A DESCRIPTION of HAWAII'S SUBSTANTIVE CRIMINAL LAW

LEGISLATIVE REFERENCE BUREAU

STATE OF HAWAII

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PATRICIA K. PUTMAN
Assistant Researcher

LEGISLATIVE REFERENCE BUREAU

UNIVERSITY OF HAWAII
Honolulu, Hawaii 96822

FOREWORD

Criminal law in Hawaii and other jurisdictions has been a subject of growing concern in recent years. This interest evolves in part out of new insights into human behavior and as a result of changes in living patterns and social attitudes. The new interest was evidenced by House Resolution 242, adopted by the House of Representatives in 1963, which requested the Legislative Reference Bureau to compare Hawaii and Illinois criminal laws. Illinois was selected for comparative purposes since it is one of the few states that has recently reviewed, revised and codified its criminal law. It adopted a new Code in 1961. The Code's drafters had the benefit of the studies that were conducted in connection with the American Institute's Model Penal Code, the 1942 Criminal Code of Louisiana and the 1955 Wisconsin Criminal Code.

Any attempt to revise or update the criminal laws of any jurisdiction is a formidable task when viewed either technically or as a reexamination of basic policies. The updating and revision of Hawaii's criminal laws is no exception. This study, published in three volumes, is offered as a preliminary step in the process. It compares Hawaii's criminal law, statutory and decisional, with the Illinois Criminal Code of 1961. Part I sets forth the Illinois Criminal Code of 1961 and contains a subject matter index. Part II contains an explanatory note on each section of the Illinois Criminal Code (relying on the comments of the Illinois State and Chicago Bar Associations' Joint Committee to Revise the Illinois Criminal Code), a comment which compares each section with existing Hawaii law, and a referral to the page in Part III at which the Hawaii law can be found. Part III contains Hawaii's statutory and decisional criminal law arranged in the same sequence of organization as the Illinois Criminal Code.

Drafts of this study were reviewed by the State Attorney General's Office, the Prosecuting Attorney's Office for the City and County of Honolulu, the County Attorneys for the counties of Hawaii, Maui and Kauai, and representatives of the Hawaii Bar Association. Their suggestions and corrections were studied and revisions made. The Bureau is most grateful for the assistance rendered by the reviewers.

Tom Dinell
Director

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ARTICLE 1. TITLE AND CONSTRUCTION OF ACT; STATE JURISDICTION

Sec. 1-1. Short Title.
RLH, Titles 30 and 31.

The source of the bulk of Hawaii's criminal law is the 1869 Penal Code of the Hawaiian Kingdom, compiled from the Penal Code of 1850. The 1869 compilation was simply a collection and arrangement of the criminal laws in force at that date.

Existing criminal statutes in Hawaii are found primarily in Titles 30 and 31, RLH and do not constitute a scientifically compiled code.

Sec. 1-2. General Purposes.
RLH, Secs. 1-15 to 1-31.

Existing Hawaii statutes do not contain a specific provision which states general purposes to be followed in the interpretation of substantive criminal laws. The rules of construction set forth in sections 1-15 to 1-31, RLH are applicable to all state statutes, unless otherwise expressed or obviously intended.

Several cases (9 H 176, 17 H 428, 20 H 669, 21 H 6, 22 H 31, 42 H 29) involve the application of rules of construction of criminal statutes. In Territory v. Shinohara, 42 H 29 (1957), the court construed a statute which defined "lottery" to exclude a pinball machine from coverage and state, "...Being penal, however, their terms must receive strict construction and their scope limited within their intent and meaning as so construed.... In construing a statute, the court must abide by the plain meaning of plain words, whatever the consequences."

Sec. 1-3. Applicability of Common Law.
RLH, Secs. 1-1, 269-1 to 269-5.

Section 1-1, RLH states that, "...no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the Territory".

Hawaii cases which have relied on the statutory rule that there are no common law offenses include: The King v. Kalailoa, 4 H 39 (1877), holding that the common law offense of illicit cohabitation is not recognized or punished in Hawaii, a jurisdiction in which offenses are defined by statute; Republic of Hawaii v. Ah Cheon, 10 H 469 (1896), holding that there are no common law offenses known to Hawaii law and that a charge of the offense of embezzlement made substantially in accordance with the language of the penal statute is good and sufficient; Republic of Hawaii v. Kapea, Kaio and Upapa, 11 H 293 (1898), holding that in Hawaii, a jurisdiction in which there are no common law offenses, an indictment of murder in the first degree need not contain all the ingredients of the common law offense and is good if the statutory offense is adequately described.

The five sections of chapter 269, RLH deal with contempt. Although this chapter is arranged in sequence in Title 31, RLH which lists specific crimes, the subject matter coverage is broad, extending over procedural and substantive aspects of direct and constructive civil and criminal contempt including provisions relating to review of judgments for civil and constructive criminal contempt as well as to summary punishment for direct criminal contempt.

Contempt of court is generally defined as an act of disobedience or disrespect toward a judicial body or interference with its orderly process. Direct contempts are usually those committed within the presence of the court, and constructive contempts those committed outside the presence of the court. Either a civil or criminal contempt may be direct or constructive. Criminal contempt, for which the punishment is retributive and punitive, is conduct that is directed against the dignity and authority of the court. Civil contempt, for which the punishment is coercive and remedial, is the failure to comply with an order of the court in a civil action for the benefit of an opposing party.

The latest statutory additions and amendments to the law of contempt were enacted in 1903. Cases decided under the earlier statutory law of contempt include the following: In re Alex. Campbell, 2 H 27 (1857); Onomea Sugar Co. v. Austin, 5 H 604 (1886); In re Lyons, 6 H 452 (1884); Ackerman v. Congdon, 7 H 31 (1887); Smith v. Aholo, 7 H 115 (1887);

Sec. 1-3. (Continued)

The King v. Lee Fook, 7 H 249 (1888); In re Bush, 8 H 221 (1891); In re Davis, 11 H 594 (1898); Ex Parte Smith, 14 H 245 (1902).

Later decisions which deal with the law of contempt in both procedural and substantive aspects include the following: In re Anin, 17 H 336 (1906); Ex Parte Thurston, 17 H 639 (1901); In re Vivas, 18 H 670 (1907); In re Mills, 19 H 88 (1908); Rose v. Ashford, 22 H 469 (1915); Sakan v. Ashford, 23 H 267 (1916); In re Goo Wan Hoy, 24 H 71 (1917); In re Bevins, 25 H 544 (1920); Coll v. Desha, 27 H 855 (1924); Vares v. Vares, 28 H 291 (1925); In re Oxiles, 29 H 323 (1926); Ando v. Ando, 30 H 8 (1927); Wong Buck Kam v. Lee Chee, 30 H 630 (1928); Fernandes v. Fernandes, 32 H 567, 604 (1932), (1933); Tugaeff v. Tugaeff, 42 H 455 (1958); In re Balucan, 44 H 271 (1960).

Hawaii decisional law is not without ambiguity in categorizing contempt into the accepted rubrics of direct and constructive criminal and civil contempts. Nor is it consistent in assigning elements of a criminal offense to a contempt.

In Rose v. Ashford the court stated, in connection with constructive criminal contempt, that contempt is sui generis and an inherent power of all courts but that certain protection, analogous to criminal procedures, is necessary to protect the rights of a person accused of contempt. Similarly, In re Bevins held that the power to punish for direct criminal contempt is inherent in every court of record but that the procedure in such a case is prescribed by statute and must be complied with.

The holding in In re Oxiles indicated that the due process required in a case of direct criminal contempt includes notice to defendant, an opportunity to be heard, assistance of counsel, and the right to call witnesses. In a recent case of direct criminal contempt, In re Balucan, the court stated that under the inherent power of summary punishment for contempt, only some aspects of criminal law are applicable, and that statutory procedural provisions are mandatory.

Classification of a contempt is important in determining procedures which affect the rights of accused and the power of the court to punish summarily.

Sec. 1-3. (Continued)

In Vares v. Vares the contempt consisted of failure of a father to pay child support pursuant to a court order and was characterized as a criminal offense. In a later case, Ando v. Ando, contempt for failure to pay alimony was characterized as a civil contempt. Still later in Fernandes v. Fernandes contempt for failure to obey a child custody order was characterized as a constructive contempt "in the nature of contempt".

Sec. 1-4. Civil Remedies Preserved.
RLH, Section 247-3.

This section provides that a criminal prosecution does not destroy the right of action by the person injured, unless it is expressly so provided.

Sec. 1-5. State Criminal Jurisdiction.
RLH, Secs. 247-5, 247-6, 252-2, 285-20, 292-1, 303-1, 303-3, 309-23.

Hawaii's general criminal law jurisdictional provision is section 247-5, RLH. It provides that state jurisdiction extends, without distinction between a principal and an accessory, to persons within or outside the State for acts or effects within the State which affect interests in the State. Section 247-6, RLH further specifies that an offense commenced outside and consummated within the State is subject to State jurisdiction.

Hawaii criminal jurisdiction over accessories to felonies is set forth in section 252-2, RLH which provides that any court with jurisdiction to try a principal felony also has jurisdiction over any accessory thereto.

Sections 285-20 (forgery), 292-1 (kidnapping), 303-1 and 303-3 (receiving stolen goods), and 309-23 (polygamy), RLH contain jurisdictional provisions relating to the particular offenses when they assume an interstate character. It is probable, however, that these cases would be within the state jurisdiction under the general provision of section 247-5, RLH or by common-law principles.

Sec. 1-5. (Continued)

There is scant Hawaii decisional law involving criminal jurisdiction, and the cases rely on common-law principles rather than on statute. The earliest cases deal with various principles of admiralty and maritime jurisdiction, and international law generally. In The King v. Parish, 1 H 58 (1849), the court stated that a foreigner who brings stolen property to shore can be tried, convicted and punished as if the larceny had been committed in Hawaii. Another early case, The King v. Chock Hoon (1885) held that a defendant who failed to deliver in China money which he had received in Honolulu and further failed to account in Honolulu to the owner of the money was subject to the jurisdiction of the Hawaii court. The same embezzlement was committed in China and in Honolulu; so jurisdiction could be properly asserted in either place. However, the court stated that a judgment in China would be a bar to prosecution in Honolulu, and vice versa. The decision in Territory v. Hart (1918) held that the court had jurisdiction to indict, try and punish defendant stockbroker for embezzlement of a client's stock when he cabled an order to New York to have the stock sold and the proceeds transferred to another account. Without reference to the criminal jurisdiction statutes, the rule was stated that the trial court had jurisdiction over a crime commenced in Honolulu and consummated in New York.

Sec. 1-6. Place of Trial.

Article I, Section 11, Hawaii Constitution; Secs. 215-1, 215-17, 216-8, 216-9, 252-2, 285-20, 303-3, 309-23, Act 125, Session Laws of Hawaii 1959; Rules 12(b), 18 and 21(b), Hawaii Rules of Criminal Procedure.

Article I, section 11 of the Hawaii Constitution fixes the place of trial as "the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, or ...such other district to which the prosecution may be removed with the consent of the accused". Act 125, Session Laws of Hawaii 1959, made it clear that the districts referred to in the constitutional venue provision are the four judicial circuits designated in section 215-1, RLH.

Section 215-17, RLH provides that a circuit court's jurisdiction extends to all criminal offenses committed within the circuit or transferred to it by change of venue from some other circuit.

Sec. 1-6. (Continued)

Section 216-8, RLH authorizes, with certain restrictions, venue for district courts in cases of offenses within their jurisdiction either in the district where the defendant was arrested, in the district where the offense was committed, or in the district where the defendant resides.

Section 216-9, RLH provides that the criminal jurisdiction of thirteen of the twenty-six district courts coincides with the judicial circuits in which the districts are situated.

Rule 18 of the Hawaii Rules of Criminal Procedure also specifies that venue is in the circuit in which an offense was committed, and Rule 21(b) recognizes that if an offense was committed in more than one circuit, venue extends to any circuit in which the offense was partially committed. Rule 12(b) requires that an objection based on improper venue must be raised by motion before trial and that failure to so move constitutes a waiver of the objection, but the court is authorized to grant relief from the waiver.

Certain offenses are governed by specific venue rules although in some of the statutes the rules are in terms of jurisdiction.

Section 252-2, RLH authorizes venue in the case of the offense of an accessory to a felony in any court which has jurisdiction to try the principal felony or where the act making one an accessory was committed.

Section 285-20, RLH authorizes venue in cases of the offenses of forgery and accessories to forgery in the jurisdiction in which the defendant is apprehended or is in custody as well as in the jurisdiction where the offense was committed.

Section 303-3, RLH authorizes venue in the case of the offense of receiving stolen goods in any jurisdiction in which the defendant had the stolen property in his possession, in any jurisdiction in which the theft could be tried, and in the jurisdiction where the defendant received the property.

Sec. 309-23, RLH authorizes venue in the case of the offense of polygamy in any jurisdiction in which the defendant is apprehended or in custody as well as in the jurisdiction in which the offense was committed.

Republic of Hawaii v. Kanalo, 11 H 435 (1898), held that an objection to venue must be raised before the defendant pleads.

Sec. 1-6. (Continued)

Territory v. Goto, 27 H 65 (1923), held that venue for the offense of conspiracy may be either in the county where the agreement was entered into or where an overt act was done by any of the conspirators in furtherance of the common design.

Territory v. Patterson, 38 H 245 (1948), relied on the statutory provision relating to venue for the offense of receiving stolen goods.

Sec. 1-7. Judgment, Sentence and Related Provisions. RLH, Secs. 83-13, 216-8, 258-52, 258-57, 258-58, 258-59, 258-60, 259-1 to 259-5; Att. Gen. Op. 62-40; Rules 5 and 32, Hawaii Rules of Criminal Procedure.

Section 216-8, RLH and Rule 5, Hawaii Rules of Criminal Procedure, provide that District Court Magistrates have power to render judgment in all cases of offenses within their jurisdiction which include offenses punishable by fine or by imprisonment not exceeding one year with or without fine and which exclude cases in which the accused has a right to and demands trial by jury.

