PAPERS

OF THE

HAWAIIAN HISTORICAL SOCIETY

No. 7.

THE EVOLUTION OF THE HAWAIIAN JUDICIARY.

Presented before the Hawaiian Historical Society June 29, 1894,
by Hon. W. Frear, Associate-Justice of the Supreme Conrt.

THE EVOLUTION OF THE HAWAIIAN JUDICIARY.

TWO PERIODS OF JUDICIAL HISTORY.

The history of the Hawaiian Judiciary may be conveniently divided into two periods: The first, which may be briefly described as the period of absolute government, extending from the earliest migrations of Hawaiians to these shores, say about the fifth century of the Christian Era, to the year 1840; the second, which may be called the period of constitutional government, extending from the year 1840 to the present time. During the first of these periods but little progress was made in the evolution of the judiciary. During the second period, as a result of peculiar conditions of political, social and industrial change, and the intermingling of the foreign and aboriginal races, of widely different but gradually assimilating ideas and needs, development has been rapid—until now, for independence, for completeness and simplicity of organization, and for satisfactory administration of justice, the Hawaiian Judiciary occupies a high place among the judiciaries of the most advanced nations.

FIRST PERIOD TO 1840—NO DISTINCT JUDICIARY.

During the first period the system of government was of a feudal nature, with the King as lord paramount, the chief as mesne lord and the common man as tenant paravail—generally three or four and sometimes six or seven degrees. Each held land of his immediate superior in return for military and other services and the payment of taxes or rent. Under this system all functions of government, executive, legislative and judicial, were united in the same persons and were exercised with almost absolute power by each functionary over all under him, subject only to his own superiors, each function being exercised not consciously as different in kind from the others but merely as a portion of the general power possessed by a lord

over his own. There was no distinct judiciary and scarcely any conception of distinct judicial power, and yet judicial forms were to some extent observed. Our authentic knowledge of them is meager and probably does not much antedate the reign of Kamehameha I.

REDRESS WITHOUT TRIAL.

The usual method of obtaining redress was for injured parties or their friends to take the law into their own hands and retaliate, as for instance in cases of assault or murder. The offender might, however, escape by fleeing to a city of refuge. In cases of theft the injured party went to the thief's house and took whatever he could find—the thief, even though the stronger of the two, being restrained by public sentiment from offering resistance. This was not mere unbridled anarchy, though closely bordering upon it, but was well recognized as a justifiable legal proceeding. Even at the present time among the most civilized nations, similar remedies are allowed, in some cases by the law as in cases of distraint, recaption, and abatement of nuisance, and in other cases by juries or by common consent in disregard of the law.

CIVIL TRIALS—COURTS—JURISDICTION.

The practice of taking the law into one's own hands, however, was seldom resorted to in cases in which the wrong-doer was of higher rank than the injured party, or, if of inferior rank, belonged to another chief. In such cases the injured party appealed for justice to the King or some chief within whose territory the accused resided. Jurisdiction depended on the place where the offender was domiciled, or rather upon the lord to whom he belonged, not upon the place where he was found or where the offense was committed. Any chief from the immediate lord of the wrong-doer to the King might take cognizance of the offense and from the decision of any chief an appeal lay to any one of his superiors. Thus there was a series of courts, which might be called local, district and national, or, under Kamehameha, district, island and national, each presided

over by one person whose jurisdiction extended over all persons domiciled within his territory and was original, and to some extent concurrent and appellate.

PROCEDURE.

There were no regular police, but the King and each chief had a number of attendants at hand, whose duty it was with the aid of their dependents to execute orders and judgments. Upon complaint being made, the parties were summoned to appear, generally in the house or front yard of the king or chief. Judgment was not often rendered until they were both heard face to face. Witnesses were rarely, if at all, examined. There was no jury, no prosecuting attorney, no lawyer to exact fees, raise technical points or create delays. Each party argued his own cause, often with great eloquence, and usually sitting cross-legged before the judge. The trial was speedy and the litigation inexpensive, but then as now not always satisfactory. Judgment was promptly rendered and as promptly executed.

POWER OF JUDGES—NATURE OF JUDGMENTS.

The personal and official characters of the judge were not distinguished. He was not bound to act impersonally as the mere mouthpiece of the law, but might decide according to his own notions of justice or expediency, and yet as a rule he was constrained by public opinion and policy to observe the recognized law. As to the penalty which he might impose, in respect to both its nature and amount, he might exercise great discretion, and might either before or after the commission of the offense grant the offender immunity from punishment. Much depended not only upon the character and enormity of the offense but often also upon the personal disposition of the chief, or the favor or disfavor in which he held the respective parties, or upon the intervention of friends who had influence with him. There was no distinction between public and private wrongs. The relief granted might be legal or equitable; restorative, compensatory or punitive. In case of theft, restoration of the stolen property and payment of damages in the nature of a fine was

often adjudged; but if the theft was from a high chief the culprit might be bound hand and foot and set adrift far out at sea in an old worn out canoe. The remedy for disturbance of a water right was the restoration of the right. Adultery among the higher ranks was sometimes punished by decapitation. Banishment to another island was not uncommonly imposed for various offenses. The penalty for breach of etiquette by a tenant toward his lord was often extremely severe; the eyes might be scooped out or the limbs broken, and after several days of torture the victim might finally be put to death by burning, strangling, clubbing or in some other way.

