

July 12, 1926.

## OPINION No. 1365.

## TAXATION; INHERITANCE TAXES:

Section 1400, R. L. 1926 (inheritance tax law) applies when property (1) passes by will or by the intestate laws of the Territory; (2) by gift, deed, grant or sale made in contemplation of death; (3) by gift, deed or sale intended to take effect in possession or enjoyment after death.

## SAME:

Property conveyed by trust deed under which the donor received the income during his lifetime, and upon his death passed to his wife in fee simple, is subject to taxation under the inheritance tax laws of the Territory.

Honorable E. S. Smith,  
Registrar of Public Accounts,  
Honolulu, T. H.

Dear Sir:

By letter of June 3rd you requested the opinion of this department as to whether or not the beneficiary of the estate created by William L. Grieve under a trust deed dated February 5, 1903, is liable to an inheritance tax under Section 1400 of the Revised Laws of Hawaii, 1925, upon property passing under it.

Section 1400 provides:

“Sec. 1400. Imposed when, rate. All property which shall pass by will or by the intestate laws of the Territory from any person who may die seized or possessed of the same while a resident of the Territory, of which, being within the Territory, shall pass, whether by the laws of the Territory or otherwise, from any person who may so die while not a resident of the Territory, or which or any interest in or income from which, *shall be transferred by deed*, grant, sale or gift, made in contemplation of the death of the grantor, vendor, or bar-

gainor, or intended to take effect in possession or enjoyment after such death, to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property, or to the income thereof, shall be and is subject to a tax hereinafter provided for, to be paid to the treasurer of the Territory as hereinafter directed . . . .”

This section applies when, *first*, property passes by will or by the intestate laws of the Territory; *second*, by gift, deed, grant or sale made in contemplation of death; and *third*, by gift, deed, grant or sale intended to take effect in possession or enjoyment after such death.

The trust deed made by Mr. Grieve is irrevocable. The amendment thereto was made by agreement between the donor and the beneficiary after the death of the remainderman.

The property did not pass by will or the intestate laws of the Territory.

It cannot be said that this conveyance is one “in contemplation of death.”

However, the statute provides that property which passes by deed, grant, sale or gift, *intended to take effect in possession or enjoyment after such death* is liable to the tax. And the gift made by the deed of trust of Mr. Grieve clearly is one intended to take effect in possession or enjoyment after the death of the donor.

The section quoted was construed by the Supreme Court of the Territory in *Brown v. Conkling*, 20 Haw. 41. The court held that the Act (the court referring to Act 102 of the Session Laws of Hawaii 1905, which is now Section 1400) is not open to construction. The *Brown* case involved the question of whether or not stocks conveyed in trust to a trustee to apply the income to the donor until his death and upon his death to deliver the stocks to the beneficiaries named therein was subject to the inheritance tax laws of the Territory.

It was strongly contended in that case that the only property subject to the tax is property passing from one person, who may die seized or possessed of the same,

or transferred by one so seized or possessed in contemplation of the death of the grantor, or intended to take effect in possession or enjoyment after death. The court in disposing of that contention said:

“The act is not open to construction and does not by any way of looking at it, without ignoring its clearly expressed provisions, require that only such property be taxed as passes by will or descent or by transfer from one dying seized or possessed of it. The transfer made by the owner in this case, which secured to him the enjoyment of the property until his death, is strictly within the plain meaning of the act.”

Mr. Grieve at his death was not seized or possessed of the property; he conveyed it, in trust, and the trust was irrevocable. He could not become seized or possessed of the property after executing the conveyance. However, he still enjoyed the income therefrom and, under the citation quoted above, the transfer is within the plain meaning of the Act.

It is the opinion of this department and you are so advised that the property passing to Mrs. Grieve by virtue of the trust deed executed in 1903 and amended in 1925, is subject to the inheritance tax laws of the Territory.

Very truly yours,

CHARLES B. DWIGHT,

Third Deputy Attorney General.

APPROVED:

WILLIAM B. LYMER,

Attorney General.