

## Chapter 273

### State Lands Generally

273.020

#### NOTES OF DECISIONS

Under a former similar statute, the Governor and agents appointed by him were not agents of the state for the sale of state lands. *Summers v. Geer*, (1906) 50 Or 249, 85 P 513, 93 P 133.

273.031

#### NOTES OF DECISIONS

##### 1. Under former similar statute

The State Land Board was a coordinate branch of the state government, and its decisions and the exercise of its discretion could not be controlled by the courts. *Corpe v. Brooks*, (1880) 8 Or 222; *Robertson v. State Land Bd.*, (1902) 42 Or 183, 70 P 614; *Miller v. Wattier*, (1904) 44 Or 347, 75 P 209; *Pennoyer v. McConnaughy*, (1891) 140 US 1, 11 S Ct 699, 35 L Ed 363, affirming *McConnaughy v. Pennoyer*, (1890) 43 Fed 196.

The board of land commissioners could be restrained from doing acts in violation of the contractual relations existing between it or the state and the purchaser. *McConnaughy v. Pennoyer*, (1890) 43 Fed 196, aff'd, *Pennoyer v. McConnaughy*, (1891) 140 US 1, 11 S Ct 699, 35 L Ed 363; *De Laitre v. Bd. of Comms.*, (1907) 149 Fed 800.

The State Land Board could assign a promissory note and a mortgage given to secure a loan by it from the Irreducible School Fund, although such power of the assignment was not expressly conferred by statute. *Lawrey v. Sterling*, (1871) 41 Or 518, 69 P 460.

The object of Act of October 28, 1868, was to convert the school and university lands into money and place the same at interest so that some benefit might be derived from these grants to the state for the benefit of the school fund. *Hurst v. Hawn*, (1874) 5 Or 275.

Oregon Const. Art. VIII, §5, constitutes the Governor, Secretary, and Treasurer of the state by their title of office and during their continuance therein "a Board of Commissioners for the sale of school and university lands," and subsequently the legislature devolved on them the additional duty of disposing of swamp lands. *McConnaughy v. Pennoyer*, (1890) 43 Fed 196, 201.

In pleading a title obtained from the State of Oregon through the land board, it was sufficient to state that on due application the board issued to a stated person a certificate of purchase for certain land. *Miller v. Wattier*, (1904) 44 Or 347, 75 P 209.

The State Land Board could be enjoined from leasing accretions to tidelands bordering on a river which were purchased from the state. *Taylor Sands Fishing Co. v. State Land Bd.*, (1910) 56 Or 157, 108 P 126.

The right to custody of notes and mortgages taken by the State Land Board on loans of the Irreducible School Fund, University Fund, and Agricultural College Fund, and the records, books and papers used in connection therewith was vested in the State Treasurer, rather than in the State Land Board. *State v. Kay*, (1915) 74 Or 268, 145 P 277.

ORS 88.110, providing that no mortgage shall be a lien

after 10 years, was not applicable to an action by the State Land Board to foreclose a mortgage securing a loan from the Irreducible School Fund. *State Land Bd. v. Lee*, (1917) 84 Or 431, 165 P 372.

The functions of the State Land Board were twofold, it being charged with the sale of the state lands and also with the care and investment of the school funds arising from such sales. *State v. Hyde*, (1918) 88 Or 1, 169 P 757, 171 P 582, Ann Cas 1918E, 688.

ATTY. GEN. OPINIONS: Responsibility for investment of Common School Fund, 1966-68, p 562.

273.041

ATTY. GEN. OPINIONS: Responsibility for investment of Common School Fund, 1966-68, p 562.

273.045

#### NOTES OF DECISIONS

##### 1. Under former similar statute

The State Land Board could make and enforce any reasonable regulation tending to promote justice and to simplify its records, as, for example, to waive a strict forfeiture incurred under a statute and allow a defaulted payment to be made, even against a subsequent applicant. *Robertson v. Low*, (1904) 44 Or 587, 77 P 744.

The State Land Board had power to waive a forfeiture for the nonpayment of instalments on the purchase price of public land. *Sehlbrede v. State Land Bd.*, (1905) 46 Or 615, 81 P 702.

State Land Board had duty to prescribe rules to permit upland owner to exercise his statutory preference rights to lease tidelands, *McCarthy v. Coos Head Tbr. Co.*, (1956) 208 Or 371, 302 P2d 238.

ATTY. GEN. OPINIONS: Rules as to mineral leases on the ocean shore, 1956-58, p 109; responsibility for investment of Common School Fund, 1966-68, p 562; tuition aid for employe, (1970) Vol 34, p 1029.

273.051

#### NOTES OF DECISIONS

##### 1. Under former similar statute

Mandamus will not lie to compel the members of the State Land Board to cancel a contract for the sale of state land and to declare a forfeiture of the money paid on account thereof. *Robertson v. State Land Bd.*, (1902) 42 Or 183, 70 P 614.

Prior to the issuance of a deed by the state, the State Land Board, on receiving information that an application is fraudulent, has power, notwithstanding the receipt of part of the purchase price, to institute a hearing on notice, and on proof of fraud, to decline to issue a deed. *De Laitre v. Bd. of Comms.*, (1907) 149 Fed 800.

Tideland deeds under the Tide Land Act of 1872 p. 129, as amended by 1874 p. 76, 1876 p. 69, and 1878 p. 41, which

provided that the grantee should hold the lands subject to an easement in the public to enter and remove oysters and other shellfish therefrom, did not convey the exclusive right of catching floating fish as appurtenant to the lands granted. *Hume v. Rogue River Packing Co.*, (1908) 51 Or 237, 83 P 391, 92 P 1065, 96 P 865, 131 Am St Rep 732, 31 LRA(NS) 396.