Sections 258-57 and 258-60, RLH and Rule 32, Hawaii Rules of Criminal Procedure, provide that in circuit court cases the sentence shall be by the court, founded on the verdict.

Section 258-52, RLH requires imposition of maximum sentences in felony cases and sets forth the procedures for fixing minimum terms to be served before eligibility for parole. This statute and Rule 32, Hawaii Rules of Criminal Procedure, also provide for defendants' statements in mitigation and for probation service investigations for imposition of sentences and the setting of minimum terms.

Sections 259-1 to 259-5, RLH deal with fines and costs in criminal cases. They provide for collection of fines and costs in the same manner as a civil judgment, for fines against a corporation, and for imprisonment or for discharge for non-payment of fines or costs. Section 259-1.5 authorizes a $500 fine for any misdemeanor conviction where a fine is not otherwise authorized and authorizes both fine and imprisonment in misdemeanor cases where fine and imprisonment are authorized in the alternative. Section 258-58, RLH provides generally for fines in felony cases.

Sec. 1-7. (Continued)

Section 259-59, RLH designates the Hawaii state prison as the institution for imprisonment of felons, and section 83-13, RLH specifies that other persons held or committed by authority of law, including misdemeanants, shall not be imprisoned in the Hawaii state prison.

Att. Gen. Op. 62-40 states that cumulative (or consecutive) sentences are permissible in the case of an accused convicted of more than one offense or under more than one count, but that there is a presumption that such sentences are to run concurrently unless it clearly appears that the court intended them to run consecutively. The Opinion cites In re Tam Fook, 7 H 162 (1887), which held that if it is intended that sentences should be cumulative, the court should so state; otherwise they are concurrent.

Other Hawaii cases involving cumulative sentences are In re Kim, 21 H 295 (1912), holding that as a matter of common law district courts have power to impose cumulative sentences against a defendant for separate offenses of obtaining money under false pretenses and Territory v. Waiamau, 24 H 247 (1918), holding that the circuit courts' power to impose cumulative sentences of imprisonment is not restricted by statutory provisions for indeterminate sentencing and that when a cumulative sentence is imposed, the term of the last sentence commences from the termination of the sentence next preceding.

Hawaii first enacted an indeterminate sentence statute in 1909 (Act 45, section 1, Session Laws of Hawaii 1909) and it was upheld in Territory v. Armstrong, 22 H 526 (1915), as constitutional against claims that it impinges upon the judicial power and discretion of the courts.

Other cases on the subject of indeterminate sentences are Territory v. Waiamau, supra, holding that where a sentence is imposed under the indeterminate sentence laws, the term of the sentence is the maximum period fixed by the court; In re Dizon, 26 H 363 (1922), stating that under the indeterminate sentence laws, the court must fix the minimum sentence within the maximum-minimum limit; Territory v. Lake, 26 H 764 (1922), holding that in imposing sentence under the indeterminate sentence law, a reasonable period of time should intervene between the minimum and maximum sentences and that a sentence of not less than five years nor more than five years does not

satisfy the provisions of the indeterminate sentence laws; Territory v. Alu, 28 H 268 (1925), which discusses the purposes of the Indeterminate Sentence Act and the Parole Act, holding that the court has a duty to impose sentence not to exceed the maximum nor be less than the minimum term prescribed by law and that in a case where the maximum may be life or any number of years, the court must fix the maximum at either life or for any number of years not less than the prescribed minimum; and State v. Sacoco and Cuaresma, 45 H 288, 367 P 2d 11 (1961) and State v. Ching, 46 H 135, 376 P 2d 379 (1962), holding that the indeterminate sentence statute for felonies is mandatory with respect to the imposition of the prescribed maximum term.

The following Hawaii cases have held that a sentence which does not conform to the statutory penalty is illegal whether the sentence was less or more severe than required by statute: In re S. H. Cooper, 3 H 17 (1866), the sentence imposed imprisonment only, omitting the statutory ingredient of "hard labor"; The King v. Tai Wa, 5 H 598 (1886), the sentence imposed a fine and imprisonment at hard labor, the statute providing for fine and hard labor but not for imprisonment; In re Apuna, 6 H 732 (1869), sentence in accord with the statutory penalty of a fine but executed by imprisonment at hard labor; Territory v. Poloaiea, 13 H 335 (1901), the sentence imposed both fine and imprisonment at hard labor, the statute providing for fine only; however overruling The King v. Tai Wa, supra, as to the holding that the error could not be corrected on appeal and that the defendant must be discharged; In re Akamuu, 17 H 487 (1906), the sentence imposed fine and imprisonment at hard labor, the statute not providing for hard labor; In re Silva, 23 H 766 (1917), the sentence imposed a maximum penalty of one year imprisonment and, in addition, costs, the statute providing for fine or imprisonment; In re Dizon, 26 H 363 (1922), the sentence imposed minimum imprisonment and a fine, omitting the statutory ingredient of "hard labor"; Territory v. Nakagawa, 38 H 258 (1948), interpreted "fine" and "imprisonment" to include statutory costs; Territory v. Maunakea and Borges, 39 H 249 (1952), a sentence of imprisonment for a term in excess of the statutory maximum, but holding that sentence may be suspended for a period of probation in excess of the statutory maximum; and Territory v. Brown, 39 H 568 (1952), the sentence imposed both fine and imprisonment, the statute providing for fine or imprisonment.

Sec. 1-7. (Continued)

Hawaii case law on the subject of mitigation of sentence was decided prior to the Parole Act of 1917. The King v. Agnee et al., 3 H 106 (1869), held that failure to ask a defendant if he had anything to say why sentence of death should not be passed is not error, and to the extent that it may be a common law right, elsewhere, that right is not adopted as a part of the Hawaii common law. Territory v. Masagi, 16 H 196 (1904), did not rule on a similar question where sentence was imprisonment at hard labor for a term of years on the grounds the objections were not properly raised in the trial court.

The 1905 laws governing place of imprisonment were interpreted in Ex Parte Higashi, 17 H 428 (1906), to mean that misdemeanants shall not be confined in the state prison and that felons shall not be confined in jail.

ARTICLE 2. GENERAL DEFINITIONS

RLH, Chapters 1, 247 and 258.

Chapters 247 and 258 contain a few definitions applicable specifically to criminal law, and chapter 1 contains definitions of certain general terms, applicable throughout RLH. Other existing statutory definitions are scattered; each definition will be discussed in context in relation to the individual terms.

Sec. 2-1.
RLH, Secs. 251-5 and 253-3.

Existing statutes do not define "acquittal" under a list of general definitions rather, by section 253-3, the statutory law sets forth three circumstances which operate as an acquittal:

1. Failure to prosecute upon an information or indictment at the term presented unless the venue is changed or the cause is postponed by the court;

Sec. 2-1. (Continued)

2. failure to sustain an information or indictment upon the law involved; or

3. verdict of not guilty by the jury.

It is of interest to note that the statute does not provide that a verdict of not guilty by the court when a jury is waived operates as an acquittal.

In Rex v. Tin Ah Chin, 3 H 90 (1869), the court held in interpreting a similar earlier statutory provision (section 1178, Civil Code of the Hawaiian Islands 1859), that failure to prosecute upon an indictment at the ensuing term embodies an imperative rule to the extent that it requires the cause to be postponed by the court if such failure is not to operate as an acquittal. The decision was based on the constitutional principle that a speedy trial is a personal right.

In The Queen v. Poor, 9 H 295 (1893), where another earlier version of this section (section 3, chapter XL, Laws of 1876) was again at issue, the court held that a failure to prosecute upon a void indictment could not operate as an acquittal since under this circumstance it is as though no indictment has been presented.

Section 251-5, RLH makes it clear that acquittal by reason of variance or defective indictment, information or complaint is not an acquittal that operates to prevent a subsequent trial of the same offense under a new indictment, information or complaint.

Sec. 2-2.
RLH, Section 258-1.

This section of RLH contains a definition of the term "act" or "doing of an act" which provides that it includes omission to act.

Sec. 2-3.
RLH, Section 1-24.

The general definition of the term "person" is made synonymous with the term "others" by statutory definition.

Sec. 2-4.

No statutory definition of the term "conduct".

Sec. 2-5.

No statutory definition of the term "conviction".

Sec. 2-6.

No statutory definition of the term "dwelling".

Sec. 2-7.
RLH, Section 247-2.

The Hawaii statutory definition of the term "felony" is "an offense that is punishable with imprisonment for life not subject to parole or for a longer period than one year".

The Hawaii Supreme Court has amplified the definition in the following cases:

In re Brito, 7 H 42 (1887), held that a penalty provision in a licensing or revenue act, such as an act to regulate the importation and sale of opium, constitutes a penal law and creates a felony if it meets the statutory definition of a felony.

Territory v. Soga, 20 H 71 (1910), considered section 2702, RLH 1905, an earlier form of the present definition of felony, and stated that the statutory definition of a felony refers solely to the imprisonment which may be imposed by the court and not to the imprisonment resulting in cases of non-payment of fine and costs.

Sec. 2-8.

No statutory definition of the term "forcible felony".

Sec. 2-9.
RLH, Secs. 258-48 and 258-49; Hawaii Rules of Criminal Procedure.

Section 258-48, RLH, a statute classified within criminal procedure, provides that a person on trial for an offense may be found guilty of an attempt to commit the offense if it appears to the jury that he did not complete the offense charged.

This statute was relied on in Territory v. Wong, 30 H 819 (1929), to sustain a conviction of an attempt to commit bribery under an indictment charging the crime of bribery.

Section 258-49, RLH, another statute relating to criminal procedure, provides that a person charged with an offense may be found guilty of any lesser degree of the same offense or of any offense necessarily included in the offense charged.

This statute was not cited in Republic of Hawaii v. Kapea, 11 H 293 (1898) and Territory v. Alcantara, 24 H 197 (1918), which held that there is no error in jury instructions that limit the alternative verdicts to guilty of murder in the first degree or not guilty if there is no evidence of an included offense or offense of a lesser degree.

In Territory v. Gamaya, 25 H 581 (1920), the court held, following the decision in Trono v. United States, 199 U. S. 521, that a defendant who wins a reversal on appeal from a conviction of a lesser offense than the offense charged in the indictment can be tried again for the greater offense.

Territory v. Regusira, 26 H 84 (1921), considered this statute in deciding that the offense of assault with a weapon obviously and imminently dangerous to life is not a lesser degree of, nor is it a necessarily included offense of, the offense of assault being armed with a dangerous weapon with intent to commit the crime of murder.

In re Gaspar, 34 H 485 (1938), involving a conviction of the crime of assault and battery with a weapon obviously and imminently dangerous to life on an indictment charging the crime of manslaughter, the court considered two statutes which deal with conviction of lesser degrees and included offenses. The court held that the special homicide statute (section 291-6, RLH) which authorizes verdicts of "not guilty", "guilty as charged", or "guilty of assault and battery" under indictments for murder or manslaugher supersedes the general provisions of section 258-49 which provides for findings of guilty of any lesser degree and of included offenses upon an indictment of any offense. Accordingly, the court directed

Sec. 2-9. (Continued)

that the judgment be amended to find the defendant guilty of the crime of assault and battery.

In Territory v. McGrew, 34 H 505 (1938), the court ruled that the offense of assault and battery is not necessarily included in the offense of assault with intent to commit rape but that the offense of assault is included within the graver offense.

Sec. 2-10.

No statutory definition of the term "includes" or "including".

Sec. 2-11.
RLH, Section 247-2.

The Hawaii statute provides that every offense which is not a felony is a misdemeanor.

Sec. 2-12.
RLH, Secs. 247-1 and 258-1.

Section 247-1, RLH defines the term "offense" as doing what a penal law forbids or omitting to do what a penal law commands.

In Correra v. Correra, 19 H 326 (1909), the court defined the term "offense" in its broadest sense to mean the transgression of a law and stated that the term as related to criminal law does not limit its meaning when used in a divorce statute.

The Supreme Court of Hawaii has upheld as valid penal laws, statutes prohibiting an employer from making deductions from wages without authorization by law or by consent of the employee, (Territory v. McVeagh, 23 H 176 (1916)). However, in Territory v. McCandless, 24 H 485 (1918), the court held unconstitutional food price-fixing legislation which contained penal provisions for violations.

Sec. 2-12. (Continued)

Territory v. Tokita, 27 H 844 (1924), cited Ex Parte Higashi, 17 H 428 (1906), and Territory v. Nishimura, 22 H 614 (1915), on the question of the right of trial by jury and held that in case of a petty crime such as serving as a school teacher without first obtaining proper certification, an offense punishable by fine, there is no right of trial by jury. The decision, in effect, recognizes a classification of offenses into petty, minor or trivial offenses on the one hand and more serious offenses on the other.

Territory v. Takanabe, 28 H 43 (1924), held that resident aliens may constitutionally be found guilty of an offense which is prescribed specifically to apply to them.

In Territory v. Achi, 29 H 62 (1926), it was held that an offense can not be created pursuant to a local ordinance which is not within the grant of legislative authority to local government because of the absence of reasonable standards.

Section 258-1, RLH provides another definition of the term "offense" for purposes of criminal procedure in circuit courts. It first defines it as the accused person's acts or omissions which constitute the specific offense and then distinguishes it from the term "transaction". Transaction is defined as "the particular acts, facts and circumstances which distinguish the offense committed from other offenses of the same nature". The basic distinction between the terms "offense" and "transaction" is that the former relates to the specific acts and omissions of the accused while the latter relates to the statutory elements of the specific offense charged.

Sec. 2-13.
RLH, Section 250-1.

The only statutory definition in RLH of the term "peace officer" is limited to apply solely to the Uniform Criminal Extradition Act. The definition provides that it includes any officer authorized to serve process in criminal proceedings.

Sec. 2-14.
RLH, Chapter 83.

Existing Hawaii law does not define the term "penal institution". Chapter 83, RLH deals with prisons, jails and prison camps which are generally referred to as "state correctional facilities".

Sec. 2-15.
RLH, Section 1-24.

