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MEMORANDUM OF LAW

SUBMITTED

IN CONJUNCTION WITH

QUESTIONS PROPOUNDED

TO THE JUSTICES BY

SENATE ORDER PASSED MAY 29, 1973.

SUBMITTED BY THE DEPARTMENT
OF THE ATTORNEY GENERAL

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MEMORANDUM OF LAW

What is involved in the questions propounded to the Justices in this matter is a determination of the nature and extent of the power and sovereignty of the Legislature of Maine with respect to the State's interest in the public lots in the unincorporated areas of the State. Public lots were reserved from conveyances of townships by Massachusetts, by Maine and by the two states acting jointly. Attached to this Memorandum as Exhibits "A," "B" and "C" respectively are examples of deeds, with reservations of public lots, from Massachusetts, from Maine and from the two states acting jointly. The public lots which are the subject of L.D. 1812 (and of the questions propounded in connection therewith) are those public lots in the unincorporated areas of the State, including plantations and unorganized townships. No questions have been propounded concerning public lots which have heretofore vested in any individual or parish or in the inhabitants of any town. In addition, no questions have been propounded concerning grass and timber rights, flowage rights or other private interests which may exist in various public lots. It is the power of the Legislature with respect to the State's interest in those public lots in which the State has fee simple title, which is the subject of these questions.

Specifically the questions relate to whether or not the use and disposition of the public lots proposed in the cited sections of L.D. 1812 (i) violates the Articles of Separation, (ii) violates the constitutional provision relating to the distribution of powers or

(iii) violates due process of law, and if there is a violation of any of the foregoing, whether or not the consent of the Legislature of Massachusetts would cure that violation.

Answers to those questions may involve subsidiary determinations of whether or not the public lots are, in fact, a trust and whether or not the Legislature has plenary power with respect to the State's interest in them as against Massachusetts (under the Articles of Separation), as against the Judiciary (under the separation of powers doctrine) and as against any private or vested rights now or hereafter existing, with respect to the manner in which the State must use the public lots (under the due process clause).

In the first year of Maine's statehood, the Supreme Judicial Court confronted a fundamental title problem created by the reservation or dedication of a public lot. In Shapleigh v. Pillsbury,[1/] plaintiffs were the grantees from Massachusetts subject to an early form of grant requiring the grantees to set off public lots for ministerial purposes, which the grantees had done. The lots were then occupied by a trespasser and plaintiffs sued for his removal, saying that the setting apart of the lots was not a valid conveyance because the beneficiaries were not in existence and since there was no valid conveyance, the plaintiffs retained the fee and could remove a trespasser. The trespasser maintained that the reservation or dedication of the public lots was a valid conveyance of the fee, that the beneficiaries were not yet in existence, that until they came into existence the fee was "in abeyance" and that while the fee was in abeyance plaintiffs were strangers to the title and, in effect, had no standing to remove defendant from the lots.

1/ 1 Me. 271 (1821).

The trespasser suggested that if anyone could maintain such an action, it was the State. The Court upheld the conveyance as a dedication for charitable purposes, noting that the benevolent intentions underlying the dedication (and numerous other charitable grants) would be frustrated by an alternative conclusion. However, the Court gave the plaintiffs (the grantees) custody and care of the lots, not to sell, but to retain until the coming into existence of the originally contemplated beneficiaries. The Court's holding that the grantees were entitled to custody until the title should vest in the intended beneficiary should be considered in light of the fact that the case predated the law adopted in 1831 by which Maine expressly assumed custody and control of the public lots.[1/] Nevertheless the case referred to the public lots as having been reserved or dedicated for charitable purposes and treated the public lots as a charitable trust.

The question of the legal effect of the reservations and, more precisely, of the rights and responsibilities of the State and of private persons during the interim period between the reservation of public lots and the vesting of title to the lots in the intended beneficiaries, continued to present a knotty problem to the Court.[2/] However, in 1839, in State v. Cutler[3/] (hereinafter referred to as "Cutler"), the Court decided that regardless of the precise legal effect of the reservations, by the act of separation, Maine had succeeded to all of the sovereignty

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1/ Chapter 510, Public Laws of 1831. The grantees remain subject to the reservation, however, and to the obligation to set off the public lots, whether or not the State assumes that responsibility. Mace v. Land & Lumber Company, 112 Me. 420 (1914) at pp. 422, 423.

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

3/ 16 Me. 349 (1839).

