

UNIVERSITY OF HAWAII
OCCASIONAL PAPERS

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OCTOBER 10, 1923

Published by the
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A thesis prepared in the Department of History
and Political Science, under the supervision
of K. C. Leebrick, Ph.D.

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(Occasional Papers are published at irregular intervals and are serially
numbered.)

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EARLY LAND TENURE

In the history of European civilization, we can readily trace the transition from allodial holding to the purely feudal system of land tenure, wherein the king is the supreme landlord and all other holders are directly or indirectly his tenants; and again to the system now prevailing in the United States, substantially allodial, though marked with traces of feudal theory. In the greater part of the United States feudalism never existed practically at all, or only in such an enfeebled form as lingered on in England in the seventeenth century; but in that little corner of our country called Hawaii men still living were born under a feudal regime in some respects more complete and effective than ever prevailed in mediæval Europe. The origins of the system in Hawaii are lost in antiquity. We can see its end but not its beginning. From the commencement of authentic history, we find the monarch to be the absolute owner, in theory and in fact, of every foot of land within his dominions, not as an individual, indeed, but in virtue of his office. This was true during what might be termed the period of the Hawaiian heptarchy, when petty kings fought continually against each other, and boundaries of kingdoms advanced and retreated according to the ability and the ambition of their sovereigns. It could not fail to be true, then, after Kamehameha the Great joined all the islands in one monarchy. As king he succeeded to all the legal rights of the sovereigns whom he superseded; as conqueror by force of arms he was able to dispose of the lands of the conquered according to his pleasure, and would have been so even if legal theory had flatly opposed him instead of fully sanctioning all that he did.

All land, then, was the king's. Reserving such as he chose as his private domain, the remainder he granted out to his principal chiefs, who rendered services and taxes in return. These tenants in chief made similar grants of part of their lands on similar terms, and the process continued in the way with which we are familiar in Europe, though in Hawaii subinfeudation was carried to an extent rarely, if ever, known in Europe—certainly not in England. Ownership remained always in the king, and it was no mere shadowy claim of title, but a real and ever-present fact. The royal dues, in service and in produce, were constantly exacted, unchecked by any of those recognized customs which in England and France and Germany placed definite limits upon the demands of the suzerain. In Hawaii the lord had his rights

against the tenant, but the tenant had none against his lord. If his burdens proved too heavy his only redress, short of rebellion, was to surrender his fief and seek another lord. Nor had he any security of tenure even while he rendered his dues punctually. Land was occasionally reallocated, and at the death of a king a general redistribution by his successor was the almost invariable rule. Up to the time of Kamehameha I fiefs in general had not become hereditary. It is true that certain lands had remained for generations in the same families. (Note 1.) This may have been more or less accidental, and have implied no acknowledgment of any actual right, but in the course of time it would naturally result in the claim of such a right, and perhaps lead eventually to a general recognition of the principle of inheritance. It is clear, however, that no such custom existed as to most of the lands of the kingdom, and that the transfer of a fief from one family to another was no matter for either surprise or just grievance.

EVOLUTION OF INDIVIDUAL RIGHTS IN LAND.

In the last years of the reign of Kamehameha I began that revolution in the system of land tenure which ended, in little over a quarter of a century, with the complete disappearance of the feudal system and the establishment of full individual ownership. Kamehameha I, by adopting the principle of hereditary succession as the normal rule in grants of land, took an important step. (Note 2.) The tenant still had no actual right in his land, nor any absolute certainty that he could either retain it for himself during his lifetime or transmit it to his posterity on his death, but at least his expectation of both events became reasonable enough to offer him some encouragement to industry. (Note 3.) The Bill of Rights of Kamehameha III, promulgated in 1839, converted this expectation into a legal right, and its principles were adopted in the constitution granted in 1840. "Protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they conform to the laws of the kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws." (Note 4.) At the same time it was declared: "Kamehameha I was the founder of the Kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property. Wherefore, there was not formerly, and is not now, any person who could or can convey away the smallest portion of land without

the consent of the one who had, or has the direction of the kingdom." (Note 5.)

After this time, as well as before, all land was the property of the king. But it was no longer subject to his arbitrary disposition. Henceforth neither the king nor any other landlord (kono-hiki) could remove a tenant or increase his rent except in accordance with law. No subject could yet obtain absolute ownership of land, but a legal interest, enforceable in the courts, could now be had under lease. As a temporary expedient this served fairly well, but it could be only temporary; with Hawaii now entering the general current of civilization, with trade expanding, with American and European immigration increasing, it was necessary to provide as soon as possible for complete individual ownership. This was done by Chapter VII of the act to organize the executive departments, approved April 27, 1846. Article IV of this chapter (Note 6) directed the creation of a board of commissioners to quiet land titles: "His Majesty shall appoint through the minister of the interior, and upon consultation with the privy council, five commissioners, one of whom shall be the attorney general of this kingdom, to be a board for the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property acquired anterior to the passage of this act; the awards of which board, unless appealed from as hereinafter allowed, shall be binding upon the minister of the interior and upon the applicant." There follow various provisions, including one authorizing appeal to the Supreme Court, and then the following: "The minister of the interior shall have power in concurrence with the privy council, and under the sanction of His Majesty, to issue to any lessee or tenant for life of lands so confirmed, being an Hawaiian subject, a patent in fee simple for the same, upon payment of a commutation to be agreed upon by His Majesty in privy council."

