SUPPLEMENTAL REPORT

On Title Insurance

THE ROYAL COMMISSION OF INQUIRY:

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

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HAWAIIAN KINGDOM

SUPPLEMENTAL REPORT *on Title Insurance*

Most people are unaware as to what title insurance is and how it works. This *Supplemental Report* of the Royal Commission of Inquiry ("Royal Commission") addresses title insurance policies and is a supplement to the Royal Commission's *Preliminary Report* of 16 July 2020 on the legal status of land titles throughout the realm in the aftermath of the unlawful overthrow of the government of the Hawaiian Kingdom on 17 January 1893 by the United States of America.[1]

TITLE INSURANCE

Typical insurance policies, such as car insurance or flood insurance, insure against a future cause of damage, that may or may not occur. Title insurance, on the other hand, insures against a past cause of damage called defects in the chain of title that affect ownership of real property. It is an agreement to indemnify the insured for losses incurred "by either on-record and off-record defects that are found in the title or interest in an insured property to have existed on the date on which the policy is issued."[2] It is a "policy issued by a title company after searching the title…and insuring the accuracy of its search against claims of title defects."[3] "One of the reasonable expectations of a policyholder who purchases title insurance is to be protected against defects in his title which appear of record."[4]

Title insurance is a one-time paid premium agreement under both an owner's policy, that protects the interests of the owner of the property, and a lender's policy, that protects the lender's interest—the debt owed—in the mortgaged lien on the property. The owner's policy does not exceed the amount of coverage on the policy. The lender's policy coverage reduces as the debt is being paid by the borrower, which will eventually expire once the final payment of the loan is made. Coverage under an owner's policy, however, "lasts for as long as the insured has some liability for title defect, whether as the present owner or possessor, or as a vendor [grantor] and warrantor of the state of the title upon some later sale. There is no such thing as term title insurance. Its policy might, potentially, last forever."[5] A grantor's covenant is explicitly stated in its warranty deed where it states, "and that the Grantor will WARRANT AND DEFEND the same unto the Grantee against the lawful claims and demands of all persons."

Being that title insurance is an indemnity agreement, Burke states that the insurer can also act as a surety, which "is a person agreeing to be answerable for the actions of another."[6] When there is a

[1] Royal Commission of Inquiry's Preliminary Report—*Legal Status of Land Titles throughout the Realm* (16 July 2020) (hereafter "Preliminary Report on Land Titles") (online at: https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Land_Titles.pdf).
[2] Barlow Burke, *Law of Title Insurance* 2.3 (3rd ed., 2019).
[3] *Black's Law* 807 (6th ed. 1990).
[4] *McDaniel v. Lawyers Title Guar. Fund.*, 327 So. 2d 852, 856 (Fla. Dist. Ct. App. 1976).
[5] Burke, 2-22.
[6] *Id.*, 2-18.

breach of covenant and warranty of title by a grantor, the "title insurer might agree to remedy a breach of the covenant for further assurances by bringing the litigation required to cure a title, instead of letting the [grantor] do it."[7] The right to remedy, as a surety, is provided under Condition no. 5 of both the owner and lender policies that states the insurer "shall have the right, in addition to the options contained in Section 7 of these Conditions, at its own cost, to institute and prosecute any action or proceeding or to any other act that in its opinion may be necessary or desirable to establish the Title, as insured, or to prevent or reduce loss or damage to the Insured." According to Hill, Steindorff and Widener, the Illinois Appellate Court concluded "that although the title company did not have an ownership interest in the property, the company had issued a title insurance policy and could have redeemed the taxes on the subject property on behalf of the prior owner, to whom it had issued a title policy."[8]

TITLE REPORT

The *Preliminary Report on the Legal Status of Land Titles throughout the Realm* of 16 July 2020 addressed "on-record" defects in title. To determine "on-record defects in title," a title insurer relies on a competent title search. "Some states have no set length but instead require that the entire title history of a parcel of land be searched back to the state's date of patent," which include Alaska, Arizona, California, Florida, Idaho, Kansas, Montana, Nebraska, Nevada, North and South Dakota, Oregon, Texas and Washington.[9] At the highest number of years for a title search are Colorado, Kansas, Montana, Nebraska, North and South Dakota, and Wyoming at 187 years.[10] At the low end of a 30-year search are New Mexico, Oklahoma and Tennessee.[11] In a study of optimal title searches, Hawai'i, Illinois and Indiana were excluded from the analysis because they provided "indeterminate search lengths."[12]

In one particular preliminary report by Title Guaranty of Hawai'i, its title search only went back one conveyance. This lack of a full title search by Title Guaranty, who serves as an agent for title insurance companies, back to the original patent, called Royal Patents, only amplifies the purpose of title insurance as an indemnity agreement. It is not a guaranty of the state of the title. "The purpose of title insurance is to protect the insured…from loss arising from defects in the title which he acquires."[13] "Because title insurance [is] a contract of indemnity, the insurer does not guarantee

[7] *Id*.
[8] Jerel J. Hill, Amelia K. Steindorff, and Vanessa H. Widener, "Recent Developments in Title Insurance Law," 50(2) *Tort Trial & Insurance Practice Law Journal* 611-638, 631 (2015).
[9] Matthew Baker, Thomas J. Miceli, C.F. Sirmans, and Geoffrey K. Turnbull, "Optimal Title Search," 31(1) *Journal of Legal Studies* 139, 148 (2002).
[10] *Id*., 149.
[11] *Id*.
[12] *Id*., 150.
[13] *Hicks v. Saboe*, 555 A.2d 1241, 1243 (Pa. 1989).

the state of the title, but agrees to pay for any loss resulting from a defective title."[14] A title insurer does not have a duty to advise "on the state of title to the property, but to insure against…loss resulting from any defects."[15] Therefore, "the title insurer does not 'guarantee' the status of the grantor's title. As an indemnity agreement, the insurer agrees to reimburse the insured for loss or damage sustained as a result of title problems, as long as the coverage for the damages incurred is not excluded from the policy."[16]

HAWAIIAN KINGDOM RECORDING AND REGISTRATION STATUTES

This *Supplemental Report* will address "off-record" risks that have created title defects since 17 January 1893. Off-record risks are interests that affect property ownership that are not found in the public records, "but nevertheless valid [because not] even the most professional, thorough, and competent title search will identify them. Therefore, they are not excluded or excepted in the policy… Sometimes they require an understanding of the type and operation of the recording act applicable to the jurisdiction in which the records are maintained—and whether or not an interest is subject to the [recording] act."[17] Recording acts are government regulations that provide constructive notice to the public of real estate transactions. According to Johnson, the specific objectives of recording acts are:

> (1) to enable interested persons, including public officials such as tax collectors, to ascertain apparent ownership of land;
> (2) to furnish admissible evidence of title for litigants in a nation where landowners did not adopt the English practice of keeping all former deeds and transferring them with the land;
> (3) to enable owners of equitable interests to protect such interests by giving notice to subsequent purchasers of the legal title; and
> (4) to modify the traditional case-law doctrine that purchasers and other transferees, no matter how bona fide, get no better title than the transferor owned.[18]

