April 25, 1916.

OPINION NO. 513.

INHERITANCE TAX:

Antenuptial agreements: Antenuptial agreements are probably not within the purview of the provision of our statute imposing taxes on transfers made in contemplation of death or to take effect thereafter.

Henry C. Hapai, Esq.,
Acting Treasurer, Territory of Hawaii,
Honolulu, T. H.

Dear Sir: In regard to the liability of the estate of Anton Cropp for an inheritance tax, I beg to advise you that probably there is no liability whatever inasmuch as the whole estate goes to Mrs. Emma Eugenia Josephine Cropp by virtue of the provisions of an antenuptial agreement.

The words of our statute are seemingly broad enough to cover any agreement whereby property is transferred in contemplation of death or is intended to take effect in possession and enjoyment after death. Our statute provides in substance that all property which shall "be transferred by deed, grant sale or gift made in contemplation of the death of the grantor, vendor or bargainor, or intended to take effect in possession or enjoyment after such death, etc.," shall be and is subject to a tax. The New York statute provides that when a transfer of property is "made by deed, grant, bargain, sale or gift, made in contemplation of the death of grantor or donor or intended to take effect in possession or enjoyment at or after such death" such property shall be subject to a tax. In construing the New York statute the New York courts have held that property transferred by an antenuptial agreement is not subject to a tax. In the case of In re Baker's Estate, 82 N. Y. Supp. 390 (affirmed 178 N. Y. 575), the court in holding that a transfer such as was

made in the present case was not subject to an inheritance tax, stated:

"It was simply the outgrowth of a contract entered into between the decedent and the claimant, which was founded upon a perfectly good and valuable consideration, and one which is regarded with favor by the law, and will generally be enforced in accordance with the intention of the parties. *Johnstone v. Spicer,* 107 N. Y. 185, 13 N. W. 753; *Peck v. Vandemark,* 99 K. Y. 29, 1 N. W. 41; *White v. White,* 20 App. Div. 560, 47 N. Y. Supp. 273. It would seem to follow, therefore, that a claim arising from such a source is in the nature of a debt against the estate, and as such enforceable like any other debt *(Hegeman v. Moon,* 131 N. Y, 462, 30 N. E. 487; *Warner v. Warner,* 18 Abb. N. C. 151); and if this is its character we do not see why it should be subject to taxation under the transfer tax law, any more than if it were a debt represented by a bond or note.

"The tax imposed by the statute in question is a tax on the right of succession, and not on the property itself (Matter of Dow's Estate, 167 N. Y. 227, 60 N. E. 439, 52 L. R. A. 433, 88 Am. St. Rep. 508), "and a payment of an obligation dependent upon a valuable consideration is not a succession in any sense." Opinion of Goodrigh, F.J., in Matter of Miller's Estate, 77 App. Div. 473-481, 78 N. Y. Supp. 930, 934.

"But it is said that the contract was entered into in contemplation of, and was not "intended to take effect in possession or enjoyment" until after, the death of the obligor. This, in a certain sense, is doubtless true, as it would be of any other form of debt the payment of which was deferred until after the death of the debtor, but this does not affect its validity nor alter its character. Hegeman v. Moon, supra. Neither, in our opinion, does it subject the debt to taxation under the act in question, unless it can be shown that the agreement was entered into in bad faith and with some evasive intent. Matter of Bullard's Estate, 76 App. Div. 207, 78 N. Y. Supp. 491, citing with approval Matter of Spaulding's Estate, 49 App. Div. 541, 63 N. Y. Supp. 694. This court has held that the words "in contemplation of death" do not refer to that general expectation which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril (Matter of Spaulding's Estate, supra, affirmed 163 N. Y. 607, 57 N. E. 1124); and this we believe is now the generally accepted definition of the phrase. Matter of Seaman's Estate, 147 N. Y. 69-77, 41 N. E. 401; Matter of Kahlstedt's Estate, 67 App. Div. 176-178, 73 N. Y. Supp. 818.

"There is nothing in the case under discussion to lead us to suppose that the antenuptial contract to which reference has been made was entered into with any design to evade the law, or that its provisions for the benefit of the respondent were made in contemplation of death, within the meaning of that term as we understand and have defined

it. The decedent was not ill at the time it was executed, and, for aught that appears he expected to enjoy the matrimonial relation, in which he was about to enter, for many years. His obligation, therefore, as was said in Matter of Miller's Estate, supra, was entered into "in the expectation of life" rather than death. Such being the clearly established intent of the parties, it necessarily follows, in our intepretation of the scope and meaning of the act, that the decision of the learned surrogate is correct, and should be affirmed."

A similar holding is made in the Estate of Craig, 89 N. Y. Supp. 971 (affirmed in 181 N. Y. 551).

The administrator of the estate of Anton Cropp, however, to avoid litigation and expedite the closing of the estate, has offered to pay to the Territory by way of compromise one-half of the amount that would be payable if the estate were liable. In view of the doubtful nature of the claim of the Territory, I advise that the offer be accepted.

Yours very truly,

INGRAM M. STAINBACK,
Attorney General.