STATE, PUBLIC, AND PRIVATE RIGHTS, PRIVILEGES, AND POWERS

Partial report under a study carried out under the joint sponsorship of:
The School of Law of the University of Maine
and
The National Science Foundation
Office of the Sea Grant Programs

MAINE LAW AFFECTING MARINE RESOURCES

VOLUME II

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PREFACE

This is the second volume of a study of Maine law being carried out as a joint project of the School of Law of the University of Maine and the National Science Foundation, made possible by the encouragement and financial assistance of the Office of Sea Grant Programs, National Science Foundation. The major portion of the funds expended in support of this project were furnished to the School of Law under Grant No. GH 0022 awarded by the National Science Foundation pursuant to the National Sea Grant Colleges and Program Act of 1966, Public Law 89-688.

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VOLUME II STATE, PUBLIC, AND PRIVATE

RIGHTS, PRIVILEGES, AND POWERS

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* Contributed by Harriet P. Henry

INTRODUCTION

Oceanography is too important to be left to oceanographers... Wilbert M. Chapman, Second Sea Grant Conference.

Maine's destiny has long been linked with the sea. Centuries before the oceanographic decade, the people of Maine lived by the sea and from the sea. The earliest exploiters of the sea were hunters and to a limited extent harvesters of living resources from the sea. Man went down to the sea in ships built in Maine which plied the coastal and international trade lanes. Maine products were transported on these ships and ports flourished. The sea and coastal configuration of Maine have helped mold the character of Maine and its people. These people in turn have made products from Maine symbols of quality and dependability. Affinity with the sea has become for many, not only a livelihood, but a way of life.

Maine's dreams have also long been inspired by the sea. Every generation has had its own visions of greatness, be it harnessing the sea's great power in a Passamaquoddy power project or reaping wealth from the sea by locating oil in the Gulf of Maine. Today differs from yesterday in that the substance of many dreams is now technically possible of accomplishment. Within a finite span of time, even those that are presently impossible will be brought within the realm of probability. The mere fact that it will be some time before some of the more euphoric speculations of oceanographic attainment will become reality is no reason to consider any present investment in oceanographic enterprises as "wet roulette."*

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* See Wall Street Journal, September 16, 1968, p.1.

Although never designated as such, Maine has a long history of oceanographic endeavors. Yesterday differs from today and tomorrow, however, in that modern technology and the pressure of population are accelerating both the development and the despoilment of Maine's marine resources.

THe questions to be considered in this report are: To what extent is the present legal structure of Maine appropriate for and responsive to the present and future extensive exploitation of this common property resource? Which portions of this structure make sense from an economic point of view? from a conservation point of view? from any point of view? What criteria should be used to weigh conflicting demands of development versus conservation and in what manner should such conflicts be resolved?

SCOPE OF REPORT

The scope of this report is limited to a survey of Maine law. While it sometimes has been necessary to refer to international or federal law to place Maine law in context, no attempt has been made to analyze or interpret such law unless absolutely essential to an understanding of the legal framework in Maine. Similarly, though fully cognizant of its value, it has not been possible to compare Maine law with similar statutes or lack of statutes in other jurisdictions except on a very selective basis when necessary to clarify a Maine provision or to highlight an area of inadequate coverage in Maine.

Within the framework of Maine law,* the survey has been exhaustive. In many instances the inquiry has departed from that which is expressly ocean related, to explore other portions of Maine law that have tremendous impact on the management of marine resources. In a coastal state such as Maine, marine law is so integrally interwoven in the fabric of the total legal structure that any cut off must be arbitrary; because of this interrelationship and interdependence we have chosen to err on the side of overinclusiveness. We have also included a cataloguing of basic legal principles of law on ownership in the land sea interface in the absence of any legal or non-legal publications in Maine on this subject.

Although the law at some point may be considered finite, the potential for interdisciplinary analysis is infinite. To incorporate the point of view of many disciplines and at the same time assure a manageable and meaningful report, it has been necessary to use these resources selectively. The utilization of an interdisciplinary fund of knowledge is reflected in the report in the following ways.

1. Comprehensive orientation of the report.
2. Interviews with representative opinions in other fields.
3. Appraising the conflicting values present in specific problem situations. For example: each of three recent efforts to bring new industry to the shore has involved legal problems of implementation (Machiasport: creation of free trade

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* As of January 1, 1970; Changes made at the Special Session of the 104th Legislature, January-February 1970 will be summarized at the end of Volume III.

zones, State Government organization, eminent domain, zoning; Tepco Aluminum/Trenton: referendum approval of bond issue; King Resources/Long Island: zoning, oil regulations.). But each also has been intimately involved with the general economic condition of the State, with potential pollution, with recreational development, and conservation considerations.

4. In-depth review of limited legal areas by non-legal specialists.
5. Development of interrelationship among various Chapters of the report.

The report as a whole represents a synthesis and composite of a wide variety of legal and non-legal sources as well as individual opinions. Extensive documentation of the law and facts herein contained should prove a valuable reference to those interested in marine resources. The report has attempted to definitively set forth what Maine law is. The legal and interdisciplinary analysis and critique of present law has indicated in a general manner what the law should be. Hopefully the report will be helpful for those who decide what the law will be.

Portland, Maine January 12, 1970

CHAPTER TWO MARINE BOUNDARIES

Legal criteria to determine Maine's marine boundaries include not only applicable rules of law to determine the extent of Maine's territorial waters,[1] but also criteria for determining county boundaries, town boundaries, jurisdictional boundaries of State agencies in marine waters, and the demarcation of private versus public ownership on the land sea interface. The method of apportioning the flats between adjacent riparian owners, interpretation of language in deeds conveying shore front property, and the effect of accretion, avulsion, and reliction[2] will also be treated herein.

I LEGAL CRITERIA

Although the primary object of this project is to identify all existing provisions of Maine law which affect marine resources, the first field of inquiry must be a cursory examination of the international and federal body of law which determines the geographical extent of Maine's sovereignty and jurisdiction. This will place in context the definition of Maine's sovereignty and jurisdictional boundaries as set forth by Maine law.

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1. Specifically excluded from the scope of this study is Maine's historical claim, based on colonial charters and grants, to a hundred miles seaward boundary. This claim is now the subject of a suit by the United States Justice Department versus Maine and other Atlantic Coast States to quiet title. (Cause No. 35, Original, in the Supreme Court. For the complaint and other preliminary documents see 8 I.L.M. 850 (1969); the Supreme Court accepted jurisdiction on June 16, 1969, 89 S. Co. 2095.). (Portland Press Herald, March 14, 1969, p.1.).

2. Portions of this section might more accurately be described as pertaining to ownership rather than boundaries but because of the unique nature of the seashore are included in this chapter. See Chapter 3 for a more detailed discussion of the nature of private ownership.

INTERNATIONAL LAW

In modern international law, a marine league, or three nautical miles,[3] is the maximum universally accepted boundary of a coastal state's territorial waters. This distance was originally predicated on the theory that a nation-state could only lay claim to such territory as it was able to defend and protect from the shore. Three miles was historically established because it coincided with the range of a cannon.[4] Technological advancements in naval and military capabilities have rendered the rationale of this measurement obsolete, but the standard remains. Nation-states, of course, are claiming a much greater distance, ranging from 4 to 200 miles, not only for the breadth of their territorial sea but for zones for specialized purposes.[5] Only

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3. "It is common knowledge that on the oceans, seas and coastal waters generally, distances are measured in nautical miles. And it is presumed unless otherwise specified, that distances on water refer to nautical rather than land miles." Buttimer v. Detroit Sulphite Co., 39 F.Supp.222,227(D.Mich. 1941). So spoke the Michigan District Court in decreeing that despite the fact that the Great Lakes are mapped and chartered in land miles, a clause in a contract for a 600 mile, round trip on Lake Superior clearly must be interpreted as marine miles.

   The Maine Supreme Court had the unique experience of first ruling on whether a warranty that a steamship would go 15 miles per hour referred to land or sea miles. In ruling that the contract referred to sea miles the court recognized that it is impossible to measure the sea in the same manner as land is measured. The Court turned a deaf ear to defendant's plea that for reimbursement for travel there was not one kind of mile for army officers and civilians and one sort of mile for naval officers. (Steamboat Co. v. Fessenden, 79 Me. 140, 8 A. 550 (1887). In Lazell v. Boardman (103 Me. 292, 69 A. 97 (1907)) title to an island depended on whether the three mile territorial limit of the State was measured by marine or statute miles. After reciting the history of statute miles which originated in England in 1593 and has been adopted only by England and the United States, the Court held marine miles measure the three mile limit.

4. I. Shalowitz, A.L. Shore and Sea Boundaries, p.25, (1962). Kent, The Historical Origin of the Three Mile Limit, 48 Am. Journal Int'l. Law 537 (1954) (Hereinafter cited as Shalowitz).

5. I. Shalowitz, Appendix J.

in rare instances have such deviations from the three mile limit been universally accepted by other nations or recognized by international tribunals.[6] A twelve mile territorial sea, however, is gaining broader acceptance.[7]

In February, 1958, the First Conference on the Law of the Sea was convened in Geneva. Representatives of 86 states were able to achieve a wide area of agreement, including basic rules for defining the limits of inland waters, for drawing baselines from which to measure the territorial sea, for determining the status of indentations, and for delineating the outer limits of the territorial sea to the high sea. Even these basic rules were subject to further amplification in applying them to different coastal configurations, but this conference represented the first major attempt at codification since the League of Nations Conference held in Geneva in 1930.[8] Left unresolved by this 1958 conference were two major questions: the establishment of the breadth of

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6. See United Kingdom v. Norway, International Court of Justice, 1951, 1951 I.C.J. Rep. 116.

7. Recent years have seen a steady erosion of the concept of an absolute three nautical mile territorial sea. It is now almost universally accepted that the nation-state has resource jurisdiction over the continental shelf (however defined), and may establish special zones beyond three nautical miles in which it asserts exclusive jurisdiction over fishing and special jurisdiction for defense purposes (e.g., U.S. Air Defense Identification Zones). Not all claims to expanded seaward jurisdiction are so accepted. While the claim of a twelve nautical mile territorial sea seems to be accepted, at least tacitly, even by the U.S. (e.g. in the Pueblo affair), the claims of Peru and other South American nations to 200 nautical mile jurisdiction are generally rejected.

8. I. Shalowitz, p.209 et seq.

the territorial sea and fishing rights within a contiguous zone.[9] The question of breadth of the territorial sea was still left unresolved after the Second Law of the Sea Conference in Geneva in March, 1960. A six mile compromise between those nations who favored a three mile limit and those who adhered to a 12 mile limit failed to be accepted by a lack of one vote for the required two-thirds majority. Areas of agreement were incorporated in the Convention on the Territorial Sea and Contiguous Zone.[10] One significant standard adopted was the 24 mile closing line for bays. The criteria for measuring the 24 miles were set forth in the Convention. Exception from these provisions were made for historic bays. The United States ratified this Convention in 1961.[11]

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9. Id. Shalowitz noted that from the standpoint of delineation the breadth of the territorial sea is a political rather than a technical problem. Whatever its width, the same methods of delineation will be applicable.

10. U.N. Document A/Conf. 13/L. 52.

11. (1964) 15 U.S.T. (Pt. 2) 1606, T.I.A.S. No. 5639. See United States v. Louisiana, March 3, 1969, 37 LW 4139.

12

CHART 1.

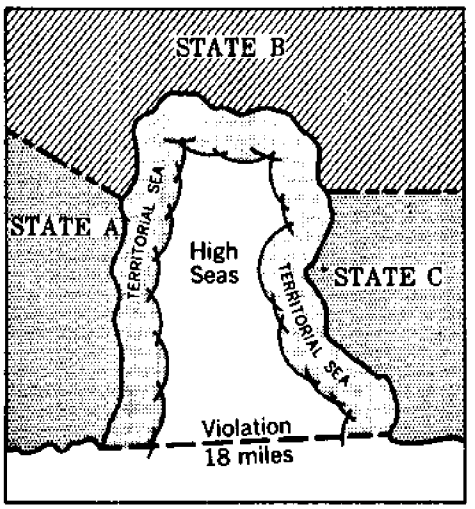

FIGURE 38.—No closing line is permissible across a bay formed by the coasts of two or more States to deny access to other States.

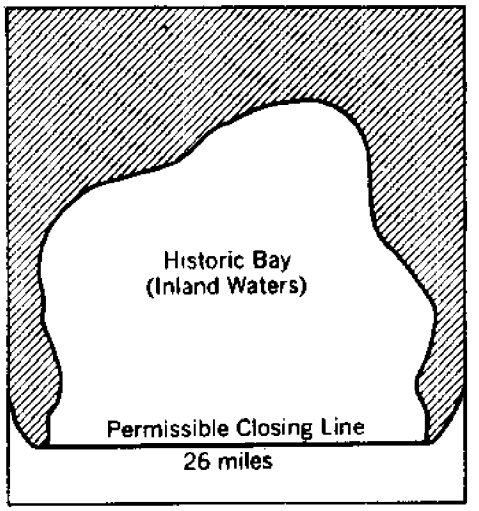

FIGURE 39.—The 24-mile closing line limitation does not apply to historic bays. No limitation on width of opening is required.

13

CHART 2.

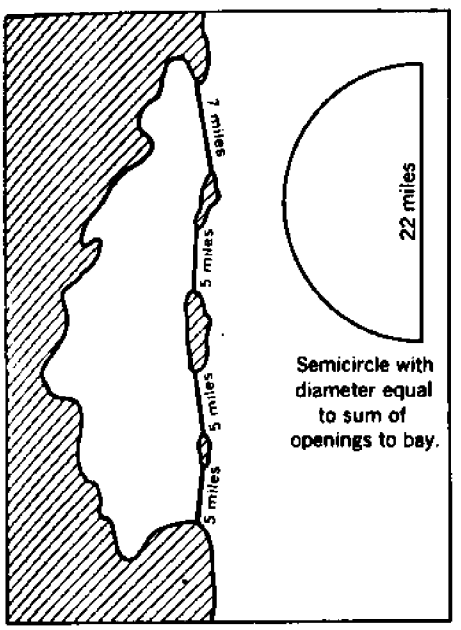

FIGURE 40.—The closing line of a multi-mouthed bay cannot exceed 24 nautical miles as measured across water entrances between the islands.

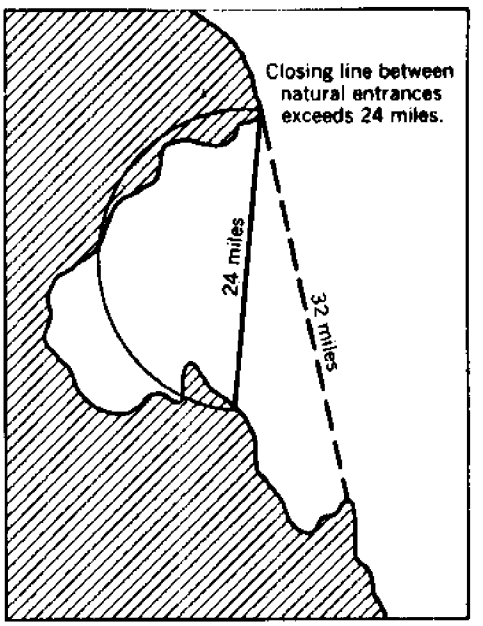

FIGURE 41.—24 miles is the maximum closing line allowable. Where the distance between headlands exceeds this amount a closing line is drawn within the bay.

12. I. Shalowitz, Shore and Sea Boundaries, p.219.

13. Id. at p.221.

14

CHART 3.

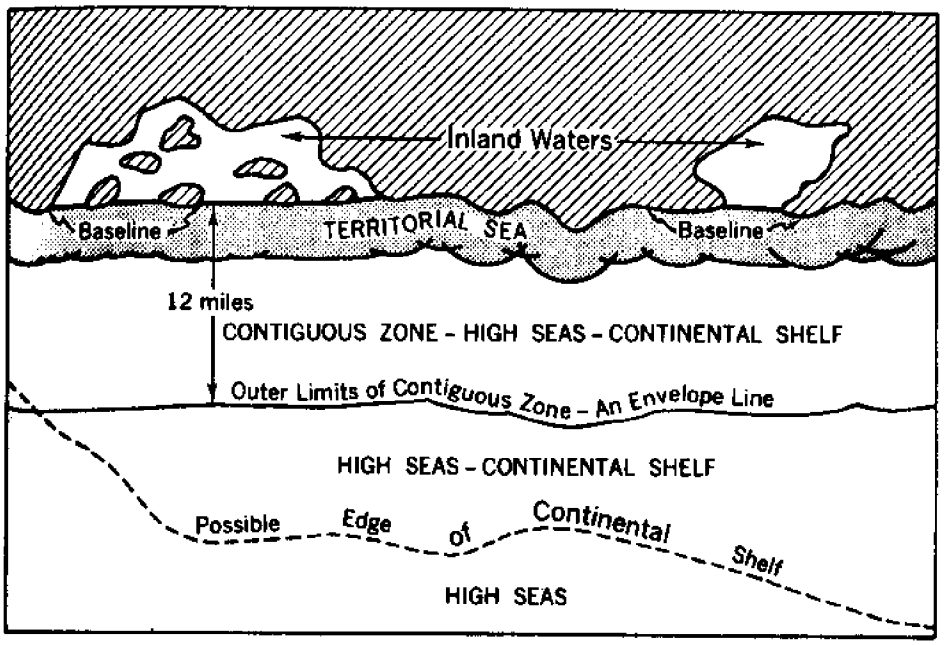

FIGURE 51.—Zones of water areas recognized in international law. These zones are not mutually exclusive but overlap in some instances.

15

The Convention on the Continental Shelf was also adopted at the First Law of the Sea Conference. This Convention attempted to legislate the areas in which coastal states could exercise their sovereign rights over the continental shelf for the purposes of exploring it and exploiting its natural resources. The continental shelf was defined as

> ...the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond the limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the sea-bed and subsoil of similar submarine areas adjacent to the coasts of islands.[16]

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14. Id. at p.239.

15. U.N. Documents A/Conf. 13/L. 55.

16. Id. at Article 1.

These criteria have been widely criticized. One objection is that the exploitability test does not satisfy the requirement of certainty essential in a legal concept.[17] Myres S. McDougal, co-author of The Public Order of the Oceans, commented

> With specific reference to the continental shelf, as we all know, the geographic configurations around the world are very, very different; but here the geographers and lawyers are in great disagreement. The achievement on this was of course the highlight in brilliance of the 1958 conventions. What was the provision: to a depth 200 meters or as far as one can dig? How far can one dig, if one can trust the New York Times, is apparently changing every few minutes. This is again the kind of legislation which emerges from these great conferences. The important tasks in the accommodation of inclusive and exclusive interests are left to the future.[18]

He summarizes the impact of this and the three other conventions drawn up at the conference as follows:

> ....I think it may take a hundred years for the law of the sea to recover from the last two international conferences which dealt with it, and I would regard the immediate call of another conference as an unmitigated disaster....[19]

In the first international adjudication under the Convention on the Continental Shelf, the International Court of Justice held that a non-party to the Convention is not bound by its equidistance criterion for delineating the continental shelf between adjacent states; the equidistance principle not being a rule of customary international law, it thus could not be accorded universal

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17. Shalowitz, supra, p.246.

18. Alexander, L.M., The Law of the Sea; McDougal, M.S. "International Law and the Law of the Sea", p.21. Ohio State University Press, 1967.

19. Id. at p.3.

applicability.[20]

BI-LATERAL TREATIES: MAINE - CANADIAN BORDER

Although the subject of numerous treaties, the precise demarcation of the seaward boundaries between the United States and Canada have never been definitely ascertained. There is still disagreement between the United States and Canada in the Bay of Fundy with regard to fishing rights and granting leases for oil exploitation and seaweed gathering. Various treaties dating from the Webster-Ashburton Treaty with Great Britain in 1842 to the 1925 treaty between Great

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20. The North Sea Continental Shelf Case. (International Legal Materials, March, 1969.) This case dealt with the delineating of the continental shelf between the Federal Republic of Germany and Denmark on one hand, and between Germany and the Netherlands on the other. The court rejected the contention of Denmark and the Netherlands that the delimitation had to be carried out in accordance with principle of equidistance as defined in Article 6 of the 1958 Geneva Convention on the Continental Shelf.

    It held that each party had an original right to those areas of continental shelf which constituted the natural prolongation of its land territory into and under the sea. If such a delimitation produces overlapping areas, they are to be divided between the parties in agreed proportions, or failing agreement equally, unless they decide on a joint regime.

    The factors to be taken into account by the parties in arriving at a delimitation are to include: general configuration of the coasts of the parties, as well as the presence of any special or unusual features; the physical and geological structure and natural resources of the continental shelf areas involved; a reasonable degree of proportionality between the extent of the continental shelf areas apertaining to each State and the length of its coast measured in general direction of the coastline; and the effects, actual or prospective, of any other continental shelf delimitations in the same region. (Text of majority opinion, 63 A.J.I.L. 591 (1969)).

Britain and Canada and the United States, have dealt with this problem.[21] This later treaty recited that

> And whereas it has been found by the surveys executed pursuant to the said Treaty of May 21, 1910, that the terminus of the boundary line defined by said Treaty at the Middle of Grand Manan Channel is less than three nautical miles distant both from the shore line of Grand Manan Island in the Dominion of Canada and from the shore line of the State of Maine in the United States, and that there is a small zone of waters controvertible jurisdiction in Grand Manan Channel, between said terminus and High Seas;
>
> The Contracting Parties in order completely to define the boundary line between the United States and the Dominion of Canada in the Grand Manan Channel, hereby agree that an additional course shall be extended from the terminus of the boundary line defined by the said Treaty of May 21, 1910, south 34°42' west, for a distance of two thousand three hundred eighty-three (2,383) meters, through the middle of Grand Manan Channel to the High Seas....[22]

The Commissioners appointed under the 1908 treaty[23] were to have located and marked this boundary. The 1909 Boundary Water Treaty, negotiated by Great Britain and the United States with regard to Boundary Waters between the United States and Canada, dealt primarily with the use of the waters between the two countries rather than delineating the water boundaries. The International Joint Commission was set up by Article VII of this Treaty.[24]

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21. 8 Stat. 572 (August 9, 1842); 35 Stat. 2003 (April 11, 1908); 36 Stat. 2477 (May 21, 1910); and 44 Stat. 2102 (February 24, (1925).

22. 44 Stat. 2105.

23. 35 Stat. 2003 (1908).

24. 36 Stat. 2448 (January 11, 1909).

FEDERAL:

President Truman's proclamation of September 28, 1945 on the Continental Shelf marks one of the earliest official declarations by the United States of its future intentions in the oceans and its recognition of the unlimited potential of extracting mineral resources from the sea. This unilateral move attempted to extend the jurisdiction and control of the United States over the natural resources of the sub-soil and sea bed of the continental shelf. It did not purport to change "The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation..."[25]

A most significant piece of federal legislation was the Submerged Lands Act of 1953[26] enacted in response to the Supreme Court's decision in United States v. California, 332 U.S. 19, (1947); United States v. Texas, 339 U.S. 707, (1950) and United States v. Louisiana, 339 U.S. 699 (1950) that the States did not own the submerged lands off their coast and that the United States had paramount rights in such lands. This act quitclaimed to the States submerged lands within three geographical miles of the coast line. Texas and Florida were given nine miles because of historical considerations. The United States was declared entitled to submerged lands further seaward. "Coastline" has been defined as "the line of ordinary low water mark along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."[27]

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25. Proclamation No. 2667 (59 Stat. 884).

26. 67 Stat. 29, 43 U.S.C. §§1301-1315 (1964).

27. 43 U.S.C. §1301(c) (1964). See also United States v. Louisiana, 364 U.S. 502, 503 (1960).

In United States v. California, 381 U.S. 139 (1965) the Supreme Court held that Congress had left to the Court the task of defining "inland Water" and adopted for the purposes of the Submerged Land Act the definitions contained in the international Convention on the Territorial Sea and Contiguous Zone.[28] In the same case it was also held that "the choice under the Convention to use the straight base line method"[29] is one that rests with the federal government and is not a question to be decided by the individual states inasmuch as it involves an international boundary.[30] A recent U.S. Supreme Court decision[31] discussed in detail the Supreme Court's interpretation and application of the Convention and held in that case that Special Masters appointed by the Supreme Court were to make preliminary determination of boundaries of submerged lands quitclaimed to Louisiana by the United States in the Submerged Land Act. In applying the definition of "coastline" established by the Convention on Territorial Seas and Contiguous Zone the Court treated Louisiana's claim to historic bays as though asserted by the national sovereign and opposed by another nation. The same decision also contained a detailed history of other lines drawn by the United States Government for various other purposes and ruled that these lines were inapplicable in determining State's territorial waters.

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28. U.N. Document A/Conf. 13/L. 52.

29. Id. at Art. 3, Art. 4.

30. 381 U.S. 139, 172 (1965).

31. United States v. Louisiana, 394 U.S. 1 (1969).

Shortly after the passage of the Submerged Lands Act, the Outer Continental Shelf Lands Act was passed to provide for the jurisdiction of the United States over the submerged lands of the outer continental shelf and to authorize the Secretary of the Interior to lease such lands for certain purposes.[32] "Outer Continental Shelf" was defined as meaning all submerged lands lying seaward and outside of the area of land beneath navigable waters as defined in Sec. 2 of the Submerged Lands Act.[33]

In 1964 Congress passed legislation, which subject to certain exceptions, prohibited foreign flag vessels from fishing in the United States territorial waters or from taking any continental shelf fishery resources. Continental shelf fishery resources were defined to include living organisms, which at the harvestable stage, either are immobile or under the sea bed or are unable to move except in constant physical contact with the seabed or subsoil of the continental shelf.[34] In 1966 Congress established a 12 mile contiguous fishing zone extending nine miles beyond the territorial sea of the United States. The United States made clear its intention to exercise the same exclusive fishery rights, subject to historic rights of other nations, in the contiguous zone as in its territorial sea.[35]

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32. P.L. 212-83, 67 Stat. 462.

33. Id. at Sec. 2a.

34. P.L. 88-308, 78 Stat. 194, 16 U.S.C.A. 1081-5.

35. P.L. 89-657, 80 Stat. 907, 33 U.S.C.A. 855.

1966 marked the passage of the Marine Resources Development Act[36] to provide for a comprehensive long range, and coordinated national program in marine science. The act was amended by the National Sea Grant College and Program Act of 1966[37] under which the present research is being carried on.

In March of 1968, President Johnson proposed an International Decade for Ocean Exploitation.[38]

LIMITED SCOPE:

The extent of Maine's seaward territorial jurisdiction is determined by both international and federal law. The delineation of the precise geographical area which is or should be under Maine's jurisdiction is beyond the scope of this report. Needless to say, the final resolution of its boundaries is of tremendous significance to Maine.

INTERSTATE: MAINE - NEW HAMPSHIRE

Maine's seaward boundary[39] with New Hampshire has not been definitively drawn. In 1731 commissioners from New Hampshire and Massachusetts who had been appointed to fix the boundary met but were unable

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36. P.L. 89-454, 80 Stat. 202, U.S.C.A. 1101-8.

37. P.L. 89-688, 80 Stat. 998, 33 U.S.C.A. 1103, 1304, 1107-8, 1121-4.

38. Far Horizons, Vol. 1, No. 5, Sept. 68 (Bimonthly newsletter of Foreign Area Research Coordination Group (FAR). The same idea was embodied in a House-Senate concurrent resolution. (Congressional Record, H. 124, Jan. 6, 1969). HER 57.

39. For survey of land boundary see Resolves 1969 c.38; P.L.1937 c.179.

to agree. New Hampshire appealed to the King who ordered the dispute to be settled by commissioners from the neighboring Provinces. Their report confirmed by the King by Order of Council on August 5, 1740, provided that "the dividing line shall pass up through the mouth of Piscataqua Harbor" and that seaward "the dividing line shall part the Isle of Sholes, and run through the middle of the Harbor, between the Islands to the sea on the southerly side."[40] Until recently no need was felt for further delimiting the ocean boundary.[41]

In 1967 the Governor of New Hampshire had suggested the establishment of a Maine-New Hampshire Boundary Commission and a resolve to this effect had been introduced in the New Hampshire Legislature. Problems for fishermen from both states have been caused by the southeast curvature of the boundary which cuts through the Isle of Shoals. New Hampshire Fish and Game wardens are prohibited from patrolling this area because they do not have jurisdiction over all the water in front of their 18 mile long coast; Maine wardens have not always patrolled this remote section of the Maine coast. Severe storms have caused Maine lobster pots to become tangled with those on the New Hampshire side. The problem has resulted in some arguments and even some shooting in the past.[42]

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40. Van Zandt, Franklin K., Boundaries of the United States and the Several States, Geological Survey Bulletin 1212, U.S. Government Printing Office: 1966, pp.83-4.

41. The New Hampshire-Maine boundary was in the news with regard to the applicability of the Maine Income Tax to the Kittery Naval Shipyard which is actually in Maine.

42. Portland Press Herald, September 30, 1967. For reciprocity in enforcing fishing laws in waters lying between Maine and New Hampshire see 12 M.R.S.A. 3054.

In 1967 New Hampshire had expressed hopes for a line due east on the theory that Maine has so much coast that it would not miss a little. The Governor of Maine had indicated a willingness to discuss the matter. Although it had been announced that three Maine members had been appointed to the Border Commission,[43] such a commission was not in fact established. A more precise demarcation of the Maine-New Hampshire Boundary, including a resolution of the above mentioned request, would be advisable before any intensive exploitation of the sea is undertaken in this area.

MAINE LAW

The Maine Legislature has decreed that the jurisdiction and sovereignty of the State extend to all places within its boundaries, subject only to such rights of concurrent jurisdiction as are granted over places ceded by the State to the United States.[44] In 1957 it further decreed with respect to off shore waters and submerged land.

> §2. Offshore waters and submerged land
> The jurisdiction of this State shall extend to and over, and be exercisable with respect to, waters offshore from the coasts of this State as follows:
>
> 1. Marginal Sea. The marginal sea to its outermost limits as said limits may from time to time be defined or recognized by the United States of American by international treaty or otherwise;

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43. Id.

44. 1 M.R.S.A. 1.

2. High Seas. The high seas to whatever extent jurisdiction therein may be claimed by the United States of America, or to whatever extent may be recognized by the usages and customs of international law or by any agreement, international or otherwise, to which the United States of America or this State may be party;

3. Submerged lands. All submerged lands, including the subsurface thereof, lying under said aforementioned waters.[45]

By the same act the Legislature declared that:

§3. Ownership of offshore waters and submerged land
The ownership of the waters and submerged lands enumerated or described in section 2 shall be in this State unless it shall be, with respect to any given parcel or area, in any other person or entity by virtue of a valid and effective instrument of conveyance or by operation of law.[46]

§6. Sovereignty in space
Sovereignty in the space above the lands and waters of the State is declared to rest in the State, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of this State.[47]

The above mentioned provisions on their face imply that Maine sovereignty, jurisdiction, and ownership extend beyond the three mile limit quitclaimed to the State by the Submerged Lands Act of 1953, and include the twelve mile contiguous zone set forth in the Convention on the Territorial Sea and Contiguous Zone[48] as well as the submerged lands of the continental shelf claimed for the United States by the Truman Proclamation of 1945, the Outer Continental Shelf Act of 1953, and the Convention on the Continental Shelf.[49] While Maine's

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45. 1 M.R.S.A. 2.

46. 1 M.R.S.A. 3.

47. 1 M.R.S.A. 6.

48. Convention was passed before this legislation but not ratified by the United States until 1961. See note 10.

49. See p.166, 170 et seq.

claim has not been litigated, it stands in opposition to the United States Supreme Court's ruling with regard to tidelands unless Maine's claim should fall under some exception thereto. The claim is also contrary to certain administrative rulings by the Maine Attorney General and judicial interpretations by the Supreme Judicial Court of Maine as to the extent of Maine's seaward boundaries.

The leading case of State v. Ruvido[50] involved a violation of a fishing statute near an island in Penobscot Bay. The Maine Court was faced with the problem of the extent of waters over which the State may exercise its authority and more specifically to what extent the jurisdiction of a State extends to bays enclosed by headlands within its borders. The decision in the case was predicated on the fact that the offense occurred within three miles of the island in question so the language in the case regarding Maine's rights versus the federal government and nature of Penobscot Bay as a "historic bay" is dictum but very interesting and potentially useful when the final lines demarcating Federal and State of Maine jurisdiction are finally resolved.

With regard to federal rights, it was said:

> But the jurisdiction of the United States Courts over these waters in admiralty and maritime causes, and the powers given to Congress under the commerce clause of the Constitution still leave the authority of the several states substantially unimpaired. The State of Maine therefore, is sovereign over the seas which wash its coast and may if it sees fit deny to non-residents the right to fish in these waters....[51]

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50. 137 Me. 102, 15 A. 2d 293 (1940).

51. Id. at p.105.

With regard to Penobscot Bay:

> Our shore in the State of Maine is fringed with thousands of islands, many of which are large and the homes of varied industries, others so wild and inaccessible that they seldom feel the tread of human feet. All are, however, an integral part of our state and to a greater or less extent, as bulwarks against the sea, form our harbors and calm reaches through which commerce flows up and down our shore. It is, therefore, important for us to know that in determining the extent of our control over the water, these islands are regarded as natural appendages of the mainland and as part of our coast as that word is used in the books....[52]
>
> ...It is difficult to conceive of a body of water more clearly defined by nature than this, or more easily patrolled and protected by the state which controls its shores. All the islands which surround it are within the State of Maine. The mariner who passes through any of these channels almost instinctively feels himself within our domain. If there is to be with respect to bays any extension of the minimum limits of territorial waters, as laid down in Commonwealth v. Manchester[53] supra, it should certainly be applied to this body of water....[54]

By this decision it is evident that the Court of Maine was in accord with the three mile limit notwithstanding certain exceptions. They were also aware that "...the legislature by its act cannot extend the jurisdiction of the state beyond the limits generally recognized by law."[55]

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52. Id. at p.105.

53. 152 Mass., 236, 240, 25 N.E. 113, 116 (1890), "We regard it as established that, as between nations, the minimum limit of territorial jurisdiction of a nation over tide waters is a marine league from its coast, and that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within the limit...."

54. State v. Ruvido, 137 Me. 105, 108, 15 A. 2d 293 (1940).

55. Id. at p.109.

There was no departure from this general understanding when the Court said in State v. Lemar[56] "...this State, unless it has parted with title, owns the beds of all tidal waters within its jurisdiction as well as such waters themselves so far as they are capable of ownership...."

The State Attorney General's Office issued the following opinion in March 1958 to the State Geologist.

> In response to your memo of March 6, 1958, it is our opinion that the Mining Bureau should at this time, consider that the State of Maine claims title to minerals which lie beneath tidal waters seaward to a line three geographical miles from its coast line. The coastline means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea.
>
> This opinion is not to be construed in any way as limiting such claims as the State may have which are saved by the provisions of Public Law 31, 83rd Congress, 1st Session. C. 65 (Submerged Lands Act).[57]

BOUNDARIES OF SUBDIVISIONS

It is a well established principle that division of its territory can only be made by the State and that the Legislature is the branch of the government to make such division.[58] Much of this division was

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56. 147 Me. 405, 408, 87 A. 2d 886 (1952).

57. Attorney General Report 1957-8, p.100. See also Attorney General's ruling on three mile jurisdiction of the Water Improvement Commission 1961-2. (Atty. Gen. Report p.163.)

58. 1 M.R.S.A. 7, Inhabitants of Jonesport v. Inhabitants of Beals, 131 Me. 37, 158 A. 860 (1932); Eden v. Pineo, 108 Me. 73, 78 A. 1126 (1911); Warren v. Thomaston, 75 Me. 329, (1883).

made by the legislative bodies of Massachusetts before Maine became a State.[59] Boundary lines are drawn as laid down by the act of incorporation of the towns, counties, etc.. An erroneous belief that a given line is a town boundary, even though universally shared in the community, yields to the language of the act incorporating the town (or county).[60]

Allocation of the seaward boundaries of counties was made by the Legislature in 1915.[61] Although now incorporated in the portion of the revised statutes relating to criminal jurisdiction[62] there is no indication that its original implications then or now should be so limited. The section reads:

> The lines of the several counties of the State which terminate at or in tidewaters shall run by the principal channel in such directions as to include, within the counties to which they belong, the several islands in said waters, and after so including such islands shall run in the shortest most direct line to extreme limit of the waters under the jurisdiction of this State, and all waters between such lines off the shores of the respective counties shall be a part of, and held to be within, such counties, respectively.[63]

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59. See State v. Thompson, 85 Me. 189, 27 A. 97 (1892) which related to the establishment of Cumberland County by the Provincial Assembly of Massachusetts Bay. The determination of the county line between Sagadahoc and Cumberland County was at issue and it was held that it must be drawn in accordance with the Act of Incorporation of Cumberland County. (See Maine Revised Statutes, 1883, p. xvi for dates of incorporation of 12 other counties.).

60. Shawmut Mfg. Co., v. Inhabitants of Benton, 123 Me. 121, 122 A. 49 (1923); Eden v. Pineo, 108 Me. 73, 78 A. 1126 (1911). See Maine Historical Records Survey, Maine Counties, Cities, Towns and Plantations of Maine; a Handbook of Incorporations, Dissolutions, and Boundary Changes. Micro Film, Fogler Library, University of Maine, Orono.

61. P.L. 1915, c.330 §1.

62. 15 M.R.S.A. 4.

63. Id.

The Maine statutes require each municipality to run its boundaries once every five years. This is to be accomplished by notifying adjoining municipalities of "the time and place of meeting for perambulation." After renewal of the boundary lines, records of the proceedings are to be recorded in the books of the municipalities.[64] Every ten years is deemed sufficient for perambulating boundaries on the edges of highways or bodies of water which the boundary line crosses or which serve as boundary lines.[65] Provision is made for appointment of commissioners by the Superior Court to ascertain and describe disputed boundary lines.[66] The authority of the commissioners is limited to fixing lines established by the Legislature.[67] These findings are subject to judicial review only after the commissioners have made a determination of law and fact.[68]

> Questions of geographical boundaries are ultimately for the court to determine. Otherwise we might have as many different lines established as there were juries passing on the question. One jury is not bound by a precedent set by another jury. If it were a question that could arise but once, a jury might settle it.[69]

With the exception of the jurisdiction given to harbor masters and port wardens[70] and power given to municipalities with regard to

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64. 30 M.R.S.A. 2001.

65. 30 M.R.S.A. 2001 (6).

66. 30 M.R.S.A. 2002.

67. Inhabitants of Fayette v. Inhabitants of Readfield, 132 Me. 328, 170 A. 513 (1934).

68. Inhabitants of Winthrop v. Inhabitants of Readfield, 90 Me. 235, 38 A. 93 (1897).

69. State v. Thompson, 85 Me. 189, 194, 27 A. 97 (1892).

70. 38 M.R.S.A. 1-6, 41-46; 38 M.R.S.A. 1021-1026.

wharves and weirs no statutory provisions or cases have been found that indicate that either counties, towns, cities, or other subdivisions have any rights in any submerged land beyond low water mark or in the waters themselves unless granted in their corporate charter. The town and county water boundaries have been of importance in determining the jurisdiction of courts in these subdivisions in civil and criminal cases. This comes into play when by statute or common law an action must be adjudicated in the locality in which it took place or when the rules, regulations, or statutes apply only to a circumscribed geographical area. It has also assumed importance when the Legislature has delegated authority to its subdivisions or other governmental entity to carry out specific functions or activities on tidal or submerged land, or in, on, or above the state's territorial waters. An example of this would be the requirement that a sale, lease, or license, for submerged land be recorded in the registry of deeds of the county or the municipal offices where the submerged land is located. It is particularly germaine to the laws of the Maine Mining Bureau, Department of Inland Fisheries and Game, and the Department of Sea and Shore Fisheries.[71]

DELINEATION TIDAL V. NON-TIDAL WATERS

Another boundary delineation which should be considered in determining public versus private ownership and the rights and duties pertaining thereto is the extent of inland applicability of the Colonial

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71. See for example: State v. Thompson, 85 Me. 189, 27 A. 97 (1892); State v. Parker, 132 Me. 137, 167 A. 854 (1933).

Ordinances.[72] The Supreme Judicial Court of Maine has interpreted the limiting phase in the Colonial Ordinances "so far as the sea ebbs and flows" to cover situations in which the body is affected by tidal actions.[73] In Lapish v. Bangor, the Court noted "The uplands adjoins tide waters, and though at Bangor the river is fresh water, that circumstance has not been considered as changing the legal principle."

In Stone v. Augusta,[74] the Court held that the Kennebec River at Augusta was tide water.

> The land, which is the subject of controversy in this case lies upon the margin of a stream, in which according to the testimony, the tide ebbs and flows, though the water is fresh. But this fact, according to the doctrine of the case above cited, [Lapish v. Bangor] is immaterial, the rule having reference rather to the question, whether the tide flows at the point in controversy, than to the fact that the water is salt or fresh.

The boundary between fresh and salt water is also relevant to water classification standards.[75] In the 1963 Act which first made a differentiation in classification standards for fresh and salt water, the criteria for separating the two was degree of salinity.

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72. See p.189 ff., infra, for text and discussion of Colonial Ordinances.

73. 8 Me. 85, 93, (1831). In accord King v. Smith, 2 Doug. 441 (Thames at London); Peyroux v. Howard, 32 U.S. (7 Pet.) 324, 338 (1833) (Mississippi at New Orleans); Attorney General v. Woods, 108 Mass. 436 (1871).

