

**Contract, Sale of Lands, Construction Of. Lands, Sale Of.
Assignment, Certificates to Purchase Land.**

Assignment of certificate of purchase of land held by one Lane examined and held to convey only a one-half interest in such certificate.

Helena, Montana, September 25, 1908.

Hon. State Board of Land Commissioners,

Helena, Montana.

Gentlemen:—

I am in receipt from you of correspondence, agreements and assignment, relating to contract heretofore entered into between the State of Montana and one M. Lane, relative to certificate to purchase N. W. $\frac{1}{4}$, Sec. 36, Twp. 2 N. R. 1 E. It appears that the certificate was issued to Mr. Lane on the 8th day of May, 1908, and that on the 12th day of May, 1908, he entered into an agreement with one W. L. Irwin, whereby it was agreed that the purchase of said land by Lane was for the joint use, benefit and advantage of himself and the said Irwin, and Irwin was by said agreement recognized as having an equal interest in said land and certificate with the said Lane. A copy of this agreement was transmitted to the board on August 8th, 1908, and the agreement was subsequently put of record in the office of the county clerk and recorder of Gallatin county, Montana, and a certified copy thereof was on or about the 14th day of August, 1908, transmitted to the state board of land commissioners. On the said 14th day of August, 1908, said Lane made assignment to one W. J. Walsh, which assignment is as follows:

“For value received we hereby assign and transfer to W. J. Walsh the within certificate of purchase, and convey to him all our right, title and interest in the land therein described.”

This assignment was acknowledged on the 14th day of August, 1908, the same being the date of the acknowledgment by Lane of the contract heretofore existing between himself and Irwin.

You are advised under the state of facts presented, that the land office having actual notice of the contractual rights existing between Lane and Irwin with respect to the land in question, before the presentation of the assignment by Walsh, or knowledge of the existence thereof, it would not be safe or advisable for the land department to issue patent for the entire tract of land to Mr. Walsh on his assignment. Considering the language used in the assignment to Walsh, it is quite likely that it might be construed by a court to mean only an assignment of the rights by Lane then owned and possessed, as Lane could not assign that which he did not own. In the assignment use is made of this language: "all * * * right, title and interest in the land," and from the facts made to appear, it is quite apparent that Lane only had a one-half interest which he could legally assign on the date of the assignment. Walsh and Irwin will have to either amicably settle their legal rights in the premises or leave same to the adjudication of a court of competent jurisdiction, for the facts present a controversy of law, which cannot be finally settled by the board of land commissioners.

I would advise, therefore, under the state of facts presented, that when a patent is issued by the state it be to W. L. Irwin and to W. J. Walsh jointly, unless in the meantime some adjustment of their rights is by them amicably made and the land office is given satisfactory evidence of such fact.

All the papers transmitted for consideration by this department are herewith returned.

Respectfully submitted,
ALBERT J. GALEN,
Attorney General.