RELIGIOUS TRIALS—ORDEALS.

There were ecclesiastical as well as civil tribunals. The political and religious systems being closely interwoven, the jurisdiction of the priests was not confined to breaches of the religious taboos, but was to some extent concurrent with that of the chiefs over civil wrongs. The procedure, however, was quite different. Their trials were by ordeal and were of two kinds, ordeal by fire and ordeal by water.

One form of the water ordeal was the "wai halulu," or shaking water. A calabash of water was placed before the suspected person. After a prayer had been offered by a priest, the accused was required to hold both hands, with fingers spread out, over the calabash, while the priest closely watched the water. If it shook, the accused was guilty, otherwise innocent. The shaking of the water may have been accomplished by sleight of hand, or perhaps the consciousness of his guilt made the culprit's hands shake sufficiently to produce by reflection or shadow a tremulous appearance in the water.

Fire-ordeal was often resorted to in cases of theft and was as follows: The complainant first paid a fee or costs of court, usually a pig. A fire was then kindled and three kukui* nuts were broken, one of which was thrown into the fire. While it was burning a priest uttered a prayer. So with the other nuts, one after the other. If the thief appeared and made restitution of the stolen property before all the nuts were consumed, he was dismissed with a heavy fine. Otherwise a proclamation was made that the theft had been committed and that the thief was being prayed to death. The thief then generally pined away and died, overcome by superstitious fears that he was the object of the wrath of the avenging deity.

*Aleurites moluccana, or Candle-nut.

It will be noticed that the trial by fire-ordeal might take place in the absence of the suspected person or even without a suspicion against any person in particular, the ordeal serving as both detective and court; also that both forms of the Hawaiian ordeal were in a measure based upon reason and justice. The ascertainment of the truth depended upon, or at least might have been left to, the operation of the guilty conscience of the accused, and the presumption was in favor of innocence; while in most forms of ordeal as found among other races the burden of proof was upon the accused to establish his innocence and this could be done in theory only through the miraculous interposition of providence, in practice only by chance or legerdemain.

NATURE OF LAWS AND LITIGATION.

The extent to which judicial forms were observed, the nature of the cases that were likely to arise and the efficiency with which rights were protected, varied from time to time with the character of the rulers, the nature of the laws, and the state of society. The laws, all of them unwritten, were established by usage, or by the edict of the King, and proclaimed throughout the country by heralds. Of these, the taboos, imposed in early times for religious purposes only, but afterwards also made use of by the chiefs for political purposes, in order that they might add to their civil authority the sanction of religion, formed the largest and most complex as well as most oppressive body of laws. Next in number but first in importance, came the laws of real property upon which the whole system of government was based, including the laws of tenure, water rights, fishing rights and taxation. Laws relating to personal security were few but important, the violations of which, considered more as

torts than as crimes, generally took the form of assault and occasionally of murder. There was little occasion for the law of contracts; for, estates in real property were created and transferred by favor rather than by contract; and personal property, of which very little was accumulated owing to the rapacity of the chiefs, was exchanged only by barter, in which case the bargain was not binding until delivery of the goods and expression of satisfaction by both parties and then it became irrevocable. Domestic relations were little regulated by law; parents might do as they pleased with their children, often giving them to others or putting them to death; marriage and divorce rested upon the consent of the parties or their relatives.

KAMEHAMEHA'S REIGN, 1782–1819.

Until the fifteenth century, peace, prosperity and security appear to have prevailed. The next four centuries were filled with turmoil, strife and oppression. But during the reign (1782–1819) of Kamehameha I., who united the group under one government, peace and security returned; appointments to office were based on merit rather than favor; the laws both civil and religious were made more uniform and were rigidly enforced; the oppression of the petty chiefs or inferior lords was checked; their power was broken, and that of the central government was strengthened. During that reign occurred the change from the island to the national system. Previously there had been one, sometimes more than one, king over each of the principal islands. But then one lord paramount or king, and therefore one supreme judicial, as well as executive and legislative officer, took the place of several. Next under him were the governors appointed by him over the different islands, taking the place of the former tenants *in capite* or perhaps rather the place of the former island kings, for they had almost regal powers. Then came the under chiefs appointed by the several governors, with the approval of the King, over districts and villages, and also the tax officers, who acted under the governors in tax and land matters. Thus there was a change not only from an island to a national system, but from a complex to a simple system. The courts, if we may at this stage call

them such, were reduced practically to three grades; the national or supreme, presided over by the King; the island or superior, presided over by the several governors; and the two classes of district or inferior courts, presided over by the under chiefs and tax officers respectively, whose jurisdiction was concurrent as to territory but different as to subject matter. The territorial divisions which have remained substantially unchanged ever since, also become established in this reign. There were four general divisions presided over by the governors, the islands of Hawaii and Oahu each constituting one, and the islands of Maui and Kauai with the adjacent smaller islands respectively constituting the others; so that now when we speak of Maui as a judicial division we tacitly include Molokai, Lanai and Kahoolawe, and likewise Niihau is regarded as included in Kauai. During this reign also, as a result chiefly of foreign influences, the religious system was undermined, and upon the death of Kamehameha in 1819, it fell to pieces. Thus ended all ecclesiastical jurisdiction, whether over civil or religious causes. Not, however, civil jurisdiction over religious matters. This continued to be exercised against the idolatry which survived the overthrow of the native religion, and also against Roman Catholicism, beginning in 1830, a few years after its introduction. It was considered lawful as against the Catholics until the Edict of Toleration of 1839 and as against native idolatry until the Declaration of Rights of 1839 and the Constitution of 1840 which guaranteed religious liberty. The inferior judges, however, in their ignorance and zeal, occasionally tried cases of idolatry until as late as the year 1857.

