R E P O R T O N T H E

P U B L I C L O T S

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September 12, 1972

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FOR RELEASE TUESDAY A.M., JANUARY 23, 1973

The Attorney General's Department has today released for the information of the members of the legislature and the people of Maine the Report on the Public Lots written by Assistant Attorney General Lee M. Schepps. It is my view that the continued suppression of this study would serve only to extend further the conjecture as to what it contains and thereby to confuse a public question that is already complex.

The report analyzes a number of difficult legal problems. These include

1. The precise nature of the public rights in the public lots.

2. The possible alternative public uses to which the lots can be put.

3. The question whether the right to cut grass and timber has expired.

4. The manner in which the State can properly terminate the right to cut grass and timber.

5. The right of the State to an accounting of profits on the public lots.

6. The right of the State to protect its lands against damage by harmful cutting practices.

While parts of it may serve as the legal support for the State's case in any litigation by the State involving the public lots, in my view the benefits of its public dissemination far outweigh any disadvantage to this office by early disclosure of our legal arguments and authorities.

One cardinal public benefit of its release is to share with the legislature and with other persons and organizations interested in the future of the public lots the expertise and information which this Department has developed in this area. From their inception the public lots have been in the nature of a charitable trust. It is, therefore, appropriate that this office make every reasonable effort, within the limits of time available to us, to provide counsel and assistance in any evaluation or re-evaluation of the manner in which these public assets are used and administered.

STATE OF MAINE

Inter-Departmental Memorandum Date September 11, 1972

To James S. Erwin, Attorney General Dept. Attorney General

From Lee M. Schepps, Assistant Dept. Attorney General

Subject 1972 Attorney General's Report on the Public Lots

The attached report deals with some (but not all) of the more important aspects of the posture and powers of the State with respect to the public lots and with respect to the owners of the timber and grass on the public lots. No treatment is given to the manner in which any or all public lots have been administered by agents of the State. No treatment is given to the particular situation of any particular public lot in a particular township. The focus is exclusively upon the rights and powers of the State, not upon the details of how that power has heretofore been exercised. While there are numerous references to specific deeds, townships and Resolves, they are intended to be illustrative of broader principles and not expositions of the peculiar legal rights and relationships with which they are specifically concerned.

Among the more significant of the conclusions reached in this report are the following:

1. The State has the power by appropriate Legislative enactment to sell the public lots in the unincorporated areas of the State and the power to use those public lots, including the income therefrom and the proceeds from the sale thereof, (i) for public purposes other than schools and (ii) for public purposes which do not benefit, or only indirectly benefit, the present or future inhabitants of the townships from which the public lots were reserved. This power can be exercised to authorize the use of public lots for park or other public purposes and it can be exercised to authorize the sale or exchange of public lots in order to assemble large contiguous quantities of land far in excess of 1000 acres.

2. The State is a tenant in common in those townships in which public lots have not been located. With the sole exception (and then only to the extent) of rights heretofore expressly conveyed by the State, the State is entitled to those attributes of ownership normally accruing to a tenant in common including the right to its proportional share in all sources of common income from the townships, the right to common possession and the right to prevent waste of the common property.

3. If Title 1 M.R.S.A. § 72.24 (which provides that "timber and grass" as it relates to the public lots means "all growth of every description") were repealed, the Court would likely construe the word

"timber", as it relates to cutting rights on the public lots, (i) to mean timber of a size which was considered at the time the rights were sold to be suitable for certain purposes or of merchantable size and (ii) to exclude beech, maple, birch, and other trees and forms of growth not commonly regarded as "timber" when the cutting rights were sold.

4. There is a distinct possibility that what was conveyed by the grass and timber deeds (ignoring arguments which could be made but for Title 1 M.R.S.A. § 72.24) was the right to cut and carry away the growth of timber in existence at the time of each conveyance and that since that growth of timber has, for all practical purposes, already been cut, the rights may have expired.

5. Substantially all grass and timber rights on the public lots terminate upon the organization of any portion of the township from which the public lot was reserved, into a plantation. While there is presently but a single form of plantation, limited to single townships containing at least 200 persons, when substantially all cutting rights were sold, there were either (i) no statutory provisions in effect limiting the area or population of plantations or (ii) the cutting rights were keyed to expire (in some cases by statute and in others by virtue of limitations in the timber deeds) upon the organization of the townships merely for the purpose of casting ballots in county, state and federal elections.

6. Where the timber and grass from a public lot has been sold, the State is entitled to make any use of the public lot which does not unreasonably impair the right of the timber owners to cut and carry away the timber and grass. In addition, the State is entitled to receive all income from the public lot which does not represent the value of timber and grass actually cut and carried away except (and then only to the extent of) income from sources unreasonably impairing the rights of the timber owners to cut and carry away the timber and grass.

7. To the extent that the State can show damage to the land (from erosion or otherwise) or damage to any thing on the land owned by the State, the State can prevent the use of cutting methods and other activities on located public lots which might otherwise be acceptable and common practice on lands owned in fee simple by the timber owners. These cutting methods include clearcutting and the use of skidders and similar heavy equipment.

Needless to say, the above conclusions are excerpted from the body of the report and are therefore to be treated only in the context in which they appear in the report itself. While the report is

lengthy, it does not represent an exhaustive treatment of even the legal issues underlying the above conclusions. If litigation of any of these issues is commenced, there is additional legal research and briefing to be done. In the judgment of this writer, however, such additional research cannot reasonably be expected to change any of the conclusions reached in the report.

I take this opportunity to express gratitude to Mr. Thomas Gibbon, a summer intern provided by the State Planning Office in cooperation with the New England Board of Higher Education, for his competent assistance in preparing the report and Miss Edith L. Hary, the State Law Librarian, for her cooperation and patience with me during long hours of research.

LMS/mf

Lee M. Schepps

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I. THE PUBLIC LOTS

A. Historical Perspective

At the close of the Revolutionary War, the Commonwealth of Massachusetts owned in fee simple vast amounts of land, including most of what is now the State of Maine. This land was largely uninhabited, uncultivated and, so long as it belonged to the State, untaxable. The policy adopted by Massachusetts with respect to these public lands (and subsequently followed by Maine) was that it was in the best interest of the people to dispose of the public lands, primarily in order to bring about their settlement and development. Since the lands were of some value, a secondary but significant motivation appears to have been to raise money from their sale in order to operate the government and to discharge indebtedness incurred during the Revolutionary War and thereafter. Lands were also occasionally given for the purpose of endowing schools or otherwise promoting the cultural and spiritual well-being of the people. Beginning as early as 1785, [1] the United States began setting apart the center lot of each township in its western territories, for the maintenance of public schools, the purpose being to promote "good government and the happiness of mankind by the spread of religion and knowledge." [2] Undoubtedly for similar purposes

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1. Cooper v. Roberts, 59 U. S. 173 (1855).
2. Cooper v. Roberts, supra, at p. 178.

and, of course, to further promote settlement of lands which it owned, Massachusetts resolved, at approximately the same time, that out of every township[1] sold, there should be reserved four lots of 320 acres each for "public uses", one for the first settled minister, one for the use of the ministry, one for a public grammar school and one for the benefit of public education in general as the Legislature thereafter might direct[2] or, in some instances, the latter lot was reserved for future appropriation as the Legislature should direct.[3] The latter lots came to be known as the "State Lots" and were largely sold off by the Legislature of Massachusetts (and later of Maine) pursuant to private and special legislation.[4] Instead of 1280 acres in each township conveyed by Massachusetts, therefore, there typically remains reserved for public uses today only 960 acres per township. Pursuant to statutes directing the sale from time to time, by lottery or otherwise, of Massachusetts' public domain in Maine, Massachusetts delivered deeds to townships reserving the public lots and designating in the deeds the uses for which each lot was reserved. Attached to this report as

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1. A tract of land six miles square, comprising approximately thirty-six square miles.
2. Laws and Resolves of Massachusetts, 1786, chapter 40.
3. Laws and Resolves of Masachusetts, 1787, chapter 80.
4. See for example Chapter 64, Resolves of 1821.

Exhibit "A" is a copy of a deed from Massachusetts prior to the separation of Maine, reserving lots for specified public uses. Attached as Exhibit "B" is a copy of a deed conveying one of the so-called Lottery lots, reserving public lots and specifying that the lot is to be located near the center of the township.

When Maine became a state, it came into ownership of approximately one half of the then unsold, and largely unsurveyed (or "unlocated") public domain in what had been the district of Maine. Some of these lands were owned outright by Maine and some jointly with Massachusetts. The Articles of Separation,[1] initially merely an act of the legislature of Massachusetts authorizing statehood for Maine, provided, in part, that:

> " . . . in all grants hereafter to be made by either state of unlocated land within the said District [of Maine], the same reservations shall be made for the benefit of Schools, and of the Ministry, as have heretofore been usual, in grants made by this Commonwealth." [2]

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1. The Articles of Separation can be found beginning at page 16 of the Laws of Maine, 1821 and at page 46 of the Public Laws of Maine, 1820-1821. They are the fifth section of Article X of the Constitution of Maine but are rarely printed with the remainder of the Constitution.
2. Articles of Separation, seventh paragraph.

The Articles also declared that:

> "These terms and conditions, as here set forth, when the said District shall become a separate and independent state, shall, ipso facto, be incorporated into, and become, and be part of any constitution, provisional, or other, under which the government of said proposed state shall, at any time hereafter, be administered; subject, however, to be modified, or annulled, by the agreement of the Legislature of both the said States; but by no other power or body whatsoever."1/

The acreage reserved in grants by Massachusetts and by Maine for public uses or for the benefit of schools or the ministry are hereinafter referred to as the "public lots" or "reserved lots" and are herein to be distinguished from "public lands" or the "public domain" which includes all lands owned by the sovereign, including lands from which the public lots were reserved.

After separation, the Maine Legislature did not immediately develop a comprehensive program for the administration of public lots or the administration and settlement of the public lands. In 1824, however, the Legislature enacted two significant pieces of legislation. First, the Legislature provided that "in all cases where lands have been granted or reserved for the use of the Ministry, or the first settled minister in any town in the State, where the fee in such lands has not already become vested

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1. Articles of Separation, ninth paragraph.

in some particular parish within such town, or in some individual,"[1] the fee was to be vested in the "inhabitants of such towns", subject to the supervision of a board of trustees consituting and having the powers of a corporation,[2] comprised of various municipal officers. The trustees had the power to administer and to sell the public lots and were required to use them, the income therefrom and the proceeds from the sale thereof, for ministerial and school purposes in a specified manner, and to render an annual accounting to the town. The Legislature expressly retained the right to alter or annul, at its pleasure, the powers of the trustees over these public lots.[3] With one significant exception, the basic framework established by this Act for the administration of school and ministerial lands by the towns in which they are located, remains the law today.[4] The statute then and now deals with the administration of ministerial and school lands in incorporated towns by the municipal trustees and does not deal with or purport to regulate the administration of public lots by the State in plantations or unorganized areas of the State.

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1. Chapter 254, Public Laws of 1824.
2. This corporation was, and is today, unquestionably a "private" corporation within the meaning of Yarmouth v. North Yarmouth, 34 Me. 411 (1852) and Dartmouth College v. Woodward, 17 U.S. 518 (1819), grants to which are contracts which may not be constitutionally impaired.
3. The ministerial lands (and funds) were directed to school purposes in 1832.
4. Title 13 M.R.S.A. §§ 3161, et seq.

In addition, in the first of many acts styled (or approximately styled) "AN ACT to Promote the Sale and Settlement of Public Lands",[1] the Legislature created the office of Land Agent, vested in him certain administrative powers over the public lands (including the right to sell grass and timber from them from year to year), provided grants of small tracts to actual settlers and declared that:

> "There shall be reserved in every township, suitable for settlement, one thousand acres of land to average in quality and situation with the other land in such township, to be appropriated to such public uses for the exclusive benefit of such town, as the Legislature may hereafter direct."[2]

This provision (i) changed the reserved acreage from 1280 acres to 1000 acres, (ii) specified the reservation of a single large quantity of land rather than four smaller ones, (iii) appropriated the entire 1000 acres to such public uses as the Legislature might thereafter direct and (iv) made the town, which might ultimately be created within the township from which the public lot was reserved, the exclusive beneficiary of the reservation. Each of these four changes represented a marked

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1. Chapter 280, Public Laws of 1824.

2. Chapter 280, § 8, Public Laws of 1824.

departure by Maine from the specific pattern of reservations of public lots which had theretofore been usual in grants by Massachusetts. Maine did not amend the Articles of Separation or seek or obtain the consent of Massachusetts to make these changes.[1] This provision, with relatively minor changes, remained in effect during the disposition of Maine's vast areas of public lands and the reservation of the public lots, and is still in effect today.[2] Copies of examples of deeds from Maine and from Maine and Massachusetts jointly, containing the reservation of the public lots pursuant to this 1824 legislation, are attached to this report as exhibits "C" and "D" respectively.

In 1831, the Legislature passed an "Act to Modify the Terms and Conditions of the Act for Separation".[3] This Legislation was made subject to the consent of the Legislature of Massachusetts, sought to give to Maine the power to control the trustees of ministerial and school lands in towns incorporated by Massachusetts (prior to separation) and sought to vest in the Legislature of Maine the power to "direct the income of any fund arising from the proceeds of the sale of land, required to be

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1. Massachusetts did not object to the changes and, in fact, joint conveyances by Maine and Massachusetts thereafter provided for 1000-acre reservations for public uses. See, for example, the conveyance in Hammond v. Morrell, 33 Me. 300 (1851).

2. Title 30 M.R.S.A. § 4151.

3. Chapter 492, Public Laws of 1831.

reserved for the benefit of the Ministry, to be applied for the benefit of primary schools, in the town in which such land is situate, where the fee in such land has not already become vested in some particular Parish within such town, or in some individual."[1] Massachusetts responded with legislation which recited, substantially verbatim, the above act of Maine and stated that the Articles of Separation were thereby "so far modified, as to permit an exercise of legislation by the Government of the State of Maine, over the subject of ministerial and school lands within its territorial jurisdiction, granted or reserved for those purposes before the separation of that state from the Commonwealth of Massachusetts, with the restrictions, and upon the conditions expressed in the aforesaid act of the Legislature of Maine. . . ."[2] Pursuant to this consent, Maine enacted a law in the following year which "directed and required" that the proceeds from the sale, as well as the income from funds created with the proceeds from the sale, of any lands reserved for the ministry or for the first settled minister (except those which had vested in a particular parish or individual) be "annually applied to the support of primary schools in each town."[3]

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1. Chapter 492, § 2, Public Laws of 1831.

2. Laws of Massachusetts, 1831, chapter 47.

3. Chapter 39, Public Laws of 1832.

For a number of reasons it seems quite clear that the 1831 amendment to the Articles of Separation was not intended to amend, and did not amend, the provisions of the Articles requiring that public lots be reserved for the benefit of schools and the ministry, but, instead, was designed to permit Maine to have jurisdiction and power over the disposition of public lots which were both (i) reserved from pre-1821 conveyances by Massachusetts and (ii) were situated in towns incorporated by Massachusetts prior to 1821. The part of the Articles amended in 1831 was a provision to the effect that all grants and conveyances by Massachusetts prior to 1821 would survive separation and remain in full force and effect. This is apparent from an examination of the words of the amendment. First of all, the language used is substantially identical to the language contained in Chapter 254 of the Public Laws of 1824 which dealt exclusively with the administration of ministerial and school lots in towns by the trustees in whose custody Maine placed the lots (after having vested beneficial ownership in the inhabitants of the town). As in that 1824 Act, no restrictions are imposed or even mentioned relating to the duties or powers of the State of Maine in either reserving public lots or administering those not then located in towns. That the proposed amendment related only to the powers of Maine with respect to

public lots which had already vested in the inhabitants of a particular town (but not in a particular parish or minister) is confirmed by the use of the expression "in the town" and the provisions for sale of the public lots, which typically occurred after but almost never before incorporation.

Furthermore, the consent of Massachusetts[1] expressly permits the proposed act of legislation by Maine "over the subject of ministerial and school lands within its territorial jurisdiction, granted or reserved for those purposes before the separation of that state from the Commonwealth of Massachusetts, provided, that in all such cases the consent of the proprietor or proprietors of such lands shall be previously obtained." (emphasis supplied). Maine did not seek, and Massachusetts did not give, any consent or amendment to the Articles of Separation permitting Maine to use entirely for school purposes, instead of ministerial purposes, public lots reserved in grants from (i) Massachusetts after 1821, (ii) Massachusetts and Maine at anytime or (iii) Maine at anytime. Moreover, while the consent of Massachusetts is broad enough to include it, it is far from clear that Maine asked for consent to divert the uses of public lots in lands granted by Massachusetts prior to 1821 but not then situated in incorporated towns.

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1. Laws of Massachusetts, 1831, chapter 47.

The precedent established by the 1831 amendment to the Articles of Separation is extremely limited and literally would require Maine to seek the consent of Massachusetts to divert from school purposes merely those public lots (or their proceeds) which are presently owned by existing municipalities which were incorporated prior to 1821 and which are located within townships conveyed by Massachusetts prior to 1821.[1/]

In 1821, the Supreme Judicial Court of Maine had held that as opposed to trespassers and other "strangers" to the title of the public lots (not expressly including the State) the owner of the lands from which the reservation is made, or who is required to set apart the public lots, is the proper custodian of the reserved lands until they become vested in the intended beneficiaries, for the purpose of preserving and protecting them until those beneficiaries come into existence.[2/] In 1831, the Land Agent was, for the first time, charged specifically by the Legislature to "take care of the public lots which have been, and shall hereafter be reserved for public uses, in the several townships in this State, until the fee shall vest in the town or otherwise, according to the force and effect of the grant, and preserve the same from pillage and trespass."[3/]

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1. The 1853 conveyance from Massachusetts to Maine, discussed hereinbelow, would likely obviate even this requirement.

2. Shapleigh v. Pillsbury, 1 Me. 271 (1821).

3. Chapter 510, Public Laws of 1831.

This act gave the Land Agent administrative control over not only the public lots reserved from grants by Maine, but also public lots reserved from grants by Massachusetts. The power of the Land Agent to prosecute trespasses upon public lots reserved in grants by Massachusetts was upheld in 1839 in State of Maine v. Cutler,[1] in which the Court held that by the Articles of Separation, Maine succeeded to all of the sovereignty of Massachusetts for the regulation of the public lots.

