THE IMPOSITION OF ANGLO-AMERICAN LAND TENURE LAW ON HAWAIIANS

Maivan Lam

The monarchical government of Hawaii created, from 1848 to 1850, the legal means by which the hitherto undivided interests in land of king, chiefs, and commoners could be divided so as to render land marketable in response to foreign demand. For complex reasons, few commoners claimed fee simple title under the new laws, with the net result that less than 1% of the total land surface passed in fee simple to fewer than 9,000 commoners. An adverse possession statute enacted in 1871 was then used in the courts over the next 100 years to significantly deprive even those few of the lands they had received. The case-law of land tenure in general, and of adverse possession in particular, reveals how the courts constructed and applied Anglo-American legal concepts of land tenure, custom and contract, to effect the dispossession of native tenants.

I. INTRODUCTION

The eight major islands of the Hawaiian archipelago (1) comprise approximately 4 million acres. It has been estimated that from the first settlement of the islands, probably as early as 600 A.D. if not before (2), and until the arrival of Captain James Cook in 1778, roughly 60 generations of Polynesians, totalling about 2 million individuals (3), lived, worked and died on these 4 million acres, creating and passing on a material, social and ideological culture that was recognizably Polynesian, but also uniquely Hawaiian. The population in 1778 is calculated to have numbered between 200,000 and 250,000 individuals (4), a figure higher than that estimated for any other Polynesian society at the time of contact.(5)

By 1848, however, new diseases, but also social and cultural disruption, had reduced this figure to 95,000.(6) In that year, the government of King Kamehameha III (7) introduced the first of several laws that would entitle, but also limit, Hawaiian commoners to the fee simple ownership of a mere 360,000 acres, or 0.9% of the total of 4 million. Of the lands so granted, it has

been estimated that the majority has since passed out of the hands of the descendants of the original Hawaiian fee simple holders.(8) And, of the total that has thus passed out, a significant, if not principal, portion is thought to have been lost through the process of adverse possession.(9)

The descendants of Hawaiians today constitute roughly 16% (10) of the state's total population of 1 million. They figure prominently among its most socially and economically deprived citizens. Overwhelmingly, modern Hawaiians believe that their plight results from their loss of control over, and access to, their native lands. This paper explores the circumstances of that loss by, first, reviewing the legal process by which commoners were deprived of their rights in land and, second, by discussing certain significant contrasts between Hawaiian and Anglo-American concepts of land use and land control revealed in the case-law of land tenure. Emphasis will be placed on the early cases which set the framework for the discussion of the legal rights in land of commoners, as well as on later adverse possession case-law which, in Hawaii, happens to highlight the material and ideological dynamics guiding the judicial delineation of native land rights.

II. THE LEGAL PROCESS OF DISPOSSESSION

a. the traditional land tenure system

The legal process of dispossession can best be followed if something is first understood of the traditional land tenure which it undid. While the specific nature of traditional Hawaiian land tenure has not been sufficiently researched and described for anthropological purposes (11), it may yet be said, for legal purposes, that the two main social classes in traditional Hawaiian society, i.e. chiefs (ali'i) and commoners (maka'ainana), held different but undivided interests in land. The first Constitution of the Kingdom adopted in 1840 recognised as much, and defined the traditional land tenure as being "in common":

> 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 ...(12)

It would appear that Kamehameha I, in uniting the islands, had not disturbed a land tenure system which, for centuries, had permitted a highly intensive cultivation of wet taro to develop

that, in turn, supported one of the most populous and stratified societies found anywhere in Polynesia.(13) The basic political, social and ecological elements of that system have been fairly well established.

Politically, an ali'i nui or paramount chief ruled over a territory which he had conquered and which he was perceived as holding, not from any man or men, but from a god or gods. The ali'i nui carved his territory up into districts over which he placed trusted aides, relatives, or allies. These subordinate ali'i, or konohiki, in turn, might place lower chiefs or retainers at the head of yet smaller and smaller subdivisions. At the bottom were the maka'ainana, or commoners, who labored on the land.(14) The surplus product of maka'ainana labor was therefore channelled upwards, sometimes through as many as four, five, or six levels, to support agents, chiefs, and the ali'i nui.

Unlike European serfs, maka'ainana were rarely called upon to provide military service to the ali'i. The latter, furthermore, enjoyed no hereditary privileges. On the death of an ali'i nui, lesser chiefs lost their holdings, unless these were confirmed by his successor, which was rare.(15) Lastly, maka'ainana were not bound to the territory of a particular chief, but could move quite freely in search of better conditions. The commoners' widely-diffused network of kinship ties spreading across land divisions facilitated this movement. Because the wealth and power of the ali'i derived directly from the labor of the maka'ainana, who could withhold it by moving to another division, the ali'i were generally restrained in the demands they made.(16) In sum, maka'ainana were entitled to little political power but could expect considerable stability. The ali'i, on the other hand, hoarded what power and glory there was but enjoyed little security.

Early foreign observers wrote admiringly of the well-tended gardens of taro, yam and sweet potato which they saw, and whose bounty they could appreciate in the healthy-looking islanders they described. Long occupancy of the islands by a dense population had resulted in "minute subdivision of land, and nomenclature thereof. Every piece of land had its name, as individual and characteristic as that of its cultivation."(17) Up in the wet valleys, the maka'ainana cultivated lush, high-yielding, irrigated gardens of taro; down in the more arid plains, they grew yam, sweet potato, and dry-land taro. In addition to these, Hawaiians tended smaller crops of sugarcane, breadfruit, banana and coconut. At sea, in the mountains, and on fallow and uncultivated lands, the commoners caught or gathered fish, birds, wood, fiber, leaves, roots, and other products used in their diet and material culture. They also domesticated pigs and fowl, which were allowed to forage freely. While, therefore, to Western eyes

(which tend to value and thus recognise cultivation, but not hunting and gathering activities), the Hawaiians may have seemed to have used but a very small portion of the total land area (18), they in fact exploited an impressive range.(19)

A key land-use institution organised this wide-ranging mode of exploitation: the ahupua'a. In its ideal conception, the ahupua'a was an economic and administrative unit of land running pie-shaped from the summit of a mountain to a broad coastal base.(20) All land in Hawaii was, theoretically, divided into such units, which were named. The ideal ahupua'a encompassed, within its confines, all the types of terrain, resources, and species required for human livelihood. In practice, ahupua'a were quite variable, both in form and expanse. All, however, apparently took in some coastline, and also enough of the mountainside, to satisfy their occupants' standard needs for the products of the sea, plain, valley and mountain, thereby assuring the basic self-sufficiency of each ahupua'a.

