

**State Lands—Certificate of Purchase of—Transferred by Will to One Holding Full Quota of State Land—Quitclaim Deed of Holder of Certificate of Purchase to One Having Full Quota of State Land.**

A certificate of purchase of State land may be devised by will or transmitted, under the laws of succession, to one already holding his full quota of State land.

A person holding a certificate of purchase may quitclaim to a person who already holds his full quota of State land, and the latter may complete the purchase and obtain a patent, provided there was no express or implied agreement at the time of the sale by the State that the purchaser should convey to any particular person.

H. V. Bailey, Esq.,  
Register State Lands,  
Helena, Montana.

My dear Mr. Bailey:

You have submitted the following questions to this office and requested an opinion thereon:

“1. Where a person holding a certificate of purchase from the State anticipates death before completion of payment of contract, can such contract on land be willed to an individual who already holds his quota of State lands? If no will is made, can an heir holding his quota of State lands inherit same?

“2. Is there any regulation prohibiting a person holding a certificate of purchase of State land from quit-claiming to a third party who holds his quota of State land, provided the third party continues and completes the payments on the contract?

Section 37 of Chapter 147, Laws of 1909, provides, in part, as follows:

"Not more than one hundred and sixty acres of agricultural land susceptible of irrigation, and not more than three hundred and twenty acres of agricultural land not susceptible of irrigation, and not more than six hundred and forty acres of grazing land or lands which, by reason of altitude are valuable only as hay land, shall be sold to one person, or company or corporation; \* \* \*"

Section 45 provides, in part, as follows:

"Whenever a purchaser of state lands, or his assigns, \* \* \* shall have paid the whole of the said purchase money, he shall be entitled to letters patent for the land sold to him or his assignor."

Section 48 provides:

"Certificates of purchase shall be assignable, but all such assignments shall be in writing, and be acknowledged as other conveyances of real estate, and shall be filed for record in the office of the register of state lands; provided, however, that the state board of land commissioners may cancel any certificate of purchase, upon the ground of fraud within three years from the date of its issue, upon giving to the person named in the certificate of purchase, at his last known place of address, thirty days notice that the same is held for cancellation; and, if the same is registered, hearing shall be had before the board of Contest, as in other contested cases, provided that such hearing may be had upon testimony taken before some officer authorized to administer oaths in the county in which the land involved is situated."

Section 37 prevents the sale to one person of more land of any class than is specified therein, while Section 45 provides that patent shall issue to any purchaser, or his assigns, who shall have paid the *whole* of the purchase price for the land sold to him.

Section 48 permits the assignment of certificates of purchase, but provides that the State Board of Land Commissioners may cancel any certificate of purchase upon the ground of fraud within three years from the date of issue. The apparent intent of this section is to make any assignment of a certificate of purchase, within three years, *prima facie* evidence of fraud. It is to be noted, however, that this section does not prohibit an assignment of a certificate of purchase to a person already holding his full quota; but from the fact that the provisions for canceling a certificate within three years appear in this connection, it is evident that the Legislature anticipated that fraud might be attempted in this manner, and, if so, that the certificate of purchase might be canceled, and it would follow that the Legislature did not intend to forever prohibit a person from acquiring

a certain quantity of land formerly owned by the State. The prohibition is against a sale in the first instance, or doing indirectly what is prohibited from being done directly.

*Gliem v. Board of Commissioners*, (Ore.) 19 Pac. 16.

The court in this case, discussing an assignment of a certificate of purchase under a somewhat similar provision of law, used the following language:

"The legislature evidently intended that when the certificate of purchase was issued to the applicant, the purchase was then made, and I do not see how the act can be construed otherwise. The policy of the law, no doubt, was to prevent an applicant from purchasing more of the state lands than the quantity mentioned; but it could hardly have been expected that it would be the duty of the board to undertake to prevent their transfer after they were sold. Nor will a refusal upon the part of the board to execute deeds to assignees of certificates of purchase have the effect to prevent such transfer, or restrict parties from acquiring such an amount of the lands as they may desire to buy. It can have no other result than to embarrass and incommode the vendor and purchaser in the transfer of the title. If the vendor were not permitted to assign the certificate, and thereby enable the purchaser to make payment of the amount due on the purchase price, deliver the certificate and assignment to the board, and receive a deed, still he could make such payment himself, receive the deed from the board, and then convey the land to the purchaser."

The court further said:

"The language of said section 11 of the act is as plain as words can make it. It unmistakably authorizes an assignment of the certificate of sale, the payment by the assignee of the balance due on the purchase price of the land, and the receipt by him of the deed therefor. Nor does the language of the section require the assignee or purchaser of the certificate to possess any particular qualifications in order to entitle him to become such assignee or purchaser; and the attempt upon the part of the board to prescribe the qualifications he shall possess, or conditions upon which the assignment or purchase shall be made, is a usurpation of legislative functions."

It would seem that under the provisions of Section 37, a certificate of purchase could not be canceled after three years even for fraud. However, no question of fraud can arise where land is conveyed by will or where heirs succeed to the right of their ancestors under the law of succession, since the land was not purchased under any agreement to convey and the conveyance is not made by virtue

of contract or for a valuable consideration. The contract to purchase is a property right, and heirs or devisees could not be deprived of property in this manner. Furthermore, the executor or administrator would have a right to carry out and complete the contract of the deceased, and after acquiring a patent from the State could convey the same to the heirs.

24 C. J. 54, and cases under note 35.

The conclusion from the foregoing is that a certificate of purchase is property that may be devised by will to one already holding his full quota of State land, and in case no will is made, it would, under the law of succession, pass to the heirs of the deceased, even though some or all of them held their full quota of State land; that a person holding a certificate of purchase may quitclaim to a person who already holds his full quota of State land and the latter may complete the purchase and obtain a patent, providing the Board is satisfied that there was no express or implied agreement or understanding at the time of the sale by the State that the purchaser intended to convey to any particular person at the time he purchased.

Very truly yours,

WELLINGTON D. RANKIN,

Attorney General.