FROM THE DEATH OF KAMEHAMEHA TO THE FIRST CONSTITUTION, 1819-1840.

Kamehameha, in view of the weaknesses of his son and successor,* by will established the office of Kuhina Nui, or Premier, who was to have power co-ordinate with that of the king. These, the King and Premier, may be said to have then constituted the Supreme Court, and they acted to some extent with the

***Liholiho, or Kamehameha II.**

advice of a council of high chiefs which became established during the reign of Kamehameha and afterwards continued to grow in power until it developed into the House of Nobles. Soon after Kamehameha's death the seat of government, and therefore we may perhaps say the seat of the Supreme Court, was removed from Kailua to Lahaina and Honolulu, these places having gradually grown in importance through the advent of foreigners. During the twenty years which succeeded the death of Kamehameha, the good forces set in motion by him continued to operate; Christianity was introduced the year following his death and schools were established. Under the influences of their new religion and learning, the chiefs gradually became more humane in their views toward their dependents and more observant of their rights; the common people grew to learn that they had rights; a few written laws relating chiefly to assault, murder, theft, drunkenness, gambling and oppression, were promulgated from time to time, beginning with the year 1823; the conception of judicial as distinguished from other functions became more clearly apprehended; trials were conducted with greater formality and in capital cases even the jury was introduced without the aid of statute. In 1839, a course of lectures on the science of government was delivered by the Rev. William Richards to the chiefs at their request, and in the same year the Declaration of Rights, aptly called Hawaii's *Magna Charta*, was adopted securing all rights of person and property. The nation was then ready to enter upon a course of constitutional government. This was done by the promulgation of the first constitution, October 8, 1840, with which date our second period of judicial history begins.

FROM THE FIRST CONSTITUTION TO THE ACT TO ORGANIZE THE JUDICIARY, 1840-1847—COURTS.

Under this Constitution legislative, executive and judicial powers were distinguished, but not with great clearness and they were still conferred upon the same persons. The supreme judicial power which with other powers had been previously exercised by the King and Premier, who acted to some extent

with the advice of the council of chiefs, was now vested in a Supreme Court consisting of the King, the Premier, and four other chiefs elected by the representative body.* The island courts, by usage or custom rather than by the express language of the Constitution, continued to be held by the Governors.† The lower courts were, as before, of two kinds, those of the tax officers and those of the district judges, the number of whom rested in the discretion of the Governors. In Honolulu there were at one time five district judges.

Notwithstanding the meagerness of the constitutional provisions relating to the judiciary there was, with the exception of the short "Law for the Regulation of Courts" of 1842, scarcely any legislation upon this subject until the comprehensive "Act to Organize the Judiciary Department" of 1847. These seven years were years of transition, during which under trying circumstances the judiciary developed into the fairly complete system set forth in the Act of 1847.

JURIES.

The Act of 1842 related chiefly to juries. These had been in use for several years and were mentioned incidentally in the Constitution, but had not yet been regulated by law. The tax officers and district judges were to sit without a jury, the former to hear tax and landlord and tenant cases, the latter to hear other cases in which the fine or damages amounted to less than one hundred dollars. Cases in which the penalty was death, banishment or other punishment of magnitude, or in which the fine or damages amounted to over one hundred dollars were to be heard with a jury by the Governors' courts or by the Supreme Court. In practice jury trials were confined to the Governors' courts.

The jury was to be composed of foreigners if both parties were foreigners; of natives, if both were natives; half of foreigners and half of natives, if there were a foreigner on one side and

*The king was Kauikeaouli, or Kamehameha III. The Premier was Kekauluohi (a woman); she died June 7, 1845, and was succeeded by Keoni Ana (John Young, Jr.) The other judges were Abner Paki, Charles Kanaina, Jona Kapena and Kaauwai. Kaauwai resigned in November, 1844, and was succeeded by Josua Kaeo.

†One of these courts was held for a time by a woman, Kekauonohi, Governess of Kauai.

a native on the other. The term foreigner (haole) was construed by the courts to include those who were naturalized as well as aliens. In capital cases unanimity, in other cases agreement of three-fourths of the jury was required for a verdict. The jury must be not less than twelve in number, excepting that in cases other than capital, the jury, if foreign, might be less in number but not less than eight,—this on account of the small number of foreigners in any one locality. As a matter of fact either eight or twelve jurors were usually drawn, but in at least one case,* if correctly reported, the jury numbered eleven. The Supreme Court, before which the most important cases might come, and which before had no regular terms, but now was to sit twice a year, was to sit only at Honolulu and Lahaina, since these were the only places where a sufficient number of foreign jurymen were likely to be found for capital cases. In the Governor's court there were to be no jury trials in the back country but only at the Governor's residence. As a further means of obtaining a sufficient number of foreign jurymen the Governor might call upon captains of vessels in port at the time of the trial. In one case† tried in 1844 before Governor Young at Lahaina, the whole jury of twelve consisted of captains of whaling vessels.