The ali'i nui placed a lower ali'i, or konohiki, over the ahupua'a, with rights to its land and resources, and to the labor and surplus product of its occupants. This ali'i, in turn, was responsible to the ali'i nui for the latter's expected share of the ahupua'as wealth. The konohiki, for example, took the lead in commanding and supervising the building of the irrigation ditches in the wet taro terraces from which the bulk of the food derived. He also apportioned the use of their waters.(21)

The maka'ainana, in turn, enjoyed liberal rights in the resources of the ahupua'a in which they resided. These rights included: the cultivation of plots of land for family consumption; the clearing, by the slash-and-burn method, of stretches of kula (dry plains lying between higher wet-lands and the coast) for dry-land crops; the use of irrigation water for growing wet taro; the catching of fish off-shore; the hunting of birds and gathering of wild plants throughout the ahupua'a; the erection of various structures in which to conduct rituals, or to sleep, cook, eat, store items, or simply camp; the freedom to move within the ahupua'a and to engage in exchange.

b. the impact of the West

Captain James Cook's arrival opened Hawaii up to the assortment of traumatic experiences that, everywhere in the Pacific, marked the contact of island subsistence societies with Western mercantilistic-capitalistic intruders. The physical devastation that afflicted the islands is easily enough understood. To begin with, the island ecosystem, which is generically a fragile system, was

made to bear the onslaught of introduced species of flora and fauna, certain of which proved highly destructive of native species, if only because the newcomers found no local predators. Secondly, the native economy, which was only modestly above the subsistence level, had to become, in a very short space of time, provisioner to just about every whaling ship that scoured the North Pacific whaling grounds, as well as every vessel that plied in the US-China trade.(22) Lastly, the islanders lacked immunity to the diseases of civilisation, which deficiency made them an easy and often fatal prey of the smallpox, measles, venereal, and influenza germs brought in by foreigners.

There were, however, other levels on which disintegration took place. The sharp Yankee traders who reprovisioned their ships in Hawaii lost no time or opportunity in selling the American and Chinese goods they carried to a quickly luxury-prone ali'i class. They took for payment water, food, and firewood at first, and sandalwood later, which the ali'i commanded the maka'ainana to haul down from the mountains, even at the expense of neglecting their field labors. Eventually, the traders accepted notes of endebtment which, as they piled up, equipped the creditors with powerful leverage against the ali'i.

As traditional island resources dwindled, enterprising foreigners stepped in to grow crops and graze animals specifically aimed at the shipping clientele. Such entrepreneurs thereby made small fortunes, but perforce at the expense of the maka'ainana, because lands and water thus reassigned to foreign agriculture and pasturage by the king and the chiefs naturally had to be withdrawn from native usage. Even where land was not specifically reassigned, the introduced stocks of sheep, goat and cattle managed to graze, or trample away many of the plants, cultivated and wild, upon which Hawaiians relied.

The success of these early foreign residents attracted yet more Western capital and persons to the islands. By 1820 (23), the missionaries also arrived, making seemingly complete the rudiments of Western civilisation: corn, wheat, sheep, goats, cows, capitalism and christianity. One major ingredient, however, still remained notably missing: the private ownership of land. More and more, the foreign community agitated against its absence.

As whaling stocks and sandalwood stands diminished and faster trading vessels cut down on the number and duration of their visits to Hawaiian ports, the foreign community began to cast about for new ways to make money beget money. Their conclusion: large-scale agricultural production for the growing markets

of California. The obstacle: the indeterminacy and insecurity, by Western standards, of land-holding in Hawaii.

At this point, the desires of the foreigners and the predicament of the chiefs made common cause. Kamehameha I was a traditionalist who had not formally tampered with the land tenure system of his ancestors. In effect, however, by having permitted the heirs of deceased chiefs to remain on the latter's ahupua'a, where formerly the holding would have reverted to the ali'i nui(24), Kamehameha created among the chiefs the new expectation that they would hold land hereditarily. Kamehameha II reinforced this expectation when, upon the death of Kamehameha I, he left "the great majority of the lands with the chiefs who had been rewarded by his father".(25)

Although the chiefs had never enjoyed either permanent or exclusive rights in the lands alloted to them by the ali'i nui, they now began on their own authority to lease and mortgage their domains to foreigners in return for the trinkets and offers of credit that the latter tendered. By 1826, traders in Honolulu were claiming that the ali'i owed them a total debt of $150,000.(26) Some of this was paid off, over the years, via new taxes or other exactions imposed on the people, including taxes payable in sandalwood.(27) By 1830, however, the sandalwood was gone and, with it, many commoners. Some had succumbed to various illnesses, others had drifted to the new coastal towns, attracted by their novelties, or to avoid the onerous task of cutting sandalwood, or because the neglect of fields and waterways over the years had made much land unworkable. The drop in population, finally, rendered the social and economic life of many communities unsustainable.

Faced with neglected lands and dissipated labor, the ali'i looked increasingly to the foreigners for their new source of wealth. These persons in return demanded the only thing the ali'i had left to offer: land. Land leased, sold, signed over, or given outright. The problem was that the king could still theoretically dispossess the chiefs, and therefore their grantees as well. In addition, the maka'ainana continued to encumber the land: with their presence, their house-lots and garden plots, their families and their artifacts. No right-thinking capitalist could be happy sinking his dollars into the development of land under these circumstances. Resolving to correct this situation, the foreigners, with backing from some of the chiefs, persuaded Kamehameha III to enact a number of laws that would clarify interests in land, and secure them.(28)

c. laws modifying land tenure (1839-1850)

The new land tenure laws were virtually all enacted in the reign of Kamehameha III (1824-1854). They, and other contemporary laws designed to establish a semblance of European-style constitutional monarchy in the islands, were passed in response to pressure exerted on the Kamehamehas by both foreign residents and visiting warships.(29) It would be incorrect, however, to assume that all the laws of the period were aimed at placating foreigners. On the contrary, some were enacted specifically to ward off their rapacity.(30) These opposing motives may be seen in the legal measures that were adopted to govern land tenure, of which the most significant are considered below.

