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THE TECHNOLOGY LEAGUE

The following circular letter was mailed to all graduates and non-graduates of the Institute, for whom there were adequate addresses, early in August. The response has been very gratifying.

THE TECHNOLOGY LEAGUE

GENERAL COMMITTEE

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P. O. BOX 5329, BOSTON, MASS.

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Formed to oppose the contemplated alliance with Harvard University, or any similar alliance, to defend the educational freedom of the Massachusetts Institute of Technology, and to promote the influence of the Faculty and Past Students in its government

ISAAC W. LITCHFIELD, '85
CHARLES C. PIERCE, '86
WALTER H. KILHAM, '89
JOSEPH H. KNIGHT, '96
J. ARNOLD ROCKWELL, '96,
LEONARD P. WOOD, '01

Dear Sir:

The Corporation of the Institute, at a meeting held on June 9, 1905, voted "That the Executive Committee be requested, when they may ascertain that the Institute has power to sell the land on which it now stands, to propose to Harvard University an agreement upon the terms of the tentative plan now before this Corporation." The vote stood 23 to 15 in a body with a total membership of 47.

This action was taken after the Corporation had re-

quested and received the opinions of the Faculty and Alumni on the proposed agreement. The Faculty, after an exhaustive study of the educational advantages and disadvantages of the plan, had declared by a vote of 56 to 7 that it was educationally unsound, and the Alumni, after the full presentation of all arguments, had also registered their disapproval of the plan, the graduates by a vote of 1,351 to 458, the past students (not graduates) by a vote of 684 to 376. Finally, a strong minority of the Corporation, including nearly all of those who have long been intimately connected with the Institute, actively opposed the plan and voted against its adoption, regarding it as financially disadvantageous, and damaging to the cause of technological education.

A majority of the Corporation thus proposes to break with the successful experience of the past and to adopt a radical change of policy against the judgment of the Faculty, through whom the Institute has achieved its pre-eminence in the scientific world and who are most competent to decide the educational questions involved, and of the Past Students, whose knowledge of the Institute has been most intimate and upon whose work the Institute depends for the maintenance of its reputation before the public. Such extraordinary exercise of corporate power, in marked disregard of the moral obligation to respect the opinions and desires of those directly interested in the welfare of the Institute, raises a question more important even than the abandonment of its independent educational policy.

Before the proposed agreement can be consummated, there will be necessary at least three decisions by the Supreme Judicial Court upon the grave legal questions involved, action by the Harvard authorities and possibly further consideration by the Corporation of the Institute, and

an appeal for legislative sanction. The Technology League has therefore been organized to oppose the plan of alliance under consideration, or any other plan which may impair the self-government of the Institute, and to secure for the Past Students a proper share in its administration.

The League has retained counsel to conduct whatever litigation may be deemed advisable in opposition to the agreement. It further proposes to take such steps as may be necessary to secure for the Alumni an effective voice in the administration of the Institute, and to take such other action as shall from time to time seem desirable.

We trust you approve the purposes of the League, and will fill out and mail the enclosed card to the Secretary immediately.

For the General Committee,

E. C. HULTMAN, *Secretary*,
P.O. Box 5329, Boston, Mass.

BOSTON, August 1, 1905.

THE SUPREME COURT DECISION

RELATIVE TO THE BOYLSTON STREET LAND OF THE INSTITUTE OF TECHNOLOGY

Following is the full text of the decision rendered by the Supreme Judicial Court of Massachusetts, Sept. 6, 1905, in the suit brought by certain abutters to restrain the Institute from erecting further buildings upon the Boylston Street campus:—

WILSON *v.* MASSACHUSETTS INSTITUTE OF TECHNOLOGY
WELLS *v.* SAME

SUFFOLK. Sept. 6, 1905.

EQUITY—ENFORCEMENT OF EQUITABLE RIGHTS BY ABUTTERS—GRANT BY LEGISLATURE—RESTRICTIONS

LORING, J.—These are two bills in equity reserved for the consideration of the full court upon the pleadings and agreed facts. They are brought by owners of two lots of land on Newbury Street, in the city of Boston, facing the square on which the buildings of the defendant Institute and those of the Society of Natural History now stand, for the purpose of having the defendant Institute enjoined from covering with its buildings more than one-third of the land "granted" to it by St. 1861, c. 183, as it is authorized to do by St. 1903, c. 438, "subject to the rights, if any, of other parties." The bills proceed on the ground that by the sale of these and other lots surrounding the square under this act (St. 1861, c. 183) an equitable restriction was imposed upon this square for their benefit, which includes the right they now seek to enforce.

