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NOTES

INDEX

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THE ALA MOANA CASE AND THE MASSIE-FORTESCUE CASE REVISITED

By Masaji Marumoto[1]

More than half a century has passed since Hawaii underwent the trauma of the Ala Moana case[2] and the Massie-Fortescue case.[3] On trial in the Ala Moana case were five local youths charged with raping Thalia Massie, the wife of a Navy lieutenant stationed at Pearl Harbor and the daughter of a prominent eastern seaboard family.[4] The Massie-Fortescue case involved the prosecution of Thalia's mother and husband for the murder of one of the accused youths. Although both cases were tried in an atmosphere highly charged with racial overtones and chauvinistic class distinctions, the judicial system in Hawaii operated strictly in accordance with the basic American principle of equality of all men before the law. The manner in which the judicial system confronted and disposed of those cases is a proud chapter in the history of judicial administration in Hawaii which merits retelling.

To recapture the flavor of the events as they occurred, I will quote liberally from contemporary first-hand accounts. They include the memoirs of Lawrence Judd, then Governor of Hawaii;[5] the memoirs of Admiral

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[1] Masaji Marumoto is a retired associate justice of the Hawaii Supreme Court. He was admitted to the Hawaii bar in November 1930 and was an associate in the Honolulu law office of Frank Thompson from January 2, 1931 to June 30, 1932. The Ala Moana case and the Massie-Fortescue case occurred and were tried during that period. Thompson was private counsel for Lieutenant Thomas Massie and his wife Thalia in the Ala Moana case, although the case was prosecuted by Griffith Wight, Deputy City and County Attorney of the City and County of Honolulu. In the Massie-Fortescue case Thompson was co-counsel for the defendants with mainland United States attorneys Clarence Darrow and Robert Leisure.

[2] Territory of Hawaii v. Ahakuelo, Crim. No. 11782 (1st Cir. Ct. Hawaii 1931).

[3] Territory of Hawaii v. Massie, Crim. No. 11891 (1st Cir. Ct. Hawaii 1932).

[4] Thalia was the daughter of Major Granville Fortescue, a retired army officer who had served as an aide to President Theodore Roosevelt and was once one of his Rough Riders. Her mother was Grace Fortescue, a niece of Alexander Graham Bell. Grace Fortescue came to Honolulu to be with her daughter when she heard that her daughter had been raped. Thalia was twenty years old at the time of the alleged rape and had been married to Thomas Massie for four years. Thomas married Thalia on the day of his graduation from the United States Naval Academy at Annapolis in 1927. Thomas was serving as a lieutenant in a submarine squadron based at Pearl Harbor.

[5] L.M. JUDD, LAWRENCE M. JUDD & HAWAII, AN AUTOBIOGRAPHY 166-216 (1971).

Yates Stirling, the Commandant of the Fourteenth District of the United States Navy, which had its headquarters at Pearl Harbor;[6] and the memoirs of Clarence Darrow, the chief attorney for the defendants in the Massie-Fortescue case.[7]

Excerpts also will be taken from a report of an investigation ordered by United States Attorney General William Mitchell, pursuant to a resolution of the United States Senate[8] [hereinafter cited as the Richardson Report]; and a report of an investigation commissioned by Governor Judd[9] [hereinafter cited as the Pinkerton Report].

The events leading to the Ala Moana trial occurred on September 12, 1931. On that evening, Thalia and her husband visited the Ala Wai Inn with some friends. About midnight, Thalia went to a table occupied by Lieutenant Ralph Stogsdall and asked him whether he would offer his seat to her. The lieutenant refused to do so and, following an unpleasant exchange of words, Thalia slapped his face. That was the last time she was seen at the Inn.

About an hour later, Eustice Bellinger was driving to Kewalo Inn with his family and some friends when he observed Thalia walking along an isolated stretch of Ala Moana Road. Upon stopping to assist her, Bellinger noticed that her face was badly bruised and her lips were swollen. Thalia explained that she had been forced into a car and beaten by five or six dark-skinned Hawaiians. When she was asked whether anything else had been done to her, she said no. She also stated that, because it was dark, she couldn't see the license plate number of the car or identify her assailants other than by their voices.

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[6] Y. STIRLING, SEA DUTY, THE MEMOIRS OF A FIGHTING ADMIRAL 244-71 (1939).

[7] C. DARROW, THE STORY OF MY LIFE 457-83 (1932).

[8] S. Doc. No. 78, 72d Cong., 1st Sess. (April 4, 1932). The RICHARDSON REPORT was made by a team of ten members appointed by United States Attorney General William Mitchell and headed by Assistant Attorney General Seth Richardson. The Attorney General made the appointment pursuant to S. Res. No. 134, adopted by the United States Senate on January 11, 1932, as an aftermath of the mistrial in the Ala Moana case and the homicide in the Massie-Fortescue case.

That resolution requested the Attorney General to report to the Senate upon the administration and enforcement of the criminal laws of the Territory of Hawaii and upon whether, in his opinion, any changes in the Organic Law of the Territory were desirable in the interest of prompt and effective enforcement of justice in the Territory.

Richardson and his team arrived in Honolulu on February 4, 1932, and, after conducting on-the-spot investigations, submitted a report to the Attorney General on March 30, 1932.

The Attorney General transmitted the report to the Senate on April 4, 1932. That was the day on which jury selection began in the Massie-Fortescue case in Honolulu, and the case had not progressed beyond that point. Consequently, the report did not touch upon that case, except to mention its existence.

[9] Report of Pinkerton Detective Agency to Governor Lawrence Judd of Hawaii (Oct. 5, 1932) (Available in Hawaii Cir. Ct. clerk's office). The PINKERTON REPORT was made by Pinkerton's National Detective Agency, Inc., of New York. That investigation was made at the request of Governor Judd who desired to obtain the truth about the Ala Moana case, in order to combat the rampant misinformation on the mainland United States about the case.

Bellinger suggested that Thalia report the incident to the police, but Thalia preferred to be taken home. When Thomas returned home, Thalia told him that a bunch of Hawaiians had repeatedly raped her. Thomas immediately telephoned the police and two police officers came to question Thalia.

After the police officers left, Thomas took Thalia to the Emergency Hospital where she was examined by Dr. David Liu, who would neither confirm nor rule out rape.

While Thalia was being examined, a police radio broadcast reported a traffic incident at the corner of North King Street and Liliha Street involving a car carrying five dark-skinned youths and bearing the license plate number 58-895. The youths riding in the vehicle were later identified as Joseph Kahahawai and Ben Ahakuelo, who were Hawaiians; Horace Ida and David Takai, who were Japanese; and Henry Chang, who was Hawaiian-Chinese. The police broadcast could not be heard in the room where Thalia was being examined but could have been heard on the hospital porch where Thomas was waiting.

After the examination Thomas took Thalia to the police station where she was questioned by Detective John McIntosh. Thalia told McIntosh that the license plate number of the automobile in which she had been abducted was 58-805. That number was one digit different from the number broadcast over the radio, but identical to a number on a blotter in McIntosh's office which Thalia could have seen.

On Sunday afternoon two police officers brought Kahahawai, Chang, Ida and Takai to Thalia's home. Thalia identified Chang and Kahahawai as her assailants but did not identify Takai or Ida, although she had seen Ida earlier that morning at the police station when he was being questioned about the traffic incident. Later in the day Ahakuelo was brought before Thalia at Queen's Hospital where she was being treated for her injuries. Thalia identified Ahakuelo by his gold tooth filling, despite the fact that she had said earlier that she could recognize her assailants only by their voices.

When the alleged rape of Thalia was reported to Rear Admiral Stirling, Commander of the Navy in Hawaii, he stated: "[O]ur first inclination is to seize the brutes and string them up on trees. But we must give the authorities a chance to carry out the law and not interfere. The case must take the usual legal course. It will be slow and exasperating to us. We must all be patient."[10] However, Admiral Stirling put continuous pressure on Governor Judd to have the case vigorously prosecuted without delay.

The accused youths were indicted on October 12, 1931, on the charge of raping Thalia, and they were tried before a jury in the First Circuit Court with Judge Alva Steadman presiding.

Griffith Wight,[11] deputy attorney of the City and County of Honolulu

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[10] STIRLING, *supra* note 6, at 245-46.

[11] Griffith Wight was a native of St. Paul, Minnesota. He received his college education at

prosecuted the case. William Heen[12] defended Ahakuelo and Chang; William Pittman[13] defended Kahahawai and Ida; and Robert Murakami[14] defended Takai.

Although Admiral Stirling's memoirs insinuated that various ethnic communities in Honolulu would rally to finance the accuseds' legal defense,[15] there was no merit to this claim. The nominal fees charged by Heen and Pittman were paid by their clients' relatives and Murakami, who was appointed by the court, received the standard fee of $200 for his services.

The jury which heard the case was composed racially of six Caucasian-Hawaiians, one Caucasian, one Portuguese, two Japanese and two Chinese.[16]

Yale and Stanford, and his law degree from Stanford University in 1926. Thereafter, he came to Hawaii and served as assistant United States Attorney for Hawaii until he was appointed deputy City and County Attorney of Honolulu in 1929. 5 MEN OF HAWAII 459 (G. Nellist 5th ed. 1936) [hereinafter cited as MEN OF HAWAII].

[12] Heen was a Hawaiian-Chinese born in Hawaii. He received his law degree from Hastings Law School in 1904. He was appointed judge of the First Circuit Court of the Territory of Hawaii in 1917 by President Wilson, being the first non-Caucasian to receive such appointment after Hawaii became a Territory of the United States. *Id.* at 221. At the time of the Ala Moana case, he was back in private practice and was also a member of the Legislature of the Territory of Hawaii. Although he was the sole Democrat among 15 Senators, he served as chairman of the Senate Judiciary Committee.

[13] Pittman was born in Vicksburg, Mississippi. He received his early education in Mississippi and Tennessee and his law training in the State of Washington. He was a descendant of Francis Scott Key, composer of the "Star Spangled Banner," and the brother of Senator Key Pittman of Nevada. Pittman came to Hawaii in 1915. *Id.* at 353. He served as Attorney General of the Territory of Hawaii from 1934 until his death on December 19, 1936. It is stated in a memorial printed in *Resolutions of the Bar,* 34 Hawaii 953-54 (1939): "He courageously represented the causes of his clients. He was a man of deep instincts, intuitions and common sense, and it is remembered that in a day of public hysteria, when others faltered, he represented, with determined resoluteness, the causes of his fellow men."

[14] Murakami was a native of Hawaii of Japanese ancestry. He graduated from the University of Chicago Law School in 1925 and became a member of the Hawaii bar in that year. On July 17, 1952, he was nominated by President Truman as judge of the First Circuit Court, the first attorney of Japanese ancestry to be so nominated, and served in that position on an interim basis until February 1, 1953, when he resigned after the national administration changed from that of President Truman to that of President Eisenhower.

[15] STIRLING, *supra* note 6, at 251-52.

[16] In occupational background, the jury included two employees of the City and County of Honolulu, two employees of Honolulu Iron Works, a retired police captain, an employee of Mutual Telephone Company, an employee of American Factors, an employee of Theo. H. Davies & Company, an employee of Von Hamm Young Company, an employee of Schuman Carriage Company, an employee of Aloha Motors and an employee of Honolulu Shoe Company. POLK-HUSTED'S DIRECTORY OF THE CITY AND COUNTY OF HONOLULU AND THE TERRITORY OF HAWAII (1930-31). Among the employers of the jurors, American Factors and Theo. H. Davies & Company were Big Five firms; Honolulu Iron Works, Von Hamm Young Company, Schuman Carriage Company and Aloha Motors were large Caucasian firms, and Mutual Telephone Company was a public utility company, which is now known as Hawaiian Telephone Company. Big Five firms were five Caucasian sugar factors which controlled the economy in Hawaii.

Defense counsel interposed a corroboration and an alibi defense on behalf of the accused at trial. They argued that Thalia's uncorroborated testimony could not sustain a conviction for rape under the statute in effect at the time.[17] They also introduced evidence to prove that the defendants were nowhere near the scene at the time of the alleged rape.

The results of the Pinkerton investigation substantiated the defendants' testimony. The Pinkerton Report stated with regard to the first defense:

> [I]t is impossible to escape the conviction that the kidnaping and assault was not caused by those accused, with the attendant circumstances alleged by Mrs. Massie. We can only assume that the reason Mrs. Massie did not give to the authorities, immediately after the alleged offense, the same details of information she was able to furnish by her testimony at the trial is because she did not possess it at the time she was questioned by those she came in contact with immediately after the alleged offense.[18]

The Pinkerton Report evaluated the second defense as follows:

> Our investigation embraced a careful examination into the alibi of the accused and we failed to discover any important circumstances disproving in any manner any portion of the statements which they had made immediately upon their arrest, their examination by the police and prosecution subsequently and their testimony at the trial. In other words, the movements of the accused on the night of the alleged assault remain presisely [sic] as they were originally accounted for.[19]

The case was submitted to the jury on December 2, 1931. It ended in a mistrial on December 6, 1931, when the jury was unable to reach a verdict after deliberating for four days.[20]

Criticism of the mistrial was widespread and bitter. The Navy Subcommittee of the United States House of Representatives accused Judge Steadman of delivering to the jury thinly veiled instructions to acquit the defendants.[21] Presumably, that charge had reference to a number of jury instructions which stated that the defendants should not be found guilty without proof of their guilt beyond a reasonable doubt.

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[17] REV. LAWS HAWAII § 4156 (1925). The statute provided: "Evidence. The female upon whom rape is alleged to have been committed . . . is a competent witness in a prosecution for the rape . . . but no person shall be convicted of rape . . . upon the mere testimony of the female uncorroborated by other evidence direct or circumstantial."

[18] PINKERTON REPORT, *supra* note 9, at 3.

[19] *Id.* at 5.

[20] A press conference with the jurors in the Ala Moana case revealed that the jurors were split down the middle of the first ballot, six for conviction and six for acquittal. The biggest spread in the ballots was seven to five and over one hundred ballots were taken before Judge Steadman declared a mistrial. Honolulu Star-Bulletin, Dec. 7, 1931, at 1, col. 1.

[21] JUDD, *supra* note 5, at 190.

Admiral Stirling, however, attributed the mistrial to the bias of the jury. He stated:

> I was informed reliably that the vote of the jury began and remained to the end, seven for not guilty and five for guilty, the exact proportion of yellow and brown to whites on the jury. . . . In Hawaii the majority of every jury will be Asiatic or mixed blood with a sprinkling of Hawaiians and whites. Ordinarily, civil justice can be obtained. In this extra-ordinary case the emotion of the races had been aroused to a pitch where sympathies were in favor of the accused men. Conviction thus was impossible.[22]

Admiral Stirling's evaluation of the jurors in the Ala Moana case conflicted with the findings in the Richardson Report:

> The jury panel which tried the Ala Moana rape case was thoroughly investigated and found to be fair-minded, of intelligence, honest, and utterly lacking in any trace of racial bias. The deliberation of the jury after the case was submitted to it consumed 96 hours. . . . During all of that time, though the argument was heated, it was sincere, and members of the panel indicated the possession of an open mind sufficiently that the vote changed materially up until the last few hours. This jury consisted, with one exception, of men of mixed and oriental blood, and was an unusual jury in that there were on it so few men of white blood. . . . [I]nvestigation of the jury panel which tried the case disclosed that the members of it who were of mixed and oriental blood for the most part voted to convict the defendants and the only white man on the jury voted to acquit.[23]

The Navy hierarchy in the nation's capitol shared Admiral Stirling's conviction that the mistrial was a travesty of justice. Admiral William Pratt, Chief of Naval Operations, sent a letter to the Navy Department stating: "American men will not stand for the violation of their women under any circumstance. For this crime, they have taken the matter into their own hands repeatedly when they have felt that the law has failed to do justice."[24]

Upon receiving a copy of Admiral Pratt's letter from Victor Houston, Hawaii's Delegate to Congress, Governor Judd exclaimed to his military aide: "This is getting repetitious. Is this supposed to be justification of lynch law?"[25]

The outcry over the mistrial was not confined to the military. The General Assembly of Kentucky, the Massies' home state, adopted a resolution calling upon President Hoover to use the power vested in him as Commander in Chief of the United States Army and Navy to demand the

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[22] STIRLING, *supra* note 6, at 250-51.

[23] RICHARDSON REPORT, *supra* note 8, at 117.

[24] JUDD, *supra* note 5, at 186.

[25] *Id.*

conviction of five Hawaiians for the attack upon Thalia, and "[i]f such a result cannot be obtained that the President declare Martial Law in Honolulu until such time as Hawaii can be made safe for women, especially the wives of our men of the Army and Navy, who not of their own volition are stationed in Honolulu. . . ."[26]

Pending retrial of the case, the defendants were released on bail. That situation disturbed Admiral Stirling who demanded of Governor Judd that the defendants be incarcerated. Governor Judd's response was that it could not be done under the existing statute.[27] Admiral Stirling reacted by stating: "Knowing the five accused men were as free as air, I had half expected, in spite of discipline, to hear any day that one or more had been found swinging from trees by the neck in Nuuanu Valley or the Pali."[28] That expectation almost became a reality six days after the mistrial.

On the evening of December 12, 1931, a group of white men, dressed in civilian clothes and riding in four automobiles, forced Ida into an automobile as he came out of a bar in Honolulu. They drove him to the Kaneohe slope of the Pali[29] where they stripped him of his clothing and beat him until he appeared to be unconscious. After the assailants departed, Ida roused himself, obtained a ride from a passing motorist and reported the incident to the Kaneohe police station.

Although Ida was unable to identify his assailants, Admiral Stirling suspected that the assailants were Navy personnel. He stated: "The civil authorities tried to prove that Navy men were involved, without success, but I believe they had been. It was said that confession was the object of Ida's seizure and that one had been obtained."[30]

On January 8, 1932, what Admiral Pratt stated American men would do to protect their women materialized in the Massie-Fortescue case.

The Massie-Fortescue case concerned the killing of Kahahawai. While questions remain as to the circumstances surrounding the killing, the following facts are known: On the morning of January 8, Thomas, Thalia's mother, Grace Fortescue and Albert Jones, a navy enlisted man, went to the Judiciary Building in two automobiles. As Kahahawai came out of the building after reporting to a probation officer, Thomas induced him to enter the back seat of one automobile by showing him a counterfeit sum-

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[26] Reprinted in HOUSE JOURNAL, 16th Terr. Leg. Sp. Sess. 71 (1932).

[27] REV. LAWS HAWAII § 3978 (1925). The statute provided: "**For what offenses.** Persons charged with criminal offenses, shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident or the presumption great." Under REV. LAWS HAWAII § 4147 (1925), rape was not a capital offense, inasmuch as that section provided: "**Rape; punishment.** Whoever commits rape . . . shall be punished by a fine not exceeding one thousand dollars, and imprisonment at hard labor for life or any number of years."

[28] STIRLING, *supra* note 6, at 253.

[29] The Pali is a well-known cliff dividing the island of Oahu from east to west. Kaneohe is located on the opposite side of the Pali from Honolulu.

[30] STIRLING, *supra* note 6, at 253.

mons. Jones then entered the back seat and Thomas drove the automobile away, with Grace following him in the other automobile. Thomas and Grace drove to a cottage which Grace had rented when she came to Honolulu. Waiting at the cottage was Edward Lord, another navy enlisted man. Later in the morning police officers observed an automobile on Waialae Avenue speeding toward Koko Head. Upon overtaking and stopping the automobile, they discovered Thomas, Grace, Lord, and the dead body of Kahahawai.

Thomas, Grace, Lord and Jones were arrested by the police and, pending action by the grand jury, were held in the custody of the United States Navy under an arrangement approved by Judge Albert Cristy,[31] who had the criminal calendar of the First Circuit Court for the year of 1932.

Deputy City and County Attorney Wight began presenting the case to the grand jury on the afternoon of Thursday, January 21, 1932 and completed his presentation on the following morning. The grand jury was asked to bring indictments for first degree murder, second degree murder and kidnaping.

Nineteen members of that grand jury had Caucasian names, one had a Hawaiian name and one had a Chinese name. After deliberating for 90 minutes the jury foreman reported to Judge Cristy that the grand jury would take no action on the matter. Judge Cristy, greatly disturbed by the report, went into the grand jury room and addressed the grand jury as follows:

> If a crime has been committed and the identity of the criminals known—that is criminals in the sense of the technical provisions of the law, and the Grand Jury for reasons refused under their oath to present an indictment therefor, I present to you the question of anarchy in this community. Are you willing to take responsibilities for that situation? You know our racial structure. Whether that is involved in any particular case and in the particular case before you is for your consideration, and not mine. . . . If there is any juror who cannot conscientiously carry out his oath of office, he should resign immediately from the Grand Jury. It is one that I do not relish any more than you do. I will ask the Grand Jury to stand adjourned until Tuesday morning at ten o'clock and return for further consideration upon the matters presented to you.[32]

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[31] Judge Cristy was a native of Ohio. He was originally appointed as judge of the First Circuit Court by President Coolidge on October 29, 1926. At the time of the Massie-Fortescue case, he was serving his second term as judge under appointment by President Hoover. Later, he was appointed to his third, fourth and fifth terms by President Roosevelt. On March 5, 1949, he was appointed associate justice of the Supreme Court of the Territory of Hawaii by President Truman. MEN OF HAWAII, *supra* note 11, at 156. Unfortunately, he died on July 11, 1949, only four months after his appointment to the Supreme Court. He was the type of judge any person who sought justice according to law, and not justice according to race, would have liked to have preside over his case.

[32] Territory v. Massie, Crim. No. 11891 (1st Cir. Ct. Hawaii 1932) (grand jury proceedings

On Tuesday morning, January 26, Judge Cristy again appeared before the grand jurors and admonished them, as representatives of the government and the community, to lay aside all racial prejudice and apply themselves coolly and impartially to the question before them.[33] Later that day the grand jury returned an indictment for murder in the second degree as to each defendant.

After the grand jury action, the defendants obtained the services of Clarence Darrow, who was then seventy-five years old and in the twilight of his career. Darrow hired Robert Leisure as his associate. Leisure, a thirty-two year old New York attorney, had already served for three years as chief of the criminal division of the office of the United States District Attorney of the Southern District of New York. Pending the arrival of Darrow and Leisure, the defendants' local attorney, Frank Thompson, assigned his young associate, Montgomery Winn, to attend to preliminary matters.

On January 27, 1932, the day after the grand jury action, Winn filed a motion to quash the indictments on the ground that they were the products of coercion. Denying the motion, Judge Cristy stated: "[T]his Court at all times left open and free to the Grand Jurors of this Territory . . . the credibility of witnesses, the weight to be given to their testimony, and the sufficiency of evidence. . . . The errors of law are the errors of the Court and the remedies are provided by proper appeals and writs of error."[34]

Winn's next move was to file a motion for disqualification of Judge Cristy under Act 292 of the Session Laws of Hawaii 1931, relating to disqualification of judges for prejudice or bias. After discussing the statute invoked in the motion in a thirteen-page memorandum, Judge Cristy withdrew from the case. In doing so, he stated: "[T]echnicalities have gone far enough. A fair and impartial trial of the real issues can in the instant case be adequately provided by resolving all doubts in favor of Defendants as to the application of Act 292 . . . ."[35] He then transferred the case to Judge Charles Davis, who presided over the trial with a firm hand.

Judge Davis was just as capable and just as fair as Judge Cristy. However, there was an irony in the withdrawal of Judge Cristy from the case and its assignment to Judge Davis. In private life, Judge Davis may not have been the kind of man with whom Admiral Stirling would have been comfortable. Admiral Stirling had stated in a letter to Richardson, in which he advocated a commission form of government in Hawaii, that: "Present governmental control should be by men primarily of the Caucasian race . . . by men who are not imbued too deeply with the peculiar

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at 67-68).

[33] *Id.* at 69-76.

[34] *Id.* at 36.

[35] *Id.* at 106.

atmosphere of the islands . . . by men without preconceived ideas of the value and success of the melting-pot."[36] The irony was that Judge Davis' wife was one-half Hawaiian, one-quarter English and one-quarter Irish. Despite Admiral Stirling's racial views, I have not seen a word of criticism of Judge Davis in the Admiral's memoirs. Perhaps he did not know that Judge Davis was married to a part-Hawaiian.

Selection of the jury in the Massie-Fortescue case began on April 4, 1932, after the arrival of Darrow and Leisure, and was completed on April 7, 1932.

For the prosecution, John Kelley[37] conducted the jury selection, as well as the trial, with the assistance of Barry Ulrich,[38] whom he had retained as special prosecutor. Kelley and Ulrich were acknowledged to be two of the leading trial attorneys in Hawaii at that time.

The jury which was finally selected consisted of six Caucasians, one Portuguese, three Caucasian-Hawaiians, and two Chinese. The Caucasian jurors were: John Stone, assistant secretary of Castle & Cooke, who was elected foreman; Olaf Sorensen, assistant department manager of Oahu Railway & Land Company; Theodore Bush, engineer of the Bishop Estate; Charles Strohlin, pump manager of Oahu Sugar Company; Shadford Waterhouse, teller of Bishop National Bank, son of George Waterhouse, vice-president of the bank, and nephew of John Waterhouse, president of Alexander & Baldwin; and Willy Beyer, independent caterer and potato chip manufacturer. One of the Chinese jurors was Theodore Char, a graduate of the University of Illinois and a certified public accountant.[39]

Judge Davis characterized the jury as an excellent one, and it was. In his memoirs, Darrow noted that: "Most of the men in the jury box were intelligent; for scholarship and native ability they would compare very favorably with a jury gathered in the United States."[40]

The trial began on April 11, 1932. Darrow called Thomas to the stand and Thomas assumed responsibility for killing Kahahawai. Thomas stated that, when Kahahawai admitted raping Thalia, he blacked out and

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[36] RICHARDSON REPORT, *supra* note 8, at 199.

[37] Kelley was a native of Butte, Montana, and the brother of Cornelius Kelley, president of Anaconda Copper Company and one of the leading industrial figures in the United States. He came to Hawaii in 1921. Kelley had been appointed as public prosecutor of the City and County of Honolulu on February 10, 1932, by Mayor Fred Wright under a new statute which became effective on the previous day. See Act of Feb. 9, 1932, No. 13, 1932 Sess. Laws 18-21 (creating the office of the Public Prosecutor for the City and County of Honolulu). At the time of his appointment he was a partner of William Heen, who had defended Ahakuelo and Chang in the Ala Moana case.

[38] Ulrich was a native of Chicago. He received his law degree from Harvard Law School in 1913. After graduating, he worked for Pillsbury, Madison, and Sutro, which was then, and is now, one of the leading law firms in San Francisco. Later he was associated with John Neylan, a well-known San Francisco attorney. He came to Hawaii in 1925.

[39] POLK-HUSTED'S DIRECTORY OF THE CITY AND COUNTY OF HONOLULU AND THE TERRITORY OF HAWAII (1930-31).

[40] DARROW, *supra* note 7, at 472.

pulled the trigger which released the fatal bullet.[41]

For the defense, Darrow brought in two psychiatrists from the mainland United States. One of the psychiatrists testified, in language which was difficult for the jurors to understand, that when Thomas heard Kahahawai say, "Yes, we done it," Thomas became temporarily insane. In a classic cross-examination Ulrich produced a book written by the psychiatrist and asked him to turn to a certain page and read a certain paragraph. The contents of the paragraph were entirely contrary to the psychiatrist's prior testimony; thus, his credibility was rendered questionable.[42]

At the trial Darrow also argued the "unwritten law." The nature of this defense is explained in Darrow's memoirs as follows:

> Of course, all of the attorneys for the prosecution, and those for the defense, as well as the judge, knew that legally my clients were guilty of murder. Yet, on the island, and across the seas, and around the earth, men and women were hoping and praying and working for the release and vindication of the defendants. As in similar cases, everyone was talking about the unwritten law. While this could not be found in the statutes, it was indelibly written in the feelings and thoughts of people in general. Which would triumph, the written or unwritten law, depended upon many things which in this case demanded the most careful consideration.[43]

In connection with that defense, Darrow called Thalia as a witness and had her essentially repeat the testimony which she had given in the Ala Moana case.

This phase of the trial ended with a very dramatic incident. After Darrow concluded the direct examination of Thalia, Kelley began his cross-examination by asking Thalia whether she had testified that her husband was kind and considerate to her and that they had no quarrels. Upon Thalia answering in the affirmative, Kelley produced a document and asked her whether the signature on the document was in her handwriting.

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[41] Admiral Stirling preferred to believe that Grace had done the killing. He wrote:

> When the mother heard the Hawaiian's confession, spoken, as it was testified, in a spirit of bravado, instead of everything going black around *her*, I believe she would see all the more clearly, not a human being, but a scorpion or a centipede to be exterminated. Does it not seem logical that a loyal mother would long have hoped for the moment? The confessed ravisher of her baby standing arrogantly before her. Would our world blame a mother if she had failed to resist the temptations to deal out a deserved punishment which the courts have been impotent to give?

STIRLING, *supra* note 6, at 264.

[42] This account has not been written in any literature on the case which I have read, and I was not certain about the accuracy of my recollection. Fortunately, I located Judge Davis' clerk, Milnor Wond, with whom I had not spoken for well-nigh twenty years, and I asked him about the matter. He said I was correct in my recollection; that the name of the psychiatrist was Dr. Edward Williams; and that Ulrich had read the book on the previous night to prepare for the cross-examination.

[43] DARROW, *supra* note 7, at 468.

What ensued is described by Darrow:

> All of Mr. Massie's counsel knew what the document was. Several months before the assault, or the trial of other assailants, she had taken a course at the University of Honolulu [sic]; in this course the students were asked to psychoanalyze themselves in writing. Mrs. Massie prepared her story and gave it to the professor. She answered the questions honestly and clearly. The students had been told that the communications would be treated in absolute confidence. I never knew, or asked, what was on the paper. We never expected to meet it in court. . . . Mrs. Massie read the paper in her hand, and in answer to the question told the attorney general [sic] that it was a privileged communication, at the same time proceeding to tear it to ribbons and then to little bits so that it could not possibly be put together . . . . Neither lawyers nor judge said anything whatever; they seemed too dazed to utter a sound. Mrs. Massie walked away from the witness-chair to where her husband sat at the side of the other defendants, slipped her arm about his neck and wept aloud on his shoulder most pitifully. Many others in the courtroom had to resort to their handkerchiefs. Everyone seemed to be on her side; they felt that it was an outrage that a matter of this nature should be dragged forth in court, and all admired and approved her courage in tearing up the paper beyond further use.[44]

As a matter of fact, when Thalia began tearing up the paper, Kelley said, "Thank you, Mrs. Massie. You appear in your true colors at last."[45] When the society ladies in the courtroom stood up and applauded Thalia's action, Judge Davis pounded his gavel, and admonished those who were applauding that there should be no further demonstration in the courtroom, and, if there should be, the courtroom would be cleared.

Ulrich opened the ensuing summation for the prosecution by stating:

> [Y]ou cannot make Hawaii safe against rape by licensing murder. You cannot use a plea of insanity as a peg on which to hang this verdict! You jurors—the judge of this court—the people of Hawaii, all of us, are on trial. We have been charged with not being able to govern ourselves. You twelve people have the responsibility of answering that charge. Will you vote for the irresponsible acts of 'lynch law'. . . or will you vote for law and order?" . . . "[Y]ou will be told by the court that no man may take the law into his own hands . . . that no amount of prior suffering caused by another can justify taking the life of the man who caused it. It is your duty to reach a verdict on the facts—not to estimate the worth of the law.[46]

In their summations, Darrow and Leisure dwelled principally on the unwritten law and did not press any claim of temporary insanity.[47]

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[44] *Id.* at 474.
[45] JUDD, *supra* note 5, at 198.
[46] T. WRIGHT, RAPE IN PARADISE 255 (1966).
[47] *Id.* at 257-65.

In rebuttal for the prosecution, Kelley reviewed the testimonies and ended by stating:

> Are you going to give Lieutenant Massie leave to walk out? They'll make him an admiral. They'll make him chief of staff. He and Admiral Pratt are of the same mind. They believe in lynch law . . . . As long as the American flag flies on that staff without an admiral's pennant over it, you must regard the Constitution and the law . . . . Do your duty, uninfluenced by sympathy, by influences of admirals. As Smedley Butler put it, 'To hell with the admirals.'[48]

The case was submitted to the jury at 5:00 p.m. on Wednesday, April 27, 1932, and the jury returned a verdict of manslaughter with recommendation for leniency as to each defendant at 5:30 p.m. on Friday, April 29, 1932.

Darrow stated that he and the defendants were surprised with the verdict and "could hardly believe we had heard aright."[49] He wrote:

> The law was on the side of the State; life, and all the human qualities that preserve it, was with us. All we could do was to dramatize it as best we could . . . . But Judge Davis had told the jury in a dozen different ways that they must not be human; the law allowed them to think, but did not allow them to feel, in spite of the fact that they were born to feel . . . .[50]

Darrow explained the outcome as follows:

> I feel that I know why and how the jury found the verdict. A jury of white men would have acquitted. This in no way prejudices me against the brown section of Hawaii; they feel that the white men get everything but a few offices. This feeling . . . comes from the obvious fact that the whites have most of the land and money . . . . Our clients were white, and a white jury no doubt would have acquitted them almost without argument; and I think it should have been done so. At that, I believe that the brown members wanted to be fair; there were Chinamen in the jury box, and Japanese, and Hawaiian and mixed bloods; it was not easy to guess what they were thinking about, if anything at all. Obviously, they do not think as we do, about our side of a situation. And it must be remembered that the judge instructed them so positively that it left little leeway.[51]

There was little merit to Darrow's statement. Six of the jurors were white men. Only one negative vote would have hung the jury. There were neither Hawaiians nor Japanese on the jury.

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[48] JUDD, *supra* note 5, at 199. Smedley Butler was an outspoken marine general who was critical of the Navy hierarchy.

[49] DARROW, *supra* note 7, at 477.

[50] *Id.* at 476.

[51] *Id.* at 479.

After the trial, Theodore Char, one of the jurors in the case, stated to the press that the jurors did not take race into consideration. Some jurors did not give weight to the testimonies of the alienists, others did not believe that Thomas testified honestly or that he did the killing. As to the verdict, Char stated that at the outset the jurors were divided on second degree murder, with seven jurors voting for conviction and five voting for acquittal. The votes of the Caucasian jurors were split. Consideration was then given to manslaughter, and after much deliberation, the votes on manslaughter were divided ten for conviction and two for acquittal. Finally, the jurors who had consistently voted for acquittal changed their votes, and the votes for a conviction for manslaughter became unanimous.[52]

Immediately after the verdict was announced, Governor Judd began receiving telegrams from high sources in Washington, D.C., urging him to pardon the convicted defendants.

Typical of such telegrams was one jointly sent by Henry Rainey, majority leader of the House of Representatives, and B. H. Snell, minority leader, which read: "We, as members of Congress deeply concerned with the welfare of Hawaii, believe that the prompt and unconditional pardon of Lieutenant Massie and his associates will serve that welfare and the ends of substantial justice. We, therefore, most earnestly urge that such pardon be granted."[53]

Governor Judd also received another telegram with identical wording, sent by 103 members of the House of Representatives, of whom 71 were Democrats and 32 were Republicans.[54]

The Governor interpreted the reference to "the welfare of Hawaii" as a veiled threat to future self-government in Hawaii unless he pardoned the four defendants.[55] He discussed the matter with three close friends. They were Frank Atherton, president of Castle & Cooke; John Waterhouse, president of Alexander & Baldwin; and Clarence Cooke, president of Bank of Hawaii. Atherton recommended full pardons for the four defendants. Waterhouse and Cooke were firmly opposed.[56]

I may be wrong, but my guess is that behind the position taken by Clarence Cooke in the matter were Judge Steadman and Harold Kay, Cooke's sons-in-law. Steadman had resigned as judge after the Ala Moana case and was serving as vice-president and manager of Cooke Trust Company, a fiduciary company organized by the Cooke family, of which Clarence Cooke was president. Harold Kay was Assistant Attorney General of the Territory of Hawaii and had been assigned to monitor the Massie-

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[52] Y. SOGA, MY FIFTY YEARS MEMOIRS IN HAWAII 975-90 (1953) (printed in Japanese; cited material translated by M. Marumoto).

[53] JUDD, *supra* note 5, at 201.

[54] *Id.* at 201.

[55] *Id.*

[56] *Id.* at 200.

Fortescue case by Attorney General Hewitt. As for John Waterhouse, he was the uncle of Shadford Waterhouse who was a juror in the case and who had voted to convict the defendants for manslaughter.

On May 4, 1932, Judge Davis adjudged Massie, Grace, Lord and Jones guilty of manslaughter, pursuant to the jury verdicts, and sentenced each of them to imprisonment for ten years. Then the defendants were taken to the Governor's office, where their sentences were commuted to one hour.[57]

The action of the Governor did not please anyone, even the Governor himself. The Governor wrote in his autobiography:

> I have [not] admitted to anyone . . . until now, the full extent of my feeling of personal guilt in granting commutation in the face of threats by scores of congressmen and assorted public officials and newspaper publishers from coast to coast. I felt that I should scrub my hands afterwards, even though the jury had recommended leniency.[58]

Yet, at the time Governor Judd commuted the sentences, he really did not have any choice. The future of self-government in Hawaii was at stake, as public officials pressured the Governor to grant pardons. Among those who urged the Governor to pardon the defendants was Secretary of the Navy Charles Francis Adams, a direct descendant of John Adams, second president of the United States, and John Quincy Adams, sixth president of the United States.

According to Governor Judd, after the Massie-Fortescue case was concluded, he went to Washington, D.C., and called on Secretary of the Interior Ray Lyman Wilbur, who suggested that he call on Secretary Adams.[59]

The Governor complied with that suggestion, and when he called on Secretary Adams, the Secretary stated:

> Governor . . . there is one thing you can do now to help put the nation back into a state of sanity, so far as Hawaiian matters are concerned. You can pardon the defendants in the Massie case, all four of them. A commutation of sentence leaves them under a cloud, without civil rights. You know there's bitterness toward Hawaii all over the country. Congress is flooded with letters . . . . There's strong sentiment in Congress right now in favor of making Hawaii a mere military outpost. That could be done by changing the Organic Act, which Congress has the power to do. Influential senators are ready to lead such a movement today. If you were to issue pardons to all concerned I believe the clamor might die down. Do consider it.[60]

When Governor Judd left Secretary Adams, he stated he would con-

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[57] *Id.* at 204.
[58] *Id.* at 203.
[59] *Id.* at 207.
[60] *Id.* at 209-10. *See* Organic Act, ch. 339, 31 Stat. 141 (2 Supp. Rev. Stat. 1141) (1900).

sider pardoning the defendants. He then retraced his steps to Secretary Wilbur's office and reported to Wilbur his conversation with Adams. Secretary Wilbur told the Governor not to do anything one way or the other until the Governor heard from him. Later in the afternoon, when the Governor again called on Secretary Wilbur, the Secretary stated: "Sit tight. Follow your own convictions."[61]

With regard to the foregoing statement of Secretary Wilbur, Governor Judd wrote: "I can't prove it, but I believe he checked the matter with President Hoover, certainly a great President. He did not, however, confide in me, and this is pure speculation on my part."[62]

Upon his return to Hawaii, Governor Judd sent a telegram to Secretary Wilbur asking him to inform Secretary Adams that, with regret, he could not pardon the defendants in the Massie-Fortescue case.

Just before President Hoover left office, Governor Judd had a conversation with the President in which the President stated: "You handled the Massie case to my entire satisfaction."[63] According to the Governor, that statement touched him so deeply that it remained indelibly in his memory.

The meaning of Governor Judd's refusal to pardon the defendants in the Massie-Fortescue case is clearly set forth in the letter of Harry Hewitt, Attorney General in Governor Judd's cabinet, to Mrs. Arthur Watkins, secretary of the education division of the National Congress of Parents and Teachers. Her letter had commended the Attorney General for the stiff sentences which were imposed upon the defendants but denounced the Governor for commuting the sentences. In his letter, Hewitt wrote:

> My Dear Madam: I am in receipt of your letter of the 12th instant relating to the Massie Case and would point out, first, that I am not deserving of your praise for the sentence imposed upon these defendants, inasmuch as the same was by law imposed by the Honorable Charles S. Davis, Judge of the First Circuit Court of the Territory, and second, that the Governor does not deserve the censure noted in your letter, inasmuch as he never pardoned the defendants for the offense committed.
>
> His action was that of commutation, which expiates the penal servitude the law imposed but in no sense condones or countenances the crime committed.
>
> As you undoubtedly know this was the first instance of lynch law in the history of the Territory and everybody connected with the prosecution was fighting desperately for a principle, that principle being that lynch law would not be countenanced nor become a part of our procedure in Hawaii.
>
> Fortunately, the jury refused the appeals of defense counsel to violate their oaths as jurors and did conscientiously establish the principle sought.

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[61] JUDD, *supra* note 5, at 210.

[62] *Id.*

[63] *Id.* at 216.

> The defendants still stand guilty of their crime and all who might have a proclivity to take the law into their own hands stand forewarned of the attitude of our prosecuting machinery and our juries.
>
> I trust that you will perceive that under the circumstances the Governor's action has done nothing to undermine the superb result of the jury's verdict.
>
> Respectfully, H.R. Hewitt, Attorney General[64]

The commutation of the sentences imposed upon the defendants terminated the Massie-Fortescue case. The surviving defendants in the Ala Moana case were never retried because Thalia left Hawaii for the mainland United States with her husband and mother on May 8, 1932. Thus, the prosecution had no complaining witness.

This concluded two of the most famous trials in Hawaii. The Ala Moana and Massie-Fortescue trials whipped racial and social tensions to a furor in the Territory of Hawaii. Both prosecutions were conducted in a climate ill-suited to fair and impartial deliberation, yet the juries resisted external pressures to resort to lynch law or to apply the "unwritten law." Despite the fact that many of the jurors were employed by firms that had a stake in placating the military forces, they faithfully discharged their duties to conform their verdicts to the law as delivered by the court, rather than as dictated by public opinion.

Governor Judd's subsequent commutation of the sentences of the Massie-Fortescue defendants to one hour was a regrettable but pragmatic political decision rendered in response to threats to the Territory's autonomy.

In the Ala Moana case and the Massie-Fortescue case, the judicial system in a young Territory far removed from the nation's capitol operated strictly in accordance with the mandate of Congress as expressed in the Organic Act which provided that "the Constitution . . . of the United States . . . shall have the same force and effect within the said Territory as elsewhere in the United States."[65] To its everlasting credit, the judicial system in Hawaii did not deviate from that mandate, despite pressure from higher authorities to do so.

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[64] *Id.* at 210-11.

[65] Organic Act, ch. 339, § 5, 31 Stat. 141-42 (2 Supp. Rev. Stat. 1141) (1900) (followed by Act of March 18, 1959, Pub. L. 86-3, 73 Stat. 4 (1959)).

AWARD OF ATTORNEYS' FEES BY THE FEDERAL DISTRICT COURT OF HAWAII: A MISUSE OF DISCRETION?

I. INTRODUCTION

Federal court decisions on attorneys' fees have been criticized for producing unfair results, lacking consistent and predictable analytical approaches and failing to adequately compensate attorneys. These shortcomings complicate appellate review and thwart Congress' intention of promoting enforcement of the constitutional and statutory rights of private citizens. Despite the barrage of criticism from commentators[1] and the courts themselves,[2] no national consensus has emerged among the federal courts for a standard approach to determining awards of reasonable attorneys' fees.[3]

One commentator has characterized the current confused state of the law as follows:

> [T]here are nearly as many approaches to the issue as there are judges . . . . As a result, many lower courts have confronted the problem with little or no analysis . . . . To a great extent the outcome of these cases depended upon "the roll of the dice" - from court to court and from case to case.[4]

The basic premise of this Comment is that the viability of public interest law[5] is dependent upon the incentive provided by the award of attorneys' fees by the courts. Without the assurance of adequate compensa-

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[1] *See generally* Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. PA. L. REV. 281 (1977); Note, *Promoting The Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346 (1980); Survey, *Flexibility and Fairness—Sixth Circuit Jurisprudence Under the Civil Rights Attorney's Fees Awards Acts*, 12 U. TOLEDO L. REV. 623 (1981). For a recent and comprehensive survey of the law on federal statutory fee awards, *see* E.R. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES (1982).

[2] *See generally* text *infra* Parts II(B) and III(B).

[3] *See infra* Part II.C.

[4] Berger, *supra* note 1, at 284.

[5] Public interest laws may be defined as those that protect important individual and societal rights by providing indigents access to the judicial system to vindicate those rights. *See*, Aronson, *Attorney-Client Fee Adjustments: Regulation and Review*, 68 A.B.A. J. 284, 287 (Mar. 1982).

tion, few private attorneys or public interest law firms would be willing or financially able to represent indigent clients. As a result, many such rights protected by statute would not be extended to the poor.

This Comment analyzes the attorneys' fees decisions made by the Federal District Court of Hawaii [hereinafter referred to as "Hawaii District Court"]. It examines the validity of the criticisms enumerated above, explores the attitudes and concerns reflected in the Hawaii District Court decisions, and highlights the need for the Hawaii District Court to adopt a more objective approach and give greater consideration to the underlying statutory purposes of fee awards mandated by Congress.

Part II provides a brief history of court-awarded attorneys' fees, recites some of the major criticisms aimed at federal courts' fee decisions, and reviews the primary methods used by federal circuits to calculate fees. Part III presents a comparative analysis of five Hawaii District Court fee decisions to demonstrate their *ad hoc* approach, subjectivity and disregard of the legislative intent underlying statutory fee awards.

II. BACKGROUND

A. Historical Development

Until the eleventh century, at English common law, parties to a suit bore their own litigation costs. In 1275, however, the Statute of Gloucester authorized English courts to award attorneys' fees to successful plaintiffs.[6] By the early 1600's, statutes had been enacted allowing awards to successful defendants as well.[7] By 1875, with a few exceptions, "costs of and incident to all proceedings in the High Court" were left to the discretion of the Court.[8] The determination of an award was left to a special "taxing Master" and fees includable in the award were fixed by law.[9] This system was implemented to discourage plaintiffs from litigating a meritless claim on the chance that their opponents would settle out of court rather than incur the expenses of trial.

1. The "American Rule" and Its Exceptions

Although statutory provisions similar to those in England sanctioned awards of attorneys' fees in the first few years of the federal court system, they had all been repealed by 1800. Thus, the American Rule stands for

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[6] Goodhart, *Costs*, 38 YALE L.J. 849 (1929). *See also* Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) for a summarized history of court awarded attorneys' fees.

[7] Goodhart, *supra* note 6, at 853.

[8] *Id.* at 854.

[9] *Id.* at 854-55.

the proposition that, absent statutory or contractual provisions to the contrary, prevailing litigants are generally not entitled to have their attorneys' fees paid by the losing party.[10] Instead, fees are negotiated privately between attorney and client. However, courts have mustered their equitable powers to carve exceptions when the interests of justice demanded. Fund or property trustees are generally allowed to recover their costs, including attorneys' fees from the fund itself.[11] Courts have assessed fees as a punitive measure where a party willfully disobeyed a court order[12] or where the losing party has acted in bad faith or with improper motives.[13]

Aside from these judicially created exceptions, the major basis for deviation from the American Rule has been Congressional enactment of fee-shifting statutes.[14] Over the years, Congress has enacted nearly a hundred statutes[15] which have included provisions enabling courts to tax the prevailing party's fees to the losing party.

2. *The Statutory Remedy*

Prior to the Supreme Court's landmark decision in *Alyeska Pipeline Service Co. v. Wilderness Society*,[16] federal courts awarded attorneys' fees under their equitable powers by liberally construing the common benefit doctrine to include civil rights class actions "where the prevailing private plaintiffs, acting as 'private attorneys general,'[17] conferred a com-

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[10] *Alyeska, supra* note 6, at 247.

[11] Trustees v. Greenough, 105 U.S. 527 (1882); United States v. Equitable Trust Co., 283 U.S. 738 (1931); *see also* Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Hall v. Cole, 412 U.S. 1 (1973).

[12] Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923).

[13] Vaughn v. Atkinson, 369 U.S. 527 (1962); F.D. Rich Co., Inc. v. United States *ex rel.* Industrial Lumber Co., Inc., 417 U.S. 116 (1974).

[14] Larson, *supra* note 1, at 1. Fee-shifting statutes are provisions allowing the costs of attorneys' fees to be shifted to the losing party in a suit. Such provisions are part of statutes addressing substantive issues (civil rights, environmental protection, anti-trust, to name a few of the more well-known subjects).

[15] *Id.* at 323-27 for a compilation of fee-shifting federal statutes.

[16] 421 U.S. 240 (1975). Environmental groups seeking to enjoin the issuance of permits for the construction of an oil pipeline in Alaska brought the original suit against the Secretary of the Interior. A preliminary injunction was granted, 325 F. Supp. 422 (D.C. 1970), and the State of Alaska and Alyeska Pipeline Service Company intervened. The District Court dissolved the injunctions and the permits issued. The Court of Appeals of the D.C. Circuit reversed. 479 F.2d 842 (1973). The Supreme Court denied certiorari. 411 U.S. 917 (1973). Congress then amended pertinent legislation to allow the construction to begin. The D.C. Circuit awarded attorneys' fees to the environmental groups for functioning as private attorneys general. Alyeska was required to pay as the only private party, the court finding a statutory bar to the United States' paying and finding that it was too great a burden for the State of Alaska to pay. 495 F.2d 1026 (1974). The key fee issue addressed by the Supreme Court in the case was whether the federal courts could use their equitable powers under the common benefit doctrine to award attorneys' fees in noncommercial litigation.

[17] In Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968), plaintiffs brought a

mon benefit upon their class."[18] However, the *Alyeska* Court sharply limited the federal courts' equitable powers to award attorneys' fees in the absence of statutory authority.[19] The Court rejected the lower courts' use of the "private attorney general" concept, holding that it was within the legislature's rather than the court's province to redistribute litigation costs.[20]

Responding to the Supreme Court's invitation in *Alyeska*, Congress promptly enacted the Civil Rights Attorney's Fees Awards Act of 1976 [hereinafter cited as "CRAFAA"][21] to fill gaps and encourage consistency in civil rights laws.[22] The legislative history of the CRAFAA, which is based upon judicial interpretations of other attorneys' fees statutes,[23] has been used extensively by the federal courts to interpret the application of other fee-shifting statutes.[24]

The basic purpose of fee-shifting provisions is to encourage full en-

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class action against drive-in restaurants located near interstate highways for violation of the Civil Rights Act of 1964. The Supreme Court noted that plaintiffs bringing suit in such cases act as "private attorneys general". *Id.* at 402. By doing so they vindicate Congressional policies of the highest priority. *Id.* In granting attorneys' fees to the prevailing plaintiff, the Court held that such plaintiffs should generally recover unless recovery would be unjust. This standard has been uniformally adopted by the courts and is reflected in the U.S. House and Senate Reports accompanying Civil Rights Attorneys' Fees Awards Act of 1976. *See* S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4-5 (1976).

[18] Larson, *supra* note 1, at 4-5.

[19] Berger, *supra* note 1, at 282.

> Since the approach taken by Congress to this issue has been to carve out specific exceptions to the general American rule . . . those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in the particular cases.

Alyeska, 421 U.S. at 269.

[20] *Alyeska* at 271.

[21] Pub. L. No. 94-559 (Oct. 19, 1976) 90 Stat. 2641, amending 42 U.S.C. § 1988, which states in relevant part:

> In any action or proceeding to enforce a provision of §§ 1977, 1978, 1980, and 1981 of the Revised Statutes [§§ 1981, 1982, 1983, 1985 and 1988 of U.S.C. Title 42], Title IX of Public Law 92-318 [Title IX of the Education Amendments of 1972, §§ 1681-1686 of U.S.C. Title 20], or Title VI of the Civil Rights Act of 1964 [§§ 2000d, *et. seq.*, of U.S.C. Title 42], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Larson, *supra* note 1, at 5-6).

[22] S. Rep. No. 1011, 94th Cong., 2d Sess. 1 (1976); *see also* H.R. Rep. No. 1588, 94th Cong., 2d Sess., 1-3 (1976) (quoted in full in Larson, *supra* note 1, at 288 and 314).

[23] Larson, *supra* note 1, at 2. "Congress created a weighty guide for interpreting not only [CRAFAA] but also most of the other fee-shifting statutes as well." *Id.* at 2. For a detailed review of the legislative history of CRAFAA see the House and Senate Reports reproduced in Appendices A and B. *Id.* at 287-321.

[24] *Id.* at 6, n.5.

forcement of the laws to which they are attached through private suits.[25] For example, when Congress passed CRAFAA, the House Committee on the Judiciary noted that a provision for attorneys' fees was necessary because:

> The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees [CRAFAA] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law.[26]

3. *The Prevailing Plaintiff*

Fee-shifting statutes generally authorize fee awards to the prevailing party in litigation who vindicates a constitutional or statutory right. The legislative history of fee-shifting statutes, together with judicial construction, have defined plaintiff eligibility.[27] In addition to authorizing fees for prevailing on the merits, the statutes also warrant fee awards when a suit is terminated by settlement, consent decree, voluntary compliance by defendants, or where the plaintiff prevails on only some of the issues.[28]

Application of fee provisions to prevailing defendants varies among the statutes. While CRAFAA would allow them fees only in cases where plaintiffs acted in bad faith,[29] the Supreme Court has construed Title VII of the Civil Rights Act of 1964[30] more broadly, awarding fees to prevailing defendants where plaintiffs' suits are "frivolous, unreasonable, or groundless, or [where] the plaintiff continue[s] to litigate after it clearly

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[25] Berger, *supra* note 1, at 306.

[26] H.R. REP. No. 1558, 94th Cong., 2d Sess. 1 (1976) (*See* note 22 *supra*). However, CRAFAA

> did more than simply enable the lower courts once again to award fees; rather than being an equitable remedy, flexibly applied in those circumstances which the *court* considers appropriate, it is now a *statutory* remedy, and the courts are obligated to apply the standards and guidelines provided by the legislature in making an award of fees.

Northcross v. Board of Ed. of Memphis City Schools, 611 F.2d 624, 632 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980) (emphasis in original). *See infra*, text accompanying notes 64-68.

[27] Larson, *supra* note 1, at 35-36.

[28] *Id.*

[29] *Id.* at 85-86.

[30] 42 U.S.C. § 2000e-5(k).

be[comes] so."[31]

B. *The State of the Law*

A number of concerns have arisen regarding court-awarded statutory fees. One concern is the apparent unfairness in the substantially higher fees awarded in antitrust cases than those awarded in civil rights or public interest actions.[32] Despite the absence of congressional intent to establish stronger incentives for curbing antitrust violations, the federal courts have given attorneys who represent private antitrust litigants greater financial inducements than their counterparts in civil rights cases.[33]

Another concern is the unpredictability of fee awards that results from *ad hoc* decisions by the district courts. Uncertainty as to whether attorneys will be adequately paid for their work frustrates the legislative intent of encouraging private enforcement of the laws, since attorneys may be less likely to accept such cases and aggrieved parties may be effectively denied access to the court.[34] Another facet of this problem is the excessive time spent by attorneys litigating fee awards.[35] Sometimes more time is spent on fees than on the merits of a case.[36]

A third concern is the lack of objective standards for calculating reasonable attorneys' fees. Some courts have shown apparent displeasure with the work of attorneys by drastically reducing the hours claimed and by slashing the "customary" fee rates.[37] This subjectivity can also be seen in the manner by which some courts pick and choose from a list of often conflicting factors to achieve a desired result.[38]

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[31] Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978).

[32] Berger, *supra* note 1, at 310.

A recent unpublished survey of one hundred forty district court cases involving attorneys' fees illustrates this pattern. While the mean hourly rate awarded by courts under the fee provisions of the private antitrust statutes was $181 in the cases surveyed, the mean hourly rate awarded in the Title VII (employment discrimination) cases surveyed was $40.

Id.

[33] Berger, *supra* note 1, at 312, and note 129.

[I]f private antitrust enforcement is to be given stronger inducements than the enforcement of antidiscrimination statutes, that judgment must come from Congress, not the courts. . . . [C]ivil rights plaintiffs should not be singled out for different and less favorable treatment. H.R. REP. No. 1558, 94th Cong., 2d Sess. 9 (1976).

Id.

[34] *See* Note, *supra* note 1, at 371.

[35] Much litigation dealing solely with the issue of fees has resulted from this uncertainty. Larson, *supra* note 1, at 1.

[36] Berger, *supra* note 1, at 292.

[37] *Id. See infra* Part III(B).

[38] Berger, *supra* note 1, at 294. "While most lawyers will not pull their punches, nor will most courts arbitrarily punish overassertive attorneys or reward favored ones, those suspicions inevitably will undermine the confidence of the bar and the public in the integrity of the judicial fee-setting function." *See* F.D. Rich v. Industrial Lumber Co., 417 U.S. 116, 129

There is no consensus among the federal circuits as to which fee-setting criteria to use or how to apply them.[39] Most of the circuit courts have been content to leave the issue of "reasonable" fee determination to the district courts' discretion.[40] Where no limits have been placed upon their discretion to determine proper awards, many trial judges have made them in a summary fashion without articulating the reasons for the amount awarded.[41]

Additionally, commentators have expressed concern over the courts' exercise of that discretion.[42] One commentator noted that, "[t]he only consistent thread that runs throughout federal court decisions on attorneys' fees is their almost complete inconsistency."[43] The consequences of this confused state of the law are significant and underscore the need for remedial measures.[44]

C. *Methods of Fee Determination*

Several circuits have addressed the problem of lack of uniformity among the methods used by lower courts to calculate fees and have adopted standard approaches in an effort to avoid subjectivity and to minimize award disparities.[45] The Third, Fifth, Sixth and Ninth Circuits' approaches are described herein to provide a framework for the subsequent analysis in Part III(B) of the Hawaii District Court fee decisions.

1. *The Third Circuit*

In *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.* [hereinafter cited as *Lindy I*][46] the Third Circuit adopted what is commonly known as the "lodestar"[47] method of fee computation. A detailed affidavit of hours and customary rates submitted by the pre-

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(1974). *Id.*

[39] "A review of all decisions reported in volume 384-94 of the *Federal Supplement* (1974-1975) reveals that of the twenty-eight reported cases involving a fee determination, thirteen contain absolutely no articulated reason for the amount awarded." Berger, *supra* note 1, at 284.

[40] *See generally* Survey, *supra* note 1, at 654-55.

[41] Berger, *supra* note 1, at 284.

[42] *Id.* at 283-94; Survey, *supra* note 1, at 654-59; Larson, *supra* note 1, at 155-56.

[43] Berger, *supra* note 1, at 292.

[44] Aronson, *supra* note 5, at 287.

[45] *See* Larson, *supra* note 1, at 115-153 for a detailed, circuit-by-circuit analysis of approaches.

[46] 487 F.2d 161 (3d Cir. 1973). *See also* Merola v. Atlantic Richfield Co., 515 F.2d 165 (3d Cir. 1975) [hereinafter cited as "*Merola II*"].

[47] The term "lodestar" refers to the initial step in the fee calculation process developed by the Third Circuit: hours times rates equals the lodestar. Lodestar is defined as a guiding ideal and is derived from the celestial North Star.

vailing party is processed through a three-step procedure to arrive at an award of reasonable attorneys' fees. The first step involves multiplying the number of hours expended by the rate charged to obtain the lodestar or starting point. The court next considers certain contingency factors to "appraise . . . the probability or likelihood of success, viewed at the time of filing suit."[48] Based on the contingencies of the case the court may increase the fee by adding a multiplier or percentage to the lodestar.[49] However, the contingency factors "may not be used to decrease the final fee award."[50] The third and final step is an adjustment made to the lodestar based on three quality factors assessed by the court: "the complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe, and the amount of the recovery obtained."[51] These subjective factors may be used to increase or decrease the lodestar to recognize unusually competent or poor advocacy.[52] The primary flaw of the lodestar method of fee computation lies in the difficulty of quantifying the attorney's overall performance.[53] Although most of the other circuits permit their lower courts to use the lodestar method, only the Second and District of Columbia Circuits have expressly adopted it.[54]

2. *The Fifth Circuit*

The Fifth Circuit announced its approach to fee computation in *Johnson v. Georgia Highway Express, Inc.*[55] The *Johnson* court listed twelve factors that should be considered in determining "reasonable attorneys' fees":

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[48] Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 117 (3d Cir. 1976) (en banc) [hereinafter cited as *Lindy II*]. The court could increase the lodestar fee if supported by the following factors: "1. Analysis of the plaintiff's burden. . . . 2. Risks assumed in developing the case. . . . 3. The delay in receipt of payment for services rendered." *Id.*

[49] Larson, *supra* note 1, at 127.

[50] Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978). "To reduce the fee award in a case where there is a strong likelihood of success makes little sense [for it would] penalize the attorney. . . where the constitutional or statutory violation is clear." Larson, *supra* note 1, at 125 (quoting *Hughes* at 491 (Garth, J., concurring)).

[51] *Lindy I* at 168.

[52] *Id.* Subsequent decisions by the Third Circuit have explained how the quality factors are to be applied. In *Hughes*, the court stated that: "We find no support in *Lindy II* or in *Merola II* for the proposition that the lodestar should be reduced because of the simplicity of the case." *Hughes, supra* note 7, at 487. "[T]he quality of an attorney's work *in general*, is a component of the reasonable hourly rate; this aspect of 'quality' is reflected in the 'lodestar' and should not be utilized to augment or diminish the award under the rubric of 'the quality of an attorney's work' " (emphasis in original). *Lindy II, supra* note 4, at 117.

[53] *See* Note, *supra* note 1, at 373-74.

[54] Larson, *supra* note 1, at 120.

[55] 488 F.2d 714 (5th Cir. 1974). (*Johnson* was a Title VII class action suit on racial discrimination in jobs.) List of factors based on Model Code of Professional Responsibility, (1979) EC 2-18 and DR 2-106(B) (Fees for Legal Services). 488 F.2d at 719.

1) the time and labor required;
2) the novelty and difficulty of the questions;
3) the skill requisite to perform the legal service properly;
4) the preclusion of other employment by the attorney due to acceptance of the case;
5) the customary fee;
6) whether the fee is fixed or contingent;
7) time limitations imposed by the client or the circumstances;
8) the amount involved and the results obtained;
9) the experience, reputation, and ability of the attorneys;
10) the "undesirability" of the case;
11) the nature and length of the professional relationship with the client; and
12) awards in similar cases.[56]

The *Johnson* court held that it was an abuse of discretion not to consider these twelve factors and that a record reflecting this consideration was necessary for an effective review by the appellate court.[57]

The Fifth Circuit directed its district courts to consider all the *Johnson* factors and indicate how each affected a particular award.[58] Despite this requirement, the court did not indicate the relative weight each factor should be given. This lack of guidance left fee computation to the discretion of the lower courts.

Six years after *Johnson*, the Fifth Circuit finally discarded this unguided approach and concluded that certain factors merited special attention, even though all factors should be considered.[59] Only the Fourth and Ninth Circuits still retain the unguided *Johnson* approach.[60]

Generally, the *Johnson* and *Lindy* lodestar approaches represent the two major methods of fee computation in the federal courts. The remaining circuits have adopted variations of these basic methods.[61]

3. *The Sixth Circuit*

The method of fee calculation used by the Sixth Circuit is more analytical than those of the Third or Fifth Circuits. In *Northcross v. Board of*

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[56] *Id.* at 717-19. Both houses of Congress cited *Johnson* as the "starting point for 'evolving standards' " in determining "reasonable attorneys' fees" under the Civil Rights Attorneys' Fees Awards Act of 1976 (CRAFAA) "because the statutory purposes of Title VII and § 1988 fee awards were nearly identical." S. REP. No. 1011, 94th Cong., 2d Sess. 6 (1976). H.R. REP. No. 1158, 94th Cong., Sess. 13 (1976).

[57] *Johnson*, 488 F.2d at 720.

[58] Matter of First Colonial Corp. of America, 544 F.2d 1291, 1300 (5th Cir. 1977).

[59] Specifically factors one, five, eight and nine. Copper Liquor v. Adolph Coors Co., 624 F.2d 575, 583 n. 15 (5th Cir. 1980).

[60] Larson, *supra* note 1, at 120, 150.

[61] *Id.*

Education,[62] the court expressed its dissatisfaction with the *Johnson* approach, because "merely providing a checklist of factors to consider does not lead to consistent results . . . or reasonable fees."[63] Although the Sixth Circuit retained most of the *Johnson* factors, it incorporated them into three variables:

> The *number of hours of work* will automatically reflect the "time and labor involved," "the novelty and difficulty of the queston," and "preclusion of other employment." The *attorney's normal hourly billing rate* will reflect "the skill requisite to perform the legal service properly," "the customary fee," and the "experience, reputation and ability of the attorney." *Adjustments upward* may be made to reflect the contingency of the fee, unusual time limitations and the "undesirability" of the case. Thus, applying the approach used in this decision will result in an award reflecting those considerations traditionally looked to in making fee awards, but will also provide a logical, analytical framework which should largely eliminate arbitrary awards based solely on a judge's predispositions or instincts.[64]

Although the Sixth Circuit's approach is similar to the Third Circuit's lodestar method, there are some differences. In the Sixth Circuit, a small percentage of the total hours claimed may be deducted to eliminate "duplication, padding or frivolous claims."[65] Any other hours deducted must be clearly identified and reasons must be given for their elimination. Instead of applying a "bonus" multiplier for contingency and quality factors after the lodestar is calculated, the *Northcross* court allowed "adjustments upward" beyond the normal billing *rate* where the risk of loss was high.[66] The court saw this as reasonable compensation due the prevailing party under CRAFAA.

4. *The Ninth Circuit*

In 1974 the Ninth Circuit approved the use by its district courts of either the Third Circuit's lodestar method or the Fifth Circuit's *Johnson* approach to determine reasonable attorneys' fees.[67] In 1975, however, it

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[62] 611 F.2d 624 (6th Cir. 1979). The *Northcross* court abandoned the *Johnson* approach in favor of a circuit-wide, standard analytical approach because it was "disturbed by the extraordinary variations in fee awards." *Id.* at 636.

[63] *Id.* at 642.

[64] *Id.* at 642-43 (emphasis added for clarification). After a detailed review of the legislative history of the CRAFAA, the court concluded that the lower courts no longer can apply their broad equitable powers to fashion a remedy based on what the court considered appropriate; but rather, the courts are bound to apply a statutory remedy mandated by Congress. *Id.* at 632-33. *See also*, Berger, *supra* note 1, at 303-315.

[65] 611 F.2d 624, 636-37 (6th Cir. 1979).

[66] *Id.* at 638.

[67] *See* Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974), where the court stated that the district court could use *Lindy I* or *Johnson* to calculate fees. Larson, *supra* note 1,

formally adopted the *Johnson* factors by announcing its guidelines in *Kerr v. Screen Extras Guild, Inc.*[68] The court specifically noted that failure to consider the *Johnson* factors would constitute an abuse of discretion.[69] But the court in *Kerr* did not elaborate on how the *Johnson* factors were to be applied by the lower courts. Consequently, as will be seen in Part III, the Hawaii District Court has applied the unguided *Johnson* approach, the lodestar method, and in the later cases, a combination of the two.[70]

III. ANALYSIS

A. *Imponderables (the Court's Dilemma)*

Before proceeding with the analysis of Hawaii District Court attorneys' fee awards, it may be appropriate to pause at this point and reflect upon some of the "imponderables" that must plague the courts in making fee decisions.[71]

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at 151. *See also* Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd* 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978); Davis v. County of Los Angeles, 8 E.P.D. Sec. 9444 (N.D. Cal. 1974); Knutson v. Daily Review, Inc., 479 F. Supp. 1263 (N.D. Cal. 1979) (antitrust case where six Daily Review plaintiffs were awarded one dollar damages trebled to three dollars and $54,078.75 awarded as "reasonable attorneys' fees." *Id.* at 1267, 1279); *In re* THC Financial Corp. Litigation, 86 F.R.D. 721 (D. Hawaii 1980) (A common fund case where the court used the lodestar method and "the court allowed virtually all hours claimed for dozens of lawyers times normal billing rates ranging from $50 per hour. . . to $150. Multipliers of 1.5 and 1.4 to account for contingency factors, were allowed for several lead counsel." Larson, *supra* note 1, at 497).

[68] 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

[69] *Id.* at 70.

[70] *See infra* Part III.B.

[71] Although the case before the New York Supreme Court involved corporate officers' compensation, Justice Collins' poignant ruminations can lend some insight into the province of juridical conscience:

> Assuming, arguendo, that the compensation should be revised, what yardstick is to be employed? Who or what is to supply the measuring-rod? The conscience of equity? Equity is but another name for human being temporarily judicially robed. He is not omnipotent or omniscient. Can equity be so arrogant as to hold that it knows more about [the needs of society] than [Congress]?
>
> Yes, the [c]ourt possesses the *power* to prune these payments, but openness forces the confession that the pruning would be synthetic and artificial rather than analytical or scientific. Whether or not it would be fair and just, is highly dubious. Yet, merely because the problem is perplexing is no reason for eschewing it. It is not timidity, however, which perturbs me. It is finding a rational or just gauge for revising these figures were I inclined to do so. No blueprints are furnished. The elements to be weighed are incalculable; the imponderables manifold. To act out of whimsey or caprice or arbitrariness would be more than inexact—it would be the precise antithesis of justice; it would be a farce.

Heller v. Boylan, 29 N.Y.S.2d 653, 679 (1941) (stockholders' derivative action against American Tobacco Company directors for improper payments to company officers) (emphasis in

Among the questions a court should ask are the following: Who has been wronged? Who is being punished? Who benefits when the fees must be paid from the public coffers? Is it proper to shift the burden of attorneys' fees to a defendant who has unwittingly violated a technical provision of a statute? What is the optimum balance between encouraging legitimate suits and discouraging overzealous advocacy? Should the court attempt to persuade potential litigants, through its fee decisions, to seek nonjudicial remedies, pursue out-of-court settlements, or consider other alternative means of dispute resolution?

On the other hand, should the courts' legitimate interest in these questions allow them to exceed the bounds of legislative purpose? As Justice Frankfurter argued in *American Federation of Labor v. American Sash and Door Co.*,[72] "the judiciary is prone to misconceive the public good"[73] and matters of policy, depending as they do on imponderable value judgments, are best left to the people and their representatives.[74] The court, however, may be better armed than Congress to place timely checks upon the abuses that often result despite the lofty aims of legislative acts. The court's flexible "equitable powers" are also necessary, to keep the wheels of justice rolling despite shifting political philosophy and ponderous legislative process.

These equitable, policy, and practical concerns are explored in more concrete terms as each fee decision is analyzed. Additionally, the Comment examines the explicit and implicit attitudes apparent in the court's decisions. This inquiry may be useful in explaining the approaches taken and the outcomes reached by the court.