74. 46 Me. 127, 137 (1858).

75. P.L. 1963, c.274 §2.

§ 364. Tidal or Marine Waters

> The commission shall have 4 standards for the classification of tidal or marine waters as follows:
>
> Marine waters shall include the waters of the Atlantic Ocean, its bays, inlets, etc. to mean high tide within 3 nautical miles from the coast line and all other tidal waters within the State except that in the case of tidal effect estuaries the upstream limits of tidal waters shall be that point where at mean high tide the average sample of 3 samples taken at the bed, at mid-depth and at the surface shall show a salinity of 5,000 parts per million or greater, or where the tidal limit for purposes of pollution control statutes is specifically defined.[76]

A 1967 amendment to this section substituted the following language:

§ 364.

> The commission shall have 5 standards for classification of tidal or marine waters as follows:
>
> Marine waters shall include the waters of the Atlantic Ocean, its bays, inlets, etc. to mean high tide within 3 nautical miles from the coast line and all other tidal waters within the State generally subject to the rise and fall of the tides. In estuaries or coastal streams subject to the rise and fall of the tides, tidal or marine water classifications shall apply unless otherwise specified by statute.[77]

A strict adherence to the definition of tidal waters in accordance with this statute and the interpretation given for determining the applicability of the Colonial Ordinances would seem to demand that the tidal water classification rather than the fresh water classification should be applied by the EIC when there is tidal action in the stream. In practice, however, the Environmental Improvement Com-

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76. 38 M.R.S.A. 364 (1964) as enacted by P.L. 1963, c.274 §2.

77. 38 M.R.S.A. 364 as amended by P.L. 1967 c.475 §5.

mission still adheres to the salinity test.[78]

The difference between tidal and inland water is also meaningful with regard to the jurisdiction of the Department of Inland Fisheries and Game and the Department of Sea and Shore Fisheries. One must obtain a license to fish in inland waters.[79]

"'Inland waters' means all waters within the State above the rise and fall of the tide and wholly or partly within the territorial limits of the State and excepting private ponds as defined in Section 2557."[80]

No such requirement is necessary for sports fishing in tidal waters.[81] "Tidal waters"[82] and "territorial waters" mean "coastal waters." "'Coastal waters' means all waters of the State within the rise and fall of the tide and the marine limits of the jurisdiction of the State; but it does not include waters within or above any fishway or dam when the fishway or dam is normally the dividing line between tidewater and fresh water, nor does it include waters above any tidal bound that has been legally established in streams flowing into the sea."[83] Thus, though in some instances, the Departments of Sea and

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78. Interview with Chief Engineer of the EIC, Mr. MacDonald, Feb. 10, 1969. Mr. MacDonald stated that the salinity test is the measure of the environmental tolerance of salt water fish other than migratory species.

79. 12 M.R.S.A. 2601 (Supp.).

80. 12 M.R.S.A. 1901 (10).

81. 12 M.R.S.A. 3401 (31).

82. 12 M.R.S.A. 3401 (32).

83. 12 M.R.S.A. 3401 (4).

Shore Fisheries and Inland Fisheries and Game have joint jurisdiction over certain species of anadromous fish, they do not share this jurisdiction over the fishermen. As a rule of thumb, the jurisdiction of Inland Fisheries and Game is asserted above a dam of a tidal stream or river.[84] The only Maine case that has dealt with this problem is Oliver v. Bailey.[85]

Whether a dam or an obstruction in a tidal stream which would abrogate the effect of tidal action would also extinguish the application of the Colonial Ordinances or legislation limited to tide waters has never been squarely before the courts in Maine. As a practical matter this might make a difference in ownership of the bottom of the stream and the jurisdiction of the Wetlands Control Board.[86]

II WHO OWNS THE SEASHORE? DEMARCATION OF PUBLIC AND PRIVATE OWNERSHIP ON THE LAND-SEA INTERFACE

The ownership of the seashore and the rights of riparian owners in tidelands is a legal question which must be asked anew for every coastal state in the United States.[87] The answer depends on the his-

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84. Interview with Commissioner of Inland Fisheries and Game, Ronald Spears, March 11, 1969.

85. 85 Me. 161, 27 A. 90 (1892) in which the plaintiff had unsuccessfully contended that the legislative authorization for building the dam had separated the creek above the dam from the general body of the tidal waters for the application of statutes for the protection of migratory fish in tidal waters. See also Attorney General v. Wood, 108 Mass. 436 (1871) regarding dam on Mystic River.

86. See Chapter 1, p.53ff.

87. Shivley v. Bowlby, 152 U.S. 1 (1893).

torical legal heritage of each state, on the social and economic conditions under which the early colonies labored, on the conditions and stipulations under which each state became a part of the United States,[88] and the evolution of common and statutory law in each of the coastal states.

The common law of Maine on ownership of the shore derives from the common law of England as modified by the statutory and common law of Massachusetts.[89] Under the common law of England, the shores of the sea and navigable rivers within the flux and reflux of the tide belonged prima facie to the King. He owned them both in a private capacity, jus privatum, and as sovereign, jus publicum, in which he held them in trust for the people. The title to the sea bottom was in the King from ordinary high water mark to the extent of the territorial sea. To the King also belonged the title to the seashore on that portion of the land on the margin of the sea between ordinary low water and high water, and the title and exclusive authority in and over the water and bottoms in all navigable rivers, bays, coves, inlets, and other arms of the sea as far inland as the tide ebbs and flows. Holding the soil thus, the King held the right of navigation and fishery in trust for the benefit of his subjects.[90]

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88. 83 F. 795. Ferver v. Stewart, (C.C.D. Wash. 1897).

89. Maine became a State in 1820 by ratification of the Acts of Separation. See p.306.

90. State v. Leavitt, 105 Me. 76, 72 A. 875 (1909).

After the Magna Carta the King could not by an exercise of his prerogative exclude the public from the right of fishery or grant an exclusive right to a private individual either together with or distinct from the soil. The grantee of the King took the soil subject to this trust.[91] The restrictions placed by the Magna Carta upon the exercise of the King's prerogatives did not operate to abridge the power of Parliament over public and common rights.[92]

The rights in the waters and shores of the sea passed from the crown by various patents and charters to the colonies.[93] Ownership of the coastal and tidal lands in Maine is governed by the provisions of the Colony Ordinance 1641-7 of the Colony of Massachusetts Bay (hereinafter referred to as the Colonial Ordinances).

While these ordinances never have been adopted by legislative enactment in Maine, they were in force in colonial Massachusetts and continued in effect as an integral part of the body of Massachusetts Law after the formation of the Union. These provisions were grafted upon the substantive law of Maine and early recognized as part of Maine's common law. Their operation was held to extend even to those portions of the State of Maine that were not under the jurisdiction of the Massachusetts Bay Company when the ordinances were passed.[94]

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91. Id.

92. Id.; Moulton v. Libbey, 37 Me. 472 (1854).

93. See Maine Revised Statutes (1883) "Note by the Commissioner on the Source of Land Titles in Maine," p. v-xvii.

94. Parker v. Cutler Milldam Co., 20 Me. 353 (1841); Deering v. Longwharf, 25 Me. 51 (1845); Partridge v. Luce, 36 Me. 16 (1853); Moulton v. Libbey, 37 Me. 472 (1854); Barrows v. McDermott, 73 Me. 441 (1882); Conant v. Jordan, 107 Me. 227, 77 A. 938 (1910); Storer v. Freeman, (Cumberland County), 6 Mass. 435, 438 (1810).

COLONY ORDINANCE OF 1641-47[95]

CHAPTER LXIII

Sec.2. Every inhabitant who is an householder shall have free fishing and fowling in any great ponds, bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town, or the general court, have otherwise appropriated them:

Provided, that no town shall appropriate to any particular person or persons, any great pond, containing more than ten acres of land, and that no man shall come upon another's propriety without their leave, otherwise than as hereafter expressed.

The which clearly to determine;

Sec.3. It is declared, that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining, shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further:

Provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves, to other men's houses or lands.

Sec.4. And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow. (1641-47)

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95. Taken from the 1814 Edition of Ancient Charters and Laws of the Colony and Province of Massachusetts Bay, p.148.

It was made abundantly clear in the early Massachusetts and later Maine decisions that the English common law was not incorporated in toto in the common law of these states. Only that portion of it which was suitable to the conditions of the new world was adopted. The judiciary of Massachusetts and Maine have reiterated many times the principle that there is nothing inviolate about common law with regard to the seashore which cannot be altered by statutory enactment. Courts have varied in their willingness to adapt common law to changing socio-economic conditions in the absence of legislative direction, but most have recognized the problem.[96]

The passage of the Colonial Ordinances is a prime example of legislative modification of the common law. By act of the General Court of Massachusetts Bay Colony, the common law legal rule pertaining to the sovereign's ownership of the seashore was modified to give the riparian proprietor ownership of the flats to low water mark or 100 rods whichever was less. The private owner held this property subject to the public right of fishing and navigation.[97]

At the time of their adoption the colonists were more interested in wresting a subsistence from the soil and sea than in making laws. These ordinances reflect the great dependence of the colonists on

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96. Cottrill v. Myrick, 12 Me. 222 (1835); Barrows v. McDermott, supra; Conant v. Jordan, supra; Storer v. Freeman, supra; Commonwealth v. Alger, 61 (7 Cush.) Mass 53, 55 (1851).

97. Pike v. Munroe, 36 Me. 309 (1853).

fishing and hunting for a livelihood. The 100 rods grant to the riparian owner reflected the great interest in navigation and commerce with the expectation that this provision would encourage wharfing out which would enhance the adaptability of these lands for commerce and navigation. The right of fisheries could only be subordinated to commerce and navigation.[98] It also reflected, in an age of small populations and large amounts of ocean frontage, what a small significance and value was attached to the shore and flats themselves. "Annexed to the upland, they may be of great value to the common owner. Apart from the upland, they are rarely of any value to a private owner, who would have no access to them except by water."[99]

The value of flats for aquaculture, however, was realized even in the 1890's:

> Nothing appears showing the beach at that date to be of any value apart from the upland, of any value to reserve in granting the upland, either by reason of wharves or weirs thereon, or by reason of any other opportunity for separate occupation or quasi-cultivation like those far-reaching shores and beaches in the western part of the State, which in themselves are often more valuable than the upland.[100]

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98. Conant v. Jordan, supra; Storer v. Freeman, supra; Shivley v. Bowlby, supra.

99. Snow v. Mt. Desert Island Real Estate Co., 84 Me. 14, 17, 24 A. 429 (1891); See Shivley v. Bowlby, supra, p.11. "Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation, and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects."

100. Snow v. Mt. Desert Real Estate, supra, p.17.

The popular awareness of the commercial potential of the seashore and flats has been upgraded in recent times reflecting the increased demand and dwindling supply of shore front property, the vast economic potential of the recreational demands of the country, and the monetary returns from shell and other fish. This enlightenment has not extended to a general public awareness of the ecological importance of the wetlands, swamps, and tidal estuaries which serve as spawning grounds as well as providing nutrients for both inshore and deep sea fisheries. Jokes about swindles in buying land underwater are still in vogue, belying the fact that in some instances marsh land and underwater areas are 10 times as productive as comparable areas on dry land.

Just as the Massachusetts Bay Colony adapted the English Common Law to the demands of that colony, so have the judicial interpretations of the Colonial Ordinances undergone a metamorphosis in Maine which many times have not paralleled decisions in Massachusetts. In many instances small changes in interpretation have worked immense changes in substantive rights of the public and of private owners.[101] These rights will be discussed in detail in Chapter Three. Judicial interpretations of the terms used in the Colonial Ordinances which must be included in any survey of boundaries are discussed below.

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101. Discussion of Colonial Ordinances are contained in Whittlesey, Law at the Seashore, Tide Waters, and Great Ponds in Massachusetts and Maine, 1932; Norwood, L.E., Colony Ordinance of 1641-7 and Its Effect on Maine Law, 3 Peabody, L.R. 77 (1939); Waite G.G., Public Rights in Maine Waters, 17 Me. L.R. 161 (1965). See also Commonwealth v. City of Roxbury, 75 Mass. 451, 503 - 528 (1857).

LOW WATER MARK - HIGH WATER MARK

Low water mark has been interpreted as the line of the margin of water at ordinary low tide, and not at the lowest possible state of water at some particular time from natural causes.[102] The ordinary rather than the extreme high tide would also be the measure of boundaries of the upland. In Littlefield v. Maxwell[103] the locus in quo lay above the ordinary high water mark of the sea, but below the extraordinary high water mark and thus was not on the seashore area covered by the Colonial Ordinances. The Littlefield case cited as authority Sir Matthew Hale's treatise, De Jure Maris, "Chap. 6, speaking of the seashore says, it is certain that that, which the sea overflows either at high spring tides or at extraordinary tides, comes not, as to this purpose, under the denomination of littus maris, and consequently the King's title is not of that large extent, but only to land that is usually overflowed at ordinary tides."[104]

The "ordinary tide" definition purports to provide a criterion for determining a line which is easily ascertainable.

> The ordinance declares, that the proprietors of lands "shall have propriety to the low water mark." It evidently contemplates and refers to a mark which could be readily ascertained and established; and that, to

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102. Gerrish v. Proprietors of Union Wharf, 26 Me. 384, (1847); Ogunquit Beach District v. Perkins, 138 Me. 54, 21 A. 2d 660 (1941).

103. 31 Me. 134 (1850).

104. Id. at p.139.

> which the tide on its ebb usually flows out, would be of that description. That place, to which the tide might ebb under an extraordinary combination of influences and of favoring winds, a few times during one generation, could not form such a known boundary, as would enable the owner of flats to ascertain satisfactorily the extent, to which he could build upon them. Much less would other persons, employed in the business of commerce and navigation, be able to ascertain with ease and accuracy, whether they were encroaching upon private rights or not, by sinking a pier or placing a monument. It would seem to be reasonable, that high and low water marks should be ascertained by the same rule. The place, to which tides ordinarily flow at high water, becomes thereby a well defined line or mark, which at all times can be ascertained without difficulty. If the title of the owner of the adjoining land were to be regarded as extending, without the aid of the ordinance, to the place to which the lowest neap tides flowed, there would be found no certain mark or boundary, by which its extent could be determined. The result would be the same, if his title were to be limited to the place, to which the highest spring tides might be found to flow. It is still necessary to ascertain his boundary at high water mark in all those places, where the tide ebbs and flows more than one hundred rods for the purpose of ascertaining the extent of his title toward low water mark. It is only by considering the ordinance as having reference to the ordinary high and low water mark, that a line of boundary at low water mark becomes known, which can be satisfactorily proved and which having been once ascertained will remain permanently established.[105]

The Court has also stated that "High water mark, differing materially as, of common knowledge, it often does from that of low water, in no way controls or determines the location of the latter and cannot be used in place thereof for the purpose of locating the grant."[106]

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105. Gerrish v. Proprietors of Union Wharf, supra, p.395-6.

106. Ogunquit Beach District v. Perkins, supra, p.60.

In litigation involving federal grants and patents the Supreme Court of the United States has ruled that the mean of all high tides over a considerable period of time determines the boundary between tidelands and uplands.[107] A more recent Supreme Court decision hinted that states' definition of upland boundaries may have to yield to federal uniformity.

> The rule deals with waters that lap both the lands of the State and the boundaries of the international sea. This relationship at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the "supreme Law of the Land".[108]

which is counter to the long history of determination of such boundaries by State law.[109]

THE SHORE:

§3. ...The proprietor, or the land adjoining, shall have propriety to the low water mark, where the sea does not ebb above a hundred rods, and not more where so ever it ebbs further.[110]

The above quoted section of the Colonial Ordinances sets forth to what extent a proprietor of the upland may own land on the margin of the sea between high tide and low tide. This margin has alternately been referred to as the beach, the strand, the seashore. The Supreme Court of Maine has said that parties to contracts and conveyance are

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107. Borax Consolidated Ltd. et al. v. Los Angeles, 296, U.S. 10, 26 (1935).

108. Hughes v. Washington, 389 U.S. 290, 293 (1967).

109. Shively v. Bowlby, 152 U.S. 1 (1893).

110. See complete text of the Colonial Ordinances, p.189.

supposed to know and use language legitimately.[111] The area has been defined as follows:

> What is the sea shore must first be defined. The sea shore must be understood to be the margin of the sea, in its usual and ordinary state. Thus when the tide is out, the low water mark is the margin of the sea; and when the sea is full, the margin is high water mark. The sea shore is therefore all the ground between the ordinary high water mark and low water mark.[112]
>
> ...By beach, is to be understood the shore or strand; and it has been decided, that the sea shore is the space between high and low water mark.[113]
>
> ...The word beach, must be deemed to designate land washed by the sea and its waves; and to be synonymous with shore.[114]
>
> The "shore" is the ground between ordinary high and low water mark, the flats, and a well defined monument.[115]
>
> The word [shore] strictly means that space which is alternately covered and exposed by the flow and ebb of the tide, the flats between ordinary high and low water mark.[116]

FLATS AND THE COLONIAL ORDINANCES:

By virtue of the Colonial Ordinances, there is a presumption that the upland proprietor is also owner of the flats or shore up to one

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111. Littlefield v. Littlefield, 28 Me. 180 (1848).

112. Storer v. Freeman, supra, p.439; Lapish v. Bangor Bank, 8 Me. 85 (1831).

113. Cutts v. Hussey, 15 Me. 237, 241 (1839). See also Sinford v. Watts, 123 Me. 230, 122 A. 573 (1923).

114. Littlefield v. Littlefield, supra.

115. Montgomery v. Reed, 69 Me. 510 (1879); Morrison v. Bank, 88 Me. 155, 160, 33 A. 782 (1895).

116. Morrison v. Bank, supra.

hundred rods.[117] Flats, however, are capable of independent ownership. Flats may be obtained by adverse possession. Adverse possession of the upland will include adverse possession of the flats if the flats were still attached at the time of the disseizin. The reverse, however, is not true.[118] Flats may be separated from the upland and conveyed independently of the upland.[119]

> But the proprietor of the upland and adjoining land and shore has "the proprietory" of both, and hence may convey the whole or any part of his "propriety." He may convey the upland alone and retain the flats, or convey the flats alone and retain the upland.[120]

While a separation is possible, there is a presumption of law that the grantor intended to convey the flats with the uplands.[121] These conveyances will be construed in favor of the grantees.

Many questions have arisen as to whether the grantor intended to convey the flats with the upland. The basic problem has been the interpretation of the language in the deed to determine whether conveyances "to the shore" or making the shore a monument intended to convey to the inner shore or "high water mark", or the outer or seaward margin of the shore "low water mark". "Whether in a given deed to one margin of the other marks the boundary depends upon all the calls in

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117. Freeman v. Leighton, 90 Me. 541, 38 A. 542 (1897); Snow v. Mt. Desert, 84 Me. 14, 24 A. 429 (1891); Dunton v. Parker, 97 Me. 461, 34 A. 1115 (1903); Abbot v. Treat, 78 Me. 121, 3 A. 44 (1886).

118. Whitmore v. Brown, 100 Me. 410, 61 A. 985 (1905); Richardson v. Watt, 94 Me. 476, 48 A. 180 (1901); Thornton v. Foss, 26 Me. 402 (1847).

119. Montgomery v. Reed, 69 Me. 510 (1879); Carleton v. Cleveland, 112 Me. 310, 92 A. 110 (1914).

120. Freeman v. Leighton, supra, p.544.

121. Winslow v. Patten, 34 Me. 25 (1852); Montgomery v. Reed, supra; Dunton v. Parker, supra; Whitmore v. Brown, supra.

the deed and the particular circumstances of the case."[122]

Flats Included:

Instances in which the flats have been deemed to be conveyed with the upland include the following:

A call in a deed which described a parcel of seashore as running "to the water and thence by the water" carried the grant to low water mark. "To the water" was held to have the same significance to carry a boundary to low water mark as "by the sea", "tide water", "salt water", the "bay", "cove", "creek", "river", "Stream", or other tantamont expressions.[123]

When the terms the "sea" or the "shore" had been used to designate one boundary, it was held that it appeared quite clear that they were intended to describe that side of the beach on which the sea coincides with it, and therefore to include the beach to low water mark.[124]

When a grantor owning both upland and adjacent beach or flats, by his deed designated a boundary as "the sea" or "the ocean" or an equivalent, and conveyed "to" or "by" that boundary, nothing to the contrary appearing in the deed, the grant extended to low water mark.[125]

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122. Sinford v. Watt, 123 Me. 230, 232, 122 A. 573 (1923).

123. Babson v. Tainter, 79 Me. 368, 10 A. 63 (1887).

124. Snow v. Mt. Desert, 84 Me. 14, 24 A. 429 (1891).

125. Ogunquit Beach District v. Perkins, 138 Me. 54, 60, 21 A. 2d 660 (1941).

When a description in a deed bounded the parcel of land by the shore of the sea at high water mark and then added "including all the privileges of the shore to low water mark" the land between high and low water mark passed to the grantee.[126] Language in a deed reserving a street through the square "together with the flats viz: all my rights to the same in front of said square to the channel," passed flats by the deed.[127] In a conveyance where the following words "all the fishing rights, rights to the 'sand' and to all useful things that may drift upon the beach," were used, it was held that the word "sand" was equivalent to "land" and the grantor conveyed the fee.[128]

Flats Excluded:

Instances in which it was held that the flats did not pass with the upland include the following:

A description of the boundary lines as running "to the shore" and "thence by the shore and upland to the first bound" operated to sever the shore from the upland and to exclude it from the conveyance.[129]

A grant to the seashore, to the bank of a river, or to the line of a highway was held not to carry title beyond high water mark or the side of the river or road.[130]

126. Dillingham v. Roberts, 75 Me. 469 (1883).

127. Winslow v. Patten, 34 Me. 25 (1852).

128. Spinney v. Marr, 41 Me. 352 (1856).

129. Freeman v. Leighton, 90 Me. 541, 38 A. 542 (1897).

130. Brown v. Heard, 85 Me. 295, 27 A. 182 (1893).

"To the shore" has been held to be words of exclusion. "Round a point of land" and "round a head of a cove" also do exclude (not include) flats.[131]

When land has been described as "running" to a cove and thence along the "margin of a cove", the grant has been interpreted to include adjoining flats.[132] To the same effect would be "along the bank of a stream."[133]

A deed extending the line of the boundary to the shore and thence by the shore was held not to convey the flats since the grant was not conveyed by a deed was described as bounded "on the east by the shore" and nothing else indicative of intention appeared in the deed, the shore itself was held to be the monument, and the land between high and low water marks did not pass by the grant.[135]

A conveyance given in metes and bounds was held to convey only that portion of the upland and the flats which were contained in the circumscribed area.[136]

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131. Montgomery v. Reed, 69 Me. 510 (1879).

132. Nickerson v. Crawford, 16 Me. 245 (1839); Erskine v. Moulton, 84 Me. 243, 24 A. 841 (1892).

133. Bradford v. Cressey, 45 Me. 9 (1858); Stone v. Augusta, 46 Me. 127 (1858).

134. Storer v. Freeman, 6 Mass. 435 (1810).

135. McLellan v. McFadden, 114 Me. 242, 95 A. 1025 (1915).

136. See Carleton v. Cleveland, 112 Me. 310, 92 A. 110 (1914) which dealt with a mill pond on the Megunticook River at Camden, Maine. The river is not subject to tidal action because of the falls through which it empties into Camden Harbor. No cases have been found which dealt with metes and bounds on tidal waters, but presumably the principle would be the same.

The same principles of exclusion apply whether you are beginning with a monument on the upland and you are going toward the water or starting in the middle of a tidal stream or flat and going toward the upland. In Erskine v. Moulton,[137] a description in a deed which ran "down the middle of the stream to the upland and on the southerly side and thence on the southerly side of that stream" was held to convey to the grantee the land on that side between high and low water mark.

Indications of Intent:

It is not possible to rely solely on the language of the deed. To the shore and by the shore in absence of other call or circumstances means that the inner side of the shore is intended, but it does not follow from the mere fact that the shore or land is made a boundary or that the boundary is "by the shore" that it is by high water mark. To determine which side of the shore is intended as the boundary it is necessary to look for something further. It follows that the starting point of the boundary "by the shore" is one of the important elements in throwing light upon the question as to which margin of the shore was intended. Value of the flats will be a factor considered. If both termini of a grant are at high water mark, the shore will be excluded. If both termini of a grant are at the outer margin, the shore will be included. If one terminus, however, is at one margin and the other at the other, the grantor's intentions may not be so obvious. But in such a case, in the absence the showing of any motive for separation of the upland, the shore will be regarded as included in the conveyance because of the strong presumption under the Colonial Ordinances,[138] that such was the intention of the grantor.

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137. 84 Me. 243, 24 A. 841 (1892).

138. Dunton v. Parker, 97 Me. 461, 54 A. 1115 (1903).

TIDAL RIVERS:

As on the open ocean, riparian proprietors on tidal rivers or streams, by virtue of the Colonial Ordinances, were endowed with ownership of the flats to one hundred rods or low water mark whichever is less. Here as on the ocean frontage, the flats may be separated from the upland. Ownership of the submerged land under tidal versus non-tidal streams varies only to the extent that the entire bed can be owned under fresh water streams. The entire bed of tidal streams are capable of private ownership only if they are completely uncovered at low tide and the breadth of the stream is no wider than 200 rods (100 rods from each side).

No cases have been found which have dealt with dividing flats on the tidal stream completely dry at low tide between the opposite riparian owners. It is submitted that the rule of law that would be followed, in the absence of a previous grant, would incorporate the rules for fresh water streams "to the middle of the stream" in accordance with stated aims laid down in Babson v. Tainter,[139] of dividing the flats proportional to the ownership of the upland. In the same case there was dictum remarking that opposite owners on a creek or cove have an equal and dominant interest in the interjacent flats. Indirect support is given to this contention by the rule in Warren v. Thomaston,[140] in which town boundaries, as opposed to private ownership, were held to

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139. 79 Me. 368, 10 A. 63 (1887).

140. 75 Me. 329 (1883).

extend to the thread of the stream[141] unless altered by the Legislature. "Whether the tide ebbs and flows is a matter having no bearing on the question, the legislature has uncontrolled power over the boundaries of the towns."[142] If this is a correct interpretation it could have some very anomalous results whereby a person's flats might be in two towns although all on one side of low water mark.

FRESH WATER STREAMS:

As a general rule a conveyance of land bounded on a fresh water stream extends to the center or the thread of the stream "ad medium filum aquae."[143] "Thread of the stream is the middle line between the shores, irrespective of the depth of the channel,..The channel and the thread of the river are entirely different."[144] This is true whether the riparian owner be a private individual or a town.[145] Similarly, when a conveyance of land is made by plan, to which reference is made in the conveyance, and the plan bounds the lot by a fresh water stream, the lot extends to the center of the stream.[146] Persons owning on oppo-

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141. See definition of thread of stream below.

142. Warren v. Thomaston, 75 Me. 329, 333 (1883).

143. Pike v. Monroe, 36 Me. 309 (1853); Stevens v. King, 76 Me. 197 (1884); Hawthorn v. Stinson, 10 Me. 224 (1833).

144. Warren v. Thomaston, supra.

145. Perkins v. Oxford, 66 Me. 545 (1887).

146. Lincoln v. Wilder, 29 Me. 169 (1848).

site sides of the river and adjoining the same, own to the central line or thread of the river.[147] Persons owning both sides of the fresh water stream own the entire bed of the stream.[148]

This pattern of ownership may be negated by prior grants[149] or legislative action.[150] The bed under fresh water streams may be owned apart from the bordering land in much the same way as the shore and flats may be separated from the uplands in tidal waters. Such submerged land is also capable of being acquired by prescription.[151] The same rules of construction are applied in fresh as in tidal streams to determine whether the conveyance was meant to include the bed of the stream.[152]

As previously stated when land is conveyed by metes and bounds and there is no mention of the river nor apt language conveying more than the lot described, the grantee is limited to the lot described; he is not a riparian proprietor.[153] Neither is an owner whose land

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147. Morrison v. Keen, 3 Me. 474 (1825).

148. Wilson v. Harrisburg, 107 Me. 207, 77 A. 787 (1910).

149. Morrison v. Keen, supra.

150. Warren v. Thomaston, 75 Me. 329 (1883). Channel of river rather than thread of stream was made boundary by Corporate Charter.

151. Bradford v. Cressey, 45 Me. 9, 13 (1858); Carleton v. Cleveland, 112 Me. 310, 92 A. 110 (1914); Wilson V. Harrisburg, 107 Me. 207 77 A. 787 (1910).

152. Lowell v. Robinson, 16 Me. 357 (1839); Herrick v. Hopkins, 23 Me. 217 (1843); Bradford v. Cressey, supra; Haight v. Hamor, 83 Me. 453, 22 A. 369 (1891); Robinson v. White, 42 Me. 209 (1856).

153. Carleton v. Cleveland, supra.

doesn't extend beyond the edge of the water a riparian proprietor. A deed bounding the land as extending to the outermost land or margin of the bank or shore of the river, and granting water rights in front of the land, was held not to extend the grant beyond the water's edge, even if it is conveyed beyond the brow of the river bank.[154] Whether or not a person is a riparian proprietor has significant consequences with regard to his rights in a fresh water stream.

A different interpretation of language in a deed for land on fresh water would result only if the physical characteristics of a river or a stream versus ocean frontage demanded such variation. Sometimes the terms describing a river bank and an ocean front beach are used inter-exchangeably and often incorrectly. A discussion of these terms is to be found in Morrison v. Bank,[155] in which the Maine Court held there was no inconsistency in the two calls of a deed, one of which was "to high water mark of the Kennebec River" and the other "then westerly by the bank of the river." Relevant sections include:

> It becomes necessary to inquire into the meaning of the word in the description, "high water mark", "shore", "bank" when applied to a non-tidal stream ...[156]

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154. Wilson v. Harrisburg, 107 Me. 207, 77 A. 787 (1910). See also Stove v. Augusta, 46 Me. 127 (1858).

155. 88 Me. 155, 33 A. 782 (1895).

156. Id. at p.159.

> The term "high water mark" although sometimes used, is inappropriate when applied to a fresh water stream where the tide does not flow and ebb. But we think it must be construed as meaning, the line on the river bank reached by the water when the river is ordinarily full and the water ordinarily high. Not the highest point touched by the water in the freshet, nor when the water is lowest in the season of drought, but the highest limit reached when the river is unaffected by freshets and contains its natural and usual flow; the highest limit at the ordinary state of the river...[157]

> ...high water mark, then as the line between the riparian proprietor and the public, is to be regarded as a co-ordinate with the limit of the river bed...[158]

> The term "shore" is inapplicable to a non-tidal river. ...A fresh water river has banks instead of shores, but the word is sometimes used with reference to a non-tidal river, synonymously with bank. The bank of a river or stream extends to the margin of the stream, to that point where the bank comes in contact with the stream...[159]

> The southerly boundary, then, of the defendant's land, is at high water mark of the river, when the river is unaffected by freshets and is in its ordinary state, and where the bank touches the water when the river is in this condition.[160]

> ...To ascertain just where this would be in any case may be a matter of some difficulty. It may be the line which the river impresses upon the soil by covering it at sufficient periods to deprive it of vegetation and to destroy its value for agriculture....In other cases where the conditions are not favorable for such a line of demarcation to be made by natural causes, it can only be ascertained by careful observation.[161]

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157. Id. at p.159.

158. Id. at p.159-60.

159. Id. at p.160.

160. Id. at p.161.

161. Id. at p.161.

The Maine Supreme Judicial Court has not always made the distinction or has incorrectly made the distinction between ownership of the bottom in tidal and fresh water rivers. In Brackett v. Persons Unknown,[162] involving adverse possession of flats, the Court applied the thread of the stream principle of law to a tidal river rendering violence to legal theory if not to substantive justice.[163]

DIVISION OF FLATS:

Although the Colonial Ordinances changed the law to give ownership in the flats to the upland owner, they were silent as to how apportionment of these flats should be made between adjacent or opposite riparian owners in the absence of any division in the original grants.[164]

Although the flats are capable of severance and conveyance in any manner the riparian owner dictates, the procedure to be followed when the grantor's intentions have not been indicated is set forth in the leading case of Emerson v. Taylor, supra. The rule is to be applied when lots are all run out at the same time.

The Rule:

A base line is to be drawn from the two corners of each lot where they strike the shore, and from those two corners extend parallel lines to low water mark, perpendicular to the base line. "If the

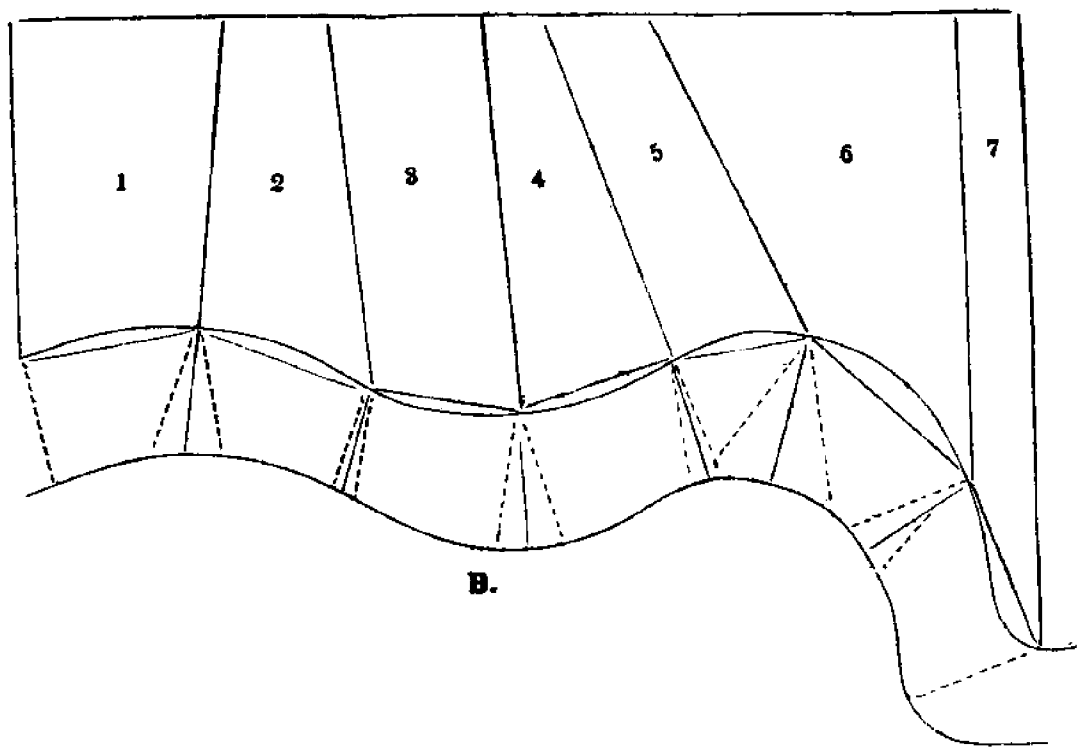
162. 53 Me. 238 (1861).

163. See also, Nickerson v. Crawford, 16 Me. 245 (1839); Warren v. Thomaston, supra.

164. Emerson v. Taylor, 9 Me. 42 (1832); Treat v. Chipman, 35 Me. 34 (1852).

shore line be straight, there will be no interference in running the parallel lines. If the flats lie in a cove, of a regular or irregular curvature, there will be an interference in running such lines and the loss occasioned by it must be equally borne, or gain enjoyed equally by the contiguous owners, as appears in the following plan marked 'B'".[165]

CHART "B"[166]



The Maine Court predicted that the rule would not equitably settle every situation in which division of flats was not provided for in the grant, but that each possible exception should be considered in the context in which the litigation arose.[167]

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165. Emerson v. Taylor, 9 Me. 42 (1832). To the same effect, Kennebec Ferry Co. v. Bradstreet, 28 Me. 374 (1848).

166. Emerson v. Taylor, supra, p.45.

167. Treat v. Chipman, 35 Me. 34 (1852); Emerson v. Taylor, supra.

It was soon decided that this formula applied to the original division of the flats. Subsequent subdivision could not act to enlarge the flats apportioned to the uplands in the initial division which might result from establishing new perpendicular lines.[168]

It was also made clear that the formula used to apportion flats, in no way influences the apportionment of the uplands or a terminus of a grant which extends to the ocean.[169]

A petition for division of land described as bounded on the sea or on a bay on the sea is to be held as a petition for a division of the flats as well as of the uplands.[170]

Since it was not mandatory that the flats be divided in this manner, if the grantor otherwise specified or intended, a broad latitude has been allowed in adjusting the apportionment of flats to the intention of the grantors.

Reasons for obtaining the flats[171] and patterns of use, such as erection of weirs, have been used in determining original intention. Disseizin which would not be competent to satisfy the requirements of adverse possession, has been allowed as evidence of the intention of the grantor.[172]

168. Call v. Carroll, 40 Me. 31 (1855); Portsmouth Harbor Co. v. Swift, 109 Me. 17, 82 A. 542 (1912).

169. Ogunquit Beach District v. Perkins, 138 Me. 54, 21 A. 2d 660 (1941).

170. Patridge v. Luce, 36 Me. 16 (1853).

171. Adams v. Frothingham, 3 Mass. 353 (1807).

172. Treat v. Chipman, 35 Me. 34 (1852).

A conveyance of land adjoining tide water "with flats adjoining the land and pertaining thereto" would pass only such flats as the law would determine to belong to such parcel, unless there be sufficient evidence to show that language was used by the parties in a different sense. To explain language used in conveying an estate, its actual condition and occupation at the time of the conveyance may be considered "and the purchaser of land with flats appertaining thereto, must be presumed to have known the manner in which the flats had before been conveyed in deeds spread upon the records, and the manner in which they were occupied at the time of conveyance."[173]

The role of ancient records in determining intent or conditions at the time of conveyance of flats has also been litigated.[174]

A division of flats by the formula must yield to a prior division of flats of adjacent territory in so far as the formula is inconsistent with a prior conveyance.[175]

The same formula for division of flats on the ocean front, also applies to the division of flats on a tidal river.[176] In the ocean, as well as in a tidal river, the base line should run along the upland

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173. Treat v. Strickland, 23 Me. 234 (1843).

174. Proctor v. Railroad Co., 96 Me. 458, 52 A. 933 (1902).

175. Dillingham v. Roberts, 77 Me. 284 (1885).

176. Portsmouth Harbor & Co. v. Swift, 109 Me. 17, 82 A. 542 (1912).

and not over the flats. Therefore, it would be improper to draw the line from a point not a part of the upland, such as a small rock point usually surrounded by water and located several hundred feet from the upland.[177]

ISLANDS:

It was clearly established in Hill v. Lord[178] that the Colonial Ordinances apply to islands. The effect of this declaration would be that the upland owner of land on an island surrounded by water at low tide, would own to low tide or one hundred rods, whichever is less.

Different rules would apply, however, when an island is situated within one hundred rods of the opposite upland and there is no channel between the island and the upland at low water. (Query: Unless previously conveyed would all the island within one hundred rods of the upland pass with a conveyance of the upland? There are no cases on this point, but by analogy to the rules in rivers, they would. See page 214, infra.

In the above situation when there is separate ownership of the island and the mainland, title to the flats between the mainland and the island would belong to the mainland in the absence of any special grant. Title to flats circling the island would be limited to those on the sea side of the island between the island and the receding sea.[179]

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177. Id.

178. 48 Me. 83 (1861).

179. Babson v. Tainter, 79 Me. 368 10 A. 63 (1887).

> Our opinion is that the flats in dispute in the present case belong wholly to the plaintiff, and that the island takes no share in them. It would seem that they must go wholly to the island or wholly to the main – they are a continuous, unbroken embankment between the two "properties". If the island takes them, the mainland frontage has no flats for that extent. It is certain that the island cannot take the flats surrounding it on all sides. For, if it did, it would not only appropriate to itself those lying between itself and the shore (northerly of the island), but would take a great extent of flats along the shore, lying easterly and westerly of itself. In this way a diminutive island might be so situated as to absorb into its ownership an immense area of flats at the expense of the opposite uplands. It was virtually held in Thornton v. Foss, 26 Me. 402, supra, that an island within the one hundred rods, owned separately from the ownership of the shore, did not include flats on its easterly and westerly sides along the shore in front of the mainland, but that the title extended to such flats as were on its southerly side between itself and the receded sea.[180]

In determing what rule to apply, it is necessary to determine the definition of what constitutes an island. In Eden v. Pineo[181] the Court held that island status could not be denied to a territory connected to the mainland by a bar uncovered twelve hours of each day, but which had historically been known as an island. In the Babson case, the Court found a parcel "described as containing about two acres, and though it consists mostly of rocks and ledges, and is unfit for habitation of man, it must be considered as having size and permanency enough to entitle it to the appellation of island..."[182] It had also been contended that the territory in question was too insignificant in size to be regarded as an island. It was held:

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180. Babson v. Tainter, supra, p.372.

181. 108 Me. 73, 78 A. 1126 (1911).

182. Babson v. Tainter, supra, p.371.

> It is generally conceded that it is not everything which rises above high water mark that can be called an island. There may be reefs and rocks and accumulations that are not such in an essential sense. Thatch growths may not be. Thornton v. Foss, 36 Me. 402. Elevation of mussel beds have been declared not to be. King v. Young, 76 Me. 76. Sand heaps and bars may not be - or it may be a question of fact whether they are or not, when separated from the mainland only by narrow channels or sloughs. Railroad v. Schurmeier, 7 Wall 272; S.C., 10 Minn. 82.[183]

[184]

In Thornton v. Foss, thatch growths though not deemed an island were held subject to adverse possession, but ownership so gained was limited to those portions actually occupied and included no other flats.