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

In 1849, in Dillingham v. Smith,[5/] the Court again was faced with an issue involving the legal effect of the reservations of the public lots. It did not hold but strongly suggested that with respect to public lots reserved by Massachusetts, fee simple title to the lots

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

2/ Cutler, supra, at p. 351.

3/ Cutler, supra, at p. 351.

4/ Cutler, supra, at p. 352.

5/ 30 Me. 370 (1849).

remained in Massachusetts and passed to Maine upon separation. It did hold, however, that with respect to lots reserved from grants by Maine, Maine reserved legal title by virtue of having excepted the lots from the conveyance and "constituted itself a trustee" of the public lots by the act of 1824 by which Maine resolved thereafter to reserve from each township 1000 acres for public uses. The Court also noted that the reservation of the public lots was not an "appropriation" of the public lots but that the public lots were, in the language of the act,[1/] "to be appropriated" and that the "expected town or corporation can acquire no title to any definite number of acres for any particular use, except by virtue of such appropriation."[2/]

As a result of the decision in Dillingham vs. Smith, Maine appears to have had legal title to all lots which were reserved from its own conveyances, may have had legal title to public lots reserved from pre-1820 conveyances by Massachusetts and clearly had custody of and control over substantially all of the public lots. In 1852, the Court held that no private person could object to the absence of Massachusetts from court proceedings to locate a public lot in a township granted by Maine and Massachusetts jointly,[3/] thus making Maine's custody, as against objection by all but perhaps Massachusetts itself, complete and exclusive. Finally, in 1853, Massachusetts deeded all of its interest in all of the public lots in which it had any interest to Maine.[4/] The deed recited that the conveyance was subject to and was not intended to alter

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1/ Chapter 383, § 4, Public Laws of 1828, containing substantially identical provisions as for the reservations of public lots as were contained in Chapter 280, § 8, Public Laws of 1824.

2/ Dillingham, supra, at p. 378.

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

4/ Me. House Document #12, 1854.

obligations imposed by the Articles of Separation, but other than this reference to the Articles of Separation, the deed itself imposed no new or additional restriction. As a result of the deed, Maine appears to have had legal title to all public lots, including those reserved by Massachusetts, by Maine and by the two States jointly. Put another way, subject to responsibilities imposed by the Articles of Separation itself, if any there were, Maine appears as of 1853 to have stood in the shoes of Massachusetts with respect to all public lots.

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

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1/ 74 Me. 545 (1883).

2/ Chapter 39, Public Laws of 1832.

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

as follows:

"After the district of Maine became a state, it was found that there was a variety of acts and resolves of Massachusetts, passed in pursuance of the policy of appropriating lands for public purposes, the lands situated mostly in Maine, different enactments having different charitable objects in view, and extending different legal rights to beneficiaries. It was deemed impracticable and inexpedient to carry all of the purposes of the commonwealth expressed in its legislation into literal effect. While the charities were to be upheld, it was thought best to turn all of them that could be into the channel of the public schools. So the law of 1832, c. 39, was passed, some legislation, in 1824 and 1831, preceding the law of 1832, and leading to it. Acts of 1824, c. 254, § 4, of 1831, c. 492. The Act of 1832, in its substance kept alive from then till now, provides that the proceeds arising from the sales of such ministerial lands as had 'not vested in any parish or individual,' should be applied to the support of public schools. This act is declared, by the complainants in this bill, to be unconstitutional, as altering or attempting to alter vested rights. We think otherwise.

"No doubt, Maine could do in relation to these lands within her boundaries what Massachusetts could have done had there been no act of separation. The commonwealth's sovereignty over the lands, by the bargain of separation, or as a consequence of it, fell upon the state of Maine. This proposition, we think, needs no discussion for its proof. State of Maine v. Cutler, 16 Maine, 349; Dillingham v. Smith, 30 Maine, 370, 381.

* * * * * *

"In 1804, the deed passed to the grantees named therein. This deed contains an exception, and it is stated in the deed what the lots are excepted for. But this exception enures to the grantor; not to a stranger. It grants nothing to any parish or minister in Upton. No trust was perfectly created by it. There might never be an incorporated town or parish. The deed itself might notremain operative. It might become forfeited for the conditions named in it. The deed did not, *ipso facto*, create an appropriation of land for ministerial purposes. It merely reserved to the grantors the right and means of creating a trust, according to their declared public policy, should opportunity offer. By means of the exception, something was to be or might in the future be appropriated.

