March 29, 1919.

OPINION NO. 817.

TAXATION: SECTION 5 OF ACT 222 OF THE SESSION LAWS 0F 1917 CONSTRUED:

A railway company which merely incidentally crosses the public highway in two places does not occupy the public streets or highways of the Territory, within the meaning of Section 5 of Act 222 of the Session Laws of 1917.

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

Dear Sir: I beg to acknowledge the receipt of your communication of the 10th inst. together with tax assessor Farley's letter to you of the same date, all in regard to the taxation of the Kauai Railway Company, the specific question upon which you ask the opinion of this department being whether this company should be taxed under the provisions of Section 1241 of the Revised Laws of Hawaii, 1915, as amended by Act 222 of the Session Laws of 1917.

The particular part of the Act which is now under consideration is the last paragraph in Section 5 thereof as follows:

"Provided also that the combined property of every corporation holding a public utilities franchise and occupying the public streets or highways of the Territory . . . shall be valued and assessed at not less than the total amount of the par value of the capital stock issued by such corporation."

Tile question now arises as to whether, upon the facts as set forth in Mr. Farley's letter, this company "holds a public utilities franchise" and occupies "the public streets or Highways of the Territory".

First: Does the company hold a public utilities franchise? I am of the opinion that this inquiry must be answered in the affirmative.

This company was organized pursuant to the provisions of Act 435 of the Session Laws of 1903, and a charter pursuant to the provisions of that Act was issued to it in 1906. Your department was at that time advised that such a charter might legally be granted, and I do not care, at the present time, to disturb that opinion. The question as to whether the local Legislature and the executive officials of this government have the power to grant a charter of this kind may arise in the future when it will be given more serious consideration by this department, but because of the conclusion I have reached with regard to the second question above indicated, I do not deem it necessary to go into that subject at length at the present time.

Second: Does this company occupy the public streets or highways of the Territory? I am of the opinion that this inquiry should be answered in the negative, for the reason that the word "occupying" as used in the Act above quoted, means something more than a mere incidental crossing of the public streets in two places only.

I am of the opinion that this Act was intended to affect those classes of public utilities which used the public streets and highways as a general means of carrying on their business, such as street railways, telephone and electric light companies, and was not intended to include the mere incidental crossing of a public highway from one piece of privately owned land to another.

This view has some support in the case of the *Territory vs. the H. R. T. & L. Co.,* 23 Haw. 397 at 398, where the court said:

"Upon the theory that the Territory was not likely ever to share in the surplus income of the company (Rapid Transit Company) under paragraph 4 of Section 17 of the

franchise act, a statute was passed at the Session of 1905, (S. L. 1905, Act 88; R. L. H. 1915, Section 1241; Act 222 S. L. 1917, Section 5) with a view evidently to obtain more from the company in the way of taxes upon its property."

The conclusion which I have arrived at is that the company should be assessed as an enterprise for profit without regard to the last proviso contained in Section 5 of Act 222, Session Laws, 1907.

Yours very truly,
HARRY IRWIN,
Attorney General.