In 1842, the Legislature took the custody and control over the public lots away from the Land Agent and gave it to the County Commissioners of the several counties in which the public lots were located.[2] The act authorized the seizure and sale of timber taken by trespass from the public reserved lots and provided that the proceeds from the sale of seized timber were to be paid into the county treasury, and were to be held there by the commissioners and a full accounting of the proceeds made to the "treasurers of towns, rightfully owning it, whenever applied for." In 1845, the County Commissioners were authorized to grant permits for cutting timber on the reserved lots" not to exceed one permit for one 6 ox team on any one lot

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1. 16 Me. 349 (1839).

2. Chapter 33, § 21, Public Laws of 1842.

in each year."[1] In 1846, the Legislature provided that income from the public lots should be paid into the County Treasury and expended for school purposes, according to a specified formula.[2] Three years later, the Legislature shifted responsibility for the care and custody of the public lots to agents within each county and directed that the agents annually turn over all income, with an accounting, to the State Treasurer who was required to keep an accurate account of all moneys received by him under the act.[3] The State obligated itself to "be accountable to the beneficiaries for the full amount of all moneys thus received, with 6% interest thereon," and the act recited that "whenever the inhabitants of the township or tract, in which lands have been reserved for public uses, shall have become organized into a plantation for election purposes or otherwise, and shall have organized one or more school districts according to law", the State Treasurer was directed to pay the annual interest to the clerks of the plantations for application to the support of schools in the district.

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1. Chapter 149, Public Laws of 1845.

2. Chapter 217, Public Laws of 1846.

3. Chapter 82, Public Laws of 1848.

While this report does not purport to be a history of social or political developments in Maine during the period in question, the direction taken in 1850 by the Maine Legislature regarding the public lots, should, to some extent, be interpreted in light of the events and attitudes of the day. For a number of years, timber was stolen in great quantities from much of the public lands of the State, including the public lots.[1/] The Land Agents annually reported, complained of, and, in general, offered suggestions to curb the widespread timber trespasses on the public domain.[2/] By 1854, it was reported that "most of the timber" on certain public lots had been taken off by trespassers, that the value of such public lots was thereby greatly diminished and that "trespassing, to some considerable extent, will be carried on, while the State holds the lands; it cannot be entirely stopped."[3/] Part of the problem undoubtedly was that the State either could not afford or determined that it was economically not feasible to create and employ

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1. See for example Report of William P. Panott, Land Agent, 1840, at page 67, in the Maine Land Agents Reports, 1840-1856. Stealing timber is hereinafter referred to as "timber trespass."

2. See for example Report of L. Bradley, Land Agent, 1842, at pages 5, and 6, in the Maine Land Agents Reports, 1840-1856.

3. Report of George C. Getchell, Land Agent, 1854 at pages 1, 7 and 8, in the Maine Land Agents Reports, 1840-1856.

the massive law enforcement capacity which would have been required to prevent timber trespasses in much of the remote and then extremely wild public domain.[1/]

At the same time, the outlook for settlement of the public domain began to change. It had been recognized since the separation of Maine from Massachusetts that some portions of the wildlands were not well suited for settlement and that the timber on those lands represented the substance of even their long term value to the State.[2/] Nevertheless, the fundamental and broad view had been that much, if not most, of the wildlands were suitable for settlement and the policy of the State seems clearly to have promoted this prospect. By 1848, however, the Land Agent reported to the Legislature that with respect to much of the public domain, "the value of the land

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1. In addition, of course, the trespassers themselves, who were often large timber operators, may have exerted political pressures to thwart preventive measures. The United States suffered the same depredations and was subjected to such pressures in its western territories. For a history of efforts by the federal government to prevent timber trespassers on its western lands, see Gates, History of Public Land Law Development (Wash. D.C. 1968) written for the Public Land Law Review Commission, chapter 19.

2. Message of Governor to first assembled Legislature of the State in 1820, found in Resolves of Maine, 1820-1828, Volume I at page 11, et seq.

consists entirely in its timber, and that generations to come will not furnish a demand for it for any other purpose. . . ."[1] Even with respect to those portions of the public lands which had been designated as suitable for settlement, the Land Agent felt that the "truth is, that the situation of these [settling] lands far to the north, their distance from market towns, the injury of the wheat crop by the weevil, the rot of the potato, all conspire to retard very seriously the progress of their settlement."[2] He noted that while "our wild lands are unoccupied or unimproved they are of no more value than an equal area of the ocean"[3] and urged the legislature to give, rather than sell, land to actual settlers.

Even giving away land undoubtedly would not have overcome for Maine the problem it felt to have been presented by the California gold rush of 1849. Governor Hubbard, in his message to the Legislature on May 14, 1850, said:

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1. Report of Samuel Cony, Land Agent, 1848, at page 5, in the Maine Land Agents Reports, 1840-1856.

2. Id. at pages 6 and 7.

3. Id. at page 7.

> "At this time, while the tendency to emigration is so strong, it becomes doubly important that our people should be furnished with inducements to stay at home. It may be questionable whether any we can offer will accomplish the object. It is a common remark, that it would be better for us to give our lands away, than to suffer them to remain unoccupied. Would it not be well to make the experiment?" 1/

Compounding these problems was the developing tendency by Massachusetts to refuse to cooperate in any respect with the development of her portion of Maine's wildlands (including the part jointly owned), and to resort to circuitous legal arrangements by which private persons could enjoy profits from Massachusetts' lands, yet the fee to the lands remained in Massachusetts and was therefore not taxable under the Articles of Separation. 2/ Finally, the State appears to have been in

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1. Message of Governor found in the Acts and Resolves of Maine, 1850, at page 313. By 1853, there is a pronounced degree of concern about the emigration of "hundreds and thousands" of the "young and enterprising portion of our population" and the fear of an exhaustion of the "vigor of the body politic" expressed in the Message of the Governor found in the Resolves of Maine, 1853, at page 51.

2. This dispute culminated in the 1853 deed from Massachusetts to Maine of all of Massachusetts' interest in territories in Maine, discussed hereinbelow. The subject of the dispute is treated in the "History of the Wild Lands of Maine" which is contained in the annual report of the Forest Commissioner in 1908.

financial straits and the year 1850 was characterized by the State Treasurer as the turning point in Maine's struggle to discharge its public debt.[1]

In this atmosphere, the Legislature enacted in 1850 a significant piece of legislation concerning the public lots. That act[2] again vested in the Land Agent the care and custody of the public lots (taking it away from agents within the counties) and "authorized and directed [the Land Agent] to sell for cash, the right to cut and carry away the timber and grass from off the reserved lands. . . excepting however the grass growing upon the improvements of any actual settler, the right to continue until the tract or township shall be incorporated or organized for plantation purposes. . . ."[3] This authority and instruction extended to all located public lots and to all public lots thereafter reserved in grants by Maine or by Massachusetts or by both jointly, whether or not located.[4]

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1. Treasurers Report of 1850 at page 12, found in the Legislative Documents of 1850.
2. Chapter 196, Public Laws of 1850.
3. Chapter 196, § 2, Public Laws of 1850.
4. The exception pertaining to the grass on improvements by actual settlers was not expressly applicable to unlocated lots. The expression "located" public lot hereinafter refers to a public lot which has been partitioned from the township or tract from which it was reserved. Partition typically occurred by court proceedings to "locate" the public lot or by mutual agreement between the State and the proprietors of the township. "Unlocated" public lots refer to those lots prior to their location, and represent, in substance, a common and undivided interest of the State in a township from which the reservation was made.

The Land Agent was directed to sell the foregoing rights to the person or persons who owned the tract or township "at the same rate per acre as the tract or township shall or may have sold for, making, however, such reasonable deduction for the soil as in the opinion of the agent should be made."[1] A copy of an example of a deed conveying the grass and timber rights on a public lot pursuant to this statutory provision is attached to this report as Exhibit "E". The Land Agent was likewise directed to "proceed to procure the location of the lands reserved for public uses" in land theretofore and thereafter sold by the State, unless (i) the Land Agent and the proprietors could agree on a location, in which event the agreement was to be reduced to writing and filed in the Land Agent's office, or (ii) the proprietors themselves had theretofore taken steps to set apart and locate the public lots under existing laws.[2]

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1. Chapter 196, § 2, Public Laws of 1850. It is interesting to note that many of the proprietors of those townships did not buy the grass and timber cutting rights. "The reasons for neglecting the favorable provisions of law are apparent when it is seen that this undivided interest has not been paid for, and that a joint ownership with the State is a matter of pecuniary advantage so long as the State willingly acquiesces and makes no claim for the value annually pocketed by her co-tenant." Report of Isaac R. Clark, Land Agent, 1855, at pages 3 and 4, in the Maine Land Agents Reports, 1840-1856.

2. Presumably referring to the provisions of R.S. 1841, c. 3, § 14, originally enacted by chapter 480, § 2, Public Laws of 1830, authorizing the proprietors to institute such proceedings.

The act also required the county agents to turn over to the State Treasurer the funds in their hands for each tract or township. The land agent was directed to "open an account with each township" and there to debit and credit, respectively, expenses and income from specific sources (including the proceeds from the sales of the timber and grass) and annually turn over to the Treasurer the balance in each account. The Treasurer was required to keep the accounts separate and in tact, again debiting expenses and crediting income, where appropriate, and the balance of each account was directed to be "paid over to the authorities provided by law to receive the same when they shall hereafter exist, until which time the funds arising from said reserved lands shall remain in the treasury."[1/] Finally, the act vested in the assessors of plantations custody and control of the public lots within the plantations and directed that income be invested for the benefit of the plantation and interest on the invested principal be applied for the use of schools.[2/] This act established the basic framework within which the State has administered the public lots in the unincorporated areas, and the income therefrom, since 1850.

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1. Chapter 196, § 6, Public Laws of 1850

2. This provision was repealed two years later and the care and custody of public lots in plantations was given to the Land Agent. Chapter 284, Public Laws of 1852.

The increasing problems between Maine and Massachusetts respecting the lands in Maine owned by Massachusetts (and by the two states jointly), were solved by the acquisition by Maine of all of the remaining interest of Massachusetts in its lands in Maine.[1] The deed,[2] dated November 23, 1853, conveyed all the right, title and interest of Massachusetts in all lands in Maine, whether described or not described in the deed, with specified exceptions, and provided that all lands reserved by Massachusetts in any townships for public uses

> ". . . are hereby conveyed to said State of Maine to be held in accordance with and subservient to the provisions and stipulations contained in the act relating to the separation of the District of Maine from Massachusetts proper and forming the same into a separate and independent State, passed June 19, 1819--
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> "And that this conveyance is in no wise to impair or invalidate the obligation of the provisions in said act of separation, contained for setting apart and reserving lands to educational and religious uses." [3]

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1. For the legislative history leading to this acquisition, see chapter 413, Resolves of 1852, authorizing the Governor of Maine to lay its grievances before Massachusetts; chapter 6, Resolves of 1853, sending the Land Agent to Boston to negotiate; chapter 57, Resolves of 1853, establishing a commission to negotiate details; and chapter 80, Resolves of 1853, (special session) ratifying and confirming contract. Sales of public lands were generally suspended during this period. Chapter 64, Resolves of 1853; chapter 83 Resolves of 1853, (special session).

2. Maine House Document, 1854, #12.

3. Id. at page 10.

The deed itself imposed no restrictions on Maine respecting the public lots. It merely recited that the public lots were to be held subject to, and nothing in the deed was intended to alter, obligations imposed by the Articles of Separation. Subject to the provisions of the Articles of Separation, therefore, Maine stood in the shoes of Massachusetts in relation to all public lots reserved in grants by Massachusetts. In other words, distinctions between Maine and Massachusetts with respect to all public lots, regardless of the sovereign which reserved them, were abolished except to the extent that the Articles of Separation themselves imposed obligations upon Maine.

In 1876, the Legislature directed that the Land Agent should "bring to a termination all unsettled business connected with the land office, relating to the lands belonging to the state; to the end that the office may be discontinued at the earliest practicable moment."[1/]

By 1878, the Land Agent reported that all of the public lands had been sold, "thus leaving the State devoid of its once rich and extensive landed possessions",[2/] that in all incorporated towns, fee simple title to the reserved lots had vested in the

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1. Chapter 119, Public Laws of 1876.

2. Report of Edwin C. Burleigh, Land Agent, 1878, at page 5, in Maine Land Agents Reports 1874-1891.

towns and that substantially all that remained for the Land Agent was the care of the public lots in unincorporated areas, "no authority existing for their sale, but only for the sale of the timber and grass growing upon them."[1] In 1891, the Land Agent was made Forest Commissioner for the State of Maine,[2] and in 1923, the title "State Land Agent" was abolished.[3]

As the public lands were sold, many townships were laid off into 100 acre (or similar sized) lots and sold by the lot. No reservation of any portion of a public lot is contained in such conveyances, the public lot in those townships presumably being that portion of the township marked or laid off by the Land Agent as the public lot within the township and not cut into smaller lots and conveyed away by the State.[4] Both Maine and

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1. Id., at page 6. The Land Agent also noted that with "reference to those townships far removed from settlements, no questions can probably arise for a long course of years, if indeed ever."

2. Chapter 100, § 1, Public Laws of 1891.

3. Chapter 196, Public Laws of 1923.

4. See for example chapter 380, sec. 2, Public Laws of 1830.

Massachusetts frequently conveyed public domain, however, by townships or by portions of townships. In addition, it was common for townships, or portions thereof, to be conveyed in fractional undivided interests. Thus a deed of public domain might convey an undivided quarter part of the northern half of a township. Similar fractional undivided (or divided) interests in the same township would subsequently be conveyed until a 100% interest in the entire township was conveyed. Deeds conveying such fractional undivided interests also provided for the reservation of that proportionate part of the public lot which the conveyed interest in the township bore to 1000 acres. For example, the deed conveying an undivided quarter part of the northern half of a township would reserve for public uses a total of 125 acres, that figure being one quarter of one half of 1000. In addition, the grass and timber deeds conveying many of the public lots conveyed fractional undivided interests in the cutting rights. Thus a deed might convey the right to cut and carry away the timber from an undivided half of a public lot.

As the public lands were sold off, public lots were reserved from substantially all of the townships.[1/] Pursuant to

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1. In some instances, the public lots were not reserved or less than 1000 acres were reserved. See, for example, Blake v. Bangor Savings Bank 76 Me. 377 (1884); In re Ring, Petitioner, 104 Me. 544 (1908).

statutes in effect since 1824, the ownership of the State terminates when the township or tract from which the public lot or lots were reserved becomes incorporated.[1] The State therefore owns and administers only those public lots which are situated in plantations and in unorganized areas of the State. Of the public lots owned and administered by the State, some have been located and others remain unlocated within the township. Timber and grass deeds were delivered pursuant to the 1850 act with respect to both located and unlocated public lots. There are today, therefore, four categories of the approximately 398,000 acres of public lots owned and administered by the State: (i) located public lots where grass and timber conveyances were not made, (ii) unlocated public lots where grass and timber conveyances were not made, (iii) located public lots where grass and timber conveyances were made and (iv) unlocated public lots where grass and timber conveyances were made.[2] Some of the public lots have been sold,[3] but most public lots reserved from townships or tracts which are presently unincorporated, are still owned by the State.

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1. State v. Mullen, 97 Me. 331.

2. For a statistical report on quantity, location and status of the public lots, see "Report on Public Reserved Lots", 1963, prepared by State Forestry Department pursuant to Chapter 76, Resolves of 1961.

3. Id. See also Chapters 8, 13 and 16, Resolves of 1971.

B. The State and the Public Lots

In the first year of Maine's statehood, the Supreme Judicial Court confronted a fundamental title problem created by the reservation or dedication of the public lots. In Shapleigh v. Pillsbury[1/], plaintiffs were the grantees from Massachusetts subject to a form of grant requiring the grantees to set off public lots for ministerial purposes, which the grantees had done. The lots were then occupied by a trespasser and plaintiffs sued for his removal, saying that the setting apart of the lots was not a valid conveyance because the beneficiaries were not in existence and since there was no valid conveyance, the plaintiffs retained the fee and could remove a trespasser. The trespasser maintained that the reservation or dedication of the public lots was a valid conveyance of the fee, that the beneficiaries were not yet in existence, that until they came into existence the fee was "in abeyance" and that while the fee was in abeyance plaintiffs were strangers to the title and, in effect, had no standing to remove defendant from the lots. The trespasser suggested that if anyone could maintain such an action, it was the State. The Court upheld the conveyance as a dedication for charitable purposes, noting that the benevolent intentions underlying the dedication (and numerous other charitable grants) would be frustrated by an alternative conclusion. However, the Court gave the plaintiffs (the grantees) custody and care of the lots, not to sell, but to retain until the coming into existence of the originally

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1/ 1 Me. 271 (1821).

contemplated beneficiaries. While the Court's holding that the grantees were entitled to custody until the title should vest in the intended beneficiary is of extremely limited significance,[1] the case set the pattern for consideration of the public lots as a charitable trust, for imposing some character of fiduciary obligation on persons having custody and care of the lots until the coming into existence of the intended beneficiaries and for the willingness of the courts to employ equitable principles and weigh equitable considerations in order to carry into ultimate effect the beneficial purposes originally contemplated by the dedication of the public lots for charitable purposes.[2]

The question of the legal effect of the reservations and, more precisely, of the rights and responsibilities of the State and of private persons during the interim period between the reservation of public lots and the vesting of title to the lots in the intended beneficiaries, continued to present a knotty problem

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1/ This is true primarily because the case predates the efforts by Maine to locate and assume custody and control over those public lots which, under the terms of grants by Massachusetts, were required to be set off by the grantee. That the grantees remain subject to the reservation and to the obligation to set off the public lots, whether or not the State assumes that responsibility, was made clear in Mace v. Land & Lumber Company, 112 Me. 420 (1914) at pp. 422, 423.

2/ See for example Sewall v. Cargill, 15 Me. 414 (1839).

to the Court.[1] However, in 1839, in State v. Cutler[2] (hereinafter referred to as "Cutler"), the Court decided that regardless of the precise legal effect of the reservations, by the act of separation, Maine had succeeded to all of the sovereignty of Massachusetts with respect to the public lots and Maine was entitled to assume full and complete custody and control of public lots reserved in grants from Massachusetts.[3] The Court warned that the decision was not to be construed as making Maine the absolute proprietor of the public lots "and so authorized to defeat the terms of the grant by Massachusetts; but to maintain [the public lots], for the security of those, who may be entitled to the benefit."[4] The rationale for the decision remained the same as in Shapleigh v. Pillsbury in that the Court emphasized that the rights of the State of Maine over the lots was better than "mere strangers or trespassers"[5] and the State was more likely and more capable of taking possession and preserving "the property for the benefit of its citizens, for those charitable purposes intended."[6] The Court noted that the State was not to be favored where its interest was merely a "despotic interference" but where it acted to preserve property for charitable purposes, where the beneficiaries do not yet exist, the State was to be favored.