> It was a prospective provision for a gift, but not a gift per se. The nature of such a reservation of lots for public uses is well and clearly described by SEWALL, J., in Rice v. Osgood, 9 Mass. 38, 43, in accordance with our own views, although in that case another form of reservation, in substance the same, was under discussion. If not for legal reasons, certainly for great moral and political considerations, the state of Maine has ever been willing to effectuate the designs and policy of the parent commonwealth in relation to all of the lands reserved or appropriated by her for public uses within the limits of this state,--modifying the original plan in such respects only as the growth of society and the needs and the sentiments of the community would seem to demand and make reasonable.[1/]"

The Court did not expressly purport to construe the Articles of Separation. Nevertheless, the Articles of Separation clearly recite that the public lots were required to be reserved "for the benefit of Schools, and of the Ministry." While the Union Parish Society had no vested rights whatsoever by virtue of the reservation, the question remains whether Maine had any specific obligation to use the public lots in any particular fashion. In other words, is Maine required to cause some interest in the public lots to vest in any particular class of beneficiaries or to use the public lots for a particular public purpose? Regardless of whether it was necessary to answer this question to decide the specific controversy before the Court in Upton, the Court seems to have addressed itself to that question by discussing Maine's willingness to use the public lots for "public uses" in ways which the "growth of society and the needs and the sentiments of the community would seem to demand and make reasonable."

In 1903, in State v. Mullen[2/] (hereinafter referred to as "Mullen") the Court again discussed the powers of the State over the public lots.

1/ 74 Me. at pp. 546, 547, 548.

2/ 97 Me. 331 (1903).

The Court again noted that Maine had generally pursued the policy of making reservations of land for public uses, that until incorporation the reserved lands and the funds arising therefrom are under the general control of the State,[1/] and that the "State has placed no limitations upon its power to designate the uses, or to control thereafter the title vested in the beneficiaries, only that they are to be public and for the benefit of the town."[2/] The Court stated that the first general designation of the public uses for which income from the public lots should be spent was the act of 1846[3/] specifying an expenditure of funds for school purposes. Prior to that time the income had been merely turned over to the State, as in the case of income from all public lands[4/] or held by some particular agent of the State awaiting claim by the towns or persons "rightfully owning it."[5/] The Court then held that the State "according as it reserved to itself. . . the power to direct, has directed that the use for which reserved lands are to be held is the support of schools, and this use follows the proceeds of the sales of the lands themselves."[6/] It obviously followed, therefore, and the Court remarked that within the category of schools, the State enjoyed a wide discretion and could appropriate funds arising from the reserved lots to a particular

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

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

3/ Chapter 217, Public Laws of 1846.

4/ Chapter 280, Public Laws of 1824.

5/ Chapter 33, Public Laws of 1842.

6/ Mullen, supra, at p. 337.

school, to a particular grade of schools or to the schools in a particular part of a town or plantation. "The only limitations expressed are that the use be public and for the benefit of the town."[1/] As in Upton, the Court in Mullen did not expressly construe the Articles of Separation.

While Upton and Mullen involved directly the relationship between Maine and private individuals or entities, and not the relationship between Maine and Massachusetts under the Articles of Separation, nevertheless the language of the Court in those cases (and other previously cited cases) seems strongly to suggest that prior to the time Maine causes an interest in the public lots to vest in private person or entity, Maine has exclusive sovereignty and unlimited power over the public lots, that the only limitations imposed upon the public lots is that they be used for "public uses" and for the benefit of the township from which they were reserved[2/] and that even the foregoing limitations have been imposed by Maine itself. The Courts did not state (or even imply) that Maine is under any constitutional or fixed obligation to use the public lots for any particular class of beneficiaries or for educational or religious uses. Neither did the Court attempt to reconcile its language with the Articles of Separation.

1/ Mullen, supra, at p. 337.

2/ Substantially all deeds of public domain from Maine after the enactment of Chapter 280, § 8, of the Public Laws of 1824 and from Maine and Massachusetts jointly at any time expressly purported to reserve public lots merely for "public uses" rather than for ministerial and educational uses.

One possible explanation why the Court did not expressly construe the Articles of Separation is that both Upton and Mullen involved using the public lots for school purposes and the Articles of Separation were amended in 1831 to permit some character of diversion of the public lots from ministerial to school purposes.[1/] To the extent that the Amendment authorized a wholesale diversion of all public lots from ministerial to school purposes, the Court might be understood to be saying, in those cases, that Maine could, with the consent of Massachusetts, modify the original plan of Massachusetts with respect to the public lots in ways which the growth of society and the needs and sentiments of the Community seem to demand and make reasonable.

