November 23, 1921.

OPINION No. 992.

INHERITANCE TAX: EXEMPTION TO CHARITABLE OR EDUCATIONAL INSTITUTIONS:

Opinion No. 623 reconsidered and the authorities discussed.

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

Dear Sir: I beg to acknowledge the receipt of your communication of the 21st instant, together with your office file in re Inheritance Tax, Estate of Alfred Willis, deceased, in which letter the opinion of this Department is requested upon the point raised by Mr. Judd as to whether or not a bequest and devise to a foreign corporation or society for charitable, educational or religious purposes is a taxable transfer within the meaning of our inheritance tax statute.

This question arises in connection with the estate of the late Bishop Willis who devised and bequeathed certain property situate in Hawaii to a foreign society known as the Society for the Propagation of the Gospel in Foreign Parts.

Mr. Judd in his letter to you of the 21st instant states that in the year 1916 under the will of Helen E. Carpenter a similar bequest was held by this Department to be non-taxable under the statute. I have made an examination of the opinions rendered by this Department during that year and can find no reference to the case referred to by Mr. Judd nor to the principle involved. If any such opinion was rendered at that time

it must have been an informal one and therefore probably rendered without careful consideration.

On January 15, 1917, Mr. Stainback, the then attorney general, rendered an opinion to your Department in which it was held that charitable institutions located outside of the Territory are not exempt from the Territorial inheritance tax. Mr. Judd now claims that this opinion was not rendered on any ease then pending and apparently contends that the discussion of the question in that opinion was purely an academic one and therefore open for reconsideration. As to whether or not any case was then actually pending I do not know as the opinion itself does not refer to any such case. I doubt very much, however, whether the Attorney General's Department engaged itself at any time in the discussion of purely academic questions with your Department.

Several times since the writer has been in office this same question has arisen and in each case the opinion rendered by Mr. Stainback has been followed but without making any further examination of the question of law involved. So far therefore as the question of departmental construction is involved we have a continuous departmental construction from 1917 to the present time, which, under our Supreme Court rulings, is entitled to considerable weight in any case where the true intent of the statute is doubtful or ambiguous.

In no case, however, since the writer has been in office has there been any pronounced opposition to the rule laid down in Mr. Stainback's opinion and that ruling has been followed more as a matter of course than as the result of any later considered opinion on the question. In view therefore of Mr. Judd's position in

the premises I believe it incumbent on me to review this opinion together with the later authorities with a view to determining whether or not that previous opinion shall be followed or reversed.

Gleason and Otis the latest writers on the subject of inheritance taxation that I have been able to obtain, lay down the general rule as follows:

> Exemptions to Charities. It is a general rule that these must be expressed in the inheritance tax statute and are not to be read into it by implication. Under this rule such exemptions are generally confined to domestic corporatlons unless foreign charitable corporations are specified in the Act."

An examination of the cases cited in support of the text above quoted shows that these cases are not conclusive of the questions in this jurisdiction for the reasons that the statutes are not identical with and in some cases not even similar to ours.

An instructive but not necessarily a conclusive case cited is that of *Alfred University vs. Hancock,* 60 N. J. E. 470, 46 Atl. 178, where a considerable number of cases bearing on this question is reviewed.

The New Jersey act provided an exemption to "churches, hospitals, orphan asylums, public libraries, bible and tract societies and all religious, benevolent and charitable institutions and organizations". The bequest was to Alfred University, which was located in the State of New York and admitted to be a charitable institution. The New Jersey Court said: "The overwhelming weight of authority is that where the legislature grants an exemption from such a tax to corporations or organizations it includes in the exemption only domestic corporations and organizations".

Of the cases cited in support of the above quoted

text this New Jersey case seems more nearly on all fours with the case now under consideration as the language used in the exemption part of the statute is general in its nature and while not identical with ours is reasonably similar.

