The Sacred Skyline: The Conflict Over Height Restrictions for Copley Square

by

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ABSTRACT

This thesis presents an important event in the development of height restrictions for buildings, America's first zoning court case. The case took place at turn-of-the-century Boston in one of the City's most prestigious areas, Copley Square. A 12-story apartment house was proposed for the site between the Museum of Fine Arts and the nationally famous Trinity Church. The project generated opposition from all over the Commonwealth and led to the creation of a statute imposing height restrictions on the Square. The statute was violated by construction above its limits and what ensued was a legal battle that went to the U.S. Supreme Court. The Court ruled that the superstructure of the building had to be cut down but more importantly clarified the constitutional basis for zoning against height.

The basic intent is to depict the case through the debates of the opposing parties and focus on their specific interests. This not only provides insight into perceptions of the City at that time but also forms a strong background for understanding the Supreme Court decision. The importance of this decision is also traced as a first step towards the development of comprehensive zoning.

Thesis Supervisor: Robert Fogelson
Title: Professor of Urban Studies and Planning
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CHAPTER ONE: BACKGROUND

INTRODUCTION

During the late nineteenth century, towns and cities experienced rapid growth all over the U.S. As urban populations began to swell, progressive reform elements recognized that the American city was all too often merely a place in which to make money; it presented an environment of impersonality, corruption, and over-crowding. The Progressives spoke of returning the government to the people and were prepared to make use of state intervention wherever it suited their purposes. To many at that time, the city became more than a new social form but a threat to their values which they would fight to preserve.

The following case study presents one example of this fight which also serves as one of the most important events in the development of building height restrictions. The battleground was Copley Square in Boston, Massachusetts with the enemy being the Westminster Hotel, otherwise known as the Westminster Chambers. The hotel appeared to be planned and designed in conformance with the existing building laws but considerable opposition was formed to block its construction. The resulting confrontation gave rise to the Statute of 1898 which limited building heights about the Square. The role of the Westminster Hotel will be discussed not only in regard to the creation of height restrictions on the Square but for its
impact on the constitutional basis of zoning as well. In order to understand how the hotel could have been so significant, it is first essential to understand the context and environment of Copley Square.

THE DEVELOPMENT OF COPLEY SQUARE

The context for the development of the Westminster Hotel is an open area, popularly known as Copley Square. Copley Square is located at the intersection of two building grids which had been laid out on reclaimed land during the mid-nineteenth century. (Figure 1) These grids composed the Back Bay and the South End with the Copley Square area being situated near the middle of the Back Bay. Within the Back Bay, land values were higher towards the Public Gardens, the Charles River, and Commonwealth Avenue and decreased outward from these points. The Copley Square location lay relatively distant from any of these highly valued areas.

The Copley Square area was somewhat unique in that its process of development differed from the building patterns found within the Back Bay and South End grids. These areas had been primarily created out of a sequential process of fill and build which meant that as soon as the land was laid, owners built on their property. The filling continued westerly with structures following closely behind. This type of building pattern created an environment where within any block there were buildings of similar age and architectural character. When the land fill of the Back Bay and the South
FIGURE 1 THE COPLEYSQUARE LOCATION
End met at the Copley site in 1870 the sequential process of fill and build was abandoned. Instead, structures were erected in a piecemeal fashion and only after all of the land had been laid out.² It took over 20 years to fully enclose the boundaries of the area and this led to a more complex architectural environment than within the grids themselves.

When the initial phase of construction began in 1872 it included only public buildings around a vacant parcel of land. The first of these public structures was the Museum of Fine Arts which came to be situated on the south side of the area. This land had the lowest value of all of the lots in the vicinity and the building was principally conceived to improve this value.³ The land where the Museum was located had earlier been owned by the Boston Water Power Company. The Company had been persuaded that the erection of the Museum would serve to increase the value of their other holdings in the vicinity, furthermore the public could derive the benefit of having the Museum of Fine Arts in proximity to the Museum of Natural History and M.I.T. already located in this area. The land was conveyed to the city to be used for an Institute of Art and was held until the Massachusetts Legislature issued an act incorporating the trustees of the Museum of Fine Arts.

The second large-scale public building to be located at the Copley area was Trinity Church (1872-7). The Church's former site had become unsatisfactory due to commercialization and had spent years searching for an appropriate site for
relocation. A competition was held for the design of the Trinity Church with the final design by Henry Hobson Richardson providing an important front to the urban space which then came to approximate a square. (Figure 2)

A third piece of development was comprised of two public buildings, the Chauncy Hall School and the Second church, located on the north side of Boylston Street. The two buildings were relatively small but together presented themselves as one continuous facade facing the Copley site. The Chauncy Hall School became one of the most celebrated schools in Boston and acted to enhance the land values in this part of the city. Contemporary with this twin development, and located on the northwest corner of the Copley area, was the (new) Old South Church situated at the intersection of Boylston and Dartmouth Streets.

By 1876, the five public buildings above described were arranged as a surrounding boundary to the central space. Over the next four years, the north side to the square would come to be infilled. This infill was comprised of single-family brownstone dwellings and included two apartment-hotels built adjacent to each other at the northeast corner of the area. After a decade of development, the large-scale structures erected at the Copley site enclosed the area. (Figure 3) The south side of the Copley area was defined by the Museum of Fine Arts as the principal facade facing the open space, the central tower and mass of the Trinity Church created the
FIGURE 2  THE TRINITY CHURCH LOCATION
FIGURE 3 LARGE SCALE STRUCTURES AT THE COLEY SITE
eastern focus, and on the north side, development presented itself as a continuous wall with the Old South Church at the northeast corner. The urban space which was created became an important place and architectural center of the city and accordingly the area greatly increased in value. The next phase of development would be confined mainly to the erection of apartment-hotels.

In looking at the reasons for the rise of the apartment house it should be noted that there was virtually no precedent for this building type in the United States when the Hotel Pelham appeared in Boston in 1857. Boston appears to have this distinction due to a very prevalent French influence with many of the leading exponents of French style residing in the city. The Pelham not only introduced the first mansard roof, but the first "French Flat" hotel to Boston.

The Pelham remained Boston's only apartment house until the late 1860's due to the then radical nature of multi-family occupancy in America. Of the four hotels that followed, three were located in the Back Bay and the fourth was erected opposite the Pelham. After this initial stage of introduction, large numbers of apartment houses appeared so that by 1878, there were over a hundred. In describing these early apartment houses, the 1885 edition of King's Handbook of Boston states:

The "French Flat" or Continental system of dwellings, sometimes called "family hotels",--a single tenement occupying the whole or part of a
floor, instead of several floors in a house, gained its foothold in America by its introduction in Boston. Before the annexation of the surrounding districts, Boston is said to have been the most densely populated city in America; and there was a natural demand for economy in space.

The reason for the success for the new building type is revealed in the King description, with the comparison of the individual "tenement" or "apartment" with the several floors of a townhouse. The apartment house attempted to duplicate the established three or four-story townhouse in most respects and improved upon it in one significant aspect. The apartment afforded much larger reception areas which in being on one floor without a staircase could be contiguous and spacious in a way that would be impossible to achieve in the typical connected townhouse. A townhouse would have at most three or four rooms on each floor while an apartment hotel (at the upper middle class level) usually had five rooms and a bath on a floor, at a minimum. This competitiveness in reception areas was essential as people entertained according to the spacious fashion of the day. The apartment hotels also offered many luxuries and technological features which became major factors in their popularity.

As a result of the increasing demand for units and desires for profits, most early apartment houses were quite tall. Although the apartment house fulfilled the desires for a horizontal rather than a vertical lifestyle, the height of these buildings was uncomplimentary to every type of
FIGURE 4 REPRESENTATIVE PLANS
residential streetscape in Boston. Therefore, although the individual apartment achieved social parity with the townhouse, it was not popular in terms of its exterior appearance.

The problems of scale which the early apartment house posed on residential streets were not the case on commercial thoroughfares and this led to the desirability of Huntington Avenue and Copley Square. By 1890, apartment hotels had come to surround the Square. (Figure 5) The fact that these hotels attracted mainly Social Registered people gives an indication of the type of clientele to which a commercial enterprise established at Copley Square might cater. Commonwealth Avenue, however, was not a commercial thoroughfare and the construction of an apartment hotel named Haddon Hall in that location prompted the enactment of height restrictions for structures bordering on parkways to 70 feet. (Statute of 1896, chapter 313.) Although Haddon Hall duplicated the side-hall-and-bay window townhouse plan, it stacked up this plan 10-stories high which resulted in great neighborhood opposition.6

After the establishment of the apartment hotel, the final important step in the development of the Copley area was the acquisition of land west of Dartmouth Street by the Trustees of the Boston Public Library for a new library building. With this construction and city acquisitions of interior land pieces, the site came to approximate a square bisected on its diagonal by Huntington Avenue. The library, designed by
FIGURE 5 APARTMENT HOTELS AROUND THE SQUARE
McKim, Mead and White, and finished in 1896, reinforced the public nature of the Square and represented the completion of a 25-year cycle of building. (Figure 6) The library and Trinity Church became two of the most important public buildings in the city and the Square became a topic for discussion about architectural fashion. With the location of significant structures and increasing land values, Copley Square became a desirable location for commercial and private enterprise which could use the advantageous location to their benefit. Not only was the area situated at the center of the most aristocratic part of the famous Back Bay but it was also convenient to the railroad stations, electric car service, and trading centers as well.

**INCEPTION OF THE PLAN**

The original idea to build the Westminster Hotel began with Henry E. Creiger, a Chicago architect, and George W. Arthur, a Boston promoter. Their concept was to construct a million dollar hotel by borrowing $500,000 on a mortgage and then raising an additional $500,000 through a public sale of stock. This stock would offer dividends of 12 percent per year and provide sufficient income to pay $30,000 annually towards a sinking fund to meet the mortgage payments. By compounding this series of annuities, at an annual interest rate, the sinking fund would accumulate value over time enabling the mortgage to paid off in 13 years. The estimated
FIGURE 6 COMPLETION OF THE 25 YEAR CYCLE OF BUILDING

[Map Diagram]

NEW OLD SOUTH CHURCH

BOYLSTON ST.

DARTMOUTH ST.

HUNTINGTON AVENUE

TRINITY CHURCH

ST. JAMES ST.

MUSEUM OF FINE ARTS

BOSTON PUBLIC LIBRARY
return on the project was expected to be sufficient to cover not only the annual stock dividends, but the interest on the mortgages, taxes, insurance, operating expenses, and payments on the sinking fund as well. If this could be accomplished, the end result would be debt-free ownership of a million dollar property in 13 years, costing only half that amount. The plan was also particularly attractive in that it did not require any cash outlays from the parties participating in the venture.

The next step in implementing the plan was to find a suitable site. This task was made particularly easy because of Arthur's familiarity with development in Boston and the partners selected 17,760 square feet of land at the corner of Trinity Place and St. James Avenue. This site was occupied by six houses belonging to five owners. (Figure 7) The cost of these lots had originally been $3.50 per foot in 1877 but due to the increasing worth of the area they were reassessed in 1897 at $5.97 per foot or $105,900. This was exclusive of any buildings which themselves were assessed at $92,000, making a total assessed cost for both land and buildings of $198,300. The owners of the houses agreed to the plan for increasing the value of their property and on July 1, 1897, they signed a trust agreement. Under this agreement, Henry B. Williams and Babson S. Ladd became trustees for all of the owners of the lots with the provision for the erection of a 10-story, 120 foot, apartment-hotel on the site. (Figure 8)
FIGURE 7 PROPOSED SITE AND PROPERTY OWNERS

FIGURE 8 SKETCH OF THE PROPOSED HOTEL
On July 19, 1897, the owners signed deeds conveying their property to "a conduit" Nathaniel G. Green, who, after raising $425,000 on a first mortgage and $75,000 on a second mortgage for them, reconveyed the property (subject to those mortgages) to the trust to issue the trust stock. The owners received $308,400 in cash out of the money raised on the mortgages and $56,000 in stock of the trust (566 shares) for a total payment of $365,000. This represented a profit of $166,700 above the value of the land and buildings or a 46 percent return on the deal. The remaining balance of the trust stock would be used for the payment of the construction contracts.

At the same time, the firm of Woodbury & Leighton, a distinguished builder in Boston, departed from their traditional business practices and in effect made a contract with themselves. They took part in the formation of a corporation called the Westminster Construction Company and made their contract with this corporation. This company was the embodiment of the whole speculation, with the contractors as well as the owners and architect entering into it. They became the members and stockholders of this company which would make and execute the contracts for the construction of the building which the trustees, who held the legal title, did not want to be personally obliged to superintend.

The Westminster Construction Company was incorporated under the laws of Maine and the list of the stockholders filed with the Secretary of State of Maine shows that of 1,500
shares issued; Woodbury & Leighton took 500, the architect and promoter between them took 500 shares, and two members of the Fawcett Ventilated Fireproof Co. (the structural contractor) took 400 shares. George Arthur was made the President, Isaac F. Woodbury was the Treasurer, and Henry Creiger along with an agent of the Fawcett Co., and one of the land owners, constituted the Board of Directors.

CONSTRUCTION OF THE HOTEL

The construction process started with the procurement of a permit to construct the foundations of a 10-story apartment house of the dimensions 148 feet on St. James Avenue and 100 feet on Trinity Place. This permit was issued by the Building Department of the City of Boston on July 16, 1897. Five days later, the department issued a second permit for the erection of a building of 10-stories (120 feet) complete with architrave, frieze, and cornice as planned and designed "provided the person conforms to the provisions and statutes related to the construction of buildings in the city of Boston."

At that time, the general limitation of the height of buildings in Boston was, by the Statute of 1894, chapter 443, 125 feet, or not exceeding two and one-half times the width of the widest street on which the building stands. This latter limitation would permit a building of more than 120 feet upon this site. Either way, the building as contemplated would be allowed.
The trustees then made a written contract with the Westminster Construction Company to erect the hotel for $635,000. Under their contracts, the Westminster Construction Company agreed to take at par so much of the trust stock as was not taken by the other contractors or by the original owners as part payment of their estates. Under this provision, they acquired 3869 shares, representing an interest of about three-eights in the ownership of the building and land. Woodbury & Leighton agreed to take at par 300 shares, representing an ownership of about one thirty-second, and the Fawcett Company took 115 shares. The balance of the contract price, under each contract, was payable in cash.

