A BRIEF HISTORY OF HAWAIIAN WATER RIGHTS

PERRY

A Brief History of HAWAIIAN WATER RIGHTS

**

Antonio Perry
Associate Justice of the Supreme Court of Hawaii

**

Read at the Annual Dinner of the Hawaiian Bar Association June 15, 1912, by Judge Perry

A history, however brief, of the water rights of Hawaii is a forcible reminder of the material progress of these Islands. The causes and the results of the development of those rights on the one hand and the growth of agricultural production and the increase of prosperity on the other, bear a close relation to each other. Water, like land is one of the elements contributing prominently to the wealth of a country and certainty and security of the titles to each are always sought but not always obtained without a struggle. Due very largely to the generosity and the wisdom of a King, Hawaii has been fortunate in having had individual titles to its land developed, defined and rendered secure at an early day, the transition from the ancient state of affairs when the King was the owner of all of the land in the Kingdom, through a period when titles in individuals were in embryo, undefined and almost indefinable, to the present condition of clear definition and absolute certainty, occupying in the aggregate scarcely more than a decade. So, too, the titles to the water were rendered secure by the same act of King Kamehameha III but the process of ascertaining and defining the precise extent and limits of those rights has not been as brief and decisive as was that relating to the land. In furtherance of the relinquishment by the King of the great bulk of the lands in his Kingdom to his chiefs and to the common

people the Land Commission was by Act of April 27, 1846, created to receive, hear and pass upon the claims of all those who, under the terms of the royal gift, deemed themselves entitled to portions of the land. The commission held its sessions during a comparatively short period of years, while the best evidence on the subject was abundant and easily available and made its awards of separate parcels, some large and others smaller, to named individuals, the parcels being described either by metes and bounds or by names well known to those who lived in that day and upon whose testimony definite boundaries were subsequently ascertained, whether with or without the aid of judicial tribunals. The act creating the land commission contained a provision that the decision of the board should be "in accordance with the principles established by the Civil Code of this Kingdom in regard to prescription, occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary" and certain other specified rights, but the commission did not deem it to be a part of its duty to hear claims to water or to determine or define the rights of persons or lands to water; and no adjudications were made by it on the subject. As far as that body and that period were concerned, the whole matter was left open for future investigation and determination, ---with this qualification only, that as is apparent from a long line of subsequent judicial decisions, the water rights, whatever they were, in existence at the time of the awards of the land commission passed to the awardees as appurtenant to the land.

Knowledge of the causes leading up to and of the circumstances surrounding the great Mahele and of the principles upon which the Land Commission acted in the pursuit of its investigations and in the making of its awards is essential to a correct understanding of the origin and development of early Hawaiian water rights, but the limits of this paper do not permit of a review of those causes and principles.

Its reading is addressed to those who are familiar with them and only the briefest possible reference will be made to them.

From very early days, long prior to the Mahele, the distribution of water for the purposes of irrigation was the subject of unwritten regulation. The familiar word "Kanawai," used for so long a time that the memory of man runneth not to the contrary to denote a law or laws, upon whatever subject, in its origin signified regulations concerning water. The very first laws or rules of any consequence that the ancient Hawaiians ever had are said to have been those relating to water. The water, it is true, like the land was all, originally, the property of the King, to be disposed of as he saw fit, but the ordinary disposition of it was, again as in the case of the land, to permit its use to the chiefs and through them to the common people, the actual occupants and cultivators. The rules were undoubtedly simple at first. The supply of water was usually ample to satisfy the requirements of the land. Cultivation on a large scale for purposes of export was unknown and the needs of the people were few and simple. Taro, of course, was the main vegetable food and with a little sugar-cane, bananas, sweet potatoes and perhaps one or two other articles, composed the list of products for which irrigation was required.

