

Opinion No. 55-6130

March 16, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. E. S. Walker, Commissioner of Public Lands, State Land Office, Santa Fe, New Mexico

Re: State Land Sale No. 3008:

OPINION

This office has received your request for an opinion upon the following questions in connection with the above sale:

"1. Whether the Commissioner may permit one who purchases under contract pursuant to 7-8-9, N.M.S.A., 1953, before paying the total price bid in full, to break the land into smaller tracts, allow payment in full on each of these tracts, and issue a patent therefor?"

"2. Whether the Commissioner can approve assignments of a portion of such a purchase contract?"

"3. Whether either of the above could be done if the original purchaser posted bond to guarantee full payment of the purchase price bid at the original sale?"

We take note that the Attorney General of this State in Opinions rendered on March 28, 1924; December 12, 1931; August 27, 1932, and December 22, 1932 in effect answered Question No. 1 and No. 2 above in the affirmative. The reliance that the Land Commissioners must have placed upon these opinions and the practices which they must have engaged in, in conformity therewith, makes our task very difficult since we cannot agree with those conclusions. Whatever implications may be cast upon titles which have been granted by the State as a result of sales where land is purchased under contract and subsequently patent has issued on only a portion thereof prior to payment in full of the contract have caused us to be doubly cautious here. We cannot, however, escape the conclusions hereinafter cited even though opposed to others previously rendered by this office. Our refuge, if we be in error, is the public interest. Any and all doubts which we have entertained have been resolved in its favor.

Firstly the applicable provisions of the Enabling Act; Section 10 of that Act reads in part as follows:

". . . No mortgage or other encumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. **Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of a county wherein**

the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves: Provided, that nothing herein contained shall prevent said proposed state from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

"All lands, leaseholds, timber, and other products of land before being offered shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value as ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid . . .

"Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, **not made in substantial conformity with the provisions of this act shall be null and void**, any provision of the Constitution or laws of the said state to the contrary notwithstanding . . ."

Here then is the supreme law governing the sale of public lands anything in our State Constitution or statutes to the contrary notwithstanding. This Act and all that can reasonably be implied therefrom, marks the limits beyond which our Constitution and statutes may not go. Any power given to any public official touching upon the handling of public lands by the Constitution or our statutes is circumscribed by this Act.

Pertinent constitutional provisions and statutes touching upon the questions you ask are the following:

Article XIII, Section 2:

"The commissioner of public lands shall select, locate, classify, and have the direction, control care and disposition of all public lands, under the provisions of the acts of congress relating thereto and such regulations as may be provided by law."

Section 7-8-9, N.M.S.A., 1953 Compilation:

"State lands shall be sold for cash or upon payment of one-twentieth of the purchase price in cash and the balance at any time within thirty (30) years from the date of the contract. Deferred payments shall bear interest at the rate of four (4) per centum per

annum from the date of contract until paid, interest payable annually, and interest due and unpaid shall bear interest at the rate of one (1) per centum per month from the date such interest is due until paid; Provided, that the provisions of this act shall not be applicable to lands selected for the benefit of the Santa Fe and Grant County railroad bond fund, but such lands shall be sold as provided by Section 5236, New Mexico Statutes, Annotated, Code of 1915 (7-8-18), and outstanding contracts for such lands shall not be subject to the provisions of this section."

Section 7-8-21, N.M.S.A., 1953 Compilation:

"Any purchaser of state lands under deferred payment contract, not in default as to any payment, may assign all right, title and interest under any such contract; Provided, certified copy of the assignment shall be filed with the commissioner before same shall become effective."

We should note also the holding of our Supreme Court in *Vesely vs. Ranch Realty Co.*, 38 N.M. 480. There it was held that the only remedy the State has where a contract purchaser defaults in cancellation of the contract and retention of monies paid in as liquidated damages. The State upon default cannot proceed against the purchaser for no personal obligation is created in this type of transaction. The only security for the payment of the purchase price that the State has is the land itself. The legal title which remains in the State until final payment is made is thus the only inducement to purchaser to complete and fully execute the contract. *State ex rel Otto vs. Field*, 31 N.M. 120.

