Fishing Rights in Hawaii

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It was formerly assumed that the allodium of the land was in the king, although there gradually grew a hesitancy about removing the chiefs and tenants without cause. King Kamehameha III was finally persuaded to make a division of the land in such manner that it would be possible for himself and his subjects to have such an interest in the land that there could be no arbitrary removal of the people from the land they occupied. It was finally decided that the king should retain his private land, one-third should go to the chiefs and one-third to the tenants who actually tilled the soil.

After a good deal of controversy as to the terms of the holdings and the rules to govern the allotment, the "Mehele" or Great Division of 1848 was carried into effect.

The islands were primarily divided into districts and the districts were divided into *ahupuaas*, the largest of the grants. Within the *ahupuaa* were various *Ilis* or smaller divisions, some of which were merely divisions of the *ahupuaa* for the sake of convenience to the owner of the *ahupuaa* and others were what were termed *Ili kuponos*, or *Ilis* owned by an outside party and having no relation to the *ahupuaa*, further than being situated within its boundary. Usually the *Ili* comprised one piece of ground but frequently an *Ili* will be found which is divided into three or more *lelcs* or jumps, situated in different parts of the *ahupuaa* or even in different *ahupuaas*. Occasionally these were further divided.

Aside from the holding referred to above, were the holdings of the small tenant or actual tiller of the soil. These consisted of his house lot and the small amount of land which he had been permitted by his over lord (the system of land tenures being not unlike the feudal system) to hold and work for his own use subject to the tax of his superior. During the division these grants to the tenants were termed "*kuleana awards*," or merely "*Kuleana*."

Since the year 1839 the rights of persons with respect to the fishery enjoyed by the *konohiki* and the common people have been regulated and defined by written laws.

Originally, the King granted to a high chief or other in high rank an *ahupuaa*, or large section of land, which usually ran from the mountains to the sea and included as well the attached fishery, so that the chief would have varied ground from which to gather wood, thatch, ti leaves, and on which to grow taro; also the attached fishery supplied him with fish.

The *ili kupono*, forming, as it did, no part of the *ahupuaa*, in which it was physically situated, and its landlord being in no wise subservient to the *konohiki* of the *ahupuaa*, had its own fishing ground appurtenant to the land, entirely separate and distinct from the fishing grounds of the *ahupuaa*.

The right of the *konohiki*, or landlord, of an *ahupuaa* or *ili kupono* was not exclusive, but certain rights were granted the *hoaaina*, or tenant. These rights were, generally, to cultivate his taro, gather wood, thatch, and ti leaves, and to catch fish within the boundary of the domain of his chief. These divisions of land are known and defined today, although they may have been divided into several different parts.

The first written law on the subject of fisheries in these Islands was adopted by the King, Nobles and Chiefs on the 7th day of June, 1839.

In this statute it was declared that:

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

And further, that:

"These are the fishing grounds which His Majesty, the King, takes and gives to the people: The fishing grounds without the coral reef, viz: the Kilohee grounds, the Lohee grounds, the Malolo grounds, together with the ocean beyond."

"But the fishing grounds from the coral reef to the sea beach are for the landlords and for the tenants of their several lands, but not for others."

An examination of this Act (Chap. 3, Laws of 1839) will show that it was intended to govern the subject of fisheries completely. Experience demonstrated that it was incomplete and various amendments were adopted on April 1, 1841. Again in 1845 another act was passed on the subject more clearly defining the rights of the several parties. Section 1 of this last Act defines the fishing ground of the people to be "the entire marine space without and seaward of the reef upon the coast of the several islands," etc. Section 2 of this last Act reads:

"Sec. 2. The fishing grounds from the reefs, and where there happens to be no reefs from the distance of one geographical mile seaward to the beach at low water mark, shall in like manner be considered private property of the landlord whose land by ancient regulation belong to the same; in the possession of which private fisheries the said landlords shall not be molested except to the extent of the reservations and prohibitions hereinafter set forth."