Most important in the system of distribution of water for application to the soil were the main ditches diverting the water from natural streams. Each of these large auwai's was authorized and planned by the King or by one or more chiefs or konohikis whose lands were to be watered thereby, the work of excavation being under the direction of the chief providing the largest number of men. The water diverted was subsequently divided among the chiefs in the proportions in which each had contributed men for the accomplishment of the undertaking. The same rule was followed with reference to the parcelling out of the water to which each chief was thus entitled among the common people on

his lands. To each hoaaina a share was allotted in accordance with the labor furnished by the recipient. Some hoaainas contributed merely the labor of their own hands, others that also of their sons or other relatives. It sometimes happened that a small ili was represented in the work of construction by a larger number of laborers than a large ahupuaa and was in consequence assigned a larger share of the water than was awarded to the larger tract. It is easily apparent, however, that this system of assignment in accordance with the labor provided in digging the auwais was in its results the equivalent of a system of distribution in accordance with the acreage planted, for each konohiki and hoaaina would doubtless bestir himself to contribute towards the completion of the enterprise sufficiently to meet the requirements of the land which he desired to till. The old system, particularly in view of the conditions then existing concerning the possession of land, possessed the merit of encouraging industry. One of the causes for dispossession by the King was the failure of the hoaaina to render his plot productive. On the other hand if one in the enjoyment of a water right increased his accustomed contribution of labor to the maintenance of the auwai his energy was rewarded by the allotment to him of additional water. By way of illustrating the beneficial operation of the system of distribution just described, it may be noted that in some instances chiefs or those under them contributed labor with reference to the needs not only of the lands then held by them but also of lands which they hoped to obtain in the near future. Such was the case with the high chief in planning the Paki auwai about to be referred to. And so also these rights or privileges were subject to loss through non-use. A tenant who by his exertions in the digging of the auwai had obtained the right to water sufficient to irrigate all of his land and who, subsequently, for an undue period of time, allowed a large part of his land to remain un-

cultivated was deprived of all water save that necessary for the cultivated portion.

It may be added at this point that in some ditches not all of the water was used but after irrigating a few patches the ditch returned the remainder of the water to the stream.

Each large auwai was given the name of the chief or of the land most prominently connected with the undertaking. In the digging of one of the more recent ditches, the Paki auwai, extending from a point above Luakaha to the vicinity of the present cemetery in Nuuanu Valley and so named because the chief Paki planned it and directed its construction, 700 men were employed, 300 being furnished by Paki, 300 by the chief Kehikili and 50 each by Huakini and Dr. Rooke. The work was completed in three days. It is interesting to note that the old kamaaina who in 1886 gave the very clear testimony upon which this statement concerning this particular auwai is based, was very modest with reference to his mental attainments. Shortly after taking the stand he explained that in the old days he was pipe-lighter to the high chief Kehikili and that, quoting his own words, "my profession employed all my time which kept me from mental cultivation."

The construction of a dam and the actual, original diversion of the water were attended with much rejoicing, song and feasting and with solemn religious ceremonies. The day was named with the water kahuna's assistance and the konohikis furnished awa root for the priest and other edibles in abundance for the workers. Prayers were addressed to the local water god, invoking his assistance and protection. After the feast all refuse was busied in the imu which had been dug in the bed of the auwai, the sam was built in a very short space of time and the water turned into the new auwai, passing over the imu. The dams were always composed of loose stones and clods of earth and grass and were not made right but so as to permit of some of the water percolating.

No dam was permitted to divert more than one half of the water flowing in the stream at the point of diversion and quantity taken was generally less. Lower holders were likewise entitled to water and their rights were respected.

The burden of maintaining the ditches fell upon those whose lands were watered, failure to contribute their due share of service rendering the delinquent hoaainas subject to temporary suspension or to entire deprivation of their water rights or even to total dispossession of their lands.

By the aid of smaller branch ditches each land received its share of water. The methods of distribution differed at different times and in different places. One method, perhaps the one best known in later years, was that by time only, the watercourse being allotted to certain weeks or at certain hours of the day or night, as the case might be. The Hawaiians' ideas of the time of day and of the duration of time were not exact and under this system the time for each land was regulated in accordance with the position of the sun and that of the stars. In some instances of large, neighboring lands the allotment was of all night to one and of all day to the other for the period of days necessary to water all of the subdivisions of each tract, followed by an exchange of night and day use between the tracts and then an exchange again at the end of the period and so on endlessly. Another was for each land beginning with the highest to take, irrespective of time, all the water it needed, and then to permit it to flow on to the next to satisfy its requirements and so on in order until the lowest had received its share and then to repeat the process. It is not entirely clear whether the last method wholly preceded the other, but the probability would seem to be that it did, at least in all cases where the supply was abundant, and that it was gradually supplanted by the more precise distribution by time as a decreasing supply or an

increasing demand rendered it necessary or advisable. In still other instances, comparatively rare, however, the patches were given water merely by overflow or percolation from adjoinging patches and not directly from any watercourse.