There are two problems with such an explanation. The first problem is that the language in Upton and in Mullen seem distinctly broader than that, particularly when the Court states in Upton that Maine could do in relation to these lands what Massachusetts could have done had there been no act of separation. The second problem is that the 1831 Amendment of the Articles of Separation may well not have authorized a wholesale diversion of all public lots from ministerial to school purposes.

The Act by Maine proposing an amendment to the Articles of Separation[2/] specifically proposed that (i) "Trustees of any Ministerial and School Fund incorporated by the Legislature of Massachusetts in any town within [Maine] shall hold and enjoy their powers subject to

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1/ In Upton the Court mentioned "some legislation in 1824 and 1831, preceding the law of 1832, and leading to it. Acts of 1824, c. 254, § 4, Of 1831, c. 492." The latter act is the proposed Amendment to the Articles of Separation.

2/ Public Laws of 1831, chapter 492.

the control of the Legislature of Maine" and (ii) the Legislature of Maine "shall have the power to direct the income arising from the proceeds of the sale of land, required to be reserved for the benefit of the Ministry, to be applied for the benefit of primary schools, in the town, in which such land is situate, where the fee in such land has not already become vested in some particular Parish within such town, or in some individual" (emphasis supplied). Both sections appear on their face to be dealing with public lots in existing towns, the first section dealing with the situation where the public lots have already vested in a particular Parish or individual and the second section dealing with the situation where the public lots have not already vested in a particular Parish or individual. No specific reference is made in the act to public lots which are not in existing towns.

Moreover, the act speaks not of public lots per se but of the income from the proceeds arising from the sale of public lots. Public lots were sold after incorporation into a town, but rarely prior to incorporation. In addition, the language of the act is extremely similar to the language of Chapter 254 of the Public Laws of 1824 (cited in Upton), enacted seven years before the proposed amendment to the Articles of Separation, which dealt not with public lots which were in the unorganized areas of the State but with public lots in existing towns.

In short, the amendment to the Articles of Separation proposed by Maine may not have been prospective in effect but retrospective, in order to give Maine the power to alter the provisions of prior

grants and reservations. The Articles of Separation expressly provided that all "grants of land [by Massachusetts] . . . and other rights . . . having or to have effect within the said District [of Maine], shall continue in full force" after separation. That the amendment was directed at Maine's power to alter rights having or to have effect within Maine and previously granted or created by Massachusetts seems rather a compelling conclusion when viewed in the light of the language consenting to the amendment in which the Legislature of Massachusetts permitted an exercise of legislation by Maine "over the subject of ministerial and school lands within its territorial jurisdiction, granted or reserved for those purposes <u>before</u> the separation of that state from the Commonwealth of Massachusetts."[1/] (Emphasis supplied).

It appears, therefore, that the amendment to the Articles of Separation may not have concerned a wholesale diversion of all public lots from ministerial and school purposes exclusively to school purposes but merely a diversion in use with respect to those public lots reserved from grants by Massachusetts prior to separation. If this is correct, then no amendment to the Articles of Separation has been sought or obtained to divert the uses of public lots reserved in grants by Maine or by Maine and Massachusetts jointly.[2/] Moreover, in 1853 Massachusetts deeded to Maine all of its right, title and interest in the public lots[3/], subject only to obligations imposed by the Articles of Separation. If any distinction existed between

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1/ Laws of Massachusetts, 1831, Chapter 47.

2/ Joint deeds, such as the one attached hereto as an Exhibit, generally reserved public lots for "public uses" as did Maine's deeds, and not expressly for ministerial or school purposes.

3/ The deed is Maine House Document #12, 1854.

the obligations of Maine under the Articles of Separation with respect to public lots reserved by Massachusetts prior to separation, on the one hand, and with respect to public lots reserved by Massachusetts, by Maine or by the two states jointly after separation, on the other hand, such a distinction may well have been abolished by the 1853 deed.

Based upon the assumption that the 1831 amendment of the Articles of Separation did not authorize a wholesale diversion of use of all public lots, based upon the language of the Court in Upton and in Mullen, based upon the fact that Maine did not seek the consent of Massachusetts when in 1824[1/] it began to reserve a single lot of 1000 acres for such "public uses" as the Legislature should thereafter direct (rather than four lots of 320 acres each for ministerial and school purposes), it would appear that the requirements of the Articles of Separation, if any there are, have not been literally construed by either the Courts or the Legislature during the history of this State.[2/] More specifically, it appears that the State has, to a large extent, unilaterally assumed the power to deal with the public lots in the manner which it sees fit. If the State has this power, the power would seem clearly to extend not only to the particular public use which the State makes of the public lots, but the particular class of beneficiaries of those public uses as well.