The first of the two sections just quoted provides for no alteration in the nature of existing titles, but only for the accurate determination of rights in land already existing, their legal basis being the Bill of Rights of 1839. Tenure at the will of the landlord had become tenure for life or for a term; rent, in produce or in labor, was no longer fixed at the discretion of the landlord, but by agreement of the parties or by law. It was for the board of commissioners to fix the boundaries of the lands in whose possession both landlords and tenants had thus been confirmed, and to determine under just what conditions they were held. It was to give nothing new to either landlord or tenant, but merely to establish definitely their respective rights.

But once the rights of the occupant in his land had been determined,—when, so to speak, the terms of his lease had been recorded,—the second of the two sections quoted would enable him to buy up the reversion at a price to be fixed by the king in council, and to obtain a patent in fee simple, something unknown to earlier Hawaiian law. Other provisions were made in this same act (Note 7), and in supplementary statutes passed within the year (Note 8), for the sale and lease of land, so that when the board should have completed its work, the law of real property in Hawaii would differ in no essential respects from that in England and the United States.

PRINCIPLES ADOPTED BY THE BOARD OF LAND COMMISSIONERS.

In compliance with the statute, William Richards, John Ricord, J. Y. Kanehoa, John Ii and Z. Kaauwai were appointed commissioners, and commenced their labors by a careful investigation into the nature of old land tenures and the respective rights of all classes of persons making claim to shares in landed property. On August 20, 1846, as a result of their examination, they agreed on certain principles, which, on October 26, 1846, were adopted by the legislature as rules which should govern in the partition of the lands of the islands (Note 9). The board declared it to be “fully established that there are but three classes of persons having vested rights in the lands: First, the Government; second, the landlord; and third, the tenant.” Considering the practically unlimited powers which the king had until recently enjoyed, and which he still possessed except as they had been restricted by law, it was concluded that “should the King allow to the landlord one-third, to the tenant one-third, and retain one-third himself, he, according to the uniform opinion of the witnesses, would injure no one unless himself.” It is to be noted that the text uses *the King* and *the Government* interchangeably throughout. It is not Kauikeaouli Kamehameha, but the Hawaiian State, which has been found to be the rightful owner of an undivided third of the lands within the national boundaries. (Note 10.) Until a few years earlier the King *was* the State, and there could be no distinction between king’s property and public property. Now, with the establishment of constitutional government, a national treasury as distinct from the king’s private purse had been created. As the king was thereby relieved from the duty of defraying the expenses of the state, so must he surrender the income and the property which he had held as the state’s representative, though like any other resident of the kingdom he might hold property of his own and dispose of it at pleasure. (Note 11.)

ROYAL REVENUES.

The development of a system of government finance, independent of royal control, took place rapidly—almost instantaneously—in Hawaii, but was otherwise very similar to that in England. In the one case the process took years, and in the other, centuries; it is not the only instance in which the history of Hawaii is that of Europe in miniature, and in which the one may help to explain the other. In England, as elsewhere, the king was originally expected to “live on his own.” He paid all the expenses of the government out of his private estates, feudal dues, and such other revenues as were from time to time granted to him by the representatives of the people, or annexed by him in some more or less informal manner. Any surplus remaining he disposed of for his own benefit. Sometimes, of course, he attended to his own benefit first and the business of government was conducted on what happened to be left. In the course of time new sources of revenue were opened, not granted to the crown, but freeing it from the obligation of defraying the cost of certain parts of the administration. Finally the king surrendered his hereditary revenues in return for an annual grant of money and relief from most of the expenses of government. This practice has been followed at the accession of each new monarch, and each one has been freed from the payment of certain charges which had been borne by his predecessors, until the civil list, as it is still called, has become practically the “pay and allowances” of the sovereign. Curiously enough, the surrender of the hereditary revenues in return for an allowance of less value by some millions of dollars, is occasionally spoken of as if it were a munificent gift bestowed by the king upon the British people; his relief from the obligation of meeting the expenses of the government—some hundreds of millions—is forgotten.

In both England and Hawaii, then, the national revenues were sooner or later taken out of the hands of the king, a grant of money from the public treasury being given to him at the same time. In both countries the king could possess property of his own. In both countries, too, there was a third class of property which remained at the disposal of the king,—private in the sense that he had the full enjoyment of its proceeds, but public in that he held it because of his position as head of the state, and only while occupying that position. In England the revenues of the duchy of Lancaster are paid over to the king throughout his reign; he has the free use of them, whatever they may amount to, but on his death or deposition they pass to his successor in

office. A similar source of income was provided for the constitutional king of Hawaii in 1848, when the crown lands were set aside. While there were at first considerable differences between his rights in them and those of the English king in the duchy of Lancaster, these differences were largely removed within a few years, and the likeness in the later days of the Hawaiian monarchy was very close.