The Hawaii statutory definition of the term "person" applies to all provisions of RLH and includes individuals, corporations, firms, associations, societies, communities, assemblies, inhabitants of a district or neighborhood, persons known or unknown and the public generally where it appears, from the subject matter, sense and connection in which the word is used, that such construction is intended.

In Teves v. Reade, 23 H 564 (1916), the term "person" in a garnishment statute was held to include municipal corporations.

Sec. 2-16.

No statutory definition of the term "prosecution".

Sec. 2-17.
RLH, Secs. 5-7 and 5-90(d).

There are no statutory definitions of these terms for purposes of Hawaii criminal law.

Section 5-7, RLH defines the term "government employee" for purposes of the prohibiting of government employees from striking against the government, to mean any person employed by the government, including the holder of an appointive office.

Section 5-90(d), RLH defines the terms "public officer" and "public employee" for purposes of functions of the state loyalty board, to mean any person elected or appointed to or employed in the government of the state, any county, or any political subdivision, and any person appointed to or employed in any office or employment if any part of the compensation of such person is paid out of public funds.

Sec. 2-17. (Continued)

In Territory v. Wells, 25 H 747 (1921), involving the crime of extortion, a special police officer without pay was held to be a public officer within the meaning of the extortion statute.

Sec. 2-18.

See section 2-17.

Sec. 2-19.

No statutory definition of the term "reasonable belief" or "reasonably believes".

Sec. 2-20.
RLH, Section 248-6.

The term "solicitation" is used in the Hawaii statute as one of the means by which the offense of instigation is committed. Instigation is discussed at Article 8 of the Ill. CC.

Sec. 2-21.
First amendment to the Constitution of the State of Hawaii and RLH, Secs. 83-75 and 250-1.

The first amendment to the state constitution sets forth the geographical jurisdiction of the State in terms of the islands, appurtenant reefs and territorial waters included and excluded.

Section 250-1, RLH defines the term "state", for purposes of the Uniform Criminal Extradition Act, to include any state, the District of Columbia, or a Territory, organized or unorganized of the United States.

Section 83-75, RLH defines the term "states of the United States", for purposes of the Interstate Parole and Probation Compact, to mean states in the Union, the Commonwealth of Puerto Rico, the Virgin Islands and the District of Columbia.

Sec. 2-21. (Continued)

The most recent Hawaii decisions involving the extent of state jurisdiction are In the Matter of the Application of Island Airlines (No. 4339, June 21, 1963 and July 22, 1963). Both the majority and dissenting opinions in these cases recognize that jurisdiction over land and water extends to the air above them.

Sec. 2-22.

No statutory definition of the term "statute".

ARTICLE 3. RIGHTS OF DEFENDANT

Sec. 3-1. Presumption of Innocence and Proof of Guilt.
RLH, Section 253-2.

The Hawaii statute provides "A person accused shall be presumed innocent, and in case his guilt is not proven beyond a reasonable doubt, be acquitted." This section was amended in 1959 to substitute "proven beyond a reasonable doubt" for "satisfactorily shown". The law relating to the presumption of innocence along with the concept of reasonable doubt is stated with respect to jury instructions in The King v. Akana, 7 H 549 (1889); Republic of Hawaii v. Hickey, 11 H 314 (1897); Republic of Hawaii v. Yamane, 12 H 189 (1899); Territory v. Robello, 20 H 7 (1910); Territory v. Buick, 27 H 28 (1923); Territory v. Martins, 28 H 187 (1925); Territory v. Honda, 31 H 913 (1931); Territory v. Young, 37 H 150 (1945); Territory v. Martin, 39 H 100 (1951); Territory v. Park, 39 H 670 (1953). Territory v. Rutherford, 41 H 554 (1957) cites Wigmore in explaining the relationship between the presumption of innocence and evidence rules on the burden of proof. Territory v. Pascua and Manzano, 42 H 53 (1957), states the general concept of the presumption of innocence.

Sec. 3-1. (Continued)

Hawaii decisional law has consistently affirmed the right of a criminal defendant to have the benefit of reasonable doubt. In the Matter of Nahaku, 4 H 56 (1878). Decisions have approved of jury instructions which merely state the rule of reasonable doubt. The King v. Ah Sing, 5 H 553 (1886); The King v. Akana, (supra); Republic of Hawaii v. Edwards, 11 H 571 (1898); Territory v. Schilling, 17 H 249 (1906). Other decisions have approved jury instructions which include more or less elaborate definitions of "reasonable doubt". The King v. Ahop, 7 H 556 (1889); Republic of Hawaii v. Hickey, supra; Republic of Hawaii v. Yamane, supra; Territory v. Robello, supra; Territory v. Buick, supra; Territory v. Young, supra; Territory v. Martin, supra.

Sec. 3-2. Affirmative Defense.

See section 4-8 Ignorance or Mistake, Article 6 Responsibility, Article 7 Justifiable Use of Force; Exoneration, section 11-4 Indecent Liberties with a Child, section 11-12 Bigamy, and Article 27 Criminal Defamation.

Sec. 3-3. Multiple Prosecutions for Same Act.
RLH, Section 251-4; Rule 14, Hawaii Rules of Criminal Procedure.

The Hawaii statute provides that where an act constitutes two or more diverse and distinct offenses, different in their nature and character and one is not merged in another, the offender may be proceeded against for each and cannot plead a conviction or acquittal for one in bar of proceedings against him for the other.

The Hawaii Rules of Criminal Procedure do not provide for compulsory joinder, but Rule 14 provides for relief from prejudicial permissive joinder.

An early case involving multiple prosecutions for the same act is The King v. Tai Wa, 5 H 596 (1886), in which defendant was convicted of cruelty to ten mules. Subsequently he was charged with cruelty to two horses which were used in driving the ten-mule pack train. The court found that acts of cruelty to the mules were not acts of cruelty to the horses so that the former conviction did not constitute a bar to the second charge. The court went on to state by way of dicta

Sec. 3-3. (Continued)

that the prosecution might have charged cruelty to each of the ten mules as each was an individual animal subject to cruel treatment.

The Queen v. Lau Kin Chew, 8 H 370 (1892), involved defendants charged with arson after being acquitted of a murder prosecution in which the evidence was that death was caused by burns received during the burning of the victim's house. The court held that the multiple prosecution statute must give way to Article 8 of the Constitution of 1887 which provided, "no person shall be required to answer again for an offense of which he has been duly acquitted."

Republic of Hawaii v. Radin, 11 H 802 (1898), involved two prosecutions for unlawful possession of opium wherein two packages of opium were detected the same day, one in defendant's hack and one in his premises. The court held that the two "possessions" amounted to a single offense.

The Hawaii Supreme Court has not considered the matter of multiple prosecutions under the argument that they might constitute the oppressive use of a criminal trial in violation of the concept of due process contained in Article I, section 4 of the State Constitution or the Fourteenth Amendment of the United States Constitution.

Sec. 3-4. Effect of Former Prosecution.
Article I, section 8, Hawaii Constitution; RLH, Chapter 251.

The Hawaii constitutional provision on jeopardy, "...nor shall any person be subject for the same offense to be twice put in jeopardy;" is identical with the corresponding Federal provision except that the State Constitution does not specify jeopardy of life or limb. In the proceedings of the Constitutional Convention of Hawaii (Vol. I, p. 301), it is reported, "This section is derived from the.... Fifth Amendment to the Federal Constitution and will give to this State the benefit of Federal decisions construing the same." It should be noted, however, that the double jeopardy provision of the United States Constitution does not apply to the states unless double jeopardy amounts to a denial of due process under the Fourteenth Amendment (Kohlfuss v. Warden of Connecticut State Prison, 183 A. 2d 626, 149 Conn. 692, cert. denied 83 S. Ct. 298, 371 U. S. 928 (1962).

Sec. 3-4. (Continued)

The Hawaii statutes with respect to former conviction or acquittal, unamended since enactment in 1869, provide the following rules:

Section 251-1: A person cannot be tried again for an offense for which he has been convicted, or acquitted upon a good and sufficient indictment.

Section 251-2: Conviction of an offense in a court having jurisdiction is a bar to a subsequent prosecution for the same offense.

Section 251-3: Acquittal, on the facts and merits, of an offense in a court having jurisdiction is a bar to a subsequent prosecution for the same offense.

Section 251-4: Conviction or acquittal of one offense if the act of the defendant constitutes two or more diverse and distinct offenses that are not merged is not a bar to a subsequent prosecution for the other offense.

Section 251-5: Acquittal of any charge of an offense on the ground of variance or defect in the indictment is not a bar to a subsequent prosecution for the same offense.

Hawaii decisional law on double jeopardy presents the following rules:

1. A nolle prosequi of an appeal from conviction in the district court is not a bar to a subsequent prosecution for the same offense. The King v. Manner, 3 H 339 (1872); Territory of Hawaii v. Fullerton, 16 H 526 (1905).

2. Jeopardy does not attach unless the indictment is valid and a jury impaneled and sworn, The Queen v. Poor, 9 H 295 (1893).

3. Failure to indict or prosecute on a charge of instigation to commit an offense does not constitute an acquittal and is not a bar to a subsequent prosecution on the charge of being an accessory before the fact to the same offense, Republic of Hawaii v. Oishi, 9 H 641 (1894).

4. An appeal from a conviction of a lesser included offense resulting in reversal is not a bar to a subsequent prosecution for the greater offense. The

court stated that it was bound by the opinion of the United States Supreme Court in Trono v. United States, 199 U. S. 521 (1905); Territory v. Gamaya, 25 H 581 (1920). Note that the United States Supreme Court held contra in Green v. United States, supra.

5. Entry of a valid sentence subsequent to a void sentence does not constitute double jeopardy, In re Dizon, 26 H 363 (1922).

6. A conviction of a lesser offense (assault and battery) is a bar to a subsequent prosecution for a higher offense (rape) if based on the same conduct and if one offense is a necessary and essential part of the other offense; Territory v. Silva, 27 H 270 (1923), overruling Territory v. Schilling, 17 H 249 (1905); Territory v. Ouye, 37 H 176 (1945), conviction of presence at a gambling game a bar to prosecution for conducting same.

7. A former district court prosecution is not a bar to a subsequent circuit court prosecution for the same offense if the district court lacked jurisdiction, no criminal complaint or charge having been entered, Territory v. Burum, 34 H 75 (1937).

8. An acquittal in a former prosecution is a bar to a subsequent prosecution for the same offense when the acquittal followed a directed verdict on grounds that did not amount to variance. Territory v. Coe, 37 H 601 (1947).

9. Former conviction in a Federal District Court of an offense under the White Slave Traffic Act is not a bar to a subsequent territorial prosecution for the offense of procuring and pimping because the federal and territorial offenses are not identical in law or in fact, Territory v. Lii, 39 H 574 (1952).

10. Former conviction in district court of heedless and reckless driving is not a bar to a subsequent prosecution of negligent homicide arising out of the same transaction where the victim died after the former conviction, Territory v. Nihipali, 40 H 331 (1953).

11. The Fifth Amendment to the United States Constitution prohibits the Territory from appealing a verdict of acquittal, Territory v. Santos, 42 H 102 (1957).

Sec. 3-5. General Limitations.
RLH, Chapter 254.

Section 254-1, RLH provides that there is no statute of limitation applicable to the following offenses: (1) murder in the first and second degrees; (2) manslaughter; (3) rape; (4) assault with intent to ravish; (5) carnal abuse of a minor under twelve; (6) kidnapping; (7) arson in the first and second degrees; (8) burglary in the first and second degrees; (9) forgery; (10) robbery in the first and second degrees; (11) larceny in the first degree; (12) giving promising or receiving a bribe; (13) extortion in the first and second degrees; (14) compounding an offense punishable by imprisonment for life; and (15) embezzlement. Offenses numbered (4), (5), (6), (12), (13) and (14) were added to the category by Act 535, Session Laws of Hawaii 1947. All other offenses are subject to a two-year statute of limitations.

Section 254-2, RLH defines that a prosecution may be commenced for the purposes of section 254-1 by issuance of a warrant, by compelling the accused to appear to answer a charge, or by indictment.

Sec. 3-6. Extended Limitations.
RLH, Chapter 254.

See section 3-5.

Sec. 3-7. Periods Excluded from Limitation.
RLH, Section 254-1; Rule 12(b)(5), Hawaii Rules of Criminal Procedure.

Section 254-1, RLH tolls the running of the statute of limitations in the following situations:

1. A person who flees from justice,
2. A person who absents himself from the State, or
3. A person who conceals himself so that he cannot be found by the officers of the law so that process cannot be served on him.

Sec. 3-7. (Continued)

In Re Habeas Corpus, Balucan, 44 H 271 (1960), the court held that infancy does not toll the statute of limitations thus defeating the privilege against self-incrimination asserted by a minor who could not be criminally prosecuted during the two-year period of the statute.

Rule 12(b)(5) of the Hawaii Rules of Criminal Procedure provides that pleadings and motions shall not affect any statutory provisions relating to periods of limitation.

Sec. 3-8. Limitation on Offenses Based on Series of Acts. RLH, Secs. 281-6 and 293-2.

Section 281-6, RLH permits a single prosecution for distinct acts of embezzlement committed against the same person within a twelve-month period. This statute was relied on in Republic of Hawaii v. Coelho, 11 H 213 (1897), but was not cited in Territory v. Blackman, 32 H 460 (1932), which held that in an indictment charging one embezzlement, the prosecution must elect which embezzlement it relies on for conviction if several embezzlements are sought to be proved and are not a continuing transaction but are separate and distinct as to time amount and subject matter.

Section 293-2 similarly permits a single prosecution for as many as three acts of stealing committed against the same person within a six-month period.

No Hawaii statutes or cases were found on the point of statutes of limitation for continuing offenses.

TITLE II. PRINCIPLES OF CRIMINAL LIABILITY

ARTICLE 4. CRIMINAL ACT AND MENTAL STATE

Sec. 4-1. Voluntary Act.
RLH, Section 258-1.

The statutory definition of "act" includes "omission to act".

Sec. 4-2. Possession as Voluntary Act.
RLH, Secs. 21-95, 21-96, 21-148, 52-12, 96-26, 261-5, 262-3, 264-9, 267-8, 267-11, 267-25, 275-3, 288-3, 296-9, 301-1 and Chapter 303.

