

MAINE STATE LEGISLATURE

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Wm. F. Hill
DOCUMENTS

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THE LEGISLATURE

OF THE

STATE OF MAINE,

DURING ITS SESSION

A. D. 1856.

PART SECOND.

Augusta:

FULLER & FULLER, PRINTERS TO THE STATE.

1856.

THIRTY-FIFTH LEGISLATURE.

HOUSE.

No. 36.

STATE OF MAINE.

HOUSE OF REPRESENTATIVES, }
April 9, 1856. }

THE minority of the joint special committee, to which was referred the proceedings of the late governor and council in relation to the claim of Samuel F. Hersey and Dudley C. Hall to the timber on certain townships of land purchased by Maine from Massachusetts, ask leave to present the following

REPORT:

The undersigned would have contented himself by withholding his assent to the report of the majority, if that report were not calculated to mislead those who are not familiarly acquainted with all the facts of the case, and if it had not unnecessarily, and unjustly sought to cast censure upon the late executive department.

The proceedings of the committee were entirely ex parte. Neither the late executive, nor Messrs. Hersey & Hall, whose rights are assailed, were notified to appear before the committee, nor were they in any way there represented. But notwithstanding all this, enough appeared before them, in my opinion, fully to vindicate the action of the late governor and council, and exonerate them from all blame. What that action was, appears from the following papers.

Petition of Messrs. Hersey and Hall.

To His Excellency the Governor, and the

Honorable Council of the State of Maine:

The undersigned petitioned the Legislature of Maine, at their last session, that a trade made by us with Land Commissioners of Massachusetts, under date of March 24th, 1853, for the purchase of the interest of the Commonwealth of Massachusetts in and to the timber on the following tracts of land: township numbered five in the thirteenth range, townships L and M in the second range, and township numbered seventeen in the tenth range, should be recognized by Maine, and that Land Agent of Maine be authorized to convey to us the interest which the State of Maine acquired to the timber on said tracts by virtue of a conveyance made to Maine by Massachusetts, as set forth by the papers herewith submitted. By a resolve approved March 12, 1855, the subject was referred to the Governor and Council, and we would respectfully ask a hearing at your earliest convenience.

SAMUEL F. HERSEY,

D. C. HALL, by S. F. HERSEY.

May 1, 1855.

IN COUNCIL, December 31, 1855.

Referred to a committee of the whole Council.

ATTEST—A. JACKSON, *Secretary of State.*

Report of Council, and action thereon.

The committee of the whole Council, to which was referred the claim of Samuel F. Hersey and Dudley C. Hall, described in a resolve of the Legislature in their favor, approved March twelfth, eighteen hundred and fifty-five, and by said resolve referred to the Governor and Council, Report: That they have carefully investigated said claim, and are satisfied from the evidence submitted, that it is just and equitable and should be allowed. They, therefore, recommend that the Land Agent be authorized to convey to the said Samuel F. Hersey and Dudley C. Hall, the right to cut and carry away the timber standing upon that part of townships L and M, in the second range, number seventeen in the tenth range, and number five in the thirteenth range, west from the east line of the State, which was conveyed to Maine by the State of Massachusetts, for the term of one hundred years from

the twenty-fourth day of March, in the year eighteen hundred and fifty-three, making the same reservations for public uses as are provided by law in cases where the fee to the soil is conveyed, and also reserving all lots in said tracts conveyed by Massachusetts to settlers, and further reserving to each settler who may have possessory rights on any lots in said tracts, the right to cut such timber as he may want for building purposes and firewood, which is standing and growing on the said lot claimed; and also reserving the right of said settlers to purchase of Hall and Hersey the timber on their respective lots, at the same price per acre which the said Hall and Hersey pay the State of Maine, namely, forty-two and a half cents per acre for number five in the thirteenth range, sixty cents per acre for L, and fifty cents per acre for M, in the second range, and fifty cents per acre for number seventeen in the tenth range. And that the Land Agent be further authorized to pay to the said Hersey and Hall the amount which has already been received, and which may hereafter be collected by the State for timber cut on such part of said townships since said twenty-fourth of March, eighteen hundred and fifty-three—the conveyance above described, and the payment for timber cut, to be made to said Hersey and Hall upon the condition that the said Hersey and Hall shall pay for the same the sum of fifteen thousand seven hundred and sixty-nine dollars and eighty-five cents, in the manner following, namely: One-fifth of the sum named, in cash, with interest from the twenty-fourth day of March, eighteen hundred and fifty-five, and the balance in six approved notes of equal sums, payable in one, two, three, four, five and six years, respectively, from the last named date, with interest annually. And upon the further condition, that in consideration that by the terms of payment herein stipulated, the State abates the interest upon the purchase money for the term of two years from the twenty-fourth day of March, eighteen hundred and fifty-three, the said Hersey and Hall shall relinquish all claim for damages in consequence of the delay which has arisen in making the conveyance, and on every other account in connection with their agreement with Massachusetts for the purchase of the timber on said townships.