1/ In 1830, the Court speculated that perhaps the fee simple title in grants by Massachusetts remained in Massachusetts. Porter v. Griswold, 6 Me. 430 (1830) at p. 435.

2/ 16 Me. 349 (1839).

3/ Pursuant to the provisions of Chapter 510, §§ 7, 9, Public Laws of 1831.

4/ Cutler, supra, at p. 351.

5/ Cutler, supra, at p. 351.

6/ Cutler, supra, at p. 352.

In 1849, the Court again was faced with an issue involving the legal effect of the reservations of the public lots. It did not hold but strongly suggested that with respect to public lots reserved by Massachusetts, fee simple title to the lots remained in Massachusetts and passed to Maine upon separation. It did hold, however, that with respect to lots reserved from grants by Maine, Maine reserved legal title by virtue of having excepted the lots from the conveyance and "constituted itself a trustee" of the public lots by the act of 1824 by which Maine resolved thereafter to reserve from each township 1000 acres for public uses.[1/] As a result of this decision, and the acts of Maine it upheld, Maine clearly had legal title to all lots which were reserved from its own conveyances, may have had legal title to public lots reserved from pre-1820 conveyances by Massachusetts and clearly had custody of and control over substantially all of the public lots. In 1852, the Court held that no private person could object to the absence of Massachusetts from court proceedings to locate a public lot in a township granted by Maine and Massachusetts jointly,[2/] thus making Maine's custody, as against objection by all but perhaps Massachusetts itself, complete and exclusive. In 1853, when Massachusetts deeded all of its interest in all of the public lots in which it had any interest to Maine, the deed recited that the conveyance was subject to and was not intended to alter obligations imposed by the Articles of Separation. As discussed in the first part of this paper, however,

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1/ Dillingham v. Smith, 30 Me. 370 (1849).

2/ Hammond v. Morrell, 33 Me. 300 (1851).

the conveyance itself imposed no obligations and it likely abolished any distinctions remaining between the posture of Maine with respect to reservations in grants by Maine and reservations in grants by Massachusetts, or by the two jointly. Thereafter, Maine had legal title to, as well as custody and control of, all public lots. Subject only to responsibilities imposed by the Articles of Separation itself, if any there were, Maine stood in the shoes of Massachusetts.

In 1883, in Union Parish Society v. Upton[1/] (hereinafter referred to as "Upton"), the Supreme Judicial Court came directly to grips with the nature of the powers of Maine over the public lots. The immediate issue before the Court was whether the act of 1832[2/] diverting ministerial lands to school purposes interferred with vested rights and was therefore an unconstitutional impairment of a contractual right or obligation.[3/] Plaintiffs were organized in 1879 in the Town of Upton which was incorporated in 1860 in a township conveyed by Massachusetts in 1804 pursuant to the Resolve of 1788 requiring a reservation of public lots for ministerial and school purposes. The grass and timber had been sold by the town, the proceeds disbursed exclusively to schools and this suit sought to recover a share of the proceeds for ministerial purposes. The Court held first that the 1788 Massachusetts resolve conveyed no

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1/ 74 Me. 545 (1883).

2/ Chapter 39, Public Laws of 1832.

3/ The plaintiffs relied upon Yarmouth v. North Yarmouth, 34 Me. 411 (1852) and the principles established in Dartmouth College v. Woodward, 17 U.S. 518 (1819).

land but merely established or declared a policy to except certain lots from conveyances when conveyances should be made. The Court then held that the reservation of the public lots contained in the 1804 deed from Massachusetts enured only to the grantor and granted nothing to any parish or minister, saying that no trust was "perfectly" created by the reservation.[1/] Observing that there might never be an incorporated town, the Court held that the "deed did not, ipso facto, create an appropriation of land for ministerial purposes. It merely reserved to the grantors the right and means of creating a trust according to their declared public policy, should opportunity offer. By means of the exception, something was to be or might in the future be appropriated."[2/] While a determination that plaintiff had no vested rights which the State could disturb might have fully disposed of the case, the Court nevertheless sought either to justify its determination or to answer the issue of whether or not the State was somehow obligated to cause an interest to vest. It noted that upon becoming a State, Maine discovered that Massachusetts, in pursuance of its policy of reserving lands for public purposes, had passed numerous enactments having "different charitable objects in view. . . . It was deemed impracticable and inexpedient to carry all of the purposes of the Commonwealth expressed in its legislation into literal effect. While the charities were to be upheld, it was thought best to turn all of them that could be into the channel of public schools."[3/]

1/ The Court relied upon an analogous rule established in Rice v. Osgood, 9 Mass. 38 (1812).

2/ Upton, supra, p. 548.

3/ Upton, supra, at pp. 546-547.

The Court stated that Maine could do in relation to the public lots within Maine, "what Massachusetts could have done had there been no act of separation." The Court held that "if not for legal reasons, certainly for great moral and political considerations, the State of Maine has ever been willing to effectuate the designs and policies of the parent commonwealth in relation to the land reserved. . . for public uses. . .--modifying the original plan in such respects only as the growth of society and the needs and the sentiments of the community would seem to demand and make reasonable."[1/]

The Court did not expressly purport to construe the Articles of Separation. Nevertheless, the provisions of the seventh paragraph of the Articles of Separation are in direct conflict with the holding and with the dicta in Upton unless that case is taken to have interpreted the requirement that public lots be reserved for ministerial and school purposes as meaning that public lots were required to be reserved merely for public uses.[2/] Otherwise, the State would have no power to designate the particular public use for which public lots, or their proceeds, may be used.

In 1903, in State v. Mullen[3/] (hereinafter referred to as "Mullen") the Court again discussed the powers of the State over the public lots. The Court again noted that Maine had generally pursued the policy of making reservations of land for public uses, that until incorporation the reserved lands and the funds arising therefrom are under the general control of the State[4/], and that the

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1/ Upton, supra, at p. 548.

2/ As the State had nominally purported to do commencing with reservations of public lots by Maine after enactment of Chapter 280, Public Laws of 1824.

3/ 97 Me. 331 (1903).

4/ Citing Dudley v. Greene, 35 Me. 14 (1852).

"State has placed no limitations upon its power to designate the uses, or to control thereafter the title vested in the beneficiaries, only that they are to be public and for the benefit of the town."[1] The Court stated that the first general designation of the public uses for which income from the public lots should be spent was the act of 1846[2] specifying an expenditure of funds for school purposes. (Prior to that time the income had been merely turned over to the State, as in the case of income from all public lands[3] or held by some particular agent of the State awaiting claim by the towns or persons "rightfully owning it."[4]) The Court then held that the State "according as it reserved to itself. . . the power to direct, has directed that the use for which reserved lands are to be held is the support of schools, and this use follows the proceeds of the sales of the lands themselves."[5] It obviously followed, therefore, and the Court remarked that within the category of schools, the State enjoyed a wide discretion and could appropriate funds arising from the reserved lots to a particular school, to a particular grade of schools or to the schools in a particular part of a town or plantation. "The only limitations expressed are that the use

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1/ Mullen, supra, at p. 335. The limitation that the uses be public and for the benefit of the town are characterized as having been imposed upon Maine by Maine itself.

2/ Chapter 217, Public Laws of 1846.

3/ Chapter 280, Public Laws of 1824.

4/ Chapter 33, Public Laws of 1842.

5/ Mullen, supra, at p. 337.

be public and for the benefit of the town."[1] As in Upton, the Court in Mullen did not expressly construe the Articles of Separation.

Under Upton and Mullen, it is clear that prior to the time any person or entity has, by the action of the State itself, acquired any vested interest in any public lot, the State has title to the public lots, is entitled to exclusive custody and control and may designate the public uses for which the public lot, or the income or proceeds therefrom, are to be used. It is also clear that any such designation extends to and is binding upon the person or entity in which the State vests or, more aptly, to which the State gives an interest in the lot. If the State has the unilateral power to modify the details of the original plan of Massachusetts by diverting land and funds intended to benefit the ministry and ministers to schools,[2] then that same power would authorize the diversion of land and funds intended to benefit schools to another public use. Likewise, while it is indisputable that the original plan of Massachusetts contemplated that three of the public lots were to be of benefit to the inhabitants of the townships from which the reservations

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1/ Mullen, supra, at p. 337.

2/ Because the decision in Upton so clearly rests upon a construction of the power of the State to designate the particular uses, the obvious First Amendment problems inherent in the use of public resources for religious purposes are given no treatment here.

were made,[1] there is no persuasive reason why the power to modify the plan of Massachusetts respecting particular public uses does not include the power to modify the class of beneficiaries. This conclusion seems particularly compelling since the requirement that the supposed future inhabitants of the particular townships were somehow to benefit from the public lots is not expressed in the Articles of Separation, but arises only because this was the predominant (but not exclusive)[2] purpose originally specified by Massachusetts prior to the separation.

While the above conclusions necessarily and logically flow from the decisions in Upton and Mullen, there nevertheless remains an inconsistency or haitus between the express provisions of the Articles of Separation and both the legislative acts and judicial decisions thereafter. This haitus is borne partially of the failure by the Court directly to construe the Articles of Separation. For example, neither Upton nor any other case has held that Maine has no obligation somehow to "effectuate the designs and policy of the parent commonwealth" in relation to the

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1/ The first settled minister and the ministry were unquestionably intended to be the first minister settled within and the parish having jurisdiction over the township from which the public lots were reserved. The existence of the "State Lot", for education in general or public uses in general, as the Legislature should direct, confirms that the remaining three lots were intended to benefit the inhabitants of the township, vis a vis the inhabitants of the State, but also confirms that the concept of "public uses" was, as a whole, broad enough to encompass future disposition by the Legislature and education in general.

2/ Again, the reservations usually made by Massachusetts prior to separation included the State Lot for such "public" purposes as education in general and "as the Legislature should direct."

public lots. Nor did Upton elaborate upon what the "designs and policy of the parent commonwealth" are, regardless of whether the obligation is legal, moral or political. More significantly, no case has held that the public lots are or could be treated merely as another part of the public domain.

The requirement in the Articles of Separation that the public lots be reserved from conveyances of townships, is inherently incompatible with the notion that the Articles of Separation contemplated no difference in the posture of the sovereign toward the public lots and the posture of the sovereign toward the public domain. Had Maine delivered two deeds to each township, one conveying the township less the public lot and one conveying the public lot, and placed the entire proceeds from both conveyances in the general treasury, common sense dictates that the spirit, if not the letter, of the Articles of Separation would have been violated. If such circumvention was violative of the Articles of Separation in 1821, it would seem no less violative in 1883, when Upton was decided, or in 1972. Moreover, almost every case, from Cutler to Mullen has referred to the State as a trustee of the public lots and not as merely the proprietor of the public lots.[1/] In addition, the purposes for which the lots were reserved have been referred to as "charitable"

1/ Maine has been so characterized with respect to public lots reserved in grants by Massachusetts and by Maine (and by both jointly).

by the Supreme Judicial Court in many of the same decisions.[1] The very rationale for the Cutler decision was that instead of a "despotic" intereference by the State, this was an action by the State for the "preservation of property", to take which there is no person in existence. The role of Maine has been referred to as managing the public lots "for the protection and preservation of whatever of value there may be growing thereon."[2] This characterization is not generally used in referring to portions of the public domain, including the beds of tidal waters and of great ponds.[3]

Further, the Court has zealously protected public lots when they are in the hands of private persons, charging the custodians with fiduciary obligations and effectively preventing a transfer of the fee by the custodians.[4] Yet, nothing said by the Court precludes the tempting analogy that the obligations imposed by Massachusetts upon private persons are identical in source, purpose and wording to the obligations imposed by the Articles of

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1/ Cutler, supra, at p. 351.

2/ Dudley v. Greene, 35 Me. 14 (1852) at p. 16.

3/ See for example Opinion of the Justices, 118 Me. 503 (1920) holding that the beds of great ponds, like other property owned by the people, may be transferred by the Legislature unless prohibited by the Constitution.

4/ Shapleigh v. Pillsbury, supra; Flye v. First Congregational Church, 114 Me. 158 (1915).

Separation upon Maine. No doubt differences exist between the sovereign and private persons, but the legal distinction relates more to such practical problems as enforcement of the trust[1/] rather than whether in principle a trust was created and fiduciary obligations assumed.

Finally, in several early cases, parties have argued that the State could not sell public lots but is required by the Articles of Separation to retain and protect them until the coming into existence of the intended beneficiaries.[2/] Though the Court did not accept the argument, neither did they expressly reject it, managing to dispose of such cases on other grounds.

So long as specific charitable purposes were contemplated, the distinction between the "public uses" for which the public lots were reserved, and any use by the government for non-private purposes may have been clear. This is particularly true where Massachusetts, and then Maine, sold land in huge quantities merely to raise sufficient revenue to pay old debts and run the day-to-day operations of the government. The distinction fades completely, however, where no specific charitable or public purposes are required because the expression, "charitable purposes," like

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1/ See 2, 4 Scott on Trusts §§ 95, 378 (3d. Ed. 1967) to the effect that charitable trusts cannot be enforced against the State except to the extent that the State consents to be sued.

2/ Dudley v. Greene, 35 Me. 14 (1852); Walker v. Lincoln, 45 Me. 67 (1858); Argyle v. Dwinel, 29 Me. 29 (1848).

public purpose, is incapable of precise definition.[1] It would be legally and logically insupportable under the rules established in Upton and Mullen to argue that the Legislature has no power to determine that the growth of society and the needs and sentiments of the community seems to have demanded and made reasonable the sale of the public lots and the use of the proceeds for the day to day operation of the government, since such use is clearly a public use. The Court has never attempted to analyze and resolve the inconsistency between the holding in (and necessary consequences of) Upton and later cases, and the plain wording of the Articles of Separation. One explanation is that in the absence of a First Amendment argument on which to base a decision, the Court could make no other ruling if it were to sustain the legislation diverting ministerial lands to other purposes. Even if the State is truly considered a trustee (charitable or otherwise) of the public lots, nevertheless until some interest in the public lots became vested, the State could, through a form of legislative cy pres,[2] alter the purposes of the trust. Under this explanation, of course, the Court abdicated to the Legislature equity jurisdiction which, at common law,

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1/ 4, Scott on Trusts, § 368 (3d. ed. 1967).

2/ This expression was used in sustaining a particular use of "section sixteen" lands (discussed below) by the Legislature of the State of Mississippi in Daniel v. Sones, 147 So.2d 626 (Miss., 1962).

belonged exclusively to the chancellor.[1]

Another explanation is that the Court felt that the provisions of the Articles of Separation requiring reservation of public lots for specified purposes were legally unenforcible by anyone with the possible, but by no means certain exception of Massachusetts. Between 1803 and 1962 the United States granted a total of some 330,000,000 acres to the various states for all purposes, of which some 78,000,000 acres were given in support of common schools.[2] In the enabling legislation authorizing the adoption of state constitutions and admission of states into the Union (and in numerous specific instances of legislation), the federal government provided that "section sixteen [the center section] in every township shall be granted to the inhabitants of such township for the use of schools."[3] While the terms and conditions of such enabling legislation were not made, ipso facto, part of the

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1/ Stanley v. Colt, 72 U.S. 119 (1866); See Bridgeport Public Library v. Burroughs Home, 82 A. 582 (Conn. 1912) for the rule that it is a violation of the doctrine of separation of powers for the legislature to exercise such a function.

2/ Lassen v. Arizona Highway Dept., 385 U.S. 458 (1967) at page 460 citing The Public Lands, Senate Committee on Interior and Insular Affairs, 88th Congress, 1st Sess., 60 (Comm. Print., 1963).

3/ Alabama v. Schmidt, 232 U.S. 168, 172 (1914).

Constitution of the State and were generally categorized as a "compact,"[1] nevertheless, the relationship between the United States and the states created from its territory is highly analogous to the relationship between Maine and its parent sovereign. In 1855 in Cooper v. Roberts[2], the United States Supreme Court, examining the power of Michigan to sell section sixteen land to a mining company (instead of granting it to the inhabitants of the township for schools) without the consent of Congress, held that:

> "The trusts created by these compacts relate to a subject certainly of universal interest, but of municipal concern, over which the power of the State is plenary and exclusive. In the present instance, the grant is to the State directly without limitation of its power, though there is a sacred obligation imposed on its public faith."[3]

More than fifty years later, Justice Holmes writing in Alabama v. Schmidt[4] noted that the Act of Congress requiring Alabama to grant section sixteen "to the inhabitants of such township for the

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1/ Cooper v. Roberts, 59 U.S. 173 (1855). Such compacts do have the force of law. United States v. 111.2 Acres of Land in Ferry County Washington, 293 F. Supp. 1042 (E.D. Wash. 1968), aff'd., 435 F.2d 561 (9th Cir. 1970); Magnolia Petroleum Company v. Price, 206 P. 1033 (Okla., 1922) aff'd., 267 U.S. 415 (1925). The Articles of Separation were characterized as a "compact" in Dudley v. Greene, 35 Me. 14, 16 (1852).

2/ 59 U.S. 173 (1855).

3/ Cooper v. Roberts, supra, at pp. 181, 182.

4/ 232 U.S. 168 (1914).

benefit of schools" vested title to section sixteen in the State and was not a limited conveyance, subject to a reverter, but was an absolute gift to the State "for a public purpose of which that State is the sole guardian and minister."[1/] The Supreme Court held that the obligation imposed upon Alabama by the Act of Congress was merely "honorary. . . and even in honor would not be broken by a sale and substitution of a fund. . . ."[2/] Finally, the Court held that the State had the authority to "subject this land in its hands to the ordinary incidents of other titles in the State."[3/] The Court in Upton may have justifiably regarded

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1/ Alabama v. Schmidt, supra, at p. 173.

2/ Alabama v. Schmidt, supra, at pp. 173, 174.