THE GREAT MAHELE.

The principles adopted by the board of land commissioners were simple, but their application to particular cases was naturally a difficult matter. The board, with occasional changes in membership, proceeded steadily with its work, but it became evident that its operations "would occupy a long series of years, and that the Commission would encounter much difficulty in settling the rights of the chiefs and konohikis." (Note 12.) The need of some more expeditious method of settlement soon forced attention, and the matter was finally taken up in the Privy Council, where it was fully discussed at the sessions of December 11, 14 and 18, 1847. (Note 13.)

Meanwhile the king, as the landlord from whom the tenants in chief held, had advanced a claim to a large part of the land of the islands,—that is, he believed himself to have rights under the second of the three classes of persons named in the principles adopted by the board,—and had worked out a division of the lands in the island of Oahu, between himself and the chiefs, on the basis of his claim. "The chiefs do not greatly object to this, but they ask: Has the government a third interest in lands left to us? The King replies Yes, and the government has a third interest in his." (Note 14.) It will be seen that this was meant as an adjustment of rights within the second of the three classes, assigning to each konohiki, superior or inferior, his proper share, after which the government (the first class) would take one-third from each konohiki, and the tenants (the third class) would presumably be entitled to convert their leaseholds into fee simple estates of one-third area. There was considerable debate in the council as to the validity of the king's claim. Some believed that "the King as an individual and as the head of the nation should be regarded as one"; that "the government portion of the lands should go into the hands of the King, from which he should select a part as his individual property, and set aside the remainder for the use and support of his government." Chief Justice Lee, however, after study of the question, gave it as his opinion that "the King and the government were one and the same in

most things, but not in every thing. From the constitution it seemed clear that in property the King and government were two separate and distinct persons." (Note 15.)

After full discussion it was determined (December 18, 1847) to appoint a committee which should endeavor by negotiation to effect an equitable division of lands between the chiefs on the one hand and the government and the king on the other, this to be followed by a division of the second portion into state and crown lands. The right of the tenants to their third was recognized, but a general distribution to them was not attempted. Each tenant might receive an allotment upon application, which seems to have been made in only a few cases, most apparently preferring their existing leaseholds to the smaller holdings in fee simple. The committee's work was so quickly performed that on March 30, 1848, there was "presented a book of 225 pages consisting of the lands assigned to the King on the left and those to the chiefs on the right—also a division of the King's lands from those belonging to the Government." (Note 16.) This was the "Mahele Book," signed and sealed by the king on March 8, 1848. In it is contained an instrument setting aside the crown lands, translated into English as follows: "Know all men by these presents, that I, Kamehameha III, by the grace of God, King of these Hawaiian Islands, have given this day of my own free will and have made over and set apart forever to the chiefs and people the larger part of my royal land, for the use and benefit of the Hawaiian Government, therefore by this instrument I hereby retain (or reserve) for myself and for my heirs and successors forever, my lands inscribed at pages of this book: these lands are set apart for me and for my heirs and successors forever, as my own property exclusively." (Note 17.)

The action of the king and council was brought before the legislature at its next session, and on June 7, 1848, was passed an act confirming the division agreed on. The pertinent portions read as follows:

"Whereas, It hath pleased his most gracious Majesty Kamehameha III, the King, after reserving certain lands to himself as his own private property, to surrender and forever make over unto his chiefs and people the greater portion of his royal domain;

"And whereas, * * *

"Be it enacted by the House of Nobles and Representatives of the Hawaiian Islands in Legislative Council assembled,

"That expressing our deepest thanks to his Majesty for this noble and truly royal gift, we do hereby solemnly confirm this great act of our good King, and declare the following named lands, viz: * * * To be the private lands of his Majesty

Kamehameha III, to have and to hold to himself, his heirs and successors forever; and such lands shall be regulated and disposed of according to his royal will and pleasure, subject only, to the rights of tenants." (Note 18.)

Thus the Great Mahele (i. e., division) was completed, and the crown lands, as distinct from lands for the use and benefit of the government, were set apart.

PERIOD FROM 1848 TO 1864.

The next few years may be passed over briefly. From the time of the division until his death, Kamehameha III administered the crown lands through an agent, receiving the revenues, selling and leasing at pleasure. He died on December 15, 1854, and was succeeded on the throne by his nephew, Kamehameha IV. The late king's will, probated January 27, 1855, after providing for the payment of his debts and devising certain lands to his consort, Queen Kalama, in lieu of dower, left all his remaining estate to his nephew, the new king. The administration of the crown lands was continued as before. They were treated in all respects as private lands; the queen consort (Emma) joined with the king in deeds to individuals whenever it would have been necessary for a private citizen to do so in order to bar right of dower; portions were sold and the remainder was heavily burdened with mortgages. (Note 19.)