Many Hawaii statutes prohibit possession. Some flatly prohibit possession of specified objects without reference to any accompanying mental state, e.g., 21-96, RLH, dressed frog; 21-148, RLH, game bird; 96-26, RLH, explosive; 267-25, RLH, concealed deadly weapon; 275-3, RLH, unlawfully enemy flag during wartime; 288-3, RLH, lottery ticket.

Others prohibit "knowing" possession, e.g., 264-9, RLH, switchblade knife; 301-1, RLH, drink containing methyl alcohol; chapter 303, RLH, stolen goods. Still others prohibit possession with intention to accomplish a specified purpose, such as sale or the commission of another offense, e.g., 21-95, RLH, small frog; 52-12, RLH, narcotic drug; 267-8, RLH, obscene publication; 296-9, RLH, explosive. A few analogous situations involve ownership or possession of real property used for forbidden purposes, e.g., 261-5, RLH, criminal syndicalism; 262-3, RLH, cockfighting; 267-11, RLH, place of prostitution.

Sec. 4-3. Mental State.
RLH, Section 247-4.

The only general definition of a mental state element of an offense is found in section 247-4, RLH. The extensively inclusive definition of the term "malice" covers hatred, ill will, desire of revenge, cruelty of disposition or temper, motive or desire of gain or advantage to the offender or another, or of doing a wrong or injury to any person or the

public. It also includes acting with heedless, reckless disregard or gross negligence of life, health, personal safety or legal rights or privileges of another; and willful violation of a legal duty or obligation and willful contravention of law.

An examination of the criminal statutes of Hawaii reveals that different words and phrases concerning mental state appear in the same chapter or even in the same provision which have essentially the same meaning or some of which have only a general meaning or differ from others only in that they have emotional implications. Occasionally terms having inconsistent meanings appear in the same provision. Some of the words and phrases used in the Hawaii statutes to describe mental state are: "by conspiracy or by willful falsehood or deceit"; "careless or heedless"; "careless, reckless or negligent"; "corruptly"; "corruptly and falsely"; "cruelly"; "deceptive and fraudulent"; "deliberate premeditated malice aforethought"; "falsely and corruptly"; "false and fraudulent"; "feloniously"; "forcibly, or fraudulently and deceitfully"; "fraudulent intent"; "fraudulently"; "fraudulently and deceitfully"; "grossly negligent"; "having knowledge"; "intentional and malicious"; "knowingly"; "knowingly and corruptly"; "knowingly and designedly"; "knowingly and fraudulently"; "malice aforethought"; "maliciously"; "needlessly"; "negligently"; "negligently or maliciously"; "openly, willfully and deliberately"; "reckless disregard of life"; "through negligence"; "unlawfully"; "unlawful and intentional"; "unlawfully and maliciously"; unlawfully, willfully, falsely, fraudulently, deceitfully, maliciously or corruptly"; "voluntarily"; "wantonly or maliciously"; "willfully"; "willfully and corruptly"; "willfully intending"; "willfully with intent to injure"; "willfully and knowingly"; "willfully or knowingly"; "willfully, knowingly and falsely"; "willfully and maliciously"; "willfully or maliciously"; "willfully and maliciously, or fraudulently"; "with intent"; "without legal or justifiable motive or object".

Hawaii decisional law on the matter of mental state is discussed in other sections of this Article, in Article 7 on Justification and in the sections dealing with specific offenses.

Sec. 4-4. Intent.

RLH, Secs. 262-2, 264-3, 265-1, 265-2, 266-1, 275-3, 281-1, 283-6, 286-1, 288-4, 291-2, 291-3, 291-7, 293-1, 294-4, 296-8, 306-1.

Many Hawaii cases have involved the matter of intent, both specific and general, as an element of an offense.

The King v. Swinton, 1 H 92 (1852), a case of embezzlement, held that the offense is not shown without fraudulent intent. The court interpreted [section 281-1, RLH] the term "fraudulently" as "intent to defraud - a secret, deceitful or unlawful appropriation".

The King v. Gibson, 6 H 310 (1882), a case of libel, held that the indictment was fatally defective for failure to charge malicious publication [section 294-4, RLH]. The court discussed the presumption of legal malice that follows from the fact of publishing matter which is defamatory on its face.

The Consuelo, 7 H 704 (1889), a case of violation of the opium laws, held that opium concealed on a ship is deemed to be concealed with fraudulent intent.

Cleghorn v. Opium Pills, 8 H 461 (1892), a case of violation of the opium laws, held that fraudulent intent need not be shown.

Provincial Government v. Gertz, 9 H 288 (1893), a case of violation of the opium laws, held that intent to import opium was an essential element of the offense.

Provisional Government v. Caecires, 9 H 522 (1894), a case of murder, held that omission of the statutory words "deliberate, premeditated" before the word "malice" [section 291-3, RLH] charges murder in the second degree.

Republic of Hawaii v. Tsunikichi, 11 H 341 (1898), a case of murder in the first degree, held that the phrases "deliberate premeditated malice aforethought" and "extreme atrocity or cruelty" [section 291-3, RLH] charge the same offense in different ways.
Accord: Republic of Hawaii v. Yamane, 12 H 189 (1899).

Lo Toon v. Territory of Hawaii, 16 H 351 (1904), a case of assault with a dangerous weapon with intent to commit murder, held that the specific intent was an essential ingredient of the offense.

Territory v. Palai, 23 H 133 (1916), a case of unlawful use of dynamite "for the purpose...to injure...property" [section 296-8, RLH] in which no injury had been done, held that "unlawful" is equivalent to "without authority of law" or "not permitted by law". The court stated that the offense was committed although no actual damages ensued.

Territory v. Lau Hoon, 23 H 616 (1917), a case of bribery, held that the gist of the offense [section 265-1, RLH] is the corruption or attempt to corrupt an official in the discharge of his duty and that a corrupt intent on the part of the person accepting the bribe is not necessary.

Territory v. Alcantara, 24 H 197 (1918), a case of murder, held that the essential difference between murder and manslaughter is that in the former the killing is with malice [section 291-2, RLH]. The court also held that in determining the elements of the offense, it is immaterial whether the intent was to kill the victim or whether the death was the accidental or otherwise unintentional result of the intent to kill someone else.

Territory v. Marks, 25 H 219 (1919), a case of larceny, held that the offense must include not only the element stated in the statute [section 293-1, RLH] of felonious taking but also both the intent to deprive the owner of the thing taken and to appropriate it to the taker's own use.

Territory v. Wills, 25 H 747 (1921), a case of extortion by public officer, discussed the factors of the intent element of the offense, e.g., extortion to procure money "for his own benefit and profit", unlawfully, willfully, corruptly, feloniously and extorsively. The statute [section 283-6, RLH] does not use the terms "unlawfully", "feloniously" and "extorsively".

Territory v. Forrest, 26 H 695 (1923), a case of issuance of a check without funds in the bank, held that intent to defraud is an essential ingredient of the offense created by [section 286-1, RLH].
Accord: Territory v. Chong Pang Yet, 27 H 693 (1924).

Territory v. Kim Ung Pil, 26 H 725 (1923), a case of robbery, held that the necessary intent element of the offense [section 306-1, RLH] the intent to steal and that the term "feloniously" means done with intent to commit crime.

Territory v. Awana, 28 H 546 (1925), a case of embezzlement, held that fraudulent intent is an essential ingredient of the offense [section 281-1, RLH] and that the term "feloniously" is equivalent to "purposely" or "unlawfully".
Accord: Territory v. Oneha, 29 H 150 (1926).
Territory v. Yoon, 36 H 550 (1943).

Sec. 4-4. (Continued)

Territory v. Braly, 29 H 7 (1926), a case of manslaughter, held that malice aforethought means malice and nothing more [section 291-7, RLH].

Territory v. Wong Pui, 29 H 520 (1926), a case of assault and battery, held that under the former statutory definition of assault, a necessary ingredient was malice. The court stated the common rule, "Every one shall be presumed to intend the natural and plainly probable consequences of his acts."

Territory v. Shindo, 32 H 76 (1931), a case of cruelty to animals, held that an act of negligence does not fall within the offense of [section 262-2, RLH] to needlessly mutilate or kill any living creature.

Territory v. Yoshimura, 35 H 324 (1940), a case of manslaughter, held that express intent is not essential in the offense [section 291-7, RLH] and that negligence and reckless indifference to the lives and safety of others supply the intent.

Territory v. Cutad, 37 H 182 (1945), a case of murder in the first degree, held that deliberation and premeditation are essential elements of the offense [section 291-3, RLH] and distinguish it from murder in the second degree.

Territory v. Caminos, 38 H 628 (1950), a case of receiving bribes, held that the corrupt intent of the statute [section 265-2, RLH] means an intent, motive and design to pervert public office and trust by not performing his official duties.

Territory v. Yamamoto, et al., 39 H 556 (1952), a case of unlawful possession of a flag, held that the term "unlawful" in the statute [section 275-3, RLH] creating the offense means "without legal justification or excuse, without legal authority, or right".

Territory v. Wong, et al., 40 H 257 (1953), a case of presence at a gambling game, held that the statute [section 288-4, RLH] creating the offense must be interpreted as "an intentional physical presence at, or sufficiently near the actual situs of gaming in progress as to permit one to observe its progress".

Sec. 4-4. (Continued)

State v. Sorenson, 44 H 601 (1961), a case of aggravated assault and battery, held that the offense created by section 264-3(b), RLH may be committed either with intent to maim or with intent to disfigure. The court stated that to convict for this offense the act must have been committed with the specific malicious intention that aggravates the assault.

State v. Hale, 45 H 269 (1961), a case of burglary in the first degree, held that the gist of the offense created by section 266-1, RLH is the intent to steal or to commit some felony.

Sec. 4-5. Knowledge.
RLH, Secs. 267-8, 286-1, 288-4, 303-1, 309-26, 330-6.

Knowledge, and other terms of similar import, as the required mental state element of an offense have produced the following Hawaii law.

In the Matter of the Bark Kalakaua, 4 H 325 (1880), a case of opium smuggling, held that guilty knowledge (or intent) of the transaction by those in charge of the vessel was essential to a decree of condemnation. Accord and that lack of knowledge is an affirmative defense: The King v. Ah Sing, 5 H 553 (1886); Provisional Government v. Gertz, 9 H 288 (1893); Republic of Hawaii v. Lee Yick, 10 H 135 (1895).
Contra: Cleghorn v. Opium Pills, 8 H 461 (1892).

The King v. Mahukaliilii, 5 H 96 (1884), a case of forgery, held that proof of guilty knowledge rebutts the presumption of innocence through ignorance [section 285-7, RLH].

The King v. Grieve, 6 H 740 (1883), a case of common nuisance by printing an obscene pamphlet, held that knowledge or intent was a necessary ingredient of the offense. The statute [section 267-8, RLH] does not specify any necessary mental state.

The Queen v. Leong Man, 8 H 339 (1892), a case of selling opium, held that guilty knowledge is an element of the offense.

Sec. 4-5. (Continued)

Territory v. Cunha, 15 H 607 (1904), a case of liquor laws with respect to minors, held that knowledge was a necessary element of the offense.
Accord: Territory v. Hall, 17 H 536 (1906).

Territory v. Forrest, 26 H 695 (1923), a case of issuance of checks without funds in the bank, held that the statutory element [section 286-1, RLH] of knowledge of lack of funds in the bank is an essential ingredient of the offense.

Territory v. Santana, 37 H 586 (1947), a case of soliciting by driving any person to a place of prostitution, held that although the statute [section 309-26, RLH] does not expressly require that the acts should be done knowingly, the statutory words imply prior knowledge by the defendant of the character of the place to which he drives another. Such knowledge is an essential ingredient of the offense.
Accord: Territory v. Tacuban, 40 H 208 (1953), where the complaint used the word "participate" in reference to prohibited gambling game and the statute [section 288-4, RLH] does not express a specific mental state. Similarly, Territory v. Wong, et al., 40 H 257 (1953), as to knowledge that the game constitutes gaming.

Territory v. Patterson, 38 H 245 (1948), a case of receiving stolen goods, held that knowledge that the goods were stolen is a necessary element of the offense [sections 303-1 ff., RLH].

Territory v. Delos Santos, 42 H 102 (1957), a case of contributing to the delinquency of a minor, held that the statutory mental state requirement of section 330-6, viz., knowingly or willfully refers to the doing of the proscribed act or acts and not to knowledge of the child's age.

Sec. 4-6. Recklessness.
RLH, Secs. 247-4, 263-5, 291-10 (amended by Act No. 48, Session Laws of Hawaii 1964), 296-13, 311-1.

The most recent Hawaii legislation on the matter of non-intentional mental state of criminal liability is the 1964 amendment to section 291-10, RLH. The amended statute provides for two degrees of the offense of negligent homicide

for death caused by negligent operation of a vehicle, first degree in cases of gross negligence being a felony and second degree in cases of simple negligence being a misdemeanor. Before the amendment the offense, a felony, covered careless, reckless or negligent operation and expressly excluded "willful or wanton". The amended version eliminates the "willful or wanton" exception because, according to House Judiciary Committee Report No. 396, "such action would fall within the category of murder".

The only statute found which specifies the mental state of "wantonly" is its use alternatively with maliciously and intentionally in the misdemeanor of section 296-13, RLH relating to scattering poison in certain places.

Statutory references to the term "reckless" are found in section 247-4, RLH where it is included in the definition of "malice" and in section 263-5, RLH where it is included as one of alternative mental states for the offense of malicious burning.

Section 311-1, RLH which creates the offense of careless or heedless driving was analyzed and interpreted in State v. Tamanaha, 46 H 245 (1962). The court held that the statute set up the standard of ordinary negligence as determinative of careless and heedless driving. It was pointed out that the Hawaii statute is almost unique with respect to the general subject of "reckless" driving as it does not use the words and phrases, commonly used elsewhere, "willful and wanton disregard", "recklessly" or "in reckless disregard" of the safety of persons or property. In discussing the enactment in 1941 of the negligent homicide statute [section 291-10, RLH] and the 1941 amendment to section 311-1 which substituted the word "carelessly" in place of the word "furiously", the court stated:

> "This would seem to indicate a legislative intent to make ordinary negligence the standard of conduct under both the negligent homicide and the 'careless and heedless' driving statutes. The word 'furiously' is certainly more indicatory of willful and wanton conduct than the term 'carelessly' which negates such notion."