"The case of *In re Speed's Estate,* 216 Ill. 23, 74 N.E. 809, which is cited in support of the text is also closely analogous to the case now under consideration and very similar to the case of *Alfred University vs. Hancock, supra.* The Illinois statute reads as follows:

> "When the beneficial interests of any property or income therefrom shall pass to or for the use of any hospital, religious, educational, bible, missionary, tract, scientific benevolent or charitable purpose, or to any trustee, bishop or minister of any church or religious denomination, held and used exclusively for the religious, educational or charitable uses and purposes of such church or religious denomination, institution or corporation, by grant, gift, bequest, or otherwise, the same shall not be subject to any such duty or tax, but this provision shall not apply to any corporation which has the right to make dividends or distribute profits or assets among its members."

The bequest was to a Kentucky religious corporation and the exemption was claimed. The Supreme Court of Illinois in denying the claim of exemption said:

> "There I nothing in this amendatory act to indicate that it was the legislative intent that its provisions should apply to corporations created under the laws of a sister state. It is a universally accepted rule of construction that an act of the General Assembly of a state granting powers, privileges, or immunities to corporations must be held to apply only to corporations created under the authority of that state over which such state has the Power of visitation and control, unless the intent that the act shall apply to other than domestic corporations is plainly expressed in the terms of the act."

We have therefore two cases which, while under statutes materially different in wording from ours, support the general rule laid down in the text that foreign

charitable corporations or associations are not exempt unless specifically exempted in the Act.

I do not believe that any of the other cases cited in support of the text above quoted are particularly applicable to the present case because of certain fundamental differences in the language in the exempting portion of the statute. In the case of *Minot vs. Winthorp,* 162 Mass. 138 N.E. 512, the exemption was to "charitable, educational or religious societies or institutions, the property of which is exempt by law from taxation". The Supreme Court of Massachusetts held that this referred to a general exemption from taxation by the law of Massachusetts and that therefore the income tax exemption could apply only to corporations or societies the property of which was exempt from general taxation by the law of that state. If Section 1324, R. L. II. 1915, consisted solely of the first two lines the Massachusetts case would be strong authority against the exemption now claimed but considered in connection with the remainder of the section under which the present claim of exemption is made the Massachusetts case has no application whatever (See Fishe's Estate, infra). The case of *In re Hicock,* 78 Vt. 259, 62 Atl. 724, cited in support of the text was decided under a statute identical in language with the Massachusetts statute and upon the same grounds set forth in Minot vs. Winthrop, supra. The case of *Humphreys vs.* State, 70 Ohio State 67, 70 N.E. 957, cited in support of the text was decided on a statute which expressly provided for an exemption to educational, religious and charitable institutions "within the state" and is clearly inapplicable to the case now under consideration.

On the other hand we have a late case decided in the State of California which is directly the other way. The California decision is important for two reasons, namely, (1) our inheritance tax statute was based and drafted upon the California statute, and (2) the language used in the California statute provided for the exemption and from which the case was decided is identical with ours. I refer to the case of *In re Fiske's Estate,* 172 Pac. 390. In that case the testatrix devised and bequeathed to Princeton University certain property situate in California. The Supreme Court of the State of California in deciding that the transfer was exempt from the tax said,

"It is difficult to conceive of any language by which a more direct exemption could be made. Authorities are cited from other states wherein exemptions of charitable corporation have been held, under the language of the particular statute construed, to apply only to domestic charitable corporations. Our attention is not called to any law which is as broad and comprehensive in its scheme of exemption as our statute. If this statute simply read, 'All property transferred to corporations and institutions now or hereafter exempted by law from taxation,' it might very well be argued, as it was in the cases in question, that the exemption 'law' referred to was the law of this state, and that therefore, we should look to its law to determine what societies, corporations, and institutions are exempt from taxation. As there are additional provisions in the statute concerning exemptions, we are not justified in any construction of the statute which depends upon such consideration alone. Some of the cases cited are based upon the general consideration that, where 'corporation' are referred to in such legislation it must be inferred that the Legislature was exempting such corporations only as it has jurisdiction over, namely, domestic corporations. Under the statute of this state there is no room for such construction, for the exemption is extended to a 'society' an 'institution,' an 'association of persons,' and to 'any person' as well, if engaged in the work described. It must be apparent that the Legislature intended to exempt from taxation all property devoted to certain purposes, namely, property 'devoted to any charitable, benevolent, educational, or public purpose,' 'or any other like work.'

