April 13, 1922.

OPINION NO. 1015.

INHERITANCE TAXATION; FAMILY ALLOWANCE AS A DEDUCTION.

The faintly allowance provided for by Act 38 of the Session Laws of 1917 is a deductible item as an expense of administration and is therefore not taxable under the Inheritance Tax statute.

Hon. A. Lewis, Jr.,
Treasurer, Territory of Hawaii,
Honolulu, T. H.

Dear Sir: I beg to acknowledge the receipt of your communication of the 3rd inst., requesting the opinion of this Department upon certain deductions claimed by the executor of the estate of A. Lidgate, deceased.

This inquiry would have been answered before this time but for my absence on the island of Hawaii.

It appears that under the provisions of Act 38 of the Session Laws of 1917 the probate court of the First Judicial Circuit ordered the executor to pay to the widow the monthly sum of $1,000.00 as a family allowance. This order has been complied with by the executor, and the total sum of $10,000.00 has been paid to the widow pursuant thereto. The executor now claims that the amount so paid under said order is deductible from the gross estate and is not taxable under the statute.

You now request the opinion of this Department as to whether or not the contention of the executor should be sustained and I am of the opinion that it should.

The rule is laid down in "ROSS on Inheritance Taxation," page 86, as follows:

"where a homestead is set apart absolutely by the probate court to the widow, her title is in no way derived from the will of the husband nor by virtue of the law of succession. The title is deraigned solely from the order of court. And money paid from the funds of the estate by order of court for the maintenance of the widow and children stands on the same basis. That she would have received the realty set apart as the homestead and tbe money paid as the family allowance as sole devisee and legatee if there had been no orders therefor by the probate court is immaterial. Therefore as the homestead and family allowance pass by virtue of the orders of the court as a right bestowed by the beneficence of the law and not by will or the interstate laws, they are not subject to the inheritance tax."

The same rule was followed by the New York Courts under a statute similar but not as generous as our. (See Gleason and Otis on Inheritance Taxation, page 391, Matter of Libolt 102 Appel. Div. 29).

I am of the opinion, therefore, and so advise you, that no tax can be assessed on the amounts so paid to the widow under the said order. I am,

Yours very truly,

HARRY IRWIN,

Attorney General.