Under the permits, the work began with the demolition of the houses on August 27, 1897. The demolition was completed by September 16, on which date the construction of the foundations of the new building was started. Public agitation at once began with the demolition serving as the first notice to the public of the construction of the Westminster Hotel. Persons interested in the Museum of Fine Arts, Trinity Church, and other public buildings surrounding the Square applied to the Construction Company to see if some arrangement could be made by which the height of the building could be reduced below 120 feet. The result of their negotiations was an offer found unacceptable. But, what really brought attention to the hotel was a letter from the Westminster Construction Company, written on September 23, to a prominent member of the Trinity
Church offering to stop the building at 7-stories and then sell the land and building for $1,085,000. The Construction Company estimated that even at this price there would be a return on investment of from 8 to 10 percent on the property. As an alternative proposition the Company offered to limit the building to 7-stories, if they were paid $75,000 per story for each of the three stories omitted (i.e., $225,000). In other words, they were offering to sell the right which they claimed they had, to build to 125 feet. From the point of view of the trustees of the Public Library, they were powerless to prevent the construction because there just was no money available for that purpose. With this offer, the agitation exacerbated and the Westminster Hotel was vigorously discussed in magazines and newspapers.

Nevertheless, the construction process continued and the foundation was completed by January 1, 1898 at a cost of $30,000. The steel framework was then delivered to the site and by January 14, the bill which eventually became the new height statute was introduced thereby showing the owners of the Westminster that public opinion was strongly against their project even at this early stage.

The building as designed was for residential apartments of the best character. (Figure 9) The framework was completely steel. The walls, floors, partitions, and staircases were of brick, marble, or terra-cotta. It was state-of-the-
art "fireproof" construction with all modern appliances for comfort and safety. (Figures 10 and 11)
FIGURE 9  FLOOR PLAN OF THE WESTMINSTER HOTEL
FIGURE 11 CONSTRUCTION OF THE HOTEL
CHAPTER TWO: HISTORY OF THE STATUTE OF 1898

THE RISE OF OPPOSITION

An early feature of the movement for the restriction by law of building heights on Copley Square was a circular, the first signer of which was ex-Mayor Frederick O. Prince, that was distributed to call a public meeting for discussion of this topic. The circular was widely circulated among the inhabitants of Boston, especially in the Back Bay district, and to the large property holders of the city, by a committee which was formed and held its first meeting in October 1897 for the purpose of stopping the Westminster building.

The circular stated:

A most important question now confronting the people of Boston is this: Shall all that has been done to make its chief square beautiful go for nothing? The proposed erection on the corner of St. James Avenue and Trinity Court of a building rising to the height of 125 feet means a serious disfigurement of Copley Square. It negatives the efforts already made to give architectural and artistic beauty to the square, and it is bound to discourage those who are studying how best to develop its possibilities as the future center of Boston.

The undersigned, believing that the erection on Copley Square of buildings rising to an extreme height would destroy the hopes long cherished by the public for the adornment of the square and convinced that a vigorous expression of public opinion will have influence in protecting the square in the future . . .

The committee consisted of the trustees from the Museum of Fine Arts, the Public Library, the Institute of Technology, leading members of Trinity Church, and other well known
citizens. It was obvious to the group that nothing could be accomplished until the assembling of the State Legislature at which time they could present their grievances. When the Legislature met on January 1, 1898, the foundations for the Westminster Hotel, adapted to a 10-story building for which they had a permit, had been completed. None of the steelwork or the materials were delivered until after the Legislature convened. But, by January 11, these materials which had been in production since the contract signings in September, began to be delivered.

A petition was presented to the legislature signed by J.H. Benton, a trustee of the Public Library and by one of the Subway Commissioners, calling for a bill to limit the height of all buildings or structures within 500 feet from any line of Copley Square to a height of 80 feet from the sidewalk to the highest point of the roof. The petition and accompanying bill were presented to the House of Representatives and were subsequently supported by a petition signed by more than 3,000 people from all over the Commonwealth. The petitioners represented taxable property valued at $75,000,000. J.H. Benton put this amount in perspective:

This amount exceeds the assessed valuations according to the last apportionment of any city in the Commonwealth except six. There are five counties in the Commonwealth which have a less valuation than this amount. The amount of taxable property in the Commonwealth represented by this petition exceeds the valuation of the city of Springfield by more than ten million dollars, and is a little more than the entire valuation of the city of Lowell. These
valuations are exclusive of the value of property in the charge of the Massachusetts Institute of Technology, the Museum of Fine Arts, and the Trustees of the Public Library. If this is added, you have before you applications for this legislation from persons and interests in the Commonwealth representing at least $100,000,000. Among the more notable petitioners were; George L. Meyer, the recent Speaker of the House; William Minot, the largest individual taxpayer in Boston who controlled and managed more real estate than any other person in the city; Charles W. Eliot, President of Harvard College; Edward Everett Hale, clergyman; and many other prominent people from all parts of the Commonwealth. The extent of concern is also reflected by the fact that additional petitions were also presented from many important cities and towns including Worcester, Lowell, Springfield, and New Bedford.

On January 29, 1898, the Park Commissioner of Boston wrote to the trustees of the Westminster claiming that their plans constituted a violation of the restrictions imposed by Chapter 313 of the acts of 1896 as amended by Chapter 379 of the acts of 1897 which authorized the establishment of a building-line on parkways to 70 feet. The Westminster building is only 60 feet in a straight line to the corner of Copley Square which the Commissioner stated is a public park.

The Joint Committee on Cities held a number of hearings in February and March at which the defendants and the property owners on the north side of the square, who, with one exception, opposed the bill, were represented by counsel. The
petitioners were represented by J.H. Benton and E.W. Burdett for the Boston Public Library, Samuel J. Elder for the Art Museum and Institute of Technology, and Charles W. Bartlett for the original petitioners. These men were all busy lawyers but yet rendered their services gratuitously for what they considered to be the interests of the public. The petition was also supported by the owners of the Ludlow and Pierce buildings and one owner of a dwelling on the north side of the square. 12

The remonstrants to the bill were no less adequately represented. The Westminster Hotel was represented by A.E. Pillsbury, an ex-attorney-general, and for other remonstrants were ex-Congressmen Sherman Hoar and S.Z. Bowman. The city of Boston was also represented through its law department. These hearings were largely attended with full accounts in the newspapers creating a widespread interest.

A statement was presented to the Committee written by President Frederick O. Prince of the Public Library Trustees against the erection of tall buildings in or near Copley Square. The protest stated that Copley Square was the most beautiful of all the Squares in Boston--surrounded by structures like Trinity Church and the Public Library which "are monuments of aesthetic taste and objects of great urban pride." If buildings the height of the Westminster Hotel are to be built about the Square, its beauty would be greatly impaired and the entire architectural effect of the entire
Square would be seriously affected. In protecting his own interests, Prince concluded that the Library would be especially injured.

Another protest was offered, this time on behalf of the Museum of Fine Arts, which also claimed to be chief sufferer. The Museum's complaint alleged that the Westminster Hotel as proposed would interfere with the light necessary for the exhibition rooms on the side of the Museum which is directly opposite to it. In conclusion, the Museum took the position that an 80 foot restriction on building heights about the Square would be the highest acceptable limit. Some of the other remonstrants had even tougher positions, including Colonel Henry L. Higginson, the first witness to be heard. He stated that those who erect tall buildings in such a place are ignoring the rights of society and owe a duty to those who have invested large sums of money in making the Copley Square area "ornamental." The Westminster Hotel was termed a "monstrosity" which would be a disgrace to the city. Colonel Higginson favored a height of 45 feet. 13

Complaints were also offered to the Committee that the Westminster building would be detrimental to the architectural appearance of Trinity Church which is located directly opposite the Hotel on the northerly side of St. James Ave. A resolution of the wardens and vestrymen of the Church set forth that in their judgement a height exceeding 70 or 80 feet was unreasonable and excessive. The adverse impact of the
Westminster building was illustrated by a sketch portraying a 125 foot building rising above the Square. According to the newspapers, "the effect was grotesque and those who crowded about the table burst into applause." This sentiment was amplified by the counsel for the petitioners who referred to the Westminster as "a dry goods box covered with terra-cotta."

Other issues of importance to the petitioners included the threat of fire. If a fire broke out, the valuable collections of art and literature stored about the Square could possibly be destroyed. This was an especially sensitive issue due to Boston's experience with the great fire of 1872 and the argument was made that it injured no person more to limit the height of buildings than to say that wooden buildings could not be built in the North End. A communication was also read from the Society of Architects stating that in its opinion, the erection of buildings in the vicinity of Copley Square of above 80 feet would destroy the beauty of the Square.

The counsel for the petitioners stressed that the reason that an expensive building like the Westminster could be profitable was due to the value given to its location through the enormous expenditure of public money in and around Copley Square. Taking into consideration gifts by the State, the City, and individuals for educational and religious institutions, $15 million had been spent. It was this expenditure by the public that the owners of the Westminster Chambers were trying to turn to their own private profit.
No evidence was introduced by either side bearing on the question of whether Copley Square constitutes a public park. But, there was evidence that large sums of money had been expended; gifts of land by the state and the city, and private donations for buildings in the immediate area of the Square. These buildings included the Library, the Art Museum, Institute of Technology, Natural History Building, Normal Art School, and Horace Mann School for deaf mutes. These expenditures had greatly enhanced the value of the property in the neighborhood held by private owners.

PUBLIC VERSUS PRIVATE USES

During the hearings, the use of statistics was very important as they were presented in order to portray the nature of the Square and its adjacent areas. One of the primary issues raised was the public versus private composition of the Copley area. Over half of the land was devoted to religious, educational, charitable and other public uses. The land thus occupied had a total valuation of nearly $10 million. The collections of books, manuscripts, paintings, statuary, and other works of art in these buildings were worth 5 to 6 million dollars, although many were irreplaceable. This made a total valuation of land, buildings, and personal property within the area more than $15 million. The statistics also showed that the public/private balance changed dramatically upon the Square where the value of the property
put to public use exceeded the value devoted to private use by almost $5 million. (Figure 12)

**COLEY SQUARE AS AN EDUCATIONAL CENTER**

The Commonwealth and the city made this district a great educational center. Over 4,000 students and teachers attend schools within it each day. The Museum of Fine Arts exhibits its holdings for the use and enjoyment of about 200,000 people each year without charge. Moreover, more than one million people enter the Public Library building annually to freely use and enjoy its collections. As J.H. Benton remarked, "There is no other district like it in any city in New England or, I believe, in the United States." The area was further distinguished in a letter written by clergyman Edward Everett Hale who said, "The Commonwealth with its eyes open has established a university around Copley Square."

The Commonwealth gave to educational and other public purposes 363,300 square feet of land in the Back Bay. Within this district it gave to the Public Library, the Horace Mann School, the Massachusetts Institute of Technology, the Society of Natural History, and for Copley Square 200,000 square feet. The Commonwealth retained the right to re-enter upon all of these lands if they are used for any other purpose than the public purposes for which their use was given. This does not include the 95,500 square feet given by the city to the Museum of Fine Arts.
FIGURE 12  PUBLIC VERSUS PRIVATE USES

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<td>Value of land ($)</td>
<td>5,218,068</td>
<td>4,368,000</td>
<td>9,586,068</td>
</tr>
<tr>
<td>Value of buildings ($)</td>
<td>4,470,371</td>
<td>4,070,000</td>
<td>8,540,371</td>
</tr>
<tr>
<td>Total Valuation ($)</td>
<td>9,688,439</td>
<td>8,438,000</td>
<td>18,126,439</td>
</tr>
</tbody>
</table>

| Area (ft²) of estates          |              |              |              |
| abutting the Square            | 273,687      | 76,537       | 350,224      |
| Value of land ($)              | 3,411,423    | 1,008,900    | 4,420,323    |
| Value of buildings ($)         | 3,639,000    | 699,300      | 4,338,300    |
| Total Valuation ($)            | 7,050,423    | 1,708,200    | 8,758,623    |
The land and buildings within this district are valued by the assessors at $18 million. Of this amount, just over half is exempt from taxation under the law of the Commonwealth, as devoted to religious, charitable, and educational uses. If you add to the real estate thus exempt from taxation within this district, the value of the collections of the Public Library and the Art Museum which have either been given for public purposes or purchased with city money, and are exempted from taxation, then within the district there is exempt from taxation property put to educational, religious, and benevolent purposes property worth 14 or 15 million dollars.

Looking to the estates abutting on Copley Square alone, the land and buildings put to these uses are valued at $6,650,000. If all property is included, personal and real, upon the Square alone for these purposes, it is valued at over $11,000,000. J.H. Benton said, "Practically, this property which has been given by the taxpayers of the City and the Commonwealth and by benevolent and charitable persons belongs to all the people."

PROPERTY VALUES ON COPLEYSQUARE

The petitioners contended that the millions of dollars spent by the City, the Commonwealth, and by benevolent people to erect beautiful buildings for the benefit of the public, have resulted in an enormous increase in the value of the property held by private owners within the district. William
Minot said that this increase was due to two reasons:

One, that owing to the expenditure of seven or eight million dollars in public buildings the Square has been so beautiful as to be unique in America. Another, that the new station to be erected on Dartmouth Street at the expense of the corporations has added to the value.

In other words, the increase of value which the owners of private property in this district have already received is due as Minot says, "entirely to the expenditure of money to which the private owners upon Copley Square have not contributed." He added, "It does not seem altogether grateful; indeed, it may be said that it hardly seems decent, that the private owners on that Square should now seek to destroy the beauty which at such an enormous expense has created a part of the value of their lands."

As an example of the profit which these private owners have realized, the eleven owners of property on Boylston Street between Clarendon and Dartmouth Streets will be illustrated. These owners purchased their property of 65,000 square feet for $215,188, or on average $3 per square foot. At the time of the hearing, the property was assessed at an average valuation of $15 per square foot while land on the next block was assessed at $7.50 per square foot, thereby demonstrating the effect of public expenditures in Copley Square on its real estate values. Not only have they had the profitable use of this property but they could sell it with a restriction of 70 feet in the height of buildings upon it for a sum which would give them a profit of more than 400 percent
upon their investment. Benton contended that the eleven owners of the estates upon the north side of Copley Square have within twenty years made a profit of more than $750,000. In fact, when the 70 foot limitation on buildings abutting parkways affected Commonwealth Avenue, the building which prompted the restriction, Haddon Hall, did not see values depreciate there. Additionally no further bills have been introduced to correct any wrongs which could have been created.

Taking one of the estates for an additional illustration, the Second Church purchased its 13,440 square feet of land on May 9, 1877 for $43,770 or $3 per square foot. The assessed value of this land alone had increased to $178,000 or $13 per square foot by 1898. The Church has had the use of this property, been exempt from taxation upon it, and it is now worth more than four times what it cost.15

CHARACTERISTICS OF THE DISTRICT

At the hearings, the point was made that the district was peculiarly unlike any other within the Commonwealth. This is due not only to the fact that the larger part of it was devoted to charitable, religious, and educational uses, but that the height of buildings upon the larger portion of it is already practically restricted. The contention was made that the owners of less than one-half of the district can therefore build above all the rest. The private owners of the unrestricted scattered pieces of land throughout the district
would have an advantage over all the rest of the territory by reason of the fact that they could build to 125 feet. These owners would have this advantage over the rest of the territory because the rest of it is covered with public buildings constructed with money raised by taxation, or given by benevolent people. The result has been the addition of value to the private property which the owners of the Westminster seek to use to the injury of all the other property in the area.  