In all cases the jury was to be selected by the Hawaiian authorities except in a criminal case against a Frenchman. In such case, by the convention forced upon the King by Captain Laplace, June 17, 1839, the accused was to be tried by a jury proposed by the French Consul and accepted by the Hawaiian Government. A similar provision was inserted in the British Convention of 1844, and in both the French and British treaties of 1846, notwithstanding the acknowledgment of Hawaiian independence and capacity for self-government by those nations in 1843.

Questions of fact were to be decided by the jury; questions of law by the judge. But this was not clearly understood until the decision of the Supreme Court in the case of Ricord, Curator vs. Charlton in June, 1845; for questions of law as well as of

*_In re_ Guardianship F. J. Greenway, a _non compos_, 1844.

†Tyron vs. Calkin, Sept. 17, 1844.

fact were generally argued and submitted to the jury. In a probate case* in 1844 the only material questions left to the jury were questions of law upon the construction of a will.

LAW CASES.

The laws recognized but little difference between civil and criminal cases. The native language not admitting of fine distinctions, but one word, "hewa," was used in the laws to denote offense, literally "wrong," and this included both torts and crimes. As a rule therefore civil and criminal actions were blended, and the judgment, consisting of fine and damages in one sum, was divided between the Government and the injured party in certain proportions. Thus, in one case† a person was found guilty by the lower judges of stealing twenty-one goats and placing his mark on them. The penalty was fourfold‡ or eighty-four goats, half to go to the Government and half to the owner. Upon appeal to the Governor and a jury, the latter having affirmed the judgment of the lower judges and recommended mercy, the Governor remitted the Government's half and ordered the defendant to deliver the balance to the owner within thirty days on pain of having execution issued for their value at fifty cents each. As time went on, however, civil and criminal actions came to be distinguished more and more, especially in foreign cases.

CHAMBER CASES.

Chamber cases, in equity, probate, admiralty and bankruptcy, tried by the judge as distinguished from law cases, civil and criminal, tried by the court, were not recognized by the laws, but as they arose one after another the Governor assumed jurisdiction, and, with the assistance of the Attorney General,§ decided them, when between foreigners, in accordance with the principles of American and English jurisprudence. The King also on one occasion‖ as Chief Justice of the Supreme Court

* Estate of Homai, June, 1844

† Rowlinson vs. Sumner, July 20, 1844.

‡ Following the mosaic law.

§ John Ricord, appointed March 9, 1844.

‖ In Brinsmade vs. Jarves, April 22, 1846.

took jurisdiction in chambers, sitting at eight o'clock in the evening in vacation, and granting a writ of prohibition ordering Judge Andrews not to proceed with a jury in a certain case until he had heard and passed upon a demurrer. The jury was often used in chamber cases in those days but since then partly by usage and partly by statute, this has been gradually changed until now jury trials in such cases are rare and are practically confined to certain issues in probate and bankruptcy cases, when appealed to a jury at regular term.

PROCEDURE.

Proceedings in all the courts were somewhat informal. In the lower courts, the judges, sitting one or two at a time, acted as both judge and prosecutor. There was no lawyer in the kingdom until the arrival of John Ricord in 1844. The judge would ask what the complaint was, what the defense was, and, after hearing the oral statements of the parties, would examine the witnesses, who were sometimes sworn, and finally pronounce judgment. In the Governor's court the complaint was in writing in the form of an ordinary letter. There were no other pleadings except the general answer, (which was sometimes made orally) until August, 1845, when after considerable discussion a special plea was allowed to be filed.* The first demurrer was allowed in April, 1846.† In July of the same year extensive rules of pleading and practice were issued by Judge Andrews.

POWER OF JUDGES.

As to the laws by which the courts were controlled and the extent to which they themselves possessed legislative power:—During the years 1840-1842, a number of laws were passed on a great variety of subjects, some relating to private, some to public matters, many advisory rather than mandatory, and in 1842 these were published in a small volume of two hundred pages, known at first as the "Laws of the Hawaiian Islands," later as the "Old Laws," and now as the "Blue Book," from the

* In Brewer & Co. vs. von Pfister, August 19, 1845.
† In Brinsmade vs. Jarves, *Supra.*

color of the cover, which is of a bluish green. These laws read very quaintly when compared with present laws. The penalties attached to offenses were of great variety, such as fines of money or other property, imprisonment, irons, flogging, confiscation, banishment,* and in some cases the punishment was left to the discretion of the judge both as to kind and amount. These laws could not be expected to cover all cases that might arise, and consequently it was provided, in general terms in the Constitution, that the laws should give redress to every man injured by another without his own fault and punish all men who commit wrong against either the kingdom or individuals; and, more particularly in a law of 1841, that when a case should arise to which no statute was applicable, the judge should inflict such punishment as the general principles of the new system should require, after first reflecting on those principles, the nature of the wrong and the punishment that would have been inflicted under the old system. Thus was continued considerable legislative power in the judiciary in law cases both civil and criminal. In chamber cases between foreigners the Governor generally called in the assistance of the Attorney General, who usually wrote out an elaborate opinion with marginal references to authorities and applied the principles to the case in question. The Governor would then adopt the opinion as his own and add that future adjudications would be governed by the same principles and marginal references. Likewise in law cases between foreigners he would adopt the instructions of the Attorney General delivered to the jury. Thus large branches of common law and equity, admiralty and probate law were adopted by the Governors. The Supreme Court also felt at liberty to do the same. The King in his decision granting the writ of prohibition above referred to, says, "I have power to restrain those who are under me when they go too fast. This was the ancient custom. I often still practice it for the benefit of my native subjects; and I am informed out of the books of foreign countries that such power properly exists in a chief judge over any court under him." In their decision in the Charlton case, the Supreme Court in granting a