"Sec. 3. *The landlord shall be considered in like manner to hold said private fisheries for the equal use of themselves and of the tenants on their respective lands;* and the tenants shall be at liberty to use the fisheries of

their landlords, subject to the restrictions in this article imposed."

The other sections give the landlords the right each year to set apart for themselves one specie or variety of fish natural to the fishery and to give public notice of this fact by proclamation, etc., and fixing penalties against landlord and tenant for violation of the Act. Also defines the species of fish designated as the royal fish and prescribes that there shall appertain to the government and for a division of them between the king and the fishermen, and makes extensive provisions relative to the King's tabu, etc.; providing for the appointment of fishery agents to "exact and receive of all fishermen for the use of the royal exchequer during the legalized fishing seasons the one-half part or portion of all protected fish taken within the reefs," etc.

Time and experience demonstrated to the satisfaction of the King that it was not profitable for the government to engage in the fishing business, so on July 11, 1851, the King approved an Act granting to the people the rights of piscary belonging to the Government. The second section of this Act reads:

"Section 2. All fishing grounds pertaining to any government land, or otherwise belonging to the government, excepting only ponds, shall be and are hereby forever granted to the people for the free and equal use of all persons; provided, however, that for the protection of such fishing grounds the minister of the interior may tabu the taking of fish thereon at certain seasons of the year."

Another Act was passed the same year (1851), entitled: "An Act to protect the people in certain fishing grounds," and reads, in part, as follows:

"Sec. 1. That no person who has bought or who may hereafter buy any government land, or obtain land by leases or other title from any party, has or shall have any greater right than any other person resident in this

kingdom over any fishing grounds not included in his title, although adjacent to said land. The fish in said fishing ground shall belong to all persons alike, and may be taken at any time, subject only to the tabu of the minister of the interior."

The Civil Code of 1859 embraced all the laws in force in the islands on the subject of fisheries. Section 384 of the Civil Code is a verbatim copy of Sec. 2 of the Act of 1851, above quoted, and Section 387 is a copy of Sec. 2 of the Act of 1845 except the word "konohiki" is substituted for the word "landlord" used in the original enactment. *The other sections hereinbefore quoted were included in this chapter of the Civil Code.* All of these laws without material change were carried forward and are published as Chapter 84 of the Penal Laws of 1897. These statutes on the subject of fisheries had been in force, some of them for more than half a century, and all of them for most of that time, when Sections 95 and 96 of the Organic Act, June 14, 1900, came into effect.

The provisions of the Organic Act on the subject are as follows:

"Sec. 95. That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial inclosure shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested right shall be valid after three years from the taking effect of this Act unless established as hereinafter provided.

"Sec. 96. That any person who claims a private right to any such fishery shall, within two years after the taking effect of this Act, file his petition in a circuit court of the Territory of Hawaii, setting forth his claim to such fishing right, service of which petition shall be made upon the attorney-general, who shall conduct the case for the Territory, and such case shall be conducted as an ordinary action at law.

"That if such fishing right be established the attorney-

general of the Territory of Hawaii may proceed, in such manner as may be provided by law for the condemnation of property for public use, to condemn such private right of fishing to the use of the citizens of the United States upon making just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the treasury of the Territory of Hawaii not otherwise appropriated."

In construing certain parts of the above sections the Supreme Court of the United States in Damon v. Territory, 194 U. S. 154, 48 L. E. 916, stated, relative to the vested rights reserved:

"The right claimed is a right within certain metes and bounds to set apart one species of fish to the owner's sole use, or, alternatively, to put a taboo on all fishing within the limits for certain months, and to receive from all fishermen one-third of the fish taken upon the fishing grounds. A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right."