THE CONSTITUTIONALITY OF THE LAW

The Westminster representatives claimed that the petitioners asked for special legislation. To this point was the counter-argument that they seek such legislation for "a special case". The petitioners felt that it was fortunate that there is nothing in the Constitution of the Commonwealth "which prevents the Legislature from passing a wholesome law because it is special in its application." There is not only no provision against special legislation in the Constitution of the Commonwealth, but there is a special provision for such legislation. Article 4, Chapter 1, of the Massachusetts Constitution provides that:

Full power and authority are hereby given and granted to the said General Court from time to time to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth.

Examples were also given that this power has been freely
exercised in the past and that the laws of the Commonwealth are full of special statutes applying to specific towns and localities and to specific portions thereof. Such a limitation has already been imposed upon the entire city to the extent of 125 feet in height. Another limitation has also been specially imposed upon the owners of all estates upon Commonwealth Avenue and upon other streets and areas bordering upon public parks, whereon the Park Commissioners have established a building line of 70 feet. Therefore, the Commonwealth has exercised its right to regulate reasonably the use of private property in the public interest. The case of the building-line on parkways is noteworthy in that not only has no claim for damages by this limitation been made, but also no change in the valuation of property on the Avenue been caused by the restriction of 70 feet.¹⁷

William Minot, one of the Building Commissioners who framed the building Act of 1892 for Boston, was of the opinion that such a restriction would benefit rather than harm the estates in the district. In 1884, the Old South Society bought two lots next to their property on Boylston Street, unrestricted, for $10,220. The next year, they sold the same land with restrictions providing that no building should be erected on it more than four-stories high, and that about 20 percent of it could never be built on at all. Even so, the parcel brought $23,600. This examination of the taxable valuations of this property, and of adjacent property unre-
stricted shows that the valuations of the two lots and of the five adjoining lots on Boylston Street were the same before the restrictions were placed upon the two lots, and that the valuation of the seven lots (including the two restricted lots) has continued to be uniform. No owner of these restricted lots has ever complained because they were valued at the same amount as the unrestricted lots immediately adjoining.

The valuations also show that whereas property on Boylston Street abutting upon Copley Square was on average assessed at $14 per foot, property on Boylston Street in the next Square was assessed at only $7.50 per foot. The petitioners contended that these facts show two things: First, that William Minot is right when he says that the restrictions would not injure the property. Second, that he is also right when he said that the value of the property on Copley Square has been largely created by the expenditure of public money in the buildings about it. Therefore even if the value of the property should be somewhat reduced by the restrictions asked for, the reduction would be only a portion of the value which has occurred to this property by the expenditure of public money. As Benton said: "... the Commonwealth would only be reasonably regulating and controlling the value which has been put upon this property by the money of the Commonwealth and City." The Counsel for the Westminster countered that the right to build as high as the owner pleases is a property
right. If he is restricted in that right, his property is injured, and he should have compensation.

THE RIGHTS OF PRIVATE LANDOWNERS

The petitioners argued that the Constitution protects private rights so that no act of the legislature can injure them. If the legislation does not provide for compensation for any private property which is injured, it will be void. As Benton said, "You cannot injure them if you would, and nobody asks you to do so." While the Constitution protects private interests, so that the Legislature cannot injure them, it confides the public interest solely to the General Court, "commanding it to pass all such wholesome laws as may be for the public interest. It puts the public interest into your keeping. The petitioners believe that large public interests require your protection here, and hence they come to you, as the only power to which they can appeal, for such protection. If you find these interests do not require protection, it is as much your duty to provide it by general or by special legislation, as you may deem expedient, as it is the duty of the judiciary to protect the rights of private property in the courts." He went on to say:

Every landowner holds his property subject to the right of the public to lay out roads as well as other improvements. The public charges him with these betterments and this must be paid or else lose the land. Even though his idea of development may be different, he must pay because he holds his land not for himself alone, but subject to the sound judgement of the body politic, and to public convenience and neces-
sity. The law says that if public convenience and necessity require these things, he must submit, and without compensation. It is the good of the whole, and not his good, that is to be considered.

THE WESTMINSTER POSITION

Henry B. Williams, one of the Westminster Trustees, appeared before the Committee and claimed that buildings of only six or eight stories could not be profitable on land of this high value. Williams' testimony carried some weight in that he owned and controlled three other hotels and was the third largest private taxpayer in the city of Boston. Williams explained that the legislation would be an unfair hardship because if he was prevented from erecting the Westminster to its proposed height he might see himself surrounded by 125 foot tall hotels while not being able to build a similar structure. Williams stated that the value of property in Copley Square was due more to commercial desirability, being located at the apex of three great thoroughfares, than to any aesthetic sentiment. With increasing value put upon this property by the assessors, Williams felt that higher construction was absolutely essential to a fair return on investment.

The claims stated by Henry B. Williams were countered by the petitioners who cited the enormous profits paid to the landowners as well as the letter to a member of Trinity Church. As mentioned previously, the letter stated that
buildings of moderate height would be profitable in the Copley Square area thereby refuting the Williams claims. On this point William Minot added that it would be difficult to see why an apartment house with restrictions could not be as profitable on Copley Square as upon Commonwealth Avenue where they exist and are said to be profitable.

Interestingly, T. Webster King, the owner of a lot on one corner of Dartmouth and Boylston Streets told the Committee that the Public Library was "squatty" in appearance and should have been 20 or 30 feet higher. He saw no reason why a location such as Copley Square should not be ornamented, as, in his opinion it would be by the erection of the most lofty and elegant buildings that could be erected under the current law. King's counsel, Sherman Hoar added that the opposition to the erection of the Westminster Hotel was hysterical and that the facts had been grossly exaggerated. Hoar presented drawings by a Boston architect to explain that a building of 125 feet behind the Public Library would be entirely invisible from any point inside Copely Square. Hoar stated that a building would have to be 127 feet, or 2 feet above the allowable limit, in order to be seen behind the Library from Trinity Church.

A.E. Pillsbury, Counsel for the Westminster Trustees, stressed that the foundations for the new hotel had already been laid and that contracts representing $600,000 had been made as early as August 1897. Pillsbury made the point that
the Legislature had the power to limit the height of buildings only in accordance with the police power which is to be exercised in cases where the public health is jeopardized. Pillsbury continued that the police power could not be used legally in the interest of art and that the Supreme Court would declare any Legislation unconstitutional if it restricted building heights in the interest of art.

CLOSING ARGUMENTS

In the closing argument before the Committee, J.H. Benton summer up the petitioners' feelings in regard to the Square by stating:

Neither argument nor illustration are needed to make clear the imperative duty of the Legislature to protect this Square and the district about it from the irreparable injury which now threatens it. The question is plain and simple: Do you approve this threatened injury to this beautiful square, and all the precious interests upon and about it, or do you not. If one of these monstrous structures is put up it will be a constant menace to the safety of the treasures of art and of letters, and of all the beautiful and costly buildings about it will be a lasting shame and disgrace to the City and the Commonwealth. the Legislature alone can prevent this. If it does not prevent it it will be because it approves it. If you, gentlemen, do not report legislation which will prevent it, it must be because you approve it. And if any of you should hereafter, as you doubtless all will, from time to time, go to this beautiful square to make the use, which as citizens you have a right to make, of the public institutions about it, and find upon it ten-story tenement houses, destroying its beauty and threatening the safety of all that the public own there, you will be able to say, 'I could have prevented that building from being there, but I approved it and therefore permitted it.' 18
In his closing argument, Samuel J. Elder, the counsel for the Art Museum and Institute of Technology, partly discussed the powers of the legislature and of cities:

Still again, has there ever been any doubt where one section of a city was more exposed to fire than another, or where a fire could entail greater and more irreparable injury in one section than in another, that the municipality itself, even without an act of legislature or the aid of the General Court, might make restrictions and regulations which hamper the landowner in every direction? Is there any doubt that he may be compelled to employ safeguards and appliances and costly construction which were not demanded of the man in the next block, or in the next ward?

Elder later added:

I have also the honor to represent the Trustees of the Museum of Fine Arts, the third largest landowners in this section. They do not ask for this restriction on the ground merely of art or architecture or aestheticism. They have been charged by the State and the city with a great public trust. They received from the city land now worth a million and a half of money. They have erected upon it, from gifts and bequests of public spirited individuals and from the State, a building worth $300,000 and they have in possession works of art, not merely worth in the vicinity of a million dollars, but many of them treasures irreplaceable at any price and the rest replaceable only at prohibitive valuations. The receptacle of these treasures stands thirty-six feet from the street line, and when constructed required no especial precaution against fire. The era of high buildings had not come. The structures of the day were accessible to the fire department, and in no reason contingency imperiled the safety of my client's trust. They find within the last six months a building proposed in close proximity to them one hundred and twenty feet in height, but of alleged fireproof quality. What fireproof buildings are, you know. My friend Mr. Bartlett has described the crumbling away in an afternoon of a whole district of fireproof buildings in this city, and you have but to read the daily papers to learn how little the skill of man has been able to
forestall and stay the fiercest of the elements. Steel structures are no exception. The question of fire is one of preeminent importance to this institution. The roof of the Museum of Arts is, for the lighting of its galleries, necessarily largely of glass. Fire in a building overtopping it by many stories is as certain, as things human can be, to result in disastrous consequences. Even a little smoke, a stream of water, the sifting down of cinders, the fall of a window sash may wipe out of existence much of what Massachusetts has done for art in America. In such a situation what was the duty of these trustees? What would have been your duty had you occupied their places? To sit calmly by and wait the event? Or was it their imperative duty to present their danger to the public from which they hold their trust and leave to that public, represented by you, to remove or authorize the continuance of the peril?

Upon another ground the Museum seeks this legislation. To an art museum light is as essential as shafting and machinery to a factory. One hundred and twenty feet of yellow masonry across the way will destroy one side of the building for the uses to which it is and was intended to be put. One of my friends on the other side has made merry with this argument. The diagrams introduced before you to illustrate the destroyed usefulness of one side of this building dealt principally with one gallery. From necessity some one was taken for illustration, and that the one most injured. How large is it? cries my friend; and when its size is roughly estimated, and, as it turns out, considerably under-estimated, the shafts of their wit are aimed at the luckless Dutch Room. His idea of art seems to be that of the Western pork king, who boasted the yards of canvas he got for his money. Let me tell him that there are two canvases in the Dutch Room, each less than two feet square, painted by Rembrandt's hand worth $80,000 in the market, and irreplaceable if a coal of fire lights upon them. Last week four canvases were presented at the Museum, trifling in their size, no one two feet square, but worth $150,000. Art is not measured in Boston or elsewhere by linear measure. The duty imposed upon these trustees has been performed. It rests with you to deal with the problem they have presented you.
Referring to the petitioners, Elder said that in the presence of the mass of petitioners, and the public sentiment in favor of limiting the height of buildings in Copley Square they could rest their case.

**DECISION BY THE COMMITTEE**

The Committee recommended a 90 foot limit on three sides of the Square, and a 100 foot limit on Boylston Street. There were four reasons for this difference in allowable height. First, the 90 foot limit applied to the east, west, and south sides of the Square allowing a larger amount of sunlight to enter. The 100 foot limit was on the north side, where this consideration did not apply. Second, the principal architectural buildings of the Square upon which large amounts of money had been expended (namely the Trinity Church, Art Museum, and Public Library) were located on only the three sides and these buildings would be the most affected by a building above 90 feet. The third consideration was the shape of the Square which due to its configuration would allow a taller building on Boylston Street than on the other sides without impairing its appearance. The fourth consideration was that there was a greater danger to the public buildings from fire and loss of light on three sides of the Square.

The limit of 90 feet fixed by the Committee in its report had been reached via a compromise between an 80 foot limitation asked for by the petitioners and the height asked for by the remonstrants. Many of the petitioners were Back Bay
people who were determined to keep the building down to 80 feet and they disregarded the question of damages to the city. Amendments were offered both on the floor of the House and the Senate, making the limitation 92 feet and 96 feet but they were defeated. These amendments were offered in the interests of the Westminster Chambers with the 96 foot amendment permitting the construction as eventually carried out.

On May 23, 1898, the 90 foot bill became law. It included a clause, put in at the request of A.E. Pillsbury, expressly excepting Copley Square from the general 70 foot park law.

By this point the construction of the steel framework of the building was entirely erected to the height of seven stories. The masonry walls of the building were completed to a point between the third and fourth stories, the construction of the upper part of the building having been suspended by a stipulation from the city. At this time, all of the material for the construction of the entire building (except for a part of the inside finish) had been specially designed and produced by the manufacturers in pursuance of their contracts. The greater part of the materials had already been delivered to the site. In addition to the $365,000 paid for the land, $185,000 had been actually expended on the construction, for a total of $550,000.20
THE STATUTE OF 1898--CHAPTER 452

The Statute of 1898 as approved was titled, "An Act Relative to the Height of Buildings on or near Copley Square in the City of Boston" and contained four sections in regard to how building height restrictions should be handled in the area.

Section 1, delineated the boundaries of two building height areas, one of 90 feet and of 100 feet. (Figure 13) This section also provides that there may be erected on any such building above these prescribed limits, "suitable towers, domes, sculptured ornaments and chimneys as the board of park commissioners may approve."

Section 2 repealed the Statute of 1896, Chapter 313, and the Statute of 1897, Chapter 379 so far as they limit the height of buildings erected within the territory specified in section 1.

Section 3 provided for the payment of damages to any person owning or having an interest in an uncompleted building begun before January 14, 1898, which is injured by the provisions of this act. Any construction exceeding the height restrictions in section 1 may recover damages from the city of Boston for materials bought or contracted for which would be wasted if the building was made in conformity with the statute.

Section 4 provided for compensation to all persons sustaining damages to their property by reason of the limitation of the height of buildings prescribed by the act.
FIGURE 13 HEIGHT LIMITATIONS PRESCRIBED BY ST. 1898
PROCEEDINGS SUBSEQUENT TO PASSAGE OF THE ST. 1898

Upon the passage of the Statute of 1898, and before going forward to complete the upper part of the building, the defendants and their counsel had numerous conferences with the mayor, corporation counsel, city solicitor, and Park Commissioners. At these meetings, the plans for the building as originally designed were exhibited and various methods for completing it in conformity to the Statute were considered. The owners of the Westminster had to face the problem of how to complete their building within the limitation of the Statute. As a starting point, the owners requested their architect to prepare plans showing a building of seven-stories, a building of seven-stories with a Mansard roof, an eight-story building, and a nine-story building. The owners were desirous of getting in as many stories as possible and finally selected the eight-story plan which they submitted to the Park Commissioners for their approval. This plan necessitated construction to the height of 96 feet.