* To the island of Kahoolawe.

new trial ordered that it should be deferred until the record should be sent to England for the opinion of jurists there. This was done and the decision was supported by those jurists. In his speech to the Legislature in 1846, the King said that he reserved the right in foreign cases of delicacy or difficulty to take counsel abroad when he considered it expedient.

FOREIGN INTERFERNCE: CHANGES IN JUDICIARY.

Under the circumstances the administration of justice during the seven years under consideration was as good as could reasonably be expected. Among the natives a sense of security prevailed such as had been unknown before. The very first person tried for murder under the new laws was a high chief.* He was convicted by a jury of twelve chiefs and was hung. The people felt that rank was no longer a shield from the penalties of crime. Foreigners also were well satisfied as a rule. The laws and the policy of the courts were well adapted to the intermixture of barbarism and civilization then existing. But there was a class of foreigners who for many years had done all they could to embarrass the Government, and who now concentrated their assaults upon it chiefly through the courts, challenging their jurisdiction and methods of procedure, and resisting their process. The principal scene of action was the Governor's court on Oahu. It was largely owing to some of the cases that came before this court that Lord George Paulet, upon the representations of the British Consul, Richard Charlton, made the demands which brought about the provisional session of the Islands to Great Britain in 1843, when for more than five months all jurisdiction over foreigners was taken from the regular courts. After this the American Commissioner, George Brown, did what he could to embarrass the court, sometimes appearing as counsel, and conducting himself in such a way as would render him liable to punishment for contempt were he not the representative of a foreign nation. He was so informed by our Government, and requested to appear no more in court and finally to leave the country. In connection with these cases, much diplomatic correspondence was carried on, in which the positions taken by

* Kamanawa, grandfather of King Kalakaua, tried in 1840.

our Government were generally sustained by the American and British Governments. These tribulations and this correspondence were of great value in pointing out the need of judges familiar with the common law and the needs to be provided for in the Act of 1847. At first, the Governor, Mataio Kekuanaoa, who was a man of great ability, but necessarily unlearned in the common law, wrestled alone. Later he sat in foreign cases with Dr. Judd on one side and John Ricord on the other. The latter had been appointed Attorney-General and was to act as co-ordinate judge when called upon by the Governor. In such cases he was often obliged to act both as attorney and judge, his opinion or instructions to the jury, as already mentioned, being written out and adopted by the Governor as his own. This was not satisfactory, but for a time, could not be avoided, because of the scarcity of legal minds then in the country. On September 19, 1845, however, the Governor appointed Lorrin Andrews to act as his substitute in all foreign cases. Judge Andrews himself did not have altogether a smooth time. In one case* in which he rendered judgment against a sea captain for a seaman's wages, he was defied by the captain to collect the judgment. Execution was issued against the captain's cargo, and to enforce this the police and military forces were in boats on their way out to the vessel which was defended by the captain and crew with cutlass, harpoons and spades, when the plaintiff to avoid bloodshed withdrew his claim.† By the Act of 1846 to Organize the Executive Departments, it was provided that until the passage of the Act of 1847 to Organize the Judiciary Department, there should be appointed one or more judges to sit at Honolulu with original jurisdiction in cases involving over one hundred dollars in value and appellate jurisdiction in all other cases from all the local courts of the kingdom, and also special police justices to sit without a jury at Lahaina and Honolulu (the centers of foreign population and therefore of crime) in cases involving less than one hundred dollars in value. Accordingly Lorrin Andrews was appointed, June 24, 1846, as one of such judges of original and appellate jurisdiction, and afterwards, on

* Hughes vs. Lawrence, October, 1845.

† The owners of the vessel in New Bedford, Mass., afterwards reproved the Captain and signified their readiness to satisfy the judgment.

December of the same year, W. L. Lee was appointed as another, the two to act jointly or severally.* Special judges had been appointed in 1844 on Hawaii and Kauai for foreign cases. Thus there was provided throughout the kingdom a judiciary well adapted to the needs of both foreigners and natives.

FROM THE ACT TO ORGANIZE THE JUDICIARY TO THE PRESENT TIME, 1847–JUNE, 1894.

We now come to the Act of 1847. The preceding seven years, as we have seen, were years of rapid growth principally by judicial adaptation to changing conditions; the period since has been one of slower growth chiefly by statutory adaptation to changing conditions. This period will be considered as a whole, although it might well be subdivided as follows: Five years under the Act of 1847, forty years under the Act of 1852, and a year and a half under the Act of 1892, each of these acts being a comprehensive act to re-organize the judiciary, and making important changes. Numerous other acts of less importance have been passed from time to time.