In the Babson case it had also been contended that the owner of the island should rightly have the flats surrounding the island because at one time there had been a channel even at lowest tide between the island and the main. In disallowing this claim, the Court held:

> It may seem odd that nature may, without any act of man, transfer one person's property to another. But she may do it, when her work is accomplished by movements so slowly and silently operating as not to be seen while they are going on. The true answer to this proposition of the defendant is, that an owner of flats has no fixed and absolute title thereto. It is a shifting, ambulatory, dependent, or conditional ownership. (Emphasis supplied). The owner of the island might own flats appended to the island until those flats became affixed to the opposite shore. The elements might operate favorably to the one proprietor or the other. They might make and keep the channel near the mainland or near the island -- or might from time to time change and remove it -- or might fill it up -- and might open it again. But wherever natural causes place the channel they interpose a ruling boundary. If they altogether remove the channel other principles settle the boundary.[185]

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183. Id. at p.370-1.

184. 26 Me. 402 (1847).

185. Babson v. Tainter, supra, p.373.

ISLANDS (Non Tidal Stream):

In the grant of land on a non-tidal stream, in the absence of any contrary intention, the grant legally extends to the middle or thread of the stream "and not only the bank, but the bed of the river and the islands therein."[186] If a person owns both sides of the river above tide waters, he owns the island to the extent of the length of his land upon the river.[187] Ownership of the island may be different than from land on the river bank, in which case owners of the island are riparian owners as well as owners of the mainland opposite the island. Each owner has for an opposite, the owner of the part of the island facing his land. Their equal and common right is confined to the flow of water in the channel between them. There is no legal right in common or severalty in waters naturally flowing between other owners on another channel of the other side of the island where they have no land.[188]

SEASHORE PROPERTY OWNERS -- ACCRETION, AVULSION, AND RELICTION:

Those who own property on the seashore do so at their own risk and with the knowledge that not only can the sea give land, but it can also take it away. Considering the vast extent of Maine's coast, there have been relatively few cases dealing with the shifting boundaries of the shore. In the few cases that have been litigated no clear cut distinction has been drawn between the technical refinements of accretion, avulsion, reliction, erosion, and submergence of land.

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186. Bradford v. Cressey, 45 Me. 9, 12 (1858).

187. Granger v. Avery, 64 Me. 292 (1874).

188. Warren v. Manufacturing Co., 86 Me. 32, 29 A. 927 (1893).

The Maine Supreme Judicial Court has paid at least lip service to the common law principles. For example, "It is settled law that the owner of land bordering on a stream, a lake, or the sea, which is added to by accretion, that is by the gradual and imperceptible accumulation or deposit of land by natural causes, becomes thereby the owner also of new made land."[189] Strict adherence to the common law doctrine, however, must yield to the unique doctrine of tidal ownership as set forth in the Colonial Ordinances which in some cases would result in a variance with the common law principles. (Already touched upon, ISLANDS, supra.)

Fiction of Status of Flats:

In general, determination of ownership of flats has been determined on the basis of the shore line configuration as of the date of the litigation.

> The theory or fiction of the law is that flats brought into existence by the slow and imperceptible process of accretion, are presumed to be a natural condition always existing, or as having the same effect as if they had always so existed. It matters not, in applying the doctrine, whether the nucleus of the flats which finally extends from the upland, commences at the shore or at a distance in the sea from the shore and separable from it.[190]

What the topography was at some ancient time has been held immaterial, although consideration has to be given in some instances to how and in what manner the present status came into existence from a former configuration.

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189. State v. Yates, 104 Me. 360, 363, 71 A. 1018 (1908).

190. Babson v. Tainter, supra, p.375.

In the early Maine case of Dunlap v. Stetson,[191] the Federal Court had interpreted the conveyance as excluding the flats and being limited to the edge of the banks or upland. With regard to the progression of erosion, it was held that despite the fact that there had been an encroachment on the bank by the gradual wear of the stream of the river, the grantee must be confined to the line of the bank as it now actually exists and have no legal or equitable title to any portion of the front which now constitutes the flats.

> It is like the common case of alluvion, where something is gradually added to land by an imperceptible increase. What is taken from the bank is an imperceptible increment to the flats, and passes to the owner of it, in the same manner, as if there had been a like increment to the bank, it would have passed to the riparian proprietor. He takes the title, subject to those common incidents which may diminish or increase the extent of his boundaries. This is common learning laid down in Mr. Justice Blackstone's Commentaries (2 Comm. 261), and has been recognized in Adams v. Frothingham, 3 Mass. 363, and very recently acted upon by the king's bench in a case strikingly in point (Stratton v. Brown, 4 Barn. & C. 485)[192]

In Adams v. Frothingham,[193] it was held that "an increase from alluvion either from natural causes or a combination of natural and artificial causes must be to the benefit of the owner of the upland, or to him who owned the flats to which the increase was attached." (Emphasis supplied.)

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191. 4 Mason, 349, 8 Fed. Case, 75 (Case No. 4164) (1827).

192. Id. at p.82.

193. 3 Mass. (Tyng) 331, 363-4 (1807).

> It is contended that the ancestor could have been seized only of so much of the flats as existed in his lifetime, and as the demandant has declared on the seizen of her ancestor, she cannot recover more than he was actually seized of.
>
> But we do not think much of this objection. It has already been shewn, that the antient (sic) statute, reative to the subject of flats annexed them to the adjoining upland, to the distance of one hundred rods from the shore. Whatever increase therefore happened from natural causes, or from a union of natural and artificial causes, within that distance, must be to the benefit of the owner of the upland, or to him who owned the flats, to which the increase was attached. This increase is of necessity gradual and imperceptible. No man can fix a period when it began. No testimony can mark the exact margin of the channel on any given day or year. The ancestor being seized of the estate, of which all the flats now demanded are part, and having the right by law to all such additions, as should be made by the gradual retiring of waters, he must be supposed to have been seized of all which now exists, for no one can show any parcel of which he was not seized.[194]

No Maine case has been found in which increments to the shore by artificial means or by a combination of artificial and natural means have been litigated, but the Massachusetts rule has not been discredited even in dicta. Whether the Maine Court would be willing to accept the result of Adams v. Frothingham, supra,and then go the step further in which the accretion was allowed to the upland owner even if it is entirely caused by artificial causes, as in Michaelson v. Silver Beach Improvement Association, Inc.[195], remains to be seen.

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194. Id. at p.363-4.

195. 343 Mass. 251 (1961).

Island v. Mainland:

The question has arisen as to the ownership of the flats between an island and the mainland that has gradually filled up so there is no longer a channel. The answer depends upon the manner in which the accretion took place. If it started from the mainland and eventually reached the island, the island ownership in the flats would be obliterated. Similarly if the shore was connected with the island in a continuous unbroken span of flats occasioned by the receding of the sea rather than the build up of the soil, all the flats go to the main. (Commented on supra, Islands, p.211 ff) If the accretion, however, attaches to the island and moves toward the shore, the addition would belong to the island.[196]

It is not necessary to add land to the main that the accretion began at the shore and moved outward toward low water mark. The highest portion of new land may start some distance from the shore with the accretion increasing toward the shore until there is no longer a channel. But if an island forms at a distance from the shore, and then by its own growth extends inward until it reaches the shore, such new made land will not become the property of the owner of the soil.[197] If a new island is formed, according to the common law, such island would belong to the sovereign.[198]

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196. Babson v. Tainter, supra, p.374.

197. King v. Young, 76 Me. 76 (1884).

198. 2. Bl. Comm. 261; Martin v. Waddell, 41 (16 Pet.) U.S. 367 (1842); Angell, J.K., On Tidewater, (1826) p.79.

The Babson case adhered to the same legal principle set forth in the King v. Young, supra, but the case was distinguished on the facts because a thatch growth did not qualify as an island. (See p.213).

> The conclusion arrived at by us does not clash with the principle, well settled that where the right to the soil under the water belongs to a subject, he is entitled to all increments coming thereon. (2 Bl. Comm. 262). This applies to growths upon and above flats. Should the bar in this case come up above high water mark, and become solid land, it would be an incident of - a part of - the island or main, according as it grew up from the shore to the island or vice-versa....[199]

Unanswered Questions:

Because of the nature of ownership of flats some very interesting legal questions are suggested. At what point does ownership in the flats become extinguished? Are they taxable when completely under water? In case of coastal erosion when upland is diminished, does the former owner of the upland still retain ownership of the shore, or does it attach to the new upland owner? For a practical application of these questions see Chapter on Erosion, infra, Vol. III.

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199. Babson v. Tainter, 79 Me. 368, 374, 10 A. 63 (1887).

CHAPTER THREE PUBLIC AND PRIVATE RIGHTS ON THE SEASHORE AND IN MAINE'S TIDAL WATERS

Basic to any study of Maine law affecting marine resources is an understanding of public and private rights on the seashore and in Maine's tidal waters. No two coastal states have identical law pertaining to the land-sea interface although states that emerged from English colonies share a common heritage. Maine law in this area, in general, corresponds to the laws of Massachusetts, of which it was once a part. The pattern of ownership on the shore in Massachusetts in turn derives from the Colony Ordinance of 1641-7 (See Chapter 2, p.189 hereinafter referred to as the Colonial Ordinances) enacted by the General Court of the Massachusetts Bay Colony and judicially adopted by both Maine and Massachusetts.

I NAVIGABLE WATERS

The geographic extent of Maine's tidal boundaries was discussed in Chapter 2. In this section the discussion of tidal waters is included under the broad category "navigable waters"; also included are four other sub-categories describing Maine's inland waters which must be accorded peripheral attention in any comprehensive analysis of Maine law dealing with marine resources.

At common law navigable waters were defined as waters in which the tide ebbed and flowed. The King was the owner of these waters and the land under these waters from high tide to the extent of the

territorial sea in a private capacity, and in a sovereign capacity as trustee of the public right of navigation and fisheries. There were some fresh water rivers in England that were impressed with a public servitude, but by and large fresh water rivers were subject to private ownership. The absence of large lakes or inland seas in England accounted for the lack of the development of substantive law on great ponds in England.[1]

During the period of the Colonial government, the sovereign power of the King was transferred to the Provincial governments which were empowered to make laws not repugnant to the laws of England. Economic considerations in the colonies resulted in Massachusetts' modification of the common law in two important aspects: (1) the Colonial Ordinances granted to the riparian owner ownership in tidal flats to the low water mark or 100 rods below high tide, whichever was less, subject to the public servitude of navigation and fishery; and (2) the demands of commerce and development in a new country dictated that the inland waterways should be used as highways of commerce. In England there were no major arterial waterways that were not subject to the ebb and flow of the tide, but the reverse was true in the United States.[2] The common law in the colonies was modified, therefore, to impress fresh water navigable waterways with the public servitude of navigation while still retaining for the riparian proprietor the other rights inherent in private ownership.

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1. Whittlesey, supra, p.xxxviii, xxx; Veazie v. Dwinel, 50 Me. 479, 484 (1862).

2. Whittlesey, supra, p.xxx; II Water and Water Rights, Allen Smith Publishing Co. (1967), p.6.

Another concept of navigability was developed in Maine, as in other states, because of the needs of the lumbering industry. Bodies of water that were floatable were also impressed with the public servitude of navigation for purposes of business and commerce. A river which, in its natural condition, unaided by artificial means is susceptible to public use to float vessels, rafts, or logs, is a navigable or floatable stream according to the law of Maine, though not a navigable river in the technical (i.e., tidal) sense of the common law.[3]

The term "navigable" no longer has a clear meaning. Some confusion is inevitable because the Maine Court has sometimes spoken of "not navigable in the technical sense" meaning not a tidal river (the criterion of navigability at common law). In such cases "technical" is to be interpreted as meaning in the legal sense. On the other hand, the court has also used floatability -- capacity to float logs, rafts or boats -- as the criterion to determine whether a stream is navigable. In the latter cases navigability becomes a question of fact rather than a technical legal concept.[4] Confusion arises when it is not clear in context whether non-navigable means non-tidal or merely non-floatable. This is particularly relevant in cases involving milldams. Although not in the original act, the 1841 revision of the statutes[5] recast the language of the Milldam Act,[6] and for the first

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3. Wilson v. Harrisburg, 107 Me. 207, 77 A. 787 (1910); Pearson v. Rolfe, 76 Me. 380 (1884); Brown v. Chadbourne, 31 Me. 9 (1849).

4. Smart v. Aroostook Lumber Co., 103 Me. 37,68 A.527 (1907); Gerrish v. Brown, 51 Me. 256 (1863).

5. R.S., 1841, c.126; See 38 M.R.S.A. 611 ff. for present law.

6. See Brown v. DeNormandie; 123 Me. 537, 124 A. 697 (1924).

time expressly included the condition that such dams be upon "non-navigable" streams. "Non-navigable" under the Milldam statute has been interpreted to mean a stream above the influence of the tide.[7] Confusion may be further compounded by still other definitions of navigability for purposes of the federal Commerce Clause, under which the power of the Army Corps of Engineers to regulate navigation derives, or the expanding definition of navigability sought by the Federal Power Commission in its licensing of dams and reservoirs.

CLASSIFICATION OF WATER BODIES IN MAINE

In Maine bodies of water may be roughly divided into five separate categories[8] listed and briefly described below.

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7. Veazie v. Dwinel, 50 Me. 479, 485 (1862).

8. In the Massachusetts case of Comm. v. Vincent, 108 Mass. 441, 447 (1871) the Court said that "The term 'navigable waters', as commonly used in the law, has three distinct meanings: first, as synonymous with 'tide waters,' mean waters, whether salt or fresh, wherever the ebb and flow of the tide from the sea is felt; or second, as limited to tide waters which are capable of being navigated for some useful purpose; or third, (which has not prevailed in this Commonwealth) as including all waters, whether within or beyond the ebb and flow of the tide, which can be used for navigation." But see Stanton v. Trustees of St. Joseph's College, Me. 233 A. 2d 718, 720 (1967).

   The law distinguishes between navigable and non-navigable waters for the purpose of determining what waters the public has the right to use and what waterways are the private property of the riparian owners. Navigable, or public waters, have been variously defined as those bodies of water which are tidal (Opinion of the Justices, 118 Me. 503, 106 A. 865 (1919); Small v. Wallace, 124 Me. 365, 129 A. 444 (1925)), or lakes or ponds whose surface area is greater than ten acres (Flood v. Earle, 145 Me. 24, 71 A. 2d 55 (1950)), or whose waters are suitable for, or capable of, having property transported upon them (Brown v. Chadbourne, 31 Me. 9 (1849); Wadsworth v. Smith, 11 Me. 278 (1834)). When a body of water falls within one of the above categories it is deemed to be a public waterway open to certain public uses.

1. Tidewater

By English common law, a stream or body of water was navigable only if it was subject to the ebb and flow of the tide. Private and public rights in tidal waters and the land-sea interface are discussed infra. As there noted, in Maine obstructions or impediments to navigation in tidal streams must be specifically authorized by the Legislature; they have not been sanctioned under general statutory provisions.

2. Floatable, Navigable Non-Tidal Streams

The common law right of navigation in floatable or navigable non-tidal streams has been equated in a legal sense to the common law right of navigation in tidal waters. The mere fact that the title to the bed is in a private owner does not prevent the use of the stream by the public for the purpose of navigation. "The only purpose for which it becomes a matter of importance to determine whether or not the tide flows is in ascertaining who owns the soil."[9] But with the exception of navigation, the public does not necessarily enjoy the same rights in these waters as in tidal waters. In Brown v. Chadbourne, supra, the Court said

> For in this State, the rights of public use have never been carried so far as to place fresh water streams on the same ground as those in which the tide ebbs and flows, and which alone are considered strictly navigable at common law, and to exclude the owners of the banks and beds from all property in them. In some of the States of the Union such a rule has been established by judicial decision and in others by legislative acts.[10]

9. Wilson v. Harrisburg, 107 Me. 207, 211, 77 A. 787 (1910); Ownership of soil in tidal and non-tidal streams is discussed in Chapter 2.

10. Brown v. Chadbourne, 31 Me. 9, 21-22 (1849). See also Berry v. Carle, 3 Me. 269 (1825).

In Veazie v. Dwinel it was said that in many states the common law distinction between navigable rivers and those which are simply recognized as highways does not exist; "in this State as has been seen, the common law definition has been fully recognized."[11] In states such as Wisconsin, the full range of public rights have been imposed on fresh water rivers, not only for purposes of commerce and agriculture or incidents of navigation, but for the full range of recreational uses.[12]

While the public servitude applicable to tidal waters has not been extended in Maine to merely navigable-in-fact rivers and streams, the distinction is constantly being eroded. The common right of fisheries was not extended to fresh water streams, but very early in Colonial history the sovereign power of the colony was deemed properly exercised in regulating migratory fish in fresh water as well as in tidal streams, and in granting exclusive fisheries to towns. (See p.252). Neither have rights deriving from the ownership of the soil, such as fishing, swimming, cutting ice, standing on the bottom, etc., been extended to the public in non-tidal streams. For example, "The riparian proprietor has the right to take fish from the waters of his own land, to the exclusion of the public."[13]

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11. Veazie v. Dwinel, supra, p.485.

12. See Baker v. Voss, 217 Wis. 415, 259 N.W. 413 (1935).

13. Opinion of the Justices, 118 Me. 503, 507, 106 A. 865 (1919).

> The only limitation upon the absolute rights of riparian proprietors in non-tidal rivers and streams is the public right of passage for fish, and also for passage of boats and logs, provided the streams in their natural condition are of sufficient size to float boats or logs. Subject to this qualified right of passage, non-tidal rivers and streams are absolutely private. Wadsworth v. Smith, 11 Me. 281, 26 Am. Dec. 525; Pearson v. Rolfe, 76 Me. 386.[14]

The Maine Court has extended the concept of navigability to pleasure boating[15] rather than adhering to the strict limitation of navigation in the pursuit of commerce and agriculture, but has never directly extended the public rights of fishing, swimming, hunting or other recreational uses to its non-tidal rivers.[16] At least one analyst, however, feels that in the light of language in Smart v. Aroostook Lumber, the Maine Supreme Judicial Court will take the latter step when faced with the problem. In upholding pleasure-boating the Court said:

> The existing conditions which create the purposes of the public use of the Presque Isle Stream are subject to change, and the driving and temporary storing of logs now of principle importance, may become secondary in importance to the travel of summer residents and the transportation of merchandise for their accommodations. In this State, recreation is assuming features and incidents as valuable to the public as trade and manufacturing.[17]

While this may be the direction that the Maine Court is heading, the step has not actually been taken. Recreation was not a commercial consideration in colonial days. It is not necessary to speculate

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14. Id. at p.507.

15. Smart v. Aroostook Lumber Co., 103 Me. 37, 68 A. 527 (1907).

16. Waite, G.G., Public Rights in Maine Waters, 17 Maine Law Review, 161, 165.

17. Smart v. Aroostook Lumber, supra, p.48.

about the decline of the Puritan ethic to acknowledge the commercial value of recreation to the economy of Maine, whether it be engaged in by riparian owners or the resident or non-resident general public. It would not be a difficult transition to include recreational rights as an incident of commerce, for which the public servitude on navigable rivers has already been imposed. As a practical matter it has been pollution, rather than legal rights, which has acted as a deterrent to the public use of these rivers for recreational purposes. It would probably be difficult if not legally impossible to successfully deter the use of these non-tidal navigable rivers for recreational purposes. While injunctive relief might be possible to restrain specific activities by specific persons, it would be difficult to prove damages. What is to prevent a person from fishing or swimming from pleasure boats legally entitled to be on these rivers? The riparian owner has the exclusive right of fishery over these waters, but the fish belong to the people in their sovereign capacity. Unless such pleasure craft cast anchor on the river bed, it would be hard to see how a riparian owner's rights would be violated.

Navigable or floatable non-tidal streams are subject to the provisions of the Milldam Act, under which the riparian owner has a general statutory authorization[18] to dam such waters for power purposes. The owner of the milldam must compensate other riparian owners for flowage of their lands caused by the dam. A riparian owner on a navigable or floatable non-tidal stream is entitled to a reasonable use of

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18. 38 M.R.S.A. 611 and following.

the water as against all other riparian owners.[19]

3. Non-Floatable Streams

In Maine, a non-floatable stream is completely private except for the passage of fish.[20] The legal status of such streams, and the difference between these streams and floatable streams, was set forth in Wadsworth v. Smith[21] to the effect that above the flow of the tide, rivers become private, either absolutely or subject to the public right of way, according to whether they are small or large streams. Those streams that have the capacity to be of public use in transportation are highways by water over which the public have a common right; and the private property of the owner of the soil is subservient to the enjoyment of this public right. "But such little streams or rivers as are not floatable, that is, cannot, in their natural state, be used for the carriage of boats, rafts, or other property, are wholly and absolutely private; not subject to the servitude of the public interest, nor to be regarded as public highways, by water, because they are are not susceptible of use, as a common passage for the public."[22] The character of a non-floatable stream cannot be changed by improvements put on it, but if the stream was navigable to begin with, the public would be entitled to the benefit of such improvement.[23]

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19. See Stanton v. Trustees of St. Joseph's College, Me. 233 A. 2d 718 (1967); Stanton v. Trustees of St. Joseph's College, Me. 254 A. 2d 597 (1969) and cases cited therein.

20. Opinion of the Justices, 118 Me. 503, 507, 106 A. 865 (1919).

21. 11 Me. 278 (1834).

22. Id. at p.281.

23. Wadsworth v. Smith, supra; Holden v. Robinson Co., 65 Me. 215 (1876). Query: What would be the legal status if a beaver dam made a stream navigable?

A riparian owner of a non-floatable stream may build a milldam on it under the general statutory provisions. He is entitled to a reasonable use of the waters, subject to the right of other riparian owners. A non-riparian owner has no right to the use of the stream.[24]

4. Great Ponds

By virtue of the Colonial Ordinances all ponds 10 acres or over are public. The State owns the bottom and the waters. Private ownership in a great pond or lake extends only to the natural low water line, and all beyond that is owned by the State. The level of water in great ponds may not be altered except by legislative authorization.[25] The public is guaranteed access to great ponds "so long as they trespass not upon any man's corn or meadow."[26] The right of free fishing and fowling guaranteed in great ponds by the Colonial Ordinances has been considered by the Courts of both Maine and Massachusetts as typical and illustrative of the general principle applicable thereto, which has been extended from time to time to include other privileges deemed to be in keeping with the spirit and intention of the Colonial Ordinances.[27]

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24. The second St. Joseph case (254 A. 2d 597 (1969)) held that any change in the quantity or quality of water resulting from activity on or in service of non-riparian land may be prohibited without showing actual damage.

25. Fernald v. Knox Woolen Co., 82 Me. 48, 56, 19 A. 93 (1889); Smedberg v. Moxie Dam Co., 148 Me. 302, 92 A. 606 (1952).

26. In Massachusetts this phrase has been interpreted to mean land devoted to annual crops under cultivation (West Roxbury v. Stoddard, 89 Mass. (7 Allen) 158, 166 (1863); and improved and enclosed land. Slater v. Gunn, 170 Mass. 509 (1898)). In Maine, the public may not cross any man's tillage or mowing land (Barrows v. McDermott, 73 Me. 441, 451 (1882)). See Locke, H.E., 12 Maine L. Rev. 148.

5. Ponds Less Than 10 Acres

Ponds less than 10 acres are capable of private ownership.[28] The public has no right in ponds of less than 10 acres, although some Court decisions, speaking in the context of rivers and streams, have said that bodies of water capable of sustaining traffic are to be deemed navigable.[29] Even if the right of navigation in private ponds could be established, such right would be meaningless because there is no right of access over private lands as is guaranteed for access to great ponds. The only eventuality where this possibility would have any relevance would be entry to private ponds from a public highway or approach by seaplane.

Presumably the bottom of small ponds is privately owned and may be divided according to the grantor's deed. There is no law, however, to determine how to divide such bottom land among riparian owners in the absence of direction in a grant.

In Bradley v. Rice,[30] the Court held that because of the wording of the deed, ownership of the land stopped at the margin of the pond; but the opinion contains an informative discussion of the rule to be

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27. See Whittlesey, supra, p.15; Brastow v. Rockport Ice Co., 77 Me. 100 (1885); Barrett v. Rockport Ice Co., 84 Me. 155, 24 A. 802 (1891); McFadden v. Haynes Ice Co., 86 Me. 319, 29 A. 1068 (1894); Auburn v. Union Water, 90 Me. 576, 38 A. 561 (1897); Conant v. Jordan, 107 Me. 227, 77 A. 938 (1910).

28. Private ownership under common law included all ponds. No direct Maine judicial ruling has been found with regard to the capacity of private ownership in ponds less than 10 acres, except in the negative sense to the effect that ponds over 10 acres cannot be privately owned.

29. Brown v. Chadbourne, 31 Me. 9 (1849).

30. 13 Me. 198 (1836).

applied in the absence of clear direction in the deed. In the Bradley case it had been contended that ownership should be construed to run to the pond's thread or center, by analogy to the division of land on a fresh water stream. The Court acknowledged that the law was well settled and understood that the riparian proprietor's interest would go to the thread of the stream when the land is bounded by a river or stream, or an artificial pond created by expanding a stream by means of a dam, but commented that no cases had been cited, nor had they found any extending this rule of construction to a pond or lake. The Court distinguished Hathorn v. Stinson[31] because in that case the pond was a mere expansion of a river or stream, but added that "the law of boundary, as applied to rivers, would no doubt be inapplicable to the lakes, and other large natural collections of fresh water, within the territory of this State."[32] In refusing to extend the grant by analogy, the Court said

> This is law well settled and understood. But it has not been so settled, with regard to ponds and lakes. Nor are we aware, that there can be one construction for small ponds or lakes, and another for large ones. Where shall the line be drawn? At what point does the one construction end, and the other begin? In the absence of any direct authority, for extending by construction the bounds, which the grantors have prescribed in the deeds under consideration, we do not feel at liberty to do so, from any supposed analogy between streams and ponds. It is, to say the least of it, of very doubtful application.[33]

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31. 10 Me. 224, 238 (1832). See also Mansur v. Blake, 62 Me. 38 (1873).

32. Bradley v. Rice, supra, p.201.

33. Id. at p.201-2.

II PUBLIC RIGHTS IN TIDAL WATERS

Public rights in tidal waters and on the seashore have been described both as easements and property rights in the public.[34] Expressions of judicial appraisal of these rights have ranged from describing them as rights held in trust for the people by the State, on the one hand, to rights granted to members of the public as individuals on the other hand. The latter view is reflected in "Its whole purpose was to declare a privilege in the public, not as a sovereignty but as individuals,...Neither the State, nor the public in an organized capacity, acquired the rights conferred by the ordinance."[35] Perhaps the most useful description can be found in Treat v. Lord[36] to the effect that such rights "are part of the State's sovereignty, conferred for the public good." Such a description makes it easier to understand why these rights may not be extinguished by adverse possession, destroyed or given away by the public, yet at the same time explain why the Legislature has the power to regulate, curtail, hold in abeyance, or extinguish public rights in tidal waters.

The primary rights of the public in tidal waters are the common law rights of navigation and fishing. These rights were not created but confirmed by the Colonial Ordinances.[37] As stated in Chapter 2,

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34. See Waite, G., Public Rights in Maine Waters, 17 Me. Law Rev. 161.

35. Opinion of the Justices, 118 Me. 503, 504, 523, 525, 106 A. 2d 865 (1919).

36. 42 Me. 552, 560 (1856).

37. Whittlesey, John J., Law of the Seashore, Tidewaters and Great Ponds in Massachusetts and Maine, 1932, p.11. See p.189 supra for text of Colony Ordinance 1641-7 referred to throughout this report as the Colonial Ordinances.

the Colonial Ordinances gave propriety to the owner of the adjoining upland to low water mark "where the sea does not ebb above 100 rods", subject to the same public servitude in effect when the land was owned by the sovereign. The granting of this land to the riparian proprietor by the Massachusetts Bay Colony reflected what had been uniform practice.[38] The recitation of the public servitude in the Colonial Ordinances was necessary to reconcile the continuance of public rights with private ownership of land in the tidal area. As set forth in the section on Private Rights, private ownership on the shore is a somewhat hybrid ownership. It partakes of some elements of the crown ownership before the Magna Carta and some elements of the sovereign power of Parliament after Magna Carta, fused into a pattern of rights evolving from the circumstances of Colonial America.

Although the common law servitude is the basis of these public rights, since their enactment in 1641-47, the Colonial Ordinances have been used as a point of reference by the Court in ruling on rights in the tidal area.

Based on the Colonial Ordinances, judicial interpretations of public rights in tidal areas have diverged from the English common law. Similarly, the interpretation of the Colonial Ordinances by the Supreme Judicial Court of Maine has sometimes deviated significantly from corresponding interpretations in Massachusetts. Despite their common origins, therefore, Massachusetts law must be used with caution in determining what is the law in Maine, or in anticipating the out-

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38. Whittlesey, supra, p. xliii.

come of points of law not yet litigated in Maine. This diversion also reflects the flexibility that the courts have found in the Colonial Ordinances, and despite protests to the contrary,[39] in many instances one must look to the Court rather than the Legislature to find out what the law is in regard to public versus private rights in Maine's land-sea interface and tidal zones.

The Colonial Ordinances had specified "Provided, that such propriety [of the riparian owner] shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves, to other men's houses or lands" and "Every inhabitant who is an householder shall have free fishing and fowling in any great ponds, bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town, or the general court, have other appropriated them."[40]

PUBLIC RIGHT OF NAVIGATION

Although the modern interpretation of the right of navigation is much broader than the English common law right of navigation or the right of navigation expressed in the Colonial Ordinances, the public has certain unique rights and prerogatives on the shores and flats, be they bare or submerged, deriving from the English common law pertaining to this area and the judicial interpretation of navigational

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39. E.g., Barrows v. McDermott, 73 Me. 441 (1882).

40. Whittlesey; xxv. See complete text on p.189.

rights under the Colonial Ordinances. These rights with regard to navigation and fishing were not extended to fresh water rivers by virtue of the Colonial Ordinances.

It has not always been possible to definitively categorize the present day rights of the public in the shore as flowing from the navigation or the fishing privilege, but they have been so classified for the purposes of this report. The public right of navigation has been interpreted to include any passage on the water for the carrying out of trade or agriculture.[41] To enable the carrying out of broad commercial purposes and because of the right of the public "to pass to and from other men's houses or land" the Maine Supreme Judicial Court has given a broad definition to permissible activity in the inter-tidal zone.

The public has a right to sail over flats, to rest a vessel on flats when the soil is bare,[42] to moor vessels, to load and unload cargo.[43] An operator of a ferry may moor his boat on the flats to take on and discharge passengers, and the passengers have the right to cross the flats going to and from the boat. "The right of navigation so reserved is not simply the right to sail over the flats when covered with water to the house and land of other men than the owner of the flats, but includes the right of mooring on the flats, of unloading the cargo

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41. Brown v. Chadbourne, 31 Me. 9 (1849).

42. Marshall v. Walker, 93 Me. 532, 536, 45 A. 497 (1900).

43. Deering v. Long Wharf, 25 Me. 51 (1845); State v. Wilson, 42 Me. 9, 24 (1856).

on the flats, and of transporting it to other men's land and house."[44] The public may ride over the flats or skate on them when covered with ice.[45]

Statutory provisions prohibiting cattle from running at large on a beach;[46] the fact that adverse possession may not be established from cattle pasturing on a beach;[47] and a state statute[48] authorizing municipalities to require permits to ride a horse or drive a vehicle or motorcycle on the beach, would strongly suggest that -- but for the express statutory provisions -- these activities would be encompassed in the public rights on the shore.

The public has a right to moor a boat from a public highway crossing a tidal stream. A person can leave a boat below low water mark,

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44. Andrew v. King, 124 Me. 361, 129 A. 298 (1925).

45. French v. Camp, 18 Me. 433 (1841); Woodman v. Pitman, 79 Me. 456, 10 A. 321 (1887); Marshall v. Walker, supra.

46. Provincial Stat. of 1749 (Cutts v. Hussey, 15 Me. 237 (1839)).

47. Donnell v. Clark, 19 Me. 174 (1841).

48. 17 M.R.S.A. 3853-A as added by P.L. 1965, c.355. This section uses the term "public beach, shore or bank." According to the Colonial Ordinances all beaches are public between high and low water mark so the exact meaning of this phrase is unclear. The complete text of the statute reads:

Public Beaches and Shores

The municipal officers in any municipality wherein a public beach, shore or bank exists may grant a permit to persons to allow horses, cattle, sheep, swine, motor vehicles or motor driven cycles to enter upon such beach, shore or bank at the times designated on such permit. Anyone willfully permitting cattle, horses, sheep, swine, motor vehicles or motor driven cycles to enter upon such public beach, shore or bank without such permit, shall be guilty of trespass and shall be punished by a fine of not more than $20 or by imprisonment for not more than 30 days, or by both.

and has the right to approach public waters from any part of the high-
way.[49] A person, however, does not have any right to pass over pri-
vate property to gain access to flats even for conducting legitimate
activity once he is there.[50] He may be on the shore legitimately how-
ever, by obtaining access from the sea or from a public highway.

The public has these rights until the owner appropriates the flats
to his exclusive use and possession.[51] While the flats remain in a na-
tural state, covered by the flow of the tide and left bare by its ebb,
the public servitude is intact. If flats are partially enclosed by a
wharf or a weir, the public has the right to be on the free space of
the flats that are not enclosed.[52]

In Massachusetts the public has no right to cross the beach or
shore for any purpose other than navigation, fishing or fowling.[53] In
Butler v. Attorney General,[54] although the public's right to sail over,
swim, float or fish in tidal waters covering the sea was affirmed, the

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49. Parsons v. Clark, 76 Me. 476 (1884).

50. Littlefield v. Hubbard, 124 Me. 299, 128 A. 285 (1925); Small v. Wallace, 124 Me. 365, 129 A. 444 (1925).

51. Marshall v. Walker, supra, p.572.

52. Deering v. Long Wharf, 25 Me. 51 (1845); State v. Wilson, 42 Me. 9 (1856).

53. Whittlesey, p.70.

54. 195 Mass. 79 (1907).

Court specifically held that there was no public right in Massachusetts to use the shore for bathing purposes.[55] Swimming over the flats is also permitted in Maine.[56] While no case has been found in Maine which specifically faces the question of using the seashore for bathing purposes,[57] the broad powers given to the public to be on the flats would be sufficient to encompass the public rights of swimming on the seashore. Support is given to this broad interpretation in the language in Andrew v. King, supra: "In the pursuit of his private affairs, of business as well as pleasure, the defendant has the right to land on the flats."[58]

PUBLIC RIGHT OF FISHING

The public right of fishing in tidal waters, though confirmed by the "free fishing and fowling" of the Colonial Ordinances, was a long-established common law right. The public right of fisheries has never been challenged, although statutes regulating its usage have frequently been subject to judicial interpretation. The common law right has been interpreted to include shell as well as swimming fish.[59]

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55. To the same effect, Blundell v. Catterall, 5 B.&A. 268; 3 Kent 417 in which the English Court held that the King's subjects had no right to cross the seashore with bathing machines to bathe.

56. Marshall v. Walker, 93 Me. 532, 536, 45 A. 497 (1900).

57. Swimming in great ponds is an allowable public use. (Gratto v. Palangi, 154 Me. 308, 147 A. 2d 455 (1958).

58. Andrew v. King, supra, p.364.

59. Bagott v. Orr, 2 P.B. 472, Parker v. Cutler Milldam Co., 20 Me. 353 (1841); State v. Leavitt, 105 Me. 76, 72 A. 875 (1909); Weston v. Sampson 62 (8 Cush.) 347 (1851); Martin v. Waddell, 41 U.S. (16 Peters) 367 (1842).

It is a well settled principle of common law that the fish in the waters of the State, including the sea within its limits, as well as the game in its forests, belong to the people of the State in their collective capacity.[60] Fish are ferae naturae and belong to the first takers.[61] Fish swimming in tidal waters above as well as below low water mark are the property of the first taker regardless of the ownership of the soil under the water where they are taken. A riparian's right to fish derives not out of the ownership of the soil, but from his right to share in the common right of fishery reserved to the public.[62] While the riparian owner has no exclusive right to the fish that swim over his land, because of the Colonial Ordinances he does have one advantage over the general public which derived from his ownership of the soil. That is a right of erecting fixtures on the flats or attaching them to the shore. A proprietor "may fasten his seine by grapplings to the shore and erect weirs for the purpose of catching fish, those having public rights only cannot do so."[63]

From the same rationale comes the prohibition against the public taking thatch grass, mussel manure, sand or sea shells, although the taking of sea manure is permissible.[64] It is permissible to take free

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60. State v. Peabody, 103 Me. 327, 69 A. 273 (1907).

61. Perry v. Dodge, 144 Me. 219, 67 A. 2d 425 (1949).

62. Small v. Wallace, 124 Me. 365, 129 A. 444 (1925).

63. Matthews v. Treat, 75 Me. 594 (1884).

64. Moore v. Griffin, 22 Me. 350 (1843); Matthews v. Treat, 75 Me. 594 (1884); Treat v. Parsons, 84 Me. 520, 24 A. 946 (1892); Sawyer v. Beal, 97 Me. 356, 54 A. 848 (1903). See p.278 for discussion of profit a prendre.

floating seaweed, but not seaweed that is cast on the beach.[65] The public is also prohibited from depositing snow scrapings on the flats of another as an incident of cutting ice from tidal rivers below low water mark. In McFadden v. Ice Company[66] it was contended that, by analogy to fishing, such a practice should be permissible. The Court held, however, that property rights cannot be established by analogy alone. The rights reserved for fishermen were not reserved for ice cutting.

> The fisherman has a right to go upon another's flats because it is one of his reserved rights. But no such right was reserved to the ice-cutter. His right to cut ice upon our public rivers and ponds results from the fact that, below the line of low water, the State owns the beds of navigable rivers and great ponds, and holds them in trust for the public. Below the line of low water everyone may cut ice. It is a public right. Above the line of low water, no such right exists. Nor does it exist upon flats. And we fail to perceive how an ice company, operating upon one of our navigable rivers, can possess the right to deposit the snow scraped from its ice upon the flats of an adjoining owner, without the latter's consent. It is not among the reserved rights mentioned in the ordinance of 1647, nor, so far as we can discover, has the right thus to incumber another's land been recognized or affirmed by judicial decision, either in this country or in England.[67]

The McFadden case is interesting because the defendant had argued that it should be public policy to increase rather than restrict public rights in navigable waters. He had argued that ice rights were more important commercially than fishermen's rights to build their huts,

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65. Hill v. Lord, 48 Me. 83 (1861); Matthews v. Treat, supra.

66. 86 Me. 319, 29 A. 1068 (1894).

67. Id. at p.325.

that the loss of this tonnage of ice up and down the rivers would be of immense commercial value, and that the effect of prohibiting the deposit of ice scrapings on the frozen flats would be taking this property from the public and giving it to private individuals upon the shore. One can speculate whether the outcome of this case would have been different if the State had leased the right to cut ice from below low water marks to an entrepreneur.[68]

INTERFERENCE WITH PUBLIC RIGHTS

The right of the sovereign to regulate public rights will be discussed in the next section. Private owners of flats or shore property have, under judicial interpretation of private rights under the Colonial Ordinances, the capacity to extinguish the public rights on these flats by enclosing or filling in the flats. Once flats are completely filled or enclosed, they assume the characteristics of the upland.[69] The Wetland statutes requiring the shore or flat owner to have the approval of the municipality and the Wetlands Control Board to fill the flats[70] have curtailed this private right. Zoning ordinances might also have the same effect. The capacity of a private person to defeat public rights is limited to the area from the high tide line down to low tide to a maximum of 100 rods.

The power to extinguish public rights is not absolute. Most of the cases involving the inability of a private individual, or the

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68. See discussion of Mining Laws, infra. Vol. III.

69. Marshall v. Walker, 93 Me. 532, 45 A. 497 (1900).

70. 12 M.R.S.A. 4651-4709 as added by P.L. 1967, c.348.

public collectively, to interfere with or extinguish public rights have concerned obstructions to navigation. These cases have continually reiterated the principle that (even apart from federal requirements) the Legislature must authorize any obstruction in tide waters or navigable streams. A property owner, however, may make use of the air space above navigable waters, providing navigation is not thereby obstructed.[71]

In Dyer v. Curtis[72] a creek was closed against the income tide to create a fresh water pond for the formation and harvesting of ice. The Court recognized in that case that by virtue of the Colonial Ordinances the owner of the upland had the fee to the flats to ordinary low water mark, but between low and high water mark he held them subject to certain reserved rights of the public. The Court went on to say that navigation might not be obstructed, nor the passage of fish into bays, creeks, or up the course of navigable rivers impaired, without legislative authority. "These are matters of common rights, and such an obstruction of them, even by the holder of the fee and the seashore, is a public nuisance. They are rights, also, against which no prescription runs. No erection, injurious to them and without legislative sanction, ever acquires the right to be, by lapse of time."[73]

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71. Low v. Knowlton, 26 Me. 128 (1846).

72. 72 Me. 181 (1881).