The first, the Bill of Rights of 1839, provided, among other things, that:

> "Protection is hereby secured to the persons of all the people, together with their lands, their building lots and all their property, and nothing whatever shall be taken from any individual, except by express provision of the laws." (31) (emphasis added)

The Bill also stated that the land of the kingdom belonged to the people and chiefs in common, and that the king had only its management, not its private proprietorship.(32) Consistent with the recognition given the people's interests in the land, their interests in fisheries were recognised in a separate declaration:

> "His Majesty the King, hereby takes the fishing grounds from those who now possess them, from Hawaii to Kauai, and gives one portion of them to the common people, another portion to the landlords, and a portion he reserves to himself.(33)

The kingdom's first constitution, promulgated in 1840, confirmed the provisions of the Bill of Rights noted above, and further emphasised the need to protect the interests of commoners, albeit in language drafted by missionary advisors to the kingdom which made it appear that the legitimacy of those interests sprung, not from traditional Hawaiian social structure, but from Christian theology:

> "God has also established government, and rule for the purpose of peace; but in making laws for the nation it is by no means proper to enact laws for the protection of the rulers only; neither is it proper to enact laws to enrich the chiefs only, without regard to enriching their subjects also, and hereafter there shall by no means be any laws enacted which

> are at variance with what is above expressed, neither shall any tax be assessed, nor any service or labor required of any man, in a manner which is at variance with the above sentiments."(34)

Between 1845 and 1846, in response to the foreign clamor for deeds to property, a Land Commission was set up, and given certain principles by the legislature to follow in its work, which was defined as:

> "... the investigation and final ascertainment or rejection of all claims of private individuals, whether native or foreigners, to any landed property acquired anterior to the passage of this Act (creating the Commission)."(35)

The courts have since looked upon these principles of the Land Commission as the authoritative statement of the status of the law of land tenure existing in Hawaii in 1846.

The principles adopted were both descriptive and prescriptive. As such, they provided the transition from a traditional regime where maka'ainana rights in land were extensive and stable (as indeed the 1839 Bill of Rights and the 1840 Constitution recognised) to a fee simple regime where they would be drastically reduced and, in the course of time, dissipated. Indeed, the principles strike a positively schizophrenic note as they simultaneously recall a past unexpectedly progressive while urging in a future described in terms unrealistic and ultimately unfulfillable.(36)

The Land Commission was empowered to disengage the king's interests from a particular piece of land only where a party claimed directly from the monarch, or his government. Where chiefs and maka'ainana also possessed interests in a certain parcel, no fee simple title could issue to the new claimant. Since most lands were burdened in the latter manner, the Land Commission's authority proved inadequate to the problems posed by the desire of the foreign residents and chiefs freely to buy and sell land, respectively. In 1848 and 1850, the government of Kamehameha III finally adopted measures that would, in large part, meet the demands of these two of persons. The sets of laws enacted came to be known as the Great Mahele of 1848 (37), and the Kuleana Act of 1850 (38).

The Great Mahele was an arrangement between the king and some 245 chiefs to separate out, and mutually quitclaim, their interests in land. Earlier, in December of 1847, the Privy Council (39) had met to outline the steps the division would take:

1. The king would keep his private lands (40) as his own individual property, subject to the rights of tenants.
2. One third of the remaining land would become the government's, one third the chiefs' and one third that of the maka'ainana.
3. The chiefs and tenants on a particular ahupua'a could divide out their interests to reflect these proportions whenever either party desired the division.
4. Tenants on the king's private lands could obtain a fee simple title to a third of the lands possessed and cultivated by them whenever they or the king desired the division.
5. Chiefs could satisfy the government's one third share in their lands by setting aside one third of them, or paying the money equivalent thereof to the government.(41)

In reality, the Great Mahele proceeded as follows: the King assigned to himself 2,477,000 acres or 60.3% of the islands' total land surface. The 245 chiefs received a total of 1,600,000 acres or 38.8%. Out of his share, the king then made over to the government 1,500,000 acres.(42) The Mahele thus created three classes of landlords with rights to allodial titles: the king, the government, and the chiefs (henceforth usually referred to in the documents as the konohiki). The Mahele papers, however, spelled out that each of these three classes held "subject to the rights of native tenants". As the landlords began to sell off their lands, questions arose concerning the meaning of that clause. William Lee, a young New York lawyer who happened to visit Honolulu in 1846 and then stayed on to become the kingdom's Chief Justice, was given the task of drafting resolutions intended to protect these "rights of native tenants". His recommendations, adopted by the legislature on August 6, 1850 (43), became known as the Kuleana Act.

The Kuleana Act provided, in relevant part, that:
1. Fee simple title, free of commutation, shall be granted to all native tenants who occupy and improve any government land, to the extent of such improvement, provided claims are recognised by the Land Commission. Konohiki (chiefs and their agents) are not tenants under the meaning of this Act.
2. The preceding provision applies, in like terms, to tenants on konohiki and Crown lands.
3. The Land Commission will award fee simple title in accordance with the above principles, and also consolidate the lands of individuals "so that each man's land may be by itself".
4. "When the landlords have taken allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house timber, aho cord, thatch, or ti leaf, from the land on which they live, for their pri-

vate use, should they need them, but they shall not have the right to take such articles to sell for profit. They shall also inform the landlord or his agent, and proceed with his consent. The people also shall have a right to drinking water, and running water, and roads shall be free to all, should they need them, on all lands granted in fee simple: provided, that this shall not be applicable to wells and water courses which individuals have made for their own use."(44)

Several factors account for for the fact that the Land Commission awarded little more than 8,000 fee simple titles to the maka'ainana under the Kuleana Act. The 2-year period the legislature allotted for some 30,000 maka'ainana to file their claims in was grossly inadequate, especially when one considers that the 245 konohiki were given, after the initial period, several extensions, amounting to 5 years, in which to secure their claims. The Act was not effectively broadcast and explained to a population still ill at ease with the written word and the written law. Commoners, who had little cash, could ill afford the fees for the surveys which were required before awards were granted. Most importantly, no doubt, the prospect of having to make a living, possibly solely from the few "cultivated" lots awardable, where formerly subsistence required the exploitation of the entire range of the ahupua'a, appeared forbidding and therefore was rejected. There is evidence that some tenants assumed that if they did not file claims, the old tenurial system would continue, at last for them, whether by right or by consent of the konohiki of the ahupua'a, and so chose to live as of old, rather than claim title. Others, in turn, apparently feared that the konohiki would take reprisals against them if they filed for kuleana lots within the konohiki's lands.

It became apparent soon after the Act's passage that William Lee had not succeeded in either safeguarding, or even clarifying, tenant interests in land, for the issue that surfaced again and again in subsequent land ligation was how the Kuleana Act affected those rights. Specifically, what rights, if any, did kuleana awardees have in an ahupua'a other than the right to use and control their fee simple lots therein? And what rights, if any, did the majority of commoners, who did not claim or receive fee simple titles, retain in an ahupua'a?

The courts' answer has evolved over time. Three years after the Act, the influential Oni v. Meek (45) decision came down. It held that:

1. awardees gained fee simple title but lost all customary rights in the land, with certain exceptions;
2. these exceptions consisted of those rights which had been specifically enumerated in the Kuleana Act (46), and which

now remained available to awardees and non-awardees alike by virtue of their occupancy of land in an ahupua'a;

3. where, in a particular ahupua'a, the konohiki and tenants had not jointly terminated the old order, but mutually agreed to prolong their old relationship, traditional rights would continue, but on a contractual as opposed to customary basis.