On June 11, Professor C. Frank Allen of M.I.T. took measures of the building and found that the horizontal frame was up to 81.5 feet. This brought the frame to the ceiling of the seventh story while steel posts extended to 92 feet. With four more feet for the roof, this revealed that the building would be 96 feet tall.
It soon became rumored that a violation of the law was intended and on June 14, the public committee (through General Loring of the Art Museum) employed Samuel J. Elder to take legal steps to prevent the erection of the building above 90 feet prescribed by the act they had fought so hard to get. He at once notified the Attorney-General. The next day, Elder wrote General Loring stating that since the steel posts were 92 feet at the time that the Statute was passed, there was not enough evidence for the Attorney-General to find intent to violate the law and he therefore asked General Loring to let him know when construction begins on the eighth story.

On July 2, Woodbury & Leighton informed President Crafts of M.I.T. that they intended to build to the then present height of the steel posts which they admitted was 2 feet above the 90 foot limit and which would make the building 96 feet with the addition of the roof. This intent was communicated to Samuel J. Elder who immediately made an application to the Attorney-General to permit the use of his name in legal proceedings to prevent this violation. The Attorney-General set a hearing on this question at the earliest possible date.

A.E. Pillsbury appeared at the hearing in opposition and desired a postponement. The Attorney-General was willing to grant it but only on the condition that Pillsbury would agree that in the meantime there would be no violation of the law. In response, Pillsbury made three points. First, he would not deny that his clients were intending to build above the 90
foot limit but claimed the Statute was unconstitutional. Second, he felt that the Attorney-General in his official capacity as representing the general public had no right to bring the matter before the court because this was not a "public nuisance". He felt that there should be no easement of air and light attached to Copley Square, but that it affected the abutters only. Third, he felt that the law gave the city of Boston alone the right to enforce it. The hearing was adjourned until July 26 to allow a consideration of these questions.

In the meantime, the 96 foot plans had been submitted to the Park Commissioners for their approval and by them had been submitted to Professor Francis W. Chandler, the consulting architect of the city. Also of note, Professor Chandler was a professor at the Institute of Technology which was one of the most active promoters of the Statute. On July 14, Professor Chandler reported that the plans contemplated a violation of law by the addition of 6 feet of construction above the limit of the Statute. He submitted a sketch showing how the building could be erected within the 90' limit but retain only seven-stories. Chandler gave the opinion that his suggestions would not injure the architectural effect of the original design. On July 16, the plans were returned by the Park Commissioners to Woodbury & Leighton with a letter enclosing Professor Chandler's sketch and stating that the plans were being returned without approval.22
Woodbury & Leighton were extremely anxious to secure an approval of the plans and called upon Professor Chandler and the Art Museum to try and induce them to withdraw their objections. At the suggestion of A.E. Pillsbury, Woodbury & Leighton contacted Benjamin I. Gilman of the Art Museum for the purpose of getting the Art Museum to discontinue proceedings saying that they wanted to get in the eighth story. It was later contended that the eighth story furnished the motive for breaking the law but Woodbury & Leighton denied this.

On July 25, the day before the postponed hearing before the Attorney-General was to resume, upon a written demand upon the mayor by the counsel for the trustees of the Art Museum, the city of Boston filed a bill in equity in the Supreme Judicial Court of Massachusetts. The bill was filed under the authority of the Statute of 1894, Chapter 257 to restrain the construction of the building above the limitations imposed by the Statute of 1898. When this was called to the attention of the Attorney-General at the hearing by A.E. Pillsbury, he therefore asked that the case be discontinued on the ground that the city had brought proceedings. Pillsbury stated that he could not assume that this bill was not filed in good faith or that the city would not act and therefore, declined to take any action until it could be seen what steps the city proposed to take.

In response to the bill, the defendants demurred, on the ground that the Statute was unconstitutional and asked for the
approval of the architrave, frieze, and cornice by the Board of Park Commissioners. The city felt that this was a satisfactory adjustment of their suit for an injunction subject to the constitutionality of the Statute. The city law officers, the defendant's counsel, and the defendants all believed that the legal remedy for the enforcement of the St. 1898 was in the city of Boston under the St. 1894. They also felt that the arrangement for the completion of the building, with the approval of the Park Commissioners, was permitted by the St. 1898 if constitutional, and made the structure lawful. The suit was left pending and was not further prosecuted for the reason that this arrangement was satisfactory to the city authorities. The city felt that this was a valid defense to the bill and never made an actual application for an injunction.

It was the opinion of the mayor and the law officers of the city, as well as the defendant's counsel, that, in any view of the Statute, the building could be lawfully completed at the height of eight stories, with the architrave, frieze, and cornice of sculptured ornaments as originally designed. This opinion was conditional on such ornamentation being approved by the Park Commissioners under the authority conferred by the Statute. After an examination of the plans by the commissioners along with a full explanation of this proposed method of completing the building, the mayor and law officers were given to understand that the sculptured
ornaments if erected in accordance with the plans would be approved. This understanding was communicated to the defendants. It was the opinion and belief of the city law officers, the mayor, the defendants counsel, and the defendants, that such an approval would make the structure lawful in any view of the Statute.

On the very next day after the city brought suit, the builders began going forward above 90 feet and they rapidly reached the 96 foot mark in the middle of August. When the construction went above 90 feet, it was done with the knowledge that the city Park Commission and consulting architect disapproved of their actions. The construction was also pursued in the face of public opinion including two bills in equity and the proceedings before the Attorney-General.

Professor Chandler wrote a protest to A.E. Pillsbury and received the reply that he probably did not understand the law. On August 18, Professor Chandler met with Isaac F. Woodbury and called his attention to the violation of the law. Woodbury responded sharply stating, "The building is there, and by God it is going to stay there."23

No action whatever was taken by the city under its bill in equity and it appeared that they had agreed with the Westminster Chambers. A new application was made to the Attorney-General, which was immediately granted and the information in his name, at the relation of the Museum of Fine Arts, was filed in court September 17, 1898.
At this time, the exterior construction of the building was wholly completed with most of the part above the 90 foot line having been constructed after the passage of the Statute. (Figure 14) The total work expenditure at this point was $435,000, in addition to the $365,000 paid for the land, for a total of $800,000. The cost of the land and the building as originally designed was $1,000,000, therefore 80 percent of costs had already been incurred.

The suit then stood for hearing, but after the building had been completed, the Park Commissioners were asked to view it and thereupon passed the following vote on October 31, 1898:

Voted, by virtue of and in the exercise of the power conferred upon this Board by Chapter 452 of the Acts of the year 1898, that the sculptured ornaments erected on the building situated at the corner of St. James Avenue and Trinity Place, known as the Westminster Chambers, above the height of ninety feet, as shown in the plans thereof submitted to the Board and in the building as now erected, be and the same are hereby approved.

This in effect overruled their own architect.

The approval of the sculptured ornaments was claimed by Pillsbury to be an authorization of that portion of the building behind the ornaments. The vote was immediately pleaded in the various suits as an excuse for their action.

At the hearings, Pillsbury made three claims. First, that the Statute was unconstitutional. Second, that the Attorney-General, as representing the public had no right to
FIGURE 14 EXTERIOR OF THE WESTMINSTER HOTEL
interfere, as the sole right to enforce lay with the city of Boston. Third, that this approval by the Park Commission, after the completion of the building, rendered it legal.

The city Law Department appeared in court and stated that they did not intend to press their bill and was content to leave the building as it stood.

The construction of the upper part of the building as completed was as follows: The height of the walls to the highest point of the roof was 96 feet (the City Building Department found the completed height to be 96.5 feet while a professor at the Institute found it to be 97.2 feet), the ceiling of the rooms of the upper (eighth) story is a few inches above a horizontal line of 90 feet; above these rooms was an open air space extending to the roof. The walls of the building fronting on St. James Avenue and Trinity Place, respectively, in the basement and first story are of granite and limestone. The second story is of ornamental terra-cotta. Above the second story there is a light colored mottled brick specially manufactured for this project, with terra-cotta balconies and ornamentation. From and above a line at the height of 88 feet 8 inches on the two street fronts there were sculptured terra-cotta ornaments. These were tied in and formed part of a wall in the rear portion of which steel angle irons are spaced and connect near their top by two horizontal steel beams constituting the architrave, frieze, and cornice of the building. On the two sides of the building not fronting
on streets, the walls at a corresponding height are of plain brick.

**DAMAGES**

The damages incurred by the defendant because of the Statute of 1898, if valid, allegedly exceeded $300,000. Some of the elements of damage claimed by the defendants, in addition to the loss of the ninth and tenth stories, are as follows:

As the material for the building was produced for and adapted to a ten-story building 120 feet high, much of it was heavier than would have been needed or produced for a building of a lesser height. The Westminster Construction Company also necessarily incurred additional cost and expense in the transportation and handling of this heavier material than would have been used for a building of the statutory height. The Westminster owners were also obliged to incur expenses in what was claimed to be actual reconstruction of the building made necessary by the Statute, this being distinguished from the cost of rearrangement of the design or construction. This includes recutting, splicing, and riveting steelwork and transporting it, and in the reconstruction of floors made necessary by the rearrangement of some of the balconies which could not be placed upon an eight-story building as they were to be placed on the ten-story building as originally projected.
On February 28, 1899, the defendants and the Fawcett Company brought suit against the city of Boston under the Statute of 1898 for the compensation due by the provisions of the Statute, if constitutional. The city of Boston answered in court a general denial, and its officers denied any liability to the defendants. They also denied that the St. 1898 imposed upon the city any valid obligation to pay them compensation. The case was left pending and was never brought forward for trial.

At the time of the passage of the Statute of 1898, the city of Boston did not have any money specially appropriated to any purpose such as that prescribed by the damage clauses of this Statute. There was no expressed statutory power or authority to raise, appropriate, or pay money for such a purpose. The power of the city to raise and appropriate money for any and all purposes is limited and restricted by the laws of the Commonwealth relating to municipal indebtedness applicable to the specific city, especially chapter 29 of the Public Statutes, with its amendments, and chapter 399 of the acts of 1900.

BUILDINGS ON AND ABOUT COPLEY SQUARE

The Westminster side contended that the application of the 90 foot limitation was designed to make the statute appear as though this limitation was impartially applied to other lands as well as to the Westminster Chambers. But, for any practical purpose of restraint the limitation only applies to
the Westminster's land. This building is the only building on any of the lands described in the Statute. "The construction whereof was begun but not completed before the fourteenth day of January in the current year," as described in the Statute. It is also the only building to which any of the provisions of section 3 of the Statute applied or can ever apply. The Statute was in fact directed solely against the Westminster building especially in the interest of the Trinity Church and Museum of Fine Arts which are the nearest buildings and the only ones which the building will affect. However, the other buildings above named, especially Trinity Church and the Art Museum, interfere with the light and air of Copley Square more than the Westminster building does.
CHAPTER THREE: THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

This case came before the Massachusetts Supreme Court as an "information in equity" by the Attorney General, at the relation of the Museum of Fine Arts, to prevent the erection and maintenance of the Westminster Chambers above the limit of height prescribed by Chapter 452 of the Acts of 1898. The case came before the Supreme Court, as opposed to a lower court, because the issue in question was the constitutionality of a state Statute. While the Attorney General became the plaintiff, there were several defendants. The defendants were Henry B. Williams and Babson L. Ladd, the Trustees of the Westminster Chamber Trust, Westminster Construction Company, and Isaac F. Woodbury and George E. Leighton, the copartners in the firm of Woodbury & Leighton.

THE RIGHT OF THE ATTORNEY GENERAL TO INTERVENE

The plaintiff contended that the territory described in the first section of the Act of 1898 was practically devoted to public uses. Apart from the central square which is a park, there are buildings of a public character adjoining the Westminster Chambers. Some of these, such as the Museum of Fine Arts and the Public Library, are entirely public in their aims and objects, although committed for the purpose of management into the hands of trustees formed into corporations. The plaintiff claimed that the Statute of 1898 was
an enactment for the benefit of the public to give them the enjoyment of a beautiful public park adorned with public buildings, in the capital of the Commonwealth.

The Statute gave to the public rights of light and air over lands abutting on streets adjacent to the park. This limitation in height preserves the architectural features of the square, allows the sun to fall more fully upon the park, and furnishes a large portion of light and air to the park and public buildings thereby rendering their use more beneficial to the public. In addition, the Statute helps protect the public buildings and the entire neighborhood from injury by fire. The plaintiff therefore submitted that inasmuch as the limitations imposed by the Statute affects real estate for the benefit of the public, the Attorney General is not only the proper, but the only officer to enforce the rights of the public. The Attorney General can interfere in behalf of the public even on the ground of this being a "public nuisance" because the meaning of this term has been extended to cover cases where no nuisance in the popular meaning of the word exists. An interference with the right of the public will be regarded under the law as a public nuisance because the term has become synonymous, through legal precedents with the interference of these rights. The space for air and sunlight over the Westminster property, above 90 feet, belongs to the public and warrants the interposition of the Attorney General. The plaintiff cited a case (Attorney General v.
Metropolitan R.E., 125 Mass 515) in which the Court said "to warrant the interposition of the Attorney General, the public nuisance must be such as to affect or endanger the public safety or convenience," a position that they were willing to stand on in this case.

THERE IS NO EXCLUSIVE REMEDY IN THE CITY OF BOSTON

The plaintiff felt that although the city of Boston filed a bill to enforce the provisions of the Act of 1898, they have not proceeded with it and are content to leave the building standing in violation of the Statute. Since the third and fourth sections of the Statute give a right to persons sustaining damage to recover such damage from the city of Boston, the City has strong interest by reason of their liability to damages to proceed no further with their bill. If they do decide to continue, it will merely be for the purpose of sustaining the defendant's contention that the Statute is unconstitutional.

The plaintiff contended that it was clear that if the city of Boston has an exclusive right to enforce the act, then the rights of the whole public would go without enforcement, because the city is interested in refusing to proceed with such enforcement. The plaintiff further added that the city of Boston has at best nothing more than a concurrent remedy with the Attorney General and the Statute of 1894, Chapter 257, confers nothing more.
The Statute of 1894, Chapter 257, grew out of section 136 of Chapter 419 of the Acts of 1892. In 1892, the Legislation codified the building laws applicable to the city of Boston. In the final section, the act repealed all other acts referring to the city which are consistent with it. The Statute provided in detail methods of construction which were in the nature of police regulations designed to protect the health, safety, and comfort of the people. Although it imposed many restrictions upon owners of real estate in the use of their property, no compensation was provided anywhere in the act for damages caused from a compliance with its provisions.