The Hawaiian Kingdom's original recording act was considered a "race" statute with a grace period. The term "race" does not refer to a particular ethnicity but rather the first to record a conveyance in the government registry of land transactions. In the Hawaiian Kingdom, the 1846 act provided: "All deeds of landed property and leases for a longer period than one year, however executed…shall be recorded with the registrer of conveyances within thirty days after the execution thereof, in default of which no such

[14] *Omega Healthcare Investors, Inc. v. First Am. Title Ins. Co.*, 2003 U.S. Dist. LEXIS 267, **6-7 (D. Mass. Jan. 9, 2003).
[15] *Stewart Title Guar. Co. v. West*, 676 A.2d 953, 960 (Md. Ct. Spec. App. 1996).
[16] *Id*.
[17] Burke, 2-22.
[18] Corwin W. Johnson, "Purpose and Scope of Recording Statutes," 47 *Iowa L. Rev.* 231 (1962).

document shall be valid against another document conveying the same right or interest subsequently executed, but previously acknowledged and recorded."[19]

In order to soften the penalizing aspect of an unrecorded deed, the recording act was amended in 1859 to be a "race-notice" statute, which provides: "All deeds, leases for a term of more than one year, or other conveyances of real estate within this Kingdom, shall be recorded in the office of the Registrar of Conveyances, and every such conveyances not so recorded shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, not having actual notice of such conveyance, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded."[20] The "race-notice" statute gives priority over unrecorded instruments to subsequent purchasers provided they are not aware of the unrecorded deed. As stated by the Hawaiian Supreme Court, "It is undoubtedly true that a deed duly registered is good against a prior unregistered deed, if the second purchaser have no notice of the first conveyance."[21]

To give effect of the recording act's constructive notice to subsequent purchasers or lenders, the registration statutes must first be strictly complied with. The registration statute provides: "To entitle any conveyance, or other instrument to be recorded, it shall be acknowledged by the party or parties executing the same, before the Registrar of Conveyances, or his agent, or some judge of a court of record, or notary public of this Kingdom, or before some minister, commissioner or consul of the Hawaiian Islands, or some notary public or judge of a court of record in any foreign country."[22] The 1872 statute provides the form of the certificate of acknowledgment:

> Section 3. Such certificate shall be substantially in the following form to wit:
>
> Hawaiian Islands)
>) ss.
> Island of ……..)
>
> On this … day of ……. A.D. ……., personally appeared before me A.B., known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein set forth.
>
> Section 4. When the person offering the acknowledgment is unknown to the officer taking the acknowledgment, the certificate shall be substantially in the following form, to wit:

[19] Statute Laws of His Majesty Kamehameha III, 248 (1846).
[20] Hawaiian Civil Code, Compiled Laws, §1262 (1884).
[21] *Rives v. Makulu*, 2 Haw. 166 (1859).
[22] Hawaiian Civil Code, §1255.

Hawaiian Islands)
) ss.
Island of ……..)

> On this … day of ……. A.D. ……., personally appeared before me A.B., satisfactorily proved to me to be the person described in and who executed the within instrument, by the oath of C.D., a credible witness for that purpose, to me known and by me duly sworn, and he, the said A.B., acknowledged that he executed the same freely and voluntarily for the uses and purposes therein set forth.[23]

The 1872 statute also provides: "No certificate of acknowledgment contrary to the provisions of this Act shall be held valid in any court of this Kingdom, nor shall it be entitled to be recorded in the Registry of Public Conveyances."[24] "The certificate," states Webb, "is *prima facie* evidence of its genuineness and contents, and of the execution of the instrument."[25] The statute prohibits the recording of deeds that do not conform to what constitutes a valid acknowledgment under Hawaiian law.

According to the Hawaiian Civil Code: "Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed."[26] The significance of this statute is that a deed, not in conformity with the 1872 act, is void *ab initio* on the face of the document, and not considered voidable, which is where a proceeding must declare a deed to be void. According to Black's Law, an "agreement is said to be 'void ab initio' if it has at no time had any legal validity."[27] The deed does not exist at law. The Civil Code also provides for the compulsory nature of Hawaiian law: "The laws are obligatory upon all persons, whether subjects of this kingdom, or citizens or subjects of any foreign State, while within the limits of this kingdom, except so far as exception is made by the laws of nations in respect to Ambassadors or others. The property of all such persons, while such property is within the territorial jurisdiction of this kingdom, is also subject to the laws."[28]

All certificates of acknowledgement not in conformity with Hawaiian law done after 17 January 1893 are void *ab initio*. Under Hawaiian law, any instrument that was "done in contravention of a prohibitory law is void, although the nullity be not formally directed."

[23] Id., 407, An Act Requiring the Identification of Persons offering Acknowledgments to Instruments (1872).
[24] *Id.*
[25] Britain R. Webb, A Treatise on the Law of Record of Title 122 (1890).
[26] Hawaiian Civil Code, §8.
[27] Black's Law, 6.
[28] Hawaiian Civil Code, §6.

OFF-RECORD RISKS OF FORGERY AND IMPERSONATION

Title insurers may also find defects in title caused by "off-record risks" that would not otherwise be found on the record of registered deeds or mortgaged liens. A "title insurer will be liable for hidden defects and all matters affecting title within the policy coverage and not excluded or specifically excepted from such coverage."[29] A title insurer "covers defects not revealed by an abstractor's search of the public records related to real property. Such defects are known to title insurers as 'off-record risks.' They are interests not of record, but nevertheless valid."[30] According to Burke:

> The most extreme, and common, off-record defect is the type 'pertaining to the identity of the parties to a document'; that is the forgery of a document in the chain of title. Like other off-record risks, a forgery in the chain of title is not discernable from an inspection of the public records or the fact of other documents involved in the issuance of a policy. Moreover, a forgery will void the chain thereafter and so then typically produce a total failure of title and a total loss of the face amount of insurance extended under the policy. 'Void' in this sense means that the affected document and chain of documents cannot support the purpose for which they were drafted and are incapable of ratification.[31]

A forgery is not limited to the grantor or grantee of a deed or mortgage, but also applies to the officer providing a certificate acknowledging the deed or mortgaged lien to be valid. "False impersonation is representing oneself to be a public officer."[32] According to the Hawaiian Penal Code:

> To constitute forgery, it is not essential that the forged instrument should be so made, that if genuine, it would be valid. For example, it is forgery to fabricate any false instrument on unstamped paper, which by law requires a stamp, or to make a false will of a living person, notwithstanding it can have no validity as a will until his death: Provided, however, that it is essential to constitute forgery, that the false instrument should carry on its face the semblance of that for which it was counterfeited, and that it should not be obviously invalid, void, and of no effect.[33]

Commenting on the forgery statute, the Hawaiian Supreme Court, in *King v. Kalaluhi*, explained:

> [T]he instrument, to be the subject of forgery, must purport on the face of it to be good and valid for the purpose for which it was created. Our Code has modified this ruling to this extent, that the instrument should not be obviously invalid, void and of no effect. Moreover,

[29] *53 Spencer Realty LLC v. Fidelity Nat'l Title Ins. Co.*, 2017 N.Y. Misc. LEXIS 4829 (N.Y. Sup. Ct. Kings City. Dec. 17, 2017).
[30] Burke, 2-22.
[31] *Id*., 2-24.
[32] Black's Law, 754.
[33] Hawaiian Penal Code, Chapter XXX, section 7.