State v. Arena, 46 H 315 (1963), a case of negligent homicide under section 291-10, RLH held that only ordinary negligence is required to sustain a conviction under the statute.

Sec. 4-7. Negligence.
RLH, Secs. 262-2, 267-5, 282-6, 291-7, 291-10 (amended by Act No. 48, Session Laws of Hawaii 1964), 311-1.

Hawaii statutes which expressly specify negligent criminal offenses include depositing on highways glass and certain other materials dangerous to traffic (section 267-5, RLH); officer permitting prisoner to escape (section 282-6, RLH); negligent operation of a vehicle causing death (section 291-10, RLH); careless or heedless operation of a vehicle.

The Hawaii Supreme Court has consistently held since The King v. Bush, 1 H 62 (1850), that the killing of another in the commission of a negligent act is manslaughter. Territory v. Braly, 29 H 7 (1926); Territory v. Yoshimura, 35 H 324 (1940); Territory v. Kaupu, 35 H 396 (1940), all involving manslaughter (section 291-7, RLH) through negligent driving, were decided before the establishment of the separate offense of negligent homicide (section 291-10, RLH).

For further discussion of negligent homicide and careless and heedless driving (section 311-1, RLH), see Sec. 4-6, Recklessness.

Territory v. Shindo, 32 H 76 (1931), held that killing a dog by negligently running over the animal with a vehicle did not constitute the offense of needlessly mutilating and killing a living creature (section 262-2, RLH).

Sec. 4-8. Ignorance or Mistake.
RLH, Section 258-45.

This section states the familiar rule that everyone shall be presumed to intend the natural and plainly probable consequences of his acts.

A few Hawaii cases have been found on the subject of ignorance or mistake as a defense.

The King v. Grieve, supra (under Sec. 4-5, Knowledge), held that ignorance of the Hawaiian language was a defense to a charge of common nuisance by publishing a pamphlet in that language because knowledge was a necessary mental state element of the offense.

Republic of Hawaii v. Akau, 11 H 363 (1898), a case of violation of the intoxicating liquor law, held that defendant's ignorance that his act was an offense is not a defense.

Sec. 4-8. (Continued)

Territory of Hawaii v. Lo Kam, 13 H 14 (1900), held that the defendant's reasonable belief that he had lawful authority to remain on certain premises was a defense to a charge of vagrancy.

Territory v. Hall, supra (under Sec. 4-5, Knowledge), a case of furnishing intoxicating liquor to a minor, held that the defense of ignorance of the fact of minority must be raised as an affirmative defense.

Sec. 4-9. Absolute Liability.

Many offenses under Hawaii statutes do not include a description of a mental state element. It is a matter for the courts, then, to determine as to each such offense, either that mental state is not an element or that the legislature intended that a particular mental state be implied, frequently as a matter of common law analogy.

Among the offenses which are absolute in language are the following: Sections 261-1 to 261-3, certain acts of anarchistic publication and criminal syndicalism, including both felony and misdemeanor; sections 262-2 to 262-6, certain acts of cruelty to animals, misdemeanor; sections 267-1, 267-4, 267-7, 267-8, 267-23 to 267-25, certain acts of common nuisance, misdemeanor; section 270-1, corporate contributions for political purposes, including both felony and misdemeanor; section 271-1, refusal to pay carrier of passengers, misdemeanor; section 274-1, destruction, defacement or removal of survey monuments, misdemeanor; sections 275-1 to 275-3, 275-5, 275-6, certain acts of disloyalty and discretion of the United States flag, including both felony and misdemeanor; section 278-1, drunkenness in a public place, misdemeanor; section 279-1, divulging of grand jury proceedings, misdemeanor; sections 280-1 to 280-4, certain acts of dueling, including both felony and misdemeanor; sections 282-1 to 282-3, 282-7, 282-8, certain acts of escape or rescue of persons in custody, including both felony and misdemeanor; sections 283-1 to 283-4, certain acts of extortion, including both felony and misdemeanor; sections 287-3 to 287-5, certain fraudulent conveyances, including both felony and misdemeanor; sections 288-2 to 288-9, certain acts of gambling, misdemeanor; section 289-9, certain acts

Sec. 4-9. (Continued)

involving misbranded Hawaiian coffee, misdemeanor; section 289-16, certain acts involving defective merchandise, misdemeanor; section 289-17, stowaways,misdemeanor; section 289-18, scalpers' sales, misdemeanor; section 289-19, confidence games, including both felony and misdemeanor; sections 290-1 and 290-2, certain acts involving slaughter-house operations, misdemeanor; section 296-5, removal of articles from public exhibits, misdemeanor; section 300-2, picketing of residence, misdemeanor; section 302-1, use of profane or obscene language, misdemeanor; section 302A-2, public vending machine sale of prophylactics, misdemeanor; sections 305-1 and 305-2, riot, including both felony and misdemeanor; section 309-5, concealing death of illegitimate, including both felony and misdemeanor; chapter 309, numerous sex offenses, including both felony and misdemeanor; section 310-1, certain sales involving prizes or premiums, misdemeanor; chapter 311, numerous traffic violations, misdemeanor; chapter 312, certain acts of trespass, mis-demeanor; chapter 314, numerous acts of vagrancy, misdemeanor; chapter 315, certain acts involving potable water, mis-demeanor; section 316-1, sale of underweight loaf of bread, misdemeanor.

In addition to the listed offenses found in Title 31: Crimes, RLH, there are many other statutory provisions which do not describe a mental state element of an offense. Most of these provisions are in legislation of a regulatory, police or public welfare nature.

Territory v. Yamamoto, et al., supra (under Sec. 4-4, Intent), interpreted section 275-3 to find that the offense of having possession of an enemy flag during wartime was one which imposed absolute liability and that mental state was not an element of the offense.

ARTICLE 5. PARTIES TO CRIME

Sec. 5-1. Accountability for Conduct of Another.
RLH, Secs. 252-1, 252-3, 252-4.

Section 252-1, RLH defines "principals" in an offense to include those who take part in the commission of an offense or are present and aid, incite, countenance or encourage others in the commission.

Section 252-3, RLH defines "accessory before the fact".

Section 252-4, RLH provides that principals and accessories before the fact are similarly accountable for the offense.

These statutory provisions on principals and accessories have been relied on in many Hawaii cases.

The King v. Makamaka, 7 H 394 (1888), was one of the earliest cases to cite the statutory definition of "principal" (section 252-1, RLH) as including one being present, who aided, incited, countenanced or encouraged the commission of the offense.
Accord: Hang Fook v. Republic of Hawaii, 9 H 593 (1894); Republic of Hawaii v. Yamane, 12 H 189 (1899); Territory v. Ebarra, et al., 39 H 488 (1952); Territory v. Bollianday, et al., 39 H 590 (1952); Territory v. Tacuban, 40 H 208 (1953); State v. Carvelo, 45 H 16 (1961); State v. Jones, 45 H 247 (1961); State v. Ornellas, 46 H 103 (1962).

The King v. Wo Sow, 7 H 734 (1889), held that the criminal procedure rules authorize joining principals, accessories before the fact and accessories after the fact in one indictment (section 252-4, RLH).
Accord: Territory v. Peterson, 23 H 476 (1916); Territory v. Hart, 35 H 582 (1940).

Republic of Hawaii v. Oishi, et al., 9 H 641 (1895), relied on the statutory definition (section 252-3, RLH) in finding that the defendant was an accessory before the fact when the offense had been committed in pursuance of defendant's instigation when he was not present.
Accord as to abetting: Territory of Hawaii v. Watanabe Masagi, 16 H 196 (1904).

Sec. 5-2. When Accountability Exists.
RLH, Secs. 248-6 to 248-8, 252-2.

Statutory provisions on instigation (see Ill. CC, Article 8, Solicitation, Conspiracy and Attempt) make it punishable as an attempt, merge it in the offense, and relieve the instigator of liability if he repents before the offense is committed, countermands his instigation and endeavors to prevent the offense.

Section 252-2, RLH provides that there are accessories only to felonies.

Hawaii cases on the subject of accountability for the conduct of another have established the following principles:

The prosecuting witness for the offense of sodomy may be guilty of the offense charged as an accomplice, Republic of Hawaii v. Luning, 11 H 390 (1898); Republic of Hawaii v. Edwards, 11 H 571 (1898).

The victim of the offense of statutory rape cannot be prosecuted for the offense, Re Habeas Corpus, Balucan, 44 H 271 (1960).

The presumption of intent necessary to constitute first degree robbery which is applicable to one who commits robbery while armed with a dangerous weapon extends to one who is a principal by reason of being present and aiding and abetting the commission of the robbery, State of Hawaii v. Shon, 47 H 145 (1963).

Territory v. Bollianday, et al., supra (under Sec. 5-1, Accountability for Conduct of Another) held that an accessory before the fact to a misdemeanor is a principal.

Sec. 5-3. Separate Conviction of Person Accountable.

Hawaii law on separate convictions involving principals and accessories includes the following case:

Republic of Hawaii v. Ruttman, 11 H 591 (1898), held that the defendant was not immune from prosecution as a principal because of the acquittal of another principal charged with the same crime.

Sec. 5-4. Responsibility of Corporation.
RLH, Section 259-2.

Section 259-2, RLH merely prescribes the procedures for collecting fines from corporations after conviction.

There is little case law on the matter of corporate criminal liability.

Territory of Hawaii v. Pacific Club, 16 H 507 (1905), held that an incorporated social club was guilty of the offense of selling intoxicating liquor without a license.

Accord as to a corporation charged with improper storage of explosives, Territory v. Hilo Mercantile Co., 23 H 409 (1916).

Sec. 5-5. Accountability for Conduct of Corporation.

No Hawaii law was found on these specific problems of accountability for conduct of a corporation.

ARTICLE 6. RESPONSIBILITY

Sec. 6-1. Infancy.
RLH, Secs. 249-1 and 249-2; Chapter 333.

Section 249-1, RLH follows the common law rule that a person under the age of seven has no criminal capacity.

Section 249-2, RLH departs from the common law rule that between the ages of seven and fourteen a presumption of incapacity exists which can be rebutted by clear proof in the particular case that the defendant appreciated the nature and quality of his conduct. Instead, the Hawaii statute provides that there is no presumption for or against capacity for accused persons between the ages of seven and fourteen. The competency of a person in this age bracket to commit an offense is determined in the particular case by evidence as to whether the accused acted with intelligence and understanding of the nature of his act.

Sec. 6-1. (Continued)

The determination of jurisdiction for infants between the ages of twelve and eighteen--criminal proceedings or juvenile court treatment--is governed by chapter 333, RLH. Various procedural matters in this area have been ruled on in Re Habeas Corpus, Balucan, 44 H 271 (1960); Re Castro and Others, 44 H 455 (1960); State v. Tominaga, 45 H 604 (1962).

Sec. 6-2. Insanity.
RLH, Secs. 249-3 to 249-5.

Section 249-3, RLH provides that a person is not criminally responsible for an act if he is not competent to discern the nature and criminality of the act because of idiocy or mental imbecility.

Section 249-4, RLH provides for the same test as in section 249-3 (incompetent to discern the nature and criminality of his act) in the case of a person acting under mental derangement. The rule is qualified, however, to impose responsibility in the case of incompetency by reason of mental derangement if the criminal act is done pursuant to prior intent entertained when the person was competent according to the same test.

Section 249-5, RLH deals inter alia with compulsion by force "which he cannot resist...." This provision may embody the "irresistible impulse" rule, but the court has not had occasion to interpret it.

Hawaii's rules on insanity have been interpreted by the State Supreme Court as follows:

Territory v. Alcosiba, 36 H 231 (1942), interpreted the term "mental derangement" in section 249-4, RLH as synonymous with the word "insanity" and meaning the result or manifestation in the mind of a disease of the brain. "Disease" was interpreted to mean any underdevelopment, pathological condition, lesion or malfunctioning of the brain or any morbid change or deterioration in the organic functions or structure of the brain. The court contrasted mental derangement, resulting from a disease of the brain, with emotional insanity, unassociated with mental disease, and held that the latter is not a defense to exculpate the defendant for his criminal act.
Accord: State v. Foster, 44 H 403 (1960).

Sec. 6-3. Intoxicated or Drugged Condition.
RLH, Section 249-4.

Section 249-4, RLH provides that mental derangement induced by voluntary or heedless "intoxication or otherwise" is not a defense to criminal responsibility..

In re the "Mary Belle Roberts", 3 H 823 (1877), held that long, continued and excessive drinking which has not caused "real" insanity is not a defense to the offense of opium smuggling.

The only other case reference found on the matter of intoxication as a defense is a jury instruction included in a note appended to the concurring opinion in State v. Foster, supra (under Sec. 6-2, Insanity). The instruction provides that voluntary intoxication is no excuse, justification or extenuation of a crime committed under its influence, but that it may be a defense where specific intent is an essential ingredient of the crime charged.

There would appear to be some inconsistency in the Hawaii usage of the term "mental derangement". When used to indicate insanity, the term is limited specifically to results of a disease of the brain; whereas when it is used with respect to voluntary or heedless intoxication "or otherwise", the term may refer to a temporary condition of intoxication involving no aspect of a diseased brain.

Sec. 6-4. Affirmative Defense.

Hawaii cases have held that insanity is not an affirmative defense, and in a prosecution for murder, a plea of not guilty controverts and puts in issue defendant's sanity at the outset of the trial, Territory v. Adiarte, 37 H 463 (1947); State v. Foster, supra.

ARTICLE 7. JUSTIFIABLE USE OF FORCE; EXONERATION

Sec. 7-1. Use of Force in Defense of Person.