A companion case, Halelea v. Montgomery (47), decided by the same court in the same year, held that any lawful occupant of an ahupua'a, whether awardee or not, enjoyed appurtenant piscary rights (these were not enumerated in the Kuleana Act), which rights the konohiki was powerless to extinguish. Traditional rights, however, were subsequently cut back in a case decided in 1884 at a time when the water needs of the plantation economy began to compete seriously with those of native tenants. Flatly contradicting Oni v. Meek, the Maikai v. Hastings (48) case held that a konohiki could, by leasing his ahupua'a or a subdivision thereof to a third party, terminate the water-rights of tenants on the ahupua'a provided he did not thereby also deprive the kuleana awardees thereon of their water.

This decision thus conferred preferential water rights on those who held land under one of two legal devices consecrated by the new order: a lease or a fee simple title. The majority of Hawaiian commoners, who did not make use of these devices, could, one is given to understand, continue to use ahupua'a water so long as nobody else wanted it. In practice, as more and more foreigners bought or leased ahupua'a from the konohiki, they more and more came to control its water. Beyond the obvious preference shown non-traditional land tenure in Maikai v. Hastings (49), the cases above also bespeak the court's struggle with, or manipulation of, the concepts of contract and custom at this time. It should be noted that the judges sitting on the Supreme Court of Hawaii (50) from its inception until the present have all been socialised in the tradition of Anglo-American jurisprudence. As a result, they were conditioned to look everywhere, even in Polynesia, for the familiar face of Anglo-American law. The cases show, for example, that the judges simply did not recognize, or did not wish to acknowledge, the existence of a Hawaiian customary right where, in their view, a rule from Anglo-American contract law could just as easily resolve a problem.

Indeed, a case decided in 1893 (three years before the annexation of the islands by the United States) went so far as to paint the main part of the Hawaiian social structural past in contractual colors. Dowsett v. Maukeala (51) was a case in which a Hawaiian commoner sought to possess, adversely to a foreign grantee of a konohiki, some lands on which the commoner had

lived all his life. The court ruled that since Maukeala, or his predecessor, had not filed a kuleana claim, he was presumed to have wanted the pre-1850 order to continue. That order, the Court went on, allowed tenants onto the land strictly at the sufferance of the konohiki, i.e., with their permission, or acceptance, as in contract law. It being elemental in Anglo-American law that adverse possession cannot spring from a permissive entry, and Maukeala never having shown the necessary repudiation of that permissive or contractual relationship, Dowsett prevailed.

It was not until December 1982, some 100 years after Oni v. Meek was decided, that the State Supreme Court finally rejected this characterisation of traditional Hawaiian land tenure as having been contractual. The Kalipi v. Hawaiian Trust decision (52), written by a part-Hawaiian Chief Justice, stated:

> "(That view) implies that all traditional rights may have been, in essence, contractual rather than customary insofar as commoners cultivated their lands and enjoyed privileges in exchange for services to the lord of the ahupua'a. We do not, however, adopt this conclusion. For we find it difficult to imagine any custom in any ancient culture which did not exist to in some fashion benefit those who ruled. The relevant inquiry is therefore not whether those who once ruled continue to benefit, but rather whether the privileges which were permissibly or contractually exercised persisted to the point where they had evolved into an accepted part of the culture and whether these practices had continued without fundamentally violating the new system."(53)

The opinion concluded that occupants of an ahupua'a, by virtue of their status as residents of the place, enjoy gathering rights therein for items used in traditional Hawaiian practices. The opinion also noted that the exercise of such rights, once shown to be valid, i.e. traditional and continuous, could be constrained only if shown to be unacceptably disruptive of modern "understandings of property". The opinion left future courts to decide what would constitute an example of the unacceptably disruptive exercise of a traditional right, but suggested that its pursuit on "developed", as opposed to undeveloped, lands would be so viewed.

The requirement that a custom be traditional and continuous to be valid sounds very much like the common law requirement that adverse possession be uninterrupted and of long-standing to be legally effective. And therein lies the irony of the situation. For while Anglo-American concepts of contract law were applied in the interpretation of the Kuleana Act to defeat Hawaiian cus-

tomary land tenure, it was the Anglo-American device of adverse possession, which in essence accepts that a right can be created through practice or custom, which in turn was invoked to deprive Hawaiians of the fee simple titles to land they had claimed under a non-customary provision of a new legal order in which some of them had agreed to participate.

III. ADVERSE POSSESSION (54)

a. the general features

The law of adverse possession as applied in Hawaii consists of two prongs: on the one hand, a statute of limitations on the legal capacity of a true owner to reclaim his land; on the other, judicial opinions delineating the contours of legal usurpation. The relevant statute (55) was passed in 1871, 21 years after the passage of the Kuleana Act which had made fee simple titles generally available in Hawaii for the first time. Since the statute cut off the true owner's right to redress after he had been dispossessed by the adverse possessor for 20 years or more, and since 20 years had in fact just elapsed since land was first alienable in Hawaii, it can be seen that the 1871 legislature, now significantly influenced by non-Hawaiians, lost no time in making this new means of gaining yet more Hawaiian land available to non-Hawaiians. The limitation period was reduced to 10 years in 1898, where it remained until 1973, when it was returned to 20 years. As Hawaiian-rights advocates have become more aware of the nefarious role played by this statute, other measures have been enacted, in 1978 and 1983, to reduce the opportunities for adverse possession.(56)

The adverse possession statute provides that the period within which the true owner must bring suit begins to run when he, or his predecessor, is first dispossessed, unless, at the time of dispossession, the then rightful owner is disabled (57), in which event a 5-year grace period for bringing suit is added on to the end of the disability. Successive owners, however, may not claim disability since this condition is recognised but once in a limitation period. A true owner interrupts the running of the statute in only one of two ways: by re-entering his property and possessing it peacefully and contiuously for one year, or by re-entering and filing suit within one year.

