

PRELIMINARY REPORT

Attainder of Treason and the Corruption of Blood

THE ROYAL COMMISSION OF INQUIRY:

Investigating War Crimes *and* Human Rights Violations Committed *in the* Hawaiian Kingdom

Dr. David Keanu Sai, Ph.D.

HEAD, ROYAL COMMISSION OF INQUIRY

Dr. Federico Lenzerini, Ph.D.

DEPUTY HEAD, ROYAL COMMISSION OF INQUIRY

HAWAIIAN KINGDOM

PRELIMINARY REPORT:

Attainder of Treason and the Corruption of Blood

This preliminary report of the Royal Commission of Inquiry on the *attainder* of high treason and the reversion of property and the doctrine of the *corruption of blood* addresses the actions taken by the insurgents committing the high crime of treason and the effects of *attainder* and *corruption of blood* under English common law and its statutory incorporation into Hawaiian Kingdom law.

In the Statute Laws of 1846, section 7, it was enacted: “[I]and so patented [that is purchased from the Government] shall never revert to the king of these islands, nor escheat to this government, for any other cause than *attainder of high treason*, as defined in the criminal code (emphasis added).”¹ Among the prerogatives of the king that affect lands is “[t]o punish for high treason by forfeiture, if so the law decrees.”² The King’s superior right to forfeiture was transferred to the government when the Hawaiian Kingdom became a constitutional monarchy. Under the treason statute, which has no degrees, the Penal Code states:

1. Treason is hereby defined to be any plotting or attempt to dethrone or destroy the King, or the levying of war against the King’s government, or the adhering to the enemies thereof, giving them aid and comfort, the same being done by a person owing allegiance to this kingdom.
2. Allegiance is the obedience and fidelity due to the kingdom from those under its protection.
3. An alien, whether his native country be at war or at peace with this kingdom, owes allegiance to this kingdom during his residence therein, and during such residence, is capable of committing treason against this kingdom.
4. Ambassadors and other ministers of foreign states, and their alien secretaries, servants and members of their families, do not owe allegiance to this kingdom, though resident therein, and are not capable of committing treason against this kingdom.
5. To constitute the levying of war, contemplated in the first section of this chapter, it shall be requisite that the persons concerned therein be parties to some overt act, in or towards procuring, preparing or using force, or putting themselves in a condition in readiness to use force, either by being present at such overt act, or by promoting, aiding in, or being otherwise accessory before the fact to the same.

¹ Section 7, Article II—*Of the Disposition of Government Lands*, Chapter VII, Statute Laws of His Majesty Kamehameha III, Vol. 1 (1846).

² *Resolution of the Legislative Council approving the principles adopted by the Board of Commissioners to quiet Land Titles* 85 (1846).

6. In order to constitute the levying of war, the force must be employed or intended to be employed for the dethroning or destruction of the King or in contravention of the laws, or in opposition to the authority of the King's government, with an intent or for an object affecting some of the branches or departments of said government general, or affecting the enactment, repeal or enforcement of laws in general, or of some general law; or affecting the people, or the public tranquility generally; in distinction from some special intent or object, affecting individuals other than the King, or a particular district.
7. An accessory before the fact to treason is guilty of treason, and shall be subject to prosecution, trial and punishment therefor, though the principals more directly concerned have not been convicted, or are not amendable to justice.
8. No person shall be convicted of treason but by the testimony of two or more lawful witnesses to the same overt act of treason whereof he stands charged, unless he shall in open court, confess such treason.
9. Whoever shall commit the crime of treason, shall suffer the punishment of death; and all his property shall be confiscated to the government.
10. If any person who shall have knowledge of the commission of treason against this kingdom, shall conceal the same, and shall not, as soon as may be, disclose and make known such treason to the Governor of the island on which he resides, he is guilty of a great crime, and shall be punished by a fine not exceeding five thousand dollars, or imprisonment at hard labor not exceeding ten years, in the discretion of the court.³

By specific reference to the term *attainder*, the Hawaiian legislature adopted the English common law on high treason. In *The King v. Agnee et al.*, the Hawaiian Supreme Court stated, “[w]e do not recognize as conclusive the common law nor the authorities of the courts of England or of the United States, any farther than the principles which they support may have become incorporated in our system of laws, and recognized by the adjudication of the Supreme Court.”⁴ In *Agnee*, the Court cited English common law commentators on criminal law such as Chitty and Bishop as well as English criminal cases.