Which is respectfully submitted.

NOAH SMITH, JR., *Per Order.*

January 1, 1856.

Read and accepted by the Council and by the Governor approved.

ATTEST—A. JACKSON, *Secretary of State.*

Thus it appears that the late Governor and Council decided that the claim of Messrs. Hersey and Hall was "just and equitable and ought to be allowed." As the majority report seems to confound the purchase of the timber on the above tracts of land, with a contingent contract for the soil, it becomes necessary to inquire, what was the extent of their claim? Their petition shows expressly that they did not claim the soil, but "*the interest of Massachusetts in and to the timber.*" It was this claim, and this only, that the Governor and Council acted upon, and decided. Was their decision right? To determine this point, we call attention to the following evidence and considerations:

I. Did Messrs. Hersey and Hall make a binding contract with the State of Massachusetts for this *timber*, not the *soil*, for that is in no way involved in this controversy? By the following sections of the statute of Massachusetts for 1851, c. 190, it appears that the Land Agent of that State had power to make absolute contracts for the sale of timber and grass on the lands in Maine, by the approval of the land commissioners, who are the Secretary, Treasurer and Auditor of the State.

"SECT. 3. It shall be the duty of the Land Agent to superintend the public lands in Maine, and generally to take all necessary steps for their protection and security which are not contrary to the laws of said State; MAKE CONTRACTS AND EXECUTE THEM FOR THE SALE OF TIMBER AND GRASS GROWING OR STANDING ON SUCH LANDS; *provided*, in all cases, that the mode of selling, and the terms and conditions of sale of such timber, shall first be approved by the commissioners of public lands, or a majority of them; *and provided, also*, that in no case the fee in the soil shall be disposed of."

"SECT. 7. The Secretary, Treasurer and Auditor of the Commonwealth for the time being, are hereby appointed commissioners of the public lands, for the purposes of this act."

In pursuance of this power, the Land Agent of that state did make a *written* contract with Messrs. Hersey and Hall for the sale of the timber on these townships, *absolute and uncon-*

ditional on its face, so far as the *timber* was concerned. This original contract was lost, as appears by the certificate of the Land Agent, and therefore he prepared a memorandum of this contract, which contains the whole substance of it, and placed it on the records of the land office of his state. The price of the timber and the time of taking it off were fully settled and agreed upon, and the whole contract approved according to law by the land commissioners, as will appear by the following official documents.

Certificate of the Land Agent of Massachusetts.

This may certify, that on or about the 24th day of March, A. D. 1853, the undersigned, Land Agent of Massachusetts, made an agreement with Dudley C. Hall and Samuel F. Hersey, for the sale of timber belonging to Massachusetts upon townships L and M of the second range, number seventeen in the tenth range, and number five in the thirteenth range, west from the east line of said State of Maine, and also the interest of Massachusetts in the soil of said townships, if authority to convey said soil should be granted by the Legislature then in session, subject to the condition that the action of the Legislature did not require the conveyance of the entire interests of Massachusetts in the lands of Maine, to Messrs. Clark & McCrillis, according to a contract made with said Clark & McCrillis, on the twelfth day of said March.

The price of the timber upon said tracts, if the land authorities of Massachusetts could not agree upon it with said Hall and Hersey, was to be fixed by Anson P. Morrill, Land Agent of Maine, and the terms of payment, and the time for removing the *timber*, were to correspond with the terms in the sale to Clark & McCrillis aforesaid.

SAMUEL WARNER, JR., *Land Agent of Mass.*

Boston, 19th October, 1853.

A true copy of certificate on file in the Land Office.

Attest:—SAMUEL WARNER, JR., *Land Agent.*

Witness to Samuel Warner, Jr.'s signature :

EDWARD A. SNELLING.