"The property formerly belonged to Kamehameha IV., from whom it passed to his brother, Lot Kamehameha, and from him by mesne conveyances to the plaintiff. The title of the latter to the ahupuaa is not disputed. He claims the fishery also under a series of statutes and a royal grant. The history is as follows: In 1839 Kamehameha III. took the fishing grounds from Hawaii to Kauai and redistributed them,—those named without the coral reef, and the ocean beyond, to the people; those 'from the coral reef to the seabeach for the landlords and for the tenants of their several lands, but not for others.' The landlord referred to seems to have been the konohiki,

or overlord, of an ahupuaa, or large tract like that owned by the plaintiff. It is not necessary to speculate as to what the effect of this act of the king would have been standing alone, he then having absolute power. It had, at least, the effect of inaugurating a system, *de facto*. But in 1846, the monarchy then being constitutional, an act was passed, article 5 of which was entitled 'Of the Public and Private Rights of Piscary.'" . . . .

"The foregoing laws not only use the words 'private property,' but show that they mean what they say by the restrictions cutting down what otherwise would be the incidents of private property. There is no color for a suggestion that they created only a revocable license, and if they imported a grant or a confirmation of an existing title, of course the repeal of the laws would not repeal the grant. The argument against their effect was not that in this case the ahupuaa did not belong to the fishery, within the words 'landlords whose lands, by ancient regulation, belong to the same' (the land seems formerly to have been incident to the fishery), but that citizens have no vested rights against the repeal of general laws. This is one of those general truths which become untrue by being inaccurately expressed. A general law may grant titles as well as a special law. It depends on the import and direction of the law. A strong example of the application of the rule intended by the argument is to be found in Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, ante, 229 24 Sup. Ct. Rep. 107, where a railroad company was held to have no vested right to exemptions proclaimed in a general tax act. The statute was construed not to import an offer, covenant, or grant to railroads which might be built in reliance upon it. But if a general law does express such an offer, as it may, the grant is made. If the Hawaii statutes did not import a grant, it is hard to see their meaning.

"However, in this case it is not necessary to invoke the statutes further than to show that, by the law in force since 1846, at least, such rights as the plaintiff claims, and which, as is shown by the evidence, he and his predecessors in title have been exercising for forty years, have been recognized as private property."

The Territorial Statute on the subject, so far as this

discussion is concerned, is found in the Revised Laws of Hawaii, 1925, and is as follows:

(Revised Laws, 1925)

"Sec. 750. *Konohiki rights.* The fishing grounds from the reefs, and where there happen to be no reefs, from the distance of one geographical mile seaward to the beach at low water mark, shall, in law, be considered the private property of the konohikis, whose lands, by ancient regulation, belong to the same; in the possession of which private fisheries, the said konohikis shall not be molested, except to the extent of the reservations and prohibitions hereafter in this chapter set forth. (C. C. 1859, s. 387, Cp. L. s. 387; P. L. s. 1452; R. L. s. 475; R. L. 1915, s. 612.)

"Sec. 751. *Tenants' rights.* The konohikis shall be considered in law to hold said private fisheries for the equal use of themselves and of the tenants on their respective lands, and the tenants shall be at liberty to take from such fisheries, either for their own use, or for sale or exportation, but subject to the restrictions imposed by law, all fish, seaweed, shellfish and other edible products of such fisheries. (C. C. 1859, s. 388; Cp. L. s. 388; am. L. 1892, c. 18, s. 1; P. L. s. 1453; R. L. s. 476; R. L. 1915, s. 613.)

"Sec. 752. *Konohikis' notice of tabu fish.* The konohikis shall have power each year to set apart for themselves one given species or variety of fish natural to their respective fisheries, giving public notice, by viva voce proclamation, and by at least three written or printed notices posted in conspicuous places on the land, to their tenants and others residing on their lands, signifying the kind and description of fish which they have chosen to be set apart for themselves. (C. C. 1859, s. 389; Cp. L. s. 389; P. L. s. 1454; R. L. s. 477; R. L. 1915, s. 614.)