In order to secure prompt and easy enforcement of the act, section 136 gave the courts equity jurisdiction through the inspector of buildings. The next year, the Legislature by Chapter 293 of the Acts of 1893 changed one section to establish a new regulation but omitted to provide any method for its enforcement. In the same year, by Chapter 199 of the Acts of 1893, the Legislature amended Chapter 316 of the Acts of 1888 by provisions applying to the city of Boston, giving the building inspector the right to apply for an injunction (although the Act of 1888 had been specifically repealed, so far as it applied to the city of Boston, by the codification of 1892). In view of this confusion, the Legislature in the following year enlarged the authority given under the Act of 1892 to enforcing that act to "the acts relating to the erection or alternation of buildings or other structures in
the city of Boston." This referred to the acts of police regulation which were based on the codification of 1892.

The plaintiff conceded the nature of the legal doctrine to be that where a Statute provided a remedy for its enforcement the form of remedy provided must be exclusive. They submitted that the doctrine does not apply to the present case because the Act of 1898 is in no way an amendment or a part of the codification of 1892. The codification was a general act applying to the whole city and for specific purposes. The Statute of 1898 is a local act applying to only a portion of the city, which to some extent is the same in purpose yet for different reasons. The Act of 1898 is more in analogy to chapter 313 of the Acts of 1896 (as amended by chapter 379 of the Acts of 1897) providing a limitation of height bordering on all parkways of the city. The Act of 1898 also differs radically from the codification of 1892 in that it provides compensation to an owner injured by the act, whereas the Act of 1892 leaves the property owner without remedy. Here, the Legislature must have felt that where the property of a private individual is appropriated to public use in connection with measures of municipal regulation that compensation must be provided. Section 2 of the Act of 1898, refers to the parkway acts of 1896 and 1897 and its repeal of such portions of those as apply to the territory specified, clearly classified this act with the parkway acts rather than with the "building laws" of the city of Boston. 27
THE APPROVAL BY THE PARK COMMISSIONERS

In reference to what the Park Commission in fact legitimized, the plaintiff stated that the vote of the Park Commissioners showed an approval merely of the "sculptured ornaments erected on the building above the height of ninety feet." In the actual construction, the sculptured ornaments approved form an ornamental facing of terra-cotta partly in relief extending around two sides of the building. The vote does not therefore attempt to be an approval of the building, even if such power was given to the Park Commission.

The sculptured ornaments approved included "an architrave, frieze, and cornice" but none of these words was found in the act itself except as they may be covered by some of the terms mentioned. Comparing the language of the Act of 1898 with chapter 379 of the Act of 1897 which gave the Park Commission the right to approve certain ornamental structures upon buildings facing on parkways, it can be seen that the Park Commission had a larger right on parkways than it has on Copley Square. On the former it may approve not only steeples, towers, domes, etc., but also "cornices, parapets, balustrades, and roofs." These words are omitted from what seems to be a corresponding provision in the Act of 1898. Since the Act of 1898 repeals the portion of the Act of 1897 applying to Copley Square, the Legislature must have omitted some ornamental features intentionally. The defendants therefore are in a position of claiming an approval by the Park Commissioners of
a "cornice" after the Legislature has refused to permit the Park Commission to approve any such feature.28

The Statute of 1898 provided "that there may be erected on such building, above the limits prescribed, such steeples, towers, domes, sculptured ornaments, and chimneys as the Board of Park Commissioners may approve." So far from showing that any such architectural features have been erected on the building as an addition to its height, these elements for which approval has been sought are on the side of the building below the top, as the architectural terms of "architrave, frieze, and cornice" indicate those portions of the entablature which lie below the roof of a building. In the original architectural sense these features lie between the top of a column and the roof and therefore are not "on" the building.

The plaintiff further stated that the intention of the Act of 1898, as well as that of 1897, is that in order to add to the architectural attractiveness of a building, the Park Commissioners may allow some well-known architectural features to be placed upon buildings. These are to be placed on top of a building and not arranged in the form of a facing around the side.

CONSTITUTIONALITY OF THE STATUTE OF 1989

In dealing with the question of the validity of the Statute, the prosecution drew a distinction between the national and state constitutions. The powers of the national
government are expressly or by inference conferred upon it by the Constitution. With the state, however, the government existed before the adoption of the Constitution and was not created by it. By the adoption of a written constitution, the people have simply sought to provide a framework of government to continue the already existing powers of the government as well as imposing certain limitations on these powers. So far as the power of the Legislature is concerned, the entire law-making power of the government was committed to it except insofar as it is restrained by specific constitutional limitations. The Legislature is therefore not a special agency for the exercise of specially defined Legislative powers, but is entrusted with the general authority to make laws at discretion.

The provision in Article 4, Section, Chapter 1, of the Constitution of Massachusetts that grants full power to the General Court to make "all manner of wholesome and reasonable orders" is in its nature such a limitation. Great weight has always been given to the construction by the Legislature of its own constitutional powers unless it appears beyond a reasonable doubt that their action is in violation of some expressed prohibition or limitation. The burden therefore is on the defendants to show that the Act of 1898 is in opposition to some limitation placed upon the power of the Legislature by the Constitution. No duty is imposed upon the plaintiff to show that the Act is warranted as an exercise of
a specific power. If the Act can be justified under any branch of the legislative power, it must be constitutional.\textsuperscript{29}

**THE POLICE POWER**

The right of the Legislature to enact laws for the proper policing of the State is unquestioned, although the effect may be to deprive a citizen of his property. The only limitation upon such acts is that they must be "wholesome and reasonable" and on this power, the police power of the State has been founded. it is within the police power of the State to restrict or prohibit the erection of buildings of certain kinds within a municipality or within any district thereof. In the case, Salem v. Maynes, 123 Mass. 372, the Legislature authorized the prohibition of wooden buildings on the ground that such a prohibition was necessary because of danger from fire. It was held immaterial that the defendants had begun work, purchased material, and entered into contracts for the erection of a wooden building before the passage of the ordinance prohibiting it, by the city of Salem.\textsuperscript{30}

It is under this power that the height of buildings have been limited, not only on the ground of the danger from fire from buildings of excessive height, but also because of the menace to the health and comfort of the people by shutting out light and air from the streets. The Act of 1898 was therefore a legitimate exercise of the police power of the Legislature, not only on the ground of the danger from fire to the neigh-
borhood, but also to the public buildings within that neighbor
dom. Here, the interests of the public in educational and artistic treasures would be seriously threatened by the presence of a very tall building.

It was within the police power of the Legislature to impose a limitation in the height of buildings about Copley Square in order to obtain a full amount of light and air not only for the public park, but also for the benefit of the public institutions in the neighborhood which need an ample supply of light for the full enjoyment of their contents by the public. The plaintiff submitted that the Statute of 1898 would have been a proper exercise of the police power of the Legislature even if its sole purpose had been to prevent the cutting off of light from the Museum of Fine Arts. This is because this light is needed for the proper display of its pictures and collections for the benefit of the general public who go there and not of any private individual.

In Lawton v. Steele, 152 U.S. 133, the court in discussing the limits of the police power and after specifying certain examples of the exercise of that power says:

Beyond this, however, the State may interfere whenever the public interests demand it, and in this particular a large discretion is vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. To justify the State in thus interposing its authority on behalf of the public, it must appear first, that the interest of the public generally is distinguished from those of a particular class requiring such
interference, and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Even so, the Fourteenth Amendment of the United States Constitution provides that "no State shall deny to any person within its jurisdiction the equal protection of the laws," does not impair the police power of the State.

A PUBLIC PURPOSE

The taking of the defendant's property, the plaintiff argued, is for a public use. The court has allowed the taking of private property when the result is for the comfort and pleasure of the whole people and the constitutionality of the taking of lands for public parks is supported on this ground. The court has previously been in the opinion that land may be taken for a park when it is "kept open for prospect or light." It was therefore within the power of the Legislature to take the Westminster property above 90 feet merely for the purpose of furnishing a "prospect."

The plaintiff submitted that

it is within the power of the Legislature to pass an Act merely for the purpose of preserving the architectural symmetry of any section of any city. The power of the Legislature to provide for the education of the people cannot be limited to provisions for learning from books. It is as much within the power of the Legislature to educate the taste and artistic sense of the people by regulations as to the character of the municipal architecture as it is to establish architectural schools where the principles of the art may be taught.
It was in the exercise of this power to take private property merely for the purpose of enhancing architectural effect that the Legislature enacted chapter 404 of the Acts of 1892, wherein the State House Construction Commissioners were authorized "to provide an open space on the east side of the State House extension." In the following year the Legislature authorized the laying out of land which had been taken as a park. The prosecution contended that it was entirely within the power of the Legislature to authorize this taking of this land merely for the purpose of affording the public a better view of the fine public building. In other words the "comfort" of the people is a public use.

THE DEFENDANT'S DEMURRER, A.E. PILLSBURY, COUNSEL FOR DEFENSE

The defendant's demurred on the grounds that the information submitted to the court did not disclose a case in which the Attorney General has a right to interfere in equity and also that the Act of 1898 as applied to the defendants was unconstitutional. The defense pleaded the approval of the buildings by the Part Commissioners under the authority of the Statue and that the remedy in the city of Boston, under St. 1894, Chapter 257, was the exclusive remedy for enforcement of the Act of 1898.

The following section is a summary of the grounds of the Demurrer.
THE WESTMINSTER CHAMBERS AS A PUBLIC NUISANCE

The only cases in which an information in equity by the Attorney General can be sustained in the State Supreme Court are of two classes. First, are those involving a public nuisance which affects or endangers the public safety or convenience and require immediate judicial interposition. The second class is for public charitable trusts. For the court to consider the information in equity by the Attorney General for the prevention of a public nuisance there must be clear proof. If this proof is in any way conflicting and the injury to the public uncertain, the court will withhold its action.

The defense contended that the information in this case did not show a public nuisance. All that the information shows is an apartment house built 6 feet above the statutory limitation of 90 feet situated near the corner of an open public space. There is not even sufficient evidence to show that it is a public park in law. A public park in Boston can only be established by location and laying out under St. 1875, Chapter 185. Copley Square is a piece of open public ground in connection with the surrounding streets. In the information filed by the plaintiff, Copley Square is referred to as "an open Square and a public park." But, under the law, it cannot be both a public Square and a public park.

The defendants felt that the statute did not attempt to deal with the building as a nuisance but rather dealt with it in a completely different manner. The statute did not attempt
to exercise the police power, but the power of eminent domain with compensation. Nothing in the information filed can constitute a nuisance at common law. Nuisances arise from violation of common law and not from violation of public Statutes. In its most elemental sense, a public nuisance involves either direct encroachment on public rights or property, or some act which leads to the common injury of the common public. Under no circumstances is a building a public nuisance at common law unless it is so insecure so as to put people lawfully passing by in peril. In the most extreme aspects of this case there is injury to the public which would necessitate an injunction by the court on the grounds of a public nuisance.

The only ground on which this case can proceed is that the building unlawfully encroaches on the light and air of a public park, and for this reason is a public nuisance. But, this claim interprets into the Statute a purpose which it does not show. It has no reference to the light and air of parks but is intended to secure the symmetry of Copley Square and architectural effect of certain buildings there, and nothing else.

The question really should be not whether the building as described is a public nuisance, but whether the building as approved by the Park Commissioners is a public nuisance. This vote of approval in the narrowest view cannot be taken for less than an approval of the architrave, frieze, and cornice
on the two street fronts of the building. Without considering whether the approval extends farther, if these front erections are approved and are lawful there is nothing left which constitutes an obstruction of light and air and nothing left visible which can offend the eye or which can constitute a public nuisance or violation of public right in any way. If that portion of the building toward the alleged park which is visible from the park does not unlawfully obstruct light and air, the rear parts, which are no higher and are invisible from the park, cannot unlawfully obstruct it. Therefore, even if it was possible to regard the building without the approval of the Park Commissioners as a public nuisance, it is not possible to view it as such in light of the approval.32

THE REMEDY IN THE CITY OF BOSTON IS EXCLUSIVE

The court can not interfere by injunction on information of the Attorney General even against a public nuisance if there is another adequate remedy as there is in the city of Boston under St. 1894, c. 257. The first section of this act says expressly that the Supreme Judicial court shall, on the application of the city of Boston by its attorney, "have jurisdiction in equity to enforce or prevent the violation of the provisions of the acts relating to the erection or alteration of buildings or other structures in the city of Boston" which is being erected in violation of the provisions of this act. On the question of whether this remedy extends to
enforcement of the St. 1898, it clearly is an act which relates to buildings within the description of the St. 1894 and can be shown by its history.33

After the codified law of 1892, and before the Act of 1894, there were three acts relating to the erection of buildings in Boston: Sts. 1893, 292, 297, 464. After the act of 1894 and to this point there were fourteen such acts. Three of these statutes are entitled exactly like the codified law of 1892; one "An act relative to the construction of buildings in the city of Boston"; one "An act relative to the erection or alteration of structures in the city of Boston;" two "An act relating to the erection or alteration of buildings in the city of Boston;" and the others are variously entitled. These are all enforceable under the Act of 1894, and none of them contain any remedy for its enforcement showing that it has not been necessary in legislation to follow either the title or the exact descriptive words from the Act of 1894, or to use any particular designation in order to make a Boston building law enforceable under it.

In other words, the course of legislation indicated that the act of 1894 is designed and is taken to extend to the enforcement of all Statutes, however entitled, in any way relating to the erection of buildings in Boston. The Statute of 1898 is also such a Statute and is enforceable by the city of Boston under the Act of 1894. The view that the city's remedy is exclusive is strengthened by its liability to
damages and by the power given to the Park Commissioners. The Legislature treated this matter as a subject of local regu-
lation which affected the city principally and committed the whole subject to the city with broad powers, in view that the subject was merely of local concern, and in view of the liability to damages.

The Statute of 1898 can stand only by holding it to be a local regulation enforceable only by the city of Boston in its discretion. The Legislature has no constitutional power to require the city of Boston to pay damages, raised by public taxation, to secure the supposed architectural symmetry or effect of its public streets or squares, or to prevent interruption of the light or air of public parks.

THE APPROVAL OF THE PARK COMMISSIONERS

The vote is an approval of the whole superstructure making the building lawful as it stands. The plaintiff may claim that the power of the commissioners extends only to the approval of "sculptured ornaments" and that the architrave, frieze, and cornice are not such. This is too narrow of a construction of their power. The Commissioner's power is not limited to, for example, a row of statues standing with their feet on the 90 foot line but is a broad power designed to be liberally construed and exercised. The approval includes not only the sculptured ornaments themselves, but everything which is incidental to the affixing of sculptured ornaments or is
incidental to the ornaments themselves according to the character of the construction. This should include the whole architrave, frieze, and cornice which are purely ornamental features of any building. Any building can be made complete without them but they are the ornamental finish which makes the building attractive and architecturally symmetrical.