B. Hawaii District Court Fee Decisions

The five representative fee awards by the Hawaii District Court analyzed herein include two truth-in-lending[75] [hereinafter TILA] suits, two Section 1983[76] (civil rights) actions, and one Endangered Species Act[77] case. The facts and procedural history of each case are briefly summarized before the court's decision on attorneys' fees is critiqued. The cases are discussed chronologically in order to show the evolution of the court's method of awarding attorneys' fees.

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original).

[72] 335 U.S. 538 (1949) (Frankfurter, J., concurring).

[73] *Id.* at 556-57.

[74] *Id.*

[75] 15 U.S.C. §§ 1601-13, 1631-41, 1671-77 (1976).

[76] 42 U.S.C. § 1983 (civil action for deprivation of rights).

[77] 16 U.S.C. §§ 1531-43.

1. Kessler v. Associates Financial Services Company of Hawaii, Inc.[78]

Kessler was a debtor in default who brought suit in 1975 for violation of the TILA when his creditor accelerated the unpaid balance of his loan. Legal Aid Society of Hawaii (Legal Aid) sued the finance company on Kessler's behalf for failing to adequately disclose the acceleration clause in the loan agreement. Judge Dick Yin Wong initially granted summary judgment to the defendant, but on plaintiff's amendment of the complaint, found the finance company to be in violation of the statute. However, Judge Wong held that the ruling would only apply prospectively on the ground that the finance company was unaware of its duty to disclose due to an ambiguity in the TILA; accordingly, he again granted summary judgment for the defendant. The Ninth Circuit reversed the grant of summary judgment below, holding that the lower court exceeded its authority since only the appellate court could apply laws prospectively. Judgment was entered for plaintiff and attorneys' fees awarded after a hearing by Judge Wong.[79]

A review of Judge Wong's fee decision is instructive because of the summary and subjective manner in which the determination was made. After hearing argument on the fee award, Judge Wong denied defendant's request for a full evidentiary hearing to consider the propriety of the hours claimed by plaintiff's attorneys. He merely considered the *Johnson* factors,[80] and concluded that a fair award would be $2,000.[81] Despite his

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[78] 573 F.2d 577 (9th Cir. 1977) (on the merits); 639 F.2d 498 (9th Cir. 1981) (on the fee decision).

[79] Kessler v. Assoc. Fin. Co., Civ. No. 75-0162 (D. Hawaii July 21, 1978). Plaintiff Kessler was awarded $1000 plus costs of $281 and $2,000 for attorneys' fees, as provided for in the TILA:

> Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to the sum of — (1) [actual damages]; (2) [a penalty not less than $100 or more than $1,000 based on twice the amount of any finance charge in connection with the transaction]; and (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, *together with a reasonable attorney's fee as determined by the court.*

15 U.S.C. § 1640(a) (emphasis added).

[80] That part of the court's transcript pertaining to the fee determination is quoted below to faciliate its analysis:

> With respect to the first factor mentioned in the Kerr case, the [part of the transcript] concerning the time and labor required, the plaintiff's attorneys have averred through affidavits that they have spent over 250 hours. That is one factor to be considered, although I think the defendant rightly points or rightly questions why so many hours were spent on certain aspects of the case. With respect to the novelty and difficulty of the questions involved, the questions in the Kessler case was [sic] perhaps unique, however, I don't think it was that difficult. I think it was just a question of interpretation.
>
> With respect to the skill requisite to perform the legal service properly, this is also dependent upon Factor No. 2 because the more difficult the question the more skill will be required to perform the legal service properly. There's no doubt that the ser-

discussion of all the *Johnson* factors, he never actually explained how that figure was reached. Though there was a detailed diary of hours spent and work performed attached to the plaintiff's Memorandum in Support of Motion for Award of Attorneys' Fees, Judge Wong did not indicate which hours were being eliminated or why. The only explanation offered

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vice performed here by plaintiff's counsel was done properly, otherwise they wouldn't have achieved the results that they did. However, I don't think that it was really that sort of question that required a high degree of expertise to attain the results obtained—which were obtained.

With regard to the fourth factor: the preclusion of other employment by the attorney due to acceptance of the case, I think the Legal Aid Society by choice accepted this case, as well as others, and it seems to the Court that the time that they spent—the time and labor required which was the first factor—would benefit the entire line of truth in lending cases that the Legal Aid Society handled after these cases or were handling at the same time these cases—when I say "these cases", I'm referring to both the Kessler and the St. Germain case—and I don't think the time that they spent should be chargeable only to the Kessler case.

The customary fee which is the fifth factor to be considered, it is difficult to determine what the customary fee would be in a case of this type if it were handled by a private attorney. I don't think most private attorneys would handle a case which would recover a maximum of $1,000. But, looking at the other cases, they do range from zero to several thousand dollars.

Sixth, whether the fee is fixed or contingent. In this case I don't think the fee was either fixed or on a contingent basis, but at least not on a specific contingent basis. I think it was contingent on the basis that if the plaintiff were to win, Legal Aid Society hopefully would recover from the defendant and not from the plaintiff. In other words, I don't think that there was any contract, implied or otherwise, that the plaintiff would pay any fees at all to Legal Aid Society for representing the plaintiff. Seven, time limitations imposed by the client or the circumstances. This is not a factor because the client I don't think imposed any time limitations and neither did the circumstances.

Eight, the amount involved and the results obtained. I think this is a very important factor. Here the amount involved was a thousand dollars and the result which was obtained was also a thousand dollars. To use this to springboard a claim or an award of attorneys' fees of some $20,000 I think is ridiculous.

Nine, the experience, reputation, and ability of the attorneys. The Court has already commented on the ability of the attorneys, but again the Court has stated that no great degree of expertise was necessary for the Kessler case.

Ten, the undesirability of the case. I don't think this is a factor.

Eleven, the nature and length of the professional relationship with the client. The Court will have to assume that this client just walked into the Legal Aid Society just for this one case, since I don't think the Legal Aid Society maintains a permanent clientele.

And, twelve, awards in similar cases. This, again, I think is linked to Factor 5, the customary fee and the Court has already commented on that.

In considering all of these factors, the Court feels that a fair award of attorneys' fees, including the time spent on the appeal, is $2,000 and that is the amount the Court will award as attorneys' fees in this case. Counsel for the plaintiff will prepare the appropriate order.

Kessler, supra note 79.

[81] *Id.*

was that 250 hours may have been excessive.[82]

Judge Wong's interpretation of item six, the fixed or contingent fee factor, was difficult to fathom. No matter what the outcome of the litigation, there is no risk of nonpayment where an attorney works for a fixed fee or is compensated on the basis of billable hours. In contrast, when counsel is compensated on a contingency basis, his fee is conditional on a favorable outcome. Therefore, the greater the risk of losing, and nonpayment, the higher the contingency fee should be. Judge Wong determined that *Kessler* fit neither category of factor six,[83] but it certainly would seem to qualify as a contingency fee case. The claim for 250 hours was for work performed by two attorneys, paralegals and administrative staff over a three year period, during which time there were no periodic payments.[84] No private attorney or firm would take a case where they would be tied up for three years without some assurance of a large award in the event of a successful outcome. This is not to say that the attorney in *Kessler* should have been awarded the entire $20,000 claimed; but the eight dollars an hour granted ($2,000 divided by 250 hours) does not seem to be reasonable compensation.[85]

Item eight, the amount involved and results obtained, appears to be the primary basis for Judge Wong's determination. He was disturbed that the attorneys' fees claimed amounted to $20,000 for a result of only $1,000.[86] But the maximum amount allowed by the statute is $1,000 for an individual violation,[87] and there could not have been any greater amount involved. Most courts and commentators have criticized this factor as irrelevant in quantifying the value of attorneys' services based upon nonpecuniary relief or nominal damages.[88]

Although Judge Wong may have implicity raised several legitimate concerns,[89] he runs afoul of the fundamental purposes of statutory fee

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[82] *Id.*

[83] *See infra* text accompanying notes 117-18.

[84] *Kessler, supra* note 79.

[85] Despite the court's finding that item ten (the undesirability of the case) was not a factor to be considered, one could disagree in light of the risk of loss, delay in payment, inflation, and the low fee awarded for the time and effort expended.

[86] *See* Berger, *supra* note 1, at 320; Survey, *supra* note 1, at 655 (recommending that small percentages be deducted to account for duplication or padding, especially if multiple attorneys are involved, but that other reductions be supported by factual findings) (citing Northcross v. Board of Education, 611 F.2d 624, 637 (6th Cir. 1979)).

[87] *Kessler,* No. 75-0162 (D. Haw. Jul. 21, 1978); *see also supra* note 80.

[88] *See* Survey, *supra* note 1, at 669; Note, *supra* note 1, n. 166.

[89] Certainly, no fee-paying client would consider paying $20,000 to win a claim worth only $1,000. Perhaps this anomaly has prompted the court to conclude that attorneys' fees are generally not very "reasonable" and that $2,000, though well below the market rate for the number of billable hours claimed, is much more "affordable." In addition, the court's perception of the equities of the case may be meaningful: an action based on a *technical* rather than a *bad faith* violation of the statute, brought by a debtor to avoid the consequences of his default, using the services of a Legal Aid attorney whose salary is paid by state and federal appropriations and whose job it is to take cases of clients unable to pay fees. The

awards.[90] Where Congress has placed the burden of paying attorneys' fees upon the violator of a law, it would seem unfair for the court to reallocate the cost of litigation to plaintiff's attorneys by making the nominal statutory amount of plaintiff's recovery the measure of reasonable attorneys' fees.

Both parties appealed Judge Wong's fee award.[91] Defendant-appellee finance company challenged the propriety of the award because plaintiff-appellant Kessler "was represented without charge by . . . a non-profit public interest legal aid corporation . . . [and therefore] incurred no obligation to pay any attorneys' fees . . . ."[92] The Ninth Circuit joined the Third and Fifth Circuits in holding that legal service organizations which successfully represent clients without charge in TILA suits are entitled to attorneys' fees.[93] The court reasoned that adequate compensation of Legal Aid attorneys would encourage private suits to enforce the Act.[94]

Plaintiff-appellant Kessler claimed that the $2,000 awarded for attorneys' fees was too low considering the effort expended.[95] But the Ninth Circuit affirmed the award, on the ground that *Kerr* only required that the *Johnson* factors be considered. The court held that since the factors were considered, even though they were not fully explained, there was no clear abuse of discretion by the district court.[96]

Despite the Ninth Circuit's adoption of the *Johnson* factors from the Fifth Circuit, its approval of the mechanical application of the factors by the lower court was not consistent with the Fifth Circuit's insistence on

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specter of overlawyering may have been implicated as well by the court's reference to the attorneys' springboarding a fee (*see supra* note 80).

[90] Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-03 (1968); *See also* Gimarc v. Neal, 417 F. Supp. 129, 131 (D.S.C. 1976) (first-class attorneys would be discouraged from taking consumer cases if fees were tied to the plaintiff's statutory remedy.); *See* S. REP. No., 1011, 94th Cong., 2d Sess. 1-6, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5909-13. (Civil Rights Attorney's Fees Awards Act of 1976); S. REP. No. 295, 94th Cong., 1st Sess. 40-43, *reprinted in* U.S. Code Cong. & Ad. News 774, 806-10 (Voting Rights Act of 1965-Extension); Macey, *Award of Attorney's Fees as a Stimulant to Private Litigation Under the Truth In Lending Act*, 27 BUS. LAW 593, 596 (1972) ("[I]f courts were required to correlate the amount of the fee with the amount of the recovery, there might as well not even be a provision for attorney's fees, [since] the maximum recovery allowed . . . is $1,000 . . . ."); *cf. Kessler*, No. 75-0162 (Judge Wong agreed noting that "[he did not] think most private attorneys would handle a case which would receive a maximum of $1,000."). *See supra* note 80.

[91] Kessler v. Assoc. Fin. Serv. Co., 639 F.2d 498 (9th Cir. 1981). The same panel of judges that heard the appeal on the merits, Kessler v. Assoc. Fin. Serv. Co., 573 F.2d 577 (9th Cir. 1977) heard the appeal on the fee award.

[92] 639 F.2d at 499.

[93] *Id.*

[94] *Id.*

[95] *Id.* Although successful plaintiffs have no stake in the fee award, most statutes require claims for attorneys' fees be brought in the name of the party rather than the attorney.

[96] *Id.* at 500.

substance over form.[97]

2. Palila v. Hawaii Department of Land and Natural Resources[98]

The Sierra Club, joined by the National Audubon Society, Hawaii Audubon Society, and Alan C. Ziegler of the Bishop Museum, brought suit in the name of the *palila* bird[99] in 1978 against the Department of Land and Natural Resources (DLNR) seeking declaratory and injunctive relief under the Endangered Species Act of 1973.[100] The action sought to have the State remove all wild goats and sheep from the bird's critical habitat on the upper slopes of Mauna Kea, Hawaii's highest mountain. The Hawaii District Court held that the DLNR's failure to adequately clear the palila's habitat of grazing animals amounted to a "taking" under section 9 of the Act, and accordingly granted summary judgment for the plaintiffs. The Ninth Circuit affirmed on appeal.

Plaintiff's attorneys from the Sierra Club Defense Fund petitioned for $208,850 in attorneys' fees for work performed at the trial level.[101] The fee request was based on 682 hours at $110 per hour for lead counsel and 106.5 hours at $80 per hour for associates. In addition, counsel requested a bonus of $125,310 "to compensate for the contingency factor and to reward plaintiffs' counsel for the quality of their work . . . and the beneficial results obtained as a result of that work."[102]

In a cursory two-page decision, Judge King approved payment of the hours and rates billed for actual time expended on the litigation, finding them to be both reasonable and justified. He reasoned that compensation of the "lodestar" fees was necessary to replenish the Sierra Club's legal defense fund. However, he ruled that the Sierra Club was not entitled to a bonus in light of its status as a nonprofit, public service organization that had been fully compensated for time spent.[103]

Judge King's fee decision in *Palila* was even more summary than that of Judge Wong in *Kessler*. He cited no authorities and considered none of the *Johnson* factors as required by the Ninth Circuit. Evidently, Judge King applied the *Lindy* lodestar method[104] adopted by the Third Circuit

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[97] Davis v. Fletcher, 598 F.2d 469, 470-71 (5th Cir. 1979).

[98] Palila v. Hawaii Department of Land and Natural Resources, 471 F. Supp. 985 (D. Hawaii 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) (on the merits). *See also* Comment, *Palila v. Dept. of Land and Natural Resources: "Taking" Under Section Nine of Endangered Species Act of 1973*, 4 U. HAWAII L. REV. 181 (1982).

[99] An endangered species of the native Hawaiian honeycreeper family.

[100] 16 U.S.C. § 1531 (1974).

[101] Palila v. Hawaii Dept. of Land and Natural Resources, No. 78-0030 (D. Hawaii June 9, 1980) (attorneys' fee decision.)

[102] *Id.* at 2. Counsel would calculate the fee as: 682 hours times $110 = $75,020 plus (106.5 times $80) = $83,540 times 2.5 (bonus multiplier) = $208,850.

[103] *Id.*

[104] *See supra* text accompanying notes 46-54.

by simply accepting the hours and rates requested by plaintiffs' counsel as reasonable and justified. Surprisingly, the State did not appeal the award despite the court's failure to consider the *Johnson* factors as mandated in *Kerr*.[105] Perhaps the State's attorneys were relieved that the $125,000 bonus had been denied by Judge King.

3. Yuclan International, Inc. v. Arre[106]

In 1979, several theatre operators brought a Section 1983 action against municipal officials seeking to invalidate a city ordinance that provided for revocation or suspension of a license to operate movie theatres upon conviction of the licensee or his agents for the crime of pornography.[107] Plaintiffs, Yuclan International, Inc. and Yuclan Enterprises, Inc., asserted that the ordinance placed prior restraints on speech and expression, and provided inadequate standards to determine whether a public show was obscene, indecent or immoral. Judge King granted plaintiffs' motion for summary judgment on the issue of prior restraint, but ruled against them on the question of inadequate standards.[108]

Plaintiffs filed a motion for attorneys' fees under CRAFAA[109] claiming $46,553.26 plus $1,400.70 in costs. The fee request was calculated on 421.65 hours expended in the litigation at hourly rates of $125 and $90 for lead counsel and co-counsel, respectively.

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[105] *Kerr*, 526 F.2d 67, 69-70 (9th Cir. 1975). *See also* Fountilla v. Carter, 571 F.2d 487, 496-97 (9th Cir. 1978); Ellis v. City of Oswego, 642 F.2d 367 (9th Cir. 1981); Higgins v. Harden, 644 F.2d 1348 (9th Cir. 1981) (where the Ninth Circuit reversed and remanded because the lower courts failed to consider the *Johnson* factors in awarding attorneys' fees).

[106] Yuclan Enter., Inc. v. Arre, 488 F. Supp. 820 (D. Hawaii 1980) (on the merits); Yuclan Int'l, Inc. v. Arre, 504 F. Supp. 1008 (D. Hawaii 1980) (attorneys' fees decision).

[107] Honolulu, Hawaii Ordinance 79-26 (May 9, 1979)(entitled "Regulating Public Shows as defined in Hawaii Revised Statutes Section 445-161"). Licenses may be suspended or revoked if:

1) The licensee has presented or permitted the presentation of an obscene, indecent or immoral public show on the licensed premises based on the standards prescribed hereinbefore [sic].
2) During the term of the existing license, the licensee or his employee(s) has [sic] been convicted of promoting pornography on the licensed premises in violation of HRS §§ 712-1214 to -1215; or
3) The licensee has violated any of the provisions of this article, HRS §§ 445-161 to -165, or any rules and regulations promulgated by the Director of Finance as authorized herein.

[108] *Yuclan Enter. Inc.*, 488 F. Supp. at 821-22.

[109] The statute provides, in pertinent part:

> In any action or proceeding to enforce a provision of §§ 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. §§ 1681 *et. seq.*] [42 U.S.C.]§ 2000d *et seq.*, or title VI of the Civil Rights Act of 1964 the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (Supp. 1980).

The approach followed by Judge King in arriving at his fee award in *Yuclan* was distinctly different from that taken in *Palila* six months earlier. Instead of routinely accepting the hours and rates claimed by plaintiffs' counsel, Judge King subjected their request to close scrutiny. In a detailed twelve-page Memorandum and Order he considered the twelve *Johnson* criteria in fixing the proper fee award.[110] Initially, Judge King declared that factors four (preclusion of other work), seven (time limitation), eight (amount and results), and eleven (relationship) were not relevant for the fee determination in *Yuclan*.[111] He then considered the remaining *Johnson* criteria in calculating a reasonable hourly rate for each attorney, a reasonable number of hours spent on the case, and in determining whether any bonus or incentive was due.[112]

In establishing a reasonable hourly rate for each attorney, the court reviewed counsels' skill, customary fees, reputation, experience and ability (factors three, five and nine). Although Judge King acknowledged that lead counsel was a specialist in the first amendment area, he found counsel's customary rates to be unreasonable because the case did not demand such expertise. Consequently, he reduced senior counsel's customary hourly rate from $125 to $75, and junior counsel's from $90 to $50. The court reasoned that lower paid associates, law clerks or other non-lawyers could have competently handled much of the work.[113] The reduced rate represented an average rate for the various services performed.[114]

The court proceeded to apply factors one and two (time and labor required and novelty and difficulty of the questions involved) to ascertain a reasonable number of hours for each attorney. Judge King found the

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[110] Yuclan Int'l v. Arre, 504 F. Supp. 1008 (D. Hawaii 1980).

[111] *Id.* at 1012. Plaintiff's counsel had indicated "that criteria (4), (7), (11) and (12) were not relevant to a determination of reasonable fees in this case." *Id.* at 1012 (footnote omitted). Judge King noted his position in a footnote:

> This court finds also that criteria [sic] (8), the amount involved and results obtained, is not relevant to this determination. Since plaintiffs sought only declaratory and injunctive relief, no monetary amount was involved. The absence of a monetary award should not be used to bar or reduce an award. Criterion (12), awards in similar cases, is considered here in the determination of reasonable hourly rates based on the customary fee and other criteria.

Id. at 1012, n.4.

[112] *Id.* at 1012.

[113] *Id.* at 1013. Judge King explained that:

> It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it.

(quoting *Johnson*, 488 F.2d at 717).

[114] Judge King reasoned that, since "the numerous tasks performed and hours devoted to the case make it impossible to assign a different hourly rate to each type of task[,] the hourly rate for each attorney is reduced to reflect an average rate for all the work performed." *Id.* at 1013.

hours claimed to be excessive in light of the relative simplicity of the first amendment issues in the suit.[115] Despite plaintiffs' counsels' contention that the case presented legal issues that were novel and difficult, the court reduced the hours billed for preparation of briefs and memoranda by one-third.[116]

Finally, the court considered factor six (whether fee contingent or fixed) to determine whether a bonus or incentive was appropriate. Judge King found a contingency arrangement between plaintiffs and their counsel, but concluded that the risk of nonrecovery was negligible in this instance. Since "success at the outset was virtually assured for this case,"[117] he refused to add a bonus or incentive. Factor ten, the undesirability of the case (pornography), was also not sufficiently established by plaintiffs' counsel to warrant a bonus or incentive.[118]

In all, the court reduced the total hours from 421.65 to 345.65 and the fee request from $46,553.26 to $21,415.00. No appeal was taken. In sharp contrast to *Kessler* and *Palila*, Judge King's *Yuclan* fee determination was a well-reasoned and balanced application of the *Johnson* factors to the *Lindy* lodestar method and was adequately supported by findings of fact and conclusions of law.[119]

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[115] *Id.* The court acknowledged that, "[w]hile this Court does not want to discourage quality legal work and has no disagreement with plaintiffs' counsel that the work was of high quality, it is not convinced that all of the hours submitted were reasonably necessary to prepare and present the case." *Id.* at 1014. In particular the court cited the expectation of the Mayor of the City and County of Honolulu that the courts would find the ordinance unconstitutional, based upon the testimony presented at hearings before the ordinance was passed by the City Council. "The point is simply that the number of hours devoted to preparing the case and presenting it to this court are unreasonably high given the fact that the ordinance was recognized as probably unconstitutional simply from preparation done for testimony given by plaintiff's counsel and others." *Id.* at 1013-14.

[116] "An example of this 'overlawyering' is plaintiffs' supplemental memorandum to their motion for summary judgment, a document in excess of 100 pages in length exclusive of exhibits and affidavits." *Id.* at 1014 (citing Berger, footnote omitted).

[117] *Id.* at 1015. The court quoted Berger to support its conclusion:

> If viewed from the perspective of a reasonable attorney looking at the case from its outset, success was virtually assured, there has been no significant risk and there should be no adjustment. If the court concludes that success was more likely than not at the outset, an increase in the fee award in the range of fifty percent would be appropriate. Where the court concludes that the chance of success was about even at the outset, an increase in the hourly rate in the range of 100% appears appropriate. Finally, if the case appears unlikely to succeed when initiated, an increase of the basic hourly rate of up to 200% may be justified to compensate the attorney for the substantial risk undertaken.

Id. (quoting Berger *supra* note 1, at 326).

[118] *Id.* at 1015.

[119] Judge King indicated that his fee decision was based on the Third Circuit's "lodestar" method and cited to Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp., 540 F.2d 102, 112 (3d Cir. 1976). *Id.* at 1015, n. 6. Although the Ninth Circuit has not formally adopted the lodestar analysis, a number of other district courts in the circuit have used it. *See* Knutson v. Daily Review, Inc., 479 F. Supp. 1263 (N.D. Cal. 1979) (citing In re Equity

4. Suzuki v. Yuen[120]

In a class action brought against the State of Hawaii in 1973 by the American Civil Liberties Union of Hawaii, the Office of the Public Defender, and the Legal Aid Society of Hawaii on behalf of "[a]ll persons who are now or who may be in the future admitted [to] and detained at a psychiatric facility,"[121] the plaintiffs challenged the constitutionality of the nonconsensual civil commitment provisions of the State's mental health statutes. Finding the laws authorizing hospitalization of mentally ill persons without their consent to be violative of the fourteenth amendment to the United States Constitution, Judge King struck them down.[122] The court retained jurisdiction pending enactment of legislation amending these laws. Later, the amended statutes were also struck down as unconstitutional by Judge King in *Suzuki v. Yuen* [hereinafter *Suzuki III*].[123]

Upon winning in *Suzuki II,* plaintiffs were awarded $15,000 in attorneys' fees under CRAFAA.[124] Defendant, the Director of Health of the State of Hawaii, appealed both the ruling on the constitutionality of the statute in *Suzuki II* and the subsequent order denying a stay of the award of attorneys' fees pending appeal. The award of attorneys' fees itself, however, was not appealed.[125]

The Ninth Circuit affirmed the lower court's ruling that the statute unconstitutionally permitted commitment of persons posing a danger to property and that it unconstitutionally failed to require a showing of imminent danger prior to commitment. However, it reversed Judge King's holding that the statute unconstitutionally deprived persons of their privilege against self-incrimination and that the State must establish the need for commitment by proof beyond a reasonable doubt. The appeal of the order denying a stay of the award of attorneys' fees was dismissed as moot.[126]

Funding Corp. of Am. Sec. Litig., 438 F. Supp. 1303, 1326-27 (C.D. Cal. 1977); Lockheed Minority Solidarity Coalition v. Lockheed Missiles & Space Co., 406 F. Supp. 828, 831 (N.D. Cal. 1976); In re Gypsum Cases, 386 F. Supp. 959, 962 n. 3; Stanford Daily v. Zurcher, 64 F.R.D. 680, 682-83 (N.D. Cal. 1974)). *See also Knutson,* 479 F. Supp. at 1269 n.5 (citing decisions by courts of appeals in other circuits following the lodestar analysis).

[120] 507 F. Supp. 819 (D. Hawaii 1981) (attorneys' fees decision).

[121] Suzuki v. Quisenberry, 411 F. Supp. 113, 118 (D. Hawaii 1976) [hereinafter cited as *Suzuki I*].

[122] *Id.*

[123] 438 F. Supp. 1106 (D. Hawaii 1977).

[124] 42 U.S.C. § 1988 (1976 & Supp. 1980). No fees were awarded for work done on *Suzuki I* because the case was concluded before the passage of section 1988. Suzuki v. Yuen, 507 F. Supp. at 820 n.1.

[125] Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980).

[126] The issue of the stay was dismissed as moot because the attorneys' fees had been paid on a garnishment order before the appeal reached the court. *Id.* at 175. As to the constitutionality of the statute's nonconsensual commitment provisions, the court affirmed the un-

Following the Ninth Circuit's decision,[127] plaintiffs filed a motion for award of attorneys' fees under CRAFAA[128] for work done in defending the State's appeal.[129] Plaintiffs claimed $17,071.00 for 227.2 hours expended on the appeal and requested compensation at customary rates.[130]

Judge King's fee determination proceeded along the lines of *Yuclan* in applying the *Johnson* factors to the *Lindy* lodestar method. However, the court supplemented the *Johnson* criteria with four factors relevant to an assessment of fees for appellate work. They included the quality of briefs and oral argument, the amount of time necessary to prepare them, the difficulty of the issues on appeal and the complexity and importance of the case from the appellate court's view. Also, four of the *Johnson* criteria (four, seven, ten and eleven) were excluded from consideration as being inapplicable to the fee decision.[131]

The factors relevant to a determination of the reasonable hourly rate for work done on appeal were: the quality of the briefs and oral argument; the skill requisite to perform the legal service properly; counsel's customary fee; the experience, reputation and ability of the attorneys; and the complexity and importance of the case from the point of view of the appellate court.[132]

Judge King acknowledged that the district court was not in a position to assess the quality of briefs and oral argument, or the complexity and importance of the case in the eyes of the appellate court. Despite this reservation, he reduced lead counsel's rate from $100 to $75 and co-coun-

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constitutionality of the provisions which allowed commitment of persons "dangerous to any property" and the commitment of persons without a showing of "imminent danger." *Id.* at 176, 178. However, it held that the State's "five day nonconsensual evaluation commitment" provision and the showing of "sufficient evidence," rather than "proof beyond a reasonable doubt" to justify such commitment did not deprive persons of their privilege against self-incrimination. *Id.* at 176-77, 178-79.

[127] 617 F.2d 173 (9th Cir. 1980).

[128] 42 U.S.C. § 1988 (1976 & Supp. 1980).

[129] Suzuki v. Yuen, 507 F. Supp. 819 (D. Hawaii 1981).

[130]

	HOURS	RATE	FEES
Senior Counsel (Mr. Alston)	107.5	$100	$10,750.00
Assoc. Counsel (Ms. Floyd)	103.7	65	6,740.50
Assoc. Counsel (Mr. Park)	2.5	65	162.50
Law Clerks (2)	15.5	25	412.50
Total	230.2		$18,065.50

[131] [T]he following *modified Johnson* criteria and additional factors will be considered: (1) *the quality of briefs and oral arguments*, (2) *the time and labor required for preparation of briefs and oral argument*, (3) *the difficulty of the issues on appeal*, (4) the skill requisite to perform the legal service properly, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) the amount involved and results obtained, (8) the experience, reputation and ability of the attorneys, (9) awards in similar cases, and (10) *the complexity and importance of the case in its posture on appeal.*

Id. at 824 (emphasis added).

[132] *Id.*

sels' rates to $50. He explained that he had previously considered lead counsel's work at the district level in light of the other three factors, and found that $75 was a reasonable hourly rate; by applying the same factors to the two co-counsel, Ms. Floyd and Mr. Park, who were admitted to practice in Hawaii in 1976 and 1977, respectively, he found that $50 was a reasonable rate for each.[133]

As for the bonus/incentive element, Judge King did not consider the contingency (risk of loss) factor as he did in *Yuclan*.[134] Instead, he stated that no increase in the hourly rate was justified because "this Court finds that there were no extraordinary skills necessary to perform the legal services properly."[135] Judge King assumed that the briefs were of high quality, but he noted that the Ninth Circuit's opinion on the appeal did not indicate that the circuit court considered the case a complex one.[136] Therefore, he concluded that the hourly rates set by the court were adequate.[137]

Judge King's consideration of the qualitative factors relating to the attorneys' performance without an assessment of the risk of loss factor to determine whether a bonus was appropriate is inconsistent with his *Yuclan* fee decision. Had he analyzed the risk of loss under the Berger method[138] as he did in *Yuclan*, the case would have merited at least a "more likely than not" assurance of success. Consequently, a fifty percent bonus adjustment to attorneys' hourly rates would seem to be warranted in this case, since the outcome was not "virtually assured".

Judge King next determined the reasonable number of hours spent on the appeal. He first rejected defendant State's suggestion that the fee award be reduced by fifty percent since plaintiffs prevailed on only two out of four issues on appeal.[139] Nonetheless, he noted that "in applying the *Johnson* factors and others formulated for purposes of awarding appellate fees, the issues on which plaintiffs were unsuccessful will be con-

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[133] *Id.* at 825.

[134] *See supra* note 117.

[135] Suzuki v. Yuen, 507 F. Supp. at 825.

[136] "The [appellate] court analyzed the case under four separate questions and reached conclusions without the need for long complex reasoning." *Id.* In fact on the issue of the standard of commitment (i.e. sufficient evidence versus beyond a reasonable doubt) Judge King stated that a recent Supreme Court decision had resolved the question for the appellate court. *Id.*

[137] *Id.*

[138] *See supra* note 117.

[139] 507 F. Supp. at 824. Judge King reasoned that:

> [P]laintiff's success on the merits should be viewed in light of the impact of the appeal on the statutory scheme and on the plaintiff class rather than on counting issues . . . . They are entitled to compensation for all time reasonably spent on the appeal even though some of that time was devoted to issues upon which they did not prevail.

Id. (citing Reproductive Services v. Freeman, 614 F.2d 585, 600 (8th Cir. 1980) and Busche v. Burkee, 483 F. Supp. 1326, 1328 (E.D. Wis. 1980)).

sidered."[140] This position seems to contradict a Ninth Circuit opinion decided in October 1980, quoting with approval *Northcross v. Board of Education*, the Sixth Circuit's landmark attorneys' fees case: "So long as the party has prevailed on the case as a whole, the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith . . . ."[141]

Judge King found the number of hours spent on brief preparation to be unreasonably high and reduced it by two-thirds. With respect to time spent on preparation for oral argument, and other miscellaneous actions and services, the court reduced those hours by approximately one-half.[142] He sustained these chunk-sized cuts in hours mainly on his somewhat conclusory findings of duplication of effort.[143] He added that, in his judgment, the basic research could have been done by "lower-paid associates and law clerks."[144]

Finally, somewhat apologetically, the court again acknowledged its "lesser ability to assess some of the factors relevant to a determination of reasonable fees for appellate work."[145] However, taking heart, the court looked to awards given in similar cases for guidance.[146] Judge King took judicial notice of *Doe v. Clark*,[147] a Hawaii case in which the Ninth Cir-

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[140] 507 F. Supp. at 824 (citing Nadeau v. Helgemoe, 581 F.2d 275, 279 (1st Cir. 1978)). Judge King noted that "[i]n reducing the number of hours to be compensated, this court is aware of its duty to weigh the hours claimed and examine the request carefully for *possible duplication of effort.*" Suzuki v. Yuen, 507 F. Supp. at 825 (emphasis added).

[141] Saunders v. Claytor, 629 F.2d 599, 602 (9th Cir. 1980) (quoting Northcross v. Bd. of Educ., 611 F.2d 624, 636 (6th Cir. 1979)).

[142] Suzuki v. Yuen, 507 F. Supp. at 825-26. Despite Judge King's aversion to the use of percentages like 50%, apparently fractions like two-thirds and one-half are not objectionable! The court in Prandini v. Nat'l Tea Co., 585 F.2d 47 (3d Cir. 1978), admonished that, "district courts, in awarding attorneys' fees, may not reduce an award by a particular percentage or amount (albeit for justifiable reasons) in an arbitrary and indiscriminate fashion . . . [they] must make specific findings to support [their] action[s]. 585 F.2d at 52.

[143] Judge King believed that much of the time spent on the appeal was unnecessary because of the "previous experience and expertise of Mr. Alston and Ms. Floyd with the issues developed during trial court proceedings . . . [and] the extensive preparation put into the previous two phases (*see Suzuki I* and *II*) the possible duplication of effort between counsel, but rather, the duplication of time spent at the appellate level on familiar and clear-cut issues established at trial.

[144] *Id.* at 825. In its *Yuclan* decision the court relied on this reasoning to support its reduction in the *hourly rate*. 504 F. Supp. at 1013. To apply it here to reduce *hours expended* is inapposite as well as inconsistent.

[145] 507 F. Supp. at 826. Earlier, Judge King stated quite prophetically that, "[t]his task is undertaken with full recognition that this Court is not in a position to evaluate some factors related to appellate fees and that, on appeal, if any, the Ninth Circuit may view these factors differently." *Id.* at 823. *See infra* text accompanying notes 151-61.

[146] 507 F. Supp. at 826.

[147] No. 79-4601 (9th Cir. entered Sept. 5, 1980) (class action involving handicapped children who sued the Superintendent of Hawaii's Department of Education (Charles G. Clark) and others, alleging that their rights to equal educational opportunity had been violated). The merits were resolved by a consent agreement. Doe v. Clark, No. 78-0394 (D. Hawaii

cuit awarded fees of $4,236.00 to Legal Aid for its appellate work. He concluded that the amount awarded in *Doe* was comparable to the amount he would award in this case.[148]

Although the amount of the awards may be comparable, close scrutiny of the *Suzuki* and *Doe* appeals reveals little substantive similarity between the two. First, there were four complex constitutional issues in the *Suzuki* appeal; whereas, in *Doe,* defendant State's appeal concerned the propriety and amount of the attorneys' fees awarded to Legal Aid by the district court after a consent agreement. Second, the Ninth Circuit reversed two holdings in *Suzuki;* in *Doe* the appellate court summarily affirmed the lower court's award to Legal Aid. Third, Legal Aid in *Doe* requested $5,185.00 and received $4,236.00 (81%) for 116 hours of appellate work; private attorneys in *Suzuki* requested $17,071.00 and received $5,529.00 (32%) for 227 hours of work. The suggestion that *Doe* and *Suzuki* are similar cases ignores their varying factual and procedural histories.

Interestingly, in his earlier *Palila* fee decision, Judge King awarded attorneys representing the Sierra Club fees of over $83,500.00.[149] The court found that in protecting the *palila,* lead counsel properly expended 682 hours at $110 and his associates expended 106.5 hours at $80.[150] It seems ironic that attorneys for the endangered *palila* bird would deserve so much more encouragement than the attorneys in *Suzuki,* who were advocates for people whose fundamental right of liberty was also endangered.

Plaintiffs' attorneys appealed the fee award. In an uncharacteristic move, the Ninth Circuit held that the lower court had abused its discretion by unreasonably reducing plaintiffs' attorneys' hourly rates and hours claimed.[151] The Ninth Circuit's decisions in the past had consistently affirmed lower court fee awards as long as the *Johnson* factors were

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Aug. 3, 1979)).

[148] 507 F. Supp. at 826.

[149] *See supra* text accompanying notes 98-105.

[150] *Id.*

[151] Suzuki v. Yuen, 678 F.2d at 763-64. The court not only reversed but also recomputed the award: "The following table summarizes our award:

	Hours	Rate	Amount
1. Brief Preparation			
Alston	35	100	$3,500
Floyd	35	65	2,275
Clerks	25	25	625
SUBTOTAL	95		6,400
2. Motion to dismiss			
Alston	.4	100	40
Floyd	2.2	65	143
SUBTOTAL	2.6		183

considered.[152] Perhaps the appellate court's deviation from its normal deference to the lower court's discretion can be explained by its perception that it was better able to evaluate the quality of the attorneys' appellate work than the lower court. The same panel heard both the appeal on the merits in *Suzuki II* and the fee appeal in *Suzuki v. Yuen.* Circuit Judge Wright authored both opinions for the panel.[153]

Essentially, the appellate court found that of the six factors used by Judge King to reduce the hourly rates,[154] four were inappropriately applied. The court ruled that the time elapsed and ensuing inflation rendered the $75 trial hourly rate inadequate for appellate work. It stated that the quality of work must be assessed by a careful review of appellate briefs and not assumed; that the length of appellate opinions is not a measure of complexity; and that the intervening Supreme Court decisions which clarified the law on the burden of proof issue related more to the

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3. Oral Argument			
Alston	26.9	100	2,690.00
Park	2.5	55	137.50
Floyd	1.0	65	65.00
Clerks	3.5	25	87.50
SUBTOTAL	33.9		2,980.00
4. Miscellaneous			
Alston	5	100	500.00
Floyd	3.9	65	253.50
SUBTOTAL	8.9		753.50
TOTAL	140.4		$10,316.50

Id. at 764-65.

[152] *See infra* note 192. The exception in this case is contained in the court's statement that, "[w]e look more closely where appellate fees are involved." *Suzuki,* 678 F.2d at 762 (citing Perkins v. Standard Oil Co., 474 F.2d 549, 552 (9th Cir. 1973)) (antitrust case where plaintiff was successful in two Supreme Court appeals; district court awarded fees totaling $275,000 for 3,200 hours, which circuit court reduced to $128,000 by deducting hourly rate from $85 to "ave. hourly rate" of $40 for most hours).

[153] Suzuki v. Yuen, 617 F.2d 173 (appeal on the merits) and Suzuki v. Yuen, 678 F.2d 761 (appeal on the fee award).

[154]

1. The $75 hourly rate for lead counsel had been found reasonable in the trial proceeding;
2. Associate counsel were recent bar admittees;
3. No special expertise was required;
4. The memoranda before the appellate court were assumed to be of quality consistent with those before the district court;
5. The brevity of the appellate decision indicated that the issues were not considered complex by the appellate court; and
6. The intervening Supreme Court decision of Addington v. Texas, 441 U.S. 418 (1979), had resolved the burden of proof issue.

"Except for items 2 and 3, we find little relationship between these factors and a reasonable hourly rate."

678 F.2d at 763.

determination of time required than to hourly rates.[155] In addition, the court held that, absent evidence to the contrary, customary rates should not be rejected by the court without clearly articulated reasons.[156] As a result, the court restored the plaintiffs' attorneys' customary rates (lead counsel—from $75 to $100; associate counsel—from $50 to $65/55 and law clerks—from $15 to $25).

The appellate court also reviewed the hours requested "to determine what time may have been duplicative or unreasonable."[157] Of the 227.2 hours of appellate work claimed, Judge King awarded 92.5 hours (41%); whereas, the appellate court awarded 140.4 hours (62%). Although the appellate court reinstated all the hours requested for oral argument, an abortive motion, and miscellaneous matters, it agreed with Judge King that time spent by two attorneys on brief preparation was excessive.[158] However, the court did add eighteen hours more than that awarded by Judge King, because, except for a few pages, plaintiffs' 67-page brief was an original effort.[159] The court emphasized that:

> While we survey a fee request in light of the record to exclude duplicative effort, . . . the legislative history of [CRAFAA] is clear that calculation of fees for prevailing civil rights plaintiffs is to be the same as in the traditional fee arrangements and that reasonable time spent is to be compensated.[160]

While the Ninth Circuit's decision was by no means ground-breaking, the scrutiny given by that court to the lower court's award of attorneys' fees was unusual. In *Kessler*, which also involved appellate work, the court did not find it necessary to scrutinize the hours and rates claimed by plaintiff's attorneys for work on the appeal, despite the average $8 hourly rate awarded by Judge Wong.[161] Perhaps the attorneys in *Kessler* should have limited their fee appeal to the hours claimed for appellate work in order to invite a more rigorous review by the appellate court.

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[155] *Id.*

[156] *Id.* at 764 (citing Knighton v. Watkins, 616 F.2d 795, 800 (5th Cir. 1980).

[157] 678 F.2d at 764.

[158] The court stated that extensive preparation was not necessary because "issues were well rounded in the summary judgment papers and in the district court's published opinion. Preparation . . . required study of only three Supreme Court opinions and drafting arguments for distinction." *Id.*

[159] *Id.*

[160] *Id.*

[161] Plaintiffs' attorneys requested compensation for 250 hours of work in the district and appellate courts but no distinction was made in the fee determination. The district court awarded $2,000 for all hours claimed. Kessler v. Assoc. Fin. Serv. Co., No. 75-0162 (D. Hawaii), *aff'd*, 639 F.2d 498 (1981).

5. Goin v. Bank of Hawaii, Inc.[162]

Plaintiffs Samuel Goin and David and Sherri Bullock, represented respectively by Legal Aid and a private attorney, brought a class action suit against Bank of Hawaii for alleged violations of the TILA.[163] The complaint, on behalf of approximately 150,000 customers, charged that the Bank of Hawaii VISA (BANKAMERICARD at time of suit) monthly statements did not provide sufficient information for cardholders to verify their finance charges.[164] Judge Wong denied class certification[165] but subsequently granted plaintiffs' motion for summary judgment on the TILA claims brought in their individual capacities.[166] Plaintiffs were awarded

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[162] No. 77-0101 (D. Hawaii Oct. 23, 1978) (decision on the merits); No. 77-0101 (D. Hawaii Apr. 21, 1981) (decision on attorneys' fees).

[163] 15 U.S.C. §§ 1601-14, 1631-41, 1642-46, 1663-64, 1665a, 1666, 1666d, 1666f, 1666j, 1667-67e, 1671-77 (1976 & Supp. IV 1980) and specifically Regulation Z, 12 C.F.R. § 226. A successful class action would have allowed a recovery of not more than "the lesser of $500,000 or 1 per centum of the net worth of the creditor." 15 U.S.C. § 1640 (a)(2)(B) (Supp. 1976).

[164] The amended complaint charged the Bank with fifteen "disclosure" violations in its monthly periodic statements to cardholders. No. 77-0101 (D. Hawaii) (Plaintiffs' First Amended Complaint, filed January 6, 1978).

[165] No. 77-0101 (D. Hawaii May 9, 1978) (Order on class certification):

> This Court hereby denies the plaintiffs' motion for determination and certification of the class described in para. 5 of their First Amended Complaint. This Court finds that plaintiff Goin lacks the requisite standing to bring this suit as a class action both because he no longer possesses a BankAmericard and because he used his BankAmericard for business or commercial purposes. Plaintiffs Bullock are not adequate representatives of the class so long as no injunctive relief is sought.
>
> Should a further amended complaint be filed within 30 days seeking injunctive relief by plaintiffs Bullock, this Court will determine and certify the existence of a class with the Bullocks as the class representative on the following conditions:
>
> (a) The class will consist of those BankAmericard holders who used their cards solely for non-business or non-commercial purposes.
>
> (b) Plaintiffs Bullock shall be responsible for giving notice of the class action to the potential class members, advising them of the following: that should the plaintiffs prevail on the merits, the unnamed class members will share with them in a class recovery which will be determined by the Court; that the class recovery, if any, upon its division among the members of the class will in all likelihood amount to only nominal damages per individual member of the class and may well be less than the minimum statutory recovery for each class member; and that each class member may request to be excluded from the class by a specified date and bring an individual suit should that class member so desire.

Id. at 3-4.

[166] No. 77-0101 (D. Hawaii Oct. 23, 1978) (order granting summary judgment):

> The Court finds that Bank of Hawaii's periodic statements violate the Truth-in-Lending Act in two respects. First, the total of the average daily balance is disclosed as ".00" even though the sum of the daily average balance for purchases and the average daily balance for cash advances was, in fact, an actual dollar amount. In consequence, the customer could suffer some confusion when reading the average daily balance column. Therefore, the Bank is in violation of 12 C.F.R. § 226.6(c).
>
> Second, the Court feels that the intent and purpose of 12 C.F.R. § 226.7(b)(1) is

minimum statutory damages of $100.00 each, court costs, and reasonable attorneys' fees to be determined by the court.[167] Plaintiffs unsuccessfully appealed the denial of class certification, but the Ninth Circuit remanded for entry of judgment on the award of reasonable attorneys' fees and costs.[168]

Plaintiffs requested over $46,000.00 for approximately 440 hours of work claimed by three attorneys.[169] After Judge Wong's untimely death, Judge King issued the fee decision. He reduced the hours claimed to 65, allowed an hourly rate of $40, and awarded only $2,600.00.[170] Essentially, he deducted all 265 hours spent on the class aspects of the case, both at trial and on appeal, because plaintiffs were unsuccessful in obtaining class certification. Whether by inadvertence or design, the court omitted from consideration all 82.6 hours claimed by Mr. Kanter of Legal Aid. Finally, Judge King eliminated twenty-seven hours devoted to conference and telephone calls among the attorneys.[171] He relied almost exclusively on two *Johnson* factors to justify his drastic cut of plaintiffs' attorneys' fees. The two factors applied were the amount involved and awards in similar cases.[172]

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that sufficient information be provided to the customer so that the customer himself can calculate the finance charge, if he wants to check on the accuracy of the finance charges levied against him. The Court finds that the periodic statements violate 12 C.F.R. § 226.7(b)(1) by not clearly and conspicuously disclosing sufficient information. The reverse side of the disclosure statement states that the average daily balance is obtained by "adding all the Daily Balances of an account for the billing period and dividing by the number of days in the billing period." No matter how the cardholder may try, however, it is impossible for the cardholder to calculate the average daily balance based upon the information provided on the form. The number of days in the billing period is not stated. The starting date of the billing period is not disclosed, nor is there any explanation that the billing period commences on the date following the date of the cardholder's last periodic statement. The Court does not feel that the customer should be required to make any assumptions concerning the number of days in the billing period. . . .

Id. at 4-5.

[167] *Id.* at 5.

[168] No. 78-3668 (9th Cir. Nov. 24, 1980).

[169] No. 77-0101. (Plaintiffs' Supp. Mem. in Support of Motion for Attorneys' Fees, filed Jan. 8, 1981).

Attorney	Rate*	Hours	Amount
John Paer, Legal Aid	112.50	197.0	22,162.50
Richard Kanter, Legal Aid	75.00	82.6	6,195.00
Steven Guttman, Private	112.50	160.2	18,022.50
Total		439.8	$46,380.00

* Customary rate of $75, 50 and 75, respectively, plus multiplier of .50 to account for contingency factor.

[170] No. 77-0101 (D. Hawaii Apr. 21, 1981) at 3. (Decision and Order Granting Plaintiffs' Motion for Award of Attorneys' Fees).

[171] *Id.* at 5.

[172] The court stated that "the measure of success in the whole case and the small amount

A review of the court's decision highlights the tension that exists between the court's desire to use its equitable powers to reduce litigation costs by controlling the amount of fees awarded under the statute, and Congress' goal of encouraging enforcement of the TILA through adequate compensation of plaintiffs' attorneys. It is apparent that Judge King sought to discourage cases like *Goin* where the fees requested were greatly disproportionate to the $200 awarded to plaintiffs.[173] He reasoned that most of the hours claimed were unnecessary because this was a simple case made complex by plaintiffs' attorneys over-litigating an obvious TILA violation.[174] Judge King stated that the hours expended on the class action were eliminated because it was clear at the outset that plaintiff Goin was not an adequate representative of the class and because plaintiffs Bullock elected not to amend their complaint to seek injunctive relief.[175]

Though plaintiff Goin's lack of standing may have been clear to the court in hindsight, the course of litigation is rarely predictable at the outset by the parties involved.[176] It is questionable whether the inadequacy of the class representatives was really manifest from the start. The class action was initiated in March, 1977, and it wasn't until May, 1978 that Judge Wong denied plaintiff Goin's representation and allowed the Bullocks to represent the class if they amended their complaint.[177] Over 200 hours had been expended by plaintiffs' attorneys on the case by that time.[178] To deduct all the hours for work expended on the class certification contravenes Judge King's earlier position in *Suzuki* that plaintiffs are entitled to compensation for reasonable hours, even for the time spent on issues that were ultimately unsuccessful.[179]

Despite Judge King's implicit characterization of the class action as vexatious, he failed to recognize that it is the duty of public interest law firms to devote their efforts to litigation which will enforce the TILA on behalf of a large class of consumers. The class action in this case was unsuccessful but it served as a catalyst to prompt Bank of Hawaii to revise its VISA monthly statements to comply with the TILA disclosure requirements. As a result, the purported class of 150,000 cardholders ben-

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of damages awarded indicate that reasonable attorneys' fees are much lower than those requested by plaintiffs . . . [and] the amount involved and the results obtained is a critical [factor] . . . . This award in light of criterion 12 . . . is consistent with the [award by Judge Wong in *Kessler*]." *Id.* at 4, 7.

[173] *Id.* at 4.

[174] *Id.* at 6-7.

[175] *Id.* at 4.

[176] "This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. Even when the law or facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978).

[177] No. 77-0101 (Order, filed May 9, 1978).

[178] No. 77-0101 (D. Hawaii, filed Jan. 8, 1981) (Affidavits of Guttman and Paer).

[179] Suzuki v. Yuen, 507 F. Supp. 819, 824 (D. Hawaii 1981).

efited from the abortive class action, albeit indirectly. Therefore, it would have been proper for the court to award fees for time expended on the unsuccessful class action in this case, since the "work was reasonably calculated to advance plaintiffs' interest."[180]

Though Judge King's wholesale discounting of plaintiffs' attorneys' hours and rates may be disputed, he cannot be faulted for failing to support his decision with factual findings and legal precedents. In fact, he made a convincing argument that the fees requested were unreasonable and excessive. What is disturbing in this case is the apparent undercurrent of emotion that seems to reflect the court's personal biases. Attorneys from Legal Aid and Mr. Guttman may have been singled out by Judge Wong and Judge King for special rebuke, since they had "pestered" the court with 115 of the 139 consumer protection cases docketed in the Hawaii District Court between 1974 and 1981.[181] Although this aspect of the case may be overstated, the words of Judge Wong and Judge King quoted below cannot be overlooked. Whether they are indicative of bias or merely the court's justifiable indignation over plaintiffs' attorneys' actions is uncertain.

As has been noted previously, Judge Dick Yin Wong decided the merits of the case, while Judge King issued the fee decision after Judge Wong's death. They had worked together and known each other for many years. A close reading of defendant Bank of Hawaii's Memorandum in Opposition to Motion for Award of Attorneys' Fees would indicate that counsel's memorandum may have been a thinly disguised effort to play upon the emotions of the court.[182] After previously invoking the name of Judge Wong twenty-six times in the twenty-five page memorandum and quoting several passages from Judge Wong's statements in the record and from Judge Wong's *Kessler* fee decision, counsel for defendant Bank of Hawaii concluded their argument by admonishing Judge King to remember that "Judge Wong's point [about springboarding a small claim] applies with even greater force to this case. Surely *he* would not in this case award plaintiff's attorneys fees greater than $3,025.00. Bank of Hawaii requests this court not to do so either."[183]

Defendant's counsel also reminded Judge King of Judge Wong's displeasure with plaintiffs' attorneys for having brought this action:

> Before ruling on this matter I would like to express the concerns of the Court with respect to the actions taken by the Legal Aid Society and counsel for the Plaintiff, Mr. Guttman. I think in a lot of these cases where there are perceived errors in the forms submitted to customers of finance companies, banks et. cetera, if they were truly interested in seeing that a proper

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[180] Gluck v. American Protection Industries, Inc., 619 F.2d 30, 33 (9th Cir. 1980).

[181] *See*, Exhibit "G" to Appellant's Brief, mem. No. 81-4432 (9th Cir. June 21, 1982).

[182] 77-0101 (D. Hawaii, filed Feb. 11, 1981).

[183] *Id.* at 25 (emphasis added).

> disclosure form is submitted, perhaps they should go to the banks and point out what things are wrong, how they should be changed and if the Bank [sic] at that point refuses to change their forms, I think that they should come into court to ask for relief. Of course, under the law they have every right to say: Well, the banks have violated the law, so we're going to stick them and I don't think that's the proper procedure to use. But, this Court is bound by the law and if that's the procedure that the plaintiffs want to take, *at least plaintiff's* [sic] *counsel want* [sic] *to take,* the Court would just have to hear the case, although the *Court is really not in favor of that procedure.*[184]

Counsel's message could not have gone unnoticed by Judge King. In fixing the fee for this case he reduced the hours requested from 440 to 65 and discounted the customary hourly rate from $75 to $40. As a result, plaintiffs' attorneys were awarded $2,600.00 plus costs of $58.22. Judge King stated that "[t]his award, in light of criterion 12 awards in similar cases, is consistent with the $2,000.00 awarded by Judge Wong in another TILA case in which one of the attorneys here was involved. The award was upheld by the Ninth Circuit."[185] Judge King concluded that the total award of $2,600.00 was also consistent with a Fifth Circuit case.[186]

The Fifth Circuit case relied on was *Earl v. Beaulieu,*[187] where the court was outraged by the fact that the plaintiff "systematically demolished the automobile, refused to make the deferred payments he had agreed to pay. . . , [and had the gall to enlist the aid of Central Florida Legal Services against the] no more than literate" pro se defendant of Wayne's Garage.[188] The court stated, indignantly, that "[s]omewhere along the line, a certain sense of proportion has been lost as the unfortunate Mr. Beaulieu, like the proverbial butterfly, is broken on the wheel by the monstrous engines wheeled into place by the Congress."[189] The court then chastized plaintiff's attorneys by quoting Cromwell's edict to the Long Parliament: "You have sat here too long for any good you have been doing. Let us have done with you. In the name of God, go!"[190]

Despite the different facts and circumstances in *Goin* — the Bank of Hawaii (largest in the state) and the prestigious law firm of Goodsill, Anderson, Quinn and Stifel can hardly be equated to the proverbial butterfly — Judge King's approach and impatient tone would indicate that he

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[184] Defendant's Opposition to Motion for Award of Attorneys' Fees, No. 77-0101 (filed Feb. 11, 1981) at 12 (quoting Order Granting Plaintiffs' Motion for Summary Judgment, filed Oct. 23, 1978).

[185] No. 77-0101 (Decision, filed Apr. 21, 1981) at 7. The attorney involved in *Kessler* and *Goin* is Paer of Legal Aid. Perhaps this reference to Mr. Paer indicates the value Judge Wong would have placed on the work of Mr. Paer in *Goin.*

[186] *Id.*

[187] 620 F.2d 101, 103 (5th Cir. 1980).

[188] *Earl,* 620 F.2d at 103.

[189] *Id.*

[190] *Id.*

considered the actions of plaintiffs' attorneys to be clear-cut examples of overlawyering deserving of strong judicial discouragement. Clearly, Judge King could not have selected a better case than *Beaulieu* to express Judge Wong's and his sentiments about plaintiffs' attorneys' handling of the *Goin* case.[191]

Legal Aid appealed the fee award and claimed that the lower court abused its discretion on seven grounds.[192] Somewhat surprisingly, since it cited the *Kessler* opinion as the basis for its review, the appellate court reversed and remanded on two grounds.[193] In its unpublished memorandum opinion, the Ninth Circuit panel found that the lower court abused its discretion by setting the reasonable hourly rate for Mr. Paer at $40 and by failing to grant any attorneys' fees for the hours claimed by Mr. Kanter of Legal Aid.[194]

More significantly, but perhaps not surprisingly, the appellate panel found that the district court did not abuse its discretion by reducing the hours claimed by Goin's attorneys. The court stated that even though the district court emphasized the amount involved and the results obtained, it did not affect the outcome of the court's fee award.[195] The appellate court also found that the reduction in hours was based on relevant *Kerr*

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[191] It is interesting to note, however, that compared to the court's award of $2,600 (65 hours x $40 per hour) to plaintiffs' attorneys, defendant Bank of Hawaii paid its attorneys $69,454.63 for 935.63 hours. Two of the bank's attorneys billed at rates ranging from $80 to $125 per hour. Exhibit "D" to plaintiffs' Supplemental Memorandum in Support of Motion for Award of Attorney's Fees, No. 77-0101 (D. Hawaii, filed Feb. 20, 1981).

[192]

> (1) Failing altogether to award fees for time spent on the case by one of Plaintiff Goin's attorneys; (2) Failing to apply the customary hourly rate where the record clearly showed what the rate should be; (3) Failing to compensate Plaintiff Goin's attorneys for time spent on the class certification and appeal; (4) Failing to add a bonus for the contingency nature of the case; (5) Improperly reducing the amount of compensable hours because of factually incorrect information; (6) Setting the fees based on 1978 rates rather than 1981 rates when the award was made; (7) Failing to follow the law of this circuit when it deducted from the award of fees because Plaintiffs did not prevail on all claims.

Appellant's Opening Brief at 8-9, No. 81-4432 (9th Cir., filed Oct. 30, 1981).

[193] Memorandum, No. 81-4432 (9th Cir. June 21, 1982). The Ninth Circuit has consistently affirmed attorneys' fees awarded by lower courts, provided the *Johnson/Kerr* factors are considered. *Kessler, supra* at 500. *See,* Manhart v. City of Los Angeles, Dept. of Water, Etc. 652 F.2d 904 (1981); "Kerr does not require the court to make precise calculations on the record . . . . '[A] recital of the facts and the guidelines considered suffices . . .'." *Id.* at 908. *Accord,* Dennis v. Chang, 611 F.2d 1302, 1308 (9th Cir. 1980).

[194] Memorandum, No. 81-4432 (9th Cir. June 21, 1982). "The district court abused its discretion by setting the reasonable hourly rate at $40 for Mr. Paer, in light of the evidence that the scale of fees for attorneys with less experience was $55-60 in 1977 and $65-70 in 1978 . . .". *Id.* at 1. "The district courts' otherwise detailed opinion on the fee award makes no mention at all of Mr. Kanter's services." *Id.* at 2.

[195] *Id.* at n.1. *Accord,* Vanelli v. Reynolds School Dist. No. 7, 667 F.2d 773 (9th Cir. 1982): "If the court views one guideline as controlling, its decision will not amount to an abuse of discretion, so long as it is clear all guidelines were considered." *Id.* at 781.

factors, and not on the erroneous factual findings by the lower court that plaintiffs made an unsuccessful constitutional attack on the TILA damage provision, and prevailed on only one of seven claims.[196]

The *Goin* court conceded that, "in cases such as this, although a small monetary award may frequently result, principles of considerable importance may be vindicated."[197] Earlier, the appellate court in *Kessler* stated that the "purposes behind granting attorney's fees is to make the litigant whole and to facilitate private enforcement of the Truth-in-Lending Act."[198] The *Kessler* court also noted that the "policy considerations that support awards of attorney's fees to legal services organizations prosecuting civil rights litigation also support such awards in Truth-in-Lending cases."[199]

Similarly, the dissenting opinion in the Seventh Circuit's *Mirabal v. General Motors Acceptance Corporation*[200] expressed the need for effective enforcement of the TILA, which "embodies the national policy that economic stablization and competition will be enhanced if consumers are given accurate and meaningful disclosure of credit."[201] Certainly, the Ninth Circuit must also recognize that a statutory provision for attorneys' fees would be meaningless unless attorneys for successful parties are adequately compensated.[202] On the other hand, these statutory policy considerations must also be balanced against the need for courts to pressure

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[196] No. 81-4432 at n.1. "Actually the court reduced the amount of hours claimed . . . based on a detailed evaluation of several relevant *Kerr* criteria." *Id.*

[197] *Id.*

[198] 639 F.2d 498, 499 (quoting Hannon v. Security National Bank, 537 F.2d 327, 328 n. 1 (9th Cir. 1976).

[199] 639 F.2d at 499. The policy considerations were stated by the court in Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980): "(1) the award encourages the legal services organizations to expend its limited resources in litigation aimed at enforcing the . . . statutes; and (2) . . . encourages potential defendants to comply with . . . [the] statutes." *Id.* at 1306.

[200] 576 F.2d 729 (7th Cir. 1978) (Swygert, Cir. J., dissenting).

[201] *Id.* The majority, however, expressed several concerns. Plaintiffs in that case were awarded $2,000 for attorney's fees on a claim of 350 hours for trial and appellate work. On appeal the court affirmed the lower court's award for the following reasons:

> [T]he amount which petitioner claims to have spent on the . . . case seems clearly out of proportion with the amount in controversy [$2,000] . . . . Additionally, to grant large attorney's fee awards on the basis of relatively small injury would encourage suits which do not further the clients' interest or the public's interest. The costs of these suits already forces many claims to settlement.

Id. at 730-31.

[202] *Id.* at 734. The dissent was disturbed by the "enormous disparity between the amount . . . received by defendants' attorneys and plaintiffs' attorney." *Id.* at 731. Judge Swygert argued that the majority's concern over excessive costs and "forced settlements" was not convincing, since defendants can make:

> an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure . . . [and] can place on the plaintiff much of the financial risk involved in litigation . . . . Once a defendant makes such an offer, he is not liable for plaintiff's costs and attorney's fees if plaintiff does not ultimately recover the amount of the offer.

Id. at 734.

plaintiffs' attorneys to vindicate statutory rights in a cost-effective way.

The high cost of litigation already forces many fee-paying clients to seek alternatives to full litigation of disputes: negotiated settlements, arbitration, stipulations, narrowing of issues, pre-trial conferences, or the more novel "mini-trial."[203] Are there similar pressures on public interest litigators who are compensated through statutory provisions?[204] Obviously, the *Kessler* and *Goin* cases are examples of how the award of attorneys' fees can be an effective tool for the courts to control litigation of TILA cases.[205] The historically low fees[206] granted by the Hawaii District Court for TILA and other consumer actions may already have had a chilling effect on the private bar and on Legal Aid as well.

The district court docket files show a reduction in the number of consumer credit protection cases brought between 1975 and 1981. Forty-eight actions were brought in 1975 while in 1981 there were only four.[207] Arguably, this trend may be the result of other factors and not solely attributable to low fee awards. For example, there may be fewer violations of the TILA because of the deterrent effect of previous enforcement efforts. However, the *Goin* case brings into sharp focus the Hawaii District Court's seeming inability to strike a balance between encouraging suits to achieve the underlying legislative purpose of fee awards and preventing what it may perceive to be questionable practices by attorneys to generate large fees.

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[203] Green, *Growth of the Mini-Trial*, 9 Litigation 12 (Fall 1982).

[204] One commentator suggests that:

> Primarily, the amount of court grants directly affects the willingness of the private sector to litigate these suits. As Congress recognized, fee shifting can be an 'important tool' for ensuring the enforcement of constitutional guarantees. However, the tool is only effective when the award granted by the court covers the expenses of litigation and returns to the attorney a profit equivalent to that which he would have earned in his normal practice. To the extent that the statutory fee returns a lesser amount, lawyers will be economically discouraged from taking these cases.
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> Second, controls over the size of the award enables the court, to a considerable degree, to direct procedure. The liberality with which courts compensate attorneys for imaginative claims and tactics will ultimately establish the extent to which such novel procedures are utilized. Alternatively, denial of fees when questionable tactics are employed will lead to a more streamlined procedure and improved efficiency of adjudication.

Note, *supra* note 1 at 372.

[206] It should be noted that Mr. Guttman, the private attorney representing the Bullocks in *Goin*, did not join in the appeal for attorneys' fees. He attested that he has been "effectively discouraged" from taking anymore TILA cases because of low fee awards. Plaintiff's Memorandum in Support of Motion for Judgment and Award of Attorneys' Fees on remand, No. 77-0101 (D. Hawaii, filed Sept. 15, 1982). After the hearing for attorneys' fees on remand Legal Aid and Bank of Hawaii settled out of court and Legal Aid was paid $12,000.

[206] *See e.g.*, Kela v. Beneficial, No. 76-0108 ($250.00); Martin v. Beneficial, No. 76-0109 ($192.12); Abad v. Associates Financial Services, No. 76-0446 ($156.68) (cited in Appellant's Opening Brief, No. 81-4432 (9th Cir., filed Oct. 30, 1981).

[207] Appellant's Opening Brief, at Exhibit "G."

C. Summary

After having reviewed five Hawaii District Court fee decisions and three subsequent appellate rulings in some detail, some general observations are in order. First, these decisions exhibit many of the flaws previously identified by other commentators. The fee decisions exemplify the Hawaii District Court's tendency to overlook the importance of achieving predictability through consistency or of adhering to the underlying policy objectives of statutory fee awards in its effort to reach what it considers a just award.

In cases such as *Goin*, the court implicitly weighs the merits of competing interests in determining reasonable attorneys' fees. The resolution of the conflict is largely a discretionary judicial decision. As a result of this wide latitude of discretion, the Hawaii District Court has travelled "different paths in different cases"[208] in order to achieve its desired conclusion.

That this subjective approach is prone to abuse is apparent in most of the decisions reviewed. Too often the district court has resorted to characterization ("spring-boarding," "unreasonably high," "overlawyering"), post-hoc reasoning ("clear at the outset," "simple case," "obvious claim"), selective multiple-choice factors ("amount involved and results obtained," "awards in similar cases"), and case-shopping (i.e., *Earl* — 5th Circuit, *Mirabal* — 7th Circuit) to justify wholesale reductions of fee requests. Perhaps these devices are employed to cover up the judge's "inherent dislike for public interest cases and for their lawyers."[209] One commentator suggests that, in making fee awards, judges should be guided more by the intent of Congress, as enunciated in the legislative history of CRAFAA, than by their own inclinations.[210]

Arguably, the Ninth Circuit's reversal of the *Suzuki* and *Goin* fee awards, despite their narrow holdings, places some limits on the lower court's misuse of discretion. Yet the *Kessler* decision still stands. Perhaps, if Judge King had followed Judge Wong's lead in *Kessler* by simply reciting each of the twelve *Johnson* factors, he would not have run the risk of being overturned in *Goin*. However, dicta in the appellate opinions of *Kessler*, *Suzuki*, and *Goin* suggest that the Hawaii District Court should heed the legislative purposes of fee-shifting statutes.

The scattered remarks in the appellate decisions cited above may serve as subtle reminders to the Hawaii District Court that adequate fee awards are necessary to make lawyers available to persons the statutes are intended to protect. Without the assurance of adequate compensation by the courts, few private attorneys or public interest organizations would

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[208] Berger, *supra* note 1, at 327.

[209] Larson, *supra* note 1, at 162.

[210] *Id.* at 162-63 (quoting Abermarle Paper Co. v. Moody, 442 U.S. 405, 416 (1975)).

be willing or financially able to take cases on a contingency basis.[211] Consequently, many statutory rights remain nugatory for those who cannot afford to pay attorneys' fees for legal assistance.[212]

The low awards of attorneys' fees by the Hawaii District Court presents two additional problems. By regularly discounting customary rates and reducing the hours claimed in attorneys' fee requests, the district court seems to be working under the assumption that attorneys' claims may be inflated or deliberately padded. Conversely, because of the court's propensity to award low fees, attorneys may also be operating under the assumption that their hours must be augmented to compensate for the anticipated cuts by the Hawaii District Court. This vicious circle creates related side-effects. By awarding low fees the district court is forcing attorneys to appeal in hopes of recouping some of their losses. This leads to extended litigation on the issue of attorneys' fees, and results in more congestion in the courts.[213]

Finally, based on the Hawaii District Court cases discussed above, it seems unlikely that the *Johnson* approach will be discarded by the Ninth Circuit in favor of the more objective methods adopted by other circuits. The appellate court tolerates the use of both the *Johnson* approach and the *Lindy* lodestar method but only the lower court's failure to "consider" the *Johnson* factors is grounds for reversal on appeal. Evidently, the Ninth Circuit prefers to preserve the lower courts' flexibility to decide the fee issue on a case-by-case basis. But the recent appellate decisions in *Suzuki* and *Goin* may signal the Hawaii District Court to use its discretion more carefully.

IV. Conclusion

This Comment has attempted to explore several dimensions of the award of "reasonable attorneys' fees" by the Hawaii District Court. The appellate rulings in *Suzuki* and *Goin* are encouraging in two respects. First, there are clear limits to the lower court's discretion in fixing "reasonable" hours expended and "reasonable" hourly rates for *appellate* work. Second, "reasonable" hourly rates must be based upon "customary" rates, as supported by evidence on the record, rather than by the lower courts' own notions. However, the Hawaii District Court still retains virtually unlimited discretion to determine the amount of hours "reasonably" expended at *trial* level. In addition, the "clear abuse of discretion"

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[211] Indeed, the low fee awards by the Hawaii District Court for TILA cases can serve only to discourage private counsel from taking such cases when other less risky, more highly paid work is available to them in great abundance.

[212] Aronson, *supra* note 5, at 287.

[213] Note, *supra* note 1, at 377. In *Goin*, despite the district and appellate courts' efforts for speedy resolution of the case (denying class, summary judgment, etc.) the judicial process consumed over five years from time of suit to the final settlement of attorneys' fees.

standard of review for fee awards is still a formidable barrier to overcome. Any challenge to the hours allowed by the lower court is largely doomed at the outset, as the Ninth Circuit's *Goin* decision amply demonstrates.