The Hawaii Supreme Court first ruled on the subject of self-defense in The King v. Bridges, 5 H 467 (1885). The opinion held that the defendant must retreat before resorting to deadly force and that, "when a person takes the life of another under the plea of self-defense, it is for him to show the actual necessity for the act: that the person killed was in the act of committing some felony, or in the act of committing grievous bodily harm upon the slayer under such circumstances as would induce a reasonable belief from the manner of the assault and the weapon used that the danger was imminent and nothing short of taking the life of the aggressor would prevent it."

Territory v. Yadao, 35 H 198 (1939), held that in a prosecution for assault and battery with a weapon obviously and imminently dangerous to life, the right of self-defense was not limited to absolute necessity but only by what reasonably appeared dangerous to the defendant.

Sec. 7-2. Use of Force in Defense of Dwelling.

Two Hawaii cases were found on the subject of defense of dwelling.

The King v. Howard, 1 H 66 (1851), held that the owner of a house is not justified in attacking with a deadly weapon a person who declines to leave the house. The court stated the rule of law to be that before assaulting an intruder, the owner or occupant of the house must request him to leave and allow him a reasonable time to depart, after which, the owner or occupant may use reasonable and necessary means to eject him, but that the only justifiable use of deadly weapons is in defense of self and family. Accord: Territory v. Warren, 35 H 232 (1939), but extending justification to case of preventing a great crime or to accomplishing a necessary public duty.

Sec. 7-3. Use of Force in Defense of Other Property.

Territory of Hawaii v. Savidge, 14 H 286 (1902), was a case of assault and battery by the person with title to certain real property against the person actually in peace-

Sec. 7-3. (Continued)

able possession of the property which included a dwelling. The court held that the person with title but out of possession is not justified in using force to recover possession, and that the person in actual peaceable possession may defend his possession by the use of reasonable and necessary force.

Sec. 7-4. Use of Force by Aggressor.

No Hawaii case was found in which the defendant was the aggressor but claimed self-defense.

Sec. 7-5. Peace Officer's Use of Force in Making Arrest: RLH, Section 255-7.

Section 255-7, RLH provides that necessary force may be used when a person arrested refuses to submit or attempts to escape.

The King v. Sherman, 1 H 150 (1853), held that a police officer may use only necessary force in resisting force within the limitations of self-defense.

Provisional Government v. Caecires, 9 H 522 (1894), a case of murder in the second degree of an arresting police officer, held that a police officer is justified in using necessary force (section 255-7, RLH) even though no formal arrest was made. The court approved a jury instruction that limited the officer's use of deadly force unless in his own defense.

Leong Sam v. Keliihoomalu, 24 H 477 (1918), a tort action for damages against a police officer, held that a peace officer is not liable for injuries inflicted by him in the use of reasonably necessary force to overcome resistance to his authority.

Territory v. Machado, 30 H 487 (1928), was decided in reliance on section 255-7, RLH. The court held that the statute, applicable alike to arrests for felonies and misdemeanor, does not limit to self-defense the right of an officer to use necessary force in making an arrest.

Sec. 7-6. Private Person's Use of Force in Making Arrest.
RLH, Section 255-7. (See Sec. 7-5, Ill. CC, Peace Officer's Use of Force in Making Arrest.)

The Hawaii statute on the use of force in making an arrest does not differentiate between arrests by officers of justice and those by private persons.

Sec. 7-7. Private Person's Use of Force in Resisting Arrest.

Provisional Government v. Caecires, supra (under Sec. 7-5, Peace Officer's Use of Force in Making Arrest), involved an arrest by peace officers, apparently in plain clothes who had not had an opportunity to declare their official authority to defendant. The decision approved of jury instructions which stated the rule that a person who kills an officer attempting an unlawful arrest is not justified but may be guilty of manslaughter or even assault and battery rather than murder, in the absence of express malice.

Sec. 7-8. Force Likely to Cause Death or Great Bodily Harm.

None.

Sec. 7-9. Use of Force to Prevent Escape.
RLH, Section 255-7. (See Sec. 7-5, Ill. CC, Peace Officer's Use of Force in Making Arrest.)

The Hawaii statute does not expressly refer to escape from custody or place of confinement after arrest.

Sec. 7-10. Execution of Death Sentence.
Act 282, Session Laws of Hawaii 1957.

Capital punishment was abolished by Act 282, Session Laws of Hawaii 1957.

Sec. 7-11. Compulsion.
RLH, Section 249-5.

Section 249-5, RLH exculpates a person from criminal responsibility for any act which he is compelled to do by

Sec. 7-11. (Continued)

irresistible force or by force which he cannot escape. Justification is not available unless the threat or imminent danger was greater than the injury inflicted.

Sec. 7-12. Entrapment.

Territory v. Achuck, 31 H 474 (1930), in approving a jury instruction on the law of entrapment, held that it was for the jury to determine whether the defendant was entrapped by the city and county attorney or whether the thought and criminal design had originated in the defendant's mind and the city and county attorney had merely furnished him with an opportunity to commit the offense of conspiracy.

Sec. 7-13. Necessity.

No Hawaii law was found on the defense of necessity.

Sec. 7-14. Affirmative Defense.

No Hawaii law was found on the subject of justifiable use of force or exoneration as an affirmative defense.

TITLE III. SPECIFIC OFFENSES

PART A. INCHOATE OFFENSES

ARTICLE 8. SOLICITATION, CONSPIRACY AND ATTEMPT

Sec. 8-1. Solicitation.
RLH, Secs. 248-6, 248-8, 309-26.

Section 248-6, RLH defines the offense of instigation as commanding, soliciting, offering to hire, or otherwise endeavoring another to commit an offense. The penalty for instigation is the same as the penalty imposed for an attempt to commit the principal offense.

Section 248-8, RLH provides that an instigator may relieve himself of criminal liability if before the principal offense is attempted, he repents, countermands the instigation, and endeavors to his utmost to prevent commission of the principal offense.

Section 309-26, RLH concerns the specific sex offense of solicitation and is discussed under Sec.11-15, Ill. CC, Soliciting for a Prostitute.

Republic of Hawaii v. Oishi, et al., 9 H 641 (1895), held that the offense of inciting another to do a criminal act does not require that the defendant hypnotized the other so as to destroy his will. See Sec. 5-1, Ill. CC, Accountability for Conduct of Another.

Sec. 8-2. Conspiracy.
RLH, Secs. 268-1 to 268-5, 268-9, 268-10, 296-15, 308-5.

Section 268-1, RLH defines conspiracy to include two or more persons conspiring to do any of the following: to commit an offense, to instigate or incite others to commit an offense, or to commit certain acts generally classified under the heading of malicious prosecution or abuse of process.

Section 268-2, RLH states the rule that a person who joins the conspiracy after it is formed is criminally responsible to the same extent as an original conspirator.

Sec. 8-2. (Continued)

Section 268-3, RLH provides that the conspiracy alone constitutes the offense, and no act in furtherance of the conspiracy is required.

Section 268-4, RLH states the rule that a conspirator is criminally responsible for all the acts of his co-conspirators.

Section 268-5, RLH provides that a husband and wife alone cannot be guilty of conspiracy.

Section 268-9, RLH provides penalties for first degree conspiracy. A maximum of $10,000 fine or imprisonment at hard labor for ten years, or both, is imposed for conspiracy to commit a felony, to incite another to commit a felony, or to malicious prosecution where the proceedings involve a felony. The penalty for conspiracy to commit or incite a felony is limited to that of the principal offense.

Section 268-10, RLH provides penalties for second degree conspiracies which include all conspiracies not provided for in section 268-9. A maximum of $1,000 fine or one year imprisonment, or both, is imposed. The penalty for conspiracy to commit or incite a misdemeanor is limited to that of the principal offense.

Section 296-15, RLH contains a specific conspiracy provision relating to interference with electrical meters. The penalty for conspiracy is the same as for the principal offense - a fine of not more than $1,000, imprisonment not more than one year, or both.

Section 308-5, RLH provides that conspiracy to commit any offense of sabotage is subject to the same penalty applicable to the principal offense. The statute also provides that the conspiracy is an offense regardless of whether an act in furtherance was committed. A conspirator is denied a defense on the ground that a co-conspirator has been acquitted, not been arrested or convicted, is not amenable to justice, has been pardoned, or otherwise has been discharged before or after conviction.

Sections 268-1, 268-9, and 268-10, RLH were completely rewritten in 1949 (Act 10, Session Laws of Hawaii, Special Session 1949) after serious questions had been raised as to the constitutionality of the statutes defining,

establishing degrees for, and providing penalties for, the offense of conspiracy. See International Longshoremen's and Warehousemen's Union, et al. v. Ackerman, Attorney General, et al., 342 U.S. 859 (1951) cert. denied, 187 F. 2d 86 Orev., 82 Fed. Supp. 65.

Prior to the 1949 amendments the Hawaii definition of conspiracy, including numerous examples, was materially different from any other statutory definition of the offense, Territory v. Hart, 35 H 188 (1939).

Other cases, concerned with the substantive law of conspiracy, decided while the earlier statutes were in effect include:

The King v. Anderson and Russell, 1 H 67 (1851);
The King v. Thornton, 4 H 45 (1877);
Republic of Hawaii v. Yamane, 12 H 189 (1899);
Territory v. Johnson, 16 H 743 (1905);
Territory v. Soga, 20 H 71 (1910);
Territory v. Scully, 22 H 618 (1915);
Territory v. Belliveau, 24 H 768 (1919);
Territory v. Goto, 27 H 65 (1923);
In re French, 28 H 47 (1924);
Territory v. Achuck, 31 H 474 (1930);
Territory v. Blackman, 32 H 460 (1932);
Territory v. Legaspi, 39 H 660 (1953).

Cases decided since the effective date of the amended statutes have stated the following rules:

1. In determining admissibility of evidence of acts and declarations of co-conspirators, the court is guided by the statutes which provide that one who joins a conspiracy after its formation is liable as an original conspirator (section 258-2, RLH) and that the act of each conspirator is the act of all of them (section 268-4, RLH). The issue of termination of the conspiracy is a question of fact for determination by the jury, Territory v. Kitabayashi, et al., 41 H 428 (1956). Accord: State v. Yoshida, 45 H 50 (1961); State v. Yoshino, 45 H 206 (1961); State v. Yoshino, 45 H 640 (1962).

Sec. 8-2. (Continued)

2. A conspiracy exists where two or more persons combine and act together to accomplish a criminal or unlawful purpose, State v. Yoshino, 45 H 206 (1961).

Sec. 8-3. Defense.

No Hawaii law was found on the subject of defense to solicitation or conspiracy based on legal incapacity or immunity.

Sec. 8-4. Attempt.

RLH, Secs. 248-1, 248-2, 248-5, 258-48, 308-4, 313-1; Rule 31(c), Hawaii Rules of Criminal Procedure.

Section 248-1, RLH defines attempt as an act done towards committing and in part execution of the intent to commit an offense. The definition is illustrated by the example of putting poison in the way of a person, with intent thereby to murder him.

Section 248-2, RLH distinguishes from attempt, the mere preparation of the means of committing an offense, nothing being done in execution of the intent to commit the offense. Mere preparation is illustrated by the example of merely procuring poison intended to be used for murder.

Section 248-5, RLH provides the penalties for attempts. If the principal offense is punishable by imprisonment for twenty years or more or for life, the maximum penalty is imprisonment at hard labor for twenty years; in other cases, the maximum is tied to the penalty for the principal offense.

Section 258-48, RLH (incorporated by reference into the Hawaii Rules of Criminal Procedure, Rule 31(c)), provides that a defendant may be found guilty of an attempt of an offense charged if the offense was not completed.

Section 308-4, RLH provides especially for attempts to commit any offense of sabotage. An attempt of sabotage includes, in addition to attempts included under section 248-1, RLH, solicitation not followed by commission of the

offense, collection or assemblage of materials with the intent to use them in the commission of the offense, and entry with or without permission of premises with the intent to commit the offense. The penalty for such attempt is one-half the penalty for the principal offense, the maximum for the most serious principal offenses being fine of $10,000, imprisonment at hard labor for twenty years, or both.

Section 313-1, RLH provides for the offense of attempted train wrecking with a maximum penalty of $1,000 fine or ten years imprisonment at hard labor.

Decisional law on attempt is found in the following Hawaii cases.

Rex v. Kaimano, 3 H 565 (1874), a case of attempted sexual intercourse with a female under the age of fourteen, held that the general attempt statute (section 248-1, RLH) applies to any offense.
Accord: Territory v. Wong, 30 H 819 (1929), a case of attempted bribery; State v. Gager and Histo, 45 H 478 (1962), a case of attempted rape.

The King v. Leong Tiam, 7 H 338 (1888), a case of attempted illegal entry into the Kingdom, involved the distinction between mere preparation and attempt. The court held that purchasing the passport of another and sailing to Honolulu was mere preparation, but that the act of presenting the passport with the intention of landing constituted the attempt to commit the offense.

Territory v. Muranaka, 19 H 321 (1909), a case of violation of a county ordinance prohibiting construction of lodging houses in the vicinity of schools, stated that if the ordinance prohibited keeping a lodging house within the designated area, such construction would not constitute an attempt to commit an offense but would be mere preparation of the means to commit. (Sections 248-1 and 248-2, RLH.)

Territory v. Wong Pui, 29 H 441 (1926), a case of assault and battery, stated that failure of an attempt is not necessary to a conviction for attempt.

Sec. 8-5. Multiple Convictions.
RLH, Secs. 248-3, 248-7, 258-48, 258-49, 268-7;
Rule 31(c), Hawaii Rules of Criminal Procedure.

Section 248-3, RLH provides that an attempt merges into the principal offense if the attempt is successful.

Section 248-7, RLH provides that an instigation merges into the principal offense if the instigator is guilty of the principal offense as an accessory before the fact or otherwise.

Sections 258-48 and 258-49, RLH (incorporated by reference in Rule 31(c), Hawaii Rules of Criminal Procedure) provide that a person tried for an offense which the evidence proves was not completed may be found guilty of an attempt to commit the offense but may not be tried again for the attempt; and that a person tried for an offense may be found guilty of any lesser degree of the offense or of any included offense.