Let us consider the following hypothetical situation which would be possible were we to hold that a patent may issue to a portion of a tract of land which is being sold under purchase contract prior to final payment thereon. A prospective purchaser makes application to the State Land Commissioner to sell a section of land. Half of this land for some particular reason is much more valuable than the other half. The whole of the section is duly advertised for sale after appraisal thereof and subsequently sold at public auction. Sometime later the purchaser, after having paid much less than the contract price, applies to the Commissioner for a patent on that half of the land which is more valuable than the other half. The Commissioner issues the patent upon payment of whatever he deems that property to be worth. The purchaser thereafter relinquishes the remainder and less valuable portion to the State. It is at once apparent that that purchaser has secured from the State lands which were not the subject of the notice of sale. The advertisement or notice of sale contemplates a sale of the whole, a sale which includes all of the land regardless of the relative values of the various portions therein. In effect, what happens in a situation such as this, is that there is more than one sale. The issuance of a patent for less than all of that which was originally contracted for is a completely different transaction from the original. Thus a portion of public lands have been sold, in effect, without proper advertisement. Substantial conformity with the provisions of the Enabling Act has not been met.

We find nothing in the statutes quoted above which would lead to a different conclusion. As concerns the statutes on assignments, § 7-8-21, the Commissioner, under the statute, is not required to approve or disapprove the assignment. Any assignment thereunder is complete when a certified copy is filed with the Commissioner. Under this statute, we believe that a partial assignment can be made, but any assignment, whether it be to the whole or to a portion of the land under contract, is subject to final payment of the whole. And if an assignment is made to a part, the Commissioner, before issuing a patent to that portion, must await full and final payment of all of the contract. The general and quite extensive power of the Land Commissioner over public lands is deemed by this office to fall short of the authority to issue patents to portions of land being purchased under contract where the full purchase price has not been paid. This conclusion, we believe, is warranted by the language underlined above in the Enabling Act, and also the holding in the case of Vesely vs. Ranch Realty Co., supra. If the only security of the State is the legal title which remains with the State, then it is felt that the spirit of the Enabling Act would be subverted were that security impaired by permitting the more valuable portions of land to vest in the contract purchaser prior to full payment of the contract. It seems to us that the trust created in these lands cannot be effectively executed if the above practice is permitted.

The answer to your first question is, therefore, answered in the negative. The answer to your second question is that approval or disapproval by the Commissioner of an assignment or partial assignment is immaterial for the statute gives the purchaser that right and upon a certified copy of the assignment being filed, the assignment is complete. However, where a partial assignment is involved, no patent may be issued thereon until the full purchase price on the whole contract has been paid.

Concerning Question No. 3, we do not believe that the Enabling Act would prohibit the Land Commissioner from handling a credit transaction on public lands in the manner suggested by your question. The Enabling Act permits sales of public lands on credit, provided that ample security is given. Posting of a bond to guarantee full payment of the purchase price could certainly be ample security. However, by statute, Section 7-8-9, supra, the State has limited the general powers of the State Land Commissioner as concerns the manner in which sales shall be made, i.e., (1) For cash; (2) On credit upon payment of one-twentieth of the purchase price in cash and the balance at any time within thirty (30) years from the date of the contract. We deem this statute to be controlling on the manner of sale. If then, as is our view, a patent cannot issue unless and until all of the contract is fully paid, this, and the statutory provisions setting up the two methods of sale would seem to preclude the power to engage in a transaction such as suggested by this question.

The answer to Question No. 3 is, therefore answered in the negative.

Trusting that this answers your inquiries satisfactorily, I am

By: Santiago E. Campos

Assistant Attorney General