Plaintiffs' attorneys seeking fees for successful civil rights and consumer protection actions must be forewarned that the Hawaii District Court does not regard public interest law as a "favored charity."[214] Until the Hawaii District Court makes a conscious effort to incorporate the legislative purposes of fee-shifting statutes into its fee determinations, the award of "reasonable attorneys' fees" by the court will not be comparable to fees paid to attorneys by a private client.[215]

Maurice M. Arrisgado

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[214] Aronson, *supra* note 5, at 287. "Because public law challenges existing commercial practices, administrative policies, and judicial precedents, it is not surprising that it is not a favored charity." *Id.*

[215] S. Rep No. 94-1011, 94th Cong., 2d Sess., 6 (1976): "In computing the fee, counsel for prevailing parties should be paid as is traditional with attorneys compensated by a fee-paying client . . . ." *Id. See also,* Suzuki v. Yuen, 678 F.2d at 764, text accompanying n. 160 *supra.*

COMMUNITY COMMUNICATIONS CO. v. CITY OF BOULDER: ANTITRUST LIABILITY OF HOME RULE MUNICIPALITIES AND THE PARAMETERS OF HOME RULE AUTHORITY

I. INTRODUCTION

Beginning in 1943 with *Parker v. Brown*,[1] a series of United States Supreme Court decisions has addressed the issue of state action immunity from federal antitrust liability. In 1982, the Supreme Court was presented with an opportunity to determine the applicability of the *Parker* doctrine to municipalities.[2] *Community Communications Co., Inc. v. City of Boulder, Colorado*[3] posed the question of whether a home rule municipality,[4] which had enacted an ordinance temporarily staying expansion of intracity cable television services, was immune from antitrust liability under the *Parker* state action exemption. The United States Supreme Court held that a municipality is not automatically exempt under *Parker*, even when it acts in a regulatory governmental capacity.[5] The Court also held that the city's grant of home rule powers, although conferred in the state

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[1] 317 U.S. 341 (1943). In *Parker*, the Court held that the Sherman Antitrust Act did not prohibit a state from adopting an agricultural marketing program which restricted competition among the state's raisin growers. *See infra* notes 34-44 and accompanying text.

[2] The term *municipality* is used generically herein to refer to cities, counties, townships and special districts which are empowered to provide local government services.

[3] 455 U.S. 40 (1982).

[4] Under municipal home rule, local government is given increased legal authority over local affairs. Municipal home rule may be created by provision in the state constitution or by statute. While constitutionally created home rule generally provides broad protection against state intrusion into areas of local concern, the scope of statutory home rule depends on prevailing legislative sentiment. For example, a legislature might delegate broad home rule powers to local government during one session and, in a subsequent session, rescind previously delegated authority. *See generally* 2 M. LIBONATI, LOCAL GOVERNMENT LAW § 4 (1981); D. MANDELKER, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 179-206 (1977); 2 E. MCQUILLAN, MUNICIPAL CORPORATIONS § 9 (1979); O. REYNOLDS, LOCAL GOVERNMENT LAW Ch. 6 (1982); Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1968).

[5] *Community Communications*, 455 U.S. at 49-56. *See infra* notes 92-97 and accompanying text.

constitution,[6] was insufficient to constitute either the action of the State of Colorado itself in its sovereign capacity or municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy.[7]

This note discusses the effect of the *Community Communications* decision upon municipal antitrust liability as well as its potential impact on the exercise of discretionary home rule powers.

II. FACTS OF THE CASE

Respondent, City of Boulder (hereinafter "Boulder"), is organized as a home rule municipality[8] under the constitution of the State of Colorado. Its legislative powers are exercised by an elected city council.[9] In 1966, petitioner Community Communications Co., Inc. (CCC), became the assignee of a twenty-year, revocable, non-exclusive permit, granted by a city ordinance in 1964 to conduct a cable television business within the city limits. CCC was at that time the sole provider of community antenna television (CATV) service in Boulder. Due largely to technological limitations of the CATV industry, CCC's service was confined to a discrete geographic area of the city, comprising approximately twenty percent of the population.[10] By the late 1970s, however, advances in the state of the art of CATV made it commercially practicable for CCC to expand its service throughout Boulder.[11] In May 1979, CCC informed the city council of its

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[6] COLO. CONST. art. XX, § 6 (1980). The Colorado Home Rule Amendment provides in pertinent part:

> The people of each city or town of this state, having a population of two thousand inhabitants . . ., are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.
>
> Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.
>
> It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.
>
> The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

[7] *Community Communications*, 455 U.S. at 55-56.

[8] No general consensus as to the meaning of the term appears in the various statutory provisions or commentaries. As to the pertinent details of Boulder's home rule status, see *supra* note 6. For general information regarding home rule organization and powers, see *supra* note 4.

[9] *Community Communications*, 455 U.S. at 44 n.2 and accompanying text.

[10] *Id.* at 44.

[11] *Id.* at 44-45.

planned expansion. Two months later, the newly formed Boulder Communications Company approached the council for a permit to provide competing service throughout Boulder.[12]

The council responded by enacting an *emergency* ordinance prohibiting geographic expansion of CCC's service in Boulder for three months.[13] The announced purpose of the ordinance was to allow the council sufficient time to draft a model CATV ordinance and to solicit competitive bids from companies interested in servicing the Boulder area.[14]

CCC filed suit in the United States District Court for the District of Colorado,[15] seeking, inter alia, a preliminary injunction to prevent enforcement of the moratorium ordinance. It argued that the council's action was a restraint of trade in violation of section 1 of the Sherman Act.[16] The City claimed that the ordinance could not be in violation of the antitrust laws, either because it was a permissible exercise of the City's police powers, or because Boulder enjoyed antitrust immunity under the *Parker* doctrine.[17] The district court determined, however, that the City's home rule autonomy was limited to matters of local concern and that CATV operations embraced "wider concerns, including interstate commerce . . . [and] the First Amendment rights of communicators."[18] Assuming, arguendo, that it was within the City's authority to enact the ordinance, the court nonetheless found the *Parker* exemption "wholly inapplicable"[19] in light of *City of Lafayette v. Louisiana Power & Light Co.*[20] The court therefore granted the preliminary injunction and held that, absent *Parker* immunity, Boulder was subject to antitrust liability under section 1.[21]

A divided panel of the United States Court of Appeals for the Tenth Circuit reversed,[22] rejecting the notion that CATV regulation was beyond

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[12] *Id.* at 45.

[13] *Id.* at 45-46. In a rather complex move, the city council simultaneously repealed and reenacted the original ordinance, thus granting the permit to CCC with certain modifications, including the three month moratorium. For an illuminating analysis of the council's rationale, see Community Communications Co. v. City of Boulder, 630 F.2d 704, 709 (10th Cir. 1980)(Markey, Chief Judge, dissenting).

[14] 630 F.2d at 709.

[15] Community Communications Co. v. City of Boulder, 485 F. Supp. 1035 (D. Colo. 1980).

[16] 15 U.S.C. § 1 (1976) provides, in pertinent part, that "[e]very contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States . . ., is declared to be illegal."

[17] *Community Communications*, 455 U.S. at 47.

[18] *Community Communications*, 485 F. Supp. at 1038-39.

[19] *Id.* at 1039.

[20] 435 U.S. 389 (1978). In *Lafayette*, the Court held that a city or other state subdivision or agency is not automatically exempt from the operation of the antitrust laws. See discussion of *Lafayette*, *infra*, beginning at note 72 and accompanying text.

[21] *Community Communications*, 485 F. Supp. at 1039.

[22] Community Communications Co. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980). Chief Judge Seth wrote the opinion for the majority, in which Circuit Judge Seymour joined. Judge Markey dissented in a separate opinion.

the home rule authority of Boulder. The majority distinguished *Lafayette*, noting that Boulder, unlike the cities in that case,[23] had no "proprietary interest" in the regulated enterprise which would subject it to antitrust liability.[24] The city's action was also found to be "the only control or active supervision exercised by state or local government, and . . . represented the only expression of policy as to [CATV regulation]."[25] Therefore, the requirements for *Parker* exemption were not met. In a detailed dissent, Judge Markey[26] reviewed *Parker* and its progeny[27] and argued that *Lafayette*'s strong presumption against antitrust immunity for cities[28] could not be defeated absent a showing that the state legislature had contemplated the type of action challenged.[29]

On appeal to the United States Supreme Court, a divided Court reversed.[30] In the majority's view, the moratorium ordinance could not qualify as *state action* — and hence was ineligible for exemption under *Parker* — unless it constituted action of the State of Colorado in its sovereign capacity or municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy.[31] Justice Rehnquist, in dissent, argued that the majority's use of exemption analysis misconstrued what was properly a case for application of the *Parker preemption* doctrine.[32] He further criticized the majority's failure to distinguish political subdivisions of a state from privately owned businesses.[33]

III. DEVELOPMENT OF THE *PARKER* DOCTRINE

The legislative intent of the Sherman Act has been construed as including a presumption against implied exclusions of conflicting laws or policies.[34] The United States Supreme Court has observed that the Act's language "shows a carefully studied attempt to bring within the Act every

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[23] *See* discussion of *Lafayette*, *infra*, beginning at note 72 and accompanying text.

[24] *Community Communications*, 630 F.2d at 707.

[25] *Id.*

[26] The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation. Chief Judge Markey's analysis offers perhaps the most complete review of facts underlying the litigation.

[27] *Community Communications*, 630 F.2d at 715.

[28] *See Lafayette*, 435 U.S. at 398.

[29] *Community Communications*, 630 F.2d at 716 (*citing Lafayette*, 435 U.S. at 415).

[30] Brennan, J., delivered the opinion of the Court, joined by Marshall, Blackmun, Powell and Stevens, JJ. Stevens, J., also filed a concurring opinion. Rehnquist, J., filed a dissenting opinion, joined by Burger, C.J. Justices O'Connor and White did not take part in the consideration or decision of the case.

[31] *Community Communications*, 455 U.S. at 52.

[32] *Id.* at 60 (Rehnquist, J., dissenting).

[33] *Id.* A fuller discussion of these issues begins, *infra*, at note 98 and accompanying text.

[34] *See, e.g., Lafayette*, 435 U.S. at 398-400; Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975).

person engaged in business whose activities might restrain or monopolize commercial intercourse among the states."[35] Therefore, the intent of Congress to "establish a regime of competition as the fundamental principle governing commerce in this country" should not be displaced except by policies which have been found sufficiently weighty to override the presumption.[36] Under the *Parker* doctrine, state governmental action may be exempt from federal antitrust liability when a state, acting in its sovereign capacity, adopts a specific policy displacing competition and controls its implementation.[37]

A. Parker v. Brown

In *Parker*,[38] the Court held that the Sherman Act did not reach the activities of a state commission, authorized by state legislation to administer an agricultural marketing program restricting competition among the state's raisin producers.[39] Specifically, the state plan operated to stabilize prices along the distributive chain of the 1940 California raisin crop. The program's stated purposes were to "conserve the agricultural wealth of the state" and to "prevent economic waste in the marketing of [California's] agricultural products."[40] The Court assumed, without deciding, that "Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce."[41] The Court noted, however, that nothing in the language or history of the Sherman Act suggested a purpose to restrain a state or its officers or agents from activities directed by its legislature.[42] *Parker* held the challenged state action to be immune from antitrust liability; however, the Court affirmed prior rulings in which it prohibited states from attempting to immunize private individuals by authorizing them to violate the antitrust laws or by declaring their actions to be lawful after the fact.[43] Neither states nor municipalities may

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[35] *Lafayette*, 435 U.S. at 398-99 (*citing* United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 553 (1944); Goldfarb v. Virginia State Bar, 421 U.S. 773, 786-88 (1975)).

[36] *Lafayette*, 435 U.S. at 398.

[37] The concept of state action immunity antedates *Parker*, albeit in different and not altogether unified contexts. *See* Comment, *Antitrust — The Sherman Act versus Federalism: A Clash Between Giants*, 58 DEN. L.J. 249, 250-51 (1981).

[38] 317 U.S. 341 (1943).

[39] *Id.* at 351.

[40] *Id.* at 346.

[41] *Id.* at 350.

[42] *Id.* at 350-51: "In a dual system of government in which, under the constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its affairs and agents is not lightly to be attributed to Congress."

[43] *Id.* at 351 (*citing* Northern Securities Co., Inc. v. United States, 193 U.S. 197, 332, 344-47 (1904)).

with immunity become participants in a private agreement or combination by others for restraint of trade.[44]

B. *Application of the* Parker *Doctrine*

The Court did not confront the state action immunity issue again until thirty-two years later in *Goldfarb v. Virginia State Bar*,[45] where it struck down enforcement of minimum-fee schedules for attorneys as price fixing in violation of section 1 of the Sherman Act.[46] In rejecting the state bar's reliance on *Parker*, the Court stated that *Parker* protection was unavailable absent a showing that the state, acting as a sovereign, had compelled the challenged activities.[47]

Goldfarb stands as the United States Supreme Court's first articulation of *Parker*'s applicability to antitrust defendants other than states per se. However, the court failed to define the degree of state control necessary to invoke *Parker* state action immunity. Instead, the Court stated: "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is *required by the state* acting as sovereign."[48]

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[44] *Id.* at 351-52 (*citing* Union Pacific R. Co. v. United States, 313 U.S. 450 (1941)).

[45] 421 U.S. 773 (1975).

[46] Under the regulatory scheme in *Goldfarb*, minimum-fee schedules were published by the county bar association and enforced by the state bar association. Reports and ethical opinions published by the state bar indicated that Virginia lawyers could not disregard the fee schedules without exposing themselves to formal disciplinary action. Plaintiffs, unable to find a lawyer in their county who would perform a title examination for less than the prescribed fee, brought a class action, alleging that the minimum-fee schedule constituted price fixing in violation of section 1 of the Sherman Act. *Id.* at 775-78.

[47] *Id.* at 790. Although the state bar was by law an agency of the state supreme court, neither that court nor the Virginia legislature had suggested, approved or enforced the fee schedule promulgated by the bar association:

> [I]t cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent [bar associations]. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving the regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them . . . . Although the State Bar apparently has been granted the power to issue ethical opinions, there is no indication . . . that the Virginia Supreme Court approves the opinions . . . . It is not enough that . . . anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.

Id. at 790-91.

[48] *Id.* at 790. Implicit in this standard is a consideration that the nature of the entity, as well as the nature of its challenged activities:

> The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. The State Bar . . . has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond

The *Parker* doctrine has also been applied to protect private parties whose anticompetitive activities are substantially controlled by the state. In *Cantor v. Detroit Edison Co.*,[49] a drug store owner who sold electric light bulbs brought suit against a privately owned electric utility company, alleging that the utility's light bulb distribution program[50] violated both the Sherman and the Clayton Acts.[51] A plurality of the Justices held that the utility's activities in the area of light bulb marketing were sufficiently autonomous to remove the program from the protection which might have been available had the state initiated and supervised the plan.[52]

In contrast to the unanimous opinion of eight Justices in *Goldfarb*,[53] *Cantor* produced four separate written opinions, each offering a distinct construction of the *Parker* rule.[54] Justice Stevens, writing for the plurality, argued that *Parker* addressed only the limited issue of antitrust claims against a state, acting through its officers or agents, rather than

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the reach of the Sherman Act.

Id. at 791-92.

Thus, *Goldfarb* left the courts with considerable leeway in determining whether a state acts as a sovereign through other, lesser agencies. The Court's interpretation of the *Parker* doctrine itself seems to vary with the facts in issue of each case, including the type of defendant. *See, e.g., infra* note 59 and accompanying text.

[49] *Cantor*, 428 U.S. 579 (1976).

[50] The utility's practice was to replace used standard-size light bulbs with new ones for its customers who brought in their used light bulbs, regardless of whether the customers' light bulbs had been purchased elsewhere. *Id.* at 582. Although the private utility was at that time completely regulated by the state's public services commission, the company had initiated its distribution program long before the advent of state regulation. *Id.* at 594.

[51] As regulated, the utility could not in fact have abandoned the light bulb programs without prior state approval. However, there was no evidence in the record indicating that such approval would not have been routinely granted on request, since the state had no policy of its own regarding light bulb marketing. *Id.* at 593-94.

The district court granted defendant's motion for summary judgment, holding that the state's control over the activities of the defendant constituted affirmative state action, thus placing the case "squarely within the *Parker* doctrine." 392 F. Supp. 1110, 1111 (E.D. Mich. 1974). The issue on appeal was "whether the *Parker* rationale immunizes private action which has been approved by a state and which must continue while the state approval remains effective." *Cantor*, 428 U.S. at 581.

Note that this statement of the issue enlarges the question presented in *Goldfarb*. While *Goldfarb* emphasized state *control* over a particular activity, the statement of the issue in *Cantor* suggests that state *approval* of an agency's action might be sufficient under *Parker*. *Cantor* also involves a state regulated private business rather than an agency of the state government as was the case in both *Parker* and *Goldfarb*.

[52] Stevens, J., delivered the opinion of the Court, in which Brennan, White and Marshall, JJ., joined, and in which (except as to Parts II and IV) Burger, C.J., joined. Burger, C.J., filed an opinion concurring in the judgment, and concurring in part. Blackmun, J., filed an opinion concurring in the judgment. Stewart, J., filed a dissenting opinion, in which Powell and Rehnquist, JJ., joined.

[53] 421 U.S. 773 (1975)(Powell, J., did not participate).

[54] *See supra* note 52.

against a private party.[55] The plurality argued that the *Parker* rule should be read narrowly as holding only that a state itself could not be sued under the antitrust laws.[56] Thus, *Parker* was not controlling where the legality of any act of a state or of any of its officials or agents was not at issue.[57] Justice Stewart, dissenting, argued that a rule limiting the application of the *Parker* doctrine to state officers or agents would be inconsistent with prior decisions such as *Goldfarb*,[58] where the Court explicitly weighed the degree of state control over the anticompetitive activity of a private party defendant. According to the dissent, the utility's mandatory compliance with the state tariff rendered it immune from antitrust liability.[59]

In a concurring opinion, the Chief Justice argued that the nature of the challenged activity — not the status of the parties per se — should be dispositive.[60] Justice Blackmun also concurred, arguing in favor of a *rule*

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[55] *Cantor*, 428 U.S. at 590-91. The plurality suggested that there also may be "cases in which the State's participation in a decision [to engage in anticompetitive activity] is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it." *Id.* at 594-95. While this suggestion leaves open the possibility of extending *state action* to include private action directed by a state, the *Cantor* decision is more than an incremental advance in the Court's case by case development of the *Parker* doctrine. The fact that the defendant in *Cantor* was a private party sparked a major division among the Justices concerning the exact holding of *Parker*.

[56] *See supra* note 55 and accompanying text; *infra* note 57.

[57] The issue, as framed by the plurality, was whether private conduct required by state law is exempt from the Sherman Act. The Court immediately qualified this statement, however, and in fact applied *Parker* analysis because of the state's participation in the challenged activity. The issue thus became whether the private party exercised sufficient freedom of choice to enable the Court to conclude that it should be held responsible. *Id.* at 592-93.

[58] 421 U.S. 773 (1975). *See also* Eastern R. Conf. v. Noerr Motors, 365 U.S. 127 (1961) (no violation of Sherman Act where private persons attempted to influence the passage or enforcement of state laws regulating competition).

[59]

> The utility company thus engages in two distinct activities: It proposes a tariff and, if the tariff is approved, it obeys its terms. The first action cannot give rise to antitrust liability under *Noerr* and the second — compliance with the terms of the tariff under the command of state law — is immune from antitrust liability under *Parker* and *Goldfarb*.

Cantor, 428 U.S. at 624 (footnote omitted).

[60] *Id.* at 604-05 (Burger, C.J., concurring in the judgment and in all except parts II and IV of the Court's opinion). The Chief Justice correctly observed that the distinction between private and government defendants was unnecessary to the resolution of the case. *Id.*

The Chief Justice cited *Goldfarb* in support of this proposition, noting that the defendant there was a private, voluntary association and that the Court in *Goldfarb* need not have considered *Parker* at all had it decided that *state action* could never encompass the activities of private parties controlled by a state. Thus, argued the Chief Justice, a light bulb distribution program which has no logical connection to the state's regulatory interests is not *state action* under *Parker*.

Note that the Chief Justice's application of *Parker* apparently does not include the question of the degree of control exerted over an activity by the state. In practice, this analysis

of reason for determining when the federal policy underlying the antitrust laws should preempt conflicting state regulatory schemes. He noted in particular that the light bulb marketing program was not rationally connected to the state's regulatory goals.[61]

Following *Goldfarb* and the split of opinion in *Cantor*, the Court continued to treat both the nature of the challenged activity and the nature of the defendant's relationship to the state as significant factors in *Parker* analysis. In *Bates v. State Bar of Arizona*[62] the Court rejected an antitrust challenge to an Arizona Supreme Court disciplinary rule which prohibited advertising by attorneys.[63] Defendants contended that the Court's rule violated the Sherman Act because of its tendency to limit competition.[64] Rejecting this claim, the Arizona Supreme Court held that, even if it was anticompetitive in effect, the rule was exempt from antitrust attack as "an activity of the State of Arizona acting as a sovereign."[65] On appeal to the United States Supreme Court, this portion of the judgment was affirmed.[66] The Court based its decision, in part, on the fact that the State of Arizona, through its supreme court, was the real defendant;[67] ad-

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subsumes the requirement of sufficient state involvement in the challenged activity without requiring express action by the state government granting authority to the private defendant. *See id.*

[61] *Id.* at 612-14. Justice Blackmun's concurrence, along with substantial portions of both the plurality and dissenting opinions, digresses somewhat from the issue of private party immunity into a three-way debate on federalism and state regulatory integrity. *See, e.g., id.* at 587-90 (the plurality opinion); *id.* at 605-12 (Justice Blackmun's concurrence); *id.* at 614-40 (the dissent).

As the Chief Justice noted, however, the precise issue raised in *Cantor* was a narrow one:

> The reading of *Parker* in Part II [of the plurality opinion, which in effect proposed a new test for balancing competing state and federal regulatory policies] is unnecessary to the result in this case . . . . There was no need in *Parker* to focus upon the situation where the State, in addition to requiring a public utility "to meet regulatory criteria insofar as it is exercising its natural monopoly powers" . . . also purports, without any independent regulatory purpose, to control the utility's activities in separate, competitive markets.

Id. at 604.

The concept of the state's policy interest in a particular activity is perhaps the touchstone of the plurality's various rationales. Restated, the rule would be that marginal state interest and involvement in the anticompetitive activity of a private party is insufficient to invoke state action immunity under *Parker*. In the instant case, for example, "there can be no doubt that the option to have, or not to have, such a program is primarily [the utility's], not the Commission's." *Id.* at 594 (footnote omitted).

[62] 433 U.S. 350 (1977).

[63] Defendants, two members of the Arizona State Bar, were temporarily suspended from practicing law in the state after publishing price lists for legal services offered by their legal aid clinic. *Id.* at 353-54.

[64] *Id.* at 356.

[65] *Id.* at 357.

[66] *Id.* at 361-62. None of the separate opinions in *Bates* took issue with the majority's *Parker* analysis. (The Court's treatment of appellants' first amendment claims is not discussed herein.)

[67] The court thus distinguished *Goldfarb* and *Cantor*. *Cf. Goldfarb*, 421 U.S. at 790 ("[w]e

ditionally, the challenged activity — regulation of the legal profession — was uniquely and traditionally within the state's independent regulatory interest.[68] In contrast to the mere acquiescence of the state in *Cantor*, the Court found that the disciplinary rules reflected "a clear articulation of the State's policy with regard to professional behavior," and that the state policy was effectuated in part via enforcement proceedings by the policymaker, the Arizona Supreme Court.[69]

Under *Bates* the relationship between the antitrust defendant and the state is tested by a two-tiered analysis. First, the challenged activity must "reflect a clear articulation of the State's policy."[70] Second, the state must supervise the activity or subject its underlying policy to "pointed re-examination."[71] There can be no finding of sovereign state action unless both parts of the test are met.

The Court formally articulated *Bates'* two-step test in *City of Lafayette v. Louisiana Power & Light Co.*[72] There the Court addressed for the first time the issue whether state action immunity applied with equal force to municipal defendants.[73] The Court rejected outright the argument of the cities of Lafayette and Plaquimine that Congress never intended to subject local governments to the antitrust laws,[74] finding that a

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need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent.").

In *Bates*, the Court distinguished *Cantor*, saying:

> First, and most obviously, *Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party. Here, the appellants' claims are against the State. The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision.

433 U.S. at 361 (footnote and citations omitted).

[68] *See Cantor*, 428 U.S. at 584-85, 604-05, 612-14 (concurring opinions). *See also Bates*, 433 U.S. at 362 ("federal interference with a state's traditional regulation of a profession is entirely unlike the intrusion this Court sanctioned in *Cantor*" (footnote omitted)).

[69] *Bates*, 433 U.S. at 362.

[70] *Id.*

[71] *Id.* In *Bates*, this part of the test was met through state supreme court enforcement of the rule against advertising.

[72] 435 U.S. 389 (1978).

[73] Petitioners, two Louisiana cities, were empowered to own and operate electric utility systems both within and beyond their city limits. *Id.* at 391. Petitioners sued Louisiana Power & Light (LP&L), with which they competed in the areas outside their respective city limits, alleging various antitrust violations. LP&L counterclaimed, also alleging antitrust violations. For a detailed account of the claims, see *id.* at 391-92.

[74] "The antitrust laws impose liability on and create a cause of action for damages for a 'person' or 'persons' as defined in the Acts"; and the Court has previously held that municipalities are 'persons' within the meaning of the Acts. *Id.* at 394-96 (*citing, e.g.*, Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906)). *See also* A. STICKELLS, FEDERAL CONTROL OF BUSINESS: ANTITRUST LAWS § 190 (1972) ("[p]ersons may include indi-

city's anticompetitive conduct was actionable absent an overriding policy consideration, such as that employed in *Parker*.

The cities argued in the alternative that their status as political subdivisions of the state permitted them to operate in a manner that would otherwise be subject to antitrust challenges.[75] The plurality rejected this argument,[76] noting that under cases since *Parker*, anticompetitive conduct by state agencies and individuals is not exempt unless "compelled by direction of the State acting as a sovereign."[77] As it applies to cities, *Parker* required "evidence that the State authorized or directed a given municipality to act as it did."[78] However, the plurality made it clear that its holding did not require a political subdivision "to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit."[79] An adequate state mandate could be found to exist where it is clear "from the authority given a governmental entity to operate in a particular area, that the legislature *contemplated* the kind of action complained of."[80]

Justice Stewart, dissenting,[81] argued as he had in *Cantor*,[82] that "valid governmental action" without more was sufficient to invoke *Parker* pro-

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viduals, corporations, co-operatives, partnerships, state governments and municipalities.").

[75] The cities' argument was based on the theory that *Parker* exempted all government entities from the antitrust laws. *Lafayette*, 435 U.S. at 410.

[76] The plurality observed that *Parker* exempted only "acts of government" by a state as sovereign. "[F]or purposes of the *Parker* doctrine, not every act of a state agency is that of the State as a sovereign." *Id.* (*citing Goldfarb*, 421 U.S. at 790).

[77] *Id.* 435 U.S. at 410 (*citing Goldfarb*, 421 U.S. at 791). *Acting as a sovereign* in this context refers to action "as part of a comprehensive regulatory system, . . . clearly articulated and affirmatively expressed as state policy, and . . . actively supervised by the State." *Id.* (citations omitted).

The plurality also warned of the potential for abuse which a blanket immunity for local governments would create; in our system of federalism, cities "do not receive all the federal deference of the states that create them." *Id.* at 412.

[78] *Id.* at 414. "In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, . . . we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." *Id.* at 412-13.

[79] *Id.* at 415.

[80] *Id.* (*quoting* City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (1976)(emphasis added)).

The plurality continued to apply both parts of the test for *Parker* immunity, examining the nature of the challenged activity as well as its source (*See supra* note 61 and accompanying text), and stated the rule for municipal antitrust defendants: "[T]he *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, *or* by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* at 413 (emphasis added). The Court apparently recognized a distinction between municipal governments and other private parties by tempering the strict, direct state control language of *Goldfarb* and *Cantor*.

[81] *Id.* at 426 (Stewart, J., dissenting).

[82] *Cantor*, 428 U.S. at 614 (Stewart, J., joined by Powell and Rehnquist, JJ., dissenting).

tections.[83] In this case, he argued, the city defendants were governmental bodies, not private persons,[84] and were, therefore, exempt from antitrust laws intended only to attack "concentrations of private economic power unresponsive to public needs . . . ."[85]

The rationale put forward by the plurality in *Lafayette* was subsequently adopted by a majority of the Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum.*[86] Plaintiff-respondent Midcal Aluminum, Inc. ("Midcal") sued successfully for an injunction[87] against enforcement of a California statute which required all wine producers and wholesalers to file fair trade contracts or price schedules and to sell wine only in conformance with the price maintenance program. The United States Supreme Court affirmed in a unanimous opinion,[88] finding such activity, even on the part of a state, actionable absent special antitrust immunity.[89] The Court applied *Parker*'s two-part test, holding that where private parties participate in anticompetitive programs under state authority, "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy', [and] the policy must be 'actively supervised' by the State itself."[90] Although the state in *Midcal* authorized price setting in the wine industry, the actual price schedules were fixed by private parties, the wine producers themselves. Moreover, the state neither reviewed nor actively regulated the price fixing process. Thus, the program failed to pass the second part of the *Parker* test.[91]

The terms "clearly articulated," "affirmatively expressed" and "actively

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[83] "[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Id.* (*citing* Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961)).

[84] *Lafayette*, 435 U.S. at 426.

[85] *Id.* at 428. This conclusion follows from the assumption that *Parker* distinguished between private and governmental *actors* only, and not between the types of activities undertaken by a state or at its direction. *Id.* at 428-29. *But see supra* notes 41-42 and accompanying text, and Justice Blackmun's concurrence in *Cantor*:

> Arguably, the Sherman Act should have remained confined within the outlines of [Congress' commerce power] as it was thought to exist in 1890, on the theory that if Congress believed it could not regulate any more broadly, it must not have attempted to do so. But that bridge already has been crossed, for it has been held that Congress intended the reach of the Sherman Act to expand along with that of the commerce power.

Cantor, 428 U.S. at 406 (*citing* Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738, 743 n.2 (1976)).

[86] 445 U.S. 97 (1980).

[87] When the California Department of Alcoholic Beverage Control acted to enforce the price schedules against Midcal, the latter filed a writ of mandate in the California Court of Appeal for the Third Circuit. *Id.* at 100.

[88] 445 U.S. 97 (1980)(Brennan, J., did not participate).

[89] *Id.* at 102-05.

[90] *Id.* at 105 (*citing Lafayette*, 435 U.S. at 410).

[91] *Id.* at 105.

supervised," however, remain troublesome. The Court has yet to refine the meaning of the test, and it appears that further development must be had on a case by case basis.

IV. *COMMUNITY COMMUNICATIONS CO., INC. v. CITY OF BOULDER*

Community Communications presented the question of whether a home rule city[92] should be distinguished from other municipal entities in applying the *Parker* state action immunity doctrine.[93] The Supreme Court answered this question in the negative, holding that home rule cities are not sovereign governments for *Parker* purposes,[94] and that the authority supporting the challenged activity must be derived from the legislative command of the state if it is to come within the reach of *Parker*.[95]

The City of Boulder had argued that it could regulate cable television since such action was *comprehended* within the state's grant of autonomy to the city; it further argued that the requirement of an affirmative expression of state policy was implicit in the general grant of home rule powers.[96] According to the Court, however, the state's position was one of mere neutrality with regard to CATV regulation and was thus insufficient under *Parker*: "Acceptance of such a proposition — that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances — would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require."[97]

Justice Rehnquist dissented,[98] taking issue primarily with the majority's choice of *exemption*, rather than *preemption*, analysis in describing *Parker* immunity.[99] In Justice Rehnquist's view, preemption analysis is properly invoked whenever the Court is called upon to examine "the interplay between the enactments of two *different* sovereigns — one federal

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[92] *See supra* note 4.

[93] For the pertinent facts and history of *Community Communications*, see *supra* notes 8-33 and accompanying text.

[94] *Community Communications*, 455 U.S. at 50.

[95] *Id.* at 55. The Court did not reach the question whether Boulder's CATV ordinance would satisfy the requirement of active state supervision. Instead, the majority determined that the moratorium ordinance failed to meet the threshold requirement of conforming to clearly articulated and affirmatively expressed state policy. *Id.* at 51-52 n.14.

[96] *Id.* at 55.

[97] *Id.* at 56.

[98] *Id.* at 60 (Rehnquist, J., dissenting). While Justice Rehnquist was correct in noting that "no language of 'exemption', either express or implied," appears in the *Parker* decision, nowhere in *Parker* did the Court expressly adopt his view that "state regulation of the economy is not necessarily preempted by the antitrust laws . . . ." *Id.*

[99] It is unclear whether Justice Rehnquist's dissent stands for the proposition that all government entities are not equally exempt under *Parker*.

and the other state . . . ."[100] In contrast, exemption involves "the interplay between the enactments of a single sovereign" and thus presents no problems of federalism.[101] The result of this error, said the dissent, was to confuse local government entities with privately owned and operated corporations. Municipalities, as political appendages of the states, should be excepted from antitrust liability where such liability would operate as an encroachment upon the sovereignty of the states.[102]

Justice Stevens concurred with the majority opinion and cautioned against acceptance of the dissent's assumption "that the Court's analysis of the exemption issue is tantamount to a holding that the antitrust laws have been violated."[103] He noted that *Parker* and subsequent cases, including *Community Communications*, had treated the violation issue as "separate and distinct from the exemption issue."[104] Justice Stevens emphasized *Cantor*'s distinction between a charge that public officials have violated the Sherman Act and a charge that private parties had done so. He noted in particular that *Cantor* would have been entirely different had the claim been brought against a public official or agency.[105]

The majority opinion in *Community Communications* is somewhat

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[100] *Community Communications*, 455 U.S. at 61 (Rehnquist, J., dissenting).

[101] *Id.* at 60-61 (Rehnquist, J., dissenting)(quoting Handler, *Antitrust — 1978*, 78 COLUM. L. REV. 1363, 1379 (1978)).

[102] Justice Rehnquist, dissenting, reviewed the *Parker* decision stating:

> This Court assumed [in *Parker*] that "Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program . . . because of its effect on interstate commerce." In this regard, we noted that "[o]ccupation of a legislative field by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws." We then held, however, that "[w]e find nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."

Id. at 62-63 (*citing* 317 U.S. at 350-51)(citations omitted). For a more detailed view of *Parker* as a "classic example of preemption analysis," see Handler, *supra* note 101, at 1380.

[103] *Community Communications*, 455 U.S. at 58 (Stevens, J., concurring).

[104] Justice Stevens stated, without explanation, that the question of whether Boulder violated the Sherman Act was distinguished from the violation issue in *Lafayette*, because "the character of their respective activities differs." *Id.* (Stevens, J., concurring). Presumably, Justice Stevens was referring to the direct proprietary interests of the city defendants in *Lafayette*, as opposed to the merely regulatory interest of the Boulder City Council.

[105] *Id.* at 59 n.2 and accompanying text (Stevens, J., concurring). Justice Stevens in effect reiterated the unsettled controversy raised in *Cantor* — whether *Parker* addresses only the legality of state conduct or whether it applies as well to private parties associated with the state program. In response, the dissent argued:

> It will take a considerable feat of gymnastics to conclude that municipalities are not subject to treble damages to compensate any person "injured in his business or property." Section 4 of the Clayton Act, 15 U.S.C. §15, is mandatory: "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . *shall* recover threefold the damages by him sustained."

Id. at 65 n.2 (Rehnquist, J., dissenting)(emphasis added)(*citing Lafayette*, 435 U.S. at 442-43)(Blackmun, J., dissenting)).

equivocal. In declining to address the treble damages issue, Justice Brennan first stated that the possibly serious adverse impact of the Court's rule for cities is not a factor in construing the meaning of the Sherman Act: the antitrust laws, "like other federal laws imposing civil or criminal sanctions upon 'persons,' of course apply to municipalities as well as other corporate entities."[106] On the other hand, he also suggested that "certain activities which might appear anticompetitive when engaged in by private parties, [sic] take on a different complexion when adopted by a local government."[107]

Although the treble damages issue technically was not before the Court on appeal,[108] it has been an implicit factor in the Court's *Parker* analysis even before *Community Communications*. The Court appears to have adopted Justice Stevens' view that, regardless of the issues likely to be involved in a possible finding of violation by a city, judicial interpretation of the Sherman Act should follow a case by case evolution.[109]

V. IMPACT

A. *The Status of Home Rule Municipalities*

It is clear that after *Community Communications* home rule local governments and other municipal defendants will not receive antitrust immunity via simple analogy to the *Parker* doctrine. As Justice Brennan's opinion emphasized, "We are a nation not of 'city-states' but of States," a principle that makes no accommodation for sovereign subdivisions of States.[110] Thus, a home rule city which enters a field of trade and bars all competition or otherwise engages in actions with private enterprises will be considered a *person* under the Sherman Act[111] and may face liability under the antitrust laws. The same liability will attach even if, as in *Community Communications*, a home rule city regulates trade but does not itself participate in the respective field of trade.[112]

Although the Court failed to address specifically the critical distinction between *Community Communications* and *Lafayette* — that the city of Boulder was a home rule entity — the *Community Communications* deci-

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[106] *Id.* at 56 (footnote omitted).

[107] *Id.* at 56-57 n.2 (*citing Lafayette*, 435 U.S. at 417 n.48).

[108] *Id.* at 54 (*quoting Community Communications*, 630 F.2d at 717).

[109] *Id.* at 59-60 (Stevens, J., concurring).

[110] *Id.* at 54 (citing Community Communications, 630 F.2d, at 717).

[111] *Id.* at 50.

[112] "Although *Lafayette* did not specifically consider antitrust liability for simple regulatory action, there is no indication that the plurality intended to exclude regulatory action from the state authorization standard." Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518, 533 (1979). Thus, after *Community Communications*, potential laibility of home rule and non-home rule political subdivisions in the exercise of trade regulation is clear.

sion has altered future implementation of a broad grant of home rule power. The effect of *Community Communications* will likely be the erosion of the city's autonomy. In dissent, Justice Rehnquist observed that a municipality might be forced to "cede its authority back to the state."[113] Limitation of autonomy goes against the underlying rationale for grants of broad powers. Home rule powers are often conferred in general terms[114] in order to eliminate the troublesome process of specifically refining requisite powers of a local government unit.[115] Conferring home rule powers in broad scope is thus advantageous both to the state and to the local government entity. It would be burdensome and difficult indeed to require a state legislature to anticipate the specialized needs of individual political subdivisions and thereafter to incorporate those needs in the statewide scheme by legislative resolutions. A broad grant of power thus enables those who live in a particular community to determine relevant needs and to resolve problems unique to that community.[116]

A home rule municipality now seeking immunity under the *Parker* doctrine must, at a minimum, satisfy the two-part test developed in *Lafayette*. There must be present an "adequate state mandate for anticompetitive activities of cities and other subordinate governmental units."[117] Additionally, such activities must be actively supervised by the state.[118] In one respect, compliance with this test may place local governments under the protective umbrella of state action immunity. On the other hand, home rule subdivisions may be forced to sacrifice autonomy and the ability to effect programs suited to the special needs of their localities.

Forcing home rule governments to petition state legislatures for protection against antitrust liability will likely have several effects. First, *Community Communications* affects powers of home rule governments which

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> Municipalities will no longer be able to regulate the local economy without the imprimatur of a clearly expressed state policy to displace competition. The decision today effectively destroys the "home rule" movement in this country, through which local governments have obtained, not without persistent state opposition, a limited autonomy over matters of local concern. The municipalities that stand most to lose by the decision today are those with the most autonomy.

Community Communications, 455 U.S. at 70-71 (Rehnquist, J., dissenting)(footnotes omitted).

[114] M. LIBONATI, LOCAL GOVERNMENT LAW §4.15 (1981). *See also supra* note 4.

[115] C. RHYNE, LAW OF LOCAL GOVERNMENT OPERATIONS 66 (1980). For example, a home rule city located in an attractive coastal area will have concerns which differ from those of a city located further inland. The coastal city may wish to promote itself as a resort destination, exercising its home rule powers to implement regulations which preserve the characteristics of its resort image. On the other hand, the inland city may be concerned primarily with regulations which foster the growth of certain industries.

[116] *See generally infra* notes 125-33 and accompanying text.

[117] *Lafayette*, 435 U.S. at 415.

[118] *Midcal*, 445 U.S. at 105. *See also*, Bosselman, *Potential Immunity of Land Use Control Systems from Civil Rights and Antitrust Liability*, 8 HASTINGS CONST. L.Q. 453 (1981).

are exercised not only for commercial purposes, but also for purposes which are only tenuously related to the restraint of trade. Although municipalities may easily identify and seek sanctions for obvious monopolies — such as the provision of public utility services — difficulties arise in identifying other municipal activities which would invite antitrust challenges.

Second, a delay in the implementation of home rule municipal activities will impede their effectiveness. For example, counties in the State of Hawaii receive home rule powers under the state constitution, to which amendments are made at ten-year intervals. A ten-year span could render the intent of certain municipal actions nugatory, thus discouraging implementation of innovative social or economic programs.

Third, although *Lafayette* stated that cities cannot place their own parochial interests above the nation's economic goals as embodied in the Sherman Act,[119] a countervailing argument posits that the antitrust laws will be used to "regulate the relationship between states and political subdivisions."[120] For example, a home rule government may wish to implement health service programs in response to newly arisen health needs in its community. Fearing antitrust challenges from potential private competitors, it would return to the state government for specific approval of the program. Such dependence upon state action, however, would only weaken the program; since immediacy of response is critical to effective satisfaction of health care needs, delays caused by resort to the state would dilute any benefits reaped by the home rule action. The local government will be effectively limited to initiating administrative plans for health services; it may never actually implement those services because the state legislature may decline to approve or fund the program.

A fourth effect involves the use of the Sherman Act as a means of determining social and economic policies of local governments. For example, a city might wish to preserve the open areas of a district for aesthetic purposes. Governmental action toward this goal might involve the enactment of appropriate ordinances curtailing certain commercial activities. After *Community Communications*, however, parties who are precluded from conducting such activities under the ordinance may seek relief by bringing an antitrust action. In such situations, the determination of antitrust violation issues becomes paramount, and underlying socioeconomic policy reasons for the local government's action are pushed to the wayside. Use of the Sherman Act in this manner also places the federal courts in the position of examining the validity of a local government's indirect, as well as direct, regulation of its economy.[121]

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[119] *Lafayette*, 435 U.S. at 413.

[120] *Community Communications*, 455 U.S. at 70 (Rehnquist, J., dissenting).

[121] *Id.* at 67 (Rehnquist, J., dissenting). "[T]he federal courts will be called upon to engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that this Court has properly rejected . . . [and] the Sherman Act will be the

Lastly, the holdings of *Community Communications* and *Lafayette* mandate that a home rule municipality obtain prior state sanction for anticompetitive activities. A home rule municipality thus needs to balance carefully the desirability of immunity protection against the preservation of independent decision-making. Efforts to satisfy the *Lafayette* test and to maintain a balance between protection and autonomy present troublesome areas in the analysis of municipal governance.[122] The reasoning in both *Lafayette* and *Community Communications* turns principally upon the requisite quantum of state control over a particular municipal activity which will invoke *Parker* protections. However, this concept of *state control* remains elusive; the rule of analysis has been stated variously in terms of state *mandate, contemplation, grant* or *direction.*[123] Without a more precise explanation of what constitutes, for example, legislative contemplation of a city program, regulation or other activity, local governments are at a loss to determine the parameters of state control.

B. Probable Areas of Antitrust Litigation

With the advent of *Community Communications*, several overall effects are apparent in regard to antitrust litigation. A substantial grey area now remains as to how local governments may render themselves immune to antitrust attack. Home rule municipalities might be forced to seek additional state constitutional amendments or statutes, for example, to avoid antitrust litigation in the areas of franchising, procurement and zoning.[124] The *Community Communications* decision thus appears to encourage increased litigation to determine the parameters of home rule. Indeed, the litigation process could become a test of virtually every action taken by a home rule entity. Increased litigation would place a greater burden on the courts. Actual litigation and potential litigation leading to sizeable settlements and judgments could deplete municipal treasuries.[125]

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governing standard by which reasonableness of all local regulation will be determined." *Id.* (footnote omitted).

[122] *See supra* note 113.

[123] *See generally supra* notes 45-91 and accompanying text.

[124] These areas of municipal regulation appear particularly vulnerable to antitrust attack. Slawsky, *Can Municipalities Avoid Antitrust Liability?*, 14 URB. LAW. vii, xi (1982).

[125] The following cases provide examples of pre-*Community Communications* antitrust litigation against political subdivisions, which, if decided after *Community Communications*, may have resulted in settlements or damage awards in the range of millions of dollars: Community Builders, Inc. v. City of Phoenix, 652 F.2d 823 (9th Cir. 1981); Crocker v. Padnos, 483 F. Supp. 229 (D. Mass. 1980); Highfield Water Co. v. Public Service Commission, 488 F. Supp. 1176 (D. Md. 1980); Westborough Mall, Inc. v. City of Cape Giradeau, 532 F. Supp. 284 (E.D. Mo. 1981).

1. Franchising

Local governments seek to provide an array and volume of services, but cannot themselves fund or administer all such services. The terms and conditions of granting a franchise between a political subdivision and a private party, which by operation tend to exclude promotion of similar businesses in designated areas, may suggest causes of action under the antitrust laws.[126] This inherent exclusion of other businesses might give rise to claims of monopoly practice or price-fixing, for example, as potential violations of the Sherman Act.

2. Procurement

Procurement provides another example of an area likely to invite litigation;[127] in purchasing goods or services, a municipality must select one vendor from a wide field of interested parties. Prior to *Community Communications*, disgruntled vendors would have contested a lack of adherence by the local government to statutory selection procedures.[128] After *Community Communications*, however, recovery under the antitrust laws is possible notwithstanding compliance with statutory selection procedures. Assuming the treble damages remedy will apply to municipalities, the antitrust route seems all the more enticing to frustrated vendors.[129] The fact that municipalities are reluctant to fully litigate claims in apprehension of treble damages judgments lends added incentive for opponents to bring suit. Settlement would be an inherently attractive option for the local government; in effect, however, it disproportionately favors the host of would be claimants.

3. Zoning

Zoning litigation presents another area in which antitrust liability might erode home rule powers. Objections to zoning ordinances are usually made by challenging the constitutionality of a municipality's exercise of its police power.[130] However, since zoning ordinances frequently affect commercial activities, the Sherman Act may now become a new and effective means of attacking zoning ordinances. Opponents of zoning actions may now claim that such regulations violate antitrust laws by constituting

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[126] Rose, *Municipal Activities and the Antitrust Laws After City of Lafayette*, 57 U. DET. J. URB. L. 483, 495 (1980). Franchises, concessions and licensing are typically granted for the provision of transportation, health services, utilities and recreation facilities.

[127] *Id.* at 489.

[128] *Id.* at 491.

[129] *Id.*

[130] *See* Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926); Nectow v. City of Cambridge, 277 U.S. 183 (1928).

a monopoly or otherwise restraining trade. Pitting federal antitrust statutes against a zoning ordinance may stymie the health, safety and welfare bases of municipal police power.[131] For example, use of these traditional bases as a foundation for the valid exercise of police power in the promotion of historic preservation may soon reach its demise in the wake of antitrust attack. In *City of New Orleans v. Dukes*,[132] a home rule municipality enacted an ordinance to preserve the character of its historic *Vieux Carré* district and to promote tourism. The ordinance prohibited the operation of pushcart vendors who had been operating for less than eight years. A unanimous opinion stated that the "legitimacy of the objective is obvious."[133] Had the ordinance faced a challenge under the Sherman Act, the outcome may not have been so optimistic. The seemingly preferential treatment of certain vendors, coupled with the exclusion of other vendors conducting similar businesses, might have been deemed a restraint of trade in violation of antitrust provisions.

C. *Treble Damages and Antitrust Litigation*

The ultimate question posed in the wake of *Community Communications* is whether home rule political subdivisions will be subject to treble damages liability for antitrust violations under the Clayton Act.[134] The plurality in *Community Communications* left unresolved the matter of treble damages as applied to home rule municipalities. In dissent, Justice Rehnquist noted that it would be difficult for a court to avoid imposing treble damages[135] in view of the relatively unambiguous language of the Clayton Act.[136]

The plurality in *Lafayette* did suggest that remedies for private violations may differ from those appropriate for local government violations:

> [I]t has not been regarded as anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose

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[131] Justice Rehnquist states that the *Community Communications* ruling will "impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety and welfare, for fear of subjecting the local government to liability under the Sherman Act." *Community Communications*, 455 U.S. at 60 (Rehnquist, J., dissenting).

[132] 427 U.S. 297 (1976).

[133] *Id.* at 304.

[134] Clayton Act, ch. 323, 38 Stat. 731 (1914)(codified as amended at 15 U.S.C. § 15a 1976), provides in pertinent part, "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . without respect to the amount in controversy, and shall recover three fold the damages by him sustained . . . ." *See also* E. KINTER, AN ANTITRUST PRIMER 25 (2d ed. 1973).

[135] *Community Communications*, 455 U.S. at 65 n.2 (Rehnquist, J., dissenting). "It will take a considerable feat of judicial gymnastics to conclude that municipalities are not subject to treble damages to compensate any person 'injured in his business or property.'" *Id.*

[136] *See supra* note 134.

> such sanctions upon 'persons' . . . [b]ut those cases do not necessarily require the conclusion that remedies appropriate to redress violations by private corporations would be equally appropriate for municipalities.[137]

However, a recent case, *City of Newport v. Fact Concerts, Inc.*,[138] seems to provide the next logical step in resolving the treble damages question after *Lafayette* and *Community Communications*.

In *Fact Concerts*, the city of Newport exercised a contractual option to cancel an event scheduled by a musical concert promoter.[139] The promoter sought punitive damages, alleging tortious injury from the city's act of cancellation. *Fact Concerts* drew a distinction between the recovery of punitive damages from private parties and local governments, holding that municipalities are immune from punitive damages for tortious acts.[140]

The Court in *Fact Concerts* noted common law background and legislative history which denied awards of punitive damages against municipalities.[141] In dicta, the Court implied that any amount exceeding compensation for injury would not be awarded.[142] Treble damages, by definition, exceed compensation adequate to redress injury. Arguably, treble damages might not be permitted in antitrust actions against municipalities.

Fact Concerts emphasized public policy reasons for prohibiting punitive damage awards against municipalities.[143] Punitive damages are designed to punish wrongdoers and deter similar wrongful acts,[144] and the propriety of awarding punitive damages necessarily involves judicial scrutiny of the party to be punished. In the case of a municipality, the inno-

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[137] *Lafayette*, 435 U.S. at 401-02.

[138] 453 U.S. 247 (1981). A private promoter was contractually licensed by the city to organize concerts. In the interest of public safety the city moved to cancel one such event. The promoter prevailed in having the event take place, but detrimental publicity of the cancellation prompted losses in ticket sales. The promoter sought compensatory and punitive damages.

[139] *Id.* at 250.

[140] *Id.* at 271.

[141] *Id.* at 259-62. By 1871, the distinction between compensation owed by the municipality and punishment aimed at actual wrongdoers was clearly established at common law. The policy behind early common law cases was the same as that used in *Fact Concerts*: "The courts . . . protected the public from unjust punishment, and the municipalities from undue fiscal constraint." *Id.*

[142] *Id.* at 262. On the issue of treble damages generally, the Court called attention to one case which held that "a municipality could not be found liable for treble damages under a trespass statute, notwithstanding the statute's authorization of such damages against 'any person.'" *Id.* at 261. *See* Hunt v. City of Booneville, 65 Mo. 620 (1877).

[143] *Id.* at 267-71. Regarding retribution, one of the objectives of punitive damages posed by the Court was that "an award of punitive damages against a municipality 'punishes' only the taxpayers . . . . These damages are assessed over and above the amount necessary to compensate the injured party. Thus, there is no question here of equitably distributing the losses resulting from official misconduct." *Id.* at 267.

[144] W. PROSSER, LAW OF TORTS 9-10 (4th ed. 1971).

cent taxpayer would suffer. Hence, the Court in *Fact Concerts* found no reason to impose punishment on such blameless parties.[145]

The *Fact Concerts* decision acknowledged the danger of burdensome costs for municipalities which would result from the creation of punitive awards.[146] After *Community Communications*, antitrust treble damages pose a similar threat to the fiscal equilibrium of political subdivisions. Faced with the prospect of paying treble damages, a local government may simply choose to settle with private party opponents, regardless of whether it actually violated antitrust provisions. Treble damages awards and sizeable settlements would thus engender fiscal havoc. Indeed, bankrupt municipalities would force state governments to subsidize the satisfaction of such judgments against the municipalities.[147]

VI. CONCLUSION

Community Communications illustrates the dilemma of balancing the preservation of local home rule discretion against the maintenance of certain federal policies, such as the insulation of state sovereignty and the promotion of free markets. As a result of this decision, the scale seems to tip decidedly in favor of federal policies. It is unlikely that the ruling of *Community Communications* will be applied narrowly to future violations of antitrust laws by home rule municipalities. The ruling will more likely have a greater impact in defining the parameters of home rule, if not actually challenging the very existence of home rule.

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[145] *Fact Concerts*, 453 U.S. at 267. *See also*, Note, *Antitrust Liability of Municipalities*, 11 CONN. L. REV. 126, 140 (1978).

[146] *Fact Concerts*, 453 U.S. at 270.

[147] Boscoe, *Antitrust*, 58 DEN. L.J. 249, 263 (1981).

U.S. v. Ross: CONTAINERS, AUTOMOBILES AND THE LAW OF SEARCH & SEIZURE

I. Introduction

This Note reviews *United States v. Ross*,[1] the latest Supreme Court opinion to address fourth amendment issues in the context of automobile searches. Through *Ross*, the Court has clarified federal law regarding closed container searches as well as the scope and applicability of the automobile exception to the warrant requirement.

In 1981 the Court was faced with two cases involving warrantless searches of closed containers found in automobiles.[2] Although the cases involved similar facts, the Court arrived at opposite results; the disparate holdings made it difficult for Court observers to predict future outcomes in this area of law and for police to act with constitutional certainty. The Court in *Ross* has adopted the position that all closed containers found in automobile searches may be opened without a warrant. The value of *Ross* thus lies in its clarification of this troubled area of the law.

Part II of this Note outlines the facts in *Ross*. To facilitate an understanding of the *Ross* decision, Part III sets forth the historical development of the auto exception to the warrant requirement. Additionally, it surveys the conflicting caselaw which was before the Court in *Ross*. Finally, Part IV analyzes and comments on the *Ross* opinion in the context of prior federal and Hawaii caselaw.

II. Facts of the Case

On the night of November 27, 1978, a reliable informant telephoned District of Columbia police and said that a man known as "Bandit" was selling narcotics stored in the trunk of his car. Police located the suspect car, and a license check disclosed that it was registered to Albert Ross. A computer check further verified Ross' description and his use of the alias "Bandit".[3]

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[1] 102 S.Ct. 2157 (1982).

[2] *Robbins v. California*, 453 U.S. 420 (1981) and *New York v. Belton*, 453 U.S. 454 (1981).

[3] 102 S.Ct. at 2160.

Police stopped the car as it headed out of the area and ordered Ross to get out. After observing a bullet on the front seat, they searched the interior of the car and found a pistol in the glove compartment. Ross was arrested and handcuffed. A detective subsequently took Ross' keys and proceeded to open the car trunk, where he found a closed, brown, "lunch type" paper bag. Upon opening this bag, he found several glassine bags containing a white powder which later proved to be heroin. During a subsequent search of the vehicle at the police station, the officer found a zippered, red leather pouch in the trunk. He opened this pouch to discover $3,200 in cash. No warrant was obtained for either container search.[4]

The District of Columbia Court of Appeals reversed Ross' conviction by the lower court and held that neither the paper bag nor the leather pouch could be searched without a warrant, as both were containers "worthy" of constitutional protection.[5] The United States Supreme Court granted certiorari and, in a six to three decision, reversed the judgment of the Court of Appeals by upholding the constitutionality of both container searches.[6]

III. Historical Background

The Supreme Court arrived at its resolution in *Ross* only after a lengthy, conflicting and "intolerably confusing" history of debate in this area of law.[7] This section of the Note will review the precedential disarray which existed prior to *Ross*.

A. Origin and Nature of the Auto Exception to the Warrant Requirement

The Supreme Court has held that the fourth amendment requires searches and seizures to be authorized by judicial warrant.[8] A major ex-

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[4] *Id.*

[5] 655 F.2d 1159 (D.C. Cir. 1981).

[6] The majority opinion, written by Justice Stevens, was joined by Chief Justice Burger and Justices Rehnquist and O'Connor. Justices Blackmun and Powell each filed concurring opinions. Justices White, Marshall and Brennan dissented.

[7] *Robbins v. California*, 453 U.S. at 430 (Powell, J., concurring). Justice Powell further stated that in cases concerned with automobile searches and seizures, "[t]he Court apparently cannot agree even on what it has held previously, let alone on how these cases should be decided." *Id.* Justice Powell attributed much of the existing confusion to the problem of applying the fourth amendment to ever-varying fact situations and to "the often unpalatable consequences of the exclusionary rule, which spur the Court to reduce its analysis to simple mechanical rules so that the constable has a fighting chance not to blunder." *Id.* Commentators have frequently recognized that "[f]ew areas of search and seizure law are more confused than automobile stops and searches." 1 W. Ringel, Searches and Seizures, Arrests and Confessions, § 11.1(2d ed. 1982).

[8] Unwarranted searches are considered to be per se unreasonable. *See Mincey v. Arizona*,

ception to this warrant requirement, commonly referred to as "the auto exception," was first enunciated by the Court fifty-eight years ago in *Carroll v. United States*.[9] In that case, federal prohibition agents stopped Carroll's car because they had probable cause to believe he was transporting bootleg liquor. The agents conducted a warrantless search of the car and ripped open its upholstery to uncover sixty-eight bottles of gin and whiskey.[10]

The Supreme Court affirmed Carroll's conviction and held that when police have probable cause to believe a vehicle contains seizable goods, they may conduct a warrantless search of that vehicle.[11] The Court assumed that a car could be taken out of the jurisdiction while a warrant was being sought, and this mobile characteristic of the auto made warrant procurement an impracticable requirement.[12]

While this rule might appear to be straightforward, there has been little judicial agreement since *Carroll* about either the necessity of mobility as a prerequisite to the auto exception, or the scope of the exception itself.[13] The Court has upheld several searches wherein the mobility rationale was clearly inapplicable. For example, in *Chambers v. Maroney*,[14] the Court upheld the warrantless search of a car that had been brought to the police station and secured. The *Chambers* opinion failed to clarify the relationship between the mobility rationale and the auto exception, thus leaving future decisionmakers in uncertainty. The result in that case, however, implied that mobility would be a factor—and not a prerequisite—in invoking the auto exception to validate a warrantless search.[15]

The Court in *Chambers* also put to rest temporarily the argument that an immediate search of a car is per se a "greater intrusion" of fourth amendment rights than is seizure and immobilization of the car pending warrant procurement. For constitutional purposes, the Court saw no dif-

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437 U.S. 385, 390 (1978). The warrant requirement serves to effectuate the fourth amendment mandate that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

[9] 267 U.S. 132 (1925).

[10] *Id.* at 136.

[11] *Id.* at 149.

[12] *Id.* at 153.

[13] *See generally* 1 RINGEL, *supra* note 7. At the same time, however, *Carroll* was followed in a subsequent line of cases. *See, e.g., Brinegar v. United States*, 338 U.S. 160 (1949); *Husty v. United States*, 282 U.S. 694 (1931).

[14] 399 U.S. 42 (1970). *See also South Dakota v. Opperman*, 428 U.S. 364 (1976) (police may inventory contents of an impounded vehicle without a warrant); *Texas v. White*, 423 U.S. 67 (1975) (where police have probable cause to search the car of a fraudulent check suspect at a bank drive-in window, they may also search the car after it is brought to the station house).

[15] 399 U.S. at 52. In *Chambers*, the mobility factor, combined with probable cause to believe that the car contained weapons or evidence from a recent robbery, justified an immediate search of the car. The fact that police did not search the car when it was stopped, but instead took it to the station and searched it there, did not negate this justification.

ference between the two acts; thus, "either course [would be] reasonable under the Fourth Amendment."[16]

In the 1974 case of *Cardwell v. Lewis*[17] the diminished privacy interest, inherent in cars, was found to be yet another rationale underlying the auto exception. The Court noted that vehicles are open to public scrutiny and rarely serve as residences or repositories of personal effects.[18] These factors established a lesser expectation of privacy in automobiles and therefore supported the auto exception.

After *Lewis*, the Court was faced with the question of whether police could open movable containers found during the course of automobile searches. The next section of this Note reviews the Court's various holdings concerning this issue.

B. Searches of Containers Found in Automobiles

In *United States v. Chadwick*[19] a footlocker, which federal agents had probable cause to believe contained marijuana, was seized after it arrived at a train station and had been placed in the trunk of a car. The double-locked container was transported to a federal building, where it was opened without a warrant to reveal the marijuana within.[20]

In reversing Chadwick's conviction, the Supreme Court held that the diminished privacy expectation in cars did not carry over to luggage placed in a car; therefore, such a rationale was insufficient to justify the opening of that container. The Court emphasized that luggage is, by definition, a repository of personal effects; as such, it warrants stronger fourth amendment protection. Moreover, the mobility rationale was unavailable to justify the warrantless search because the footlocker had been under the exclusive control of the agents.[21] Thus, the search in *Chadwick* was an unconstitutional invasion of privacy.[22]

Two years later, in *Arkansas v. Sanders*,[23] the Court was faced with a

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[16] *Id.*

[17] 417 U.S. 583 (1974) (plurality opinion). In *Cardwell*, the police seized a murder suspect's vehicle from a public parking lot after his arrest. At the police impoundment lot, the exterior of the car was searched. The vehicle itself had been seen at the murder location and had been used to push the victim's car over a cliff. *Id.* at 586-88.

[18] *Id.* at 590-91.

[19] 433 U.S. 1 (1977).

[20] *Id.* at 4-5.

[21] *Id.* at 13 n.7. The Court went on to add, however, that the mobility rationale would not necessarily fail whenever police impound a vehicle. The Court noted that cars, unlike footlockers, are inherently mobile and can be broken into and stolen from police parking lots. *Id.*

[22] While the government did not argue that the auto exception was properly applicable, it did contend that the rationale behind the exception justified the warrantless search of the footlocker. Thus, the Court reached its decision in *Chadwick* by reviewing this rationale.

[23] 442 U.S. 753 (1979). *Sanders* differed materially from *Chadwick* only in that the car in *Sanders* was in motion prior to the police approach. *Id.* at 755.

factual situation similar to *Chadwick*. As in *Chadwick*, police had probable cause to seize the suitcase in question before it was placed in the car. Although the *Sanders* Court found the search of the container to be unconstitutional, it restricted its holding to "personal luggage."[24] This distinction between containers "worthy" of fourth amendment protection, and those that were not, led lower courts to conclude that the undefined class of containers labeled as "personal luggage" was protected, while all other containers were not.

After *Sanders*, there arose a critical need for clarification as to the permissible scope of searches of containers found in autos. Courts had begun deciding this issue differently with regard to all variety of containers.[25] This hoped-for clarification was not forthcoming in 1981, however. In that year, the Supreme Court reviewed two cases with substantially identical fact patterns, *Robbins v. California*[26] and *New York v. Belton*,[27] and issued decisions with opposite results.

In *Robbins*, California highway patrol officers stopped a car that had been driven erratically. When the driver got out of the car, the officers smelled marijuana smoke. A search of the car yielded two green, opaque packages in the recessed luggage compartment at the rear of the car. The officers unwrapped these packages and found thirty pounds of marijuana.[28]

A plurality of the Court drew upon the reasoning of *Chadwick* and *Sanders* to find the search unconstitutional. The *Robbins* plurality equated the privacy interest in opaque, plastic packages with the privacy interest in luggage, refusing to label these packages as "unworthy" of fourth amendment protection. Thus, under *Robbins*, all closed, opaque containers found in lawful auto searches could not be opened without a warrant.[29]

In *Belton*, a New York state trooper stopped a speeding car with four men in it. The officer smelled marijuana smoke in the car and found marijuana while searching the passenger compartment.[30] The officer also found Belton's jacket on the back seat of the car. He unzipped a jacket pocket and found cocaine.

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[24] *Id.* at 765. Thus, "personal luggage" such as the footlocker in *Chadwick* and the suitcase in *Sanders* enjoyed full warrant protection against searches.

[25] *Compare, United States v. Rivera*, 654 F.2d 1048 (5th Cir. 1981) (warrantless search of garbage bag invalidated), with *Evans v. State*, 368 So.2d 58 (Fla. Dist. Ct. App. 1979) (warrantless search of garbage bag upheld). For a comprehensive survey of the varied treatment courts have given to different types of containers, *See* Note, *Warrantless Searches Under the Automobile and Search Incident Exceptions*, 9 FORDHAM URB.L.J. 185 (1980).

[26] 453 U.S. 420 (1981) (plurality opinion).

[27] 453 U.S. 454 (1981).

[28] 453 U.S. at 422.

[29] *Id.* at 428. The plurality stated that no constitutional distinction should be made between types of containers. *Id.* at 426-27.

[30] 453 U.S. at 455-56. The marijuana was found on the floor of the car in an envelope marked "Supergold". The envelope search was not in issue in *Belton*.

The Court utilized the search incident to arrest exception to the warrant requirement to uphold the search in *Belton*. The underlying rationale of this exception, as outlined by the Court in *Chimel v. California*,[31] is that an immediate search may be conducted if it is necessary to protect the safety of the arresting officer or to preserve evidence. The *Belton* court relied on *United States v. Robinson*,[32] which held that the lawful arrest of a person justifies the opening of any container found on that person without probable cause or a warrant. Arguably, the Court strained the applicability of this rationale in concluding that the entire passenger compartment of an auto—including any containers found inside—was within the arrestee's "immediate control" and thus open to warrantless searches.[33]

While the *Robbins* and *Belton* decisions were factually similar, their disparate holdings fostered uncertainty on the issue of whether police can open containers found in autos during valid warrantless searches. Once the Court decided that no constitutional distinction should be made between different types of containers, however, it had to take a decisive stand on this issue. The holding in *Ross* takes such a stand. The next section of this Note presents an analysis and commentary on that holding in the context of prior federal and Hawaii case law.

IV. Analysis and Commentary

A. *The Ross Interface with Federal Law*

Justice Stevens, writing for the majority in *Ross*, first noted that *Carroll* had sanctioned a warrantless search for concealed goods.[34] Since contraband is usually concealed in containers, the holding in *Carroll* would be nullified if containers were not brought within the permissible scope of a warrantless auto search. *Carroll* sanctioned ripping open car upholstery to reach concealed items, and it would be illogical, in the Court's view, to assume that *Carroll's* holding would have differed if that case had in-

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[31] 395 U.S. 752 (1969).

[32] 414 U.S. 218 (1973). *Robinson* involved the warrantless search of a crumpled cigarette package, recovered from the arrestee's coat pocket. The arrestee had been stopped while driving without a license. The search took place incident to his arrest, and the cigarette package was found to contain heroin. *Id.* at 220-23.

[33] The Court's use of this rationale in *Belton* has been severely criticized. *See, e.g.*, Note, *Search and Seizure—Fourth Amendment:The Constitutional Scope of Warrantless Automobile Searches*, 57 Notre Dame Law. 435 (1981). Justice Brennan's dissent in *Belton* called the majority's use of this rationale "analytically unsound". Brennan stated that once police remove occupants from a car to conduct a search of it, the contents of the car are clearly outside the scope of an arrestee's immediate control. 453 U.S. at 468 (Brennan, J., dissenting).

[34] 102 S.Ct. at 2162.

volved a paper bag instead.[35] Therefore, the *Ross* Court held that police may conduct a warrantless search if they have probable cause to believe the vehicle is carrying contraband or evidence of crime.

It should be noted that the exigency of mobility, which justified the auto exception in *Carroll*, was arguably not present in *Ross*. However, *Ross* was far from unique in this respect; such theoretical infirmities had been present in prior cases which upheld warrantless searches of containers. The search in *Chambers* had been justified under the auto exception even though no exigency, such as mobility, was present.[36] Thus, *Ross* merely exemplified necessary judicial flexibility in this area of law; through its holding, the Court demonstrated a willingness to forego stringent requirements of this underlying rationale.

The majority in *Ross* may be criticized for its disregard of the auto exception rationale.[37] However, it carefully limited application of its rule to true auto exception cases—those cases where police suspicion originally focuses on the vehicle and not merely on a container outside the vehicle. As defined by *Ross*, true auto exception cases do not include fact situations such as those presented in *Chadwick* and *Sanders*, where the "relationship between the automobile and the contraband [is] purely coincidental."[38]

This caveat to *Ross'* otherwise straightforward rule apparently makes a temporal distinction as to probable cause. If police have probable cause to search a particular container *before* it is placed in a car, they may not open it without a warrant. Yet, where police develop probable cause to search a container only *after* it has been placed in a car, they may conduct a warrantless search of the container.

This distinction is puzzling in view of the fact that police may seize the container in both instances. In *Chadwick* and *Sanders*, the Court noted that once a closed container has been seized from an auto and placed in policy custody, it differs in no meaningful way from any other closed container. It seems illogical, then, to require a warrant in the prior, but not in the latter fact situation.[39]

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[35] *Id.* at 2169. Indeed, said Justice Stevens, "[a] contrary rule could produce absurd results inconsistent with the decision in *Carroll* itself." *Id.*

[36] The searches in *Robinson* and *Belton* were upheld under the search incident to arrest exception although arguably, the facts in those cases presented little support for an immediate search to protect the officers or to preserve evidence.

[37] In addition to condemning the majority's failure to require that an exigency justify the container searches, the dissent charged that, by substituting the probable cause judgment of police for that of a magistrate, the Court ignored a major premise of the warrant requirement—the importance of having a neutral, detached magistrate determine if probable cause exists. 102 S.Ct. at 2173-82 (Marshall, J., dissenting).

[38] This statement was first made by the Arkansas Supreme Court in *Sanders v. State*, 262 Ark. 595, 600 n.2, 559 S.W.2d 704, 706 (1977). It was repeated by Chief Justice Burger in *Arkansas v. Sanders*, 442 U.S. at 766-67, and quoted by Justice Stevens in *Ross*, 102 S.Ct. at 2166-67.