LITIGATION OVER THE ESTATE OF KAMEHAMEHA IV.

Kamehameha IV died intestate on November 30, 1863, and the crown passed to his brother, Kamehameha V. A dispute at once arose as to the distribution of his estate and particularly as to the disposition to be made of the crown lands. The widow, Queen Emma, laid claim to one-half, with dower in the other half, on the theory that the crown lands were his private property and subject to the ordinary rules of inheritance. If this assumption were correct, her right to receive one-half could not be disputed, for under Hawaiian law an equal division of the estate must be made between the late king's widow and his father. (Note 20.) As to her dower right in the remainder the case was not so clear. Her entire claim was opposed by the attorney-general, who held that the crown lands constituted "a royal domain-annexed to the Hawaiian crown," that they descended from each holder to his successor on the throne, and that they were not subject to the right of dower.

It seems probable that up to this time no very careful consideration had been given to the exact legal status of the crown

lands. Since they had first been set apart, the reigning sovereign had always received the income from them, as he would have done whether they were his private property or "a royal domain annexed to the crown." On the one occasion when a new king had acceded, he had entered into possession, by law, of whatever property was attached to the crown, and, by the will of his predecessor, of the latter's private property, so that no question had arisen as to which category included the crown lands,—they all passed into the same hands anyway, and there was nothing to draw particular attention to the matter. It is easy to find contemporary statements that seem to imply that the lands set apart for Kamehameha III in 1848 were ceded to him as absolutely as those assigned to the chiefs were to them, but such remarks were not made as technical legal statements, and too much must not be deduced from them. On the other hand it seems to have been pretty commonly assumed, without any great amount of reflection, that the crown lands would go with the crown. Once the issue was actually made, it was not hard for reasonable men to take diametrically opposite views and to make a plausible argument on each side. The character of Kamehameha V, of Queen Emma and of the attorney-general are sufficient evidence that the litigation was an honest attempt to settle an honest difference of opinion.

The case was argued at the April term, and the decision announced by Justice George H. Robertson on May 27, 1864 (Note 21). "In our opinion, while it was clearly the intention of Kamehameha III to protect the lands which he reserved to himself out of the domain which had been acquired by his family through the prowess and skill of his father, the conqueror, from the danger of being treated as public domain or Government property, it was also his intention to provide that those lands should descend to his heirs and successors, the future wearers of the crown which the conqueror had won; and we understand the act of the 7th June, 1848, as having secured both these objects. Under that act the lands descend in fee, the inheritance being limited however to the successors to the throne, and each successive possessor may regulate and dispose of the same according to his will and pleasure, as private property, in like manner as was done by Kamehameha III. In our opinion the fifth clause of the will of Kamehameha III was not necessary to pass the reserved lands to Kamehameha IV, any more than the first clause was necessary to pass to him the crown. He was entitled to inherit those lands by force of the act of 7th June, 1848, when he succeeded to the crown, in virtue of the public proclamation made by his predecessor with the consent of the House of Nobles. (Note 22.)

* * * We are clearly of opinion also that her Majesty Queen Emma is lawfully entitled to dower in the reserved lands, except so far as she may have barred her right therein by her own act and deed. There is nothing in the Act of 7th June, 1848, which can be understood as taking away the Queen's right of dower in the lands therein named; nor is there any law of this Kingdom which renders the matrimonial rights of the wife of the King any less than or any different from those of the wife of any private gentleman. Such was unquestionably the understanding of both Kamehameha III and his successor as to dower in those lands, which are to be dealt with in all respects as private inheritable property, subject only to the special legislative restriction on the manner of their descent."

To sum up, then, it had been established that the reigning sovereign might enjoy the revenues of the crown lands during his lifetime, and might also sell or mortgage any part or all of them, the proceeds becoming his private personal property; that on his death all such lands still held should pass to his successor in office, subject to the same right of dower as private lands.

LEGISLATION OF 1864-1866.

For the first time the exact legal status of the crown lands was now clear and the serious condition of affairs was brought to public attention. The new king was, indeed, confirmed in his right to the benefit of them, but they came to him burdened with mortgages placed on them by his predecessors and their value further diminished, during Queen Emma's life-time, by her right of dower. His income from them promised to be small. But this was not the worst of it. The former kings, though they had mortgaged a great deal, had not sold much, but there was nothing to prevent a spendthrift monarch from disposing of every acre to the highest bidder, and leaving nothing to those who came after. Of course this had been known from the beginning, but there had never been any imminent danger and nothing had been done. Now, however, the decision of the Supreme Court moved the legislature to provide not only for the needs of the reigning king but also for the protection of his successors.

First, the king was relieved from the burden of Queen Emma's dower. By an act passed December 3, 1864, a grant of six thousand dollars a year from the national treasury was made to her, in lieu of dower, the preamble reciting that "Whereas, it is not advantageous to the Kingdom that the Royal Domain should be diminished." (Note 23.) This was in effect an increase of the civil list during the lifetime of Queen Emma.