The Act of 1847 embodied in statutory form the results of the experiences of the preceding seven years.

FORMS OF ACTION. PROCEDURE.

Civil and criminal actions at law were clearly distinguished and chamber matters, in equity, admiralty, probate and bankruptcy, fully recognized. The former were to be heard chiefly at term by the courts, the latter in vacation by the judges.

Many rules of pleading and practice were prescribed by the statute. These have since been added to largely by statute, rules of court, judicial decisions and usage, but no code of procedure has yet been enacted. There is great need of such a code. At present we have in general a mixture of common law and code pleading and practice, somewhat modified by local usages.

* The Hawaiian Reports, of which eight volumes have been published, begin with the decisions of Judge Lee of the following month, January, 1847.

JURIES.

All juries, foreign as well as native, were to number twelve (the foreign population having increased sufficiently) and a verdict of three-fourths of these was to be sufficient in capital as well as other cases, a provision which has continued to this day with excellent results. We have seen that by treaty the French and British consuls were entitled to select juries for their respective countrymen in criminal cases. To avoid discrimination this privilege was now extended by statute to consuls of all nationalities. And although the provision was omitted from the British Treaty of 1852 and the French Treaty of 1858, it remained in the statute until 1862, at which date our judiciary became wholly independent of foreign interposition.* The race and mixed jury system is still kept up and is the only surviving part of our judicial system which distinguishes between the foreign and native races. It is destined to disappear to be replaced perhaps by a jury for all cases to be composed of men familiar with the English language without regard to nationality.

SEPARATION OF EXECUTIVE, LEGISLATIVE AND JUDICIAL FUNCTIONS.

The Act of 1847 expressly provided that the judges should be entirely independent of the executive department, and that the King in his executive capacity should not control the decisions of the judges, but this was understood to mean, not that judicial and executive, to say nothing of legislative functions, should not be exercised by the same person, but that the functions themselves when exercised by the same person should be kept separate and distinct. As to executive and judicial functions, the tax officers continued to try cases between the Konohikis† and makaainanas‡ until 1851; the Governors to try divorce and separation cases until 1853; the King and Premier to sit in the Supreme Court, and the King to have power to try impeachments

* The custom which had existed before 1847 and which was embodied in the Act of that year, that in admiralty cases between foreigners, jurisdiction should not be taken without the previous written request of the representative of the nation whose subject was concerned, had been abolished in 1855.

† Land agents of chiefs.

‡ Tenants, common people.

of Governors and Ministers until 1852. As to legislative and judicial functions, the Constitution of 1852 provided not only that they should be kept distinct but that they should not be united in any one individual or body. The Constitution of 1864 limited this to judges of courts of record, but the Constitution of 1887 provided that no judicial officer should be eligible to the legislature and no legislator should, during the term for which he was elected, be appointed to any judicial office. Nevertheless under other provisions of the various constitutions, ever since 1852, the upper house has been a court of impeachment (as the lower house had been before in certain cases) and each house a court to pass upon the qualifications of its own members. The power to try impeachments may perhaps as well remain where it is.* But the power to try election cases and to pass upon the qualifications of members of the legislature should be turned wholly over to the courts. This was partially done in 1890 by giving to the courts such jurisdiction when the legislature was not in session.†

POWER OF JUDGES.

As to the discretionary power of the courts and judges, we have seen that under the old laws in both civil and criminal cases, they possessed much power. This ceased in criminal matters in 1850 when a penal code was enacted which was intended to be complete and to leave no act criminal or punishable at the discretion of the judges, since which time penal offenses have been wholly of statutory origin. While referring to this code, we may add that the penalties were limited almost entirely to fines and imprisonment, showing the marked progress in sentiment during the preceding ten years; whipping was kept until 1872 as an alternative punishment for larceny of the fourth degree, except that it might not be inflicted upon females. As to civil matters, the Act of 1847, provided that the decisions of two-thirds of the judges of the Supreme Court should be absolute law, as binding as if passed by the Legislature, and also that any of the courts might adopt the reasonings

* No case of impeachment has ever been tried in this country.

† Such jurisdiction has since been turned wholly over to the courts by the Constitution of July 4, 1894.

and analogies of the common law and of the civil law, when deemed founded in justice and not in conflict with the laws and usages of this country. This was repealed in the Civil Code of 1859 and in its place it was provided that in civil matters the judges should apply necessary remedies to evils not specifically contemplated by law, conserving the cause of morals and good conscience, and appealing to natural law and reason or to received usage and the laws and usages of other countries; also that they might adopt the reasonings and principles of the admiralty, maritime and common law of other countries and also of the Roman or civil law so far as founded in justice and not in conflict with the laws and customs of this country. Under the authority of these acts the courts generally followed the common law, when applicable, departing from it in not a dozen cases in forty-five years and then only when it had grown obsolete or had been repealed by statute in most other common law countries. Finally in 1892 it was provided by statute that in civil matters the common law, as ascertained by English and American decisions, should be the common law of these Islands except as otherwise established by Hawaiian law, judicial precedent or national usage. Thus ended as far as possible the legislative power of the courts. We may notice here that the adoption of the common law by our courts ever since they began to adopt any foreign law is significant of the early and continued predominance here of the Anglo-Saxon civilization as distinguished from that of Continental-European nations who have for the most part followed the Roman law.

