

HOUSE No. 1793

The Commonwealth of Massachusetts.

DEPARTMENT OF THE ATTORNEY-GENERAL, BOSTON, June 13, 1910.

JAMES W. KIMBALL, Esq., *Clerk of the House of Representatives.*

DEAR SIR:— I have the honor to acknowledge the receipt of an order adopted by the Honorable House of Representatives on the 9th day of June, 1910, which is as follows:

“Ordered, That the Attorney-General give his opinion . . . to the House of Representatives whether or not in his judgment the Massachusetts Agricultural College at Amherst is a state institution; also whether the trustees of the Massachusetts Agricultural College as individuals have a legal right to purchase land and later sell it to the Massachusetts Agricultural College at an increased price over the original cost.”

The first question as to which my opinion is desired is whether the Massachusetts Agricultural College at Amherst is a State institution.

The Massachusetts Agricultural College was incorporated by St. 1863, c. 220. By that act certain persons were “constituted a body corporate, by the name of the Trustees of the Massachusetts Agricultural College, the leading object of which” should be “without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life”; and it was provided that “they and their successors, and such as shall be duly elected

members of said corporation, shall be and remain a body corporate by that name forever." The power of removing trustees from the corporation was given to the trustees, but vacancies in the board of trustees were to be filled by the legislature. The Governor of the Commonwealth, the secretary of the Board of Education, the secretary of the Board of Agriculture, and the president of the faculty were made ex officio members of such corporation (§1). The corporation was given the usual powers in regard to taking and holding of property, making by-laws, saving a common seal, suing and being sued (§§ 2, 3). The legislature reserve the right to alter, limit, annul or restrain the powers vested in the corporation, and especially to "appoint and establish overseers or visitors of the said college, with all necessary powers for the better aid, preservation and government thereof" (§5). The corporation was required to report to the legislature, and it was provided that its location, plan of organization, government and course of study should be subject to the approval of the legislature (§§ 5, 6). The purchase of a site was authorized, and one-tenth part of the moneys received from the State Treasurer from the sale of land scrip by virtue of the provisions of the 130th chapter of the Acts of the Thirty-second Congress was appropriated therefor, on the condition that the further sum of \$75,000 should be subscribed for the purpose of erecting suitable buildings thereon (§§ 6, 7). When the college was established, two-thirds of the annual income from the fund created by the sale of such land scrip was to be paid to its treasurer (§8). This land scrip represented public land, and was granted by the United States, by the Act of Congress above referred to, to the several States, to be invested by them (see §§ 4, 5), other than ten per cent. thereof, and the interest in each State to be appropriated "to the endowment, support and maintenance of at least one college where the leading object" should be "without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts." It was further provided by the act of incorporation of the college (§ 9) as follows:

“In the event of a dissolution of said corporation, by its voluntary act at any time, the real and personal property belonging to the corporation shall revert and belong to the Commonwealth, to be held by the same, and be disposed of as it may see fit, in the advancement of education, in agriculture, and the mechanic arts. The legislature shall have authority at any time to withhold the portion of the interest or income from said fund provided in this act, whenever the corporation shall cease or fail to maintain a college within the provisions and spirit of this act and the before-mentioned act of congress, or for any cause which they deem sufficient.”

Since the original act of incorporation, there has been considerable legislation in regard to the college. By St. 1864, c. 223, its corporate name was changed to “The Massachusetts Agricultural College,” and it was provided that the location, plan of organization, government and course of study should be subject to the approval of the Governor and Council, instead of to the approval of the legislature. The power to fill vacancies in the board of trustees was, by St. 1871, c. 378, conferred upon such board, but by the Resolves of 1884, chapter 50, the power of appointment and removal was conferred upon the Governor, with the advice and consent of the Council, and the term of service was fixed at seven years. By St. 1866, c. 263, the Board of Agriculture was constituted a board of overseers of the college, with powers and duties to be defined and fixed by the Governor and Council. (See P. S., c. 20, § 5; R. L., c. 89, § 10). By St. 1894, c. 143 (see St. 1895, c. 57), the Massachusetts Agricultural Experiment Station was consolidated with the experiment department of the Agricultural College, and it was provided that the property of the former should be accepted by the trustees of the college “for said college in behalf of the Commonwealth” (§2). Other acts contain provisions in regard to the reports of the trustees of the college, in R. L., c. 19, §7, such reports being classified under “reports of public institutions.” Many appropriations in favor of the Massachusetts Agricultural College have been made, and free scholarships have been established there by the State. See, for example, St. 1909, c. 436. It has been provided that the books and accounts of the college shall be

kept under the direction of the Auditor of the Commonwealth, who shall audit the expenditures and receipts at least twice a year. (See, for example, St. 1909, c. 436, § 3.) St. 1889, c. 45, provides that such trustees shall be allowed and paid from the treasury of the Commonwealth "such sum as is necessary for their personal and incidental expenses incurred in the discharge of their duties, in the same manner as the trustees of other public institutions are now paid and allowed."