LAND OFFICE, }
Boston, Dec. 14, 1853. }

I hereby certify that the agreement referred to in the within written certificate, as made on the 24th day of March, was in writing, and that my copy of said agreement is lost or mislaid.

SAMUEL WARNER, JR., *Land Agent.*

A true copy of certificate endorsed upon the certificate on file in the Land Office.

Attest:—S. WARNER, JR., *Land Agent.*

Witness to the above:—EDWARD A. SNELLING.

Terms of sale to Clark & McCrillis.

Boston, Sept. 25, 1855.

I hereby certify, that an agreement between the Commonwealth of Massachusetts and Messrs. C. S. Clark, William H. McCrillis and Thomas Howe, for the sale of timber and grass standing and growing on certain townships in the State of Maine, said agreement bearing date of the 12th of March, 1853, the time for removing the timber, logs, &c., was fixed at one hundred years, and the terms of payment were, one fifth cash, and the remainder in six equal annual payments.

S. N. GIFFORD,

Auditor to the Commonwealth, and

Clerk to the Land Commissioners.

Witness:—D. H. ROGERS.

Price and approval by the Commissioners.

The price fixed by me for the timber growing or standing upon the townships within named, is the sum of fifteen thousand seven hundred and sixty-nine dollars and eighty-five cents, (deducting the public lots,) for the interest of Massachusetts therein, exclusive of settlers' lots, and it is understood Messrs. Hall and Hersey assent to this price.

(\$15,769.85.)

SAMUEL WARNER, JR., *Land Agent.*

APPROVED:—E. M. WRIGHT, *Sec'y of Common'th,* }
JACOB H. LOUD, *Treasurer,* } *Commis-*
DAVID WILDER, JR., *Auditor,* } *sioners.*

A true copy of Commissioners' certificate upon the files of the Land Office in Massachusetts.

ATTEST:—SAMUEL WARNER, JR., *Land Agent*.

Thus it appears that a legal, binding contract was made, and completed in all its details for this timber, which was capable of enforcement in any court of law. This was on the 24th of March, 1853, and the contract of sale to Maine was not entered into till July, 1853, and was not completed and the deed given till October, 1853. At that time Massachusetts could only sell to Maine what property and rights she had left. She could not, if she would, repudiate and defeat this contract, nor override it, after it had been deliberately made by her agent, fully authorized and strictly following his authority as he did. Nor did she undertake to do so, or show any desire to, for the whole deed is only a quit claim of "all the right, title and interest of the said Commonwealth in and unto the following described lands." It will also be perceived that the assertion in the majority report that, "The *agreement* with Messrs. Hall and Hersey was made by the Land Agent of Massachusetts when he was not legally authorized to make it, and subject to a conditional act by the Legislature of Massachusetts, which was never complied with," is not true, when applied to the sale of the *timber*, but is true only when applied to the sale of the *soil*; and inasmuch as Messrs. Hersey and Hall have never claimed the *soil*, and the Governor and Council have never acted on any such claim, the whole assertion is deceptive, and either designed to cover up the true issue, or was an unpardonable blunder, and confounding of distinctions, so plain that the wayfaring man *need* not err therein.

II. While such was the state of facts at the time of the purchase by Maine, the next inquiry is,—was Maine bound by this contract? It will appear by the following extract from the deed from Massachusetts to Maine, that there was an *express, definite and positive reservation of all rights arising from the sale of TIMBER, and that Maine took the lands subject to these rights to the same extent as Massachusetts then held them.*

Extract from deed to Maine.

And, whereas the said Commonwealth had, prior to the 23d day of July, A. D. 1853, made sale of timber, and granted permits to cut and take off timber upon many of the townships and tracts hereinbefore described and conveyed, some for limited periods, and others without limitation as to time, but all upon terms and conditions mentioned and agreed upon in the several instruments and writings, given to the respective parties, at the time when such sales and permits were made and given; therefore it is understood and agreed by the parties to this *Deed* and conveyance, that all such townships and tracts are hereby sold and conveyed by said Commonwealth, and purchased and taken by said State of Maine, subject to the legal rights, claims and interest of all parties claiming under such sales and permits, to be held and enjoyed by them and their assignees respectively, as fully, and to the same extent as they would have held or been legally entitled to enjoy them, if this deed and conveyance had not been made.