These requirements, on their face, impose a particular burden on commoner Hawaiians whose scattered kuleana lots it is that the owners of surrounding ex-konohiki domains have been typically trying to adversely possess. An original kuleana-grantee of 1852-54, it must be remembered, may, a century later, have

hundreds of descendants, each of whom could have inherited a claim to a fraction of the kuleana. Probably few of these would know for certain whether a particular person on the kuleana was an adverse possessor or simply a distant relative, guest, friend, or tenant of the extended family. Even assuming that a co-heir understood the implications of tolerating an uninvited presence on the family land, he might still decide against taking steps to regain possession since the inconvenience of having to reside on that land for a year, or the cost of the legal fees involved in filing suit, might outweigh the economic value of safeguarding his fractional share of the land.

b. the requirement of hostility

While it is the statute which bars the true owner's claim, it is the courts which confer new title on the adverse possessor, provided he can show actual, open, hostile, exclusive, and continuous possession.(58) This paper will discuss only the court's understanding of the element of "hostility", by which is meant the assertion of a right explicitly adverse to another's right, for it is this particular element which relates back to the questions of custom, contract, and permission discussed above in connection with the earlier Kuleana Act cases.(59)

The Dowsett v. Maukeala ruling mentioned previously held that descendants of Hawaiian commoners could not adversely possess former konohiki lands in their ahupua'a, unless they held fee simple kuleana lots in that ahupua'a, or otherwise showed that they had categorically repudiated their "permissive" past tenure. The problems confronting a commoner who would repudiate the chief of an ahupua'a are easy to imagine. A Hawaiian would not repudiate a key element of his entire social order with the same ease with which a Westerner might repudiate a clause in a contract under Western law. Nevertheless, the court chose to analogise the two situations. Consequently, the law of adverse possession, which has worked so wonderfully well for the non-Hawaiian adverse possessor, was prevented, from the start, from becoming a tool by which commoner Hawaiians might claim konohiki lands.

Intriguingly, the judiciary did not require a particularly stringent showing of the element of hostility in those cases where the adverse possessor was not a commoner. Indeed, the general rule laid down as early as 1902 (60), and reiterated as late as 1973 (61), states that if all the other elements of adverse possession are satisfied, hostility will be presumed, though it may be rebutted.

The preferred evidence of hostility in Hawaii is a "colorable title". This could consist of a conveyance from one of the many heirs of a kuleana whose undivided interest in the land, often insignificant, prompted him to sign over his right to the would-be adverse possessor rather than wait and see how a family division of the property would benefit him. Hawaii's usual adverse possessors have been sugarcane and pineapple plantations, ranches, and large private estates. These parties usually started off by receiving the bulk of their holdings from the chiefs. Subsequently they often found that their property was annoyingly cut up by the kuleana holdings that dotted ahupua'a lands. To consolidate their lands, these parties then typically bought "colorable" titles from co-heirs willing to part with their fractional claims for a modest sum.

Documents, such as tax receipts, which show dealings with the government over the coveted parcel of land, are another highly favored form of asserting rights to land, and of displaying hostility. A Land Commission award, even if fraudulent, is also prime evidence of hostility.(62) Finally, in proving hostility the nature of possession at its origin, whether permissive or hostile, is presumed to be the nature of possession throughout its duration.(63)

A true owner defending his land may rebut the presumption of hostility in court with evidence that shows that he retained control over his land. Again, documented dealings with the government are highly persuasive, and "private property: no trespassing" signs posted on the property also help, but are not sufficient.

An area where the courts' treatment of the showing of hostility is particularly significant is where co-tenants become adverse. The legal theory of co-tenancy holds that "a tenant in common shares a general fiduciary relationship with his co-tenants, which relationship may require the tenant in possession to give his co-tenants actual notice of an adverse claim".(64) In the case of City and County of Honolulu v. Bennett (65), the widow of Kamehameha III died intestate and a certain Bennett claimed a portion of her land via a chain of title from her uncle or, in the alternative, via adverse possession against a certain McAulton, who, for his part, also asserted a share based on his descent from another uncle. The Supreme Court asked the trial court to determine whether McAulton's genealogy was genuine, and in the event that it was, whether Bennett had fulfilled the notice requirement imposed by law when one co-tenant asserts hostility against another. Had Bennett, that is, given notice to McAulton, or otherwise shown that he, Bennet, had not known of the co-tenancy, which would excuse the notice requirement; or made

reasonable even if fruitless efforts to reach his co-tenant; or demonstrated that McAulton in fact already knew of the hostile claim?

When it is recalled that modern Hawaiian law, at its inception in the 1839 Bill of Rights and the 1840 Constitution, itself characterised the traditional tenure in land of king, chiefs and commoners as "in common", i.e. as a co-tenancy, the question arises as to why the landmark Dowsett v. Maukeala case (which prohibited commoners from adversely possessing konohiki lands) was decided, not on co-tenancy principles, but via the far more twisted and alien device of declaring an entire social and economic order to have been a mere matter of contract law? Had co-tenancy law been invoked, not only would the maka'ainana have had the duty to notify the konohiki of his intention to adversely possess his land, but, reciprocally, the konohiki and their foreign grantees would also have had to notify the co-tenant maka'ainana whenever they acted to alter the nature of landholding, as in sales and leases of the ahupua'a. Indeed, under this theory of co-tenancy, it could be argued that deeds to ahupua'a land issued without the consent, or actual notice, of its maka'ainana co-tenants, are defective.

The court's choice of which legal principles to invoke ultimately has little to do with either legal precedent or even logic. Rather, it takes its cue from those forces that govern the organisation of society as it is transformed from a somewhat primitively ordered community into a centralised civilised state in which the increasingly unequal access to economic and political power finds expression in the parallel institutionalisation of increasingly unequal legal rights. Beginning in the 1970s, as a result of escalating Hawaiian political activism, both the legislature and the courts moved to limit the opportunities for would-be adverse possessors. But the greater protection now given kuleana awardees and their descendants came far too late and, interestingly, at a time when the plantations are closing down, selling off their parcels to hotel and condominium builders, and generally losing interest in consolidating landholdings.

V. CONCLUSION

This brief analysis of the development of the modern law of land tenure in Hawaii is based on data that are too narrow and superficial to permit weighty generalisations about the nature of the relationship between law and the evolution of society as it passes from a primitive to a more civilised stage. But the temp-

tation to draw conclusions nevertheless is irresistible; and yielding to temptation, though foolhardy, will hopefully stir debate as well as prod research.

It seems clear that the Hawaiians had, at contact, a mixed economy geared primarily to meeting sustenance needs but also capable of generating a surplus production. The rights in land of commoners were based on their occupancy of discrete and self-sufficient ahupua'a. King Kamehameha III, in whose reign the major laws restructuring land tenure were passed, seems to have intended, via those laws, to safeguard the rights of the commoners to an adequate livelihood from the ahupua'a. He appears to have assumed that those rights could and would be exercised in a mixed legal order that would combine, on the one hand, a fee simple regime for fields in cultivation and, on the other, a traditional regime of ahupua'a occupancy rights for hunting and gathering activities.