Under English common law, *attainder* of high treason is a metaphor that has the effect of the corruption of blood resulting from the commission of high treason along with reversion of property by escheat, both real and personal, to the king or government. *Attainder* is at “common law, that extinction of civil rights and capacities which took place whenever a person who had committed treason or felony received sentence of death for his crime. The effect of ‘attainder’ upon such felon was, in general terms, that all his estate, real and personal, was forfeited. At the common law,

³ Penal Code of 1850 8-9 (1869).

⁴ *The King v. Agnee et al.*, 3 Haw. 106, 112 (1869).

attainder resulted in three ways, viz: by confession, by verdict, and by *process* or outlawry (emphasis added).”⁵

By “process,” *attainder* resulted by an act of Parliament called a *bill of attainder*, which Edward Coke critiqued as a process that lacked provable evidence but acknowledged that the Parliament did have the authority to *attaint* for high treason. When Henry VIII ascended to the throne in 1509, “attainder by parliament was an established means of dealing with special offenders, particularly those who posed a threat to the security of the king and his realm.”⁶ John Hatsell’s *Precedents of Proceedings in the House of Commons* that was published in 1781 explains:

Although it is true, that this measure of passing Bills of Attainder...has been used as an engine of power...it is not therefore just to conclude, that no instances can occur, in which it ought to be put in practice. Cases have arisen...and may again arise, where the public safety, which is the first object of all government, has called for this extraordinary interference; and, in such instances, where can the exercise of an extraordinary power be vested with more security, than in the three branches of the legislature [Monarch, House of Lords, House of Commons]? It should, however, always be remembered, that this deviation from the more ordinary forms of proceeding by indictment or impeachment, ought never to be adopted, but in cases of absolute necessity; and in those instances only, where, from the magnitude of the crime, or the imminent danger to the state, it would be a greater public mischief to suffer the offence to pass unpunished, than even to over-step the common boundaries of law; and...by an exemplary through extraordinary proceeding, to mark with infamy and disgrace, perhaps to punish with death, even the highest and most power offenders.⁷

In Coke’s commentary on the 1352 Statute of Treasons in the Third *Institute*, he explains that the term “attaint” in the statute “necessarily implieth that he be proceeded with, and attainted according to the due course, and proceedings of law, and not by absolute power.”⁸ The suspect, according to Coke, had to be *attainted* with direct proof of evidence and not *attainted* with the probability of evidence. He explains, “This doth also strengthen the former exposition of the word (*provablement*,) that it must be provably, by an open act, which must be manifestly proved.”⁹

According to William Blackstone, “ANOTHER immediate consequence of attainder is the corruption of blood, both upwards and downwards; so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to

⁵ Black’s Law 126 (6th ed. 1990).

⁶ Stanford E. Lehmberg, “Parliamentary Attainder in the Reign of Henry VIII,” 18(4) *The Historical Journal* 675-702, 677 (1975).

⁷ 4 John Hatsell, *Precedents of Proceedings in the House of Commons* 90 (1796).

⁸ Edward Coke, *The Third Part of the Institutes* 12 (6th ed. 1680).

⁹ *Id.*

the king's superior right of forfeiture: and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor."¹⁰

Section 8 of the Hawaiian treason statute addresses the first two ways where *attainder* results by conviction by trial or confession without trial. The third way is by "process" or "outlawry." The latter was a process during the medieval period in England for the county court or by writ declared a fugitive on the run for the commission of treason an "outlaw." The former could be done by a *bill of attainder* or *law of attainder* enacted by the English Parliament and signed into law by the Monarch. While the United States constitutionally prohibits *bills of attainder*, where "[n]o bill of attainder or ex post facto Law shall be passed,"¹¹ and Great Britain abolished practically all the law of forfeiture and escheat for treason and felony in 1870,¹² the Hawaiian Kingdom has no such prohibition, which would allow *bills of attainder* to be enacted by the Legislative Assembly, but no such bill has ever been enacted.

