STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calender years

1965 - 1966

January 14, 1965

Honorable Denis Blais
Executive Council
State House
Augusta, Maine

Dear Councillor:

Since your request I have reviewed the procedure which was followed on January 6th in connection with the swearing in of the new Executive Council. Apparently the Council was sworn in to office by the Governor in the Council Chamber following the instructions set forth in an agenda for council protocol which was prepared by the outgoing Secretary of State and Council.

However, I find that Article IX, Section 1, of the Constitution of Maine, requires that the members of the Council must be sworn in before the presiding officer of the Senate in the presence of both Houses of the Legislature. It, therefore, appears that the procedure set forth in the council protocol agenda which was followed was incorrect.

I must, therefore, conclude that the constitutional oath of office has not yet been properly administered to the newly elected members of the Executive Council and that they should be sworn in before the presiding officer of the Senate in joint convention before both Houses of the Legislature.

Yours very truly,
RICHARD J. DUBORD
Attorney General

January 21, 1965

Honorable Leon J. Crommett
House of Representatives
State House
Augusta, Maine

Re: *Ministerial and School Lands; and Funds therefrom. Use of Entire Fund for School Purposes by Administrative Unit.*

Dear Representative Crommett:

In answer to your request, we tender the following formal opinion:

FACTS:

Some years ago, the Town of Millinocket sold its public school lot pursuant to existing statutory authority. The funds realized from said sale are on deposit in the Millinocket Trust Company; and are earning a yearly income of $300. The school officials of the Town desire to make use of the principal for school purposes.

QUESTIONS:

1. Whether, under existing law, a Town may use any or all of the reference principal for school purposes?

2. If the answer to the first question is in the negative, whether the Legislature may (constitutionally) authorize towns to make such use of the principals?

ANSWERS:

1. No.
2. Yes.

REASON:

The present statutory provisions covering the administration of ministerial and school lands; and the administration of the gains derived from the sale of those lands is located in 13 M.R.S. § 3163 § 3172 and 30 M.R.S. § 4159 – § 4161 (formerly R.S., c. 57, § 50 § 64). Briefly, those provisions cover matters concerning: (1) The vesting of the grants (§ 3161; formerly § 50 of chapter 57, R. S.); the authority of the town to convey said ministerial and school lands (§ 3164; formerly § 53 of chapter 57, R. S.); the manner of investment of the proceeds of sale (§ 3165; formerly § 54 of chapter 57, R. S.); and the use of the income of the fund for school purposes in the town (§ 3167; formerly § 56 of chapter 57, R. S.). Because none of the reference statutes authorize the use of the principal amount of the funds, the first question must be answered in the negative.

A review of certain of the Maine Case Law concerning the second proposed question may be of some assistance in arriving at an attending answer. In *Union Parish Society v. Upton,* 74 Me. 545 (1883), our Supreme Judicial Court decided that a law enacted in 1832 (Laws of 1832, c. 39) was constitutional although it resulted in the diverting of proceeds of sales of reserved lands from the ministerial fund to the fund for public schools. It is to be noted that such law applied only to those lands where the title had not vested in any beneficiary. Certain of the language of the Court provides an interesting historical note concerning public lots:

> "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 1823 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 sale 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." *Union Parish Society v. Upton, supra,* at page 546-547.

In *State v. Cutler,* 16 Me. 349, our Supreme Judicial Court determined that the State was entitled to the custody and possession of the reference lots until an entity exists for

whose benefit the reservation was made. The Court stated, inter alia:

"By the act of separation, and the adoption of the constitution, we have succeeded to all the sovereignty of the Commonwealth of Massachusetts, for the regulation of the great subjects of State Rights. Our title to our portion of the public lands is the same as hers. Our jurisdiction over the territory is complete. Redress for injuries to those lands is to be sought in our Courts. But the principles of law as to individual and corporate rights are to govern our decision. Where the State has no right or title against individuals or corporations, but a mere despotic interference, it is not to be favored. But when it employs its power for the preservation of property, to take which, there is no person in existence, though it is not considered as passing by escheat to the government, it may well enough be considered as entitled to the possession against mere strangers and trespassers. It is not by this construction, intended, that the State becomes proprietor absolutely, and so authorized to defeat the terms of the grant made by Massachusetts; but to maintain them, for the security of those, who may be entitled to the benefit. ***" *State of Maine v. Alvan Cutler,* supra, at page 351.