[39] The *Ross* court merely addressed this concern by fiat: "[T]he protection afforded by

There are several reasons why the Court may have placed this limitation on the *Ross* rule. The results in *Chadwick* and *Sanders* would appear to be flatly inconsistent with the holding in *Ross*. Through such a probable cause limitation, however, the Court was able to distinguish those cases. Viewed in this light, *Chadwick* and *Sanders* were not true auto exception cases because police in those cases had probable cause to search the containers prior to their being placed in vehicles.

The *Ross* caveat requires that police develop probable cause to search a container *after* it is placed in a car. This requirement nullifies the potential for police abuse of the auto exception. The train station and airport arrival scenarios of *Chadwick* and *Sanders* occur by the thousands every day. Overly zealous police officers could easily wait until a suspect container happened to reach a vehicle and then, under the auto exception, seize the container and conduct a warrantless search. By enunciating this limitation to the *Ross* rule, the majority warned that the auto exception will not be available as a general talisman to validate all warrantless container searches.

The *Ross* holding further requires that the probable cause determination of police officers be based on objective facts that would justify the issuance of a warrant.[40] In effect, this requirement equates assessment of probable cause by a police officer with that of a magistrate. A valid warrant to search a car would authorize a search of every part of the car which might conceal the object searched for; a search under the auto exception should be of the same scope.[41]

Therefore, under *Ross*, the scope of the search of a container in an auto should be determined by the type of item searched for and by the places in which police have probable cause to believe the item may be found. For example, probable cause to believe that illegal aliens are in a van will not justify the search of a suitcase located in that van. Similarly, probable cause to believe that a container in an auto trunk contains contraband will not justify a search of the entire car. However, when police suspicion focuses on the vehicle as a whole, every part of the vehicle that could conceal the object of the search may be entered.[42]

Ross rejected any analysis of containers in terms of whether they are "worthy" or "unworthy" of fourth amendment protection. Instead, the

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[the fourth amendment] varies in different settings . . . [and] an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband." 102 S.Ct. at 2171.

[40] *Id.* at 2164. Mere subjective good faith will not suffice.

[41] Indeed, the Court stated that the scope of a search under the auto exception is to be "no broader and no narrower than a magistrate could legitimately authorize by warrant." *Id.* at 2172.

[42] *Id.* at 2170-71. Whether a given container manifests an expectation of privacy is not controlling under *Ross*. Instead, "nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages . . . must give way to the interest in the prompt and efficient completion of the task at hand." *Id.* (footnote omitted).

Court settled the issue decisively by holding that all containers found during lawful auto searches may be opened without a warrant if they might reasonably conceal the object of the search. This holding seems to result from practical considerations; it aids law enforcement efforts by articulating a clear guideline for police officers.[43] Justice Marshall, dissenting, remarked that the only explanation for the *Ross* result was the majority's desire to expedite police evidentiary needs.[44] However, the need for a clear, workable rule in this area of law was apparent.

Indeed, once the Court had agreed not to reignite the "worthy/unworthy" container debate, it had to draw a line one way or the other. Either all closed containers would be protected by the warrant requirement or none would be. The only alternative to the *Ross* holding in this dilemma would have been to rule that no container found during lawful auto searches could be opened without a warrant. This problematic alternative would have required the Court to effectively overrule *Carroll, Chambers, Robinson* and *Belton*—all of which authorized warrantless searches of containers found in cars. Such drastic action would have constituted an unacceptable gutting of precedent. Further, heavy burdens would be placed on an already over-taxed judiciary by the ensuing increase in warrant applications.[45] Faced with these potential problems, the *Ross* Court found it both practical and necessary to hold in favor of opening any container found in a lawful auto search and to overrule only the "precise holding" in *Robbins*.[46]

The Supreme Court in *Ross* was faced with a complex precedential situation. Although the Court's opinion does not neatly resolve all contradictions in this area of law, *Ross* adopts a workable rule to guide law enforcement officers in the field. Moreover, *Ross* provides needed guidance for the federal courts.

While *Ross* constitutes binding precedent for the federal judiciary, state courts may have very different state precedents which allow—or even compel—holdings contrary to *Ross*. The next section of this Note will discuss the potential impact of *Ross* on the state level and, more precisely, on the Hawaii Supreme Court.

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[43] It appears that police officers and police instructors, at least, are gratefully receiving *Ross*. *See, e.g.*, Fyfe, *Robbins, Belton, and Ross—The Policeman's Lot Becomes a Happier One*, 18 CRIM.L.BULL. 461 (1982).

[44] 102 S.Ct. at 2181 (Marshall, J., dissenting).

[45] Additional demands would also be placed on police departments; difficulties would arise in the detention of vehicles and persons as well as the seizure and safeguarding of containers.

[46] 102 S.Ct. at 2172. *Robbins*, which had no majority opinion and was issued on the same day as *Belton*, was an embarrassment for the Court. The Court probably used the term "precise" as a diplomatic gesture to former Justice Potter Stewart, the author of the *Robbins* plurality opinion.

B. *Ross and Hawaii Law*

The Hawaii Supreme Court has consistently provided a high level of privacy protection in its adjudication of search and seizure cases. This has been made possible by the court's final, unreviewable authority to interpret the state constitution, and by specific provisions in Hawaii's constitution which sanctify the right to privacy.[47]

Hawaii caselaw has established a strict, twofold test, which effectively requires a warrant to search closed containers—including those containers found in vehicles. The first prong of the test requires that the full scope of a warrantless search be justified by a particularized showing of exigent circumstances.[48] The Hawaii Supreme Court has recognized that the exigent circumstance requirement is "incapable of precise definition." At a minimum, however, the exigency must present a foreseeable risk that due to the mobility of the vehicle or public exposure to it, the suspected item might be removed or destroyed before a warrant could be obtained.[49]

In *State v. Jenkins*[50] the Hawaii court invalidated the warrantless search of a knapsack found in a van because exigent circumstances were not present. In so doing, the court effectively rejected the *Robinson-Belton* rule allowing the search, incident to arrest, of any container found in an auto. Although the police in *Jenkins* had strong probable cause to search the knapsack, the court noted that this was simply not enough.[51]

The second prong of the Hawaii search and seizure test forbids the warrantless search of any container that has been reduced to the exclusive custody of police. The seminal case of *State v. Kaluna*[52] demonstrates the court's application of this restriction. In *Kaluna*, during a jailhouse entry search, the defendant handed a police matron a small, folded tissue taken from her bra and said, "This is all I have."[53] Police opened the tissue and found illicit drugs. The court affirmed the suppression of

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[47] The search and seizure provision of the Hawaii Constitution reads:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized or the communications sought to be intercepted.

HAWAII CONST. art. I, §7. Additionally, art. I, § 6 of the Hawaii Constitution states that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest."

[48] *See, e.g., State v. Kapoi*, 64 Hawaii 130, 637 P.2d 1105 (1981); *State v. Bennett*, 62 Hawaii 59, 610 P.2d 502 (1980); *State v. Elliot*, 61 Hawaii 492, 605 P.2d 930 (1980).

[49] *See State v. Jenkins*, 62 Hawaii 660, 619 P.2d 108 (1980).

[50] *Id.*

[51] The police had seen a plastic bag containing marijuana on top of the knapsack. 62 Hawaii at 661, 619 P.2d at 110.

[52] 55 Hawaii 361, 520 P.2d 51 (1974).

[53] *Id.* at 362, 520 P.2d at 54.

the drugs, finding that the rationale predicate to the warrant exception—in this case, the search incident to arrest exception—did not justify a search of the container. Kaluna had been arrested for attempted armed robbery, and police had no reason to believe the packet contained a weapon. In addition, the *Kaluna* court emphasized, once a closed container is reduced to police control, no exigency will justify opening it without a warrant. Indeed, the nature of the containers protected in *Kaluna* and other cases epitomizes the Hawaii Supreme Court's concern for privacy expectations.[54]

In 1980, the Hawaii Supreme Court decided *State v. Rosborough*,[55] a case with facts strikingly similar to those in *Chadwick*. In *Rosborough*, the court invalidated the warrantless searches of a matchbox taken from the defendant's person and a footlocker taken from his car.[56] In so doing, the court relied on the reasoning of *Kaluna*, *Chadwick* and *Sanders*, which protects any closed container against warrantless searches once that container is reduced to police custody.

A survey of Hawaii caselaw seems to indicate that *Ross* will not be followed should a case with its facts arise here. To follow *Ross*, the Hawaii Supreme Court would have to overrule *Jenkins* and other decisions in which it has consistently applied its twofold rule.[57]

Despite recent personnel changes in the five-member Hawaii court,[58] abandonment of this twofold rule seems unlikely. Instead, the court will probably base future decisions on its interpretation of the state constitutional provisions relating to privacy and search and seizure.[59] The practicability rationale underlying *Ross* will probably be treated with disdain, for, as the Hawaii court has repeatedly noted, police and judicial convenience vis-a-vis the warrant requirement carries little weight in this jurisdiction.[60]

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[54] Even a machine gun-type ukulele case found in a sniper's vehicle has been protected from a warrantless search in Hawaii. *See State v. Haili*, 63 Hawaii 553, 632 P.2d 1064 (1981). The *Haili* court cited *Robbins* in support of its holding. *Id.* at 556, 632 P.2d at 1065.

[55] 62 Hawaii 238, 615 P.2d 84 (1980).

[56] *Id.* at 244, 615 P.2d at 88. In *Rosborough*, police had strong probable cause at the outset to believe that the defendant's footlocker contained marijuana. The footlocker arrived at the airport, and police seized and searched it without a warrant after the defendant had placed it in his car.

[57] Were *Ross* before the Hawaii court, this rule would likely have invalidated the search of both the paper bag and the leather pouch.

[58] William S. Richardson, who served as Chief Justice of the Hawaii Supreme Court for seventeen years, retired in December of 1982. Two other Hawaii Supreme Court justices also retired recently.

[59] Should it choose to do so, the Hawaii Supreme Court will have to clarify or qualify at least one of its precedents. In *State v. Chong*, 52 Hawaii 226, 473 P.2d 567 (1970), the court held, citing *Chambers*, that the permissible scope of a warrantless auto search extends to the entire vehicle. Such a search, said the court, being incident to a lawful arrest, does not violate either the federal or the state constitution. *Id.* at 234, 473 P.2d at 572.

[60] Specifically, the court said: "[M]ere inconvenience to police, or to the judge to whom the application for a warrant is presented, is never a valid reason for by-passing the warrant

V. Conclusion

The United States Supreme Court in *Ross* has provided a definitive answer to an area of law not easily given to neatly reasoned solutions. The *Ross* holding is particularly desirable in the wake of confusing precedent—such as *Belton* and *Robbins*—because it sets forth a probable cause standard that should resolve most fact scenarios consistently. The rule provides a clear and specific guideline for police and lower courts: where police have probable cause to believe a vehicle is carrying contraband or evidence of crime, they may search the vehicle and all containers within it that may reasonably conceal the object of the search.

For example, if police seek a hand grenade, *Ross* forbids the opening of a lightweight container without a warrant. If the object of the search is a rifle, police cannot open a brown, lunch-type paper bag. But where police have probable cause to search for drugs or other objects which may be concealed in tiny containers, the situation is best described as "open field."[61] To the extent that this type of search constitutes the norm, *Ross* spells an end to the warrant requirement in the area of automobile search law.[62]

The impact of *Ross*, however, may lessen in the near future. The 1980's are witnessing an increase in the use of radio and telephonic search warrants.[63] Greater availability of such search warrants may tend to decrease the frequency of *Ross*-like scenarios.

In Hawaii, with its unique constitutional provisions and container search caselaw, *Ross* may not be followed. The twofold test that the Hawaii Supreme Court has consistently applied to container searches apparently would not be satisfied by the *Ross* probable cause standard.

Steven J. McHugh

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requirement." *See State v. Rosborough*, 62 Hawaii at 244, 615 P.2d at 88 (quoting *State v. Dias*, 62 Hawaii 52, 58, 609 P.2d 637, 641 (1980).

[61] Under *Belton*, if probable cause exists to arrest anyone in the vehicle, police can search all containers found inside the vehicle. Thus, after *Ross*, a full warrantless search of a lawfully stopped vehicle may be conducted by police if they have probable cause either to arrest or to search.

[62] The attendant concerns of civil libertarians are thoroughly alluded to in the *Ross* dissent. 102 S.Ct. at 2181-82. (Marshall, J., dissenting).

[63] In Hawaii, for example, police have statutory authority to obtain warrants based upon oral statements given over the phone. Hawaii R. Penal P. 41(g).

THE BEGINNINGS OF THE FEDERATED STATES OF MICRONESIA SUPREME COURT

Bruce M. Turcott*

INTRODUCTION

The Federated States of Micronesia is one of several fledgling Pacific Basin nations that are emerging from under the wing of the United States in its capacity as trustee of the Trust Territory of Micronesia. In 1978, three former Trust Territory districts—now the states of Yap, Truk, Kosrae and Ponape—united to form the Federated States of Micronesia.[1] Within the FSM's federal system of government, the Supreme Court of the FSM is the highest national court. The FSM Supreme Court was established by Article XI, Section 2 of the FSM Constitution which became effective on May 10, 1979.[2] The Supreme Court's official existence commenced on May 5, 1981 when it was certified operational by Chief Justice Harold W. Burnett of the Trust Territory High Court.[3] In the Judiciary Act of 1979,[4] the FSM Congress specified the organization and composition of the Court, the qualifications of the justices and the general powers possessed by the Court. Shortly thereafter, the FSM Congress confirmed Edward C. King as Chief Justice and Richard H. Benson as Associate Justice.[5]

The purpose of this essay is to sketch a broad overview of the structure and operations of the Supreme Court of the Federated States of Micronesia. It is designed to complement the inaugural index of FSM Supreme

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[1] The Constitution of the Federated States of Micronesia was ratified by the citizens of the districts of Yap, Truk and Ponape on July 12, 1978 and became effective on May 10, 1979 upon the convening of the first F.S.M. Congress, pursuant to F.S.M. CONST. art. XVI, § 1. Kosrae, a new state, was formerly part of the Ponape District.

[2] The F.S.M. Constitution is reprinted in Appendix A.

[3] Letter from Harold W. Burnett to Edward C. King (May 5, 1981) (certifying the FSM Supreme Court).

[4] F.S.M. CODE §§ 101-125 (1979). See Appendix B.

[5] *See infra* notes 14-22 and accompanying text.

Court decisions that appears in this issue of the University of Hawaii Law Review. The scope of the essay extends from the Supreme Court's role in relation to the Trust Territory High Court to the logistical problems entailed in establishing a new judicial system.

The Structure and Jurisdiction of the FSM Supreme Court

The FSM Supreme Court stands at the apex of the national court system of the FSM. The Supreme Court is divided into trial and appellate divisions.[6] Although the FSM Constitution authorizes the creation of such inferior courts as the Congress may establish,[7] no such courts have yet come into existence.

The trial division of the Supreme Court has "original and exclusive jurisdiction in cases affecting officials of foreign government, disputes between states, admiralty or maritime cases, and in cases in which the national government is a party except where an interest in land is at issue."[8] The trial division shares concurrent original jurisdiction with the appellate division and inferior national courts in "cases arising under [the FSM] Constitution; national law or treaties in disputes between a state and a citizen of another state, between citizens of different states, and between a state or citizen thereof, and a foreign state, citizen, or subject."[9] When jurisdiction is concurrent, the FSM Congress may by statute designate the "proper" court to exercise jurisdiction.[10]

The appellate division of the Supreme Court has jurisdiction to hear cases from lower national courts and from state or local courts "if [the cases] require interpretation of . . . [the] Constitution, national law, or a treaty."[11] If a state constitution permits, the appellate division "may review other cases on appeal from the highest state court in which a decision may be had."[12]

Generally, Chief Justice King hears cases at the trial level in Ponape and Kosrae states. He is headquartered in Ponape but rides circuit bimonthly for a week of hearings in Kosrae. Associate Justice Benson presides over the trial division of the Supreme Court in Yap and Truk and is based in Truk. However, on appeal of a case from the trial division, the trial judge must disqualify himself from sitting on the appellate panel. The appellate panel consists of the justice who did not preside over the trial and at least two additional judges temporarily appointed by the

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[6] F.S.M. CONST. art. XI, § 2.
[7] *Id.* § 1.
[8] *Id.* § 6(a).
[9] *Id.* § 6(b).
[10] *Id.* § 6(c).
[11] *Id.* § 7.
[12] *Id.*

Chief Justice.[13] The appeal takes place on the island where the trial was held.

FSM Supreme Court Justices

Article XI, Section 2 of the FSM Constitution provides that the FSM Supreme Court shall consist of one Chief Justice and not more than five Associate Justices.[14] The justices are appointed by the President of the FSM with the approval of two-thirds of the FSM Congress[15] and serve on "good behavior."[16]

The Judiciary Act of 1979 dictated the appointment of one Chief Justice and one Associate Justice during the formative years of the Court.[17] The Act establishes the qualifications for the positions as follows: (1) thirty years of age at the time of nomination; and (2) graduation from an accredited law school with admission to the practice in any jurisdiction or "equivalent and extraordinary legal ability obtained through at least five years of experience practicing law."[18]

Edward C. King was nominated for the position of Chief Justice by President Nakayama on May 17, 1980[19] and confirmed by the FSM Congress on October 24, 1980.[20] A 1964 graduate of the Indiana University School of Law, Chief Justice King brought sixteen years of legal experience to his position. The first six years were spent practicing at a private corporate law firm in Detroit, Michigan and teaching part-time at the University of Detroit Law School. The last ten years were spent in public service law, including two years as supervising attorney of the Center for Urban Law and Housing in Detroit, four years as Deputy Director of the Micronesian Legal Services Corporation and four years full-time as the Director Attorney, then Executive Director, of the National Senior Citizens' Law Center in Washington, D.C., concurrently working part-time as counsel for the Micronesian Legal Services Corporation.

Richard H. Benson was nominated for the position of Associate Justice by President Nakayama on October 31, 1980[21] and confirmed by the FSM

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[13] *Id.* § 2, F.S.M. CODE tit. 4, § 104 (1982).

[14] F.S.M. CONST. art. XI, § 2. However, the Judiciary Act of 1979 has limited the composition of the Court to "A Chief Justice and one other Associate Justice and such others as may be prescribed by law." F.S.M. CODE tit. 4, § 103.

[15] F.S.M. CONST. art. XI, § 3.

[16] *Id.*

[17] F.S.M. CODE tit. 4, § 103 (1982).

[18] *Id.* § 107.

[19] Presidential Communication No. 1-181 to Speaker Brethwel Henry (May 17, 1980) (nominating Edward C. King for Chief Justice).

[20] FSM C. R. No. 1-96.

[21] Presidential Communication No. 1-258 to Speaker Brethwel Henry (October 31, 1980) (nominating Richard H. Benson for Associate Justice).

Congress on November 8, 1980.[23] After graduation from the U.S. Naval Academy and ten years of naval service, Associate Justice Benson received his J.D. degree from the University of Michigan Law School in 1956. He brought over twenty-four years of legal experience to his position. The first fourteen years were spent in private practice in South Carolina (his home state) and in Guam. He presided over the Island Court of Guam and subsequently the Superior Court of Guam during the ten years prior to his confirmation as Associate Justice.

Judicial Administration and Court Staff

In view of Micronesia's vast area and high airfare, the justices decided to have Associate Justice Benson establish a branch of the FSM Supreme Court in Truk. Associate Justice Benson took up residence on Truk in July, 1981, while Chief Justice King remained in Kolonia, Ponape, the FSM capitol.

Ponape Staff. In the early months of its existence, two FSM employees—a secretary and an administrator—were temporarily assigned to the new court on Ponape. In October, 1981, one of the employees, Jack E. Yakana, former administrator for the Commission on Future Political Status and Transition, became the FSM Supreme Court's permanent Director of Administration. Since then, the staff has been expanded to include a Chief Clerk, a Justice Ombudsman, a secretary to the Chief Justice, an Administrative Assistant, a Secretary/Court Reporter and a Maintenanceman. In addition, students from Papua New Guinea, Hawaii and U.S. mainland law schools have interned as law clerks. Future staff positions include a Ponape State Justice Ombudsman, additional stenographic staff and a post-graduate law clerk.

Truk Staff. Associate Justice Benson presently employs two secretarial staff members and shares the services of the Clerk of Court and Probation Officer of the Truk District Trust Territory Court.

Kosrae and Yap Staff. Since there is no resident justice in Kosrae or Yap, state and Trust Territory employees assist the FSM Supreme Court when the justices ride circuit. The State Court Clerk in Yap and the District Court Clerks in Kosrae are responsible for filing papers for the FSM Supreme Court. In both states, the FSM Supreme Court has hired Justice Ombudsmen who use the office facilities in their respective states.

Facilities

Ponape Office. The courtroom and library facilities of the Ponape branch of the FSM Supreme Court are sorely inadequate. The Ponape

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[23] FSM C. R. No. 1-137.

office of the Court is located in a cramped building that is shared with two other governmental agencies.

In early 1982, the Ponape State Legislature enacted a land lease measure[23] which would have enabled the FSM Supreme Court to build its own office and courtroom. However, the Ponape State Governor subsequently vetoed the measure. Alternatively, the FSM Supreme Court has arranged for the construction of an addition to the Court's present quarters which is scheduled for completion in May, 1983. Additional space will also be available when the two agencies relocate.

Preliminary plans have also been drawn up for a permanent court facility in Palikir, five miles outside of Kolonia, in anticipation of the establishment of the FSM capitol at that site. However, disputes between the Ponape state government and the FSM national government over the transfer of land at Palikir threaten to delay the move.

Truk Office. Associate Justice Benson operates out of the Truk District Court. No plans are pending to construct permanent facilities at this date.

Libraries. The task of developing libraries for the FSM Supreme Court in each of the four states has proven to be a challenging one. Most of the Court's collection at Ponape consists of law books selected personally by the Chief Justice from the Library of Congress' used book program, discards sent from the United States District Court in the Northern Marianas and donations from the West Publishing Company. Without the assistance of a librarian, it has been burdensome to monitor the various incomplete sets of reporters scattered throughout the FSM. Moreover, the process of updating the collection has been aggravated by the fact that a parcel shipped from the U.S. mainland takes at least three months to arrive in Micronesia. Upon receipt, additions to the collections must be warehoused due to the severe shortage of space in the current library quarters. Consequently, court personnel in Ponape must be satisfied with a core working library that consists of little more than the United States Supreme Court and Federal Reporter volumes[24] and those resources available at the District Court library next door.[25]

Judicial Functions

Court Rules. In March and April of 1981, Justices King and Benson held a series of advisory sessions in each of the four states to discuss the

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[23] Ponape L. B. No. 247-81.

[24] The Ponape collection also includes FSM Public Laws and Congress Journals, U.S. Law Week, the Supreme Court digest and all three federal digests, Moore's Federal Practice and some hornbooks and other treaties.

[25] The Trust Territory District Court library has the Federal Reporter 2d, Federal Supplement, Pacific 2d, American Law Reports (through A.L.R. 3d and including A.L.R. Fed.) and United States Code Annotated. None are presently kept current.

adoption of court rules and general court administration. The sessions resulted in a decision to adopt the United States federal court rules as a model for the FSM national court rules. Revised rules of civil, criminal and appellate procedure have been finalized and are in the process of being issued.

Publication of Judicial Opinions. Approximately twenty-seven of the FSM Supreme Court's opinions have been selected for eventual publication. They are presently compiled as the "FSM Interim Reporter" [cited as "1 FSM Intrm. ___ (19___)"].[26] Broader dissemination of the Court's opinions will be achieved when the "Pacific Islands Reporter" becomes a reality.[27]

Transcript Preparation. All proceedings before the FSM Supreme Court are recorded with sound equipment and transcribed by the Court's secretaries who double as court reporters. The transcription process has produced reasonably good results, but its efficiency is marred by the lack of specially-trained professional reporters. The present staff must not only transcribe in English, a second language, but are faced with unfamiliar legal terms. There is a need for trained, local court reporters. Private counsel who order transcripts are charged $2.50 per page while the Public Defender and Micronesian Legal Services attorneys are charged $1.25 per page.[28]

Interpreters. An interpreter must often be present during trial as all proceedings before the FSM Supreme Court are conducted in English. The Clerk of the Court is primarily responsible for providing interpreters. The ready availability of interpreters has eroded potential language barriers.

Assessors. The Judiciary Act of 1979 authorizes the employment of "assessors" in disputes that raise issues of local law or custom.[29] A list of

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[26] The first opinions of the FSM Interim Reporter are summarized in this issue. Subscriptions for the FSM Interim Reporter are taken on an annual basis for $25.

[27] The Fifth South Pacific Judicial Conference, held in Canberra, Australia, in the summer of 1982, passed a resolution calling for the development of a Pacific Islands Reporter. Chief Justice King attended the conference and has been corresponding with Chief Justice R. F. Daly of the Solomon Islands High Court in an effort to coordinate the publication. When enough material has been submitted by the various jurisdictions, the reporter will be published by the Legal Division of Great Britain's Commonwealth Secretariat. Letter from Chief Justice R. F. Daly to Chief Justice Edward C. King (November 4, 1982) (discussing Pacific Islands Reporter). The various jurisdictions include: Papua New Guinea, Australia, New Zealand, New Caledonia, Vanuatu, Nauru, Fiji, Wallis and Futuna, Tuvalu, Kiribati, Tokelau, Western Samoa, Tonga, Nieu, Cook Islands, French Polynesia, Federated States of Micronesia, Palau, Northern Mariana Islands, Guam, Marshall Islands, Trust Territory and American Samoa. Memorandum from Chief Justice Edward C. King to All Pacific Island Reporter Committee members (October 4, 1982) (discussing distribution responsibilities for the Pacific Islands Reporter).

[28] General Court Order No. 1982-3.

[29] F.S.M. CODE tit. 4, § 113 (1982). A portion of the F.S.M. Constitution is known as the "judicial guidance provision" and provides as follows: "Court decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical

assessors for Ponape Island culture has been assembled, with lists for the other islands in the process of being compiled.[30] To date, however, the FSM Supreme Court has yet to take testimony from an assessor. In *In the Estate of Jane Nahnsen,*[31] an assessor had been appointed to testify on the issue of whether a customary gift of land had been exchanged for the care of the aged, but the claim in question was withdrawn prior to the trial.

Legal Practice

The majority of the practicing bar in the FSM consists of trial counselors who lack formal legal training but who are authorized to practice under the supervision of an attorney by a grandfather clause in the FSM Supreme Court Rules for Admission to Practice.[32] Trial counselors who acquire legal knowledge through experience may be admitted to practice upon passing a bar examination.[33] In addition, FSM citizens may take the bar examination upon graduation from law school.[34] The rest of the practicing bar are expatriates who fill essentially all of the legal positions in the national government.[35] Expatriates who wish to practice law in the FSM must both pass the bar examination and have been admitted to practice in another jurisdiction.[36]

Free legal services are available to all FSM citizens in both criminal and civil matters through the Public Defender or Micronesian Legal Services Corporation. Ponape is the only state which employs a local attorney on its Public Defender staff. The Micronesian Legal Services Corporation is staffed with both expatriate attorneys and Micronesian trial counselors.

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configuration of Micronesia."

[30] Developed pursuant to General Court Order No. 1982-1, the Ponape list has 12 names, including a member of a Land Registration Team and teachers of traditional culture with the State Aging Program.

[31] Civil No. 8-81; *see also In the Estate of Jane Nahnsen,* 1 FSM Intrm. 97 (1982) (denial of motion to dismiss in the same case).

[32] F.S.M. Supreme Court Rules for Admission to Practice, § 1(B). An explanation of these rules was recently issued by the Supreme Court. *See* Explanation of the Rules for Admission to Practice Before the Supreme Court of the Federated States of Micronesia, July 30, 1981.

[33] F.S.M. SUPREME COURT RULES FOR ADMISSION, § II.

[34] *Id.* § II(A)(2) & (3).

[35] All attorneys in the Attorney General's office, five at present, are expatriates. The F.S.M. Congress retains an expatriate legislative counsel and other expatriate attorneys are staff. The Supreme Court's two Justices are expatriates.

[36] F.S.M. SUPREME COURT RULES FOR ADMISSION, § II(A)(1).

Legal Education

The shortage of practitioners with formal legal training highlights the FSM's compelling need for greater access to legal education. While a modest number of FSM citizens are attending law schools in the United States, most attend the University of Papua New Guinea School of Law.[37] Six students are currently enrolled there.

Measures short of a formal legal education have been undertaken to train court staff and trial counselors.[38] Trial counselors and court staff are being instructed in the techniques of legal research and the use of the library. In addition, Chief Justice King is developing a training program designed to lead to the certification of new trial counselors. However, the FSM Supreme Court's Rules for Admission to Practice must be amended to provide for the certification of additional counselors before the program can be implemented.[39]

Several judicial training sessions have been conducted since 1981 to improve the quality of the FSM judiciary. District court judges from all four states and Palau attended a five-day Judicial Conference and Legal Education Program held in Kosrae in August, 1981. The topics of discussion included customary law, burden of proof and assumption, the use of documentary evidence, case management, cooperation between the state and national judiciaries and the mechanics of budgeting.

A second judicial training conference was held in Ponape in August, 1982. Professors Addison Bowman and Williamson B.C. Chang of the University of Hawaii School of Law taught seminars on topics ranging from caseflow management, alternative sentencing and separation of powers to customary law. Harvey and Maureen Solomon, both nationally recognized educators in the field of judicial administration, also conducted sessions for court clerks and administrative staff through the Institute for Court Management. Ted Glenn, Juvenile Justice Specialist for the Trust Territory Government, organized a training program for probation officers and Justice Ombudsmen.

A third judicial training conference was held in Ponape in March, 1983. Professors Bowman and Chang presided over seminars on evidence and

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[37] The Chief Justice or Associate Justice typically hires as temporary law clerks all of the University of Papua New Guinea law students who return to Ponape or Truk for their vacation period from November through February. In addition, an internship program has been arranged with that school. Between their third and fourth years at the University of Papua New Guinea (a four-year school), students will spend one year at the Supreme Court working as law clerks under the direction of the Chief Justice. The Chief Justice intends to use this program to supplement the students' English law education by training them to do legal research.

[38] Chief Justice King has taught courses on Ponape in remedies and civil procedure and is currently teaching legal research. These courses are offered in affiliation with the College of Micronesia's Continuing Education Division.

[39] *See* F.S.M. SUPREME COURT RULES FOR ADMISSION.

judicial administration.

Relations Between the Judicial and Executive Branches

The power granted to the executive branch to administer the National Public Service System[40] has disrupted relations between the executive and judicial branches of the FSM government because all judiciary employees, with the exception of the justices and the director of administration, are subject to the system.[41] The executive branch's control of the appointment and compensation of judiciary personnel encroaches upon the judiciary's autonomy. A separation of powers issue recently arose when the Chief Justice attempted to modestly raise his secretary's annual salary to $7,500.00. When the personnel department refused the salary increase, Chief Justice King issued an order creating a separate judiciary personnel system.[42] He reasoned that the inclusion of judiciary personnel in the National Public Service System was unconstitutional because the FSM Constitution had named the Chief Justice as the chief administrative officer of the judiciary.[43] However, implementation of the order was forestalled by an agreement between the President and Chief Justice to the effect that neither would enforce their rules pending legislative action.[44] In the meantime, the modest salary increase was granted. Subsequently, the FSM Congress considered and declined to pass a bill[45] that would have exempted most of the key court staff from the national personnel system.

Another area of potential conflict involves the FSM's Financial Management Act[46] which highly centralizes the disbursements of government funds. Under this system, the FSM Supreme Court is required to requisition all purchases through the Property Supply Division of the Department of Finance. This system has proven to be inconvenient and disruptive of court operations. For example, certain law book and equipment orders apparently have been mislaid or amended without notice to the Court by the Property and Supply Division.[47]

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[40] *See* National Public Service System Act, F.S.M. CODE tit. 52, §§ 111-166.

[41] *See* F.S.M. CONST. art XI, § 9.

[42] General Court Order No. 1982-4, F.S.M. Supreme Court.

[43] F.S.M. CONST. art. XI, § 9, see Appendix A.

[44] Letter from President Tosiwo Nakayama to Chief Justice Edward C. King (September 20, 1982) (discussing personnel issue); letter from Chief Justice Edward C. King to President Tosiwo Nakayama (September 23, 1982) (discussing personnel issue).

[45] FSM C. B. 2-280.

[46] F.S.M. CODE tit. 55, §§ 201-225.

[47] Letter from Jack E. Yakana, FSM Supreme Court Director of Administration, to Ted Pelen, Chief of Property and Supply Division (February 15, 1983) (discussing mishandling of court's purchase orders).

Relations Between the FSM Judiciary and Trust Territory Courts

Over the seemingly independent judicial system established by the FSM Constitution and the Judiciary Act of 1979 is cast the superstructure of the Trusteeship Agreement between the United Nations and the United States, which presently controls the entire FSM government through the Department of Interior of the United States.[48] Secretarial Order 3039,[49] the latest order issued by the Secretary of the Interior, delegates authority over judicial functions to the FSM and provides that "all cases, except for suits against the Trust Territory of the Pacific Islands Government or the High Commissioner, currently pending but not in active trial . . . shall be transferred" to the FSM courts.[50] The Secretarial Order also provides that the High Court of the Trust Territory retain final appellate review over FSM Supreme Court decisions by way of writ of certiorari.[51] Recently, a jurisdictional dispute[52] between the two court systems required the issuance of a Joint Order on the Transfer of Cases and Resolution of Jurisdictional Issues.[53] This sensitive question of jurisdiction is fully discussed in an article published in Issue 1 of this volume.[54]

The Trust Territory courts have worked closely with the FSM Supreme Court to secure the orderly transfer of cases. In addition, the Trust Territory courts both serve as interim state courts until the state court systems are operational and share court and library facilities with the FSM Su-

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[48] Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665 (1947), *reprinted in* 2 F.S.M. CODE 895 (1982). The agreement provides that the United States shall "foster the development of such political institutions as are suited to the trust territory." *Id.* art. 6(1).

[49] United States Department of Interior Secretarial Order No. 3039, April 25, 1979, *reprinted in* 2 FSM Code 950 (1982), [hereinafter referred to as "Secretarial Order No. 3039"].

[50] *Id.* § 5(a).

[51] Secretarial Order No. 3039, § 5(b).

[52] *See* F.S.M. v. Otokichy, 1 FSM Interm. 183 (1982); *see also* Bowman, *Legitimacy and Scope of Trust Territory High Court Power to Review Decisions of Federated States of Micronesia Supreme Court: The Otokichy Cases*, 5 U. HAWAII L. REV. ___ (1983).

This dispute is an example of how confusing and potentially disruptive to the administration of justice it can be to work under two sets of laws—the Trust Territory and the Federated States Codes. Parts of the Trust Territory Code have been repealed by the F.S.M. Code but it is not always clear which parts. For example, Section 2 of the National Criminal Code, F.S.M. CODE tit. 11, provides:

> Trust Territory Laws Repealed. Title 11 of the Trust Territory Code is hereby repealed to the full extent of National Government jurisdiction in all matters covered by the provisions of law contained therein.

[53] Special Joint Rule No. 1, High Court, Trust Territory of the Pacific Islands; Supreme Court, Federated States of Micronesia: *Joint Order for Transfer of Cases and Resolution of Jurisdictional Issues*, July 13, 1981 (signed by Chief Justice King and by former High Court Chief Justice Harold M. Burnett).

[54] Bowman, *supra* note 52.

preme Court. However, some friction between the two court systems has stemmed from the use of the single courtroom in Ponape. For example, a recent incident involving the actions of one of the High Court judges resulted in a resolution by the FSM Congress prohibiting that particular judge from hearing future FSM cases.[55]

Conclusion

Management of the highest court in a fledgling nation has been a demanding task for Chief Justice King and Associate Justice Benson. Yet, it appears that the major difficulties have been overcome. Now firmly established at the head of a developing national and state court system, the FSM Supreme Court is a solid foundation upon which to construct a strong judicial system and a bright promise for the future.

[55] FSM C. R. No. 2-87.

Appendix A

CONSTITUTION OF THE FEDERATED STATES OF MICRONESIA

Preamble

WE, THE PEOPLE OF MICRONESIA, exercising our inherent sovereignty, do hereby establish this Constitution of the Federated States of Micronesia.

With this Constitution, we affirm our common wish to live together in peace and harmony, to preserve the heritage of the past, and to protect the promise of the future.

To make one nation of many islands, we respect the diversity of our cultures. Our differences enrich us. The seas bring us together, they do not separate us. Our islands sustain us, our island nation enlarges us and makes us stronger.

Our ancestors, who made their homes on these islands, displaced no other people. We, who remain, wish no other home than this. Having known war, we hope for peace. Having been divided, we wish unity. Having been ruled, we seek freedom.

Micronesia began in the days when man explored seas in rafts and canoes. The Micronesian nation is born in an age when men voyage among stars; our world itself is an island. We extend to all nations what we seek from each: peace, friendship, cooperation, and love in our common humanity. With this Constitution we, who have been the wards of other nations, become the proud guardian of our own islands, now and forever.

ARTICLE I

Territory of Micronesia

Section 1. The territory of the Federated States of Micronesia is comprised of the Districts of the Micronesian archipelago that ratify this Constitution. Unless limited by international treaty obligations assumed by the Federated States of

Micronesia, or by its own act, the waters connecting the islands of the archipelago are internal waters regardless of dimensions, and jurisdiction extends to a marine space of 200 miles measured outward from appropriate baselines, the seabed, subsoil, water column, insular or continental shelves, airspace over land and water, and any other territory or waters belonging to Micronesia by historic right, custom, or legal title.

Section 2. Each state is comprised of the islands of each District as defined by laws in effect immediately prior to the effective date of this Constitution. A marine boundary between adjacent states is determined by law, applying the principle of equidistance. State boundaries may be changed by Congress with the consent of the state legislatures involved.

Section 3. Territory may be added to the Federated States of Micronesia upon approval of Congress, and by vote of the inhabitants of the area, if any, and by vote of the people of the Federated States of Micronesia. If the territory is to become part of an existing state, approval of the state legislature is required.

Section 4. New states may be formed and admitted by law, subject to the same rights, duties, and obligations as provided for in this Constitution.

ARTICLE II

Supremacy

Section 1. This Constitution is the expression of the sovereignty of the people and is the supreme law of the Federated States of Micronesia. An act of the Government in conflict with this Constitution is invalid to the extent of conflict.

ARTICLE III

Citizenship

Section 1. A person who is a citizen of the Trust Territory immediately prior to the effective date of this Constitution and a domiciliary of a District ratifying this Constitution is a citizen and national of the Federated States of Micronesia.

Section 2. A person born of parents one or both of whom are citizens of the Federated States of Micronesia is a citizen and national of the Federated States by birth.

Section 3. A citizen of the Federated States of Micronesia who is recognized as a citizen of another nation shall, within 3 years of his 18th birthday, or within 3 years of the effective date of this Constitution, whichever is later, register his intent to remain a citizen of the Federated States and renounce his citizenship of another nation. If he fails to comply with this Section, he becomes a national of the Federated States of Micronesia.

Section 4. A citizen of the Trust Territory who becomes a national of the United States of America under the terms of the Covenant to Establish a Commonwealth of the Northern Mariana Islands may become a citizen and national of the Federated States of Micronesia by applying to a court of competent jurisdiction in the Federated States within 6 months of the date he became a United States national.

Section 5. A domiciliary of a District not ratifying this Constitution who was a citizen of the Trust Territory immediately prior to the effective date of this Constitution, may become a citizen and national of the Federated States of Microne-

sia by applying to a court of competent jurisdiction in the Federated States within 6 months after the effective date of this Constitution or within 6 months after his 18th birthday, whichever is later.

Section 6. This Article may be applied retroactively.

ARTICLE IV

Declaration of Rights

Section 1. No law may deny or impair freedom of expression, peaceable assembly, association, or petition.

Section 2. No law may be passed respecting an establishment of religion or impairing the free exercise of religion, except that assistance may be provided to parochial schools for non-religious purposes.

Section 3. A person may not be deprived of life, liberty, or property without due process of law, or be denied the equal protection of the laws.

Section 4. Equal protection of the laws may not be denied or impaired on account of sex, race, ancestry, national origin, language, or social status.

Section 5. The right of the people to be secure in their persons, houses, papers, and other possessions against unreasonable search, seizure, or invasion of privacy may not be violated. A warrant may not issue except on probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

Section 6. The defendant in a criminal case has a right to a speedy public trial, to be informed of the nature of the accusation, to have counsel for his defense, to be confronted with the witnesses against him, and to compel attendance of witnesses in his behalf.

Section 7. A person may not be compelled to give evidence that may be used against him in a criminal case, or be twice put in jeopardy for the same offense.

Section 8. Excessive bail may not be required, excessive fines imposed, or cruel and unusual punishments inflicted. The writ of habeas corpus may not be suspended unless required for public safety in cases of rebellion or invasion.

Section 9. Capital punishment is prohibited.

Section 10. Slavery and involuntary servitude are prohibited except to punish crime.

Section 11. A bill of attainder or ex post facto law may not be passed.

Section 12. A citizen of the Federated States of Micronesia may travel and migrate within the Federated States.

Section 13. Imprisonment for debt is prohibited.

ARTICLE V

Traditional Rights

Section 1. Nothing in this Constitution takes away a role or function of a traditional leader as recognized by custom and tradition, or prevents a traditional leader from being recognized, honored, and given formal or functional roles at any level of government as may be prescribed by this Constitution or by statute.

Section 2. The traditions of the people of the Federated States of Micronesia may be protected by statute. If challenged as violative of Article IV, protection of Micronesian tradition shall be considered a compelling social purpose warranting

such governmental action.

Section 3. The Congress may establish, when needed, a Chamber of Chiefs consisting of traditional leaders from each state having such leaders, and of elected representatives from states having no traditional leaders. The constitution of a state having traditional leaders may provide for an active, functional role for them.

ARTICLE VI

Suffrage

Section 1. A citizen 18 years of age may vote in national elections. The Congress shall prescribe a minimum period of local residence and provide for voter registration, disqualification for conviction of crime, and disqualification for mental incompetence or insanity. Voting shall be secret.

ARTICLE VII

Levels of Government

Section 1. The three levels of government in the Federated States of Micronesia are national, state, and local. A state is not required to establish a new local government where none exists on the effective date of this Constitution.

Section 2. A state shall have a democratic constitution.

ARTICLE VIII

Powers of Government

Section 1. A power expressly delegated to the national government, or a power of such an indisputably national character as to be beyond the power of a state to control, is a national power.

Section 2. A power not expressly delegated to the national government or prohibited to the states is a state power.

Section 3. State and local governments are prohibited from imposing taxes which restrict interstate commerce.

ARTICLE IX

Legislative

Section 1. The legislative power of the national government is vested in the Congress of the Federated States of Micronesia.

Section 2. The following powers are expressly delegated to Congress:

(a) to provide for the national defense;

(b) to ratify treaties;

(c) to regulate immigration, emigration, naturalization, and citizenship;

(d) to impose taxes, duties, and tariffs based on imports;

(e) to impose taxes on income;

(f) to issue and regulate currency;

(g) to regulate banking, foreign and interstate commerce, insurance, the issuance and use of commercial paper and securities, bankruptcy and insolvency, and patents and copyrights;

(h) to regulate navigation and shipping except within lagoons, lakes, and rivers;
(i) to establish usury limits on major loans;
(j) to provide for a national postal system;
(k) to acquire and govern new territory;
(l) to govern the area set aside as the national capital;
(m) to regulate the ownership, exploration, and exploitation of natural resources within the marine space of the Federated States of Micronesia beyond 12 miles from island baselines;
(n) to establish and regulate a national public service system;
(o) to impeach and remove the President, Vice-President and justices of the Supreme Court;
(p) to define major crimes and prescribe penalties, having due regard for local custom and tradition; and
(q) to override a Presidential veto by not less than a ¾ vote of all the state delegations, each delegation casting one vote.

Section 3. The following powers may be exercised concurrently by Congress and the states:
(a) to appropriate public funds;
(b) to borrow money on the public credit;
(c) to promote education and health; and
(d) to establish systems of social security and public welfare.

Section 4. A treaty is ratified by vote of ⅔ of the members of Congress, except that a treaty delegating major powers of government of the Federated States of Micronesia to another government shall also require majority approval by the legislatures of ⅔ of the states.

Section 5. National taxes shall be imposed uniformly. Not less than 50% of the revenues shall be paid into the treasury of the state where collected.

Section 6. Net revenue derived from ocean floor mineral resources exploited under Section 2(m) shall be divided equally between the national government and the appropriate state government.

Section 7. The President, Vice-President, or a justice of the Supreme Court may be removed from office for treason, bribery, or conduct involving corruption in office by a ⅔ vote of the members of Congress. When the President or Vice-President is removed, the Supreme Court shall review the decision. When a justice of the Supreme Court is removed, the decision shall be reviewed by a special tribunal composed of one state court judge from each state appointed by the state chief executive. This special tribunal shall meet at the call of the President.

Section 8. The Congress consists of one member elected at large from each state on the basis of state equality, and additional members elected from congressional districts in each state apportioned by population. Members elected on the basis of state equality serve for a 4-year term, and all other members for 2 years. Each member has one vote, except on the final reading of bills. Congressional elections are held biennially as provided by statute.

Section 9. A person is ineligible to be a member of Congress unless he is at least 30 years of age on the day of election and has been a citizen of the Federated States of Micronesia for at least 15 years, and a resident of the state from which he is elected for at least 5 years. A person convicted of a felony by a state or national government court is ineligible to be a member of Congress. The Congress may modify this provision or prescribe additional qualifications; knowledge of the English language may not be a qualification.

Section 10. At least every 10 years Congress shall reapportion itself. A state is entitled to at least one member of Congress on the basis of population in addition to the member elected at large. A state shall apportion itself by law into single member congressional districts. Each district shall be approximately equal in population after giving due regard to language, cultural, and geographic differences.

Section 11. A state may provide that one of its seats is set aside for a traditional leader who shall be chosen as provided by statute for a 2-year term, in lieu of one representative elected on the basis of population. The number of congressional districts shall be reduced and reapportioned accordingly.

Section 12. A vacancy in Congress is filled for the unexpired term. In the absence of provision by law, an unexpired term is filled by special election, except that an unexpired term of less than one year is filled by appointment by the state chief executive.

Section 13. A member of Congress may not hold another public office or employment. During the term for which he is elected and 3 years thereafter, a member may not be elected or appointed to a public office or employment created by national statute during his term. A member may not engage in any activity which conflicts with the proper discharge of his duties. The Congress may prescribe further restrictions.

Section 14. The Congress may prescribe an annual salary and allowances for members. An increase of salary may not apply to the Congress enacting it.

Section 15. A member of Congress is privileged from arrest during his attendance at Congress and while going to and from sessions, except for treason, felony, or breach of the peace. A member answers only to Congress for his statements in Congress.

Section 16. The Congress shall meet in regular, public session as prescribed by statute. A special session may be convened at the call of the President of the Federated States of Micronesia, or by the presiding officer on the written request of ⅔ of the members.

Section 17.(a) The Congress shall be the sole judge of the elections and qualifications of its members, may discipline a member, and, by ⅔ vote, may suspend or expel a member.

(b) The Congress may determine its own rules of procedure and choose a presiding officer from among its members.

(c) The Congress may compel the attendance and testimony of witnesses and the production of documents or other matters before Congress or any of its committees.

Section 18. A majority of the members is a quorum, but a smaller number may adjourn from day to day and compel the attendance of absent members.

Section 19. The Congress shall keep and publish a journal of its proceedings. A roll call vote entered on the journal shall be taken at the request of 1/5 of the members present. Legislative proceedings shall be conducted in the English language. A member may use his own language if not fluent in English, and Congress shall provide translation.

Section 20. To become law, a bill must pass 2 readings on separate days. To pass first reading a ⅔ vote of all members is required. On final reading each state delegation shall cast one vote and a ⅔ vote of all the delegations is required. All votes shall be entered on the journal.

Section 21.(a) The Congress may make no law except by statute and may enact no statute except by bill. The enacting clause of a bill is "BE IT ENACTED BY

THE CONGRESS OF THE FEDERATED STATES OF MICRONESIA:." A bill may embrace but one subject expressed in its title. A provision outside the subject expressed in the title is void.

(b) A law may not be amended or revised by reference to its title only. The law as revised or section as amended shall be published and re-enacted at full length.

Section 22. A bill passed by Congress shall be presented to the President for approval. If he disapproves of the bill, he shall return it with his objections to Congress within 10 days. If Congress has 10 or less days remaining in its session, or has adjourned, he shall return the bill within 30 days after presentation. If the President does not return a bill within the appropriate period, it becomes law as if approved.

ARTICLE X

Executive

Section 1. The executive power of the national government is vested in the President of the Federated States of Micronesia. He is elected by Congress for a term of four years by a majority vote of all the members. He may not serve for more than 2 consecutive terms.

Section 2. The following powers are expressly delegated to the President:

(a) to faithfully execute and implement the provisions of this Constitution and all national laws;

(b) to receive all ambassadors and to conduct foreign affairs and the national defense in accordance with national law;

(c) to grant pardons and reprieves, except that the chief executive to each state shall have this power concurrently with respect to persons convicted under state law; and

(d) with the advice and consent of Congress, to appoint ambassadors; all judges of the Supreme Court and other courts prescribed by statute; the principal officers of executive departments in the national government; and such other officers as may be provided for by statute. Ambassadors and principal officers serve at the pleasure of the President.

Section 3. The President:

(a) is head of state of the Federated States of Micronesia;

(b) may make recommendations to Congress, and shall make an annual report to Congress on the state of the nation; and

(c) shall perform such duties as may be provided by statute.

Section 4. A person is ineligible to become President unless he is a member of Congress for a 4-year term, a citizen of the Federated States of Micronesia by birth, and a resident of the Federated States of Micronesia for at least 15 years.

Section 5. After the election of the President, the Vice-President is elected in the same manner as the President, has the same qualifications, and serves for the same term of office. He may not be a resident of the same state. After the election of the President and the Vice-President, vacancies in Congress shall be declared.

Section 6. If the office of the President is vacant, or the President is unable to perform his duties, the Vice-President becomes President. The Congress shall provide by statute for the succession in the event both offices are vacant, or either or both officers are unable to discharge their duties.

Section 7. The compensation of the President or Vice-President may not be increased or reduced during his term. They may hold no other office and may

receive no other compensation from the Federated States of Micronesia or from a state.

Section 8. Executive departments shall be established by statute.

Section 9.(a) If required to preserve public peace, health, or safety, at a time of extreme emergency caused by civil disturbance, natural disaster, or immediate threat of war, or insurrection, the President may declare a state of emergency and issue appropriate decrees.

(b) A civil right may be impaired only to the extent actually required for the preservation of peace, health, or safety. A declaration of emergency may not impair the power of the judiciary except that the declaration shall be free from judicial interference for 30 days after it is first issued.

(c) Within 30 days after the declaration of emergency, the Congress of the Federated States of Micronesia shall convene at the call of its presiding officer or the President to consider revocation, amendment, or extention of the declaration. Unless it expires by its own terms, is revoked, or extended, a declaration of emergency is effective for 30 days.

ARTICLE XI

Judicial

Section 1. The judicial power of the national government is vested in a Supreme Court and inferior courts established by statute.

Section 2. The Supreme Court is a court of record and the highest court in the nation. It consists of the Chief Justice and not more than 5 associate justices. Each justice is a member of both the trial division and the appellate division, except that sessions of the trial division may be held by one justice. No justice may sit with the appellate division in a case heard by him in the trial division. At least 3 justices shall hear and decide appeals. Decision is by a majority of those sitting.

Section 3. The Chief Justice and associate justices of the Supreme Court are appointed by the President with the approval of ⅔ of Congress. Justices serve during good behavior.

Section 4. If the Chief Justice is unable to perform his duties he shall appoint an associate justice to act in his stead. If the office is vacant, or the Chief Justice fails to make the appointment, the President shall appoint an associate justice to act as Chief Justice until the vacancy is filled or the Chief Justice resumes his duties.

Section 5. The qualifications and compensation of justices and other judges may be prescribed by statute. Compensation of judges may not be diminished during their terms of office unless all salaries prescribed by statute are reduced by a uniform percentage.

Section 6.(a) The trial division of the Supreme Court has original and exclusive jurisdiction in cases affecting officials of foreign governments, disputes between states, admiralty or maritime cases, and in cases in which the national government is a party except where an interest in land is at issue.

(b) The national courts, including the trial division of the Supreme Court, have concurrent original jurisdiction in cases arising under this Constitution; national laws or treaties; and in disputes between a state and a citizen of another state, between citizens of different states, and between a state or a citizen thereof, and a foreign state, citizen, or subject.

(c) When jurisdiction is concurrent, the proper court may be prescribed by statute.

Section 7. The appellate division of the Supreme Court may review cases heard in the national courts, and cases heard in state or local courts if they require interpretation of this Constitution, national law, or a treaty. If a state constitution permits, the appellate division of the Supreme Court may review other cases on appeal from the highest state court in which a decision may be had.

Section 8. When a case in a state or local court involves a substantial question requiring the interpretation of the Constitution, national law, or a treaty, on application of a party or on its own motion the court shall certify the question to the appellate division of the Supreme Court. The appellate division of the Supreme Court may decide the case or remand it for further proceedings.

Section 9. The Chief Justice is the chief administrator of the national judicial system and may appoint an administrative officer who is exempt from civil service. The Chief Justice shall make and publish and may amend rules governing national courts, and by rule may:

(a) divide the inferior national courts and the trial division of the Supreme Court into geographical or functional divisions;

(b) assign judges among the divisions of a court and give special assignments to retired Supreme Court justices and judges of state and other courts;

(c) establish rules of procedure and evidence;

(d) govern the transfer of cases between state and national courts;

(e) govern the admission to practice and discipline of attorneys and the retirement of judges; and

(f) otherwise provide for the administration of the national judiciary. Judicial rules may be amended by statute.

Section 10. The Congress shall contribute to the financial support of state judicial systems and may provide other assistance.

Section 11. Court decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia.

ARTICLE XII

Finance

Section 1.(a) Public money raised or received by the national government shall be deposited in a General Fund or special funds within the National Treasury. Money may not be withdrawn from the General Fund or special funds except by law.

(b) Foreign financial assistance received by the national government shall be deposited in a Foreign Assistance Fund. Except where a particular distribution is required by the terms or special nature of the assistance, each state shall receive a share equal to the share of the national government and to the share of every other state.

Section 2.(a) The President shall submit an annual budget to Congress at a time prescribed by statute. The budget shall contain a complete plan of proposed expenditures, anticipated revenues, and other money available to the national government for the next fiscal year, together with additional information that Congress may require. The Congress may alter the budget in any respect.

(b) No appropriation bills, except those recommended by the President for im-

mediate passage, or to cover the operating expenses of Congress, may be passed on final reading until the bill appropriating money for the budget has been enacted.

(c) The President may item veto an appropriation in any bill passed by Congress, and the procedure in such case shall be the same as for disapproval of an entire bill by the President.

Section 3.(a) The Public Auditor is appointed by the President with the advice and consent of Congress. He serves for a term of 4 years and until a successor is confirmed.

(b) The Public Auditor shall inspect and audit accounts in every branch, department, agency or statutory authority of the national government and in other public legal entities or nonprofit organizations receiving public funds from the national government. Additional duties may be prescribed by statute.

(c) The Public Auditor shall be independent of administrative control except that he shall report at least once a year to Congress. His salary may not be reduced during his term of office.

(d) The Congress may remove the Public Auditor from office for cause by a ⅔ vote. In that event the Chief Justice shall appoint an acting Public Auditor until a successor is confirmed.

ARTICLE XIII

General Provisions

Section 1. The national government of the Federated States of Micronesia recognizes the right of the people to education, health care, and legal services and shall take every step reasonable and necessary to provide these services.

Section 2. Radioactive, toxic chemical, or other harmful substances may not be tested, stored, used, or disposed of within the jurisdiction of the Federated States of Micronesia without the express approval of the national government of the Federated States of Micronesia.

Section 3. It is the solemn obligation of the national and state governments to uphold the provisions of this Constitution and to advance the principles of unity upon which this Constitution is founded.

Section 4. A noncitizen, or a corporation not wholly owned by citizens, may not acquire title to land or waters in Micronesia.

Section 5. An agreement for the use of land for an indefinite term is prohibited. An existing agreement becomes void 5 years after the effective date of this Constitution. Within that time, a new agreement shall be concluded between the parties. When the national government is a party, it shall initiate negotiations.

Section 6. The national government of the Federated States of Micronesia shall seek renegotiation of any agreement for the use of land to which the Government of the United States of America is a party.

Section 7. On assuming office, all public officials shall take an oath to uphold, promote, and support the laws and the Constitution as prescribed by statute.

ARTICLE XIV

Amendments

Section 1. An amendment to this Constitution may be proposed by a constitu-

tional convention, popular initiative, or Congress in a manner provided by law. A proposed amendment shall become a part of the Constitution when approved by ¾ of the votes cast on that amendment in each of ¾ of the states. If conflicting constitutional amendments submitted to the voters at the same election are approved, the amendment receiving the highest number of affirmative votes shall prevail to the extent of such conflict.

Section 2. At least every 10 years, Congress shall submit to the voters the question: "Shall there be a convention to revise or amend the Constitution?". If a majority of ballots cast upon the question is in the affirmative, delegates to the convention shall be chosen no later than the next regular election, unless Congress provides for the selection of delegates earlier at a special election.

ARTICLE XV

Transition

Section 1. A statute of the Trust Territory continues in effect except to the extent it is inconsistent with this Constitution, or is amended or repealed. A writ, action, suit, proceeding, civil or criminal liability, prosecution, judgment, sentence, order, decree, appeal, cause of action, defense, contract, claim, demand, title, or right continues unaffected except as modified in accordance with the provisions of this Constitution.

Section 2. A right, obligation, liability, or contract of the Government of the Trust Territory is assumed by the Federated States of Micronesia except to the extent it directly affects or benefits a government of a District not ratifying this Constitution.

Section 3. An interest in property held by the Government of the Trust Territory is transferred to the Federated States of Micronesia for retention or distribution in accordance with this Constitution.

Section 4. A local government and its agencies may continue to exist even though its charter or powers are inconsistent with this Constitution. To promote an orderly transition to the provisions of this Constitution, and until state governments are established, Congress shall provide for the resolution of inconsistencies between local government charters and powers, and this Constitution. This provision ceases to be effective 5 years after the effective date of this Constitution.

Section 5. The Congress may provide for a smooth and orderly transition to government under this Constitution.

Section 6. In the first congressional election, congressional districts are apportioned among the states as follows: Kosrae — 1; Marianas —2; Marshalls —4; Palau —2; Ponape —3; Truk —5; Yap —1. If Kosrae is not a state at the time of the first election, 4 members shall be elected on the basis of population in Ponape.

ARTICLE XVI

Effective Date

Section 1. This Constitution takes effect 1 year after ratification unless the Congress of Micronesia by joint resolution specifies an earlier date. If a provision of this Constitution is held to be in fundamental conflict with the United Nations Charter or the Trusteeship Agreement between the United States of America and

the United Nations, the provision does not become effective until the date of termination of the Trusteeship Agreement.

Constitution editor's note: Resolution No. 32 of the Micronesian Constitutional Convention, adopted October 24, 1975, states: "WHEREAS, in establishing the government for the new Federated States of Micronesia, and making provision for the governing of the various states, the question has arisen over whether this affects the traditional leaders of Micronesia. It is not the intention of the Delegates to the Micronesian Constitutional Convention to affect adversely any of the relationships which prevail between traditional leaders and the people of Micronesia, nor to diminish in any way the full honor and respect to which they are entitled; now, therefore,

BE IT RESOLVED by the Micronesian Constitutional Convention of 1975 that it is the consensus of this Convention that all due honor and respect continue to be accorded the traditional leaders of Micronesia, and nothing in the Constitution of the Federated States of Micronesia is intended in any way to detract from the role and function of traditional leaders in Micronesia or to deny them the full honor and respect which is rightfully theirs; and

BE IT FURTHER RESOLVED that upon the signing of the Constitution, this Resolution be included with all duplications of the Constitution so that the intent of the Delegates may be evident to all who read the Constitution of the Federated States of Micronesia.

Appendix B

Title 4

Judiciary of the Federated States of Micronesia

Chapters:

CHAPTER 1

Judicial Organization

Sections:

§ 101. Short title.—This title is known and may be cited as the Judiciary Act of 1979 (PL 1-31 § 1)

§ 102. Supreme Court.—The judicial authority in the Federated States of Micronesia is vested in the Supreme Court of the Federated States of Micronesia. (PL 1-31 § 2)

§ 103. Composition of the Supreme Court.—The Supreme Court shall consist of a Chief Justice and one other Associate Justice and such others as may be prescribed by law. (PL 1-31 § 3)

§ 104. Special assignments.—The Chief Justice may give special assignments pursuant to article XI, section 9(b) of the Constitution. In the case of temporary Justices appointed pursuant to this authority:

(1) The person appointed shall meet the qualifications of section 107 of this

chapter.

(2) The Congress may by resolution disapprove of the continued service of any temporary Justice whose cumulative service exceeds three months, and the disapproved person shall thereafter be ineligible for further service as a temporary Justice for one year, unless the Congress shall sooner revoke its disapproval.

(3) The Chief Justice shall give notice to the President and the Congress upon the appointment of any temporary Justice. (PL 1-31 § 4).

§ 105. Vacancy in the Office of Chief Justice.—Whenever the Office of Chief Justice is vacant or the Chief Justice is unable to perform the duties of office, and no appointment of an Acting Chief Justice has been made by the Chief Justice or the President pursuant to article XI, section 4 of the Constitution, the powers and duties of the office shall devolve upon the Associate Justice senior in precedence who is able to act, until such disability is removed or another Chief Justice is appointed and duly qualified. (PL 1-31 § 5)

§ 106. Precedence of Associate Justices.—Associate Justices shall have precedence according to the seniority of their commissions. Justices whose commissions bear the same date shall have precedence according to seniority in age. (PL 1-31 § 6)

§ 107. Qualifications of Supreme Court Justices.—A person nominated to the position of Chief Justice or Associate Justice of the Supreme Court shall:

(1) be at least thirty years of age at the time of nomination; and

(2) be a graduate from an accredited law school and be admitted to practice law in any jurisdiction, or be a person of equivalent and extraordinary legal ability obtained through at least five years of experience practicing law. (PL 1-31 § 7)

§ 108. Salaries of the judiciary.—The Chief Justice of the Supreme Court of the Federated States of Micronesia shall receive a salary of $40,000 per annum. The Associate Justices of the Supreme Court shall receive a salary of $38,000 per annum. (PL 1C-27 § 2)

§ 109. Trial Division sessions.—The Trial Division shall be continuously in session subject to recess and shall serve the States of Kosrae, Yap, Truk, and Ponape as needed and as consistent with their respective charters. (PL 1-31 § 8)

§ 110. Appellate Division sessions.—The Appellate Division shall convene from time to time as may be necessary for the efficient disposition of appellate matters. A single Appellate Division Justice may make all necessary orders concerning any appeal prior to the hearing and determination thereof, subject to review by the full Appellate Division. (PL 1-31 § 9)

§ 111. Clerks of Courts.—The Chief Justice of the Supreme Court may appoint a Clerk of the Supreme Court, who shall maintain an office in Ponape. The Clerk of the Supreme Court shall perform those duties prescribed by the Chief Justice. The Chief Justice may also appoint Assistant Clerks in the States who may also serve as clerks of the State or District courts. The Clerk of the Supreme Court in Ponape shall be the Chief Clerk. The Clerks of the Supreme Court shall perform those duties prescribed by the Chief Justice. (PL 1-31 § 10)

§ 112. Other employees.—The Chief Justice may appoint and prescribe duties for such other officers and employees of the Supreme Court as he deems necessary, and may delegate this authority to an Associate Justice. (PL 1-31 § 11)

§ 113. Assessors.—Any Justice of the Supreme Court may appoint one or more assessors to advise him at the trial of any case with respect to local law or custom or such other matters requiring specialized knowledge. All such advice shall be of record and the assessors shall be subject to examination and cross-

examination by any party. (PL 1-31 § 12)

§ 114. Removal of Clerks, officers, and employees.—The Chief Justice may remove any Clerk, officer, or employee of the Supreme Court for good cause. The removal may be appealed to the Appellate Division of the Supreme Court. (PL 1-31 § 13)

§ 115. Assistance to State courts.—Pursuant to article XI, section 10 of the Constitution:

(1) The Chief Justice of the Supreme Court shall establish suitable arrangements and procedures for State court utilization of facilities, Clerks, officers, and employees of the Supreme Court and for Supreme Court utilization of facilities, clerks, officers, and employees of the State or District courts. The Chief Justice may delegate this authority to an Associate Justice.

(2) The Justices of the Supreme Court shall make themselves available, to the extent not inconsistent with the proper performance of their duties as Supreme Court Justices, for appointment as temporary judges of State or District courts or assessors on matters of law on State courts. (PL 1-31 § 14)

§ 116. Seal.—The Appellate Division of the Supreme Court shall have a seal which shall be kept in the custody of the Clerk of the Supreme Court in Ponape. The Trial Division of the Supreme Court shall have seals which shall be kept in the custody of the Assistant Clerks of the Supreme Court in each State. (PL 1-31 § 15)

§ 117. General powers of the Supreme Court.—The Supreme Court and each division thereof shall have power to issue all writs and other process, make rules and orders, and do all acts, not inconsistent with law or with the rules of procedure and evidence established by the Chief Justice, as may be necessary for the due administration of justice, and, without limiting the generality of the foregoing, may grant bail, accept and cause forfeit of security therefor, make orders for the attendance of witnesses with or without documents, and make orders for the disposal of exhibits. (PL 1-31 § 16)

§ 118. Authority to administer oaths and take acknowledgments.—Each Justice, Clerk, and Assistant Clerk of the Supreme Court shall have power to administer oaths and affirmations, take acknowledgments, and exercise all powers of a notary public. (PL 1-31 § 17)

§ 119. Contempt.

(1) Any Justice of the Supreme Court shall have the power to punish contempt of court. Contempt of court is:

(a) any intentional obstruction of the administration of justice by any person, including any Clerk or officer of the Court acting in his official capacity; or

(b) any intentional disobedience or resistance to the Court's lawful writ, process, order, rule, decree, or command.

(2) All adjudications of contempt shall be pursuant to the following practices and procedures:

(a) Any person accused of committing any civil contempt shall have a right to notice of the charges and an opportunity to present a defense and mitigation. A person found in civil contempt may be imprisoned until such time as he complies with the order or pays an amount necessary to compensate the injured party, or both;

(b) Any person accused of committing a criminal contempt shall have a right to notice of the charges and an opportunity to present a defense and mitigation; provided, however, that no punishment of a fine of more than $100 or imprison-

ment shall be imposed unless the accused is given a right to notice of the charges, to a speedy public trial, to confront the witnesses against him, to compel the attendance of witnesses in his behalf, to have the assistance of counsel, and to be released on bail pending adjudication of the charges. He shall have a right to be charged within three months of the contempt and a right to be charged twice for the same contempt; and

(c) A person found to be in contempt of court shall be fined not more than $1,000 or imprisoned for not more than six months.

(3) Any adjudication of contempt is subject to appeal to the Appellate Division of the Supreme Court. Any punishment of contempt may be stayed pending appeal, but a punishment of imprisonment shall be stayed on appeal automatically, unless the Court finds that a stay of imprisonment will cause an immediate obstruction of justice, which finding must be supported by written findings of fact. A denial of a stay of imprisonment is subject to review. (PL 1-31 § 18)

§ 120. Sessions and records to be public.

(1) All sessions and records of the Supreme Court shall be public, except when otherwise ordered by the Court for good cause.

(2) Any person desiring to attend any session that has been closed or view any record that has been suppressed may petition the Court closing the session or suppressing the record. Any interested person may appeal the action of the Court on said petition to the Appellate Division of the Supreme Court. (PL 1-31 § 19)

§ 121. Publication of decisions.—All decisions of the Appellate Division of the Supreme Court, including concurring and dissenting opinions, shall be published. The Trial Division of the Supreme Court may order one or more of its decisions to be published. (PL 1-31 § 20)

§ 122. Judicial ethics.—Justices of the Supreme Court shall adhere to the standards of the Code of Judicial Conduct of the American Bar Association except as otherwise provided by law or rule. The Chief Justice may by rule prescribe stricter or additional standards. (PL 1-31 § 21)

§ 123. Practice of law prohibited.—No Justice, Clerk, officer, or employee of the Supreme Court shall practice law in the Federated States of Micronesia. (PL 1-31 § 22)

§ 124. Disqualification of Supreme Court Justice.

(1) A Supreme Court Justice shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(2) He shall also disqualify himself in the following circumstances:

(a) where he has a personal bias or prejudice concerning a party or his counsel, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the Justice or such lawyer has been a material witness concerning it. The term private practice shall include practice with legal service or public defender organizations;

(c) where he has served in governmental employment and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(d) where he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(e) where he or his spouse, or a person within a close relationship to either of them, or the spouse of such a person is:

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as lawyer in the proceeding;

(iii) known by the Justice to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) to the Justice's knowledge likely to be a material witness in the proceeding.

(3) Upon taking office and every year thereafter, a Justice shall list as of record the personal and fiduciary financial interests of himself and his spouse and minor children residing in his household.

(4) For the purposes of this section the following words or phrases shall have the meaning indicated:

(a) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund or if the outcome of the proceedings could substantially affect the value of the fund;

(ii) an office or membership in an educational, religious, charitable, or civic organization is a "financial interest" in securities held by the organization only if the outcome of the proceeding could substantially affect the value of the securities;

(iii) the proprietary interest of a policyholder in a mutual insurance company, of a member of a cooperative association, of a depositor in a mutual savings association or credit union, or a similar proprietary interest is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of Government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(5) No Supreme Court Justice shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (2) of this section. Where the ground for disqualification arises only under subsection (1) of this section, waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(6) A party may move to disqualify a Supreme Court Justice for one or more of the reasons stated in subsections (1) or (2) of this section. Said motion shall be accompanied by an affidavit stating the reasons for the belief that grounds for disqualification exist, and shall be filed before the trial or hearing unless good cause is shown for filing it at a later time. Upon receipt of such a motion, the Justice shall rule on it before proceeding further in the matter, stating his reasons for granting or denying it on the record. (PL 1-31 § 23)

§ 125. Disposition of fines and fees.—The Clerk of the Supreme Court shall periodically transmit to the Treasury of the Federated States of Micronesia all fines and fees collected in the Supreme Court. (PL 1-31 § 24)

CHAPTER 2

Jurisdiction

Sections:

§ 201. Appellate jurisdiction.

(1) The jurisdiction of the Appellate Division of the Supreme Court is as provided in the Constitution.