By ss. 1 and 2 of St. 1861, c. 183, the defendant Institute is incorporated. By s. 3 it is provided that the square in question "shall be reserved from sale forever, and kept as an open space or for the use of such educational institutions of science and art as are hereinafter provided for." By s. 4 it is provided that the defendant Institute shall hold, occupy, and control the westerly two-thirds of said square, subject to the "stipulations" specified; and by s. 5 it is provided that the Boston Society of Natural History "shall be entitled to hold, occupy, and control" the easterly one-third on certain provisions there specified. By s. 6 it is provided that the rights and privi-

leges given in the last two sections are granted subject to certain "further conditions" there specified. Then comes the section which is here relied on by the plaintiffs; to wit, "The above-named societies shall not cover with their buildings more than one-third of the area granted to them respectively." By ss. 8 and 9 the commissioners on the Back Bay are "instructed to reserve from sale the lots fronting on said square on Boylston, Clarendon, and Newbury Streets until said societies shall, by enclosure and improvements, put said square in a sightly and attractive condition," and that an appraisal should be made of all the surrounding lots (except those on Berkeley Street, which had been already sold) and of the square in question; and, if the surrounding lands, when sold, do not equal the appraised value of the two (the surrounding lots and the square), the two societies shall pay the amount of the deficit to the Commonwealth for the school fund, to which the proceeds of the sale of these lands had been appropriated by the Legislature.

St. 1861, c. 183, was enacted on a petition asking for the "incorporation of an institution to be entitled the 'Massachusetts Institute of Technology,'" and that "a section of land on the Back Bay may be reserved and granted to the use of said Institute on such terms and conditions as may be deemed most conducive to the objects of the Institute and the industrial and educational interests of the Commonwealth," and on a petition by the Boston Society of Natural History asking for a similar grant. These petitions were referred to the joint standing committee on education, who made a report set forth in the agreed facts, hereinafter set forth in part in this opinion. This committee reported a bill which is not made a part of this case, but "shortly afterward the act of St. 1861, c. 183, was passed" on April 10, 1861.

On Sept. 5, 1861, the appraisal called for by s. 9 was completed; and the land in the square and the land in the surrounding lots on Boylston, Newbury, and Clarendon Streets was appraised at $1.05 a foot.

A word as to what the Back Bay lands were will explain the occasion of the "grant" to these petitioners.

What is now known as the Back Bay District of Boston was originally flats covered by the ebb and flow of the tide, and used for mill purposes. It became desirable to change the use of these flats from mill purposes to land purposes. The title to these flats was in the Commonwealth and the companies which owned the right of flowage for mill purposes. Prior to 1857 the Commonwealth had by an adjustment got title to all the land shown on the following plan which was adopted by the Back Bay commis-

sioners appointed under Resolve, 1852, c. 79, and annexed to their fifth annual report rendered in January, 1857. It had determined to fill and sell these lands, and had laid out the land for that purpose by the adoption of this plan. See *Commonwealth* v. *Roxbury*, 9 Gray, 45; Fifth Annual Report of the Commissioners on the Back Bay; Report of the Commissioners appointed under Resolve of 1856, c. 76, with accompanying documents, printed in Senate Doc. No. 17, for the year 1857; Resolves, 1852, c. 79; 1855, c. 60; 1856, c. 76; 1857, c. 70; Sts. 1857, c. 169; 1859, c. 154; 1860, c. 200, s. 5. The Commonwealth had thus come into an extensive territory from the sale of which a large profit was expected to result after the cost of filling had been met. In 1861, when the act in question was passed (St. 1861, c. 183), these flats or lands were "being filled, but at that time, with other large tracts to the west and south, were almost entirely vacant, the residence portion of the city being east of Arlington Street, and the business portion still more to the east."

The lots surrounding the square in question (forty-six in number) were sold at four different auction sales, severally held on Sept. 29, 1863, May 19, 1864, October 26, 1865, and April 10, 1869. The lot now owned by the plaintiff Wilson was bought at the second, and the lot now owned by the plaintiff Wells at the third, of these sales. A plan annexed to the agreed facts sets forth the actual price received by the Commonwealth from the sale of the forty-six surrounding lots. It is stated by the plaintiffs and not contradicted by the defendant that this plan shows that these forty-six surrounding lots were sold for $\$2.46\frac{8}{9}$ a foot, and that the Commonwealth received from these sales $90,384.06, over and above the appraised value of the square here in question, plus the appraised value of the surrounding lots made under s. 8 of St. 1861, c. 183.

As both the plaintiffs, on the one hand, and the defendant, on the other hand, have sought support from the way these sales were conducted, a short statement of it is necessary.