Mandamus will not lie to compel the State Treasurer to surrender school securities to the State Land Board. *State v. Kay*, (1915) 74 Or 268, 145 P 277.

FURTHER CITATIONS: *McConaughy v. Wiley*, (1888) 13 Sawy 148, 33 Fed 449; *Schneider v. Hutchinson*, (1899) 35 Or 253, 57 P 324, 76 Am St Rep 474; *Summers v. Geer*, (1907) 50 Or 249, 85 P 513, 93 P 133.

ATTY. GEN. OPINIONS: Authority to waive requirement as to surrender of certificates of sale and execute deed to applicant, 1922-24, p 619; authority to reimburse attorney for board for payment of interest on loan, where check for interest given by mortgagor to attorney was not paid, 1922-24, p 662; authority to sell unsurveyed lake bed land, 1924-26, p 213; lease of swamp land, 1928-30, p 320; authority to lease beds of navigable streams for purpose of raising oysters, 1930-32, p 329; lease of lands in Columbia River, 1934-36, p 380; memorandum of understanding between state and United States Department of Agriculture relative to cooperate erosion control activities, 1936-38, p 74; authority of State of Oregon to cede state-owned land within boundaries of antelope refuge, 1936-38, p 238; lease to a private individual bed of a lake which has been drained for agricultural purposes, 1944-46, p 50; type of notice that must be given to owners of land abutting or fronting on tide and overflow lands, 1950-52, p 173; power to convey tide and overflow lands to another governmental body, 1950-52, p 274; authority to cancel and refund interest charges of a loan secured by mortgage, 1946-48, p 162; authority of State Land Board to lease submerged coast lands for oil and gas discovery, 1960-62, p 99; State Land Board authority to grant easement or permit to tide and overflow lands, 1960-62, p 104; acreage and other limitations on leasing authority of State Land Board, 1960-62, p 237; sale or use of beds of navigable rivers, 1960-62, p 391; leasing river bed to U.S. Government, 1962-64, p 16; leasing beds of nontidal navigable waters and tidelands, 1962-64, p 104; use of earnings of the fund to pay administrative maintenance or improvement costs, 1964-66, p 307.

273.065

## NOTES OF DECISIONS

## 1. Under former similar statute

The decisions of the Board of School Land Commissioners created by the Act of October 22, 1864 were final in cases arising under the land law, and it was not required to defer to the decisions of the circuit court, nor was it obliged to conform its acts and decisions to any other rules than those of its own adoption. *Anderson v. Laughery*, (1871) 3 Or 277.

The decision of the Board of School Land Commissioners was final so far as the interest of the state was concerned but did not prevent a party from showing, in a proper proceeding, that a deed made by the board was obtained through fraud or upon false testimony. *Hurst v. Hawn*, (1874) 5 Or 275.

The State Board of School Land Commissioners had no power, after a valid disposal of school lands had been made to one person, in accordance with law, to make another disposal of the same lands to a different person. *Wardwell v. Paige*, (1881) 9 Or 517.

The action of the commissioners in determining which of two applicants was to be preferred in the purchase of state tidelands could not be questioned unless for error in

the construction and application of the law, or for some fraud extrinsic and collateral to the contest by which the plaintiff was prevented from having a full and fair hearing before the commissioners. *Shively v. Welch*, (1884) 20 Fed 28.

The deeds of the State Land Board were conclusive of its right to convey and were not subject to collateral attack, although they could be directly attacked in equity. *State v. Warner Valley Stock Co.*, (1910) 56 Or 283, 106 P 780, 108 P 861.

273.101

ATTY. GEN. OPINIONS: Claims against fund made by division as trustee of J. T. Apperson Trust Fund, (1969) Vol 34, p 860.

273.105

ATTY. GEN. OPINIONS: Reimbursing the school fund interest account regularly from the sinking fund in an amount equal to that portion of the administrative expense of the State Land Board resulting from the performance of its duties imposed by 1943 c. 175, 1942-44, p 209; purchase of light fixtures for State Land Board offices and payment of rent by State Land Board for space occupied by the Veterans' Welfare Department, 1948-50, p 228; use of earnings of the fund to pay administrative maintenance or improvement costs, 1964-66, p 307; disposition of receipts from Elliott State Forest and Common School Forest Lands, (1970) Vol 34, p 1131.

LAW REVIEW CITATIONS: 48 OLR 309.

273.115

ATTY. GEN. OPINIONS: Authority of state to pay assessments for public improvement on state land acquired by escheat, 1966-68, p 172.

273.125

ATTY. GEN. OPINIONS: Refund of consideration for lease executed under mistake of law, 1934-36, p 374.

273.131

ATTY. GEN. OPINIONS: Compromise settlement where a mistake of fact has occurred as to quantity of land conveyed, 1946-48, p 251; procedure to write off claims, 1964-66, p 423.

273.145

ATTY. GEN. OPINIONS: Authority to join in the formation of a nonprofit improvement district corporation, 1942-44, p 77.

273.151

ATTY. GEN. OPINIONS: Authority to enter into a memorandum of understanding between the State of Oregon and the U.S. Department of Agriculture, relative to cooperative erosion control activities, 1936-38, p 74.

273.171

ATTY. GEN. OPINIONS: Tuition aid for employe, (1970) Vol 34, p 1029.