(2) The Appellate Division of the Supreme Court may review other cases appealed to it from a State court if the appeal is permitted by State constitution or District charter. (PL 1-31 § 25)

§ 202. Territorial jurisdiction.—The jurisdiction of the Supreme Court shall extend to the whole of the Federated States of Micronesia as defined in article I, section 1 of the Constitution. (PL 1-31 § 26)

§ 203. Jurisdiction over persons—Civil.—The Supreme Court may exercise personal jurisdiction in civil cases only over persons residing or found in the Federated States of Micronesia or who have been duly summoned and voluntarily appear, except as provided in section 204 of this chapter. (PL 1-31 § 27)

§ 204. Service of process outside the territorial jurisdiction of the Supreme Court.—The jurisdiction of the Supreme Court shall be coextensive with the jurisdiction granted to the courts of the Trust Territory by sections 131 through 136 of title 6 of this code and subject to the procedures stated therein. (PL 1-31 § 28)

§ 205. Judicial acts outside of territorial jurisdiction.—Any action taken by the Supreme Court or a Justice thereof or by a State court or a judge thereof outside the territorial jurisdiction of the court shall be as valid and effective as if taken within the territorial jurisdiction of the court. (PL 1-31 § 29)

§ 206. Initial organization of Supreme Court.—The Supreme Court is deemed organized when:

(1) at least one Justice has taken office; and

(2) the Chief Justice of the Trust Territory High Court, upon written request by the Chief Justice of the Supreme Court of the Federated States of Micronesia, certifies that subsection (1) of this section has been complied with and that the Supreme Court is prepared to hear matters. (PL 1-31 § 30)

§ 207. Requisites of certification.—Certification by the Chief Justice of the Trust Territory High Court shall be made in English and transmitted to the Chief Justice of the Supreme Court of the Federated States of Micronesia. The Chief Justice of the Trust Territory High Court may also transmit copies of his certification to the President and the Congress and to the State or District courts. (PL 1-31 § 31)

§ 208. Severability.—If any provision of this chapter, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the chapter which can be given effect with-

out the invalid provision or application, and to this and the provisions of this chapter are severable. (PL 1-31 § 32)

INDEX

1981-82 FEDERATED STATES OF MICRONESIA SUPREME COURT CASES IN BRIEF

The first twenty-seven opinions or orders included in the first volume of the Federated States of Micronesia Interim Reporter is summarized in numerical/chronological sequence, including both trial and appellate division opinions. The index departs from *A Uniform System of Citation* by utilizing the term "Court" in reference to the FSM Supreme Court interchangeably with full reference to the FSM Supreme Court. Most citations of statutes, constitutions and other authority are in footnote form. The justice or justices writing the opinion are italicized at the beginning of each summary. The subject index and Table of Statutes and Other Authorities is keyed to the numbers assigned in the FSM Interim Reporter.

OPINIONS OF THE SUPREME COURT OF THE FEDERATED STATES OF MICRONESIA

Table of Contents

1. FSM v. Carl, 1 FSM Intrm. 1 (1981)

King. Defendant Mongkeya was a co-defendant charged with robbery in violation of F.S.M. Code tit. 11, § 920 (1982) for allegedly striking several women at a hotel and taking turtle meat from them.

Evidence adduced at a preliminary examination indicated that although Mongkeya had suggested a physical assault, he did not take or at any time possess the turtle meat. Nor was his own act in pushing a waitress against a wall followed by the taking of anything of value. Insufficient evidence existed to establish probable cause of guilt of the crime of robbery. Moreover, there was no indication that the beatings were sufficiently severe to justify a charge of aggravated assault under the National Criminal Code. Because it had no jurisdiction over the matter and further prosecution had to proceed in the Trust Territory High Court, the Court ordered the charge dismissed and dissolved bail requirements.

2. In the Petition of Robert, 1 FSM Intrm. 4 (1981)

King. Petitioners sought admission to practice before the FSM Supreme Court as attorneys. The petitions raised the question of whether *limited* or provisional Trust Territory High Court authorization to practice law is sufficient High Court "certification" to qualify an applicant for admission. Under the Supreme Court's Rules for Admission I.A., "grandfather clause," a previously certified attorney under the Trust Territory High Court is entitled to practice law before the FSM Supreme Court. Those not qualifying under Rule I.A. must take a written examination. The grandfather clauses such as Rules I.A. and I.B. are based on principles of fairness, experience, and comity. The limited or restricted certifications of the petitioners did not embrace these principles. Where the High Court's certification is reserved or limited or in any way falls short of that standard, Rule I.A. is inapplicable. Therefore, the petitions for admission pursuant to Rule I.A. were denied.

3. FSM v. Albert, 1 FSM Intrm. 14 (1981)

Two of three defendants sought to have charges against them dismissed on the ground that the Court lacked jurisdiction under the FSM National Criminal Code to hear criminal cases involving juveniles. Declining to dismiss the case, the Court stated that the FSM National Criminal Code vests exclusive jurisdiction over murder and rape in the Supreme Court of the FSM. However, the Trust Territory Juvenile Code (enacted prior to the FSM National Criminal Code) remains in effect unless repealed by implication because of inconsistency with the FSM statute. Here, the Trust Territory Juvenile Code, 15 TTC § 4, relating to murder and rape, was clearly inconsistent and thus repealed. Further, under the Court's broad rule-making powers under F.S.M. CONST. art. IX, § 9 and unrepealed portion of the Juvenile Code, 15 TTC § 1 (specifying that "in cases involving offenders under the age of 18 years, Courts shall adopt a flexible procedure . . ."), the Court instituted special procedures for consideration of criminal charges against juveniles and severed the juveniles' case from this case.

4. In the Matter of Maketo Robert, 1 FSM Intrm. 18 (1981)

King. Counsel representing defendants in three separate arraignments arrived one-half hour late to the scheduled proceedings. Counsel stated that he was required to investigate a matter or be held in contempt by the High Court and was delayed in his return by construction work along the way.

Under F.S.M. Code, tit. 4, § 18 (1982), contempt is comprised of "an intentional obstruction of justice." Stating that although it did not believe the attorney intentionally malingered or dallied along the way, the acts of counsel nonetheless evidenced intentional misconduct by way of omission rather than commission. Counsel failed to alert his office or make other arrangements for the hearings scheduled. This intentional failure to take precautionary steps and the consequent waste of the time of the Court and officers of the Court, constituted an "intentional obstruction of the administration of justice" within the meaning of F.S.M. Code tit. 4, § 18(1) (a) and is contempt of court.

5. FSM v. Boaz, 1 FSM Intrm. 22 (1981)

King. In a drunken condition, defendant pounded the walls of a house at two a.m., creating a large hole. He then threatened members of the community and the house's occupants. After the defendant's raucous entry into the house, the occupants departed.

F.S.M. Code tit. 11, § 961 (1982) provides that burglary is the entry with purpose to commit felony, assault, or larceny. Since no felony or larceny had been committed, conviction rested on a finding of defendant's specific intent to commit an assault. The Court found that defendant's desire to fight carried with it a desire to commit an assault. The defendant was guilty of violating § 961 regardless of whether the assault actually occurred.

Defendant's defenses of privilege and voluntary intoxication negating intent also failed. The defendant had no privilege to enter into the house even though the house was owned by the defendant's cousin based on the time of the entry and circumstances surrounding it. In addition, there was no clear evidence as to the amount of alcohol consumed by the defendant. Moreover, the Court was loathe to uphold the defense, stating in dicta that it was a far better rule that the

defendant rather than the community bear the risk and consequences of the defendant's own, voluntary intoxication. Therefore, the Court found the defendant guilty.

6. FSM v. Boaz, 1 FSM Intrm. 28 (1981)

Defendant challenged the jurisdiction of the Court over the charge of burglary under F.S.M. Code tit. 11, § 961 (1982) and moved for a judgment of acquittal. Defendant contended that the Trust Territory provision for assault was repealed and its element as part of the crime of burglary was void.

Provisions of a Trust Territory statute remain intact if self-sustaining and capable of separate enforcement and if not "inconsistent or in conflict" with statutory provision of FSM Congress. *FSM v. Albert*, 1 FSM Intrm. 14 (1981). Since FSM Congress has defined major crimes in the National Criminal Code as those calling for imprisonment of three years or more, assault provisions of the Trust Territory Code remain intact because assaults are punishable by six months imprisonment. Therefore, there still exists criminal prohibition against assault.

In addition, though public law requires that "criminal prosecution shall be made in the name of the FSM," Congress limited this provision to cases involving violations of laws enacted by the Congress and violation of statutes within the jurisdiction of the National Government. Thus, Trust Territory statutes remain intact as they are capable of enforcement by the Trust Territory court system. Though an element of burglary, assault alone is not within the jurisdiction of the Court. But a statute providing for combination of assault and some other act does constitute a crime within the FSM. The motion was denied.

7. FSM v. Ruben, 1 FSM Intrm. 34 (1981)

At one a.m., defendant repelled the unruly and loud entry of his brother-in-law by brandishing a machete which resulted in a slight wound to the intruder. Defendant was acquitted of the charge of assault with a dangerous weapon because he was protecting himself and his family.

Generally, a person can use no more force than is reasonably necessary to protect himself, his family and his home and property from an intruder. However, there is also no legal requirement that the person protecting his home and family sift through possible weapons that might be available to determine the one most perfectly suited for the occasion. In this case, the defendant used force reasonably necessary to expel an intruder.

Though tradition may allow entry of the brother-in-law into one's home, the general privilege to enter does not mean the privilege may be exercised at all times and in every conceivable manner. *FSM v. Boaz*, Cr. No. 1981-502 (FSM Tr.Civ. Pnp. July 1981). Therefore, it is reasonable for the defendant to believe he should take action to remove his brother-in-law from the house to avoid further damage to the house and possible injury to family members. As the party asserting customary law, the Government did not meet its burden of proving by the preponderance of the evidence the effect of such law. The Court suggested that even though defendant was acquitted, he may still owe customary obligations to his brother-in-law arising out of the incident.

8. FSM v. Hartman/Seferin, 1 FSM Intrm. 43 (1981)

Benson. In both cases, the defendants were indicted for burglary and larceny which arose out of the same transaction and formed parts of one plan. The arraignment court on its own motion dismissed the larceny count for lack of jurisdiction. After counsel had an opportunity to submit memoranda and make oral argument, the trial court agreed with the original finding and held that absent express statutory authority, the Court has no ancillary jurisdiction over state court crimes (larceny in violation of 11 TTC § 852), even though the Court has jurisdiction over burglary, notwithstanding that both counts are based on the same act or transaction.

9. Niemes v. Maeda Construct. Co., 1 FSM Intrm. 47 (1982)

Benson. Plaintiff sought preliminary injunction against defendants in a matter involving the validity of a grant of easement in the Trial Division. The FSM Court dismissed as it did not have jurisdiction to hear the case because: (1) it was not a case "arising under" the Constitution of the FSM; and (2) diversity among the defendants was not complete.

Upon dismissal, the Court noted that supervision of the Trust Territory over the islands of the FSM was still significant and since the High Court, as the alternate forum, is not a provincial court, and does not therefore present problems of discrimination in favor of residents over non-residents to justify exercise of jurisdiction by the Supreme Court of the FSM.

10. Lonno v. Trust Territory, 1 FSM Intrm. 53 (1982)

King. Plaintiff seaman brought an unlawful discharge action against his employer, defendant Trust Territory Maritime Service System. In denying defendant's motion to dismiss for lack of jurisdiction, the FSM Court held that jurisdiction over admiralty or maritime matters, which were formally exclusive of the Trust Territory High Court when lawsuits against the Trust Territory were involved, had been delegated to the national court pursuant to Secretarial Order 3039. That allocation of the former exclusive High Court jurisdiction between the Supreme Court of the FSM and the various state courts will be determined on the basis of jurisdictional provisions within the Constitution and laws of the FSM and its respective states. (See discussion of this case in Bowman, *Legitimacy and Scope of Trust Territory High Court Power to Review Decisions of Federated States of Micronesia Supreme Court: The* Otokichy *Cases*, 5 U. HAWAII L. REV. ___ (1983)

11. Lonno v. Trust Territory, 1 FSM Intrm. 75 (1982)

King. Plaintiff seaman brought a suit for unlawful discharge against defendant employer Trust Territory. Defendant's motion to dismiss was denied and defendant filed a petition for interlocutory appeal which the trial court treated as a request for a "prescribed statement" within the meaning of proposed FSM R. APP. PROC. 5(a). The Court refused to issue the preliminary statement because there was no substantial ground for a difference of opinion and that an immediate appeal would retard, rather than materially advance the ultimate determination of the litigation.

12. FSM v. Tipen, 1 FSM Intrm. 79 (1982)

King. Defendant Tipen was arrested and handcuffed while drinking beer with his friend on Nov. 6, 1981 in the Downtown Bar in Kolonia. Simultaneously, one officer conducted a warrantless search of defendant's closed, opaque, purse-sized bag. Defendant was subsequently charged with illegal possession of a weapon and marijuana which were found in the bag. The trial court granted defendant's motion to suppress and held that the warrantless search and seizure was unreasonable where belongings of bar patron were searched without consent and without any basis for believing that the defendant had committed or was committing a crime.

13. In re Nahnsen, 1 FSM Intrm. 97 (1982)

King. Plaintiff Akira Suzuki filed a petition for probate of two wills with the Ponape District Court. Pursuant to petitioner's motion, the case was transferred to the Trust Territory High Court which then transferred the case to the FSM Supreme Court. Repondent Lena Rudolph filed motion to dismiss for lack of jurisdiction. Denying the motion, the Court held that although state courts, rather than national courts should normally resolve probate and inheritance issues, the national court may exercise jurisdiction on grounds of diversity of citizenship where state courts have not yet been established.

14. Nix v. Ehmes, 1 FSM Intrm. 114 (1982)

King. Plaintiff Nix, who was attacked and stabbed by an assailant (apparently without provocation), filed a petition for a writ of mandamus to require the state attorney to bring criminal action against the assailant. Dismissing the petition, the Court (trial division) held that in the absence of extraordinary circumstances, prosecutorial discretion based upon good faith will not be overruled.

15. State of Truk v. Otokichy, 1 FSM Intrm. 127 (1982)

Defendant was accused of violating Title 11 of the Trust Territory Code, and the Federated States of Micronesia, as prosecutor, sought to bring the case before the Trial Division of the Supreme Court of the FSM. The Trial Division held that it did not have jurisdiction to entertain the case. Only cases arising under the national laws of the F.S.M. fall within the jurisdiction of the Supreme Court. Noting that FSM CONST. art. VIII, § 1, defines national powers as those expressly delegated to the national government or of an "indisputable national character," the Court found that Title 11, a criminal code, was not a national law. Further, although the Congress of the FSM has the power to define major crimes, at the time of the alleged criminal act, jurisdiction of Title 11 had not been delegated to the national government, nor had Congress' exercise of its power, the National Criminal Code, become effective.

Further, the Court found that neither did it have jurisdiction by virtue of Secretarial Order 3039, which transferred certain judicial powers and functions to the FSM. Order 3039 recognized that the existing community and district courts and the appellate divisions of the Trust Territory High Court would continue to operate until functioning courts of the FSM were established. The FSM Constitution contemplated state and local courts which were not yet functioning. The FSM

Supreme Court could not presume to act in their absence.

16. State of Truk v. Otokichy, 1 FSM Intrm. 133 (1982)

Benson. In two cases brought before the Trial Division of the Supreme Court of the FSM, defendants were accused of several serious crimes in violation of Title 11 of the Trust Territory Code. As these alleged violations occurred prior to the effective date of the National Criminal Code, the same considerations as those involved in *State of Truk v. Otokichy*, 1 FSM Intrm. 127 (1982), arose. Thus, the Court again denied jurisdiction.

17. FSM v. Mudong/Benjamin, 1 FSM Intrm. 135 (1982)

King. Defendants, being separately charged for assault with a deadly weapon, filed motions to dismiss on grounds that the cases had been resolved through Ponapean customary settlements. The Court denied motions to dismiss and held that customary settlements resolving disputes among families or clans may not, absent extraordinary circumstances, require court dismissal of criminal proceedings. The Court further noted, however, that the customary understandings would be taken into account during sentencing.

18. Tosie v. Tosie, 1 FSM Intrm. 149 (1982)

King. Petitioners, seeking a writ of habeas corpus, challenged the National Criminal Code as violative of their rights of due process, equal protection, and of the *ex post facto* clause of the FSM Constitution. Petitioners were convicted and imprisoned under Title 11 of the Trust Territory Code. Title 11 authorized the President to consider and act upon requests for parole. The National Criminal Code, enacted in 1981, contained a broad repeal of Title 11 "to the full extent of National Government jurisdiction in all matters covered by the provisions of the law contained therein." The Court found that if the National Criminal Code did erase the possible parole considerations for those persons who had committed offenses before the effective date of the Code, serious constitutional questions of violations of the *ex post facto* clause would be presented because reducing the availability of parole could constitute an increase in punishment for an earlier crime. However, F.S.M. Code tit. 11, § 102 (1982) provided that the Code did not apply to offenses committed prior to its effective date. Although this section preserved intact the President's parole powers for offenses committed prior to the effective date of the National Criminal Code and the President has the power to consider petitioners' requests for parole, since the petitioners were not lawfully detained, the petition for writ of habeas corpus was denied.

19. Manahane v. FSM, 1 FSM Intrm. 161 (1982)

King. Plaintiffs, parents of the deceased infant, brought a wrongful death action against the Federated States of Micronesia, the State of Ponape, and two doctors individually. The FSM filed a "motion for correction of misjoinder" maintaining that under the Sovereign Immunity Act, it could only be liable for the negligence or wrongful acts of its employees acting within the scope of their office or employment, and that the doctors were not employees of the national government. Recognizing that the proper motion was one for summary judgment, the

Court treated the motion as such, and denied the motion because there was a genuine issue of material fact as to whether the FSM was responsible for state hospitals.

The Court noted the even though the State of Ponape acknowledged by affidavit that it, without the involvement of the national government, recruited, hired, signed the employment contracts, thereby controlling the employment status of the two doctors under the language of the contracts, the obligations ran to the Trust Territory government. Moreover, in the transfer of the executive functions from the government of the Trust Territory to the FSM, the FSM agreed to assume health service functions "to the extent that functions in this area are of the competence of the national government." Prior to this agreement, the FSM Congress enacted legislation authorizing the President to accept and perform executive functions transferred from the Trust Territory, including those within the powers of the State. These latter functions would be performed temporarily by the national government, and later turned over to the states upon request by the states and subsequent agreements between the High Commissioner, the states, and the national government. Since no such agreements had been presented to the Court or established in the record, a question of fact still existed and summary judgment could not be granted.

20. Truk State v. Hartman, 1 FSM Intrm. 174 (1982)

Benson. Defendants were accused of escaping from a municipal jail in violation of Title 11 of the Trust Territory Code. At the time of the alleged escape, the defendants were under arrest by the municipal police for a municipal offense. The question presented was whether the FSM Supreme Court had jurisdiction to try the case. In ordering the case back to District Court for further proceedings, the Court first noted that although the FSM Supreme Court has jurisdiction to try cases arising under a national law, Title 11 was not adopted by the FSM Congress as a national law; rather Congress repealed Title 11 to the extent of the national government's jurisdiction in matters covered by the National Criminal Code. Second, while the Constitution gives Congress the power to define major crimes, Congress chose to define escape in the National Criminal Code differently from Title 11. Under the National Criminal Code, the crime of escape relates only to matters involving a national interest. Since the escape in question did not involve a matter of national interest, the case did not arise under national law, and therefore, the Court lacked jurisdiction.

21. FSM v. Trial Div. Sup. Ct./Otokichy, 1 FSM Intrm. 183 (1982)

King, Fritz, Weeks. The government of the Federated States of Micronesia appealed the ruling of the Trial Division of the Supreme Court of the FSM that it lacked jurisdiction to try several criminal cases (*See State of Truk v. Otokichy*, 1 FSM Intrm. 127 (1982), and *State of Truk v. Otokichy*, 1 FSM Intrm. 133 (1982)). A writ of prohibition to prevent transfer to the Trust Territory High Court was sought and granted.

Several defendants were charged with serious crimes under Title 11 of the Trust Territory Code. These crimes allegedly occurred before the National Criminal Code became effective. The Trial Division of the Supreme Court decided that, as Title 11 was not adopted as national law, it lacked jurisdiction to try the cases.

The Appellate Division reversed, however, finding section 102(2) of the National Criminal Code controlling. Section 102(2) provides that prior law governs prosecutions for offenses committed before the effective date of the National Criminal Code. By acting affirmatively to authorize such prosecutions, Congress brought such prosecutions within the realm of national law. Under Article XI, section 6(b) of the FSM Constitution, the Trial Division of the Supreme Court has jurisdiction in cases arising under national laws. The Court, therefore, granted petitioner's writ of prohibition to prevent transfer and ordered the Trial Division to retain jurisdiction and proceed with the cases. (*See also*, Bowman, *supra* FSM case No. 10)

22. FSM v. Yal'Mad, 1 FSM Intrm. 196 (1982)

King. The Government appealed an interlocutory order authorizing the release of the defendant pending trial. Such an order is not a final judgment and would not normally give rise to a governmental appeal. Noting that it is important for the Court to be particularly vigilant and exercise its inherent powers to avoid unnecessary expenditure of resources for premature and unauthorized appeals, the Court also recognized that there may be special circumstances which afford some basis for proceeding with the interlocutory appeal. Therefore, the Government was ordered to file a brief explaining why an interlocutory appeal should be permitted.

23. Suldan v. FSM, 1 FSM Intrm. 201 (1982)

King. Plaintiff had been a police officer employed by the national government. He was dismissed for alleged absence from his post at times when he was assigned for duty. Upon plaintiff's appeal under administrative law, an ad hoc committee was convened pursuant to law. The committee's recommendation that plaintiff be reinstated with full compensation and benefits was transmitted to the President, who disapproved it, not based on the merits, but in order that the case could be brought before the Court because of a perceived conflict of interest. In appealing to the Court, plaintiff contended that the procedures set forth in the National Public Service System Act for appeals for termination of government employees fail to meet the requirements of the FSM Constitution. However, the Court did not reach this constitutional issue because the administrative steps essential for review by the Court had not yet been completed.

The National Public Service System Act requires that the highest management official for the agency make a final decision which is subject to limited judicial review. Under the Public Service Systems regulations, that "highest management official" is the President. The President, in this case, however, did not make a decision on the merits. The President could not reassign to the Court the decision-making responsibility set forth in the statute. Therefore, the Court found that it was premature to review the personnel dispute, and remanded the case to the President for further administrative action.

24. Alaphonso v. FSM, 1 FSM Intrm. 210 (1982)

King, Laureta, Soll. Defendant appealed from his conviction on three counts of assault with a dangerous weapon in violation of F.S.M. Code tit. 11, § 919, on the grounds that there was insufficient evidence to support findings of guilt and that

the trial court improperly rejected defendant's alibi defense. As this was the first appeal on the merits from a criminal conviction to the Appellate Division of the FSM Supreme Court and there was no precedent establishing the standard of proof to be met in criminal cases, the Court had to establish that standard. The Court considered the history of the due process provision of the FSM Constitution and determined that the rationale behind the adoption of the reasonable-doubt standard in the United States is applicable to the Micronesian Constitution, society, and culture. Therefore, the due process clause of Article IV, section 3 of the Constitution requires proof beyond a reasonable doubt as a condition for criminal conviction. The Court further held that the trier of fact must consider the evidence in its totality, including the alibi, in deciding the guilt of the defendant. Assertion of an alibi does not shift the burden of persuasion from the government. Upon review of the record, the Appellate Division found that the trial court applied the correct standard of proof and did consider the defense of alibi in reaching its decision. Therefore, defendant's appeal was dismissed.

25. FSM v. Jonas, 1 FSM Intrm. 232 (1982)

King. Various criminal charges were brought against defendant. Since there was no justice of the Supreme Court on Ponape at the time of his arrest, defendant was brought before the Trust Territory District Court judge, who set bail at $10,000 and imposed various restrictions on defendant in the event of his release upon bail.

Defendant sought modification of bail, which was granted along with a modification of a restriction upon defendant should he be released upon bail. Since earlier cash bail requirements set by the state court had not exceeded $1500, the Court found the $10,000 bail amount excessive and reduced the bail amount to $1500. This lower amount, when coupled with the added restrictions imposed on defendant upon his release, including travel restrictions, would meet the object of imposing bail — assuring the presence of defendant at trial. The Court further overruled a restriction that defendant be prohibited from having contact with any other defendant as such a restriction would impose a serious obstacle to defendant's preparation of his defense.

26. In re Iriarte (I), 1 FSM Intrm. 239 (1983)

King. Although the facts were not clear to the Court, it appeared that petitioner had criticized the municipal judge at a court proceeding. Sometime after that incident, and without a hearing of any kind, the municipal judge issued an order to detain petitioner for contempt of court. Petitioner asserts that he voluntarily went to jail seeking information as to the reason for issuance of the order, but was not detained, nor was he informed of the reason for the order. Subsequently, petitioner traveled to Honolulu upon Ponape State business. Upon his return, he was presented with an order for his detention for contempt of court issued by the Trust Territory High Court. Petitioner had no advance notice nor was he afforded any hearing before being detained. Petitioner's motion for release with the Trust Territory High Court was denied. Shortly thereafter, this petition for writ of habeas corpus was filed with the Supreme Court.

The Court held that it had jurisdiction to consider this petition for writ of habeas corpus. Although the community courts and Trust Territory courts are not

constitutional courts, they are integral parts of the domestic governments. They continue to exercise trial court functions only on an interim basis, until the State of Ponape establishes its own courts. They are not immune to the restraints imposed upon officials by the Constitution or statutes. Because petitioner alleged that his constitutional due process rights were violated, and the FSM Supreme Court is the ultimate arbiter of constitutional rights, the Court had jurisdiction to entertain the petition.

While the Court recognized the need to protect judicial officers against improper pressures which may ultimately deprive the courts of their ability to render impartial decisions, the need for impartial administration of justice and the constitutional guarantee of rights for citizens demands scrupulous judicial compliance with the law. Due process in a criminal contempt proceeding requires reasonable notice of the charge and an opportunity to be heard before punishment. A court, however, has a limited power to act summarily where the contemptuous conduct takes place during courtroom proceedings, where personally observed by the judge, and where the judge acts immediately. Since the municipal judge failed to act immediately, the municipal court could not act summarily in finding contempt. However, in deference to the Trust Territory High Court, and because a serious contempt of court may have occurred, the Court delayed petitioner's release to afford the High Court the opportunity to provide due process in compliance with the Constitution.

27. In re Iriarte (II), 1 FSM Intrm. 254 (1983)

King. This action follows the FSM Supreme Court's issuance of its opinion holding that petitioner's confinement was violative of due process, but allowing the Trust Territory High Court an opportunity to proceed with the contempt charges in compliance with constitutional requirements. Shortly after the Supreme Court's opinion was issued, the municipal judge issued his second order of commitment reciting that petitioner had two weeks earlier unlawfully disrupted the court while in session and that petitioner had left the courtroom before the court had an opportunity to advise him that he was in contempt of court. Based on these recitations, the municipal judge found petitioner to be in summary contempt. A proceeding was convened in the Trust Territory High Court where petitioner requested a later hearing date. The later hearing date was granted, but the High Court denied bail. Contending that due process requirements had still not been met, petitioner filed a motion with the Supreme Court requesting immediate release. The Court agreed that continued confinement of petitioner was violative of his rights under the Constitution. In criminal contempt proceedings, the constitutionally required procedures would normally include, as a minimum, the right to receive reasonable notice of the charges, a right to examine witnesses against the defendant, to offer testimony, and to be represented by counsel. A narrow exception to the normal notice and hearing procedures is allowed when necessary to maintain order in the courtroom. But when the necessity for immediate action ends, so too does the court's power to employ summary contempt. Thus, the municipal judge's attempt to exercise summary contempt power two weeks after termination of the actions complained of, could not be given legal effect. Normal notice and hearing procedures should have been followed. The Court also held that the municipal court's refusal to set bail was unjustifiable. Right to bail preserves the presumption of innocence and prevents infliction of punishment prior

to conviction. Where, as here, there is no indication that petitioner would fail to appear for hearing, absolute denial of bail is violative of due process. Challenging the Supreme Court's jurisdiction over this matter, the government argued that petitioner failed to exhaust High Court remedies because the petition should have been made to the Appellate Division of the High Court in Saipan. However, the Court found that the petitioner had exhausted his High Court remedies because the Constitution of the FSM did not contemplate its citizens petitioning any body outside of the FSM as a condition to consideration of their constitutional claims by courts established under the Constitution. The High Court is an anomalous entity operating on an interim basis within, or adjacent to, the constitutional framework. It fills a void existing because of the absence of state courts. Upon establishment of state courts, the need for intervention by the Supreme Court in trial matters will be greatly reduced.

SUBJECT INDEX FOR FSM CASES IN BRIEF

Citations are to FSM Case Numbers in Table of Contents to Cases in Brief.

TABLE OF STATUTES AND OTHER AUTHORITIES

FEDERATED STATES OF MICRONESIA CODE

TRUST TERRITORY CODE

SECRETARIAL ORDER 3039

Special Joint Rule No. 1 of the High Court and

FEDERATED STATES CIVIL PROCEDURE

FEDERATED STATES APPELLATE PROCEDURE

FEDERATED STATES CRIMINAL PROCEDURE

F.S.M. SUPREME COURT RULES FOR ADMISSION TO PRACTICE

INDEX

1980-82 HAWAII INTERMEDIATE COURT OF APPEALS

CASES IN BRIEF

This alphabetical index provides a summary of each Hawaii Intermediate Court of Appeals case decided between May 6, 1980 and January 27, 1981, inclusive. The phrase "ICA" refers to the Hawaii Intermediate Court of Appeals; other courts are specifically indicated. The name of the judge authoring the opinion or "per curiam" appears at the beginning of each summary. The date of a statute construed is omitted from the citation. Several of the case summaries herein were further reviewed by the Hawaii Supreme Court by way of writ of certiorari. The reader is referred to Issue 1 of this Volume for summaries of the Hawaii Supreme Court cases.

For additional background on the formation and structure of the Hawaii Intermediate Court of Appeals, the reader is referred to M. GOODBODY & R. HOOD, *An Introduction to Hawaii's New Appellate System*, 15 HAWAII B.J. 47 (1980).

Ahlo v. Ahlo, 1 Hawaii App. 324, 619 P.2d 112 (1980)

Burns. A husband and wife appealed a family court's decision in their divorce action. The wife claimed that the judge had erred by: (1) denying her motion for relief from decree under HAWAII FAM. CT. R. 60 without holding a hearing; (2) incorrectly dividing the property; and (3) failing to provide for the support, education and maintenance of the adult children. The husband claimed the judge should not have granted the wife's motion for extension of time to file an appeal under HAWAII FAM. CT. R. 73(a). Her motion had been made approximately 48 days after the entry of the decree and not within 30 days of entry of the decree as required by Rule 73(a). The husband also claimed the wife should not have been awarded alimony. The ICA affirmed the lower court on all disputed issues. The family court was not required to hold a hearing to decide whether to grant relief under Rule 60 but might decide on the basis of the papers submitted to it. The motion for extension of time to file an appeal made under Rule 73(a) did not have to be made within 30 days of the entry of the decree of absolute divorce, but might be made at any time within 60 days of the entry of such decree. A review of

the record indicated no manifest abuse of the family court judge's wide discretion in awarding alimony and dividing property. Without evidence of such abuse, his decision would not be set aside. The trial judge had not erred by failing to provide for financial assistance to the adult children. HAWAII REV. STAT. § 580-47 allowed the judge to do so, but neither party had requested an order requiring the other to provide such support. Nor did the record reveal a need for it.

Ailetcher v. Beneficial Finance Co., 2 Hawaii App. 301, 632 P.2d 1071 (1981)

Padgett. An automobile dealership and one of its employees brought an action against finance company to recover damages allegedly suffered as a result of finance company's refusal to make loans to dealership's customers until the employee paid off a delinquent loan. The trial court entered judgment in favor of defendant finance company, and the dealership and its employee appealed. Affirming in part and reversing in part, the ICA held: (1) dismissal of the action as to the co-defendant corporation was proper because uncertified and unsworn to documents filed in opposition to a motion for summary judgment will not be considered; (2) directed verdict was proper as to the counts of defamation, unlawful methods of debt collection, invasion of privacy, and conspiracy because the evidence was insufficient to permit recovery; (3) directed verdict was proper as to the count of negligent infliction of emotional distress in the course of an attempt to collect a debt because, standing by itself, it does not give rise to a claim for relief; (4) directed verdict was improper as to the count of intentional infliction of mental and emotional distress where there was evidence from which a reasonable jury could have found that the means employed for collection were unreasonable and that mental and emotional distress arising therefrom were foreseeable; (5) directed verdict as to the count of unfair acts or practices in violation of HAWAII REV. STAT. § 480-2 was improper where there was evidence from which a jury might have found the creditor's threats to cut off business with the debtor's employer unless the debtor or the employer paid up the debtor's loan in full were an unfair business practice and where evidence was sufficient to permit a finding of damage; (6) a lender of domestic currency is not a merchant for the purposes of HAWAII REV. STAT. ch. 480; and (7) damages for mental distress and suffering are not recoverable in an action under HAWAII REV. STAT. ch. 480.

Aloha Petroglyph, Inc. v. Alexander & Baldwin, Inc., 1 Hawaii App. 353, 619 P.2d 518 (1980)

Per Curiam. Appellant Aloha Petroglyph, Inc. alleged it had entered into a lease of space in a shopping complex owned by appellee Alexander & Baldwin, in reliance on appellee's fraudulent promise to implement a program to bring tourists to the shopping center. The ICA affirmed the trial court's entry of a partial summary judgment in favor of appellee on the issue of fraud. The general rule was that fraud could not be based on promises as to future conduct. Moreover, even assuming a claim of fraud might be based on evidence of present representations as to future conduct, there was no affirmative evidence that appellee had misrepresented his present intent to appellant. The only evidence of fraudulent intent introduced by appellant was appellee's denial he had ever made a statement of intent. Such evidence was insufficient to prevent summary judgment for the appellee.

American Security Bank v. Read Realty, Inc., 1 Hawaii App. 161, 616 P.2d 237 (1980)

Burns. In a case involving an escrow company's obligations under an assignment of sales commission agreement, the trial court found a lack of actual or constructive notice and interpreted the assignment agreement. On defendants' appeal, the ICA first held the trial court was not clearly erroneous because: (1) the record provided sufficient basis for the trial court's finding of no actual notice of the assignment; and (2) neither sound policy nor purpose would be served by applying the doctrine of constructive notice. Second, noting that an appellate court is not bound by a trial court's construction of a contract based solely upon the terms of a written instrument without the aid of extrinsic evidence, the ICA held that the trial court erred in its interpretation of the assignment agreement.

Amfac Financial v. Pok Sung Shin, 2 Hawaii App. 428, 633 P.2d 1125 (1981)

Padgett. Amfac Financial Corporation filed a complaint for a mortgage foreclosure and the appointment of a receiver with respect to certain property situated in Kalia, Waikiki, Honolulu, upon which it was proposed to build a project called the "Hobron." A building permit for the "Hobron" had been issued prior to the lawsuit. The City and County refused to extend the duration of the building permit. The receiver moved for a preliminary injunction—it was the only relief sought in this action. After the preliminary injunction was granted, the appellants' (Life of the Land, et al.) moved to intervene. The circuit court denied the motion. Affirming, the ICA found: (1) that the appellants had shown no basis for an intervention as of right because the intervenors could not show how the preliminary injunction could impede or impair their ability to protect their interests; and (2) it appeared that their interests were adequately represented by existing parties. Moreover, even if there had been questions of law and fact in common between the matter of issuance of the preliminary injunction and the interests of the proposed intervenors, the trial court did not abuse its discretion in denying the motion to intervene, where the preliminary injunction had expired of its own terms and there was no bar to proposed intervenors' bringing an action seeking relief on whatever grounds they might have.

Association of Apartment Owners v. Amfac, Inc., 1 Hawaii App. 130, 615 P.2d 756 (1980)

Hayashi. Plaintiff filed an action against the owner of the land and others to recover the cost of repairing the foundation to the condominium. Defendant filed a motion for summary judgment contending that she could not be held liable under an implied warranty of habitability because she was only a passive owner and was neither a real estate developer nor builder. Furthermore, since the condominium was a conversion from apartment status, at the time of its sale it was not "new housing." The motion was denied. After the denial, both parties agreed to an interlocutory appeal reserving questions of "all issues assertable in connection with that prior motion for summary judgment" or of "all legal issues relating to the basis of liability" of the defendant. Affirming, the ICA held that whether defendant was a developer or passive owner and whether the condominium was "new housing" were material issues of fact which bar the issuance of summary judgment. However, the ICA declined to render an opinion as to the reserved

questions because: (1) the lower court failed to present a specific question or questions of law; and (2) sufficiently uncontroverted and specific facts were not supplied. Therefore, the case was remanded.

Association of Apartment Owners v. Walker-Moody Construction Co., 2 Hawaii App. 285, 630 P.2d 652 (1981)

Burns. Association of condominium owners sued the contractor and developer for damages for defects and/or inadequacies in the common elements of the building. The trial court granted defendants' motion for summary judgment and the association appealed. Affirming in part and reversing and remanding in part, the ICA held: (1) summary judgment was improper where there was an issue of material fact as to whether the developer completed the work required by the settlement agreement in a satisfactory manner; and (2) summary judgment was proper where the affidavit of attorney concerning his understanding of negotiations which led to prior settlement agreement was not admissible to vary the unambiguous terms of the prior settlement agreement.

Au v. Kelly, 2 Hawaii App. 534, 634 P.2d 619 (1981)

Per Curiam. Alfred Y.K. Au (Au) was injured when a swinging entrance door of the Financial Plaza of the Pacific sprang back and struck him on the wrist. In the first trial, a jury found in Au's favor, finding that Financial was 70% negligent and Au 30% negligent. It awarded $45,000 in favor of Au which was reduced to $31,500 for his comparative negligence. Financial Plaza of the Pacific moved for a new trial and remittitur. After a hearing, Au was given the choice of agreeing to $14,000 in remittitur or submitting to a new trial. Au refused and the trial court granted a new trial only the issue of damages. At the second trial, the jury rendered a verdict of $2,000. Affirming, the ICA held: (1) since Au did not obtain and bring up for review the transcript of the first trial and the ICA could not determine what the evidence was, Au had failed to establish that there was an abuse of discretion by the trial court in setting aside the jury's verdict and granting a new trial; and (2) since Au did not specify the refusal of the trial court to admit as evidence a chart detailing Au's loss of income following the incident and there was nothing in the record to show the objections were properly preserved, the issue was not addressed.

Bambico v. Perez, 2 Hawaii App. 298, 631 P.2d 592 (1981)

Per Curiam. The parties to an unperformed residential sales transaction each claimed entitlement to the buyer's $16,000 down payment. The buyers filed an action claiming that the sellers breached the residential sales contract and damaged her furniture, seeking return of her $16,000 down payment. The trial court required the sellers to return $4,000, but allowed them to keep the remaining $12,000 of the down payment. The buyers took an appeal. Reversing and remanding, the ICA held: (1) the Initial Payment Receipt and Contract (IPRC), the agreement for the purchase of the property, was not a valid and enforceable contract because it did not indicate a payment structure, rate of interest, or specify a method by which those unknowns could be determined; (2) because there was no valid and enforceable contract, the buyers were entitled to a return of all the down payment except to the extent that the seller had valid and enforceable set-

offs; and (3) the buyer waived or abandoned any claim based on the trial court's failure to award her any compensation for damages to her furniture where her only claim on appeal concerned the return of the entire down payment.

Bank of Hawaii v. Allen, 2 Hawaii App. 185, 628 P.2d 211 (1981)

Per Curiam. In May 1974, appellant Allen co-signed a promissory note for $70,000 which was due on October 1, 1974. Allen paid $500 on the note, but thereafter the note was in default. Bank of Hawaii brought an action on the note in September 1977, and the trial court entered summary judgment in favor of the bank in January 1978. On appeal, Allen argued that the bank was not entitled to summary judgment because: (1) he was fraudulently induced by the bank to sign the note; and (2) he had mistakenly signed the note in his individual capacity while intending to sign as president of a closely-held corporation. Affirming, the ICA held: (1) mere representation on the part of the bank that it was relying on the credit of the co-signer of the note did not give rise to fraudulent inducement and is not a defense to an action brought on the unpaid promissory note; and (2) an authorized representative who signs his own name to an instrument is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity.

Bardin v. Peters, 2 Hawaii App. 547, 634 P.2d 1049 (1981)

Per Curiam. The plaintiff-appellant entered into a DROA as purchaser of a condominium unit on Maui from the defendants-appellees. The lower court entered summary judgment for the agents. Reversing, the ICA found that the agent's showing that the purchaser was unable to pay certain monies on August 7th was not a sufficient showing that there was no genuine issue of material fact as to his ability to pay by October 1st.

Barwick Pacific Carpet Co. v. Kam Hawaii Construction, Inc., 2 Hawaii App. 253, 630 P.2d 638 (1981)

Per Curiam. Defendant appealed judgment against it for the cost of carpeting sent to its condominium project in Kihei, Maui. The trial court had concluded that a contract existed between the parties, and had been formed through the conduct of each. Affirming, the ICA found that the lower court's conclusion was both supported by and consistent with the Uniform Commercial Code (HAWAII REV. STAT. § 490:2-204) because: (1) nine bills of lading for carpet made out to defendant were signed by persons responding to phone calls from defendant's office; (2) no objection to the goods was communicated to plaintiff for nearly a year after the last shipment, in which time the carpet had already been installed in the condominium project. Given the business setting between the parties, defendant's failure to object to the goods within a reasonable period of time implied that defendant assented to the debt and created the account stated by plaintiff.

BATS, Inc. v. Shikuma, 1 Hawaii App. 231, 617 P.2d 575 (1980)

Per Curiam. On August 2, 1974, the holder of the insurance policy in question, defendant and third-party plaintiff-appellee Kenneth Nakamoto rented a van in Hilo, Hawaii from plaintiff BATS, Inc. to help his friend Gene Shikuma move

Shikuma's belongings from Hilo to Shikuma's new residence in Kona. After they finished moving Shikuma's belongings, Shikuma was to drive the van to his new home in Kona and return the van the next day to plaintiff's office in Hilo. On the way to Kona, Shikuma was involved in an accident. The ICA found that Nakamoto was "using" the vehicle so as to qualify for insurance coverage under the collision clause of his automobile insurance policy because the van was under the supervision and control of Nakamoto, and Shikuma operated the van to serve a purpose of Nakamoto's.

Beerman v. Toro Manufacturing Corp., 1 Hawaii App. 111, 615 P.2d 749 (1980)

Padgett. Plaintiff was injured by an allegedly defective lawn mower. Plaintiff recovered from the operator of the mower but the claim against the manufacturer was dismissed. On appeal, the ICA decided the four issues as follows. First, it was not necessary for plaintiffs to identify the specific defective mower in order to prove that particular mower to be defective; therefore the motion to dismiss was erroneously granted. Second, although claims under HAWAII REV. STAT. § 480-13 cannot be limited to injuries to business, the legislative intent of the statute does not reflect a permissible use for personal injury suits; therefore, claims for treble damages were properly dismissed. Third, although plaintiff was awarded compensatory damages from the operator, punitive damages may still be recovered from manufacturer. Finally, the issue of costs should be remanded to the lower court for consideration after the conclusion of the trial.

Board of Directors of the Ass'n of Apt. Owners v. Regency Tower Venture, 2 Hawaii App. 506, 635 P.2d 244 (1981)

Per Curiam. The board of directors of a condominium association brought an action against an architectural firm, the sole stockholder of the firm, the developer, general contractor and subcontractors based on alleged defects in design and construction of a condominium tower. All the defendants cross-claimed against each other. All the claims were settled except for the actions between the developer, the architectural firm, and the sole stockholder of the firm, which went to trial. The lower court entered judgment in favor of the developer against the architectural firm and the sole stockholder of the firm. Both an appeal and a cross-appeal were taken. Affirming in part, reversing in part and remanding, the ICA held, *inter alia*, that: (1) the developer's claims for damages as a result of architectural malpractice were barred by the statute of limitations because the statute of limitations begins to run when the plaintiff knows, or in the exercise of reasonable care should have discovered, that an actionable wrong has been committed against his property; (2) the developer's claim alleging that the sole stockholder in an architectural firm had been paid $75,000 by mistake, the action was one at law and triable to the jury as a matter of right in light of the relief prayed for and the facts alleged; (3) the trial court did not err in not granting the architectural firm's and the sole stockholder's motion for a directed verdict and motion for a judgment notwithstanding the verdict with respect to the claim involving the allegedly mistaken payment of $75,000, because (a) under applicable rules, the standard for granting a judgment notwithstanding the verdict is the same as that for granting a motion for a directed verdict, (b) a judgment notwith-

standing the verdict is improper if there are issues of fact appropriate for submission to the jury, (c) on motions for directed verdict, the evidence and the inferences which may be fairly drawn from the evidence must be considered in the light most favorable to the party against whom the motion is directed, and if the evidence and the inferences, in that manner, are of such character that reasonable persons, in the exercise of fair and impartial judgment, may reach different conclusions upon the crucial issues then the motion should be denied and the issue should be submitted to the jury, and (d) it was not improper for the trial court to direct a verdict finding the existence of an architectural contract where no substantial evidence had been introduced from which a jury could infer that no contract had been entered into; and (4) the trial court erred in granting a remittitur, because in a case tried of right before a jury, the trial court has no power to enter an order for remittitur without granting a new trial as the alternative to acceptance of the remittitur.

Booker v. Midpac Lumber Co., 2 Hawaii App. 569, 636 P.2d 1359 (1981)

Burns. Booker hired Ingman on a contingency fee basis to represent him on a tort claim. Prior to going to trial, Booker terminated Ingman's services. The lower court in awarding Ingman's attorney's fees estimated the billable hours spent by Ingman on the case. On Ingman's appeal, the ICA recognized Hawaii's adoption of the "reasonable fee" rule (citing *Carroll v. Miyashiro*, 50 Hawaii 413, 441 P.2d 638 (1968)) which allows a trial court, in its discretion, to determine the fee prior to the disposition of the case or determine that the discharged attorney's fee is or is not contingent on the outcome of the case, taking into consideration "all relevant factors." However, the ICA held that the lower court had manifestly abused its discretion by refusing to consider the one-third contingency contract and the reasonably estimated value of the case. Therefore, the case was remanded.

Boudreau v. General Electric Co., 2 Hawaii App. 10, 625 P.2d 384 (1981)

Padgett. Plaintiff Boudreau was injured when a washer-dryer in her apartment exploded, apparently because of tampering in the past by unknown persons. She sued the manufacturer General Electric, the retailer Amfac and her landlord Furtado for damages related to her injury. The jury awarded damages to plaintiff against General Electric but apparently subtracted medical expenses that had been reimbursed although no instruction had been given on the collateral source rule. The trial court denied Amfac's motion for indemnity against General Electric. General Electric, Boudreau and Amfac all appealed. The ICA reversed for a new trial. As to General Electric's contention that there was insufficient evidence to find it negligent, the ICA held that the jury's answers on a special verdict form were irreconcilable. The jury found the appliance to be not defective but General Electric to be negligent. Instructions to the jury did not make a clear distinction between strict liability and negligence. These instructions and the special verdict form as drawn could have contributed to the jury's confusion. Since the ICA reversed for a new trial, General Electric's argument that the trial judge erred in allowing a late expert witness was rendered moot. The plaintiff's argument that there should be an additur on the damages award was also moot, the ICA noting that if the issue of damages is reached on the second trial, an additional jury instruction on collateral source rule would prevent a recurrence of the issue. The

ICA found that plaintiff's argument as to the special verdict finding that Furtado was not negligent did have merit. The special verdict form as drafted was confusing to the jury as to this issue; therefore, the ICA reversed for a new trial with respect to the judgment in Furtado's favor. The reversal for a new trial also made it unnecessary to discuss Amfac's appeal although it noted that Amfac had made a timely tender of its defense and insofar as its legal fees were concerned, general law would grant it indemnification.

Bright v. American Society of Composers, Authors, & Publishers, 2 Hawaii App. 471, 634 P.2d 427 (1981)

Padgett. A member of an association of composers brought action against the association, claiming that its methods of determining monies to be distributed to its members was unfair to those members in Hawaii. The lower court granted summary judgment in favor of appellee ASCAP on the ground that appellants had not exhausted their remedies for the relief they sought within the ASCAP organization. The ICA reversed and remanded, finding that on the record before them, there appeared to be substantial issues of fact with respect to: (1) whether appellant had exhausted his remedies or was required to exhaust his remedies; and (2) whether appellant had abandoned a request for review of an alleged discriminatory practice or whether appellee had failed to give him a hearing. In addition, there was an insufficient record upon which to determine whether the provision in the articles of association which provided that an aggrieved member "may" appeal to a board of review was directory or mandatory in the circumstances.

Brodie v. Hawaii Automotive Retail Gasoline Dealers Association, 2 Hawaii App. 316, 631 P.2d 600 (1981)

Padgett. Appellees, Hawaii Automotive Retail Gasoline Dealers filed a complaint against appellants, Brodie and National Tire of Hawaii, Ltd., alleging many causes of action, including libel and unfair business practices. After the action was eventually dismissed in favor of appellants for lack of prosecution, appellants brought this suit against appellees for malicious prosecution. The lower court granted summary judgment for appellees that there was no malicious prosecution. On appeal, the ICA stated that in order to establish a claim for malicious prosecution, the prior proceeding must have been: (1) terminated in the plaintiff's favor; (2) initiated without probable cause; and (3) initiated with malice. Although the first requirement was satisfied by appellants, the second and third requirements were not clearly on the record. The ICA found that appellants might be able to infer that appellees lacked probable cause from the fact that appellees failed to prosecute in their original action. Although a lack of probable cause does not necessarily lead to an inference of malice on the part of appellees, the ICA reversed and remanded the grant of summary judgment for appellees in order that appellants could have a chance to produce evidence to support their claim of malice because this is a case of first impression and appellants may have been ignorant of the rules. However, if appellants failed to produce any additional evidence proving malice, then a directed verdict for appellees should be granted.

Brown v. Brown, 1 Hawaii App. 533, 621 P.2d 984 (1981)

Per Curiam. Although HAWAII REV. STAT. § 580-47 provides that upon granting a divorce a court shall take into consideration the relative abilities of the parties and the condition in which each party will be left by the divorce, the family court decreed that: (1) the wife be granted the one-fourth interest of property she inherited upon which both she and the husband had been living; (2) the husband was responsible for paying $6,000 for a road put on the premises; and (3) the husband was to remove a quonset hut on the premises within 90 days or forfeit any interest in the same. The ICA reversed, holding that the court below had abused its discretion in items (2) and (3) above because the court's resolution was obviously inequitable given the totality of circumstances that both parties were unemployed, aged, in poor health, and without substantial assets.

Cafarella v. Char, 1 Hawaii App. 142, 615 P.2d 763 (1980)

Padgett. Plaintiff appealed a directed verdict entered for the defendant at the close of all of the evidence in a jury trial of a dental malpractice action, after disqualification of plaintiff's expert, in spite of a finding that the expert was qualified to testify.

Reversing and remanding, the ICA held that: (1) Without a motion to strike, it was error for the trial court to disqualify the expert after both sides had rested; (2) since the expert's testimony should have been accepted, there was sufficient evidence to support a verdict for the plaintiff; (3) negligence was the ultimate fact issue and was a question for the jury; (4) since the evidence was not inherently improbable or incredible, the trial court should have denied the motion for directed verdict. Interestingly, the ICA noted that under HAWAII R. CIV. P. 50(b), the expense of a retrial might well have been saved if the circuit court had exercised its power to take the motion for directed verdict under advisement and let the case be decided by the jury.

Calasa v. Greenwell, 2 Hawaii App. 395, 633 P.2d 553 (1981)

Burns. Defendant-appellant filed a HAWAII R. CIV. P. 60(b), Motion to Vacate Decree Quieting Title, claiming that he had not received notice of the quiet title action which had taken place two years previously. Upon the trial court's denial of the motion and the subsequent appeal, the ICA found the trial court to have erred in interpreting HAWAII R. CIV. P. 60(b)(4) to place a reasonable time limit on this type of action in the absence of exceptional circumstances. However, on the merits, the ICA affirmed the lower court's ruling in favor of plaintiff-appellee on the grounds that due process requirements were satisfied in this situation. Due to the fact that the proceedings involved title to land in the jurisdiction, and concerned a non-resident defendant whose address was unknown, service by posting a copy of the summons on the land, and by publication in conformity with HAWAII REV. STAT. § 637-59 were reasonably calculated means of informing the defendant of the quiet title action.

Carnation Co. v. Huanani Enterprises, 1 Hawaii App. 466, 620 P.2d 273 (1980)

Per Curiam. In a suit arising from money due on a delinquent promissory note,

the issue on appeal was whether it was proper for a trial court to order summary judgment on the question of plaintiff's damages, when two months previously it had ordered that the question of damages was to be determined at trial. Noting that it knew of no authority precluding a change of decision by the trial court prior to entry of final judgment in a case, the ICA held that the later order was not barred by the earlier.

Carriers Ins. Co. v. Domingo, 1 Hawaii App. 478, 620 P.2d 761 (1980)

Per Curiam. In an appeal of a summary judgment in a declaratory judgment action on a public liability policy holding that the policy did not apply to the accident in question, the ICA did not reach the issues argued in the briefs because both parties had failed to comply with HAWAII R. CIV. P. 56(e) and therefore the basis for judgment below was inadequate. Specifically, the insurance policy to be interpreted was not certified and two affidavits were in violation of the requirement that they be based on personal knowledge, set forth facts that would be admissible as evidence and show that affiant is competent to testify as to the matters stated therein. Therefore, the judgment below was remanded.

Chainey v. Jensen, 1 Hawaii App. 94, 614 P.2d 402 (1980)

Padgett. Plaintiff was injured in an automobile accident in which he was found to be 68% negligent. He appealed the jury verdict contending that two jury instructions concerning statutory duties were improperly refused by the trial court. Affirming, the ICA held that the instructions were surplusage as they involved the duty to act as a reasonable person, a duty which was adequately covered by general instructions. Furthermore, the offered instructions did not deal with specific statutory duties and, thus, the general instructions were sufficient.

Chierighino v. Bowers, 2 Hawaii App. 291, 631 P.2d 183 (1981)

Per Curiam. Mortgagee brought action to foreclose mortgages. The trial court entered judgment dismissing the action and cancelling and releasing defendants from the lien of those mortgages, and mortgagee's brother appealed. Affirming, the ICA held that mortgagee's brother, who was not a party to the action, was not entitled to seek appellate review.

Chow v. Alston, 2 Hawaii App. 480, 634 P.2d 430 (1981)

Hayashi. Under a fellowship program contract, appellant was assigned to appellee, the Legal Aid Society of Hawaii, to provide legal assistance to low income communities. He experienced some problems in reaching an agreeable work situation with his supervisor, prompting her to draft a memorandum to her superior detailing the difficulties between them. Appellant was eventually discharged. Appellant brought suit against his supervisors and his employer, alleging that: (1) he had been defamed by his supervisor's memorandum; and (2) the actions of his employer and supervisors had constituted intentional interference with his contractual right.

Affirming the trial court's grant of summary judgment against appellant, the ICA held: (1) on review of the record, it could not be concluded that the memorandum rose to the level of libel *per se*, even in light of the settled law in Hawaii

that it is libelous to state in writing that a member of any profession lacks the technical knowledge for proper practice or that he has been guilty of professional misconduct; (2) moreover, even if the memorandum had been found to be libelous *per se*, the defense of qualified privilege was applicable, since the author had acted reasonably in the discharge of some public or private duty and the communication concerned a subject matter in which both the author and the recipient had a corresponding interest or duty; and (3) a review of the record disclosed no genuine issue of material fact and no basis for the claim, as a matter of law, that appellees had acted with intent and legal malice to interfere with appellant's contractual right.

Chung v. Food Pantry, Ltd., 2 Hawaii App. 136, 627 P.2d 288 (1981)

Per Curiam. Plaintiff Chung had been injured in the course of his employment by defendant Food Pantry, Ltd. Soon after the injury occurred, defendants began making voluntary compensation payments to claimant and continued to do so until final payments were made in 1961. However, no payments had been made for disfigurement. The Director of Labor and Industrial Relations granted a lump sum award of $1,000 for the disfigurement which was affirmed by the Labor and Industrial Relations Appeals Board, even though the injury occurred in 1960 and the claim was not made until 1976. On appeal, although more than fifteen years had passed between the time of the injury and the claim for disfigurement, the ICA held that the claim was not barred by any statute of limitations. HAWAII REV. STAT. § 97-52 barred claims made two years after the date of the injury, but § 97-53 limited the application of § 97-52. Where the employer voluntarily made compensation payments, the two-year statute of limitations was inapplicable. The ICA refused to construe these two sections to mean that the statute of limitations begins to run after the final voluntary payment is made. Moreover, HAWAII REV. STAT. § 386-9, which limits the jurisdiction of the Director of Labor and Industrial Relations to ten years after the date of the last payment of compensation, was also inapplicable because that statute deals only with applications for compensation based on either a change in fact or a mistake in a determination of fact relating to the physical condition of the claimant, neither of which was true in this case. Since the defendants failed to show that they incurred prejudice as a result of the fifteen-year delay between the final voluntary payment and the filing of the lump sum claim, the delay was not a bar to such a claim as a matter of law.

City & County of Honolulu v. Ambler, 1 Hawaii App. 589, 623 P.2d 92 (1981)

Per Curiam. The trial court: (1) affirmed a declaratory ruling by the Honolulu Zoning Board of Appeals; (2) enjoined appellant's gift shop operations; and (3) denied appellant's HAWAII R. CIV. P. 59(a) motion for a new trial. Affirming, the ICA found that it was not clearly erroneous for the lower court to conclude that appellant's gift shop did not meet the requirements of an "accessory use" permitted under HONOLULU, HAWAII, COMPREHENSIVE ZONING CODE § 21-711(b) because the shop was not operated primarily for the benefit or convenience of the owners, occupants, employees, customers or visitors to the hotel; (2) the record contained credible evidence of sufficient quantity and probative value to justify a reasonable man in reaching the conclusion reached by the lower court; and (3) the denial of the motion for a new trial based on newly discovered evidence was well within the

sound discretion of the trial court, where the new evidence was the result of a survey conducted after the trial.

City & County of Honolulu v. Bennett, 2 Hawaii App. 180, 627 P.2d 1136 (1981)

Per Curiam. Appellant, intervenor in a land condemnation action, filed a HAWAII R. CIV. P. 60 motion for relief of judgment on the 364th day following the entry of judgment. The trial court denied the motion. On appeal, the appellant claimed first, that the judgment should have been set aside because of newly discovered evidence under HAWAII R. CIV. P. 60(b)(2) and second, that the judgment should have been set aside because appellant lacked the effective assistance of counsel at the 1976 trial. Affirming, the ICA held: (1) there was no showing that public records which were claimed to have been newly discovered evidence were not available to appellant at time of first and second trials below, and thus appellant failed to show due diligence with regard to discovery of such evidence and was not entitled to relief from judgment; and (2) the claim that appellant's counsel had failed to introduce certain documentary evidence at trial was not a basis for relief from judgment in the absence of extremely aggravated circumstances.

City & County of Honolulu v. Manoa Investment Co., 1 Hawaii App. 52, 613 P.2d 662 (1980)

Per Curiam. Defendant owned a parcel of land which was set aside as part of a roadway pursuant to the City and County Master Plan. The parcel was part of a tract of land which had been subdivided into a number of lots. In an eminent domain proceeding, the trial court granted summary judgment to the City awarding defendant $1.00 as just compensation for the parcel. The ICA affirmed on the ground that the parcel was an implied dedication as a roadway despite involuntary compliance with the City's Master Plan. The ICA also held that the doctrine of implied dedication is equally applicable to property in Land Court as well as property under the regular system.

City & County of Honolulu v. Wong, 2 Hawaii App. 216, 629 P.2d 123 (1981)

Padgett. Relying on the plaintiff-appellant's offer to purchase a parcel of land from defendants-appellees' subdivision, defendants-appellees subdivided their tract. The parcel was to be a proposed extension of Woodlawn Drive. On cross-motion for summary judgment, the trial court granted defendants' motion for summary judgment because there was no implied dedication of the parcel, even if it was designated on a map. Affirming, the ICA held that the mere act of showing a street extension on a subdivision map pursuant to ordinance does not constitute an implied dedication with the effect of giving the parcel a nominal value in condemnation proceedings. The ICA distinguished this case from previous ones in which an implied dedication had been found because in the previous cases the owner of a tract of land had subdivided it into smaller parcels and, by either designating one parcel as a roadway or granting roadway easements over it, led purchasers or lessees to rely on the designation or easement in purchasing or leasing their properties. However, in the instant case, the parcel in question had not been subdivided out of defendants' land but merely shown as a future street on their remaining property as required by law. Further, the purchasers of the subdi-

vided lots had access to their lots over other streets and did not rely on any past, present or future use of the parcel in question as a roadway.

Clarkin v. Reiman, 2 Hawaii App. 618, 638 P.2d 857 (1981)

Burns. This case involves two consolidated cases in which the trial court: (1) denied plaintiff's prayer for specific performance under a letter agreement because the contract was mutually abandoned; and (2) denied plaintiff's prayer for relief for breach of contract because the contract was *inter alia* unconscionable, and without consideration.

In the first case, in April of 1968, a 78-year-old man and his 71-year-old wife contracted, as lessors, to change a 66-year-old land lease with 26 years fixed rental into a 99-year land lease with 50 years fixed rental. The rental for the first 14 years of the additional 24-year fixed rental period was set at 6% of $2.00 per square foot and for the final 10 years it was set at 6% of $2.50 per square foot. Further, although the lessee promised to have the necessary documents drawn for signature, he did not do so until January 1971. Thereafter, he did not question why the lessors had not signed nor did he further pursue the matter until October 1974. By that time, one of the two lessors had died and the other was over 84 years of age and, with the cooperation of the lessors, a 152-unit condominium-apartment building had been constructed on the land covered by the lease and the units had been sold together with 55-year leases of the underlying land. Based on these facts the ICA affirmed the judgment below finding that the lower court did not manifestly abuse its discretion when it denied the equitable relief of specific performance because from 1968 until 1974, the conduct of Clarkin "was not that of one who is ready and desirous to carry out the contract." The ICA noted that a manifest abuse of discretion occurs when the trial court clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant. Furthermore, specific performance may be refused where the contract is not fair and just in all its terms, where it is inequitable, oppressive, or unconscionable or where the circumstances attending it are not such as recommend it favorably to the court.

The second set of facts involved the same parties and adjoining parcels of land. On June 7, 1968, Clarkin personally gave to the Reimans a letter in which he offered to lease Lot 13-A-5 in the event that the Reimans did not execute a lease for said property to Rand Hawaii, Ltd. on or before August 15, 1968. The Reimans signed their acceptance. However, the Rand Group timely exercised their option. The lower court awarded Reiman attorney's fees. Both sides appealed. The ICA noted that the construction and legal effect to be given a contract is a question of law. Moreover, an appellate court is not bound by a trial court's construction of a contract based solely on the terms of a written instrument without the aid of extrinsic evidence; in such circumstances, the appellate court must make its own independent determination. Affirming the lower court, the ICA concluded that the June 7, 1968 letter agreement was not a valid and enforceable contract, because it did not specify or fully express an essential term or specify the method of ascertaining it.

Cleveland v. Cleveland, 1 Hawaii App. 187, 616 P.2d 1014 (1980)

Burns. Although the appellant (husband) was by training a teacher and an at-

torney, at the time of the hearing below, the appellant was a self-sufficient farmer and herb grower and owned part of a seven-acre property on Maui. Subsequent to the filing of the divorce decree, the trial court ordered defendant-appellant to pay $100 per month child support. On appeal, appellant argued that the trial court abused its discretion, and that the order was unfair and contrary to the statute. Specifically, appellant argued that a child support order must be based on the payor's "present ability" to pay, and not his potential ability to pay. Affirming, the ICA held that the family court can consider what the payor is capable of earning, as well as the size of the payor's estate and net worth, in entering an order of child support.

Coleman Industries, Inc. v. Tony Team, Inc., 2 Hawaii App. 84, 625 P.2d 1062 (1981)

Per Curiam. The plaintiff alleged that the status of a van as a new vehicle had been misrepresented and prayed for rescission. The trial court granted judgment for defendant on the ground of *res judicata* because a prior suit had put this question at issue. Finding the record clear on this point, the ICA affirmed.

Cosmopolitan Financial Corp. v. Runnels, 2 Hawaii App. 33, 625 P.2d 390 (1981)

Hayashi. Appellees signed a promissory note, one as borrower (Runnels) and three as indorsers-guarantors, in favor of appellant Cosmopolitan Financial Corp. (CFC) on the express, oral inducement by the president or manager of CFC that the negotiable instruments would not be enforced against the guarantors. The trial court allowed parol evidence as to the oral inducement and found that the indorsers-guarantors were not liable. Affirming, the ICA found: (1) the president/manager was an authorized agent to bind the corporation under the concepts of apparent or ostensible authority and promissory (equitable) estoppel; (2) under modern principles of the Uniform Commercial Code, the parol evidence was properly admitted; (3) since the inducement was a fraud upon the state bank examiners and the law will leave the parties to an illegal bargain where it finds them, CFC could not enforce the guarantees.

County of Hawaii v. Leeb, 1 Hawaii App. 308, 618 P.2d 1154 (1980)

Padgett. In an action for eminent domain, defendant-landowner's expert witness, a real estate appraiser, testified as to the value of the proposed condemned property by offering two comparables. The trial court struck the alleged comparables on the grounds that the appraiser had not checked with the parties whether the transactions were arm's length transactions. Reversing, the ICA held that although the trial court did not abuse its discretion in striking the two comparables as offers of substantive evidence of value, striking evidence which was supportive of an expert's opinion was an abuse of the trial court's discretion. Furthermore, the exclusion was not a harmless error because it could have had a devastating effect upon the jury's consideration of the expert's testimony on value.

County of Maui v. Puamana Management Corp., 2 Hawaii App. 352, 631

P.2d 1215 (1981)

Padgett. Appellee had been acting as an agent for many owners of single family units in a certain development in order to rent out the units for periods of one week or more. The trial court enjoined appellee from operating a reservations desk and maid or laundry services on the premises, but specifically permitted appellee to run a reservations desk, washer and dryer services, and domestic help for tenants of the units if these activities were not based on the premises. Plaintiff-appellant, County of Maui, appealed from a declaratory judgment and injunction granted against defendant-appellee, Puamana Management Corp., contending that the injunctive relief was not wide enough in scope. The ICA affirmed, holding that if the County of Maui wished to redefine its zoning ordinance it ought to do so, but that the Court was unwilling to limit the extent to which an individual may use his property without express legislation.

Crutchfield v. Hart, 2 Hawaii App. 250, 630 P.2d 124 (1981)

Padgett. Summary judgment for defendant was granted in a negligence case. On appeal, plaintiff contended that she was not allowed an adequate opportunity to conduct discovery. Stating that HAWAII R. CIV. P. 56(f) should be liberally construed, the ICA reversed judgment, finding summary judgment improper as plaintiff's interrogatories to defendant were still pending during both dates, and in fact, were never answered.

Cuerva & Associates v. Wong, 1 Hawaii App. 194, 616 P.2d 1017 (1980)

Burns. Civil actions Nos. 40634 and 40635 were consolidated for trial and appeal. In Civil No. 40634, plaintiff/payee Cuerva sued Wong, one of the co-makers of a promissory note. Wong filed a third-party complaint against two other co-makers. In defense to his liability on the note, Wong alleged a partial failure of consideration in that Cuerva had not fully performed the services that constituted consideration for the note. Judgment in favor of Cuerva against Wong was entered in the amount of $10,000, together with interest from the date of the jury's verdict at the statutory rate of 6% per annum. Cuerva was awarded attorney's fees of $825 under HAWAII REV. STAT. § 607-14 (assumpsit). The trial court gave separate judgments in favor of Wong against the co-makers for contribution and $633 in attorney's fees. On appeal, the ICA reversed the lower court's holding that HAWAII REV. STAT. § 607-14 governed the award of attorney's fees in this case. The ICA found recovery to be based on the promissory note rather than quantum meruit so HAWAII REV. STAT. § 607-17 controlled the award of attorney's fees. The ICA also awarded interest from the date of the jury's verdict at the interest rate specified in the note. Citing the standard that judicial discretion will not be disturbed on appeal without a showing of abuse, the ICA found no abuse of discretion in the trial court's refusal to grant Cuerva a trial continuance on the grounds that a material witness was unavailable for trial. The ICA affirmed the trial court's finding that Cuerva had not demonstrated unavailability since air transportation from the witness' residence to Honolulu had never been interrupted.

In Civil No. 40635, Borthwick, Wong's partner, appealed the lower court's Order Denying Motion for Reconsideration and the Award of Attorney's Fees to Wong. The ICA affirmed the lower court's denial of the motion on the ground that it had merely reiterated matters and arguments presented in Borthwick's

earlier HAWAII R. CIV. P. 59(a), 59(e) and 60(b)(6) motions. In addition, the earlier Rule 59 motions had been untimely so the trial court had not erred in denying them and deciding not to reconsider. However, the ICA reversed the award of attorney's fees to Wong relating to the defense of Borthwick's Motion for Reconsideration. The ICA found Borthwick's motion to be without proper basis or merit, and that the rule that attorney's fees may not be awarded unless such award is authorized by statute, stipulation or agreement precluded the award to Wong.

Dang v. Mt. View Estates, 1 Hawaii App. 539, 621 P.2d 988 (1981)

Per Curiam. Appellant failed to make interest payments to appellee as required by an agreement of sale for land in Hawaii County. The lower court granted a partial summary judgment for appellee, cancelling the agreement of sale and reserving all other issues for trial. The ICA affirmed the summary judgment, finding that the appellant did not respond with specific facts to show that there was a genuine issue for trial as required by HAWAII R. CIV. P. 56(e). In addition, purchasers under an agreement of sale are not entitled to be treated as if they were mortgagors by having the property treated as a security lien subject to foreclosure sale remedies rather than straight forfeiture.

D'Elia v. Association of Apt. Owners of Fairway Manor, 2 Hawaii App. 347, 632 P.2d 296 (1981)

Per Curiam. The Association of Apartment Owners charged maintenance fees according to the interior and lanai square footage of the apartments and also amended the declaration of horizontal property regime to add charges for the installation and maintenance of a cable television system. Characterizing the appeal as "frivolous" and suggesting that the appellee apply for an award of reasonable attorney's fees, the ICA noted that it had no power to amend the Declaration regarding the method of apportionment and that the amendment of the Declaration and By-Laws was permissible since the charge for cable television was no different in principal or nature than charges for electricity, gas, water, and air conditioning maintenance. Therefore, the judgment below was affirmed.