Continuing, in *Millinocket v. Mullen,* 108 Me. 29, the Court determined that the inhabitants of the town could legally maintain an action of assumpsit concerning certain stumpage removed from the public school lot by the defendant. The Court reviewed the legislation relating to ministerial and school lands and the funds arising therefrom, and wrote upon the subject of the control and management of the school funds as follows:

"It seems clear from these statutory provisions that the legislative purpose was to place the ministerial and school funds, arising from the sale or otherwise of these lands, the fee in which was thus vested in the inhabitants of the town, in the control and management of an agency or instrumentality that should be perpetual and yet be entirely separate from the inhabitants of the town, either as individuals or as a municipality. The purpose was a wise one. It made more certain that the funds would be carefully preserved, invested, and the income thereof applied to the uses intended. This independent instrumentality, the trustees of the ministerial and school funds, was authorized to negotiate sales of the lands, and the statute provided specially the means by which the title should be transferred to purchasers. There is no provision in the statute that actions involving the title to such land are not to be brought in the name of the inhabitants of the town in whom the fee is vested. It would seem that such actions must necessarily be so brought. * * *" *Millinocket v. Mullen,* supra, at page 32.

In an earlier case concerning the public school lot in Millinocket, the Supreme Judicial Court decided the case of *State v. Mullen,* 97 Me. 331. *State v. Mullen,* supra, was an action of trespass to real estate. The Court upheld the non-suit of the plaintiff for the reason that the trespass was committed after the incorporation of Millinocket; and, therefore, the State ceased to be trustee of the reserved lands, and had no interest in them by which to maintain the action. In *Mullen,* the Court recognized the two ways in which public lands came into existence. Prior to the separation of Maine from Massachusetts, the latter state made grants of public lands; and after the separation, this State (by virtue of its sovereignty) became entitled to the care and possession of such lands. The Court also recognized the other method of creating public lands, i.e., through enactment of general law (Stat. 1824, c. 280, as revised by Stat. 1828, c. 393). In both instances, the State became trustee; and became entitled to the possession of the lands until they vested in the beneficiary. In those instances where the State, by general law, had appropriated land for public use, it was held that: "The State has placed no limitation 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." *State v. Mullen,* supra, at page 335.

Thus, if the Town of Millinocket acquired its public school lot by reason of the general law of the State of Maine, the fee has vested in the Town and the Legislature, by an enactment of general law, may authorize such Town to use the fund for school purposes. Such legislation should be so drawn that the vote of the townspeople occurs after the approval of the trustees (municipal officials.)

If the Town of Millinocket acquired the public lot pursuant to the act relating to the separation of the District of Maine from Massachusetts, Public Laws of Maine, 1821, Volume 1, p. 46, the Legislature may, through an enactment of general law, authorize the Town to make use of the "corpus" for school purpose. We predicate our opinion on the existence of Chapter 492 of the Laws of Maine, 1831, wherein the Legislature of this State created an Act to modify the terms and conditions of the Act of Separation; and in said Act decreed that the terms and conditions of the original Act "are hereby, so modified, or annulled, that the trustees of any ministerial or school fund incorporated by the Legislature of Massachusetts, in any town within this State, shall have, hold and enjoy their powers and privileges, subject to be altered, restrained, extended or *annulled* by the Legislature of Maine with the consent of such trustees and of the town for whose benefit such fund was established." (Emphasis supplied) The reference Act specified that it "shall take effect and be in force, provided, the Legislature of the Commonwealth of Massachusetts shall give its consent thereto." The reference consent was given by the Commonwealth of Massachusetts through its enactment of a legislative mandate of approval signed by the Governor June 20, 1831. *Laws of Massachusetts,* 1831, c. 47.

Very truly yours,
JOHN W. BENOIT
Assistant Attorney General

March 2, 1965

Kermit S. Nickerson, Deputy Commissioner — Education

Transportation of pupils; Review of Opinion Dated December 14, 1964.

Supplemental Statement Re December 14, 1964 Opinion

In a formal opinion dated December 14, 1964, this office declared that a superintending school committee of town A, which had contracted with the superintending school committee of town B so that the former town was educating the pupils of the latter town, could also contract with town B concerning the conveyance of town B's public school pupils to town A's schools. In the reference opinion we declined to render a formal opinion regarding the further use which was made of town A's school buses, i.e., the transportation of certain of town B's private school children to a private school in town A.

You have requested that we review the reference opinion. You indicate that you are concerned with the fact that town A's buses are going beyond "the town limits to provide conveyance for hire to another municipality." We know of no statutory provision confining the use of school buses to the town limits. Under the given facts, town B does not possess the necessary buses required to transport its students to town A; and has contracted with town A for the plural purposes of acquiring both an education for its youngsters and for the conveyance of these children to the place where the classes are held. In effect, town B's superintending school committee is providing