When western-style courts were set up, they at first tended to recognise the features of the traditional regime. The very early Oni v. Meek case held that traditional rights in an ahupua'a were lost by fee simple awardees only, or by those who agreed to relinquish their rights. The companion Halelea v. Montgomery case was even more protective of traditional rights. It stated unambiguously that all residents of an ahupua'a, awardees or not, retained fishing rights appurtenant to the land. Maikai v. Hastings then took the exact opposite track and withdrew appurtenant water rights from most tenants while retaining them for those who held ahupua'a land in fee simple or in leasehold. Not accidentally, the holders of fee simple or leasehold land tended to be foreigners engaged in commercial agriculture. Dowsett v. Maukeala next provided the rationale for this accelerated abrogation of traditional land rights: the court reasoned that such rights had in any case been permissive, or contractual, and therefore susceptible to private repudiation by the konohiki or his grantee.

Kalipi v. Hawaiian Trust, decided in 1982, finally rejected this century-old characterisation of the Hawaiian social past. It sweepingly reconfirmed the traditional rights of native tenants and re-anchored them on the foundation of ahupua'a occupancy. But then, as if intimidated by its own boldness, the court drew back, and made the rights subordinate to the "modern understanding of property", if and when it is determined that the exercise of the rights concerned unduly disrupts that understanding.

The 100-year old legal practice in Hawaii, only recently challenged, of viewing the rights of persons to resources in terms ex-

clusively of their contractual relationships with other persons is certainly more characteristic of Western capitalistic cultures than it is of any Polynesian society. And yet, it would be excusing too much to say that the court in Hawaii, in arriving at that particular view, was simply exhibiting cultural blindness. The court was perfectly able to support an alien customary right when it did not get in the way of the new economic order, as when it refused to restrict traditional fishing rights in Halelea v. Montgomery, fishing not being at the time commercially attractive. The court was even ready to extend traditional ahupua'a rights to persons who could not claim them by tradition, as when in Maikai v. Hastings it permitted a konohiki lessor to divert water away from Hawaiian commoner use and provide it instead to lessees of the land, who were by then usually foreign.

Conversely, the court was none too anxious to advance or even preserve the new Anglo-American legal rights of Hawaiian commoners who attempted to assert them, either by availing themselves of the new law of adverse possession or by invoking their new fee simple titles against those who would adversely possess their kuleanas. Indeed, the affinity for contract law is by no means as irresistible or pervasive in Western capitalist societies as it is made out to be. It is now widely recognised that the freedom of parties to contract is in fact extensively hedged in by state regulations that are highly attentive to the parties' respective status in society.(66)

A related myth is that a modern state, unlike a primitive society, confers legal standing, not on corporate groups such as lineages and clans, but on individuals, a state of affairs normally presented as enlightened, and highly liberating, by apologists of Western modern society. Others, however, have seen in the modern state the terror of a form of aloneness and powerlessness that is missing in primitive societies.(67) For the modern state wrenches individuals away from the security and power encapsulated in their traditional corporate groups, which were organised around universally-inclusive criteria like kinship and residence (universal because the attributes of birth and location attach to all individuals and automatically qualify them for membership in some corporate group), and now pits them instead, not just against other individuals, but against new corporate groups, organised around the non-universal attributes of wealth and power, from which the many are excluded. In Hawaii, for example, it was the Kuleana Act which supplied the wrenching, and the adverse possession law which then set up the uneven contest: between Hawaiian individuals on the one hand, and foreign corporations and estates on the other.

The way out of the state of powerlessness experienced by many Hawaiians, and possibly all indigenous peoples absorbed by nation-states, appears most arduous. Hawaii now has a constitutional provision protecting the subsistence rights of native Hawaiians. And the Supreme Court, as noted earlier, has broadly declared that Hawaiian custom shall receive legal protection. These are somewhat overly general statements of entitlement but they are in many ways preferable to the enumeration of specific hunting, gathering and access rights spelled out in the Kuleana Act of 1850, which had the effect of limiting, freezing, and thereby rendering obsolete a way of life.(68) The vagueness of the entitlements, however, does make them susceptible to redefinition as the balance of political power shifts over time. And power in the modern state, as has been argued, is not universally available, but confined to particular corporate groups from which the majority are excluded. Hawaiians have for a long time been in that excluded majority. Their current political activism, however, appears very much like an attempt to create their own corporate group, organised to capture and exercise power. They are coping with civilisation on its own terms.

Notes

1. Starting with the geologically oldest and northernmost: Niihau, Kauai, Oahu, Molokai, Lanai, Maui, Kahoolawe, Hawaii.
2. P.V. Kirsch, "The chronology of early Hawaiian settlement", Archeology and Physical Anthropology in Oceania, vol.9, 110-9 (1974).
3. Figures released by Marion Kelly, Bishop Museum, at a conference on Hawaiian rights organised by the Native Hawaiian Legal Corporation in Honolulu, May 27-28, 1983.
4. R.C. Schmitt, Historical Statistics of Hawaii, 7 (1977).
5. Peter Bellwood, The Polynesians: Prehistory of an Island People, London: Thames and Hudson (1978).
6. R.C. Schmitt, Demographic Statistics of Hawaii 1778-1965 (1968).
7. Kamehameha III, or Kauikeaouli, was a son of Kamehameha I, the conqueror from the island of Hawaii who, after an arduous if intermittent campaign, put the entire chain under a unified rule for the first time in 1810.
8. Neil Levy, "Native Hawaiian rights", 63 California Law Review 849 (1975). Levy states (note 145), that less than 1/3 of the original lots awarded to commoners on Kauai remained

in Hawaiian hands in 1915; and that, on populous Oahu (where Honolulu is located), less than 6.6% of kuleana lands continued to be "Hawaiian" in 1936.

9. Kali Watson, Report for Alu Like: Adverse Possession (unpublished manuscript).

10. This figure is derived from the last survey (1960) in which the separate categories of Hawaiian and part-Hawaiian were used, showing 11,294 and 91,109 respectively. (Schmitt, note 4 above at 25.) Adding these two categories together, one arrives at a "descendants" population of 102,403 out of a total population of 632,772, or 16.18%. Beginning in 1970, residents were classified on the alternative bases of self-identification or the race of their father, and the part-Hawaiian category was dropped. The census then registered 71,274 Hawaiians. The ethnic composition of the state is rendered even more complex by the fact that the last two decades have seen a tremendous influx of Caucasians, Filipinos, and East Asians into the islands, so that the 16% figure may no longer reflect reality. On the other hand, if the strong tradition of interracial breeding in Hawaii holds, and to the extent that descendants of Hawaiians continue to breed with non-descendants, thereby producing descendant children who may claim Hawaiian rather than another identity, the descendant category will stabilise or even increase. Indeed, if present and contemplated laws conferring certain advantages on Hawaiians fulfill their promise, an increasing number of part-Hawaiians will presumably identify themselves as Hawaiians in the future. For discussions of ethnic identification as political strategy, see Frederik Barth, Ethnic Groups and Boundaries, Boston: Little Brown and Co.(1969); Charles F. Keyes, Isan: Regionalism in Northeastern Thailand, Ithaca, N.Y.: Cornell Data Paper, no.65 (1965); E.R. Leach, Political Systems of Highland Burma, Boston: Beacon Press (1965); F.K. Lehman, "Ethnic categories and social systems", in P.Kunstadter, ed., Southeast Asian Tribes, Minorities and Nations, Princeton, N.J.: Princeton University Press, 95-124 (1967).