D'Elia v. Association of Apt. Owners of Fairway Manor, 2 Hawaii App. 350, 632 P.2d 298 (1981) (amended opinion)

Per Curiam. Plaintiff's motion for attorney's fees regarding the companion case (see above case) was filed after an appeal on the only counts upon which the attorney's fees could have been awarded had been noticed. The remaining count, which related to damages and was necessarily dependent on the counts appealed, was not a separate "issue" or "claim" over which a circuit court could retain jurisdiction. Finding that once the notice of appeal has been filed on the main action, the circuit court lost its jurisdiction to determine the attorney's fees, the ICA reversed and remanded the award of attorney's fees without passing on the applicability of HAWAII REV. STAT. § 514A-94 to the situation or the amount of the attorney's fees award.

Dement v. Atkins, 2 Hawaii App. 324, 631 P.2d 606 (1981)

Burns. Plaintiff alleged that defendant induced him to enter into a property development agreement through fraud and misrepresentation, and that defendant was guilty of gross negligence and mismanagement. In affirming the summary judgment entered in favor of defendant-appellee, the ICA noted that fraudulent inducement sufficient to invalidate the terms of a contract requires: (1) a representation of a material fact; (2) made for the purpose of inducing the other party to act; (3) known to be false but reasonably believed true by the other party; and (4) upon which the other party relies and acts to her damage. Moreover, a written contract will be cancelled because of fraud only in a clear case and upon strong and convincing evidence. Because the facts of this case did not show that defendant-appellee made any representations prior to the time plaintiff-appellant signed the property development agreement or that plaintiff-appellant relied upon any such representations when she signed the agreement, plaintiff-appellant could not establish all of the elements required to prove fraudulent inducement and summary judgment was appropriate.

De Mund v. Lum, 1 Hawaii App. 443, 620 P.2d 270 (1980)

Padgett. Appellee Wiliwilinui Ridge Subdivision subdivided certain property and conveyed deeds containing a restrictive covenant requiring the land to be used only as a single family residence. The land was developed by a developer and sold to appellee Lum. Lum converted part of her house into an apartment for rent-paying boarders. De Mund, a neighbor, sought an injunction against continued use of the apartment, and joined the developer and subdivision as defendants. The trial court: (1) granted summary judgment for appellee Lum on the ground that she had not violated the restrictive covenant; (2) granted summary judgment for appellee developers on the ground that they did not owe any duty to enforce the covenant; and (3) dismissed cross-claims between appellees Lum and the developers. On the issue of whether the use of the apartment violated the covenant, the ICA reversed, stating that the definition in the zoning ordinances, which can usually be used to define terms in covenants, could not be used here because the copies given to the court were not certified, there was nothing in the record concerning the date of the subdivision, the covenants or the sale of the first property, and there were questions of fact relating to the intentions of the parties and the meaning of the covenant. The ICA upheld the dismissal of the developers because the complaint did not allege any duty of the developers to enforce the covenant, and it is not clear that developers have any duty. Finally, the ICA stated that the dismissal of the cross-claims should be reconsidered on remand.

Disher v. Kaniho, 2 Hawaii App. 344, 631 P.2d 1209 (1981)

Per Curiam. After a settlement granting plaintiff, an employee, $70,000 from various negligent defendants, the trial court granted both the workers compensation insurance company's motion to intervene as a party plaintiff and plaintiff's motion for adjudication of attorney's fees and costs. The employee's attorney received 40% of the $70,000 settlement as per the contract between the employee and the attorney. The trial court split the expenses totalling $7,498 evenly between the employee and the insurance company, and it was from this order that the insurance company appealed.

The ICA affirmed the decision below, holding that HAWAII REV. STAT. § 386-8 provides that when the employer (insurance company) allows the employee to pursue the action alone and then intervenes at the last minute, as in this case, "the reimbursement to the employer shall be less his 'share' of expenses and attorney's fees." The trial court did not abuse its discretion by requiring the insurance company to pay half of the expenses.

Di Tullio v. Hawaiian Insurance Guaranty Co, 1 Hawaii App. 149, 616 P.2d 221 (1980)

Burns. Plaintiff, Chairman of the Board of Realtor's Professional Standards Committee, sought indemnification from the realtor board for the cost of defending himself in an action for libel and slander which was the result of an allegedly tortious statement made by plaintiff to a newspaper reporter investigating a condominium project. On appeal of the summary judgment in favor of the defendant, the ICA reversed and held that there were genuine issues of material fact as to: (1) whether the plaintiff made his statement "in the conduct of" the Board's business; (2) whether the plaintiff was an "executive officer, director or stockholder" of the Board; and (3) whether the plaintiff made his statement "while acting within the scope of his duties" as executive officer, director or stockholder.

Dowsett v. Cashman, 2 Hawaii App. 77, 625 P.2d 1064 (1981)

Burns. Buyers-appellants defaulted on an agreement of sale for the purchase of a condominium. Seller thereupon filed suit asking for cancellation of the agreement of sale and to keep all payments made by buyers or, in the alternative, that the buyers be ordered to pay all amounts due. After some delay and continuances to give the buyers an opportunity to perform, the trial court awarded judgment for the seller on January 18, 1978. Buyers then moved to vacate and to set aside the judgment. The trial court orally denied this motion on February 16, 1978. On February 17, 1978 the buyers noticed on appeal the January 18th judgment and the February 16th oral order. On February 22, 1978, the written order was filed on the February 16th oral order. No appeals were filed after this written order. Affirming, the ICA first held that it had no jurisdiction to hear the appeal on the February 22nd order since no notice of appeal was filed after the trial court's written order. Pursuant to HAWAII R. CIV. P. 73(a), an appeal may be taken after the "entry" of judgment. Since "entry" signifies something more than mere oral rendition of an order or ruling of the court, the appeal taken on the February 16th oral order was ineffective to give jurisdiction to the ICA. Second, the February 17th decision to cancel the agreement of sale was a new issue on appeal which the ICA declined to consider. Finally, since the evidence below indicated that the judgment of cancellation was entered by the trial court with prior consent of the parties for the purpose of executing a compromise and settlement of the case and the law favors settlements and consequently it must favor their finality, the trial court had properly approved of the settlement agreement and thus did not err when it refused to allow the appellants to repudiate it.

Ellis v. Harland Bartholomew & Assoc., 1 Hawaii App. 420, 620 P.2d 744 (1980)

Hayashi. Plaintiff filed a complaint in January 1965 for "disparagement of

property" and in March 1977 the trial court dismissed the complaint for failure to prosecute pursuant to HAWAII R. CIV. P. 41(b). On appeal, the four factors enunciated in *Davis v. Williams*, 588 F.2d 69 (4th Cir. 1978) should be considered in deciding whether to dismiss for failure to prosecute: (1) the degree of personal responsibility on the part of the plaintiff; (2) the amount of prejudice to the defendant caused by the delay; (3) the presence or absence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) whether the effectiveness of sanctions is less drastic than dismissal. Plaintiff had a valid excuse for delay for a few years while the legality of his proceeding pro se in behalf of a dissolved corporation was in litigation, but most of his delay was unjustified and he never appeared ready or willing to go to trial. Lapse of time had eroded the memories of almost all the witnesses. The ICA found that the plaintiff's right to go to trial had been misused so that the right of defendant to be free from costly and harassing litigation was infringed. Therefore, the trial court had not abused its discretion in dismissing the complaint.

Employees' Retirement System v. Big Island Realty, Inc., 2 Hawaii App. 151, 627 P.2d 304 (1981)

Per Curiam. A real estate broker appealed the amount of his commission. At the time the appeal was taken, the broker's fee issue was completely adjudicated. However, because many other issues in the foreclosure case were not yet decided the ICA dismissed the appeal for lack of jurisdiction. Since the case was deemed a multiple claims or multiple parties case, it could not be entertained absent certification under HAWAII R. CIV. P. 54(b). Before dismissing the case, the ICA entertained the possibility that this case might have been deemed a single case involving a single claim, where the matter would have been appealable under HAWAII REV. STAT. § 641-1(b), with the trial court's permission. However, absent such permission the appeal could not be taken until the entire case was fully adjudicated. The ICA also considered the application of the collateral order doctrine but resisted any extension of that doctrine beyond special and exceptional circumstances because HAWAII REV. STAT. § 641-1(b) and HAWAII R. CIV. P. 73(a) and 54(b) give the trial court discretion to decide whether orders may be appealed interlocutorily. In any event, the ICA held the award of the broker's fee was not a collateral order.

Escritor v. Maui County Council, 2 Hawaii App. 200, 629 P.2d 1146 (1981)

Per Curiam. Special administrator of estate and others brought action against a corporation, a named individual, and John and Mary Does 1-10 as defendants. However, no further steps were taken by the plaintiffs to identify any of the names, identities, capacities, responsibilities or involvements of the Does. The trial court entered final judgment for defendants and plaintiffs appealed. In dismissing the appeal, the ICA held: (1) pro forma John Doe allegations in a complaint made for the purposes of obtaining an order under HAWAII R. CIV. P. 17(d), which stand alone and are not followed up by the identification of the John Doe parties and their responsibilities in the case do not provide a basis for holding that an order is not a final judgment under HAWAII R. CIV. P. 54(b); (2) under the provision of HAWAII R. CIV. P. 77(d), a lack of notice of entry of an order by the clerk does not affect the time to appeal; and (3) where a party, within the time for

filing a notice of appeal from a judgment, actually received notice of the judgment and instead of filing a notice of appeal, filed an ex parte motion for extension of time to file a motion for reconsideration purportedly under HAWAII R. CIV. P. 59(e), and the court lacked jurisdiction to grant such a motion, an appeal taken within 30 days from the disposal of the motion for reconsideration but more than 30 days after the entry of the original order was not timely.

First Hawaiian Bank v. Zukerkorn, 2 Hawaii App. 383, 633 P.2d 550 (1981)

Burns. The lower court granted plaintiff-appellee First Hawaiian Bank summary judgment in its efforts to collect on a note allegedly due to the bank, and on the balance due on a Master Charge account. The ICA affirmed summary judgment on the Master Charge account, but reversed and remanded the portion of the case dealing with the note due to the bank. The ICA ruled that there was a genuine issue of material fact as to whether the defendant-appellant had made a new promise to pay his debt, and had thus effectively bound himself to a new limitations period on the debt. The ICA clarified its holding by noting that an unconditional or a conditional express promise could have been given. Furthermore, an implied promise could have been made as the result of an express acknowledgement of the debt or from part payment of the debt. Such express acknowledgement, however, would only be prima facie evidence of a new promise which could be rebutted by other evidence and by the circumstances under which it was made.

Fletcher v. Fletcher, 2 Hawaii App. 485, 634 P.2d 1039 (1981)

Burns. A husband and wife jointly owned and operated a retail store in Paia, Maui. The trial in a subsequent divorce proceeding involved *inter alia* the wife's request for: (1) the court to appoint an appraiser to value the partnership; (2) one-half of the "fair net value" of the partnership; (3) one-half of the amounts which the husband drew out of the partnership since separation. The trial court refused to appoint an appraiser but determined the wife's interest in the partnership based on the evidence. Reversing, the ICA held: (1) the trial court erred in dividing the partnership primarily as a dissolution of a partnership under HAWAII REV. STAT. § 524-142, rather than as a divorce under HAWAII REV. STAT. § 580-47; (2) despite the error, the lower court did not abuse its discretion when it refused to appoint an appraiser to assess the value of the retail business owned by the parties; (3) the trial court manifestly abused its wide discretion in its division and distribution of the major assets of the parties by the use of clearly erroneous accounting principles and methods.

Ford v. Holden, 2 Hawaii App. 549, 634 P.2d 1051 (1981)

Per Curiam. This is an appeal from two orders awarding costs and attorney's fees: one incorporated in an order granting a motion for summary judgment and entered in favor of appellee Holden; the other, an order granting appellees RMS, Inc. and Hall's motion for attorney's fees and costs, after the entry of an order for summary judgment. At the time the notice of appeal was filed, no adjudication of appellant's claim against another party (Parkos) had been made and there were outstanding counterclaims by Parkos against the appellant as well as cross-claims between the various parties defendant. Dismissing the appeal, the ICA held that

the orders appealed from were not final and hence, not appealable since no certificate under HAWAII R. CIV. P. 54(b) had been obtained. Therefore, the orders awarding costs and attorney fees given to the successful party on motions for summary judgment are not appealable orders where the summary judgments themselves are not appealable.

Survivors of Freitas v. Pacific Contractors Co., 1 Hawaii App. 77, 613 P.2d 927 (1980)

Burns. This was an unusual workers' compensation case where the employer and insurance carrier, rather than survivors, sought coverage for the decedent under the Hawaii Workers' Compensation Act, HAWAII REV. STAT. ch. 386. Reversing a Department of Labor and Industrial Relations award, the Labor and Industrial Relations Appeals Board found that, although decedent was an employee at the time of his fatal accident, the accident did not arise out of and in the course of employment. The appellants (employer and insurance carrier) appealed the Board's decision on two grounds: (1) that the Board's rejection of six of employer's proposed findings was "clearly contrary" to HAWAII REV. STAT. § 91-12 because the Board did not specifically indicate why the proposed findings were rejected; and (2) that the Board "erroneously ignored" the presumption contained in HAWAII REV. STAT. § 386-85 (absent substantial evidence to the contrary, the claim is for a covered injury). The ICA affirmed, concluding: (1) the Board's decision complied with the provisions of HAWAII REV. STAT. § 91-12 because the Board met the requirement that the agency incorporate its findings and rulings in its decision and that such findings and rulings are made reasonably clear; and (2) the Board's failure to state whether it applied the presumption that work injury is covered did not prejudice appellants' rights because the Board's conclusion that the decedent's fatal accident was not work connected was supported by substantial evidence to overcome the presumption.

Gamino v. Greenwell, 2 Hawaii App. 59, 625 P.2d 1055 (1981)

Burns. Plaintiff was a party to a divorce action in the family court which ordered certain real property to be sold. After an agreement had been reached for the sale, the plaintiff made an offer to purchase the property himself. When the family court judge indicated an inclination to direct the conveyance of the property to the party to the agreement, the plaintiff stipulated to an order for the sale, although withholding his consent to it. He did not take a direct appeal from this order; instead, he filed a complaint in the circuit court seeking declarations which would have voided the sale. The circuit court dismissed the complaint on the grounds that it would not hear or decide issues which should have been brought up before the family court. On appeal, the ICA affirmed the dismissal, finding that the action in the civil court constituted a collateral attack on the family court's judgment. Since a collateral attack may not be made upon a judgment rendered by a court of competent jurisdiction and the family court had such jurisdiction, dismissal of the complaint in the circuit court was proper.

Giuliani v. Chuck, 1 Hawaii App. 379, 620 P.2d 733 (1980)

Burns. Plaintiffs (buyers) had entered into a Deposit, Receipt, Offer and Acceptance agreement (DROA) for the sale of some residential property. Defendant

(seller's attorney) prepared documents which did not conform to the terms of the agreement, and plaintiffs refused to sign the papers after attempts to have defendant reform documents failed. The attorney then informed plaintiffs that their deposit was forfeited due to their breach of the DROA agreement. Plaintiffs were awarded their deposit in district court against the seller for rescission of the contract. Thereafter, plaintiffs sued the attorney in circuit court for intentional deprivation of property. Summary judgment was granted in favor of defendant on the ground that the plaintiffs had failed to establish any duty owed to them by the attorney. On appeal, the ICA noted that it is well-settled that an attorney representing a client may be held personally liable to an adverse or third party who sustains injury as a result of the attorney's intentional tortious acts, and that the privilege to act on behalf of a client's interests does not prevent liability for unjustified actions and is stated as such in the Code of Professional Responsibility. However, in spite of the scarcity of facts on the record, the ICA found that the amended complaint was sufficient to state a cause of action for intentional harm to a property interest, but specifically insufficient to state a claim for fraud. Therefore, summary judgment was reversed and case remanded.

Au dissent. Under the admitted and uncontroverted facts, there is no " 'generally culpable and not justifiable' conduct of the defendant, which might subject him to liability under the circumstances." The defendant had not acted "for the purpose of producing the harm involved." Balancing the conflicting interests of the litigants and the societal interests, "in the manner suggested by the reporters of the Restatement [of Torts, 2d]," defendant was entitled to judgment as a matter of law.

GLA, Inc. v. Spengler, 1 Hawaii App. 647, 623 P.2d 1283 (1981)

Per Curiam. Lower court dismissed plaintiff's suit to collect a debt for failure to file a statement of readiness within one year after the filing of the complaint as required under HAWAII R. CIR. CT. 12(f). On appeal, the ICA held that the lower court had not abused its discretion in dismissing plaintiff's suit on the grounds that plaintiff's inadvertence did not amount to excusable neglect.

Gomez v. Pagaduan, 1 Hawaii App. 70, 613 P.2d 658 (1980)

Burns. Appellant, purchaser of a condominium under an agreement of sale, defaulted and vendor obtained summary judgment for writ of possession, rent due, liquidated damages, costs and attorney's fees. Purchaser appealed award of liquidated damages, which entitled vendor to keep all payments made by purchaser prior to termination of agreement of sale. Affirming, the ICA held that where the purchaser's breach does not involve bad faith conduct, a provision in the agreement stating that vendor may elect to keep all payments as liquidated damages in the event of purchaser's default may be enforced by the vendor if there is a reasonable relation between the amount of payments retained and the amount of vendor's actual damages. The ICA concluded that actual damages exceeded the liquidated damages utilizing California's method of determining actual damages, which include: (1) the excess of the contract price over the fair market value of the property at the date of termination of the agreement; (2) the amount of interest due during the purchaser's equitable ownership; (3) the actual (if resold) or estimated (if not resold) costs of sale (including broker's fees) which the seller

reasonably incurred or could reasonably incur on resale of the property on or about the date of termination of the agreement; (4) any payments other than principal and interest which the agreement required the purchaser to make but which he did not make; and (5) any expenses or damages which the agreement entitles the seller to claim from the purchaser in the event of purchaser's breach (to include costs and attorney's fees). The ICA based its decision on *Jenkins v. Wise*, 58 Hawaii 592, 574 P.2d 1337 (1978), where the non-defaulting seller was entitled to the benefit of his bargain in the form of the purchase price (or as in this case the actual value of the premises plus principal payments previously received).

Green v. Green, 1 Hawaii App. 599, 623 P.2d 890 (1981)

Per Curiam. The family court had required a husband to pay his former wife monthly installments of $100 for 24 months in lieu of one-half of his partially vested but unmatured federal civil service benefits. On appeal, the husband alleged that pursuant to 5 U.S.C. § 8345(j)(1) (1976) a divorce court's award to a spouse could mandate the federal Office of Personnel Management to pay the sum to his wife even though he had not retired. Declining to address that argument, the ICA determined that even if the husband's claim was true, the lower court did not abuse its discretion by requiring the husband to pay the monthly installments from sources other than the retirement benefits.

Haas & Haynie Corp. v. Pacific Millwork Supply, Inc., 2 Hawaii App. 132, 627 P.2d 291 (1981)

Padgett. Defendant had supplied building materials to one of plaintiff's subcontractors for a project on Kauai. When the subcontractor failed to pay, defendant applied for a mechanic's and materialman's lien against the project in the Fifth Circuit. Plaintiff there set up a defense of release, but at the same time commenced action in the First Circuit for declaratory judgment that the defense of release was good against defendant's claim of a mechanic's and materialman's lien on the project. The First Circuit granted plaintiff's motion for summary judgment. On appeal, the ICA found that: (1) since a mechanic's and materialman's lien action is purely a creature of statute, HAWAII REV. STAT. § 602-1, mandates that such action be governed by that statute; (2) HAWAII REV. STAT. § 507-43(a) also provides that a claim of a mechanic's and materialman's lien shall be applied for in the circuit where the property is situated, thus the First Circuit had no jurisdiction in the matter; (3) alternatively, even if the First Circuit had jurisdiction, it was an abuse of discretion to entertain an action for declaratory judgment where another statutory remedy, the mechanic's and materialman's lien action, had been especially provided.

Haiku Plantations Ass'n v. Lono, 1 Hawaii App. 263, 618 P.2d 315 (1980)

Per Curiam. Plaintiffs-appellees brought an action to determine easement rights of the parties. Plaintiff is an association of leasehold residents of Haiku Plantations, a subdivision on Bishop Estate lands in Kaneohe. Defendants-appellants are fee simple owners of the Lihue Kuleana located above plaintiffs' land. Pursuant to HAWAII REV. STAT. § 7-1, access to the Lihue Kuleana is through the Haiku Plantation. Such access was provided via two right-of-ways. One right of

way was effectively extinguished when Kahekili Highway was opened by the City and County of Honolulu. The second right of way was realigned by the Land Court in 1966 to plaintiffs' private roadway. The trial court determined that the use of a roadway's right of way by the appellants was limited to ingress and egress and did not include the right to park. Affirming, the ICA held that the law is well-settled that a right of way easement for ingress and egress does not include the right to park thereon. Although the grant by HAWAII REV. STAT. § 7-1 is general, no Hawaii cases have expanded the grant of a right of way easement to beyond that for ingress and egress. Furthermore, even assuming that § 7-1 is an unrestricted grant of right of way whose parameters are determined by evidence of historical and customary usage, appellants' evidence did not support a finding of usage of the easement for parking.

Hall v. American Airlines, Inc., 1 Hawaii App. 258, 617 P.2d 1230 (1980)

Padgett. As a first-class passenger of defendant American Airlines, Inc., plaintiff discovered that cargo placed in the rear of the passenger compartment was unsafely stowed and constituted a danger to the passengers. Believing the condition to be unsafe, he brought it to the attention of the flight crew, which, instead of correcting the condition, gave appellant the choice of either getting off the airplane or flying on. Plaintiff chose to get off the airplane and alerted FAA personnel of the condition. The FAA assessed a fine of $1,000.00 against the airline which, without admitting liability, by way of compromise, paid $775.00. Plaintiff then brought an action claiming general damages based on emotional distress and punitive damages. Partially because plaintiff did not put in any evidence of special damages (which according to plaintiff's counsel was because appellant was interested in a principle not damages), the trial court granted the airline's motion for directed verdict. Reversing, the ICA held that the plaintiff's evidence was sufficient to go to the jury on the question of breach of contract at least on the question of nominal damages. Therefore, it was error to grant a directed verdict. In addition, there was enough evidence from which a jury could make inferences of wanton or willful conduct on the part of American Airlines in refusing to remedy the alleged unsafe condition. The ICA rejected the defendant's arguments that Texas law was the controlling law, noting that in an action for breach of contract of carriage, the law of the place of origination of the carriage is applied in the absence of a more compelling interest in some other jurisdiction. Although New York was the origination of the flight, the ICA found that the record on the matter was sketchy and the court below really never was presented with an opportunity to pass upon the question of what law should govern in this case. Finally, since plaintiff was not interested in damages, but rather in principle, the ICA reversed the judgment below and remanded for a new trial, unless within ten days the airline consented to entry of judgment in favor of appellant for one dollar ($1.00) and his costs.

Hall v. American Airlines, 1 Hawaii App. 312, 617 P.2d 1234 (1980) *denying reh'g to* 1 Hawaii App. 258, 617 P.2d 1230 (1980)

Padgett. At oral argument, counsel for both sides indicated that they were willing to accept a judgment for nominal damages. Therefore, the trial court made such an award. Appellant's counsel moved for reconsideration contending that: (1)

he did not concede that his client was interested only in principle and not in damages; and (2) defendant's conduct supported an award for punitive damages. The ICA noted that even though the record was deficient upon which a decision could be made on the question of conflict of laws, the case of *Ferreira v. Honolulu Star-Bulletin*, 44 Hawaii 567, 365 P.2d 651 (1960) permitted the ICA to reach a decision without retrial of the issues. Upon review of the tape of the oral arguments, the ICA found that appellant's counsel did indeed state that his client would be content with nominal damages. On the question of punitive damages, the ICA stated nothing in the record indicated that the wrongful act was done willfully, wantonly or maliciously, or was characterized by aggravating circumstances. Therefore, the judgment was affirmed.

Hall v. Andow, 2 Hawaii App. 551, 634 P.2d 1052 (1981)

Padgett. Appellant, a framing subcontractor, entered into a subcontract with appellee, general contractor, for the construction of homes in Hilo. The construction project did not go forward, causing the appellant to initiate this action in the circuit court. On appeal of a directed verdict and order taxing costs and attorney's fees against the appellant, the ICA found that appellant agreed to be bound by the terms of the agreement between the general contractor and the owner which provided that the project's commencement be subject to certain contingencies. In reviewing the trial court's record, the ICA noted that the appellant's testimony clearly established his knowledge that the project's commencement was contingent on obtaining the Governor's signature and that signature had not been obtained when he signed the subcontract agreement. The ICA thus concluded the directed verdict was properly granted. The ICA, however, reversed as to the award of attorney's fees finding no term in the subcontract awarding such fees.

Hamabata v. Hawaiian Ins. & Guar. Co., 1 Hawaii App. 350, 619 P.2d 516 (1980)

Per Curiam. The standard of review of a decision of the Labor and Industrial Relations Appeals Board (Board) is set out in HAWAII REV. STAT. § 91-14(g)(5), which provides for reversal of the Board's decision when it is clearly erroneous based on the evidence of the whole record. Using that standard, the ICA affirmed an order of the Board denying appellant temporary total disability compensation for a job-related injury. The ICA held that there was no clear error apparent on the whole record, because there was ample testimony to support the Board's conclusion that appellant's complaints were not totally disabling.

Hana Ranch v. Kaholo, 2 Hawaii App. 329, 632 P.2d 293 (1981)

Hayashi. In a quiet title action brought by Hana Ranch, the circuit court found that it had acquired record title to the disputed parcel of land, as well as by adverse possession. The defendants appealed, arguing merely that the trial court's finding was in error but failing to specify which of the court's findings it took exception to. The ICA affirmed the trial court's findings with respect to Hana Ranch's acquisition of record title, applying the "clearly erroneous" standard of HAWAII R. CIV. P. 52(a). The ICA refused to consider arguments raised for the first time by defendant's counsel at oral argument, noting that this is a "flagrant violation" of HAWAII SUP. CT. R. 3(b)(5).

Hana Ranch v. Kanakaole, 1 Hawaii App. 573, 623 P.2d 885 (1981)

Padgett. This case arose out of claims to property which had originally been granted by King Kamehameha to twenty grantees. The complaint below had two claims, one for partition under HAWAII REV. STAT. ch. 668 and the other for quieting title under HAWAII REV. STAT. ch. 669. The first claim involved the original grantee Kapule, whose descendants (appellants Hokoana) were claiming title. The trial court held that appellants had not produced any credible evidence linking the family to the original patentee or the property in question and that appellees (the Sentinellas) had made a *prima facie* showing of adverse possession. Affirming, the ICA found: (1) even though there was a question as to whether appellants had a present interest in the claim, the appellants had sufficient standing to appeal since "[i]t behooves the court in the pursuit of justice on behalf of all the parties not to be over nice in the application of modern, technical, legal concepts in determining standing in such cases [where there is a likelihood that there are misunderstandings due to divergence in cultural concepts upon which modern law is based and early Hawaiian society]." 1 Hawaii App. 576; and (2) the trial court was not clearly erroneous.

The second claim involved the original grantee Kaholokahiki, whose descendants (the Floreses) were claiming title against a claim of adverse possession and a different line of title by Hana Ranch. The trial court found that neither party could establish the direct line of descent, but concluded that Hana Ranch had established title by adverse possession. Reversing, the ICA found Hana Ranch was not entitled to possession because it appeared that both the Floreses and Hana Ranch had some interest in the property and that Hana Ranch and its predecessors should have known there were co-tenants on some of the shares, even if they did not specifically know it was the Floreses. In addition, Hana Ranch admitted that no actual notice had been given to any possible co-tenants. Therefore, the case was on all fours with *City and County of Honolulu v. Bennett*, 57 Hawaii 195, 552 P.2d 1380 (1976). On remand the trial court was instructed to apply the tests laid out in *Bennett*.

Hadley v. Ching, 2 Hawaii App. 166, 627 P.2d 1132 (1981)

Per Curiam. Appellant appeals both the trial court's decision that he and appellees were joint venturers and the order that he pay appellees a specified sum. First, the ICA found that the trial court was correct in looking to the substance and circumstances of the relationship, regardless of the labels the parties placed upon it, and from the evidence it was reasonable for the trial court to characterize the relationship as a joint venture. Second, the ICA found that the formation of the corporation was a condition precedent to the obligation to perform under the contract, and since the corporation was never formed, appellant could not rely on it to compel performance by appellee. Third, even though it was inoperative, the ICA looked to the contract in determining that the intention of the parties as to the sharing of profits and losses was identical to the general rule that where there is no express division the law will imply an equal division. Therefore, the trial court did not err in applying the general rule. Finally, there was no error in the trial court's conclusion that the contribution of a corporation, of which appellees were sole stockholders, was attributable to appellees' share of the joint venture; nor did the contribution make the corporation a third party in the joint venture.

Harris v. State, 1 Hawaii App. 554, 623 P.2d 446 (1981)

Hayashi. Appellant was an involuntary resident-patient who was being treated for alcoholism at a state hospital and who was injured when she slipped and fell near a water cooler in the dining area of the hospital and was reinjured several months later when she slipped and fell in a dimly-lit parking lot at the facility. Appellant alleged that the State was negligent in its duty to keep the floor around the water cooler in a safe and clean condition and that it likewise did not perform its duty to ensure that the parking lot floodlights were lit. The trial court rendered judgment in favor of the State. Affirming, the ICA held: (1) liability cannot be imposed where the owner (the State) has not been put on actual or constructive notice of the unsafe condition or defect which caused the plaintiff's injuries; and (2) the factual findings of the trial court were not clearly erroneous.

Hascup v. City and County of Honolulu, 2 Hawaii App. 595, 637 P.2d 1146 (1981)

Per Curiam. Plaintiff suffered injuries when she caught her heel in a hole in the sidewalk and fell. Defendant-appellant's argument on appeal was based on *inter alia*: (1) the trial court's denial of its motion for directed verdict that photographs of the hole alone were insufficient basis for the jury to infer the length of time necessary to constitute constructive notice against the City and County; and (2) the trial court's refusal to admit testimony of a former deputy corporation counsel that might have impeached plaintiff's photographic evidence. Affirming, the ICA held that: (1) given that it is the duty of a municipal corporation to keep its streets and sidewalks in a reasonably safe condition, and that the existence of a defect in such street or sidewalk for such a length of time that by reasonable diligence the proper authorities ought to have known of the defect is sufficient to permit an inference of constructive notice, the length of time it is necessary that such a defect exist in order for an inference of notice to arise is ordinarily a question for the jury; (2) the admission or exclusion of impeaching evidence is a matter resting within the discretion of the trial court and will not be overturned on appeal in the absence of a showing of abuse; and (3) in a civil case, a directed verdict may be granted only when after disregarding conflicting evidence, giving the plaintiff's evidence all the value to which it is legally entitled and indulging in every legitimate inference which may be drawn from the evidence in plaintiff's favor, it can be said that there is no evidence to support a jury verdict in plaintiff's favor.

Hawaii Automotive Retail Gasoline Dealers Ass'n, Inc. v. Brodie, 2 Hawaii App. 99, 626 P.2d 1173 (1981)

Per Curiam. The trial court granted defendant's motion to dismiss plaintiff's action for defamation and unfair and deceptive trade practices for failure to prosecute. On appeal, the ICA held there was no abuse of discretion. The trial court's reason for dismissal was plaintiff's failure to prosecute pursuant to HAWAII R. CIV. P. 41(b).

Hawaiian Electric Co. v. Pacific Laundry Co., 2 Hawaii App. 228, 629 P.2d

641 (1981)

Hayashi. A grant of permanent injunction limited defendant Hawaiian Electric's use of a private roadway for parking business vehicles to business hours of 6 a.m. to 12 midnight, despite defendant's arguments that the equities compelled the trial court to permit them to park on said roadway at all hours. The ICA affirmed, holding that the granting of equitable relief is a matter addressed to the discretion of the trial court and will not be overturned on review unless it is shown to have been abused or manifestly against the clear weight of the evidence. The ICA further noted that a court of equity has plenary power to mold its decree to satisfy the requirements of the particular case and thereby conserve the equities of all parties.

Hawaiian Trust v. Hogan, 1 Hawaii App. 560, 623 P.2d 450 (1981)

Per Curiam. An attorney, alleging himself to be the attorney for the administrator with the will annexed of an estate of the decedent, appealed orders entered against him from below: (1) an order denying his motion to vacate judgment order for attorney's fees; (2) the order granting plaintiff's motion to strike "lien"; and (3) the order granting attorney's fees and sanctions. The ICA affirmed in part and reversed in part, finding: (1) the appellant, a purported attorney for an administrator who has been discharged by his client, has no standing to contest a judgment in an inter vivos trust where the administrator and all parties in interest have agreed to the terms of the judgment; (2) it was error to strike without hearing an attorney's lien against the trust assets filed by one who at the time of the bill of instructions was attorney for one of the parties and who rendered services in connection therewith; (3) the lower court properly enjoined appellant from purporting to continue to represent the administrator; and (4) it was error to assess attorney's fees against an attorney where there is no statute, stipulation, or agreement for such an assessment.

Hayashi v. Chong, 2 Hawaii App. 411, 634 P.2d 105 (1981)

Hayashi. C'est Si Bon executed a one-year entertainment contract with defendants, Chong and Zulu. This contract was attached as rider to the American Guild of Variety Artists contract, which contains an arbitration clause. Affirming the circuit court's confirmation of an arbitration award in favor of plaintiff-appellee, the ICA ruled that its review of the confirmation of an arbitration award is limited to allegations of error under HAWAII REV. STAT. §§ 658-9 and 658-10. Following this restrictive standard of judicial review, the ICA concluded that certain contracts executed by the defendants indicated that the arbitrator did not exceed his authority.

Homes Consultant Co. v. Agsalud, 2 Hawaii App. 421, 633 P.2d 564 (1981)

Hayashi. Homes Consultant was engaged in the business of home remodeling and sold and installed steel and fiberglass siding for homeowners. It used door-to-door salespersons, paying them "par sales" or commissions. In October 1977, the Unemployment Insurance Division of the Department of Labor and Industrial Relations notified Homes that it owed unemployment contributions based on the department's findings that the salespersons were "employees" and the commis-

sions paid were covered by Hawaii employment security law, HAWAII REV. STAT. ch. 383. Homes paid the assessment, but appealed to the Appeals Board. In order to prevail by not being considered an "employer," Homes had to meet the requirements of HAWAII REV. STAT. § 383-6, basically that: (1) the individual is free from control; (2) the service is outside the usual course of business or performed outside all of the places of business; (3) the individual is customarily engaged in an independently established trade, occupation, business or profession of the same nature as involved in the contract of service. The Appeals Board found (2) and (3), but not (1), satisfied, therefore the assessment was upheld. However, on appeal to the circuit court, the circuit judge ruled that all three requirements were met and reversed the assessment. The Director of the Department of Labor and Industrial Relations appealed. Reviewing the circuit court's ruling under HAWAII REV. STAT. § 91-14(g), pursuant to HAWAII REV. STAT. § 91-15 and through it HAWAII R. CIV. P. 52(a), the ICA found that the circuit court had clearly erred when it found that the Appeals Board had clearly erred because Homes had exercised a sufficient general control to support the Appeals Board decision. Moreover, the ICA found that both the circuit court and the Appeals Board had erred in finding that requirement (3) had been met. Therefore the ICA reversed the circuit court and reinstated the decision of the Appeals Board.

Horst v. Horst, 1 Hawaii App. 617, 623 P.2d 1265 (1981)

Burns. Appellant appealed from divorce decree, alleging: (1) failure to provide adequate relief pendente lite; (2) violation of HAWAII REV. STAT. § 580-47 for failing to justly and equitably divide and distribute the property and award costs and attorney's fees; and (3) error in considering personal conduct of the spouses by admitting and considering evidence of problems created by the presence of wife's mother. The ICA affirmed, holding that there was no abuse of discretion to: (1) impair jointly owned capital to provide relief pendente lite where a husband had insufficient income for both parties; (2) divide and distribute marital property and award attorney's fees based on consideration of the financial abilities of the parties; and (3) consider the wife's mother's presence as limited to resulting financial impact upon accumulation or preservation of separate property of the husband and not to other improper considerations such as fault pertaining to the personal conduct of the parties.

Hugh Menefee, Inc. v. Hale Kekoa Joint Venture, 2 Hawaii App. 311, 631 P.2d 597 (1981)

Per Curiam. Menefee entered into a listing contract with Hale Kekoa, which provided that Menefee would be the exclusive broker for their condominium project. Under the contract, Menefee was to receive a commission on "fully executed and binding" sales of units in the condominium. Menefee arranged at least 110 sales before the developer, who had encountered difficulties in proceeding with the project, decided to cancel all the sales contracts obtained by Menefee and to return the buyers' deposits. Thereafter, the developer proceeded with a somewhat different project on the same parcel but cancelled its listing contract with Menefee. When Menefee brought suit to obtain brokerage fees for its past sales, the circuit court granted summary judgment to the developer. The ICA reversed, finding a genuine issue of material fact as to whether the terms of the listing

contract entitled Menefee to commissions. Accordingly, the case was remanded for further proceedings.

Hupp v. Accessory Distributors, Inc., 1 Hawaii App. 174, 616 P.2d 233 (1980)

Padgett. In the two design defect cases combined in this opinion, defendant Accessory Distributors, Inc. appealed from the refusal of the court below to set aside a default entered against it and plaintiff Keith Hupp appealed from the refusal of the court below to enter a default judgment on the issue of liability in his favor. Four major issues were addressed by the ICA. First, the ICA found that this was a case of inexcusable neglect and therefore the judge below did not abuse his discretion in refusing to set aside the default. Second, the ICA held that trial courts must be given leeway in their discretion to require proof of liability in the support of a default judgment. Third, the ICA held that the standard of proof is met if the plaintiff at the hearing adduces evidence which would be sufficient at trial to overcome a motion for directed verdict. Finally, after examining the evidence adduced, the ICA found that a reasonable juror presented with the evidence of this case could decide in favor of plaintiff. Therefore, both trial court decisions were affirmed.

Hustace v. Jones, 2 Hawaii App. 234, 629 P.2d 1151 (1981)

Padgett. In a dispute between two landowners over the location of the common boundary between their properties, the trial court held that the boundary line was as alleged by the plaintiff. Defendants appealed, contending that plaintiff's possession to the fence erected between the properties was not hostile and that plaintiff had failed to prove title to a small piece of property lying beyond the boundary of defendants' land. The ICA held that adverse possession to the fence was adequately proved but that plaintiff had failed to prove title to the small parcel by adverse possession or by proper survey. The ICA noted that original surveys of the land commission awards are frequently inaccurate and that plaintiff should have produced evidence of the metes and bounds of the land commission award to support his claim. The ICA reversed and remanded for entry of an amended decree excluding the small parcel from the property to which title was quieted in the plaintiff.

Ikegami v. Ikegami, 1 Hawaii App. 505, 620 P.2d 768 (1980)

Padgett. In 1963, the decedent entered an agreement to make the children of his first marriage the major beneficiaries of his estate under his will. Subsequent to the agreement, the decedent converted most of his personal property to real property and bank accounts with his second wife holding as tenant by the entirety. In 1973, just prior to his death, he executed a new will leaving everything to his second wife. The lower court held the decedent did not violate his agreement by conveying or disposing of his property during his lifetime since he had merely agreed to leave his children a substantial portion of property he possessed at the time of his death. Reversing and remanding, the ICA found that the lower court was clearly erroneous because of evidence of the intentions of the parties entering the agreement. Although there was no express condition preventing the decedent from converting his property during his lifetime, based on the written

agreement to make the will and the testimony of the parties involved, the decedent took on the obligation to convey to his children the bulk of his estate. Therefore the decedent's subsequent disposition of his estate was in violation of this agreement.

In re Coleman, 1 Hawaii App. 136, 615 P.2d 760 (1980)

Per Curiam. The validity of a second will was challenged by appellants who alleged that the testatrix was mentally incompetent and that appellant and his wife had exerted undue influence on the testatrix. The trial court found the second will invalid on the ground that it was the result of undue influence. When the first will was admitted to probate, appellants moved for a jury trial pursuant to HAWAII REV. STAT. § 531-2 to determine the validity of the second will. The jury found the testatrix not of sound mind but did not reach the question of undue influence. On appeal, appellant challenged the trial court's instructions given to the jury contending that: (1) the trial judge failed to instruct the jury on presumption of testamentary capacity; and (2) the giving of instruction on testatrix's soundness of mind was in error because no such evidence was produced at trial. As to the first instruction, the ICA held that where the requested instruction was substantially covered by other instructions given, the trial court had not abused its discretion. As to the second instruction, the ICA held that there was sufficient evidence presented upon the issue of the testatrix's capacity since there were three medical expert witnesses testifying as to the mental competency of the testatrix. Therefore, the judgment was affirmed.

In re Doe, Born on January 19, 1961, 1 Hawaii App. 243, 617 P.2d 830 (1980)

Hayashi. After a hearing, the family court waived its jurisdiction over the defendant, a juvenile, and transferred him to the circuit court for trial as an adult. On appeal, citing *Kent v. U.S.*, 383 U.S. 541 (1966), the defendant argued: (1) due process and fairness required a finding of probable cause before jurisdiction could be waived; and (2) the presumption of guilt at the hearing impaired the court's ability to fulfill the full hearing and investigation requirements of the U.S. Constitution and Hawaii law. Finding no abuse or mistaken exercise of discretion, the ICA affirmed the family court order and held: (1) *Kent* is not authority for the rule that a finding of probable cause is necessary before the family court can waive jurisdiction and such a requirement is more a matter for the legislature; and (2) there was substantial evidence upon which the family court based its decision, including testimony from a diagnostic team, the police report, letters of commendation and the serious nature of appellant's charge of rape where the victim was physically abused and required hospitalization.

In re Doe, Born on May 6, 1961, 1 Hawaii App. 266, 617 P.2d 826 (1980)

Padgett. Appellant, a juvenile 17 years old at the time of the offense, was convicted as an adult of attempted rape after the family court waived its jurisdiction. Affirming, the ICA held: (1) even though HAWAII FAM. CT. R. 135 was not literally complied with, there was no prejudice to the defense from the delay in filing the charge because the detention hearing clearly notified appellant and his attorney of the charges against him; (2) there was no error in refusing to stay the proceed-

ings until an appeal from the waiver order could be heard because appellant would have presented a danger to the community; (3) HAWAII REV. STAT. § 571-22 was complied with because a full blown investigation was conducted. At oral argument appellant withdrew his point that the rape statute under which defendant was convicted was unconstitutional based on sexual discrimination in light of *State v. Rivera*, 62 Hawaii 94, 612 P.2d 526 (1980).

In re Doe, Born on June 11, 1961, 1 Hawaii App. 301, 618 P.2d 1150 (1980)

Hayashi. Defendant was charged in family court with murder. He was eight days short of being eighteen at the time of the alleged offense. A petition for waiver of family court jurisdiction was filed. The family court ordered a diagnostic team to examine the defendant and to submit its findings and recommendations to the court. Upon reviewing the nature of the offense, the defendant's background, and the team's recommendation for waiver, the family court waived its jurisdiction. Defendant appealed the waiver contending that the decision was based solely on the seriousness of the offense and the age of the defendant when factors such as a supportive family, good school records and the offense charged being the first offense supported retention of jurisdiction. On appeal, the ICA noted that Hawaii courts have consistently followed the guidelines for waiver set forth in *Kent v. U.S.*, 383 U.S. 541 (1966). Where the family court had considered all factors, reversal of the order is not appropriate unless there was abuse of discretion or the decision is not supported by substantial evidence. Therefore, the judgment was affirmed.

In re Doe, Born on August 7, 1961, 1 Hawaii App. 611, 623 P.2d 1262 (1981)

Burns. Appellant, a juvenile, appealed from family court order granting State's petition for waiver of jurisdiction over a minor pursuant to HAWAII REV. STAT. § 571-22(a). The ICA affirmed, reaching the following conclusions: (1) a minor involved in offenses against property may pose a substantial threat to the safety of the community sufficient to allow a waiver to adult court jurisdiction; (2) the evidence was sufficient to support finding that the safety of the community required minor to remain under judicial restraint beyond his minority; (3) justice did not require reversal of a decision upon a legal theory not raised in the lower court that enrollment in an alcoholic treatment facility was a viable alternative; and (4) a minor who is treatable may nonetheless be waived if the safety of the community so requires. The ICA found no basis for defendant's arguments that offenses against persons were worse than offenses against property, and that offenses against property, as a matter of law, did not amount to substantial evidence that the safety of the community required restraint beyond the defendant's minority.

In re Estate of Henry, 2 Hawaii App. 529, 634 P.2d 615 (1981)

Burns. The domiciliary administrator and the ward's parents appealed the amount of fees awarded to the guardian's attorney. The ICA remanded, finding it was without jurisdiction to hear an appeal because it was premature. The probate court's award of attorney's fees was neither a final order nor a collateral order.

In re Kaohu, 1 Hawaii App. 469, 620 P.2d 1082 (1980)

Burns. Appellant was on probation when he was indicted for another crime. Pursuant to HAWAII REV. STAT. § 706-626(3), he was committed without bail. His regularly scheduled probation terminated while being held. Defendant argued that he should be released. The literal language of HAWAII REV. STAT. § 706-626(3) clearly states that if a defendant is on probation, he can be committed without bail for a new charge. There was no ambiguity in the language of the statute and the literal application would not produce an unjust result, clearly inconsistent with the purposes of the statute; there is no room for judicial construction and the statute must be given effect according to its plain meaning. The trial court found that probation status was not required under the statute. Thus even though the trial court found that defendant's probational status had terminated, defendant could still be held. Therefore, defendant applied for a writ of habeas corpus. In deciding the writ, the ICA held that the trial court erred in two respects. First, contrary to the trial court's position, probational status is required for commitment without bail under HAWAII REV. STAT. § 706-626(3), based on the plain meaning of the statute, which is not subject to judicial construction. Second, the probationary period is tolled during the time of defendant's commitment since the purpose of commitment without bail is to hold a probationer in anticipation of revocation proceedings and as the commitment's legality depends upon the continuation of the period of probation, it would not make sense for the probation period to run during the commitment as it would not maintain the balance that the law was designed to achieve. Thus, the lower court made the right decision for the wrong reasons.

In re A Male Minor Child, 1 Hawaii App. 364, 619 P.2d 1092 (1980)

Burns. Appellant, the natural mother of the minor child in question, appealed the lower court's denial of her request to nullify the adoption decree on the grounds that consent was obtained by fraud, duress and undue influence. First, deferring to the trial court's finding that the natural mother's consent was duly acknowledged, the ICA held that the signed consent was adequate, further noting current HAWAII FAM. CT. R. 103(f)(5) requires a duly acknowledged consent was not in effect at the time of the adoption and that HAWAII REV. STAT. § 578-2 required only a written consent, not a notarized consent; a parent who is explaining why she agreed to the adoption of her child by another has reason to dissemble with respect to collateral agreements concerning visitation. Second, the ICA construed HAWAII REV. STAT. § 578-12 as a one-year statute of limitations which prohibits any direct or collateral attack on adoption decrees except on the grounds of fraud, and not on the grounds of undue influence or duress. Disregarding appellant's contention that evidence of duress and undue influence constitute fraud, the ICA deferred to the lower court's finding of no fraud. The lower court's exclusion of proffered testimony was also upheld because appellant could not establish that the statements offered were made prior to the existence of motive, interest or fabrication on her part and thus the hearsay exception of a prior consistent statement was not available.

In re Sing Chong Co., 1 Hawaii App. 236, 617 P.2d 578 (1980)

Burns. The lower court ordered: (1) enforcement of a "Memorandum" agree-

ment of sale which subdivided a lot into two parcels, "X" and "Y"; (2) the sellers (petitioners-appellants) to convey to respondent-appellee title to "Y" together with an easement over "X." Notwithstanding the absence of findings of fact and conclusions of law, the ICA found: (1) the "Memorandum" was a valid and enforceable contract because it is complete and certain as to its essential terms; (2) the sellers could not cancel the agreement because they were at least 50% responsible for the delay in completing the roadway; (3) the buyers built a roadway which satisfied the city's requirements. Therefore, the sellers received all they are entitled to and had no legal basis to complain. In addition, the circuit court did not err in its designation of the boundary between the parcels if the specified area may be relied upon to determine the appropriate course and distance of the fourth side, even if the application of the stated course and distance to the fourth side of a parcel fails to close the boundary.

International Market Place Corp. v. Liza, Inc., 1 Hawaii App. 491, 620 P.2d 765 (1980)

Per Curiam. Liza, Inc. (Liza) contracted with International Market Place (IMP) to operate a nightclub known as Duke Kahanamoku's from December 20, 1971 to March 30, 1980. When Liza failed to comply with certain terms relating to the monthly license and rental fees, IMP brought an action in district court which was subsequently consolidated with a later circuit court action for breaches of the licensing and operating agreement. After Liza filed a motion for continuance on the ground that she was suffering mental and emotional illness which would prevent her from effectively participating in the trial, IMP moved for a separate trial on the single issue of IMP's right of possession. Upon agreement of the parties, the separate trial occurred and the trial court concluded, *inter alia*, that IMP was entitled to a Writ of Possession and attorney's fees, also specifying that the separate judgment was to be considered "final" in accordance with HAWAII R. CIV. P. 54(b). Liza's motion for stay of the writ pending appeal was denied and the sheriff seized the premises the next day. However, since the lease term had expired by the time the appeal on the issue of possession was set for oral argument, the issue was rendered moot. Therefore, the interlocutory appeal was dismissed and the case was remanded for trial on the remaining issues.

Isemoto Contracting Co. v. Andrade, 1 Hawaii App. 202, 616 P.2d 1022 (1980)

Hayashi. Contractor Isemoto Contracting Co. (ICC) sued its subcontractor Andrade for breach of the subcontract. Andrade's answer denied liability but failed to assert any compulsory counterclaims. After a jury-waived trial which resulted in a final judgment in ICC's favor, ICC neglected to deliver a copy of the judgment it prepared to Andrade's counsel prior to filing it with the trial court. Andrade's counsel, however, did not object to the Notice of Final Judgment he received on March 8, 1976. On August 2, 1976, Andrade filed a Motion to Vacate the Judgment based upon HAWAII R. CIV. P. 60(b)(1), (4) and (6), which motion was denied after a hearing. The trial court subsequently denied Andrade's HAWAII R. CIV. P. 60(1) and (6) Motion to Reconsider the Order Denying the Motion. On appeal, the ICA held that the trial court had not abused its discretion in finding that Andrade's counsel's decision not to assert any counterclaims with his answer

did not amount to excusable neglect that interfered with the fair dispensation of justice under HAWAII R. CIV. P. 60(1). Secondly, the trial court had properly denied Andrade's Motion to Vacate the Judgment under HAWAII R. CIV. P. 60(b)(6) because it allows the court in its discretion to relieve a party from final judgment for any reason justifying relief not specified in the preceding clauses of HAWAII R. CIV. P. 60. The ICA observed that this case did not exhibit any exceptional circumstances that would warrant HAWAII R. CIV. P. 60(b)(6) relief since Andrade's counsel had not availed himself of the right to raise counterclaims by amendment of the pleadings under HAWAII R. CIV. P. 13. Finally, the ICA considered the issue of whether the trial court had abused its discretion in deciding that ICC's noncompliance with HAWAII R. CIR. CT. 21 and 23 did not require relief from the judgment. The ICA held that the trial court's refusal to vacate the judgment was proper since the trial court had not acted in such an arbitrary or capricious manner as to deny Andrade due process of law. Andrade had constructive notice of the pendency of the proposed findings of fact and conclusions of law when ICC served him with copies but nevertheless failed to object to them or serve any alternative findings or conclusions on the court. Similarly, Andrade had an opportunity to object to the Notice of Entry of Judgment, but failed to do so. Hence, ICC's noncompliance with HAWAII R. CIR. CT. 21 and 23 was mere harmless error. Therefore, the trial court's decision was affirmed.

Jacoby v. Kaiser Found. Hosp., 1 Hawaii App. 519, 622 P.2d 613 (1981)

Burns. Plaintiff appealed from a summary judgment entered against him in a medical malpractice claim involving complications subsequent to surgery by the defendant because the statute of limitations had run. Citing *Yoshizaki v. Hilo Hosp.*, 50 Hawaii 150, 433 P.2d 220 (1967), the ICA held that the two-year limitation specified in HAWAII REV. STAT. § 657-7.3 does not begin to run until the plaintiff discovers or through reasonable diligence should have discovered (1) the damage, (2) the violation of the duty, and (3) the causal connection between the violation of the duty and the damage. The summary judgment was reversed since there were questions of fact and credibility concerning the tolling of the statute of limitations such that the court could not say from the record that the plaintiff could not prevail under any circumstances.

Jendrusch v. Jendrusch, 1 Hawaii App. 605, 623 P.2d 893 (1981)

Burns. Plaintiff-appellant and former husband entered into property settlement agreement which was initially approved and incorporated into interlocutory decree of divorce. This agreement was subsequently incorporated by reference into the final decree of divorce. The wife brought an order to show cause and subsequently made a HAWAII FAM. CT. R. 60(b)(6) motion requesting the lower court to order that the marital residence be sold and that one-half of the proceeds be awarded to her. Interpreting the property settlement agreement as part of the decree, the lower court found that the intention of the parties was to award the marital residence to the husband (as custodial parent) and that the wife and wife's mother were only entitled to their contribution to the property which the lower court ordered paid. After determining that the ICA was interpreting a decree and not a contractual agreement, the ICA affirmed the denial of the wife's HAWAII FAM. CT. R. 60(b)(6) motion because the lower court had no jurisdiction

over the order to show cause, but reversed all other orders of the lower court, holding that: (1) property settlement agreement did not award wife's share of residence to husband; therefore, the wife remained co-owner of the property; (2) where jurisdiction was not reserved in divorce proceeding, family court jurisdiction concerning property settlement agreement ended when time to appeal divorce decree expired; (3) thereafter, the appellant's appropriate remedy (as co-owner of the property) would be an action for partition. With respect to the interpretation of the judgment, the determinative factor is the intention of the court gathered from all parts of the judgment itself. The reviewing court is not bound by the trial court's interpretation, and the decree is not protected by the clearly erroneous rule.

Jessmon v. Correa, 1 Hawaii App. 529, 621 P.2d 982 (1981)

Per Curiam. Appellants were found by the trial court to have committed deceit and fraud in an insurance-real estate plan with appellees. The ICA affirmed, refusing to set aside the findings of fact of the trial court since it was not "driven irrefragably to the conclusion that all objective appraisals of the evidence would result in a different finding." *Low v. Honolulu Rapid Transit*, 50 Hawaii 582, 445 P.2d 372 (1968).

John Wilson Enterprises, Ltd. v. Carrier Terminal Service, Inc., 2 Hawaii App. 128, 627 P.2d 294 (1981)

Padgett. The owners of a condominium apartment had listed it with plaintiff, dba Pali Kai Realtors, for sale. Defendants, the corporate owner of the apartment and two of its officers, refused to pay commissions to plaintiff after one officer accepted an offer on behalf of the defendants. The circuit court found plaintiff entitled to real estate commissions, interest and expenses. Affirming the circuit court's judgment, the ICA held that plaintiff was entitled to the commission because the listing contract required only that the broker produce a ready, willing and able purchaser. The commission was earned when such a purchaser was produced regardless of whether the offer to purchase is accepted. Because the secretary-treasurer-director of the small closely held corporation orally indicated acceptance of an offer to purchase the apartment listed with the brokerage firm, the offer papers were immediately forwarded to the corporation. However, the corporation delayed more than two months before disaffirming the acceptance. In the meantime broker and the purchaser, in reliance on the secretary-treasurer's oral acceptance, deposited monies in escrow and incurred expenses. Such facts constituted sufficient evidence to support the trial court's finding that plaintiff had procured a ready, willing and able buyer under the contract. In addition, the ICA refused to consider defendant's contention that the lower court's findings and conclusions were inadequate to support a judgment against the individual defendants, because that contention was not raised in either the Questions Presented or Points Relied Upon pursuant to HAWAII SUP. CT. R. 3(b).

Kaiman Realty, Inc. v. Carmichael, 2 Hawaii App. 499, 634 P.2d 603 (1981)

Burns. Plaintiff-buyer instituted action for specific performance of six condominium apartment sales contracts. Trial court (1) denied specific performance because time was of the essence, ordered sellers to refund the buyer's deposits be-

cause buyer was still willing to perform; and (2) dismissed defendant-sellers' counterclaim for liquidated damages. Affirming the denial of specific performance, the ICA noted that a party is not entitled to the remedy of specific performance where time is of the essence and that party does not tender performance within the specified period. The findings of fact clearly established the parties' intent that time was of the essence and that the plaintiff-buyer breached its covenant to perform all its contractual obligations by October 16, 1978 when only one of the six agreements of sale was executed three days after the specified time. Reversing and remanding the dismissal of defendant-sellers counterclaim for liquidated damages, the ICA found that the trial court erred in deciding the counterclaim without a jury because sellers did not waive their rights to a jury trial.

Kajiya v. Department of Water Supply, 2 Hawaii App. 221, 629 P.2d 635 (1981)

Burns. Plaintiffs alleged that the deaths of their fifty-two ornamental Japanese carp (koi) were caused by the addition of a toxic amount of chlorine to the water without notice by the Department of Water Supply (Department). The Department's Director (Murayama) allegedly maliciously advised plaintiffs to dispose of the dead fish so that subsequent chemical analysis was not possible. Defendants' motion for summary judgment was granted. On appeal, the ICA found: (1) the failure to properly denominate defendant Board of Water Supply was not a fatal jurisdictional defect when the defendant was properly served, answered without raising the issue, and showed no prejudice by reason of the misnomer; (2) summary judgment was inappropriate because there was (a) a question of law as to both defendants' duty of care and the proper standard of proof as to defendant Murayama's alleged malice (i.e., "clear and convincing" if acting as a public official); and (b) a question of fact, in the absence of uncontested affidavits and depositions, as to the malice. Additionally, the ICA framed the duty as one in control of a dangerous agency: "When one is in control of what he knows or should know is a dangerous agency, which creates a foreseeable peril to persons or property that is not readily apparent to those endangered, to the extent that it is reasonably possible, one owes a duty to warn them of such potential danger."

Kalauli v. Lum, 1 Hawaii App. 284, 617 P.2d 1239 (1980)

Per Curiam. Plaintiff was injured by defendant in an automobile accident. Jury entered verdict for the defendant and plaintiff appealed. Plaintiff contended that, unknown to plaintiff's attorney, a key witness was interviewed and tape-recorded by defendant's insurance company. If plaintiff had known of the tape recording, he would have presented the case differently. Affirming, the ICA noted that no discovery, formal or informal, was made of the defendant. Although there is a duty of every party to disclose all relevant but non-privileged information, affirmative action is required of the party seeking information. No party is required to volunteer information.

Kawaihae v. Hawaiian Ins. Co., 1 Hawaii App. 355, 619 P.2d 1086 (1980)

Hayashi. The jury in the trial below had denied the plaintiff's claim as a dependent of the deceased, for no-fault insurance benefits, but had nevertheless granted the plaintiff attorney's fees pursuant to HAWAII REV. STAT. § 294-30. Affirming,

the ICA noted that under HAWAII REV. STAT. § 294-30, the trial judge had the discretion to award attorney's fees and costs to a losing claimant who files for no-fault insurance benefits unless it is determined by the trial court judge that the claim is fraudulent, frivolous or excessive. Further, the ICA ruled that the statute applies to all attorney's fees whether for trial or appeal and remanded the issue back to the trial court for action on appellee's request for attorney's fees and costs on appeal.

Kim v. Kim, 1 Hawaii App. 288, 618 P.2d 754 (1980)

Burns. Husband appealed a divorce decree awarding the wife her interest in the husband's federal civil service retirement in the form of a single lump sum payment rather than a percentage of each monthly payment. Following *Richards v. Richards*, 44 Hawaii 491, 355 P.2d 188 (1960), the ICA held that the HAWAII REV. STAT. § 580-47 empowers the family court to make a cash award in lieu of division of property where the specific division is inappropriate or impractical. Furthermore, the family court decision will not be set aside unless there has been manifest abuse of the judge's wide discretion in such matters. Here, the assets were equally divided and there is no basis upon which the husband can equitably claim more. Judgment affirmed.

King v. Ilikai Properties, 2 Hawaii App. 359, 632 P.2d 657 (1981)

Hayashi. Plaintiffs, who were accosted in a condominium unit they had leased from a private owner, appealed from the trial court's grant of summary judgment. The ICA affirmed and held that where several orders are filed, no one of which entirely embraces the entire controversy, HAWAII R. CIV. P. 54(b) infers that the last of the series of orders gives finality and grants appealability. The ICA also construed the RESTATEMENT (SECOND) OF TORTS § 315 (1965) to find that a hotel has no duty to protect persons who are not guests of the hotel. In the absence of a special relationship or circumstances, i.e., a decline in security from the time the tenant moves in, notice given to the landlord regarding attacks, and/or many tenants voicing their concerns regarding the attacks, a landlord also has no duty to protect tenants from criminal acts of third parties.

Kojima v. Uyeda, 2 Hawaii App. 172, 628 P.2d 208 (1981)

Per Curiam. Plaintiffs (a corporation and its president) sued defendants (the corporation's secretary-treasurer) for failing to pay certain union assessments and taxes and prayed for reimbursement of all penalties and interest, $10,000 each for punitive damages and intentionally inflicted emotional distress. Defendants counterclaimed that they had borrowed money on their own credit to loan to plaintiffs which plaintiffs had agreed to pay. The trial court made several findings and conclusions which were so contradictory, ambiguous and incomplete that the ICA reversed and ordered a new trial. Further, the ICA held that at the new trial plaintiffs would not be entitled to advance their claim of negligence, upon which suit was originally brought, against defendants, because plaintiffs lost on that issue in the circuit court and failed to appeal that decision or to raise the issue on appeal.

Kraft v. Bartholomew, 1 Hawaii App. 459, 620 P.2d 755 (1980)

Padgett. In the process of a real property exchange agreement, the Krafts employed an escrow company which did a title search that uncovered many encumbrances against the property. However, upon the Krafts' inquiry, the escrow company replied that there was no problem with the property, and the seller stated that the only problem holding up the sale was a dispute between the seller and his bank over interest charges. In reliance on such assurances, the Krafts improved the property. Later, the Krafts discovered that a mortgage foreclosure was pending on the property. Eventually, the property was foreclosed and the Krafts lost the down payment and monies spent on improvements. Kraft won a money judgment against appellee and cross-appellant escrow company. After the jury verdict, the appellee's motion for a remittitur or a new trial in the alternative was granted. However, the trial court granted the remittitur without offering the appellant a new trial. On appeal, the ICA held that where an escrow company receives information derogatory to the title of the property and misleads the buyer or fails to disclose any problems, there should be no directed verdict for the escrow company. Here, there was enough evidence for a jury to find such a breach of duty and causation. In addition, the ICA held that: (1) the trial court's grant of remittitur without the alternative of a new trial violated appellant's right to a jury trial, and ordered a new trial; and (2) a payment by the buyer directly to the seller, who had fled the jurisdiction, could not be a per se item of damage against the escrow company where the payment occurred long before the escrow company's involvement.

Lau v. Wong, 1 Hawaii App. 217, 616 P.2d 1031 (1980)

Padgett. Appellant and appellee were the general partners in a limited partnership formed in 1957 to engage in the construction business. Appellee's active involvement in partnership affairs ceased in 1968 or 1969. The appellant sold related machinery and equipment and closed the partnership office in 1974. In 1971, appellee sued for a dissolution of the partnership, appointment of a receiver and the winding up of partnership affairs, alleging that the appellant had refused to allow appellee to examine the partnership books from June 1, 1967 to August 1, 1971. The complaint was dismissed for want of prosecution on October 13, 1972. On April 30, 1974, appellee filed another complaint which appellant moved to dismiss on the grounds of res judicata. Appellee amended his complaint to set forth five counts, one of which incorporated the allegations of the earlier complaint that was dismissed for want of prosecution (Count I). Appellee was successful on Counts I, II and IV at a jury-waived trial and a judgment ordering the dissolution and termination of the partnership and other relief was entered. On appeal, the ICA held that the court below had erred in determining that the earlier dismissal was not res judicata as to Count I. Under HAWAII R. CIV. P. 41(b), a dismissal for want of prosecution operates as a dismissal on the merits unless the court orders otherwise. However, the trial court's finding that appellant had breached the partnership agreement in failing to make the books available for inspection was not clearly erroneous so the trial court's ruling on the issue of res judicata did not affect the outcome of the case. The ICA also held that the trial court had properly terminated the partnership since the findings which were supported by substantial evidence established that appellant had withheld information concerning the business from appellee and had failed to call any partnership

meetings, which conduct amounted to a "willful or persistent" breach of the partnership agreement under HAWAII REV. STAT. § 425-132. Finally, the ICA held that appellee was not limited to a return of his contribution to the partnership upon termination.

Lee v. Kimura, 2 Hawaii App. 538, 634 P.2d 1043 (1981)

Burns. The appellant initiated action in the circuit court for an accounting and partitioning of two leasehold parcels of real property. The circuit court dismissed appellant's complaint and directed her to execute an assignment of all rights, title, and interest in leases to appellees. Affirming, the ICA noted that parol evidence does not operate to exclude evidence as to the true relationship between the parties on one side of a written agreement. A lease is a written contract as between lessor and lessees but is not a contract between the lessees. Thus, the trial court's findings of fact and conclusions of law were not clearly erroneous. The ICA also noted that notwithstanding the statute of frauds, an oral contract with respect to an interest in land becomes enforceable if there has been part performance. Here, the appellee made substantial repairs to the property, paid the rent and taxes, collected the rental income, and relied upon the oral agreement, thus, taking the case out of the statute of frauds.

Liberty Bank v. Shimokawa, 2 Hawaii App. 280, 632 P.2d 289 (1981)

Hayashi. Bank brought action against guarantor to recover on a promissory note executed by guarantor's ex-husband. The trial court entered judgment in favor of defendant, and plaintiff appealed. Reversing, the ICA noted that the transaction was not governed by the Uniform Commercial Code and held: (1) the continuing guaranty as executed by guarantor was a valid, enforceable contract of guaranty between the guarantor and the bank; (2) the continuing guaranty contract was not void for lack of consideration at its inception on the ground that initial loan funds were disbursed to guarantor's ex-husband on February 11, 1972, and the continuing guaranty bearing guarantor's signature as requested by the bank was dated February 15, 1972; and (3) while the failure to supply a limit on liability was a major source of contention for the parties because of the bank's responsibility to supply the limit and the guarantor's failure to carefully read the document to which she affixed her signature and the bank's error in overlooking the omission, neither was a basis to invalidate the entire contract.

Lima v. State, 2 Hawaii App. 19, 624 P.2d 1374 (1981)

Per Curiam. Defendant was convicted of the first degree rape of the fourteen year old cousin of his ex-wife. The ICA reversed, holding that the State had failed to meet its burden of proving beyond a reasonable doubt all of the elements of HAWAII REV. STAT. § 707-730. Subsection (1)(a) of the rape statute requires that the prosecution prove that "forcible compulsion" was used. Part two of the definition of "forcible compulsion," HAWAII REV. STAT. § 707-700(12), requires a showing that the victim used "earnest resistance" to prevent the attack. In the absence of substantial evidence to support such a finding, the ICA found it necessary to reverse the conviction.

Linson v. Linson, 1 Hawaii App. 272, 618 P.2d 748 (1980)

Burns. A serviceman appealed a family court ruling that his wife was entitled to a share of his military retirement benefits, although his right to receive them had not matured at the time of their divorce. Her right was made expressly contingent on the serviceman completing the years necessary for him to be eligible to receive them. The ICA affirmed, holding that non-vested military retirement benefits are included in the estate of the parties and are therefore divisible between divorcing spouses under the provisions of HAWAII REV. STAT. § 580-47 (governing the division of marital property in a divorce). The ICA noted that the law has long recognized contingent interests in property and that the legislative history of HAWAII REV. STAT. § 580-47 requires that the phrase "estate of the parties" be broadly interpreted to include anything of present or prospective value. A federal preemption challenge was rejected because the ruling conflicted with no express or implied federal policy. Without such a conflict there is a presumption that the whole subject of the domestic relations of husband and wife belongs to the laws of the states, not the laws of the United States.

Loui v. Corey, 2 Hawaii App. 556, 634 P.2d 1055 (1981)

Padgett. This appeal involved two circuit court cases. In one case, specific performance of a DROA was granted in a partial summary judgment. The other case was dismissed *sua sponte* and attorney's fees were awarded to the defendant's attorney. The first case was partially remanded and reversed by the ICA because two paragraphs in the agreement of sale were not within the scope of the DROA. As to one paragraph relating to attorney's fees, the standard DROA language had been deliberately crossed out; therefore, since the law did not afford any remedy, the paragraph was deleted. The other paragraph, relating to litigation against third parties was also deleted because there was no provision in the DROA for the "usual covenants" nor any proof in the record that an agreement would usually include such a paragraph regarding attorney's fees. The other paragraph, admitted "unusual" by appellee's counsel, was also deleted because there was no evidence that it was a "usual" covenant in agreements of sale. The agreement was affirmed in all other respects. In addition, the trial court's award of attorney's fees was reversed.

Manley v. Mac Farms, Inc., 1 Hawaii App. 182, 616 P.2d 242 (1980)

Per Curiam. The issues in these two consolidated appeals arose out of an amended cross-claim filed by defendant and third-party plaintiff Thomas Voiss against defendant and third-party plaintiff Mike Minder. After trial in which a default on the amended cross-claim was entered against Minder, a motion to set aside the default was filed on Minder's behalf and denied by the lower court. The lower court, however, refused to enter judgment for Voiss against Minder because Voiss had failed to prove Minder's personal liability to him. The ICA addressed two issues. First, applying the test set forth in *BDM, Inc. v. Sageco, Inc.*, 57 Hawaii 73, 549 P.2d 1147 (1976), the ICA held that the court below abused its discretion in denying the motion to set aside the default since inexcusable neglect or a willful act in failing to respond to the amended cross-claim was not shown. Second, while the court below may have had discretion to require Voiss to make a prima facie case on the issues of unjust enrichment or alter ego, where default was

entered, the court failed to notify Voiss that any such showing was expected of him. Therefore, the ICA held that the court below erred in denying Voiss' motion to prove a case of liability.