> our Code expressly states that it is not essential that the forged instrument should be so made that if genuine it would be valid.[34]

When a person impersonates a public officer providing a certificate of acknowledgement for a deed or mortgage, he comes under the forgery law of the Hawaiian Kingdom, and the certificate itself is the evidence of forgery. To constitute forgery under Hawaiian law, a certificate assumed to "being true and genuine, according to the apparent purport of said writing, well knowing the same to be false and forged."[35] The United States' illegal overthrow of the government of the Hawaiian Kingdom on 17 January 1893 constitutes an "off-record" risk because there is a direct nexus of this act to the recording and registering statutes. On the 17th, Queen Lili'uokalani proclaimed, by government decree:

> I, Liliuokalani, by the Grace of God, and under the Constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom.
>
> That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the said Provisional Government.
>
> Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest, and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representative and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.
>
> Done at Honolulu this 17th day of January, A.D. 1893.
>
> Liliuokalani, R.
> Samuel Parker,
> *Minister of Foreign Affairs.*
> Wm. H. Cornwell,
> *Minister of Finance.*
> Jno. F. Colburn,
> *Minister of the Interior.*
> A.P. Peterson,
> *Attorney General.*[36]

[34] *The King v. Kalaluhi*, 3 Haw. 417, 418 (1873).
[35] *Id*., 417.
[36] United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawai'i: 1894-95, 586 (1895) (hereafter "Executive Documents").

After completing an investigation into the overthrow of the Hawaiian government, the new U.S. Minister assigned to the Hawaiian Kingdom, Albert Willis, was tasked, by President Cleveland, to negotiate with the Queen for resolution and settlement through executive mediation. The negotiations began on 13 November 1893 at the U.S. Legation in Honolulu and lasted until 18 December 1893. At the first meeting in the U.S. Legation, Minister Willis opened with a statement from the President. He made known to the Queen of "the President's sincere regret that, through the unauthorized intervention of the United States, she had been obliged to surrender her sovereignty, and his hope that, with her consent and cooperation, the wrong done to her people might be redressed."[37] Willis stated to the Queen that the President would expect a full granting of amnesty to the insurgents after she is restored. She responded, "There are, under this [Penal Code], no degrees of treason. Plotting alone carries with it the death sentence."[38] She countered that amnesty would not be granted.

This first day of negotiations came to an end and after Willis notified the Secretary of State, Walter Gresham, of the Queen's position, Gresham sent a telegram dated 24 November 1893 stating, "The brevity and uncertainty of your telegram are embarrassing. You will insist upon amnesty and recognition of obligations of the Provisional Government as essential conditions of restoration. All interests will be promoted by prompt action."[39] After several meetings, the Queen, on 18 December 1893, agreed to the conditions of restoration. She wrote:

> Sir: Since I had the interview with you this morning I have given the most careful and conscientious thoughts as to my duty, and I now of my own free will give my conclusions.
>
> I must not feel vengeful to any of my people. If I am restored by the United States I must not forget myself and remember only my dear people and my country. I must forgive and forget the past, permitting no proscription or punishment of any one, but trusting that all will hereafter work together in peace and friendship for the good and for the glory of our beautiful and once happy land.
>
> Asking you to bear to the President and to the Government he represents as message of gratitude from me and my people, and promising, with God's grace, to prove worthy of the confidence and friendship of your people.
>
> I am, etc.,
>
> Liliuokalani.[40]

Unbeknownst to President Cleveland of the settlement and agreement of restoration, he notified the Congress, by message, of his findings on the same day, 18 December 1893. The President

[37] *Id*., 1242.
[38] *Id*., 1243.
[39] *Id*., 1191.
[40] *Id*., 1269.

concluded "that the provisional government owes its existence to an armed invasion by the United States."[41] He also determined that on the 17th of January, "the Government of the Queen…was undisputed and was both the *de facto* and the *de jure* government,"[42] while the insurgency "was neither a government *de facto* nor *de jure*" but merely declared themselves to exist.[43] He concluded his message with:

> Actuated by these desires and purposes, and not unmindful of the inherent perplexities of the situation nor of the limitations upon my power, I instructed Minister Willis to advise the Queen and her supporters of my desire to aid in the restoration of the status existing before the lawless landing of the United States forces at Honolulu on the 16th of January last, if such restoration could be effected upon terms providing for clemency as well as justice to all parties concerned. The condition suggested, as the instructions show, contemplate a general amnesty to those concerned in setting up the provisional government and a recognition of all its *bona fide* acts and obligations. In short, they require that the past be buried, and that the restored Government should reassume its authority as if its continuity had not been interrupted. These conditions have not proved acceptable to the Queen, and though she has been informed that they will be insisted upon, and that, unless acceded to,, the efforts of the President to aid in the restoration of her Government will cease, I have not thus far learned that she is willing to yield them her acquiescence.[44]

After receiving Willis' telegram of the Queen's agreement to the conditions of restoration, Gresham responded to Willis on 12 January 1894:

> On the 18th ultimo the President sent a special message to Congress communicating copies of Mr. Blount's reports and the instructions given to him and to you. On the same day, answering a resolution of the House of Representatives, he sent copies of all correspondence since March 4, 1889, on the political affairs and relations of Hawaii, withholding, for sufficient reasons, only Mr. Stevens' No. 70 of October 8, 1892, and your No. 3 of November 16, 1893. The President therein announced that the conditions of restoration suggested by him to the Queen had not proved acceptable to her, and that since the instructions sent to you to insist upon those conditions he had not learned that the Queen was willing to assent to them. The President thereupon submitted the subject to the more extended powers and wider discretion of Congress, adding the assurance that he would be gratified to cooperate in any legitimate plan which might be devised for a solution of the problem consistent with American honor, integrity, and morality.
>
> Your reports show that on further reflection the Queen gave her unqualified assent in writing to the conditions suggested, but that the Provisional Government refuses to acquiesce in the President's decision.

[41] *Id*., 454.
[42] *Id*., 451.
[43] *Id*., 453.
[44] *Id*., 458.

> The matter now being in the hands of Congress the President will keep that body fully advised of the situation, and will lay before it from time to time the reports received from you, including your No. 3, heretofore withheld, and all instructions sent to you. In the meantime, while keeping the Department fully informed of the course of events, you will, until further notice, consider that your special instructions upon this subject have been fully complied with.[45]

EXECUTIVE AGREEMENT OF RESTORATION IS A TREATY

Under United States laws, there are two procedures by which an international agreement can bind the United States. The first is by a treaty whose entry into force can only take place after two-thirds of the United States Senate has given its advice and consent under Article II, section 2, Clause 2 of the U.S. Constitution. The second is by way of an executive agreement entered into by the President, under his sole authority, that does not require ratification by the Senate.