The surrounding lots consisted of twenty-two on Boylston Street, twenty-two on Newbury Street, and two on Clarendon Street. The lots fronting the square on Berkeley Street had been sold before St. 1861, c. 183, was enacted, as we have already said; and, as we have said, all that were sold after that act were sold at public auction. Those on Boylston Street were sold on Sept. 29, 1863. The twenty-two lots on Newbury Street were offered for sale on May 19, 1864; and fifteen of them were sold then. The remaining seven were sold on Oct. 26, 1865, and the two lots on Clarendon Street were sold on April 10, 1869.

In case of all forty-six lots the purchaser took a bond for a deed, followed by a conveyance later,—in one instance twenty-eight years later. The explanation for this course of conducting the transaction is obvious. So long as the title to it stood in the Commonwealth, a lot of land was not subject to taxation by the local authorities.

The four auction sales were advertised. The advertisements of the sales at which the two lots now owned by the plaintiffs were bought ended with this statement: "Catalogues with plans showing the situation and area of the several lots to be sold, and the minimum price of each, together with form of deed to be given by the commissioners and full particulars in regard to the restrictions and stipulations to be incorporated therein may be obtained" at the office of the commissioners.

The catalogue in case of the first of these two auction sales (the second of the four) covered lots on Commonwealth Avenue, as well as the twenty-two lots in question on Newbury Street; and in case of the second of these two sales (the third of the four), besides the seven lots here in question, other lots on Newbury Street and lots on Commonwealth Avenue and Beacon Street.

The plan referred to in the concluding paragraph of the advertisement was pasted inside the catalogue. It was the only statement contained in the catalogue of what was to be sold and of the upset prices fixed by the commissioners with the approval of the governor. It was not otherwise referred to in the catalogue. A copy of the plan so referred to in the advertisement and pasted in the catalogue at the first of these two sales (the second of the four) shows this square laid out as provided in St. 1861, c. 183, and is as follows: The plan referred to in the advertisements and pasted in the catalogue at the second of these sales (the third of the four) was the same as the one above set forth, with this difference: In the one used at the later sale the names of the purchasers of the several lots sold at the former sale were added. The plans used at the first and fourth sales were also the same, with similar differences as to the absence or presence of the names of purchasers of lots.

The form of deed referred to in the catalogues for the first three of the above four sales was a printed form adopted prior to St. 1861, c. 183, and apparently used for the sale of all lots on the Back Bay indifferently. It referred to the plan of 1857 alone. It will be observed that on this plan the land is not divided into lots. After November, 1866, the form of deed set forth in the catalogues referred "also to the plan recorded with Suffolk Deeds at end of Book 885," which is, in fact, a plan showing the square

here in question, laid out as provided in St. 1861, c. 183. Of the forty-six lots here in question, only two—namely, those on Clarendon Street—were sold under such a catalogue.

Two plans were referred to in the bonds for a deed given for all the lots except those given for three; namely, the plan of 1857, above set forth, and a sale plan of lots on Commonwealth Avenue and Marlborough Streets, recorded Nov. 5, 1860, Book 788, p. 159, which apparently differs from the plan of 1857, in showing the division of the land into lots. The reference to these plans was a part of the printed form of bond used for Back Bay lots generally. In case of the other three lots (not including, however, either of the two here in question) the second of the above plans was not referred to; and the plan showing the square here in question laid out as provided in St. 1861, c. 183, was referred to as well as the plan of 1857.

In the deeds of sixteen of the lots on Boylston Street, the only plan referred to is the plan of 1857. In the other six the other plan set forth in this opinion is also referred to, showing the square in question laid out as provided by St. 1861, c. 183. In case of Newbury Street the deeds of twelve lots refer to the 1857 plan only, while both plans set forth in this opinion are referred to in the deeds of the other ten lots, including the lots now owned by the plaintiffs.

All the forty-six surrounding lots are now built upon. The buildings on Boylston Street are occupied "by the Young Men's Christian Association and for sundry mercantile uses, by the Hotel Brunswick, and by four dwelling-houses used for residences"; the lots on Clarendon Street by apartment houses, the one on Boylston Street having "stores beneath"; those on Berkeley Street by a private apartment house, and by an apartment and mercantile building; and those on Newbury Street, as follows: corner of Newbury and Berkeley Streets by a church; the next seven, by dwelling-houses used as residences; the next by a club-house; the next, No. 85, by a doctor's office and lodging-house (which the owner "intends within a few months to occupy . . . again for a residence as well as for his office, as formerly"); the next, by a lodging-house; the next four, by residences (in the last of which the owner also "carries on her business as a dressmaker, and lets rooms for doctors' offices"); the next, by a lodging-house; and on the other corner is the rectory of Trinity Church.