Media Five Limited v. Yakimetz, 2 Hawaii App. 339, 631 P.2d 1211 (1981)

Padgett. An architect and a contractor involved in improvements to leased premises sought to attach a mechanic's and materialman's lien to the interest of the lessee (a restaurant) as well as to the interests of the lessor (the Waikiki Shopping Plaza Limited Partnership) and to the interests of the fee owner of a portion of land on which the Shopping Plaza was built, land which had been leased to the Shopping Plaza. The circuit court ruled that no lien should attach with respect to the interests of the Shopping Plaza or the fee owner. The ICA reversed with respect to the Shopping Plaza, finding that the provisions of HAWAII REV. STAT. §§ 507-41 and 507-42 allowed the lien to attach to a lessor where the lease requires the construction of improvements by the lessee, as it did here. The ICA affirmed with respect to the fee owner because its lease to the Shopping Plaza did not require the construction of improvements.

Michely v. Anthony, 2 Hawaii App. 193, 628 P.2d 1031 (1981)

Hayashi. On July 20, 1970, Albert Michely, the third-party defendant-appellee, purchased a certain residential property under an agreement of sale. He sold his interest in the property to the Anthonys, the defendants and third-party plaintiffs-appellants, under a sub-agreement of sale on June 30, 1972. Albert Michely was married sometime between the making of the sub-agreement of sale to the Anthonys and its due date; and on September 1, 1974, he assigned his interest in the subject property to his wife, Carol Michely, the plaintiff-appellee. The Anthonys failed to make the final payment under the sub-agreement and Carol Michely brought an action on July 31, 1975 to cancel the sub-agreement of sale. The trial court cancelled the sub-agreement of sale and the defendants appealed. Affirming, the ICA held: (1) the record demonstrated that purchaser's grantees did not condition their consent to assignment by purchaser of his interest in the property to his wife on extension of due date on the balance of the purchase price owing to purchaser under the sub-agreement; (2) the trial court did not err in finding that grantees failed to comply with conditions of agreement under which they were granted an extension of time in which to pay purchaser's assignee balance owing on the sub-agreement; and (3) the trial court did not abuse its discretion in ordering cancellation of the sub-agreement following failure of grantees to abide by terms of agreement for extension of time to pay purchaser's assignee balance owing purchaser under the agreement.

Miho v. Albrecht, 1 Hawaii App. 108, 614 P.2d 411 (1980)

Per Curiam. Plaintiff attorney filed suit to collect his legal fees. Jury verdict was in favor of plaintiff. Defendants appealed, contending that the trial court: (1) improperly denied directed verdict for the defendant since no evidence was produced as to the number of hours worked; and (2) erred in instructing the jury that the defendants could be found jointly and severally liable. Following the standard for directed verdict enunciated in *Stewart v. Budget Rent-A-Car Corp.*, 52 Hawaii 71, 470 P.2d 240 (1970), the ICA noted that since evidence was produced as

to the rate charged and amount due, the number of hours could be easily calculated. As to the jury instruction, defendants had admitted in their answer that they were jointly and severally liable; they did not contest that allegation during pretrial or trial. Therefore, the judgment was affirmed.

Miller v. Kahuena, 1 Hawaii App. 568, 623 P.2d 89 (1981)

Padgett. Defendants' HAWAII R. CIV. P. 41(b) motion to dismiss at the close of plaintiff's evidence in a jury-waived trial was denied and judgment below which quieted title in certain land was awarded to the plaintiffs. Affirming, the ICA held: (1) defendant waived his HAWAII R. CIV. P. 41 motion by proceeding with evidence and the appellate court may take into consideration all evidence in the record; (2) it was not clearly erroneous for the court below to hold that appellees had established title to real property superior to the appellants' claims; (3) where the evidence establishes that both appellants and appellees claim title from a common source, it is not necessary for the appellees to go beyond that source to establish its connection with the original grantee; and (4) the court below was within its discretion to allow an exception to the hearsay rule by permitting statements of deceased family members to be admitted in evidence as to ancestry and relationships within the family to provide evidence connecting the common source of title with the original grantee.

Miller v. Pepper, 2 Hawaii App. 629, 638 P.2d 864 (1982)

Burns. The plaintiffs-appellants thought they had entered into a residential rental-with-option-to-purchase agreement but two days later they found out from a third party that the owners had contracted to sell to other parties. The trial court entered summary judgment against the plaintiffs because even though defendants accepted a rental deposit from plaintiffs with the understanding that plaintiffs were desirous of negotiating an option to purchase, defendants were nonetheless free to sell their residence to a third party prior to the formation of any binding contract with plaintiffs. Affirming, the ICA held that an alleged lease and option-to-purchase agreement is legally invalid and unenforceable where the manner or method of payment of the purchase price is left to be negotiated at a later date.

Minatoya v. Mousel, 2 Hawaii App. 1, 625 P.2d 378 (1981)

Burns. In a boundary dispute between owners of adjacent property at Kualoa, Oahu, appellant damaged the driveway leading to a garage, partially blocked it and padlocked a shower attached to it, after there was no response to her request that appellee move the garage onto "your own property." Appellee brought suit for a permanent injunction and for damages. The trial court granted the injunction and awarded damages totalling $151.00. The trial court found: (1) the appellee had paper title to the disputed property; (2) appellee had title by adverse possession even though appellant argued that the required hostility was not present since the appellee had always believed the disputed land was included on the deed. On appeal, the ICA partially affirmed on the merits and reversed on the issue of damages, holding: (1) the trial court's findings were not "clearly erroneous;" (2) there was no merit in appellant's argument that her motion for a new trial based on the bias of the judge should have been granted because the proper

course would have been to move for disqualification of the judge prior to his entering a judgment on the merits; (3) there was sufficient evidence for the lower court's denial of appellant's motion to appeal in forma pauperis; (4) since no proof as to monetary value of damages had been adduced at trial, only nominal damages not exceeding $1.00 could have been awarded.

Mitsuba Publishing Co. v. State, 1 Hawaii App. 517, 620 P.2d 771 (1980)

Per Curiam. Plaintiff's defamation action included both state defendants and Walter T. Yamashiro. However, the entire case was dismissed by the trial court because the State had not waived its sovereign immunity. Plaintiff brought an appeal on the grounds that Yamashiro should not have been dismissed as a defendant. Before the appeal was decided, Yamashiro died in an airplane accident. Therefore, the ICA granted a motion to dismiss the appeal, noting that a personal action, such as one for defamation, does not survive when the defendant dies.

Moffat v. Speidel, 2 Hawaii App. 334, 631 P.2d 1205 (1981)

Padgett. Moffat and Speidel were neighbors on Tantalus, and were among the co-tenants of an adjacent lot which was designated for roadway purposes and was in fact used as a roadway to their respective homes. Speidel's garage was connected to the roadway by an old cantilevered concrete slab which had become structurally unsound. Unable to afford the cost of repairs, Speidel proposed to demolish his garage—which he did—and to pave another portion of the roadway lot which slopes down from the roadway to his property. Moffat had maintained a compost heap for many years in the area of the roadway lot which Speidel proposed to pave as his new driveway. Over Moffat's objections, Speidel removed the compost heap and put some material in this area, forming a temporary stairway to his property. Moffat sought injunctive relief which the circuit court granted, forbidding Speidel from continuing his construction and ordering him to restore the right-of-way to its prior condition. The ICA reversed, finding first, that the injunction was not sufficiently specific, as required by HAWAII R. CIV. P. 65(d). Second, the ICA found that Moffat had no prescriptive right to use the compost heap area for that purpose to the exclusion of Speidel's proposed use for a roadway. Therefore, the ICA reversed the portion of the injunction requiring restoration of the compost heap. Finally, the court held that, although Speidel could demolish his garage irrespective of Moffat's wishes, his destruction of the cantilevered concrete slab (which was partially in the roadway lot) may have derogated his co-tenants' rights. Accordingly, the ICA ordered that, on remand, Speidel be allowed to construct his new driveway unless it is shown to interfere with some legitimate roadway use by his co-tenants, and that the court below obtain further evidence regarding the cantilevered slab so as to fashion an equitable decree.

Mohl v. Bishop Trust Co., 2 Hawaii App. 296, 630 P.2d 1084 (1981)

Per Curiam. Plaintiffs sued multiple defendants, one of which obtained a summary judgment in its favor by the trial court. Trial as to the remaining defendants commenced on April 6, 1978, but recessed that same day subject to the call of the court. On April 26, 1978, plaintiffs filed a notice of appeal from the summary judgment. On May 4, 1978, the trial court scheduled the trial to continue on

May 9, 1978. Dismissing the appeal, the ICA held that in a case involving multiple claims and multiple parties, absent certification under HAWAII R. CIV. P. 54(b) the trial court's judgment is not appealable until all claims or rights and liabilities of all parties are completely adjudicated.

Munds v. First Ins. Co. of Hawaii, 1 Hawaii App. 104, 614 P.2d 408 (1980)

Per Curiam. Plaintiffs sought declaratory judgment to bind defendant insurance companies to defend them in a lawsuit relating to a soil subsidence problem. Specifically, plaintiffs prayed that the court declare that: (1) the policies were valid and existing at the time in question; (2) the policies covered the matters which were the subject of the lawsuit; (3) the insurance companies had an obligation to defend the plaintiffs. On appeal of the trial court's summary judgment in favor of the plaintiffs, the ICA ruled that in a declaratory judgment involving more than one issue, the judgment should contain a declaration defining the rights of the parties with respect to each issue submitted. Here, only a general order for summary judgment and general judgment were entered. The record was incomplete and rights involved were uncertain. Therefore, judgment was reversed and the case remanded.

Noor v. Agsalud, 2 Hawaii App. 560, 634 P.2d 1058 (1981)

Per Curiam. An employee had been working as a psychiatric assistant at a hospital but voluntarily left her job due to the stressful nature of her work. During the period of difficulty at work and after she left her job, the appellant failed to seek available counseling services at her place of employment. She was later denied unemployment benefits because she voluntarily ceased working without "good cause." In appeal of the administrative decision, the circuit court found that the appellant had not met her burden of showing good cause. Affirming, the ICA stated that the appellant failed to explore reasonable alternatives to resolve her employment difficulties, including consultation with the employer for possible solutions to the appellant's problems.

Noguchi v. Nakamura, 2 Hawaii App. 655, 638 P.2d 1383 (1982)

Per Curiam. Plaintiff appealed from a directed verdict in a civil action for false imprisonment. Plaintiff had told defendant-boyfriend that she no longer wanted to go out with him, but at his request she consented to go with him in his car "only to the store and back." Defendant brought her back, but sped off again before plaintiff departed the car. The trial court entered a directed verdict based on plaintiff's "consent" to be in the car. Reversing, the ICA reasoned that: (1) an actor is subject to liability to another for false imprisonment if he acts intending to confine the other within the boundaries fixed by him, his act results in such confinement and the other is conscious of the confinement or is harmed by it; (2) a moving automobile can constitute a place of confinement; (3) where a defendant goes beyond an implied consent and does a substantially different act, defendant may be liable for false imprisonment; (4) whether a previous consent is broad enough to cover a particular confinement is a question of fact to be determined by the jury in doubtful cases; (5) in a civil case, a directed verdict may be granted only when, after disregarding conflicting evidence, giving the plaintiff's evidence all the value to which it is legally entitled and indulging in every legitimate infer-

ence which may be drawn from the evidence in plaintiff's favor, it can be said that there is no evidence to support a jury verdict in plaintiff's favor. Therefore, the ICA concluded that there was sufficient evidence to go to the jury on the claim of false imprisonment.

Nordmark v. Hagadone, 1 Hawaii App. 487, 620 P.2d 763 (1980)

Per Curiam. Defendant Hagadone, the president of KISA radio, struck plaintiff while driving an automobile leased to KISA radio. The accident took place in an area where residents are not part of KISA's listening audience and defendant was intoxicated. The trial court found that defendant was acting within the scope of his employment and that KISA radio was liable under respondeat superior. Noting that the modern trend has been towards liberalizing the scope of employment even in some instances where an employee conducts personal activity in the course of the business day, the ICA affirmed on the ground that the trial court was not clearly erroneous because it considered: (1) an automobile leased by the corporation; (2) driven by its president and general manager who was vested with responsibility and authority to conduct and manage and was in and out of his office all day; and (3) an accident caused by his negligence occurring at mid-day.

Okada v. State, 1 Hawaii App. 101, 614 P.2d 407 (1980)

Per Curiam. Plaintiff, an intermediate school student, was under the supervision of a public school instructor and was directed to clean a glass terrarium with a water hose. The glass jug exploded while the plaintiff was washing it in a manner contrary to the direction of the instructor. The trial court found the instructor was not negligent even though there was a momentary lapse of supervision. Reversing for a new trial, the ICA ruled that the instructor had a duty to supervise and held that the circuit court's finding of non-negligence was clearly erroneous since a reasonable inference could be drawn from the lapse in supervision that the instructor had breached her duty to supervise. Furthermore, the unforeseeability of the accident does not resolve the problem created by the trial court's finding.

Orallo v. DeVera, 1 Hawaii App. 391, 620 P.2d 255 (1980)

Burns. The appeal resulted from a dispute about ownership of a house. Defendant-appellee testified that in consideration for his co-signing a mortgage on the house, the plaintiff-appellant had to make him a partner, with title to a half share in the house. Plaintiff alleged that she had only agreed to give defendant a partnership interest in one-half of any profit made from a future sale of the house, but defendant had fraudulently caused his name to be placed on the deed as one-half owner of the house. Plaintiff raised three points on appeal against a jury verdict in favor of the defendant: (1) the trial court was in error by refusing to grant her motion for a directed verdict; (2) there was insufficient evidence to support the verdict for defendant; and (3) parts of the verdict were inconsistent. The ICA rejected her three arguments and affirmed the jury verdict for defendant. First, viewed in the light most favorable to the defendant, the record did not support a directed verdict for plaintiff. Credibility was the decisive issue and the trial court correctly decided that the credibility of the plaintiff's testimony was more properly left to the jury. Second, defendant's testimony was sufficiently sub-

stantial to support the jury's verdict in his favor. Plaintiff's arguments were based on the mistaken assumption that defendant had to meet the same standards of sufficiency of evidence that were required of a plaintiff. Unlike a plaintiff, the defendant had no burden of proof so it could not be said that he failed to produce sufficient evidence to support the verdict in his favor. What the jury had really decided was that plaintiff had not met her burden of proof. Third, the jury verdict was not inconsistent because it found that plaintiff intended to give defendant a partnership interest of one-half share in the ownership of the house.

Ottensmeyer v. Baskins, 2 Hawaii App. 86, 625 P.2d 1069 (1981)

Padgett. Appellant was the first runner-up in the Hawaii pageant for Miss Hawaii-U.S.A. 1974 which was put on by one of the appellees. Appellant claimed that one of the appellees (Dr. You) knew that the declared winner of the pageant was ineligible for the title by reason of her age in advance of the pageant, and after the pageant took active steps to prevent appellant from being declared the winner. Because appellant failed to file affidavits in opposition to Dr. You's affidavit as required by HAWAII R. CIV. P. 56(e) and HAWAII CIR. CT. R. 7(b), the trial court granted summary judgment in favor of the appellee Dr. You. The appellant's only response to the motion was an oral one made by appellant's counsel at the hearing. On appeal, the ICA noted that despite violations of both rules, a review of the whole record showed that there were genuine issues of material fact regarding the status of Dr. You as an agent of appellee Miss Universe, Inc. Therefore, the case was remanded for further proceedings.

Park v. Esperanza, 2 Hawaii App. 232, 629 P.2d 644 (1981)

Per Curiam. Plaintiffs Park filed a complaint against multiple defendants. Two of the defendants, Waikiki Realty and Young, filed a cross-claim against other defendants. The trial court entered judgment in favor of the plaintiffs against Waikiki Realty and Young who appealed the judgment without seeking certification of an interlocutory appeal under HAWAII R. CIV. P. 54(b). Dismissing the appeal, the ICA held that in a case involving multiple claims and multiple parties, a judgment of the trial court is not appealable absent certification under HAWAII R. CIV. P. 54(b) until all the asserted claims of all the parties have been completely adjudicated.

Paxton v. State, 2 Hawaii App. 46, 625 P.2d 1052 (1981)

Padgett. After failing to file answers to defendant's interrogatories, plaintiff's complaint was dismissed. Plaintiff moved under HAWAII R. CIV. P. 60(b) to set aside the dismissal order on the ground that his failure to file answers to the interrogatories constituted excusable neglect because he was absent from Hawaii and could not contact his attorney. The circuit court denied the motion finding the neglect inexcusable. Affirming, the ICA held that, in view of the particular circumstances of this case, the circuit court did not abuse its discretion in refusing to grant relief from the dismissal.

Penn v. Transportation Lease Hawaii, 2 Hawaii App. 272, 630 P.2d 646 (1981)

Burns. Lessee brought suit against lessor seeking a judgment declaring a note invalid and a settlement agreement invalid because it lacked consideration, was the result of coercion and was made under duress. Lessor responded with a motion for a preliminary injunction which was granted by the trial court requiring lessee to deliver to lessor all automobiles covered in the settlement agreement, and the lessee appealed. Affirming, the ICA held: (1) lessee could not use pressure caused by suit brought by lessor as a basis for defense of duress against the settlement agreement; (2) the trial court was not clearly erroneous in finding that lessee breached the settlement agreement; and (3) the trial court did not abuse its discretion in granting an injunction which took property out of possession of lessee to put it in possession of lessor when it was necessary to protect legal rights and to prevent irreparable mischief.

Phillips v. Kula 200, 2 Hawaii App. 206, 629 P.2d 119 (1981)

Burns. Plaintiffs (two limited partners of defendant Kula 200) alleged that the partnership wrongfully paid nearly $570,000 to the two general partners and another limited partner. Prior to this action, the general partners asked all the limited partners to amend the limited partnership certificate to approve and ratify the alleged wrongdoings. Upon a favorable response of 75.69% (75% was required), the certificate was so amended. The lower court ruled that plaintiffs could maintain a derivative action under HAWAII R. CIV. P. 23.1 in favor of the limited partnership against the limited partnership, its two general partners, and another limited partner. Affirming, the ICA held that a limited partnership has a right to claim damages for breach of fiduciary duties by its general partners, and that in such a case the limited partners themselves may act if the partnership fails to do so. The ICA further held that "similarly situated" language of Rule 23.1 refers to the 24.31% non-approving minority, whose interests were clearly not fairly and adequately represented by the approving majority. The ICA noted that, barring an express agreement among all the partners, it is "elementary partnership law" that one partner cannot profit individually from the partnership business and cited the Uniform Limited Partnership Act for the proposition that "without written consent of all the limited partners, a general partner . . . has no authority . . . to do any act in contravention of the certificates. . . ." *See* HAWAII REV. STAT. §§ 425-21 to 425-52. Thus, the consent of 100% of the limited partners is required to bar a direct or derivative action for damages by a limited partnership or any of its limited partners.

Phillips v. Queen's Medical Center, 1 Hawaii App. 17, 613 P.2d 365 (1980)

Per Curiam. In a wrongful death action, appellant failed to obtain an expert medical witness to establish his wife's cause of death. After granting appellant numerous opportunities to obtain a qualified witness, the trial court granted summary judgment for the appellee. The ICA affirmed, finding this case on point with *Devine v. Queen's Medical Center*, 59 Hawaii 50, 574 P.2d 1352 (1978) which held that summary judgment may be properly granted when there is no expert medical testimony to link the insufficiencies complained of to the cause of death.

Powers v. Shaw, 1 Hawaii App. 374, 619 P.2d 1098 (1980)

Padgett. Defendant had purchased real property at a foreclosure sale, and prior to a hearing confirming the sale and fixing fees and costs, moved to subpoena six attorneys of plaintiff's law firm, each providing all records of services rendered. The defendant consolidated appeals from orders below quashing subpoenas duces tecum, allowing attorney's fees on foreclosure, allowing additional fees on forfeiture of the down payment on the first foreclosure sale and denying defendant's motion to file a cross-claim against other unsecured claimants to the fund. Affirming all orders, the ICA held: (1) in light of the fact that the litigation had extended over twelve years and the amount of effort spent as well as submittance of extensive records, under HAWAII R. CIV. P. 45(b) defendant's motion to subpoena appeared unreasonable and oppressive on its face and defendant failed to sustain his burden to establish that the lower court's order to quash was an arbitrary one; (2) the trial court did not abuse its discretion in setting the amount of attorneys' fees since plaintiffs had submitted records showing the immense time spent on the litigation; (3) the appeal was not frivolous; (4) the additional award of attorneys' fees was deemed appropriately assessed against the forfeited deposit upon defendant's failure to complete purchase of the property; and (5) the lower court did not err in refusing to allow appellant's cross-claim since there was no surplus arising out of the foreclosure proceedings.

Price v. Christman, 2 Hawaii App. 265, 629 P.2d 633 (1981)

Per Curiam. Plaintiffs, owners of a condominium at Kihei, Maui, brought action against board of directors of the owners' association and manager seeking injunctive relief and damages for various infractions of their ownership rights in certain common areas of the building, and for violation of provisions in the condominium by-laws. The trial court granted summary judgment in favor of defendants. Three days later, plaintiffs filed a motion to reconsider which the trial court treated as an HAWAII R. CIV. P. 59(e) motion to alter or amend judgment. On January 19, 1978, the trial court orally denied the motion, but did not enter its order until January 30, 1978. Plaintiffs, however, filed their notice of appeal on January 24, 1978, after the trial court's oral denial, but before entry of the written order. Dismissing the appeal, the ICA held that where a motion to reconsider an order granting summary judgment was reasonably made and thereby terminated the running of the time for appeal, an appeal filed after the trial court's oral order but before the trial court's written order was ineffective to give the appellate court jurisdiction over the appeal.

Quality Masons, Inc. v. Tomita, 2 Hawaii App. 90, 626 P.2d 204 (1981)

Per Curiam. A subcontractor (appellant) applied for a mechanic's and materialman's lien for work done. The general contractor claimed that the costs of correcting the subcontractor's work exceeded the lien amount but did not establish the amount of set-off. At a hearing on a motion for rehearing, it was apparent that the trial court believed the set-off was greater than the lien amount. On the subcontractor's appeal, the ICA found: (1) the subcontractor's contention that the trial court cut off its presentation of evidence on amounts expended was without merit under HAWAII REV. STAT. § 507-42 because of the contention that the value of the work exceeded the contract price; and (2) since the general contractor did

not meet its burden of establishing a set-off in a mechanic's lien case as to the proponents of the set-off, the case was reversed and remanded to determine the amount of the probable set-off and attachment of the lien if consistent with the finding.

Quality Sheet Metal Co. v. Woods, 2 Hawaii App. 160, 627 P.2d 1128 (1981)

Burns. Dillingham supplied materials to a roofing contractor hired by a general contractor constructing Woods' house. The roof proved faulty and Dillingham contracted Quality to inspect and make recommendations. Subsequently, a Dillingham employee contacted Quality to perform the repairs. Quality brought action for payment against both Dillingham and Woods. Woods counterclaimed against Quality and cross-complained against Dillingham. Dillingham failed to answer Woods' cross-complaint and default judgment was entered. In answering Quality's complaint, however, Dillingham cross-claimed for indemnification against Woods, which the circuit court allowed. On appeal, the ICA first reversed because the default judgment served as a bar to the claim upon which this appeal was taken, since the action upon which the default judgment was entered concerned the same parties and subject matter. Second, the ICA held that it was not clearly erroneous for the trial court to find that Quality had contracted with Dillingham because: (1) Dillingham's employee contacted Quality; (2) employees of both Dillingham and Quality inspected the roof together; (3) Quality indicated to Dillingham that it did not want to do the repairs; (4) Quality made a report to Dillingham outlining the necessary repairs; (5) Quality declined a personal request by Woods to perform the repairs; and (6) Quality finally agreed to do the job when a Dillingham employee pleaded with Quality. Moreover, since this was not a jury trial the finding of facts would not be set aside.

Romig v. De Vallance, 2 Hawaii App. 597, 637 P.2d 1147 (1981)

Burns. Buyers under an agreement of sale (A/S) of a residential condominium appeal from summary judgment for seller which cancelled the A/S and allowed seller to retain all amounts thus far paid by buyers. Reversing summary judgment in part and remanding on material issues of fact regarding buyers' rights under the agreement, the ICA held: (1) although buyers waived all claims for property damage and construction faults on the dwelling, buyers did not thereby waive rights arising out of the fact that the dwelling was partially constructed on the wrong lot; and (2) by analogy to the Uniform Commercial Code, HAWAII REV. STAT. § 2-609, a buyer under the A/S of an interest in land has a right to require the seller to provide written assurance of due performance where reasonable grounds for insecurity arise with respect to the seller's performance. Furthermore, until assurance is received, he or she may suspend, if reasonable, any performance for which he or she has not already received the agreed return.

Ruth v. Fleming, 2 Hawaii App. 585, 627 P.2d 784 (1981)

Padgett. The defendant-appellee hired the plaintiff-appellant bail bondsman to post bail for her sister in California. Subsequent to posting bail, her sister was rearrested. The bond was forfeited because of the sister's failure to appear as scheduled in court which was the result of her incarceration and the bondsman's failure to take action to prevent the forfeiture. The bondsman was required to

incur expenses to have the forfeiture exonerated and brought suit against defendant-appellee seeking indemnification. The lower court found the bondsman negligent and denied him any relief. Citing *Kamali v. Hawaiian Electric Co.*, 54 Hawaii 153, 504 P.2d 861 (1972), the ICA affirmed and stated that unless the indemnity agreement indicates clear and unequivocable assumption of liability by the indemnitor for the indemnitee's negligence, by law the agreement does not constitute an indemnity contract. There was no language in the contract that the defendant-appellee assumed such liability. Furthermore, the ICA found no evidence that the defendant-appellee breached the contract and ample evidence to support the trial court's finding of negligence by the bondsman.

Sabol v. Sabol, 2 Hawaii App. 24, 624 P.2d 1378 (1981)

Burns. The trial court granted wife's petition for divorce and awarded her custody of the couple's child. The decree ordered husband to pay alimony "until further order of the court or until wife dies or remarries" and child support. In the husband's appeal, the ICA affirmed for two reasons. First, letters attached to a social study report, containing hearsay evidence were admissible because the family court may use a "wide range of out-of-court information" to make its decision since the underlying principle of custody awards is the best interests of the child, but "otherwise inadmissible evidence should be admitted only for use in deciding the custody issue." The trial court would determine the weight such opinion was to be given. Second, the ICA found no "manifest abuse of the judge's wide discretion" in the award of custody or alimony.

Sanders v. Point After, Inc., 2 Hawaii App. 65, 626 P.2d 193 (1981)

Hayashi. Plaintiff alleged at trial that while visiting the Point After, Inc. discotheque, he was beaten by two of its employees. The jury held in favor of the defendants. Although plaintiff-appellant alleged error in several procedural decisions rendered by the trial judge, all of the trial judge's decisions were upheld. First, the circuit court's denial of plaintiff's motion for continuance and to bifurcate the trial were not subject to reversal on appeal absent a showing of abuse. Second, the circuit court's denial of admission of certain depositions for failure to give reasonable notice and of medical testimony in proceedings limited to the issue of liability were not clearly erroneous. Third, the circuit court's grant of defendants' motion for directed verdict dismissing the claim for punitive damages was considered moot on appeal in view of the ICA's affirmation of the verdict of no liability and the circuit court's decision regarding selection of a special verdict form proposed by defendants was not reviewable due to plaintiff's failure to include his proposed verdict form in the trial record.

Santos v. Perreira, 2 Hawaii App. 387, 633 P.2d 1118 (1981)

Burns. To travel to and from their property, the Santos' used a disputed unimproved dirt road which ran through the Perreiras' property. The Santos' were required to open a gate in the Perreiras' boundary fence. The Perreiras locked their gates and bulldozed their land. The Santos' brought suit for injunctive relief to prevent the Perreiras from obstructing the use of a roadway easement. Reversing and remanding, the ICA rejected two of the three theories advanced in favor of the easement. It rejected plaintiffs' claim of reasonable necessity to use the right-

of-way on the grounds that this theory is limited to unique tenancies and *kuleanas*. It also rejected the theory that the easement was a surrendered public road on the grounds that there was no requisite evidence of the state or county's adoption or acceptance of this road as a public highway. However, the ICA suggested that a valid easement could exist under the theory of implicit grant or reservation. In addition, the ICA found that the lower court committed reversible error by admitting survey maps into evidence without limiting their use and allowing such maps to be used to prove that plaintiff was entitled to the right-of-way. The ICA utilized the following test for reversible error: (1) all of the competent evidence is insufficient to support the judgment; or (2) it affirmatively appears that but for the incompetent evidence, the trial court's decision would have been otherwise.

Schrader v. Benton, 2 Hawaii App. 564, 635 P.2d 562 (1981)

Burns. Parties entered into a DROA for the purchase of a condominium unit. There was an underlying mortgage on the property and the mortgagee would not consent to the agreement of sale, but would consent to the assumption of the mortgage. Sellers refused to sell since the mortgagee would not consent to the agreement of sale. The buyers sued for specific performance. Reversing, the ICA found that the trial court abused its discretion by ordering the seller to allow the mortgage assumption because there was insufficient evidence to support the finding of a completed contract between the parties. Even if there were a contract, the trial court abused its discretion because the seller was not placed in an equitable position. The buyer was given the power to wait three years from closing to remove the seller's liability on the loan. The assumption of the mortgage without removal of seller's liability is not what the seller had bargained for since the seller would lose the difference between the agreement of sale rate and the mortgage rate, if the latter were lower. However, because the date for the payment of the agreement of sale had passed during the legal proceedings, payment in full was all the ICA could order.

Scott v. Contractors License Board, 2 Hawaii App. 92, 626 P.2d 199 (1981)

Padgett. The ICA held that where a circuit court overturns an agency's order in a contested case under the Administrative Procedure Act, HAWAII R. CIV. P. 52(a) requires the court to enter findings of fact and conclusions of law which are sufficient to enable a reviewing court to determine the steps by which the court reached its ultimate conclusions on each issue. The ICA stated that while "there is no necessity for over elaboration of detail or particularization of facts, the findings must include as much of the subsidiary facts as would be necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each issue." The ICA accordingly remanded.

Seltzer Partnership v. Linder, 2 Hawaii App. 663, 639 P.2d 420 (1982)

Padgett. The instant controversy arose when the defendants-appellants prevented the plaintiffs-appellees from having access to Parcel 9-A across defendants-appellants' land. The plaintiffs-appellees filed suit for an injunction preventing defendants-appellants from blocking their access to their property across defendants-appellants' land, alleging that they had the right to use Ease-

ment 4 by grant and by necessity. The trial court granted an injunction restraining the defendants-appellants from interfering with plaintiffs-appellees' use of two roadway easements across defendants-appellants' property and dismissing defendants-appellants' counterclaim. Reversing, the ICA held that the lower court erred in concluding that Easement 4 and the twenty-foot roadway were easements for access over Parcel 11-A appurtenant to Parcel 9-A. Since it follows therefrom that the injunction below was improvidently granted, the case was remanded for a determination, if any, of the damages suffered by appellants as a result of the use of their premises by appellees as an easement appurtenant to Parcel 9-A. The ICA reasoned as follows: an easement cannot be established on the basis of adverse use where the person making the use apparently owned or had the right to use the property in question. Also, absent an evidentiary showing that access to one *kuleana* was originally through another *kuleana* or a showing of ancient usage of such access, a right-of-way by necessity under HAWAII REV. STAT. § 7-1 cannot be established. Regarding express easements, where the language reserving an easement was clear and unambiguous, it cannot be varied by parol testimony. Moreover, a conclusion of law that a quasi-easement or easements existed over property based upon a mental reservation of the grantor not expressed in the clear and unambiguous words of an easement reservation covering the same subject matter is erroneous. Furthermore, where an express easement for roadway and utility purposes is reserved by the grantor in favor of certain lots which it is subdividing and selling, the maxim *inclusio unius est exclusio alterious* forbids, as a matter of law, the implication of a reservation of the same easement or one slightly varying in route for another lot in which the grantor also had an interest. The ICA further reasoned that where there was no proof that persons other than the grantor owned an easement in favor of the appellees' lands over appellants' lands, a reservation in favor of "others" owning easements would not establish an easement in favor of the appellees. Also, the fact that the later purchaser of an adjoining lot has no practicable access other than across the property of an earlier purchaser, does not alone create an encumbrance on the property of the earlier purchaser.

Sheedy v. Sheedy, 1 Hawaii App. 595, 623 P.2d 95 (1981)

Burns. Plaintiff-appellant appealed from a divorce decree alleging error in the family court's (1) division of her separate property (an inheritance) and (2) consideration of her sexual conduct in deciding how to divide and distribute the property. Affirming, the ICA concluded that the lower court acted well within its allowable discretion pursuant to HAWAII REV. STAT. § 580-47 in dividing and distributing the property, subject only to the qualification that the division be just and equitable. In addition, although no specific mention was made of sexual conduct, evidence of the plaintiff-appellant's relationship with an adult male and their planned marriage were properly received under "the condition in which parties will be left by the divorce" category specified in HAWAII REV. STAT. § 580-47, and introduction and consideration of the questioned evidence did not constitute reversible error.

Shelly Motors v. Bortnick, 2 Hawaii App. 308, 631 P.2d 594 (1981)

Per Curiam. Bortnick sold an automobile to Shelly Motors who subsequently

learned that the car had been stolen. In circuit court, Shelly Motors sued Bortnick for breach of warranty of title under § 2-312 of the Uniform Commercial Code (HAWAII REV. STAT. § 490:2-312), then moved for summary judgment, contending that Bortnick had not excluded or modified the warranty of good title. The trial court granted the motion and Bortnick appealed. The ICA reversed, based on Bortnick's allegation that he stated to a Shelly Motors employee that he was giving only such title as he had been given by the individual who had sold the car to him. The ICA held that this raised a genuine issue of material fact as to whether he had modified the warranty of good title as permitted under the statute. Accordingly, the case was remanded for further proceedings.

Silva v. Bisbee, 2 Hawaii App. 188, 628 P.2d 214 (1981)

Padgett. The buyers failed to make timely payments under the contract of sale and suit was brought to cancel the sale and for damages. The circuit court awarded plaintiffs $29,000 in general damages and $50,000 in punitive damages for fraud and infliction of emotional distress arising out of the sale of plaintiffs' property for less than market value to a joint venture in which their real estate broker (defendant Bisbee) was an undisclosed member. Affirming, the ICA held that, as defendants concededly stood in fiduciary relationship to plaintiffs, their failure to disclose Bisbee's pecuniary interest in the transaction constituted constructive fraud as a matter of law. In addition, the ICA ruled that defendants cannot appeal a motion for directed verdict on a ground not specified at trial as required by HAWAII R. CIV. P. 50(a). Therefore, that the question of whether "a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances" was properly one for the jury.

Silver v. George, 1 Hawaii App. 331, 618 P.2d 1157 (1980)

Padgett. Plaintiff borrowed money at the request of three borrower defendants and loaned the money to defendants. In suing on the promissory note, plaintiff was unable to collect either his borrowing costs or any interest from defendants because the attorney-defendant retained to prepare the note, drew a note which did not cover his borrowing costs and which was usurious on its face. The trial court granted summary judgment in favor of the attorney-defendant because he was not the attorney for the plaintiff. Reversing, the ICA held that: (1) it is a per se violation of an attorney's duty to draw a note which is on its face usurious; (2) that duty runs at least to the named parties to the note, including the payee, even though the payee did not hire him or pay his fee; (3) the attorney is a client's agent in drawing the note; and (4) clients should not be permitted to be unjustly enriched at the expense of the payee when the attorney draws a note which violates the law.

Smothers v. Renander, 2 Hawaii App. 400, 633 P.2d 556 (1981)

Burns. The trial court reviewed the validity of the parties' rights under various oral and written agreements. The lower court ruled in favor of plaintiff by finding: (1) the defendant to be obligated to release plaintiff's note and mortgage; and (2) plaintiff's note and mortgage was null and void. Defendant appealed from the lower court's order to pay attorney's fees for both plaintiff and intervenor. The ICA affirmed in part and reversed in part. First, noting that attorney's fees could

not be awarded absent statute, agreement, stipulation or precedent authorizing such payments, the ICA found that the award of attorney's fees to plaintiff was limited to the portion of defendant's counterclaim which was "in the nature of assumpsit" and to which HAWAII REV. STAT. § 607-14 applied. Second, the ICA applied HAWAII REV. STAT. § 607-17, as interpreted by *Food Pantry v. Waikiki Business Plaza*, 58 Hawaii 606, 575 P.2d 869 (1978), to affirm the full amount of the trial court's award of attorney's fees to intervenors. Finally, the ICA reversed the lower court to the extent that it refused to award costs to plaintiff pursuant to HAWAII REV. STAT. § 607-9 and HAWAII R. CIV. P. 54(d), for expenses for transportation of an attorney, for copies of depositions taken by other parties, for photocopying costs, for telephone and unspecified postal services, and for plaintiff's travel, meals and lodging during trial.

Standard Oil Co. of Cal. v. Hawaiian Ins. & Guaranty Co., 2 Hawaii App. 451, 634 P.2d 123 (1981)

Padgett. A private airplane crash killing all six persons aboard may have been caused by fuel contaminants in the vehicle's left engine, which had failed shortly before the mishap. Decedents' heirs and executors filed suits against three firms involved in refueling the aircraft, alleging various theories of negligence and products liability. After settlements were effectuated, the defendant firms brought suit to recover costs, expenses and attorneys' fees from Hawaiian Insurance & Guaranty Company, Ltd. (HIG). The insurer had issued a policy covering the three corporations for comprehensive general liability arising out of the maintenance of the truck involved in the refueling of the airplane. HIG appealed the trial court's grant of summary judgment against it. In addition, one of the appellee-firms, Standard Oil Company of California (SOCAL), cross-appealed the fifty-fifty apportionment of its settlement and litigation expenses decreed by the court below.

The ICA affirmed in part the orders below, reversing the apportionment of settlement and litigation expenses between SOCAL and HIG. The ICA held: (1) where one of three parties covered by a liability insurance policy promptly notifies the insurer that it has been joined in litigation, the carrier is on notice of the potential liability for the covered risk and is not excused from its duty to defend all insureds despite the fact that no further notice is given when an additional insured is joined as a third-party defendant; (2) if the insurer refuses to defend when it has the duty to do so, it becomes liable for the expenses incurred in defense including attorney's fees by its insured and for the amount of any judgment or of any settlement; (3) where a policy provides for apportionment of liability among all valid insurers but lacks clear language covering the matter of self-insurance, and the insured has no other insurance, there can be no apportionment; and (4) under HAWAII REV. STAT. § 43-455, the insurer who challenges coverage and loses is liable for the costs and attorney's fees incurred in prosecuting the action.

State v. Ahlo, 2 Hawaii App. 462, 634 P.2d 421 (1981)

Per Curiam. The three appellants were convicted of murder in the first degree after a jury trial in Hilo. Affirming convictions, the ICA upheld the trial court's refusal to suppress statements made by two of the appellants, despite the absence of any *Miranda* warning. The mere fact that the investigation had focused upon the appellants did not constitute a custodial situation triggering the *Miranda* re-

quirement. The determination was properly made from an objective appraisal of the totality of circumstances (focus is only one factor) and the ICA found no error in the trial court's admission of photographs and filmed evidence of the murder victim where the cause of death was at issue, because the test of admissibility is whether the probative value of evidence outweighs its possible prejudicial effect.

The trial court did not abuse its discretion when it struck the testimony of a prosecution witness who had not been listed as such, rather than granting a mistrial. Appellants' counsel had failed to object as soon as the witness had been called to the stand, but had done so only after testimony had been given for some time.

The trial court's refusal to permit the withdrawal of counsel did not require appellants' counsel to violate the canon of ethics, *viz.*, HAWAII DISCP. R. 7-102, and was well within the discretion of the court. The ICA found that counsel's disbelief of his clients' defense of alibi, advanced in accordance with HAWAII R. PEN. P. 12.1, did not rise to the level of knowledge, at which point the canon of ethics would apply. The ICA did not find the trial court's conduct as prejudicial in its instruction to the jury that they may consider all of the evidence before them, including the evidence in the record supporting conspiracy charges that had been dropped.

It was within the trial court's discretion to forbid appellants' counsel during final argument the use of a chart illustrating the matter of reasonable doubt, since it is the duty of the court to charge the jury on the applicable principles of law.

State v. Allen, 2 Hawaii App. 606, 638 P.2d 338 (1981)

Burns. Defendants were preempted from appearing in district court for arraignment and plea for gambling by a grand jury indictment of the circuit court. Appellants, at all times in the case represented by privately retained counsel, had waived jury trial, moved to have the case remanded to the district court and moved to suppress all evidence seized by the police. The lower court refused to remand to the district court and defendants were subsequently convicted in circuit court. Counsel filed an appeal forty-seven days following entry of judgment, rather than within the aggregate maximum of forty days specified in HAWAII R. PEN. P. 37(b) and (c). Affirming the judgment below, the ICA held: (1) the rule that failure of court-appointed counsel to take timely appeal does not foreclose the right of the defendant to appeal also applies where counsel is not privately retained; (2) nothing in HAWAII R. PEN. P. prohibits prosecution by indictment, after the process of prosecution by complaint has commenced, but before arraignment and plea or before jeopardy has attached since discretion lies with the prosecutor, not the court; (3) remand by the circuit court to the district court of a jury-waived trial is discretionary under HAWAII R. PEN. P. 5(b)(4); and (4) where an affidavit in support of a search warrant shows that the police officer received a reliable tip, then conducted an investigation, which revealed facts constituting probable cause that gambling was occurring within the dwelling to be searched, such affidavit was sufficient under prior case law, regardless of the possibility that some other information contained in the affidavit was obtained through improper use of binoculars.

State v. Alsip, 2 Hawaii App. 259, 630 P.2d 126 (1981)

Padgett. Defendant was convicted for second-degree robbery in a jury-waived trial. On appeal, the ICA disagreed with defendant's contention that there was insufficient evidence to support the conviction. Finding ample evidence to support the lower court's decision without resort to the statements complained of, judgment was affirmed.

State v. Alvey, 2 Hawaii App. 579, 637 P.2d 780 (1981)

Padgett. The defendant was convicted of first-degree burglary. He appealed on the grounds of undue prejudice caused by a witness' testimony mentioning the defendant's previous probation. In examining the potentially prejudicial testimony, the trial court applied a balancing test which required weighing the probative value of the evidence presented in the testimony against its prejudicial effect. The ICA affirmed the conviction, finding the evidence to be more probative than prejudicial and that such evidence comported with the "intent" and "absence of mistake or accident" exceptions to the exclusionary rule.

State v. Amaral, 1 Hawaii App. 6, 611 P.2d 996 (1980)

Per Curiam. No attempt was made to locate a rape victim, a resident of Honolulu, who was to testify at a grand jury hearing in Maui. A motion to dismiss the indictment was granted since it was issued solely on the hearsay testimony of an officer involved in the case. In affirming the decision, the ICA rejected the State's reliance on *State v. Murphy*, 59 Hawaii 1 (1978) where a detective's hearsay testimony did not invalidate an indictment. In this case, unlike *Murphy*, the officer's testimony was deliberately used to improve the indictment.

State v. Bigelow, 2 Hawaii App. 654, 638 P.2d 873 (1982)

Per Curiam. Appellant appeals from a conviction for cruelty to animals on the grounds that the trial court did not specifically state in its general findings of guilt that the animals were confined. Affirming, the ICA held: (1) appellant had no remedy on appeal where he could have, but failed to, request a specific finding pursuant to HAWAII R. PEN. P. 23(c); (2) insofar as the contention on appeal is that the general finding of the trial court was unsupported by the evidence, and there is no transcript on appeal, a party seeking to appeal from a general finding of guilt must take appropriate steps, outlined in HAWAII R. PEN. P. 39(b) and 75(c) to place in the record a determination of what the evidence was before the trial court.

State v. Boehmer, 1 Hawaii App. 44, 613 P.2d 916 (1980)

Per Curiam. Two defendants were arrested for driving under the influence of intoxicating liquor, and given a breathalyzer test after arrest. "As to defendant Boehmer, the test reading showed 0.11% by weight of alcohol in his blood, and to defendant Gogo, .10% by weight of alcohol in his blood." In each case, the trial judge relied upon the breathalyzer test result not only as evidence of, but also as creating a presumption of, the defendants' state of intoxication. The trial court convicted both defendants under HAWAII REV. STAT. § 291-4, Driving Under the Influence of Intoxicating Liquor, even though there was a margin of error in both

breathalyzer tests. Reversing and remanding, the ICA found: (1) the inherent margin of error could put both defendants' actual blood alcohol level below the level necessary for the presumption to arise and (2) the failure of the prosecution to establish beyond a reasonable doubt that the actual weight of alcohol in defendants' blood was at least .10% required the trial judge to ignore the statutory presumption in its determination.

State v. Brighter, 1 Hawaii App. 248, 617 P.2d 1226 (1980)

Padgett. Pursuant to a search warrant, the police entered defendant's father's house and seized over one hundred items which defendant identified as being stolen by others and purchased by him. Defendant was charged with theft. However, because of the coercive atmosphere surrounding the defendant's questioning and the fact that defendant was experiencing heroin withdrawal at the time, all of defendant's statements regarding the property were suppressed. Thereafter the prosecution dropped the charges and the trial court ordered all items except "contraband" be returned. The police refused to return all property stating that all of it was "contraband." Defendant moved for an adjudication by the trial court as to which items were contraband. At the hearing, a police detective testified that the decision to withhold the items was based on the statements which defendant had made that the items were stolen property. The trial court ordered that only four items be returned and denied the rest, even though it recognized that the statements defendant had made that day were suppressed. On defendant's appeal, the ICA reversed, holding that it was clear error for the trial court to rely on the detective's statement that what appellant said at the time of the search was the basis for lawfully detaining the property. The fact that the evidence in question had previously been suppressed constituted a prima facie showing at the hearing (pursuant to HAWAII R. PEN. P. 41(e)) that appellant was legally entitled to possession of his property. Thereafter, the government bore the burden of proving by a preponderance of evidence that the illegally seized evidence was "contraband," i.e., items that may not be lawfully possessed (such as stolen property) and, therefore, legally subject to retention by the State. Although the State's burden was not met, the ICA remanded because it appeared from the record that there may be evidence not introduced which might meet the burden.

State v. Brown, 1 Hawaii App. 602, 623 P.2d 892 (1981)

Per Curiam. The trial court had granted defendant's motion for deferred acceptance of nolo contendere plea for a charge of unauthorized control of propelled vehicle in violation of HAWAII REV. STAT. § 708-836. On the State's appeal, the ICA affirmed, finding that HAWAII REV. STAT. § 853 which only described the acceptance of deferred guilty pleas, did not abrogate trial court's inherent power to grant or deny motion for deferred acceptance of nolo contendere plea which is inferred from the power to receive a plea. It is a settled rule of statutory interpretation that the legislature, in the enactment of a statute, will not be presumed to overturn inherent powers, unless such intention is made clearly to appear by express declarations or by necessary implication.

State v. Carson, 1 Hawaii App. 214, 617 P.2d 573 (1980)

Padgett. Appellant was tried for the homicide of a man she had stabbed numer-

ous times. Although there were no eyewitnesses to the homicide, appellant bore numerous cuts and bruises after the incident. At her trial for manslaughter, appellant raised the defense of justification. The trial court instructed the jury that the burden of proof was on the appellant to prove self-defense by a preponderance of the evidence. The ICA overturned her conviction for manslaughter on the ground that the court's instruction failed to take into account the plain language of HAWAII REV. STAT. § 701-115 and the decision in *State v. McNulty*, 60 Hawaii 259, 581 P.2d 310 (1978) in which the Hawaii Supreme Court pointed out that the Hawaii Penal Code places on the State the burden of proving the absence of self-defense. The shifting of the burden of proof to appellant was held to be plain error which requires reversal of a conviction when the substantial rights of a defendant have been affected, even in the absence of an objection to the instruction below.

State v. Cieslik, 1 Hawaii App. 403, 619 P.2d 1102 (1980)

Per Curiam. Defendant was convicted of violating HAWAII REV. STAT. § 291C-101 which makes it a crime to drive a vehicle at speeds greater than reasonable and prudent under the circumstances. On appeal, defendant claimed that there was insufficient evidence to support the conviction and the ICA reversed. The prosecution had failed to include the essential elements of actual and potential hazards and conditions which would have some bearing on whether defendant's speed was not reasonable and prudent.

State v. Crowder, 1 Hawaii App. 60, 613 P.2d 909 (1980)

Burns. Co-defendant Santarone appealed his conviction of theft in the first degree alleging that his warrantless arrest was effected without probable cause and that evidence obtained incident to his arrest should not have been admitted at trial. Citing *Dunaway v. New York*, 442 U.S. 200 (1979), the ICA found that appellant was arrested when he was first taken into physical custody by the police officer and returned to the hotel for detention there rather than when he was formally arrested. The ICA overturned the conviction because the State failed to show that the arresting officer knew that a bystander's statement that Santarone was "involved in it, too" was trustworthy since the arresting officer did not testify that he knew that the bystander was in fact the hotel security guard who witnessed the crime. Thus, Santarone's arrest was without probable cause and the evidence recovered from the search incident thereto should not have been admitted.

State v. Damas, 1 Hawaii App. 14, 611 P.2d 997 (1980)

Per Curiam. When $371 in cash disappeared from a locked evidence cabinet at police headquarters, the bag which previously contained the money and the property receipt was tested for fingerprints. Based on the results of this test and other testimony, the appellant was convicted of theft in the first degree. The trial court denied the appellant's motion for acquittal at the close of the prosecution's case and again after the jury returned a verdict of guilty. The ICA reversed, holding the evidence presented at trial did not substantially support each essential element of the indictment because, inter alia, other persons who had access to the bag touched the bag and other fingerprints on the bag were not identified.

State v. Fabio, 1 Hawaii App. 544, 622 P.2d 619 (1981)

Per Curiam. Appellant was convicted for the promotion of a dangerous drug. Reversing, the ICA held that an instruction to the jury lacked a clarifying instruction concerning the permissive nature of an inference therein. The instruction appeared to shift the burden of proof to the defendant on a material element of the crime that defendant knew the substance was cocaine and thereby did not comport with due process of law as required by the fourteenth amendment.

State v. Faulkner, 1 Hawaii App. 9, 612 P.2d 121 (1980)

Per Curiam. The public defender had a week to prepare for the trial and on the day of the trial, the State reduced the criminal charges to circumvent the defendant's request for a jury trial. Although a motion for a continuance by the defense was denied, the trial was continued for nine days to assist the defendant in locating witnesses. Based on the record, the trial court did not abuse its discretion in not dismissing the motion for a continuance.

State v. Faulkner, 1 Hawaii App. 651, 624 P.2d 940 (1981)

Hayashi. Appellant was seen removing parts from a car parked at an area under the supervision of the Harbors Division. The Harbors Division officer inquired whether appellant owned the car, but appellant did not respond and went to his own car and attempted to leave. The officer told appellant he was under arrest. When appellant struck the officer and attempted to drive away, the officer removed the keys and stopped the car. Appellant was subsequently convicted in a jury trial of resisting an order to stop a motor vehicle in violation of HAWAII REV. STAT. § 710-1027, but acquitted of reckless endangering. Affirming, the ICA held first that since the evidence established a prima facie case for the offense charged, the trial court did not err in denying appellant's motion for judgment of acquittal. Second, the trial court did not abuse its discretion: (1) when it refused to allow appellant to impeach Officer Redling's testimony with allegations that he had beaten two of his former wives and the circumstances surrounding the termination of his former employment; (2) in excluding the proposed testimony of the officer's supervisor as to harbor police procedures; (3) in excluding the testimony of appellant's former attorney regarding appellant's belief that Harbors Division patrol officers did not have jurisdiction in the area in which appellant was arrested; and (4) in denying appellant's motion for a new trial based on newly discovered evidence and jury misconduct.

State v. Fauver, 1 Hawaii App. 3, 612 P.2d 119 (1980)

Per Curiam. Police entered the defendant's premises after an ambulance crew, notified of an overdose, had been unable to locate the victim. The lower court granted a motion to suppress marijuana found during the warrantless entry. Affirming, the ICA found that there was no emergency justifying the entry since two hours had lapsed between the request for an ambulance and the search, the police were notified by two persons that no overdose victim was on the premises, and no other evidence existed which indicated a life threatening situation.

State v. Feliciano, 2 Hawaii App. 633, 638 P.2d 866 (1982)

Hayashi. Counsel for defendant appealed defendant's conviction for burglary, but filed the Notice of Appeal more than ten days after judgment was entered. The ICA cited its prior ruling in *State v. Allen*, 2 Hawaii App. 606, 638 P.2d 338 (1981), which constitutionally prohibits the appellate court from denying jurisdiction to hear the appeal on the merits. On appeal, defendant claimed that the trial court erred in admitting, over defendant's objection, hearsay testimony of a police officer recounting a non-testifying neighbor's statement to the officer which led to the arrest of defendant. Appellant also claimed that prejudice to his case at trial had resulted from the trial court's admission, over appellant's objection, of testimony by a police fingerprint technician who was not on the State's list of witnesses. The witness was not listed because he had lately replaced the originally named technician who had since retired. The ICA held that: (1) where hearsay statements are offered to explain a police officer's conduct during the investigation leading to the arrest of a defendant but not for its truth, such statements may be admissible as an exception to the hearsay rule; moreover, the ICA found that even had the evidence objected to been admitted erroneously, it was harmless beyond a reasonable doubt; and (2) the prosecuting attorney's failure to provide defendant with the names of all witnesses prior to the trial is not grounds for reversal, if the defendant has not been surprised and prejudiced.

State v. Freedle, 1 Hawaii App. 396, 620 P.2d 740 (1980)

Padgett. The decedent had been stopped by police and given tickets for illegal parking and failure to carry his no-fault insurance card. A dispute occurred between decedent and Officer Freedle, and decedent, who was unarmed, was killed by a bullet from Freedle's gun. Officer Freedle was indicted under HAWAII REV. STAT. § 707-702(1)(a) (manslaughter). Thereafter, the trial court dismissed the indictment, finding that the evidence was insufficient to support indictment. Reversing, the ICA noted that as a general rule, indictments must be based on probable cause. However, the rule testing indictments in Hawaii is set forth in *State v. Okamura*, 59 Hawaii 549, 584 P.2d 117 (1978), that it is merely necessary to establish a situation where a strong suspicion of guilt would be believed and conscientiously entertained by a reasonably prudent person and whether that suspicion can be turned into proof is a matter for trial. The ICA noted that every inference should be drawn in favor of indictment. The ICA found no merit in defendant's contention that dismissal should be sustained since the prosecutor did not define the word "recklessly" for the grand jury. No such duty exists under the circumstances. *State v. Scotland*, 58 Hawaii 474, 572 P.2d 497 (1977); *State v. Bell*, 60 Hawaii 241, 589 P.2d 517 (1978). Finding clear error on the part of the lower court, judgment was reversed and remanded.

State v. Gutierrez, 1 Hawaii App. 268, 618 P.2d 315 (1980)

Per Curiam. Defendant-appellant was charged with murder and was convicted at a jury-waived trial. Defendant appealed on the grounds that there were: (1) prejudicial misconduct by the prosecutor; (2) prejudicial error in permitting the prosecution to impeach one of its own witnesses; and (3) ineffective assistance of counsel. The ICA noted that a prosecution witness had evidenced obvious hostility to the prosecutor and the latter was permitted by the trial court to treat the

witness as a hostile witness. The questioning of the witness was an attempt to show gangland involvement with the murder. The ICA noted that such questioning in a jury trial would raise questions of fairness. However, in a jury-waived trial, the presumption is that any incompetent evidence is disregarded and the issue should be determined from a consideration of competent evidence only. Thus, treatment of the witness as hostile is deemed not to have influenced the trial court. Accordingly, the first two issues on appeal were without merit.

The burden of establishing ineffective assistance of counsel rests upon the appellant. He must show specific errors or omissions and that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense. *State v. Antone*, 62 Hawaii 346, 615 P.2d 101 (1980). Here, the defense counsel decided not to pursue cross-examination vigorously, waived opening argument and spent only five minutes in closing argument. These actions were tactical ones which will not be questioned by a reviewing court. Furthermore, these actions failed to meet the tests laid down in *Antone* to establish ineffective assistance of counsel. Therefore, the judgment below was affirmed.

State v. Harper, 1 Hawaii App. 481, 620 P.2d 1087 (1980)

Hayashi. Appellant Miller, while riding in an automobile with two victims, allegedly robbed them, using a pellet pistol. The court found that the pistol was loaded at the time of the incident and that it was a dangerous instrument. Therefore defendant was convicted both as a principal and an accomplice even though he was charged only as a principal. Appellant appealed on the grounds that: (1) there was no substantial evidence to support the finding that the pellet pistol was loaded; (2) the pellet gun was not a dangerous instrument; and (3) he should not have been convicted as an accomplice because he was not charged as such. Affirming, the ICA found: (1) there was substantial evidence; (2) the pellet gun was a dangerous instrument; and (3) there was no reversible error since appellant did not allege he was surprised at trial or that substantial rights were abridged.

State v. Jenkins, 1 Hawaii App. 430, 620 P.2d 263 (1980)

Burns. Defendant was convicted of theft in the first degree. On appeal, she contended that the trial court should have granted a motion to dismiss the indictment because the prosecutor had misstated several facts in the summary of the testimony in a first grand jury proceeding and a second grand jury proceeding. The ICA upheld the denial of the motion because the grand jurors had all been present during the initial testimony and the prosecutor made it clear that his summary was not evidence, stating that a dismissal should only be based on extreme misconduct that clearly infringes on the jury's decision-making function. However, defendant also claimed that the trial court should not have admitted into evidence her statement that she had no money in response to a police matron's question without being warned of her right to remain silent, even though the statement was only used to attack her credibility and show she meant to hide evidence. The ICA held that the question did violate *Miranda* and was not permissible as part of the search. Because this error was not harmless beyond a reasonable doubt, the conviction was reversed.

State v. Karwacki, 1 Hawaii App. 157, 616 P.2d 226 (1980)

Per Curiam. Pursuant to a plea agreement, defendant pled guilty to theft in the first degree and filed a motion for Deferred Acceptance of Guilty Plea (DAGP). The trial court made clear that there was no promise on the part of the court that the motion would be granted. Subsequently, the motion for DAGP was denied and the defendant was sentenced to five years' probation. In affirming, the ICA noted that whether a court grants or denies a motion for DAGP is within the discretionary powers of the trial judge and will not be disturbed unless there has been a plain and manifest abuse of discretion. To constitute an abuse, it must appear that the court clearly exceeded the bounds of reason or disregarded rules on principles of law or practice to the substantial detriment of a party litigant. Here, the sentencing judge did not act arbitrarily and capriciously; thus, there was no abuse of discretion.

State v. Kauai Kai, Inc., 2 Hawaii App. 118, 627 P.2d 284 (1981)

Hayashi. Lessees of state-owned land were repeatedly notified that they were delinquent in rent due and that they were in noncompliance with the construction schedule as provided in the general lease agreement. A final notice of default was sent along with provisions for cure of breach by payment of past due rent and submission of a development plan within a specified time period. Subsequently, the lease was cancelled and forfeited. The State then brought suit to collect delinquent rentals from lessees and from sureties on the lease. The trial court rendered judgment in favor of the State. Affirming, the ICA held first that notice of cancellation and forfeiture was complete and proper since it was sent via certified mail, return receipt requested and such receipt was returned. This complied with HAWAII REV. STAT. § 171-20 and the lease provision itself. Second, the cure provisions were reasonable since (a) the lease rentals were in arrears even with numerous extensions for payment; (b) the failure to pay rent was a sufficient basis to cancel the lease; and (c) previous building plans did not conform to zoning due to lessees' choice of design. Third, notice to lessees of cancellation and default was constructive notice to the sureties since one of the sureties served as a corporate officer of the lessee. Moreover, a surety is held responsible to know every default of his principal. Finally, since the lease was effectively cancelled, request for assignment of the lease was a nullity.

State v. Kutzen, 1 Hawaii App. 406, 620 P.2d 258 (1980)

Padgett. Two cases contained the same group of four defendants who were convicted of theft. The first issue concerned a photo line-up conducted by the police. The four defendants had been seen by a store detective during the theft. Ten weeks later the detective was shown a group of five pictures, four of which were of the defendants. The ICA held that the trial court should have found the line-up impermissibly suggestive because including four defendants in a group of five pictures is similar to presenting one picture for the identification of one suspect. However, the ICA remanded this issue because impermissibly suggestive line-ups may be admitted if under the totality of the circumstances the line-up does not give rise to a very substantial likelihood of misidentification. The trial court was directed to conduct proceedings to determine the circumstances.

The second issue was whether use of mug shots as evidence was so prejudicial

as to require reversal. Mug shots were shown to the jury with paper stapled to the bottom to hide the police identification numbers. The mug shots were used to establish the store detective's prior identification of the defendants, although there was in-court identification. Adopting the rule in *United States v. Fosher*, 568 F.2d 207, 214 (1st Cir. 1978), the ICA used three criteria to consider whether the use of the mug shots was proper: (1) the government must have a demonstrable need to introduce the photographs; (2) the photographs themselves, if shown to the jury, must not imply that the defendant had a prior criminal record; and (3) the manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs. The ICA held that the admission of the photographs was reversible error because there was an absence of demonstrable need since there was an in-court identification, and because the stapled paper failed to hide the nature of the photographs.

State v. Lee, 1 Hawaii App. 510, 520 P.2d 1091 (1980)

Padgett. Appellee Lee had posted a bail bond for $150,000 on behalf of a criminal defendant in another case. The State then moved to have the bail bondsman (Lee) show that he had unencumbered real property to a value twice the amount of the bond. At the hearing on this motion, the State claimed that perjured statements were given and subsequently the grand jury returned indictments against the appellees for perjury in violation of HAWAII REV. STAT. § 710-1060. The trial court granted the appellee's motion to dismiss the indictment "with prejudice" on the ground that the alleged false testimony, whatever it was, was not material to the issue before the court on the motion for justification. On appeal, the ICA "reconstructed" the prior proceedings on the motion for justification, even though the bond and the motion had not been designated into the record on appeal. After reviewing the probable facts, the ICA concluded that if the court below believed that the only issue was whether there was sufficient unencumbered property in the name of the surety bondsman, and such a finding was made, then any testimony with respect to the relationship of the bondsman to the previous owner of the property or of an alleged deed back (that had not been filed at Land Court) was not material. Therefore, the ICA found no error and affirmed the lower court.

State v. Le Vasseur, 1 Hawaii App. 19, 631 P.2d 1328 (1980)

Padgett. Appellant removed two Atlantic Bottlenose dolphins from the University of Hawaii marine laboratory and released them in the ocean off the coast of Oahu. He was convicted of first-degree theft and sentenced to five years probation with a special condition that he serve six months in jail. The ICA affirmed, finding: (1) advancement of the appellant's case did not prejudice the preparation of his defense; (2) no abuse of the trial court's discretion in the limiting of appellant counsel's voir dire of the jury panel; (3) no abuse in the trial court's rejection of the "choice of evils" defense or rejection of appellant's jury instructions; and (4) the trial judge did not act erroneously in passing sentence.

State v. Liuafi, 1 Hawaii App. 625, 623 P.2d 271 (1981)

Burns. The defendant was convicted of attempted murder, in violation of HAWAII REV. STAT. §§ 705-500 and 707-701, and of failure to render assistance, in violation of HAWAII REV. STAT. § 291C-12 for purposefully running over a man

with his automobile. The ICA held first, that the trial court erred in not allowing defense counsel to cross-examine the complaining witness regarding a possible civil suit against the defendant but that the error was harmless beyond a reasonable doubt in view of other overwhelming and independent testimony. Second, the trial court did not err in admitting into evidence the results of a breath test because the State had met the foundational requirements that (a) the machine was in proper working order at the time of the test, (b) the correct chemicals were used, (c) the accused was not allowed to put anything in his mouth for fifteen minutes prior to the test, and (d) the test was administered by a qualified person in a proper manner. Third, the trial court did not err in finding that the defendant had waived his rights to counsel and to remain silent since the trial court had wide discretion to determine the credibility issue presented by conflicting testimony as to the defendant's proficiency in the English language. Fourth, notwithstanding the fact that defendant failed to request a jury instruction to the effect that he could only be convicted of one but not both of the offenses, the ICA applied HAWAII R. PEN. P. 52(b) which allows plain errors or defects that affect substantial rights to be noticed, even if not brought to the attention of the trial court. The ICA then found that the defendant could not have been convicted of both offenses and the trial court had committed error by failing to so instruct the jury, but that such a failure was not grounds for automatic reversal. Therefore, the ICA affirmed the attempted murder conviction and vacated the conviction for failure to render assistance. Questions regarding the constitutionality of HAWAII REV. STAT. § 291C-12 and the trial court's failure to instruct the jury on state of mind under that provision were not considered.

State v. Manipon, 2 Hawaii App. 492, 634 P.2d 598 (1981)

Hayashi. The defendant-appellant was found guilty by a jury of two counts of robbery in the first degree. On appeal, he urged the ICA to reverse his conviction on the grounds that: (1) the lower court erred in denying his motion for acquittal as there was insufficient evidence for a jury to fairly determine guilt beyond a reasonable doubt; (2) there was insufficient evidence to support the jury's verdict; and (3) it was plain and reversible error for the court to admit police photographs used during a photographic line-up. Affirming the court below, the ICA noted that it is elementary that a criminal case may be proven beyond a reasonable doubt on the basis of reasonable inferences drawn from circumstantial evidence. But, viewed in the light most favorable to the government, and giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact such that a reasonable mind could fairly conclude guilt beyond a reasonable doubt, there was substantial evidence in the record to support a verdict of guilty. Moreover, since no objection had been made to evidence, it was properly considered by the trier of fact. Finally, the ICA declined to address the issue of the line-up photograph because counsel failed to raise a proper objection and stipulated to the photographs being submitted into evidence.

State v. Mata, 1 Hawaii App. 31, 613 P.2d 919 (1980)

Per Curiam. The defendant was convicted for promoting a dangerous drug in the second degree, in violation of HAWAII REV. STAT. § 712-1242. Affirming, the ICA decided three issues: (1) the statements made to the grand jury by the dep-

uty prosecutor and two witnesses were not so improper or prejudicial as to require dismissal of the indictment; (2) the defendant's right to a speedy trial was not violated by a nine-month period between indictment and trial where delay was primarily caused by trial docket congestion due to exceptional circumstances, the defendant's assertion of right was somewhat ambiguous, and the only prejudice arguably shown was the defendant's inability to remember events on or about the date of the offense, when 11 of the 20 months that passed between dates of offense and trial preceded indictment and any presumption of prejudice arising from the record was rebutted by the record; and (3) there was substantial evidence to support the conclusion of the trier of fact that the substance defendant sold contained methaqualone, a substance that was prohibited by law to be sold.

State v. Mayo, 1 Hawaii App. 644, 623 P.2d 898 (1981)

Per Curiam. The defendant was convicted for theft in the first degree in violation of HAWAII REV. STAT. § 708-831(1)(b) for certain personal property which included inter alia two airline tickets for return to Calgary, Alberta, Canada from Maui. Defendant appealed on the technical argument that the amount paid for the ticket was not the "value" of the tickets at the time and place of the offense. The ICA responded by taking judicial notice (as an appellate court) of the fact that the tickets had a face value of $459 because it is common knowledge unused airline tickets can be redeemed at the airline or travel agency. Thus, having established the value of the goods, the judgment below was affirmed.

State v. Medeiros, 1 Hawaii App. 536, 621 P.2d 986 (1981)

Per Curiam. Appellant was convicted by a jury for promoting prostitution in the third degree. The ICA reversed, finding the prosecution to be guilty of misconduct at the trial for questioning the defendant in a manner to establish guilt by association. The failure of the appellant's counsel to object established that appellant lacked effective assistance of counsel, the standard for which is articulated in *State v. Antone*, 62 Hawaii 346, 348, 615 P.2d 101, 104 (1980) (quoting *State v. Kahalewai*, 54 Hawaii 28, 30, 501 P.2d 977, 979 (1972) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1979)), where the assistance must be "within the range of competence demanded of attorneys in criminal cases."

State v. Messamore, 2 Hawaii App. 643, 639 P.2d 413 (1982)

Per Curiam. Defendant appealed his conviction for rape and sexual abuse, claiming, inter alia: (1) that the trial court erred in permitting the victim's parents under the *res gestae* exception to testify as to what the child had told them of the incident some ten days after its occurrence; and (2) that the court's refusal to fully ascertain the circumstances surrounding a possibly prejudicial conversation overheard by a juror during a trial recess violated defendant's constitutional right to a fair trial by an impartial jury. Reversing and remanding the case for a new trial, the ICA held that: (1) the *res gestae* exception to the hearsay rule does not apply in a case where the witness is a child whose statement to a parent detailing the event was made ten days after it occurred and was apparently not made in response to the actual event in question; (2) statements which do not qualify as part of the *res gestae* may be admissible as prior consistent statements if they satisfy the requirements of HAWAII R. EVID. 613(c) and 802.1(2); (3) in a

criminal case the trial court's failure to inquire into the totality of the circumstances surrounding a statement overheard by a juror, and its reliance solely on that juror's own subjective determination of her ability to remain impartial constitutes reversible error; and (4) unless the reviewing court can declare that a constitutional error committed by the trial court is harmless beyond a reasonable doubt, the error necessitates reversal.

State v. Miner, 2 Hawaii App. 581, 637 P.2d 782 (1981)

Hayashi. Defendant was convicted for criminal trespass in the first degree. On appeal, the defendant contended that the house he had entered was not a "dwelling" within the meaning of HAWAII REV. STAT. § 708-800(a) because the owner of the house had not resided in the structure for several months, although she had secured entry to the building and visited the premises daily. The ICA affirmed the conviction, noting that although its definition of "dwelling" differed from that of the lower court, such a finding did not warrant reversible error. Location and description, rather than use, are the primary considerations in the determination of a dwelling.

State v. Mitake, 1 Hawaii App. 335, 619 P.2d 1078 (1980)

Padgett. Defendant was convicted of theft in the first degree after a jury trial. On appeal, the defendant contended that: (1) the identification made of him at trial by five witnesses was the result of an impermissibly suggestive line-up; and (2) the refusal of the trial court at the pre-trial identification suppression hearing to permit him to examine the five witnesses violated his rights under U. S. CONST. amends. 5 & 6 and HAWAII CONST. art. 1, §§ 8 & 11. Affirming, the ICA held: (1) the defendant failed to show that the pre-trial identification procedure was impermissibly suggestive or that the identification at trial was not reliable under the totality of the circumstances; and (2) it is not a violation of the defendant's constitutional rights to deny examination of the identification witnesses to be called at trial during a pre-trial suppression hearing based upon a claim of impermissibly suggestive pre-trial identification proceedings where no showing has been made of any facts indicating impermissible suggestiveness nor of any facts indicating an inability of the defendant to obtain such facts without examining the witnesses at the hearing.

