

State Lands, Lease of. Board of Land Commissioners, Powers and Duties. Powers and Duties, of Board of Land Commissioners. Lease of State Land, to Issue When.

After an applicant has made application for a lease of state lands in due form, and tendered the first installment of rent and all fees connected with the issuance of such lease, and the same have been acceptd by the register of state lands, with the understanding that the lease will issue as soon as it can be made out, the register or board cannot thereafter rescind the agreement or refuse to issue the lease.

May 14, 1914.

Hon. S. V. Stewart,

Governor of the State of Montana,
Helena, Montana.

Dear Sir:

I am in receipt of your communication under date of the 13th

instant, asking for my opinion of the duty and authority of the State Register of state lands, under the following state of facts:

One B appeared at the state land office and made application in due form for a lease on certain tracts of state lands recently selected in Madison county, on April 26th, 1914. This selection had been approved, though the papers had not been returned from the United States Land Office. Mr. B deposited the amount of the appraised value fixed by the state land agent as the minimum rental, together with all fees connected with an application for a lease. The Register of state lands accepted this initial payment and all the fees, and advised B that the lease would be issued in due course. Thereafter notices were sent out from the state land office that competitive bids for the leasing of such land would be received on May 20th. The question now seems to be:—as to whether the Register must issue the lease to B, or whether the whole matter must be held in abeyance until competitive bids are opened on the 20th day of the month, as per the notices?

Authority for leasing of state lands by the state board of land commissioners is found in Section 2, Article XVII of the constitution:

"The lands of the first of said classes may be sold or leased, under such rules and regulations as may be prescribed by law. The lands of the second class may be sold, or the timber thereon may be sold, under such rules and regulations, as may be prescribed by law. The agricultural lands may be either sold or leased, under such rules and regulations as may be prescribed by law. The land of the fourth class shall be sold in alternate lots of not more than five acres each, and not more than one-half of any tract of such land shall be sold prior to the year one thousand nine hundred and ten (1910)."

Pursuant to the authority given by this section, the legislature has enacted the land laws of the state, which are found in Chapters 1 to 6 inclusive, of Title 7, Part 3 of the Revised Codes, and an act amendatory thereto, known as Chapter 147, Laws of the 11th Legislative Assembly. These provisions are as follows:

"The state board of land commissioners may lease any portion of the land of the state, at a rental to be determined after examination by an appraiser."

Sec. 42, Chap. 147, Laws 1909.

"It shall be the duty of the Register to make and sign all leases of state lands issued by him."

Sec. 4, Chap. 147, Laws 1909.

"All sales and leasing of state lands shall be conducted by the Register of state lands."

Sec. 37, Chap. 147, Laws 1909.

"The Register shall upon such payment and the delivery of such bond, execute and deliver to such lessee a lease of such lands."

Sec. 44, Chap. 147, Laws 1909.

It is to be noted here that the board is given power to lease state lands. The administration of this power seems to be placed in the hands of the Register of state lands. This conclusion is strengthened when we compare the provisions of the law regarding the sale of state lands as distinguished from the leasing of state lands. The provisions in regard to sales of state land are as follows:

"All sales of state lands shall be at public auction only."

Sec. 38, Chap. 147, Laws 1909.

"All sales of state lands and all sales of timber on state lands shall be subject to the approval and confirmation of the state board of land commissioners; and no sale shall be deemed completed until after such approval and confirmation."

Sec. 40, Chap. 147, Laws 1909.

A comparison of these provisions indicates an intention on the part of the legislature that the Register of state lands should be the agent of the state in the matter of leasing the lands of the state, and that his acts need not be approved or confirmed in these transactions. No provision is found anywhere in the law requiring competitive bidding upon leases. In other words, the Register is clothed with discretion in the matter of leasing state lands—This discretion being limited only by that provision which provides that no land shall be leased for a longer period than five years, nor for a less rental than that fixed by the board, which shall not be less than five per cent per annum of the appraised value of such lands. It is a general principle of law that where an officer is clothed with discretionary power, his determination of any fact in the matters under his jurisdiction, is final, in the absence of an abuse of discretion.

29 Cyc. 1433.

Having reached the conclusion that the matter of leasing of state lands is a proper function of the Register of state lands, and that he has been clothed by law with the power to do so, it remains to see what effect the transaction described in your inquiry has upon the Register and upon the state.

"A state is bound in its dealings with individuals, and must be adjudged and abide by the rules which govern in determining the rights of private citizens, when the sovereign engages in business, and the conduct of business enterprises, and contracts with individuals * * * whenever the contract in any form comes before the courts, the rights and obligations of the contracting parties must be adjusted on the same principles as if both contracting parties were private persons."

"In the absence of fraud or collusion, the acts of public officers within the limits of the authority conferred upon them, and in the performance of the duties assigned them in dealing with third persons, are the acts of the state, and cannot be repudiated. * * * This is of necessity, for as the state can only act by its duly constituted authorities there would be no safety in dealing with the state if it were otherwise, and each

succeeding official could repudiate the acts, avoid the contracts, rescind settlements, and reclaim payments."

Mechem Public Officers, Sec. 835, quoting from People vs. Stevens, 71 N. Y. 527.

"When a contract has been awarded, to the lowest bidder, and his bid accepted, he has a right to have the written contract made out in accordance with his bid so accepted."

2 Howards Practice Reports (U. S.) 423.

So well settled is this principle of law that the courts almost universally grant writs of mandate to compel the making and writing of a contract, which its officers in the exercise of their duty have entered into. The Supreme Court of our own state in the case of State ex rel. Mitchell Furniture Co. vs. Toole, Governor, in passing upon the question of the duties of the State Furnishing Board, after bids had been adevrtised for and received and some of them accepted, used the following language:

"The board is a governmental agency, possessing such powers and jurisdiction, and such only as the law confers upon it. In the examination, comparison, and consideration of the proposals, and in awarding the contract, the board exercises its discretion. The duty imposed is to award the contract to the lowest responsible bidder, unless the bids be rejected. This the statute commands it to do; and whenever after a compliance with the statutory prerequisites, essential to the valid acceptance of a bid, it is regularly awarded the contract, there spring into existence vested rights, which the Boards cannot destroy or impair."

And further:

"In the absence of fraud, accident and mistake or other legal reason sufficient to render acceptance void or voidable, the contract resulting therefrom cannot be changed or annulled nor may its obligation be impaired by any act of the Board."

This decision has not been questioned by our own court. That a ministerial act will be compelled by a writ of mandate is well established by the decisions of our own state.

Chumasero vs. Potts, 2 Mont. 242;

Territory ex rel. Lammer vs. Potts, 3 Mont. 364;

State ex rel Eaves v. Richards, 16 Mont. 145.

The Supreme Court of Oregon has gone so far as to use the following language:

"Where the commissioners refuse to award the contract to the person entitled thereto, under said act, he may enforce against them such award by a mandamus, although they have made an unauthorized award to other parties, provided the party entitled thereto, has done nothing to waive his right, and has used reasonable diligence in asserting it."

In view of the above considerations, I am of the opinion that a contract valid and binding as against the state was entered into when the Register accepted the initial payment of rental and the fees

connected with the issuance of a lease and filing a bond, on the 26th day of April, and that the Board could not afterwards repudiate this contract or rescind it, and that a writ of mandamus would lie to compel the execution of the lease in accordance with the terms agreed upon, between Mr. B and the Register of state lands. The lease should be issued.

Yours very truly,

D. M. KELLY,
Attorney General.