It may also be claimed by the plaintiff that as the architrave, frieze, and cornice to some extent enclose a part of the upper story, they are beyond the power of the commissioners to approve. To this it may be responded that the Statute carries the power to approve "steeples, towers, and domes." Each of these structures may be occupied and used for other purposes. For example, on the Trinity Church, the main body is surmounted by a tower approaching in size the dimensions of that part of the building on which it is erected and of the height of 222 feet. This tower is occupied and used for various purposes. The same is true of the Old South Church, also within the 90 foot limitation. (This tower is 220 feet.) It is also common knowledge that domes frequently add another story and sometimes more to the height of a building. The defendants could have put a dome upon the Westminster Chambers which would practically have added another story to it and made it more contradictory to the Statute and to good taste. It cannot be the purpose of the Statue to make the question of use a test of the legality of sculptured ornaments, which cannot be a test of the legality
of steeples, towers, or domes. Whatever is beyond the sculptured ornaments is immaterial if the Park Commissioners see fit to approve them.\footnote{34}

CONSTITUTIONALITY OF THE STATUTE OF 1898

It is clear that the Statute is not an attempt to exercise the police power to regulate the use of property without compensation. It is an exercise of the power to take private property with compensation, in other words, the power of eminent domain. The Statute presents this question: Has the legislature the power to limit the height, and prescribe the architectural character of particular buildings, prescribing one height for one and another height for another. The point becomes one of unreasonable discrimination, with the Statute being directly against the Westminster Chambers alone. The Statute favors the lots on the north side of the Square by permitting there a height of 100 feet. But, even these lots are discriminated against as a the general law permits 125 feet. There is also a discretionary power conferred upon the Park Commissioners which is liable to result in unlawful discrimination in favor of some lots and against others.\footnote{35}

Under the constitution, laws must be reasonable and equal in their operation upon all citizens. The more closely the Statute is scrutinized, the more clearly it will appear that the real purpose of the legislation was to preserve the supposed architectural symmetry of Copley Square according to
the notions of people who think, for reasons of individual taste, that it should be preserved in this form. The character of the Statute is illustrated by the fact that a church could not even be built on the Westminster lot as high as the Trinity or the Old South Church. The Statute has no references to the character of buildings and instead prohibits against all buildings there, no matter how desirable their character.

Section 3 of the Statute, which applies to the defendants only, gives damages only for the particular elements of damage therein specified. It is not in fact adequate for these injuries. Nothing but a general provision giving general damages to be ascertained on general principles of law is enough to satisfy the constitutional requirement of compensation. This is a defect in the Statute unless it is cured by the provision for damages in section 4. But it may be claimed that section 4 is limited to land damages and cannot be extended to cover the peculiar damages suffered by the defendants by interruption of their project, loss of material purchased or contracted for, or non-performance of contracts. It is not clear that section 4 supplies the omission of section 3 and therefore would be a failure of compensation in violation of articles X and XII of the Declaration of Rights.

The Statue of 1898 is also in conflict with the second clause of section I of the 14th Amendment of the U.S. Constitution, as amounting to a deprivation of property without due
process of law. This is because the taking of private property, either by eminent domain or by taxation, to uses not public, is a failure of due process of law. It is also in conflict with the 14th Amendment as denying to the defendants the equal protection of the laws. Unless section 4 of the Statute corrects the inadequacy of the damages provided by section 3, the Statute is in conflict with the 14th Amendment as failing to provide just compensation, which is essential to due process of law.

THE SUPREME COURT DECISION

The Court assumed that in the case as presented, that Copley Square, "is an open square and a public park, intended for the use, benefit, and health of the public, and is surrounded by buildings devoted to religious, charitable, and educational purposes, some of which contain books, manuscripts, and works of art of great value, many of which are in their nature irreplaceable."

In discussing the inherent qualities of a park, the Court said:

The grounds on which public parks are desired are various. They are to be enjoyed by the people who use them. They are expected to minister, not only to the grosser senses, but also the love of the beautiful in nature, in the varied forms which the change in seasons brings. Their value is enhanced by such touches of art as help to produce pleasing and satisfactory effects on the emotional and spiritual side of our nature. Their influence should be uplifting, and, in the highest sense, educational. If wisely planned and properly cared for, they
promote the mental as well as the physical health of the people. For this reason it has always been deemed proper to expend money in the care and adornment of them, and make them beautiful and enjoyable. Their aesthetic effect never has been thought unworthy of careful consideration by those best qualified to appreciate it. It hardly would be contended that the same reasons which justify the expenditure of money to make the park attractive and educational to those whose tastes are being formed, and whose love of beauty is being cultivated. 37

The Court felt that in regard to the height and mode of construction of buildings in cities, regulations are often made by legislative enactments, in the exercise of the police power, "for the safety, comfort, and convenience of the people, and for the benefit of the property owners generally. This right was so well established in the law as to be beyond question. In view of the kind of buildings erected on the streets about Copley Square, and the uses to which some of these buildings are put, it would be hard to say that this Statute might not have been passed in the exercise of the police power, as other Statutes regulating the erection of buildings in cities are commonly passed."

The Court found that it did differ from other Statutes of this nature in that it provided compensation to injured parties. In this respect, it conforms to the constitutional requirements for the taking of property by the right of eminent domain. In other words, the Court felt that the Statute was intended as the taking of some private property rights for the benefit of the public who use Copley Square. The Court interpreted the Statute as in effect creating an
easement annexed to the park. It therefore adds rights in light and air, and in the views over adjacent land determined by building height restrictions. The Court cited Olmsted v. Camp (33 Conn. 551) in discussing the line between public and private uses. In this case the Court said:

From the nature of the case, there can be no precise line. The power requires a degree of elasticity, to be capable of meeting new conditions and improvements and the ever-increasing necessities of society. The sole dependence must be on the presumed wisdom of the sovereign authority, supervised, and, in cases of gross error or extreme wrong, controlled, by the dispassionate judgement of the court.

The defendants had argued that the Legislature, in passing the Statute, was seeking to preserve the architectural symmetry of Copley Square. But, in this regard, the Court felt that if the Statute was merely for the benefit of individual property owners, the purpose does not justify the taking of property rights against the will of an owner. The Legislature could, however, pass the Statute for the benefit of the public by seeking to promote the beauty and attractiveness of a public park in the capital of the Commonwealth. The Court could not say that the lawmaking power might not determine that this was such a matter of public interest as to justify the taking of private property to prevent unreasonable encroachments upon the light and air which it had previously received.

The Court also approved the fact that the city of Boston was required to compensate the injured parties rather than
provide for payment from the treasury of the Commonwealth as the city hoped. The Court did not want to limit the power of the Legislature in the distribution of public burdens, leaving the discretion with the lawmaking power. The Court felt that while the Statute is aimed at the public, it is also largely local. This is because a large part of the public which are affected by the Statute are citizens of Boston. With the valuation of Boston also being a large proportion of the valuation of the whole Commonwealth, it was justified to put all of this public burden on the city of Boston.

Regarding the question of the Park Commission's approval of the sculptured ornaments and whether it relieves the building from the prohibitions of the Statute, the Court said that clearly it did not. In looking at the building, the Court noted that only on two sides was there the ornamental facing of terra-cotta. The facing is partly in relief and extends upward from a line 90 feet in height to the roof, constituting the architrave, frieze, and cornice of the building. This was referred to in the Park Commission vote as "sculptured ornaments." On the other two sides of the building, the walls at a corresponding height are of plain brick.

In the Statute, the prohibition against erecting a building above 90 feet is absolute, except that certain types of construction may, with the approval of the Park Commissioners, be put on any building above that height. These are steeples, towers, domes, sculptured ornaments, and chimneys.
All other parts of the building are left within the restrictions. The ornaments on the Westminster Chambers are not "erected on" a building constructed within the prescribed limits. Here, solid brick walls extend 6 feet above the limit with its roof at the top. The Park Commissioners, by their approval of certain sculptured ornaments on the face of the wall on two sides of the building, did not assume to approve the other parts of the building which constitute the solid structure. The Statute certainly gave them no authority to approve of the building as a whole. They were authorized to approve sculptured ornaments surmounting a 90 foot building. What the Commissioners did do was to approve the ornamentation of the architrave, frieze, and cornice of two of the four walls of a 96 foot building. The other two walls were left unornamented and 96 feet in height. The Court ruled that the defendants could derive no advantage from the Park Commission's vote in regards to the building proper as distinguished from the ornamentation on the face of two of its walls. The Statute did not even permit roofs to be built above the prescribed building line, as did the Statue of 1897, Chapter 378, which it repealed.

In response to the defendant's contention that the Attorney General could not maintain a suit in equity to enforce the Statute, the Court said that his right depends on the interpretation of the Statute. As mentioned earlier, they held that the Statute gives rights in the nature of an
easement over lands facing Copley Square. This easement is annexed to the Square for the benefit of the public for whose use and enjoyment Copley Square was laid out. These rights are similar in their nature to rights in highways, in great ponds, and in the navigable waters of the Commonwealth. An individual cannot maintain an action for a deprivation of such public rights unless he has incurred damages different in kind from those to the public generally. The Attorney General as a public officer represents the public and may bring suit to protect their rights. In the Westminster case, a permanent injury to the public is in question which could deprive them of what the Statute has provided. The project is therefore in the nature of a public nuisance and in equity is to be dealt with that way.

There was one other objection presented by the defendants, to which the Court responded. The issue concerned the right of the Attorney General to bring suit in this case. The defendants had argued that by St. 1894, Chapter 257, the city of Boston is given the right to enforce its building laws and that this remedy excludes all others. This remedy still applies to violations of the St. of 1898, Chapter 452, but the Court felt that this was passed in reference to the elaborate statutes then in force under the police power of the Legislature for the erection of buildings in Boston. At that time, no statute like this one (St. 1898) had been contemplated. The St. of 1898 materially differs from the acts relative to
the erection of buildings in Boston in the other Statute. This Statute was enacted for a different purpose, to create public rights annexed to public property. The Statute also calls for the payment of damages incurred from the city of Boston. The Statute does not provide a remedy for its enforcement and therefore relief from wrongs against it is to be sought at common law. The St. of 1898, Chapter 452, was viewed by the Court as not being intended to create rights enforceable only under St. 1894, Chapter 257, but creates rights which are enforceable under general laws.

GOVERNOR CRANE'S VETO

When the case had a further hearing, in the spring 1900, the Court at the request of the owners postponed the case until the Legislature acted on the bill, referred to it the year before. This bill was made to the Legislature by the owners of the Westminster to change the law so as to legalize their building and passed both houses. It was vetoed by Governor Crane on the ground that he was "unable to give his sanction to a measure intended to relieve citizens of the Commonwealth from the consequences of deliberate disregard to the provisions of a statute of the General Court." There had been a great scandal in regard to the passage of the bill and many representatives explained that they changed their votes with a certain dinner given the night before figuring largely in the excuses. Governor Crane's veto was widely approved and achieved national importance.
THE SECOND STATE SUPREME COURT CASE

The case came before the Supreme Judicial Court of Massachusetts a second time in January, 1901, with the defendants seeking to change their testimony by the addition of other facts. After the first Court decision, the Trustees of the Museum of Fine Arts withdrew from the case because it was determined that they were going to move from their site on Copley Square. This was an ironic twist in that they had been greatly involved in the passage of the Legislation but yet the case would now have to continue in the name of the Attorney General alone. The Attorney General had stated that if the Museum should give up the case, then he should feel "called upon" to prosecute it himself. 39

The defendants contended that the litigation proceeded upon the sole ground that Copley Square is a public park and that the Statute of 1898 was passed for the protection of its light and air as such a park. In order to maintain this position, the prosecution has misread its purpose which was solely to preserve the architectural symmetry of Copley Square, the architectural effect of Trinity Church, and the light and air of the Art Museum. The defense argued, that Copley Square never constituted a public park nor was regarded as such by the city, the public, or the Legislature. The previous Supreme Court decision rested upon this allegation and apart from the question of the constitutionality of the Statute, the case cannot stand if Copley Square is not a
public park. With this in mind it is important that the history of the square is analyzed.

HISTORY OF COLEY SQUARE

When the Copley area was initially laid out in the mid-nineteenth century, it was composed of two triangular pieces of vacant land. The larger was enclosed by Boylston and Dartmouth Streets and Huntington Avenue. The smaller triangle being bounded by Huntington Avenue, St. James Avenue, and Trinity Place. (Figure 15)

THE LARGE TRIANGLE

The larger of the two triangular pieces of vacant land was acquired and held by the city of Boston on June 20, 1881. On that date the Board of Aldermen passed the following order (approved on June 25, 1881).  

Ordered, that the Park Commissioners be requested to report to the City Council the expense of laying out as public parks the lot of land on Dartmouth and Boylston Sts. in front of the Art Museum, and the lot of land at the junction of Huntington Ave. and Boylston St. .

Upon this order, the Park Commissioners gave an estimate of the cost of acquisition and this report was referred to the Committee on Public Parks, and no further action was taken on it.

On April 20, 1882, a petition was received requesting that a public hearing be given upon the subject of laying out the larger lot as a public square. This petition was referred to the Committee on Public Parks who subsequently gave the
FIGURE 15  THE LARGE AND SMALL TRIANGLES
public hearing. They made a report on May 11, 1882, the substance of which is as follows:

The lot of land in question is surrounded by some of the most costly and ornamental public buildings in the city, erected in a great measure by private munificence and on one side of the square is situated the land recently given by the Commonwealth for the site of the new Public Library.

The consensus at the hearing was a willingness to follow this proposal. In addition, a proposal was made that the city appropriate $100,000 for the objective of laying out the lot and that the balance of the amount needed to purchase the land be obtained through private contributions. This proposition met many of the views that the committee had previously entertained and they unanimously gave the opinion, that the generous proposition and earnest desire of so large a number of heavy taxpayers should not be ignored and that such a favorable opportunity for not only beautifying the city, but also adding to the health and comfort of all classes of citizens should not be lost.

The Committee therefore authorized the City Treasurer to make a special appropriation to cover the expense of land acquisition and to spend the sum in the name of the city under the provisions of Ch. 107 of the Acts of 1881.

In accord with the vote, the larger triangle was conveyed to the city by four deeds. The first deed was from the Trustees of the Museum of Fine Arts dated July 3, 1882, and conveying the southwesterly apex of the triangle. A clause in this deed stated that it was "to be used for the purpose of a public street or park of the said city." The second deed was
from the Harbor and Land Commissioners dated June 30, 1882 and released to the city the southerly half of an existing alley-way immediately north of and adjacent to the first tract. This transfer was made upon the condition that the parcel would "forever be kept open as a public park . . . and shall be subject to the limitations and stipulations relative to lands of the Commonwealth on the south side of Boylston St. . . . ."