Acoba dissent: The defendant was precluded from showing the suggestiveness of the identification line-up by exclusion of the witnesses' testimony and was foreclosed from obtaining facts which would be relevant and material in determining his constitutional claim. In effect, defendant was prevented from presenting a defense since the only evidence linking defendant to the crime was eyewitness identification. Therefore, the case should have been reversed and remanded.

State v. Mitchell, 1 Hawaii App. 121, 615 P.2d 109 (1980)

Burns. Defendant appealed his conviction for promoting a dangerous drug (heroin) arguing that he was denied a constitutional right to a speedy trial. The offense occurred on August 10, 1976 and defendant was indicted on December 8, 1976. He was arrested on December 12, 1976 and was released on bail on December 23, 1976. The original trial was scheduled for the week of April 18, 1977. However, due to various reasons, the trial was not held until April, 1978.

The ICA noted several reasons for the delay: (1) defendant's pre-trial motion to consolidate and for a continuance, filed just prior to the first scheduled trial; (2) the trial court's delay in ruling on the motion to consolidate; (3) defendant's delay in filing his speedy-trial motion to dismiss; (4) apparent calendar congestion in the trial court causing the court to *sua sponte* reset the trial date from January to April of 1978. Applying the balancing test established in *Barker v. Wingo*, 407 U.S. 514 (1972), the ICA found that the defendant was not denied the right to a speedy trial. Other than defendant's assertion of memory loss, the court found little evidence that the delay in this case created or enlarged the possibility that defendant's defense would be impaired. Finally, a four-month delay in indictment did not violate defendant's due process, especially when there was a legitimate state purpose. Judgment affirmed.

State v. Motorists, Inc., 2 Hawaii App. 448, 634 P.2d 120 (1981)

Padgett. A consent judgment in favor of the State was entered below which: (1) enjoined the defendants from representing and advertising that they would provide certain benefits to motorists who received traffic citations without first supplying the Office of Consumer Protection with a certified audit by an independent certified public accountant showing the ability of Motorists, Inc. to meet its financial obligations; and (2) provided that the defendants should advise all consumers in future advertisements concerning traffic counseling that the Supreme Court had rejected their argument that the traffic citation system in the State is illegal. A few months after the entry of the judgment, Shak organized a new corporation, operated solely by Shak, which did not follow the injunction. Therefore, the State filed a motion to enforce the injunctive provisions against appellees Shak and Transportation, Inc. However, only appellee Shak was served with the motion. The lower court dismissed the motion. On the State's appeal, the ICA found that because the judgment was and is binding upon Shak individually, he cannot carry on the acts and activities enjoined through a new corporation which he controls. However, in order for a new corporation controlled by a party bound by the injunction to be enjoined, personal service must be made upon it or the court must otherwise obtain personal jurisdiction over such corporation. Therefore, the case was reversed and remanded.

State v. Moyd, 1 Hawaii App. 439, 619 P.2d 1107 (1980)

Per Curiam. Defendant appealed the trial court's denial of his motion for change of venue. The ICA stated that the burden of showing great prejudice against the defendant in a particular circuit is on the defendant and the trial court's decision would only be overturned if there was an abuse of discretion. Defendant's charges of rape and related offenses were prominent in the newspapers when he was arrested. The ICA, however, upheld the denial of change of venue because the trial was three months after the last newspaper story and five months after the heat of the furor. There was no evidence of recent prejudice or any trouble selecting the jury.

State v. Nakasone, 1 Hawaii App. 10, 612 P.2d 123 (1980)

Per Curiam. After noticing that the defendant was talking loudly to some patrons in a restaurant, a police officer approached the defendant. The defendant

was arrested and subsequently convicted of disorderly conduct because of an argument that ensued between the officer and defendant. The conviction was reversed since absent evidence of threatened physical inconvenience to the public, a person cannot be convicted of disorderly conduct.

State v. Napoleon, 2 Hawaii App. 369, 633 P.2d 547 (1981)

Padgett. The defendant broke complainant's arm by striking him with a baseball bat. The lower court excluded evidence of the complaining witnesses' past actions and character and imposed a duty to retreat upon the defendant. On defendant's appeal, the ICA held that the deadly force, as that term is defined in HAWAII REV. STAT. § 703-300(4) was not justified under HAWAII REV. STAT. § 703-304(5) when appellant could have avoided the use of such force by retreating to safety. The ICA further held that points relied upon, which do not comply with HAWAII SUP. CT. R. 3(b)(5), would not be considered on appeal.

State v. Nieves, 1 Hawaii App. 586, 623 P.2d 100 (1981)

Padgett. Defendant was convicted in a non-jury trial for third-degree assault in violation of HAWAII REV. STAT. § 701-712. On appeal, defendant alleged that: (1) a prosecutor's investigator interviewed the accused during the pendency of proceedings without permission of counsel warranted dismissal; and (2) the admission into evidence, without objection, of hearsay evidence that he had admitted to beating the victim in violation of his constitutional rights warranted reversal. Moreover, the trial judge's decision was presumed to be made on the consideration of competent evidence only and any hearsay was presumed to have been disregarded. Affirming, the ICA held that: (1) dismissal was not warranted because there was no showing of prejudice to the defendant; and (2) reversal was not warranted because there was no objection, the defendant had opened the area, and the judge's decision was based on the evidence of the witnesses.

State v. Pacariem, 2 Hawaii App. 277, 630 P.2d 650 (1981)

Per Curiam. Defendant was convicted of manslaughter after a jury trial and he appealed. Affirming, the ICA held: (1) where appellant failed to set forth the instruction and the grounds urged for the refusal thereof in his statement of points relied upon as required by HAWAII SUP. CT. R. 3(b)(5), claimed errors in the giving of instructions will not be further considered; and (2) the evidence sufficiently supported the conviction.

State v. Pokini, 1 Hawaii App. 98, 614 P.2d 405 (1980)

Hayashi. While on probation, defendant was indicted for murder. After a bail hearing in the Third Circuit Court, bail was set at $100,000. Subsequently, pursuant to HAWAII REV. STAT. § 706-626(3), the State filed a Motion for Commitment Without Bail, which was granted by the First Circuit Court. Defendant appealed this order, contending that the doctrine of collateral estoppel precludes the First Circuit Court from ordering defendant committed without bail. The ICA noted that while the first hearing determined whether defendant was entitled to bail and, if so, what amount, the second hearing determined whether there was probable cause to believe that defendant committed another crime while on probation

and, if so, whether he should be committed without bail. Because the issues raised in the first hearing were different from the issues in the second, collateral estoppel was inapplicable. Therefore, the judgment was affirmed.

State v. Preston, 1 Hawaii App. 658, 624 P.2d 381 (1981)

Padgett. Defendant was indicted for converting monies owed to Hawaii Child Centers to her own use between September and November 1977. The indictment was based upon the testimony of a single witness who testified that she had paid monies to the defendant during the period in question. At trial, testimony given by another witness as to another incident of payment of monies was introduced. On appeal from defendant's conviction for theft in the first degree, the ICA held that it was not error to admit testimony relating to other payments since the payments were made within the period of the indictment and the indictment was sufficiently broad to cover transactions other than the one testified to before the grand jury. The ICA also rejected defendant's contention that it was error to admit testimony of a surprise witness whose name was not supplied prior to trial. The testimony was admissible since the matters testified to had been admitted by defendant so the surprise, if any, was harmless.

State v. Rapozo, 1 Hawaii App. 255, 617 P.2d 1235 (1980)

Per Curiam. Appellant was convicted of murder in the first degree. He appealed on the ground that he did not receive effective assistance of counsel at trial because the attorney should have used the defense of intoxication as the main thrust of the defense at trial rather than the defense of accident. Affirming the conviction, the ICA noted that the record did not indicate that there was any defense in this case which had much likelihood of success and that the ICA could not say that the decision to emphasize the defense of accident was one which would not be made by diligent, ordinary, prudent lawyers in criminal cases.

State v. Rapozo, 1 Hawaii App. 660, 617 P.2d 1237 (1980)

Per Curiam. Appellant appealed his conviction for murder in the first degree on the ground of ineffective assistance of counsel. Four days before oral argument, appellant made motion that the case be remanded to the circuit court based on his affidavit that there was perjured testimony at trial. The ICA denied his motion for remand on three grounds: (1) movant failed to support his novel proposition that a conviction should be reversed as a result of subordination of perjury with legal authority as required by HAWAII INT. CT. APP. R. 6(d); (2) movant's delay in filing his motion for remand despite his prior awareness of the grounds for the motion robbed his opponent of sufficient time to respond to the motion; and (3) movant was not without remedy in the court below even after his appeal was disposed of.

State v. Rapozo, 2 Hawaii App. 587, 637 P.2d 786 (1981)

Burns. Prosecution's witness revealed more information during the murder trial than in pre-trial discovery. A mistrial was properly denied because there was no evidence the State was informed that the witness would give such testimony. Further, the testimony was properly admitted because there was sufficient proof of

the existence of a conspiracy. *State v. Yoshino*, 45 Hawaii 206, 364 P.2d 638 (1961). Since appellant-defendants' failed to request jury instructions regarding the existence of a conspiracy, the matter was not preserved for appeal.

State v. Realina, 1 Hawaii App. 167, 616 P.2d 229 (1980)

Burns. Defendant Realina brandished a cane knife, after another man followed him in a car and grabbed his shirt. The district court convicted defendant Realina of the statutory offense of terroristic threatening. On appeal, the ICA reversed, holding that the evidence on the record did not support the conviction. The ICA noted that defendant-appellant Realina clearly met his statutory burden of coming forward with evidence of justification — in this case, self-defense — and that the prosecution failed to prove facts negativing the defense beyond a reasonable doubt.

State v. Rezac, 1 Hawaii App. 455, 620 P.2d 759 (1980)

Per Curiam. Defendant was convicted of assault in the third degree, a violation of HAWAII REV. STAT. § 707-712(1)(a). He had grabbed and shoved to the ground a woman who was trying to walk away from him after an argument. Defendant claimed that his conviction was not based on sufficient evidence because the testimony of the woman was not credible. The ICA found the testimony of the woman and other witnesses substantial evidence tending to support the finding for conviction.

State v. Sakoda, 1 Hawaii App. 298, 618 P.2d 1148 (1980)

Per Curiam. Defendant appealed his conviction for leaving the scene of an accident in violation of HAWAII REV. STAT. § 291C-13. The ICA reversed, holding that prosecution under HAWAII REV. STAT. § 291C-13 (relating to accidents involving damage to vehicle or property) is appropriate only when there has been an accident resulting in damage to property but no physical injury to any of the parties involved. In a motor vehicle accident resulting in personal injury to any of the parties, prosecution should be brought under HAWAII REV. STAT. § 291C-12.

State v. Sanchez, 2 Hawaii App. 577, 636 P.2d 1365 (1981)

Per Curiam. The defendant had intervened in a fight, and was observed by a police officer to be standing over his victim, kicking the victim three or four times. The defendant was subsequently convicted for assault in the third degree (HAWAII REV. STAT. § 707-712). On appeal, the threshold issue concerned whether substantial evidence existed to show that the defendant did not reasonably believe that the kicks were immediately necessary to defend himself from unlawful attack by the victim. Viewing the evidence in a light favorable to the State, the ICA determined the presence of substantial evidence indicating that the defendant's belief was not reasonable.

State v. Thompson, 1 Hawaii App. 49, 613 P.2d 908 (1980)

Per Curiam. The defendant was convicted of forgery in the second degree. He appealed the conviction contending that his written statements which referred to another forgery were improperly admitted into evidence. The ICA affirmed the

conviction, noting that evidence of another forgery is admissible since it is relevant in proving intent. Furthermore, the probative value of the evidence outweighed any prejudicial effect it may have had.

State v. Valentine, 1 Hawaii App. 1, 612 P.2d 117 (1980)

Per Curiam. In spite of testimony by a psychologist that he could not control his behavior while under stress, the defendant was convicted of harrassment. On appeal, defendant contended that the State had failed to meet its burden of proving his sanity beyond a reasonable doubt. The ICA reversed the conviction since there was no testimony upon which a rational conclusion was reached that the appellant was sane.

State v. White, 1 Hawaii App. 221, 617 P.2d 98 (1980)

Hayashi. Appellant White and a group of other men got into a fight with a mainland visitor which resulted in the robbery of the visitor's belongings and death. After he was arrested, White made several inculpatory statements which were later transcribed and signed. This written statement amounted to a confession on certain of the charges against him. Just prior to trial, White allegedly informed his counsel that the written statements were made under duress. Counsel immediately moved to have the confession and document suppressed. The trial court denied the motion on the ground that the time for pre-trial motions had expired, the trial had already begun and jeopardy had attached. Prior to the detective's testimony and prior to admission of the statement into evidence, counsel's objections were overruled. Noting that the law was clear, the ICA held that the trial court erred in its failure to separately, apart from the jury, determine the voluntariness of the confession. Rather than ordering just the voluntariness hearing, the ICA reversed and remanded for a new trial.

State v. Wilkins, 1 Hawaii App. 546, 622 P.2d 620 (1981)

Hayashi. Appellant was convicted by a jury for distribution of a harmful substance. On appeal, he raised two issues: (1) whether the State established a sufficiently reliable chain of custody with respect to the physical evidence to withstand his Motions for Acquittal; and (2) whether the court committed reversible error in admitting the testimony of an undercover officer concerning prior unrelated purchases of PCP and its street designation as THC or "tea". Affirming, the ICA found: (1) the chain of custody was sufficiently established to insure that the substances admitted into evidence were in fact the same substances obtained from the appellant for the time period until the substances were tested; (2) proof of the chain of custody from the testing until the time of trial was not necessary absent a specific allegation of tampering, substitution, loss or mistake (citing *State v. Vance*, 61 Hawaii 291, 602 P.2d 933 (1979)); and (3) the testimony of the undercover agent was properly admitted since a proper foundation for competence, relevance and expertise had been laid.

State v. Yee, 2 Hawaii App. 264, 630 P.2d 129 (1981)

Per Curiam. Contrary to a written warning not to return to the premises, two prostitutes were in fact permitted by representatives of the Pacific Beach Hotel to

come on the premises if they were invited by a guest. Placing the burden on defendants to convince the court that they were invited on the premises as guests, the lower court convicted them of criminal trespass. The ICA reversed, stating that the correct application of HAWAII REV. STAT. § 708-814(c) places the burden on the State to prove that defendants entered or remained unlawfully on the premises. The ICA found that the State did not uphold its burden in a criminal case as it failed to prove every essential element of its case.

Stewart v. Melnick, 1 Hawaii App. 87, 613 P.2d 1336 (1980)

Per Curiam. Appellant was a month-to-month tenant at the rate of $700 a month. Appellee-landlord gave written notice to appellant on March 18, 1976 that rent would be increased to $1,400 on May 1, 1976. On May 18, 1976 appellant sent written notice to appellee that he (appellant) could not afford $1,400 a month rent and would vacate the premises by end of June if appellee would provide him notice to vacate by June 5, 1976. That same day appellee sent appellant notice to vacate the premises within five days due to appellant's failure to pay the increased rent on May 1, 1976. Appellant remained in possession of the premises through *July, 1976* and continued to pay the $700-a-month rent. Appellee brought suit for summary possession and the lower court ruled that the landlord properly raised the tenant's rent and the tenant was thereby liable for $2,100. The appellate court found that HAWAII REV. STAT. § 666-2 required the landlord to give the tenant written notice to quit 25 days before the end of the month-to-month period, or, where the tenant failed to pay the rent at the time agreed upon, the landlord may terminate the tenancy by giving the tenant written notice to vacate of at least five days. Therefore, the ICA held that the March 18, 1976 notice of rental increase did not constitute a valid termination of appellant's tenancy since it contained no notice of termination of appellant's tenancy. Consequently, appellant's $700 month-to-month tenancy remained in effect and appellee's letter demanding appellant vacate the premises within five days for failure to pay $1,400-a-month rent did not end the tenancy. Appellant was not in arrears because he tendered to appellee the $700 he (appellant) was obligated to pay under the existing tenancy. Accordingly, judgment below was reversed and judgment directed in favor of appellant-tenant.

St. Paul Fire & Marine Ins. Co. v. Hawaiian Ins. & Guaranty Co., 2 Hawaii App. 595, 639 P.2d 1146 (1981)

Padgett. This was a wrongful death action which alleged that two doctors negligently administered Halothane anesthetic to the decedent, which contributed to his death. The lower court entered summary judgment against defendant insurance company (HIGC), which was the primary malpractice insurer of the two doctors. The lawsuits were filed, consolidated and then settled for a lump sum of $165,000. The insureds' policy purported to limit HIGC's liability to $100,000 for each "claim" thereunder, the remaining portion to be paid by plaintiff-appellee (St. Paul). Affirming summary judgment, the ICA held: (1) insurance contracts, being contracts of adhesion, are to be liberally construed in favor of the insured and against the insurer; and (2) where an insurance contract failed to define the word "claim" in its limitation of liability, and three separate acts of negligence involving two separate insureds resulting in one death had been alleged, there

were three claims for purposes of the policy liability limitation clause.

Sturkie v. Han, 2 Hawaii App. 140, 627 P.2d 296 (1981)

Burns. Han purchased a subleasehold interest in property on Portlock Road, Oahu, from the trustee of the estate which owned the property. Part of the purchase price was paid in cash and the remaining was covered by a promissory note. When Han failed to make the second payment due on the note, the trustee filed a complaint for foreclosure. Defendants answered by raising defenses and counterclaims. Three junior lienors were joined and filed cross-claims against defendants and against each other. On plaintiff's motion for summary judgment and entry of interlocutory decree of foreclosure the lower court entered the interlocutory decree of foreclosure but made no mention of the motion for summary judgment, the cross-claims and counterclaims. Defendants appealed the foreclosure decree and decisions on issues incidental to the enforcement of that decree. However, at oral argument, defendants contended that the ICA had no jurisdiction to hear the case.

Dismissing the case, the ICA recognized that a foreclosure decree is an exception to the general rule that a judgment, order or decree is not final unless it completely adjudicates an entire claim. An appeal may be taken from a decree of foreclosure even though matters relating to it, e.g., order of sale, award of costs and fees, remain undetermined. However, where there are multiple claims or multiple parties, HAWAII R. CIV. P. 54(b) certification must be obtained for an interlocutory appeal to a decree of foreclosure. Since such certification was not obtained and the matters of summary judgment, counterclaims and cross-claims remained undetermined, there was not the requisite finality for the ICA to entertain the appeal.

Because appellants here were aware of the necessity for HAWAII R. CIV. P. 54(b) certification, yet pursued their appeal, then waited until oral argument to use the lack of certification to attack the ICA's jurisdiction, the appeals were frivolous and had been used merely for delay. Therefore, reasonable attorney's fees were awarded appellees.

Suesz v. St. Louis-Chaminade Educ. Center, 1 Hawaii App. 415, 619 P.2d 1104 (1980)

Hayashi. Plaintiff had been employed as a teacher by defendant on a year-to-year contract for a three-year probationary period. Instead of granting him tenure after three years, the school declined to rehire him. Plaintiff claimed: (1) the failure to rehire was a breach of his contract; and (2) representations made to him that he would be rehired if he improved created an issue of promissory estoppel. Affirming, the ICA held in favor of defendant on all issues raised on appeal. First, defendant was granted summary judgment as to the first claim. The ICA found no factual issues existed with respect to appellant's contract. After trial on the promissory estoppel issue, the trial court found that representations had been made to plaintiff that he would be hired. The ICA affirmed because the findings of fact showed no promise made to appellant and these findings were not clearly erroneous. Also, the trial court had allowed one of plaintiff's attorneys to withdraw as counsel at the hearing on the motion for summary judgment. The ICA upheld this ruling because plaintiff still was represented by another attorney who was fully

knowledgeable about the case.

Survivors of Cariaga v. Del Monte Corp., 2 Hawaii App. 672, 638 P.2d 1386 (1982)

Burns. Claimants-appellants filed a HAWAII REV. STAT. § 386-3 Dependents' Claim for Compensation with the Workers' Compensation Division of Hawaii's Department of Labor and Industrial Relations (DLIRB), alleging that the decedent's suicide by hanging was caused by his "depression as a result of being suspended from his job for no apparent reason." The Department's Director determined that the fatality did not arise out of and in the course of employment, and appellants appealed to the Labor and Industrial Relations Appeals Board (LIRAB) pursuant to HAWAII REV. STAT. § 386-87. Without issuing a proposed decision or providing an opportunity for the filing of exceptions, the LIRAB issued a Decision and Order signed by the two members who attended the hearing, affirming the Director's Decision and Order.

Reversing and remanding, the ICA found that HAWAII REV. STAT. § 91-11 (Hawaii Administrative Procedure Act) required that a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision must be served upon the parties, and an opportunity had been afforded to each party adversely affected to file exceptions and present argument to all of the members of the LIRAB. In addition, said members shall personally consider the whole record or such portions thereof as may be cited by the parties.

Survivors of Cariaga v. Del Monte Corp., 2 Hawaii App. 672, 642 P.2d 537 (1982) (amended decision)

Burns. Claimants-appellants filed a HAWAII REV. STAT. § 386-3 Dependent's Claim for Compensation with the Workers' Compensation Division of Hawaii's Department of Labor and Industrial Relations after decedent's suicide, claiming the suicide was a result of being suspended from work for no apparent reason. The Department's Director ruled against them and the matter was appealed to the Labor and Industrial Relations Appeals Board (LIRAB) pursuant to HAWAII REV. STAT. § 386-87. The hearing was attended by only two of the three full-time members of the LIRAB. At the conclusion of the hearing the chairperson stated that due to this absence there would be a proposed decision issued for review and the filing of exceptions. Instead, a final decision was issued, affirming the prior decision. Claimants appealed from the decision primarily on the grounds that the LIRAB failed to satisfy the requirements of HAWAII REV. STAT. § 91-11 prior to issuing its Decision and Order. The ICA, reversing and remanding, held that in accordance with the legislative history of the statute, it was enacted to require that each member read and examine the evidence presented. This implies and requires that *all* members of the agency, who are to render the decision, be personally informed as to all the evidence, including the hearing of the witnesses.

Switzer v. Drezen, 2 Hawaii App. 96, 626 P.2d 202 (1981)

Per Curiam. Plaintiff was struck by defendant's automobile while crossing the highway. The trial court ordered a directed verdict in favor of the defendant. The ICA reversed, stating that on motions for a directed verdict, the evidence and the

inferences which may be fairly drawn therefrom must be considered in the light most favorable to the party against whom the motion is directed and if the evidence and inferences viewed in that manner are of such character that reasonable persons in the exercise of fair and impartial judgment may reach different conclusions upon the crucial issue, then the motion should be denied.

Swoish v. Panoa Foods, 2 Hawaii App. 679, 639 P.2d 426 (1982)

Per Curiam. In an attempt to save the produce corporation of which he was a director, officer and shareholder, the defendant-appellee gave verbal and personal guaranty of payment to the plaintiff-appellant for the supply of produce on a thirty-day credit basis. Over a two-year period, the produce corporation compiled unpaid debts to the appellee in the amount of approximately $26,116.39. In the circuit court, appellee obtained summary judgment on the basis of HAWAII REV. STAT. § 656-1(2). The ICA noted that appellant fell within the exception that "[t]he defendant's promise is original or absolute or primary or independent, as it is variously expressed, and not merely collateral to the obligation of the original debtor, it is not within the statute." The ICA further stated that a promise by an officer, director or stockholder is original where the promisor's primary objective is to secure some direct and personal benefit from the performance by the promisee of his contact with the corporation. The factual question of whether a guarantor's primary object in making his guaranty was to secure direct and personal benefits to himself from the promisee's performance. Consequently, the ICA reversed, finding that it was error to grant summary judgment.

Taibbi v. Marvit, 2 Hawaii App. 554, 634 P.2d 1054 (1981)

Per Curiam. This is an appeal from an order granting $2,400 in attorney's fees and $25 in costs to defendants on grounds that suit by appellants was in bad faith and frivolous. The ICA reversed as to attorney's fees but affirmed as to costs based on the general rule that each party to litigation must pay his or her own counsel's fees and such fees are not allowable in the absence of a statute, agreement, precedent, rule of court or stipulation authorizing the allowance. The ICA also noted that until the enactment of Act 286 (Session Laws, 1980) there was no statute allowing fees in such cases.

Taira v. Oahu Sugar Co., Ltd., 1 Hawaii App. 208, 616 P.2d 1026 (1980)

Per Curiam. Appellant, an employee of third-party defendant-appellee Central Pacific Boiling & Piping, Ltd. (CPB), was seriously injured when the plank he was straddling while repairing a cane cleaner belonging to appellee Oahu Sugar cracked and he fell to the ground. The plank had been attached to the cane cleaner at the direction of appellant's foreman, another CPB employee. Evidence adduced in appellant's case-in-chief established that CPB's supervisor had directed the manner in which the repairs were conducted. CPB was an independent contractor engaged by Oahu Sugar to repair the cane cleaner. At the close of appellant's evidence, the trial court granted a directed verdict in favor of Oahu Sugar on the grounds that Oahu Sugar, as a general contractor, was not liable for actions taken at the direction of CPB which resulted in appellant's injuries.

On appeal, the ICA applied the standard for review of a directed verdict announced in *Farrior v. Payton*, 57 Hawaii 620, 626, 562 P.2d 779, 784 (1979): The

evidence and the inferences which may be fairly drawn from the evidence must be considered in the light most favorable to the party against whom the motion is directed and if the evidence and inferences viewed in that manner are of such character that reasonable persons in the exercise of fair and impartial judgment may reach different conclusions upon the crucial issue, then the motion should be denied and the issue should be submitted to the jury. The ICA held that a jury could not find that Oahu Sugar had participated in the supervision of the repair work based upon the testimony of an Oahu Sugar supervisor to the effect that Oahu Sugar gave verbal instructions to CPB regarding "more or less what's to be done." Secondly, the ICA affirmed the trial court's exclusion of all expert testimony and evidence relating to compliance with the Occupational Safety and Health Act (OSHA), 29 U.S.C.A. § 651 *et. seq.* on the grounds of relevancy. The ICA's relevancy ruling followed the trend of case law in other jurisdictions that OSHA creates no implied private causes of action and hence did not impose a duty on Oahu Sugar in appellant's favor. The ICA rejected appellant's argument that *Mitchell v. Valdastri*, 59 Hawaii 53, 575 P.2d 1299 (1978) (where evidence of compliance with OSHA was admitted) was controlling. *Mitchell* was factually distinguishable in that, unlike the present case, there was evidence therein that the owner of the workplace had provided an unsafe place of work to its independent contractor.

Tanuvasa v. City and County of Honolulu, 2 Hawaii App. 102, 626 P.2d 1175 (1981)

Padgett. In this personal injury case, the ICA addressed three basic issues. First, the ICA upheld the exclusion of certain evidence that it found to be "remote and speculative." The evidence consisted of a gun and marijuana which were seized from plaintiff's car after plaintiff had been severely beaten by a police officer. Second, the ICA reiterated the Hawaii rule that "the fact of damage, proximately resulting from a tort, must be established with reasonable certainty." At issue was a jury instruction to the effect that damages could be awarded if as a proximate result of plaintiff being beaten by a police officer, plaintiff was prevented from pursuing a career as a professional football player. According to the ICA, this instruction was not supported by the evidence and it was therefore prejudicial to appellant City and County. Finally, the ICA emphasized in dictum that HAWAII SUP. CT. R. 3(b)(5) must be strictly complied with by an appellant in order to avoid dismissal of his appeal. Appellant's specific transgression of the rule was his failure to include in his brief a statement of the points upon which he intended to rely.

Title Guaranty Escrow Services v. Powley, 2 Hawaii App. 265, 630 P.2d 642 (1981)

Hayashi. Escrow company brought complaint in interpleader against prospective sellers and buyers of leasehold interest in a hotel to determine which of them were entitled to proceeds of an escrow account established for a proposed sale. The trial court found that buyers had forfeited $50,000 deposit paid into escrow as part of down payment by their inability to pay balance of down payment in compliance with the terms of the Deposit, Receipt, Offer and Acceptance, and buyers appealed. Affirming, the ICA held: (1) the trial court did not abuse its

discretion by excluding expert testimony; and (2) the trial court was not clearly erroneous with respect to certain findings of fact under HAWAII R. CIV. P. 52(a) as the ICA was not driven irrefragably to the conclusion that all objective appraisals of evidence would result in different finding.

Tomita v. Hotel Service Center, 2 Hawaii App. 157, 628 P.2d 205 (1981)

Per Curiam. The incident that gave rise to the claim occurred on June 2, 1975. Although appellee felt some pain and notified her employer of the incident at that time, she continued working and did not seek medical attention until July 12, 1975, at which time she was unable to work for a few days. Since the disabling effect of the work-related injury was not manifest until July 12, 1975, a claim was not filed until June 9, 1977. The Labor and Industrial Relations Appeals Board found the employee's claim for workers' compensation was timely filed. Affirming, the ICA held that under HAWAII REV. STAT. § 386-82, the running of the two-year statute of limitations begins at the point where the effects of employee's work-related injury forces him or her to seek medical attention and prevents the employee from working at his or her normal work activity.

Tsuchiyama v. Kahului Trucking and Storage, Inc., 2 Hawaii App. 659, 638 P.2d 1381 (1982)

Per Curiam. The Labor and Industrial Relations Appeals Board found that the claimant-appellee was totally and permanently disabled as a result of an industrial accident incurred in the course and scope of his employment by the employer-appellant. The Board applied the "odd-lot doctrine," where a work-related permanent partial disability combined with other factors such as age, education, experience, renders an employee unable to obtain employment, he is considered permanently, totally disabled. The employee has the burden of establishing prima facie that he falls within the odd-lot category. Affirming, the ICA found: (1) the fact finder's determination of whether regular, gainful employment exists for a worker in the claimant's condition must be based on the entire mix of evidence on the issue including, if offered, evidence relating to motivation; and (2) based upon all of the evidence in the whole record, the Board was not clearly erroneous in determining that the claimant fell within the odd-lot doctrine.

Tuinei v. City and County of Honolulu, 2 Hawaii App. 574, 636 P.2d 1363 (1981)

Per Curiam. This case concerned a dispute between law offices over whether fees should be divided. The appellant sought to overturn a dismissal of an attorney's lien for fees in a contingent fee case. The ICA declined to express an opinion on the merits of the controversy and remanded the case because the appellant was entitled to an evidentiary hearing as to what arrangement had been made between the respective attorneys for the numerous plaintiffs.

Vanatta v. Pacific Guardian Life Insurance Co., Ltd., 1 Hawaii App. 294, 618 P.2d 317 (1980)

Per Curiam. Decedent purchased a life insurance policy from defendant life insurance company. Prior to the issuance of the policy, the decedent was asked

whether he had sought medical or surgical advice or treatment or whether he had any departure from good health. The decedent answered "no" although he had been treated for alcoholism. The decedent died within the contestable period. The ICA noted that the case was governed by HAWAII REV. STAT. § 431-419 which provides that a misrepresentation, unless there was intent to deceive or unless it materially affected the risk, shall not prevent a recovery on the policy. However, the ICA held that genuine material issues of fact on intent and risk required that the case be reversed for trial on the merits.

Vaughan v. Williamson, 1 Hawaii App. 496, 621 P.2d 387 (1980)

Burns. Originally the parties were divorced in Massachusetts, but the husband left the jurisdiction before property division orders were made. Prior to the divorce, the husband had been bequeathed stocks which were registered jointly in his and his wife's names. In later court proceedings, with notice to appellee but without his participation, the wife had the residential property partitioned and received three judgments for execution. The wife then commenced an action in Hawaii under the Uniform Reciprocal Enforcement of Support Acts (URES) of Massachusetts and Hawaii, HAWAII REV. STAT. ch. 576 seeking recognition of the Massachusetts judgment for child support, alimony, one-half of the value of stocks, and costs and attorney fees. The husband did not counterclaim but requested a credit with 10% proceeds of the corporate stocks, his share of the sale of the residence and the value of personal property in the wife's possession at the time of the division. The family court held that: (1) the wife could enforce the judgment executions; (2) the husband was barred from claiming an offset; (3) HAWAII REV. STAT. § 580-47 authorized division of the securities in the Hawaii court; and (4) gave the husband 80% and the wife 20% of the value of the stocks. No mention was ever made of any of the credits for the residence and personal property for the husband. Affirming in part and remanding the case on the husband's appeal, the ICA held: (1) the lower court gave due consideration to all of the evidence; (2) the lower court's findings that the judgment executions were not fraudulent and that there had been due notice given of the hearings were not clearly erroneous; (3) under application of Massachusetts law, the division of property under Hawaii law was not erroneous; (4) the lower court should have decided the division and distribution of the personal property; and (5) the lower court should have credited the husband with net proceeds from the sale of the residence.

Vessey v. Vessey, 1 Hawaii App. 57, 613 P.2d 363 (1980)

Per Curiam. Pursuant to a divorce decree, the wife was to receive income generated by a rental unit in lieu of support payments by the husband. Subsequently, the wife remarried and the husband requested the family court to order the rental unit be sold since HAWAII REV. STAT. § 580-51 provided that he was no longer legally obligated to support her. Citing HAWAII REV. STAT. § 580-47, the wife contended that the income from the rental unit was a division of property and is not modifiable. The family court ordered the apartment sold and the proceeds divided. On appeal, following *Arakaki v. Arakaki*, 54 Hawaii 60, 502 P.2d 380 (1972), the ICA held the wife's entitlement to rental payments is specifically in lieu of payments for spousal support. Accordingly, the termination was proper

and the judgment was affirmed.

Vieira v. Robert's Hawaii Tours, Inc., 2 Hawaii App. 237, 630 P.2d 120 (1981)

Per Curiam. Plaintiff-employee sued employer for all amounts due under a five-year employment contract after employer discharged him prematurely. Defendant counterclaimed for amounts loaned to the plaintiff and for its assumption of a debt owed by plaintiff to a client. The trial court found that the employer had no reasonable basis for dissatisfaction with plaintiff's performance and no cause for termination. Plaintiff was awarded damages for a portion of the contract period but, because he had failed to act in mitigation for the remaining contractual period, he was ineligible for further relief.

The ICA affirmed the lower court's finding of wrongful termination and discussed the proper measure of damages. A wrongfully discharged employee is entitled to recover the amount of compensation agreed upon for the remaining period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. The burden of proof is upon the employer to show that other employment was comparable, or substantially similar, to that which the employee has been deprived before projected earnings from other employment opportunities can be applied in mitigation. An employee's rejection of or failure to seek employment of a different or inferior kind may not be used to mitigate damages. Although the ICA stated that it was clear error for the trial court to find that plaintiff had failed to act in mitigation of damages, it reversed the entire decision on damages and remanded for a new trial on this issue only. With regard to defendant's counterclaims for money loaned to the plaintiff and assumption of his debt, the ICA held that the trial court's findings were sufficient to permit affirmance on this issue.

Waikiki Shore, Inc. v. Zoning Board of Appeals, 2 Hawaii App. 43, 625 P.2d 1044 (1981)

Padgett. The Honolulu Zoning Board of Appeals decided to grant a variance for the operation of a nightclub and restaurant in a Waikiki apartment building. After closing the public hearing on the issue of the variance, the Board received a letter from the attorney for the applicant rebutting information presented at the hearing by opponents of the variance, and some members of the Board took a view of the premises. The Board eventually voted to approve the variance with an express disclaimer that it was influenced by the letter or the view. Accepting the Board's disclaimer with respect to the letter and finding there had been no view, the circuit court upheld the Board despite clear and unequivocal evidence in the record that the view had been taken. Based on *Town v. Land Use Commission*, 55 Hawaii 538, 524 P.2d 84 (1974), the ICA found that the circuit court was "clearly erroneous" because the receiving of the letter and the taking of the view was procedurally fatal despite the disclaimer. The case was remanded to the agency for further proceedings.

Wakuya v. Oahu Plumbing & Sheet Metal, Ltd., 2 Hawaii App. 373, 636 P.2d 1352 (1981)

Padgett. This case arose as the result of an injury that had occurred when the

door handle to a bank vault came off. Reversing the jury verdict in favor of defendants-appellees, the ICA held that absence of a provision addressing the procedure to identify unidentified defendants, the filing of a document naming those defendants, and obtaining a court order naming and providing for service upon them is an acceptable practice. HAWAII REV. STAT. § 657-7.5 did not preclude the identification of such defendants on the record, although the identification was made 30 days from the filing of a third-party complaint naming them. The ICA further concluded that HAWAII R. CIR. CT. 28, which sets forth a six-month limit for service of process upon identified defendants, does not commence to run until the defendants are identified on the record.

Wallace v. Wallace, 1 Hawaii App. 315, 619 P.2d 511 (1980)

Burns. Husband and wife entered into a divorce decree which did not include husband's retirement benefits as part of the assets of the parties. The wife filed a motion to reconsider the settlement agreement. The trial court held that the agreement was entered into under a mutual mistake of material fact that retirement benefits were not subject to division upon divorce. The original decree was set aside and an amended decree was issued which incorporated the essentials of the original decree together with a division of the retirement benefits. Husband appealed. Following *Tavares v. Tavares*, 58 Hawaii 541, 574 P.2d 125 (1978), the ICA noted that the family court's inherent power and authority, prior to the effective date of the Hawaii Family Court Rules, was governed by common law and not by statute. Under common law, the power to vacate or set aside judgment may be properly exercised for the prevention of error and injury and for the furtherance of justice. Here, there was a mutual mistake of material fact that goes to the essence of the division of the estate of the parties. Although the lower court's judgment setting aside the original decree was affirmed, the entry of a new decree was reversed because there was no hearing.

Welton v. Gallagher, 2 Hawaii App. 242, 630 P.2d 1077 (1981)

Burns. After a close relationship developed between them, plaintiff presented the defendant with $20,000 in bearer bonds and told her to place them in her safe deposit box. When the relationship ended, plaintiff demanded the bonds be returned and commenced the action when defendant refused. The trial court awarded judgment in favor of defendant, finding that a valid inter vivos gift had been made by plaintiff. On appeal, plaintiff contended: (1) defendant's evidence is insufficient to produce a firm belief in the mind of a reasonable person that a valid gift was made, as is required under the clear and convincing standard established by the lower court; and (2) as a preliminary issue, several questions remained regarding his competency as a donor because of undue influence and his own depression and drunkenness. Noting that the burden of proving that a donor was dominated by the donee, or that a confidential or fiduciary relation existed between them, rests upon the person attacking the gift and distinguishing *Texeira v. Texeira*, 40 Hawaii 631 (1955), the ICA found there was insufficient evidence to show that plaintiff had been "clearly susceptible to the influence of" the defendant. The ICA declined to consider plaintiff's claims of chronic depression and drunkenness because the issue was not properly raised on appeal. Stating the requisite elements of a valid inter vivos gift, the ICA found: (1) delivery was evi-

denced by the fact that plaintiff gave defendant bearer bonds, which by their definition are redeemable by whosoever holds them; (2) acceptance was demonstrated by the defendant when she placed the bonds in her safety deposit box; and (3) donative intent is adequately evidenced by the circumstances of the parties' relationship — plaintiff was fond of defendant, had made several gifts before, and was extremely grateful to her for taking him back after an unfortunate love affair.

WESCO Realty, Inc. v. Cameron, 1 Hawaii App. 89, 614 P.2d 399 (1980)

Padgett. Plaintiff-appellant WESCO, dba Tire Warehouse, appealed order granting appellee's motion for directed verdict. Tire Warehouse entered into a contract to sublease certain property from Cameron for Tire Warehouse operations. Subsequently, a dispute arose between the parties over some provisions in the sublease and Tire Warehouse sought to cancel the agreement on the ground that the terms of the lease did not conform to the contract, thereby rendering the contract incomplete and unenforceable. The court reversed the lower court's order, holding that there was sufficient evidence that the parties to the contract contemplated further negotiations as to essential terms to allow the issue to go to the jury. The court relied upon *Francone v. McClay*, 41 Hawaii 72 (1955), which held, inter alia, that "if the contract to lease or the negotiations of the parties affirmatively disclose or indicate that further negotiations, terms and conditions are contemplated, the proposed lease is considered incomplete and incapable of being specifically enforced." Furthermore, the court stated that, "on motions for a directed verdict, the evidence and the inferences which may be fairly drawn from the evidence must be considered in the light most favorable to the party against whom the motion is directed and if the evidence and inferences viewed in that manner are of such character that reasonable persons in the exercise of fair and impartial judgment may reach different conclusions upon the crucial issue, then the motion should be denied and the issue should be submitted to the jury." *State Savings & Loan v. Corey*, 53 Hawaii 132, 145, 488 P.2d 703, 711 (1971); *Farrior v. Payton*, 57 Hawaii 620, 626, 562 P.2d 779, 784 (1977).

Whitesell v. Houlton, 2 Hawaii App. 365, 632 P.2d 1077 (1981)

Burns. Plaintiffs Whitesells and defendant Houlton owned and occupied adjoining residential properties. Houlton's property contained a banyan tree which hung over the Whitesells' property and the two-lane street fronting both properties. The Whitesells cut back the tree and sued for the expenses of doing so. The district court found that Houlton, owner of a banyan tree, was liable for damages it caused to a neighbor's property and for costs incurred by the neighbor in cutting it back. Affirming, the ICA adopted the rule used in Virginia, on this issue of first impression, and held that overhanging branches or protruding roots constitute a nuisance only when there is an imminent danger of them causing, or they actually cause, harm to property other than plant life. Such harm, which must take place in ways other than by casting shade or dropping leaves, flowers or fruit, allows the damaged or imminently endangered neighbor to require the owner of the tree to cut back the tree within a reasonable time, or to pay for such cut-back expenses.

Wick Realty v. Napili Sands Maui Corp., 1 Hawaii App. 448, 620 P.2d 750 (1980)

Padgett. Francis Schuh, the owner of Napili Sands purchased some real property on the advice of an architect named Parsons, and agreed to pay a commission to a real estate agent from Wick Realty in two installments. Schuh paid the first installment but refused to pay the second when he learned that the agent had agreed to split his fee with the architect, who did not have a real estate license. Such fee-splitting is prohibited by HAWAII REV. STAT. § 467-14(14) now HAWAII REV. STAT. § 467-14(13). Wick Realty sued for the second payment and Napili counterclaimed for return of the first payment of the commission. The trial court entered a judgment for Wick Realty and defendant appealed. Affirming, the ICA held that there was no private right of action because the legislative history did not contain any intent to create that right. In addition, certain findings of fact were not clearly erroneous.

Wigington v. Pacific Credit Corp., 2 Hawaii App. 435, 634 P.2d 111 (1981)

Burns. Wigington executed a contract for the purchase of a new truck. Eventually, City Collectors, dba Pacific Credit Corp., became the assignee for collection of the debt outstanding, and sent a demand for payment. In his complaint, appellee-debtor alleged unfair and deceptive practices by appellant-collector under HAWAII REV. STAT. §§ 443-47 and 480-2 by reason of use of a deceptive demand for payment form in violation of HAWAII REV. STAT. §§ 443-44 and 443-45. Appellant-collector appealed the trial court's granting of summary judgment in favor of appellee-debtor in his suit for injunctive relief and damages pursuant to HAWAII REV. STAT. § 480-13. Appellee-debtor cross-appealed the failure to award him reasonable attorney's fees.

Affirming in part and reversing in part, the ICA held: (1) the issue of primary jurisdiction of the State of Hawaii Collection Agency Board was moot in light of the abolition of that administrative agency by HAWAII REV. STAT. § 26H-4 (Act 70, 1979 session). The issue, if addressed, would have called for determining whether the administrative agency should have made the initial adjudication, thus postponing the trial court's jurisdiction. (2) The trial court did not abuse its discretion in not dismissing the lawsuit pursuant to HAWAII R. CIV. P. 41(b) because of appellee-debtor's "contumacious conduct" (his failure to prosecute). (3) It was error for the trial court to decide as a matter of law that the release agreement between appellee-debtor and his creditor was not intended to cover appellee-debtor's claims against appellant-collector. The issue of the extent of coverage is a question of fact. (4) The trial court erred in concluding, as a matter of law, that appellee-debtor had proven his right to damages under HAWAII REV. STAT. § 480-13. The ICA outlined the four essential elements of a cause of action under HAWAII REV. STAT. § 480-13: (a) violation of HAWAII REV. STAT. ch. 480; (b) injury to plaintiff's business or property resulting from such violation; (c) proof of the amount of damages; and (d) the action is in the public interest or the defendant is a merchant. (5) The trial judge did not abuse his discretion, pursuant to HAWAII REV. STAT. § 480-13, in enjoining appellant-collector from continuing its deceptive collection practices. Voluntary compliance did not moot the issue. (6) In light of the absence of proper affidavits by appellee-debtor, the trial court's silence on the question of costs and fees was not construed as a denial thereof. The failure of appellee-debtor to submit proper documents does not bar him from obtaining

costs and fees. If these issues are not decided prior to entry of judgment, they may be decided within a reasonable time after judgment has been entered. However, if an appeal on the merits is taken before an award of costs and fees, the trial court loses its jurisdiction to award them until disposition of the appeal. If the issues of costs and fees are decided after judgment, each decision may be appealed pursuant to HAWAII R. CIV. P. 73. (7) Statutory awards of attorney's fees will not be denied because legal representation was provided without charge, if appellee-debtor is legally obligated to pay to his counsel whatever fees he receives.

Williams v. Kleenco, 2 Hawaii App. 219, 629 P.2d 125 (1981)

Per Curiam. An appeal was taken from a decision and order of the Labor and Industrial Relations Appeals Board which affirmed a ruling by the Director that the claim was not barred by the statute of limitations contained in the Workers' Compensation Act, HAWAII REV. STAT. ch. 386 and remanded matter for determination of the amount of the award. Dismissing the appeal, the ICA held that the Board's decision and order was not final and therefore was not appealable; nor would deferral of review of the preliminary ruling pending entry of a subsequent final decision deprive appellant of adequate relief such that review would be required under the Hawaii Administrative Procedures Act, HAWAII REV. STAT. § 91-14(a).

Winslow v. State, 2 Hawaii App. 50, 625 P.2d 1046 (1981)

Hayashi. An aggrieved public employee brought an action against the State as her employer for breach of her labor contract, and against her union, the United Public Workers, for the commission of a prohibited practice. The circuit court granted summary judgment to the State and the union.

The issue with respect to the State was whether the employee is required to exhaust the remedies established in her labor agreement before she brought the action in circuit court against her public employer. These remedies included four levels of written grievance proceedings followed optionally by binding arbitration. Although she had filed a grievance under the terms of the agreement, the employee had abandoned it prior to reaching the fourth level in favor of the court action. Under these circumstances the ICA affirmed, holding that the employee is bound to follow her labor agreement's grievance procedure and only upon exhaustion of this remedy may she bring her employer into court.

On the other hand, the ICA found that the employee may pursue an action against her union regardless of whether she had exhausted her administrative remedy with respect to her employer. Moreover, the employee has the option of bringing such an action either before the Hawaii Public Employment Relations Board or the circuit court. Having found that this action was properly before the circuit court, the ICA then reviewed the lower court's grant of summary judgment and found that the record contained allegations of facts sufficiently controvertible that summary judgment was not appropriate. Accordingly, the ICA reversed the order granting summary judgment to the union and remanded the case for trial.

Wright v. Chatman, 2 Hawaii 74, 625 P.2d 1060 (1981)

Per Curiam. In two cases consolidated for non-jury trial, the manager of an apartment building allegedly allowed the unauthorized entry of the mother of one

of the plaintiffs. The trial judge concluded, inter alia, that an emergency situation existed at the time which justified the entry and judgment was entered in favor of the defendants. On appeal, plaintiffs-appellants alleged that the findings of the trial judge were not sustained by substantial evidence. Under the "clearly erroneous" standard in HAWAII R. CIV. P. 52(a), the ICA sustained the trial court's judgment. Additionally, the ICA noted that appellants' failure to comply with HAWAII SUP. CT. R. 3(b)(5) forced the ICA to do the work more properly done by the appellant.

Wright v. Wright, 1 Hawaii App. 581, 623 P.2d 97 (1981)

Hayashi. In a family court order, the court considered appellant's former husband's current economic status, including his remarriage, in setting the amount of child support where no previous order of support had been entered. Noting that the general rule is that remarriage *alone* does not justify modification of an existing court order but remarriage is one of the elements which can be considered in weighing and balancing equities for the benefit of all of the parties concerned, the ICA affirmed and found that the family court had not abused its discretion and could properly consider the husband's current obligations to his second family as part of the totality of circumstances bearing upon his ability to pay a fixed amount of support for his children from a previous marriage.

Yoshimoto v. Lee, 2 Hawaii App. 477, 634 P.2d 130 (1981)

Per Curiam. Certain persons claiming an interest in land appealed a judgment which quieted title in the land in favor of the appellees. Affirming, the ICA held: (1) substantial evidence of open, notorious, adverse and hostile possession of real property for the statutory period and appellees' predecessor-in-title did not enter as a co-tenant sufficiently established title by adverse possession; (2) it was not error to admit a document into evidence over a general objection where no specific grounds for the objection were pointed out; (3) where the objection to a deposition on the ground that the questions were leading was not raised at the deposition, but was raised for the first time at the trial, it was waived under HAWAII R. CIV. P. 32(d)(3)(B).

Yoshioka v. E. F. Hutton & Co., 2 Hawaii App. 125, 626 P.2d 1186 (1981)

Padgett. The plaintiffs entered into Customer's Agreements with defendant, E. F. Hutton & Company, Inc. Plaintiffs appealed a summary judgment in favor of defendant, and defendant cross-appealed the trial court's refusal to stay proceedings pending arbitration. In reversing the trial court, the ICA found that the common law of not enforcing arbitration agreements had been reversed by statute. Thus, where the agreement entered into between plaintiffs and defendant provided that any controversy arising out of or relating to customer's account shall be submitted to arbitration, HAWAII REV. STAT. § 658-5 mandates that court proceedings shall be stayed pending arbitration. In addition, the issue of whether New York laws governed is also a matter for arbitration under the agreement. The ICA did not reach the summary judgment issue.

SUBJECT INDEX

FOR HAWAII INTERMEDIATE COURT OF APPEALS

CASE SUMMARIES FOR 1980-82

The reader is referred to the alphabetical case summaries for the correct citation of the case.

CONTRACTS

FAMILY LAW

TABLE OF STATUTES, ORDINANCES AND RULES

§ 91-14	City & County of Honolulu v. Ambler
§ 91-14(a)	Williams v. Kleenco
§ 91-14(f)	Waikiki Shore, Inc. v. Zoning Bd. of Appeals
§ 91-14(g)	Homes Consultant Co. v. Agsalud; Noor v. Agsalud
§ 91-14(g)(5)	Hamabata v. Hawaiian Ins. & Guar. Co.; Scott v. Contractors License Bd.; Tsuchiyama v. Kahului Trucking & Storage
§ 91-15	Homes Consultant Co. v. Agsalud
§ 171-1	State v. Kauai Kai, Inc.
§ 264-1; -41	Santos v. Perreira
§ 287-29(1)	Standard Oil Co. of California v. Hawaiian Ins. & Guar. Co.
§ 291-4; -5	State v. Boehmer
§ 291-12; -13; -14	State v. Sakoda
§ 291C-1; -12; -14	State v. Liuafi
§ 291C-101; -102	State v. Cieslik
§ 294-4(1)(B); -4(3); -30	Kawaihae v. Hawaiian Ins. Cos.
§ 341-161	State v. Liuafi
§ 346	In re Henry
§ 368-8	Disher v. Kaniho
§ 371-4(a), (b), (c), (d)	Survivors of Cariaga v. Del Monte Corp.
ch. 377	Winslow v. State
ch. 383	Homes Consultant Co. v. Agsalud
§ 383-6	Homes Consultant Co. v. Agsalud
§ 383-30(1)	Noor v. Agsalud
ch. 386	Survivors of Cariaga v. Del Monte Corp.
§ 386-82	Chung v. Food Pantry, Ltd.; Tomita v. Hotel Service Center
§ 386-83	Chung v. Food Pantry, Ltd.
§ 386-85	Freitas v. Pacific Contractors
§ 386-88	Williams v. Kleenco
§ 386-89	Chung v. Food Pantry, Ltd.
§ 425-29	Phillips v. Kula 200
§ 425-132	Lau v. Wong
§ 425-142	Fletcher v. Fletcher
§ 431-419	Vanatta v. Pacific Garden Life Ins.
§ 431-455	Standard Oil Co. of California v. Hawaiian Ins. & Guar. Co.
§ 443-1 *et seq.*	Ailetcher v. Beneficial Fin. Co.
§ 443-4(4); -4(8); -23; -44; -45; -46; -47	Wiginton v. Pacific Credit Corp.
§ 444-17(5); -17(12); -18	Scott v. Contractors License Bd.
§ 467(14) [now (13)]	Wick Realty v. Napili Sands Maui Corp.

§ 478-4; -6	Silver v. George
§ 480	Ailetcher v. Beneficial Fin. Co.; Brodie v. Hawaii Automotive Retail Gasoline Dealers Ass'n
§ 480-2	Ailetcher v. Beneficial Fin. Co.; Beerman v. Toro Mfg.; Wiginton v. Pacific Credit Corp.
§ 480-3	Beerman v. Toro Mfg.
§ 480-13	Ailetcher v. Beneficial Fin. Co.; Beerman v. Toro Mfg. Corp.; Wiginton v. Pacific Credit Corp.
§ 481A	Brodie v. Hawaii Retail Automotive Gasoline Dealers Ass'n
§ 490:1-201(42)	Association of Apt. Owners of 1555 Pohaku v. Walker-Moody Constr.
§ 490:2-104(1); -105(1)	Ailetcher v. Beneficial Fin. Co.
§ 490:2-202	Association of Apt. Owners of 1555 Pohaku v. Walker-Moody Constr.
§ 490:2-204	Barwick Pacific Carpet v. Kam Hawaii Constr.
§ 490:2-312(2)	Shelly Motors v. Bornick
§ 490:2-609; -610	Romig v. DeVallance
§ 490:3-403(2)(a)	Bank of Hawaii v. Allen
§ 507-41; -42	Media Five Ltd. v. Yakimetz; Quality Masons, Inc. v. Tomita
§ 507-43	Quality Masons, Inc. v. Tomita
§ 507-43(a)	Haas & Haynie Corp. v. Pacific Millwork Supply, Inc.
§ 514-35; -41	Hugh Menefee, Inc. v. Hale Kekoa Joint Venture
§ 514A-94	D'Elia v. Association of Apt. Owners of Fairway Manor
ch. 514E	County of Maui v. Puamana Mgt. Corp.
§ 531-1; -2	In re Coleman
§ 571-1	In re Doe, Born on Aug. 7, 1961
§ 571-3	Wallace v. Wallace
§ 571-8.5(a)(6)	Cleveland v. Cleveland
§ 571-13	In re Doe, Born on Aug. 7, 1961
§ 571-22	In re Doe, Born on Jan. 19, 1961; In re Doe, Born on May 6, 1961; In re Doe, Born on June 11, 1961
§ 571-22(a); (b)(3)	In re Doe, Born on Aug. 7, 1961
§ 571-41	Sabol v. Sabol
§ 571-43	In re Doe, Born on Aug. 7, 1961
§ 571-45; -46	Sabol v. Sabol
§ 576	Vaughan v. Williamson
§ 578-1; -2; -12	In re A Male Minor Child
§ 580-9	Horst v. Horst

§ 580-47	Ahlo v. Ahlo; Brown v. Brown; Cleveland v. Cleveland; Fletcher v. Fletcher; Green v. Green; Horst v. Horst; Kim v. Kim; Linson v. Linson; Sheedy v. Sheedy; Vaughan v. Williamson; Vessey v. Vessey; Wallace v. Wallace; Wright v. Wright
§ 580-51	Vessey v. Vessey
§ 580-56	Vaughan v. Williamson
§ 580-56(a)	Jendrusch v. Jendrusch
§ 583-3(a)	Allen v. Allen
§ 601-7(b)	Minatoya v. Mousel
§ 602-1	Haas & Haynie Corp. v. Pacific Millwork Supply
§ 603-12	Wallace v. Wallace
§ 607-3	Minatoya v. Mousel
§ 607-9	Smothers v. Renander
§ 607-14	Cuerva & Associates v. Wong; Hall v. Andow; Smothers v. Renander; Wiginton v. Pacific Credit Corp.
§ 607-17	Cuerva & Associates v. Wong; Hall v. Andow; Powers v. Shaw; Smothers v. Renander
§ 612-16(d)	State v. Freedle
§ 621-26	State v. White
§ 621-33	Kalauli v. Lum
§ 634-59	Calasa v. Greenwell
§ 634-61	Mitsuba Publishing Co. v. State
§ 641-1	Mohl v. Bishop Trust Co.
§ 641-1(b)	International Market Place Corp. v. Liza, Inc.
§ 622-13	DeMund v. Lum
ch. 656	Swoish v. Panda Foods
§ 657-7.3	Jacoby v. Kaiser Found. Hosp.
§ 657-7.5	Wakuya v. Oahu Plumbing & Sheet Metal
§ 657-8	Board of Directors of the Ass'n of Apt. Owners v. Regency Tower Venture
§ 657-31	Moffat v. Speidel
§ 658-9; -10	Hayashi v. Chong
§ 662-15(4)	Mitsuba Publishing Co. v. State
§ 663-4	Mitsuba Publishing Co. v. State
§ 663-31	Chainey v. Jensen
§ 666-2	Stewart v. Melnick
ch. 668	Hana Ranch, Inc. v. Kanakaole; Jendrusch v. Jendrusch
ch. 669	Hana Ranch, Inc. v. Kanakaole
§ 669-3	Calasa v. Greenwell

§ 685-5 ..... Yoshioka v. E.F. Hutton & Co.
§ 699-1 ..... Minatoya v. Mousel
§ 701-704 ..... State v. Liuafi
§ 701-105 ..... In re Kaohu
§ 701-109 ..... State v. Moyd
§ 701-109(1) ..... State v. Liuafi
§ 701-109(2) ..... State v. Lima
§ 701-109(4) ..... State v. Alvey
§ 701-115 ..... State v. Carson; State v. Realina
§ 701-118(7); (8) ..... State v. Le Vasseur
§ 702-206(3)(c) ..... State v. Freedle
§ 702-214 ..... State v. Pacariem
§ 703-300 ..... State v. Realina
§ 703-300(1) ..... State v. Sanchez
§ 703-300(4) ..... State v. Napoleon; State v. Realina
§ 703-301 to -304 ..... State v. Realina
§ 703-304(1) ..... State v. Sanchez
§ 703-304(2) ..... State v. Realina
§ 703-304(5) ..... State v. Napoleon
§ 703-305 to -309 ..... State v. Realina
§ 704-400 ..... State v. Valentine
§ 704-404 ..... State v. Valentine
§ 704-411 ..... State v. Valentine
§ 705-500 ..... State v. Liuafi
§ 706-621 ..... State v. Le Vasseur
§ 706-626 ..... In re Kaohu
§ 706-626(3) ..... State v. Pokini
§ 706-627; -628; -630 ..... In re Kaohu
§ 707-700(2); (3) ..... State v. Lima
§ 707-701 ..... State v. Liuafi; State v. Rapozo
§ 707-702 ..... State v. Pacariem
§ 707-702(1)(a) ..... State v. Freedle
§ 707-712 ..... State v. Lima; State v. Nieves; State v. Sanchez
§ 707-712(1)(a) ..... State v. Rezac
§ 707-715(a); -720 ..... State v. Realina
§ 707-730 ..... State v. Lima; State v. Messamore; State v. Moyd
§ 707-731 ..... State v. Lima
§ 707-736 ..... State v. Lima; State v. Messamore
§ 708-10(1)(c) ..... State v. Alvey
§ 708-221; -222 ..... State v. Harper
§ 708-800 ..... State v. Miner
§ 701-801(1) ..... State v. Mayo
§ 708-810 ..... In re Doe, Born on Aug. 7, 1961; State v. Alvey
§ 708-813(1) ..... State v. Miner
§ 708-814(c) ..... State v. Yee
§ 708-831 ..... State v. Damas; State v. Jenkins; State v. Karwacki

§ 708-831(1)(b)	State v. Crowder; State v. Kutzen; State v. Preston; State v. Le Vasseur
§ 708-832	State v. Alvey
§ 708-833	In re Doe, Born on Aug. 7, 1961
§ 708-834(1)(b)	State v. LeVasseur
§ 708-836	In re Doe, Born on Aug. 7, 1961; State v. Brown
§ 708-840	In re Doe, Born on Aug. 7, 1961; State v. Manipon
§ 708-840(1)(b); (2)	State v. Harper
§ 708-841(1)(b)	State v. Alsip
§ 708-842	State v. Manipon
§ 708-852	State v. Thompson
§ 710-1000(9)	State v. Lee
§ 710-1027	State v. Lee
§ 710-1060	State v. Lee
§ 711-1101	State v. Nakasone
§ 711-1106	State v. Valentine
§ 712-1204	State v. Medeiros
§ 712-1223	State v. Allen
§ 712-1231	State v. Allen
§ 712-1241	State v. Mata
§ 712-1242(1)(c)	State v. Fabio
§ 804-16	State v. Lee
ch. 853	State v. Brown

HAWAII RULES OF CIVIL PROCEDURE

Rule 5(b)	Manley v. Mac Farms, Inc.
Rule 6(b)(2)	Escritor v. Maui County Council
Rule 8	Dang v. Mt. View Estates
Rule 8(a)	Giuliani v. Chuck
Rule 9(b)	Dement v. Atkins
Rule 11	Brodie v. Hawaii Retail Automotive Gasoline Dealers Ass'n
Rule 12	Hupp v. Accessory Distributors
Rule 12(b)	Ailetcher v. Beneficial Fin. Co.; Bright v. ASCAP
Rule 12(b)(6)	Gamino v. Greenwell; Giuliani v. Chuck
Rule 12(c)	Association of Apt. Owners of 1555 Pohaku v. Walker-Moody Constr.
Rule 13	Carnation Co. v. Haunani Enter.
Rule 15(b)	Coleman Industries v. Tony Team, Inc.
Rule 15(c)	Wakuya v. Oahu Plumbing & Sheet Metal

Rule 17(d)	Escritor v. Maui County Council; Wakuya v. Oahu Plumbing & Sheet Metal
Rule 23	Carnation Co. v. Haunani Enter.
Rule 23.1	Phillips v. Kula 200
Rule 24	Chierighino v. Bowers
Rule 24(a)(2), (b), (c)	Amfac Fin. Corp. v. Pok Sung Shin
Rule 30(c)	Kalauli v. Lum
Rule 32(d)	Sanders v. Point After, Inc.
Rule 32(d)(3)(b)	Yoshimoto v. Lee
Rule 37(a)(4)	Cuerva & Associates v. Wong
Rule 41(b)	Brodie v. Hawaii Retail Automotive Gasoline Dealers Ass'n; Ellis v. Harland Bartholomew & Associates; GLA, Inc. v. Spengler; Harris v. State; Hawaii Retail Automotive Gasoline Dealers Ass'n v. Brodie; Lau v. Wong; Santos v. Perreira; Wiginton v. Pacific Credit Corp.
Rule 42(a)	Carnation Co. v. Haunani Enter.
Rule 42(b)	International Market Place Corp. v. Liza, Inc.; Sanders v. Point After, Inc.
Rule 45(b)	Powers v. Shaw
Rule 43(b)	Kalauli v. Lum
Rule 50	Silva v. Bisbee
Rule 50(a)	Miho v. Albrecht
Rule 50(b)	Board of Directors of the Ass'n of Apt. Owners v. Regency Tower Venture
Rule 52	Michely v. Anthony; Suesz v. St. Louis-Chaminade Educ. Center; Winslow v. State
Rule 52(a)	Hana Ranch, Inc. v. Kaholo; Harris v. State; In re Sing Chong Co.; Jessmon v. Correa; Nordmark v. Hagadone; Scott v. Contractors License Bd.; Smothers v. Renander; State v. Kauai Kai, Inc.; Title Guar. Escrow v. Powley; Wick Realty v. Napili Sands Maui Corp.; Wright v. Chatman
Rule 54	Vieira v. Robert's Hawaii Tours

Rule 54(b)	Employees' Retirement Sys. v. Big Island Realty; Ford v. Holden; Hana Ranch, Inc. v. Kanakaole; International Market Place Corp. v. Liza, Inc.; King v. Ilikai Properties; Mohl v. Bishop Trust Co.; Park v. Esperanza; Sturkie v. Han;
Rule 54(d)	Smothers v. Renander
Rule 55(b)	Hupp v. Accessory Distributors
Rule 55(b)(2)	Manley v. Mac Farms, Inc.
Rule 55(c)	Hupp v. Accessory Distributors; Paxton v. State
Rule 56	Association of Apt. Owners v. Amfac, Inc.; Bank of Hawaii v. Allen; Bright v. ASCAP; Brodie v. Hawaii Automotive Retail Gasoline Dealers Ass'n; Carnation Co. v. Haunani Enter.; DeMund v. Lum; DiTullio v. Hawaiian Ins. & Guar. Co.; Gamino v. Greenwell; Giuliani v. Chuck; Kajiya v. Department of Water Supply; Standard Oil Co. of California v. Hawaiian Ins. & Guar. Co.; Winslow v. State; Wiginton v. Pacific Credit Corp.
Rule 56(c)	Carriers Ins. Co. v. Domingo; Kawaihae v. Hawaiian Ins. Cos.
Rule 56(e)	Association of Apt. Owners of 1555 Pohaku v. Walker-Moody Constr.; Brodie v. Hawaii Automotive Retail Gasoline Dealers Ass'n; Crutchfield v. Hart; Dang v. Mt. View Estates; Jacoby v. Kaiser Found. Hosp.; Munds v. First Ins. Co. of Hawaii; Ottensmeyer v. Baskin
Rule 56(f)	Brodie v. Hawaii Automotive Retail Gasoline Dealers Ass'n; Crutchfield v. Hart
Rule 56(g)	Suesz v. St. Louis-Chaminade Educ. Center
Rule 59	Au v. Kelly; Price v. Christman
Rule 59(a)	City & County of Honolulu v. Ambler; Cuerva & Associates v. Wong
Rule 59(c)	Hupp v. Accessory Distributors
Rule 59(e)	Cuerva & Associates v. Wong; Escritor v. Maui County Council
Rule 60	Giuliani v. Chuck

Rule 60(b)	City & County of Honolulu v. Bennett; Paxton v. State
Rule 60(b)(1)	Isemoto Contracting Co. v. Andrade
Rule 60(b)(4)	Calasa v. Greenwell; Isemoto Contracting Co. v. Andrade
Rule 60(b)(6)	Calasa v. Greenwell; Cuerva & Associates v. Wong; Dowsett v. Cashman; Isemoto Contracting Co. v. Andrade
Rule 65(d)	County of Maui v. Puamana Mgt. Corp.; Moffat v. Speidel; State v. Motorists, Inc.
Rule 72(e), (k)	Scott v. Contractors License Bd.
Rule 73	Price v. Christman; Wiginton v. Pacific Credit Corp.
Rule 73(a)	Chierighino v. Bowers; Dowsett v. Cashman; Employees' Retirement Sys. v. Big Island Realty, Inc.; Escritor v. Maui County Council; Hana Ranch, Inc. v. Kanakaole; King v. Ilikai Properties, Inc.
Rule 75(c)	State v. Bigelow
Rule 77(d)	Escritor v. Maui County Council

HAWAII RULES OF PENAL PROCEDURE

Rule 5(b)(1), (4); 7(a)	State v. Allen
Rule 12(b)(3)	State v. Mitake; State v. White
Rule 12(e)	State v. Mitake
Rule 12.1	State v. Ah Lo
Rule 16	State v. Rapozo
Rule 16(b)(1)(i)	State v. Feliciano
Rule 16(e)(8)(i)	State v. Feliciano
Rule 21	State v. Moyd
Rule 23(c)	State v. Bigelow
Rule 24(a)	State v. Le Vasseur
Rule 37(b), (c)	State v. Allen
Rule 39(b)	State v. Bigelow
Rule 40	State v. Rapozo
Rule 41(e)	State v. Brighter; State v. Mitake
Rule 48	State v. Mitchell
Rule 49(c)	State v. Allen
Rule 52(b)	State v. Carson; State v. Liuafi

HAWAII SUPREME COURT RULES

Rule 3(b)	John Wilson Enter. v. Carrier Terminal Serv.
Rule 3(b)(3)	Silver v. George

Rule 3(b)(4)	City & County of Honolulu v. Bennett
Rule 3(b)(5)	City & County of Honolulu v. Bennett; Hana Ranch, Inc. v. Kaholo; King v. Ilikai Properties, Inc.; State v. Amaral; State v. Napoleon; State v. Pacariem; State v. Preston; Tanuvasa v. City & County of Honolulu; Wright v. Chatman
Rule 3(f)	Hana Ranch, Inc. v. Kaholo
Rule 9(e)	Cuerva & Associates v. Wong
Rule 16.2	Giuliani v. Chuck
Rule 22	Association of Apt. Owners v. Amfac, Inc.

HAWAII INTERMEDIATE COURT OF APPEALS RULES

Rule 6(d)	State v. Rapozo
Rule 9	City & County of Honolulu v. Bennett
Rule 9(e)	Sturkie v. Han

HAWAII RULES OF CIRCUIT COURT

Rule 7(a)	City & County of Honolulu v. Bennett
Rule 7(b)	Ottensmeyer v. Baskin
Rule 12(f)	GLA Inc. v. Spengler; Wiginton v. Pacific Credit Corp.
Rule 18(a)(1)	Boudreau v. General Elec. Co.
Rule 21	Isemoto Contracting Co. v. Andrade
Rule 23	GLA Inc. v. Spengler; Isemoto Contracting Co. v. Andrade
Rule 28	Wakuya v. Oahu Plumbing & Sheet Metal

HAWAII FAMILY COURT RULES

generally	Sheedy v. Sheedy; Wallace v. Wallace
Rule 16(b)	Sabol v. Sabol
Rule 52	Horst v. Horst
Rule 52(a)	Jendrusch v. Jendrusch
Rule 59(b); (d)(1)	Ahlo v. Ahlo
Rule 60	Wallace v. Wallace
Rule 60(b)	Ahlo v. Ahlo
Rule 60(b)(6)	Jendrusch v. Jendrusch
Rule 70	Gamino v. Greenwell
Rule 75(c)	Sabol v. Sabol