From these statutes it appears that the Massachusetts Agricultural College is not a mere agency of the Commonwealth. It has a distinct corporate existence. It is a public charitable corporation organized for educational purposes. The right to control its character and location was reserved by the legislature. The legislature expressly reserved the right to amend and repeal the charter, though this right was undoubtedly reserved by the general law. Gen. Sts., c. 68, § 41. It also expressly reserved the visitorial power, though such power was undoubtedly in the legislature apart from statute. *Amherst Academy v. Cowsls*, 6 Pick. 427, 433. Under these and other powers the legislature has to a considerable extent controlled the affairs of the college. Much of the property which the corporation holds has come to it by appropriation by the Commonwealth, either from moneys raised by taxation or from property granted to the State by the general government to be used for such purposes. See *Massachusetts Agricultural College v. Marden*, 156 Mass. 150, 156. All the original deeds of the real estate run to the Massachusetts Agricultural College, and in one or more of them it is described as a corporation created by law. The property transferred from the Massachusetts Agricultural Experiment Station is, by express statutory provision, held "in behalf of the Commonwealth." Generally speaking, however, it is apparent that under the form of organization of the college, property is held by it upon trust for the benefit of the public, subject to reversion to the Commonwealth in the event of a voluntary dissolution of the corporation. Except for this limited reversion, the situation is that existing in the ordinary case of a public

charitable corporation. As to whether the Commonwealth has any additional rights over the property, by reason of the fact that it was acquired by the expenditure of public moneys, I express no opinion.

Though these facts characterize the Massachusetts Agricultural College as a public charitable corporation, it does not follow that the college is a State institution. The words "State institution" are susceptible of various meanings. Very likely the college is such an institution within the meaning of some statutes. In the strict sense of the words, however, it is not, in my opinion, a State institution. To be a State institution implies that the institution, and the work it carries on, is directly under the control of the State, that its officers are agents of the State, and that its property is the property of the State. The Massachusetts Agricultural College does not answer these requirements. The fact that it is subject to legislative government and control, and the fact that the Commonwealth has contributed to its support, do not constitute it a State institution. *Chalfont v. State*, 37 Ohio St. 60.

Although, as I have said, the Massachusetts Agricultural College is not strictly a State institution, the legislature, as appears from statutes to which I have referred, seems often to have treated it as such. Whether action on the part of the Commonwealth and of the corporation, which shall establish the position of the college as a State institution, in the strict sense, and shall beyond question vest the title to its property in the Commonwealth, is desirable, is not for me to determine.

The second question as to which my opinion is desired is whether the trustees of the Massachusetts Agricultural College, as individuals, have a legal right to purchase land and later sell it to the Massachusetts Agricultural College at an increased price over the original cost.

My opinion is not sought as to the rights or liabilities of the trustees upon any specific state of facts. I can therefore merely state the general principle of law which is applicable. The trustees of the college are substantially directors of the corporation, and, like directors generally, stand

in a fiduciary relation to the corporation. The rule which applies to fiduciaries is stated in *Parker v. Nickerson*, 112 Mass. 195, 196, as follows:

“As a general rule, a trustee or agent cannot purchase on his own account what he sells on account of another, nor purchase on account of another what he sells on his own account. He cannot unite in himself the opposite characters of buyer and seller. And if he does so, the *cestui que trust* or principal, unless upon the fullest knowledge of all the facts he elects to confirm the act of the trustee or agent, may repudiate it, or he may charge the profits made by the trustee or agent with an implied trust for his benefit.”

See also,

Parker v. Nickerson, 137 Mass. 487, 497.

Old Dominion Copper Co. v. Bigelow, 188 Mass. 315, 321, 329.

S. C., 203 Mass. 159, 177, 178.

Hayes v. Hall, 188 Mass. 510, 511.

American Circular Loom Co. v. Wilson, 198 Mass. 182, 206.

Very truly yours,

DANA MALONE,

Attorney-General.