AN ANCIENT INSTANCE OF MUNICIPAL OWNERSHIP.

BY SAMUEL UTLEY.

On October 24, 1668, a committee of the General Court of Massachusetts Bay, after solemn consideration, reported that Worcester would support sixty families. A grant of land to several persons was made; the grantees organized as proprietors; after a number of ineffectual attempts, what is now regarded as a final settlement was made in 1713; and on June 14, 1722, an act of incorporation of the town was passed.

Thus there were two corporations, one the proprietors owning the common and undivided land, and the other the town with the usual conditions attending municipal corporations.

It appears by the records of proprietors, as published by the Worcester Society of Antiquity, p. 235, that on the "last tuseday of Sept. 1733," they "Voted that 100 acres of the pooreist land on mill Stone hill be kept Comon for the use of the town for building Stones." Thus we have an attempt of the proprietors of a new town to establish municipal ownership in a stone quarry, 172 years ago; and it occurred to me that the Society might be interested in a brief notice of the history thereof.

It is well established that proprietors, as well as towns, could in the early times, convey title to land by vote duly recorded in their records.

On Feb. 27, 1750, a committee of the proprietors which had been appointed to sell common land, sold to Daniel Heywood all the common land on Millstone Hill, estimated

to be 97 acres, it being the land referred to by the prior vote, this deed being probably made in ignorance of the earlier disposition thereof. This land was later conveyed to one Gleason, and doubt having arisen as to his title, he in 1763 sued his grantor, one Flagg, in the Superior Court of Judicature, which held, that the vote in question passed a fee, that Heywood and his heirs had no title, and gave judgment for Gleason against Flagg; and the proprietors settled with Heywood, but no deed seems to have been made that changed the original status. Thereafter the town assumed title, though not always insisting on it, to the extent of bringing suit. They also had a survey made in 1765, and found 100 acres and 100 rods, and recorded a plan in the town records, giving boundaries in full. They forbade cutting wood, voted not to sell stones or the land itself, allowed the town of Shrewsbury to get stones for their meeting-house steps, appointed committees to care for the land and prosecute trespassers, which in one case seems to have been done, as the town discontinued the action, the defendant being David Chadwick, one of the persons interested in the adverse title. At various times committees were appointed to examine the title, who reported that the town had a fee.

In 1824 William E. Green, who held part of the Heywood title, cut wood on the premises, and the town brought suit against him for trespass. This case was taken to the Supreme Judicial Court, and is reported in 2 Pick. 425. Each party claimed title by possession.

The court held that the case of Gleason v. Flagg, in the Provincial Court, was not a bar, because the parties were not the same, and that plaintiff had no title by possession. It also held, that the town had not a fee in the land but only, in the language of the court, "good right to enter for the purpose mentioned in the grant, and if they at any time exceeded their legal rights," it did not avail them, in the absence of twenty years' exclusive possession. The court

said that the land is not ganted in express terms, but only a limited use for a particular purpose, and that a grant of mines does not carry the land. So judgment was for the defendant.

For many years no act appears of record.

In 1848, our associate, the late Andrew H. Green, became owner of most of the premises, and in 1851 sued Samuel Putnam, who owned about ten acres of the balance, the case being reported in 8 Cush. 21. The case was submitted, on an agreed statement of facts, in which it appeared in detail, that defendant had taken stone for every conceivable purpose and had sold it to be used within and without Worcester in the same way, establishing the business of a quarryman on the premises for his own use and benefit. It also appeared, that for over fifty years other inhabitants of Worcester had gone there as they chose, cleared away wood, brush and soil, quarried stone which they furnished to such other inhabitants of Worcester as wanted it, claiming an interest in the places they had thus occupied, and selling them to others, stone being dressed on or near the place of quarry.

The plaintiff claimed that the vote was a mere license, that not being recorded in the Registry of Deeds, it was revoked by a subsequent conveyance, that it only conveyed a life estate to the then existing inhabitants of Worcester, that it was for corporate purposes only, that defendant could not sell stone, that the use was strictly limited to building stones, and that hewing stone and getting out stone as a trade was not allowable. The question that the vote was vague and invalid, in not establishing boundaries, which was raised but not expressly decided in the earlier case, was not referred to.