In *United States v. Belmont*,[46] Justice Sullivan explained there are different kinds of treaties that did not require Senate approval. The case involved a Russian corporation that deposited some of its funds in a New York bank prior to the Russian revolution of 1917. After the revolution, the Soviet Union nationalized the corporation and sought to seize its assets in the New York bank with the assistance of the United States. The assistance was "effected by an exchange of diplomatic correspondence between the Soviet government and the United States [in which the] purpose was bring about a final settlement of the claims and counterclaims between the Soviet government and the United States."[47] Justice Sutherland explained:

> That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (article 2, 2), require the advice and consent of the Senate.[48]

Justice Douglas, in *U.S. v. Pink*,[49] cautioned how to interpret executive agreements. He explained:

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[45] *Id*., 1283-1284.
[46] *United States v. Belmont*, 310 U.S. 324 (1937).
[47] *Id.,* 326.
[48] *Id*., 330.
[49] *United States v. Pink*, 315 U.S. 203 (1942).

> The exchanges between the President and M. Litvinov must be read not in isolation, but as the culmination of difficulties and dealings extending over fifteen years. And they must be read not as self-contained technical documents, like a marine insurance contract or a bill of lading, but as characteristically delicate and elusive expressions of diplomacy. The draftsmen of such notes must save sensibilities and avoid the explicitness on which diplomatic negotiations so easily founder.[50]

In other words, the form and substance of executive agreements are comprised of an exchange of diplomatic notes and not laid out in a single document such as a formal contract or treaty.

THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION

Article 41 of the 1880 Institute of International Law's *Manual on the Laws of War on Land* declared that a "territory is regarded as occupied when, as the consequence of invasion by hostile forces, the State to which it belongs has ceased, in fact, to exercise its ordinary authority therein, and the invading State is alone in a position to maintain order there." The phrase "in fact" signifies that a "situation of occupation must be assessed based on the relevant facts. The existence of the necessary factual conditions alone triggers the application of the law of occupation, no proclamation nor acknowledgment of occupation is required of the belligerents."[51] On the contrary, President Cleveland did acknowledge the occupation. He stated to the Congress:

> As I apprehend the situation, we are brought face to face with the following conditions:
>
> The lawful Government of Hawaii was overthrown without the drawing of a sword or the firing of a shot by a process every step of which, it may safely be asserted, is directly traceable to and dependent for its success upon the agency of the United States acting through its diplomatic and naval representatives.
>
> But for the notorious predilections of the United States Minister for annexation, the Committee of Safety, which should be called the Committee of Annexation, would never have existed.
>
> But for the landing of the United States forces upon false pretexts respecting the danger to life and property the committee would never have exposed themselves to the pains and penalties of treason by undertaking the subversion of the Queen's Government.
>
> But for the presence of United States forces in the immediate vicinity and in position to afford all needed protection and support the committee would not have proclaimed the provisional government from the steps of the Government building.

[50] *Id.,* 241.
[51] Marco Longobardo, "The Occupation of Maritime Territory under International Humanitarian Law," 95 *International Law Studies* 322-361, 325 (2019).

> And finally, but for the lawless occupation of Honolulu under the false pretexts by the United States forces, and but for Minister Steven's recognition of the provisional government when the United States forces were its sole support and constituted its only military strength, the Queen and her Government would never have yielded to the provisional government, even for a time and for the sole purpose of submitting her case to the enlightened justice of the United States.[52]

The definition of occupation was later codified under Article 42 of the 1899 Hague Convention, II ("1899 HC II"), and then superseded by Article 42 of the 1907 Hague Convention, IV ("1907 HC IV"), which provides that territory "is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Thus, effectiveness is at the core of belligerent occupation. Crawford explains:

> Pending a final settlement of the conflict, belligerent occupation does not affect the continuity of the State. The governmental authorities may be driven into exile or silenced, and the exercise of the powers of the State thereby affected. But it is settled that the powers themselves continue to exist. This is strictly not an application of the "actual independence" rule but an exception to it…pending a settlement of the conflict by a peace treaty or its equivalent.[53]

When territory is "effectively" occupied, international law obligates the occupying State to administer the laws of the occupied State. This is reflected in Articles 2 and 3 of the 1874 Brussels Declaration where, "[the occupying State] shall take all the measures in his power to restore and ensure, as far as possible, public order and safety [and] shall maintain the laws which were in force in the country in peacetime, and shall not modify, suspend or replace them unless necessary." Although the Declaration failed to be signed off by the European States it did have scholarly approval, which is another source of the rules of international law.[54] The United States, however, previously codified this customary international law of administering the laws of the occupied State under the 1863 Lieber Code. Article 6 provides:

> All civil and penal law shall continue to take its usual course in the enemy's places and territories under Martial Law, unless interrupted or stopped by order of the occupying military power; but all functions of the hostile government—legislative executive, or administrative—whether of a general, provincial, or local character, cease under Martial Law, or continue only with the sanction or, if deemed necessary, the participation of the occupier or invader.

[52] Executive Documents, 455.
[53] James Crawford, The Creation of States in International Law 73 (2nd ed., 2006).
[54] *Infra*, notes 53 and 54.

After Spanish authority was defeated by United States troops in Santiago de Cuba in July of 1898 during the Spanish-American War, Spanish law continued to be administered by the United States military in accordance customary international law. The overthrow of Spanish authority did not transfer sovereignty to the United States but rather triggered the customary international laws of occupation that obliged the occupying State to administer the laws of the occupied State over territory that it is in effective control of. This customary law was the basis for General Orders no. 101 issued by President McKinley to the War Department on 13 July 1898:

> Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation.[55]

The provisions of the Lieber Code were superseded by the 1899 HC and then the 1907 HC, where, in particular, Article 43 provides that when "the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." "The expression 'laws in force in the country' in Article 43," explains Sassoli, "refers not only to laws in the strict sense of the word, but also to the constitution, decrees, ordinances, court precedents, as well as administrative regulations and executive orders."[56] Sassòli further elaborates, "The occupant may therefore not extend its own legislation over the occupied territory nor act as a sovereign legislator. It must, as a matter of principle, respect the laws in force in the occupied territory at the beginning of the occupation."[57]

Despite the failure of the President's duty and obligation to restore the Queen under an executive agreement—recognized as a treaty under international law, the law of occupation under the provisions of the 1863 Lieber Code, and later the 1907 HC, continued to apply despite the unlawful control by the American insurgency of Hawaiian territory. After the United States violated international law by purporting to have unilaterally annexed the Hawaiian Islands by enacting a joint resolution, being a municipal law, on 7 July 1898, the control held by the insurgency was transferred to the federal government, by its President, William McKinley, the successor to President Cleveland. Since the occupation began on 17 January 1893, the United States has and

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[55] *Ochoa v. Hernandez*, 230 U.S. 139, 155 (1913).
[56] Marco Sassoli, *Article 43 of the Hague Regulations and Peace Operations in the Twenty-first Century*, Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, June 25-27, 6 (2004) (online at http://www.hpcrresearch.org/sites/default/files/publications/sassoli.pdf).
[57] *Id*., 5.

continues to violate the international law of occupation, that has since been codified under the 1907 HC IV, by not administering the laws of the Hawaiian Kingdom, as it existed at the time of the unlawful overthrow of the Hawaiian government, which includes the recording and registration statutes.