The third deed also came from the Harbor and Land Commissioners dated July 13, 1882, and conveyed to the city the rectangular piece of land lying immediately north of and adjacent to the passageway the southern half of which was given by their previous deed. This deed contained so-called "Back Bay Restrictions" as to the desired character of the buildings but no reference to parks or other uses was included. In actuality, this tract had been bonded by the Commonwealth to a private citizen and the city repurchased the bond and called for this deed. The fourth deed came from the Massachusetts Institute of Technology dated July 21, 1882, and conveyed to the city the remainder of the triangle which lied east of and adjacent to the larger tract described in the third deed. The fourth deed also did not contain a statement of limitation as to a park or other uses. 41

These four parcels of land which composed the large triangle were bought in accordance with the proposition of the City Council. The duty of finding an appropriate name was
referred to the Joint Committee on Common and Public Grounds which in February, 1983 reported that they recommend that the square be named Copley Square in commemoration of John Singleton Copley, who was a distinguished Boston-born artist. This order was passed and approved on February 21, 1883, and the Committee on Common and Public Grounds was authorized to place a suitable curbstone around the square.

During the State Judicial Court Case, the defendants claimed that this larger triangle had never been laid out or otherwise dealt with by the Board of Park Commissioners as or for a public park. This triangle was never under the Commissioners' control but instead, has always remained within the jurisdiction and control of the Committee on Common and Public Grounds of the City Council, or the Superintendent of Public Grounds.

THE SMALL TRIANGLE

The smaller of the two triangular pieces of land was enclosed by Huntington and St. James Avenues and Trinity Place. This triangle was acquired by the city of Boston when the City Council authorized a special appropriation to be called Trinity Triangle. The Board of Park Commissioners was then asked to acquire the land for a public park, which would spare the facades of the Trinity Church and the Museum of Fine Arts from a proposed hotel. They spent $30,000 and purchased the deed from a private owner. This deed was conveyed to the city on January 3, 1885 with the provision that it be
used only for the purposes of a public park or street and that no building could ever be erected on any part of it. The excess cost above $30,000 (or approximately $40,000) was paid by public subscription after public agitation to preserve the triangle from being built upon. Ironically, the present defendants, H.B. Williams, contributed $1,500 and Babson S. Ladd, contributed $500 to this subscription.

In April, 1885, on recommendation of the Committee on Common and Public Grounds, it was ordered that the name of Copley Square be made to include the parcel of land adjacent to it, known as Trinity Triangle. This order placed the parcel under the charge of the Committee on Common and Public Grounds.

The smaller triangle was never laid out or otherwise dealt with by the Board of Park Commissioners as or for a public park except in one instance.43 This happened in March, 1898, while the bills which resulted in the Statute of 1898 were pending before the Legislature. The city law department was asked by supporters of these bills to bring the bill in equity against the owners of the Westminster Chambers under the Act relating to the building line on parkways. For the purpose of furnishing some ground for this bill, the city law officer who brought it advised the Park Commissioners to make some expenditure upon the small triangle, to support a claim that it was a park. In response to this advice, the Park Commission expended on the triangle $3.50 on March 4, $1.75 on
March 5, 1898, and $63.99 in 1899. Also, on March 1, 1898, the Park Commission notified the Superintendent of Public Grounds that the Superintendent of the Park Commission would take charge of Trinity Triangle.

STATUS OF THE TRIANGLES

Each of the triangles consists physically of grass covered ground surrounded by a stone curbing. The large triangle has at times since the passage of the St. of 1898 had flowers and plantings, but not before. Neither triangle has ever been furnished with seats nor any other accommodation for public use and the public has really never occupied them for any purpose.

The defendants perceived the entire open space known as Copley Square to consist merely of certain streets which surround and enclose the two triangular pieces of vacant ground. In fact, they felt that there was not evidence to make Copley Square, or any part of it, a public park or to give it any legal or physical characteristics of a park (except to a minor part of one of the triangles).

The first significant fact is that the two earliest projects to acquire one or both of the triangles for park purposes, at the expense of the city, were abandoned. The only facts having any tendency to make any part of Copley Square a park are the terms of two of the four deeds by which the larger triangle was acquired by the city in June and
July, 1882. The other two deeds contain no words of limitation as to a park or other special uses.

When in February, 1883, the Joint Committee on Common and Public Grounds named the lot of land which was purchased, it referred to it as "a public square" and the subsequent order passed February 21, 1883, which named it as Copley Square, also confirmed this. Therefore, it was made public knowledge at the beginning that the city did not regard or treat any part of this triangle as a park, but as a "public square."44

The substance of the history of the larger triangle is that no part of it is limited to park uses, even by deed. The only exceptions are the southerly half of the passageway, a strip 12½' wide (687 ft²), released by the Harbor Commissioners on June 30, 1882, and the easterly part (13,218 ft²), conveyed by the Institute of Technology, which is limited by virtue only of the reference in the deed to the St. of 1881, c. 107. The deed itself contained no words of limitation.

Thesouthwesterly apex (759 ft²), is limited only to "a public street or park" and the large rectangular section (being the northwesterly part of the triangle (12,600 ft²), is under no limitation to park or other uses. The defendants therefore argued that these facts tended to disprove the allegation that this triangle, or any part of it, is a park. They further felt that even the two parts of the triangle which could be claimed as a park are not necessarily a park in the eyes of
the city. A park cannot be forced upon the city against its will.

The smaller triangle was acquired by the city with the deed stating that it should be used only for the purpose "of a public park or street." This conveyance left its use open and the city's conduct indicates a purpose not to make it a park. It was ordered that it be placed under the charge of the Committee on Common and Public Grounds, even though there was a park department in charge of all the parks of the city. It was established ten years earlier by virtue of St. 1875, c. 185.

The smaller triangle was never dealt with by the Board of Park commissioners as a public park. The only exception was while the bills which resulted in St. 1989 were pending before the Legislature when the city law department was asked by supporters of these bills to bring a bill in equity against the owners of the Westminster Chambers under St. 1986, c. 313, providing a building line on parkways. The city did not do so voluntarily but acted in response to the request. The proceedings with the Park Commission later taking charge showed that the city law officers did not believe that it was a park and felt obliged to advise the Park Commissioners to make expenditures on the triangle in order to warrant even the filing of a bill under the Parkways Act. The city never prosecuted this bill.
The Boston Park Act, St. 1985, c. 185, contains provisions for the acquisition, establishment, and maintenance of public parks in Boston and apparently excludes any other method of acquisition. Under the park system established by this Statute, the defendants contended that a public park cannot be established in Boston except by proceedings of the Park Commissioners in accordance with the Statute. There must at least be some clear act of dedication and acceptance by the city. In the case of either of the triangles in Copley Square, there has been no such action of the city or by the Park Commissioners or otherwise. The conduct by the city since their acquisition is inconsistent with their acceptance as public parks and instead, indicates a purpose to keep these triangles for a public square or a part of the public grounds of the city.

THE LEGISLATURE'S PERCEPTION OF COPLEY SQUARE

In this case, the more important question is not whether Copley Square is technically a park, but whether the Legislature actually regarded it as a park and passed the Statute for the protection of its light and air as a park. On the face of the Statute, there is no indication that this was its purpose. The Statute does not contain the word "park" nor does it make any allusions to light or air. It ignores the distinction between the parts of Copley Square which can be claimed to have the character of a park (the who small pieces of the larger triangle) and the Square as a whole.
Section 2 of the Statute which declares that the Building-Line Acts of 1896 and 1897 do not apply to this territory also indicates that the Statute was not passed for the protection of the light and air of the Square. The limitation imposed by these earlier Acts, if any, is 70 feet. If there was such a limitation, then the raising of the limit to 90 feet by the Statute of 1898 could not have been for the protection of the light and air of the Square, which would necessarily be more interrupted by a building 90 feet high than by one 70 feet high. The 90 foot limitation also applies to land as far east as Clarendon Street which is 248 feet from the easterly line of the Square. Even a building of 125 feet this far distant from the Square could not interfere to any perceptible extent (which the Legislature would take note of) with the light and air of the Square.

The committal of the power of approval of the excepted structures to the Park Commissioners does not necessarily indicate that Copley Square was regarded as a park. It can be otherwise accounted for by Section 2 which provides that he Building-Line Sts. 1986, c. 313, and 1987, c. 379, do not apply to the Square. In committing the power to the Park Commissioners, St. 1898 was only following St. 1897, which did the same thing. The St. 1898 followed this precedent of committing the power of approval of the excepted structures to the Park Commissioners instead of leaving it with the City Council.
The first movement toward St. 1898 was the circular for a public meeting which is plainly directed to the protection of the "architectural and artistic beauty of the square" and nothing more. The original petition and bill asked for legislation to prevent the construction of buildings to a height exceeding 80 feet within 500 feet of the Square. Protection of the light and air of the square does not call for any such extended application. The real purpose was to keep down the Westminster Chambers so that Trinity Church might dominate one side of the Square. All the buildings near the Square were to be kept low so that the Trinity Church and library would appear imposing by contrast.

The movement was promoted for the purpose of preventing a ten-story building on the Westminster site, especially for the protection of the light of the Art Museum and of the architectural effect of Trinity Church, whose skyline would be broken by a building 120 feet high on this site. The Square is shaded much more by Trinity Church and the Art Museum than by the Westminster Chambers even at 120 feet high. Therefore, it does not appear that the legislature actually dealt with Copley Square as a public park and passed the Statute for the protection of its light and air as such. As to whether this question is concluded by the previous opinion of the Court, it was concerned with the approval of the sculptured ornaments by the Park Commissioners and did not have all of the facts pertaining to the nature of Copley Square.
No person standing in or passing through Copley Square would ever know whether the building is 90 feet or 96 feet or perceive any difference in light, air, or view between the two heights. The only perceptible thing is the ornamental character of the architrave, frieze, and cornice, which makes the building more attractive. Still more perceptible would be the unsightly character of the building if these ornaments were cut off and the building left flat above the window copings at the height of 90 feet. This would result in injury to the architectural appearance and effect of the Square as a whole.46

It should also be noted that the previous Supreme Court case based its decision on the architrave, frieze, and cornice being merely "an ornamental facing of terra-cotta." In fact, they are tied into the form part of a wall and form the upper part of the building. The defendants argued that the approval of the ornamentation by the Park Commissioners legalizes any necessary support especially if it means no additional interruption of light or air about which the Court would be concerned.

REBUTTAL TO THE CLAIM THAT COPLEY SQUARE IS NOT A PARK

As was stated earlier, the smaller triangle was purchased by the Park Commission under the Boston Park Act (St. 1875, c. 185). The public was so interested in securing this plot of ground for a public park that they voluntarily contributed to its purchase a sum in excess of that appropriated by the city.
The defendants were themselves so anxious in this respect that their contribution constituted 5 percent of the total subscription. The deed stating that it be used for the purpose of a public park or street. But, even before this purchase by the city, the contention has been made three times in Court that this plot had been dedicated to the city as a public park by its owners (Boston Water Power Co. v. Boston, 127 Mass. 374, William v. Boston Water Power Co., 134 Mass., 406, and Attorney General v. Whitney, 137 Mass. 450). In Williams v. Boston Water Power Co., the complainant was the same Henry B. Williams as in this case. At that time he was the owner of the entire lot on which the Westminster Chambers was built. As an owner, he filed a bill in equity claiming the small triangle to be "an open square" with a right to have it kept open so that there could be an unobstructed view and light and air. The bill stated that Williams had built six houses at great expense, which had an unobstructed view of the triangle and that the defendant was beginning to build houses which diminished the light and air and allegedly impaired the value of Williams' land.

Subsequently, in 1884, the Attorney General filed in Court to have this same triangle declared to be a park, but only a minority opinion of the Court Agreed. Failing in this effort, the triangle was purchased in 1885 by the Park Commission and Henry Williams contributed $1,500 in order to keep this area open. Now after helping the city purchase the
Square for his benefit, he feels that there need not be any reciprocal obligations.

DENIAL OF THE EQUAL PROTECTION UNDER THE LAWS

The defendants claimed that the Statute was in conflict with the Fourteenth Amendment as denying them the protection of the laws. They felt that in fact the Statute unreasonably discriminated against the Westminster Chambers. Their land was the only land to which the 90 foot limitation applied which was not already occupied by a costly and elaborate building of permanent character. This limitation was directed against them alone while appearing to apply to others. The Statute paid no regard to the character of any building built on this lot and one such as the Trinity Church would not be allowed.

The Statute permitted all buildings of any character on the north side of the same Square to be carried to a height of 100 feet and buildings in all other parts of Boston can be up to 125 feet tall (St. 1894, c. 443, Sec. 9) of which there are many. Since the passage of the Statute, an eleven-story hotel (125 feet tall), the Lenox, has been built without protest at the corner of Exeter and Boylston Streets, breaking the skyline of the Public Library. (Figure 16) Therefore, buildings could be erected outside the territory covered by the Statute of 1898 which would break what the opposition counsel termed "the sacred skyline" of Copley Square.
FIGURE 16  THE LENOX HOTEL BREAKING THE SKYLINE OF THE PUBLIC LIBRARY
THE DECISION OF THE SUPREME JUDICIAL COURT

On March 13, 1901, the Supreme Court of Massachusetts ruled that the decision in 178 Mass. 476 be sustained without specifying facts in detail. The Court said that if the Statute can be given a reasonable construction which will sustain it as constitutional, it is their duty to so construe it, even if it appeared that in the endeavors which suggested the legislation, considerations were presented to the Legislature which would not be a sufficient constitutional justification for such an enactment. The decree was for the plaintiff and the Court ordered that the defendants, Williams and Ayer (Trustees of the Westminster Chambers) and their agents be enjoined and restrained from maintaining the building after October 1, above the height of 90 feet or to ever construct it above that height. They were directed to take down and remove those parts of the walls and other parts as may be above that height, without prejudice to their right under the Statute to ornamentation that the Board of Park Commissioners may hereafter approve. The full Court indicated their view of gravity of the situation by taking the unusual step of immediately framing the decree themselves instead of sending it to a single Justice for that purpose.
CHAPTER FOUR: THE CASE COMES TO A CLOSE

THE COMMITTEE ON CITIES, APRIL, 1901

The Counsel for the owners of the Westminster Chambers, Albert E. Pillsbury, appeared before the Committee on Cities again in an attempt to save the top of the building. He told the Committee that what had really transpired was that several lawyers got together in order to construe a novel and somewhat difficult Statute. They viewed it naturally in the light most favorable to the interests that they were trying to protect. These lawyers put their construction on an Act which was never before known in this Legislature and the owners completed the building on the faith of it. Then the Court put a different construction on it. But even though they acted upon a view of the Statute that the Court did not concur with, they should not be punished by the destruction of their property. The burden principally falls on Woodbury & Leighton because the St. 1898 impaired the sale and value of the trust stock upon which the corporation chiefly relied for payment. Woodbury and Leighton were the largest contractors who had so much invested in it that they were compelled to carry it through litigation. Now that the Court has decreed that the building be cut down to the 90' line, the owners have vowed that they will not expend any money to improve its appearance. It is possible that if they decided to even put the same
ornamentation back on, they could go to the Park Commissioners and have it approved again.