POLICE AND DISTRICT COURTS.

As to the organization of the courts:—The lower courts under the Act of 1847 remained but little changed. There were to be District Justices not over three for each district. The number was limited to two in 1852 and left unlimited in 1892. In fact only one is usually appointed except in a few of the more important districts—where two are appointed. Two of the District Justices, one at Honolulu and one at Lahaina, were as before to be Police Justices. All were to have jurisdiction with certain exceptions, over cases in which the fine or damages did

not exceed one hundred dollars. In other criminal cases they might arrest, examine and commit for trial in the higher courts.*

A Police Justice differed from a mere District Justice chiefly in these respects; he had jurisdiction over cases arising on the high seas as well as over those arising in his district; when there were both a Police and a District Justice in one district, the latter had no jurisdiction over foreigners; and for the purposes of arrest, examination and commitment in criminal matters the former had jurisdiction over the entire island or circuit in which his district was situated. The jurisdiction, both civil and criminal, of the lower courts has been frequently enlarged and restricted. Their criminal jurisdiction at present extends to all misdemeanors and some other offenses. Their civil jurisdiction was enlarged to include cases involving values up to two hundred dollars in 1868, and further up to three hundred dollars in 1890. In 1892 it was made exclusive up to fifty dollars and concurrent with that of the Circuit Courts, from fifty up to three hundred dollars. But no case of libel, slander, malicious prosecution, false imprisonment, breach of promise of marriage, or seduction, nor any case which involves title to real estate or which must be tried by jury, can be tried in the lower courts. The number of districts has been increased from twenty-four to thirty and now reduced to twenty-nine. The number of District Justices who were to be Police Justices was also increased from time to time until finally in 1892, all were made District Magistrates with the powers previously exercised by Police Justices, thus marking the growing importance of the outer districts. In 1893 the criminal jurisdiction of the Magistrates in the eight most important districts was made co-extensive with the respective circuits of which their districts formed a part.

THE SUPREME COURT.

The Supreme Court, consisting of King, Premier and four chiefs, was stripped of most of its power by the Act of 1847 and abolished in 1852, its name being transferred to what had since 1847 been known as the Superior Court of Law and Equity, but

*The grand jury has never existed in these islands.

which was in reality if not in name already the Supreme Court. Both these courts sat only at Honolulu, Lahaina having fallen out of the race for supremacy.

This Superior Court of Law and Equity was the outgrowth of the court of original and appellate jurisdiction already established, consisting of Judges Lee and Andrews. It was now to consist of a Chief Justice (Lee) and two associate Justices (Andrews and John Ii), with appellate jurisdiction in the less important cases from the lower courts and original jurisdiction in most other cases. The court held four terms a year, the three judges sitting together even in jury cases. When this became the Supreme Court in 1852, any one of the Justices might hold the court, subject to exceptions to the court *in banco*. They continued to sit together however until 1869 when, without further statutory authority, the practice was given up on account of its inconvenience. They sat singly in chambers, subject to appeal to the court *in banco*, but their respective powers were not the same, those of the Chief Justice being greater than those of the others, and those of the first associate than those of the second. They also went singly to the different circuits to hold court with the Circuit Judges. There was great lack of men learned in the law available as judges. Hence the distinction between the powers of the several justices, and the necessity of their going circuit, and of their sitting together on appeals from their own individual decisions—in order that the available talent might be made to go as far as possible. The brunt of the work fell upon Chief Justice Lee, a man of rare qualities and abilities honored and respected by all. But as the supply of suitable men available as judges gradually increased, and as growing business demanded, and growing wealth could afford it, greater judicial powers were conferred upon the associate justices until now there remains no distinction in the strictly judicial powers and duties of the Chief Justice and the two Associate Justices; also, in order to lessen the influence which a justice would have when sitting with the other justices on appeal from his own decision at chambers, or on exceptions from his own rulings at the Circuit or Supreme Court, their number was increased to five (in 1886). The results, however,

were thought not to justify the expense and the number was again reduced to three (in 1888). But in 1892 all original jurisdiction (except as to the issuance of certain writs) was transferred from the Supreme Court to the Circuit Courts, the former remaining almost purely an appellate court—on questions of law from the District and Circuit Courts, on questions of law and fact from the Circuit Judges in chambers. At the same time provision was made for supplying the place of a disqualified or absent Justice of the Supreme Court in any particular case, by a Circuit Judge or a member of the bar.

THE CIRCUIT COURTS.

The Circuit Courts under the Act of 1847 took the place to some extent of the former Island or Governors' Courts. In each circuit there were to be two judges, afterwards increased to three on Maui (1850) and Hawaii (1851) and in all circuits not to exceed three (1859)* and finally (1892) reduced to one except on Oahu where there are two.† Each Circuit Court held one term a year, (now increased to two on Maui, Kauai and each of the two Circuits on Hawaii, and four on Oahu) and was to consist of a Justice of the Superior Court (Supreme Court after 1852) sitting with one or more Circuit Judges.‡ Now that the Supreme Court is only an appellate court the Circuit Judges sit alone. The Circuit Courts had appellate jurisdiction in cases appealed from the lower courts and original jurisdiction in most other cases. The Circuit Judges in chambers had appellate jurisdiction from the lower courts in native cases, and some original jurisdiction except in foreign cases at Honolulu.

