80-157

RICHARD S. COHEN
ATTORNEY GENERAL

STEPHEN L. DIAMOND
JOHN S. GLEASON
JOHN M. R. PATERSON
ROBERT J. STOLT
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

December 16, 1980

Honorable Eugene J. Paradis
Box 273
Stillwater, Maine 04489

Dear Representative Paradis:

You have requested this office to render an opinion concerning the status of a parcel of land in the Town of Milford, Maine, as a school lot. A private party claiming ownership to the parcel of land wishes to develop it but is encountering some difficulty as a result of the uncertainty of the ownership and status of the property.1/

For the reasons set forth below, we are inclined towards the view that the parcel of land in question has retained its original status as a public lot. However, because of the nature of the issues that lead to this conclusion, especially to the extent they entail questions of title and historical questions concerning the use of the parcel and transactions involving it, we are not in a position to reach any firm conclusions without a full factual record, which would most appropriately be developed in an adversary context before a court. In addition, only a court or the Legislature can put the real estate title questions of the kind at issue here to rest in a manner that will fully satisfy future owners and others involved commercially with the property. With this background we proceed to provide you with our analysis of the issue.

Under the law in place prior to 1973, incorporated towns were free to sell all or part of their public reserved lands in accordance with 13 M.R.S.A. § 3164, repealed by P.L. 1973, c. 628, § 4-A.2/ In 1973, the Legislature provided that:

1/ We understand the request was made in response to certain written views expressed by counsel to the Maine Municipal Association and to concerns raised by Carlton Bryer who believes he holds the fee to this parcel of land.

2/ For a more detailed discussion of the history of public reserved lands, see Opinions of the Attorney General, dated May 19 and November 9, 1979; Schepps, Maine's Public Lots: The Emergence of a Public Trust, 26 Maine L. Rev. 217 (1974).

> Where lands have been granted or reserved for the use of the ministry or first settled minister, or for the use of schools, in any town incorporated and in existence on January 1, 1973, and the fee in these lands has not vested in some particular parish therein or in some individual, it shall vest in the inhabitants of such town and not in any particular parish therein for such uses. The inhabitants of any such town shall hold and enjoy said public reserved lands subject to the control of and subject to responsibilities imposed by the State. 13 M.R.S.A. § 3161.

The Town of Milford was incorporated in 1833. P.&S.L. 1833, c. 351. Thus, any school lot still vested in the Town of Milford on January 1, 1973, can no longer be freely sold by it.

In addressing the status of the parcel in question here, this Office has relied entirely on an abstract of title submitted to this Office by Mr. Bryer and has assumed all information contained in such abstract to be entirely correct.[3/]

From the information that has been supplied to us, it appears that in 1838, a 200 acre parcel of land was located and accepted as a public lot designated for schools in the Town of Milford. Penobscot Registry of Deeds, Vol. 191, pp. 311, 313 and 316. At that time the Trustees of the Ministerial and School Fund for the Town of Milford ("Trustees") were authorized to manage and sell such a lot for the support of the schools. See P.L. 1832, c. 39, § 2; P.L. 1831, c. 492; P.L. 1824, chs. 254, § 3, and 280, § 8. It then appears that in a deed dated March 2, 1850, the Trustees quitclaimed this parcel of land to Hosea B. Emery. Id., at Vol. 203, p. 348. The Trustees covenanted that they complied with all laws regulating the sale of Ministerial and School lands. Id.

It is our understanding that in September of 1850, two transactions with respect to this parcel of land took place. On the 21st of September, Emery conveyed the parcel to Joseph Butterfield and Robert Davis, Jr. Id. at Vol. 207, p. 450. Butterfield and Davis then, in a deed dated September 25, in consideration of $800 paid by the Trustees, appear to have conveyed to the Trustees the land "being one of the lots formerly belonging to the Trustees." Id. at Vol. 207, p. 453. Thus, the parcel was re-conveyed to the Trustees within seven months of the conveyance to Emery, apparently because

---

3/ The abstract of title appears to have been prepared by John D. Bunker, Esq. We have neither the expertise nor the resources to search title records, especially in a case as complicated as this one involving title transactions occurring over 140 years ago.

the debt to the Trustees arising out of the original transaction was transferred to and assumed by Butterfield and Davis. The September 25 deed provides that the Trustees were:

> To have and to hold the aforementioned premises with all the privileges and appurtenances unto the same belonging to the said Trustees and their successors in Office to the use of the fund forever . . . . Provided nevertheless that if the said Butterfield [and] Davis . . . [shall] pay to the said Trustees . . . the sum of [$800] payable [in one-third installments on November 21, 1850, 1851 and 1852, with interest], this deed shall be void . . . (Emphasis added).

The fund referred to in the September 25 deed, of course, is the Ministerial and School Fund which is held by the Trustees in trust for the support of the schools and ministries in that town. See P.L. 1832, c. 39, § 2; P.L. 1831, c. 492; P.L. 1824, chs. 254, § 3, and 280, § 8.

It is our further understanding that on January 12, 1858, the Trustees caused to be recorded in the registry of deeds a Notice of Foreclosure against Butterfield and Davis on the premises described in the September 25 deed, the Notice being published previously in a newspaper, "The Democrat," on December 8, 15 and 22, 1857. Penobscot County Registry of Deeds, Vol. D, p. 93. The statutes then in effect provided that foreclosure could be accomplished by publication in a newspaper printed in the county where the premises are situated or in the state paper three successive weeks setting forth the specifics of the mortgage and the breach thereof, and by causing a copy thereof to be filed in the registry of deeds. R.S. 1857, c. 90, § 5 (First). This appears to have been accomplished by the Trustees. The statutes further provide that the mortgagor, or person claiming under him, may redeem the mortgaged premises within three years after first publication, "and if not so redeemed his right of redemption shall be forever foreclosed." R.S. 1857, c. 90, § 6. In this case, pursuant to the facts made known to us, Butterfield and Davis would have had until December 8, 1860 to redeem. There is apparently no record of such a redemption or the discharge of the mortgage. The mortgage could be discharged

> "by the deed of release from the person authorized to discharge it, or by causing satisfaction and payment under his hand to be entered in the margin of the record of such mortgage in the register's office." R.S. 1857, c. 90, § 26.