273.185

ATTY. GEN. OPINIONS: Authority to prevent destruction

of wild flowers and shrubs within state parks, 1924-26, p 603.

**273.201 to 273.216**

ATTY. GEN. OPINIONS: Necessity for competitive bidding, 1964-66, p 77.

**273.201**

ATTY. GEN. OPINIONS: Sale to municipality without competitive bids, 1958-60, pp 178, 179; sale as personalty without competitive bidding of realty constructively severed, 1964-66, p 77.

**273.205**

ATTY. GEN. OPINIONS: Sale as personalty without competitive bidding of realty constructively severed, 1964-66, p 77; application to State Board of Higher Education, 1966-68, p 76.

**273.211**

ATTY. GEN. OPINIONS: Sale as personalty without competitive bidding of realty constructively severed, 1964-66, p 77; application to State Board of Higher Education, 1966-68, p 76.

**273.216**

ATTY. GEN. OPINIONS: Sale as personalty without competitive bidding of realty constructively severed, 1964-66, p 77; application to State Board of Higher Education, 1966-68, p 76.

**273.225**

**NOTES OF DECISIONS**

Freedom from liability for rent is granted only for removal of material for the purposes excepted, whether for commercial or noncommercial use. State Land Bd. v. Port of Portland, (1962) 232 Or 607, 376 P2d 661.

**273.231**

**NOTES OF DECISIONS**

Freedom from liability for rent is granted only for removal of material for the purposes excepted, whether for commercial or noncommercial use. State Land Bd. v. Port of Portland, (1962) 232 Or 607, 376 P2d 661.

FURTHER CITATIONS: State v. Port of Portland, (1942) 168 Or 120, 121 P2d 478.

ATTY. GEN. OPINIONS: Removal of sand and gravel from submerged lands of the Columbia River, 1948-50, p 323; removal of sand and gravel from submerged part of former donation land claim, 1956-58, p 55.

**273.235**

**NOTES OF DECISIONS**

The State Land Board's action to recover for sand removed from a navigable river bed was to be determined under the statute in effect at the time of the taking. State v. Port of Portland, (1942) 168 Or 120, 121 P2d 478.

If defendant fails to prove that the island from which he took sand and gravel was privately owned prior to the effective date of 1878 p. 54, which repealed the statutes under which private ownership was allowed, he should be required to account for all sand and gravel taken between

high-and low-water marks. State v. McVey, (1942) 168 Or 337, 121 P2d 461, 123 P2d 181.

Proof of the reasonable value of sand and gravel taken by defendant was not afforded by testimony of the State Land Board's clerk that according to latest rules and regulations of the board the royalty on sand and gravel was ten cents per cubic yard. Id.

FURTHER CITATIONS: State Land Bd. v. W. Pac. Dredging Corp., (1966) 244 Or 184, 416 P2d 667.

**273.241**

CASE CITATIONS: State Land Bd. v. Port of Portland, (1962) 232 Or 607, 376 P2d 661.

**273.251**

**NOTES OF DECISIONS**

1. Indemnity lands
2. University lands
3. Swamp lands
4. Tidelands
5. What are "tidelands"

**1. Indemnity lands**

When the selection by a state of indemnity school lands has been approved and certified, the title thereto vests in the state if the Federal Government is the owner of the premises. Morse v. Odell, (1907) 49 Or 118, 89 P 139.

**2. University lands**

One object of Act of October 28, 1868, was to place a class of lands in market that had never been offered before, to wit, the university lands. Fleischner v. Chadwick, (1874) 5 Or 152.

**3. Swamp lands**

Act of Congress, September 28, 1850, was a grant in praesenti and passed a fee simple title to the states affected thereby of all swamp and overflowed land within their borders, and by Act of Congress, March 12, 1860, Oregon became vested with a fee simple title to the swamp and overflowed lands within the state immediately upon its passage. Gaston v. Stott, (1873) 5 Or 48; Miller v. Tobin, (1887) 16 P 540, 16 P 161.

A patent issued to the state under the United States Swamp Land Act of 1850 cannot be impeached in an action at law by showing that the land which it conveys was not in fact swamp and overflowed land. Cahn v. Barnes, (1881) 7 Sawy 48, 5 Fed 326.

The United States Swamp Land Act was a grant in praesenti only in the sense that when the Secretary of the Interior determined what lands came within its operation and caused a patent to issue therefor, title vested and related back to the passage of the Act. Pengra v. Munz, (1887) 29 Fed 830.

Under Act 1860 §2, selection by the state within the time prescribed was a condition precedent to the vesting of title. Id.

While the United States Swamp Land Act operated as a grant in praesenti to the state, the latter did not take the equitable title or any interest in any particular tract of land thereunder until it had been identified by the list or approved by the Secretary of the Interior; and it could make no conveyance of any such title or right as against the Federal Government. Kerns v. Lee, (1906) 142 Fed 985.

The state had no duty to perform in the selection of swamp lands, and a selection of swamp lands made by its officers under an Act of its legislature was not binding upon the United States, unless approved and confirmed by the Secretary of Interior. Id.

#### 4. Tidelands

The tidelands became the property of the state upon its admission into the Union. *Hinman v. Warren*, (1877) 6 Or 408, 411; *Hogg v. Davis*, (1892) 22 Or 428, 30 P 160; *Astoria Exch. Co. v. Shively*, (1895) 27 Or 104, 39 P 398, 40 P 92; *Corvallis & Eastern R. Co. v. Benson*, (1912) 61 Or 359, 121 P 418; *Shively v. Welch*, (1884) 20 Fed 28.

