April 21, 1930.

OPINION No. 1557

DESCENT AND DISTRIBUTION; DOWER; INHERITANCE TAX:

Where a widow takes a distributive share of her deceased husband's estate in the absence of issue of the deceased, her dower is merged and extinguished in her greater right by descent, and inheritance tax should be computed on the value of the whole estate so taken without any deduction on account of any supposed dower.

Honorable E. S. Smith,
Treasurer, Territory of Hawaii,
Honolulu, T. H.

Sir:

In your letter of April 5, 1930, to this office, you request our advice as to the proper basis for determining the amount of inheritance tax in a case where a man dies intestate, without issue, being survived by his widow and certain relatives not his issue, the widow thus being entitled to take as an heir one-half of the estate.

You ask the following three questions:

"1. If one-half is distributed to widow, is her dower right waived?
2. If one-half is distributed to the widow, is a portion of this one-half her dower?
3. Is the widow's dower deducted and the balance of the estate distributed one-half to the widow as aforesaid?"

Your first question was settled in 1864, in the case of *Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 716, wherein the Supreme Court, speaking through Mr. Justice Robertson, said:

"In order to simplify the case we will first dispose of the claim for dower in one-half of the estate, in addition to an absolute right in the

other half, as heir under the statute, set up on behalf of Queen Emma. In our opinion, if she is entitled to dower at all, she must take dower in the entire estate which came to her late royal husband with the crown, at the demise of his predecessor Kamehameha III. If, as claimed on her behalf, she is entitled as a statutory heir to take one-half of her late husband's estate absolutely by way of inheritance, she cannot take dower also in the other half. In that case her right to dower, as widow, would be lost in her superior right to inherit as an heir. She cannot take in both those rights in the same estate."

In *Carter v. Carter* (1897) 10 Haw. 687, 693, it is also said, as to dower, that:

"it is paramount to both the statute of wills and the statute of descents, although where there are no children the wife's dower right may be merged in her right by descent (Est. Kamehameha IV, 2 Haw. 715)."

The above decisions do not make it absolutely clear whether (1) the widow's right of dower, when her husband dies intestate without issue, is *ipso facto* extinguished and merged in her greater right to take one-half or more of her husband's estate, or whether (2) under such circumstances, she has a right to elect to take either by way of dower or as an heir. These decisions do lay down the rule, however, that she cannot take both her distributive share and in addition her dower. It is deemed unnecessary here to attempt to determine whether the widow does have a right of election in such cases. From the statements contained in your letter, it appears that the widow is to receive one-half of her deceased husband's estate. Since she claims this share, it is immaterial whether or not she had a right of election between a distributive share and her dower, for she has apparently elected in any event to take the distributive share and her dower right has merged in the larger estate.

Answering more specifically your first question, therefore, you are advised that if one-half the estate is distributed to the widow, her dower right is merged in the larger estate and extinguished.

Your second question my be answered by the statement that since the dower right is merged and extinguished, and since the widow cannot take both dower and a distributive share in the estate, no portion of the distributive share can be held to be dower. Either the widow takes solely as heir or distribute under the intestate laws (Section 3305, R. L. 1925) or she takes her dower solely under the dower statute (Chapter 177, R. L. 1925). She cannot take partially under both. The two are mutually exclusive under the two decisions above cited.

We come now to your third question. This has, in effect, been answered in our reply to your first question. We will, however, discuss the question further with reference to the actual computation of the inheritance tax.

The inheritance tax statute (Sec. 1400, R. L. 1925, as amended by Act 173; S. L. 1929) provides that "all property which shall pass by will or by the *intestate laws* of the Territory * * * shall be and is subject to a tax" computed according to certain rules prescribed in the same section.

It seems clear that if the widow took any property as dower such property would not pass to her "by will or by the intestate laws of the Territory", and would not be subject to inheritance tax. *Estate of Castle* (1912) 25 Haw. 108, 114-117.

But the decisions of the Territorial Supreme Court, as above stated, have established the proposition that when a widow takes as heir, her dower is merged and extinguished and no part of the estate she takes is composed of dower. She thus takes solely by virtue of the *intestate laws* of the Territory and not by virtue of the statute relating to dower. It would seem to follow inevitably, and such is the opinion of this office, that where the widow of a person dying intestate without issue takes a distributive share of her deceased husband's estate, the inheritance tax should be computed

on the value of the whole share she thus takes without any deduction on account of the value of any supposed dower contained in her distributive share.

Respectfully,

C. NILS TAVARES,
Second Deputy Attorney General.

APPROVED:
H. R. HEWITT,
Attorney General.