To our knowledge, no such deed of release or notation of discharge has been found with respect to the September 25 deed in the registry.

From this, we can only conclude there was no redemption, and all rights in the parcel vested in the Trustees.

The question arises of whether the parcel re-conveyed to the Trustees is again considered a school lot within the scope of 13 M.R.S.A. § 3161 or whether it is merely "town-owned property" outside the scope of that provision. No case law has been found on this question. The Butterfield and Davis deed to the Trustees, however, suggests the answer. That deed makes a conveyance to the Trustees, rather than to the Town. Further, the deed provides that the Trustees are to hold the parcel "with all the privileges. . . unto the same belonging to the said Trustees and their successors in office to the use of the fund forever." Under the deed the Trustees hold the parcel with the same privileges and for the same uses as it was held prior to the Trustees' conveyance to Emery on March 2, 1850, i.e., "to the use of the fund." To find that the same parcel of land held for the same purposes by the Trustees is no longer land reserved for the use of schools on the basis of loss of title for a seven-month period of time in 1850 would be a victory of form over substance.

The language of 13 M.R.S.A. § 3161 does provide that its mandate does not apply to lands "vested in . . . some individual." An argument can be made that since this parcel did vest in an individual or individuals in 1850, albeit for only seven months, section 3161 is not applicable to the parcel. This argument requires a strained reading of the statute. The statutory phrase "has not vested" evinces a continuing and present state of ownership. Thus, giving the language of the statute its plain meaning (Paradis v. Webber Hospital, 409 A.2d 672 (Me. 1979)), section 3161 applies to a parcel, originally designated as a school lot, to which title was held by the Trustees in 1973, even though title to that parcel had briefly vested in another party prior to 1973. Moreover, the intent of the Legislature that the ministerial and school lots be held and preserved for the "beneficial uses" of the public (Opinion of the Justices, 308 A.2d 253, 269-70 (Me. 1973)), is furthered by the interpretation treating this parcel in the hands of the Trustees as a school lot rather than as mere "town-owned property" to be dealt with in any manner the Town may choose.

Finally we note that there is a procedure, set forth in 14 M.R.S.A. § 6104, pursuant to which a mortgagor (such as Butterfield and Davis) or his successor (such as Mr. Bryer) may petition the Superior Court for clarification of ownership "[w]hen the record title of real estate is encumbered by an undischarged mortgage, and the mortgagor and those having his estate in the premises have been in uninterrupted possession of such real estate for 20 years after the expiration of the time limited in the mortgage for the full performance of the condition thereof. . . . " [Emphasis added]. In

such cases the Superior Court will issue a decree which will prevent any person from enforcing the mortgage, if, after appropriate notice to affected parties, "no evidence is offered of any payment within said 20 years or any other act within said time, in recognition of its existence as a valid mortgage. . . ." This procedure may well have been available to Mr. Bryer, the present claimant to the property, were it not for the recorded existence of a foreclosure on the Butterfield and Davis mortgage over 120 years ago. While Butterfield or Davis may have redeemed the mortgaged premises back then without recording their redemption, the title information made available to this office indicates that Butterfield and Davis lost all their rights in the property to the Trustees as of December 8, 1860. Thus it appears that as of that date, there was no "encumbrance" on the property in question by an "undischarged mortgage" because, as a result of the foreclosure, the Trustees acquired absolute title. Assuming the accuracy of the title information, then, it appears that the procedure for clarifying title in 14 M.R.S.A. § 6104 is unavailable to Mr. Bryer.[4/]

In conclusion, on the basis of the abstract of title submitted, the mortgage in the September 25, 1850 deed from Butterfield and Davis to the Trustees was foreclosed upon by the Trustees, without the further opportunity for redemption as of December 8, 1860. As a result thereof, it appears that the parcel was then a school lot and must now be considered as such for the purposes of 13 M.R.S.A. § 1361. If this conclusion is accurate, the Town of Milford could not freely convey its interest in the parcel without obtaining authority for such conveyance from the Legislature.

Having offered our views on this question, we must emphasize that our conclusion is less than certain. As noted above, we have had to analyze the problem on the basis of factual assumptions which might, after a full adversary hearing, prove to be inaccurate or incomplete. In any event, given the complexity of the issues involved as well as the need for certainty in real estate titles, Mr. Bryer's best course of action would be to seek to persuade the Legislature to enact a resolve authorizing the conveyance by the Town of its interest in the parcel. Should that fail, Mr. Bryer

---

4/ It also may have been possible to obtain title against the Trustees and Town by adverse possession. From 1847 until 1885, it appears that state and political subdivisions could be disseized of public lands by 20 years adverse possession. R.S. 1841, c. 147, § 12, repealed by P.L. 1885, c. 368; Phinney v. Gardner, 121 Me. 44 (1921). However, we have no basis of analyzing this possibility with the facts available to us.

might wish to consider litigation, particularly in light of the tentative nature of our conclusion. Needless to say, the decision to litigate should be made on the basis of advice from private counsel as to the cost of such a lawsuit and its probability of success.

I hope this information is helpful. Please feel free to contact us if we can be of any further service.

Sincerely,

RICHARD S. COHEN
Attorney General

RSC:jg
Enclosure