Each chief or konohiki or some one designated by him became the superintendent (luna wai) of the ditch and its maintenance and of the distribution of its waters and such disputes as arose were ordinarily referred to him for s ttlement. In dry seasons the right was recognized in the luna wai to transfer water from the lands having more than strictly necessary to those in need. This right is said to have been claimed and exercised in some instances as late as the eighties. For unjustifiable interference with a dam it was permissible for any one to kill the offender and to place the body in the breach made by him in the dam, this as a warning to others. If the offender, however, was a man of great prominence in the community, his death might not be permitted to pass unnoticed but might cause considerable local disturbance, in which latter respect some analogies may be found in more modern history.

A fact made clear by the testimony of many kamaainas in later water controversies is that prior to the Mahele, under the ancient Hawaiian systems, more elaborate in some ahupuaas than in others, disputes concerning water were extremely rare. The aim of the konohikis and of all others in authority was to secure equal rights to all and to avoid quarrels. A spirit of mutual dependence and helpfulness prevailed, alike among the high and the low, with respect to the use of the water. This laudable condition was doubtless due to several causes. The rainfall was in many localities more abundant, the supply of water larger and the area under cultivation less extensive than at the present time. The desire for wealth, as the term is used today, did not exist. If each had a sufficiency for his simple needs, he was content. The land tenures were so precarious as to be conducive to abstention from unjustifiable

or otherwise irritating claims by the tillers of the soil. And yet it must be said on this last point that even during the period shortly preceding the Mahele, when the landlords were directed by statute not to dispossess the occupants except for just cause, the same friendly relations, free from all contention, usually characterized the exercise of the rights under consideration.

With assured ownership of distinct pieces of land in individuals and particularly with the advent of foreigners accustomed to more definite delimitation of rights of property, possessed of more advanced knowledge in the art of cultivation and imbued with a keener desire for material prosperity, and, as to some localities, with a decreased rainfall, came more frequent and more intense misunderstandings and differences concerning the ownership of water. In 1860, only fourteen years after the creation of the Land Commission, an act was passed (by way of amendment to an act of 1856 relating to commissioners of private ways) providing for the appointment in each election district throughout the Kingdom of three suitable persons to act as commissioners whose duty it was to determine all controversies respecting rights of way and rights of water between private individuals or between private individuals and the government and upon whom it was enjoined to render such decision as might "in each particular case appear" to be "just and equitable between the parties interested," with right of appeal to the circuit and the supreme courts. By subsequent amendments a single commissioner was substituted for each board of three (1888), and appeal was allowed to the supreme court only (1907), and the decision was required to be such as might "in each particular case appear to be in conformity with vested rights and **** just and equitable

between the parties" (1886).* It was intended by the legislature that the proceedings before these commissioners should be simple, expeditious and inexpensive and with a very few exceptions they were in fact quite informal. The petitions for adjudication would seem in some instances to have been oral only. As late as 1884 the "law's delays" were evidently unknown in those courts. On June 7 of that year the commissioners in deciding a controversy ordered that the defendant "remove the obstructions in the auwai and open a free passage for the water to plaintiff's land and that he give him water tomorrow morning;" and the order was apparently complied with. The powers and duties of the commissioners were finally, by act of 1907, transferred to the circuit judges. Our courts of equity have been held to have had during the period under discussion concurrent jurisdiction with the commissioners of controversies respecting water and in a few instances the aid of equity was invoked. In the great majority of cases, however, the hearings were before the commissioners.

---

* At least since 1886 the law has required that all of the testimony adduced in water controversies, as well as all decisions, "shall be recorded in books of record to be kept and preserved" by the commissioners or circuit judges, as the case may be, and has provided that "the said books when filled shall be deposited with the clerks of the respective courts" (meaning the circuit courts and the supreme court). Even prior to 1886 some of the commissioners and probably all of them, recorded the testimony in bound volumes. Inquiry of the clerks of the circuit courts and of the supreme court has, however, disclos d the fact that no such records are on file with any of the courts named, save two volumes, now in the Archives Building in Honolulu in the custody of the clerk of the supreme court, relating to hearings before the commissioners for the District of Honolulu during the period from 1860 to 1887 inclusive. The writer has been unable, after some further search, to find any of the missing records.