The owners of the Westminster Chambers have come to the Legislature in order to present House Bills 658 and 781 intended to equalize the limitation of height in the Act of 1898 by so amending it that there would be a uniform limitation of 100 feet on all sides of the Square. If either bill is passed it would leave the building as it stands. The reason for presenting the bill is that in fact, public sentiment on this question has completely changed since the Act of 1898. When the public had succeeded in keeping the building down to eight stories instead of ten they were satisfied. There are none left to argue here against this proposed legislation except seven in attendance out of 3,000. The most respectable people who led the movement for St. 1898 do not oppose this legislation. The only people left, it appears, are seven calling themselves the "protective committee." Pillsbury said that they ought to be called the "destructive committee" by what they intend to do to the Square. In fact, a petition accompanied this new bill signed by 200 leading citizens and business firms including some of the most prominent real estate men in Boston, along with Mayor Hart. Their interest is that of the public and they recognize the injury which will be caused by cutting off the top of the Westminster Chambers. 51
Pillsbury claimed that the public has far more interest in this bill than the owners of the building. That is because it will avert the impending injury to the public by the cutting down of the building into an "architectural monstrosity" which will blemish Copley Square. In his closing remarks, Pillsbury said:

There is another conclusive reason for passing the bill. The plainest justice demands it. No more contemptible persecution has been perpetrated in the name or by the authority of Massachusetts since the hanging of the Quakers than this persecution—-for such it is—-of the owners of this building for putting upon it, in good faith, the ornamental finish that saves its appearance and the appearance of Copley Square. Yet for this they must be punished by further loss, and the public must be punished by disfigurement of the Square. The Legislature ought to welcome the opportunity of putting an end to this folly and inequity by the passage of this bill.

These arguments failed to persuade the Legislature to pass the bills and the case came before the U.S. Supreme Court to make a definitive judgment as to the constitutionality of the Statute of 1898.

THE SUPREME COURT OF THE UNITED STATES

The owners of the Westminster took a writ of error to the Supreme Court of the United States and while the case was being argued in Washington, Mayor Collins was presenting another petition to the Legislature to the same effect as the petitions of previous years. Also at this time, a new Attorney General, Herbert Parker, came into the case because Hamilton's term had expired.
The case came before the U.S. Supreme Court to review the judgment of the State Court. In this new litigation the plaintiffs were objecting that the Statute of 1898 was in conflict with the Fourteenth Amendment of the Federal Constitution. In considering whether the Statute conflicted with the Federal Constitution, the defense argued that the Statute fully prescribed the remedies open to the parties injured by the passage of the Act so as to give them complete compensation. They felt that Sections 3 and 4 of the Act together cover every possible element of loss.

The defense submitted that it was entirely within the authority of the Massachusetts Legislature to pass this Statute based on the police power inherent in every government. It is not essential that such a regulation should apply to all parts of the community, but the Legislature may, if it wishes, select a limited portion to which the regulations apply. The only limitation on such legislation is that it be "wholesome" and "reasonable." The defense argued that this case came within this limitation because it was a public square surrounded by public buildings which are not only of great value in themselves, but contain collections of literature and art for which it is even difficult to attach a price. The defense contended that the danger from fire to these public buildings was in itself a sufficient basis for passing the Statute. Furthermore, the importance of an adequate supply of light to the Art Museum, as well as to the public
area and adjacent streets, would also be in themselves an entirely adequate basis for the passage of the Statute. Even though the making of compensation is not incident to the exercise of the police power, the fact that compensation was given does not change the power under which the Legislature acted. If the Court thinks that the intention of the Legislature was to take rights in light, air, and view in the nature of an easement annexed to the streets and public square, it is in all respects in accordance with the rules regulating the taking of property by right of eminent domain. 52

In rebuttal to the plaintiffs' claims that they did not receive "due process of law," the defense cited previous court decisions defining due process to mean only such a process as recognizes the right of the owner to be compensated if his property is taken and transferred to the public. They said that the Federal Court should not interfere with a Statute which has been declared constitutional by the State Supreme Court unless it clearly appears that there is some abuse of law. A large discretion should necessarily be vested in the State Legislature to what the interests of the public require and the measures for their protection. 53 Also, the Federal Court is legally bound to give the same meaning to a state statute as was given it by the Supreme Court of the State. Apart from these considerations, the Legislature had the right to promote the beauty and attractiveness of a public park in the capital of the Commonwealth and to prevent
unreasonable encroachments upon the light and air which it had previously received (as the Court stated in 174 Mass., 476). The defense, furthermore, stated that the case involved a public improvement for the benefit of the entire Commonwealth, the expense of which might properly have been charged to the citizens of the Commonwealth, but which the Legislature had the power to place on the city of Boston. This point is not controlled by the Fourteenth Amendment, but it is purely a question under the Constitution of the State of Massachusetts, whether such a provision by the Legislature is permitted by that Constitution. On this point, the decision of the State Court is conclusive and should therefore be considered determined against the plaintiffs. 54

THE UNITED STATES SUPREME COURT DECISION

The Court ruled on February 23, 1903 that "due process of law" was not denied to the owners of property damaged by the enforcement of St. 1898. That the Statute did not conflict with the Constitution of the State was for the Court settled by the decision of the State Court. The Court found that the Statute did not conflict with the Constitution of the State in the Declaration of Rights, Art. X. This provision reads, "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." This was substantially the same as the provisions in the Fifth Amendment to the Federal Constitution which says, "Nor shall private
property be taken for public use without just compensation."

As far as the Federal Constitution was concerned, the State
can authorize the taking of a possession prior to any payment
or even final determination of the amount of compensation.
This decision was in harmony with the prior judgments in Court
in declaring the adequacy of the provision for compensation in
the Statute.

The Court said that the proceedings in this case were in
many respects novel and that possibly no case has arisen like
it in the country. The Massachusetts Supreme Court treated
the case as a condemnation, a taking for the public use and it
is a taking for the use primarily of the citizens of Boston.
As such, the Court sustained the competence of the Legislature
to cast the burden on the city. The Court also held that
there was not a failure to make adequate provision for the
payment of the damages sustained by the taking. They were
therefore in the opinion that the Statute of 1898 was not in
conflict with the Federal Constitution and consequently
affirmed the judgment of the Supreme Judicial Court of
Massachusetts.

THE COMMITTEE ON CITIES, FEBRUARY 1903

A new element came into the case in 1902 with the new
owners of the Art Museum property now appearing before the
Committee on Cities in order to increase the limitation in
height on their property from 90 feet to 100 feet. The Art
Museum allowed a three-year limit to expire without bringing
suit against the City of Boston for any damage caused by the statute of 1898, and sold the property subject to the 90 foot limitation. The intentions of the new owners therefore served to undermine a major basis for the decision against the Westminster Chambers and this was evidenced in public opinion. In fact, the Boston Herald conducted interviews with several prominent businessmen in the city on the question of height restrictions for Copley Square with surprising results. There was practically unanimous opinion that the chief reason for limiting the height of buildings on the south side of the Square was no longer in evidence and that if the limit was allowed to continue it would result in a marked depreciation of the adjoining property.

Nevertheless, the bill to equalize the height limitations around all sides of the Square did not pass. The main reason is that the opposition to any increase in height stressed that many of the principal reasons for enacting height restrictions were still in place. Sunlight was needed just the same, the shape of the Square still called for lower buildings on that side, and in regard to architectural appearances the Public Library and Trinity Church would still be affected by the erection of higher buildings on the south side. In addition, the danger from fire in a tall building was only reduced in that the Art was no longer there to suffer the consequences.
AFTERMATH

As ordered by the Supreme Court decision, the work of removing the offending portion of the Westminster was finally begun on August 29, 1903, with the city assuming the damages of more than $300,000. The removal of the six feet of superstructure did not destroy the upper floor of the hotel but only required the abandonment of about 5 feet of air space between the ceiling and the roof and a lowering of the ceiling by approximately 20 inches. The six feet of cornice was removed with the new roof construction serving as a roof garden. (Figure 17) The actual removal of the top of the Westminster Hotel came to be a source of levity as was illustrated in a Boston Herald article which stated,

They're getting ready to stop the dance of the blithesome cherubs on the cornice of the Westminster, in Copley Square, to destroy the garlands of flowers and fruit that they carry, and to relieve the caryatids of the six feet of stuccoed trouble that these beautiful females have been patiently carrying on their heads for the last four years.

Apart from this lighthearted view of the work, the difficulty of the removal was nevertheless immense as was depicted later in the article.

Picture a forest of heavy steel uprights with steel branches spreading in all directions. These branches are supported or connected by steel plates solidly bolted together by bolts that were driven by power while they were red hot. After the heads were chiseled off, the bolts could not be knocked out. They were made to stay for ages and they had to be cut out. The contract for the remodelling of the building called for the cutting out of a slice six feet high, not off the top, to speak accurately, but
FIGURE 17    THE WESTMINSTER HOTEL BEFORE AND AFTER THE REMOVAL
between the top and the eighth story of the building, leaving the top, or such portion of it as could be preserved, to be dropped upon the rest of the structure.

The heavy trunks of this steel forest had to be sawed off to the required height, the upper story of the building had to be ripped to pieces to permit the taking out and regrafting of the branches, water and gas pipes cut out and reset, elevator shafting overhauled, and an infinite number of other incidental tasks to be done.

This pruning job in steel has been done. The entire framework of the building has been lowered the required distance, the work of concreting the new roof is progressing rapidly, and once the roof is completed, and the building protected from the storms, the present roof and ornamental cornice will go, leaving the caryatids with nothing to carry on their heads, looking like a series of desolate females bereft of a burden which they were apparently willing to bear for years to come. (Figure 18) . . . even those who objected to what they believed to be a violation of the law will probably regret their spoilation unless they can console themselves with the thought that the building, however injured architecturally, will stand as an example of the law's vindication.

Mr. Woodbury of Woodbury & Leighton stated that no effort would be made to supply any ornamentation. He reiterated the position that there had been no deliberate violation of the law and that the aim of the cornice was not to add utilizable space to the hotel, but to provide ornamentation for a structure which could not be built to the height originally planned. Woodbury said, "If a 90 foot building is desired by the people of Boston, let them have it." In fact, he decided to have the remodelling done to 80 feet 10 inches so as to be safely within the law.
FIGURE 18 DETAIL OF THE REMOVAL

WESTMINSTER CHAMBERS ROOF NOW AND TO BE.
The Dotted Line is Very Close to the Future Height of the Building.
CONCLUSION

The Westminster Hotel served as a test case where the Supreme Court adopted a broad view of the proper goals of the police power to encompass safety, comfort, convenience, and benefit of property owners generally. When the opinion noted the kind of buildings located around Copley Square and stated that

It would be hard to say that this Statute might not have been passed in the exercise of the police power, as other statutes regulating the erection of buildings in cities are commonly passed.

This was an affirmative gesture towards a perception of the police power as the basis for the regulation of building heights. According to Norman Williams in American Land Planning Law, most of American zoning has proceeded directly from the statement. By leaving "the door open" on the question of the applicability of the police power to restricting building heights, the opinion indicated that public control of private land did not necessarily require compensation.

Interestingly, a difference of height restrictions covering the whole city of Boston was adopted only a few years after the Westminster case. Under these regulations, buildings were restricted in most of the city to 80 feet and occasionally to 100 feet on very wide streets, with a 125 foot height permitted in a small area of the commercial district. These new limitations were explicitly a zoning plan, with
different regulations for different districts. The regulations were upheld in both the Massachusetts and U.S. Supreme Courts in Welch v. Swasey (later used as a precedent in Euclid v. Ambler) which involved a proposed 125 foot building in the residential district facing the Public Garden.

The U.S. Supreme Court started their opinion by stating that the early 125 foot general height limitation was valid in principle and concurred specifically on the principles in the Westminster case. The Court also ruled that different areas of the city could be differentiated under the police power. The two-district height restrictions thus upheld continued in effect in Boston for twenty years until the establishment of comprehensive zoning which superseded them.

The Westminster Hotel was razed in 1963 with the particular irony that the new occupant for its side was the 60-story John Hancock Insurance Company building, the tallest building ever built in Boston. (Figure 19) Not only is the Hancock building about 8 times taller than the Westminster, it has also proved to be a considerably greater safety hazard as well as significantly impacting the environment of the Square. Large numbers of glass panels have come crashing down due to design problems and there was even some cracking to Trinity Church which had to be resolved in a multi-million dollar out-of-court settlement. In fact, the dramatic scope of impact by the John Hancock building on the Square can be seen
FIGURE 19  THE JOHN HANCOCK BUILDING
in the 1984 Copley Design Competition "background information." These design guidelines reflect the fact that the John Hancock Tower not only deflects gale force winds into the area, but substantially shades the Square as well. The John Hancock development has served to illustrate the point that when it comes to the exploitation of political leverage, nothing's sacred.
Footnotes


2. Ibid., p. 2.

3. Ibid., p. 41.

4. Ibid., p. 42.


6. Ibid., p. 106.

7. Edmund A. Whitman, Address Before the Joint Committee on Cities, 1902, p. 4.


10. Ibid., p. 6.

11. Ibid., p. 7.

12. Ibid., p. 7.


17. Ibid., p. 28.

18. Ibid., p. 38.


21. Ibid., p. 5.

22. Edmund Whitman, *Address Before the Joint Committee on Cities*, 1903, p. 11.


26. Ibid., p. 10.

27. Ibid., p. 11.

28. Ibid., p. 12.

29. Ibid., p. 13.


32. Ibid., p. 5.

33. Ibid., p. 10.

34. Ibid., p. 18.

35. Ibid., p. 20.

36. Ibid., p. 21.

37. *Massachusetts Supreme Court, 174 Mass. 479*.


42. Ibid., p. 5.
43. Ibid., p. 11.
44. Ibid., p. 72.
45. Ibid., p. 13.
48. Ibid., p. 33.
49. Ibid., p. 39.
50. Massachusetts Supreme Court, 178 Mass. 336.
52. U.S. Supreme Court, 188 U.S. 491, p. 5.
53. Ibid., p. 6.
54. Ibid., p. 7.
55. U.S. Supreme Court, 188 U.S. 491.
57. Boston Herald, Aug. 27, 1903, p. 11.
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2. March 15, 1901
3. Aug. 27, 1903

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