3/ To the same effect, see King County v. Seattle School Dist. No. 1, 263 U.S. 361 (1923) which also held in a similar situation that no trust was created for the benefit of the school district and that the school district therefore had no right to enforce the trust. See also Sloan v. Blytheville Special School Dist. No. 5, 273 S.W. 397 (Ark. 1925) which held that under grants similar to those in Cooper v. Roberts and Alabama v. Schmidt, supra, Arkansas was not limited by the compact to use the funds for education purposes or for the benefit of the inhabitants of the township. The vitality of the rules established in Cooper v. Roberts and Alabama v. Schmidt has been questioned in United States v. 111.2 Acres of Land in Ferry County Washington, 293 F. Supp. 1042 (E.D. Wash. 1968), aff'd., 435 F.2d 561 (9th Cir., 1970), citing Lassen v. Arizona, 385 U.S. 458 (1967). Both cases involved constructions of later grants by the United States, each grant including relatively elaborate conditions and procedures for the administration and sale of school lands and disposition of the proceeds. The issue in both cases involved whether the school fund was entitled to compensation for the transfer of the lands. Of significance is the fact that the Court in 111.2 Acres of Land spoke of the interposition of the school system as the beneficiary of the trust as justification for enforcement of the trust. This concept was expressly rejected in Upton, supra.

as remote the likelihood that Massachusetts could or would take exception to its decision.[1/]

Whatever the rationale, the Supreme Judicial Court of Maine has ruled that prior to the time the State itself causes an interest in the public lots to become vested, the State, through legislative enactment, has the power to designate the particular uses to be made of the public lots (both before and after they become vested) as well as the beneficiaries of those uses and such designations may be made in accordance with what the Legislature determines the needs and the sentiments of the community seem to demand and make reasonable. No logical distinction can be drawn under the rationale of Upton and Mullen which would require the State to use the public lots for school purposes but would not require it to use the public lots for ministerial purposes. Similarly, no logical application of that rule would require the State to use the public lots for the benefit of the inhabitants of the township and would prohibit other public uses. Whatever requirements exist have been imposed and can be removed by Maine itself. Furthermore, no logical application of that rule would prevent the State from selling the public lots. It is apparent that the land comprising the lot was never intended for the exclusive purpose of building the school upon it, but was a financial endowment. The earliest acts of Maine, public as well as private and special, were to authorize the sale of the lots by

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1/ In King County v. Seattle School District No. 1, supra, at p. 364, the United States Supreme Court noted that Congress might enforce such obligations. See also Emigrant Co. v. County of Adams, 100 U.S. 61, 69 (1879).

the towns in which the lots had vested. The substitution of funds for the section sixteen lands was also a common practice among the several states, and was sanctioned in Alabama v. Schmidt, supra. The State therefore has the power by appropriate legislative enactment to sell the public lots and the power to use the public lots of which it is trustee, including the income therefrom or the proceeds from the sale thereof, (i) for public purposes other than schools[1/] and (ii) for public purposes which do not benefit, or only indirectly benefit, the present or future inhabitants of the townships in which the public lots are situated. This power can be exercised to authorize the use of public lots for park or other public purposes and it can be exercised to authorize the sale or exchange of public lots to assemble large contiguous quantities of land far in excess of 1000 acres.

1/ To some extent this is already being done with the public lots located in Baxter State Park. Title 12 M.R.S.A. § 902.

C. The State and the Proprietors of the Townships

1. Located Public Lots

First, it should be noted that no title to the townships could be conveyed which would deprive the State of its right to cause the public lots to be set apart and located.[1] Under the express provisions of substantially all deeds from the State and pursuant to express statutory authority,[2] the public lots are to average in situation, quality and value as to timber and minerals with the other lands therein. The words "timber and minerals" modify the word "value" and do not modify the words "quality" or "situation".[3] "Quality includes not only the soil, but the kind and amount of growth upon it, and situation includes proximity to floatable streams and accessibility for operation or settlement upon it."[4]

Once public lots have been duly located, the State is the owner in fee simple of the public lot including all rights therein and appurtenances thereto,[5] less anything lawfully and actually

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1/ Argyle v. Dwinal, 29 Me. 29 (1848).

2/ Title 30 M.R.S.A. § 4151.

3/ The deeds themselves do not mention timber or minerals, only "quality" and "situation," Moreover, minerals are ordinarily measured in terms of value not in terms of situation or quality.

4/ Stetson v. Grant, 102 Me. 122, 227 (1906).

5/ The capacity in which the State holds the public lots and its powers with respect thereto are discussed hereinabove.

conveyed away by the State.[1] With the sole exception (and then only to the extent) of rights and interests so conveyed, it is fair to assume that the State has at least the same rights and privileges in the public lots as a private person would have in a similar quantity of land which he owned, including the exclusive right of possession, use and enjoyment and the exclusive right to receive income and profits arising therefrom or attributable thereto. In those instances where located public lots are totally surrounded by private property, the State presumably has the power to acquire full rights of ingress and egress by the exercise of its power of eminent domain.[2]

2. Unlocated Public Lots

Where public lots have not been duly located, the State is a tenant in common with the other persons or entities which own the balance of the township.[3] In other words, the State has a common and undivided interest in all townships in which the public lots

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1/ This includes the right to cut and carry away the grass and timber, discussed hereinbelow. In addition, the Forest Commissioner has the power under certain circumstances, to sell gravel and mining rights, to lease or grant campsite privileges, flowage rights and other easements, profits and possessory rights in the public lots. Title 12 M.R.S.A. § 514.

2/ Cases discussing the fact that the State owns and manages the public lots in a sovereign and governmental capacity, and not in a proprietary capacity, are discussed hereinbelow.

3/ Donworth v. Sawyer, 94 Me. 242 (1900); Hammond v. Morrell, 33 Me. 300, 305 (1851); Mace v. Land & Lumber Company, 112 Me. 420 (1914).

have not heretofore been located.[1] With the exception (and then only to the extent) of express agreements to the contrary or rights and interests which it has conveyed,[2] the State, as a tenant in common, enjoys, at the very least, rights normally enjoyed by all tenants in common in real property including, among other things, the right (i) to enter upon the common property and take possession of the whole thereof, subject to the equal and similar rights of the other cotenants,[3] (ii) to share in all rents and profits arising out of or attributable to the common property,[4] and (iii) the right to prevent waste or the capricious or irresponsible use of the common property by cotenants.[5] In Maine, a statute provides that if one or more joint tenants or tenants in common takes rents

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1/ According to the 1963 Report, there were 160,286 acres of unlocated public lots, giving the State a relatively small common and undivided interest in several million acres.

2/ For practical purposes, the grass and timber rights, discussed hereinbelow, are the major rights or interests in unlocated public lots which the State has heretofore conveyed.

3/ Carter v. Bailey, 64 Me. 458, 464, 465 (1874); see also 20 Am. Jur.2d., Cotenancy and Joint Ownership, § 33 and the authorities there cited.

4/ Hudson v. Coe, 79 Me. 83 (1887); see also 20 Am. Jur.2d., Cotenancy and Joint Ownership, §§ 40 et seq. and the authorities there cited.

5/ See 20 Am. Jur.2d., Cotenancy and Joint Ownership, §§ 37, 38. Title 14 M.R.S.A. § 7505 prohibits waste without advance notice and provides a statutory action to recover treble damages under certain conditions.

or income in the joint estate or more than their proportional share, the other cotenants may, after demand and refusal to pay, have an action against the refusing cotenant.[1/] The sources of income in the unorganized territory of Maine giving rise to a potential claim for a proportional share by all cotenants are, of course, limitless in number but clearly include income from minerals, timber, overnight camping rentals, campsite leases and other surface rentals, taking sap from sugar maple trees, commercial harvesting of wild crops and hunting leases.

In general, a cotenant who is charged with rents collected, or with anything on account of profits realized, or the value of use and occupancy, is to be credited with reasonable expenditures made by him in protecting and maintaining the common property.[2/] In an action by the Land Agent for the value of timber cut from a public lot prior to its location, the defendant was held to be entitled to credits only for the State's proportional share of the cost of scaling, surveying lines and fire protection because these were expenses actually incurred by the defendant for the common benefit of the cotenants.[3/] The cost of taxes,[4/] attorneys fees and

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1/ Title 12 M.R.S.A. § 953.

2/ See 20 Am.Jur. 2d., Cotenancy and Joint Ownership, § 52 and the authority there cited.

3/ Mace v. Land & Lumber Company, supra, at pp. 425, 426.

4/ The Court noted that the "public lots are not subject to taxes and the payment or non-payment of taxes on the portion owned by the defendant could in no wise affect the State's interest." Mace v. Land & Lumber Company, supra, at p. 426.

services of a general manager of the defendant were expressly disallowed because they were not for the common benefit of the cotenants.

There is a substantial body of law governing the rights, duties and liabilities among cotenants. There is no persuasive reason why the State may not assert all rights which it enjoys under this body of law. The State's cotenants are entitled to appropriate credits and contribution where expenses have been incurred protecting the common property and where common liabilities have been discharged. In determining whether obligations discharged are in fact common obligations and whether expenses for the benefit of the common property have in fact been incurred solely by the State's cotenants, however, the posture of the State ought to be considerably more advantageous than that of private individuals because, among other things, the State is not obligated to pay taxes, it owns the land free and clear of debt, it administers the program and shoulders the responsibility of fire prevention in the unorganized areas of the State and otherwise directly or indirectly pays or underwrites the payment for expenses for the benefit of the millionsof acres in which it is a tenant in common.

II. THE GRASS AND TIMBER RIGHTS

A. What was conveyed?

Different positions are taken by various courts as to the legal consequences resulting from a conveyance of timber growing on land. In general, such deeds or contracts convey either (i) a fee simple absolute in the timber, (ii) an estate or interest in the timber determinable with respect to timber not removed within an expressed or implied time limit, often characterized as a fee simple defeasible, (iii) a profit a prendre, or (iv) a mere revocable license.[1/] Because the grass and timber deeds delivered pursuant to Chapter 196 of the Public Laws of 1850, covering the public lots (hereinafter referred to as the "Grass and Timber Deeds") were delivered under seal, because they used traditional words of real estate conveyancing[2/] and because they were delivered in exchange for a specific consideration paid or provided to be paid upon delivery of the deed (and not dependent upon the quantity of timber to be cut), there is no reasonable doubt that the Grass and Timber Deeds conveyed an interest in the real property to which the grass and timber was attached, and not a mere revocable license to enter upon the land and cut timber.[3/]

1/ See 1 Thompson on Real Property § 101 (1964).

2/ Including a habendum clause referring to heirs, executors, administrators and assigns.

3/ Brown v. Bishop, 105 Me. 272, 277 (1909) holds that the words "to cut" import the same right as "to cut as one's own" or "to have".

The "conveyance of growing trees to remain alive upon the land and to be cut in the future, is a conveyance of an interest in land, that may nourish and support the growth conveyed. The trees become chattels only when severed from the soil."[1/] The interest is the same whether created by grant or by reservation or exception in a deed and the interest is assignable.[2/]

The conveyance of a "right" to take any substance which can be severed from the freehold is the language typically used in the creation of a profit a prendre.[3/] A profit a prendre is a right or power to acquire, by severance or removal from another's land, somthing previously constituting a part of the land.[4/] While it is an estate in real property, for purposes of the Statute of Frauds (and cannot be created orally), no title to the subject of the profit actually passes to the grantee - instead, the grantee has

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1/ Donworth v. Sawyer, 94 Me. 242, 254 (1900).

2/ Id., at pp. 255, 257.

3/ 1 Thompson on Real Property § 135 (1964). The most recent and leading case on profits a prendre in Maine, however, involved a deed "reserving the gravel" and this was held to have created a profit. Beckworth v. Rossi, 157 Me. 532 (1961).

4/ 1 Thompson on Real Property § 135 (1964).

only a right which, when exercised, gives him title to the subject of the profit after its severance and when it becomes personalty.

While Maine recognizes profits a prendre and some cases, in dicta, have even mentioned that the right to "cut wood"[1/] and the right to cut grass[2/] may be the subject of a profit a prendre, no Maine case has ever held any form of conveyance of timber rights to be a profit a prendre. There are a few distinctions between the normal attributes of a profit a prendre and the Grass and Timber Deeds, especially as they have been regarded by the Courts. Profits a prendre normally do not convey the exclusive right to take the subject of the profit unless there is clear and explicit language in the grant to that effect.[3/] That is to say, the owner of the servient estate may partake of the subject of the profit and may convey to others a similar right to partake of the profit. At least one case rests squarely upon the assumption, however, that the Grass and Timber Deeds convey all of the cutting rights and subsequent grantees receive nothing.[4/] Further, the fact that the consideration received was a single cash payment rather than some form of royalty is an indication that title to the timber was intended to pass and not merely a profit a prendre.[5/] In

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1/ Duncan v. Sylvester, 24 Me. 482, 487 (1844).

2/ Hill v. Lord, 48 Me. 83, 100 (1861).

3/ 3 Tiffany, Real Property § 846 (3d ed. 1969).

4/ Walker v. Lincoln, 45 Me. 67 (1858).

5/ See Hahner, "An Analysis of Profits a Prendre", 25 Ore. L. Rev. 217, 225 (1946).

Small v. Small,[1] the Court held that "valid title to the timber" passed to the grantee of a Grass and Timber Deed, and in other cases, the Court has referred, in dicta, to the Grass and Timber Deeds as having sold the timber.[2]

The cases in Maine seem firmly grounded on the proposition that the interest of the grantee in all such transactions is a fee simple determinable.[3] More significantly, Maine cases have not used, much less emphasized, labels in any of the cases construing the conveyance of cutting rights, but have taken a more functional approach.[4] For substantially all purposes pertinent to this report, the particular label given to the interest of the grantees of the Grass and Timber Deeds is of limited significance.

The essential distinction between the conveyance of timber in fee simple absolute and fee simple defeasible is that the latter interest contemplates a cessation of cutting rights and the fee

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1/ 35 Me. 400 (1853). The Court there noted by inference, at page 401, that the Land Agent, in the Grass and Timber Deeds, had sold "the timber in a lump to be taken off in the indefinite future."

2/ Walker v. Lincoln, supra.

3/ Cf. Brown v. Bishop, 105 Me. 272 (1909); Small v. Small, supra; and Falk, Timber and Forest Products Law § 68 (1958) to the effect that the purchaser of timber in Maine acquires a defeasible title, and the authority there cited.

4/ Penley v. Emmons, 117 Me. 108, 110 (1918).

simple interest in the timber not removed from the land prior to the expiration of the cutting rights is, by a legal fiction, deemed to become re-vested in the grantor and taken away from the grantee. A fee simple absolute in timber, on the other hand, does not contemplate a cessation of cutting rights. There can be a fee simple absolute in one growth of timber, the result of which is to give the grantee a perpetual right to remove timber which was in existence at the time of the conveyance.[1] There can also be a fee simple absolute in successive growths of timber, the result of which is to give the grantee a perpetual right to remove all timber, whether in existence at the time of the conveyance or thereafter coming into existence.[2]

As with other kinds of deeds, the cardinal rule for interpretation of a timber deed is the expressed intention of the parties gathered from all parts of the instrument, giving each word its due force and read in light of existing conditions and circumstances[3]. Within that framework, the rights and interest conveyed to the grantee under a timber deed depend upon what timber may be cut under the grant and when the right to cut that timber expires[4]. In other words, the appropriate questions to ask when interpreting a timber deed are whether the timber which is conveyed (or which may be cut) is limited as to a certain size, class or

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1/ Cf. Bross v. Peyton, 450 P.2d 760 (Ore. 1969).

2/ See discussion at 52 Am. Jur.2d, Logs and Timber, § 53; See also the discussion at 1 Thompson on Real Property § 101 (1964), and the authorities there cited.

3/ Penley v. Emmons, 117 Me. 108, 110 (1918).

4/ Id., at p. 111.

species or includes an entire growth or even successive growths and whether the timber conveyed must be removed within a definite or reasonable time or whether there is a perpetual right of removal.

In Donworth v. Sawyer[1], the timber deed in controversy was a conveyance in 1850 by Massachusetts of "all the pine and spruce timber standing on said Township. . . to be taken off from time to time to suit [the grantee's] convenience." The deed further recited that it was not to retard the settlement of the township and that lots on the township sold for settlement by Massachusetts were to be cleared the next lumbering season or as soon thereafter as practicable. The proprietors of the township sued the timber grantees in trover for the value of pine and spruce timber cut in 1897 and 1898, arguing that the deed had conveyed only pine and spruce timber standing on the township at the date of the deed, and did not pass title to any trees that should thereafter become timber. That is, the plaintiffs urged that "timber", as it was commonly understood at the time of the delivery of the timber deed, meant timber of a certain size at the time of the conveyance and that it did not include either trees which sprang up subsequently to the date of the deed or trees which were saplings or seedlings at the date of the deed but which had subsequently grown into the size of "timber". The defendant argued that the words pine and spruce "timber" meant pine and spruce "growth" and that the grantees (defendant's predecessors in title) therefore owned

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1/ 94 Me. 242 (1900).

and had the right to remove pine and spruce trees which were not of timber size at the time of the grant but which thereafter grew to such size. The defendant pointed out that the deed in issue was "almost identical" to the "deeds whereby the timber and grass on the public lots of this state are conveyed." The Court found that Massachusetts' purpose, as expressed in the deed, was to foster the settlement of public domain and, in furtherance of that purpose, it sold the pine and spruce to be removed from the township so that the land could more easily be cleared. The Court stated that Massachusetts "wanted the forest cleared, not preserved" and held as follows:

> " * * * Where, as in this state, the grant of growing trees to remain affixed to the soil or the exception of them from the grant, is an interest in land, it is logical to consider the trees, and the right in the soil, and the growth of them as a unit and inseparable. Their owner is entitled to their increase. The grant of trees, or timber, or particular kinds of timber trees, should be held a grant of the growth, standing at the time of the grant. If the grant limit itself by size of tree, age, or adaptability for specified uses, then of course the particular described tree would pass and none other. But where there is no limitation of that character, and the grant is of standing timber, to be taken off in the future, the common understanding would be that the grantee might cut timber from the lot until the present growth, suitable for the purpose, shall have been exhausted, or until the right to cut shall have expired by limitation, either express or implied.

> "That must have been the purpose of the grant in question. Massachusetts said to the grantees, for a valuable consideration, you may 'log' for pine and spruce on the township at your pleasure, but fast enough to clear the land for settlers as they may come."[1]

The Court, therefore, concluded that while the defendants owned the entire growth in existence at the time of the conveyance, they did not own any subsequent or successive growths and the plaintiffs were therefore entitled to recover, inter alia, the value of "any pine and spruce so cut that were not standing at the time of the conveyance. . . in 1850."[2]

The Court in Donworth not only delved into the intent of Massachusetts in making the grant, but it held that "the word 'timber' should be given the meaning suited to the purposes of the grant apparent from the whole deed."[3] It noted that the word timber may mean that wood which, at the time of the grant, was known and intended to be of a type suitable for building houses or ships or capable of being squared and cut into beams, rafters, planks and boards. Shortly after Donworth was decided, the State brought suit to determine whether or not "beech, maple, birch and other trees, not suitable for any purpose but for fire-wood [are] to be regarded

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1/ Donworth v. Sawyer, supra, at pp. 256, 257.

2/ Id., at p. 257.

