

HOUSE No. 2124

The Commonwealth of Massachusetts.

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, Mar. 12, 1913.

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

DEAR SIR:— I have the honor to transmit herewith my opinion submitted in accordance with the Order of the Honorable House of Representatives as follows:

“Ordered, That the Attorney-General be requested to inform the House of Representatives whether, in his opinion, the provisions of House Bill No. 1961, being An Act to authorize the city of Boston to assume the payment of the tolls for the use of the East Boston tunnel, a copy of which is sent herewith, would, if enacted, violate any provision of the Constitution of the United States or of the Constitution of the Commonwealth.”

House Bill No. 1961 referred to in said Order is entitled “An Act to authorize the City of Boston to assume the Payment of the Tolls for the Use of the East Boston Tunnel”, and provides as follows,—

“SECTION 1. The city of Boston is hereby authorized to appropriate from the tax levy each year, until the tenth day of June, nineteen hundred and twenty-two, the sum of one hundred and twenty-five thousand dollars to be added to the rental received from the Boston Elevated Railway Company for the lease of the East Boston tunnel, the sum total of which shall be used to provide for the payment of the interest and sinking fund requirements of the bonds issued for the construction of the East Boston tunnel. Said appropriation may be initiated by either the mayor or city council.

“SECTION 2. This act shall take effect upon its passage.”

While the inquiry of the Honorable House of Representatives is very broad in its terms, I assume that it is directed

toward the effect of such bill, if enacted, upon the provisions of St. 1897, c. 500, § 17, of which the material part is as follows:

“ . . . Said city shall collect from each person passing through said tunnel in either direction a toll of one cent: *provided, however,* that if in any year ending on the thirtieth day of September the receipts from such tolls, together with the rental above-provided for, amount to a sum so in excess of the interest and sinking fund requirements of said bonds for that year that the board of railroad commissioners is of opinion that the toll may be reduced, said board shall on petition of ten citizens of said city establish such reduced toll for the period of one year from the first day of January next ensuing, as will in its opinion yield an amount sufficient to meet, with said rental, said interest and sinking fund requirements for that year; or said board may altogether discontinue such toll when it is of opinion that such rental alone is sufficient to meet said requirements; but any such reduction shall be carried into effect by a provision for the sale of tickets, and the cash fare shall continue to be one cent. The whole amount of such tolls and of said rentals is hereby pledged to meet the principal and interest of the bonds issued to pay for the construction of said tunnel or tunnels, and this pledge shall be expressed on the face of such bonds as one of the terms thereof; *provided, however,* that after such tolls have been discontinued if said rentals shall for any year ending on the thirtieth day of September yield an amount more than sufficient to meet the interest and sinking fund requirements of said bonds for such year such excess over said requirements shall be regarded as general revenue of said city. In case in any year the rentals and tolls above-provided for shall not yield a sufficient amount to meet said interest and sinking fund requirements the compensation received by said city under section ten of this act shall be applied so far as may be necessary toward meeting such requirements. Said corporation shall be the agent of said city to collect such tolls under such arrangements as shall be agreed upon by said city and said corporation, or in case of disagreement, as shall be determined by the board of railroad commissioners.”

In discussing an amendment to this section which abolished such tolls and instead thereof required the city of Boston to set aside from the compensation received by it from the Boston Elevated Railway Company under section 10 of the same chapter a toll of one cent for each person passing through said tunnel in either direction, the then Attorney-

General, in an opinion to the Committee on Metropolitan Affairs (II Op. Atty. Gen. 505) said:

“It is to be observed that the pledge above referred to is obviously designed to afford security for the full and timely payment of the principal and interest of the bonds issued to pay for the work of constructing the tunnel, by specifically devoting a certain income to that purpose. If the income as assigned exceeds the amount necessary, the surplus may be treated as the general revenue of the city of Boston. If, on the other hand, the specified sources are not sufficient to provide the necessary sum, a third source of income is made available, namely, the income received by the city as compensation for the use of the public streets, ways and places, under the provisions of § 10. If, after experiment, it appears to the Board of Railroad Commissioners that the tolls and rental exceed the amount required for principal and interest of the bonds issued by the city, they may reduce the toll by making provision for the sale of tickets, though cash fares must still be paid in the same amount by passengers; and if the rental alone becomes sufficient for the specified purposes, the tolls may be discontinued.

