A. G. FILE NO. 0-3465

OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

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Honorable Lee Brady
Commissioner
Department of Banking
Austin, Texas

Dear Mr. Brady: Opinion No. 0-3465

Re: Construction of Article 512 of the Revised Civil Statutes with respect to the words "banking house" and "fixtures".

We beg to acknowledge receipt of your letter of inquiry as follows:

"Your attention is directed to the provisions of Article 512 of the Revised Statutes of Texas, 1925, which reads as follows:

> "'No State bank or bank and trust company shall invest more than fifty per cent of its capital stock and permanent surplus in its banking house, nor more than fifteen per cent of its capital stock and permanent surplus in the furniture and fixtures to be used in its said banking house, unless said corporation shall have first applied to the State Banking Board and received written permission to make a larger investment than is allowed hereunder, which written permission shall be entered upon the minutes of a regular meeting of said banking corporation.'

"A banking corporation recently incorporated under the laws of this State, having a capital stock of $35,000.00, surplus of $10,000.00 and debentures outstanding in the sum of $15,000.00, has constructed a bank building and has installed in that building 'built-in Friendly type marble fixtures with four cages, built on brick walls'

costing $2,295.00. It has also installed a vault door at a cost of $600.00, Venitian blinds at a cost of $71.20 and a Neon sign at the entrance of the customers' vault at a cost of $20.00. These items have been added to the cost of the building, making a total of $13,139.12, at which figure the building is carried on the books of the bank. This bank has invested in movable fixtures a sum equal to 15% of its capital and surplus.

"The bank has taken the position that the built-in marble fixtures above mentioned having been constructed on brick walls, constitute a part of the building and, therefore, are not fixtures within the purview of Article 512 above mentioned. The same position is taken with reference to the vault door, Venitian blinds and Neon sign.

"Please advise whether or not these marble fixtures, this vault door, blinds and sign are 'fixtures' within the purview of Article 512, or whether they constitute a part of the banking house within the meaning of that Statute."

Your inquiry is incapable of a definite or final answer one way or the other, for the reasons hereinafter stated.

The term "fixtures", in legal contemplation, ordinarily means those articles or things that are permanently attached to the land, with the intention that they should become a part thereof. Obviously, the word is not used in this sense in the bank statute, but rather it is used in the sense of personal property commonly known as "trade fixtures". These trade fixtures may, and in most instances do, consist of articles capable of permanent attachment to the land, but on the other hand, they are likewise equally capable of use as personal property, with no intention whatever of permanently attaching them to the realty.

The matter is not determined by any rule of physical or structural attachment of the fixture to the land, such physical attachment, and the extent and nature thereof, are merely circumstances tending to evidence the real intention of the person or persons owning the building and the fixtures. Each and every article mentioned by you may, present the proper intention, become and be a

part of the building, and therefore a part of the land. On the other hand, each and every article mentioned by you, present such an intention, may become and be trade fixtures -- personal property -- and not a part of the building in which they are located, and to which they may even be to some extent physically attached.

As early as Hutchins v. Masterson, 46 Tex. 551 (1877) our Supreme Court said:

> "It is said, the weight of the modern authorities establish the doctrine that the true criterion for determining whether a chattel has become an immovable fixture, consists in the united application of the following tests:
>
> "1st. Has there been a real or constructive annexation of the article in question to the realty?
>
> "2d. Was there a fitness or adaptation of such article to the uses or purposes of the realty with which it is connected?
>
> "3d. Whether or not it was the intention of the party making the annexation that the chattel should become a permanent accession to the freehold? - this intention being inferable from the nature of the article, the relation and situation of the parties interested, the policy of the law in respect thereto, the mode of annexation, and purpose or use for which the annexation is made.
>
> "And of these three tests, preeminence is to be given to the question of intention to make the article a permanent accession to the freehold, while the others are chiefly of value as evidence as to this intention. (Ewell on Fixtures, 21, 22.)"

In Moody v. Aiken, 50 Tex. 65 (1878) a banker's safe was involved, and while the safe itself was not secured to the building, it was, however, enclosed within the walls of a vault in such way as it could not be removed without

destroying the walls in part, and was thus effectually made fast in the building. In that case the Supreme Court said:

> "More recent decisions have, however, to some extent, brought order out of this confusion, and have established for our guidance certain rules founded on reason and custom. These make the true test of a removable fixture at least to depend not so much on the mere fact of 'a ligature, a bolt, or a screw' as upon constructive annexation, the intention of the party in making the same, and the relation which the article bears to the uses of the freehold."

The court further adds:

> "Under the authority of the case of Hutchins vs. Masterson and others cited above, the intention of the parties becomes a controlling element in the determination of the question whether a particular annexation has or has not assumed the character of a fixture", and affirmed the judgment of the trial court, holding the safe to be personalty and not a part of the realty.

In the case of Inge v. First State Bank of Denton, 57 S. W. (2) 217, involving a time-lock door to a vault used by a bank, Justice Lattimore said:

> "The obligation of the appellee by its lease was to return the building 'as it now is.' We are thus relegated to the rules in Hutchins v. Masterson, 46 Tex. 554, 26 Am. Rep. 286. The rules therein set out, when read in the light of Moody vs. Aiken, 50 Tex. 65, make it plain that our rule of public policy and in favor of trade and to encourage industry encourages the tenant to install trade fixtures which, if erected for a mere temporary purpose and without any intention on the part of the tenant that same become a part of the realty, and if

> not so attached as to become a part thereof, may be removed. It is the intention which is the important factor; hence the evidence of the bank officials that appellee did not intend for the articles to become a part of the realty. This testimony was admissible, but it was not exclusive; 'the intention being inferable from the nature of the article, the situation of the parties interested, the mode of annexation, the circumstances which require the installation and the use to be made thereof."
>
> The court then held:
>
> "The time lock door and the bank cages and windows are trade fixtures, and as such the tenant is entitled to remove them. It is of no importance that the closet door (held to be realty) matches in appearance the cages, but it is of importance that the time lock door is especially a bank vault door. The one door is not a trade fixture, the other is."

See also: Dallas Joint Stock Land Bank v. Lancaster, 100 S. W. (2) 1029; Clark v. Clark, 107 S. W. (2) 421.

These cases are cited and quoted for the purpose of emphasizing the fact that the matter of classification of the fixture is largely if not altogether one of intention. By "intention" we mean, of course, the intention of the party putting in or installing the fixture.

From what we have said, it follows that if the bank in question in constructing its building placed or installed its marble fixtures, cages, vault door, Venetian blinds and Neon sign, intending at the time that these things should be a permanent part of the building, they would be such in law. This presents a question of fact which you are authorized to determine from the evidence before you. In this connection, we will say that such fact question should be determined from all the facts and circumstances surrounding the situation, and not alone by the mere present statement of the Board members who construct-

ed the building. The fact that the bank has carried on its books the banking house at a value to include the cost of these fixtures, is a cogent circumstance supporting the present contention of the bank with reference to the character of the fixtures, or in other words, with respect to the intention of the bank at the time the building was constructed and the fixtures installed.

Under date of January 8, 1934, the writer of this opinion, then counsel to the Banking Commissioner, advised your Department with respect to the status of a bank vault door as a real fixture or trade fixture, a copy of which opinion is before us, and a copy of which you may have if the original is not available to you at this time.

Trusting that what we have said will be a sufficient answer to your inquiry, we are

Very truly yours

ATTORNEY GENERAL OF TEXAS

APPROVED MAY 8, 1941

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OS-MR

APPROVED
OPINION
COMMITTEE
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