3/ Id., at p. 252.

as 'timber' within the meaning of chapter 196 of the laws of 1850". [1] In its decision handed down on February 24, 1903, the Court did not reach that issue but disposed of the case on other grounds. On March 28, 1903, in an "Act to make certain the meaning of the language 'Timber and Grass' relating to the public lots," [2] the Legislature declared that the language "Timber and Grass," as it relates to the public lots, "is hereby construed to mean all growth of every description on said lots." This provision is found today at Title 1 M.R.S.A. § 72.24. If that statute were repealed, the result presumably would be to place the State and the owners of rights conveyed under the Grass and Timber Deeds in the same position with respect to the size and species of growth conveyed, which they were in prior to its enactment. The State should thus again be able to raise the issues it could have raised but for the enactment of that legislation. That some persons may have acquired rights under Grass and Timber Deeds since the enactment

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1/ State v. Mullen, 97 Me. 331 (1903). The general rule in the lumber industry is that "timber" denotes trees of a size suitable for manufacture into lumber for use in building and allied purposes and does not includesaplings, brush, fruit trees or trees suitable only for firewood and decoration. See M & I Timber Co. v. Hope Silver-Lead Mines, Inc., 428 P.2d 955, 959 (Ida. 1967) and the treatises, annotations and cases from all over the country there cited. See also Nash v. Drisco, 51 Me. 417 (1864) to the effect that "timber" does not include "firewood" or "cordwood". For an example of what language was used when the Legislature intended to convey more than merely "timber," see Chapter 51, Resolves of 1853 authorizing the sale from Indian Township of the right to cut "all the timber of whatever kind or quality."

2/ Chapter 232, Public Laws of 1903.

of, or even in reliance upon the provisions of Chapter 232 of the Public Laws of 1903 is probably irrelevant because the State owns and manages the public lots in a sovereign and governmental capacity,[1] and there is no laches or equitable estoppel against the State when it acts in such a capacity.[2]

The legislation in 1903, for practical purposes, means that the grantees of the Grass and Timber Deeds were given the right to cut all species and all sizes of trees and other growth on the public lots. It did not purport to dispose of the issue of whether one growth or successive growths of timber were conveyed by the Grass and Timber Deeds. The deed in Donworth was held to have conveyed but a single growth of timber, and the rule there enunciated is that a timber grantee to whom a single entire growth has been conveyed can continue to cut until the growth conveyed is exhausted or until the right to cut shall have expired, whichever shall first occur.[3]

1/ Donworth v. Sawyer, supra, as well as a number of cases dealing with the public lots seem clearly to support this proposition; see also Mace v. Land & Lumber Co., 112 Me. 420, 425 (1914) and State v. Northwest Magnesite Co., 182 P.2d 643 (Wash. 1947).

2/ State v. Bean, 159 Me. 455 (1963).

3/ It seems clear that the cutting rights expire upon the first to occur of the named alternatives, Otherwise successive growths could have been cut by the grantees and the plaintiffs would not have recovered the value of the pine and spruce trees cut in 1897 and 1898 which were not in existence at the time of the conveyance in 1850. See also Clark v. Weaver Bros. Realty Corp., 200 So. 821 (La. 1941).

There are obvious and fundamental similarities between the deed in Donworth and the Grass and Timber Deeds. A review of the distinctions between them, however, provides a more incisive format upon which to analyze the Grass and Timber Deeds. The pertinent distinctions between the two forms of deeds are as follows:

1. The deed in Donworth used the wording "standing" to describe the timber conveyed, whereas the Grass and Timber Deeds did not;

2. The deed in Donworth conveyed the "timber", whereas the Grass and Timber Deeds conveyed the "right to cut and carry away the timber";

3. The deed in Donworth conveyed "pine and spruce timber", whereas the Grass and Timber Deeds conveyed the "timber and grass";

4. The intent of Massachusetts in conveying the pine and spruce timber in Donworth was to "clear the forest" whereas Maine may have had a different motive with respect to the Grass and Timber Deeds.

5. The grantees of the deed in Donworth could remove timber "at their convenience", whereas the grantees of the Grass and Timber Deeds are authorized to remove the grass and timber until the incorporation, or organization as a plantation, of the township or tract from which the public lot was reserved. These distinctions are discussed below in the order in which they are set forth above.

1. The Court in Donworth did not base its conclusion that a single growth, as opposed to successive growths, was conveyed by the deed in that case because the word "standing" was used in

connection with the word "timber". The Court relied upon Putnam v. Tuttle[1] for the proposition that the grant in Donworth was of trees standing on the land at the date of the deed, and none other, and the deed in Putnam was not of "standing" timber but of "all the wood and trees. . . forever."[2] Instead, the Court seems to have adopted the position of the defendant that the word "standing" was used in contra-distinction to the word "down" and to have inquired as to what standing timber was conveyed, timber standing at the time of the grant or timber thereafter standing. The Court held that the "grant of trees, or timber, or particular kinds of timber trees, should be held a grant of the growth, standing at the time of the grant."[3]

In Penley v. Emmons[4], the Court construed a deed that conveyed "a certain lot or parcel of poplar, bass-wood and white birch timber, and all of said timber" and gave the grantees "the right to enter and remove the same at their convenience." The Court held that all that was conveyed was the timber standing at

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1/ 76 Mass. 48 (1857).

2/ Neither the Grass and Timber Deeds nor the deed in Donworth convey any timber "forever".

3/ Donworth, supra, at p. 256.

4/ 117 Me. 108 (1918).

the time of the conveyance.[1] While there is at least one instance in which, in the same Resolve[2], the word "standing" is used to describe timber to be conveyed in a ten-year timber deed and is not used to describe timber to be conveyed in certain Grass and Timber Deeds, there are also instances (including at least one in 1850) in which Maine and Maine and Massachusetts jointly conveyed "timber" on the public domain for a term of ten years without mentioning the word "standing".[3] There seems to have been no appreciable difference in what was conveyed by the two forms of conveyance. While the presence of the word "standing" in a timber

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1/ See also Pease v. Gibson, 6 Me. 81 (1829), Webber v. Proctor, 89 Me. 404 (1896) and Erskine v. Savage, 96 Me. 57 (1901), all of which are cited in Penley v. Emmons, supra, all of which involved timber deeds which did not use the word "standing" and all of which were limited to a single growth (or less). See also 1 Thompson on Real Property § 98 (1964) to the effect that timber as used in timber deeds and contracts refers to standing trees.

2/ Chapter 319, Resolves of 1874.

3/ See, for example, deed dated January 15, 1850 appearing at Volume 2, page 108 of the Maine-Massachusetts Joint Deeds and deed dated December 27, 1870 appearing at Volume 15, page 641 of the Maine Record of Deeds, all in the Maine State Archives.

deed can conceivably be of significance therefore (though it is not in Donworth [1]), its absence from the deed is apparently of no significance in Maine in determining whether one or successive growths are intended to be conveyed by a timber deed.

2. The Grass and Timber Deeds grant the "right" to cut and carry away the grass and timber, whereas the deed in Donworth granted the "timber" and made no mention of a "right". It is apparent from pertinent legislation that the word "right" was used frequently in authorizing the Grass and Timber Deeds.[2] Nevertheless, as was discussed hereinabove in this report, no

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1/ A lengthy deed to David Pingree, et al, dated December 24, 1850, and appearing in Volume 5 at pages 105, et seq. of the Massachusetts Deeds (in the Maine State Archives) is substantially identical in all respects to the deed in Donworth and while the expression "standing timber" is used in the conveyance of one tract, the deed recites that with respect to numerous other tracts thereunder conveyed, "a sale of timber on said township [or tract] is intended."

2/ In Chapter 196, § 2, Public Laws of 1850, the "right" to cut was first to be offered to the proprietors of the balance of the township. In Chapter 319, Resolves of 1874, in the same paragraph the Legislature directed the sale of "all timber standing on. . . ten townships. . . the right to cut, to extend [for 10 years]" and the sale of "the right to cut timber and grass on all lands reserved for public uses. . . . "

distinction has ever been made by the Courts of this State between the conveyance of the timber and the conveyance of the "right" to cut timber.[1/] Both the "timber" and the "right" to cut timber were conveyed by the State for periods of ten years and 15 years[2/] and both forms of conveyance ought logically to have conveyed the same legal interest. The deed in Donworth granted the "pine and spruce timber" and the Court held that to mean a grant of "the right of lumber from the pine and spruce. . . "[3/] In Brown v. Bishop[4/], the Court construed a deed by which the grantors "[did] covenant and permit" the grantees to cut certain species, and held that the words "to cut" as used in that deed "import the same right as 'to cut as his own', or 'to have' and accordingly the contract should be held to mean the same as if the language used had been 'do hereby agree, covenant and permit J. C. Bishop. . . to have all hemlock, fir, spruce'", etc.[5/] If the Grass and Timber deeds

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1/ In California, but apparently not elsewhere, the conveyance of the right to cut as opposed to the timber itself, may take on a significant distinction. See Crain v. Hoefling, 132 P.2d 882 (Cal., 1942) and Buffum v. Texaco, Inc., 250 Cal. Rptr. 852, D.C. App. (1966). See, however, Mailliard v. Willow Creek Ranch Co., 78 Cal. Rptr. 139, 141 (Ct. App., 1969).

2/ See for example Volume 17, p. 305, Maine Record of Deeds (in the Maine State Archives) and Chapter 51, Resolves of 1853.

3/ Donworth v. Sawyer, supra, at p. 253.

4/ 105 Me. 272 (1909).

5/ Brown v. Bishop, supra, at p. 277.

also granted the right "to have" the timber, there seems to be no logical distinction between the "right to have" the timber and a transaction by which one is permitted to have the timber.

While the grant of a "right" to cut timber may be of relevance in determining whether the interest conveyed is a fee simple determinable or a profit a prendre, it is of no relevance in determining what timber the grantee has the right to cut and for how long the grantee has the right to cut it.[1/] It is the scope and not the name of the interest conveyed which is relevant. In M & I Timber Co. v. Hope Silver Lead Mines, Inc.,[2/] the Court construed a reservation of the "right" to remove "any and all timber" with no time limit for removal. The Court held that the interest created by the reservation was a profit a prendre but then went on to inquire as to what timber was subject to the profit. The Court held that only trees existing as timber at the time of the grant were subject to the profit.

According to some writers, what is logically and in actual substance conveyed in every conveyance of growing timber, whether the instrument evidencing the transaction expressly grants the "right" to cut timber or grants the timber itself is merely the right to cut and carry away the timber.

1/ Cf. Penley v. Emmons, 117 Me. 108, 111 (1918).

2/ 428 P.2d 955 (Ida., 1967).

"All that passes to the timber grantee is this right; he has title to this right; but, until severed, the trees remain a part of the land, and the estate of the grantor in the land in terms of the totality of all his rights therein is diminished only to the extent that this granted right of removal remains to be exercised. The land owner has not parted with any segment of his estate in the land (citations omitted); he has merely parted with the right to appropriate part of the land by severance, with the consequence that upon appropriation the physical substance of his estate will be so far diminished. The owner of the right to cut and remove the timber, the so-called timber owner, on the other hand, can translate his ownership of his right into ownership of the timber severed from the land, i.e., convert an interest in land to an interest in personalty; but when his cutting operations cease, or if he fails to exercise his right within the time allowed, he loses, not the timber but the right to acquire a property therein by severance. (citations omitted)."[1/] (Parenthesis supplied.)

3. The conveyance of pine and spruce timber by the deed in Donworth may be distinct but is not different in kind from the conveyance of grass and timber by the Grass and Timber Deeds. The Court in Donworth noted, presumably as evidence that successive growths were not intended by the deed in Donworth, that it "is well known that pine and spruce lands in the region of this township do not reproduce the same kind of growth."[2/] Of course, but for a piece of legislation passed more than fifty years after the formation of the intent of the State as grantor, the Grass and

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1/ Luccock, "Timber Deeds-A Case for the Restatement of the Law of Property," 20 Wash. L. Rev. 199, 206, 207 (1945). See also Goode, "Logs and Logging-Timber Deeds and Contracts - Interest of Grantee or Vendee", Comment, 34 Ore. L. Rev. 256 (1955).

2/ Donworth v. Sawyer, supra, at p. 253.

Timber Deeds may also have conveyed only the pine and spruce timber rather than all timber. In any event, of the cases which have construed timber deeds, and particularly the duration of timber rights in this State, none are known to this writer to have turned on the distinction between a conveyance of all timber or merely some species of timber. The other distinguishing feature between what things were conveyed by the two deeds, of course, is that the Grass and Timber Deeds conveyed grass rights. Even assuming successive annual growths of grass were intended to be conveyed by both parties to the Grass and Timber Deeds, the rarity of naturally occurring wild grass[1/] in commercial quantity in the unorganized territory in Maine, much less the frequency with which it was or is commercially harvested and the value of that harvest, in relation to the quantity and value of the timber growing and harvested in 1850 and today in the unorganized territory of Maine precludes a construction of the Grass and Timber Deeds, emphasizing or dependent upon the fact that wild grasses were conveyed.[2/] It is probably not inaccurate to say that, with rare exception, none of the

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1/ Grass growing upon the improvements (cleared areas) made by any actual settlers were expressly excluded from the conveyance.

2/ Moses Greenleaf's famous "A Survey of the State of Maine" (1829) lists four pages of valuable forest trees which are the natural products of Maine and says of the "lesser shrubs" and "perennial and annual plants" that some "have valuable properties, but the enumeration is hardly necessary." Greenleaf's Survey at p. 114.

consideration paid for the Grass and Timber Deeds is fairly attributable to the value of wild grasses then or now growing on the public lots. The reason the grass was conveyed in the first place was to feed the oxen and horses used to carry out the timber,[1/] and it seems highly unlikely that any use whatever was made of the grasses except while timber operations were actually being conducted. In other words, grass was only a complement to the timber rights. Moreover, the Legislature on at least one occasion authorized and directed the sale of the right to cut grass and timber for a period of fifteen years.[2/] No doubt more than a single growth of grass was intended but that does not mean that more than one growth of timber was conveyed. If the grantee had exhausted all timber on the tract in the first season and had returned in the fifteenth season to cut that which had grown up in the interim, it seems reasonably clear under the existing law in Maine that the grantee would have had no right to cut timber again in the fifteenth year, notwithstanding his right to "successive growths" of grass. The Grass and Timber Deeds ought logically to be construed in light of the fact that the essence of the transaction was a timber conveyance.

1/ Wood, "A History of Lumbering in Maine, 1820-1861", University of Maine Studies, Second Series, No. 33, The Maine Bulletin, Vol. XLIII, No. 15 at pp. 17, 86, 95.

2/ Chapter 51, Resolves of 1853.

4. The timber rights in Donworth were for most of a township, not for a public lot, and specific reference was made in the deed to the fact that the conveyance of timber rights was not to retard settlement of the township. The Court found that in making the conveyance, Massachusetts "wanted the forest cleared, not preserved."[1] The intent was presumably therefore not only to clear the forest, but to keep it cleared until settlement of the township. Nevertheless, the Court held that Massachusetts conveyed but a single growth in that deed. In the case of the Grass and Timber Deeds for unlocated public lots, it is conceivable (but not likely) that Maine had a similar motive in mind, in keeping with the dominant policy of the State to promote the settlement of all of the public domain. It is more likely, however, that with respect to all of the public lots, located and unlocated, the State conveyed the grass and timber rights in order "to prevent the timber and grass from destruction and pillage"[2] pursuant to the long-standing policy of the State to manage the public lots "for the protection and preservation of whatever of value there may be growing thereon",[3] not for the

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1/ Donworth v. Sawyer, supra, at p. 253.

2/ Walker v. Lincoln, 45 Me. 67, 70 (1858).

3/ Dudley v. Greene, 35 Me. 14, 16 (1852). Section 3 of Chapter 196 of the Public Laws of 1850 directed and required the land agent to locate all public lots theretofore or thereafter reserved. That this was not actually done should not reflect upon the intent of the Legislature at the time that there were to be no unlocated public lots.

purpose of clearing the land. If the State had no policy promoting the clearing of the public lots, the State certainly could not have intended to keep the lots cleared by the conveyance of successive growths for the indefinite future.

In Flye v. First Congregational Parish[1/], the Court had occasion to construe the rights of certain parties respecting the management of a public lot reserved for ministerial purposes. There the lot had vested from time to time in various ministers as they served the parish, but at the time of the suit, no settled minister was then serving the parish and title to the public lot was "in abeyance". In striking down an attempted conveyance by the parish of "all the trees standing and growing on the lot", the Court held that although the parish was entitled to income from the lot while no minister served the parish, if the purported conveyance were "carried into effect the lot would be stripped, and not merely the income or profits of the capital to which the parish is entitled, but the capital itself would be effectively disposed of."[2/] With advance notice of imminent organization or incorporation of a township, it is not only feasible but in the direct pecuniary interest of the owners of grass and timber rights upon the public lots, for those owners to insure that the new town inherits, as its legacy, stripped or cut-over land.

1/ 114 Me. 158 (1915).

2/ Id., at p. 166. See also Dunn v. Burleigh, 62 Me. 24, 36 (1873) where the court declined to indulge in the presumption that the Legislature intended that land intended to benefit settlers be placed in a position where it might be stripped of timber.

While this may have been an equally feasible possibility for those townships incorporated or organized shortly after the grass and timber rights were sold, with respect to the vast majority of townships, which the Legislature may not have expected would be incorporated for at least a sufficient amount of time to exhaust a single growth, it is at least questionable that the Legislature intended that the threat of stripping the endowment endure through successive growths (with no new consideration for the intended beneficiaries) until incorporation or organization of the township. If the State had intended that no endowment be preserved, the State could have sold the public lots in fee simple, rather than cutting rights upon them. Obviously, the State did not sell but elected to preserve the public lots.

Unlike the deed in Donworth, the Grass and Timber Deeds specify an event upon the occurrence of which, all rights thereunder conveyed are to terminate. No doubt a persuasive argument can be made that the Legislature of 1850 and subsequent legislatures actually intended that successive grass and timber growths (in effect, all of the then known use and value) on all of the public lots be sold for a period of time which could be centuries in duration and could be eternal. Governor Dana, in his message to the Legislature, delivered May 14, 1849, said:

> "The timber townships contain far the most valuable reservations [of public lots], while they generally hold out but small inducement to settlements. Undoubtedly the largest receipts [from stumpage sales] will be from reservations in township (sic) which will remain unoccupied for centuries."1/

1/ Message of Governor Dana found in Laws of Maine 1849, at p. 196.