73. Id. at p.184.

III REGULATION OF PUBLIC RIGHTS

The Supreme Judicial Court of Maine has repeatedly acknowledged the power of the Legislature to regulate, change the use of, limit, hold in abeyance, or extinguish public rights and privileges provided it is done for a public purpose.[74] "Public purpose" to justify regulating public rights, is more closely related to the public use or the public purposes for tax purposes (see p.379) than the public use for eminent domain purposes. (see p.358).

The restrictions placed by the Magna Carta upon the exercise of the King's prerogatives did not operate to abridge the power of Parliament over public and common rights. Of necessity, the jurisdiction to regulate and dispose of those rights which are common and public must reside in the legislative body which is the representative of the people. "'The power of the Commonwealth by the Legislature over the sea, its shores, bays and coves, and all tidewaters, is not limited like that of the Crown at common law.' Shaw, C.J. in Commonwealth v. Alger, 7 Cush., 82."[75] This is true in fresh as well as salt water. "The State represents all public rights and privileges in our fresh water rivers and streams and may dispose of them as it sees fit."[76]

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74. Moor v. Veazie, 32 Me. 343 (1850); Moulton v. Libbey, 37 Me. 472 (1854); State v. Leavitt, 105 Me. 76, 72 A. 2d. 875 (1909); Opinion of the Justices, 118 Me. 503, 106 A. 2d 865 (1919); Flood v. Earle, 145 Me. 24, 71 A. 2d 55 (1950); State v. Lemar, 147 Me. 405, 87 A. 2d 886 (1952).

75. State v. Leavitt, 105 Me. 76, 78, 72 A. 875 (1909).

76. Mullen v. Log Driving Co., 90 Me. 555, 38 A. 557 (1897).

GENERAL POWER TO REGULATE NAVIGATION

Federal supremacy in the field of navigation has never been challenged by the State of Maine. This supremacy was articulated in a late 19th Century Maine case, in which the Maine Court had held that although under the Constitution the State had surrendered admiralty jurisdiction to the United States and the power to regulate interstate commerce, the Federal power was not absolutely exclusive of the State's power to regulate commerce. The commerce clause of the United States Constitution does not render nugatory State legislation which affect, but do not interfere with existing regulations of Congress on the same subject. Prior to September 19, 1890, Congress had not acted on the subject of bridges over navigable waters, so lack of permission from the Secretary of War was not sufficient justification for a town to refuse to build a bridge authorized by the Legislature before that date.[77] After Congress did act, a State could not declare unlawful a structure impeding navigation that Congress had declared lawful, and conversely could not declare lawful, what Congress has deemed to be unlawful.[78] "When, therefore, Congress acts in so far as it acts in the premises, the jurisdiction of the State government, judicial as well as legislative, recedes."[79]

Until such time as the federal government preempts the field neither a person, a town, nor county commissioners have the authority

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77. Adams v. Ulmer, 91 Me. 417, 39 A. 347 (1897); See State v. Leighton, 83 Me. 419, 22 A. 380 (1891).

78. Frost v. Railroad Co., 96 Me. 76, 51 A. 806 (1901).

79. Id. at p.83.

to obstruct navigation unless they have received direct authorization from the Legislature or approval by some body to whom legislative authority has been delegated. In Dyer v. Curtis, supra, it was indicated that delegated authority to the harbor master would have been sufficient.[80] State v. Anthoine held that county commissioners have no power to locate highways over creeks or arms of the sea which are navigable, and construct bridges so as to impede their use for the purposes of navigation.[81] In Cape Elizabeth v. County Commissioners, it was held that a way across a tide water could only be located by the authority of the Legislature; such authority was delegated to the harbor master to approve the project, but the approval was not in fact obtained.[82] Tuell v. Inhabitants of Marion indicated that the towns or cities have no right to obstruct navigation, unless they are given the right or the duty is imposed by statute.[83] In Chase v. Cochran, although the town had constructed a bridge according to plans approved by the Secretary of War, it was held that no public way could be located across the flats without the authority first being obtained from the Legislature.

POWER TO PROTECT AND ENHANCE NAVIGATION

As part of the sovereign power over navigation, the State of Maine, as well as other states, has broad powers both to protect and enhance

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80. 40 Me. 45 (1855).

81. 64 Me. 456 (1874).

82. 110 Me. 460, 86 A. 980 (1913).

83. 102 Me. 431, 67 A. 320 (1907).

navigation. The State acting within its sovereign power to regulate navigation is entitled to take any necessary land or private right by eminent domain. While the State is required to compensate private owners for property actually taken and used, it is not required to make compensation for consequential damages arising out of such improvement to navigation if the property damaged is not directly involved. This is true even though the injury or damage is directly attributable to the State's action with regard to navigational improvements.[84] In Brooks v. Cedarbrook,[85] damage from erosion downstream caused by a dam to improve navigation upstream was held not to be compensable injury but damnum absque injuria.

> The riparian owners of all public streams in this State, hold the riparian lands subject to the paramount right of navigation of such streams by the public. The public right of navigation existed before the private ownership of the land under or adjoining public streams ....In all the grants of land from the Sovereign there is always, at least unless otherwise expressly stipulated, a reservation of the public right to use all navigable rivers as public highways. Such a reservation naturally and properly retains with it the rights for the Sovereign to make and authorize all reasonable improvements from time to time, to facilitate the use of the river by the public, even though the landowner thereby suffers inconvenience or loss, so long as none of his property is actually appropriated by the Sovereign....All these acts assume the right of the state to make such improvements, without making compensation except when private property is actually appropriated ...[86]

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84. See Home for Aged Women v. Commonwealth, 202 Mass. 422 (1909); Crocker v. Champlin, 202 Mass. 437 (1909); United States Gypsum Co. v. Mystic River Bridge Authority, 329 Mass. 130 (1952).

85. 82 Me. 17, 19 A. 87 (1889).

86. Id. at p.20, 21.

The constructors of public highways, bridges, railroads, and public utilities in tidal areas and on navigable streams seem to enjoy, to a limited extent, the same immunity from consequential damages to private property that the sovereign has in his activities with regard to navigation. This immunity, however, is in effect only to the extent that the Legislature has authorized the acts, and that the activity is carried out strictly within the limits prescribed by the Legislature. In Roger v. Kennebec Railroad Co.,[87] it was held the compensation, provided by the statute for damages occasioned by the location and construction of railroads, extends only to real estate or materials taken. In that case the Legislature had authorized the railroad company to construct a causeway or bridge across navigable tide waters. In a suit for damage to plaintiff's mill, it was held that for any lawful act done in construction of the road, the plaintiff would not be entitled to recover damages even though he may have been indirectly injured providing the railroad had not exceeded the authority conferred on it by the Legislature. In the Roger case, however, the Court ascertained that the railroad had not been authorized to obstruct navigation, so it might be liable for damages.

POWER TO CURTAIL PUBLIC RIGHTS OF NAVIGATION

Although the sovereign is entrusted with the preservation of the public right of navigation for the public and for individual members of the public, the sovereign itself may grant permission to individuals or corporations to obstruct or impede navigation, or the State

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87. 35 Me. 319 (1853).

itself may impede navigation. The sovereign may grant exclusive permission for navigation to one individual to the detriment of the general public, and it may completely extinguish the rights of navigation. Such curtailment must be for a public purpose.

One example of the sovereign giving permission by general statute to obstruct navigation is the Milldam Act,[88] but even under this Act passageway for fish and for boats must be provided and the mill dam owner must make compensation to riparian owners whose lands are overflowed.

When the sovereign holds in abeyance or curtails the right of navigation for a public purpose the general public has no recourse. Moor v. Veazie[89] upheld the constitutionality of a statute granting exclusive use for a stated period to certain persons to navigate by steam boat certain portions of the Penobscot River above the tidewaters, on the basis that the common law right of navigation could be rendered more beneficial if new modes of transportation were encouraged. The exclusive use was compensation for the skill, expense, and risk required for its introduction. It was emphasized in the Moor case, that the customary modes of (non-steam) navigation were in no way impaired, and that even as to steam boats, this was to be only a temporary suspension of the common law right of navigation, a right which citizens

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88. 38 M.R.S.A. 611-892.

89. 32 Me. 343 (1850).

as subjects could not be deprived even by the government itself.[90] And it may be added that the exclusive grant, limited as it was, was conditioned on the recipient making major improvements in the navigability of the stream.

In Parker v. Cutler Milldam Co.,[91] which dealt with construction of a milldam across tidal flats, the Court held that the regulation of the navigable waters within the State is vested in the sovereign power, to be exercised by laws duly enacted. Navigation may be impeded if, in the judgment of that power, the public good requires it. The diversion of the Saco River was also upheld in Spring v. Russell.[92] The State in its discretion can authorize the diversion of waters of great ponds for public purposes without compensation to riparian owners.[93]

An example of the sovereign power to curtail the public right of navigation more absolutely than by the partial monopoly granted in the Moor case can be seen in Frost v. Railroad Co.,[94] in which the Legislature had authorized the construction of a railroad trestle across a

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90. Compare quote from dissent in Woodman v. Pitman, 79 Me. 456, 469, 10 A. 321 (1887) to the effect that Courts may declare the relative rights of persons but they cannot extinguish them. This legislative incapacity to deprive citizens of the common law right of navigation suggested in the Moor case can only be reconciled with other cases, it is submitted, if the distinction is made between completely extinguishing the rights of navigation for everyone versus excluding any person or group of people from exercising this right other than for a term of years.

91. 20 Me. 353, 357 (1841).

92. 7 Me. 273 (1831).

93. American Woolen Co. v. Kennebec Water District, 102 Me. 153, 6 A. 316 (1906).

94. 96 Me. 76, 51 A. 806 (1901).

channel, thereby preventing navigation in and out of a cove. The effect of this action was to ruin plaintiff's business which depended on access to the open sea through the cove. In rejecting the plaintiff's suit, the Court declared that the right of navigation in and out of the cove was not an individual property right protected from governmental action by the Constitutional prohibition against taking of private property without just compensation.

> This right of the plaintiff, however, was not his private property, nor even his private right. It could not be bought, sold, leased or inherited. He did not earn it, create it or acquire it. He did not own it as against the sovereign. The right was the right of the public, the title and control being in the sovereign in trust for the public and for the benefit of the general public, and not for any particular individual.[95]

Inasmuch as it was a public right only, the Court held it may be abridged or extinguished at the pleasure of the sovereign acting for the public without making compensation to those who were wont to use it. The right is always subject to be thus extinguished, and individuals should not assume it to be permanent. In order to extinguish public rights a public purpose must be established even though such action does not involve compensation.

> The sovereign cannot take private property for public uses without providing for just compensation to its owner, but this constitutional provision does not limit the power of the sovereign over public rights. If, in the evolution of life and commerce, the sovereign comes to believe that the public good will be increased by the creation of some new or additional means of communication and commerce at the expense or

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95. Id. at p.85.

> even sacrifice of some older one enjoyed merely as a public right, the sovereign can so ordain, even to the detriment of individuals. If, in the judgment of the sovereign, a railroad across a navigable channel of water and completely obstructing its navigation is of more benefit to the public than the navigation of the channel, he has the unrestricted power to thus close the channel to navigation without making compensation to those who had been wont to use it.[96]

REGULATION OF FISHING RIGHTS

The common law right of fishing was extremely important to the early colonists, not so much as a means of commerce or recreation, but as a means of subsistence. The restrictions placed on the King after Magna Carta were not applicable to Parliament nor to the legislatures of the colonies.[97]

The Legislature in Maine, as well as legislative bodies in pre- and post-statehood Massachusetts, has always asserted the right to regulate and control fisheries by appropriate enactment designed to secure the benefit of this right to all its inhabitants.[98] This power to regulate applies to fresh as well as tidal waters, and to shell as well

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96. Id. at p.86. But c.f., Griggs v. County of Allegheny, Pennsylvania, 369 U.S. 84 (1962) which held that airport noise sufficient to deprive a nearby property owner of the reasonable use of his property constituted a "taking" for which compensation was required.

97. Moulton v. Libbey, 37 Me. 472 (1854); Waters v. Lilley, 21 Mass. 145 (1826); Comm. v. Vincent, 108 Mass. 441 (1871).

98. Moulton v. Libbey, supra, State v. Snowman, 94 Me. 99, 46 A. 815 (1900); State v. Peabody, 103 Me. 327, 69 A. 273 (1907); State v. Leavitt, 105 Me. 76, 72 A. 875 (1909); State v. Lemar; 147 Me. 409, 87 A. 2d 886 (1952); State v. Laskey, 156 Me. 419, 165 A. 2d 579 (1960).

as free swimming fish.[99]

The power to regulate fisheries may be exercised by the State (or sovereign) or may be delegated to a State agency or a municipality; broad discretion may be granted to the persons or groups so designated. Such agency or persons, however, may not promulgate rules or regulations inconsistent with existing statutes.[100]

Licenses for fishing have been required both by various statutes and by regulations.[101] Although Maine cases have said that a license granted by the State is not a contract or property right and may be revoked by the sovereign which granted it at its pleasure and without notice,[102] more recent federal cases make it clear that occupational licenses, at least, may not be revoked without substantial due process. The Maine Court has upheld the constitutionality of licensing requirements, as well as laws and regulations which have set forth the conditions under which fish may be taken from both inland and tidal waters; who may take them;[103] when they may be taken[104] where they may

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99. Cottrill v. Myrick, 12 Me. 222, 229 (1835); Fuller v. Spear, 14 Me. 417 (1837); State v. Lemar, supra; Moulton v. Libbey, supra.

100. Moulton v. Libbey, supra; State v. Leavitt, 105 Me. 76, 72 A. 875 (1909); McKenney v. Farnsworth, 120 Me. 450, 118 A. 237 (1922).

101. State v. Lemar, supra; State v. Leavitt, supra.

102. State v. Pulsifer, 129 Me. 423, 152 A. 711 (1930).

103. State v. Leavitt, supra; State v. Peabody, supra. See Section on Residence Chapter 4 for discussion of discrimination versus non-residents.

104. McKenney v. Farnsworth, supra, dealt with the constitutionality of closed times for lobsters.

be taken;[105] the size and the amount which may be taken;[106] the gear and equipment to be used in the taking;[107] and the manner in which the fish may be handled, processed, and transported.[108]

Regulations in Derogation of the Common Law

The Legislature has granted exclusive fisheries to towns or individuals in derogation of the common law rights of free fisheries declared under the Colonial Ordinances.[109] Statutes which are in derogation of the common law are said to be strictly construed, especially if they are also penal statutes. A good example of strict interpretation may be seen in clam ordinances promulgated under authority delegated to municipalities. Such ordinances have frequently been found unconstitutional because of slight defects in statutory language.[110] The Legislature has required that fishways be built in dams in tidal and fresh water streams so that anadromous fish might reach spawning grounds upstream. When the dam owner is required to construct such a fishway,[111] he is entitled to very detailed instructions as to what is

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105. See State v. Thompson, 85 Me. 189, 27 A. 97 (1892).

106. See Moulton v. Libbey, supra; Thompson v. Smith, 79 Me. 160, 8 A. 687 (1887); Campbell v. Burns, 94 Me. 127, 46 A. 812 (1900).

107. See State v. Skolfield, 63 Me. 266 (1874); State v. Murray, 84 Me. 135, 24 A. 789 (1891).

108. E.g., State v. Dodge, 117 Me. 269, 104 A. 5 (1918).

109. State v. Leavitt, supra; Comm. v. Hilton, 174 Mass. 29 (1889).

110. State v. Wallace, 102 Me. 229, 66 A. 476 (1906); State v. Peabody, 103 Me. 327, 69 A. 273 (1907).

111. 12 M.R.S.A. 2201-2204 (Supp.).

expected of him.[112]

Thus the regulation of fisheries in Maine has resulted not only in the abridging or restriction of the public rights of fishery, but has also resulted in the regulation of fisheries which by common law would be private property. Even before the separation of Maine and Massachusetts, the Legislature of Massachusetts had passed laws regulating the taking of migratory fish in interior fisheries, including the granting of exclusive fisheries to towns.[113] The constitutionality of these acts, upheld by the Massachusetts Courts, was reaffirmed early in Maine's history:

> By the common law in England, fisheries in streams not navigable, belong to the riparian proprietor. In Massachusetts, from its earliest settlement, this principle has been modified. It was deemed most conducive to the public good, to subject the salmon, shad and alewive fisheries to public control, whenever the Legislature thought proper to interpose. They were much relied upon, as among the means of subsistence afforded by the common bounty of Providence, and some regulation became necessary for their preservation. Our ancestors were understood to have brought with them such parts of the common law as were applicable to their circumstances, claiming, however, and exercising the right, through every period of their history, to change or qualify it. It was competent for the Colony, Province or Commonwealth of Massachusetts, having a Legislature of its own, to appropriate to private use, that which was held

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112. Waters v. Lilley, 21 Mass. 145 (1826); Stephen v. Gooch, 7 Me. 152 (1830); Penobscot v. Treat, 16 Me. 378 (1839); Fossett V. Bearce, 27 Me. 117 (1847); Spear v. Robinson, 29 Me. 531 (1849); Bearce v. Fossett, 34 Me. 575 (1852).

113. E.g. An Act to Regulate Fisheries in Damariscotta passed March 5, 1810; An Act to Regulate Fisheries in Damariscotta River passed February 15, 1816; An Act to Regulate Fisheries in Damariscotta River passed February 28, 1821; An Act for the Preservation of Fish Called Salmon, Shad and Alewives in Rivers and Streams of the Counties of Lincoln and Cumberland, passed March 1, 1798. See Peables v. Hannaford, 18 Me. 106 (1841).

> in common in the mother country, or to provide that, what is there private property, should here be enjoyed in common.
>
> In Massachusetts, then, by common consent, manifested by legislative acts and by general acquiescence, the common law rights of the riparian proprietor, yielded to the paramount claims of the public. It was implied in all grants of land made by them, and in all conveyances by individuals, upon streams through which these fish passed to cast their spawn. The right of the public to regulate the interior fisheries, is proved both by legislative acts, referred to in the argument, and by judicial construction. Stoughton & als. v. Baker & als., 4 Mass., 522; Nickerson v. Brackett, 10 Mass., 212; Ingraham v. Wilkinson, 4 Pick., 278; Vinton & als. v. Welsh, 9 Pick., 87.[114]

Conservation and Development Considerations

The conservation and economic aspects of various fishing statutes and regulations will be analyzed more thoroughly in the Chapter on Fisheries. These factors were taken into account in Moulton v. Libbey, supra, in which the Court examined the constitutionality of the town's regulation of shell and oyster fisheries by limiting fishing privileges to residents of the town.

> If those rights are to be regulated, it may be necessary to place the exercise of them under the superintendence and care of some persons to make them as valuable or useful as possible, as well as for their preservation ...Those not needed [for bait or home consumption] for such uses are not to be taken without a permit from the selectmen or assessors. If they could be taken by all without any limitation of the quantity and for the purpose of sale for profit, the result might be, that they would soon be so much diminished or destroyed, that none desirable would be left for the common use for food or for bait. Such control of them may be rather for their protection, and in furtherance of the enjoyment of the common right.[115]

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114. Cottrill v. Myrick, 12 Me.222, 229 (1835).

115. Moulton v. Libbey, supra, p.494.

IV CONFLICTING PRIORITIES IN THE EXERCISE OF PUBLIC RIGHTS

Not only may the Legislature regulate all public rights but also may prescribe, subject to Congressional jurisdiction, the relationship subsisting between them. The Court held in Woodman v. Pitman[116] that the judiciary may intervene in regulating conflicting uses only when the Legislature has failed to do so.

> If it omits to do so, such matters necessarily become the subjects of judicial interpretation. While the judicial is not co-extensive with the legislative jurisdiction upon the question, there can be no doubt that it is within the scope of judicial authority to determine the manner in which such public privileges may be best enjoyed by the public, provided that any judicial regulation which may be attempted shall do no violence to existing law.[117]

In the Woodman case, the Court was faced with the competing public claims of travel on a frozen river by horse teams versus the right to harvest ice. Although the fact situation is obsolete, the reasoning of the Court is enlightening as to the criteria by which priority of public rights should be determined:

> The opinion in the Woodman case recognized the inexhaustible and ever changing complications in human affairs, presenting new questions and new conditions which the law must provide for as they arise, but expressed confidence "that the law had expansive and adaptive force to respond to the demands made of it; not by subverting, but by forming

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116. 79 Me. 456, 10 A. 321 (1887).

117. Id. at p.460.

new combinations and making new applications out of its already established principles,..."[118]

The Court described the conflicting public rights (travel versus ice-cutting) as not absolute in any person, but as common or public rights which belong to the whole community. In Roman law they were classified as imperfect rights. "Not all persons can or do enjoy the boon alike. Much depends upon first appropriation. One man's possession may exclude others from it."[119] What would be a reasonable exercise of these conflicting rights must be determined by each fact situation and the decision must be weighed by community benefit:

> Each right is in theory, speaking generally, relative or comparative. Each recognizes other rights that may come in its way. Each must be exercised reasonably. And what would be a reasonable exercise of the one or the other at any particular place, for, clearly, there would be a difference in the relative importance of the different rights in different localities, depends in a large degree upon the benefits which the community derive therefrom. The public wants and necessities are to be considered. The two kinds of franchise belong to the people at large, are owned in common, and the common good of all must have a decisive weight on the question of individual enjoyment.[120]

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118. Id. at p.458. The Court cited as a prime example of the development of the law by the judiciary, the adopting of the concept of navigability to non-tidal waters. "The Court felt obliged to adopt the interpretation, as a new application of an old rule, from an irresistible public necessity. (Emphasis supplied). (Id. at p.460).

119. Id. at p.458.

120. Id. at p.459.

The Woodman case emphasized that the abridgement of one public right must be for the fuller enjoyment of another public right. The benefit must be direct, not remote or indirect, and be advantageous to the same people who had been restricted in the abridged right:

> ...and it has been explained that the benefit must be a public benefit to the same public; that the same public or same part of the public which suffers the inconvenience, must also receive the benefit; that it must be both beneficial and injurious to the public using the same waters.[121]

Purporting to apply these principles, the Court found the general commercial importance of ice harvesting to be a public benefit, and the paramount right of passage, even to its possessors, as scarcely good for anything. Perhaps to justify its assault on the sanctity of navigation the Court classified the right to passage on ice as "an off-shoot of the navigable right -- something akin to it -- but a right of a secondary or inferior degree."[122]

A concurring opinion stated that the right of navigation in public waters was paramount: the waters might be subjected to any other useful purpose even though such use might temporarily impede the paramount right, but a use which blocks navigation must cease until the necessity of navigation be served.[123] The concurring judge felt that passage on the ice was the paramount right, but it had to be exercised

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121. Id. at p.464.

122. Id. at p.461.

123. Id. at p.467.

in common with such use as the frozen surface was adapted to. One such use was the harvesting of ice, a use that might impede travel. "Both are common rights, and both may be lawfully exercised; but cannot be enjoyed at the same spot at the same time, because the one may be there destructive of the other, so that it may be reasonable for that use giving the larger public benefit to restrict other uses to a narrower compass, but it cannot lawfully monopolize the whole right to the utter destruction of all rights....Courts may declare the relative rights of persons, but they cannot extinguish them."[124]

Paramountcy of Navigation

The concurring opinion emphasized that navigation is paramount, an oft-repeated phrase on the Federal level. On the State level it may well be asked -- paramount to what? As for a public purpose, it is certainly paramount to private property rights; and there is language to the effect that the public right of navigation is paramount to other public rights. Thus in Moulton v. Libbey, supra, it was held that "The common right of fishing has always been held and enjoyed in subordination to the right of navigation. Any erection which can be admitted by the latter will not be prevented by the former right."[125] In State v. Plant[126] it was said "for the propagation of fish and for the protection of migratory birds the State may exercise certain control of its waters, but it is beyond the power of the Legislature to suspend the general use of a navigable river as a highway."

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124. Id. at p.468-9.

125. Moulton v. Libbey, supra, p.493.

126. 130 Me. 261, 263, 115 A. 35 (1931).

It has already been demonstrated that this language is inaccurate: obstructing a tidal channel for a railroad trestle (another highway and thus another avenue of commerce), the legislative sanctioning of mill dams and storage dams, the lowering and raising of water levels, etc., and even allowing construction of fishing weirs that might in fact obstruct navigation[127] -- all suggest the possibility that as pressures of the ocean age mount, "an irresistible public necessity"[128] might further erode the doctrine of the supremacy of navigation.

V STANDING TO SUE

"Jus Publicum may be of trifling value..."[129]

SOVEREIGN AS PROTECTOR OF PUBLIC RIGHTS

It has already been shown that the State has the power to regulate, limit, hold in abeyance, or extinguish public rights. The public has no recourse from such action unless the Court finds that such alteration or dimunition of the public right was not carried out for a public purpose. On the other hand, the State has a responsibility for guaranteeing that the public will not be disturbed in its enjoyment by private interference with public rights. Such interference was a common law indictable offense. In State v. Fisheries[130] the County Attorney

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127. See p.296.

128. See n118, p.258.

129. Dyer v. Curtis, 72 Me. 181 (1881).

130. 120 Me. 121, 113 A. 22 (1921).

brought an action in his own name to restrain a fishing corporation which was causing pollution from the processing of fish. The Court held that the County Attorney is not a common law officer, and hence could not exercise the common law powers of the Attorney General in the absence of a statute authorizing him to bring a bill in equity in his own name for the abatement of a public nuisance.

PRIVATE ACTIONS

A private person who can show a peculiar injury that is distinct from that suffered by the public at large may, however, bring an appropriate legal action.[131] Private individuals have even been allowed to exercise self-help in removing an obstruction to navigation.[132]

Peculiar Damages - Navigation Right

Most of the cases involving an individual suing to abate an interference with a public right, or for damages because of such interference, have been based on an obstruction to navigation.[133]

The wharf owner in Franklin Wharf v. Portland,[134] was "peculiarly injured" from the outfall from the municipal sewer. Sand, gravel, mud and fill transported by the sewer had so obstructed the dock that it

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131. Low v. Knowlton, 26 Me. 128, 132 (1846); Dudley v. Kenney, 63 Me. 465 (1874).

132. Brown v. Chadbourne, 31 Me. 9 (1849); State v. Anthoine, 40 Me. 435, (1855).

133. Milldams authorized by the statute were great potential obstructions to navigation. The authority to build a mill dam, however, did not authorize the owner to obstruct navigation and the Maine courts have held that to avoid a public nuisance a mill dam owner must provide a suitable safe and convenient passage through or by his dam for rafts, logs and other lumber. Veazie v. Dwinel, 50 Me. 479 (1862).

134. 67 Me. 46 (1877).

had become virtually unnavigable and the wharf owner had to dredge it at his own expense. The Court discounted defendant's argument that the right of navigation was subordinate to the right of sewerage,[135] and held the obstruction of navigation by the deposit of sewerage to be a public nuisance. As to the owner of the wharf, by diminishing the depth of the adjacent water and impairing its use, the obstruction also caused inconvenience or injury not common to the public, and this constituted a private nuisance.[136]

The mere fact that a person is delayed or compelled to take a circuitous route by an obstruction in the highway does not necessarily constitute peculiar damage. "But where an individual suffers expensive delay or substantial pecuniary loss in traveling or transporting goods, it may be a particular damage for which he has a right of action."[137] In the Smart case the Court held that the obstruction of a stream had not only obstructed plaintiff's right in common with others to pass up and down the stream, but cut off his right of access to his private property, a private right appurtenant to his land. The right was upheld even for a pleasure boat.

In Whitmore v. Brown[138] plaintiff brought a suit to abate a wharf built in front of her property without her consent and without the statutorily required license. She further sought to enjoin an extension

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135. Id. at p.55.

136. Id. at p.59.

137. Smart v. Lumber Co., 103 Me. 37, 68 A. 527 (1907).

138. 102 Me. 47, 65 A. 516 (1906).

of this wharf. She based her case on the contention that the wharf restricted the boating privileges in the cove which fronted her lot, and such privilege was a peculiar element of the land's market value; that the structure was unsightly and thereby lessened the value of her estate; and that the structure materially impeded the passage by water to and from her land.

In denying relief the Court held that even though the obstruction was illegal, no private right had been violated. The lack of a license was a matter for the State to pursue. The Court further stated that the right of boating in the cove was a public right and not peculiar to the owner as occupant of land bordering on the cove; that the law does not recognize any legal right to an unobstructed view of scenery across land or flats of others, unless they are acquired by grant; "...nor does the law recognize as a cause of action the annoyance caused by the proximity of ugliness of otherwise harmless structures upon the land of another."[139] The evidence did not show that the existence of the structures would as a matter of fact obstruct access to or from her land by water (a private right), although such structures might impede general navigation in the cove which was a public right. For structures already in existence she had an adequate remedy at law.[140]

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139. Id. at p.59.

140. Id. at p.59-60.

The Court reminded the plaintiff that structures which infringe public rights can be dealt with only by the public, that is by proceeding in the name of the State or some authorized person in behalf of the public. "To enforce the public right for his benefit, he must set the public agencies in motion."[141] The Court was less than sympathetic with plaintiff's lament about being left to the action of public officials instead of having the power to sue in her own name. The Court said:

> The plaintiff further urges the hardship of her being left to the action of public officials to enforce the public right and relieve her from the damage done her by these unlicensed structures. She suggests that the officials, influenced by local, political, or other immaterial considerations, may improperly neglect and even leave her helpless. Even if this apprehension be well founded, the court cannot afford relief in this suit. Her remedy against recalcitrant public officers is in some other procedure.[142]

Peculiar Damage to the Common Right of Fisheries

While in most cases it has been fairly easy to show special damages enabling a private individual to bring suit for an obstruction to navigation, it seems virtually impossible for any person to bring a private action for disruption or destruction of the common right of fishery, and no Maine case has been found in which the State has brought to a successful conclusion prosecution for damage to the public right of fishery.[143]

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141. Id. at p.58.

142. Id. at p.59.

143. The State may take steps to alleviate the problem. E.g., Pollution by Medomak Canning Co. (See New York Times, Oct. 20, 1968, p.54; Maine Times, June 6, 1969 with regard to three state agencies investigating the situation) which is not the same thing as prosecution.

In Parker v. Cutler Milldam Co.,[144] an action was brought for injuries to the fishing privilege and water privileges on plaintiff's land fronting on tidewater, which were caused by a dam obstructing the river. The effect of the dam, which had been authorized under the Milldam Act, was to flood the beach so that the flats were covered at all stages of the tide, precluding clam fishing. In denying relief the Court held that the right of fishing was a public right -- hence, no private action. The Court said "the testimony in the case does not prove any appropriation of the clam fishing to private use. The witness speaks of fisherman generally and not the owner of the flats taking them for bait."[145] The Court thus held, in effect, that collectively fishermen have no standing to sue for damage for interference with the common right of fishery.

Even if there had been testimony that the owner of the flats had taken clams for bait, it is doubtful if it would have been a sufficient ground for compensation. In the Parker case, supra, the Court could have held that the flat owner's right to the fishery was one that he held in common with the general public and hence no special damages. The denial of the owner of the flats having any peculiar interest in the fisheries on his own flats was set forth in Moulton v. Libbey,[145a] supra, in which the owner was precluded from taking shellfish on his own flats without a license. In the Parker case, compensation would have been due under the Milldam Act to the owner if his uplands were flowed, but the same compensation was not allowable for flowing of flats.

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144. 20 Me. 353 (1841).

145. Id. at p.358.

145a. 37 Me. 472 (1854).

In Lamond v. Seacoast Canning Co.[146] defendant had thrown refuse into the river so near plaintiff's fishing weir that putrid sardine oil and punctured cans were carried into the weir by the tide, preventing fish from entering said weirs. In that case the plaintiff did prevail; the Court awarded him damages sufficient to cover the cost of moving the refuse from his weir, but allowed him no damages from loss of profits on the theory that there was no sufficient basis for ascertaining such prospective profits.[147]

The frustration that must be felt by all fishermen dependent upon the common right of fisheries for a livelihood in the face of legal incapacity to protect that interest is graphically demonstrated in Smedburg et al. v. Moxie Dam Co.[148] In the Smedburg case, the plaintiff had protested in vain the lowering of waters in Lake Moxie, which had destroyed the fishery resources on which his recreational business of boating and fishing depended. The Court started with the proposition that the State has full right to control and regulate the waters of great ponds and the fishing therein.[149] Fernald v. Knox Woolen Co. was cited to the effect that waters of lakes may not be drawn down below natural level without legislature authority. The Court then assumed for purposes of the demurrer that the defendant was creating

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146. 108 Me. 155, 79 A. 385 (1911).

147. In the Lamond case damages were based on five weeks of work for plaintiff and his hired man in 1906 amounting to a total of $90, and for four weeks of work in 1907 amounting to $72 for an aggregate total of $162 for two men for nine weeks which is an indication of the value of a fisherman's time in 1906. Id. at p.260.

148. 148 Me. 302, 92 A. 2d 606 (1952).

149. 82 Me. 48, 19 A. 93 (1889).

a public nuisance in controlling and regulating the waters of the lake in a manner not authorized by its charter, and went on to consider if by such a public nuisance any legal interest of the plaintiff had been threatened with harm or destruction by this action. Rights to access or other riparian rights were not material to the case inasmuch as plaintiff was not a littoral owner.

In refusing relief the Court held that the plaintiff had suffered no peculiar loss. The right of the plaintiff to fisheries of Lake Moxie were neither greater nor less than the right of the public generally. By choosing to engage in a business based upon the use of a resource held in trust by the State, plaintiff did not create for himself or his guests private rights entitling him to any greater protection of fisheries than belonged to every one of the public. Other private camps in the area were undoubtedly worth less for the same reasons. Guides, storekeepers, and businessmen whose livelihood depended on any part of the lure of fishing suffered injury identical in kind. Since plaintiff was injured in his enjoyment of a public right, his loss was damnum absque injuria (damage without legal harm)

In holding that the State alone had the right to complain against the action of the defendant who might be guilty of a public nuisance in lowering the water level, the Court said that the plaintiff as owner of a sporting camp can claim no right of fishing greater than the sum total of the rights of his prospective guests. "It is the right of this changing group of fishermen which in substance he says are threatened with destruction. If the individual fisherman cannot

complain but must await and rely upon action by the State, then the group of fishermen have no greater personal grievance. If the group has no grievance, their representative, the plaintiff, can claim no violation of a legal right on their behalf, or on his own account, for he had no personal right not bound within the rights of the group."[150]

> The true test seems to be whether the injury complained of is the violation of an individual right, or merely a hindrance to the plaintiff in the enjoyment of the public right....
>
> We conclude that the complaint at best from the viewpoint of the plaintiff shows a hindrance only to the plaintiff and his guests, as individuals, in their enjoyment of a public right. Such a hindrance does not affect a private right of the plaintiff. His loss is damnum absque injuria.[151]

These cases have tremendous importance and significance to the clam diggers, who have no standing to sue for pollution of clam flats, the closing of which may cause them deprivation of their livelihood. As noted above, in the Franklin Wharf case the Court had denied that navigation was subordinate to sewerage. The Maine Supreme Judicial Court has yet to declare that fisheries are subordinate to sewerage, but this unstated premise is true in fact if not in law in fresh water streams and tidal rivers of Maine.

Strength in Numbers?

An association of fishermen or a fishing cooperative, such as a Title 13 Chapter 81 Corporation, would, according to the Smedburg case, fare no better than an individual fisherman. Perhaps a legislatively

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150. Id. at p.310.

151. Id. at p.310.

established organization of clam diggers or fishermen or a local or regional shellfish committee charged with the protection of shellfish resources might have standing to sue as a statutory power inherent in its statutory defined purpose.[152] In view of State v. Fisheries, the authorization for such an organization to bring an action for an abatement of a public nuisance would have to be specific. Such authorization is unlikely to be granted; for example, the Atlantic Sea Run Salmon Commission, created to protect fish, is specifically prohibited from passing any regulations based on a condition which is within the jurisdiction of the Water Improvement Commission.[153]

Criminal Statute Rather Than Common Law Nuisance

Even though individuals or an affected class of persons might be unable to sue to abate pollution under the common law doctrine of nuisance, it might be possible that they would have some recourse under criminal law. E.g. in State v. Giles,[154] defendant had maintained that a criminal complaint brought for the violation of a short lobster statute was insufficient in law because a private person had made it. Although there had been provisions for private persons making complaints in previous statutory codifications before a later amendment by the Legislature, this absence was not deemed material. The Court held that express provisions of the statute are not required to authorize unoffic-

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152. 120 Me. 121, 113 A. 22 (1921) See p.261.

153. 12 M.R.S.A. 3603 (1)(D). Name changed to Environmental Improvement Commission.

154. 101 Me. 349, 64 A. 619 (1906).

ial persons to make criminal complaints. It is a rule of common law that in the absence of statutory requirements to the contrary, all such complaints may be made by any person who can legally be a witness and has knowledge or information of any violation of the criminal law.[155]

In the Giles case the Court cited two other fishing regulations which they thought illustrated the improbability that the Legislature could have intended to restrict the method of enforcing the provisions of the short lobster act by leaving complaints solely to official persons. Speaking about statutory prohibitions against interfering with aquaculture beds granted by the State for oyster planting or for interfering with fishing weirs,[156] the Court had said:

> ...No valid reason is apparent why a private citizen whose fishing privilege or oyster bed is imperiled by the public wrong of his neighbor should be deprived of the right to take prompt measures to prevent the injury by making the complaint thereof in his own name. He should not be compelled to await the convenience of the commissioner or his deputy for the commencement of a prosecution.[157]

But even though a private person has the power to initiate the criminal process by filing a complaint, he cannot control the prosecution. The case may be abandoned by the prosecutor in the exercise of his discretion.

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155. Id. at p.352.

156. See Maine Revised Statutes (1903) Chapter 41 §§ 37,40; 12 M.R.S.A. 4253 (2); 12 M.R.S.A. 4508; 38 M.R.S.A. 1026.

157. State v. Giles, supra, p.354.

The inability of an individual member of the public to bring an action in his own name to protect the public right of fisheries either for recreational purposes or as a means of livelihood stands in sharp contrast to the power of eminent domain which has been allowed private persons to develop the mineral resources owned by the State of Maine. (See Chapter IV Eminent Domain, p.358 ff.). This incapacity also extends to an individual's ability to protect other recreational or aesthetic values derived from Maine waters -- values largely intangible which must be measured qualitatively in the absence of economic criteria.

> In the absence of a market mechanism to price water and to allocate it among its various uses, public action is necessary to articulate public and private decisions concerning water use and pollution control. Public action is required since these decisions cannot be made on the basis of pure economic efficiency; social values and preferences are also at issue.[158]

The establishment of a dollar and cents value or monetary loss (e.g. projected loss of revenue from closure of clam flats because of pollution) does not alter the common law right to sue in one's own name, but could provide momentum for official action or statutory relief.

VI PRIVATE OWNERSHIP IN THE SHORE

NATURE OF OWNERSHIP

What is the nature of private ownership in the land sea interface up to 100 rods of flats, which was given "to the proprietor of the land adjoining" by the Colonial Ordinances?[159]

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158. Maine Water Resources Plan, Vol. I, Edward C. Jordan Co., Feb. 1969, p.14.

159. For complete text see Chapter Two, p.189.

"The ordinance of 1647 'vested the property of the flats in the owner of the upland in fee, in the nature of a grant;...'"[160] Ownership of these flats is as full and complete as the ownership of the uplands except that it is subject to some extent to certain public rights.[161] As noted in Chapter 2, supra, these flats are capable of being detached from the uplands and can be conveyed separately. A widow is entitled to dower in flats owned by her husband, although they are covered by water and remain unimproved down to the time of his decease.[162]

Certain incidents of ownership may also be separated from the fee in flats.[163] In Wyman v. Oliver the fishing privilege was severed from the upland by assignment of dower. The distribution among the heirs prevented the release of dower from restoring the fishing privilege to its former condition as an incident to the upland and rendered it necessary in the distribution of the reversion to treat it as distinct property.

The Colonial Ordinances did not spell out what the proprietor could or could not do with his flat other than not "prohibiting the passage of boats or other vessels in or through any sea creek or cove, to other men's houses or lands." This seeming lack of detail is under-

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160. Dyer v. Curtis, 72 Me. 181, 184 (1881); See also Marshall v. Walker, 93 Me. 532, 45 A. 497 (1900); Chase v. Cochran, 102 Me. 431, 67 A. 320 (1907); Andrew v. King, 124 Me. 361, 129 A. 2d 298 (1925); Comm. v. Algers, 61 Mass. (7 Cush.) 53 (1851).

161. Whitmore v. Brown, 102 Me. 47, 56, 65 A. 516 (1906).

162. Brackett v. Persons Unknown, 53 Me. 228, 238 (1861).

163. 75 Me. 421 (1883).

standable from statements to the effect that the ordinances were not merely an enactment, but were a declaration of existing claims, rights and liberties. In early colonial days it suited the colonists' views of policy and expediency to treat the soil in the extensive seashore and flats of the maritime frontier as the property of the riparian proprietor. This pattern of ownership was not written into the ordinances or statutes or codified until 1641. The colonists were much more interested in wresting the means of subsistence from the ground and sea and forest and the inland waters than in making laws.[164]

One of the activities permitted, under judicial interpretation of the Colonial Ordinances, was allowing riparian owners to wharf out. The early Maine cases reiterated statements made previously in Massachusetts that the compelling rationale of transferring these flats to private ownership was to serve the needs of navigation and commerce.

