

State Lands—Improvements Upon Belong to Whom Upon Cancellation of Certificate of Purchase.

Improvements placed upon State land by a purchaser, which are so attached or affixed to the land as to become a part of the realty, become the property of the State upon forfeiture of the contract of purchase, but improvements, not of such a nature or so attached or affixed to the land as to become a part of the realty, remain the personal property of the defaulting purchaser and may be removed by him. Each case depends upon questions of fact, the important consideration being the intention with which the improvements were placed upon the property.

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

My dear Mr. Bailey:

You have asked to be advised as to whether improvements placed on State lands under a certificate of purchase become the property of the State on failure to complete payments under the contract of purchase, or whether they remain the property of the original purchaser. Attached to your letter is a form of contract of purchase entered into by the State with the purchaser and entitled: "Certificate of Purchase of State Lands." This certificate contains the following provision:

"IT IS UNDERSTOOD AND AGREED, That time is the essence of the above payments, and the purchaser herein agrees, in accepting this certificate, to make such payment, with interest, on or before the date herein specified. And whenever the purchaser, or his assigns, has defaulted on any payment for a period of thirty days, this certificate may be forfeited and the land described herein revert to the State of Montana, upon a notice to that effect mailed to the last known address of said purchaser, or his assigns, which notice shall allow him thirty days additional time within which to make such payment, with interest thereon. If such notice is so mailed, and such payment, with interest, is not made, within such additional period of thirty days, then said purchaser and his assigns agree to immediately vacate and surrender said premises, and thereafter remaining in possession of such land shall be unlawful, and such purchaser, or his assigns may be summarily ejected, and the right of possession shall revert to the State of Montana; provided, however, that a like notice of default shall be mailed to the bondsmen, if any, of such purchaser, or his assigns, and in case of the final default of said purchaser, or assigns, such bondsmen shall be entitled to redeem said land at any time within thirty days after such final default. If payment be not made as above provided, the State Board of Land Commissioners may sell the said land, or any part thereof, as other State lands are sold, and all payments made by the previous purchaser, or his assigns, shall be forfeited to the State."

Section 4425 of the Revised Codes of 1907 defines real property as:

1. Land.
2. That which is affixed to land.
3. That which is incidental or appurtenant to land.
4. That which is immovable by law.

Corpus Juris, in treating of this subject, says:

"Articles annexed or structures erected by a purchaser, of land who is in possession by virtue of his contract of pur-

chase, but who has not yet obtained title to the premises, cannot ordinarily be removed by him without the consent of the vendor, the presumption being, from his interest under his contract and expectation of acquiring absolute title, that he intended the articles or structures to be part of the land. The purchaser in such case stands in a position analogous to that of a mortgagor, and has no greater rights of removal than the mortgagor has as against the mortgagee." (26 C. J., p. 675, Sec. 36, and note 4 (b).)

Section 80 or Chapter 147, Laws of 1909, provides:

"All lessees having improvements on State Lands, and who do not wish to re-lease the same, may dispose of or remove such improvements as are capable of removal without damage to the land, at any time within ninety days from the expiration of such lease, after which period all such improvements that have not been removed shall become the property of the state, * * * "

There is, however, no special statute covering the disposition of improvements placed on lands under a certificate of purchase. However, where improvements are attached to the land so as to become a part of the realty, they would no doubt, under the provisions of Section 4425, supra, and the general law applicable to improvements affixed to realty, go with the land and become the property of the State upon forfeiture of the contract of purchase and final default.

On the other hand, any improvements made on the land by the purchaser, which are not so attached or affixed to the land as to become a part of the realty, retain their character as personalty, and hence may be removed by the purchaser.

In 26 C. J. 675, it is said:

"Machinery annexed merely to test the property for mining purposes by one who had an option on the property, or who had actually contracted to purchase it, but had only made a first payment, has been regarded as retaining its character as personalty and so to be removable by him."

In *Mattison v. Connerly*, 46 Mont. 103, it was held that the mere fact that fence posts were set in the earth did not, in itself, make them fixtures, but that the intention with which they were placed there was the controlling consideration.

I am, therefore, of the opinion that the improvements placed upon State land by a purchaser, which are so attached or affixed to the land as to become a part of the realty, become the property of the State upon forfeiture of the contract of purchase and cancellation of the certificate of purchase, but that improvements, not of such a nature or so attached or affixed to the land as to become a part of the realty, remain the personal property of the defaulting purchaser

and may be removed by him. Each case depends upon questions of fact involved in the particular case, and the important consideration is the intention with which the improvements were made.

Very truly yours,

WELLINGTON D. RANKIN,

Attorney General.