Not only has more than one century elapsed while the State has acquiesced in the existing arrangement, but, in truth, the words of the Grass and Timber Deeds, upon their face, appear to convey rights of unlimited and potentially perpetual duration. Nevertheless, the deed in Donworth and the deeds in other cases also appear, on their face, to convey successive growths or unlimited and potentially perpetual cutting rights and the Courts have, in effect, struck them down. There are a number of factual and legal reasons why the same rationale as was applied in Donworth and in other cases preventing the creation of the right to successive growths for an indefinite period of time, apply to the Grass and Timber Deeds.

The cutting rights conveyed in the deed in Donworth provided no definite expiration date but permitted the grantees to cut "from time to time to suit their convenience." The Court held that this language permitted the grantees to cut until the first to occur of (i) exhaustion of the growth existing at the time of the conveyance, or (ii) the expiration of an express or implied time limit. In Donworth, the growth was exhausted before suit was brought and the Court did not consider whether, in fact, any time limit was implied in the deed. The rule is, however, that where no time limit is supplied in a timber deed, the courts will require that the timber conveyed be removed within a reasonable time.[1/] The construction of the Donworth deed that but a single growth was conveyed and the judicially supplied "reasonable time" limit where no express time limit for removal is contained in a timber deed, are both manifestations of the reluctance by courts to construe any timber deed as having conveyed perpetual or indefinite cutting rights.

1/ Penley v. Emmons, supra. See also 1 Thompson on Real Property § 103 (1964).

It is possible for parties to a timber deed to agree upon perpetual timber rights in the grantee, but where such rights are not clearly contemplated by the timber deed, they will not ordinarily be implied since they are extremely burdensome.[1] A "contract giving the vendee the perpetual right to enter and remove timber from land is so unreasonable in its nature that no agreement will be construed as conferring this right unless the intention of the parties so to do is plainly manifested."[2] It has been held that one "who claims an unlimited and perpetual time for removal of timber from the land of another must establish it by clear and definite language in his deed or contract."[3] This writer can find no Maine cases upholding either a perpetual right to remove a single conveyed growth or a right perpetually to remove successive growths. There are several cases in this State, however, expressly refusing so to construe timber deeds. In Pease v. Gibson,[4] a timber deed conveyed all "pine trees fit for mill logs" and gave the grantee two years to remove them. In answer to the defendant's argument that the deed passed title to successive growths, giving him two years to enter and cut and making him a trespasser thereafter, liable in damages for trespass but owner of the pine trees nonetheless, the Court held:

1/ See 164 A.L.R. 423, 424 and the authority there cited.

2/ 1 Thompson on Real Property § 102 at p. 428 (1964).

3/ Clyde v. Walker, 348 P.2d 1104, 1106 (Ore., 1960).

4/ 6 Me. 81 (1829).

> "To admit the construction given by the defendant's counsel, and consider such a permission as a sale of the trees, to be cut and carried away at the good pleasure of the purchaser, and without any reference to the limitation, in point of time specified in the permit, would be highly injurious in its consequences. It would deprive the owner of the land of the privilege of cultivating it and rendering it productive, thus occasioning public inconvenience and injury; and, in fact, it would amount to an indefinite possession. The purchaser, on this principle, might, by gradually cutting the trees and clearing them away, make room for a succeeding growth, and before he would have removed the trees standing on the land at the time of receiving such a license or sale, others would grow to a sufficient size to be useful and valuable; and thus the owner of the land would be completely deprived of all use of it. Principles leading to such consequences as we have mentioned cannot receive the sanction of this court."1/

The public policy underlying the rule set forth in Pease v. Gibson is that it occasions public inconvenience and injury to allow the grantee of the right to cut and carry away timber upon a tract of land, the right for an indefinite period of time to deprive the owner of the land of the privilege of making other productive use of the land. Where the owner of the land is the State and where the income and profits from the land have been dedicated by the State for a public purpose, such as education, common sense dictates that the inconvenience and injury thus caused to the public is immeasurably greater than in the case of the purely private rights which were litigated in Pease v. Gibson.

1/ Pease v. Gibson, supra, at p. 84. See also Webber v. Proctor, 89 Me. 404 (1896).

The cutting rights granted in the Grass and Timber Deeds expire upon the incorporation, or organization for plantation or election purposes, of the township or tract from which the public lot was reserved.[1/] The precise time when that event may occur is now and no doubt was in 1850 completely unknown. Rights under some Grass and Timber Deeds have been terminated by the occurrence of that named event.[2/] Obviously, however, most such tracts or townships are still not incorporated and the present owners of rights conveyed by the State under the Grass and Timber Deeds continue to cut grass and timber from those public lots.

If one assumes that the Legislature will not incorporate or organize townships unless and until they become settled and their organization or incorporation is otherwise warranted in accordance with the traditional notion of when such events ought to occur and if one further assumes that population growth and similar events in the unorganized territory of Maine are and always have been almost totally outside the control or realistic foreseeability of either the State or the Grass and Timber Deed grantees, then the rights conveyed by the Grass and Timber Deeds might, with the same legal implications, have been keyed to expire upon admission of the 60th state into the United States or the construction of the first

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1/ Bragg v. Burleigh, 61 Me. 444 (1871). See discussion in next subsection of this Report.

2/ Bragg v. Burleigh, supra. See also State v. Mullen, 97 Me. 331 (1903).

railroad through the unorganized territory[1] or any other presumably inevitable event which may occur at an unknown time in the future. The particular event specified could have occurred with respect to any given Grass and Timber Deed immediately after delivery of the deed[2] and, of course, the Court has noted that it may never occur.[3] While the Grass and Timber Deeds did not purport to convey perpetual cutting rights, the net effect is to have conveyed just that. After more than 120 years of cutting, the likelihood of or prospects for the incorporation or organization of the wildlands is as unforeseeable and as remote as it has ever been.

1/ In Dunn v. Forester [27 S.W.2d 1005 (Ark. 1930)], the timber deed provided for timber "to be cut and paid for within two years after the completion of a railroad down Mill Creek." After 20 years the railroad had not been built and the landowner sought to terminate cutting rights. The Court noted that the parties had thought a railroad would be constructed in the near future which would afford a suitable means of marketing the timber after it was cut and that in fact railroad rights of way had already been acquired by the railroad in that locality when the timber was conveyed. The Court found that those facts negative an intention to convey a perpetual right to enter on the land and cut and remove trees and applied the rule that where a time is not specified for the performance of a contract, it should be performed within a reasonable time.

2/ In Bragg v. Burleigh, supra, the timber grantee was unable to cut any timber under his Grass and Timber Deed prior to organization of the township as a plantation.

3/ Union Parish Society v. Upton, 74 Me. 545, 548 (1883); State v. Mullen, supra, at p. 338.

The Grass and Timber Deeds do not clearly and explicitly convey successive growths, and such rights arise only by the implication that the grantees are entitled to cut successive growths as they come into existence because the indefinite period of time to remove timber continues. Such implications are not favored when private persons grant timber rights.[1/] Where the grantor is the sovereign power not acting in a purely commercial capacity, such implications are particularly not favored.[2/] It has been held that grants of timber from the United States, like grants of land from the United States "must be construed favorably to the Government and that nothing passes but what is conveyed in clear and explicit language - inferences being resolved not against but for the Government."[3/] Since even the purported conveyance of successive growths of timber are, and in 1850 were, rare in Maine, and since the Legislature is presumed to have been cognizant of earlier judicial decisions in this State that such conveyances are not favored, it is arguable, if not reasonable, to assume that the Legislature would have expressed itself with the utmost clarity if in fact it truly intended to convey successive growths of timber, and would have left nothing for implication.

1/ Pease v. Gibson, supra.

2/ Donworth v. Sawyer, supra, at p. 252.

3/ United States v. State Box Company, 219 F. Supp. 684 (N.D. Cal. 1963), aff'd. 321 F.2d 640 (9th Cir. 1963). That case struck down an alleged conveyance of perpetual timber rights by the United States.

Legislature truly intended to create a cumbersome and elaborate system of accounts, and to tie up the funds in those accounts, for centuries or forever. Finally, of course, regardless of any dire predictions in 1850 concerning the reality of settlement prospects for the wildlands, it seems to have been indisputably and universally hoped at that time that all of the wildlands would in fact be settled, and would be settled soon. A persuasive argument can be made that regardless of the fears and opinions publicly and privately expounded by individuals, the expressed intent of the Legislature was that the unorganized territory would be organized (and the cutting rights would terminate) within a comparably short period of time.

Moreover, identical deeds for identical purposes covering identical types of property for an identical consideration pursuant to an identical enabling statute and by the identical grantor, ought to convey the same thing. If all Grass and Timber Deeds are construed as having conveyed successive growths with a period of time to remove those growths, which could be extremely short or could be for the indefinite future, there would be an infinite disparity between the actual amount and value of timber conveyed by and cut under various Grass and Timber Deeds, according to when or if those townships were or are incorporated. It seems more logical that all Grass and Timber Deeds conveyed a single growth with the right to remove that growth which could be extremely short or extremely long. While the percentage of the growth cut (and the net quantity of

timber conveyed) could also vary from township to township, those variations would be within the more plausible parameters of a single conveyed growth.

In addition, there is strong evidence that the dominant and immediate objective of the Legislature in 1850 in authorizing the sale of grass and timber rights upon the public lots, was to salvage some value of the timber thereon from the rampant timber trespasses then occurring and to rid itself of the formidable enforcement problems inherent in any state action to prevent such trespasses. Such an objective is not incompatible with the conveyance of a single growth of timber. It was the then existing growth of valuable timber which was being subjected totrespass. Once the public lots were cut over and the valuable timber removed therefrom, the value of any subsequent timber trespasses would obviously be diminished. More significantly, once the public lots were cut over, the State would be in a position to resell, at an appropriate time, the cutting rights on the succeeding growth. It seems clear that the State intended to preserve an endowment for the future inhabitants of the unincorporated areas. It seems further clear that this endowment was intended to be increased in value during the time title to the public lots remained vested in the State, for the grass and timber rights terminate upon organization as a plantation, not merely upon incorporation. It follows that the State may have intended to sell only that which was being lost to thieves, not everything of value which would or could ever grow to be worthy of theft. This seems particularly true because

the consideration received by the State was related to the then existing growth of timber on the lots.[1] In any event, the purpose of salvaging whatever was left from the trespasses and obtaining value for it for the benefit of the future citizens of the State, does not require the conveyance of successive growths for an indefinite and potentially perpetual period of time.[2]

The Courts of Maine have demonstrated a propensity to determine what was conveyed by a timber deed in light of the amount and adequacy of the consideration paid. In Penley v. Emmons[3], the Court held as follows:

1/ See discussion below concerning the similarity in value of 10-year cutting rights and value of grass and timber rights. See also Report of George C. Getchell, Land Agent, 1854, in the Maine Land Agents Reports, 1840-1856, to the effect that the value of the public lots, and the prices received for the grass and timber sales therefrom, were "greatly diminished" by trespasses.

2/ In United States v. State Box Company, 219 F. Supp. 684 (N.D. Cal. 1963), aff'd. 321 F.2d 640 (9th Cir. 1963), the court held that the purpose of certain timber grants by the United States in the 19th century was to aid in the construction of railroads by giving the builders sources of income and credit and that the achievement of that purpose did not require that the grant of timber be perpetual.

3/ 117 Me. 108 (1918). The deed in that case conveyed a lot or parcel of poplar, basswood and white birch timber and gave the grantees the right to enter and remove the same at their convenience.

> "But it may be urged that in the cases cited there was a definite time fixed for cutting and removing the growth, while in the case at bar the grantees were to 'enter and remove at their convenience.' We do not overlook the fact that the original purchase price was only sixty dollars and could not have been payment for a very large amount of growth. The principle is too elementary to need the support of authorities that when a time is not specified for the performance of a contract it should be performed within a reasonable time. We are therefore inclined to the claim of the defendant that twenty years or more in which to remove sixty dollars worth of standing growth is not a reasonable time, and that the time for removing the growth intended by the parties to the deed of June 20, 1893, had long ago expired."1/

In Donworth v. Sawyer, the Court held that:

> "It is common learning that the construction to be given deeds must have relation to the time and circumstances under which they were given, and that they are ordinarily to be construed most strongly against the grantor. (citation omitted) The converse rule, however, applies to grants by the sovereign power when not purely commercial and especially when they are gratuitous and not moved by a full and adequate consideration. Here the consideration was $17,479.96.2/ This grant is clearly enough of pine and spruce trees standing on the land at the date of the deed, and of none other, to be removed at the convenience of the grantees or their assigns. (citation omitted)." (parenthesis supplied).3/

The consideration paid by the grantees of the Grass and Timber Deeds for the vast majority of the public lots ranged from $50 to

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1/ 117 Me. at p. 112.

2/ This consideration covered 4000 acres of land in fee simple and cutting rights for 21,040 acres of the township. No breakdown is given.

3/ Donworth v. Sawyer, supra, at p. 252.

$350 each (5 cents to 35 cents per acre).[1] While there may, in a few instances, be a similarity between the price per acre received by the State for the sale of any given township in fee simple and the sale of the grass and timber rights on the public lot located in that township (notwithstanding the statutory provision for the deduction of a reasonable sum for the soil), there is apparently also a similarity between the price per acre received by the State for the sale of ten-year cutting rights on a township and the sale of the grass and timber rights on the same township.[2] The logical conclusion is that the value of the land was the same as the value of the timber then standing thereon[3], subject only to the possible existence of valuable

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1/ See "Report on the Public Reserved Lots", 1963, prepared by State Forestry Department pursuant to Chapter 76, Resolves of 1961 (hereinafter cited as "1963 Report".

2/ Ten-year cutting rights fetched approximately 24 cents and 16 cents per acre on public domain in T. 9 R. 16 W.E.L.S. and in T. 4 R. 18, respectively, in 1874-1875. (See Volume 17, p. 305 and Volume 18, pp. 77, 79, 81 and 83 of the Maine Record of Deeds, found in the Maine State Archives). The Consideration received by the State in the same two-year period for the Grass and Timber Deeds on the public lots in those same townships are approximately 16 cents and 18 cents, respectively. (See the 1963 Report.)

3/ See Report of George C. Getchell, Land Agent, 1854, supra. See also Maine House Document, 1852, #49, a letter from Anson Morrill discussing the sale of cutting rights and the value received.

minerals in some areas. It seems obvious that the value of the timber taken during the last century from any given public lot (excluding the value of the timber to be taken during the next few centuries) demonstrably exceeds, by any fair measure, the consideration received therefor by the State. Although absolute conveyances in fee simple may well nigh be conclusive upon the State notwithstanding inadequacy or even total lack of consideration, there is no reason why adequacy of consideration may not be considered in construing the conveyance of timber rights. On the contrary, the sovereign, acting in its sovereign capacity, ought not to be hamstrung by the value it received in other transactions but, instead, should be entitled to the presumption that if the consideration received relates only to the then existing growth, then that is all that the sovereign intended to convey. Private persons are entitled to as much.

There is, therefore, a distinct possibility that what was conveyed by the Grass and Timber Deeds (ignoring arguments that could have been made but for chapter 232 of the Public Laws of 1903) was fee simple defeasible title to the growth existing at the time of each particular conveyance and that the grantees were given the right to cut and carry away that growth until the first to occur of (i) incorporation or organization of the township or tract in which the public lot is located, or (ii) exhaustion of the growth existing at the time of the conveyance. Subject only to extremely rare exceptions, that growth has been exhausted and even in those rare instances where original growth remains, the grantees have long since had a reasonable time within which to remove that growth.

Accordingly, the rights conveyed under the Grass and Timber Deeds may have expired. The reasoning is based essentially on the facts that (i) the Grass and Timber Deeds do not clearly and explicitly convey future or successive growths of timber, (ii) there are factual and logical reasons why the State may not have intended to convey successive growths, (iii) time and history and not the unequivocal intent of the State expressed in the clear and explicit language of the Grass and Timber Deeds has awarded successive growths on many of the public lots, and (iv) the duration of the cutting rights provided in the Grass and Timber Deeds is so indefinite as to amount, in fact and in law, to a purported conveyance of a perpetual right to cut timber. It is based upon the established legal principles that (i) the word "timber" in a timber deed in Maine ordinarily means the timber or growth in existence at the time of the grant, (ii) notwithstanding the conventional rule that deeds are construed against grantors, the judicially declared public policy in Maine is against construing timber deeds as having conveyed away successive growths or perpetual or indefinite cutting rights, and (iii) this public policy is especially compelling in Maine where the grantor is the sovereign, not acting in a purely commercial capacity. This writer is unable to express the unqualified opinion that the cutting rights have expired. It is not, however, a "case where either necessity or public policy [would invoke] the court to interpose its powers of construction

at the extreme limits of its authority. Far from it."[1/] If a private person had executed and delivered a deed identical in all respects to the Grass and Timber Deeds and if, pursuant to that deed, all of the growth existing at the time of the conveyance thereafter had been exhausted, under the existing development of the law in Maine, such a person would stand at least a reasonable chance of having a court rule that cutting rights have expired. The same result ought to obtain more, and not less, forcefully where the grantor of the cutting rights is the sovereign, acting in its sovereign capacity and as trustee of a charitable endowment for the benefit of future inhabitants of the State.

1/ Bragg v. Burleigh, supra, at p. 451. After holding that the rights under a Grass and Timber Deed had expired by the organization of a plantation, though not a single tree had been cut, the Court went on to say that "the plaintiffs are presumed to know the law. They took their deed under the law, and must be content with what the law gives them. The Legislature, and not this court, is the tribunal for hearing and deciding upon the equities of the plaintiffs' case, if any they have to present. This court, at least, will take care that they do not despoil the beneficiaries of this limitation of the land agent's authority, guaranteed to them by the plighted faith of the State." Bragg v. Burleigh, supra, at p. 451.

B. When Do the Rights Terminate?

Assuming that the Grass and Timber Deeds conveyed cutting rights for a potentially unlimited number of successive growths of timber, then the cutting rights conveyed thereunder terminate with respect to any given Grass and Timber Deed upon the incorporation or organization as a plantation of the township or tract from which the public lot was reserved.[1/] It is clear that such rights terminate immediately and absolutely upon the occurrence of such an event.[2/] In addition, unless a contrary legislative intent is expressed, the cutting rights for the entire public lot terminate upon the incorporation or organization of only a portion of the township, regardless of whether or not the incorporated or organized area physically includes the entire public lot.[3/] Moreover, if

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1/ Substantially all Grass and Timber Deeds prior to 1873 provide that the right to cut and carry away the grass and timber shall continue "until the said township or tract shall be incorporated, or organized, for plantation purposes, and no longer." In 1873, a handful of Grass and Timber Deeds provided for termination when the "township or tract shall be incorporated, and no longer" and thereafter, substantially all Grass and Timber Deeds provided that the timber and grass rights continue until the "township or tract shall be incorporated into a town or organized into a plantation, and no longer". See for an example of the latter form of deed, Volume 2, page 159, Record of Deeds, Timber on Reserved Lands, found in the Maine State Archives.