> And the right of reclamation and of wharfage is general. One of the chief purposes of the ordinances was to confer such privileges. Each occupier of the shore was to be enabled to reach the sea at all periods of the tide.[165]

To the same effect is the statement in State v. Wilson:[166]

> It has never been held that such proprietor has been precluded from erecting wharves and weirs upon his own flats, notwithstanding it would prevent free passage of vessels and boats, so far as the ground was so covered, provided he did not encroach upon the public domain, in materially interrupting the general navigation...[167]

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164. Conant v. Jordan, 107 Me. 227, 77 A. 938 (1910); Comm. v. Algers, 61 Mass. (7 Cush.) 53 (1851); Whittlesey, supra, xliii.

165. Babson v. Tainter, 79 Me. 368, 375, 10 A. 63 (1887).

166. 42 Me. 2 (1856).

167. Id. at p.26.

> ...It has never been understood, that in giving the qualified [Emphasis supplied] ownership in flats to the proprietor of adjoining upland, that he was bound to keep the space forever open, and thereby be prevented from making the improvements, in a harbor having natural advantages as such, so essential to the wants of a people coming from a country where commerce and navigation received the fostering protection of its government, to this land, in which it was early perceived and felt, that prosperity was to be realized in the same great pursuit.[168]

The common law of accretion and reliction was also moulded with the paramount consideration of the need for access to the sea. (See Chapter 2 p.214). "At common law it is the presumption that the owner of sea frontage has, in virtue of his ownership, the right of ocean access for the whole width of the frontage."[169]

The Maine Court has declared that a wharf owner has the right to have the water at his wharf at its natural depth.[170] Parker v. Cutler Milldam Co.[170a] held that in Maine the flat owner has no right to have his flats uncovered with each change of tide.

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168. Id. at p.27.

169. Robinson v. Higgins, 126 Me. 55, 58, 135 A. 902 (1927). See Babson v. Tainter, supra. Cases dealing with right of way from necessity over granted land include Kingsley v. Gouldsborough Land Improvement Co., 86 Me. 279, 29 A. 1074 (1894) which held there is no right of way from necessity over remaining land of grantor when land from such right of way is surrounded on three sides by the sea. It may be more convenient to pass over highways or across the plaintiff's premises, than to be subjected to inconveniences of using the waters of the sea. But this inconvenience is not such as the law requires to constitute a legal necessity for the way claimed. To the same effect Hildreth v. Googins, 91 Me. 227, 39 A. 550 (1898). In Littlefield v. Hubbard, 124 Me. 299, 127 A. 156 (1925) the Court held that it did not require absolute physical impossibility, but consideration could be given to the expense of utilizing the way compared to the total value of the estate.

170. Franklin Wharf v. Portland, 67 Me. 46 (1877).

170a. 20 Me. 353 (1841).

> ...the corporation is not therefore liable for any injury, which the plaintiff may have suffered by obstructions to the navigation, by altering the flux and reflux of the tide. This will embrace the flowing of the beach complained of as an injury to the plaintiff in repairing vessels; the alleged injury to his mill site by retaining the tide water; and the increased difficulty in navigating the river occasioned by the flood gates.[171]

In Massachusetts it was adjudicated that the owner has no right to have his flats kept open for the ebb and flow of the tide, either for tide mills or for navigation, but only to the flow of water below low water mark, and some access thereto.[172]

Inasmuch as wharfing out was one of the paramount reasons why the 100 rods were given to the riparian owner, the Maine Court has stated that the public rights of navigation and fishery, to which the flats are subservient, "are not to interfere with his [the owner's] rights or the exclusive appropriation that shall not unreasonably impede navigation by filling and turning it into upland or by building wharves or other structures upon it so that necessarily the public would be excluded thereby."[173] The same Court made it quite clear, however that "their [the public's] right remains so long as the flats are left in a natural state covered by the flow of the tide and left bare by its ebb."[174]

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171. 20 Me. 353, 357 (1841). See also Lee v. Pembroke Iron Co., 57 Me. 481 (1867).

172. Davison v. Boston & Maine Railroad, 57 Mass. (3 Cush.) 91, 105 (1849). See also Commonwealth v. Roxbury, 75 Mass. (9 Gray) 451, 520 (1857); Jubilee Yacht Club v. Gulf Refining, 245 Mass. 60 (1923).

173. Marshall v. Walker, 93 Me. 532, 536, 45 A. 497 (1900).

174. Id.

Complete freedom and unrestricted authority to exclusively appropriate one's own flats is not automatically assured. A somewhat "defeasible" fee in these lands may result not only from the vagaries of time and tide but also from legislative enactment which may curtail the riparian owner's absolute right to the appropriation of the shore to his exclusive use and possession. Because of the unique nature of this tidal land, it is particularly susceptible to the regulatory powers of the sovereign until such time as it shall become completely filled in and become indistinguishable from upland. A good example of this point is the fact that legislative authority is necessary to locate a public way across the flats[175] on the theory that the establishment of a new way destroyed the old [water-navigation] way which was in existence.[176] Once the flats have been filled in, it is no longer necessary to obtain such approval.[177] This theory finds support in the statement in Marshall v. Walker[178] that the flats are owned by the individual in fee and that "He may appropriate them, within the limits of the law.[179] (emphasis supplied) to his exclusive use and possession. State v. Wilson,[180] referred to "qualified ownership in the flat." In Babson v. Tainter,[181] the Court was talking about accretion but said

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175. Chase v. Cochran, 102 Me. 431, 67 A. 320 (1907).

176. Kean v. Stetson, 22 Mass. (5 Pick.) 492 (1827); State v. Wilson, 42 Me. 2 (1856).

177. Henshaw v. Hunting, 67 Mass. (1 Gray) 203 (1859).

178. 93 Me. 532, 45 A. 497 (1900).

179. Marshall v. Walker, supra, p.536.

180. 42 Me. 2 (1856).

181. 79 Me. 368, 375, 10 A. 63 (1887).

"flats reclaimed by occupying or filling up partake of the character of permanent property. It is the unimproved and unenclosed flats that may be subject to transition of ownership."[182] Examples of legislative restrictions on flats, such as licensing of wharves and weirs, the establishment of harbor lines, the wetlands legislation, and the granting of exclusive fisheries will be discussed in the section, infra, on regulations of private rights on the shore.

Having established the historic basis for granting flats to riparian owners, it may well be asked if the possibility of or the actual separation of flats from the uplands does not vitiate the rationale of public concern and necessity for private ownership of tidal property? No cases have been found where the Court has considered the question.

FISHERIES

As stated above, the fishing rights of the riparian owner derive not from his ownership of the soil but as a member of the public entitled to the general right of fishery.[183] The riparian owner does, however, have some distinct advantages over the general public which arise out of his ownership of the soil. One of these privileges is to place erections on the flats for weirs or seines. Such a right is referred to as an "incorporeal hereditament" or a "profit a prendre." This type of right may be leased or sold. In the absence of a grant or lease, other persons have no right to make permanent erection on the flats, or to set their nets or seines by making them fast by grapplings to the

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182. Babson v. Tainter, supra, p.375.

183. Matthews v. Treat, 75 Me. 594 (1884).

shore.

"These are advantages often of great value, which the riparian proprietor has over others. Having a common right with others to fish in those waters, he may, without any unreasonable exercise of that right, or improper interference with the rights of others, avail himself of these superior advantages. This is believed to be the foundation, upon which the valuable private rights or privileges of fishery, often conveyed and leased by one to another for no inconsiderable amount of money, rest. And their existence as private rights, appears to have been recognized in the legislation respecting the fisheries."[184]

It is only the right to erect the weir, and not a private right in the fish, which is owned by the riparian owner. Thus, if a flat owner grants to another the right to set weirs on his flats (specifying that they are only for one species of fish), and if the erections are in accordance with the grant, all fish that enter the seine or weirs are the property of the grantee since the grantor has no property in the fish.[185]

The right to take seaweed cast up on the shore is a "profit a prendre." The title to the seaweed belongs to the riparian proprietor, and he may convey the right to take seaweed without conveying the soil of the flats.[186] Such a right of taking profit from the soil has been likened to taking drifting sand from the beach, cutting grass, or fishing in non-tidal streams. In defining this right as a right to take

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184. Duncan v. Sylvester, 24 Me. 482, 486 (1884).

185. Small v. Wallace, 124 Me. 365, 129 A. 444 (1925); Perry v. Dodge, 144 Me. 219, 67 A. 2d 337 (1949).

from the soil the Court in Hill v. Lord has admitted that "The distinction between an interest in the soil, or a right to take a profit in it, and an easement is not always palpable. The line of separation is sometimes obscure, in some points unsettled, with no established principles by which to determine it."[187]

ADVERSE POSSESSION, PRESCRIPTION, DEDICATION

The nature of the private ownership and prerogatives in the intertidal zones is amplified by a review of the cases involving adverse possession, dedication and prescription with regard to this zone.

Adverse Possession

Adverse possession is possible against private ownership in upland and tidal flats. If the flats have not been separated from the upland, adverse possession of the upland includes the flats.[188] Because of the peculiar property of flats, when disseizin is claimed against just the flats, ownership is obtained only for that portion of the flats actually occupied.[189]

Title to flats separated from the upland may be acquired by adverse possession established by proof of exclusive use in actual occupation

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186. Hill v. Lord, 48 Me. 83 (1891).

187. Id. at p.99.

188. Brackett v. Persons Unknown, 53 Me. 228 (1861); 53 Me. 238, (1861); Richardson v. Watts, 94 Me. 476, 48 A. 180 (1901).

189. Thornton v. Foss, 26 Me. 402 (1847); Whitmore v. Brown, 100 Me. 410, 61 A. 985 (1905); P.L. 1821, c.47 §5; c.62 §6.

accompanied by building thereon or enclosing the same as to exclude all others including the owner and the public.[190]

> The possession may not be so perfect in all respects, and at all times, as of higher lands, but this does not preclude an exclusive and adverse occupation; the causes which will prevent the actual use of the land, when the water is upon them, by the one, who is in possession when they are bare, will exclude another from obtaining the possession during the same time. Rights in, and perfect titles to such property, have been obtained by disseizin...[191]

The erection of a weir may establish title to flats by adverse possession.[192] McLellan v. McFadden[193] held that prescriptive rights to the enjoyment of the fishing weir granted under legislative enactment might be acquired by adverse possession. In that case title to the flats was not the subject of litigation.[194] Presumably such possession of a weir could give title by adverse possession to the flats on which it was located by enclosing the flats and excluding both the public and the owner.

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190. Thornton v. Foss, 26 Me. 402 (1847); Treat v. Chipman, 35 Me. 34 (1852); Clancy v. Houdlette, 39 Me. A. 451 (1855); Brackett v. Persons Unknown, 53 Me. 228 (1861); Marshall v. Walker, 93 Me. 532, 45 A. 497 (1900).

191. Clancy v. Houdlette, supra, p.456-7.

192. Treat v. Chipman, 35 Me. 34 (1852). The existence of a weir for 50 years was said to furnish a presumption of the original apportionment of the flat -- even if facts were insufficient to establish such a possession as would by the provision of the statute amount to disseizin.

193. 114 Me. 242, 95 A. 2d 1025 (1915).

194. C.f. Duncan v. Sylvester, 24 Me. 482 (1844).

Title to land under fresh water streams may be obtained by prescription by driving piles into the bed of the stream and maintaining buildings or other structures upon them.[195]

The public easements in flats endow this type of property with special characteristics, and covenants of possession in deeds of conveyance are not vitiated by the rights of the public in this land.[196] The right of the public to use the flats is not an incumbrance within the usual covenant against incumbrances. While the owner may appropriate the flats, within the limits of the law, to his exclusive use and possession, when not so appropriated his possession is constructive rather than actual.[197]

Prescription[198]

Title by prescription arises by a fictitious presumption, from long continued use of an incorporeal hereditament, of a previous grant which has been lost. Therefore nothing can be acquired by prescription that cannot be subject of a grant. In Hill v. Lord,[199] the defense in an act of trespass for taking seaweed from plaintiff's flats was that the right to take seaweed had been obtained by prescription either by

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195. Carlton v. Cleaver, 112 Me. 310, 312, 92 A. 110 (1914).

196. Montgomery v. Reed, 69 Me. 510 (1879).

197. Marshall v. Walker, 93 Me. 532, 45 A. 497 (1900).

198. Prescription and adverse possession are often used interchangeably. In this line of Maine cases, prescription has been used with regard to incorporeal hereditaments.

199. 48 Me. 83 (1861).

by the inhabitants of the town or alternatively by the town itself in its corporate capacity. In rejecting the defense the Court held:

1. The right to take seaweed from the land or beach of another is not an easement but a right to take a profit in the soil and can not be acquired by custom.

2. Prescriptive rights to inhabitants could not be established because there could arise no presumption of a grant, as an inhabitant cannot purchase for himself and his successors.

3. The Town as a corporation had not established prescriptive rights. A corporation can obtain rights by prescription, but to do so it must be shown that it has done so by corporate acts regulating such rights or exercising control over them. Corporate acts of declaring the premise common for the use of the inhabitants, or surveying a lot for one who did not subsequently go into possession of it, or laying out a road to the premises are not such corporate acts as would prove a prescriptive right.[200]

> For as title to land by disseizen can be acquired only by an exclusive occupation, so a title to an incorporeal heriditament, unless an easement merely, can be acquired only by an exclusive enjoyment. The free participation of the public in it, rebuts any presumption of private or corporate right.[201]

Inhabitants of a town may acquire a right of way by prescription.[202] The inhabitants of a town may obtain an easement by custom, but not

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200. Id. at p.97.

201. Id. at p.98.

202. Mayberry v. Standish, 56 Me. 342, 350 (1868); Littlefield v. Hubbard, 124 Me. 299, 127 A. 285 (1925).

an interest in the land -- a right to take a profit from it.[203]

Dedication To The Public

A public right of way to the shore may be obtained by dedication. The public must be a party to every dedication: "There is no such thing as dedication between the owners and individuals."[204] A definition of dedication from Campmeeting Association v. Andrews[205] is quoted with approval in the Littlefield case:

> Dedication is the intentional appropriation of land by the owner to some proper public use, reserving to himself no rights therein inconsistent with the full exercise and enjoyment of such use. The intention to dedicate is the essential principle, and whenever that intent on the part of the owner of the soil exists in fact and is clearly manifest, either by his words, or facts, the dedication, so far as the public is concerned, is made. If accepted and used by the public for the purpose intended it becomes complete, and the owner of the soil is precluded from asserting any ownership therein that is not entirely consistent with the use for which it was dedicated.[206]

To constitute a way by dedication, two things are essential: (1) the act of dedication and (2) the acceptance of it on the part of the public.[207] In State v. Wilson, the Court was called on to decide

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203. Hill v. Lord, supra; Moor v. Griffin, 22 Me. 350 (1843) indicated the public could not take mussel manure from the land. It also held the public had the right to take shellfish, but not the shells.

204. Littlefield v. Hubbard, 124 Me. 299, 302 (1925).

205. 104 Me. 342, 71 A. 1027 (1908).

206. Id. at p.346.

207. State v. Wilson, 42 Me. 2, 24 (1856).

whether there had been dedication of the shore as a highway by the defendant's grantor. The Court held that the right of the public does not rest upon a grant by deed, nor upon 20 years of possession; but upon the use of the land, with the assent of the owner, for such a length of time, that the public accommodation and private rights might be materially affected by an interruption of the enjoyment.[208]

> ...and it is not necessary that the dedication be made specially, to a corporate body, capable of taking by grant; it may be the general public, and limited only by the wants of the community. If accepted and used by the public, in the manner intended, it works an estoppel in pais, precluding the owner, and all claiming in his right, from asserting an ownership inconsistent with such use.[209]

The Court went on to say that whether there had been dedication by the owner of the land, and acceptance by the public, is a question of intention, and therefore may be proved or disproved by the acts of the owner, and the circumstances under which the use had been permitted.[210] In State v. Wilson, the Court held that there had not been a dedication of the shore property because "...the use of the shore, now covered by defendant's wharf, as a way for travel upon the waters of the river, was the exercise of a right which the owner of the shore could not in the least restrict or abridge; and his assent could not be inferred from the omission to object to that, over which he had no control,..."[211]

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208. Id. at p.23.

209. Id. at p.23.

210. Id. at p.24.

211. Id. at p.24-25.

It had further been contended in State v. Wilson that if the shore in question did not become a highway by dedication it was such by user. The Court recognized the well established principle that highways may have a legal existence from immemorial usage and that long occupation and enjoyment, unexplained, will raise a presumption of a grant not only of an easement, but of the land itself: "And grants may be presumed, not only to individuals and corporations, but to the State."[212] But the Court went on to say that this presumption is predicated upon the existence of some title or right which could be the subject of the grant, and that no one is presumed to have granted an easement in the right of passage to the public over his land, when that right is already (due to the public's easement in the shore) in the public to the fullest extent.[213]

In a more recent case it was held that land marked "common" on a plot plan of Biddeford Pool did not mean it had been dedicated.[214] The case involved the pressures for access to the ocean by recreation-seekers, with all the attendant problems of parking, liquor, and litter. The Court indicated that perhaps as far as purchasers in the development were concerned, an easement might have been obtained in this area, but marking the plot "common" was not conclusive evidence of dedication to the public.[215]

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212. Id. at p.26.

213. Id. at p.25-26.

214. Baker v. Petrin, 148 Me. 473, 95 A. 2d 806 (1953).

215. Id. at p.480, 486.

PREFERENTIAL TREATMENT

Although the riparian owner shares with the general public the common right of fishing and navigation, and may be excluded from fishing even on his own flats,[216] he has been the recipient of preferential treatment not only on his own flats but in the area below low water mark. Special advantages given to him by the Legislature have been upheld by the Court, even though the right of property incident to shore ownership, stops at low water mark.

The earliest statutory enactments for aquaculture of oysters, provided that permission for such cultivation would be given only with the consent of the adjoining riparian owner.[217] This was so even though the oyster stakes were to be placed below low water mark, which by definition is state-owned land. This provision requiring riparian owners' consent is still intact today and may be a great deterrent to any large scale aquaculture of oysters.

Riparian proprietors of adjacent property also have preferential treatment in obtaining municipal licenses for the cultivation of clams and mussels.[218] This preference has not been interpreted, however, as a grant to any such owner, either of a license or an absolute right to

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216. Moulton v. Libbey, 37 Me. 472 (1854).

217. Mass. Stat. Feb. 26, 1796 §1; P.L. 1849, c.142; (See 12 M.R.S.A. 4253 for present provisions).

218. 12 M.R.S.A. 4304.

a license. "What the Legislature has laid down comes to this: That on establishing the fact of ownership, holders of contiguous highlands shall have some advantage over other applicants."[219] Private concerns, and even the Department of Sea and Shore Fisheries itself, need the consent of the riparian owners to conduct research and experimentation with marine species on tidal flats.[220]

Wharves and Weirs

From the earliest statutes delegating to municipalities the authority to issue licenses for wharves and weirs, provisions were included that fishing weirs or any extensions of wharves could be placed in front of somebody else's shore or flats only with the consent of the owner.[221] In Perry v. Carlton[222] the weirs and wharf statute was interpreted as giving the land owner the first right to erect a removable weir abreast of his own land. If he should choose not to exercise such right, then any other person might do so. He had to either use the right himself or let his neighbor use it. In the Perry case, the plaintiffs had contended that they had the exclusive right of using the river below the ebb and flow of the tide opposite their flats, not because they were actually using the property themselves, but because

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219. Rogers v. Brown, 135 Me. 117, 118, 190 A. 632 (1937).

220. 12 M.R.S.A. 3701-2; 12 M.R.S.A. 3703 (1)(C) as amended by P.L. 1967, c.527 §1.

221. P.L. 1876, c.78; See 38 M.R.S.A. 1021-1026 for present provisions. In Re. Hadlock, Petitioner, 142 Me. 116, 48 A. 2d 628 (1946) sets forth a detailed history of the weirs and wharves statutes.

222. 91 Me. 349, 40 A. 134 (1898).

the right was their property. The Court held: "It is the actual use and appropriation that gives the land owner the benefit of the statute to protect his right of fishing, not an unexercised right to do so."[223]

In Sawyer v. Beal,[224] the Court held that the phrase "in front of the shore or flats of another" could not be taken literally. The Court stated that the statute must contain some implied limitation, for otherwise there would be no point, however distant in any direction, that would not be in front of plaintiff's shore since he owned the whole island with shore running in all directions. Although refusing relief the Court took notice that the apparent rights of the owner of the shore might be seriously affected by a weir built beyond the limits of his ownership, but so near thereto as to very materially injure him.

> But the purpose of this was not to extend the ownership of the owner of the shore or to give him any new or additional rights, but simply to protect him in the enjoyment of those which he already had as owner of upland and shore or of shore alone. It follows that this statute does not apply to all fish weirs that may be erected by a person in front of the shore of another but only to such as are so situated or are so near the shore of another as to injure or injuriously affect the latter in the enjoyment of his rights as such owner, as for instance by preventing, to some extent at least, fish from coming to the weir of of the shore owner, if he has one, or by injuring his weir privilege, or by obstructing access by sea to his land, or in some other way.[225]

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223. Id. at p.354-5. See this case for interpretation of the statute which is now in Section 38 M.R.S.A. 1026.

224. 97 Me. 356, 54 A. 848 (1903).

225. Id. at p.358.

> We do not mean that the shore owner can only be injured in some of the ways above referred to. The very purpose of the statute is to extend to him additional protection in the enjoyment of his rights as such owner, and to give him a remedy for injury, where prior to the statute, there was neither remedy nor injury in the legal sense.[226]

In Whitmore v. Brown,[227] relief was denied because the wharf built without the owner's permission did not obstruct access to plaintiff's property although the passage to and from her land was diminished. In Robinson v. Higgins,[228] relief was granted to the plaintiffs by a permanent injunction to keep the defendant from extending his tide water wharf in front of the plaintiffs' shore without their consent. The Court held that the extension would impede unreasonably and unlawfully the right of egress and ingress from and to their land over the deep water, a right incident to the ownership of property bordering tide water.

The relief that may be granted to a shore owner for violation of this mandatory consent provision can only be that provided for in the statute. Thus in Perry v. Dodge,[229] it was held that relief for building a weir below low water mark in front of plaintiff's upland without permission could only be the $50 damages set forth in the statute. The

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226. Id. at p.358. In Dutton v. Parker, 97 Me. 464, 54 A. 1115 (1903) recovery was allowed by same criteria, but case was distinguished on the facts situation.

227. 102 Me. 47, 65 A. 516 (1906).

228. 126 Me. 55, 135 A. 901 (1927).

229. 144 Me. 219, 67 A. 2d 425 (1949).

230. 142 Me. 116, 48 A. 2d 628 (1946).

Court held that the inadequacy of the remedy, is a matter for the Legislature not the Courts. In in Re. Hadlock, Petitioner,[230] the petitioner had applied to the municipal officers for a license to erect a fishing weir. The application was denied and was appealed to a justice of the Superior Court who directed a license to issue. Exceptions (i.e., an appeal) were filed by the owner of shorefront property nearby who had not, to that point, been a formal party to the proceedings. His appeal was dismissed on the ground that the statute made no provisions for exceptions.

In dictum on the Hadlock case, the Court had cited Whitmore v. Brown[231] to the effect that the rights intended to be safeguarded by the license requirement were such tangible ones as unobstructed navigation and fishing and not such intangible ones and unobstructed views or sightly prospects.[232]

In the Whitmore case, supra, involving the construction of a wharf in front of plaintiff's land without her permission, the Court did not deny that the value of plaintiff's land had been damaged, only that none of her legal rights had been infringed.[233] In the Whitmore case

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231. Whitmore v. Brown, 102 Me. 47, 65 A. 516

232. In Re. Hadlock, Petitioner, supra, p.119.

233. See also Gerrish v. Union Wharf, 26 Me. 384, 392 (1891) "The rightful use of one's own estate, whether covered by water or not, may not unfrequently have some effect to diminish the value of an adjoining estate, or to prevent its being used with the comfort, which might have been otherwise anticipated. This, however, is damnum absque injuria, for which the law does not, and cannot make compensation.

the Court emphasized quite strongly that "the land owner has no legal right that the market value of his land shall not be disturbed."[234] Perhaps this legal tenet has been changed by the provision in the Wetlands legislation: "would adversely affect the value or enjoyment of the property of the abutting owner."[235] If so, this would be a change in the common law principle and hence be strictly construed. This attempt to modify the common law, no matter how admirable the objective, is so vague and indefinite that if a prohibition of filling or dredging is predicated on this one portion of the Wetlands Statute, it will probably fail.[236]

REGULATION OF PRIVATE PROPERTY

As a general observation it cannot be doubted that the sovereign power of the State is competent to make whatever regulations are reasonably necessary for the public health and welfare. Good examples of this are the regulations of the Environmental Improvement Commission and zoning ordinances. In addition to the police power, the sovereign's power to regulate navigation is also brought to bear on marine resources. In determing the legal structure relating to marine resources, it is necessary to ascertain what the Maine Supreme Court has allowed as a reasonable use of the police power and the navigation power to regulate marine resources, and when it has decided that the exercise of these

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234. Whitmore v. Brown, supra, p.59.

235. 12 M.R.S.A. 4702 (Supp.).

236. See discussion on Wetlands Control Board, Chapter I, p.58.

powers amount to a taking for which the owner must be compensated.[237] In the preceding sections it has been shown that the Maine Supreme Judicial Court has almost universally upheld the sovereign's capacity to limit, hold in abeyance, or to extinguish public rights in public waters and on the land-shore interface, if done for a public purpose. The exercise of the sovereign power has been more narrowly construed when it has been used for the regulation or taking of private property.

Restrictions on Use of Private Property

An early twentieth century case, although not on the ocean, established the constitutionality of regulations restricting the use of property, without compensation the owner.[238] In Opinion of the Justices, a regulation prohibiting the cutting or destruction of trees growing on private land was sustained because such regulation was designed to prevent injurious draughts and to preserve and maintain the natural water supply. Fifty years later, the Supreme Court ruled that the creation of game preserves, which prohibited even owners of land from hunting on their own land, were not unconstitutional as they did not involve a taking of property without compensation.[239]

In the case of Moulton v. Libbey,[240] the Maine Supreme Court upheld the exclusion of the owner of the flats from engaging in shellfishing

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237. See discussion on eminent domain p. 358 infra and specific delegation of eminent domain powers to State agencies, p. 355 infra.

238. 103 Me. 506, 511, 69 A. 627 (1907). See quote p. 315.

239. State v. McKinnon, 153 Me. 15, 133 A. 2d 885 (1957).

240. 37 Me. 472 (1854).

on his own flats without a license. In that case the dissenting judge had declared that such a ruling was depriving the riparian owner of one of the property rights stemming from ownership in the soil of the flats inasmuch as the shellfish were attached to the soil. The majority opinion had predicated their refusal on the fact that the taking of shellfish was a public right and hence subject to modification or elimination by the sovereign power. It seems a particularly ironic decision inasmuch as the riparian owner could have enclosed his flats by wharves or fill with the result that either an exclusive fishery or the public right to fishery on these flats with a license would have been curtailed or eliminated.[241] The encroachment upon what would have been, by common law, private property in fisheries has been allowed both in Maine and Massachusetts. This would include granting exclusive fisheries, regulation of fisheries in inland waters, and regulations with regard to fish ladders.[242]

Maine statutes have allowed harbor masters to draw harbor lines beyond which no wharf or pier may extend.[243] The Massachusetts Court has found such restrictions constitutional.[244] Under the powers to regulate navigation, laws have been upheld in Massachusetts which prohibited taking of gravel from a beach or building upon flats.[245]

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241. See Henry v. Newburyport, 149 Mass. 582, 585 (1889).

242. Cottrill v. Myrick, 12 Me. 222 (1835); See section on regulation of fisheries, p.352.

243. See P.&S.L. 1917, c.192 §5.

244. Comm. v. Alger, 61 Mass. (7 Cush.) 53 (1851).

245. Comm. v. Tewksbury, 52 Mass. (11 Met.) 55 (1846); Comm. v. Alger, supra; Boston v. Lecraw, 58 U.S. (17 Howard) 426, 433 (1854).

Another restriction that has been placed on the absolute right of the owner of the flats is that a license must be obtained from a municipality to erect a wharf or weir in tidal waters.[246] Prior to the delegation of this authority to municipalities, licenses were obtained directly from the Legislature to build weirs.[247] Up until 1876 the owner of flats could erect wharves on them as freely as upon his uplands providing he did not interrupt or impede navigation.[248] In 1876 the Legislature passed a general statute delegating to municipalities the responsibility and duty of issuing public permits for the construction of wharves and weirs.[249] Weirs authorized by the Legislature by private and special legislation prior to the general statute were deemed to be still authorized in the absence of a special repealer or authority in the special legislation inconsistent with the general law.[250] The power of the Legislature to require a license for the erection of wharves on the flats has been firmly established.[251]

Under present law any person intending to build or extend any wharf, fish weir, or trap in tidewater must receive permission from the municipal officers. If a person is an inhabitant of an island not in any town, the owner or the owners of the island may grant such permission subject to intervention by the Commissioner of Sea and Shore Fish-

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246. 38 M.R.S.A. 1021-1026.

247. E.g., P.&S.L. 1876, c.202.

248. Whitmore v. Brown, 102 Me. 47, 57, 65 A. 516 (1906).

249. P.L. 1876, c.78.

250. State v. Cleland, 68 Me. 258 (1878).

251. Comm. v. Alger, 61 Mass. (7 Cush.) 53 (1851); Whitmore v. Brown, supra, p.56.

eries in cases of disagreement.[252] The municipal officers make the determination whether such a structure will be an obstruction to navigation or injure the rights of others. Once a license is granted, a wharf cannot be abated as an obstruction to navigation even though it be such in fact. The license, however, will not protect the wharf from a complaint of infringement of private right.[253] If a license is not obtained, it is an unlawful structure even though it does not in fact obstruct navigation. Lack of a license, however, does not make such structures outlaws to be lawfully assailed and destroyed by anyone, or abated at the private suit of any person.[254]

Shore front property as well as upland may also be subject to zoning ordinances.[255] Minimum lot sizes for construction of dwellings on uplands have been written into State law and local zoning ordinances. Recently the minimum lot size was raised from 15,000 to 20,000 square feet for construction of dwellings on property not located on a sewer.[256]

Wetlands Control Board

One of the latest statutory regulations of private property in the land-sea interface is the Wetlands Legislation, which requires that the owner of flats or shore obtain permission from the municipality and the

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252. 38 M.R.S.A. 1022.

253. Whitmore v. Brown, supra, p.56.

254. Id. at p.57.

255. See York Harbor Village Corp. v. Libby, 126 Me. 537, 140 A. 382 (1928); Wright v. Michaud, 160 Me. 164, 200 A. 2d 543 (1964).

256. 12 M.R.S.A. 4801-6 as added by P.L. 1969, c.365; 30 M.R.S.A. 4956 as repealed by P.L. 1969, c.365.

Wetlands Control Board to alter shore property by either filling or dredging.[257]

The constitutionality of this statute was raised in Johnson v. Wetlands Control Board,[258] by the landowner who had been denied a permit to fill his flats. The landowner argued that the decision of the board so restricted the use of his property that it amounted to a taking without compensation and was therefore unconstitutional. Both the State and the Natural Resources Council[259] had defended the denial of the permit as a proper exercise of the police power. The case was remanded for taking of evidence or agreement as to facts, so the constitutional issue has yet to be adjudicated in Maine.

There can be little doubt that the constitutionality of these regulations will be sustained when the issue is properly before the Maine Supreme Judicial Court. The Wetlands legislation is the only law of statewide applicability that will at most, preserve the ecological and aesthetic values of the Maine coastline and estuaries; and, at the least, provide a temporary moratorium or slowdown in filling or dredging until factors other than the immediate project at hand can be taken into consideration.[260] The goals of this act will be reinforced with the

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257. 12 M.R.S.A. 4701-7 as added by P.L. 1967, c.348 and amended by P.L. 1969, c.379. See Chapter 1, p.53 ff.

258. Me. 250 A. 2d 825 (1969).

259. Private Maine organization dedicated to conservation.

260. For discussion of shore front developments see McKee, John, Coastal Development, Maine Townsman, July, 1969, p.5.

development of local, regional, and the state wide comprehensive plan for coastal land use.[260a] The investigations now being undertaken by the Department of Inland Fisheries and Game and the Department of Sea and Shore Fisheries "Inventory of Wild Marine Life and Land and Water Utilization"[261] will provide an essential backdrop for drawing up a coastal plan and evaluating the relative advantages of leaving an area in its natural state as opposed to filling or dredging. In the meantime, the Wetlands Act is vital. It is worth noting that in previous litigation, however, one of the potentially strongest arguments to sustain the Act was not even advanced: The Colonial Ordinances used to reinforce the general police power of the State, or the Colonial Ordinances standing alone, should establish the constitutionality of the Wetlands legislation:[262]

1. Origin and Nature of Private Ownership in Area

Ownership of the shore, and the nature of such ownership, is determined by the Colonial Ordinances of 1641-7. When the 100 rods were given to the riparian owner, they were given subject

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260a. The State Planning Office is drawing up a comprehensive Maine Coastal Development Plan. The four phases of this plan are to be completed by January, 1973.

261. See Chapter I, p.104.

262. In Commissioner of Natural Resources v. Volpe, 349 Mass. 104, 112, 206 N.E. 2nd 666 (1965) the Massachusetts Court expressed curiosity about the relevance of Colonial Ordinances on the case at bar "and to what extent does the ordinance relate to matters other than navigation near and upon the locus?" The Court also inquired as to any relevant rules and regulations prescribed by the Director of Marine Fisheries.

to the public servitude of navigation and fishing.[263] As suggested supra p.273 although the land was given in fee, the fee was "defeasible" until the flats were completely appropriated and assumed the nature of uplands. These lands, although private property, are subject to legislative restrictions, such as licenses for wharves, weirs, harborlines, and a license for the exercising of the fishing privilege to the exclusion of the rights of the owner without compensation. Such laws have been promulgated, it is submitted, not so much as an extension of the general police power, but in the sovereign's specific capacity to regulate the public right of fishing and navigation in this area. Although touched upon in many cases, this point of view is mostly clearly articulated in Commonwealth v. Alger,[264] to the effect that the seashore is a unique type of property and hence was subject to greater regulations than uplands. The language has wider applicability than to the constitutionality of legislation establishing harbor lines, to which the case was addressed.

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263. Cf. Stover v. Jack, 60 Pa. State Reports (10 Smith) 339, 343, (1869) (Riparian owner owns to low water mark) "As to the intervening space between high and low water mark, the title of the private owner is qualified,..." Allen v. Allen, 19 R.I. 114, 32 A. 166 (1895) (Riparian owner owns to high water mark) "A riparian proprietor whose lands border upon tide water has, by common law, certain private rights to the shore between high and low water mark. These do not amount to seizen in fee, but are in the nature of franchises or easements....The right to build wharves and to fill up the upland may be exercised, as against anyone but the state,..."

264. 61 Mass. (7 Cush.) 53, 95 (1851). See also Boston v. Richardson, 105 Mass. 351, 359 (1870).

> And so in the exercise of the more general power of government, so to restrain the injurious use of property, it seems to apply more significantly and more directly to real estate thus situated on the seashore, separating the upland from the sea, to which the public have a common and acknowledged right, so that such estate should be held subject to somewhat more restrictive regulations in its use, than interior and upland estate remote from places in which the public have a common right....But the circumstances are entirely different in regard to the sea-shore, which lies between the sea, admitted to be common to all, and the use of which is of vast importance to the public, and ports and places, without access to which, the use of the sea for navigation would be of little value.[265]

> Considering, therefore, that all real estate derives from the government is subject to some restraint for the general good, whether such restraint be regarded as a police regulation or of any other character; considering that sea-shore estate, though held in fee by the riparian proprietor, both on account of the qualified reservation under which the grant was made, and the peculiar nature and character, position and relations of the estate, and the great public interests associated with it, is more especially subject to some reasonable restraints, (Emphasis supplied) in order that the exercise of full dominion over it, by the proprietor, may not be noxious to others, and injurious to the public, the court are of opinion that the legislature has power, by a general law affecting all riparian proprietors on the same line of shore equally and alike, to make reasonable regulations, declaring the public right, and providing for its preservation by reasonable restraints, and to enforce these restraints by suitable penalties.[266]

Another Massachusetts case[267] contains language to the effect that the Legislature could, for the protection of the rights of the public in navigation, "or for the security of the coast,

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265. Commonwealth v. Alger, supra, p.94-5.

266. Id. at p.95.

267. Henry v. Newburyport, 149 Mass. 582 (1889).

regulate the use of the territory between high-water and low-water mark, and could, without compensation, prohibit taking gravel from a beach, or building upon flats, whenever in its opinion such prohibition was necessary.[268] The Massachusetts Court in a more recent case said "all rights of owners of flats between high and low water mark under the Colonial Ordinance are subject to very extensive regulation by the General Court [i.e., Legislature]."[269]

2. Public Servitude Could be Extended To Or Interpreted To Include The Wetlands Restrictions.

The public servitude established by the Colonial Ordinances could be extended to or interpreted to include the Wetlands restrictions.

The granting of the 100 rods to the riparian owner in 1641 was done to meet the economic demands of Colonial times. As stated previously, one of these demands was to encourage commerce by allowing riparian owners access to the sea and to stimulate wharfing out to meet navigation needs. There was no implicit or explicit right to fill or appropriate the land for other than navigation or fishery purposes. Land was plentiful and population scarce, so scarce that filling in of flats was probably never contemplated at the time. If at that time, filling had been protested, it might have not been allowed, for in

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268. Id. at p.585. See also Commonwealth v. Tewksbury, 52 Mass. 55 (1846).

269. Jubilee Yacht Club v. Gulf Refining, 245 Mass. 60 (1923).

the socio-economic conditions of the colonies fisheries could only be subordinate to navigation and the shell fishing areas could be destroyed only for the paramount need of navigation.

As population grew and the pattern of life developed, the legislative bodies of Massachusetts and later Maine put restrictions on the use of the sea shore property. Some of the legislation changed the former public rights under the Colonial Ordinances.[270] The right to modify the Colonial Ordinances had been upheld by the Maine Courts, which said that the Legislature may, if disposed, abrogate the entire effect of the ordinance.[271]

The Colonial Ordinances in Maine are common law legal tenets, and the Maine Courts have repeatedly held that the common law is subject to modification with changing conditions, but that it is the Legislature's prerogative to make these changes.[272]

> But these are considerations to be addressed to the Legislature rather than to the court, whose power is to be exercised in ascertaining and declaring the law, and in applying the old principles unchanged to the ever varying circumstances of new cases presented and sometimes to the newly developed industries of the age (as the Massachusetts court applied this ordinance, in West

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270. See Comm. v. Tiffany, 119 Mass. 300 (1876) which changed the size of great ponds from 10 to 20 acres in Massachusetts. It should be noted that such an act increased private ownership rather than restricting it. The wharf and weir statutes, however, had the effect of restricting the use of private property.

271. Opinion of the Justices, 118 Me. 503, 529, 106 A. 865 (1919). Both in the Tiffany case and the Opinion of the Justices the act under consideration did not disturb private ownership. It should be noted, however, that the Colonial Ordinances themselves divested private individuals from ownership in great ponds. See Laws of Maine, 1911, Appendix, p.859 referring to Colonial Ordinance, 1641, affected by P.L. 1911, c.69 (Clam aquaculture statute).

272. E. g., Barrows v. McDermott, 73 Me. 441 (1882).

> Roxbury v. Stoddard, 7 Allen, 158), but not in setting aside its plain doctrines because they are not in accord with our own views of what it should be, when the legislature, which is properly charged with the duty of promoting the public good and preventing mischief so far as law making will do it, has not seen fit to intervene.[273]

Recognizing that the common law (deriving from the Colonial Ordinances or otherwise) can be modified, vested private rights may not thereby be denied. But no vested rights of the private individual are disturbed because the public servitude on the sea shore was broad enough from the time of the Ordinances to encompass the restrictions placed on it by the Wetlands legislation. under the theory that the Colonial Ordinances were illustrative of the general principle which has been extended from time to time to include other privileges deemed to be in keeping with the spirit and intention of the Ordinances pursuant to public requirements and the changing conditions of society.[274]

> With the growth of the community, and its progress in the arts, these public reservations, at first set apart with reference to certain special uses only, became capable of many others which are in the design and intent of the original appropriation. The devotion to public use is sufficiently broad to include them all as they arise.[275]

On the basis of the above it is contended that the Wetlands Control Act may be sustained as an expansion of the public

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273. Id. at p.449-50.

274. West Roxbury v. Stoddard, 89 Mass. 158 (1863).

275. Id. at p.167. The Roxbury case dealt with great ponds.

reservations explicit in the original ordinance.[276]

3. More Liberal Interpretations of the Fishing Servitude.

A very strong argument, it is submitted, could be made involving a more liberal interpretation of the fishing servitude. The nexus of this argument is that filling or dredging would either kill the fish themselves, would obliterate spawning grounds, or would eliminate nutrients in the food chain that are essential both for the offshore and deep sea fisheries.[277] While it might be contended that the fishing servitude must yield to someone wanting to build a marina because fishing has always been subordinated to navigation, such a contention could be rebutted by the fact that the sovereign powers of the Legislature may determine priorities between two public rights.[278]

4. Summary

It is submitted that the Maine Supreme Judicial Court has a duty to uphold the constitutionality of the Wetlands legislation because of an "irresistible public necessity"; the Court has a choice of legal alternatives by which it might justify the restrictions of the Wetlands Act without compensating the riparian owners.