THE CONTINUED EXISTENCE OF THE HAWAIIAN KINGDOM AND RESTORATION OF THE HAWAIIAN GOVERNMENT BY A COUNCIL OF REGENCY

According to the Statute of the International Court of Justice, "the teachings of the most highly qualified publicists of the various nations, [are] subsidiary means for the determination of rules of law."[58] Furthermore, *Restatement Third—Foreign Relations Law of the United States*, recognizes that "writings of scholars"[59] are a source of international law in determining, in this case, whether the Hawaiian Kingdom continues to exist as a State under international law and whether the Council of Regency has been established in conformity with the Hawaiian Kingdom law and the rules of international humanitarian law. The writing of scholars, "whether a rule has become international law," are not prescriptive but rather descriptive "of what the law really is."[60]

In his legal opinion, Matthew Craven, professor of international law, interrogated modes of extinction by which, under international law, the United States could provide rebuttable evidence that the Hawaiian State was indeed extinguished. Notwithstanding the unlawful imposition of United States municipal laws for over a century, he found no evidence under international law to support a claim that the United States extinguished the Hawaiian Kingdom as a State.[61] As such, Craven cited implications regarding the continuity of the Hawaiian Kingdom:

> a) That authority exercised by US over Hawai'i is not one of sovereignty i.e. that the US has no legally protected 'right to exercise that control and that it has no original claim to the territory of Hawai'i or right to obedience on the part of the Hawaiian population. Furthermore, the extension of US laws to Hawai'i, apart from those that may be justified by reference to the law of (belligerent) occupation would be contrary to the terms of international law.
>
> b) That the Hawaiian people retain a right to self-determination in a manner prescribed by general international law. Such a right would entail, at the first instance, the removal of all attributes of foreign occupation, and a restoration of the sovereign rights of the dispossessed government.

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[58] Article 38(1), Statute of the International Court of Justice.
[59] §103(2)(c), Restatement of the Law (Third)—The Foreign Relations Law of the United States (1987).
[60] *The Paquete Habana*, 175 U.S. 677, 700 (1900).
[61] Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law", in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations in the Hawaiian Kingdom* 126-149 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).

c) That the treaties of the Hawaiian Kingdom remain in force as regards other States in the name of the Kingdom (as opposed to the US as a successor State) except as may be affected by the principles *rebus sic stantibus* or impossibility of performance.

d) That the Hawaiian Kingdom retains a right to all State property including that held in the territory of third states, and is liable for the debts of the Hawaiian Kingdom incurred prior to its occupation.[62]

The Permanent Court of Arbitration, in *Larsen v. Hawaiian Kingdom* (1999-2001), acknowledged the continued existence of the Hawaiian Kingdom as an independent State in an international dispute submitted to the PCA for arbitration.[63] The PCA reported:

> Lance Paul Larsen, a resident of Hawaii, brought a claim against the Hawaiian Kingdom by its Council of Regency ("Hawaiian Kingdom") on the grounds that the Government of the Hawaiian Kingdom is in continual violation of: (a) its 1849 Treaty of Friendship, Commerce and Navigation with the United States of America, as well as the principles of international law laid down in the Vienna Convention on the Law of Treaties, 1969 and (b) the principles of international comity, for allowing the unlawful imposition of American municipal laws over the claimant's person within the territorial jurisdiction of the Hawaiian Kingdom.[64]

Under the indispensable third-party rule, Larsen was prevented from maintaining his suit against the Council of Regency "for allowing the unlawful imposition of American municipal laws," because the Tribunal lacked subject matter jurisdiction as a result of the United States refusal to participate in the proceedings. The United States, however, did request from the parties if it could have access to the pleadings and records of the case.[65] Both Larsen and the Council of Regency consented. Since the conclusion of the arbitral proceedings, the Council of Regency focused its attention on education and exposure of the unlawful and prolonged occupation of the Hawaiian Kingdom in order to bring compliance to the law of occupation and international humanitarian law.[66]

In order to quell any questions as to the restoration of the Hawaiian Kingdom government, Federico Lenzerini, a professor of international law, authored a legal opinion on the authority of the Council of Regency of the Hawaiian Kingdom.[67] After addressing the historical record and

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[62] *Id*., 126.
[63] David Keanu Sai, "Royal Commission of Inquiry", in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations in the Hawaiian Kingdom* 24-25 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).
[64] Permanent Court of Arbitration, *Larsen v. Hawaiian Kingdom* (online at https://pca-cpa.org/en/cases/35/).
[65] Sai, Royal Commission of Inquiry, 25-27.
[66] *Id*., 29-33.
[67] Federico Lenzerini, *Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom* para. 1 (2020) (online at https://hawaiiankingdom.org/pdf/Legal_Opinion_Re_Authority_of_Regency_Lenzerini.pdf).

citing the Permanent Court of Arbitration, he concluded, "[i]t is therefore unquestionable that in the 1890s the Hawaiian Kingdom was an independent State and, consequently, a subject of international law. This presupposed that its territorial sovereignty and internal affairs could not be legitimately violated by other States."[68]

After concluding the Hawaiian Kingdom did exist as a subject of international law, Professor Lenzerini stated, "it is now necessary to determine whether the continuous occupation of Hawai'i by the United States from 1893 to present times has led the Hawaiian Kingdom to be extinguished as an independent State and, consequently, as a subject of international law."[69] He addressed this issue "by means of a careful assessment carried out through 'having regard *inter alia* to the lapse of time since the annexation [by the United States], subsequent political, constitutional and international developments, and relevant changes in international law since the 1890s.'"[70]

Aside from all speculative arguments, Lenzerini concludes, "the argument which appears to overcome all the others is that a long-lasting and well-established rule of international law exists establishing that military occupation, irrespective of the length of its duration, cannot produce the effect of extinguishing the sovereignty and statehood of the occupied State."[71] On this subject, he provides an English translation of a statement made by the Swiss arbitrator Eugène Borel in the 1925 *Ottoman Public Debt* case:

> Whatever are the effects of the occupation of a territory by the enemy before the re-establishment of peace, it is certain that such an occupation alone cannot legally determine the transfer of sovereignty […] The occupation, by one of the belligerents, of […] the territory of the other belligerent is nothing but a pure fact. It is a state of things essentially provisional, which does not legally substitute the authority of the invading belligerent to that of the invaded belligerent.[72]

Lenzerini also cites renowned jurist Oppenheim who stated that "[t]he only form in which a cession [of sovereignty] can be effected is an agreement embodied in a treaty between the ceding and the acquiring State. Such treaty may be the outcome of peaceable negotiations or of war."[73] Without a treaty with the Hawaiian Kingdom ceding its territory to the United States, he concludes that, "according to a plain and correct interpretation of the relevant legal rules, the Hawaiian Kingdom cannot be considered, by virtue of the prolonged US occupation, as extinguished as an independent State and a subject of international law, despite the long and effective exercise of the attributes of government by the United States over Hawaiian territory."[74] Therefore, the Hawaiian Kingdom

[68] *Id*., para. 2.
[69] *Id*., para. 3.
[70] *Id*., para. 3.
[71] *Id*., para. 4.
[72] *Id*., fn. 5.
[73] *Id*., para. 4.
[74] *Id*., para. 5.