2/ Bragg v. Burleigh, 61 Me. 444 (1871)

3/ State v. Mullen, 97 Me. 331, 338 (1903).

the intention to do so is expressed by the Legislature, it appears that if any portion of the township is incorporated or organized, even if no part of the public lot is included therein, the cutting rithts for the entire township terminates.[1/]

Municipal corporations are political subdivisions of the State which enjoy full corporate status. They are created by acts of the Legislature.[2/] In the early days of the settlement of this country, the term "plantation" was used to describe a "cluster or body of persons inhabiting near each other,"[3/] and was often used interchangeably with "town" or "township", but as distinctions developed between the various types of local political entities and subdivisions, the plantation came to be categorized as merely a quasi-corporation.[4/] By the 1840's, distinct classes of plantations had come into existence. Some plantations were organized as incipient towns, to function as a "junior" form of town for almost all purposes including taxation, elections, education, support of the poor and the maintenance of roads.[5/] This type of plantation is hereinafter referred to as one organized "for plantation purposes." By 1857, but apparently

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1/ State v. Mullen, supra.

2/ Cf. Chapter 104, Private and Special Laws of 1971 incorporating the Town of Carrabasset Valley.

3/ Commonwealth v. City of Roxbury, 75 Mass. 451, 485 (1857).

4/ Blakesburg v. Jefferson, 7 Me. 125 (1830); Means v. Blakesburg, 7 Me. 132 (1830).

5/ See for example R.S. 1841, c. 14, § 44; c. 17, § 62 and c. 25, § 43.

not before, plantations were authorized to be organized for plantation purposes within one township if that township contained at least 300 persons.[1] Another type of plantation was authorized to be created essentially for the purpose of casting ballots for President, Vice-President, Representatives to Congress, Governor, Senators, Representatives to the State Legislature and county officers, and for electing three "assessors" and a clerk for the purpose of administering the calling of an annual meeting and the casting and reporting of ballots.[2] Though called assessors, these functionaries apparently had no taxing powers. This type of plantation is hereinafter referred to as a plantation organized "for election purposes." Plantations organized for election purposes, by 1857, had also acquired a few of the powers of other plantations, including the power to provide for support of the poor and to build schools and organize school districts but were not limited as to size or population.

Chapter 196 of the Public Laws of 1850 authorized the conveyance of grass and timber on the public lots until the township or tract is incorporated or "organized for plantation purposes."[3]

1/ R.S. 1857, c. 3, § 33.

2/ This type of plantation was created by Chapter 89, Public Laws of 1840. The provision appears at R.S. 1857, c. 4, §§ 70-78. Because it was passed at an "Extra Session" of the Legislature of 1840, it appears as an "Amendment" at the back of the Revised Statutes of 1841.

3/ Chapter 196, § 2, Public Laws of 1850.

In the Revised Statutes of 1857[1], however, the words "for plantation purposes" were deleted and the grass and timber rights were keyed to expire when townships were organized into plantations. Approximately a year after this new provision became effective, the Legislature "repealed" the organization of all townships organized for election purposes which exceeded a single township in size and declared that plantations organized for election purposes would thereafter be limited to one township in size.[2] In Bragg v. Burleigh[3], in 1871, the Supreme Judicial Court of Maine had occasion to construe a Grass and Timber Deed in order to determine whether it terminated upon organization of the township for election purposes. The deed was delivered in 1862 and while the deed was in the same form as all other Grass and Timber Deeds had been since 1850, the law then in effect was as it was set forth in the Revised Statutes of 1857.[4] First, the Court held that the authority of the land agent is conferred by statute, that he cannot exceed that authority or enlarge the rights of grantees by any recitals in the deed and that grantees

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1/ Effective January 1, 1858.

2/ Chapter 106, Public Laws of 1859.

3/ 61 Me. 444 (1871). The facts of this case are briefly set forth hereinabove in the immediately preceding subsection of this Report.

4/ R.S. 1857, c. 5, § 11.

are charged with knowledge of the limitations upon his authority which are imposed by statute. After a discussion of the language of the various statutes involved, the Court held that the cutting rights conveyed under the Grass and Timber Deed which was the subject of that suit terminated upon the organization of the township or tract as a plantation, regardless of whether it was so organized for plantation purposes or for election purposes and regardless of the fact that the plaintiff's deed recited that it terminated only upon organization for plantation purposes. The Court arrived at this conclusion after stating the following:

> "The legislation of the State upon this subject prior to the revision of 1857 changed several times, sometimes admitting plantations organized for election purposes to the benefit of this limitation, and sometime excluding them therefrom, according, it would seem, as the influence or interests of the settlers, or of the lumbermen controlled the action of the legislature.[2/] The eminent jurist who had charge of the revision of the statutes of 1857, could not have been ignorant of the history of this legislation, or the causes that gave rise to such legislative vacillation. He was too well versed in lexicography, as well as judicial lore, not to understand the meaning of language, or the legal effect of changing the phraseology of a statute. Nor was he accustomed to change such phraseology without a purpose. He omitted the words "for plantation purposes" in the revised code of 1857, the manifest purpose and legal effect of which, in connection with the other language used in the revision, are to restore the inhabitants of plantations, organized for election purposes, to the rights they enjoyed in an

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1/ A review of the public and private and special legislation enacted and the resolves passed by the Legislatures of 1850 to 1857 has not revealed the precise legislation to which the Court here refers. The Report of the Commissioners of the Statutes of Maine (1856) at Title 1, Chapter 31, § 11 (at p. 22) contains provisions similar to those ultimately enacted in the Revised Statutes of 1857.

earlier period of the legislation upon this subject."[1]

As a result of Bragg v. Burleigh, all cutting rights conveyed under Grass and Timber Deeds delivered pursuant to the provisions of Chapter 5, section 11 of the Revised Statutes of 1857, or similar provisions (when in effect) prior thereto, terminate upon the organization of the township into a plantation even if the organization is merely for election purposes. The writ of replevin commencing the case of Bragg v. Burleigh (Burleigh was then land agent of the State) was dated June 11, 1869. During the immediately succeeding session of the Legislature and while this case was pending, the pertinent provisions of the Revised Statutes were amended, effective March 14, 1870, to permit the land agent to "sell the timber and grass [on the public lots], or the right to cut the same. . . until incorporated into a town, for such sum as he thinks just and reasonable."[2] In other words, no organization of a township into any kind of plantation was thereafter to terminate cutting rights. Only the incorporation of the township "into a town" was to accomplish this. This latter provision remained in effect at least through the adoption of the Revised Statutes of 1903[3], by which time substantially all Grass and Timber Deeds presently in effect had been delivered.[4] In addition, the

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1/ Bragg v. Burleigh, 61 Me. 444 (1871) at pp. 450, 451.

2/ C. 135, § 2, Public Laws of 1870. Bragg v. Burleigh held that this act had no retrospective effect. 61 Me. 444, 446 (1870).

3/ R.S. 1903, c. 7, § 14.

4/ 1963 Report.

Legislature during the same legislative session (1870) abolished plantations organized for election purposes. This was accomplished by establishing a new format for the organization of all plantations and by providing that the provisions of the Revised Statutes of 1857 authorizing organization for election purposes should (without affecting existing plantations) apply only to plantations duly organized under the new law.[1/]

Had the distinction not been abolished, all Grass and Timber Deeds dated between January 1, 1858 and March 14, 1870 would terminate upon the organization of the tract or township as a plantation regardless of whether such organization were for plantation purposes or merely for election purposes. If the distinction were recreated today, the State presumably would be in the same position it occupied prior to the abolition of their distinction, with respect to Grass and Timber Deeds between the two dates mentioned. A cursory review of the 1963 Report reveals that approximately 25,000 acres of public lots fall into this category.

1/ Chapter 121, section 17, P.L. 1870, amending R.S. 1857, c. 4, § 77. The format provided in chapter 121, P.L. 1870, for the organization of plantations includes such limitations as a maximum of one township per plantation and a minimum of 250 inhabitants per plantation. The present law contains almost identical provisions.

After 1870, though the statute authorized the land agent to convey grass and timber rights to last until incorporation of the township, in fact, with the exception of but approximately four townships, the land agent continued for a few years to use the old form of Grass and Timber Deed providing for termination upon organization for plantation purposes. While Bragg v. Burleigh held that recitals in a Grass and Timber Deed could not enlarge the rights of the grantee beyond that authorized by state,[1/] it did not squarely face the issue of whether or not recitals in a Grass and Timber Deed could diminish the rights of the grantee below that authorized by statute. Because of the recitals in those Grass and Timber Deeds, therefore, they may terminate upon organization of the townships involved for plantation purposes notwithstanding the fact that the legislation authorized a conveyance of such rights until incorporation of the township.

In addition, all Grass and Timber Deeds after 1874 were authorized by one Resolve[2/] or used the same form as was established for conveyances pursuant to that Resolve. These Grass and Timber Deeds provide, in the words of the Resolve, that the cutting rights terminate when the township is "incorporated into a town or organized into a plantation." Obviously, all Grass and Timber Deeds, using this language, whether or not precisely pursuant to the cited Resolve, terminate upon organization of the township into a plantation for plantation purposes. Though the distinction between plantations organized for different purposes had been abolished prior to the dates of those deeds, nevertheless the

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1/ Bragg v. Burleigh, supra, at p. 446.

2/ Chapter 319, Resolves of 1874.

Legislature is presumed to have used that language with the knowledge that various classes of plantations had existed in various forms from time to time during the then past 30 years and in light of the distinction in wording which was the basis of the decision in Bragg v. Burleigh in 1871. Accordingly, cutting rights under most Grass and Timber Deeds after 1874 probably would terminate upon the organization of those townships for election purposes if that kind of organization were again authorized or created by the Legislature. A cursory review of the 1963 Report reveals that approximately 45,000 acres of public lots fall into this category.

The present law provides for only one kind of plantation and that plantations are not, among other things, to be composed of more than one township.[1/] As pointed out above, there were apparently no area limitations in effect for plantations organized for plantation purposes prior to January 1, 1858[2/] and no area limitations for plantations organized for election purposes until April 4, 1859.

1/ Title 30, M.R.S.A. § 5616.

2/ The effective date of the Revised Statutes of 1857. Prior to that time, plantations were authorized to organize for taxation (plantation) purposes "within such territorial limits as [the inhabitants] deem proper." R.S. 1841, c. 14, § 44.

That is to say, when the vast majority of Grass and Timber Deeds were authorized and delivered, limitations such as those which exist today as to area and purpose of organization did not exist. There is precedent, since the enactment of provisions substantially similar to those in effect today, for the organization pursuant to a special act of the Legislature of a single plantation for plantation purposes, containing four townships.[1/]

In summary, therefore, the rights conveyed by the State in all Grass and Timber Deeds terminate (i) upon the incorporation into a town of all or a portion of the tract or township from which the public lot was reserved, or (ii) in all but approximately four townships, upon the organization of all or a portion of the tract or township from which the public lot was reserved, as a plantation for plantations purposes. There are present limitations on the area of plantations but these were not in effect when the State authorized and delivered Grass and Timber Deeds on the majority of the public lots. In addition, there is presently only a single purpose for which plantations are authorized to be organized but the cutting righ

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1/ Allagash Plantation, organized pursuant to Chapter 177, Private and Special Laws of 1875. In addition, see the reference in Prentiss v. Davis, 83 Me.364, 371 (1891) to the effect that historically "many plantations consisted of more than one township."

under a substantial number of Grass and Timber Deeds would terminate (by virtue of the law in effect when the Deeds were delivered or the express provisions of the Deeds) upon legislatively authorized organization of the particular township as a plantation essentially for the purpose of voting in elections.

C. The State and the Owners of the Grass and Timber Rights

1. Located Public Lots

As discussed hereinabove in the report, in terms of the duration of the cutting rights conveyed under the Grass and Timber Deeds, it makes no difference whether the interest conveyed is characterized as a profit a prendre or a fee simple interest (determinable, perpetual or otherwise) in the timber and grass. Likewise, in terms of the respective rights and duties between the owner of the timber and the owner of the soil, it makes no difference whether the interest conveyed under the Grass and Timber Deeds as characterized as a profit a prendre or fee simple estate in the timber.

In general, a profit a prendre is a right or power to acquire, by severance or removal from another's land, something previously constituting a part of the land.[1] It is not a possessory estate in land, although it clearly involves the right to use and therefore, to some extent, to possess the land. A fee simple estate in timber, whether for a term of years or in perpetuity, appears at first blush to connote some possessory estate in the timber. In fact, this interest in timber has given rise to actions in trespass quare clausum fregit,[2] an action technically based upon present

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1. See discussion in preceding sections of this Report. See also 3 Tiffany on Real Property §§ 839, 840, (1939).

2. Howard v. Lincoln, 13 Me. 122 (1836); Goodwin v. Hubbard, 47 Me. 595 (1860).

possession.[1] Nevertheless, there is no practical distinction between the possessory rights enjoyed by the owner of a profit and the owner of an estate in timber. First of all timber itself, as opposed to the air space between standing timber, is, from a practical standpoint incapable of possession until it has been cut and converted into personalty. Further, the interest in soil enjoyed by the owner of standing timber is that interest necessary to have sustenance and growth for the timber, not the right of possession. The owner of a profit a prendre has a right of entry upon the land and the right to do anything upon the land which is reasonably necessary for the proper exercize of the right.[2] Similarly, the owner of an estate in timber has a right of entry upon the land and the right to cut and remove the timber.[3] A right of entry is not equivalent, however, to ownership of the surface. Instead, the right of entry may be exercised only for the purpose of exercising cutting rights.[4] Regardless of the name used to describe the interest of the timber owners in the public lots, therefore, the Grass and Timber Deeds

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1. See Luccock, "Timber Deeds - A Case for the Restatement of the Law of Property", 20 Wash. L. Rev. 199, 204 (1945).

2. Beckworth v. Rossi, 157 Me. 532, 535 citingl Thompson on Real Property § 225 (1964).

3. 1 Thompson on Real Property § 103 (1964).

4. Reed v. Merrifield, 51 Mass. 155, 159 (1845).

did not convey surface rights to the public lots. They conveyed only the right to do whatever is reasonably necessary for the proper exercise of the right to cut and to carry away the grass and timber, nothing more, nothing less. In the act of cutting and carrying away, the owner of the grass and timber is entitled to such possession as is reasonably necessary for the exercise of its rights and conceivably that could preclude any other surface possession in a given place at a given time.[1] Nevertheless, subject to the right of entry for the proper exercise of these rights, the State owns the surface rights of the public lots where the grass and timber has been sold.

While the owners of the grass and timber rights do not own the surface, however, they clearly have a right of entry upon the surface[2] and where there is a right of entry, there is a right of ejectment[3] of any other person for the purpose of gaining such possession as is necessary to exercise lawful rights in the property.

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1. See 1 Thompson on Real Property §§ 135, 136 (1964) and the authority there cited.

2. Stetson v. Grant, 102 Me. 222, 228 (1906) mentions that the grass and timber owners have a right of entry.

3. See 28 C.J.S. Ejectment § 6 and the authority there cited. Ejectment lies to recover possession of standing timber. Walters v. Sheffield, 78 So. 539 (Fla., 1918). See also discussion in Luccock, supra, at page 204 and the authority there cited.

The right of ejectment has significant practical implications. During the time that there is no exercise of the right to cut and carry away the grass and timber, the State is entitled to exclusive possession and therefore technically has the exclusive power to use and to make lawful disposition of the surface rights. In other words, the State alone enjoys the benefits of surface ownership and has the exclusive right to receive all sources of income except the value of the timber and grass. This clearly would include overnight camping fees, income from sugaring from maple trees, and any other source compatible with and not an unreasonable impairment of the right of the timber owners to cut and carry away timber and grass. In the case of annual (or longer) campsite leases, however, there is a practical conflict between the rights of the State and the timber owners. If the owners of the grass and timber own the right to cut and carry away an indefinite number of successive growths of timber, this right could not be frustrated by the State by leasing an entire public lot to be used in a manner which would prevent successive growths of timber or grass from coming into existence. For example, it seems logical that in this situation, the owners of the timber and grass would have the right to prevent the State from unilaterally leasing a public lot for the purpose of allowing it to be paved over and used as a parking lot. To the

extent that annual campsite or other leases could be shown to have a similar effect, it would logically follow that the owners of the grass and timber have similar rights. Moreover, when the owners of the cutting rights begin to cut, they would have the right to cut all of the growth which they own and because their rights are prior, and therefore superior, to the State's lessees, the timber owners could, to the extent the cutting methods did not injure the soil, strip a campsite of timber and grass. For both of the foregoing reasons, the owners of the cutting rights, while not entitled to possession of the surface, have a form of veto power over the ability of the State to make more than rather insubstantial other productive use of the land. While the State did not convey the surface rights, the net effect of the conveyance is to prevent the State from enjoying the more significant rewards of ownership of the surface. This rather harsh result from a mere timber conveyance is precisely the rationale underlying Pease v. Gibson[1/] and other cases which hold that perpetual or indefinite cutting rights are not deemed to have been conveyed in the absence of clear and explicit language to that effect. The inequity is further exacerbated by the fact that the timber owners own only the value of the timber when it is cut and nothing more, yet by receiving a proportion of rentals

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1. 6 Me. 81 (1829).

annually from campsites, they can receive much more money than the timber is actually worth, so the timber owners are motivated not to cut at all, but to sit back and enjoy what are basically fruits of the surface estate. While there are no doubt a number of factual situations which can be tested in court[1/] and while the burden of demonstrating damage, as well as the fairness and appropriateness of any requested relief would be upon the timber owners, nevertheless as a practical matter and in the absence of further judicial clarification of the respective rights of the parties, the full use and enjoyment of the surface of public lots from which the grass and timber has been sold may not be secured for long periods of time to annual campsite lessees solely by the State. So long as this remains the case, the agreement of the timber owners would be required and the manner in which the rentals are split is subject to negotiation between the parties.

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1. The Court declined, upon rather technical grounds, to meet the issue in Stetson v. Grant, supra, a case involving an effort by a grass and timber owner to eject the State's lessee of a public lot. The plaintiff lost because he alleged that he owned the land in fee simple and, failing to show that he owned the public lot in fee simple, he was precluded from showing merely a superior right. Cf. Rogers v. Biddeford and Saco Coal Co., 137 Me. 166 (1940).