Lands below high-water mark of a navigable river belong to the state. *Shively v. Bowlby*, (1893) 152 US 1, 14 S Ct 548, 38 L Ed 331, affirming *Bowlby v. Shively*, (1892) 22 Or 410, 30 P 154; *State v. McVey*, (1942) 168 Or 337, 121 P2d 461, 123 P2d 181.

Tidelands belong to the state by virtue of its sovereignty and until this sovereignty attaches by admission of the state into the Union, the United States Government is simply a protector thereof and hence has no authority to dispose of such lands. *Hinman v. Warren*, (1877) 6 Or 408. **But see** *Shively v. Bowlby*, (1893) 152 US 1, 14 S Ct 548, 38 L Ed 331.

The United States can dispose of tidelands before the state is admitted to the Union. *Shively v. Bowlby*, (1893) 152 US 1, 14 S Ct 548, 38 L Ed 331.

Wharves on lands below the high-water mark on a navigable river cannot be built by the upland owner, except as permitted by statute. *Shively v. Bowlby*, (1893) 152 US 1, 14 S Ct 548, 38 L Ed 331, affirming *Bowlby v. Shively*, (1892) 22 Or 410, 30 P 154.

Land between ordinary high- and low-water mark along a tidal stream belongs to the state. *Muckle v. Good*, (1904) 45 Or 230, 77 P 743.

The State of Oregon, upon its admission into the Union, became the owner of the bed and banks of the Willamette River up to the line of ordinary high water, subject only to the paramount right of navigation and the right of Congress to regulate commerce between the states. *Pacific Elevator Co. v. Portland*, (1913) 65 Or 349, 133 P 72, 46 LRA(NS) 363.

Although tides inundated a narrow strip of land created by the upland owners by artificial means, the title to the land remained in the upland owners. *State Land Bd. v. Sause*, (1959) 217 Or 52, 342 P2d 803.

Since the state had no present use for a strip of land created by artificial means, and defendants' use of it, as upland owners, did not interfere with navigation, the state was not entitled to any relief. *Id.*

#### 5. What are "tidelands"

The term "tidelands" applies to lands covered and uncovered by the ordinary tides, which the state owns by virtue of its sovereignty, and corresponds with the shore or beach, which at common law is that land lying between ordinary high- and low-water mark. *Andrus v. Knott*, (1885) 12 Or 501, 8 P 763.

Tideland must be such land as is alternately covered and left dry by the ordinary flux and reflux of the tides. *Id.*

Lands adjacent to navigable waters, where the tide flows and refloes, come within the description, but it cannot be said to apply to lands which are covered with water three-fourths of the year. *Id.*

A sand bar several miles from shore, only exposed at low tide, and covered by six feet of water at high tide, is not tideland. *Elliott v. Stewart*, (1887) 15 Or 259, 14 P 416.

Sand bars not uncovered by the "mean lower low water" but sometimes exposed when the tide falls below the zero line because of a strong wind or abnormal barometric conditions are not tidelands. *Van Dusen Inv. Co. v. Western Fishing Co.*, (1912) 63 Or 7, 124 P 677, 126 P 604.

Evidence held to show that a sand bar was not an accretion to the tideland, but constituted a separate island formed on the bed of the Columbia River, and hence the property of the state. *Katz v. Patterson*, (1931) 135 Or 449, 296 P 54.

FURTHER CITATIONS: *McConaughy v. Wiley*, (1888) 13 Sawy 148, 33 Fed 449; *Strasbaugh v. Babler Bros. Inc.*, (1960) 220 Or 35, 348 P2d 448.

ATTY. GEN. OPINIONS: State title to tidelands of Columbia River, 1924-26, p 50; authority of State Land Board to sell tidelands in Rogue River, 1924-26, p 244; sale by State Land Board of lake bed lands located in drainage district, 1928-30, p 154; ownership of lands between ordinary high-water mark and low-water mark on Oregon side of Columbia River, 1930-32, p 42; ownership of island in Willamette River, and right of State Land Board to lease same, 1934-36, p 200; authority of State Land Board to sell natural oyster bed land owned by state, 1946-48, p 102; ownership of river bed lands on Willamette River in Lane County, 1946-48, p 256; power of State Land Board to convey tide and overflow lands to another governmental body, 1950-52, p 274; ownership of tide and overflow land upon the Millicomma River as affected by 1876 p. 70, 1950-52, p 406; effect of artificial dredging on the title of riparian owners, 1952-54, p 167; State Land Board authority to grant easement or permit to tide and overflow lands, 1960-62, p 104; ownership and regulation of water and land in a port district, 1960-62, p 452; easement for airport over tidelands or submerged lands, 1962-64, p 64.

LAW REVIEW CITATIONS: 3 WLJ 355, 356.

273.255

#### NOTES OF DECISIONS

##### 1. Under former similar statute

(1) **Purchasers.** The state could determine the qualifications of the purchasers of public lands. *Ore. v. Carlson*, (1902) 40 Or 565, 67 P 516.

It was the duty of the Board of Commissioners to determine whether applicants to purchase swamp lands possessed the statutory qualifications. *Miller v. Wattier*, (1904) 44 Or 347, 75 P 209.

A certificate of sale or a receipt of the board acknowledging the first payment of the purchase price was prima facie evidence that the applicant was qualified to purchase. *Id.*

(2) **Limitation as to quantity of land.** A person who falsely swore that he had not previously purchased 320 acres of state lands, was not entitled to relief against a grantee of the state who knew of plaintiff's purchase. *Warren v. De Force*, (1898) 34 Or 168, 55 P 532.

