December 22, 1920.

OPINION No. 954.

TAXES: LIEN ON GROWING CROPS:

Taxes assessed against a growing crop constitute a lien on said crop pursuant to Section 1291, R. L. H. 1915.

Hon. Delhert E. Metzger,
Treasurer, Territory of Hawaii,
Honolulu, T.H.

Dear Sir: I beg to acknowledge the receipt of your communication of the 18th inst., together with a copy of a letter from Tax Assessor Kunewa addressed

to you requesting the opinion of this Department upon the following' question, to wit: "Are taxes due as of January 1st a lien on a growing crop?"

The question arises particularly in connection with the collection of the taxes assessed against growing crops of pineapples owned by persons other than the owner of the land upon which the crops may be growing and which growing crops may change ownership one or more times during a particular taxation period. In many cases the original owner being execution proof or having left the Territory it would be impossible to collect the tax assessed against such property unless a lien exists which would allow the assessor to proceed against the property itself.

It is rather curious that this exact question has never arisen in this jurisdiction so far as I have been able to determine and has never been passed upon by either this Department or by the Supreme Court of this Territory. I assume from the tenor of Mr. Kunewa's letter and inquiry that in practice the lien has not been regarded as existant. Section 1291, R.L.H. 1915, provides in part as follows:

"Tax Liens. Every tax due upon property shall he a prior lien upon the property assessed—which lien shall attach as of January 31st in each assessment year and shall continue for three years."

The remaining portion of this section relates to the method of enforcing the lien provided for in the portion above quoted.

While, as above pointed out, the exact question has never been considered by the Supreme Court, yet there are certain expressions used in some of the cases which tend to the conclusion that the Supreme Court considered that the lien referred to in this section applied only to real estate and not to personal property.

Since, for taxation purposes, growing crops are regarded as personality (Section 1240, R.L.H. 1915), if a consideration of the exact question should lead us to the conclusion above indicated, your inquiry would have to be answered in the negative. In the case of *Jones* vs. *Norris*, 8 Haw. 71, the defendant had sold to the plaintiff certain *lands and chattels* with a covenant against encumbrances. It subsequently developed that certain taxes remained unpaid which the plaintiff was compelled to pay and he brought action against the defendant to recover the amount so paid. While no question of lien was exactly involved in this case the Supreme Court in deciding the case in the plaintiffs favor said:

"Our statute makes no difference between real and personal property in respect to the charge of the tax being upon the owner at the date selected for the falling of the tax, although the payment of the tax upon the real estate is secured notwithstanding the sale or transfer of it by attaching a liability to the real estate itself."

In the same case the Court on page 74 said:

"'The tax collector looks to the plaintiff personally for the taxes on the property owned or possessed by him on the 1st of July and may sue him or levy upon his goods and chattels, or for that portion of the tax which is laid on the real estate he might attach it even after sale."

The language of the statute in force on the date of this decision (Civil Laws, Section 822) is almost identical with that portion of the statute above quoted and now under consideration. It will be seen, therefore, that in the Jones-Norris case the Supreme Court apparently distinguished between real and personal property so far as the question of a lien is concerned.

In the case of *Cooper* vs. *Island Realty Company*, 16 Haw. 92-95, the Court said:

"Since that decision (Jones vs. Norris, supra) the date of the assessment has been thrown back from July 1st and the tax has been made an express lien upon real estate from September 1st."

The question under consideration in the Cooper case was identical with that in the Jones case and the exact question now before us was not directly involved and the cases are cited merely as showing the previous tendency to restrict the lien to one on real property alone.

The compiler of Thayer's Digest was evidently of this same opinion for under the subject of "Liens and Priority" he grouped a number of cases under a heading which reads, "Taxes are an encumbrance against real estate upon the 1st day of January." Thayer's Digest, page 713.

The case of Cooper vs. Island Realty Company was decided in 1904 at a time when the section of the statute relating to liens consisted only of that portion of the statute above quoted. Since that time several amendments have been made, all of which now appear in said section 1291, and section 1292 S.L. 1911, chap. 146, Sec. 1) has been added. While these amendments and that additional section do not bear expressly upon the point under consideration, I believe that they, when read in connection with the original statute, furnish sufficient ground for a departure from the rule indicated in the above decisions, if those decisions can be regarded as indicating any rule whatever.

In the first place the first paragraph of Section 1291 is certainly broad enough to cover taxes both on personal and real property. The language is that every tax due upon property shall be a prior lien upon the property assessed. If the Legislature had intended to restrict this lien to a lien upon real prop-

erty alone it would have been very easy to have said so. There is no fundamental objection to the imposition of a lien for taxes on personal property and such liens exist in many of the states of the Union. The last two paragraphs of Section 1291 provide a method for the foreclosure of lien or liens therein provided for whether the lien be on personal or real property or upon the improvements upon real property. Section 1292, however, provides an additional method of foreclosing the lien on real property. Unless the Legislature intended to differentiate between the lien on real property and the liens provided in the preceding section there would have been no occasion for a specific reference to "real property" in Section 1292. It should also be pointed out that Section 1291 specifically provides for a lien upon "improvements upon real property assessed to others than owners of real property." It is not entirely clear to me that the "improvements" herementioned include growing crops, but it is quite possible that the word might be so construed.

With a full realization of the tendency of the decisions, above cited, I am of the opinion and so advise you that the lien provided for by Section 1291 covers personal property such as growing crops of pineapples as well as real property and can be enforced in the manner provided for in said section so long at least as such personal property retains the character it had when the tax was imposed.

I am,

Yours very truly,

HARRY IRWIN,

Attorney General.