"has been under uninterrupted belligerent occupation by the United States of America, from 17 January 1893 up to the moment of this writing."[75]

After confirming the continuity of the Hawaiian Kingdom, Lenzerini reviewed the process by which the Council of Regency was formed, where he concludes that "on the basis of the doctrine of necessity,…the Council of Regency possesses the constitutional authority to temporarily exercise the Royal powers of the Hawaiian Kingdom."[76] He further concludes "that the Regency actually has the authority to represent the Hawaiian Kingdom as a State, which has been under a belligerent occupation by the United States of America since 17 January 1893, both at the domestic and international level."[77]

In its capacity as representing the Hawaiian Kingdom, Lenzerini concludes that "the Council of Regency is exactly in the same position of a government of a State under military occupation, and is vested with the rights and powers recognized to governments of occupied States pursuant to international humanitarian law."[78] Therefore, "the ousted government being the entity which represents the 'legitimate government' of the occupied territory…may 'attempt to influence life in the occupied area out of concern for its nationals, to undermine the occupant's authority, or both. One way to accomplish such goals is to legislate for the occupied population.'"[79]

Regarding legislation by governments of occupied States, Lenzerini cites the Swiss Federal Tribunal which held that "[e]nactments by the [exiled government] are constitutionally laws of the [country] and applied [from the beginning] to the territory occupied […] even though they could not be effectively implemented until the liberation."[80] He explains that "[a]though this position was taken with specific regard to exiled governments, and the Council of Regency was not established *in exile* but *in situ*, the conclusion, to the extent that it is considered valid, would not substantially change as regards the Council of Regency itself."[81] Therefore,

> under international humanitarian law, the proclamations of the Council of Regency are not divested of effects as regards the civilian population of the Hawaiian Islands. In fact, considering these proclamations as included in the concept of "legislation"…they might even, if the concrete circumstances of the case so allow, apply retroactively at the end of the occupation, on the condition that the legislative acts in point do not "disregard the rights and expectations of the occupied population." It is therefore necessary that the occupied

[75] *Id*., para. 6.
[76] *Id*., para. 8.
[77] *Id*., para. 9.
[78] *Id*., para. 10.
[79] *Id*., para. 11.
[80] *Id*.
[81] *Id*.

> government refrains "from using the national law as a vehicle to undermine public order and civil life in the occupied area."[82]

When the legislative function is exercised by the Council of Regency, through its proclamations, it "is subjected to the condition of not undermining the rights and interests of the civilian population,"[83] and therefore "may be considered applicable to local people, unless such applicability is explicitly refuted by the occupying authority."[84] "In this regard," states Lenzerini, "it is reasonable to assume that the occupying power should not deny the applicability of the…proclamations when they do not undermine, or significantly interfere with the exercise of, its authority."[85] On 21 August 2013, the Council of Regency declared by proclamation:

> 1. The laws are obligatory upon all persons, whether subjects of this kingdom, or citizens or subjects of any foreign State, while within the limits of this kingdom, except so far as exception is made by the laws of nations in respect to Ambassadors or others. The property of all such persons, while such property is within the territorial jurisdiction of this kingdom, is also subject to the laws (§6, Civil Code). The Hawaiian Civil Code, Penal Code and the 1884 and 1886 Session Laws can be accessed online at http://hawaiiankingdom.org/constitutional-history.shtml.
>
> 2. The acting government of the Hawaiian Kingdom reclaims its sovereignty over all property within the territorial jurisdiction of this kingdom by virtue of its *special customary right* to represent the Hawaiian State during an illegal and prolonged occupation by the United States of America.
>
> 3. As a result of Hawaiian law not being complied with since January 17, 1893, all titles to real estate within the territorial jurisdiction of this kingdom are invalid and void for want of a competent notary public and registrar for the Bureau of Conveyances (§1249, §1254, §1255, §1262, §1263, §1267, Civil Code). Remedy for these defects will take place in accordance with Hawaiian Kingdom law and the international law of occupation.[86]

CONSTRUCTIVE NOTICE OF THE UNITED STATES' ILLEGAL OVERTHROW OF THE HAWAIIAN GOVERNMENT ON 17 JANUARY 1893

In 1993, title insurers were given constructive notice of the illegality of the 1893 overthrow of the Hawaiian government when the United States Congress passed a Joint Resolution *To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer*

[82] *Id*., para. 12.
[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] Proclamation Reclaiming Sovereignty (21 August 2013) (online at: https://hawaiiankingdom.org/pdf/Proc_Reclaiming_Sovereignty.pdf).

an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii ("Apology resolution").[87] Where President Cleveland accurately referred to the provisional government as being self-declared,[88] the Congress in the Apology resolution referred to the provisional government's successor, the Republic of Hawai'i, as "self-declared" as well.[89] According to Cambridge Dictionary, self-declared is "stated or announced by yourself."[90]

Being self-declared, the provisional government and the Republic of Hawai'i were never governments *de facto* nor *de jure*. As such, any and all persons pretending to be a *bona fide* public officer under the guise of the provisional government or the Republic of Hawai'i, came under the forgery statute, *i.e.* certificates of acknowledgement, and any purported conveyance of both Crown and Government lands after 17 January 1893. Consequently, all certificates of acknowledgment and purported conveyances are void *ab initio* because they are forged documents and, as such, are covered risks under both the owner's and lender's title insurance policies.

Schedule B of title insurance policies provides for exceptions or exclusions of coverage, which states: "This policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses that arise by reason of: [stated exceptions]." Normally, exceptions for policies in Hawai'i include, *e.g.*, mineral and water rights of any nature, rights of way, and waterline easements. Exceptions can also include government decrees. These "exceptions are usually the result of a title search, although the insurer does not everywhere have a duty to search the title before issuing a policy and, as a result, the policy should not be taken as a representation of the state of the title insured."[91] Schedule B of Hawai'i title insurance policies do not exclude coverage of the decree of the Hawaiian Kingdom by Queen Lili'uokalani on 17 January 1893, the decree of the United States by President Cleveland to the Congress on 18 December 1893, or the executive agreement of restoration between the United States and the Hawaiian Kingdom on 18 December 1893.

QUITCLAIM DEED REFLECTS STATE OF TITLE OF THE UNITED STATES TO GOVERNMENT LANDS OF THE HAWAIIAN KINGDOM AND TO CROWN LANDS

In 1994, the public record reflected the state of the title held by the United States over the island of Kaho'olawe, which, according to Hawaiian law, is part of the public lands of the Hawaiian

[87] 107 Stat. 1510, Public Law 103-150 (Nov. 23, 1993) (hereafter "Apology Resolution").
[88] Executive Documents, 453 ("When our Minister recognized the provisional government the only basis upon which it rested was the fact that the Committee of Safety had in the manner above stated declared it to exist. It was neither a government *de facto* nor *de jure*.").
[89] Apology Resolution, 1512 ("Whereas, on July 4, 1894, the Provisional Government declared itself to the Republic of Hawaii; … Whereas, through the Newlands Resolution, the self-declared Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States.").
[90] Cambridge Dictionary, *self-declared* (online at: https://dictionary.cambridge.org/us/dictionary/english/self-declared).
[91] Burke, 3-4.