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276. Another interesting tack might be that found in the Vermont case on land fill which was remanded to consider the key question of the right of the public to use the overlying waters of Lake Champlain regardless of the ownership of the land under such waters. State v. Cain, 126 Vt. 463, 236 A. 2d 501 (1967).

277. See Coastal Ecological Systems of the United States: A First Book for Estuarine Planning. Institute of Marine Sciences, University of North Carolina, 1969.

278. See Conflicting Priorities in the Exercise of Public Rights, p.257.

CHAPTER FOUR STATE POWER OF DISPOSITION, ACQUISITION, EXPLOITATION, AND ALLOCATION OF MAINE'S MARINE RESOURCES

"Law is an utterly important adjunct to any widespread exploitation of the sea." -- Dr. Athelstan Spilhaus.[1]

INTRODUCTION

What is the legal framework in Maine for utilization of the common property resource of the sea and its products? What are the constitutional and statutory enabling provisions for governmental and private endeavor? What restrictions and prohibitions have been placed on the exercise of Maine's sovereign power over its submerged lands and territorial waters? To what extent may marine resources be privately owned or managed? Can the State of Maine sell or give away its marine resources? Has it? Should it? What are the specific sovereign powers of the State of Maine in the acquisition, disposal, and regulation of public lands? Public rights? And of private property contingent to the sea? How have these powers been exercised?

This chapter will attempt to present the broad legal framework with regard to law affecting marine resources. Chapter One describing the governmental organization and the state entities designated to carry out ocean oriented activity, Chapter Two dealing with marine boundaries, and Chapter Three defining navigable waters and discussing public and private rights on the seashore and in these waters are

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1. Hearings before the Special Subcommittee of Sea Grant Colleges. 89th Congress, 2nd Session (2439) (May, 1966) p.38.

integral parts of this framework, but material presented in those chapters, unless essential to clarity, will not be repeated herein.

I CAN THE STATE OF MAINE SELL OR GIVE AWAY ITS MARINE RESOURCES?

CAN IT?

The political sovereignty and authority of government in Maine derives directly from the Act of Congress, March 3, 1820 admitting Maine into the Union on March 15, 1820,[2] and the consent of Massachusetts expressed in the Act of its General Court passed June 19, 1819.[3] The people of Maine conferred upon the Legislature all of its sovereign power except that delegated to the Congress of the United States or reserved to itself. The State Legislature may enact any law, of any character, on any subject unless it is prohibited either in express or implied terms by the Federal or State Constitution.[4]

Constitutional Provisions

There is nothing in the Maine Constitution which would prohibit the Legislature from selling or giving away any State owned upland, submerged land, or the extent of the State's ownership in its territorial waters. In Opinion of the Justices,[5] which dealt with the alienation of the State's interest in great ponds, the Supreme Judicial Court in reaffirming previous declarations of the State's title to

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2. 3 Stat. 544, Chap. 19.

3. General Laws of Massachusetts 1799-1822, Acts and Laws, 1819, c.36, c.162.

4. Baxter v. Waterville Sewerage District, 146 Me. 211, 215, 79 A. 2d. 585 (1951).

5. 118 Me. 503, 504, 106 A. 865 (1919).

great ponds below low water mark, declared that the State's title in great ponds is the same in origin as in tidal waters. The State holds and can control the use of both for public purposes and "It is in this qualified sense that the people are said to own the great ponds within our borders". The Court went on to say that "...Since the people as beneficiaries possess these public rights, the Legislature, which represents the people, has the power to abridge these rights and to grant them, or any portion of them to private individuals or corporation, if it sees fit to do so."[6]

> There seems to be some misapprehension as to these so-called public rights in great ponds. They are often spoken of as if they were sacred and inalienable. Not so. Under the original ordinance they could not be conveyed by a town without legislative authority; nor can they now. Attorney General v. Revere Copper Co., 152 Mass., 444, 25 N.E., 605, 9 L.R.A., 510. That is the only limitation upon their transfer. They can be granted and conveyed, as they often have been, by the Legislature, which represents the people. What is owned by the people may be transferred by the Legislature, unless prohibited by the Constitution, and no such constitutional inhibition barricades the way here.[7]

The dissenting opinion of Justice A. N. Spears in the same decision disallowed the conveyance of these rights in great ponds, not on the basis of lack of sovereign capacity, but based on his belief that the State did not have the title in fee to great ponds. He felt that the Colonial Ordinances' purpose was "...to declare a privilege in the public, not as a sovereignty, but as individuals, to use the waters of the great ponds, a right necessary in those early days to the

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6. Id. at p.504.

7. Id. at p.505.

acquisition of a living.... It was a personal privilege, not a State privilege, or society privilege, of which the courts, not the executive nor judicial department were guardians."[8]

The same legislative capacity to convey the State's natural resources was discussed in State v. Noyes.[9] Although the case involved the revocation of a previously granted charter to a railroad company, the language is applicable to alienation of marine resources.

> It is insisted, on the part of the government, that the legislature is limited in the exercise of this power, to some extent; and that it is not competent for them to barter away absolutely, beyond recall, the rights of the public, which may afterwards become essential to its good, and if this department of government are not subject to some restraint in this respect, the power to provide for public improvement will be diminished, and may be eventually lost. This proposition has no support in right reason or sound law.[10]

Four years earlier the Maine Supreme Judicial Court had had an opportunity to rule against alienation of the State's natural resources or placing restrictions on the common public right of fisheries. In Moulton v. Libbey,[11] the Maine Court had noted and rejected the dissenting opinion from Martin v. Waddell,[12] "The sovereign power itself cannot consistently with the principles of the law of nature and the constitution of a well ordered society make a direct and absolute

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8. Id. at p.525.

9. 47 Me. 189, (1859).

10. Id. at p.206.

11. 37 Me. 472, 487 (1854) (upholding regulation on taking of shellfish).

12. 16 Peters 367, 41 U.S. 367, 420 (1842).

grant of the waters of the State divesting all the citizens of a common right. It would be a grievance which never could be long borne by a free people."

Statutory Restrictions

The Maine Legislature has implicitly given consent to the disposition of submerged land in territorial waters. The following language may be found in 1 M.R.S.A. 3. "The ownership of waters and submerged lands enumerated or described in Section 2 shall be in this State unless it shall be, with respect to any given parcel or area, in any other person or entity by virtue of a valid and effective instrument of conveyance or by operation of law."

With the exception of isolated instances in which the sale or gift of land acquired by the State under certain circumstances is not subject to disposition by the State,[13] the only restriction in the Maine statutues against the alienation of marine resources is to be found in a 1965 law prohibiting the sale of islands located in great ponds or in the sea;[14] this could be repealed by any subsequent Legislature.

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13. E.g. Gift of land for forest purposes 12 M.R.S.A. 512 (Supp.); Public reserve lots and land granted by Percival P. Baxter in Baxter State Park 12 M.R.S.A. 902.

14. 1 M.R.S.A. 27 (Supp.) "The title of all islands located in great ponds within the State and title to all islands located in the sea within the jurisdiction of the State, except such as have been previously granted away by the State or are now held in private ownership, shall remain in the State and not be sold." A less stringent prohibition had been enacted in 1913. "The title to all islands located in the sea within the jurisdiction of the State of Maine, except such as have been previously granted away by the State, or are now held in private ownership, shall remain in the State of Maine and be reserved for public use." (P.L. 1913, c.132 §2).

HAS IT?

The change in the law with regard to islands reflects the growing awareness by the Maine Legislature of the value of Maine land and its rapidly diminishing supply. Prior to the 1920s, not only could Maine give away or sell its public lands or natural resources but it did so with great abandon.

Pre-Statehood

The practice was a continuation of prevalent practices under the colonial legislatures and the State of Massachusetts. During the period from 1783 to 1820, Massachusetts disposed by sale and grant of over six million acres which, added to the approximate four million acres granted by the Plymouth Council prior to 1783, made a total of 9,856,126 acres (about one half of the entire area of the state) disposed of before Maine had any interest in or jurisdiction over wildlands of the State.[15] After the Revolution land was cheap and plentiful and the public debt was high. Massachusetts had no resources for payment of her debt, except the sale of her wildland or direct taxes from an already overtaxed populace. In 1783 a Land Office was established to survey the wild lands and open them to the market. To bolster lagging sales a lottery of 50 townships between the Penobscot and Passamaquoddy was authorized. Even this gimmick didn't catch fire for out of 2,720 authorized tickets only 437 were sold which netted Massachusetts an equivalent of $87,400 or about 52 cents an acre for 165,280

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15. State of Maine Report on Public Reserve Lot, State Forestry Department, 1963 p.11.

acres.[16] Land was also given in lieu of pensions to veterans of the Revolution and the War of 1812. About the year 1790, land values began rising in the public's estimation and grants were made for endowing academies, schools, literary societies and as a method of financing the construction of roads, bridges and canals. As land in each township was granted, certain acreages were set aside as "public reserve lots" to finance and support the preaching of the gospel and finance grammar schools.[17]

Post-Statehood

The concept of Public Reserve Lots was continued after Maine statehood. In addition, land in Maine was granted for settlement. The Maine equivalent of "20 acres and a mule" was granted to individuals in amounts up to 200 acres at 35 cents an acre. Part of the purchase price could be paid off by working on the roads.[18] Great expanses of timber land were either auctioned off or sold cheaply. Land was given to railroads to encourage development.[19] By 1878 the land agent reported "that all public lands of the State had been disposed of, ..."[20] This exhaustion of State land did not include disposal of the

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17. Id. at p.12, 18. See discussion of Public Reserve Lots under Chapter on Maine Mining Laws, infra.

18. Maine Revised Statutes, 1883, c.5, §27-39; Public Laws and Resolves of Maine, 1863-5, Jan. 1864, p.373.

19. Report on Public Reserve Lots, p.13; The Legislature authorized conveyance of all timber and lands situated upon the banks of the Penobscot and the St. Johns Rivers to the European and North American Railroad Company to be used to aid construction of its line. (P.&S.L. 1868, c.604 §1).

20. Id. at p.14.

State's submerged land or the State's interest in tidal waters which were not even considered as worthy of disposal in 1878.

SHOULD IT?

A Giant Says No!

That the Maine Legislature had the power to dispose of the State's natural resources as it wished is most vividly illustrated by the eloquent protest that Governor Percival P. Baxter made in 1923 against the practice in general, and against the Kennebec Reservoir Company in particular. In his message vetoing the enactment of that corporation's charter, Governor Baxter protested the conveyance of State public and reserve lots and water storage rights, and asked "Shall private corporations be given the remaining rights that the people have in a great natural resource? Shall this and other valuable storage systems be given away forever, or shall the people themselves retain them?....The people of the State of Maine never should part with any more of their inherent rights in the State's natural resources. These should be held in perpetuity for the benefit of the present and future generations."[21]

Governor Baxter proclaimed that the passage of this charter by the Legislature would be nothing less than a betrayal of the trust imposed upon the Legislature by the people of the State. He felt that the plea of a private corporation that the public would be benefited by the "development" of this storage was specious, for the development

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21. Address, Joint Session of the Legislature, March 20, 1923; Laws of Maine, 1923, p.1022.

would be solely for their own private gain whereas it should be for the public interest.[22]

> In refusing to approve the bill before me, I speak for three-quarters of a million people and their unborn descendents, all of whom you and I represent. I cannot believe that the 81st Legislature, knowing the facts, and it does know them, deliberately will alienate forever the land and the water which the Almighty placed here for the benefit of all the people. Should this be done, a cry of protest will be raised from Kittery Point to Quoddy Head; thence it will roll on with ever increasing volume to far away Fort Kent, and not a city, town or plantation in the State that will not hear it.[23]

> It may be that in 1868[24] no one protested against the rape of the State's timberlands, it may be that no one foresaw their value or realized that an innocently worded Act meant the sacrifice of the princely inheritance of millions of acres of fine timberland and many noble water powers. Today the eyes of this Legislature are opened wide and so are the eyes of the people.[25]

The Governor's effectiveness was not comparable to his eloquence because the charter was passed over his veto on March 22, 1923.[26] The Act, however, was repealed less than three weeks later after the Governor had issued a proclamation calling for citizens to support a referendum on the charter. The water power interests thereupon adopted the unusual procedure of themselves starting a second referendum in a desperate effort to save their charter. Governor Baxter stated that

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22. Id. at p.1025.

23. Id. at p.1025-6. Compare quote from Nigerian Chief alluded to at a Symposium: The Maine Coast and Perspectives, October, 20-22, 1966, p.40, "I conceive that land belongs to a vast family of which many are dead, few are living, and countless numbers are still unborn."

24. See Note 19.

25. Id. at p.1026.

26. P.&S.L. 1923, c.74.

previously the corporation had never been known to consult the people to obtain special privileges that they had usually obtained for the asking.[27]

New Policy of Leasing Rather Than Sale

Governor Baxter in repudiating this giveaway had proposed that lands be leased rather than deeded away. He specifically suggested a 40 year lease for the sum of a million dollars payable in yearly installments of $25,000 a year.[28] With Governor Baxter's approval this idea was incorporated into the new charter for the Kennebec Reservoir Company which was eventually passed in 1927.[29] And thus a policy of leasing rather than selling the State's natural resources was begun. Research to date has not found any examples of the State absolutely selling or giving away any submerged land below low water mark with perhaps the exception of giving permission to extend wharves below low water mark which in Massachusetts warrants the inference that the Legislature intended to convey the title.[30]

Although the Maine Supreme Judicial Court had refused to forbid the alienation of Maine's natural resources, the Court recognized the value of those assets. In 1907, in passing upon the constitutionality of a regulation against cutting trees, the same Court said "The amount

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27. Proclamation, The Inside History of the Kennebec Dead River Storage Charters, Laws of Maine, 1923, p.915.

28. Id. at p.1045.

29. P.&S.L. 1927, c.113 §13. Provisions were made for a 50 year lease at $25,000 per annum.

30. See Boston v. Richardson, 105 Mass. 351, 362 (1870).

of land being incapable of increase, if the owner of large tracts can waste them at will without State's restrictions, the State may be helplessly impoverished and one great purpose of government defeated."[31] It can not be said, however, that the Supreme Judicial Court has been a constant watchdog of Maine's natural resources in the delicate balance of conservation versus development.[32]

II MECHANICS OF DISPOSITION AND ACQUISITION OF STATE OWNED LAND

Despite some extraordinarily interesting aspects of land disposition and acquisition in Maine, the subject cannot be dealt with in detail in this report. The actual mechanics of how such transactions may be accomplished, however, is vital to this study.

ADVERSE POSSESSION

The law of Maine is that no rights in public, tidal, or submerged lands may be obtained by adverse possession against the State. The holding in Clancey v. Houdlette,[33] however, allowed title to flats more than 100 rods below high water mark to be obtained by adverse possession. Since such land was incapable of private ownership under the Colonial Ordinances, such a holding seemed an anomaly. Claims to

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31. Opinion of the Justices, 103 Me. 506, 511, 69 A. 627 (1907).

32. E.g., There has been no conviction to date under Water Improvement Commission statutes; allowing destruction of riparian rights and fishing habitat to permit development of natural resources in a tidal estuary, (Opinion of the Justices, Me. 216 A. 2d 656 (1966)); avoiding the opportunity to uphold the constitutionality of the Wetlands Legislation (Johnson v. Wetlands Control Board, Me. 250 A. 2d 825 (1969)).

33. 39 Me. 451 (1855). See also Crooker v. Pendleton, 23 Me. 339 (1843).

public land by adverse possession against the State were also allowed in Treat v. Lord[34] and Hinckley v. Haines[35]. While these cases have never been specifically overruled, their incongruous holdings are understandable only in the light of the statute that was in effect in 1841[36] and was not repealed until 1885[37] which provided that "no real or mixed action for the recovery of lands shall be commenced in behalf of the State, unless within twenty years after the time when its title accrues."[38] The law was well stated in U.S. v. Burrill[39].

> ...Here again the distinction is ignored between a possession that is adverse in fact, that is, without right, and a possession adverse in law, that is, that can ripen into a title. The defendant's possession here was adverse in fact, but it would never ripen into a title because no title by adverse possession can be acquired except by statute against the sovereign, be it Crown or National Government or State. This is elementary law.[40]

Even under the law in effect in 1841, it was not possible to extinguish public rights or easements in public streams by adverse possession.

> ...whilst such rights as are part of the State sovereignty, conferred for the public good, cannot be lost by disseizin. The right of property is one thing, and the right to regulate or control the use of property, pro bono publico, by appropriate legislation, is quite another

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34. 42 Me. 552 (1856).

35. 69 Me. 76 (1879).

36. Revised Statute, 1841, c.147 §12.

37. P.L. 1885, c.369.

38. Revised Statutes, 1883, c.105 §11.

39. 107 Me. 382, 78 A. 568 (1910).

40. Id. at p.385-6.

> thing. The first is property, subject to be conveyed by deed or other legal mode of disposition; but the last is a part of the sovereign power itself. (Emphasis added).[41]

In Knox v. Chaloner[42] it was held that the right of the public in the navigable river could not be lost by adverse possession. In so holding the Court declared that all hindrances or obstructions to navigation without direct authority from the Legislature are public nuisances. A public nuisance can never be legitimated by lapse of time, for every continuance of it is an offense.

ROLE OF LAND AGENT

Dating from pre-statehood Massachusetts law, responsibility in Maine for State-owned or public lands had historically been vested in the Land Agent, a position established by a Massachusetts Act setting up the Massachusetts Land Office. The Land Office was originally set up to dispose of public lands. The Land Agent's duties were expanded to supervise and manage Public Reserve Lots and maintain the Land Office records.[43]

Although by 1878 the Land Agent had reported that all public lands (not public reserve lots) of the State had been disposed of, it was not until 1891 that the office of Land Agent was discontinued. In its place the office of Forest Commissioner and Land Agent was created

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41. Treat v. Lord, 42 Me. 552, 560 (1856).

42. 42 Me. 150 (1856).

43. Report on Public Reserve Lots, p.10, 18.

for the protection of forest land. In 1921 the title of Land Agent was discontinued,[44] although the Land Office records and administration remained in the office of the Forest Commissioner.[45]

As mentioned previously, the report of the Land Agent in 1878 that the available supply of State land had been exhausted did not mention disposal of the State's submerged lands or the State's interest in tidal waters. Doubtless these lands were not considered, or were thought to be valueless. The question is raised in the Chapter on the Maine Mining Bureau whether the disposition of submerged lands in Maine for mining purposes could be made under general statutory authorization applicable to onshore lands in the public domain.[46]

The responsibility given the Forest Commissioner for all State land for which management and control is not otherwise provided[47] is probably explained by the fact that the control of tidelands and the submerged lands of the territorial sea undoubtedly was not considered by the Legislature. The Legislature almost certainly never intended submerged lands to be part of the jurisdiction of the Land Agent. The Forest Commissioner is in complete agreement with this appraisal and has expressed the opinion that if these lands, should in fact be considered a part of his responsibility, he is ready, willing and anxious

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44. The term has not been expunged from the statutes, e.g., 10 M.R.S.A. 2111.

45. Report on Public Reserve Lots, p.19.

46. See Chapter on Maine Mining Laws, infra, indicating how the problem had been treated on the Federal level.

47. 12 M.R.S.A. 504 (Supp.); 30 M.R.S.A. 415 (Supp.).

to be divested of such responsibility.[48] A contrary view, that the administration and disposition of submerged land could be carried out under general statutory authorization, might be derived from the opinion in State v. Ruvido[49] in which the Court asked in another context: "Are not the general statutes of this State applicable to all places within its boundaries and are not territorial waters within these bounds?"

PRESENT STATUTORY PROVISIONS - GENERAL POWER AND SPECIFIC AGENCIES

Reference has already been made to wildlands in the public domain and public reserve lots, about which the Forest Commission has said, "From the time Maine became a State in 1820 until the present time, the State has never parted with a single acre of land except upon Legislative authority."[50] If any of Maine's submerged lands or interest in its territorial sea are to be disposed of, it is reasonable to assume that legislative authority would be required. It must also be assumed that specific or delegated authority from the Legislature is also necessary for any State agency to acquire, sell, or lease any State owned land. "State owned land" for purposes of this section includes any land to which the State or any of its agencies or instrumentalities hold title, and is not limited to the narrow sense of

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48. Interview with Austin, Wilkins, Forestry Commissioner, December 17, 1968.

49. 137 Me. 102, 109, 15 A. 2d 293 (1940).

50. Report on Public Reserve Lots, State Forestry Department, 1963, p.14.

wildlands, public reserve lots, and submerged lands. It would include land that a State agency might own or acquire in carrying out its assigned responsibilities and duties, and which land the agency would be authorized to dispose of when it was no longer necessary for such functions.

This section will attempt to illustrate the manner in which the Maine Legislature has authorized the State itself or the various State agencies concerned with marine resources to own or hold property, to manage such property, to obtain property or property rights by purchase, exchange, lease, franchise and eminent domain. Similarly, how said agencies may manage, lease, or dispose of such property will be discussed. For the most part, these provisions apply to other than marine land, but the principles involved should be studied in determining the best method for handling submerged lands and territorial waters.

State v. Federal

A rather thorough procedure has been provided in the Maine Statutes to acquire or relinquish legislative jurisdiction over land as between the State of Maine and the United States. The Federal Government must post notice of intention. Comment by the Governor and the Attorney General is then transmitted to the Legislature for their approval. The transfer must be recorded in the county or counties of the areas affected.[51] This procedure can take place only if the United States has acquired title to such land by purchase, condemnation or

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51. 1 M.R.S.A. 8.

otherwise.[52]

The Governor with the advice of Council may cede to the United States, for purposes named in the United States Constitution, any territory not exceeding 10 acres, but excluding public or private burial grounds, dwelling houses or meeting houses without consent of the owner, and excluding highways; provision is made for payment of fair compensation.[53] Other sections under this title also apply to the procedures to be followed in the transfer or taking of land by the State for the United States or conveyance to the United States. The general pattern is the involvement of the Governor and Council with ratification of their decision by the Legislature.[54]

Maine Industrial Building Authority

The Maine Industrial Building Authority has no power to own land unless it acquires title by conveyance or foreclosure when a mortgage is in default or threatened.[55] If the Authority does acquire property it may dispose of such property by sale, or lease the property temporarily not subject to the restriction on uses for which the original loan could be made.[56] A similar discretion for leasing to minimize losses is allowed to the local development corporation through which all Authority loans are channeled.[57]

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52. 1 M.R.S.A. 9.

53. 1 M.R.S.A. 12.

54. 1 M.R.S.A. 13 ff.

55. 10 M.R.S.A. 806 (Supp.).

56. 10 M.R.S.A. 703 (3) (Supp.); 10 M.R.S.A. 806 (Supp.).

57. 13 M.R.S.A. c.81; 10 M.R.S.A. 808 (Supp.).

Maine Recreational Authority

The Maine Recreational Authority may acquire property by conveyance or foreclosure when a mortgage is in default or threatened.[58] It may sell such property or temporarily lease it for uses other than those for which a loan could have originally been obtained.[59] The same discretion in leasing when a mortgage is threatened is granted to the local development corporation under the statutes of this Authority as was seen under the Industrial Building Authority.[60]

Municipal Powers Under Municipal Industrial and Recreational Obligations Act.

Under the Municipal Industrial and Recreational Obligations Act municipalities may acquire from funds provided under the Act, such lands, structures, property rights, rights of ways, franchises, easements, and other interests in lands, including lands lying under water and riparian rights which are located within the State as it deems necessary or convenient for construction or operation of any industrial or recreational project.[61] Municipalities are specifically authorized to make and enter into all leases, contracts, and agree-

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58. 10 M.R.S.A. 6006 (Supp.).

59. 10 M.R.S.A. 6007 (Supp.); 10 M.R.S.A. 5003 (9) (Supp.).

60. 10 M.R.S.A. 6007 (Supp.).

61. 30 M.R.S.A. 5325 (Supp.). See 18 Me. L. Rev. 25 for discussion of this Act.

ments necessary for carrying out the purposes of the Act, and given the general authority to do all acts and things necessary to carrying out powers expressly granted in the Act.[62]

Greater Portland Development Commission

The Greater Portland Development Commission has been granted broad corporate powers to carry out its functions. These powers, however, do not include the power of eminent domain.[63]

Maine Port Authority

The Maine Port Authority is authorized to acquire property necessary to carry out its functions. It is restricted in its exercise of the power of eminent domain, however, to the Port of Portland and the Port of Bar Harbor. It is further restricted in the exercise of this power in that if such taking should interfere with an existing public use, the taking may be consummated only after the Public Utilities Commission has held hearings to determine if, in effect, such property or property right charged with a public use is necessary to the Authority and that such taking is in the public interest.[64] The Maine Port Authority is specifically authorized to acquire use of terminal facilities to be exercised with any common carrier owning such facilities until such time that the carrier requires such facilities for its

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62. Id.

63. P.&S.L. 1945, c.123.

64. P.&S.L. 1929, c.114 as amended by P.&S.L. 1969, c.196.

own use. Such transactions are subject to the review of the Public Utilities Commission and the applicable jurisdiction of the Interstate Commerce Commission.[65]

The Authority may lease facilities to private individuals or corporations for terms not exceeding five years.[66] One exception to the five year period is the specific provision for a term up to 30 years for the Blue Nose Ferry pier at Bar Harbor.[67]

The Authority has been given broad general powers for acquiring, renting or leasing, or selling property in connection with its statutory duties. Unless specifically authorized by statute, the consent of the Governor and Council is necessary to convey, sell, lease, hire or rent any of its excess property, or to hire, lease or rent from others property deemed desirable for its purposes.[68]

Ferries

The power to establish ferries is not exercised by the Federal Government, but lies within the scope of those undelegated powers reserved to the State. All ferries are governed by general or special statutes and not by common law.[69] Statutory regulation of ferries in

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65. Id.

66. Id.

67. Resolves, 1953, c.105.

68. P.&S.L. 1929, c.114 as amended by P.&S.L. 1969, c.196.

69. Inhabitants of Beal v. Beal, 149 Me. 18, 98 A. 2d 552, (1953); 150 Me. 80, 104 A. 2d 530 (1954); Waukeag Ferry Ass'n. v. Arey, 128 Me. 108, 146 A. 10 (1929).

Maine by County Commissioners is specifically covered under 23 M.R.S.A. 2301 et seq. and regulation as common carriers is generally covered under the authority of the Public Utilities Commission.[70]

The right to keep a ferry in England was an incorporeal hereditament, being a franchise granted by the crown, or depending on a presumption which supposes a grant. As early as 1641 the colonial legislature of Massachusetts passed a statute relating to ferries (Colony and Prov. Laws 110). "By the provincial statute of the seventh of William the Third, (Col. and Prov. Laws 280)" a license was required from the court of quarter sessions for a ferry unless it were an ancient ferry. The Act was revised by Massachusetts in 1797 (Stat. 1796, Ch. 42) and in Maine in 1821 (Stat. 1821, Ch. 176).[71]

An early Maine case held that a ferry was so far a work of public interest as to justify the taking of private property for its establishment.[72] When property is taken by eminent domain for ferry purposes, approval of the municipal officers, the county commissioners, and the Public Utilities Commission is required.[73] The Legislature has the right to grant an exclusive franchise, but the grant is not exclusive unless expressly stated.[74]

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70. See 35 M.R.S.A. 15, 51.

71. Day v. Stetson, 8 Me. 365, 367-8 (1832) contains the above cited history of ferry statutes in colonial America.

72. Id. at p.371.

73. 23 M.R.S.A. 2303.

74. Inhabitants of the Town of Beal v. Beal, 149 Me. 19, 98 A. 2d 552 (1953).

The Blue Nose Ferry operated by the Canadian National Railroad was subsidized by the State of Maine in that the State appropriated $1,000,000 to the Maine Port Authority to construct a terminal at Bar Harbor for an international ferry run between Nova Scotia and Bar Harbor. This amount is to be amortized by the Canadian Government during the period of the lease.[75] When the Maine Industrial Building Authority Act was amended to enable loans to be made to build ocean piers or terminals, restrictions were placed in the statute against guaranteeing loans to any competitor of the ferry service.[76] The restriction was not eliminated until the last session of the Legislature.[77] This action coincided in time with negotiations by the City of Portland to bring the New England terminal of Lion Ferry to Portland. This ferry is to make a run between Portland and Nova Scotia. It was Rockland, rather than Portland, however, which was instrumental in the repeal of this restrictive amendment inasmuch as they too want to develop their waterfront.[78] Portland sought, but unsuccessfully, to obtain an outright grant from the 104th Legislature to build the requisite pier facilities. A similar appeal is being made in the January 1970 Special Session of the Legislature.

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75. Resolves, 1953, c.105.

76. P.L. 1961, c.341.

77. P.L. 1969, c.97.

78. Interview with Roderic C. O'Connor, Manager Maine Industrial Building Authority, August 21, 1969.

The Maine Port Authority is responsible for ferry service between Vinalhaven, North Haven, Islesboro, and Swans Island. (See Chapter I, p.38). Private and Special Laws have authorized the franchising of many other ferry services in addition to ferries operating under the general statute.

Public Utilities *

The general statutory provisions covering utilities under the jurisdiction of the Public Utilities Commission contain broad powers of purchase, eminent domain, lease or sale according to the necessities of the utility concerned. In addition specific powers may be granted to any given utility either in its corporate charter or by special acts of the Legislature.[79] As previously noted, the Public Utilities Commission acts as referee when two public utilities have conflicting demands upon the same property. Without attempting to thoroughly analyze all laws affecting utilities, eminent domain provisions for two utilities are illustrative.

Railroad corporations may purchase or take land, but such land taking shall not exceed more than 6 rods in width through woods and

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79. E.g., 35 M.R.S.A. 625: "provided nothing contained in Title 35 M.R.S.A. §619-624 shall be construed as a repeal of any of the powers conferred on any railroad corporation under any other law." See 35 M.R.S.A. 211 for broad power of utilities to dispose of assets subject to approval by the Public Utilities Commission.

* Although public utilities are in most instances private corporations, rather than state agencies, their broad powers (including eminent domain) requires their inclusion here.

forests and no more than 4 rods through other lands unless necessary for excavation, embankment or materials.[80] Additional land may be taken for improvement of existing facilities.[81] Meeting houses, dwelling houses or private or public burial grounds may not be taken without consent of the owner.[82] Electric power companies under the general statutory provisions are prohibited from exercising the power of eminent domain with respect to land within 300 feet of inhabited dwellings, land and easement on or adjacent to any developed or undeveloped water power, land that would conflict or interfere with existing wildlands of other public utilities, or lands owned or used by railroad corporations.[83]

Parks and Recreation Commission

The Parks and Recreation Commission, with the consent of the Governor and Council, may acquire land within the State by purchase, gift or eminent domain. No more than 200 acres may be taken in any one park by eminent domain. There are further prohibitions against taking any developed or underdeveloped mill site or water power privilege or land useful in connection therewith or any land being utilized for any industrial enterprise.[84] One of the biggest drawbacks in obtaining park

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80. 35 M.R.S.A. 651.

81. 35 M.R.S.A. 652 (Supp.).

82. 35 M.R.S.A. 655.

83. 35 M.R.S.A. 2306 (Supp.).

84. 12 M.R.S.A. 602.

land has been lack of funds. It is significant to note that in authorizing a $4,000,000 bond issue to establish a Maine State Park and Recreation Area Fund to purchase land, the 103rd Legislature specified that the Park Commission could not use the power of eminent domain to obtain any land financed by this fund.[85]

The Park Commissioner is authorized, with the consent of the Governor and Council, to sell and convey any of its acquired land or interests therein, to lease such land, or by revocable license grant exclusive rights and privileges to any person, firm, or corporation for the use and enjoyment of portions of such lands. Provision is also made for leasing parks owned by the government of the United States for purposes of management and development.[86]

The Park Commission has also been given the responsibility for developing public facilities for boats in the inland waters and the marginal seas adjacent to the State.[87] In carrying out this function he may grant leases for periods not exceeding 30 years for parking lots, and nearby sites for the construction of restaurants, gift shops, marinas, etc. He may lease from private individuals, corporations, political subdivisions or quasi-public organizations, for periods not to exceed 99 years, lands for the purpose of constructing and maintain-

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85. P.&S.L. 1967, c.157.

86. 12 M.R.S.A. 602.

87. 38 M.R.S.A. 321-328 (Supp.).

ing boat facilities.[88] Provisions for leasing agreements with the United States with regard to boat facilities are similar to provisions for leasing park land.[89] Approval of the Governor and Council has not been required for real estate transactions under these boating provisions except for transactions with the United States Government. No authorization has been given to the Park Commissioner to take property by eminent domain for boating facilities.

Municipal Park Commissions

A municipality may acquire and maintain real estate for recreational purposes, and may raise money to acquire open areas including swamps and wetlands.[90] Any town may receive, hold and manage gifts or bequests of land for park purposes.[91] Municipalities may take land by eminent domain for park purposes providing that land so taken is not occupied by a dwelling house wherein the owner or his family reside.[92]

The broad definition of land suitable for park purposes which was added to the State Park Commission's statute is also to be found in provisions for municipal park commissions.[93] The definition in-

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88. 38 M.R.S.A. 324 (Supp.).

89. 38 M.R.S.A. 321 (Supp.).

90. 30 M.R.S.A. 3552; 30 M.R.S.A. 5106 as amended by P.L. 1965 c.203 §4.

91. 30 M.R.S.A. 3801 as amended by P.L. 1965, c.203 §1.

92. 30 M.R.S.A. 4001 as amended by P.L. 1965, c.203 §3. "Land taken... shall not be used for purposes other than those for which originally taken."

93. 12 M.R.S.A. 601 (E) as amended by P.L. 1967, c.190 §1.

cludes areas largely in natural condition or containing natural features of scenic, ecological or scientific interest. Open area means any space or area the preservation or restriction of the use of which would: maintain or enhance the cultivation of natural or scenic resources, protect natural streams or water supply, promote conservation of swamps, wetlands, beaches or tidal marshes, enhance the value to the public of abutting or neighboring parks, forests, wildlife preserves, nature reservations, sanctuaries, or other open areas or open spaces, affect or enhance public recreation opportunities,...[94] Municipalities are specifically empowered to acquire conservation easements for the better utilization, protection, development or use of open marshland, swamps, and other wetlands.[95]

Forestry Commission

The Forest Commissioner in his capacity as land agent is responsible for the sale of State lands.[96] Land may be sold only with the approval of the Legislature. Unless otherwise directed, the Commissioner must advertise the land and sell it to the highest bidder, retaining the right to reject any bid. Only the consent of the Governor and Council is necessary to sell a forest ranger site.[97] The Forest Commissioner may accept gifts of land to the State for forest purposes.[98]

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94. 30 M.R.S.A. 3851 as amended by P.L. 1965, c.203 §2.

95. Id.

96. 12 M.R.S.A. 504 (Supp.).

97. Id.

98. 12 M.R.S.A. 512 (Supp.).

The law was amended by the 104th Legislature to allow the Forest Commissioner to purchase land for forest purposes when funds were available from bequests or trusts.[99] The amendment was introduced at the suggestion of Percival P. Baxter[100] and was passed by the Legislature before his death.

The Forest Commissioner has the power, at the direction of the Governor and Council, to sell timber and grass rights on public lands, and gravel existing in the soil if it is to be used for the construction of public highways or public works in the vicinity of the land from which the gravel is taken.[101] Approval by Governor and Council may be necessary for the Commissioner to issue permits for timber and grass stumpage.[102] In the past, some of these stumpage rights, but not the land itself in public reserve lots, have been sold. Such rights revert back to the township if and when the territory becomes organized.[103]

The Forest Commissioner grants mining rights for dredging in great ponds for material "not classified as mineral under the mining law,"[104] and for any erections, fill, or excavations in great ponds. Since

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99. 12 M.R.S.A. 512 as amended by P.L. 1969, c.144.

100. Interview with Forest Commissioner Austin Wilkins, Dec. 17, 1968.

101. 12 M.R.S.A. 514 as amended by P.L. 1968, c.544 §21; compare 30 M.R.S.A. 5162 as amended by P.L. 1965, c.65 with regard to Public Reserve Lots which contains basically the same language as 12 M.R.S.A. 514 except that to allow gravel to be taken, the Commissioner must find that there will be an increase in the value of said land by the reason of construction of such highway or public works.

102. Compare 12 M.R.S.A. 515 (Supp.) and 30 M.R.S.A. 4162 (Supp.).

the Maine Mining Bureau now has responsibility only for "hard minerals", an argument could be made that the Forest Commissioner is now responsible for oil and gas in great ponds.[105]

The Forest Commissioner, with the approval of the Governor and Council, is authorized to lease campsites, mill privileges, dam sites, flowage rights, the right to set poles, and maintain utility service lines, and the right to construct and maintain roads.[106] A blanket authorization is usually given by the Governor and Council to renew any current leases, at which time any new leases are added to the general authorization. The Forest Commissioner feels that there has been a problem on campsite lots on which one year leases are now given. This one year lease had posed a problem for persons wanting to improve the campsite who are concerned with protecting their investment and with what else might be built there. In many cases they want more than an informal understanding with the Forest Commissioner that their leases will be renewed. Recently, the Forest Commissioner had a ruling from the Attorney General that leases for campsites might run for five years.[107]

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103. Interview with Forest Commissioner Austin Wilkins, Dec. 17, 1968.

104. 12 M.R.S.A. 514 (Supp.); 30 M.R.S.A. 4162 (Supp.).

105. See 10 M.R.S.A. 2102 (B) as added by P.L. 1969, c.508.

106. 12 M.R.S.A. 514 (Supp.); 30 M.R.S.A. 4162 (Supp.).

107. Interview with Austin Wilkins, Dec. 17, 1968; Unpublished Attorney General's opinion dated April 17, 1962 from Assistant Attorney General Thomas W. Tavenner to Austin Wilkins, Forest Commissioner. The opinion was based on Revised Statutes, 1954, Chapter 36 §12 as amended (now 12 M.R.S.A. 514 as amended). It is submitted that notwithstanding the Attorney General's ruling there is nothing in that section of the code which would either authorize or prohibit a lease for five years.

Maine Mining Bureau

The Maine Mining Bureau does not hold any property as such but rather is responsible for mining on State owned land, including on-shore land, offshore substrata and inland waters.[108] The Bureau may grant a license to prospect for a period of one year, which may be renewed. Once a claim is located and recorded it will remain in effect for one year. It may be renewed for four more years, and at the discretion of the Mining Bureau for an additional five years, upon a showing of a minimum of work and expenditure to develop the claim. A license to mine must be obtained within the time allowed by the Mining Bureau (5 or up to 10 years) or the claim will be forfeited. A license to mine may be issued for a period of one year and is renewable. There is no statutory limitation on the period for which leases may be granted, but 20 years has been the most commonly term used.[109] There are no restrictions as to the total number of claims or the total area that may be claimed to any one person or corporation, although a claim is limited to a 1,500 feet by 600 feet area. There are no statutory criteria for the right to renew a prospecting or mining license other than the required amount of work, marking and recording provisions, and the payment of the proper fees. There are no statutory criteria for determining under what conditions a lease may be renewed or renewal may be denied.[110] A ruling by the Maine Mining Bureau that a proposed

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108. 10 M.R.S.A. 2101, 2101 (A) (B) as added by P.L. 1969, c.508.

109. 10 M.R.S.A. 2101-9 as amended by P.L. 1969, c.508; Interview with Robert Doyle, Executive Director of the Maine Mining Bureau.

110. 10 M.R.S.A. 2106.

mining operation is consistent with any prior or proposed State use is binding and irrevocable.[111] The Maine Mining Bureau has no general power of eminent domain, but the constitutionality of a specific allocation of this power to enable the Maine Mining Bureau to develop a mining site to be leased to a private corporation in a tidal estuary was upheld by the Maine Supreme Judicial Court.[112]

Maine Mining Commission

Although basically a regulatory rather than an operational commission, the Maine Mining Commission has been authorized to acquire land by gift or purchase which has been affected by mining operations, for the purpose of carrying out reclamation work. Upon completion of such work, the land may either be sold at public auction, conveyed to the municipality, or may remain the property of the State.[113] Presumably the determination as to how this reclaimed land should be disposed of would rest with the Maine Mining Commission although such a prerogative is not spelled out in the statute.

Department of Inland Fisheries and Game

The Department of Inland Fisheries and Game is authorized to own property for the purposes of game management areas, fish hatcheries, and feeding stations for fish. This property may be obtained by gift, be-

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111. 10 M.R.S.A. 2104 as amended by P.L. 1969, c.508. See Chapter on Maine Mining Bureau, infra, for discussion of this provision.

112. Opinion of the Justices, Me. 216 A. 2d 656 (1966).

113. 10 M.R.S.A. 2210 as added by P.L. 1969, c.472.

quest, purchase or lease. The Commissioner of Inland Fisheries and Game may also obtain property by eminent domain for game management areas, fish hatcheries, and feeding stations.[114] The Commissioner of Inland Fish and Game is further authorized to lease land for game reservation areas with the owner's consent. The area cannot exceed 1,000 acres.[115] For the purposes of maintaining State Game Farms and carrying out measures for the propagation of game birds and animals, the Commissioner may purchase suitable land and construct buildings thereon.[116]

The Commissioner may set aside, for a period not exceeding 10 years, any inland waters for the use of the State in carrying out fish culture and scientific research relative to fish.[117]

The Commissioner may acquire by deed or grant and hold in the name of the State public access sites to Merrymeeting Bay.[118]

When Fish and Game Department land is deemed no longer necessary for the purposes of the department it may, upon recommendation of the Commissioner of Inland Fisheries and Game, be sold by the Governor and Council.[119]

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114. 12 M.R.S.A. 2151.

