

April 17, 1961

Honorable Richard M. Kennedy
Representative, Eighth District
House of Representatives
First Legislature
State of Hawaii
Honolulu, Hawaii

Dear Sir:

In response to your request by letter dated April 5, 1961 regarding the constitutionality of H. B. 1268, it is our opinion that the bill, if passed, would be constitutional subject to qualifications as to the provisions in lines 5 to 10 of page 1. Questions of constitutionality are raised primarily by two sections of the bill:

Firstly, by that portion of H. B. 1268 contained in lines 5 to 10 of page 1, reading as follows:

"Notwithstanding any provision in section 129-2 to the contrary, there shall be added to the real property tax rate determined pursuant to the provisions of section 129-2 for taxation sections 1 to 7 of zone 4 of Koolaupoko taxation district in the City and County of Honolulu, the sum of \$_____ per \$1000 of assessed value of taxable real property . . ."
(Underscoring for emphasis added.)

Secondly, by that portion of the bill constained in lines 11 to 16 of page 1, reading as follows:

"Which additional sums shall be levied upon properties located in said taxation sections only and collected by the State tax collector to be expended solely for the construction of or to be contributed to any organization, public or private, for use in constructing the Castle Memorial Hospital, Inc., in Kailua, in the City and County of Honolulu . . ." (Underscoring for emphasis added.)

Discussion of the problems raised by the above will be taken in reverse order.

The proviso, set forth in lines 11 to 16, insofar as it allows contribution of taxes collected to any private organization or organizations for use in constructing "the Castle Memorial Hospital, Inc., in Kailua, in the City and County of Honolulu" raises the question of whether Article VI, section 6 of the Constitution of the State of Hawaii ¹/₂ is violated.

The wording of H. B. 1268 commencing with the "or" clause in line 13 of page 1 should be noted. This alternative permits channelling of public moneys through an intermediary, public or private, before the funds for constructing "the Castle Memorial Hospital, Inc." are actually put to such use.

Let us first consider the case where taxes are directly given over to the construction of a private hospital since if the appropriation is not permitted in that instance, a fortiori, passing the same through a middleman would also be prohibited.

That the recipient hospital in this case would be a private one does not per se eliminate the possibility of a public purpose. In the case of In re Queen's Hospital, 15 Haw. 663, the court said:

"What is a public purpose . . . is not always easy to determine. No general definition, to apply in all cases, need be laid down. It is sufficient to determine in each particular case whether, upon all the facts and circumstances, the purpose is a public one. "

¹/₂ The portion of Art. VI, section 6, germane to this part of the discussion is as follows" "No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used directly or indirectly, except for a public purpose. "

Stating the rule which should be applied to given facts, the court continued:

"'. . . (the courts) must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.' Loan Association v. Topeka, 87 U.S. 655, 665."

It decided that an appropriation by the Hawaiian legislature for the benefit of the Queen's Hospital, a private institution, would be for a public purpose. In applying the rules previously stated, the court looked to the charter of Incorporation of Queen's as well as to its going practices and found that since profits of the Hospital under said charter were restricted to charitable purposes specifically enumerated and that "no part of such profits (could) inure to the benefit of any private individual, whether a corporation or not", there could be no doubt that Queen's could be given public aid.

The court in the principal case seemed to have intimated that had the hospital followed its charter strictly, that is, given relief only to "sick and destitute Hawaiians" (the latter in the literal sense) there would have been a question as to whether the appropriation would be valid.

The rule to be derived from In re Queen's Hospital is this: Appropriation of public moneys to a hospital, even though a private one, would be for a public purpose if such hospital were an eleemosynary institution and its charitable functions were available to all alike. As to the constitutionality of handling the financing through a middleman organization, whether turning over public moneys to it would constitute a public purpose, would under the rationale of In re Queen's Hospital turn on the charter or purpose of that organization itself. The same requirements as imposed upon the ultimate beneficiary would apply to such intermediaries.

Applying the facts to the legal tests above enunciated, we find stated in Article III of the Charter of Incorporation of Castle Memorial Hospital, Inc. its objects and purposes to be:

"(a) To establish and maintain a sanitarium and hospital for the care of persons suffering from illnesses or disabilities which require that the patients receive in or out patient care.

" (b) To carry on any educational activities, including the operation of a school of nursing, related to rendering care to the sick and injured, or the promotion of health, which in the opinion of the Board of Trustees may be justified by the facilities, personnel, funds or other requirements that are or can be made available.

"(c) To promote and carry on scientific research related to the care of the sick and injured insofar as, in the opinion of the boards of trustees, such research can be carried on in, or in connection with the hospital.

"(d) To participate, so far as circumstances may warrant, in any activity designed and carried on to promote the general health of mankind ."

