November 1, 1918.

OPINION NO. 754.

TAXATION: INHERITANCE TAX

Under the facts as stated, the value of the annuity should be computed and taxed at the 3% rate.

SAME: SAME:

A sum of money which, by the will is to be set aside for the purpose of producing revenue to pay the expense incident to the care of burial plots may be subject to an inheritance tax under our statute.

SAME: SAME:

Real estate situated in a foreign jurisdiction is not taxable upon, transfer under our statute.

Hon. Delbert E. Metzger,
Treasurer, Territory of Hawaii,
Honolulu, T.H.

Dear Sir: I beg to acknowledge the receipt of your communication of the 12th ult., in which, among other matters, you ask the advice of this office upon certain features of the will and of the estate of Phebe A. Parmelee, a resident decedent, so far as they affect the assessment, of inheritance taxes under our statute. I will discuss these matters in the order in which they occur in your letter.

The annuity to Sarah E. Wheeler, Aunt of Testatrix.

In this connection you inquire whether or not it would be proper to require a showing as to the age of Sarah E. Wheeler, for the purpose of determining her expectancy of life as a basis upon which to assess the tax. I am of the opinion that such computation should be made, and the tax assessed upon the value of the annuity at the rate of 3% less the exemption of $500.00. The will under discussion is somewhat different from the one in the case of "Estate of Brown" 24 Haw. 443, which I had in mind when I spoke to you yesterday. In the brown case the annuities were

made a charge upon the estate which was to be transferred to Von Holt, the residuary legatee, the Court saying on page 345, "The transfer of the property, out of which the monthly payments to the petitioner (the annuitant) are to be made is to the respondent and not to the petitioner (the annuitant). In the case under discussion by paragraph 1 of the will, the trustee is directed to set aside or use such portions *of the capital* of the trust estate as shall be necessary to provide in some way with reasonable assurance for the payment of the aforesaid annuity to the said Sarah E. Wheeler during her life." It is apparent, therefore, that the estate to be transferred to the residuary legatee and devisee is not charged with the payment of said annuity. For these reasons, I am of the opinion that the tax on this annuity should be computed as suggested in your letter.

It may be urged by the Trustee that, if this course should be followed, then the estate upon which the tax upon the transfer to the residuary legatee is computed, should be reduced accordingly. The answer to any such suggestion is that immediately upon the death of Sarah E. Wheeler, the capital of the estate so set apart for the payment of this annuity becomes a part of the residuary estate, which by the will is transferred to Charlotte H. P. Ewing, the residuary legatee and as such is presently taxable. Act 223, S.L. 1917 (last paragraph).

Expenses of Caring for Burial Plots.

In my conversation with you yesterday, I suggested that the case of "Estate of Brown" supra, was decisive of the question here raised. A further reading of the will and of that case has convinced me that while our Supreme Court has clearly laid down principles therein which will serve as a guide herein, the facts are so dissimilar that we are forced to a conclusion different from that reached in the Brown case. The difference in facts already pointed out with reference to the annuity applies here also. The will

does not make the expense of caring for burial plots a charge against the estate transferred to Charlotte Ewing, but directs the trustee to set aside a sufficient portion of the capital to assure the proper care of said plots. There is no limitation as to time in this regard, and a permanent fund, entirely disassociated from the estate transferred to the daughter, is established. That portion of the capital so set aside will form no part of the residuary estate transferred to the daughter, and is therefore not taxable as such.

While there seems to be some conflict of authority as to whether such a fund established for the purpose of maintaining a cemetery lot is taxable, I am of the opinion that the authorities would now hold the same to be taxable. *Ross on Inheritance Tax*, page 217. It would seem, however, that since the trustee is willing to pay the tax on the estate, including the fund to be set aside for such expense, no useful purpose would be served by any further discussion of this point. The question may, however, arise in the future when the principles here laid down may then serve as a guide.

Your further question in connection with this phase of the subject, to-wit: "does it matter whether they (the burial plots) are at home or abroad?" must be answered in the negative.

Inquiry relative to granddaughter and grandson.

In my opinion, no inquiry along this line is necessary further than to establish the fact that these parties were alive on the date of the testatrix's death. If either or both had predeceased the testatrix, their legacies would become a part of the residuary estate which is transferred to the daughter and taxable as such.

Various inquiries relative to Charlotte Ewing.

I am of the opinion that the conclusion which you have reached in your letter with reference to Charlotte Ewing, and upon the assumption that she survived the testatrix, is correct.

Inquiry relative to property in a foreign jurisdiction.

Section 1345, R.L.H. 1915 provides in part as follows:

The words "estate" and "property" are used in this chapter shall be taken to mean the real and personal property or interest therein of the testator . . . passing or transferred to individuals . . . and shall include all *personal property* within or without the Territory."

This section therefore provides that so far as it relates to resident decedents, all real and personal within the Territory and all personal property without the Territory and owned by the decedent is subject to the tax, and should therefore all be appraised either in the original inventory of the estate, or by appraisers appointed especially for that purpose under the provisions of Section 1334 Revised Laws of Hawaii, 1915. If at any time you have any doubt as to the sufficiency of the ordinary appraisement as usually filed in probate proceedings, you are authorized, under this section to apply for the appointment of apraisers for the special purpose of appraising the estate for inheritance tax purposes.

Where the estate of a non-resident decedent is probated in a foreign jurisdiction, duly certified copies of the probate proceedings should be required, showing the amount and value of real and personal property of the deceased which is situated within the Territory.

Real Property Situated in a Foreign Jurisdiction.

As above pointed out, Section -335 excludes such real property from the operation of the tax.

I believe I have covered all the points of inquiry raised by your letter with reference to this estate, but if I have overlooked anything or failed to make myself clear on any point, I would be glad to discuss those matters with you.

Yours very truly,

HARRY IRWIN,
Attorney General