Section 268-7, RLH provides that a person convicted of an offense is not subject to subsequent trial or conviction of a conspiracy to commit the offense; and that a person charged in the same indictment with conspiracy to commit an offense and commission of the offense is liable to be sentenced for one only.

The King v. Thornton, supra (under Sec. 8-2, Conspiracy), followed the common law rule that where two crimes are of equal grade there (conspiracy to commit a felony is a felony) can be no merger and held that the defendant was not entitled to an acquittal on the ground that the conspiracy had merged in the subsequent felony. Sections 268-3 and 268-7, RLH were interpreted to mean that there would not be a merger even if the conspiracy and the principal offense were of different grades.
Accord: Territory v. Johnson, supra (under Sec. 8-2, Conspiracy).

Territory v. Wong, 30 H 819 (1929), denied a contention that an attempted bribery was merged in the completed substantive offense and upheld a verdict of attempted bribery under an indictment charging bribery.

Territory v. Blackman, supra (under Sec. 8-2, Conspiracy), held that a conviction of conspiracy to commit an offense may be had under an indictment charging commission of the offense.
Accord: State v. Yoshida, supra (under Sec. 8-4, Attempt); State v. Yoshino, 45 H 640 (1962).

Sec. 8-6. Offense.

See Sec. 1-5, Ill. CC.

PART B. OFFENSES DIRECTED AGAINST THE PERSON

ARTICLE 9. HOMICIDE

Sec. 9-1. Murder
RLH, Secs. 291-1, 291-3, 291-5.

Section 291-1, RLH defines murder as the killing of a human being with malice aforethought, without authority, justification or extenuation by law. Murder is divided into two degrees.

Section 291-3, RLH defines first degree murder as murder committed with deliberate premeditated malice aforethought, in the commission or attempt to commit a crime punishable with imprisonment for life not subject to parole, or committed with extreme atrocity or cruelty. All other murders are in the second degree.

Section 291-5, RLH provides the penalties for murder: imprisonment for life at hard labor not subject to parole for first degree murder; and a minimum of twenty years imprisonment at hard labor for second degree murder.

Provisional Government v. Caecires, 9 H 522 (1894), approved jury instructions on the element of malice in a prosecution of murder in the second degree. The instructions elaborated on the statutory language and declared that (1) malice is not restricted specially toward the person assaulted but is a general recklessness of the lives of others; (2) where the act is done deliberately and without sufficient provocation, malice is presumed; (3) "malice aforethought" does not imply that any considerable lapse of time is necessary between the malicious intent and the actual execution of the intent.

The omission in the indictment of the words "deliberate, premeditated" before the word "malice" charges murder in the second degree.

Republic of Hawaii v. Kapea, 11 H 293 (1898), interpreted the statutes on murder and distinguished the degrees, holding that murder in the first degree must be committed with "deliberate, premeditated malice, etc.". The court ruled that since there was no evidence that the killing was done in a manner to make it an offense of a lesser degree, it was not error to instruct the jury to find the defendants guilty of first degree murder or not guilty.
Accord: Territory v. Buick, 27 H 28 (1923), as to no evidence to support verdict of manslaughter or assault and battery; Territory v. Alcantara, 24 H 197 (1918).

Republic of Hawaii v. Tsunikichi, 11 H 341 (1898), held that the jury may find deliberation and premeditation from the nature of the act of killing, from the means used, or from other facts and circumstances surrounding the act. Jury instructions were approved which stated that it is not necessary that a deliberate, premeditated intention should be formed and matured before the crime was committed; if the act is done, the moment such intention is formed the murder is in the first degree. First degree may be a killing either with deliberate, premeditated malice aforethought or with extreme atrocity or cruelty.

Republic of Hawaii v. Yamane, 12 H 189 (1899), approved jury instructions that included the following:

1. Malice includes not only hatred, ill-will and desire of revenge, but also cruelty of disposition or temper, and a motive of doing a wrong or injury to another. It also includes acting with a heedless, reckless disregard, or gross negligence of the life, health or personal safety of another.

2. "Premeditated" means thought of beforehand for any length of time, however short.

3. Premeditated malice is the intention to unlawfully take life, or to unlawfully commit such an assault upon another that from it the taking of life would result as a natural and plainly

probable consequence and such intention is deliberately formed in the mind, and that determination meditated upon before the act is done.

4. There need be no appreciable time between the formation of the intention and the killing; they may be as instantaneous as successive thoughts.

5. Murder is killing preceded by a concurrence of will, deliberation and premeditation.

6. "Deliberately" means in a cool state of the blood. It does not so much import an act done after time for reflection, as a voluntary act upon motive, purpose and design, as contrasted to an act done in the heat of passion.

7. Murder in the first degree occurs when a person has formed the purpose deliberately and maliciously to kill or to commit such an assault that from it the taking of life would result as a natural and plainly probable consequence, and has deliberated and meditated upon it before committing the act however short the time between the purpose and its commission.

8. Murder in the second degree is a killing with malice aforethought but lacking the elements of deliberation and premeditation. A killing in the heat of passion caused by inadequate provocation is murder in the second degree.

9. Murder with extreme atrocity or cruelty means committed with atrocity or cruelty of a higher degree than is usually incident to murder.

Accord: Appl. of Palakiko and Majors, 39 H 141 (1951)
Territory v. Josiah, 42 H 367 (1958)

Territory of Hawaii v. Matsumoto, 16 H 267 (1904) first degree - extreme atrocity - exploding giant powder under victim's bed.

Territory v. Kaeha, 24 H 467 (1918), held that first degree murder is limited to three classes: killing with deliberate, premeditated malice aforethought; with extreme atrocity or cruelty; or while defendant was com-

Sec. 9-1. (Continued)

mitting or attempting a crime punishable with death. A killing during the course of robbery is not first degree because robbery is not a crime punishable by death.

Territory v. Alu, 28 H 268 (1925), held that under the Indeterminate Sentence and Parole Acts, the court in imposing sentence for murder in the second degree is authorized only to fix the maximum sentence at life or for any number of years, not less than the minimum of twenty years prescribed by statute (section 291-5, RLH).

Territory v. Young and Nozawa, 37 H 189 (1945), held that a homicide resulting from a criminal abortion, which is a felony, constitutes murder in the second degree, the element of malice aforethought being supplied by implication by the felony though the homicide was unintentional.

Sec. 9-2. Voluntary Manslaughter.
RLH, Secs. 280-1, 291-7, 291-8.

Section 280-1, RLH provides that a killing in a duel is manslaughter.

Section 291-7, RLH defines manslaughter as killing a human being without malice aforethought and without authority, justification or extenuation by law.

Section 291-8, RLH prescribes the maximum penalty for manslaughter at ten years imprisonment at hard labor.

The King v. Sherman, 1 H 150 (1853), a case of homicide resulting from a blow to the head by a club during a prison disturbance, held that if the blow was given under the sudden impulse of passion excited by provocation or if there was legal extenuation for the act, the killing was manslaughter.

The King v. Bridges, 5 H 467 (1885), stated that mere threats or mere provocation by insulting language, gestures or acts do not justify homicide. The court upheld a verdict of manslaughter in the second degree and speculated that the jury had found extenuating circumstances to mitigate the penalty for the offense charged, manslaughter in the first degree.

Sec. 9-2. (Continued)

Republic of Hawaii v. Yamane, supra (under Sec. 9-1, Murder), approved of jury instructions which included the statutory definition of manslaughter (section 291-7, RLH) and the following explanations:

1. The difference between murder and manslaughter is that only the former has in it the element of malice aforethought.

2. Homicide committed under the influence of passion or in the heat of blood produced by an adequate or reasonable provocation is manslaughter and not murder.

3. One who goes to the rescue of another who is being assaulted and while reasonably acting in defense of the other, under the heat of passion from the conflict and without malice kills the assailant, is guilty of manslaughter. Such heat of passion is caused by an adequate provocation. In this situation, if the person assaulted has safely escaped, a killing in the subsequent conflict in the heat of passion caused by thought of the recent assault is murder in the second degree if the killing was without deliberateness and premeditation. In this case the heat of passion is caused by inadequate provocation.

Territory v. Alcantara, 24 H 197 (1918), stated that malice is the element which distinguishes murder from manslaughter.

Territory v. Joaquin, 39 H 221 (1952), amplified the distinction between manslaughter and murder as follows:

> "To determine the distinction, it is necessary to inquire whether the defendant was subjected to such provocation by the deceased as to generate sudden hot blood or passion, as a result of which his reason became disturbed to such degree that he thereafter acted without deliberation or reflection. This settled principle requires that the homicide be committed under, and generated by passion, and not after a lapse of time, however short, sufficient to permit a cooling of the hot blood or passion with accompanying restoration of reasoned judgment."

Sec. 9-3. Involuntary Manslaughter and Reckless Homicide.
See Secs. 4-6, Recklessness; 4-7, Negligence; 9-2, Voluntary Manslaughter.

Under Hawaii's single manslaughter definition, homicides involving the following unlawful acts have been held to constitute manslaughter:

Leading a wild bullock through a public street, The King v. Bush, 1 H 62 (1850); unlawful whipping, The King v. Greenwell, 1 H 146 (1853); assault and battery, Republic of Hawaii v. Hickey, 11 H 314 (1898). Territory v. Braly, 29 H 7 (1926), held that section 291-7, RLH is sufficiently definite to meet the requirements of the Fifth and Sixth Amendments to the United States Constitution. The court analyzed the statute and stated that it defines manslaughter more specifically than the common law definition of an unlawful killing of another without malice. The Hawaii statute specifies what makes the killing unlawful, viz., committed without authority of law, which excludes legal executions; without justification, which includes self-defense; or under circumstances not recognized as an extenuation of mitigation of the offense. The court made it clear that the offense encompassed homicides committed both by criminal negligence and by intentional acts. The court also held that "malice" is synonymous with "malice aforethought". It should be noted that this case of manslaughter caused by reckless driving was decided before enactment of section 291-10, RLH on negligent homicide for death caused by negligent operation of a vehicle. See Secs. 4-6, Recklessness and 4-7, Negligence for cases on negligent homicide.
Accord: Territory v. Yoshimura, 35 H 324 (1940); Territory v. Kaupu, 35 H 396 (1940).

Sec. 9-4. Concealing Death of Bastard.
RLH, Section 309-5.

Section 309-5, RLH defines the offense of concealing the death of an illegitimate to apply to a mother who conceals such death in order that it can not be known if the child was born alive or not or whether it was murdered.

ARTICLE 10. KIDNAPING AND RELATED OFFENSES

Sec. 10-1. Kidnaping.
RLH, Secs. 292-1, 292-3 to 293-6.

Section 292-1, RLH defines kidnaping as "forcibly or fraudulently and deceitfully, and without authority by law, imprisons, seizes, detains or inveigles away any person, with intent to cause such person to be secreted within the State against his will, or sent out of the State against his will, or sold or held as a slave". The penalty is a $1,000 fine and imprisonment at hard labor ranging from any number of years to life.

Section 292-3, RLH establishes a rebuttable presumption that consent of a person kidnaped was obtained by fraud or extorted by duress and threats.

Section 292-4, RLH defines the offense of child-stealing as "maliciously by fraud, force or deception, conveying, leading, inveigling, taking, decoying or enticing away, or detaining or concealing any child under the age of eighteen years, with intent to deprive its parent or guardian, or any person having lawful charge of it, of the custody and control of the child, or with intent to steal any article upon or about the person of the child". The maximum penalty is a $500 fine or imprisonment at hard labor for two years, or both.

Section 292-5, RLH makes receiving or harboring a child, knowing it to have been stolen with the intent specified for the offense of child-stealing, punishable as for child-stealing.

Section 292-6, RLH exempts from the offenses of child-stealing and receiving or harboring a stolen child detention of a child from motives of humanity or under certain claims of right.

Sec. 10-2. Aggravated Kidnaping.

See Sec. 10-1, Kidnaping.

Sec. 10-3. Unlawful Restraint.
RLH, Secs. 292-2, 292-3, 304-1.

Section 292-3, RLH defines unlawful imprisonment as "maliciously, without authority by law, imprisons another, or causes anyone to be imprisoned, the imprisonment not appearing to be kidnaping". The maximum penalty is a fine of $200 or imprisonment one year.

Section 292-3, RLH provides the same rebuttable presumption against consent to unlawful imprisonment that obtains in the case of kidnaping.

Section 304-1, RLH was enacted in 1949 when it was popularly known as a "right to work act". It makes it unlawful by force or violence or threats thereof to willfully prevent or attempt to prevent: anyone from engaging in lawful work, anyone or any vehicle from lawfully entering or leaving any public or private place, or anyone from exercising any other lawful right. The maximum penalty is a $1,000 fine, imprisonment one year, or both.

ARTICLE 11. SEX OFFENSES

Sec. 11-1. Rape.
RLH, Section 309-31.

Section 309-31, RLH defines rape as whoever "ravishes or has carnal intercourse with any female, by force and against her will". The penalty may be imprisonment at hard labor for life, parolable or non-parolable, or for any number of years.

The King v. Heinrichs, 3 H 40 (1867), held that under the forcible rape statute (section 309-31, RLH) a rape may be committed upon a female of any age and that age must be alleged and proved only if the offense charged is statutory rape.

Republic of Hawaii v. Muramoto, 11 H 774 (1899), held it is essential on a charge of rape to prove penetration though the degree is immaterial.

Sec. 11-1. (Continued)

Territory v. Charman, 18 H 46 (1906), held that it is not necessary to show that the rape victim resisted to the utmost of her physical power if she was deterred from doing so by fear of great bodily harm from the threat and conduct of the accused.

Territory v. Nishi, 24 H 677 (1919), held that in the absence of unconsciousness, threats or other things that make resistance impossible the victim of rape must exercise continuously every physical means to resist penetration until the offense is consummated.

Territory v. Chee Sui, 25 H 814 (1921), stated that in a prosecution for rape it is not necessary to prove emission.

Territory v. Noguchi, 38 H 350 (1949), stated that in the case of rape upon a sleeping woman, no other force is required to constitute the offense than that necessary to effect penetration; and that if a man has sexual connection with a sleeping woman, he is guilty of rape because the act is not only by force but without her consent and therefore against her will.