11. The pioneering anthropological study is: Marion Kelly, Changes in Land Tenure in Hawaii 1778-1850 (1956). A work useful for its insights into the lives of commoners is Handy and Pukui, The Polynesian Family System in Ka'u, Hawaii (1958). Early post-contact Hawaiian authors who are particularly useful are: John Papa Ii, Fragments of Hawaiian History, Honolulu: Bishop Museum Press (1959); Kamakau, Ka Po'e Kahiko (The People of Old), Honolulu, Bishop Museum Press (1964) and Na Hana a ka Po'e Kahiko (The Works of the People of Old), Honolulu: Bishop Museum Press (1976);

David Malo, Hawaiian Antiquities, Honolulu: Bishop Museum Press (1951).

12. L.A. Thurston, The Fundamental Law of Hawaii 1-9 (1904).

13. The establishment of intensive cultivation as well as social stratification is placed between 1100 A.D. and 1450 A.D. I.Goldman, Ancient Polynesian Society, University of Chicago Press, 212 (1970).

14. "Maka'ainana" comes close in meaning to the English word "commoner". "Hoa'aina", which surfaces periodically in legal documents and is translated as "tenant", is sometimes also used for commoner. It appears, however, that maka'ainana denotes a status which is fixed, while hoa'aina denotes a relative position in a relationship based on land. In other words, a person could be the hoa'aina of a particular chief and in turn be the landlord of another hoa'aina. A person, however, could not be chief and maka'ainana at the same time.

15. Even the son of an ali'i nui could not expect automatic succession to his father's status and property. Intra- and extrafamilial usurpations via murder and war were apparently common means of succeeding to ali'i nui status. See M.D. Sahlins, Historical Metaphors and Mythical Realities: Structure in the Early History of the Sandwich Islands Kingdom, Ann Arbor: University of Michigan Press (1981). It was unlikely, therefore, that a new ali'i nui would trust his predecessor's retainers sufficiently to reappoint them.

16. "...for a chief is called great in proportion to the number of his people..." David Malo, On the Decrease of Population on the Hawaiian Islands, 125 (1839).

17. Curtis J. Lyons, "Land Matters in Hawaii", no.1, The Islanders (1875).

18. Western estimates have been as low as 1%. See Kelly, supra note 11 at 3.

19. Legal documents after 1839 often speak of "waste land" when referring to wild or fallow land which, in a swidden system, must remain that way many years. This conceptual confusion, which itself reflects a puritanical compulsion to view anything at rest, or in its natural state, as waste, has done much to justify the separation of Hawaiians from their lands for it encouraged the view that the maka'ainana did not use, and therefore could not claim, such lands.

20. For a fuller description of the ahupu'aa, which ranged in size from 100 to 100,000 acres, see Lyons, supra, note 17.

21. Antonio Perry, A Brief History of Hawaiian Water Rights. The word "kanawai", which in Hawaiian means law, or regulation, originally denoted rules having specifically to do with the use of water.

22. The figures are: 1822, over 60 whalers anchored in Hawaiian ports; 1826-29, Honolulu Harbor alone averaged 40 annually; 1841, a station on Maui reported an average of 30 ships anchored in Lahaina at any given time, with more than 400 sailors on shore daily. Kelly supra note 11 at 101.

23. Gavan Daws, Shoal of Time, Honolulu: The University Press of Hawaii, 64-5 (1968).

24. Jon Chinen, The Great Mahele: Hawaii's Land Division of 1848. Honolulu: University Press of Hawaii (1958).

25. Id.

26. Ralph Kuykendall, The Hawaiian Kingdom, 1778-1854, 91, 434-436 (1947).

27. "Missionaries living on Hawaii during these years wrote that long lines of people carrying logs were seen all the way from Waimea to Kawaihae, a distance of about twelve to fifteen miles. The chiefs now served as unofficial deputies for the commercial agents in the exploitation of the Hawaiian people and forests. They were in effect 'captive' chiefs". Kelly, supra, note 11 at 99.

28. They wanted every kind of law for every kind of grievance. A particularly outrageous incident during Kamehameha III's rule involved a foreigner whose trespassing cow had been shot by a Hawaiian. Enraged, the foreigner and a friend went onto the Hawaiian's land, grabbed him, pinioned his arms, slipped a noose around his neck and dragged him behind a horse through the streets. Not satisfied, they barged into government offices demanding laws to protect foreigners! If natives can shoot cows, they argued, they will also shoot foreigners. Natives, apparently, could not (should not?) distinguish between cows and foreigners. W.F. Frear, "Hawaiian statute law", Thirteenth Annual Report of the Hawaiian Historical Society 15 (1906).

29. Daws, see supra note 23 at 111: "Several times in the reign of King Kauikeaouli Honolulu lay under the guns of foreign warships ...".

30. For example, one of the recognised reasons behind Kamehameha III's division of the lands he had claimed in 1848 into government and Crown lands was because he was advised that should a foreign power usurp his Kingdom it would lay claim to government, but not Crown, lands. In re Estate of

His Majesty Kamehameha IV, 2 Hawaii Law Reports 715 (1864).

31. 2 Revised Laws of Hawaii (1925) at 212.

32. Note throughout these documents the use of standard Anglo-American legal terms to describe and organise a Hawaiian reality. The missionary influence in the drafting of these laws, as well the need to satisfy Westerners with recognisable Western concepts, are among the factors behind the choice of language.