(3) **Contract to dispose of land applied for.** An agreement between a corporation and another that the latter should make the affidavit required to purchase public lands and after execution of a deed therefor by the state, should transfer such lands to the corporation, was contrary to public policy. *Pacific Livestock Co. v. Gentry*, (1900) 38 Or 275, 61 P 422, 65 P 597. **But see** *Beaver Lbr. Co. v. Barker*, (1915) 74 Or 535, 146 P 88.

The provisions of the former statute did not prevent a domestic corporation from becoming a purchaser of state lands; hence, a corporate officer who purchased tidelands agreeing to hold them for the company might be declared a trustee. *Beaver Lbr. Co. v. Barker*, (1915) 74 Or 535, 146 P 88.

(4) **Survey.** The survey of tidelands required by the statute was presumed to be the true meander line at the date of the survey and constituted the basis upon which the State Land Board acted in making the deed to the applicant. *Seabrook v. Coos Bay Ice Co.*, (1907) 49 Or 237, 89 P 417.

FURTHER CITATIONS: *McCarthy v. Coos Head Tbr. Co.*, (1956) 208 Or 371, 302 P2d 238.

ATTY. GEN. OPINIONS: Right of corporation of another

state qualified to transact business in Oregon to purchase lands of state, 1930-32, p 208; right of Philippine citizens to exploit natural resources or operate public utilities, 1966-68, p 306.

## 273.261

## NOTES OF DECISIONS

## 1. Under former similar statute

(1) In general. Act of October 28, 1868, placed university lands on the market. *Fleischner v. Chadwick*, (1874) 5 Or 152.

The board was not estopped from demanding performance of the conditions precedent to the right of the applicant for a deed of public lands, by entry of an order upon its minutes accepting the application, and a like order to sell the lands to him at a price fixed, and to convey the same by quitclaim deed without prejudice to the rights of any person. *Shively v. Pennoyer*, (1895) 27 Or 33, 39 P 396.

(2) **Swamp lands.** By payment of the first instalment of the purchase price the applicant's contract with the state, under 1870 p. 54, became so far executed as to be protected by the United States Constitution against impairment by a state law. *Pennoyer v. McConnaughy*, (1891) 140 US 1, 11 S Ct 699, 35 L Ed 363, affirming *McConnaughy v. Pennoyer*, (1890) 43 Fed 196.

1870 p. 54 was an offer for sale and an acceptance constituting a contract between the applicant and the state; and he had a right to complete his purchase thereunder notwithstanding the repeal by 1878 p. 41. *Husbands v. Mosier*, (1894) 26 Or 55, 37 P 80.

FURTHER CITATIONS: *State v. Warner Valley Stock Co.*, (1910) 56 Or 283, 106 P 780, 108 P 861.

ATTY. GEN. OPINIONS: Manner in which State Highway Commission may acquire a piece of indemnity school land from the state, 1928-30, p 599.

## 273.265

## NOTES OF DECISIONS

## 1. Under former similar statute

The state had the right to sell and convey tidelands to anyone, free of any right in the proprietor of the upland, and subject only to the paramount right of navigation inherent in the public. *Parker v. Taylor*, (1879) 7 Or 436, 446; *Shively v. Bowlby*, (1893) 152 US 1, 14 S Ct 548, 38 L Ed 331, affirming *Bowlby v. Shively*, (1892) 22 Or 410, 30 P 154.

When the shore to which one claimed title as tideland by deed from the state became submerged by the gradual shifting of the river, he lost title thereto and it became revested in the state. *Wilson v. Shively*, (1884) 11 Or 215, 4 P 324; *Hume v. Rogue River Packing Co.*, (1908) 51 Or 237, 83 P 391, 92 P 1065, 96 P 865, 131 Am St Rep 732, 31 LRA(NS) 396.

Pursuant to its power to control and dispose of its tidelands the state provided for their disposition by passage of 1872 p. 129, amended 1874 p. 76. *Shively v. Welch*, (1884) 20 Fed 28.

Act of October 18, 1878, authorizing the commissioners for the sale of school lands to sell the tide and overflowed lands on the seacoast was passed upon the assumption that upon the admission of the state into the Union the title to the lands covered by the tide, then undisposed of by the United States, passed by operation of law to the state. *Case v. Toftus*, (1889) 39 Fed 730, 5 LRA 684.

1872 p. 129, as amended by 1874 p. 76 and 1876 p. 69, was based on the idea that the state is the owner of the tidelands and has the right to dispose of them and convey private interests therein, except such as the state saw fit

to give the adjacent owners, and to acknowledge in them and their grantees when they had dealt with such tidelands as private property, subject to the paramount right of navigation secured to the public. *Shively v. Bowlby*, (1893) 152 US 1, 14 S Ct 548, 38 L Ed 331, affirming *Bowlby v. Shively*, (1892) 22 Or 410, 30 P 154.

The policy had been to convey tidelands to purchasers, subject to the paramount rights of navigation and commerce. *Astoria Exch. Co. v. Shively*, (1895) 27 Or 104, 39 P 398, 40 P 92.

In the title of the state to tidelands there were two elements — the *jus privatum*, or private right, and the *jus publicum*, or public right. Like any other owner, the state could transfer its tidelands, so far as the *jus privatum* was concerned, subject to the *jus publicum*, which could not be granted, and by which the state prevented any use of them which would materially interfere with navigation or commerce on bordering waters. *Corvallis & Eastern R. Co. v. Benson*, (1912) 61 Or 359, 121 P 418.

