. Gordon*, 84 Cal. App. 701, 258 P. 612, 614 (1927).

Even if the railings and gates were considered as trade fixtures and, therefore, removable without the inserted clause in the lease, the argument is relevant only as to the lessor and lessee. See *Hammond Lumber Co. v. Gordon*, *supra*.

## CONCLUSION

In considering the evidence in the light most favorable to the appellant (*King Brothers, Inc., v. Utah Dry Kiln Co., supra*), it is as clear as the sun on a cloudless day that the railings and gates were fabricated and constructed especially to the order of the respondent and affixed to the building which the respondent was leasing for the purpose of operating its said bank. To hold that the Utah Bond Statute does not apply in this instance would be to hold that any addition to, alteration, construction, or improvement to land which was affixed as a matter of fact, but which could be unfixed by the removal of screws and bolts, or nails, would serve to defeat the application of the Statute which we urge should apply in this instance. The factual situation surrounding the case points out emphatically that the nature of the railings and gates was that of an addition to, alteration, construction, or improvement to land, i. e., special construction tends to show that the railings and gates were intended to constitute a part of the land and building; desirability as a part of the architectural

design or finish of the building indicates the railings and gates are a part of the building; the fact that the railings and gates are removable without material injury to the freehold does not defeat the nature of the items as a fixture; the appellant was a third party and not a party to the transaction between the lessor and lessee and, therefore, the agreement is not binding upon the appellant.

Because the purpose of the Statute is to protect those who performed labor and furnished the materials incorporated into the building, counsel for the appellant urges this Court to reverse the decision of the court below and award to the appellant the damages as prayed in its Complaint.

Respectfully submitted,

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