Kingdom.[92] Despite the United States' description of Kahoʻolawe in its conveyance of the island to the State of Hawaiʻi as "part of the public lands ceded and transferred to the United States by the Republic of Hawaii under the Joint Resolution Of Annexation of July 7, 1898 ("Annexation resolution")," there is no record of any conveyance of "public lands" other than it being stated in the Annexation resolution that "the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede…and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands."[93] This provision merely asserts the Republic of Hawaiʻi "signified its consent." It fails to state or cite any actual conveyance of public lands, which, under international law, can only be done by a treaty of cession. There is no such treaty. From a real estate perspective, this situation is analogous to a Purchase Contract whereby the seller gives his commitment to convey but fails to draft the warranty deed of conveyance.

Because there is no conveyance by a treaty from the so-called Republic of Hawaiʻi, the United States could only convey the island of Kahoʻolawe under a "quitclaim deed" recorded in the Bureau of Conveyances on 9 May 1994. A quitclaim deed is a "deed of conveyance operating by way of release; that is, intended to pass any title, interest, or claim which grantor may have in the premises, but not professing that such title is valid, nor containing any warranty or covenants for title."[94] A "warranty deed," however, is where a "grantor warrants good, clear title. … The usual covenants of title are warranties of seisin, quiet enjoyment, right to convey, freedom from encumbrances and defense of title as to all claims."[95]

The United States cannot warrant and defend its claim to public lands other than referring to the Annexation resolution. The Republic of Hawaiʻi, being self-declared, was never vested with lawful title—*seisin*[96]—to the public lands of the Hawaiian Kingdom, to include the island of Kahoʻolawe, and, therefore, the United States could acquire no more interest to the public lands of the Hawaiian Kingdom than the Republic of Hawaiʻi could have claimed. The significance, from a title insurer's position, is that the quitclaim deed is *prima facie* evidence that the United States was aware that it was never vested with any title to the Government or Crown lands of the Hawaiian Kingdom. If it were, the conveyance of Kahoʻolawe to the State of Hawaiʻi would have been by warranty deed.

Title insurers do not insure a "quitclaim deed" because there is no warranty or guarantee regarding title to the property. Due to a warranty deed's guarantee of a clear title, title insurance is available. A person or entity receiving the property under a "quitclaim deed," however, does so by accepting that the grantor is "not professing that such title is valid, nor containing any warranty or covenants for title." The State of Hawaiʻi's acceptance of the United States' quitclaim deed is an acceptance

[92] Preliminary Report on Land Titles, 17.
[93] 30 Stat. 750 (1898).
[94] Black's Law, 1251.
[95] *Id*., 1589.
[96] *Id*., 1358 (Seisin is the "Right to immediate possession according to the nature of the estate.").

and acknowledgment that the United States is not professing the title to the island of Kahoʻolawe is valid.

This quitclaim deed also renders the United States' conveyance of public lands in 1959 to the State of Hawaiʻi a "quitclaim" as well. Under section 5(b) of an *Act To provide for the admission of the State of Hawaii into the Union*, it provides: "the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all public lands and other public property."[97] Section 5(g) admits that "the term 'public lands and other property' means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898."[98]

All lands conveyed by the United States, by its Territory of Hawaiʻi, prior to 1959, and all lands conveyed by the State of Hawaiʻi after 1959 are quitclaims as well. Title for Government lands remains vested in the Hawaiian Kingdom under the direction of the Minister of the Interior of the Council of Regency,[99] and Crown lands remain vested in the Estate of the Crown under the direction of the Crown land Commissioners.[100] The Council of Regency serves in the absence of the Crown.

[97] 73 Stat. 4, 5 (1959).
[98] *Id*., 6.
[99] Preliminary Report on Land Titles, 46.
[100] *Id*.

UC

R-1063

STATE OF HAWAII
BUREAU OF CONVEYANCES
RECORDED

MAY 09, 1994 02:13 PM

Doc No(s) 94-076277

/s/ S. FURUKAWA
REGISTRAR OF CONVEYANCES

CONVEYANCE TAX: $0.00

I hereby certify that this is a true copy from the records of the Bureau of Conveyances.

Registrar of Conveyances
Assistant Registrar, Land Court
State of Hawaii

LAND COURT SYSTEM — REGULAR SYSTEM

Return by Mail ( ) Pickup (X) To:

Kaho'olawe Island Reserve
586-0761

QUITCLAIM DEED
FROM THE UNITED STATES OF AMERICA
TO THE STATE OF HAWAII
FOR THE ISLAND OF KAHO'OLAWE, HAWAII

THIS DEED is made this seventh day of May, 1994, by the UNITED STATES OF AMERICA, hereinafter referred to as the "UNITED STATES", acting by and under authority delegated by the Secretary of the Navy, in furtherance of and under the authority contained in Title X of Public Law 103-139, 107 Stat. 1418, 1479-1484. Two versions of this deed have been prepared and recorded; one in English and one in Hawaiian. If any question in interpretation arises from translation or useage of terms in the Hawaiian language version, the English language version of the deed shall govern.

P CONVEYANCES GISTRAR OF VEYANCES OF HAWAII

WHEREAS, the island of Kaho'olawe is a portion of public lands, formerly government lands of the Kingdom of Hawaii, which were ceded and transferred to the UNITED STATES by the Republic of Hawaii under the Joint Resolution Of Annexation of July 7, 1898, 30 Stat. 750, and pursuant to the Hawaii Organic Act of April 30, 1900, 31 Stat. 141; and

WHEREAS, under Hawaii's Admission Act, Public Law 86-3, 73 Stat. 4, and Public Law 88-233, 77 Stat. 472, public lands that are determined by the UNITED STATES to be surplus are to be conveyed to the State of Hawaii, hereinafter referred to as the "STATE"; and

WHEREAS, Executive Order 10436 of February 20, 1953, set aside and reserved the island of Kaho'olawe for the use of the UNITED STATES for naval purposes and placed the island under the jurisdiction of the Secretary of the Navy; and

WHEREAS, from 1941 to 1990, the island of Kaho'olawe and waters surrounding the island were used by the UNITED STATES as a live ordnance impact training area, which resulted in the island being rendered unsafe due to the presence of surface and subsurface unexploded ordnance; and

WHEREAS, on November 11, 1993, Title X of Public Law 103-139, 107 Stat. 1418, 1479-1484, was enacted into law, directing the UNITED STATES, through the Secretary of the Navy, to convey and return to the STATE all right, title and interest of the UNITED STATES (except certain interests set forth in Title X) in and to the island of Kaho'olawe, State of Hawaii; and

WHEREAS, Title X of Public Law 103-139, 107 Stat. 1418, 1479-1484, further directs the Secretary of the Navy to enter into a Memorandum of Understanding (MOU) with the STATE regarding the clearance or removal of unexploded ordnance from the island and environmental restoration of the island; and

WHEREAS, the MOU was executed on May 6, 1994, and was recorded in the State Bureau of Conveyances as Document No. 94-075038; and

WHEREAS, the MOU establishes the process by which the STATE will develop a use plan for the island, in consultation with the UNITED STATES, with the use plan then providing the basis from which the UNITED STATES will develop a cleanup plan that will set forth the nature and extent of ordnance clearance or removal, or environmental restoration actions to be performed by the UNITED STATES under Title X; and

WHEREAS, the MOU requires any subsequent deed or any other document for the conveyance, transfer, or use of all or any part of the island to contain such conditions as are necessary to ensure that future uses remain consistent with uses considered by the UNITED STATES to be reasonably safe; and

