July 8, 1920.

OPINION 932.

INHERITANCE TAX: RETROACTIVE OPERATION: PROPERTY DISTRIBUTION AFTER PASSAGE OF ACT:

Chapter 96 of the Revised Laws of Hawaii of 1915, as amended, providing for the imposition of an inheritance tax, is not retroactive in operation, and property which passed by will prior to the taking effect of the act, but which is not distributed because of an intervening life estate until after such date, is not subject to the tax.

Henry C. Hapai, Esp.,
Acting Treasurer, Territory of Hawaii,
Territory of Hawaii.

Dear Sir: I beg to acknowledge the receipt of your communication of the 7th inst., together with inclosures, all relating to the question as to whether any inheritance tax is due from the Trustees of the Etatate of James G. Hayselden, deceased.

It appears from the letter of Messrs. Frear, Prosser, Anderson & Marx, attorneys for the trustees of the estate, and the documents submitted therein, that James G. Hayselden died in the year 1893, leaving a will which was duly admitted to probate, by which he left his estate in trust to pay the income therefrom to his widow during her life, and on her death to distribute the estate to their children. The widow died in 1920 and the estate is now ready for distribution to the two surviving children. Under these circumstances you ask my opinion as to whether any tax is due upon the estate so passing to the two surviving children.

The inheritance tax law in force on the date of the

death of testator was Act 106, Session Laws 1892. This act was repealed in 1905, but even if we should consider that the repeal of the act did not affect a tax which had already accrued, such a conclusion could not affect the result for the reason that that act entirely exempted an estate passing to the testator's children.

The question, therefore, which is now under consideration is as to whether or not the present inheritance tax statute is retroactive in its operation so as to cover estates passing under circumstances hereinabove indicated. The presumption is that statutes are not retroactive in their operation and they should be construed prospectively rather than retrospectively unless the language of the statute is so plain and unambiguous as to require a retrospective construction. *Apokaa Sugar Company* vs. *Wilder*, 21 Haw. 571.

A careful examination of the present inheritance tax statute reveals no intention on the part of the legislature to make its provisions retrospective so far as this precise question is concerned and it should therefore be construed prospectively only. The provisions of the act relative to the taxable transfers by the exercise of a power of appointment is expressly made retroactive by Section 1323 of the Revised Laws of Hawaii of 1915 as amended, and if the legislature had intended the act to be so far retroactive as to cover the case now under consideration it would undoubtedly have said so. This precise question has been discussed in a number of jurisdictions, under statutes similar to ours and the decisions so far as I have been able to discover all follow the rule laid down by *Ross on Inheritance Taxation* on page 57, as follows:

"The question as to what law, in point of time, governs the imposition of inheritance taxes on estates in remainder has frequently

been before the New York courts for determination. It has been decided in that state, and in some others, that estates in remainder are taxable as of the time of death of the donor, notwithstanding the actual possession or enjoyment by the beneficiary is postponed until the expiration of the life estate and may perhaps fall entirely; and if there is no statute imposing a tax at the time of such death, the transfer is immune from taxation.

"It is now well settled, 'to quote from the supreme court of New York,' that the tax is upon the transfer of the property, upon the right of succession, not upon the property itself; that 'transfer' means the passing of property, or of any interest therein, in possession or enjoyment present or future, without regard to whether the actual possession and enjoyment follows immediately or comes at some future time; that where a vested, though defeasible, interest in remainder passes under a will to the remainderman on the testator's death though the possession does not pass until the death of the life tenant, the transfer or succession is referred to the time of the death of the testator, and if that occurred prior to the enactment of the act taxing transfers of property, the remainder is not taxable.'

"Referring to this question the supreme court of Iowa, In a recent decision, uses this language: 'It has been held without any apparent conflict in the authorities that an interest in property created by will or deed in the nature of a remainder becomes a vested interest from the time the will or deed takes effect, and that a subsequent collateral inheritance tax statute has no application to it. Thus, where a will creates a remainder subject to a life estate, with an added power given to the life tenant to dispose of the property if he shall elect to do so, the interest of the remainderman is vested as against a subsequent inheritance tax statute, although it may not be possible to determine until the end of the life estate, and after the taking effect of the statute, what portion, if any, of the property will be left for enjoyment by the remainderman: Estate of Langdon; Estate of Lansing; Winn v. Schenck. Even though the remainder if so far conditional that it may have to be opened up to let in afterborn children, and, on the other hand, may be devested by death without issue of the person named, nevertheless it constitutes a vested interest, not subject to a subsequent collateral inheritance tax statute, passed before the termination of her life estate: Estate of Seaman."

In the State of Iowa under a statute almost identical in language with ours the precise question now under consideration was before the Supreme Court of

that state in a case entitled *Gilhertson vs. Ballard,* 125 Iowa 420, 2 An. Cases 607. In that case the testator, who died in 1895, gave the income of his entire estate to his wife for life, with remainder over to certain collateral heirs. The inheritance tax statute of Iowa was enacted in 1896, more than one year after the testator' death, and the wife died in 1901. The State Treasure attempted to collect an inheritance tax on the estate which passed on the death of the wife to the remainder man pursuant to the terms of the will. In discussing this question the Supreme Court of the State of Iowa said:

"Unless retroactive in operation, the property is not subject to the inheritance tax. All statutes are to be construed as prospective in their operation, unless the contrary is distinctly expressed or Is to be clearly implied. Section 1 of the above chapter reads: 'All prop erty . . . which shall pass by will, or by the interstate laws of this or any other state, or by deed, grant, sale, or gift made or In tended to take effect in possession or enjoyment after the death of the grantor or donor,' to persons other than those described, 'shall be subject to a tax. . . . The tax aforesaid shall be and remain a lien on such estate from the death of the decedent until paid. See Section 1467, Code. The only fair construction to be given this language is that it refers to property which shall thereafter pass, and, if so, the tax is not exacted on any which has been previously transferred by any of the modes mentioned. It is not material to this inquiry whether we say the property is taxed because of the succession thereto by collateral heirs, or that the right of succession merely is taxed for in either event the right to the property attached to them in stante upon the decedent's death (Herriott v. Potter, 115 Iowa 648), and is not within the terms of the statute. This view is in harmony with the construction usually given similar enactments."

A valuable case note is appended to this case as reported in 2 An. Cases, on page 608, wherein the cases on this question are collected and discussed.

I am of the opinion, therefore, and so advise you, that no inheritance tax is due upon the estate passing

to the remainderman under the will of James G. Hayselden, deceased. I am,

Yours very truly,

HARRY IRWIN,

Attorney General.