There nevertheless remains an inconsistency or haitus between the express provisions of the Articles of Separation and both the legislative

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1/ Chapter 280, § 8, Public Laws of 1824.

2/ In addition, bits and pieces of the public lots have from time to time been sold or used for public uses other than the ministry or schools, as cited in the "Statement of Facts".

acts and judicial decisions thereafter. This haitus is borne partial of the failure by the Court directly to construe the Articles of Separation. For example, neither Upton nor any other case has held that Maine has no obligation somehow to "effectuate the designs and policy of the parent commonwealth" in relation to the public lots. Nor did Upton elaborate upon what the "designs and policy of the parent commonwealth" are, regardless of whether the obligation is legal, moral or political. More significantly, no case has held that the public lots are or could be treated merely as another part of the public domain.

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

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

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

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

1/ Cutler, supra, at p. 351.

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

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

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

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

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

So long as specific charitable purposes were contemplated, the distinction between the "public uses" for which the public lots were reserved, and any use by the government for non-private purposes may have been clear. This is particularly true where Massachusetts, and then Maine, sold land in huge quantities merely to raise sufficient revenue to pay old debts and run the day-to-day operations of the government. The distinction fades completely, however, where no specific charitable or public purposes are required because the expression, "charitable purposes," like public purpose, is incapable of precise definition.[3/]

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

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

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

The Court has never attempted to analyze and resolve the inconsistency between the language of its decisions and acts of the Legislature on the one hand, and the plain wording of the Articles of Separation, on the other. One explanation is that in the absence of a First Amendment argument on which to base a decision, the Court could make no other ruling if it were to sustain the legislation diverting all ministerial lands to other purposes. Another explanation may be that even if the State is truly considered a trustee (rather than a proprietor) of the public lots, nevertheless until some interest in the public lots becomes vested or until some discernable class of beneficiaries comes into existence, the State may be able, through a form of legislative cy pres,[1/] to alter the terms of the trust. The Judicial branch of the Government is the branch of government normally performing such a function, and there is some authority for the proposition that it is a violation of the separation of powers doctrine for the Legislature to exercise such a power.[2/] Other courts have expressly rejected this notion or have sustained the power of the Legislature to alter the terms of a charitable trust.[3/] After all, with regard to school lands, the Legislature acts simultaneously as the donor of the trust and in parens patriae for the beneficiaries of the

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

2/ Bridgeport Public Library v. Burroughs Home, 82 A. 582 (Conn., 1912). See also 4 Scott on Trusts, § 381, n. 16 (3d ed. 1967).

3/ Stanley v. Colt, 72 U.S. 119 (1866); Old South Society v. Crocker, 119 Mass. 1 (1875); Jones v. Vt. Asbestos Corp., 108 Vt. 79 (1936).

trust[1].

Most instances in which the Legislature proposes to alter the terms of a charitable trust, however, do not involve a change in the fundamental purposes of the trust. The legislative action proposed in L.D. 1812 involves a change in the purposes for which the public lots are owned and held by the State. Of course, the public lots in the unincorporated areas of the State may not constitute a charitable trust at all, and even if they do, they appear to be markedly different from most charitable trusts. The Court held in Upton and in Dillingham that no trust was actually created by the reservation of the public lots, only the means of creating one should the opportunity arise. Furthermore, most charitable trusts involve a discernable or existing class of beneficiaries (though the class may be indefinite as to size), whereas the intended beneficiaries (the inhabitants of the town which may be created in part or all of the township from which the public lots were reserved) does not exist. Approximately two-thirds of the unincorporated townships are totally uninhabited today. As the Courts have noted, the towns for which the public lots were reserved may never exist.[2] Indeed, the Legislature can preclude their coming into existence by refusing to incorporate any more unincorporated townships or by devoting lands to uses which are totally incompatible with their incorporation.[3]

1/ Jones v. Vt. Asbestos Corp., supra, at pp. 101, 102.

2/ Union Parish Society v. Upton, supra, at p. 548; State v. Mullen, supra, at p. 338.

3/ This has been done in the case of the eight public lots in Baxter State Park.