Next, on January 3, 1865, was approved an act of such importance that it must be quoted in full, (Note 24.)

Whereas by the act entitled "An Act relating to the lands of His Majesty the King and of the Government," passed on the 7th day of June, A. D. 1848, it appears by the preamble that His Most Gracious Majesty Kamehameha III, the King, after reserving certain lands to himself as his own private property, to surrender and make over unto his chiefs and people the greater portion of his royal domain; and whereas by the same act it was declared that certain lands therein named shall be the private lands of Kamehameha III, to have and to hold to himself, his heirs, and successors forever, and that the said lands shall be regulated and disposed of according to his royal will and pleasure, subject only to the rights of tenants; and whereas by the proper construction of the said statute the words 'heirs and successors' mean the heirs and successors to the royal office; and whereas the history of said land shows that they were vested in the King for the purpose of maintaining the royal state and dignity, and it is therefore disadvantageous to the public interest that the said lands should be alienated or the said royal domain diminished; and whereas, further, during the two late reigns the said royal domain has been greatly diminished and is now charged with mortgages to secure considerable sums of money: Now, therefore,

Be it enacted by the King and the Legislative Assembly of the Hawaiian Islands, in the Legislature of the Kingdom assembled:

Section 1. The Minister of finance is hereby authorized to issue exchequer bonds, with coupons attached, to the amount of not more than \$30,000, said bonds to bear interest at not more than 12 per cent per annum, payable half yearly, and to be redeemable at such times within the next twenty years as the said minister of finance shall deem expedient, which said bonds shall be issued whenever necessary to the commissioners of crown lands, hereinafter provided for, to be used to extinguish those mortgages which may remain unsatisfied after the administrator of his late Majesty's estate has exhausted all the estate belonging to his late Majesty, in a private capacity, which the said administrator may be legally entitled to use for the payment of the debts of the estate.

Sec. 2. Full authority is hereby given to such commissioners, jointly with the minister of finance, to negotiate for the redemption of the mortgages in the preceding section referred to, and dispose of the said exchequer bonds for that purpose in such manner as may be most advantageous to the public interest.

Sec. 3. It is further enacted that so many of the lands which by the statute enacted on the 7th of June, 1848, are declared to be the private lands of His Majesty Kamehameha III, to have and to hold to himself, his heirs, and successors forever, as may be at this time unalienated, and have descended to His Majesty Kamehameha V, shall be henceforth inalienable, and shall descend to the heirs and successors of the Hawaiian Crown forever; and it is further enacted that it shall not be lawful hereafter to execute any lease or leases of the said lands for any term of years to exceed thirty.

Sec. 4. The commissioners of the crown lands shall have full power and authority to make good and valid leases of the said lands for any number of years not exceeding thirty; but in no case shall it be lawful to collect the rents on the same for more than one year in advance, or to receive anything in the nature of a bonus for signing the

said lease, and all the rents, profits, and emoluments derived from the said lands, after deducting the necessary and proper expenses of managing the same, shall be for the use and benefit of the reigning sovereign, and payable by the said commissioners to the order of the King, except when the King shall be a minor, and then they shall be invested for the benefit of the said minor King, as the legislature may direct, until the said minor shall have arrived at the age of Majority, and excepting further as in the succeeding section set forth.

Sec. 5. There shall be set apart by the said commissioners one-fourth part of the annual revenue of the said estate, which shall be paid into the public treasury and be devoted first to the payment of the interest on the exchequer bonds herein above provided for, and so much of the said fourth part of the said income as may be in excess of the said interest on the said bonds shall be applied to the payment of the principal of the said bonds until the entire sum by this act authorized to be issued shall be fully paid.

Sec. 6. The board shall consist of three persons, to be appointed by His Majesty the King, two of whom shall be appointed from among the members of his cabinet council, and serve without any remuneration, and the other shall act as land agent, and shall be paid out of the revenues of the said land such sum as may be agreed by His Majesty the King.

As regards Kamehameha V, this law gave him the assistance of the public credit in extinguishing the debt on the crown lands, which might or might not be of any practical benefit to him. The important thing is that henceforth these lands were inalienable, so that no king might sell them and take all their value for himself, to the exclusion of his successors. Bearing in mind that His Most Gracious Majesty King Kalakaua ascended the throne only nine years later, it will be realized that this law came not much too soon.

Under the act of January 3, 1865, one-quarter of the income of the crown lands was to be turned into the treasury to pay the interest on the government's loan and to extinguish the principal. Kamehameha V, however, did not limit himself to this, but paid over nearly the entire revenue of the domain. Far from seeking to get as much as he could for himself, his ambition appears to have been to transmit the crown lands to his successor free from all indebtedness. His generosity in this respect was emulated by the legislature. It was decided to free the crown lands, once for all, from all burdens, and by a resolution approved July 6, 1866, the government assumed liability for both the principal and the interest of the bonds. (Note 25.) Bonds to the total of \$27,000 were issued to extinguish the mortgages. (Note 26.) Thenceforth until the end of the monarchy each king enjoyed the full revenue of the royal lands.