115. 12 M.R.S.A. 2102.

116. 12 M.R.S.A. 2103.

117. 12 M.R.S.A. 2106.

118. 12 M.R.S.A. 2151.

119. 12 M.R.S.A. 1959.

Atlantic Sea Run Salmon Commission

The Atlantic Sea Run Salmon Commission has been authorized to purchase or lease lands, dams and other structures, to acquire flowage rights, mill privileges and rights of way, and to build dams and other structures, for the purpose of conservation of Atlantic Sea Run Salmon. This authority is conditioned upon prior rights of towns not being affected.[120] This Commission was not delegated the power of eminent domain: the Supreme Judicial Court specifically interpreted the language giving the commission power "to acquire" as devoid of eminent domain power.[121]

Department of Sea and Shore Fisheries

Sea Moss. The Commissioner of Sea and Shore Fisheries is responsible for issuing licenses to take sea moss from any of the coastal shores, or within the tidal waters of the State. The licenses are renewable annually. Once the license is granted there are no restrictions as to the amount of moss taken or the area within the State from which it may be taken.[122]

Kelp. Prior to 1967, power to lease the right to gather and harvest kelp on the submerged lands and reefs within the jurisdiction of the State was vested in the Governor and Council who were to set the terms of the lease, the persons to whom granted, and the term up to

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120. 12 M.R.S.A. 3602.

121. Smith v. Spears, Me. 253 A. 2d 701 (1969); Me. 254 A. 2d 272 (1969).

122. 12 M.R.S.A. 4051. Irish moss would be included in the broad term "sea moss", see next two sections.

30 years, for which the lease might run. The only statutory requirements were that the area must be seaward of mean low water mark, east of 60° 45' west longitude, and the lessee was to be charged not less than $3 per year per square mile. Records of the area leased were to be filed with the Secretary of State.[123] There were no restrictions as to the total area which might be let to any one lessee.

In 1967 an attempt was made by a company interested in Irish moss to amend this kelp harvesting law to include other marine algae and remove the geographical restrictions on the areas from which such algae might be gathered. The attempt proved unsuccessful and rather than an expanded law,[124] the entire statute was repealed.[125]

Irish Moss. Concurrent with the repeal of this law, the Legislative Research Committee of the 103rd Legislature was directed to conduct a comprehensive study of marine resources, including the harvesting and processing of sea moss, algae, and kelp along the coast and determining what State policy should be with regard to leasing land for taking marine algae from submerged lands within the jurisdiction of the State.[126] Investigations were made by members of the Legislative

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123. 1 M.R.S.A. 26.

124. 103rd Legislature L.D. 1559 was proposed at the suggestion of Marine Colloids, one of the two companies in Maine that process Irish moss.

125. 1 M.R.S.A. 26 as repealed by P.L. 1967, c.418.

126. The results of this study are to be found in: Report on Marine Growth to Second Special Session of the 103rd Legislature, Legislative Research Committee, Publication 103-19, January 1968.

Research Committee; the major manufacturers processing Irish moss were visited; and two public hearings were held.[127] The Committee had reported that extensive research was done into the laws of other states and foreign countries relating to leasing of marine resources.[128]

The result of the investigations by the Legislative Research Committee was a recognition of a need within the industry for an assured supply of raw materials which could be obtained through permissive legislation for leasing.[129] A proposed "Act to Preserve, Protect and

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127. Irish moss or chondrus crispus is a dark purple branching, cartilaginous seaweed abundant along the coast of North America and northern Europe. The commercial value of Irish moss, through its various extractions, composed of a mixture of sodium, potassium, calcium, and magnesium salts comes from a wide variety of industrial and manufacturing uses such as suspending agents in foods, pharmaceuticals, cosmetics, industrial liquids, as a clarifying agent for beverages and in controlling crystal growth in frozen confections.

Marine Colloids, Inc. of Rockland, Maine, and Kraft Foods of South Portland, a division of National Dairy Products Corp. of New York, are the two major manufacturers or processors of Irish moss and related algae in the State of Maine. These two processors represent a large segment of the industry in the United States. They have already made substantial investments in modern chemical plants and facilities within the State of Maine.

The Committee ascertained that only 2 per cent of the moss processed by Marine Colloids and 20 per cent of that processed by Kraft Foods comes from the coast of Maine. The principal suppliers are located in such areas as Nova Scotia, Prince Edward Island, Spain, Portugal, Indochina, Peru and Chile. The Committee felt the need to increase the domestic source of supply of Irish moss because of the higher extractive yield of domestic over foreign moss in addition to such problems as foreign competition, transportation costs, disruption of raw material supply, and other problems arising in foreign commerce. (Legislative Research Committee, Publication 103-19, p.1-2).

128. Id. at p.3. Chairman of the Executive Research Committee of the 103rd Legislature, Horace A. Hildreth, Jr., commented to the Sea Grant Office that while this had been the hope of the Committee, such research had not indeed been accomplished.

129. Id. at p.2.

Stimulate Research and the Production and Commercial Uses of Irish Moss" was included in the Legislative Research Committee's report as part of its recommendations. This derived from a bill, drafted by the industry, which was modified by the Legislative Research Committee in the following manner:

1. The Committee felt it was inappropriate to make the entire coast of Maine eligible for leasing. They instead proposed legislation to allow leasing in only three sectors encompassing about 250 square miles out of approximately 3,000 square miles of coastline now under the jurisdiction of Maine. The committee felt that within the three areas picked there was little, if any, hand-raking activity. The Committee also felt that this limited area was adequate to allow existing industry to make the necessary economic and development efforts which they had suggested and also to justify, to some extent, additional investments in research, training and perfecting a machine to obtain mature deep water moss beyond the reach of hand-rakers.[130]

2. Exclusive rights were granted only to the extent of taking by mechanical means moss affixed to the bottom. Hand rakers were still to be allowed to take live moss by the hand-raking method anywhere, at any time on the Maine coast.

3. The suggested lease term of 10 to 20 years was felt to be excessive and the period was reduced to not less than 5 nor more than 10 years.

4. The Committee "clarified" the question of who would have the right to free moss or cast moss, meaning the moss which had broken off

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130. Id. at p.3.

the beds, and which is cast upon the shore or boats in the sea, or which sinks to the bottom, by indicating that it was to be available to the first taker by either hand-rakers or mechanical means and that no rights were to be vested in the owner of the leasehold.

In the Committee's proposed legislation, the size of a single leased area was not to exceed 25 square miles, although a person might hold more than one leased area. The 5 to 10 year lease period could be renewed up to 5 years if the original lease had been granted for the minimum time; otherwise the lease application had to be resubmitted. Other provisions of the proposed act included the requirement that moss actually be harvested by those holding a leased bed; compliance with regulations of the Commissioner of Sea and Shore Fisheries and conditions and terms of the lease; taking of the moss under conservation and harvesting practices which would protect the supply; and non-interference with the rights of others to take fish and shellfish within the waters above the leased area.[132]

The proposed legislation also contained provisions for the creation of an Irish Moss Advisory Council as well as for dedicated revenue.

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131. Id. The Committee's "clarification" made "unclear" the holdings in Hill v. Lord, 48 Me. 83 (1861); Matthews v. Treat, 75 Me. 594 (1884) indicating that it is permissible to take free floating seaweed, but not seaweed that is cast on the beach.

132. Id.

Although submitted with the affirmative recommendation of the Legislative Research Committee and gubernatorial support, the proposed law for leasing submerged land for harvesting Irish moss was resoundly defeated. Fishermen were vehement in their opposition, protesting most vigorously the exclusive rights that were to be given to Marine Colloids for mechanical harvesting of moss. It cannot be definitely ascertained whether the fishermen who protested so loudly were completely aware that under the proposed bill they still might use hand-raking methods.[133] Instead of passing the Legislative Research Committee's bill, very modest amendments were made to the research provisions of statutes of the Department of Sea and Shore Fisheries, to allow limited ocean areas to be used for aquaculture and experimentation with Irish moss. The research sections as they now stand are discussed below.

Land or Waters for Sea and Shore Fisheries Research

The Commissioner of Sea and Shore Fisheries has very limited and restricted powers to use marine submerged lands and waters for the department's own research programs. For purposes of scientific research relative to shellfish or other fish over which the Commissioner has jurisdiction, he may take any flats or waters, not exceeding an area of 2 acres in extent in any one location, for a period not exceeding 10 years. He must first obtain the written permission of the riparian owner to take any flats or waters. After such permission is obtained

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133. See In Re Dudley, Me. 256 A. 2d 592 (1969) to document supplementary income to fishermen from rock weed gathering.

there are other requirements for public notice.[134] The Commissioner of Sea and Shore Fisheries is authorized to take an area in excess of the two acres in any area by written agreement, lease or grant, under such terms or conditions as may be agreed upon by the owner. Such agreement, lease or grant shall be recorded in the Registry of Deeds in the County where the flats or waters are located.[135]

Leases to Private Individuals for Research

Although limited, provisions for the lease of territorial waters or flats to private individuals are probably more extensive than those written into the statute for the Department of Sea and Shore Fisheries itself:

> Any person or corporation interested in scientific research relating to shellfish or other fish over which the Commissioner has supervision, or in the cultivation and development of the shellfish industry or the seaweeds, including but not limited to Irish moss, for economic purposes, may apply to the Commissioner setting forth the desire to make experiments relative to the cultivation, conservation and harvesting of particular marine species or seaweeds.[136]

The applicant for the use of flats or waters for research purposes must either own the flats or have the consent, so far as it may be granted, from the owner of the flats, shore rights or waters where the work is to be undertaken; and it must be shown that such activity will not unreasonably interfere with navigation. The Commissioner may set apart so much of such shore flats and water privileges, not exceeding one acre in extent to any one applicant for such length of time

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134. 12 M.R.S.A. 3701.

135. 12 M.R.S.A. 3702.

136. 12 M.R.S.A. 3703 as amended by P.L. 1967 c.527.

not exceeding a period of six years which he feels may be necessary and proper to accomplish the ends sought. The Commissioner may set aside areas on the submerged lands or reefs within the jurisdiction of the State for experiments with the cultivation, conservation and harvesting of seaweeds, including Irish moss; no single area shall exceed more than one square mile and no one applicant shall be entitled to more than three such areas. Such areas shall not be closer to the low water mark on the adjacent shore than 25 feet and all such areas for experimentation shall be east of 69° 45' west longitude. The total area for all applicants for experiments with seaweeds shall not exceed at any one time more than 10 square miles; width of any area shall not be less than 1/4 mile. Certificates for experimentation may be revoked if any experiments conducted have been injurious to the marine species in the area.[137]

During the period under which these areas have been granted for scientific research it is unlawful for any person to take, dig, fish or in any manner destroy any marine species within the area used or taken, or to interfere with the shores, flats and waters so used. If the certificate is granted for experimenting with seaweed, the statutes have placed restrictions against taking, digging or severing any of the seaweed, but fishing in the area is not prohibited.[138]

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137. 12 M.R.S.A. 3703 as amended by P.L. 1967, c.527 §1.

138. 12 M.R.S.A. 3704 (Supp.) as amended by P.L. 1967, c.527.

Actual Lease to Marine Colloids

Because of the great interest in the subject matter of Irish moss, some of the actual provisions from the lease granted to Marine Colloids by the Department of Sea and Shore Fisheries, dated July 12, 1968, are included herein.

Area. Approximately .8 square nautical miles of submerged lands or reefs at Isle au Haut, County of Knox, State of Maine, were set apart for Marine Colloids. The area designated by the certificate contained all submerged lands not less than 25 feet seaward from any exposed land mass or shoreline, within the area described and delineated by the following coordinates and geographical locations:

NE Corner (approx. 1/3 of a naut. mile southwesterly of the Rabbit's Ear)	40°/03'/55"N - 68°/35'/34"W
NW Corner (approx. 3/5 of a naut. mile southerly of the southernmost point of Douglas Cove)	44°/03'/55"N - 68°/36'/34"W
SE Corner (approx. 1/15 of a naut. mile southerly of Horseman Ledge)	44°/02'/16"N - 68°/35'/35"W
SW Corner (approx. 1/15 of a naut. mile southerly of Seal Ledges)	44°/02'/16"N - 68°/36'/20"W

Conditions and limitations of the certificate include: 1. Recording and marking requirements as outlined in 12 M.R.S.A. § 3703 (4-6) are to be followed; 2. Areas designated are to be outlined at the corners with buoys designated as Marine Colloids Research in letters not less than 2 inches high; 3. The certificate was granted for a period of four years from date of issue, but can be revoked sooner by the Commissioner of Sea and Shore Fisheries if conditions and limitations are not met;

4. All data gained through this research is to be placed at the disposal of the Department of Sea and Shore Fisheries;[139] 5. Research activities in a leased area are not to interfere with usual fishing practices of the area; 6. The lease was granted only for research activities pertaining to chondrus crispus and related seaweed, which would be designed to aid and improve the natural growth of the individual species involved.

Florida Statute Regulating Aquaculture[140]

Because Marine Colloids asked for so much and relatively speaking got so little, we present for comparison a summary of the Florida statute (passed June 30, 1969) which has been described as the first state legislative act regulating aquaculture.[140a]

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139. At least one official of Vocaline, Mr. Larry Cole in interview, July 16, 1969, felt that stipulations that all research data must be shared with the Commissioner of Sea and Shore Fisheries might work as a detriment to a company's willingness to supply venture capital if the result of a finding becomes part of the common knowledge or matters of public record. It is submitted, that this might be a very valid objection in some instances in which companies wish to make research for their own product for their own company. Instances in which this requirement should be included, however, would include grants funded by public bodies or research done for public bodies, either to increase the general fund of knowledge or to enable regulatory bodies to determine what are proper standards and regulations for their agencies.

140. Technical and legal difficulties have been encountered in the implementation of this statute according to Mr. Dorian Cowan, Research Associate, University of Miami School of Law. Mr. Cowan's appraisal will be set forth in the Chapter on Fisheries, infra.

140a Comment supplied by New England Marine Resources Information Program, Narragansett, R.I.

141. Laws of Florida, 1969, c.69-46 amending Chapter 253, Florida Statutes by adding Sections 253.67 - 253.75.

An Act Relating to Submerged Land and Water Column, Provisions of the Statute [141]

Agency Which Leases. §253.68, 253.75
Trustees of the Internal Improvement Fund[142] may grant leases subject to recommendations by the State Board of Conservation when activities relate to tidal bottoms, and recommendations of the Game and Fresh Water Fish Commission when activities relate to bottoms covered by fresh water. Such recommendations shall take into consideration right of riparian owners, navigation, promotional and sports fishing and the conservation of fish and other wildlife or other natural resources, including beaches and shore.

Authority to Lease. § 253.68
To the extent that it is not contrary to the public interest, the trustees may lease for aquaculture activities submerged land to which they have title, and grant exclusive use of the bottom and the water column[143] to the extent required by such activities. Leases may be granted for either commercial or experimental purposes. No lease shall be granted if objected to by a majority of County Commissioners of a County in which the submerged lands are deemed to be located.
Prior to the granting of any lease, the Trustees shall publish a list of guidelines designed to protect the public's interest in the submerged lands and the publicly owned water column. Such guidelines shall be considered in passing upon applications for leases.

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142. The Internal Improvement Fund, governed by seven trustees composed of the Governor, the Secretary of State, the Attorney General, the Comptroller, the State Treasurer, the Superintendent of Public Instruction, and the Commissioner of Agriculture was established to supervise lands granted to Florida for internal improvement purposes by Act of Congress, Sept. 4, 1841 incorporated in 43 U.S.C.A. §857, (Florida Statutes Annotated, note following section 253.01). The function of the trustees of this fund have been broadened to include responsibility for all State land not vested in some other State agency. (Compare responsibility of Forest Commissioner as Land Agent, 12 M.R.S.A. 504 (Supp.)). Included in enumerations of lands involved are all tidal lands, all lands covered by shallow waters of the ocean, gulf, or bays or lagoons thereof, in all lands owned by the State covered with fresh water, and the broad categorization of all land owned by the State by right of its sovereignty. (Florida Statutes Annotated 253.03 (Supp.)).

143. Water column means the vertical extent of water, including the surface thereof, above a designated area of submerged bottom land, § 253.67 (2).

Public Notice Required Before Granting Lease. § 253.70
Before granting a lease, notice must be given by publication in a county newspaper for three consecutive weeks. In addition, notification by certified or registered mail is to be given to each riparian owner of upland lying within 1,000 feet of the submerged land proposed to be leased.

Terms of Lease § 253.71 (1)

Maximum Initial Terms	12 years commercial lease 5-10 years experimental lease
Renewability	Leases may be renewed for successive terms up to the same maximums upon agreement by the parties. Renewals are subject to publication and notification procedures as outlined above.
Assignability	Leases may be assigned in whole or part with approval of the Trustees.

Area. § 253.71
"The Trustees shall not lease a larger area of submerged land to any single lessee than has been demonstrated to be within his capacity to utilize efficiently and (consistently) consistent with the public interest. However, the trustees may hold a reasonable area of adjacent bottom land in reserve for the time when a holder of an experimental lease will begin operation under a commercial lease...."

Marking of Area. § 253.72
Areas are to be staked out and marked by appropriate ranges, monuments, stakes, buoys, and fences. Names of lessees are to be shown by signs appropriately placed.

Fees. § 253.71 (2)
A basic rental charge shall be made for each lease. This charge shall be supplemented by royalties after the productivity of the aquaculture enterprise has been established. The amount of fees is to be determined by the probable rate of productivity and the marketability and value of the product.

Restrictions on Use. § 253.72
Restrictions on the use of leased areas are to be allowed only to the extent necessary to permit the effective development of the species of animal or plant life being cultivated. The public shall be provided with means of reasonable ingress and egress for traditional water activity such as boating, swimming, and fishing. All limitations upon use of the area by the public shall be clearly posted.

Pollution. § 253.74 (2)
Leases are subject to cancellation for violation of provisions of the Air and Water Pollution Control Commission.

Supervision of Aquaculture Activities. § 253.75
The State Board of Conservation and the Fresh Water Fish Commission have responsibility for instituting procedures for supervising aquaculture activities.
In addition these agencies shall designate in advance areas of the submerged land and water column for which they recommend reservation for uses that might conflict with aquaculture activity such as recreational, commercial and sport fishing, exploration for petroleum and other minerals, and scientific instrumentation. The designation of such areas shall be considered in granting leases.

Clams and Mussels

Flats may be set aside for the planting and cultivation of clams, quahogs or mussels. Licenses to carry on such cultivation may be granted by the municipality or by the Commissioner of Sea and Shore Fisheries in the event that the municipality has been deorganized. The total area under license cultivation may not exceed one fourth of the total area of all the flats and tidal creeks within a municipality. The license may not be for less than five nor more than 10 years. The exact time of the license shall be fixed by the municipal officers in the event that the legislative body of the municipality fails to do so, or the Commissioner of Sea and Shore Fisheries in areas not licensed by municipalities. Licenses may not be granted if such activity would materially obstruct navigable waters.[144] Although preference in certain cases is given to the riparian proprietor of adjacent property, licenses to cultivate clams may be issued to other than the adjacent ripar-

144. 12 M.R.S.A. 4304.

ian proprietor or even in defiance of the wishes of such proprietor.[145]

Municipalities are not required to have a shellfish conservation program in order to grant permits for cultivation of clams, but such a program is a condition precedent to municipal ordinances regulating and licensing the taking of clams, quahogs and mussels.[146]

Cultivation of Oysters

Any inhabitant of the State, with the consent of the adjacent riparian proprietor, may plant oysters below low water mark in any navigable water, in any place where there is no natural oyster bed. The planter must mark the area with stakes extending at least two feet above high water mark but placed so as not to obstruct the navigation of the waters, and post required notices on the shore. The area, described by metes and bounds, and the permission of the adjacent riparian owner, are to be recorded with the town clerk of the municipality where the area is located and with the Commissioner of Sea and Shore Fisheries. After compliance with these requirements, the person has exclusive rights to take oysters within the area. It is unlawful for any other person to trespass within the area without the consent of the permittee.[147]

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145. 12 M.R.S.A. 4304; Moulton v. Libbey, 37 Me. 472 (1854); Rogers v. Brown, 135 Me. 117, 190 A. 632 (1937).

146. See 12 M.R.S.A. 4252 (Supp.).

147. 12 M.R.S.A. 4253.

These statutory provisions predate the establishment of a Department of Sea and Shore Fisheries,[148] which might explain, if not justify, why the Commissioner of Sea and Shore Fisheries has no power to approve, disapprove, or regulate cultivation of oysters under this section. (The Department of Sea and Shore Fisheries does have control over experimentation with oysters from polluted flats; the commercial harvesting of oysters, and regulation of the processing and transportation of oysters.[149]) Similarly, since the areas are below low water mark, the towns and municipalities have properly been excluded from jurisdiction other than as a custodian for recording exploitation activity. Strictly read, the riparian owner has the exclusive power to determine whether and by whom aquaculture of oysters may be carried on. Perhaps a more basic defect in statutory provisions covering cultivation of oysters is that there is no specific provision for utilization of rafts. Most present day cultivation of oysters is carried on in this manner.

SUMMARY

While there are no constitutional prohibitions and very few statutory restrictions against giveaways or indiscriminate sale of State owned land, submerged land, or the State's natural resources, for at least the last 30 years the State has been relatively judicious in the disposition of these assets. Sufficient safeguards have been written

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148. Laws of Maine, 1849, c.142 §12; Revised Statutes, 1857, c.40 §21.

149. See 12 M.R.S.A. 3452; 12 M.R.S.A. 4301; 12 M.R.S.A. 4309-10.

by which land transactions are reviewed and approved by either the Governor and Council, the Legislature, or both. Restrictions might even be eased on some housekeeping transactions, with complete responsibility delegated to the department within a legislatively circumscribed area of discretion. A wider area of discretion, it is submitted, should be accorded the departments and the Governor and Council, while reserving legislative approval for major policy decisions, sale or lease of significant areas to any one lessee, long term leases, dedication of an area to an exclusive use, or resolution of conflicting uses, if warranted in terms of setting long term policy or passing on irrevocable committments.

What is quite apparent, however, is the fragmentation of responsibility for management, for conservation and development, and for licensing or leasing property and property rights in the marine environment. The provisions for the exploitations of non-living resources from the sea, though written in terms inappropriate for submerged lands (see chapter on Maine Mining Bureau), would make it possible to tie up the whole ocean bottom within Maine's territorial sea, for there are no limitations on area or duration of leases. The Department of Sea and Shore Fisheries, on the other hand, has extremely limited authority to lease flats, submerged land, or "water columns" for either the research or development of living resources from the sea. What little authority the Department of Sea and Shore Fisheries has is diluted because of its dependence on riparian owners (see Preferential Treatment for Riparian Owners, p.287) and shared responsibility with towns and

municipalities. While certainly entitled to certain prerogatives on the flats within its jurisdiction, towns have limited resources, financially as well as technical, to undertake extensive management programs.[150] By statute no more than $500 may be appropriated annually by a municipality for the propagating and protecting of fish in public waters located wholly or partially within boundaries of a municipality. Similarly rotation of flats, which might be optimum from a conservation point of view, may or may not coincide with the availability of uncontaminated flats or proximity to depuration plants. The Forest Commissioner as Land Agent theoretically is responsible for management and control of land not otherwise provided for, but except for his representation on the Maine Mining Bureau, this jurisdiction is a nullity as far as the ocean is concerned. The Parks and Recreation Commission has responsibility for providing boat landings, ramps and marinas to be either State managed or leased to private individuals.

The Director of the Parks and Recreation Commission has been given responsibility for the placement of aids to navigation and regulatory markers on the waters of the State when he believes a hazard to navigation exists.[151] He may make rules for the uniform marking of water areas of the State through the placement of aids to navigation and regulatory markers.[152] While no city, county, or person may mark the waters

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150. 30 M.R.S.A. 5106 (5).

151. 38 M.R.S.A. 321 as amended by P.L. 1967, c.103.

152. 38 M.R.S.A. 323 as amended by P.L. 1965, c.173.

of the State in any manner in conflict with the marking system prescribed by the Director of the Maine State Parks and Recreation Commission,[153] there is no person or agency responsible for establishing and coordinating a system of identification buoys or other marking systems for recreational purposes, for fishing purposes, for aquaculture, or mining purposes.

The State of Maine still has time to institute a coordinated system of leasing waters and submerged lands in the marine environment. Even if exploitation in the Gulf of Maine does not locate large deposits or concentrations of "valuable" minerals, the demands for the mundane, but potentially quite profitable, sand and gravel reserves is reason enough to prepare an administrative structure. The possibility of extensive profitable aquaculture of vegetable and fish resources is yet to be proved, but the trend is to advance fisheries from a hunting to a harvesting activity when feasible.

It would seem quite obvious that there will be many conflicting demands on the sea. Recommendations for reserving areas for designated use such as is seen in the Florida aquaculture statute are certainly a step in the right direction. The lack of information needed to draw up such designated areas in Maine should not be minimized, but research into the potential of the marine environment and setting up administrative machinery to adequately protect as well as fully exploit this great resource must proceed simultaneously.

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153. Id.

CHART I EMINENT DOMAIN POWER

AGENCY	LIMITATIONS	APPROVAL NEEDED
State	Broad powers for navigation, ways, railroads, and land for military considerations.	Consent of Governor and and Council necessary
	Other	Direct legislative authorization or by State agency to which power delegated.
Maine Port Authority	Limited to Ports of Portland and Bar Harbor.	
State Highway Commission	Broad power to take land and material for highway construction.	
Utilities		
Railroads	6 rods through woods, 4 rods other lands, unless more necessary for excavation, embankment or materials.	
Power Companies	Not within 300 feet of dwelling, developed or undeveloped water power, land of railroad.	
Ferries	Land as may be necessary.	Municipal officers, County commissioners, and Public Utilities Commission.
Parks and Recreation		
Parks	No more than 200 acres one park. Cannot use proceeds from $4,000,000 bond issue.	Governor and Council
Boating Facilities	No power.	
Municipal Park Commission	Cannot take owner occupied residence. Land taken by eminent domain can not be used for purposes other than for which taken.	Municipal legislative body.
Maine Mining Bureau	No power. On one occasion was authorized to take riparian rights.	Special authorization of the Legislature.

Dept. of Inland Fisheries and Game	May take for game management, hatcheries, feeding stations.	
	[May set apart for periods of 10 years any inland waterway for purposes of fish culture and scientific research.]	[Regulatory power. Not technically eminent domain as no compensation.]
Dept. of Sea and Shore Fisheries	[May take flats not exceeding 2 acres for periods not exceeding 10 years for scientific research.]	[Not even pretense of eminent domain since consent of riparian owner necessary.]

CHART 2. COMPARISON OF AGENCY LEASING PROVISIONS

AGENCY	AREA	TIME	COMMENT
Maine Industrial Building Authority		Temporarily	Only on land taken when mortgage threatened or in default.
Maine Recreational Authority		Temporarily	" " "
Maine Port Authority		5 years except for 30 years for terminal of Blue Nose Ferry at Bar Harbor.	
Parks and Recreation Commission			
Boat facilities, parking, lots, concessions and marinas.		30 years	Commission may lease land from property owner for 99 years.
Forest Commission			
Campsite leases, mill privileges, dam sites.		Not specified 1 year usual.	Leases are renewed by blanket authorization annually by Governor and Council.
		5*	*Attorney General's opinion to the effect that campsites may be leased for 5 years.

AGENCY	AREA	TIME	COMMENT
Maine Mining Bureau			
License to prospect		1 year	Renewable
Right to claim (Minimum amount of work necessary each year. Claim must be eligible for license to mine at end of 5 years unless time extended.)	1,500 ft. x 600 ft. each claim, but no limitation of number of claims that may be held.	1 year	Renewable for 4 years. Additional 5 years at discretion of Bureau.
License to mine (No activity required.)	" "	1 year	Renewable
Lease to mine	" "	Not designated, 20 year customary lease.	Renewable at discretion of Bureau.
Sea and Shore Fisheries			
Flats (Research)	1 acre	6 years	
Submerged Land (Research)	1 sq. mile a claim. Limit 3 claims to individual. Limit 10 sq. miles in whole state to all applicants.	Not designated	First lease under amended statute was for 4 years.
Oysters	No limit	No limit	Only specifications permission of riparian owner and description filed with town clerk in municipality where located.
Municipalities and Sea and Shore Fisheries			
Area for cultivating mussels and clams.	Not more than 1/4 total area of flats within municipality.	5-10 years	Licenses issued by Sea and Shore Fisheries when municipality has become deorganized.

III EMINENT DOMAIN -- GUIDELINES ON ITS USE AND LIMITATIONS

As has been suggested repeatedly in the preceding pages, effective State action either to preserve areas from unwanted uses, or to make available for exploitation and support activities areas held in private ownership, may depend on the exercise of the power of eminent domain -- the power of the State to take private property. Such a taking may be of absolute ownership, or it may "take" from the owner the right to substantially use the property. But the State's power to take is limited. The United States Constitution prohibits a taking "without due process of law," a concept which includes payment of fair compensation. Other limitations are found as a matter of State law.[154]

The sovereign power of eminent domain may be exercised directly through legislative act or be delegated to a State agency or instrumentality after the Legislature has made the general determination that the public exigencies require that some property be taken for certain definite uses.[155] If the power is delegated, the chosen agency or instrumentality makes the specific determination that the public exigencies require that a particular property be taken at a particular time for a particular legislatively authorized purpose.[156]

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154. U.S. Constitution, Amendment XIV, §1; "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." Maine Constitution Art. 1, §21; 1 M.R.S.A. 811-813.

155. Spring v. Russell, 7 Me. 273 (1831); Brown v. Gerald, 100 Me. 351, 61 A. 785 (1905).

156. Smith v. Spears, Me. 253 A. 2d 701 (1969).

Although the Legislature makes the decision that a public exigency exists, the Maine Supreme Judicial Court has the power to review such determination and rule whether the power of eminent domain is exercised for a public use.

> If the Legislature should authorize private property to be taken ostensibly for public use, when it is apparent by the enactment itself, that it was intended to be taken for private uses only, it would be the duty of this Court, in a case properly presented, to examine and decide upon its character; and it would not be bound by any declaration of the Legislature, that the property was taken for public use. But when the question is one of expediency merely the decision of the Legislature, that it is reasonable and for the benefit of the people, is conclusive. Spring v. Russell, 7 Greenl. 273; Parker v. The Cutler Mill Dam Co., 20 Me. 353; Commonwealth v. Breed, 4 Pick. 460; The People v. The Saratoga and Rensselaer R.R. Co., 15 Wend. 132.[157]

WHAT CONSTITUTES PUBLIC USE?

"Public use" in Maine has been more narrowly construed than in Massachusetts, and "public use" for eminent domain in Maine would seem to have to be something more than "public purpose" or "public benefit" which are terms which are used as well as "public use" for upholding the constitutionality of taxes levied on specific industries or activities.[158] "Public use" has been defined as something to which every member of the public has a right to actual use, and not just something from which the public may derive incidental benefit.[159]

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157. Moor v. Veazie, 32 Me. 343, 360 (1850). See also Brown v. Gerald, 100 Me. 351 61 A. 785 (1905); Crommett v. City of Portland, 150 Me. 217, 107 A. 2d 841 (1954).

158. Crommett v. City of Portland, supra.

159. Brown v. Gerald, supra, p.370; Opinion of the Justices, 152 Me. 440, 131 A. 2d 904 (1957).

> The test of public use is not the advantage or great benefit to the public. "A public use must be for the general public or some portion of it, who have occasion to use it, not a use by or for particular individuals. It is not necessary that all the public shall have occasion to use. It is necessary that everyone, if he has occasion, shall have the right to use". Paine v. Savage, 126 Me. 121, 126.[160]

A more recent case involved a county agricultural society seeking to have its property exempt from the eminent domain process, contending that it was already being used for a public use. In ruling that the present use by the agricultural society was not a public use the Maine Court had quoted with approval language from other jurisdictions to the effect that the distinction between "public use" and "private use" lies in character of use and must to a large extent depend on the facts of each case. Mere benefit to the public or permission by the owner for use of the property by public are not enough to constitute a public use. It is essential to public use for eminent domain purposes that the public must to some extent be entitled to use or enjoy property, not by favor, but as a matter of right.[161]

Specific language in the agricultural society case may provide a helpful criterion in deciding what is a public use:

> It is not a political subdivision of the State nor is it invested with any political or governmental function. It was not created to assist in the conduct of government nor was it created by the sovereign will of the Legislature without the consent of the persons who constitute it. These persons may decline or refuse to execute powers granted by legislative charter. They may at any

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160. Opinion of the Justices, 152 Me. 440, 446, 131 A. 2d 904 (1957).

161. Agricultural Society v. S.A.D. No. 17, 161 Me. 334, 211 A. 2d 893 (1965).

> time dissolve and abandon it and are under no legal obligation to conduct an annual fair or to carry on or continue any of the activities which are said to benefit the public.[162]

Throughout the history of Maine, to meet the needs of economic and industrial development the Legislature has repeatedly abridged public rights to accomplish ends that it deemed in the public interest even though such abridgement accrued to the profit of an individual.[163] In other instances it has been necessary to take or restrict the property or the use of property from an individual for the use of the State itself, or to some other private individual or concern who is carrying "out a public use." Examples would be the power of eminent domain given to the State Highway Commission to build highways, the same power given to public utilities such as railroad and power companies to assist and promote their growth. Whether it is a restriction of public or private right, an action under the general sovereign power of the State or under some specific power such as the right to regulate navigation, the underlying public use must be established to assure the constitutionality of any such act. Once the public use is established, be it in a restriction of a public or a private right, the proportionate benefit to the public versus profit to a private individual is not governing. In Spring v. Russell,[164] the impairment of both public and private rights was affected in diverting the channel of the Saco River. In upholding the constitutionality of such activity the Supreme Court had said,

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162. Id. at p.336.

163. Cottrill v. Myrick, 12 Me. 222 (1835).

164. 7 Me. 273, (1831).

> Under the above mentioned limitations it is the unquestioned province of the Legislature to determine as to the wisdom and expediency of a law, and how far the public interest is concerned, (if in any degree), and may properly be influential in the enactment of a law directly operating on private property or private rights...We apprehend that the question of constitutionality does not in judicial consideration, depend on the proportion which the public interest bears to private interest, in the application of the restrictive principle on which the plaintiff's counsel relies.[165]

In Cottrill v. Myrick,[166] which dealt with statutory requirements for fishways, the Court stated that "If public purposes and uses were to be promoted,...it is no objection to the power of appropriation by the Legislature that it contributed also to the emolument and advantage of individuals and corporations."

In Moor v. Veazie,[167] the Legislature granted the exclusive right to navigation by boats propelled by steam on a non-tidal river to one company. The constitutionality of the act was upheld on the theory that the State had the right to make improvements in its navigable waters for the more safe, convenient and useful enjoyment of the common right of navigation. It was held that to render the common right more beneficial, the State may encourage new modes of navigation, and for that purpose may grant an exclusive use of the waters, for a term of years, for that new mode, as a compensation for the skill, expense, and risk required for its introduction.

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165. Id. at p.292.

166. 12 Me. 222, 233 (1835).

167. 32 Me. 343 (1850).

In Parker v. Cutler Milldam Co.,[168] the Legislature had authorized the construction of a mill-dam across tidal waters, which obstructed navigation and inundated a clam flat. In upholding the constitutionality of the act the Maine Supreme Court said,

> The regulation of the navigable waters within the State is vested in the sovereign power to be exercised by laws duly enacted. The navigation may be impeded, if in the judgment of that power the public good requires it. And if the more apparent object be the profit of a grantee, it is the right and duty to determine whether the public interest be so connected with it as to authorize the grant. To refuse it this right, would be to prevent the union of public and private interests for the accomplishment of any object. (Emphasis supplied.)[169]

In Day v. Stetson,[170] the plaintiff had protested the licensing of another ferry. The case was decided on the capacity of the Maine Legislature to modify a franchise granted by the Massachusetts Court of Sessions before Maine became a separate State. Language in the case, however, indicated that if the case had turned on the constitutionality of taking private property, it would have been justified. The Court indicated that a horse-ferry was so much an enterprise of public interest that taking private property for its establishment would be justified.

An example of an act of the Legislature which gives one private person the right to take other's private property is seen in the Milldam Act. This Act allows riparian owners on a stream to dam up the

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168. 20 Me. 353 (1841).

169. Id. at p.357.

170. 8 Me. 365 (1832).

stream in order to raise a head of water for mill purposes. It is necessary to compensate the upstream owner whose land is flooded, but such owners have no recourse other than damages.[171]

The rationale for taking one person's private property for the benefit of another was that the mills were necessary for the development of the Northeast United States. Originally, public use was justified on the theory that anyone was able to use the water power so generated to grind grain; but what might once have been fact eventually became fiction and even the fiction was later not deemed necessary to uphold the Mill Dam Act. In effect what happened was that the impact of the Mill Dam Act was not labeled eminent domain initially, and when its effect was finally termed eminent domain, the courts maintained that such acts had so long been accepted as part of the laws of Maine that this was not the time to question the constitutionality.[172]

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171. See Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498 (1934) for historical background of Mill Act which was first passed in Massachusetts in 1714. The Maine version was passed by the first Legislature of Maine, P.L. 1821, c.95.

172. See Nicholas, Philip, Jr. The Meaning of Public Use in the Law of Eminent Domain, 20 Boston University Law Review, 615 (1940); Head v. Amoskeag Mfg. Co., 113 U.S. 9, 15 (1885); Mullen v. Log Driving Co., 90 Me. 555, 38 A. 557 (1897). The basic Milldam provisions are to be found in 38 M.R.S.A. 611-892. A 1959 addition to Title 38 allowed land to be flowed for water storage reservoirs, and the level of the waters in such storage areas to be augmented from sources other than the natural drainage area by means of pumping or otherwise. (38 M.R.S.A. 931 as added by P.L. 1959, c.325 §1). Eminent domain was authorized to accomplish the purposes of this section, but could be exercised only with the authority of the Legislature. (38 M.R.S.A. 932-933 as added by P.L. 1959, c.325 §1). Under this legislation eminent domain is clearly labelled eminent domain.

> But it is argued, in behalf of the plaintiff, that the State does not possess the right to create a monopoly in the use of any of the public waters in favor of this corporation. It is, however, too late in the history of that question to set up such a contention now. The State represents all public rights and privileges in our fresh water rivers and streams, and may dispose of the same as it sees fit.[173]

One writer has cited the Mill Act as an example of the tenet that public benefit resulting from development of natural resources in primitive America was generally regarded as sufficient to establish public use. In the 1840's and 1850's a narrow construction of the term "public use" began to emerge according to which public benefit was insufficient and public use began to be defined as use by the public.[174]

The author goes on to state that

> The development of the West through mining and irrigation brought to the forefront a recognized exception to the narrow doctrine. Mining could not be presented to the Court as even nominally a use by the public, and yet in many regions, it was regarded as vitally important that exploitation of local mineral resources should proceed quickly, without waiting for corresponding development of other enterprises, and that such exploitation should be aided by eminent domain. Some states specifically provided in their constitutions in some form of words, that mining was a public use, and some added other forms of exploitation of local resources as well. The Supreme Court held that in this class of case the use was not so far private as not to be due process under the Fourteenth Amendment. <u>It is at present a well, if not universally recognized, exception to the narrow doctrine</u> [that "public use" means "use by the public"] <u>that condemnations necessary for exploitation of natural resources vital to local prosperity may be for a public use</u>. (Emphasis supplied).[175]

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173. <u>Mullen v. Log Driving Co.</u>, supra, p.567.

174. 20 Boston Univ. Law Review, p.617.

175. 20 Boston Univ. Law Review, p.623-24 and cases cited therein.

At the same time that the Maine Supreme Court was allowing private enterprise to be considered as a public use for a public purpose, the same court placed rigid restraints on the State going into business for itself or competing with private enterprise.[176] In Opinion of the Justices it was held unconstitutional for the State to create water storage reservoirs to increase the value and capacity of water power. The Court pointed out that the applicable portion of the Massachusetts' Statute[177] with its "good and welfare clause" is much broader and more comprehensive than the Constitution of Maine.

> In other words a State is simply a political unit and not a business corporation, except incidental to further its political purposes. In its organization and machinery it is not adapted to acquire, own, manage, or make a profit out of lands or other property except for public uses.[178]

The Court reasoned that if the State was allowed to exercise such powers, absent a public use, then the State might commit such rights to any corporation to take the property from another private individual for its own profit.

> A manufacturing corporation which might reap the benefit is called into being by no public necessity, exercises no sovereign power, subserves no public use, and is subject to no public duties Further, if the State may exercise the power suggested, it may commit the execution thereof to any agency, corporate or otherwise, and this far reaching right may be committed to any corporation.[179]

176. 118 Me. 503, 508, 513, 515, 106 A. 865 (1919). Governor Baxter's crusade against the Kennebec Water Storage Co. followed the ruling of the Supreme Court in this case that the State could not create water storage reservoirs.