The contest here is on the application of well-settled principles of law to new surroundings.

Counsel for both parties agree that it is not necessary to decide whether the effect of St. 1861, c. 183, was to convey to the two societies the fee in

the square in question or only certain rights of occupation, the fee being retained in the Commonwealth. If we speak of the grant as one or the other, it will be for convenience only, and not as expressing any opinion on this point.

We agree with the counsel for the defendant in their contention that, if St. 1861, c. 183, was not intended to give to persons buying the surrounding lots under it the right here claimed by the plaintiffs, they cannot make out a case because of the form given to the transaction by the officers of the Commonwealth. If St. 1861, c. 183, was not intended to give such a right, such acts of these officers would not bind the Commonwealth on the principle lately enforced in *Wormstead* v. *Lynn*, 184 Mass. 425.

In construing this act, the first fact, and the most important consideration, is that the grant to these two societies was not to cost the Commonwealth a penny, and that this was to be effected by dealing with the square granted to the societies in such a way as so to enhance the value of the surrounding lots that they would yield as much as or more than the aggregate value the two had under the conditions prevailing before St. 1861, c. 183, was enacted. And it is perhaps of some interest that this scheme was suggested to the Commonwealth by the petitioners for these grants, including among them the petitioners for the incorporation of the defendant Institute.

It is stated in the report of the committee of the legislature to whom these petitions for a grant of land were referred, "According to the plan of the Memorialists, sufficient space is to be reserved to leave wide openings around the buildings of the societies." And, again: "Common experience shows that such open ornamental grounds surrounding the buildings, together with the attractive exterior of the latter, could not fail to increase the value of the adjacent lands, and to this extent would reimburse the treasury for the space withdrawn from sale. As regards the amount of this enhancing influence, your committee have been furnished by the Memorialists with a large array of facts derived from the sales of lands on the Back Bay and other open parts of the city, going to show that improvements of the kind contemplated have been found in every case, not only to hasten the sale and occupation of the adjacent lands, but to add very largely to their market value, making the net proceeds of the adjacent lands in most cases as great or even greater than the value of the total area, supposing no such reservation to have been made."

St. 1861, c. 183, adopted to carry into effect this scheme of the "memorialists" (including the defendant Institute), provided (first) that the square in question "shall be reserved from sale forever"; (second) "and

kept as an open space for the use of" the two societies; and (third) "the above-named societies shall not cover with their buildings more than one-third of the area granted to them respectively." The plaintiffs contend that these declarations were addressed to the purchasers of the surrounding lots as the basis on which those lots were to be sold, and were made for the benefit of such purchasers, and that, having bought on the faith of them, these purchasers are entitled to have them specifically enforced.

The defendant, on the contrary, insists that on a fair construction of the provisions of the act the legislature intended to keep, and did keep, the control of all restrictions in its own hands, and that the value of the surrounding lots was to be enhanced by the square in question, being physically laid out before they were sold, and that the square was to continue in that condition so long as the Commonwealth, having regard to the interests of all concerned, should think it ought so to continue, and no longer; that St. 1903, c. 438, was an exercise of the control so reserved, and brought to an end as of right the advantages for which the purchasers of the surrounding lots paid an enhanced price.

When the defendant contends that in St. 1861, c. 183, the legislature kept the control of the whole situation in its own hands, it relies on the fact that, having regard to the words "further conditions" in s. 6, what are called "stipulations" in s. 4 are really conditions, and, being conditions, the subject-matters covered by them are matters between the Commonwealth and the grantees, and between them alone.

Were that the whole story, the result would not necessarily follow. The fact that a provision of a deed is put in the form of a condition, and in no other form, even when coupled with an express statement that the "non-fulfilment or breach" "shall work a forfeiture of the estate hereby conveyed, and reinvest the same in the grantor," is not decisive against its operating as an equitable restriction in addition to its operating as a common law condition. That was decided in *Hopkins* v. *Smith*, 162 Mass. 444, and is laid down in the recent case of *Welch* v. *Austin*, 187 Mass. 256, 258. The same principle would govern in case of a grant made by act of the legislature.

The doctrine of *Hopkins* v. *Smith* is that in spite of the parties to a deed having put the thing agreed upon in the form of a common law condition, and a common law condition only, the question whether it does not operate also as an equitable restriction is one of intention. The fact that the thing agreed upon has been put in the form of a common law condition, and in that form alone, is of itself a matter to be taken into consideration in arriv-