33. In re Estate of His Majesty Kamehameha IV, 2 Hawaii Law Reports 715 (1864).

34. L.A. Thurston, The Fundamental Law of Hawaii (1904).

35. Chinen, supra note 24 at 8. The Land Commission's official name was: Board of Commissioners to Quiet Land Titles.

36. These selected passages convey the essence of this contradiction: "Under Kamehameha I ...(all had) rights in the lands, or the production of them ... proportions ... were not clearly defined, but ... universally acknowledged .... The same rights which the King possessed over the superior landlords, the landlords possessed over their inferiors ... there was a joint ownership ... the King ... owning the allodium, and the person in whose hands he placed the land, holding it in trust .... The superior always had the power ... to dispossess his inferior, but it was not considered just and right to do it without cause, and dispossession did not often take place .... (Even when the superior lord had received an allodial title from the King he could) no more seize upon the rights of the tenants and dispossess them, than the king can seize upon the rights of the lords and disposses them. This appears clear ... from ... principles of justice ... also from the act of 1839 .... The rights of the parties in land might be divided out in the proportions of 1/3 to each, with allodial titles given to both tenants and landlords .... Great evils have existed ... (because) different classes of persons had undivided rights in the same lands, and each class was very liable to claim more than the due proportions - lords, or persons of superior power ... have ... been the oppressor ... from the throne down .... (His) sovereign prerogatives as lord of the nation ... His Majesty ought not, and, ergo, he cannot surrender .... (They include the powers to) ... encourage and even to enforce the usufruct of lands for the common good. Hawaiian rulers have learned ... that regard must be had to the immutable law of property ... that the well-being of their country must ... depend upon the ... development of ... resources, of which land is the principal ... the holder must

have some stake in it more solid than ... the bare permission to evolve his daily bread from an article, to which he and his children can lay no intrinsic claim .... Hawaiian rulers realise that civilised nations recognised private property and they wish to conform themselves in the main to this practice." 2, Revised Laws of Hawaii (1925).

37. Mahele means "division".

38. So called because the lots awarded came to be known as "kuleana", a term translatable as "rights, title, property, responsibility, jurisdiction, authority, interest, claim, ownership". Pukui and Elbert, Hawaiian Dictionary (1971).

39. Composed of the highest chiefs and trusted advisers to the King.

40. Presumably this meant the ahupua'a that were not assigned out to the other ali'i.

41. Chinen, supra, note 24 at 16.

42. Marion Kelly (Bishop Museum), private communication.

43. Chinen, supra, note 24 at 29.

44. 2, Revised Laws of Hawaii (1925). The last provision, which now figures as Hawaii Revised Statutes (hereafter HRS) section 7.1, is quoted in full because litigation has centered around it. The King expressly asked that this provision be appended to the Act, commenting: "a little bit of land even with allodial title, if they (the people) be cut off from all other privileges would be of very little value". Privy Council Minutes, July 13, 1850.

45. 2 Hawaii Law Reports 87 (1858).

46. HRS section 7.1.

47. 2 Hawaii Law Reports 62 (1858).

48. 5 Hawaii Law Reports 133 (1884).

49. Compare with the Halelea case above where the catching of fish, an item not then of commercial interest to foreigners, was made an inalienable right of the maka'ainana.

50. These are all Supreme Court cases.

51. 10 Hawaii Law Reports, 166 (1895).

52. 66 Hawaii Law Reports, 1 (1982).

53. Id. In the Kalipi case, the plaintiff sued to assert a right to continue a long-established family practice of entering defendants' undeveloped lands to gather natural products found therein and used in traditional Hawaiian practices. The

plaintiff owned a kuleana taro patch in an ahupua'a on the island of Molokai, and his adjoining houselot was in the neighbouring ahupua'a. He had been raised in these ahupua'a and resided there until shortly before the trial. Defendants were the remote grantees of the konohiki of the two ahupua'a. The original Land Commission awards for the two ahupua'a contained the reservations "the kuleanas of the people therein are excepted" and "we do hereby declare these lands to be set apart as the lands of the Hawaiian Government subject always to the rights of the tenants", respectively. While the court found that Kalipi himself could not assert the right claimed because he had moved out of the two ahupua'a at the time of trial, it declared that traditional rights are exercisable by actual occupants, for the reasons and within the parameters that follow:

1. A State Constitutional amendment of 1978 (Art. XII, section 7) now mandates the State to reaffirm and "protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights."

2. While the Kuleana Act (HRS section I) listed specific gathering, use and access rights entitled to special protection, HRS section 1.1 (enacted in 1892), which broadly recognised that Hawaiian usage is a source of law, may be seen as a mandate to protect other traditional rights as well.

3. In any event, courts will decide, on a case-by-case basis, whether "the application of custom has continued in a particular area" and whether, on balance, sanctioning it would overly disrupt the dominant fee simple regime.

54. A comprehensive review of American adverse possession law is contained in 3 American Law of Property, 15.1-15.16 (A.J. Casner ed. 1952). The fundamentals of Hawaii's adverse possession statute are found in Steadman, "The statutory elements of Hawaii's adverse possession law", 14 Hawaii Bar Journal 67 (1978).

55. HRS sections 657-31 through 38.

56. In 1978, a Quiet Title statute, HRS section 669.1, was modified so that not more than 5 acres could be adversely possessed at any one time, and that not more than once in every 20 years by the same adverse possessor. A good faith clause was added to the above by the 1983 legislative ses-

sion. It requires adverse possessors to show that "under all the facts and circumstances, a reasonable person would believe that he or she has an interest in title to the lands in question and such belief is based on inheritance, a written instrument of conveyance, or the judgment of a court of competent jurisdiction."

57. By minority, insanity, imprisonment, and also death.

58. First stated in George v. Holt, 9 Hawaii Law Reports 135 (1893), and reiterated in Gomes v. Upchurch, 50 Hawaii Law Reports 123 (1967).

59. The other attributes of adverse possession law are less relevant to the purposes of this paper.

60. Albertina v. Kapiolani Estate, 14 Hawaii Law Reports 321 (1902).

61. Thomas v. State of Hawaii, 55 Hawaii Law Reports 30 (1973).

62. Kanaina v. Long, 3 Hawaii Law Reports 332 (1972).

63. Tagami v. Meyer, 4 Hawaii Law Reports 484 (1956).

64. City and County of Honolulu, v. Bennett, 57 Hawaii Law Reports 195 (1976).

65. Id.

66. See Grant Gilmore, The Death of Contract, Columbus: Ohio State University Press (1974).

67. For the terror, see Stanley Diamond, "The rule of law versus the order of custom", In Search of the Primitive, New Brunswick, N.J.: Transactions Books (1974).

68. The Kuleana Act, for example, listed only 5 items that Hawaiians could continue to gather under statutory authorisation. At a recent conference on Hawaiian rights, Hawaiians pointed out that none of the 5 items were now available on their ahupua'a. Instead, a participant submitted a list of over 60 items now useful and gatherable on a single day on the island of Molokai. See Walter Ritte, "Summary of Presentation", Native Hawaiian Rights Conference, May 27-8, 1983.