

March 4, 1919.

OPINION NO. 804.

TAXATION: INHERITANCE TAX:

Under the facts stated, the Inheritance tax paid by the devisee and not by the annuitant.

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

Dear Sir: I beg to acknowledge the receipt of your communication of the 3rd inst., together with a letter addressed to you by the Henry Waterhouse Trust Company, Limited, as agents for Irene K. Dickson, dated February 28, 1919, and together with your office file, all in re the inheritance tax due under the will of Cecil Brown, deceased.

The facts in the case are clear, and are identical with

those set forth in the case entitled "In the Matter of the Estate of Cecil Brown, deceased," 24 Haw. 443. The syllabus us in that case reads as follows:

"The inheritance tax under the statute is upon the transfer of property in contemplation of death, so that when property is devised to one, with a charge that he pay another a monthly sum, the inheritance tax is chargeable *against the devisee* and not to the annuitant."

It is clear, therefore, that there was no tax chargeable in the first instance against the said Irene K. Dickson, or against the annuity to which she was entitled under the will. The question as to whether the said Irene K. Dickson can now demand and enforce repayment of the amount paid by her agents, is probably a purely academic one for the reason that you have probably paid this money into the Territorial treasury and are now, therefore, without authority to repay the same except by an Act of the Legislature appropriating that amount for the purpose of repayment. The question is an interesting one, however, and the rule relating thereto is laid down in *Elliot on Contracts*, vol. 2, sec. 1386, as follows:

"Voluntary Payment of Taxes: In the absence of any statutory provision on the subject, a voluntary payment of an assessment made under a mistake of law, but with full knowledge of the facts and not induced by any fraud or improper conduct on the part of the payee, cannot be recovered back. In order to justify a recovery by the taxpayer, it is not only necessary that the assessment be invalid, and that the corporation actually receive the money, but it is also necessary that the payment be made involuntarily and under compulsion. Thus one who voluntarily pays an illegal tax in order to obtain the rebate given for prompt payment cannot recover the same. All payments of taxes are supposed to be voluntary until the contrary is made to appear. Money illegally or erroneously, but voluntarily, paid for license taxes cannot be recovered. And the mere fact that the collector might have enforced payment will not make a payment involuntary when he was taking no steps to collect and made no threats."

It would seem, therefore, that under the circumstances which exist in this case, the said Irene K. Dickson has no claim against you or the Territory which she could legally enforce. I do not believe, however, that the Territory should, in this instance, insist upon this strictly legal right. Should the Legislature deem it advisable to appropriate the money for the refunding of this amount to Miss Dickson, I am of the opinion that the Territory's claim against Mr. von Holt for the recovery of this amount would still be enforceable.

An examination of his return for inheritance tax purposes shows that he deducted from the principal of the estate, which he took under the will, the sum of \$25,804.29, which figure I presume was arrived at by capitalizing Miss Dickson's annuity on her expectancy of life.

I am of the opinion, therefore, that a bill should be drawn and presented to the Legislature for the reimbursement to Miss Dickson of this sum of money, and that prompt steps should be taken for the collection from Mr. von Holt of the balance of tax due from him.

I return herewith the documents submitted to me.

Yours very truly,

HARRY IRWIN:

Attorney General.