PERIOD FROM 1866 TO 1893.

For nearly thirty years there is nothing of consequence to relate, except one curious episode to be mentioned later. The principal of the trust fund represented by the crown lands was now effectually protected, and it was only the interest that Kalakaua could squander, along with his regular subsidy from the civil list and his large but uncertain income from bribes and frauds on the custom-house. (Note 27.) The area of the lands in the hands of the commissioners was slightly reduced, the courts holding that certain tracts heretofore administered by them had been the private property of Kamehameha IV, and therefore passed to his heirs. (Note 28.) On one of these tracts the government had paid off a mortgage, under the terms of the act of July 6, 1866; the premises were accordingly charged with the amount, on prayer of the Minister of Finance. (Note 29.)

On September 30, 1880, Princess Ruth, a descendant of Kamehameha I, conveyed to Claus Spreckels, for a consideration of \$10,000, "all my estate, right, title and interest both at law and in equity of, in and to" the Hawaiian crown lands. (Note 30.) As the princess had no estate, right, title or interest of any description in the crown lands, either at law or in equity, this was a singular proceeding. It is possible that she imagined herself to have some sort of vague rights in the property. She was a princess of the house of Kamehameha which had once owned every foot of land in the kingdom, and she may well have found it hard to grasp the idea that all of the royal lands could pass to another family, leaving none for the descendants of the conqueror. Acts and decisions of new-fangled things like legislatures and courts could not mean much to her. Anyway, she would have no objection to taking the money which Mr. Spreckels pressed upon her. Spreckels, of course, had no illusions as to her rights, but his part in the transaction is easily understood. He was hand in glove with the king and many almost equally unscrupulous politicians, and is said to have boasted, not long after this, that he had the legislature in his pocket. His friends might help him to make something out of this deed of Princess Ruth's, and even if they could not, its possible blackmail value was considerable. He was willing to invest ten thousand dollars in an enterprise that appeared (and proved) to offer considerable profit with no great risk of loss. An incorruptible Supreme Court stood in the way of his gaining anything through legal proceedings, but his capacity to make trouble was so evident that the cabinet felt it expedient to buy him off. Accordingly there was introduced in the legislature, passed on July 20th,

and approved on July 21, 1882, an act authorizing the conveyance to him of the ahupua'a of Wailuku, a part of the crown lands in the island of Maui, "estimated to contain twenty-four thousand acres or thereabouts," on condition of his relinquishing all claims on the remainder of the crown lands. (Note 31.)

CROWN LANDS MERGED WITH THE PUBLIC DOMAIN.

Liliuokalani, the last monarch of Hawaii, was dethroned on January 17, 1893, and a provisional government was established, which was succeeded on July 4, 1894, by a republic of the familiar American form. With the enforced abdication of the queen, the lands "vested in the King for the purpose of maintaining the royal state and dignity" passed to the new "heir and successor of the Hawaiian Crown," and the provisional and republican governments successively took them in charge. To remove any doubts which might possibly exist, the constitution of the republic expressly provided: "That portion of the public domain heretofore known as crown land is hereby declared to have been heretofore, and now to be, the property of the Hawaiian Government, and to be now free and clear from any trust of or concerning the same, and from all claim of any nature whatsoever upon the rents, issues, and profits thereof." (Note 32.) After the annexation of Hawaii to the United States in 1898, the organic act, passed by Congress in 1900 to establish a government for the territory, repeated the same provision. (Note 33.) Title was no longer in the Hawaiian government, however, but in that of the United States, the treaty of annexation providing that "the Republic of Hawaii also cedes and hereby transfers to the United States the absolute fee and ownership of all public, government, or crown lands, * * * together with every right and appurtenance thereunto appertaining." (Note 34.) The treaty was not ratified as such, but the joint resolution providing for annexation (approved July 7, 1898), adopted its terms. (Note 35.)

CLAIM OF THE FORMER QUEEN.

The loss of her income from the crown lands, amounting to about \$50,000 a year, was naturally resented by the former queen, but during the existence of the republic of Hawaii it was evidently impossible for her to recover anything through the courts, whose existence was derived from the same instrument (the constitution of 1894) which asserted the crown lands to be free "from any trust" and "from all claim of any nature whatsoever." Nor does it seem to have occurred to her or to her advisers, until

a long time had passed, that her legal position had perhaps been altered since annexation. After several years, however, suit was brought in the United States Court of Claims, alleging the right of the ex-queen to the income during her life, and the last act in the history of the crown lands took place. The case deserves more than a hasty examination.