## 273.275

CASE CITATIONS: *State v. Warner Valley Stock Co.*, (1910) 56 Or 283, 106 P 780, 108 P 861.

ATTY. GEN. OPINIONS: Authority to convey bed of Summer Lake to Game Commission without compensation of at least \$5 per acre, 1940-42, p 56.

## 273.271

## NOTES OF DECISIONS

The fact that a person purchased, under the Act of 1878 p. 41, the maximum amount of state land allowed, did not disqualify him from taking an assignment of the certificate of sale issued by the board to another nor from receiving a deed therefor from the board in his own name. *Gliem v. Bd. of Comm'rs*, (1888) 16 Or 479, 19 P 16.

FURTHER CITATIONS: *Warren v. De Force*, (1899) 34 Or 168, 55 P 532; *Warner Valley Stock Co. v. Morrow*, (1906) 48 Or 258, 86 P 369; *Van Dusen Inv. Co. v. Western Fishing Co.*, (1912) 63 Or 7, 124 P 677, 126 P 604.

## 273.281

## NOTES OF DECISIONS

1878 p. 10 §2, which declared void all previous applications where the applicants had not complied with the terms of 1870 p. 54, including the percentum payment, did not apply where the failure to make the payment was not a violation of 1870 p. 54. *Pennoyer v. McConnaughy*, (1891) 140 US 1, 11 S Ct 699, 35 L Ed 363, affirming *McConnaughy v. Pennoyer*, (1890) 43 Fed 196; *Miller v. Wattier*, (1904) 44 Or 347, 75 P 209; *State v. Warner Valley Stock Co.*, (1910) 56 Or 283, 106 P 780, 108 P 861.

One becomes entitled to possession of swamp land, on making the first payment thereon and receiving a certificate therefor, if the land is in fact swamp, or has been so designated by the Secretary of the Interior. *McConnaughy v. Wiley*, (1888) 13 Sawy 148, 33 Fed 449.

By payment of the first instalment of the purchase price the applicant's contract with the state, under 1870 p. 54, became so far executed as to be protected by the United States Constitution against impairment by a state law. *Pennoyer v. McConnaughy*, (1891) 140 US 1, 11 S Ct 699, 35 L Ed 363, affirming *McConnaughy v. Pennoyer*, (1890) 43 Fed 196.

Payment and reclamation were conditions precedent to obtaining title to swamp lands under 1870 p. 54, irrespective of 1878 p. 41. *Husbands v. Mosier*, (1894) 26 Or 55, 37 P 80.

Time was to be of the essence of the contract under 1870 p. 56, repealed by 1878 p. 41; a forfeiture should take place without the necessity of a judicial declaration. *Miller v. Wattier*, (1904) 44 Or 347, 75 P 209.

A certificate of sale or a receipt of the board acknowledging the first payment of the purchase price is prima facie evidence that the applicant was qualified to purchase. *Id.*

The applicant must have proceeded fairly to acquire a "vested right" on payment of the requisite instalment and obtention of a certificate of sale from the board. *De Laittre v. Bd. of Comm'rs*, (1970) 149 Fed 800.

ATTY. GEN. OPINIONS: Cancellation of certificates in case the amount due for indemnity land remains unpaid for more than five years, 1936-38, p 16.

## 273.285

## NOTES OF DECISIONS

A purchaser of swamp land, on making the first payment and receiving a certificate therefor, is entitled, if the land is in fact swamp, or has been so designated by the Secretary of the Interior, to its possession and to possession of the vegetation growing thereon. *McConnaughy v. Wiley*, (1888) 13 Sawy 148, 33 Fed 449.

Prima facie evidence that the applicant is qualified is furnished by a certificate of sale or a receipt of the board acknowledging the first payment of the purchase price. *Miller v. Wattier*, (1904) 44 Or 347, 75 P 209.

The certificate of purchase transfers an equity in the land to the purchaser. *State v. Kelliher*, (1907) 49 Or 77, 88 P 867.

Although an applicant acquires a "vested right" when he has paid the requisite instalment and obtained a certificate of sale from the board, that right is grounded upon the condition that he has proceeded fairly. *De Laittre v. Bd. of Comm'rs*, (1907) 149 Fed 800.

## 273.290

## NOTES OF DECISIONS

The State Land Board may waive a strict forfeiture incurred under a statute and allow a defaulted payment to be made. *Robertson v. Low*, (1904) 44 Or 587, 77 P 744; *Sehlbrede v. State Land Bd.*, (1905) 46 Or 615, 81 P 702.

Time was of the essence of the contract under 1870 p. 56, repealed by 1878 p. 41, and a forfeiture took place without the necessity of a judicial declaration and the purchaser at once lost all right or interest therein. *Miller v. Wattier*, (1904) 44 Or 347, 75 P 209. Distinguished in *Robertson v. Low*, (1904) 44 Or 587, 77 P 744.

Mandamus will not lie to compel the State Land Board to cancel a certificate of sale for nonpayment of interest. *Robertson v. State Land Bd.*, (1902) 42 Or 183, 70 P 614.

1887 pp. 9, 10 §5, was an explicit waiver, on certain conditions, of the forfeiture and reversion of lands sold under 1870 p. 56. *Miller v. Wattier*, (1904) 44 Or 347, 75 P 209.

1899 p. 77 §5, waived a forfeiture only so far as one existed at the date of the Act for default in the payment of interest, and did not waive a forfeiture for default in payment of interest thereafter accruing. *Sehlbrede v. State Land Bd.*, (1905) 46 Or 615, 81 P 702.