The criminal jurisdiction of the Circuit Courts, and the jurisdiction of the Circuit Judges for the purposes of arrest, examination and commitment has now (1894) been made co-extensive with the group, instead of being confined as before to the respective circuits.

* Under the Act of 1859, Maui and Kauai each had only one Circuit Judge after 1860, Oahu two until 1862 and then only one, Hawaii three for several years and then only two.

† Hawaii was divided into two circuits in 1892 but with only one Judge over both.

‡ After 1859 a Justice of the Supreme Court might sit alone in case of the inability of a Circuit Judge to be present.

CIRCUIT COURT ON OAHU.

On Oahu the Circuit Court and office of Circuit Judge were abolished because of their uselessness and needless expense, so long as the Supreme Court and its Justices had original jurisdiction on this island. This was done gradually however. In 1859 all the original chamber jurisdiction of the Circuit Judge was transferred to the Justices of the Supreme Court, and in 1864 all jurisdiction of the Circuit Court, as distinguished from the Circuit Judge, was likewise transferred to the Supreme Court, thus leaving to the Circuit Judge only appellate jurisdiction in chambers. While so sitting his court was known as the Intermediary Court, that is, intermediary between the District Courts and the Supreme Court. This jurisdiction also was finally in 1874 transferred to the Justices of the Supreme Court sitting singly in chambers. The Court thus held by a Justice was also called the Intermediary Court, though without authority of law. To hear such appeals a Justice was required to make the circuit of the island four times a year, but in 1876 this was made optional with the Justices, to obviate the necessity of going when there were no cases to be heard. In 1892 when the Supreme Court became only an appellate court the Circuit Court of Oahu was re-established.

SPECIAL COURT OF PROBATE AND DIVORCE.

Before leaving our subject we should touch upon two special courts which have been established owing to special circumstances, though with jurisdiction in cases which are ordinarily heard by the regular courts. In 1853 an increase in the number of grounds for divorce allowed by statute caused a large increase in divorce cases, amounting to nearly four hundred a year. The small-pox epidemic of the same year caused a large increase of probate cases. Consequently, the next year a special court was established with jurisdiction concurrent with that of the Justices of the Supreme Court in probate and divorce cases in which the decedent or the libellant was a native Hawaiian.* This court was abolished in 1859.

* The Judge of Probate and Divorce was Lorrin Andrews, appointed December 28, 1854, he having resigned from the Supreme Court for that purpose.

COMMISSIONER OF PRIVATE WAYS AND WATER RIGHTS.

After land claims were settled and their boundaries fixed by the Board of Commissioners to Quiet Land Titles, many holders of kuleanas* found their lands entirely surrounded by the lands of others who denied them the rights of way which they must of necessity have. To provide for the settlement of such cases, a court known as that of the Commissioner† of Private Ways was established for each district in 1856. To this was added in 1860 jurisdiction over cases relating to Water Rights. This court should now be abolished and its jurisdiction transferred to the regular courts, not only to add to the simplicity of the system and to save expense, but also to secure better service.

BRIEF SUMMARY.

Our Judiciary as it now exists may be briefly described as consisting of one Supreme Court, five Circuit and twenty-nine District Courts. The District Courts hear the less important law cases civil and criminal; the Circuit Courts hear at regular terms such cases on appeal and other law cases originally, sitting with a jury in criminal cases, without a jury in divorce cases, and with or without a jury according to the agreement of the parties in other civil cases; the Circuit Judges hear equity, admiralty, probate and bankruptcy cases at any time in chambers; the Supreme Court at regular term hears appeal cases, on points of law from the District and Circuit Courts, on points of both law and fact from the Circuit Judges.

The limits of this paper forbid the consideration of our subject in greater detail, or the treatment of many other interesting matters closely connected with it, such as attorneys, clerks, interpreters, stenographers and law libraries of the courts, the police and prison systems, the pardoning power, special courts with jurisdiction not usually conferred on ordinary courts such as that of the Board of Commissioners to Quiet Land Titles, the qualifications required for judges, the character, ability, nationality of and special services rendered by the various judges,

* Small land claim in another's land.

† The number of Commissioners was increased to three for each district in 1859, but reduced to one again in 1888. The present Commissioner for Honolulu is Mrs. Emma Nakuina.

their salaries, tenures of office, modes of appointment and removal, the classes of cases, civil and criminal, that have been tried from time to time, the nationality of criminals and litigants, and many other matters which would throw much light on the subject already treated as well as upon the general racial, political, social and industrial history of the country.

In this brief paper an attempt has been made to trace out only the general lines of development of the ordinary courts showing their development; first, in independence of the early religious system, of foreign interference, and of the other departments of government; and secondly, in simplicity and completeness of organization and the separation and clear definition of the different functions of the various courts, judges and jury. The fundamental causes of this development have been the introduction of foreign peoples, ideas and customs, the gradual civilization of the native race, and the general political, social and industrial growth of the country. This development has been gradual and has been the result of natural causes, the system by degrees having been adapted to the changing conditions.