Aside from the merits of the ex-queen's claim, there was a preliminary legal question involved. In view of the provisions of the Hawaiian constitution of 1894, of the annexation resolution and of the organic act, it would seem on the face of it that there was nothing upon which an action could be based. The attorney for the claimant, Mr. Sidney Ballou, conceded of course that the courts of the republic were unable under the terms of the constitution to take cognizance of the case, but advanced the theory that the equitable right of the ex-queen was merely suspended, and not destroyed; that it still existed, although for the time being no court had jurisdiction. If the right remained at the time of annexation, then it was protected by the fifth amendment to the constitution (deprivation of property without due process of law), and the clause in the organic act could not destroy it. As to the status of the crown lands prior to 1893, the claimant took the position that they had always been the private lands of the king and in no sense national property. Great emphasis was laid on the words of Justice Robertson, who, in the decision of the case of the estate of Kamehameha IV, said: "The records of the discussion in Council show plainly his Majesty's anxious desire to free his lands from the burden of being considered public domain, and as such, subjected to the danger of confiscation in the event of his islands being seized by any foreign power." (Note 36.) And again, "it was clearly the intention of Kamehameha III to protect the lands * * * from the danger of being treated as public domain." Of course, if the crown lands—or a life estate in them—were the private property of Liliuokalani, the action of the provisional government amounted to confiscation.

The decision of the court was delivered by Judge Fenton-W. Booth, on May 16, 1910. (Note 37.) He first discussed the decision of 1864. "Although the court sustained the right of dower in the widow of the King, it is clear from the opinion that the crown lands were treated not as the King's private property in the strict sense of the word. While possessing certain attributes pertaining to fee-simple estates, such as unrestricted power of alienation and incumbrance, there were likewise enough conditions surrounding the tenure to clearly characterize it as one pertaining to the support and maintenance of the Crown, as distinct

from the person of the Sovereign. They belonged to the office and not to the individual." Referring to subsequent legislation, he said: "The act of 1865 to become effective under the Hawaiian constitution required the approval of the King. On January 3, 1865, Kamehameha V approved the statute which expressly divested the King of whatever legal title or possession he therefore had in or to the crown lands. The Hawaiian Government in 1865 by its own legislation determined what the court is now asked to determine." And the decision of the court was that "the reservations made were to the crown and not the King as an individual. The crown lands were the resourceful methods of income to sustain, in part at least, the dignity of the office to which they were inseparably attached. When the office ceased to exist they became as other lands of the Sovereignty and passed to the defendants as part and parcel of the public domain."

The case was thus decided on its merits. Liliuokalani had never been the owner of the crown lands, and so had lost nothing through the provisions of the constitution of 1894 and of the organic act. The court remarked: "We have not entered into a discussion of the defenses predicated upon the above provisions of law, believing the case disposed of before we reached them. It is, however, worthy of note that the organic act of 1900 puts an end to any trust—if the same possibly existed." This last statement may be doubted. If Liliuokalani ever had any private property right in the lands, and if it were not confiscated and destroyed by the constitution of the republic, then an act of Congress could not deprive her of it; that would clearly be a taking of property without due process of law, as argued by the claimant. In view of the grounds of the decision, however, the point is of no importance. The court held that ownership had been in the government under the monarchy as well as under the republic; and though it needed to go no further, it might well have decided that the constitution of 1894 destroyed (not suspended) any rights that previously existed, for the claimant's theory, though ingenious, and backed up by elaborate argument, seems without foundation.

The soundness of the decision can hardly be doubted; in fact, probably the claimant and her advisers never felt sanguine, but thought it might be worth while to take a chance. One wonders just where their arguments would lead. On their theory there was an equitable life estate in the reigning sovereign which could not be taken from him by loss of the crown through change of government. If the monarchy had been continued after Liliuokalani's deposition, instead of being superseded by the republic, would the revenues of the crown lands have continued to be paid

to the ex-queen? No one could have seriously entertained such an idea. They would of course have accrued to the new sovereign, "the heir and successor to the royal office," the Princess Kaiulani. If the same rule did not apply under the actual circumstances, it could only be because Liliuokalani was succeeded by a republican government instead of a constitutional monarch. The logic is obscure. Assuming, however, that she, as the only queen there was, continued to receive the income during her life; what was to become of it after her death? Would it go to her personal heirs? Or to the Hawaiian government? Certainly not the former, for they are not "heirs and successors to the royal office." As to the latter, if it ever succeeded "to the royal office" it was on the deposition of Liliuokalani and not on her death.

There is, indeed, only one thing which lends a little plausibility to the claim; that is the utterance of Justice Robertson, already quoted. Certainly it seems very much to the point: "It was clearly the intention of Kamehameha III to protect the lands * * * from the danger of being treated as public domain." This is as given in the claimant's argument, but the quotation is not complete, for these words follow: "It was also his intention to provide that those lands should descend to his heirs and successors, the future wearers of the crown which the conqueror had won." The Court of Claims says that "this statement" (as imperfectly quoted) "has been seized upon and assiduously emphasized by the claimant. It is not in harmony with the detailed history given by the court in its opinion." Going back to the record of the discussion in the Privy Council, mentioned by Justice Robertson, we find that in the course of the debate, December 18, 1847, the King asked: "If a foreign power should take the Islands, what lands would they respect? Would they take possession of his lands?" Mr. Lee, the Chief Justice, "gave it as his opinion, that except in the case of resistance to, and conquest by, any foreign power the King's rights to his private lands would be respected." The King asked: "During the French Revolution were not the King's lands confiscated?" To which Mr. Wyllie, the Minister of Foreign Affairs, replied: "They were confiscated, but that was by the King's own rebellious subjects." (Note 38.)