The obverse of the rule noted hereinabove that the owner of the timber may do whatever is reasonably necessary for the proper exercise of the right to cut and carry away the timber, is the rule that the owner of the timber may not unreasonably impair the rights of the owner of the fee. For example, the owner of the timber may not utilize timbering methods that unreasonably impair the rights of the owner of the fee.[1] It has been held that where the owner of the fee can show unauthorized damage to the fee (from erosion, a fire hazard or retardation of new growth from pilings of slash) or damage to sizes or species of growth not owned by the timber owner or damage to improvements on the property, the owner of the fee can prevent the owner of the timber from, and recover damages for, clearcutting,[2] using a skidder,[3] building or using roads for the purpose of hauling timber from other lands,[4] building or

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1. Baca Land & Cattle Co. v. Savage, 440 F.2d 867, 872 (10th cir., 1971), citing numerous cases.

2. Baca Land & Cattle Co. v. Savage, supra. An annotation on this general subject appears at 151 A.L.R. 636.

3. Williams v. Bruton, 113 S.E. 319 (S.C. 1922); Furman v. A. C. Tuxbury Land & Timber Co., 99 S.E. 111 (S.C., 1919).

4. Rice v. W. L. Robinson Lumber Co., 70 So. 817 (Miss., 1916).

using a railroad[1] or a steamcar[2] or making unnecessary ditches or using machinery which damages the soil.[3] In determining what is an impairment of the rights of the owner of the fee, as for example clearcutting and the use of skidders, the Courts have deemed to be relevant the issue of whether or not the particular practice or technique was in common use at the time of the timber conveyance.[4] If it was not, then any damage resulting therefrom is presumed not to have been contemplated or intended by the parties and is more likely to be considered an unreasonable impairment of the landowner's rights. It has also been held that cutting practices which may be commonly used on lands owned in fee simple by the timber operators are not necessarily thereby permissible upon lands not owned in fee simple by the timber operators because in removing timber from lands not their own, timber operators have a duty to consider not only their own welfare but that of the landowner.[5] Further, it has been held that in the protection of the rights of the landowner, the court may require the construction of "water bars" to minimize erosion and may impose corrective methods, as for example the method of disposition of slash and debris,

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1. Williams v. Bruton, supra.
2. Ellerbe v. Marion County Lumber Co., 82 S.E. 1049 (S.C., 1914).
3. Jasper Land Co. v. Manchester Sawmills, 96 So. 417 (Ala., 1923).
4. Baca Land & Cattle Company v. Savage, supra, at 873.
5. Baca Land & Cattle Company v. Savage, supra, at page 874.

which are both expensive and "unheard of in forest practice,"[1]

The rights and obligations of the owners of the grass and timber rights and the State are not unlike those of the owners of the dominant and servient estates in the use and enjoyment of easements proper.[2]

> "The reasonable use and enjoyment of an easement is to be determined in the light of the situation of the property and the surrounding circumstances. No definite rule can be stated, however, as to what may be considered a proper and reasonable use as distinguished from an unreasonable and improper use. The question is usually one of fact." [3]

2. Unlocated Public Lots.

An assessment of the rights of the State in those townships where the public lot has not been located and where the grass and timber has been sold involves the application of the rules discussed hereinabove in the two subsections of this report dealing with those two situations separately. In brief, the State has all of the rights of a tenant in common in those townships, less the right to share in the timber and grass and it also has, to the

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1. Baca Land & Cattle Company v. Savage, supra, at page 874, 875.

2. In Beckworth v. Rossi, 157 Me. 532, 536 (1961) the Court equated a profit a prendre to an easement in this respect.

3. Beckworth v. Rossi, supra, at page 536.

extent of its fractional interest in the fee, the power to prevent damage to or unreasonable use of the fee by the timber owners. In Jasper Land Co. v. Manchester[1/], the plaintiff owned an undivided 49% interest in the fee simple (surface) and all the minerals but had conveyed "all the timber growing, standing, lying or being upon the land." The defendant's licensor owned the remaining undivided 51% of the fee and owned the timber. The plaintiff alleged, among other things, that the defendant had used and threatened to continue to use a "skidder or other machinery" which destroyed the young timber growth on the land depriving the plaintiff of future growth, and which made "great and unnecessary ditches, trenches and gulches in the surface of the land", thereby injuring the land. The Court held that the plaintiff, as a tenant in common of the fee, was entitled to enjoin its cotenant from destroying and committing such waste upon the common property.

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1. 96 So. 417 (Ala., 1923).

Whereas, the General Court of the Commonwealth OF MASSACHUSETTS hath appointed and authorized us, the undersigned, a Committee to sell and dispose of the unappropriated lands in the Counties of York, Cumberland, Lincoln, Hancock and Washington, being the estate of the said Commonwealth and within the same; and Whereas, the said Commonwealth, by us, Samuel Phillips, Leonard Jarvis, and John Read, on the first day of July, in the year of our Lord one thousand seven hundred and ninety-one, by certain covenants then by us made on the part of the said Commonwealth, did agree to sell and convey certain of said lands to Henry Jackson and Royal Flint or their legal Representatives, upon and for the performance of certain conditions by them on their part stipulated to be performed, and the said Jackson and Flint having by their Contracts agreed that William Duer and Henry Knox and their Assigns should become the Representatives of the said Jackson and Flint in the same contracts and agreement; and the said Duer and Knox having by their contracts agreed that William Bingham, of the city of Philadelphia and State of Pennsylvania, should become their Representative in the same purchase; and the Covenants made by the said Committee on the part of the said Commonwealth, and by the said Jackson and Flint on their own part being given up and cancelled; and the said Bingham appearing to purchase the same land;

Now Know all Men by these Presents, That the said Commonwealth, by us, the said SAMUEL PHILLIPS, LEONARD JARVIS and JOHN READ, the Committee of the same as aforesaid, appointed and authorized thereunto as aforesaid, for and in consideration of a large and valuable sum of money paid into the treasury of the said Commonwealth by the said WILLIAM BINGHAM, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, released and confirmed to the said WILLIAM BINGHAM, his Heirs and Assigns forever, AND BY THESE PRESENTS doth give, grant, bargain and sell, release and confirm unto the said WILLIAM BINGHAM, his Heirs and Assigns forever,

two certain tracts or parcels of Land

EXHIBIT "A"

in the Commonwealth of Massachusetts, being part of the middle division of Lottery Townships containing one hundred and thirty eight Thousand two hundred and forty acres. The first of which tracts lies in the county of Hancock and consists of the Townships number twenty, twenty one and twenty two, each containing twenty three Thousand and forty acres. The said tract bounding easterly on the west line of Township number twenty three, being the dividing line between the counties of Hancock and Washington; southerly on Townships number sixteen, fifteen and fourteen; westerly on part of Township number eight and part of Township number nine; northerly on Townships number twenty six, twenty seven and twenty eight. The second of said tracts lies in the County of Washington, and consists of Townships number twenty three, twenty four and twenty five, each containing twenty three thousand and forty acres. The said tract bounding westerly on the east line of Township number twenty two before mentioned; northerly on Townships number twenty nine, thirty and thirty one; easterly on

part of Lottery Township number twenty five and part of Township number twenty four, both the last mentioned Townships being in the East Division; southerly on Townships number nineteen, eighteen and seventeen, the three last mentioned Townships lying in the Middle Division. So as to comprehend within the said boundaries the quantity of one hundred and thirty eight thousand two hundred and forty acres.

The foregoing quantity with the several other tracts lying east of Penobscot River conveyed to the said Bingham by seven other deeds bearing even date herewith making in the whole exclusive of the Lands reserved for Public Lots, and for the Proprietors in the Land Lottery one million acres.

Reserving to the Adventurers in the Land Lottery, their Heirs and Assigns, the Lots which they severally drew, and to which they are entitled by virtue of an Act of the said Commonwealth passed on the fourteenth day of November, in the year of our Lord one thousand seven hundred and eighty-six, amounting in the whole to

nine thousand two hundred and eighty

acres, according to a return thereof attested by RUFUS PUTNAM, and deposited in the Office of the Secretary of the said Commonwealth; reserving also four Lots of three hundred and twenty acres each in every Township or Tract of six miles square, for the following purposes, *to wit:* One for the first settled Minister, one for the use of the Ministry, one for the use of Schools, and one for the future appropriation of the General Court. Said lots to average in goodness and situation with the other lots of the respective Townships. And also reserving to each of the settlers who settled on the premises before the first day of July, one thousand seven hundred and ninety-one, his Heirs and Assigns forever, one hundred acres of Land, to be laid out in one lot so as to include such improvements of the said settlers as were made previous to the said first day of July, one thousand seven hundred and ninety-one, and be least injurious to the adjoining lands. And each of the said settlers who settled before the first day of January, one thousand seven hundred and eighty-four, upon paying to the said WILLIAM BINGHAM, his Heirs or Assigns, five Spanish milled dollars, and every other of said settlers, upon paying to the said WILLIAM BINGHAM, his Heirs or Assigns, twenty Spanish milled Dollars, shall receive from him, the said WILLIAM BINGHAM, his Heirs or Assigns, a Deed of one hundred acres of the said Land, laid out as aforesaid, to hold the same in fee. The said Deeds to be given in two years from the date hereof, provided the settlers shall make payment as aforesaid within that period.

TO HAVE AND TO HOLD the same, with all and singular the privileges, appurtenances and immunities thereof, to him, the said WILLIAM BINGHAM, his Heirs and Assigns forever, to his and their only use and benefit. And the said Commonwealth doth hereby grant and agree to and with the said WILLIAM BINGHAM, his Heirs and Assigns, that the foregoing Premises are free of every Incumbrance saving always the reservations herein before expressed, and that the same shall be warranted and defended by the said Commonwealth to him, the said WILLIAM BINGHAM, his Heirs and Assigns forever, saving always the reservations aforesaid, with the immunity of being free from State Taxes until the first day of July, in the year of our Lord one thousand eight hundred and one, conformably to a Resolution of the General Court of the said Commonwealth, of the twenty-sixth day of March, one thousand seven hundred and eighty-eight, for that purpose made and provided.

In Testimony of all which, we, the said SAMUEL PHILLIPS, LEONARD JARVIS and JOHN READ, the Committee aforesaid, have hereunto set our Hands and Seals, the twenty-eighth day of January, in the Year of our Lord one thousand seven hundred and ninety-three.

Signed, Sealed and Delivered in the Presence of

James Sullivan,
David Cobb.

Signed, *Samuel Phillips,* [L. S.]
Leonard Jarvis, [L. S.]
John Read. [L. S.]

Know all men by these Presents, that we the
the undersigned, a Committee appointed by
the General Court of the Commonwealth of
Massachusetts, and by the resolves of the
same Court authorized and empowered to
sell and dispose of the unappropriated lands
of said Commonwealth, lying within the Counties
of York, Cumberland and Lincoln, for and in
consideration of the sum of six hundred
and twenty one pounds thirteen shillings
and eight pence Specie to us in hand paid by
Samuel Titcomb of Wells in the County of
York and Commonwealth aforesaid, Yeoman, the
receipt whereof we do hereby acknowledge
have granted, bargained, sold and conveyed,
and by these Presents in our capacity afore-
said, do grant, bargain, sell and convey unto
the said Samuel Titcomb, a Township of land
lying in the County of Lincoln on the west
side of Kennebec River, and bounded as follows;
Beginning at the point where the north line
of the Plymouth Company's lands shall touch
the west Bank of Kennebec River, thence
running west and bounded by said line
six miles to a rock maple tree marked P & T. 1.
& T. 2. for the southwest corner of township
No. 1, and the southeast corner of township No. 2;
thence north six miles and a quarter to a rock-
maple tree marked in like manner for the
northwest corner of township No. 1, and the
northeast corner of township No. 2; thence east
eight miles and sixty rods to Kennebec River
to a hemlock tree marked for the north-
east corner of township No. 1; thence southerly
on the west side of Kennebec River to the
first mentioned bounds, containing in the
whole township twenty eight thousand four
hundred and forty one acres, as by Mr. Ballard

EXHIBIT "D"

many and room; excepting and reserving four lots for public use viz: one lot for the first settled minister, one lot for the use of the ministry, one lot for the use of schools in said township, and the other lot for the future ~~disposal~~ appropriation of the General Court, each lot to contain three hundred and twenty acres, and to be laid out near the center of the township, and to be equal in quality with the lands in said township; and upon condition that the said Pitcomb shall execute good and sufficient Deeds, to the several persons hereafter named, of the lots and quantity of land assigned to them respectively, to hold the same in fee to them, their heirs and assigns forever viz: two hundred acres to each of the following settlers who settled on settlers lots, so called, and to their heirs and assigns viz: Henry Bickford lot No. 4; Robert Rogers lot No. 6; Ebenezer Littlefield lot No. 8; James Burnd lot No. 9; John Furgerson lot No. 10; Morris Fling lot No. 11; Ebenezer Hilton lot No. 12; John Hilton lot No. 13; Aaron Thompson lot No. 14; and William Huston lot No. 15; also four hundred acres to John Moore Esq & Sons, being lots No. 8 & 9; also one hundred acres to each of the following persons, their heirs and assigns, settlers in said township, (they each paying to the said Pitcomb five dollars within one year from the date of these Presents) viz: John Putnam half lot No. 4; Casper Hooper part of said lot No. 4, being the other half; John Walker part lot No. 5; Charles Savage lot No. 6; Joseph Hilton lot No. 10; Reuben Perry lot No. 1, Southside brook; Jonathan Albee lot No. 2 Charles Wade lot No. 3; George Gray lot No. 4; Isaac Albee lot No. 5; Thomas Paine lot No. 7; William Paine lot No. 8; Samuel Williams lot No. 9;

Andrew Nelson lot No. 11; Samuel McKenney lot No. 1 North side brook; James McKenny lot No. 2; John Metcalf lot No. 3; David Metcalf lot No. 4; David Paine lot No. 5; Joseph Paine lot No. 6; Isabel Paine lot No. 7; Aaron Hilton lot No. 9; and William Blackden lot No. 10. And reserving also the right of preemption to the following persons of one hundred acres each, provided they have paid or secured to be paid to the said Litcomb on or before the 6th day of June last past six pounds Specie each viz: Charles McKenny, William McKenny, Samuel Williams, Samuel Lawry, Nehemiah Gatchel, Robert Rogers, Nathaniel Davis, and Unite Keith. Also the right of preemption of another hundred acres to Unite Keith, Nehemiah Gatchell, Charles McKenny and William Mc. Kenny, provided they have paid or secured as before mentioned ten pounds each. All the lots so reserved to the settlers to be agreably to the plan and return made by Ephraim Ballard, Surveyor.

To have and to hold the said granted and bargained premises, with the reservations and on the conditions aforesaid, to him the said Samuel Litcomb, his heirs and assigns forever. And we the said Committee in behalf of the Commonwealth aforesaid, do agree, that the said Commonwealth shall warrant and defend the said granted and bargained premises, to him the said Samuel Litcomb, his heirs and assigns forever.

In testimony whereof the said Committee in their capacity aforesaid, have hereunto set their hands and seals this twenty second day of November one thousand seven hundred and ninety two.

Signed, Sealed and Delivered in presence of Saml. Cooper, Jno. Greene

L. Jarvis (seal)
John Read (seal)
Dan. Coony (seal)

Acknowledged Nov. 22nd 1792 before Saml. Cooper, Justice of the Peace.

Joel Wellington $3000. 25040 acres T A R 1 41

Know all Men by these Presents,

THAT I, Daniel Rose "Agent to superintend and manage the sale and settlement of the Public Lands" of the STATE OF MAINE, in virtue of the authority by Law in such Agent vested, in consideration of three thousand dollars to me paid for the use of said State, by Joel Wellington of Sidney in the county of Kennebec Esquire

the receipt whereof, to the use aforesaid, I acknowledge, do hereby in behalf of said State, give, grant, bargain, sell and convey to said Joel Wellington his heirs and assigns forever, the following described land, to wit:—

Township A in the first range of Townships on the eastern line of said state surveyed by Jonah Norris and laid down in his plan thereof dated December 22 1825 and containing according to said plan said survey twenty three thousand and forty acres, be the same more or less and without any allowance or claim for any deficiency or defect in said survey whatever. Reserving in said township one thousand acres to be of average quality and situation with the other lands in said township to be appropriated by the legislature of Maine for public uses for the exclusive benefit of said town.

TO HAVE AND TO HOLD THE SAME, with all the privileges and appurtenances thereof, to the said Joel Wellington his heirs and assigns, to his and their use and behoof forever.

In Testimony Whereof, I, the said Agent, in behalf of said State, have hereunto subscribed my name and affixed my seal, this fourteenth day of February in the year of our Lord one thousand eight hundred and twenty nine

Signed, Sealed and Delivered in Presence of us,

Daniel Rose (L.S.)

Edwin Rose

Cumberland ss. Feb 15 1829 *Personally appeared* Daniel Rose *and acknowledged the above instrument by him subscribed, to be his act and deed as Agent as aforesaid, made in behalf of said State.*

Before me,

Justice Peace.

EXHIBIT "C"

R14

KNOW ALL MEN BY THESE PRESENTS,

That I, A. P. Morrill Land Agent of the State of Maine, by virtue of authority vested in me by an act of the Legislature of this State, entitled "An Act in relation to lands reserved for public uses," approved August 28th, 1850, and in consideration of ~~to~~ Two hundred fifty dollars to me paid by S. D. & H. Strickland of Bangor in the County of Penobscot the receipt whereof I hereby acknowledge, have granted, bargained and sold, and do by these presents bargain and sell unto the said Stricklands ~~his~~ heirs, executors, administrators and asssigns, the right to cut and carry away the timber and grass from the reserved lots in Township numbered five in the fourteenth range of Townships in the County of Piscataquis

excepting and reserving, however, the grass growing upon any improvements made by any actual settler, said right to cut and carry away said timber and grass to continue until the said township or tract shall be incorporated, or organized for Plantation purposes, and no longer.

TO HAVE AND TO HOLD, the same as aforesaid to ~~him~~ them the said Stricklands ~~his~~ heirs, executors, administrators and assigns.

IN WITNESS WHEREOF, I the said A. P. Morrill in my said capacity of Land Agent as aforesaid, have hereunto set my hand and seal, this tenth day of April in the year of our Lord, A. D. 1852

SIGNED, SEALED AND DELIVERED IN PRESENCE OF

I. R. Clark

A. P. Morrill Seal

Penobscot ss. April 17 1852 Then personally appeared A. P. Morrill Land Agent of Maine, and acknowledged the above instrument by him signed to be his free act and deed. Before me,

Isaac R. Clark Justice of the Peace.

EXHIBIT "E"