That Castle Memorial qualifies as an eleemosynary institution can be seen from the objects and purposes hereinabove stated. Its Charter of Incorporation also shows that Castle Memorial is a nonprofit corporation ^{2/} incorporated under

^{2/} Art. 8 of the charter of incorporation reads:

"The corporation is not organized for profit and it will not issue any stock, and no part of its assets, income or earnings shall be used for dividends, or otherwise withdrawn or distributed to any of its members; provided, however, that nothing herein contained shall prevent the payment in good faith of remuneration to any

the laws of the State of Hawaii by members of the denomination of the Seventh-day Adventists. In our opinion, an appropriation to Castle Memorial out of taxes collected would be for a public purpose since no part of the profits therefrom will inure to any individual and since such corporation is organized for charitable purposes beneficial to the general public.

However the connection between Castle Memorial Hospital and a religious body presents another constitutional issue, namely, that raised by the second sentence of Article VI, section 6 of the Hawaii Constitution, which reads as follows: "No grant shall be made in violation of Section 3 of Article I of this constitution." Section 3 in turn reads "No law shall be enacted respecting an establishment of religion. . ." The interpretation of these provisions was brought up before the 1950 Constitutional Convention. In a letter ²/ from the Attorney General of the Territory of Hawaii to Mr. Henry A. White, Chairman of the Committee on Public Finance and Taxation, the former wrote:

"With reference to the provision of section 10 that 'No grant shall be made which is contrary to or in conflict with section 5 of Article ____ of this Constitution, 'the section to which reference is made in turn providing that 'No law shall be passed respecting the establishment of religion * * * , ' it is my opinion that this clause adopts the

²/ cont'd
of them in return for services actually rendered or to be rendered to the corporation. Upon dissolution of the corporation, title to all of its assets and properties shall vest in the Hawaiian Association of Seventh-day Adventists, or its successor, to be held in trust for the purposes set forth in this Charter. Should the Hawaiian Association of Seventh-day Adventists, or its successor, for any reason not qualify to receive the assets, then they shall be transferred to the next higher organization within the Seventh-day Adventist denomination, which is qualified to receive them."

³/ Proceedings of the Constitutional Convention of Hawaii, vol. 1, p. 200.

construction placed on language of the First Amendment similarly prohibiting any law respecting the establishment of religion. That construction is that the constitution erects 'a wall of separation between church and state' which precludes support by the State of 'any religious activities or institutions whatever they may be called, or whatever form they may adopt to teach or practice religion,' in the words of the majority in *Everson v. Board of Education*, 330 U.S. 1, 16, and *McCullum v. Board of Education*, 333 U.S. 203, 210, or in the words of the minority, 'the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises * * *. Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small,' *Everson v. Board of Education*, 300 U.S. 1, 41, 52-53, quoted in *McCullum v. Board of Education*, 333 U.S. 203, 210, note 7."

The Attorney General then continues:

"Exactly how this doctrine applies in particular situations will have to be developed upon consideration of the relevant facts and judicial opinions."

Analyzing our problem in the vein suggested by the above letter, we believe the controlling case to be *Bradfield v. Roberts*, 175 U.S. 291, 20 S. Ct. 121, 44 L.Ed. 168 (1899). In that case the question was whether a hospital chartered to care for the sick could receive a grant of aid from the federal government under a contract between the District of Columbia and the directors of the hospital, composed of a monastic order or sisterhood of the Catholic Church, without there being a violation of Article I of the Amendments of the Federal Constitution. Declaring that the charter powers of a corporation control and not the religious beliefs of the stockholders, the Supreme Court of the United States upheld the appropriation.

More recently, Kentucky Building Comm. et al. v. Effron (310 Ky. 335, 220 S. W.(2d) 836, 1949) upheld the state in a test case in which a taxpayer questioned the allocation of state funds (a procedure designed to acquire matching federal funds in the construction of public and other non-profit hospitals) to sectarian hospitals. The provision of the state constitution invoked by the taxpayer declared that "no preference shall ever be given by law to any religious sect, society or denomination." Under the applicable facts, In the court's opinion:

"Religion is not taught in these hospitals nor is any one sect given preference over another. The fact that members of the governing boards of these hospitals, which perform a recognized public service to all people regardless of faith or creed, are all of one religious faith does not signify that the money allotted the hospitals is to aid their particular denomination."

Other cases upholding appropriations of the type in issue here are Opinion of the Justices, (113 A.(2d) 114, N.H., 1955) and Craig v. Mercy Hospital-Street Memorial (45 So. (2d) 809, Miss., 1950). Compare Collins v. Kephart, (117 Atl. 440, Pa., 1921).