It is possible, therefore, that the public lots are not a trust or are such a peculiar kind of trust that the Legislature has been deemed by the Courts to have plenary power to deal with them as they see fit. If the normal limitations applicable to trustees in administering a trust do not apply to the administration of the public lots by the Legislature of Maine, one practical reason why the Courts and the Legislature have not expressed concern over the precise wording of the Articles of Separation is that those particular provisions of the Articles of Separation are probably unenforcible by anyone, with the possible but by no means certain exception of Massachusetts.[1/] Between 1803 and 1962 the United States granted a total of some 330,000,000 acres to the various states for all purposes, of which some 78,000,000 acres were given in support of common schools.[2/] In the enabling legislation authorizing the adoption of state constitutions and admission of states into the Union (and in numerous specific instances of legislation), the federal government provided that "section sixteen [the center section] in every township shall be granted to the inhabitants of such township for the use of schools."[3/] While the terms and conditions of such enabling legislation were not made, ipso facto,

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1/ The United States Supreme Court would have exclusive original jurisdiction of such an action. U.S. Const., Art. III. Since Massachusetts no longer has any property rights in the public lots, its standing would rest solely on its historic position as parent sovereign.

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

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

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

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

More than fifty years later, Justice Holmes writing in Alabama v. Schmidt[4/] noted that the Act of Congress requiring Alabama to grant section sixteen "to the inhabitants of such township for the benefit of schools" vested title to section sixteen in the State and was not a limited conveyance, subject to a reverter, but was an absolute gift

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

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

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

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

to the State "for a public purpose of which that State is the sole guardian and minister."[1/] The Supreme Court held that the obligation imposed upon Alabama by the Act of Congress was merely "honorary. . . and even in honor would not be broken by a sale and substitution of a fund. . . ."[2/] Finally, the Court held that the State had the authority to "subject this land in its hands to the ordinary incidents of other titles in the State."[3/] The Court in Upton and in other cases, as well as the Legislature in its various enactments, may have justifiably regarded as remote the likelihood that Massachusetts could or would take exception to their acts and decisions.[4/]

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

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

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

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

In summary, therefore, there is a substantial question as to the parameters of the power and sovereignty of the Legislature of Maine with respect to the public lots. The immediate question is whether or not the Articles of Separation imposed any specific obligation upon Maine concerning the use and disposition of these lands and, if so, whether that obligation is enforcible and the Legislature bound to honor to it. In addition, even if the Articles of Separation imposed no specific obligations, there is a question as to whether or not the public lots constitute a trust, and, if so, whether or not the Legislature's power over them is plenary and exclusive as against the Judiciary and as against any beneficiaries now or hereafter existing. Finally, there is a question as to whether or not the consent of Massachusetts is required in order for the Legislature to take the measures proposed in the cited sections of L.D. 1812 and, if that consent is obtained, the extent of the curative value, if any, of that consent.

In this Memorandum of Law, we have attempted to set forth for your consideration some treatment of both sides of the questions propounded in this matter, without taking any position as to the answers to those questions. If we can provide further information or assistance to the Justices in answering the questions, we would be pleased, upon your request, to attempt to do so.

Respectfully Submitted,

DEPARTMENT OF THE ATTORNEY GENERAL

BY: ______________________
LEE M. SCHEPPS
Assistant Attorney General

BY: ______________________
JON A. LUND
Attorney General

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

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

two certain tracts or parcels of land

EXHIBIT "A"

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

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

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

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

nine thousand two hundred and eighty

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

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

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

Singned, Sealed and Delivered in the Presence of

James Sullivan,
Daved Cobb.

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

Know all Men by These Presents,

That we, whose names are undersigned and seals are hereunto affixed, appointed a Committee by the General Court of the Commonwealth of Massachusetts, with full power to sell and convey the unappropriated Lands of said Commonwealth, lying within the District of Maine, in consideration of *five thousand one hundred and forty five dollars & thirty three cents to us in hand paid by John Barrett of Quincy in the County of Norfolk, Gentleman, John Gardner of Milton in said County, Esquire, Benjamin Welch of Boston in the County of Suffolk, Gentleman and John Tucker of Boston aforesaid, Esquire,*