"Sec. 753. *Konohikis' tabu fish.* The specific fish so set apart shall be exclusively for the use of the konohiki, if caught within the bounds of his fishery, and neither his tenants nor others shall be at liberty to appropriate such reserved fish to their private use, but when caught, such reserved fish shall be the property of the konohiki, for which he shall be at liberty to sue and recover the value from any person appropriating the same. (C. C.

1859, s. 390; Cp. L. s. 390; P. L. s. 1455; R. L. s. 478; R. L. 1915, s. 615.)

"Sec. 754. *Restriction on konohikis' rights.* The konohikis shall not have power to lay any tax, or to impose any other restriction, upon their tenants, regarding the private fisheries, than is in this chapter before prescribed, neither shall any such further restrictions be valid. (C. C. 1859, s. 391; Cp. L. s. 391; P. L. s. 1456; R. L. s. 479; R. L. 1915, s. 616.)

"Sec. 755. *Konohikis' right to prohibit fishing.* It shall be competent to the konohikis, on consultation with the tenants of their lands, in lieu of setting apart some particular fish to their exclusive use, as in this chapter before allowed, to prohibit during certain months in the year, all fishing upon their fisheries; and, during the fishing season, to exact of each fisherman among the tenants, one-third part of all the fish taken upon their private fishing grounds. In every such case it shall be incumbent on the konohikis to give the notice prescribed in section 752. (C. C. 1859, s. 392; Cp. L. s. 392; P. L. s. 1457; R. L. s. 480; R. L. 1915, s. 617.)"

Changes in population and diversity of industries, together with other advances, have brought about corresponding changes in the holdings of original grants. An *ahupuaa* formerly held by one person may now be owned by hundreds; some have been divided, retaining the fishing rights in the *konohiki;* some have been divided with a division of fishing rights, while, in at least one case, the konohiki rights in the fishing grounds of a part of the ahupuaa have been condemned by the United States for military and naval purposes.

My conception of the effect of the above may be shown by quoting from an opinion rendered in 1919, relative to the fishing rights appurtenant to Fort Kamehameha:

"That part of Fort Kamehameha to which the fishery is attached is a part of the original *ahupuaa* of Halawa near Pearl Harbor, which land extended from the mountains to the sea. It was granted by King Kamehameha III to M. Kekuanaoa and Kamaikue in 1848, and later

came into the possession of the Trustees of the Bishop Estate and the Queen Emma Estate; the trustees of each estate holding an undivided one-half interest in the *ahupuaa.* Within this *ahupuaa,* but not subservient to it, were an *ili kupono* and a *lele* called the *ili* and *lele* of Kunana.

"The fishery of Halawa extended from near Aiea to the sea, but out of this was taken the Kunana fishery appurtenant to the *ili* of *Kunana.*

"In 1883 the trustees of the Bishop Estate and the trustees of the Queen Emma Estate divided the *ahupuaa,* and the part of the fishery to the north of the Kunana Fishery was taken by the Bishop Estate while that to the south became the property of the Queen Emma Estate. In 1905 the trustee of the Queen Emma Estate established his vested right according to the Organic Act and judgment was rendered awarding him the konohiki rights in that part of the Halawa Fishery set apart for the Queen Emma Estate. That these fishing rights are 'vested rights' within the meaning of the Organic Act has been held by the United States Supreme Court in Carter v. Hawaii, 200 U. S. 255; and Damon v. Hawaii, 194 U. S. 154.

"The lower part of the estate at Queen Emma point was obtained by the United States by condemnation proceedings and a decree was entered July 12, 1907.

"This contains 411.685 acres of land and 585 acres of fishery, and was set aside for military purposes by the President in 1916 and published in G. O. No. 20, May 26, 1916. The defendants in the case were those who took under the will of the late Queen Emma and the trustees of the Queen Emma Estate.