The fact that the devisee or legatee might be a corporation, foreign or domestic, was an entirely indifferent matter, for the exemption was made to apply to 'societies' 'corporations,' 'institutions,' 'association of persons,' and to all 'persona.'

In connection with the California case it is interesting and perhaps important to note that the Legislature of California shortly before the decision in the Fiske's Estate case but after the death of the testator amended the section of the Californian law which provided for this exemption by adding the following proviso:

"Provided, however, that such society, corporation, institution or association be organized or existing under the laws of this state or that the property transferred be limited for use within this state."

It is clear therefore that the Legislature of the State of California disagreed with the view adopted by the Supreme Court of California to the effect that the exempting part of the statute as it stood prior to the 1917 amendment did in fact exempt such transfers, to foreign charitable or educational corporations and institutions.

The decision of the California Court based as it is upon a statute which was identical with ours and from which our statute was copied is entitled to very great weight. While it has been held in a number of cases that decisions rendered in the original enacting state after the adoption of the statute in another state have only a persuasive force, yet in the case of *Young* v. *Salt Lake City*, 24 Ut. 321, 57 Pac. 1066, it was held that where a statute was adopted from another state a decision of the later state holding the, statute constitutional was entitled to very great weight.

In arriving at a final determination of the question presented we have therefore to consider as against the claim of exemption:

1. The continuous departmental construction for almost five years. "Courts give great weight in a doubtful case to the contemporaneous and unvarying construction put upon a statute by all persons dealing under it and will not set aside such construction unless clearly erroneous." *Pasquoin vs. Sanders,* 20 Haw. 352. *In re Pringle,* 22 Haw. 557-565.

2. The statement of the text writers on this question that the weight of authority is against the exemption.

3. The adjudicated cases above cited which upon analysis seem to sustain the statement of the text writers, and

4. The rule of statutory construction which holds that statutes and provisions of law exempting persons or property from taxation are to be strictly construed in favor of the Government.

"He who claims exemption (from taxation) must justify his claim by the clearest grant of Organic or statute law, Every presumption is against any surrender of the taxing power and every doubt must be resolved in favor of the state; unless the intention to surrender that power is manifested by words too plain to be mistaken it must be held still to exist." Knoxville & Ohio R. R. Co. vs. Harris, 99 Tenn. 684, 43 S.W. 115.

We must also consider as in support of the claim of exemption:

1. The case of *In re Fiske's Estate,* supra.

2. The fact that that case is an interpretation of a statute identical with ours, and

3. The fact that our statute is an adoption of the California statute.

The scales hang so nearly even as between the two theories that any attempt on my part to say how the

Supreme Court of this Territory would decide the matter would be very much in the nature of a guess. The Supreme Court in the case of *Frear vs. Wilder, 25* Haw. 603, has adopted a rather liberal attitude in a somewhat similar matter, saying, "Hence it may be said that the cheerful giver is still beloved and that tribute shall not be laid upon his generosity", and if the Supreme Court should exercise the same spirit of liberal generosity in the case now under consideration as it did in the Frear-Wilder case there can be but little doubt but that the claim of exemption in this case would be allowed.

I am so far in doubt, however, as to how this statute would be interpreted in this jurisdiction that I do not feel warranted in advising you to depart from the previous construction which has been adhered to for some years.

Mr. Judd in his letter to you has very aptly stated that "the Circuit Judge is the repository of authority for disposing of these questions", and I therefore advise you to disallow the exemption which is now claimed in this case in order that the question of law maybe finally settled by a Court of competent jurisdiction.

I am,

Yours very truly,

HARRY IRWIN,

Attorney General.