“House Bill No. 1192 in effect abolishes one source of income, viz., the tolls, and provides that the amount which would have been furnished to the city from such tolls shall be payable out of the compensation received by the city under § 10. This may or may not diminish or materially affect the sources of income available as security for the bonds issued, since the amount received as compensation under § 10 by the city may or may not be sufficient to provide for all deficits which may exist from year to year in the rental, the significant effect of the provision being to abolish the tolls entirely. This, in my judgment, constitutes a material interference with and impairment of the obligation of contract between the city and the bondholders, created by § 17. If the effect of the proposed legislation were merely to substitute one security for another of equal value, it would be, if compulsory, objectionable on constitutional grounds; if the compulsory substitution be to provide a security of less value than the original, or one of a lower grade, it certainly conflicts with constitutional requirements.”

Again, in discussing the question whether or not it is within the constitutional power of the Legislature to abolish the tolls provided for in said section, the Supreme Judicial Court, in an opinion to the Honorable Senate and House of Representatives (*Opinion of the Justices*, 190 Mass. 605, 608), said:

“Section 10 of article 1 of the Constitution of the United States contains this provision: ‘No state shall . . . pass any . . . *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility,’ etc. Upon each of the bonds referred to, issued by the city of Boston in accordance with the provisions of the St. of 1897, c. 500, are stamped the following words: ‘East Boston Tunnel. The whole amount of the rentals for the use of and tolls for persons passing through the East Boston tunnel is pledged for the payment of the principal and interest of this loan.’ This statement, which was thus made a part of the contract on the faith of which purchasers have bought the bonds, was authorized and required by the statute. The fact that lies behind the statement, namely, that the rentals and tolls are actually set apart and pledged as security for this payment, is also a requirement of the statute. We have therefore a contract which rests not only upon the agreement of the city, made for a valuable consideration, but upon the deliberate action and solemnly pledged faith of the Commonwealth. The tolls referred to are the tolls then established by law and they cannot be diminished without reducing the security to which the owners of the bonds are entitled. It is plain that the sale of bonds, carrying on their face this stipulation, creates a contract with each purchaser which it is not in the power of the Legislature to impair.”

It appears to be well established, therefore, that any legislation which affects or impairs the security afforded by the collection of the tolls as above required to the holders of bonds to meet the principal and interest for which such tolls are pledged would clearly be unconstitutional, and this would be true notwithstanding the fact that some other form of security was substituted therefor. *Seibert v. Lewis*, 122 U. S. 284, 290; *Nelson v. St. Martin's Parish*, 111 U. S. 716; *Louisiana v. Pillsbury*, 105 U. S. 278, 287, 288.

So far as the proposed bill purports to substitute for the security afforded by the collection of the tolls from persons passing through the East Boston tunnel another and different form of security to be paid by the city of Boston from its general revenue as raised by taxation, and to abolish such tolls it would, in my opinion, be unconstitutional as impairing the obligation of the contract. While the bill is entitled “An Act to authorize the City of Boston to assume the Payment of the Tolls for the Use of the East Boston Tunnel”,

the bill itself, however, does not in terms confer any such authorization. The first part of the bill goes no further than to permit the city of Boston to appropriate annually the sum mentioned therein, "to be added to the rental received from the Boston Elevated Railway Company for the lease of the East Boston tunnel." It does not abolish the tolls themselves or affect them except only and in so far as they may be reduced or discontinued by the Board of Railroad Commissioners under the provisions of the section quoted upon the basis of a rental which includes the amount actually paid in by the Boston Elevated Railway Company, amounting to three-eighths of one per cent. of the gross receipts for each year ending September 30th of all lines owned, leased or operated by it, plus the amount appropriated by the city of Boston under the provisions of the proposed bill, if added thereto.

Whether or not such appropriation may be properly added to the actual rental as a basis for a reduction or discontinuance of the tolls, it is not necessary to decide, for, if such appropriation may not legally be added to or considered a part of the rental for such purpose, the tolls will not in any wise be affected by the enactment of said first portion of the proposed bill.

As to the second portion of the bill, providing that "the sum total of which shall be used to provide for the payment of the interest and sinking fund requirements of the bonds issued for the construction of the East Boston tunnel", there seems to be constitutional objection in that it requires that the appropriation provided by said act "shall be used" in such a way as to amount to an indirect abolition of the tolls in a manner not necessarily in accordance with the provision of the original statute hereinbefore quoted, St. 1897, c. 500, § 17.

Yours very respectfully,

JAMES M. SWIFT,
Attorney-General.