Not only is it proved by the deed itself that Maine took the lands subject to this contract among others, but the following certificates clearly show that it was expressly understood by the commissioners of Maine, that they did so take *these very townships*, and *that they agreed that Maine should respect the rights of Messrs. Hersey and Hall.*

Certificate of the Massachusetts Commissioners.

The undersigned, Land Commissioners of Massachusetts, hereby certify, that at the time within mentioned, they gave to Dudley C. Hall and Samuel F. Hersey, their approval of the within mentioned agreement for the sale of the timber, and of the land also, if authority was given by the Legislature to convey the soil belonging to Massachusetts upon the *tracts* within mentioned and described, and at the time of the negotiation pending between the Commissioners of Massachusetts and the Commissioners of Maine, for the purchase of the public lands of Massachusetts, and prior to the execution of the contract by and between the Commissioners of the two States, the said agreement made with the said Hall and Hersey, by the Land Agent of Massachusetts, was disclosed to the Commissioners of the State of Maine, and they were notified that the Commissioners of Massachu-

setts had given their assent to, and approval of, the same, and considered themselves honorably bound to carry out the same; and they were assured by the Commissioners of the State of Maine, that the same should be respected by the State of Maine, in case said State should become the purchaser of said lands.

Witness our hands this 19th day of October, 1853.

EPH. M. WRIGHT, *Secretary of State.*

JACOB H. LOUD, *Treasurer.*

DAVID WILDER, JR., *Auditor.*

Certificate of E. L. Hamlin.

I hereby certify, that pending the negotiation for the purchase of the Massachusetts land in this State, between the Commissioners of Maine and Massachusetts, a contract for the sale of certain lands in Maine, belonging to Massachusetts, made by the Land Agent of Massachusetts to Messrs. Dudley C. Hall and Samuel F. Hersey, and approved by the commissioners of Massachusetts, was shown to the Maine commissioners, and the Maine commissioners were requested to deduct said lands from the contract to purchase from Massachusetts, or in some way to recognize the contract to sell said lands to said Hall and Hersey.

The Maine commissioners declined doing anything of this kind, upon the ground that they had no authority so to do; but as one of the commissioners, I said at the time, that I would, whenever requested, make a statement of these facts, so that Messrs. Hall and Hersey might present their claim to the Legislature of this State to have said contract carried out in good faith.

At the meeting of the Legislature in 1853, to take into consideration the acceptance of the purchase of the Massachusetts lands according to the agreement made by the commissioners of the two States, I was particularly requested by said Hersey to call the attention of the Legislature to the existence of the contract to sell to said Hall and Hersey, and that they claimed the fulfillment of said contract.

Through inadvertence, I forgot to mention this fact to the Legislature at that time.

Afterwards, when the deed for the purchase of the Massachusetts lands was preparing, the Massachusetts commissioners called the attention of the Maine commissioners to the contract made as above mentioned to said Hall and Hersey, and they wished to have the lands mentioned in said contract reserved from the deed. But this was declined by the Maine commissioners, who thought that the proper mode of completing said contract, was by application to the Legislature, who could authorize the Land Agent of Maine to give the deed.

ELIJAH L. HAMLIN, *State Commissioner, &c.*

Bangor, September, 1855.

It is true, as Mr. Hamlin and the majority report state, that the commissioners of Maine did refuse to recognize the contingent contract for the sale of the *soil* of these townships to Messrs. Hersey and Hall, because they were not authorized by Maine to purchase any thing less than "the lands of Massachusetts in Maine," which they justly construed to mean all her lands. If they had excepted the soil of these lots from the deed, the title to *some* lands in Maine would still have remained in Massachusetts, since her Legislature had not acted on the contract for the sale of the *soil* to Messrs. Hersey and Hall; but there is not a particle of proof that the Maine commissioners ever refused to recognize the contract for the sale of the *timber*, but on the contrary, according to the very terms of the deed, and the certificate of the Massachusetts commissioners, they did emphatically recognize it, and agree that it should be carried into effect.

The majority report asserts that, "by the terms of the deed of conveyance from Massachusetts to Maine, all tracts and townships on which sales or permits had been given, were expressly designated in said deed, and towships L and M, 2d range; 17, 10th range, and 5, 13th range, west from east line of the State, were conveyed free from all incumbrance."