While *bills of attainder* were a product of domestic law of a State and not the courts, they could also result as a consequence of a "process" of international law by virtue of a treaty between two States where the negotiations and agreement included, *inter alia*, the subject of high treason as defined by a State's domestic law. This was precisely the case of the *Agreement of Restoration* entered into between Queen Lili'uokalani and President Grover Cleveland on 18 December 1893.

The day after U.S. troops invaded, without cause, the Hawaiian Kingdom on 16 January 1893, Queen Lili'uokalani conditionally surrendered to the United States and called for a Presidential investigation.

I, Liliuokalani, by the Grace of God, and under the Constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom.

That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the said Provisional Government.

Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest, and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representative and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.

¹⁰ William Blackstone, *Commentaries on the Laws of England*, vol. 4 381 (1769).

¹¹ U.S. Constitution, article 1, section 9.

¹² *An Act to abolish Forfeiture for Treason and Felony, and to otherwise amend the Law relating thereto* (1870).

Done at Honolulu this 17th day of January, A.D. 1893.

Liliuokalani, R.
Samuel Parker,
Minister of Foreign Affairs.
Wm. H. Cornwell,
Minister of Finance.
Jno. F. Colburn,
Minister of the Interior.
A.P. Peterson,
*Attorney General.*¹³

After receiving the conditional surrender, President Grover Cleveland initiated an investigation by appointing James Blount as Special Commissioner on 11 March 1893. In a dispatch from the Secretary of State Walter Gresham to Special Commissioner Blount:

The situation created in the Hawaiian Islands by the recent deposition of Queen Liliuokalani and the erection of a Provisional Government demands the fullest consideration of the President, and in order to obtain trustworthy information on the subject, as well as for the discharge of other duties herein specified, he has decided to dispatch you to the Hawaiian Islands as his special commissioner, in which capacity you will herewith receive a commission...¹⁴

Special Commissioner Blount initiated his investigation on 1 April 1893, where he provided periodic reports to the Secretary of State. On 17 July 1893, the Special Commissioner submitted his final report. These reports were a trove of provable evidence of the high crime of treason and United States' intervention, which included sworn testimonies. On 18 October 1893, the investigation was completed, and the Secretary of State reported to the President the findings of the Special Commissioner, which placed blame squarely on U.S. Minister John Stevens and Naval Captain Gilbert Wiltse, commander of the USS Boston "with evidence, documentary and oral, contained in Mr. Blount's reports."¹⁵

The Provisional Government was recognized when it had little other than a paper existence, and when the legitimate government was in full possession and control of the palace, the barracks, and the police station. Mr. Steven's well-known hostility and the threatening presence of the force landed from the *Boston* was all that could then have excited serious apprehension in the minds of the Queen, her officers, and loyal supporters.¹⁶

¹³ United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95* 586 (1895) (hereafter "Executive Documents").

¹⁴ *Id.*, 567.

¹⁵ *Id.*, 461.

¹⁶ *Id.*, 462.

...

The Government of Hawaii surrendered its authority under a threat of war, until such time only as the Government of the United States, upon the facts being presented to it, should reinstate the constitutional sovereign...

Should not the great wrong done to feeble but independent State by an abuse of the authority of the United States be undone by restoring the legitimate government? Anything short of that will not, I respectfully submit, satisfy the demands of justice.¹⁷

A recent discovery of a note dated 17 January 1893, from Minister Stevens to Sanford Dole, the so-called President of the Provisional Government, that escaped the Special Commissioner's investigation of the records of the U.S. Legation in Honolulu, confirms Minister Stevens' premature recognition of the insurgents as a *de facto* government. Dole inquired:

Sir: I acknowledge the receipt of your valued communication of this day, recognizing the Hawaiian Provisional Government, and express deep appreciation of the same.