The certificate of sale is issued upon the express condition that the sale and certificate will become void, and all rights or interest of the purchaser thereunder will be forfeited by a failure to make the deferred payments in accordance with the law. *Id.*

## 273.295

## NOTES OF DECISIONS

Timber severed by the purchaser does not belong to an

assignee of a certificate of purchase. *Schmidt v. Vogt*, (1880) 8 Or 344.

No special qualifications to become assignee of a certificate of sale were required by 1878 §11. *Gliem v. Bd. of Comm'rs*, (1888) 16 Or 479, 19 P 16.

One who has purchased under 1878 p. 41, the maximum amount of state land allowed was not thereby disqualified from taking an assignment of the certificate of sale issued to another, nor from receiving a deed therefor from the board in his own name. *Id.*

The assignee of the certificate is not a purchaser of the legal title to the land but is simply a purchaser of the contract, which transfers to him the equitable title that his assignor had before him by virtue of the same contract. *De Laittre v. Bd. of Comm'rs*, (1907) 149 Fed 800.

An assignee is not constituted an innocent holder for value. *Id.*

## 273.300

## NOTES OF DECISIONS

The sale is not complete, nor the title vested in the purchaser, until the deed is executed and delivered by the board. Prior to execution and delivery of the deed, the purchaser has the equitable title only. *De Laittre v. Bd. of Comm'rs*, (1907) 149 Fed 800.

## 273.306

## NOTES OF DECISIONS

The provision making unrecorded conveyances void as to subsequent purchasers applies to deeds from the state of public lands. *Meacham v. Stewart*, (1890) 19 Or 285, 24 P 241.

An alternative writ of mandamus to compel the execution of a deed of certain state lands to petitioner must show on its face that the applicant has complied with the governing statute; a statement that he had made a written application to the board to purchase the land "in the manner prescribed by law" is merely pleading a conclusion of law. *Shively v. Pennoyer*, (1895) 27 Or 33, 39 P 396.

The sale is incomplete until the deed is made and delivered. *Id.*

A deed by the School Land Board was not a conclusive adjudication of the title of the grantee if, without notice and an opportunity to be heard, another was deprived of title to the same land gained by adverse possession. *Schneider v. Hutchinson*, (1899) 35 Or 253, 57 P 324, 76 Am St Rep 474.

ATTY. GEN. OPINIONS: Sale of lands over which right of way for reservoir exists, 1924-26, p 541; authority of State Land Board to waive reservation in deeds issued by state of right in state to construct and maintain ditches, etc., 1934-1936, p 696.

## 273.311

ATTY. GEN. OPINIONS: Making deeds of correction, 1924-26, p 347; refund on purchase price of school lands the title to a portion of which has failed, 1926-28, p 236; remedy where state cannot convey title to purchaser, 1926-28, p 337; right of assignee of original purchasers of lands to repayment of amount paid to state for lands, 1930-32, p 626; power to refund amount of consideration received for lease of land executed under mistake of law, 1934-36, p 374.

## 273.356 to 273.375

ATTY. GEN. OPINIONS: Division as trustee of J. T. Apperson Trust Fund, claiming refund, (1969) Vol 34, p 860.

## 273.360

ATTY. GEN. OPINIONS: Time when grantee's rights became vested under pre-1967 law, 1966-68, p 144.

## 273.382 to 273.386

ATTY. GEN. OPINIONS: Authority to condemn, 1962-64, p 217; constitutionality of lease, 1966-68, p 213.

## 273.386

ATTY. GEN. OPINIONS: Constitutionality of Act, 1962-64, p 355.

## 273.511

ATTY. GEN. OPINIONS: Condemnation of privately-owned property necessary for the completion of a reclamation project, 1948-50, p 358.

## 273.551

## NOTES OF DECISIONS

State Land Board not authorized to execute mining leases on lands held by State Highway Commission. State Hwy. Comm. v. Rawson, (1957) 210 Or 593, 312 P2d 849.

ATTY. GEN. OPINIONS: State Land Board making rules as to mineral leases on the ocean shore, 1956-58, p 109; agreement requiring lessee of forest lands subject to bonded indebtedness to pay for damage to area, 1958-60, p 353; iron pyrites as minerals, 1958-60, p 353; lands reforested with forest rehabilitation funds subject to mining lease, 1958-60, p 353; authority of State Land Board to lease submerged coast lands for oil and gas discovery, 1960-62, p 99; acreage and other limitations on leasing authority of State Land Board, 1960-62, p 237; considerations of State Land Board in executing leases, 1966-68, p 110.

## 273.705

ATTY. GEN. OPINIONS: Right of state to marine fossil collection, 1966-68, p 511.

## 273.711

ATTY. GEN. OPINIONS: Right of state to marine fossil collection, 1966-68, p 511.

## 273.715

ATTY. GEN. OPINIONS: Right of state to marine fossil collection, 1966-68, p 511.

## 273.751

## NOTES OF DECISIONS

1874 p. 51 §1, granting the tide and marsh lands situated in Benton County to plaintiff railroad being a grant in praesenti, and 1909 p. 221, purporting to repeal said section, was unconstitutional under Const. Art. 1, §18, declaring that private property shall not be taken without just compensation. Corvallis & Eastern R. Co. v. Benson, (1912) 61 Or 359, 121 P 418.

ATTY. GEN. OPINIONS: Payment for right of way granted to companies constructing railroads through unimproved state lands, 1924-26, p 612; reservation of easements of record in quitclaim deed executed by State Land Board, 1942-44, p 113.