Now this does not necessarily show that the King believed the proposed segregation of lands would insure his retention of those allotted to him, in case of his deposition, but it does at least show that he had some curiosity on the point. Again, it will not do to found any theories on the words in his speech at the opening of the legislature in 1848: "I have also reserved to myself a portion of lands which are to be retained as my private property,

and to descend to my heirs forever." (Note 39.) If we are to insist on the narrowest literal meaning of the words "private property," we may not ignore the omission of the words "and successors"; we should have to take this as an assertion that the lands would descend to his personal heirs, which, according to the Supreme Court's decision, was not the case. Taking everything into consideration, however, it is conceivable that Kamehameha III did believe the crown lands to be his own private property in the full sense of the words. If so, he was evidently mistaken as to the legal effect of the act of the legislature approving the partition. We have not only the Supreme Court's decision on the other side, but also the declarations of the legislature in 1865 that "the words *heirs and successors* mean the heirs and successors to the royal office," and that "the history of said lands shows that they were vested in the King for the purpose of maintaining the royal state and dignity." As this act was approved by Kamehameha V, it may be taken, in the absence of evidence to the contrary as expressing his views as well as those of the nobles and representatives.

EXTENT AND VALUE OF THE LANDS.

The crown lands thus finally merged in the public domain had a total area of 971,463 acres, of which 642,852 were in the island of Hawaii, 69,121 in Maui, 20,892 in Molokai, 17,369 in Lanai, 66,593 in Oahu and 154,636 in Kauai. The value was estimated at \$2,314,352. (Note 40.) This included agricultural land of all descriptions and also considerable city tracts. Some has now been alienated and the identity of the rest has of course been completely lost, having been dealt with for thirty years without distinction from other public lands.

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NOTES.

1. Fornander, II, p. 300.
2. Blackman, p. 157.
3. 2 Haw. R. 522, for some account of the customs as to inheritance in this transition period.
4. Lydecker, p. 8.
5. Lydecker, pp. 9-10.
6. Laws, I, 107.
7. E. g., Laws, I, 95.
8. E. g., Laws, II, 70.
9. Laws, II, 81. Fund. Laws, 140.
10. 7 Haw. 421. At p. 430: "The whole context of these **Principles** shows that the land tenures of this Kingdom were to be settled on the basis that the King—meaning the State or Government—had one-third of any given land held by a landlord. * * * The terms **King** and **Government** are, as we see, used interchangeably. They mean the **State** in each case."
11. Lydecker, p. 10. Constitution of 1840: "He shall also retain his own private lands."
12. 2 Haw. R. 721.
13. P. C. Records of these dates.
14. P. C. Records; Dec. 11, 1847.
15. P. C. Records, Dec. 14, 1847.
16. P. C. Records, Mar. 30, 1848.
17. Quoted, 2 Haw. R. 723 and 45 Ct. Cls. 429.
18. Laws, 1848, p. 22. Quoted, 2 Haw. R. 717 and 45 Ct. Cls. 429
430.
19. 2 Haw. R. 724-725.
20. The father of Kamehameha IV and Kamehameha V was not of royal blood. Their mother was a sister of Kamehameha III.
21. 2 Haw. R. 715-726.
22. The Hawaiian monarchy was not at this time hereditary. Art. 25, constitution of 1852, provides that "the successor shall be the person whom the King and the House of Nobles shall appoint." Lydecker, p. 38.
23. Laws, 1864-'65, pp. 71-72.
24. Laws, 1864-'65, p. 69. Quoted, 45 Ct. Cls. 431-432. The obvious omission in the preamble occurs in the original.
25. Laws, 1866-'67, p. 11. Quoted, 45 Ct. Cls. 432-433.
26. 6 Haw. R. 580.
27. The most notorious instance was the King's acceptance of a bribe of \$75,000 for the award of the opium monopoly. After he had received \$71,000, another applicant offered \$80,000, and wisely insisted on getting the license before paying. The King's profit in the transaction, accordingly, was \$151,000. The estate of the defrauded applicant, however, brought legal proceedings against the trustees whom the King had been compelled to appoint for the settlement of his debts. Refund was resisted on the ground that the transaction was an illegal one, in which the courts would give no redress. With delightful gravity the court declared that "it cannot be assumed that the King could be a party to any illegal transaction," and "in the eye of the law, the King cannot be bribed, or accept a bribe, or be capable of