

HOUSE No. 1359.

Commonwealth of Massachusetts.

OFFICE OF THE ATTORNEY GENERAL, BOSTON, May 6, 1904.

Honorable LOUIS A. FROTHINGHAM, *Speaker of the House of Representatives.*

SIR:—I have the honor to acknowledge the receipt of an order of the Honorable House of Representatives passed on the second day of May, 1904, which is of the tenor following: “Ordered, that the Attorney-General be requested to furnish to the House of Representatives his opinion as to the constitutionality of the provisions of House Bill No. 1320, which regulates the hours of labor of workmen employed by the Commonwealth, or by any county, or by certain cities and towns, or by persons contracting with the Commonwealth or with any county or with certain cities and towns,” with which order the bill referred to was transmitted to me.

I have the honor to say, in obedience to the request of the above order, that the act referred to is substantially the same in its provisions as that which received the consideration of the Attorney-General in his opinion under date of June 15, 1903, and the attention of my predecessor, Attorney-General Knowlton, in his opinion of April 24, 1901.

I have the honor to advise the House of Representatives that in my opinion the bill is constitutional, so far as it applies to the Commonwealth. So far as it applies to municipalities and counties within the Commonwealth, the reasons for holding it to be unconstitutional as in

effect taking property without compensation and without due process of law, and as authorizing the appropriation of tax-payers' money for private purposes, have been already set forth in the opinions above referred to.

Since the last opinion of the Attorney-General above cited, a majority of the Supreme Court of the United States, in an opinion written by Mr. Justice Harlan, has decided that an act of the state of Kansas, similar in its provisions to the act now submitted to me, did not conflict with the fourteenth amendment of the federal constitution. The Chief Justice and Justices Brewer and Peckham dissented from the opinion of the court above cited.

Though the opinion is by a divided court, and though the adjudication of the majority is not necessarily or conclusively binding upon the courts of the Commonwealth, since the decision of that majority was in favor of the constitutionality of the Kansas act, it is, nevertheless, manifest that the decision itself must be of commanding if not controlling influence upon other tribunals. I should, therefore, deem it presumptuous and perhaps an exhibition of undue hardihood if I assumed to reaffirm my former opinion, which is approved by a minority of the justices of the United States Supreme Court.

It is to be noted that since the decision of the Supreme Court of the United States in the Kansas case (*Atkin v. Kansas*, 191 U. S. 207), an elaborate and most carefully considered decision has been made by the Court of Appeals of New York in *Ryan v. The City of New York*, January 29, 1904, 69 N. E. 599. The majority of that court hold to the view of the majority of the Supreme Court of the United States in the Kansas case. O'Brien, Bartlett and Vann, JJ., however, dissent in a long opinion based upon the same reasons which have influenced the Attorneys-General of Massachusetts in their opinions upon the unconstitutionality of the legislation embodied in the act now referred to me.

In view of the opinions of the United States Supreme Court and of the appellate court of New York above cited,

I must advise the Honorable House of Representatives that there now appears judicial determination of high authority holding that the proposed legislation is within the constitutional limitations.

I have the honor to be,

Very respectfully,

HERBERT PARKER,

Attorney-General.