We have conferred with the ministers of the late government and have made demand upon the marshal to surrender the station house. We are not actually yet in possession of the station, but as night is approaching and our forces may be insufficient to maintain order, we request the immediate support of the United States forces, and would request that the commander of the United States forces take command of our military forces so that they may act together for the protection of the city.¹⁸

Minister Stevens responded, "Judge Dole: I would advise not to make known of my recognition of the *de facto* Provisional Government until said Government is in possession of the Police Station."¹⁹ It appears that Minister Stevens did not make a copy of the note to Dole for the records of the U.S. Legation as he should have done, but unbeknownst to the Special Commissioner, the insurgency retained Minister Stevens' note that was not discovered until 2017.²⁰ Special Commissioner Blount notified the Secretary of State on 19 July 1893, that he requested of Dole Minister Stevens' response to Dole's letter.²¹ In that communication, the Special Commissioner stated that his request of Dole "was several days ago and I presume I shall hear nothing further

¹⁷ *Id.*, 463.

¹⁸ *Id.*, 565.

¹⁹ Letter from United States Minister, John L. Stevens, to Sanford B. Dole, January 17, 1893, W.O. Smith Collection, HEA Archives, HMCS, Honolulu, available at <http://hmha.missionhouses.org/items/show/889>.

²⁰ David Keanu Sai, "Book Review of Nation Within: The History of the American Occupation of Hawai'i," 51 *Hawaii. J. Hist.* 186, 188 (2017) ("The Hawaiian Mission Houses Archives is processing a collection of documents given to them by a descendent of William O. Smith. Smith was an insurgent who served as the attorney general for Sanford Dole, so-called president of the provisional government. The "smoking gun" is a note to Dole signed by Stevens marked "private," written under the letterhead of the "United States Legation" in Honolulu, and dated January 17, 1893").

²¹ Executive Documents, 605.

from him on the subject.”²² Dole never divulged Minister Stevens’ response to the Special Commissioner because it would have revealed what was gathered by Dole’s own letter to Minister Stevens and corroborating evidence of interviews and testimonies the fact that the recognition was premature and unlawful under international law.

“Premature recognition is a tortious act against the lawful government,” explains Lauterpacht, which “is a breach of international law.”²³ And according to Stowell, a “foreign state which intervenes in support of [insurgents] commits an act of war against the state to which it belongs, and steps outside the law of nations in time of peace.”²⁴ Furthermore, Stapleton concludes, “[o]f all the principles in the code of international law, the most important—the one which the independent existence of all weaker States must depend—is this: no State has a right forcibly to INTERFERE in the internal concerns of another State.”²⁵

Minister Stevens response to Dole also reveals that he intentionally misled Secretary of State John Foster. In a dispatch telegraphed to Minister Stevens dated 28 January 1893, from Washington, D.C., Secretary of State Foster stated, “[y]our course in recognizing an unopposed *de facto* government appears to have been discreet and in accordance with the facts. The rule of this government has uniformly been to recognize and enter into relation with any actual government in full possession of effective power with the assent of the people.”²⁶ President Cleveland, however, told the Congress:

When our Minister recognized the provisional government the only basis upon which it rested was the fact that the Committee of Safety had...declared it to exist. It was neither a government *de facto* nor *de jure*. That it was not in such possession of the Government property and agencies as entitled it to recognition is conclusively proved by a note found in the files of the Legation at Honolulu, addressed by the declared head of the provisional government to Minister Stevens, dated January 17, 1893, in which he acknowledges with expressions of appreciation the Minister’s recognition of the provisional government, and states that it is not yet in possession of the station house (the place where a large number of the Queen’s troops were quartered), though the same had been demanded of the Queen’s officers in charge. Nevertheless, this wrongful recognition by our Minister placed the Government of the Queen in a position of most perilous perplexity. On the one hand she had possession of the palace, of the barracks, and of the police station, and had at her command at least five hundred fully armed men and several pieces of artillery. Indeed, the whole military force of her kingdom was on her side and at her disposal, while the

²² *Id.*

²³ E. Lauterpacht, *Recognition in International Law* 95 (1947)

²⁴ Ellery C. Stowell, *Intervention in International Law* 349, n. 75 (1921).