Our opinion, following the interpretation of the weight of authority is that the appropriation of the type here contemplated to Castle Memorial (a hospital administered under a religious or sectarian group) would not on the face of its charter be a law respecting the establishment of religion. However a word of caution is necessary because if the actual operation of the hospital tends to the "establishment of religion," regardless of what appears on the face of the charter, the continued assessment of properties in the sections indicated may be questioned constitutionally.

Having discussed the constitutional aspects relating to the provisions in lines 11 to 16, we now turn our attention to lines 5 to 10. This section of the bill purports to increase the real property tax rate upon only a portion of the Koolaupoko taxation district. Ostensibly the line of demarcation of property subject to this higher tax is so drawn to encompass an area within which the inhabitants will be most benefitted. Taxation maps indicate that zone 4 contains 9 sections. However the present bill does not include sections 8 and 9. Nor does it include zone 5 which is contiguous to zone 4, both zones being separated from the rest of the island of Oahu by the Koolau mountains. Were the bill drafted to subject both zones to the greater rate of taxation a

rationale might be forwarded that such additional burden was imposed because these zones would benefit most from the erection of a hospital on the windward side of Oahu and because the difficulty of access would make use of such hospital by persons in other zones less likely. Similar but less persuasive reasoning might apply if all of zone 4 only were subject to the higher rate. We do not say the present class classification is wholly without good reason. We do say that if such there be, the same is not apparent on the face of the bill. Discussion of the reasoning behind a particular classification for purposes of taxation is necessary because the "due process" and "equal protection" clauses of the 14th Amendment to the Federal Constitution and of section 4, Article I of the Hawaii Constitution require that the burden of additional taxes must not be imposed arbitrarily. In the words of 12 American Jurisprudence at 135:

"Due process of law as guaranteed by the Fourteenth Amendment (is) defined in terms of the equal protection of the laws--that is, as being secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by established principles of private right and distributive justice."

The requirement as to "due process of law" is satisfied

"if the law under consideration operated equally upon all who came within the class to be affected, embracing all persons who were or might be in like situation and circumstances, and the designation of the class was reasonable, not unjust, capricious, or arbitrary, but based upon a real distinction, and the law operated uniformly, and that if, added to this, the law was enforced by usual and appropriate methods."

At 12 Am. Jur. 140, the power of the legislature to classify is considered:

"The equal protection clause of the Fourteenth Amendment does not intend to take from the states the right and power to classify the subjects of legislation. It does not prohibit or prevent classification, provided such classification of persons and things is reasonable for the purposes of legislation, is based on

proper and justifiable distinction, considering the purpose of the law, is not clearly arbitrary, and is not a subterfuge to shield one class or unduly to burden another or to oppress unlawfully in its administration."

While emphasis is placed upon "reasonableness" and "non-arbitrariness" of classification, what constitutes a reasonable classification for taxation according to Cooley ^{4/} "cannot be determined by any fixed rule". And continues Cooley, "the legislature has a broad discretion in the matter of classification."

"Classification for taxation is not reviewable by the courts unless palpably arbitrary. It is no concern of the court whether the classification is the wisest or the best that could be made. The classification need not be 'reasonable and proper' according to the judgment of reviewing judges, but the court must be able to see that legislators could regard it as reasonable and proper without doing violence to common sense. In other words, 'there must be enough reason for it to support an argument, even if the reason is unsound.' However, a discriminatory tax cannot be sustained if the classification is wholly illusory."

In view of the foregoing authorities, it is our opinion that on the face of H. B. 1268, those provisions with relation to the classification of certain sections of zone 4 subject to increased tax rates do not indicate one way or the other whether a valid reason for such treatment exists. However the constitutionality of the present classification is aided, according to Robertson v. Pratt, 13 Haw. 601 (1901) by "a very strong presumption not only that the legislature intended to act constitutionally, but that it succeeded in doing so, and that the court should not declare an act of the legislature unconstitutional except in a very clear case. "

^{4/} 1 Cooley on Taxation 714 et seq.

In summary, our conclusions with respect to the constitutional points at issue in H. B. 1 1268 are:

(1) Classification for purposes of increased rates of taxation, restricting the property involved to "sections 1 to 7 of zone 4 of the Koolaupoko taxation district" is not per se unreasonable. However if an aggrieved taxpayer can show that such a classification is arbitrary or discriminatory, the bill would be declared unconstitutional;

(2) An appropriation of State taxes, if given directly to Castle Memorial Hospital, Inc. to be expended in the construction of a private hospital open to all the public would be for a public purpose and would not constitute a grant in respect of an establishment of religion;

(3) If instead of directly appropriating tax moneys to Castle Memorial, financing is done through an intermediary, such arrangement may or may not be violative of Article VI, section 6 of the Constitution of the State of Hawaii depending on the charter and functions of the intermediary itself.

Respectfully,

/s/ Samuel B. K. Chang

SAMUEL B. K. CHANG
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General