"No tenants were named or ordered to appear, so that the judgment runs only against the defendants named and does not bind the tenants of the *ahupuaa.*

"The trustees of the Queen Emma Estate could not

grant the exclusive right to the fishery (Haalelea v. Montgomery, 2 H. 62), so that upon the division of the fishery by the trustees of these two estates the tenants of the entire *ahupuaa* of Halawa still retained their rights to fish anywhere in the original fishery, and this right was not curtailed by condemnation of the defendants' rights in the decree to the United States.

"It was not in the power of the *konohiki* of an *ahupuaa* to alienate a single right conferred by law on the *hoaaina* (tenant). Oni v. Meek, 2 H. 87.

" 'Every resident on land having a fishing right appurtenant thereto, whether he be an old *hoaaina* (tenant or old resident) a holder of a *kuleana* title, or a resident by leasehold or any other title, has a right to fish in the sea appurtenant to the land as an incident to his tenancy. (Hatton v. Piopio, 6 H. 334, 336 (1882). Shipman v. Crown Land Commissioners, 6 H. 351, 353 (1882). See Haalelea v. Montgomery, 2 H. 62 (1858), Shipman v. Nawahi, 5 H. 571 (1886).'

"I am of the opinion that, under the Organic Act the individual tenants did not have to bring suit to perfect their rights when the konohiki had perfected his rights, as, according to the present statute and the statute at the time the *konohiki* rights in the lower Halawa Fishery were perfected, the *konohiki* held the fishery *equally for himself and the tenants.*

"I am of the opinion that when the fishery and land at Fort Kamehameha were obtained by judgment for military and naval purposes, that the fishery, although it became the property of the United States, did not become merged with the public fisheries as contemplated by the Organic Act but rather, on account of the specific purpose for which it was condemned, retained its status as a private fishery and should be so considered.

"The *ili* of Kunana, and the lele of the same name, not being subservient to the *ahupuaa* of Halawa, neither the

konohiki nor tenants may properly fish in the Fort Kamehameha Fishery."

"The lessee of an ili kupono within an ahupuaa, but not subservient to it, has no right as a hoaaina of the ahupuaa in the sea fishery appurtenant to the ahupuaa. Shipman v. Nawahi, 5 H. 571 (1886)."

"The tenants of the original *ahupuaa* of Halawa who fish in the Fort Kamehameha Fishery may sell the fish which they take.

" 'One who takes a conveyance by metes and bounds, of a part of an *ahupuaa,* but not including any portion of the fishing ground adjacent acquires a common right of piscary, as a tenant or occupant of the *ahupuaa*, appurtenant to the land purchased, and subject to the rights of the grantor. Haalelea v. Montgomery, 2 H. 62 (1858).'

" 'One who has a right to fish within the boundaries of a fishing right as an incident to a tenancy of a part of the land to which the fishing right is appurtenant, may sell such portion of the fish taken as is in excess of his own needs. (Hatton v. Piopio, 6 H. 334, 337 (1882).'

"Inasmuch as the President set aside the Halawa Fishery adjoining Fort Kamehameha for military and naval purposes, it is probable that this was done in order to enable the commanding officer of that post to prevent trespassing within a certain distance of the fortifications, and it is probable that the War Department was under the impression that, by the judgment, the Government obtained exclusive title, and that, in setting aside the area for military and naval purposes, it accomplished the purpose above outlined. If it be the desire of the Department that all persons be prohibited from fishing in the waters set aside, I recommend that the rights of the tenants be condemned."

Under the provisions of sections 95 and 96 of the Organic Act many vested rights have been established but there remain many rights not established under the provisions of these sections.

I know of no instances where the Attorney General has condemned established rights but it is to be noted that when condemned they are limited in their use to citizens of the United States.

It is further to be noted that under the terms of the above sections no vested right in sea fisheries at the time of passage of the above Act, which was not established within the three year limitation prescribed, is now valid.

I therefore refrain from expressing an opinion as to the constitutionality of that part of the Act but leave the thought for your consideration.

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