We deny this assertion entirely. There is not a word of that kind in the deed. There is not a single township so designated; but every word there is in the deed about sales of

timber or permits, is found in the general reservation clause, which has been already quoted.

It is therefore confidently insisted that the contract of Messrs. Hersey and Hall with Massachusetts for the timber on these townships was valid and binding, prior to the conveyance by that State to Maine, and that Maine took the land subject to that incumbrance, with a full knowledge of its existence, and was morally and legally bound to carry it into effect, according to its terms and conditions, and that it would be dishonorable not to do so.

III. The next question is, did the Governor and Council undertake to do anything more than to carry this contract into effect? By comparing the terms and price fixed by the Land Agent of Massachusetts (\$15,769.85) with the terms and price fixed in the report of the council, they will be found to be precisely the same, (\$15,769.85). Upon this point the majority report raises no controversy; but they do contend that the value of the timber is much greater than the price agreed upon.

The Committee really had no evidence from which any intelligent opinion could be formed upon this point, except the statement of Mr. Clark, the Land Agent of last year, who testified that from the best information he had, he thought the price paid was all that the timber was worth, and that in fact Maine had previously sold her half of two of these townships at the same price, about the same time. However this may be, in my judgment it has no bearing on the question, and was only dragged in with a view to create prejudice.

If Messrs. Hersey and Hall made a binding contract as has been shown, with Massachusetts for this timber, at a price fixed, satisfactory to both parties, and Maine took the place of Massachusetts in the contract, as she certainly did, according to the terms of the deed, then is the State solemnly bound to carry that contract into effect, for better or for worse, whether the purchasers made a good or a bad bargain. It is a question of legal and honorable obligation on the part of the State, and not of dollars and cents. This timber never belonged to Maine,

but to the purchasers under their contract with Massachusetts, and the only right which Maine acquired by her purchase was the right to the purchase money, as fixed in the contract.

The majority report insinuates that the notes signed by Mr. Thompson for four-fifths of the purchase money, are worthless. There is no proof of this, but if there was, the State would not be the sufferer. The Governor and Council authorized the Land Agent to convey, on the condition that one-fifth was paid in cash down, and "approved" notes given for the balance. Such notes were taken by the Land Agent, and by the terms of the deed, if they are not paid according to their tenor, the title to the timber reverts to the State, and if it is so very valuable, as the majority report would represent, the poorer the notes, the better it will be for the State.

But it is said in the majority report that the resolve, by which this matter was referred to the Governor and Council, did not authorize them to direct the Land Agent to make a conveyance of this timber, or in other words, to carry the contract into effect. It reads as follows :

"Resolved, That the claim of Samuel F. Hersey and Dudley C. Hall to have the timber on townships number five, range thirteen, number seventeen, range ten, letters L and M, purchased by Maine from Massachusetts, October 5, 1853, conveyed to them by Maine, as set forth in their petition dated February 7, 1855, be referred to the Governor and Council.

Approved March 12, 1855."