For the use of said Commonwealth, the receipt whereof, we do hereby acknowledge have given, granted, sold, and conveyed, and by these presents in behalf of said Commonwealth, do give, grant, sell, and convey, unto the said *Barrett, Gardner, Welch and Tucker, assignees of John Evans a half*

a township of Land lying in *partly in the County of Kennebeck & partly in the County of Hancock* and containing about *eleven thousand five hundred & twenty acres* (be the same more or less), the said township being number *five* in the *second* range *between the rivers Kennebeck and Penobscot north of the Waldo Patent* as the same was surveyed by *Ephraim Ballard & Samuel Weston* in the year seventeen hundred and *ninety two* bounded *beginning at the northwest corner of township No. 3 in the first range north of the Waldo patent thence north six miles to No. 4 in the third range thence three miles west on the dividing line of ranges No 2 and three thence south six miles to the dividing line of ranges No 1 and 2 thence east by the line last mentioned, three miles to the place of beginning*

Excepting and Reserving, However, four lots of ~~three~~ *one* hundred and ~~twenty~~ *sixty* acres each, for the following uses, viz: One lot for the first settled Minister, his heirs or assigns; one lot for the use of the Ministry; one lot for the use of Schools, and one lot for the future disposition of the General Court, the said lots to average in situation and quality with the other lands in said township.

To Have and to Hold, the above-granted premises, with the appurtenances thereof, to *the said Barrett, Gardner, Welch and Tucker in the proportion following viz: to said Barrett three thousand three hundred acres, to said Gardner five thousand one hundred and fifty acres, to said Welch two thousand four hundred and eighty acres and to said Tucker five hundred and ninety acres to them their* heirs or assigns forever, on condition that the said *Barrett, Gardner, Welch and Tucker their* heirs or assigns, shall grant and convey to each settler in said township, who settled therein before the first day of January, seventeen hundred and eighty-four, or in case of his decease without assignment, then to his heirs, and in case of assignment, then to the assigns, one hundred acres, to be so laid out as will best include the improvements of the settler and be least injurious to the adjoining lands, so as that the settler, his heirs or assign, may hold the same in fee simple

EXHIBIT "A"

Barrett, Gardner, Weld and Tucker
before the third day of March one thousand eighty hundred and three
shall settle twenty families within said half township including
such families as may have already settled therein.

And the said committee covenant with the said Barrett, Gardner, Weld
and Tucker

That the said Commonwealth shall warrant and defend the above-granted premises to them the said Barrett
Gardner, Weld and Tucker
on the said conditions and saving the reservations aforesaid, to them their heirs and assigns forever,
against the lawful claims and demands of all persons the above granted half township
having been contracted for by the said John Evans on
the third day of March in the year of our Lord one
thousand seven hundred and ninety five.

IN WITNESS WHEREOF, we have hereunto set our hands and seals, this nineteenth day of
February in the year of our Lord, ~~seventeen~~ eighteen hundred and one

Nath'l Wells (seal)
Leo. Jarvis (seal)
John Read (seal)

Signed, sealed and delivered, in presence of
Stephen Longfellow
~~Suffolk ss.~~ John Ellis Jr.

The words three & twenty crossed &
the words one & sixty inserted on the other side
~~Acknowledged this instrument to be their free act and deed,~~ before signing.
also part of lines 2d & 4th & the whole of line 3d on
this side & ~~Before~~ the words eighteen instead ~~Justice of the Peace.~~
of seventeen on this page inserted before signing

Suffolk ss. Feby 19th 1801 Nathaniel Wells, Leonard
Jarvis & John Read Esqrs acknowledged this
Instrument to be their free act and Deed,
Before John Avery, Justice of the Peace.

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Know all men by these presents:

THAT the undersigned Land Agents of the Commonwealth of Massachusetts and State of Maine, in virtue of the authority by Law vested in said Agents, in consideration that *Samuel Smith of the City of Bangor in the County of Penobscot and State of Maine*

has paid to us the sum of *Ten thousand two dollars and eleven cents*

for the use of said Commonwealth and State,

THE RECEIPT WHEREOF to the use aforesaid we do hereby acknowledge.