The court sustained the vote as a grant, saying that it is quite too late to question it, as the law is settled, that large tracts of land throughout the province were conveyed in the same way, the proprietors' books being the great source

of title. It was also held, that the town took the title for its present and future inhabitants, the court referring to commons, training fields and burial grounds as being held in a like manner, and that the use was not for building in a restricted sense, but, in the language of the court, "for all those structures and purposes for which such material in the progress of time and the arts may be made useful." The court also said: "it may be proper to add that the grant of the right to the stone carries with it, as a necessary incident, the right to enter and work the quarry and to do all that is necessary and usual for the full enjoyment of the right, such as hewing the stone and preparing it for use." "The only limitation, as to the persons by whom the right is to be enjoyed, is that the stones shall be for the use of the inhabitants of Worcester." "Therefore whether it is quarried and prepared by the inhabitants for their own use, or by persons who, like the defendant, make it their business to procure it and get it ready for the use of others, it is equally within the terms of the grant, so long as the stone is applied to the use of the inhabitants of the town." And this was true both of public and private use.

Thus the rights of the city and its inhabitants, seem to have been fully established by the highest court in the state, and it only remains to be seen how the experiment has worked as a practical question. The owners of the fee have not found the condition satisfactory, and have in various ways tried to obstruct the use of the quarry, putting up gates, posting notices, threatening suits and otherwise, while the city, by votes of the city council has asserted its rights and those of its inhabitants, and has agreed to stand behind all persons that are in any way molested in exercising such rights: but I do not find anything that changes the condition as left by the case of Green v. Putnam, though some of the dealers running quarries there have of late taken leases from the owners of the fee.

The stone is fully described in Perry and Emerson's

Geology of Worcester, Mass., and in general terms is a granite which on exposure shows stains like iron rust. It is thought to be of great depth. It has cracks and cross cracks, which break it into irregular blocks. It is hard to cut, is located northwesterly of the Worcester Insane Hospital, on the top of a hill about three hundred feet above the Union railroad station and away from the city. The stone itself is not as attractive to all people as some of the many other stones with which it has to compete. Some of the large builders have quarries of their own, located on the line of a railroad, and with their superior capital and enterprise are able to compete with a free quarry. Most or all quarries have what is termed refuse, consisting of stones with spots which are unfit for buildings or work in sight, but which are adapted for foundations and uses where such defects are not objectionable. These stones are already quarried, are in the way, and the owners are glad to dispose of them. These and perhaps other causes have resulted in a diminished use of this stone.

But it still remains true, that stones cannot be sold in Worcester at a price that the inhabitants are unwilling to pay, rather than to resort to their own free, municipal quarries. As examples of buildings erected from this stone, the principal building of the Worcester Polytechnic Institute, the Worcester Normal School and the Worcester Insane Hospital may be mentioned, though the latter came from their own grounds, which adjoin the quarry.

There is no novelty in the doctrine that there may be a separate ownership of land, and the mines thereon. (Washburn, Real Property, Vol. I., page 17.) In English law gold and silver mines belonged to the crown, as being necessary for coinage, and might be reserved in grants of land. In Kent's Commentaries, Vol. 3, p. 378, it is said that "it is a settled and fundamental rule with us that all valid and individual title to land within the United States, is derived from the grants from our own local governments or from

that of the United States, or from the crown, or royal chartered governments established here prior to the Revolution."

In the charter of the colony of Massachusetts Bay, the land is described with the additional clause, "and also all mines and minerals, as well royal mines of gold and silver as other mines and minerals, precious stones and quarries."

At first the laws of the United States excepted minerals in the provisions for taking up land, but the occupants made miners' rules among themselves, which were recognized by the courts, on the fictitious ground of presuming a license from the government; so the public lost all rights therein. This in 1866 was regulated by statute. Had the doctrine of royal mines been applied to quarries of stone, coal, oil and other like substances, as the Proprietors of Worcester applied it to stone, a very different history might have been written. As it is, those proprietors made an early and successful solution of a problem which of late has much vexed the people of the civilized world.

In Re

THE WILL OF THOMAS HORE.

In justice to Mr. J. HENRY LEA of South Freeport, Me., and London, England, who translated and edited the Will as it appeared in our Proceedings of October, 1904, the Committee of Publication offer this statement.

The whole mass of manuscript and correspondence on the subject had been delivered to our late Vice-President, Senator HOAR, in his lifetime, and he spoke upon the subject at the Meeting in October, 1903. After Mr. Hoar's death the material was handed to the committee by his private secretary. It is the rule to send proofs of all papers to the authors or editors, but when the Proceedings for October last were about to go to press there were special reasons for including the Hore will in that number. Although Mr. Lea was in London and could not see the proof, the matter was so carefully prepared and type-written that it seemed safe to entrust its supervision to

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