

Opinion No. 33-702

December 14, 1933

BY: E. K. NEUMANN, Attorney General

TO: Honorable Clinton P. Anderson, State Treasurer, Santa Fe, New Mexico.

Re: State of New Mexico Highway Debentures, Series G-39 and G-40, \$ 500,000.00.

OPINION

{*99} In answer to your request of December 12th, 1933, for the opinion of this office as to the legality of the issue of State Highway Debentures, above described, which you propose to purchase as an investment of permanent funds, we beg to advise as follows:

(a) Said debentures are to be dated May 1, 1933, bearing interest at the rate of 4 1/2 % per annum and due as follows:

Series G-39 -- May 1, 1941.

Series G-40 -- May 1, 1942.

(b) The resolution of the State Highway Commission authorizing the issue and the minutes of the State Board of Finance, authorizing said issue, together with the various resolutions relating to said issue, contained in said minutes, are in our opinion, regular and in due form, sufficient to constitute all procedure necessary to authorize the valid issuance and sale of said debentures to the State Treasurer.

The authority for the issuance of said debentures is found in Chapter 30, Laws of 1933, which is "an act Relating to State Highway Debentures." This act was approved February 23, 1933, and became effective immediately because of the provision contained in Section 8 thereof.

"Sec. 8. That it is necessary for the preservation of the peace, health and safety of the inhabitants of the State of New Mexico that the provisions of this Act shall become effective at the earliest possible time and therefore an emergency is declared to exist and this Act shall take effect and be in full force and effect from and after its passage and approval."

That said act became effective immediately cannot be doubted. In *Hutchens vs. Jackson*, 37 N.M. , 23 P. (2d) 355, our Supreme Court, said:

"It follows from what has been said that the trial court was correct in refusing to go behind the legislative declaration of an emergency, contained in the act in question. That determination was final and conclusive and binding upon the courts."

A petition was later filed in the office of the Secretary of State for a referendum on said Act, and the Secretary of State proclaimed that said petition contained more than 25% of the signatures of the qualified electors in three-fourths of the Counties in the state and that, therefore, the operation of said act was suspended under Section 1 of Article 4 of the Constitution of the State of New Mexico.

The effect of this petition for referendum presents the most serious question in this matter, same being: Has the State Highway Commission the legal rights, under Chapter 30, {*100} Laws of 1933, to issue the debentures in question, in the face of said referendum petition? As has been noted, if said law is in full effect and has not been suspended, the issue is legal, as the procedure for its issue has in all things, in our opinion, been valid and regular.

This office has always taken the position that said act is and has been in full force and effect since the date of its approval by the Governor, in spite of said petition for referendum. This position was upon the ground that said act, containing Section 8, commonly known as the "emergency clause," was not subject to a referendum and could not, therefore, be suspended by such petition. Our premise was based upon the provision of Section 1 of Article 4 of the Constitution, which exempts from referendum, among others, "laws providing for the preservation of the public peace, health, or safety."

This office took said position in the case of Todd vs. Tierney, which finally went to the Supreme Court as Cause No. 3910, and which has just been decided and as yet is unreported. This case resulted from controversy over Chapter 171, Laws of 1933, which, as far the referendum is concerned, is in the same status as Chapter 30, here under consideration. The Supreme Court, in a divided opinion, held, as is aptly put by Chief Justice Watson in the Opinion On Rehearing, which denied a Motion for a Rehearing, as follows:

"By majority we hold that the presence of the emergency clause does not of itself defeat the right of referendum, and hold that when and if the referable character of the act becomes a judicial question, it is to be determined by the courts independently of the legislative declaration employed in giving the act immediate effect. By a majority differently constituted we hold that the right to suspend the operation of a statute by filing petitions does not extend to an act which is already in effect.

"Applying those holdings to this case: The statute in question was at the time its enforcement was enjoined, and is now, in full force and effect. The filing of the 25% petition did not disturb its present validity or operation. But, though unavailing to suspend the operation of the statute, it was and is efficient as a 10% petition to invoke the referendum, subject to a possible judicial determination hereafter that the act is of a non-referable character.

"There can be no reasonable doubt, therefore, as to the result which may hereafter attend popular disapproval of the statute. It will not be 'annulment' in the

sense of annihilation or a voidance ab initio which follows disapproval of an act whose operation has been suspended. It will be 'annulled and thereby repealed with the same effect as if the legislature had then repealed it,' with the additional effect that 'such repeal shall revive any law repealed by the act so annulled'."

From such language, it is our opinion that Chapter 30, Laws of 1933, is now in full force and effect, and that the referendum petition cannot affect the validity of the issue of debentures issued thereunder.

It is generally conceded that where contract rights have accrued under a statute later repealed, such repeal cannot affect such rights, same having become vested.

"When a right has arisen upon a contract, or a transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute, does not affect it, or any action for its enforcement. It is a vested right which stands independent of the statute."

25 R.C.L. 938.

"Where a valid contract with the state has been entered into in pursuance of a legislative enactment a subsequent legislature cannot enact a law which provides for an abrogation of the contract."

25 R.C.L. 910.

This proposition has had some attention by our Supreme Court in Reade vs de Lea, 14 N.M. 443, in *{*101}* which case the court quoted with approval from Bruce vs. Strickland, 81 N.C. 198, wherein it was said: "The marriage took place and the title vested in the defendant previous to the restoration by statute of the common law rights of dower and before the creation of a homestead in land. It was **then** in the power of the defendant by his deed to convey a **full and complete title in fee** to the land. Has this absolute dominion over his property been abridged by an act of subsequent legislation or could it be, under the principles of the constitution, without the owner's consent or concurrence? The value of property consists in its use, disposition or conversion into something else and these are the elements constituted a vested right which the legislature cannot take away except for public use and then only on making compensation to the owner. This security is guaranteed in the constitution of the United States in the clause declaring the obligations of contracts inviolable."

Section 19 of Article 2 of our Constitution is as follows:

"No ex-post-facto law, bill of attainder, nor law impairing the obligation of contracts shall be enacted by the legislature."

In the case of Hayner vs. Dona Ana County, 29 N.M. 311, the Supreme Court was faced with this question in principle, and therein the Court said:

"It is apparent that the question involved is a very narrow one. The Legislature through the sections of the Code above mentioned had offered to pay to every one a certain bounty upon specified wild animals. The animals had been killed and evidence thereof had been presented to the county clerk of the county as provided by the statute, and certificates of indebtedness had been issued to various persons, to the right of whom the appellee had succeeded, and others similarly situated held such certificates. The offering of this reward and the performance by the various people of the conditions mentioned in the statute constituted a contract between the County of Dona Ana and the respective persons concerned. Thereby vested rights arose between the parties and the county. To allow the repeal of the statute under which these rights became vested to operate to destroy the right would be to impair the obligation of the contract between the parties, and would be violative of the Constitution of the United States (article 1, § 10, cl. 1) as well as section 19 of article 2 of the State Constitution. That such a right may not be taken away by legislature, see citing authorities."

From all of the foregoing it is our conclusion as follows:

- (a) The authority to issue said debentures is found in Chapter 30, Laws of 1933.
- (b) Such act is in full force and effect; that the debentures issued thereunder are valid in all respects and the subsequent repeal of Chapter 30, Laws of 1933, by either an act of the Legislature or vote of the people under the power of referendum, after date such debentures are issued and sold, will not effect the validity of such debentures.
- (c) The procedure taken to issue and sell said debentures is in all things proper and regular.

Consequently, it is our opinion that you may safely purchase said series of debentures as an investment for permanent funds in the State Treasury.