And have also given *four* promissory notes of even date herewith, made payable to *Thomas Russell, Esquire* Treasurer of the Commonwealth of Massachusetts, or his successor in that office, each for the sum of *Five thousand & one dollars and five cents*

payable in *one, two, three and four years* from the date hereof, with interest annually. And have also given *four* other promissory notes of even dates herewith, made payable to *James White Esquire* Treasurer of the State of Maine, or his successor in that office, each for the sum of *Five thousand & one dollars and five cents* payable in *one, two, three and four years* from the date hereof, with interest annually—

DO hereby, in behalf of said States GIVE, GRANT, BARGAIN, SELL and CONVEY to said

Samuel Smith

his heirs and assigns forever, the following *Township* of Land situate in the State of Maine, numbered *eight* in the *thirteenth* range of townships west of the east line of the State of Maine containing *twenty three thousand eight hundred & thirty five acres* be the same more or less, as the same was surveyed by *William P. Parrott and Zebulon Bradley* in the year *eighteen hundred and forty. Bounded as follows, viz. on the east by township numbered eight in the twelfth range, on the south by township numbered seven in the thirteenth range, on the west by township numbered eight in the fourteenth range and on the north by the line run by said Bradley in 1840 being the north line of said townships. No recourse is to be had to either of said States for any deficiency in the number of acres above named, or for any deficiency in the quantity, quality or growth of timber estimated to be standing thereon*

TO HAVE AND TO HOLD the aforegranted premises, with all the privileges and appurtenances thereof to the said

Samuel Smith

his heirs and assigns forever. Reserving however one thousand acres of land for public uses, averaging in situation and quality with the other land in said *Township* and also reserving to said States a lien on all the timber cut on said township, (if any) as security for the payment of said notes, no timber however to be cut without written permits are first obtained from said Agents—and on condition that if the said

Samuel Smith

his heirs and assigns shall well and truly pay said notes within the periods limited therein according to the tenour thereof, this is to be a good and sufficient Deed to convey said premises to them, their heirs and assigns. But if the payment of said notes shall not be made as above specified, this deed shall be null and void, and all payments which shall have been made pursuant to this instrument to be forfeited to the use of said States.

IN TESTIMONY WHEREOF, we the said agents, in behalf of said Commonwealth and State, have hereunto subscribed our names, and affixed our seals, this *sixteenth* day of *July* in the year of our LORD one thousand eight hundred and *forty four*

SIGNED, SEALED AND DELIVERED,
IN PESENCE OF US

William Cutter

Geo. W. Coffin [Seal]
Levi Bradley [Seal]

Penobscot ss. *October 19.* 18*44.*

Personally appeared *George W. Coffin and Levi Bradley* and acknowledged the above instrument by them subscribed to be their act and deed as Agents aforesaid, made in behalf of said States.

William Cutter Justice of the Peace.

EXHIBIT "B"

Joel Wellington $3000 - 23040 acres T A R 1 41

Know All Men by these Presents,

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

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

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

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

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

Signed, Sealed and Delivered in Presence of us,

Edwin Rose

Daniel Rose [seal]

Cumberland ss. Feby 14 1829 *Personally appeared* Daniel Rose *and acknowledged the above instrument by him subscribed, to be his act and deed as Agent as aforesaid, made in behalf of said State.*

Before me,

Justice Peace

Jona A. Cushing 17 R 13 ✓ 74

Know all Men by these Presents,

That I, Anson P. Morrill "Agent to superintend and manage the sale and settlement of the Public Lands" of the STATE OF MAINE, in virtue of the authority by Law in such Agent vested, in consideration of

Four Thousand four hundred fifty nine

dollars Eighty Cents paid for the use of said State, by Jona A Cushing of Bangor in the County of Penobscot

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

One undivided half of Township Numbered Seventeen in the thirteenth Range of Townships West from the East line of the State, meaning hereby to convey all the interest the State of Maine has in and to said Township, reserving of the same five hundred acres for public uses of equal average value, quality and location with the premises hereby conveyed — Said Township

containing 23299 ——— acres more or less, according to the survey and plan of said township made and returned to the Land Office in 1845 by Barker & Small Surveyors, reference to said survey being had.

Provided however, if the said Cushing shall fail to pay at maturity three notes of hand by him signed bearing even date herewith, payable to the Treasurer of said State, for the sum of Eleven hundred fourteen 95/100 Dollars each payable in One, Two and Three years with interest annually, or if the said ——— Cushing ——— shall cut any timber on said lot without License from the Land Agent, except what may be necessary for building and improving thereon until said notes are paid, then this deed shall be void and the fee remain in the State.

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

In testimony whereof, I, the said Agent in behalf of said State, have hereunto subscribed my name and affixed my seal, this 7th day of January in the year of our Lord one thousand eight hundred and fifty three

Signed, Sealed and delivered in presence of us,

J. R. Clark

A. P. Morrill Seal

Penobscot ss. January 7 1853 Personally appeared Anson P. Morrill and acknowledged the above Instrument by him subscribed to be his act and deed as Agent as aforesaid, made in behalf of said State.

Before me, [illegible]