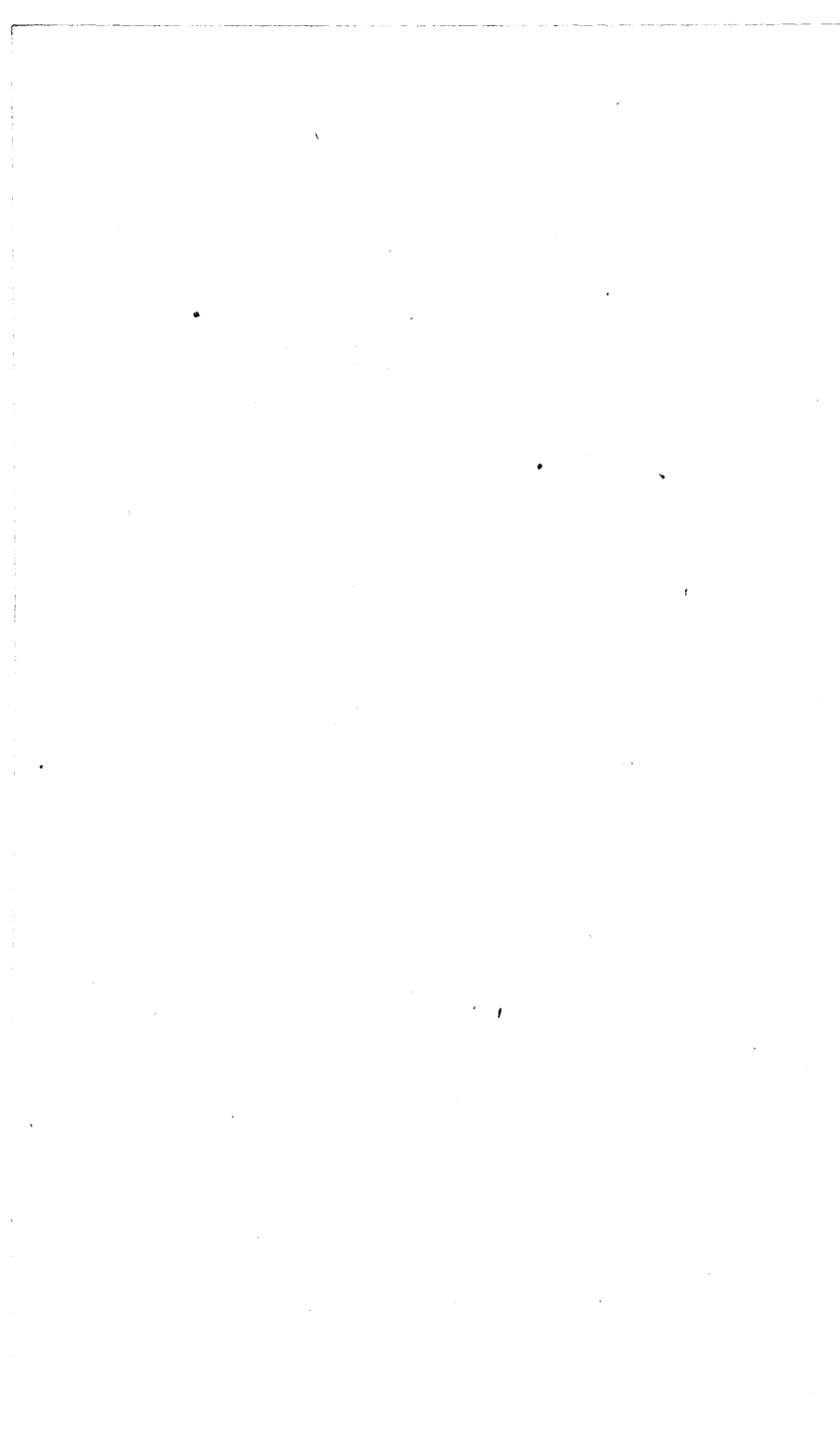
In order to understand the meaning of this resolve, we must go back to its contemporaneous history. Messrs. Hersey and Hall presented their petition to the Legislature of 1855, for a conveyance of this timber, similar in substance to the one presented afterwards to the Governor and Council. It was referred to the Committee on State Lands and State Roads, and after two hearings they were not unanimous as to the final disposition of the matter, and as it was very near the close of the session, and no time to reconcile differences of opinion or give any farther hearing, the above resolve was agreed upon,

and the matter was thus referred to the Governor and Council. No man will deny the full power of the Committee and the Legislature to adjudicate this case, and direct a conveyance to the petitioners; and having it under their jurisdiction and not being able to accomplish it themselves, *they substituted the Governor and Council in their place*, and referred the whole matter to them, without the slightest limitation or qualification, and therefore it is contended that they intended and did confer all the power that they themselves had. If the resolve does not mean this, what does it mean? The only thing in dispute was whether the petitioners should or should not have a conveyance of this timber; and if the Governor and Council were not to decide that question, there was nothing for them to decide, and the whole resolve was a nullity and absurdity. It would be equally absurd to maintain that they could decide that they *should* have a conveyance, and yet had no power to give it to them, but that they must wait another year, apply to another Legislature, and go through with the whole process again.

But even if the Governor and Council had no power by the resolve to direct a conveyance, they had power to decide and did decide that the claim was valid and binding on the State, and the State was and is bound to carry this contract into effect, and secure to Messrs. Hersey and Hall a perfect title to the timber on these townships, and therefore the resolves reported by the majority ought not to pass.

All of which is respectfully submitted.

SETH SCAMMON.



STATE OF MAINE.



HOUSE OF REPRESENTATIVES, }
April 9, 1856. }

ORDERED, That 350 copies of this Report be printed.

DAVID DUNN, *Clerk.*