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OP. 57-143

November 7, 1957

From: Attorney General
To: Tax Commissioner
Subject: Opinion on Section 115.37.5(c) RLH 1955.

This is in response to the question raised by a letter of October 15, 1957, referred to us for our opinion.

The question presented here is whether the Legislature intended that a mortgagee of a leasehold interest in lands is a mortgagee of real property within the meaning of section 115-37,5(c) Revised Laws of Hawaii 1955, enacted by Act 185, S.L. 1957.

The opinion of this office is that he is a mortgagee of real property within the meaning of said section, if the lease is for a term of more than one year.

The pertinent language of the aforesaid section is as follows:

"(c) The lien imposed by subsection (b) is not valid as against: (1) a mortgagee or purchaser of real property, or the lien of a judgment creditor upon real property, whose interest arose prior to the filing by the tax commissioner of the certificate provided for by subsection (f);...."

If subsection (c) is not applicable, the lien arising under subsection(b) is a paramount lien against

the mortgagee, whether his interest arose before or after the time of arising of the tax lien. Alternatively, the mortgagee would have to resort to the procedure set out in subsection (e), that is, he would have to put the Tax Commissioner on notice to file a certificate showing the tax liens. He could not rely on the records in the Bureau of Conveyances as complete and conclusive as of the time of search.

A search for authorities discloses a Hawaiian case in point, Henriques v. Kalokuokamaile 23 H. 706. The Court in that case determined that a statute requiring recording of a conveyance applied to a mortgage of a leasehold for a term of more than one year, as well as a mortgage of land.

There is on file an earlier opinion of this office consistent with this ruling to the effect that a leasehold is treated as real property for the purposes of the recording statutes of this Territory. This was stated in a letter to the Registrar of Conveyances dated May 8, 1943. The Registrar follows this opinion at the present time.

This opinion is directed at determining only the legislative intent in the problem before us and it is construed to include a leasehold for a term of more than one year in the meaning of real property as used in subsection(c). We do not feel that the enactment of Act 185 was intended in any way to disturb the current system of the Bureau of Conveyances relative to reliance on the recordation of real property.

We still adhere to the general proposition that an estate for years is a chattel or personal property within the meaning of the tax laws when the recording statute is not involved, In Re Perry 36 H. 340, 346. However, it is

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not the purpose of this opinion to consider the general substantive law and we do not enter into an analysis of this line of authority.

Very truly yours,



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APPROVED

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