²⁵ Augustus Granville Stapleton, *Intervention and Non-Intervention* 6 (1866).

²⁶ *Id.*, 1179.

Committee of Safety, by actual search, had discovered that there were but very few arms in Honolulu that were not in the service of the Government.²⁷

In international law, a fundamental rule exists according to which diplomats have a duty to not intervene in the internal affairs of the sovereign State they are accredited to. Every sovereign State has a right “to establish, alter, or abolish, its own municipal constitution and form of government. ...And from the same course or reasoning, it will be inferred, that no foreign State can interfere with the exercise of this right, no matter what political or civil institutions such sovereign State may see fit to adopt for the government of its own subjects or citizens.”²⁸ For a foreign diplomat, a violation of this rule would have grave consequences. An offended State could proceed “against an ambassador as a public enemy...if justice should be refused by his own sovereign.”²⁹

Supplementing the general instructions given to U.S. Minister Albert Willis who was commissioned as the U.S. diplomat assigned to the Hawaiian Kingdom, Secretary of State Gresham stated,

After a patient examination of Mr. Blount’s reports the President is satisfied that the movement against the Queen, if not instigated, was encouraged and supported by the representative of this Government at Honolulu; that he promised in advance to aid her enemies in an effort to overthrow the Hawaiian Government and set up by force a new government in its place; and that he kept his promise by causing a detachment of troops to be landed from the *Boston* on the 16th of January, and by recognizing the Provisional Government the next day when it was too feeble to defend itself and the constitutional government was able to successfully maintain its authority against any threatening force other than that of the United States already landed.

...

On your arrival at Honolulu you will take advantage of an early opportunity to inform the Queen of this determination, making known to her the President’s sincere regret that the reprehensible conduct of the American minister and the unauthorized presence on land of a military force of the United States obliged her to surrender her sovereignty, for the time being, and rely on the justice of this Government to undo the flagrant wrong.

You will, however, at the same time inform the Queen that, when reinstated, the President expects that she will pursue a magnanimous course of granting full amnesty to all who participated in the movement against her, including persons who are, or have been, officially or otherwise, connected with the Provisional Government, depriving them of no right or privilege which they enjoyed before the so-called revolution. All the obligations

²⁷ *Id.*, 453.

²⁸ Sherston Baker, *Halleck’s International Law*, vol. 1 94 (3rd ed. 1893).

²⁹ Henry Wheaton, *Elements of International Law* 301 (8th ed. 1866).

created by the Provisional Government in due course of administration should be assumed.³⁰

At the first meeting between the Queen and Minister Willis on 13 November 1893, at the U.S. Legation in Honolulu, Willis explained the “President’s sincere regret that, through the unlawful intervention of the United States, she had been obliged to surrender her sovereignty, and his hope that, with her consent and cooperation, the wrong done to her and to her people might be redressed.”³¹ He then asked the Queen, “Should you be restored to the throne, would you grant full amnesty as to life and property to all those persons who have been or who are now in the Provisional Government, or who have been instrumental in the overthrow of your government[?].”³²

In this meeting, the Queen refused to grant amnesty and instead referred to “Chapter VI, section 9 of the Penal Code, as follows: Whoever shall commit the crime of treason shall suffer the punishment of death and all his property shall be confiscated to the Government. There are, under this law, no degrees of treason. Plotting alone carries with it the death sentence.”³³ When asked again if she would reconsider, she responded, “these people were the cause of the revolution and the constitution of 1887. There will never be any peace while they are here. They must be sent out of the country, or punished, and their property confiscated.”³⁴

After several more meetings, however, the Queen, on 18 December 1893, agreed to the conditions of restoration. In her letter to Minister Willis, she stated:

Sir: Since I had the interview with you this morning I have given the most careful and conscientious thoughts as to my duty, and I now of my own free will give my conclusions.

I must not feel vengeful to any of my people. If I am restored by the United States I must forgive and forget the past, permitting no proscription or punishment of any one, but trusting that all will hereafter work together in peace and friendship for the good and for the glory of our beautiful and once happy land.³⁵

Willis dispatched the Queen’s agreement to the condition of restoration to the Secretary of State on 20 December 1893, stating the Queen “unreservedly consented, when restored as the constitutional sovereign, to grant amnesty and assume all obligations of the Provisional Government.”³⁶ President Cleveland, however, did not follow through with the United States’

³⁰ Executive Documents, 464.