## 273.755

ATTY. GEN. OPINIONS: Procedure in order that lumber company may acquire right of way across state lands, 1924-26, p 593.

## 273.761

## NOTES OF DECISIONS

This statute was a legislative sanction, confirmatory of the customs of miners, and, like the Act of Congress of July 26, 1866, was the recognition of a pre-existing right rather than the granting of a new easement. Carson v. Gentner, (1898) 33 Or 512, 52 P 506, 43 LRA 130; Parkersville Drainage Dist. v. Wattier, (1906) 48 Or 332, 86 P 775.

ATTY. GEN. OPINIONS: Right of way as including ground for reservoir, 1924-26, p 456; reservation of easements of record in quit-claim deed executed by State Land Board, 1942-44, p 113.

## 273.805

ATTY. GEN. OPINIONS: Use of earnings of the fund to pay administrative maintenance or improvement costs, 1964-66, p 307.

## 273.815

ATTY. GEN. OPINIONS: Use of earnings of the fund to pay administrative maintenance or improvement costs, 1964-66, p 307.

## 273.900

## NOTES OF DECISIONS

## 1. In general

The title to land of a person not entitled to purchase state lands, who has obtained a deed thereto by making false affidavit as to his qualifications, is not confirmed by this section. State v. Carlson, (1902) 40 Or 565, 67 P 516.

Though no title passed by the deed of the State Land Board, executed when the state was unauthorized to sell river tidelands, yet when, after such sales were authorized by 1891 p. 189, such unauthorized deeds were confirmed by this section, and the ratification related back to the date thereof, no equities of third persons having in the meantime attached. Van Dusen Inv. Co. v. Western Fishing Co., (1912) 63 Or 7, 124 P 677, 126 P 604.

Execution of deed in 1879 was held to make a prima facie case as to title confirmed by this statute. Id.

## 2. Decisions relating to note

1872 p. 129 gave shore owners a preference to purchase under certain prescribed conditions. Wilson v. Welch, (1885) 12 Or 353, 7 P 341; DeForce v. Welch, (1883) 10 Or 507; Wilson v. Shively, (1884) 11 Or 215, 4 P 324; Olney v. Moore, (1886) 13 Or 238, 11 P 187; Grant v. Ore. Nav. Co., (1907) 49 Or 324, 90 P 178, 1099; Fellman v. Tidewater Mill Co., (1915) 78 Or 1, 152 P 268; Shively v. Bowlby, (1893) 152 US 1, 14 S Ct 548, 38 L Ed 331, affirming Bowlby v. Shively, (1892) 22 Or 410, 30 P 154; Shively v. Welch, (1884) 20 Fed 28.

The title which a shore owner obtained under 1872 p. 129, as amended by 1874 p. 76, is subordinate to the public right of passage and navigation. Wilson v. Welch, (1885) 12 Or 353, 7 P 341.

1872 p. 129, as amended by 1874 p. 76 and 1876 p. 69, granted the title of the state to lands in the Willamette River lying between high- and low-water mark to the adjacent upland owners. Pacific Elevator Co. v. Portland, (1913) 65 Or 349, 133 P 72, 46 LRA(NS) 363.

In view of 1872 p. 129, as amended, a private dock could

protrude into the Willamette River and still be wholly on private property and not within the limits of the water highway. *Lange v. St. Johns Lumber Co.*, (1925) 115 Or 337, 237 P 696.

1872 p. 129, as amended, did not grant or confirm title in the United States Government to the tide or overflow lands. The word "owners" referred to the grantee of the United States Government and their successors in interest. *State v. McVey*, (1942) 168 Or 337, 121 P2d 461, 123 P2d 181.

ATTY. GEN. OPINIONS: Effect of proposed amendment, 1932-34, p 121.

#### 273.902

##### NOTES OF DECISIONS

This section precluded the Governor, the State Land Board, or any other officer of the state from contesting the claims of settlers on swamp lands under the preemption or homestead laws of the United States on account of the state's interest therein as swamp land, and required the board to quitclaim to such settlers. *State v. Warner Valley Stock Co.*, (1910) 56 Or 283, 106 P 780, 108 P 861.

#### 273.903

##### NOTES OF DECISIONS

The Act of Congress of March 12, 1860, extending the provisions of the Swamp Land Act to Oregon and Minne-

sota was a grant in praesenti to the latter states of land that was in fact swamp land; hence the remedy of one claiming such land under a patent from the State of Oregon subsequent to 1860 against one claiming under a patent from the United States after the passage of the Act is at law. *Miller v. Tobin*, (1887) 16 Or 540, 16 P 161.

Under 1889 p. 100 §1, and 1899 p. 162 §20, no state officer could contest a settlor's claim because of the state's interest in the land as swamp land; the fact that the Governor requested one without valid title to swamp land, title to which was in the state, to participate in the contest of the pre-emption and homestead claims did not estop the state from denying such person's title in a later action by the state to cancel invalid certificates of sale issued to him under 1870 p. 54. *State v. Warner Valley Stock Co.*, (1910) 56 Or 283, 106 P 780, 108 P 861.

#### 273.910

ATTY. GEN. OPINIONS: Application of section, 1958-60, p 249.

#### 273.920

CASE CITATIONS: *Grand Prize Hydraulic Mines v. Boswell*, (1917) 83 Or 1, 151 P 368, 162 P 1063.

ATTY. GEN. OPINIONS: Authority of State Land Board to lease submerged coast lands for oil and gas discovery, 1960-62, p 99.