177. Constitution of Massachusetts, Chapter 1., §1 Art. 4.

178. Opinion of the Justices, 118 Me. 503, 512, 106 A. 865 (1919).

179. Id. at p.515.

In Laughlin v. City of Portland[180] the city was allowed to operate a municipal fuel yard on the theory that such enterprise would enable citizens to be supplied with fuel, which is a necessity in the absolute sense for the enjoyment of life and health, and could otherwise be obtained only with great difficulty or not at all. The elements of commercial enterprise or pecuniary benefit to the municipality either direct or indirect were entirely lacking. In fact the municipality was expressly prohibited by statute to sell fuel at anything but cost.[181]

ECONOMIC OPPORTUNITY VERSUS EMINENT DOMAIN

The determination of what constitutes a public use for eminent domain purposes is vital to both the development and conservation of Maine marine resources. Inquiry must be made into present day law in Maine to determine whether public benefit resulting in the development of natural resources can be called a public use. Equally relevant is the state of judicial thought today on the propriety of taking by eminent domain to establish an industry which would alleviate depressed economic conditions by creating new jobs. What is the relevance of this judicial climate to the proposed creation of an industrial complex at Machiasport? Would the outcome be any different if land for an oil refinery were taken by eminent domain, or if the land were simply purchased by the State? Would there be variations in judicial response if the taking were for a foreign trade zone? Would it make any difference

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180. 111 Me. 486, 90 A. 318 (1914); to the same effect, Jones v. City of Portland, 113 Me. 124, 93 A. 41 (1915); 245 U.S. 217 (1917).

181. Laughlin v. City of Portland, supra, p.512.

if the proposed oil refinery was created for the processing of oil discovered within Maine's territorial waters? Oil from Alaskan oil fields, or from the Gulf of Maine beyond Maine's territorial waters? Oil from a foreign country? What would be the constitutionality of a State agency set up to operate either a free trade zone or an industrial complex not associated with a free trade zone? What would be the constitutionality of such a State agency using eminent domain to acquire land or purchase land with tax money?

The Supreme Judicial Court has already faced some of these questions. That it must eventually face these other problems at Machiasport or at some other coastal site for some other industry seems inevitable. The Maine Court must also come to grips with State statutes that tend to restrict development, as well as those designed to encourage it.

Eminent domain cases which have come before the Maine Supreme Court have fallen into two general categories. The first includes cases involving the taking of private property by the State contemplating a subsequent transfer to a private owner (or the delegation of the power of eminent domain to a private corporation). The general rule is that such a taking is forbidden unless the recipient of the property is to be a public utility or unless the subsequent transfer to private ownership results as a secondary consequence, rather than being the primary purpose for which the property was taken. The second category includes proposed takings for the development of natural resources; in this category, the key distinction seems to be whether the resources are owned by the State (taking valid) or privately owned (taking invalid).

Basic Rule

Typical of the first category is a case in which the Supreme Judicial Court ruled on the constitutionality of the city of Bangor's attempt to take land by eminent domain for an industrial park.[182] After noting technical deficiencies in the Act, such as standards for action by the City in the acquisition, disposition or use of such property (which the Court felt could be remedied by amendment), the Court went on to declare that it was basing its decision on the basic purpose of the Act, which it found to be a private purpose and not a public purpose under our Constitution.[183] The Court declared that the test of public use is not the advantage or great benefit to the public. It held, in authorizing taking of private property for clearance and ultimate resale to private industry, the act sought to do for private enterprise, what private enterprise could not be authorized to do for itself[184] -- secure a compulsory transfer from one private owner to another.

> ...If it follows that the city may neither raise money by taxation or acquire property by eminent domain for such purpose. There is neither the "public use" of taxation, nor the "public use" of eminent domain. The likelihood that public funds expended in acquisition of property might be repaid in whole or in part, or even with a profit, in its disposal does not alter the situation in its constitutional aspects....[185]

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182. Opinion of the Justices, 152 Me. 440, 131 A. 2d 904 (1957).

183. Id. at p.445. Pertinent provisions for Maine Constitution were listed as Art. 1 §6; Art. 1 §21; Art IV Part 3rd §1.

184. Id. at p.447.

185. Id. at p.445.

> We are not unmindful that the public exigencies or need for use of public monies for assistance in industrial development under the plan here proposed is determined by the Legislature (or under the Act by the City) and not by the Courts....The value of the plan or its economic or social benefits, however, present no issues for judicial consideration. (Emphasis supplied). We mention these factors that it may plainly appear that our opinion does not touch the need or desirability of the plan, but solely the constitutionality thereof.[186]

> We are unable to escape the conclusion that action under the Act would be for the direct benefit of private industry. An existing shoe factory or paper mill, let us say, within the proposed industrial area or park could not, for reasons clear to all, be authorized under our Constitution to acquire additional facilities by eminent domain. That such a course could well be of great value to the particular enterprise and so to the city or community would not affect the application of the law.[187]

The same rationale is evident in Hamilton v. District[188] which is very relevant to the situation at Machiasport. The Hamilton case dealt with the "public use" of taxation rather than eminent domain, but is helpful in illustrating the basic rule for public utilities. The statute[189] in the Hamilton case authorized the expenditure of public funds for the construction of wharves and the leasing thereof. Reading the statute as authorizing the leasing of wharves "without limitation as to purpose" the Court found that the statute authorized the leasing

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186. Id. at p.445-6.

187. Id. at p.446.

188. 120 Me. 15, 112 A. 836 (1921). See Rudee Inland Authority v. Basttian, 206 Va. 906, 147 S.E. 2d 131 (1966); Opinion to the Governor, 76 R.I. 365, 70 A. 2d 817 (1950); and 53 Virginia Law Review 743, discussing leases or sale of land taken by eminent domain.

189. P.&S.L. 1919, c.84 as amended by c.123.

to private persons for their own exclusive uses, and hence was invalid. The Court clearly distinguished "public wharves" which, even if privately owned, may be used by anyone upon payment of a fee; such wharves include those which are "public utilities". Thus, the element of exclusiveness of private use, and not merely private ownership, was crucial.

Railroad cases also illustrate the principle that private property may be taken from one person for the benefit of a privately owned public utility. Implicit in the Hamilton case is the indication that public utilities are "public uses." In Peavey v. Calais Railroad[190] the right of a railroad company to take private land not to exceed four rods in width was upheld on the basis of the general statute and the company's corporate charter. The Court quoted with approval Babcock v. W. R. Road Corp.[191] to the effect that the flats could be taken by virtue of the rule that a grant of a thing includes the means necessary to achieve it. In the Peavey case the railroad was prohibited from taking the land, not on the basis of the legal capability, but because it had not so done within the time allowed by its charter. In Bangor & Piscataquis Railroad Co. v. McComb[192] in which private property had been taken for the railroad's use "because the public exigencies required such taking," the Court emphasized that the use must be for the

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190. 30 Me. 498 (1849).

191. 50 Mass. 553 (1845) which allowed the railroad to build drainage ditches beyond the land included in the grant by its charter.

192. 60 Me. 290, 295 (1872).

general public or some part of it and not a use by or for particular individuals; that under no circumstances can property be taken from one individual for use of another without his consent.

Other Primary Purpose

In Crommett v. City of Portland[193] the Court upheld the constitutionality of the Slum Clearance and Redevelopment Authority Law[194] which allowed private property to be taken by eminent domain and then sold to private developers. The Crommett case held the Portland slum clearance program valid because "redevelopment of the 'blighted area' is, in our view, a secondary or minor purpose. The first and main purpose of the legislation is not to develop Portland but to clear away blighted areas and slums and to prevent their recurrence."[195]

The Court in the Bangor Industrial case reemphasized the dicta in the Crommett case

> Taken alone, the redevelopment of a city is not, in our view, a "public use" for which either taxation or taking by eminent domain may properly be utilized.[196]
>
> However beneficial it might be in a broad sense, it would clearly be unconstitutional for the Legislature to provide for the taking of any area in a city for the purposes of redevelopment by sale or lease for private purposes. Such a proposal would amount to

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193. 150 Me. 217, 102 A. 2d 841 (1954).

194. P.&S.L. 1951, c.217.

195. 150 Me. at 236. Similar reasoning may be found in Home for Aged v. Commonwealth, 202 Mass. 422 (1909).

196. 152 Me. at 447, quoting 150 Me. at 236.

> no more than the taking of A's property for sale or or lease to B on the ground that B's use would be economically or socially more desirable.[197]

Development of Natural Resources

Development of State Owned Resources

In Opinion of the Justices,[198] the Maine Court upheld the constitutionality of a law[199] allowing the Maine Mining Bureau to take riparian lands and riparian rights on a tidal estuary in order to enable a private mining company to exploit mineral deposits situated beneath the estuary.[200] The Supreme Judicial Court held that the development of mining and removing of minerals from land owned by the State located beneath waters of a certain tidal estuary were of public interest to the State, and that the use of riparian lands for the mining and removing of minerals and for operations incident thereto was a public use.

> The proposed act recognizes that the aforesaid predominent public purpose cannot be effectuated without necessary and unavoidable interference with the riparian rights of landowners. That the State may take such riparian rights necessary to the removal of its mineral resources by eminent domain proceedings upon the payment of just compensation therefore is not to be doubted.[201]

The fact that the operation was to be conducted by a lessee required to pay royalties to the State did not destroy its public use

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197. Id.

198. Me. 216 A. 2d 656 (1966).

199. P.&S.L. 1965, c.243.

200. Opinion of the Justices, 216 A. 2d 656 Me. (1966).

201. Id. at p.660.

character, or render it a private enterprise. "The end to be served is the conversion of public resources and the avoidance of waste thereof and the leasehold method must be viewed as no more than a means to that end....The State's right is paramount and cannot be made subservient to objections of riparian landowners."[202]

Privately Owned Resources

Thirty-three years earlier the Maine Supreme Judicial Court had declared unconstitutional an act which provided that "Persons or corporations possessing land, swamp, meadows, quarries, or mines, which by reason of adjacent lands or highways, cannot be approached, drained, or used without crossing of said land or highways, may establish drains or ditches thereto...."[203] In that case the defendant had entered on the plaintiff's land to lower the bed of a sluggish stream leading from a small pond on his own land so that he might remove a valuable deposit of diatomaceous earth from the bottom of the pond on his own land. Although it was conceded that it was for a great public benefit, such benefit did not make it a taking for a public use. The Haley case could be further distinguished from the Maine Mining Bureau (Opinion of the Justices) case because in the latter case, the taking of private property was technically imposed by a State agency rather than a private individual. This would seem to make no difference in eminent domain for public utilities but might for development of natural resources.

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202. Id.

203. Haley v. Davenport, 132 Me. 148, 168 A. 102 (1933) interpreting R.S. 1930, c.25 §28. Perhaps this was not a good test case. Compare general rule for development of minerals p.365, supra.

Eminent Domain and Ocean Exploitation

The mining case opens up all sorts of interesting possibilities with regard to the future development of Maine's natural resources from the tidelands and the territorial seas. Because of constitutional limitations, availability of venture capital, sheer economics and common sense, it is assumed that any exploitation in the sea will be carried out by private enterprise under State leases within Maine's territorial waters. As noted supra, the Maine Mining Bureau has not been given any general powers of eminent domain but was specifically endowed with such power for the development of one mining site under a tidal estuary. By analogy, it would seem that the Maine Mining Bureau, or other State agency responsible for mining in the territorial sea, could be empowered to take any riparian rights or shorefront property reasonably necessary to carry out a legislatively declared public purpose and public use for the development of Maine's under-sea mineral resources.

An otherwise incomprehensible amendment to the Maine Mining Bureau Act passed in the last Legislature may perhaps be a harbinger of such an extension of eminent domain power; Section 2108[203a] was amended by deleting the stricken, and adding as follows: [The holder of a license to mine or mining lease has] "right of ~~way access~~ access to any land owned or controlled by the State to and from said location." The fact that the phrase "to and from said location" still remains in the statute in connection with the revised wording in the beginning of the statute may vitiate the actual intended effect of the amendment, but the intention would seem quite clear that persons exploiting resources on State owned land would have access to these

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203a. 10 M.R.S.A. 2108 as amended by P.L. 1969, c.508.

lands over whose ever property was involved. There is no indication whether this access would have to be obtained by the Maine Mining Bureau or by the private person involved in the activity. Under the ruling of the Spears case, supra,[204] this phrase would not give the Maine Mining Bureau the right to take access by eminent domain in the absence of specific legislative authority, but if there were funds derived from royalties within the fiscal control of this agency it would be possible for the Maine Mining Bureau to purchase such access. Perhaps reasonableness and the natural workings of the political process will be sufficient safeguards against the unreasonable exercise of this power.

Powers of Theoretical State Agency to Develop Machiasport?

Despite other limitations on eminent domain noted in the above section, there is the clear precedent of the power of the Maine Mining Bureau to take private rights by eminent domain to aid a private corporation in exploiting resources on State-owned submerged land.

It is only a small step to include, by analogy, that it would be constitutional[205] for the Maine Mining Bureau or some other State agency to take private property in order to facilitate construction of a

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204. Smith v. Spears, Me. 253 A. 2d 701 (1969).

205. The Maine Port Authority is the State agency which was designated by the Legislature to make application to the Secretary of Commerce "for the purpose of establishing, operating, and maintaining foreign trade zones in the State of Maine" (P.&S.L. 1963, c.178) under the Act of Congress (19 U.S.C. 81a-u (1965)) making provision for foreign trade zones in ports of entry of the United States. The Maine Port Authority qualifies as a proper agency to establish, operate, and maintain a foreign trade zone under this law. (19 U. S.C. 81a,b). The State enabling legislation contains the (Cont.)

refinery for oil found under the submerged state-owned land (i.e. her territorial sea) or to secure land for an industrial complex to handle other mineral wealth from the sea. But surely the applicability of the Opinion of the Justices, supra, would extend no further than resources found in submerged land actually belonging to the State. Justification for taking land to utilize oil production of other states or foreign imports, to build a foreign trade zone, or to develop an industrial complex not under the auspices of a foreign trade zone would have to be based on grounds other than developing the State's natural resources. The most often proclaimed grounds have been the economic well being and general prosperity of Maine.

The Federal statute authorizing foreign trade zones provides that all such zones shall be operated as public utilities,[206] and goes on to state that

> ...and all rates and charges for all services or privileges within the zone shall be fair and reasonable, and the grantee shall afford to all who may apply for the use of the zone and its facilities and appurtenances uniform treatment under like conditions,...[207]

If this is read as requiring all warehouses and, arguably oil refineries, in the zone to accept the goods of all comers on an equal basis

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205. (Cont.) following general grant of power. "The authority granted to said Maine Port Authority confers the right and duty to do all things necessary and proper to carry into effect the establishing, maintaining, and operating of foreign trade zones within the State of Maine to comply in full with said Act of Congress, and all regulations that are made thereunder." (P.&S.L. 1963, c.178).

206. 19 U.S.C. 81n.

207. Id.

for a fair fee, then it is arguable that under Maine law[208] the zone and its facilities are a "public use" thus authorizing eminent domain and the use of tax monies to secure land for the zone. As pointed out in Chapter One, the Maine Port Authority's statutory authorization to use eminent domain is limited to Portland and Bar Harbor.[209] If the constitutional requirement of "public use" is met, the lack of specific authority could be easily remedied by amending the statute.

A State agency designed specifically to manage an industrial complex (not in a foreign trade zone) at Machiasport or some other coastal site would most probably be patterned after the Greater Portland Development Commission.[210] It should be noted that the constitutionality of the Greater Portland Development Commission has never been tested and it is unlikely that such a test would arise inasmuch as the agency has no powers of eminent domain and tax revenue[211] was not used for the purchase of the site.

Summary

In light of the Bangor Industrial Park case[212] the constitutionality of granting powers of eminent domain and right to expend tax money

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208. See Hamilton v. District, 120 Me. 15, 112 A. 836 (1921).

209. P.&S.L. 1969, c.196. See Chapter One, p.37. This Chapter, p.19

210. See Chapter One, p.36. P.&S.L. 1945, c.123.

211. It is true that South Portland and Portland have made contributions to the operation of this agency. See Section IV, p.75. on "public use" for tax purposes.

212. 152 Me. 440, 131 A. 2d 904 (1957).

in building an industrial complex and/or a free trade zone in Maine might appear doubtful, but the decided cases have left room for maneuvering.[213] In particular, the distinction drawn in the Hamilton case between public and exclusive private use is suggestive. The federal requirement that the Free Trade Zone be operated as a public utility enhances this line of reasoning. An alternate solution would be an amendment to the Maine Constitution declaring that the development of minerals from the Continental Shelf is a public use in support of which the power of eminent domain may be exercised, notwithstanding a transfer of land so acquired to private industry. A similar declaration could be made for a foreign trade zone. Such an amendment would meet no apparent federal objection, and would eliminate any doubts.

IV PUBLIC USE FOR TAXATION PURPOSES

The imposition of taxes and the expenditure of tax revenues for the economic development of Maine has resulted in the Maine Courts' giving a more liberal construction to "public use" for tax purposes than "public use" for eminent domain purposes.[214] In tax cases, public purpose and public benefit seem to be sufficient to establish public use.

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213. 120 Me. 15, 112 A. 836 (1921).

214. Crommett v. City of Portland, 150 Me. 217, 230, 107 A 2d 841 (1954); Opinion of the Justices, 118 Me. 503, 513, 106 A. 2d 865 (1919).

The question arises in three ways: (1) Constitutionality of giving tax rebates or advantage to attract industry; (2) Loan of money or State expenditure of public funds to encourage or attract industry; (3) Imposition of a special tax on a segment of the economy to promote the particular interest of said segment.

Special Tax Advantage

Tax exemptions on local property taxes to a specific industry or concern have been held unconstitutional.[215] Undoubtedly tax concessions have been made in fact by assessing practices in which property is valued below the standard percentage of real value in any particular community. Such practices are becoming rarer as tax assessing practices are being strengthened throughout the State.[216]

Loan of Money or Payment of Money

A relatively early opinion of the Supreme Judicial Court ruled against allowing towns to assist individuals or corporations to establish or carry on manufacturing of various kinds[217] because the source of such gifts or loans could only be raised by taxation. In a concurring opinion it was stated that the argument supporting the con-

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215. Brewer Brick Co. v. Brewer, 62 Me. 62 (1873); Milo Water Co. v. Milo, 133 Me. 4, 173 A. 152 (1934); Opinion of the Justices, 161 Me. 182, 207, 215 A. 2d 683 (1965) (Proposed tax advantage under the Municipal Obligations Act) but see Portland v. Water District, 67 Me. 135 (1877) under conditions where same affect was allowed.

216. See Dunham, Paul A., A Study of Property Tax Administration in the State of Maine, Bureau of Public Administration, Orono, 1969.

217. Opinion of the Justices, 58 Me. 590 (1871) to the same effect Perkins v. Inhabitants of Milford, 59 Me. 315 (1871).

stitutionality of the proposed law was that the business of manufacturing promotes public prosperity by increasing the value of private property, inviting in capital, in-migration, and furnishing employment for the people.

> The direct purpose of the proposed law is thus private in its character; it is to increase the means and improve the property of some, and furnish employment to some, while the benefit, if any, to the public is only reflective, incidental, or secondary. Can a tax be constitutionally imposed by municipal corporations to load the tables of the few with bounty that the many may partake of the crumbs that fall therefrom? (Emphasis supplied)[218]

The same prohibition against the State making or insuring a loan was in effect until the Maine Constitution was amended by adding section 14 A and B under Art. IX, which authorize the activities of the Maine Industrial Building Authority[219] and the Maine Recreation Authority, and Art. IX, 8A which authorizes the construction of speculative building for industrial enterprises. The Municipal Obligations Act presumably does not involve tax monies inasmuch as projects are financed by revenue-producing bonds not guaranteed by the full faith and credit of the State or considered municipal obligations. In actuality, tax monies may be involved in anticipatory borrowing or in liquidation of non-productive enterprises.

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218. Opinion of the Justices, 58 Me. 590, 604 (1871).

219. Opinion of the Justices, 146 Me. 183, 79 A. 2d 753 (1951); Martin v. Maine Savings Bank, 154 Me. 259, 147 A. 2d 131 (1958). See p. 31 on Maine Industrial Building Authority.

Dedicated Revenue

The third way is the levying of a special tax on a segment of an industry to promote the welfare and growth of the industry. The equal apportionment criterion isn't constitutionally necessary for the imposition of à license or excise tax, but such taxes must still fulfill a public purpose.[220]

In the leading case of State v. Vahlsing,[220a] testing the constitutionality of the potato tax, the Supreme Court admitted that the line of demarcation between a public and a private use is not always easy to draw. Times change and what clearly was a public use a century ago, may because of changed conditions have ceased to be such today. Similarly, what could not have been deemed a public use a century ago, may because of changed economic and industrial conditions, be such today. Laws which were entirely adequate to secure public welfare then may be inadequate to accomplish the same results now.[221] The Court noted that the promotion of the agriculture industry has been a recognized governmental activity in this State for many years and money raised by taxation has been provided for the benefit of agriculture as an industry, as distinguished from direct grants to those engaged therein. The Court declared that the potato tax was imposed for a

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220. Maine Constitution, Art. IX, Sec. 8; State v. Vahlsing, 147 Me. 417, 88 A. 2d 144 (1952); Opinion of the Justices, 123 Me. 573, 577, 121 A. 902 (1923).

220a 147 Me. 417, 88 A. 2d 144 (1952).

221. Laughlin v. City of Portland, 111 Me. 486, 90 A. 318 (1914); State v. Vahlsing, supra, p.426.

public purpose which was the promotion of the welfare of the people of the State as a whole and the fact that those engaged in raising potatoes may be incidentally benefited thereby does not change the purpose of the Act from a public one to a private one.[222]

> This potato tax was imposed for a public purpose, and because in the opinion of the Legislature the public exigencies required it; at least we must so hold where the industry for the benefit of which the tax is levied is as important and as basic as is the potato industry to the State of Maine which imposes the tax. The mere fact that the proceeds of this tax are to be expended primarily for the benefit of the industry on which the tax is levied does not of itself render the law constitutional; for such an argument would justify almost any tax so long as the particular industry for whose benefit the tax is primarily enacted pays the bill. What justified the tax is that the money expended for the promotion of the potato industry is not primarily expended for the benefit of those individuals engaged therein but for the benefit of the people as a whole by making available to any and all who may wish to enter into the industry the specialized knowledge and information that will enable them to carry the same on, and prospects of a market for that which they produce.[223]

In State v. Laskey,[224] the constitutionality of the quahog tax was upheld as fulfilling a public purpose because of the importance of fishery in general and the finding of the Legislature that quahogs "constitute a renewable resource of great value to the Casco Bay coastal region and the State."[225] The defendant had sought to distinguish the

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222. State v. Vahlsing, supra, p.429-31.

223. Id. at p.429-30.

224. 156 Me. 419, 165 A. 2d 579 (1960).

225. Id. at p.427.

Vahlsing case by contending that the tax was not levied for the benefit of fishing as an industry, but for the benefit of a small group of individuals in the industry; that the quahog tax provided for no promotion or advertising; and that the experimental work benefited only the individuals primarily concerned with the digging and taking of quahogs. In rejecting all three contentions the Court said,

> The purpose of a tax to benefit the public through benefit to the industry is not to be denied for the reason that the numbers engaged in the industry may be relatively small.[226]
>
> We know, however, of no rule that requires in matters of this nature that promotion and advertising be made necessary purposes.[227]
>
> The defendant dismisses the experimental work proposed by the Act as benefiting only the individuals primarily concerned with the digging and taking of quahogs, and no others. We read the Act quite differently and find therein a broad purpose to restock the shores for the benefit of the shellfish industry in years ahead and thus of all those who may be engaged therein.[228]

In State v. Stinson Canning Co.,[229] in upholding the constitutionality of the Sardine Tax, the Court reaffirmed its ruling in the two above mentioned cases. In finding public purpose, the Court took judicial notice

> ...that the area where sardine factories are largely located was at the time of the passage of the Act and still is an economically depressed area. The opportunities for employment are limited and though the

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226. Id. at p.427.

227. Id. at p.428.

228. Id. at p.428.

229. 161 Me. 320, 211 A. 2d 553 (1965).

> sardine industry is one of the lesser industries in the State, it does furnish employment to a substantial number, who otherwise would be unemployed.[230]

In upholding the public benefit of the Act even though incidental advantages might accrue to individuals beyond those enjoyed by the general public the Court said,

> In determining whether any particular measure is for the public advantage, it is not necessary to show that the entire body of the State is directly affected, but it is sufficient that a portion of the State shall be benefited thereby.
>
> The State is made up of its parts, and those parts have such a reciprocal influence upon each other that any advantage which accrues to one of them is felt more or less by all of the others. (Emphasis supplied).[231]

V RESIDENCE AND RESIDENTIAL PREFERENCE

To what extent to Maine's natural resources in general, and marine resources in particular, inure to the specific benefit of citizens of Maine? To what extent is preferential treatment constitutional?

Navigation

At common law, tidal waters were open to all who were at peace with the King.[232] Since the formation of the United States, no record has been found, except in time of war, of any of the territory encompassing what is now the State of Maine being subject to restriction

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230. Id. at p.323.

231. Id. at p.324.

232. Commonwealth v. Algers, 61 Mass. (7 Cush.) 53 (1851).

against residents of other states in the use of Maine's waterways for navigation. If there were to be such legislation now, undoubtedly it would be declared unconstitutional by the United States Supreme Court.[233] Even under the United States Constitution, however, a reasonable license differential for residents and non-residents for activity on State waterways would not be prohibited.[234]

Resources in General

The Maine Legislature has been more chauvinistic about the exploitation of other natural resources. One of the most extreme examples was known as the Fernald Law, passed April 2, 1909, which prohibited the export of electric power beyond the territorial boundaries of the State.[235] The reasoning behind this enactment was that the water power of the State belonged to the people of the State and that such power was a great necessity to industry. If the power were not allowed to leave the State, then industries would move into Maine to utilize this power.[236] The prohibition against exporting power remained on the books until August, 1955.[237] The law kept Maine power utilities from tying in with nearby power loops. The bigger the area covered by the loop, the less standby power is needed inasmuch as a utility may lend

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233. Presumably, under both the Commerce Clause and the "Privileges and Immunities" clause of the 14th Amendment.

234. E.g. 12 M.R.S.A. 3801, 3802.

235. Laws of Maine, 1909 P.L., c.244 §1,3.

236. Interview with Gordon Hayes, District Engineer, Water Resources Division, U.S.G.S., August 7, 1969.

237. Laws of Maine, 1955, P.L. c.402.

in slack hours and borrow in peak periods according to the demands placed on its system. Without a tie-in with other loops, equipment must stand idle most of the time, for there must be equipment available to meet instant maximum demand. One may speculate to what extent this law contributed to the high cost of power in Maine.

Mineral Resources

Legislation with regard to residency for mineral exploitation on State owned land has swung full cycle during the course of the century. As is spelled out in the chapter on the Maine Mining Bureau, infra, the requirement has varied from having to be a United States citizen and a citizen of Maine to both or neither. At one time an applicant for a mining or prospecting license had to be 21; the present law is satisfied by anyone 18 years of age.[238]

Parks, Recreation

No preferential treatment for Maine residents is found in the statutes governing activity and utilization of the State parks and camping grounds under the authority of the Commission of Parks and Recreation. The planner for this commission did note that camping facilities were much more heavily used (70-80% of use) by out of state residents while parks and other recreational facilities were used more often by State residents. Camping facilities are not as heavily subsidized as facilities used mostly by Maine residents, but probably yield a net return to the State: estimates vary from $19 - $30 dollars

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238. 10 M.R.S.A. 2102 as amended by P.L. 1969, c.508.

a day that each out of state family spends in Maine.[239]

Forestry

The Legislature has stipulated that "preference shall be given to persons, firms, and corporations of the State "in the sale of timber and grass rights, sale of gravel from the soil of State owned land, leases for campsites, mill privileges, flowage rights, and mining and dredging for gravel under great ponds.[240]

Fisheries

"Inhabitants"

It is in the area of living resources that the Legislature has tried, in some cases unsuccessfully, to assure preferential treatment for Maine citizens. In some cases the preferential treatment is further narrowed to the inhabitants of a town or municipality.

The term "inhabitants," notwithstanding any contrary original intent or restriction as used in the Colonial Ordinances, is now extended and restricted to every citizen having his home in some place within the State which constitutes the principal seat of his residence and where he has municipal rights and duties.[241]

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239. Interview with Norman Manwell, Park Planner, Parks and Recreation Commission, March, 1969.

240. 12 M.R.S.A. 516 (Supp.).

241. Whittlesey, Law of the Seashore, Tidewaters and Great Ponds in Massachusetts and Maine, p.6. Mr. Waite contends that public rights under the ordinances apply to any resident of the State of Maine. 17 Maine L. Rev. 161.

The term is not strictly synonymous with residence, domicile, or citizenship but seems to include all three. While many of the cases describe or refer to the privileges reserved under the ordinances as "public" or "common to all" this language is obviously to be restricted in application to those having the requisite qualifications elsewhere prescribed. Domicile is important when fishermen are "on the town" and it was held in Inhabitants of Boothbay v. Inhabitants of Wiscasset[242] that domicile for a fisherman who lives on his boat all summer was to be decided for relief purposes as the place where he boarded in the winter.

The term household has never been construed as a prohibition to those who were not householders.[243]

Justification

The justification of preferential treatment for fishermen who are the residents of the State is that the citizens of the State own these resources not only by virtue of their citizenship in the State of Maine, but also as a property right which the State in its sovereign capacity holds for all the people of the State. In the leading and until relatively recently undistinguished case of McCready v. Virginia,[244] the Supreme Court of the United States articulated that, subject to federal

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242. 3 Me. 354 (1825).

243. Slater v. Gunn, 170 Mass. 509 (1898).

244. 94 U.S. 391 (1876) (which upheld the constitutionality of a Virginia Statute which allowed only residents of the State to plant oysters in the State's tide waters).

demands of navigation and commerce, each State owns the beds of all tide waters within its jurisdiction and may appropriate them to be used by its citizens as a common property for taking and cultivating fish. In like manner the State owns the tide waters themselves, and the fish in them, so far as they are capable of ownership while running.[245] The right which the citizens of the States thus acquire is a property right, and not a mere privilege and immunity of citizenship. The Privileges and Immunities Clause (Art. IV, Sec. II) of the United States Constitution does not vest the citizens of one State "with any interest in the common property of citizens of another State."[246] Such an appropriation restricted to State residents is in effect nothing more than the use by the people of their common property. "And all concede that a State may grant to one citizen the exclusive use of a part of the common property, the conclusion would seem to follow, that it might by appropriate legislation confine the use of the whole to its own people alone."[247] The Supreme Court elaborated that since only cultivation and production rather than transportation or exchange were involved in this statute, it would not conflict with Congress' power to regulate commerce under Art. I, Sec. 8 of the Constitution.

It must be said, however, that this view of the U.S. Constitution is far narrower than modern cases would suggest. The Commerce Clause is read far more broadly, and more important, significant new meanings have

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245. Id. at p.394.

246. Id. at p.395.

247. Id. at p.396.

been attached to the Privileges and Immunities Clause and to the Equal Protection Clause of the 14th Amendment. The case should not, therefore,[248] be relied on heavily.

In State v. Tower,[249] the Maine Court upheld the right of the Legislature to discriminate against citizens of other States, quoting the McCready case to the effect that the right to fish in the interior waters of the State is not a privilege of the citizens of the several States, because citizens in one State are not vested with any interest in the common property of the citizens of another State.

In State v. Ruvido[250] the Maine Court again quoted the McCready case in upholding the constitutionality of a Maine law which prohibited non-residents from fishing in Maine's territorial waters for ground fish for commercial purposes between April 1 and November 1 each year for a period of five years[251] and in ringing tones proclaimed "The State of Maine, therefore, still is sovereign over the seas which wash its coast and may if it sees fit deny to non-residents the right to fish in these waters."

This unlimited sovereignty of the State was toppled, however, in Russo v. Reed,[252] when a similar statute was declared unconstitutional

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248. See, e.g., Russo v. Reed discussed at n252, infra.

249. 84 Me. 444, 446, 24 A. 898 (1892). Case referred to Inland Fisheries and Game Law.

250. 137 Me. 102, 105, 15 A. 2d 420, 423 (1940).

251. P.L. 1937, c.32.

252. 93 F. Supp. 554, 560 (D. Me. 1950).

under the Privileges and Immunities clause of the United States Constitution. The United States District Court for Maine held that the privileges and immunities clause does not require the States to treat residents and non-residents with complete equality with respect to commercial fishing rights in their coastal waters, but does bar discrimination against citizens of other States in the absence of substantial reason for the discrimination beyond the mere fact that they are citizens of other States. Thus the inquiry must be whether independent reasons for disparity of treatment exist and whether the degree of discrimination bears a close relation to them. "States should have considerable leeway in analyzing local evils and in prescribing appropriate cures."[253] In the Russo case the statute was held not to be a conservation measure in that it did not limit the size of the fish taken, the size of the catch, or the season of fishing.

The District Court noted that McCready v. Virginia had been distinguished by Toomer v. Witsell[254] which had involved a prohibition against commercial shrimp fishing in the three mile maritime belt off the coast of South Carolina without a license. A license for a resident cost $25, as opposed to $2,500 for a non-resident. The discrimination was so great that its practical effect was exclusionary. The Court distinguished the McCready case by the fact that oysters would remain in Virginia until removed by man, while shrimp were free

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253. Id. at p.561.

254. 334 U.S. 385 (1948).

swimming; and that the McCready case involved a Virginia tidal river which was part of the internal waters of the State, whereas in the Toomer case South Carolina was regulating fishing "in the marginal sea."[255]

The Russo case would not appear to upset the finding of the Maine Supreme Court in State v. Leavitt[256] that a law limiting the right to take clams to Scarborough residents was constitutional. In overcoming the protest that such a law violated the equal protection clause of the 14th Amendment, the Court held that the discrimination was reasonable and the public interest would thereby be promoted. By restricting the taking of clams, the whole clam fishery would be preserved from destruction by indiscriminate taking and giving preference in the harvesting of these "succulent bivalves" to the inhabitants of the town in which they were found,[257] was a reasonable classification scheme.

In State v. Lemar[258] a similar statute limiting the taking of blood worms to the inhabitants of the town was upheld.

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255. Id. at p.401. See also recent cases such as Alaska v. Arctic Maiden 366 U.S. 199, 203 (1961).

256. 105 Me. 76, 72 A. 875 (1909).

257. Id. at p.85; to the same effect State v. Peabody, 103 Me. 327, 69 A. 273 (1907). In the Peabody case, the statute was held invalid because the Legislature had not included a provision in the enabling legislation expressly prohibiting a non-resident from digging within the limits of the town. Despite the fact this was only a technical inadequacy, it was a fatal for this was both a penal statute and also in derogation of the common law and hence was to be strictly construed. Compare P.&S.L. 1903, c.317 in the Leavitt case and P.L. 1905, c.161 in the Peabody case.

258. 147 Me. 405 87 A. 2d 886 (1952).

Another discriminatory practice against out of state residents was struck down in Ipswich Clam Co. v. Green[259] which interpreted 12 M.R.S.A. 4402, 4454, and 4456. It was held that the combined effect of these sections was to exclude from Maine, except for limited purposes permitted by § 4456, lobster meat which had been removed from the shell outside the State. Out of state processors were not entitled to permits under Section 4402 and without such permits they could not possibly comply with Sections 4402 and 4454, which prohibited the possession, shipment, or transportation of lobster meat removed from the shell unless it was removed by a permit holder. The Court held such an insulation of the local market from interstate competition to be an unreasonable burden on interstate commerce in violation of the Commerce Clause, unless the prohibition could be justified as a measure necessary to protect the local health, safety, or welfare, and unless there were no reasonable non-discriminatory alternatives adequate to protect these legitimate local interests.

The Commissioner of Sea and Shore Fisheries had contended that such prohibitions were necessary to enforce Maine's strict conservation laws and it was not practical or economically feasible to conduct such inspections on out of state concerns. The Court held that there was no showing that introduction of foreign meat would substantially encourage Maine lobstermen to illicit operations that could not effectively be dealt with by other licensing and enforcement provisions such as 12 M.R.S.A. 4451 and 4455.[260]

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259. 283 F. Supp. 586 (D.Me. 1968); Me. 236 A. 2d 708 (1968).

260. Id.

The crux of this case is to be found in the fact that Maine is the only State prescribing a maximum legal length for lobsters; the minimum length for lobsters in Massachusetts is 3 3/16 inches carapace as in Maine, although the New Hampshire minimum size is only 3 1/8 inches. It is possible to tell the legal measurement by examination of the tail section within 1/4 of an inch. While the argument may have been that oversized lobsters would be caught in Maine and taken elsewhere to be shelled,[261] it is more likely that the basis of the law is protection of the local industry from out of state competition; and while Maine's maximum size limit on lobster puts the packer of lobster meat at a competitive disadvantage, protection is not limited to compensating for such disadvantages: see remarks on the "crawfish," below.

The United States Supreme Court has repeatedly affirmed "the principle that the State may not promote its own economic advantage by curtailment or burdening interstate commerce."[262] In an interview with the Commissioner of Sea and Shore Fisheries, the idea was developed a little more strongly than can be found in the decision that these controls were also designed to assure the quality of Maine lobster.[263]

Another section of the Sea and Shore Fisheries laws prohibits the sale of crawfish or imitation lobster in the State. Crawfish is broadly

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261. Id. footnote 8, p.591.

262. Id. footnotes p.590 citing H.P. Hood & Son, v. Dumond, 336 U.S. 525, 532 (1949); Baldwin v. G.A.F. Seeling, 294 U.S. 511, 522 (1935); Polar Ice Creamery Co. v. Andrews, 375 U.S. 361, 374-5 (1964).

263. Interview with Ronald Green, Commissioner of Sea and Shore Fisheries, Dec. 17, 1968.

defined to include "South African Lobster tails."[264] The present statute is a little ambiguous as to what the restriction is, but the earlier enactments make it clear that it was a complete prohibition of any sale, whether in restaurants or any avenue of commerce.[265] This type of statute is reminiscent of Wisconsin's prohibitions against oleomargerine.

"Resident" Defined

Resident and residence refer to domicile.[266]

Under the State's rules of construction, 12 M.R.S.A. 3402 (3), it is provided that any person is eligible for any resident license provided he has resided in Maine for six months next prior to date of his application, unless a longer residence is specifically provided.

Resident Commercial Fishing Licenses 12 M.R.S.A. 3801

Under the provisions on resident commercial licenses to operate "in the coastal waters of the State any weir, floating fish trap or boat engaged in seining, netting, or dragging..." the fee for each boat, weir, or fish trap licensed is $3.00 for a single operator. If the resident desires to cover one or more resident crew members the fee is $10.00 and there are no restrictions on the number of resident crew members who can be employed under this fee.[267] If, however, he desires

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264. 12 M.R.S.A. 4454; 12 M.R.S.A. 3401 (8).

265. See Revised Statutes 1954, c.38 §§107, 116.

266. 12 M.R.S.A. 3401 (22).

267. 12 M.R.S.A. 3801 (A) (B).

the license to cover one or more non-resident crew members the fee is $10.00 per boat, weir, or fish trap, and $25.00 for each member of the crew who is not a resident. Licenses issued for resident crews are unrestricted in the number of crew members who may be employed, whereas the number of non-resident crew members must be limited to the number stated in the license.[268]

Non-Resident Commercial Fishing Licenses 12 M.R.S.A. 3802

A comparable non-residence license costs $100.00 for each boat, weir, or fish trap and the license is restricted to the employment of only two non-resident crew members, although an unlimited number of resident crew members may be employed. There is a fee of $25.00 each for every additional non-resident crew member employed beyond the two authorized under the general license. The number of non-resident crew members must be set forth in the license.

Scallops 12 M.R.S.A. 4001

Scallop fishing licenses may be issued only to persons who have been a legal resident of Maine for one year next prior to the date of their application. Crew members on boats licensed to fish scallops must be Maine residents.

Sea Moss 12 M.R.S.A. 4051

A person who has been a resident of Maine for 6 months may be issued a resident sea moss license for $2.00. A non-resident license costs $15.00.

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268. 12 M.R.S.A. 3801 (C).

Municipal Shellfish Programs 12 M.R.S.A. 4252

Municipalities which have formal shellfish conservation programs may enact licensing ordinances which discriminate against non-residents and non-inhabitants of the town. Such municipal ordinances must be satisfied in addition to satisfying the State licensing requirements.

Commercial Shellfish Licenses 12 M.R.S.A. 4301

A six months residence is required to obtain a commercial shellfish license which will cover clams, quahogs, mussels, or oysters.

Worm Diggers License 12 M.R.S.A. 4302-A

Six months' residence is necessary to obtain a worm diggers license.

Worm Dealer License 12 M.R.S.A. 4301-B

To obtain a worm dealer's license, 12 months residence is required. A partnership may make application for such license providing all members of the partnership have been in residence for 12 months. A corporation may be licensed for dealing in worms provided all officers of the corporation have been residents of Maine for at least 12 months.

Cultivation of Clams, Mussels 12 M.R.S.A. 4303

Licenses for the cultivation of clams and mussels may be issued only to persons who have been residents of the State for at least one year.

Transporting Seed Clams, Quahogs 12 M.R.S.A. 4308

Authority to dig and transplant seed quahogs or seed clams under this section restricts planting of them only to flats located in the State.

Lobster and Crab Fishing License 12 M.R.S.A. 4404[269]

Three years residence, including the year immediately preceding the application, is required for a lobster and crab fishing license. Inasmuch as assistants or helpers must also be licensed, the effect of this statute is to prohibit non-residents of Maine from engaging in any aspect of lobstering.

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269. Compare five year residency requirement for Governor (Maine Constitution Art. V, Pt. 1 §4) and no specified term of residency to be eligible to serve on the Executive Council. (Art. V, Pt. 2 §1).

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