WHEREAS, any party considering the acquisition or use of any part of the island of Kaho'olawe is hereby provided NOTICE that, until such time as the UNITED STATES, in accordance with provisions of the MOU, certifies in one or more documents to the STATE that ordnance clearance or removal or environmental restoration actions under Title X and the MOU have been completed, areas that are not so certified to the STATE through documents recorded in the State Bureau of Conveyances remain DANGEROUS TO THE PUBLIC AND ARE NOT SAFE; and

WHEREAS, any party considering acquisition or use of any part of the island of Kaho'olawe is hereby provided NOTICE that any use inconsistent with those uses considered by the UNITED STATES to be reasonably safe are DANGEROUS TO THE PUBLIC AND NOT SAFE; and

WHEREAS, any party considering acquisition or use of any part of the island of Kaho'olawe is hereby provided NOTICE that documentation regarding the ordnance clearance or removal and environmental restoration actions undertaken by the UNITED STATES is on file with the Real Estate Division, Pacific Division, Naval Facilities Engineering Command, Pearl Harbor, Oahu, Hawaii, and the Kaho'olawe Island Reserve Commission, Department of Land and Natural Resources, State of Hawaii, Honolulu, Oahu, Hawaii; and

WHEREAS, Section 10001(d)(2) of Title X provides that notwithstanding any other provision of law, the UNITED STATES shall retain control of access to the island, in consultation with the STATE, prior to and following the effective date of the MOU until either clearance, removal, or environmental restoration are completed or ten years after November 11, 1993, whichever comes first, when control of access will be transferred to the STATE; and

WHEREAS, Section 10002(a)(2) of Title X states that the UNITED STATES shall be provided full and necessary access to the island and its surrounding waters to carry out any obligations of the UNITED STATES arising out of any responsibilities and liabilities under Title X; and

WHEREAS, Section 10002(a)(4) of Title X states that the STATE shall not be liable or responsible for the conduct of any cleanup and response actions arising from and relating to the use, environmental cleanup and ordnance removal and remediation of the island of Kaho'olawe and its adjacent waters.

NOW, THEREFORE, pursuant to Title X of Public Law 103-139, 107 Stat. 1418, 1479-1484, the UNITED STATES does hereby remise, release and forever quitclaim unto the STATE, its successors and assigns, that certain land, with improvements thereon, described as follows:

> All of the Island of Kaho'olawe, State of Hawaii, which comprises an area of approximately forty-five square miles, and which forms a part of the public lands ceded and transfered to the United States by the Republic of Hawaii under the Joint Resolution Of Annexation of July 7, 1898, 30 Stat. 750.

RESERVING, HOWEVER, to the UNITED STATES:

1. The right to retain control of access to the island in consultation with the STATE until either clearance or environmental restoration is completed and control of access is transferred to the STATE in accordance with the terms of the MOU, or ten years after November 11, 1993, whichever comes first.

2. The right in perpetuity of access to the island for the purpose of ordnance clearance, removal or environmental restoration activities involving newly discovered previously undetected ordnance and to carry out any obligations arising out of any responsibilities and liabilities of the UNITED STATES under the MOU and Title X of Public Law 103-139.

3. That thirty-foot high wood and fiberglass tower and associated navigation light facility used by the United States Coast Guard as a lighted aid to navigation and the right to operate, maintain, repair and replace such facility.

AND, FURTHERMORE, that the provisions of the MOU, and agreements or protocols established pursuant to the MOU, remain in full force and effect and binding upon any party that acquires fee title to the island or any part thereof, and upon any transferee that acquires a right to use the island or any part thereof, except to the extent otherwise provided through the written consent of the UNITED STATES and the STATE or its successors and assigns.

TO HAVE AND TO HOLD the said premises, together with the appurtenances, unto the said STATE and its successors and assigns forever, without possibility of reversion.

IN WITNESS WHEREOF, the UNITED STATES has caused these presents to be executed as of the day and year first above written.

UNITED STATES OF AMERICA

BY: _____

WILLIAM J. CASSIDY, JR.
DEPUTY ASSISTANT SECRETARY OF THE NAVY
FOR
THE SECRETARY OF THE NAVY
JOHN H. DALTON

CONCLUSION

All titles to real estate in this Kingdom are subject to its laws despite the unlawful overthrow of its government by the United States in 1893. As such, all titles that have since been alleged to have been conveyed after 17 January 1893 are void *ab initio* due to forged certificates of acknowledgment by individuals impersonating public officers. This includes all purported conveyances of Government or Crown lands after 17 January 1893, and any judicial proceedings regarding titles to land. Hawaiian law would have recognized these acts of the insurgents as being valid if Queen Lili‘uokalani was restored to office. The agreed upon conditions of restoration between the United States and the Hawaiian Kingdom provided, “a general amnesty to those concerned in setting up the provisional government and a recognition of all its *bona fide* acts and obligations.”

By this agreement, the United States acknowledged the acts done by the insurgency were not “*bona fide*” until after the Queen was restored. The Queen was not restored and, therefore, the insurgency continued to unlawfully impersonate public officers of the Hawaiian Kingdom in the chain of title. These defects in title are covered risks in the owner’s and lender’s policies as:

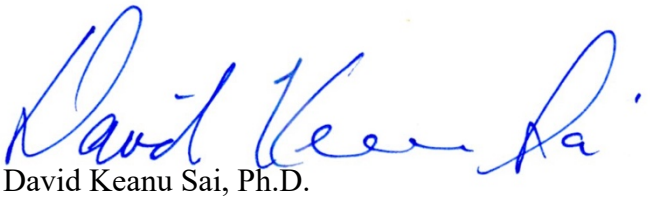
- forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
- failure of any person or Entity to have authorized a transfer or conveyance;
- a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
- a document executed under a falsified, expired, or otherwise invalid power of attorney;
- a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law;
- a defective judicial or administrative proceeding.

Furthermore, Hill, Steindorff and Widener, reported that in 2012, a California Federal District Court, in *Gumapac v. Deutsche Bank National Trust*, found that “a title report revealed a defect of title by virtue of an executive agreement between President Grover Cleveland and Queen Lili‘uokalani of the Hawaiian Kingdom that rendered any notary actions unlawful. Thus, the deed of conveyance to the homeowners was nullified.”[101] In Hawai‘i, claimants under both an owner’s or lender’s policy have a “duty to notify the insurer of any title defects.”[102]

According to Burke, a “defect in title must not only exist, but in many cases, it must be asserted as well.”[103] Therefore, the insured will be required to assert the defects in title and/or mortgage lien provided for in this *Supplemental Report* and the *Preliminary Report* of 16 July 2020 in order

[101] Jerel J. Hill, Amelia K. Steindorff and Vanessa H. Widener, “Recent Developments in Title Insurance Law,” 49(1) *Tort Trial & Insurance Practice Law Journal* 425-451, 427 (2013).
[102] *Id*.
[103] Burke, 3-27.

to trigger coverage for complete loss of title and/or mortgages lien under the respective insurance policies. As such, the insurer is obligated to indemnify the insured or remedy the defect in the chain of title and/or the mortgage lien.



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28 October 2020