It was the aim of the commissioners and of the courts to declare and to protect these rights as they existed, under the ancient Hawaiian customs and regulations, at the date of the awards of the Land Commission. The work has not always been free from difficulty. In a decision rendered in 1862 it was declared: "The commissioners feel the difficulty of fixing with rigid precision any exact time for the beginning or continuing the water right of any particular party--as to natives, whose notions of time are so loose and vague it would seem almost impracticable and all that we can do where serious disputes have arisen is to indicate about the time" and the allotment to one of the pieces was adjudged to be "from early dawn" of the water day for that land "say commence at about 4:30 or 5 a.m. until 8 o'clock a.m." The earlier adjudications by the commissioners were characterized, perhaps, by somewhat greater freedom in the readjustment of the methods of distribution of water to the new conditions, as from inexact methods to those which are more clearly defined and more certain. In the case just referred to the commissioners said: "It has always been our desire in making our decisions to place the foreigners' time for water as much within the time of daylight as possible for obvious reasons," but whether that course was followed in that particular instance by reason of consent of all parties concerned or in recognition of a change of rights secured by adverse us r does not appear. Let it be added that the commission referred to was composed of one foreigner and two Hawaiians. However that may be, this greater latitude, in so far as there was any, is not apparent in the later decisions. In 1870 the supreme court declared that "the right to use water is an easement in land, to be gained only by grant or prescription" (favors from the konohiki or the King could no longer be relied upon) and in 1884 that the commissioners "cannot, of course, create new privileges nor apportion and distribute water arbitrarily without reference to its title."

Rights of water, rightful in their inception under ancient Hawaiian

customs and regulations and lawfully passing to their present holders by grant, devise or descent, have in recent years been often referred to with inexactness as prescriptive rights. Prescription has, however, played an important part in the history of some of the rights and the ordinary principles of adverse user have been judicially applied, not only to the acquisition of a larger quantity of water than a given land was originally entitled to or in favor of kula land which in olden days had no water right whatever, but also so as to effect a change from a night use to a day use or vice versa and other changes as to the time and method of distribution.

While it has been repeatedly held that purely moot questions concerning the existence or extent of these rights would not be considered by commissioners or courts, much progress had been made in the settlement of real controversies and important principles of wide application have been decided. In addition to the principles of adverse user already mentioned and the determination of the precise rights, with reference to time and to quantity and otherwise, of many kuleanas, ahupuaas and other division of land, it has been held, inter alia, that mere non-user does not operate as a forfeiture; that water to which a land is entitled may be diverted by the owner of the land to other land, whether from one kuleana to another or from one ahupuaa to another and irrespective of whether the land to which the water is transferred was originally entitled to water, provided that the diversion can be accomplished without injuring the rights of others; that an ancient right of lower taro patches to the overflow and seepage from neighboring patches is to be respected and that such right of seepage and overflow may under certain circumstances be acquired by prescription; that under certain other circumstances no prescriptive right can be acquired to the seepage from a stream; that subterranean waters to be the subject of rights must like surface waters

in general flow in known and well defined channels; and that the surplus water of an ahupuaa, using the term as including water, whether storm water or not, that is not covered by prescriptive or riparian rights, is the property of the konohiki, to do with as he pleases, and is not appurtenant to any particular portion of the ahupuaa.

But the work of authoritative definition is not yet complete. For example, in a pending case the Territory presented the contention, for the first time in the history of local water litigation, that by virtue of the provision of a statute passed in 1850 that "the springs of water, running water, and roads shall be feee to all, on all lands granted in fee simple," the Territory is now the owner of all of the surplus water of the ahupuaa of Kaneohe on this island and presumably of all other ahupuaas. A circuit judge of the first circuit, sitting as commissioner, a few days ago filed an opinion overruling the contention and an appeal has not been perfected by the Territory; but the point may be presented under the appeal of one of the other parties to the cause. The subject of riparian rights has been touched upon in former decisions of commissioners and of the supreme court but the law on the subject as on that of subterranean waters is, perhaps, capable of further development.

Water rights are destined to play an important part in the future of Hawaii as they have in its past. The growth of urban communities and the agricultural development of the territory render inevitable the conservation and use in an increasing degree of the available waters, with probably consolidation of some rights and new distributions of others. The subject will lose none of its interest with the passage of time.