³¹ *Id.*, 1242.

³² *Id.*

³³ *Id.*, 1243.

³⁴ *Id.*, 1242.

³⁵ *Id.*, 1269.

³⁶ *Id.*

obligation to restore the Queen under the treaty, which emboldened the insurgents' unfettered control of Hawaiian territory and resources that has led to the commission of war crimes and crimes against humanity, in particular, denationalization and the action of depriving aboriginal Hawaiian subjects of their right to universal healthcare by Queen's Hospital.

Within three generations since its implementation, the national consciousness of the Hawaiian Kingdom had become erased. This was the ultimate aim of the insurgency, which was evidenced in the record of a Council of State meeting of the so-called Republic of Hawai'i in 1895. Samuel Damon, who served as the group's Vice-President, stated, "[i]f we are ever to have peace and annexation the first thing to do is to obliterate the past."³⁷ According to Beamer, the events that occurred after 1893 "were not colonial; they were active attempts at obliterating Hawaiian nationalism. The goal was to replace all forms of Hawaiian nationality in the population with a new identity as something similar to colonial subjects."³⁸ As Gonschor accurately states, "American indoctrination of the people of Hawai'i had profound negative consequences not only on Hawaiian culture and identity, but also on the islands' historiography. As soon as the Missionary Party—or, as loyalist newspaper editor Edmund Norrie called them, the *American Mafia*—had taken the reins of power, they began to systemically rewrite the country's history and obscure and discredit the achievements of the Hawaiian Kingdom (emphasis added)."³⁹

The investigation of "those persons who have been...in the Provisional Government, or who have been instrumental in the overthrow of [the] government" conducted by President Cleveland, provided clear and, as Coke remarked, "provable" evidence "by the testimony of two or more lawful witnesses" that the crime of high treason was committed. As the President stated to the Congress, if it was not for "the landing of the United States forces upon false pretexts respecting the danger to life and property the [insurgents] would never have exposed themselves to the pains and penalties of treason by undertaking the subversion of the Queen's Government,"⁴⁰ and "if the Queen could have dealt with the insurgents alone her course would have been plain and the result unmistakable."⁴¹

Of the three modes of *attainting* a person or persons of the high crime of treason under English common law, the insurgents were *attainted* by "process of law" as evidenced in President Cleveland's six-month investigation from 1 April to 18 October 1893, and acknowledged by Queen Lili'uokalani in the *Agreement of Restoration* of 18 December 1893. The condition of the *Agreement of Restoration* for the Queen, after being restored to the throne, "to grant full amnesty as to life and property to all those persons who have been or who are now in the Provisional Government, or who have been instrumental in the overthrow of your government," presupposes

³⁷ Kamanamaikalani Beamer, *No Mākou Ka Mana* 197 (2014).

³⁸ *Id.*

³⁹ Lorenz Gonschor, *A Power in the World—The Hawaiian Kingdom in Oceania* 158 (2019).

⁴⁰ Executive Documents, 455.

⁴¹ *Id.*, 453.

that these persons were guilty of committing the high crime of treason, and, therefore, were *attainted*. According to Black’s Law Dictionary, amnesty is a “sovereign act of forgiveness for past acts, granted by a government to all persons (or to certain classes of persons) who have been *guilty of...treason*. [...] Included in the concept of pardon is ‘amnesty,’ which is similar in all respects to a full pardon, insofar as when it is granted both the crime and punishment are abrogated; however, unlike pardons, an amnesty usually refers to a class of individuals irrespective of individual situations (emphasis added).”⁴²

Therefore, “all the property of one attainted, real and personal, is forfeited [and has escheated to the Hawaiian government at the time the crime of treason was committed]; his blood is corrupted, so that nothing can pass by inheritance to, from, or through him; ...and thus, his wife, children, and collateral relations suffering with him, the tree, falling, comes down with all its branches.”⁴³ On the subject of escheat, *Holdsworth: A Historical Introduction to the Land Law* (1935) says:

All land is held of some lord. That lord, or some one of his predecessors in title, is supposed to have given the land to the tenant, or some one of his predecessors in title. Therefore, if the tenant dies without heirs, it is only right that the lord should have back again that which he gave to the tenant. This is escheat *propter defectum sanguinis*. Similarly, if the tenant commits any gross breach of the feudal bond—commits, that is, a “felony” in the original sense of that term—the lord may take again that which he gave. This is escheat *propter delictum tenentis*. The right of escheat was thus a tenurial right, which was dependent upon the fact that the freehold had no tenant. Therefore it could only arise when a tenant in fee simple died without heirs or committed felony.⁴⁴

According to Coke, “[*e]schaeta*, is a word of art, and derived from the French word escheat (*id est) cadere, excidere or accidere*, and signifyeth properly when by accident the lands fall to the lord of whom they are holden, in which case we the fee is escheated.”⁴⁵ Coke also states, “[l]ands may escheat to the lord two manner of ways; one by attainder, the other without attainder,”⁴⁶ where the latter occurs when a person dies without heirs. Black’s Law states that escheat is a “reversion of property”⁴⁷ that “arises by act of the law.”⁴⁸ Escheat does not require any physical act of seizing the property but rather occurs as a consequence of being *attainted*. All real property throughout the Hawaiian Islands originates from the Hawaiian Kingdom government that were acquired by a Land Commission Award or by Patent in fee simple.⁴⁹

⁴² Black’s Law, 82-83.

⁴³ Joel Prentiss Bishop, *Bishop on Criminal Law* §967, 716 (9th ed. 1923).

⁴⁴ William Searle Holdsworth, *An Historical Introduction to the Land Law* 33 (1935).

⁴⁵ Sir Edward Coke, *The First Part of the Institutes of the Laws of England; A Commentary upon Littleton* 13a (1642).

⁴⁶ *Id.*, 92b.

⁴⁷ Black’s Law, 545.

⁴⁸ *Id.*, 1320.

⁴⁹ See Royal Commission of Inquiry, *Preliminary Report: Legal Status of Land Titles throughout the Realm* (July 16, 2020) (online at https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Land_Titles.pdf).

As a person who is *attainted* by a conviction of treason by a court of law whereby escheat occurs at the moment of the commission of the crime so that all intervening dealings with the property are avoided, escheat for a person *attainted* by a “process of law,” like a *bill of attainder* or the *Agreement of Restoration*, occurs at the moment of the commission of the crime as well. Therefore, for the sake of universal application as to the date of the commission of the high crime of treason to all the insurgents, the first moment of the commission of the high crime was 17 January 1893. Section 9 of the treason statute states, “[w]hoever shall commit the crime of treason, shall suffer the punishment of death; and all his property shall be confiscated to the government.” The term “property” in the statute includes both real and personal. Under the treason statute, property held by the insurgents in 1893 escheated to the government and not the Queen.

According to Thomas Tomlins, in the *Law-Dictionary explaining the Rise, Progress, and Present State of the British Law*, vol. 1 (1835), as “to *Corruption of Blood*, this operates upwards and downwards, so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king’s superior right of forfeiture; and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor.” Therefore, all persons who committed the crime of high treason, their real property escheated to the Hawaiian Kingdom government, and their ownership to personal property vested in the government at the moment they committed the crime of treason on 17 January 1893 and suffers from the effects of the doctrine of the *corruption of blood* thereafter.

Some of the insurgents came to be known as the Big Five, a collection of five large businesses, that wielded considerable political and economic power after 1893 to benefit themselves. The Big Five were Castle & Cooke, Alexander & Baldwin, C. Brewer & Co., American Factors (now Amfac), and Theo H. Davies & Co. Other insurgents served in the United States proxy government of the Territory of Hawai‘i implementing policies and laws that ran contrary to the laws of the Hawaiian Kingdom and in violation of the international laws of occupation.



David Keanu Sai, Ph.D.

Head, *Royal Commission of Inquiry*

26 October 2022