Re Castro and Others, 44 H 455 (1960), held valid a transfer of defendants, between ages of fourteen and eighteen, from the juvenile court to be tried as adults for the offense of rape.
Accord: State v. Tominaga, 45 H 604 (1962).

State v. Gager and Histo, 45 H 478 (1962), approved a jury instruction that, "Where a female is intoxicated to the extent of being unable to resist, the act of sexual intercourse is without her consent and is rape; but the intoxication must actually render her incapable of resistance, and not merely be such as to excite her passions...it is immaterial...if the complainant voluntarily consumed intoxicating liquors."

State v. Hashimoto, et al., 47 H (No. 4179, October 10, 1963), held that an unconscious victim of rape is incapable of consenting to or resisting a carnal attack. The court also stated that the rule of resistance does not apply unless a woman is being carnally attacked.

Sec. 11-1. (Continued)

State v. Dizon, 47 H (No. 4312, March 25, 1964), held that the resistance element of the offense of rape is a relative matter depending on the circumstances and that it was satisfied when the victim did all that she thought was possible or that she was capable of doing to demonstrate her nonconsent and resistance.

Sec. 11-2. Deviate Sexual Conduct.
RLH, Section 309-34.

Section 309-34, RLH defines sodomy as "the crime against nature either with mankind or any beast".

Territory v. Chee Siu, supra (under Sec. 11-1, Rape) in defining sodomy held that penetration alone constitutes the offense and that emission need not be proved.

Territory v. Wilson, 26 H 360 (1922), held that sodomy may be committed by mouth as well as by anus.

Territory v. Bell, 43 H 23 (1958), held that sodomy may be committed by a man with a woman by mouth.

Sec. 11-3. Deviate Sexual Assault.
RLH, Section 309-34.

Section 309-34, RLH defines sodomy (see Sec. 11-2) and makes the maximum penalty a fine of $1,000 and twenty years imprisonment at hard labor.

The Hawaii cases involving sodomy are apparently situations where the offense is perpetrated with accomplices, rather than upon victims. Republic of Hawaii v. Luning, 11 H 391 (1898); Republic of Hawaii v. Edwards, 11 H 571 (1898); Territory v. Bell, supra (under Sec. 11-2, Deviate Sexual Conduct).

Sec. 11-4. Indecent Liberties with a Child.
RLH, Secs. 209-14, 309-16, 309-17, 309-18, 309-20, 309-32, 309-34, 330-6.

Section 309-14, RLH, the statutory rape section, defines the offense as having sexual or carnal intercourse with any female under the age of sixteen years not the offender's wife. The maximum penalty is imprisonment at hard labor for ten years.

Section 309-16, RLH defines assault with intent to rape or ravish. The offense is in two categories, viz., maliciously with the intent to rape and maliciously with the intent to ravish or carnally abuse and know a female under the age of twelve years. The penalty is a maximum of $1,000 fine and imprisonment at hard labor for life or any number of years. (See Article 12, Bodily Harm.)

Section 309-17, RLH defines indecent assault as taking indecent and improper liberties with the person of a female under the age of twelve years without committing or intending to commit rape. The maximum penalty is a $1,000 fine, imprisonment at hard labor for five years, or both.

Section 309-18, RLH provides that the offense of indecent assault is a lesser included offense of rape, carnal abuse of a female under the age of twelve years, or assault with intent to rape or ravish.

Section 309-20, RLH defines the offense of carnal abuse of a female under the age of twelve years in terms of "carnally abuses and knows". The penalty is imprisonment at hard labor for life or any number of years.

Section 309-32, RLH provides that under a prosecution for rape, sodomy, carnal abuse of a female under the age of twelve years, or sexual intercourse with a female under the age of sixteen years, the offender may be found guilty of an assault with intent to commit the particular offense.

Section 309-34, RLH defines sodomy as the crime against nature, either with mankind or beast. The maximum penalty is a $1,000 fine and imprisonment at hard labor for twenty years.

Section 330-6, RLH provides that anyone who contributes to the delinquency of a child shall be fined not more than $200, imprisoned not more than one year, or both.

The following Hawaii cases concern statutory rape, section 309-14, RLH:

Re Soares, 27 H 509 (1923), involved proceedings for the removal from office of a magistrate who, as an attorney, was employed to make possible a marriage between an adult male and a female under the statutory age which would prevent a statutory rape prosecution.

Territory v. Slater, 30 H 308 (1928), held that absence of consent or resistance by the woman or use of force by the man is not an essential of the offense of statutory rape.

Territory v. Guillermo, 43 H 43 (1958), held that it is immaterial, under a charge of statutory rape, that the defendant did not know the female was under the age of sixteen even if she misrepresented her age and exhibited an adult appearance.

Accord: Re Habeas Corpus, Balucan, 44 H 271 (1960); Territory v. Delos Santos, 42 H 102 (1957), in a prosecution for the offense of contributing to the delinquency of a minor.

Hawaii cases on carnal abuse of a female under twelve, section 309-20, RLH include the following:

Territory v. Hays a.k.a. Blanton, 43 H 58 (1958), held that ordinarily evidence that the prosecuting witness is immoral or had intercourse with another is

Sec. 11-4. (Continued)

immaterial in a statutory rape case. However, where evidence by a physician is given to show that the prosecuting witness is not a virgin, evidence that she had intercourse with others than the defendant is admissible for rebutting the inference that the defendant is responsible for her physical condition.

State v. Hassard, 45 H 221 (1961), held that the offense of carnal abuse of a female under twelve is committed by a penetration, however slight, and that proof of an emission on the part of the defendant is not necessary.

Hawaii cases on indecent assault, sections 309-17 and 309-18, RLH include the following:

Territory v. Tan Yick, 22 H 773 (1915), held that the offense was defined to provide for cases of an indictment charging rape or an assault with the specified intent where the evidence may not establish the entire charge. The court found the legislative intent was to condemn the act of taking improper and indecent liberties with the persons of females under twelve regardless of the intent with which it was done. Accord: Territory v. Silva, 26 H 648 (1922).

Territory v. Bansuelo, 30 H 832 (1929), held that whether an assault upon a female under twelve is indecent or improper is to be determined by the commonly accepted standards of decency and propriety.

Hawaii sodomy cases involving children have not indicated specific ages other than in indefinite terms such as "young" or "boy", Republic of Hawaii v. Luning, supra (under Sec 11-3, Deviate Sexual Assault); Territory v. Chee Sui, supra (under Sec. 11-1, Rape); Territory v. Wilson, supra (under Sec. 11-2, Deviate Sexual Conduct.

Sec. 11-5. Contributing to the Sexual Delinquency of a Child. RLH, Section 330-6.

Section 330-6, RLH defines contributing to the delinquency of a child. In Territory v. Delos Santos, supra (under Sec 11-4, Indecent Liberties with a Child), a prosecution for this offense was based on the defendant's act of sexual intercourse with a female over

Sec. 11-5. (Continued)

twelve and under eighteen. The court held that defendant's ignorance of the child's age was not a defense.

Sec. 11-6. Indecent Soliditation of a Child.

No law was found on the subject of indecent solicitation of a child.

Sec. 11-7. Adultery and Sec. 11-8. Fornication.
RLH, Secs. 309-6 to 309-13, 309-15, 309-36.

Section 309-6, RLH defines married person, for purposes of adultery and fornication, to mean a person who has a husband or wife living.

Section 309-7, RLH provides that a person whose husband or wife has been absent for four years and is not known to be living or a person who has been legally divorced is not considered a married person for purposes of adultery and fornication.

Section 309-8, RLH defines adultery as sexual intercourse between a married or unmarried man and a married woman not his wife or between a married man and an unmarried woman. Each of the parties is guilty of adultery.

Section 309-9, RLH the penalty for adultery by a man is a fine of not less than $30 nor more than $100 or imprisonment not less than three months nor more than twelve months, or both. In the case of a woman the penalty is a fine of not less than $10 nor more than $30 or imprisonment not less than two months nor more than four months.

Section 309-10, RLH provides that under a charge of adultery where there is not sufficient proof of marriage, the accused may be convicted of fornication.

Section 309-11, RLH provides that persons who cohabit as husband and wife after they have been divorced commit adultery.

Secs. 11-7 and 11-8. (Continued)

Section 309-12, RLH defines fornication as sexual intercourse between an unmarried man and an unmarried woman. The penalty is a fine of not less than $15 nor more than $50 or imprisonment not less than one month nor more than three months. Subsequent marriage by the offenders is a complete defense.

Section 309-13, RLH provides that no woman shall be liable for adultery or fornication because she is pregnant or has given birth.

Section 309-15, RLH provides for a special case of contributing to the delinquency of a minor. The offense can be committed only by a parent, guardian or person in control of a female under eighteen who aids, abets or knowingly permits the child to commit adultery or fornication. The maximum penalty is imprisonment at hard labor for three years.

Section 309-36, RLH provides that in cases brought to recover damages for criminal conversation or seduction, the woman who was the subject of the criminal conversation or seduction is not criminally liable for adultery or fornication.

Territory v. Armstrong, 28 H 88 (1924), was a case of conspiracy to instigate the commission of adultery. The court held that the penalty provisions of the adultery statutes which prescribe a lighter punishment for women than men offenders are not unconstitutional for violation of the equal protection rule.

Sec. 11-9. Public Indecency.
RLH, Section 267-1.

Section 267-1, RLH includes in the definition of common nuisance "the endangering of the public personal safety or health, or... what is offensive or annoying and vexatious,... or is a public outrage against common decency or common morality; or tends plainly and directly to the corruption of the morals, honesty and good habits of the people...." One of the examples listed is "open lewdness or lascivious behavior, or indecent exposure".

Sec. 11-9. (Continued)

Republic of Hawaii v. Ben, 10 H 278 (1896), discussed the term "public place" for purposes of an obscenity statute. The court stated that the term is relative, and in the case of indecent exposure it is not necessary that the place be one where the public has an indiscriminate right of access. The act could be done on the offender's private property and if it is in view of people passing by or in view of neighbors' windows, or at a window in sight of passers by, it is done in a public place.

Territory of Hawaii v. Martin, 14 H 304 (1902), was a case of indecent exposure to a twelve year old girl accompanied by solicitations to sexual intercourse. The court held that the place which was near a public highway behind a lumber pile was public because it could be seen by others passing by even though the indecent exposure actually was seen by only one person.

Sec. 11-10. Aggravated Incest.

Hawaii does not divide incest into father-daughter and general categories.

Sec. 11-11. Incest.
RLH, Secs. 309-21, 323-1; Att. Gen. Op. 62-49.

Section 309-21, RLH defines incest as intermarriage or an act of sexual intercourse between persons within the degrees of consanguinity or affinity within which marriage is prohibited. The maximum penalty is a fine of $500 or imprisonment at hard labor for ten years.

Section 323-1, RLH sets forth the requisites of a valid marriage. The prohibited degrees of consanguinity, whether the relationship is legitimate or illegitimate, are as follows:

(1) ancestor and descendant of any degree;

(2) brother and sister of the half as well as of the whole blood;

Sec. 11-11. (Continued)

(3) uncle and niece;

(4) aunt and nephew.

Att. Gen. Op. 62-49 ruled that a marriage is permissible between parties who bear the relationship by adoption of uncle and niece, specifically, where one of the parties (who were natural first cousins) is the adopted child of the grandparents of the other. The Opinion reasoned that the prohibitions of section 323-1, RLH are not applicable since an adoption generally does not change the former relationship which existed between an adopted child and its natural relatives, other than its living natural parents.

No Hawaii cases were found on incest.

Sec. 11-12. Bigamy.
RLH, Section 309-22.

Section 309-22, RLH defines polygamy as "Every married person who marries another husband or wife within the [State], or having married another husband or wife out of the [State], cohabits with such other husband or wife within the [State]...." The maximum penalty is a fine of $500 and imprisonment at hard labor for two years.

Republic of Hawaii v. Li Shee, 12 H 329 (1900), reversed a conviction for polygamy because there was no proof of the giving of proxy or of the husband's consent in the alleged prior marriage which was a marriage by proxy in China. The court stated the general proposition that marriages legal where entered into are legal everywhere unless odious by the common consent of civilized nations, e.g., polygamous and incestuous marriages.

Civil actions involving successive marriages have found a presumption of the validity of the later marriage, that the parties to it are not guilty of the crime of adultery or bigamy, and that children of the later marriage are legitimate. Sato v. Sato, 29 H 716 (1927); In re Soriano, 35 H 756 (1940).

Sec. 11-13. Marrying a Bigamist.

No comparable provisions were found for the offense of marrying a bigamist.

Sec. 11-14. Prostitution.
RLH, Secs. 309-24, 309-25, 309-30.

Section 309-25, RLH defines the offense of prostitution as "Any man or woman who engages in prostitution, lewdness or assignation." "Prostitution" includes giving or receiving of the body for sexual intercourse for hire or for indiscriminate sexual intercourse with or without hire. "Lewdness" includes any indecent or obscene act. "Assignation" includes the making of any appointment or engagement for prostitution or lewdness or any act in furtherance of such appointment or engagement.

The maximum penalty is a fine of $1,000, imprisonment for one year, or both.

Section 309-30, RLH provides that any person who is "a privy to or aids, abets or participates" in any act enumerated in the prostitution statute is guilty of such act and subject to prosecution and punishment therefor.

The Hawaii statutory provisions on lascivious conduct, lewdness, prostitution, solicitation, procuring and allied sex offenses were substantially revised in 1949. The legislation (Act 26, SLH 1949) was modeled after a law drafted and recommended by the American Social Hygiene Association.

Territory v. Rutherford, 41 H 554 (1957), held that in a prosecution for assignation under section 309-25, RLH the prosecution need not prove the non-marriage of the defendants because if they were married, this defense rested on evidence peculiarly within the knowledge of the defendants.

State v. Cavness, 46 H 470 (1963), affirmed a judgment of conviction for aiding and abetting the commission of an act of prostitution under section 309-30, RLH. The aiding and abetting consisted of

Sec. 11-14. (Continued)

furnishing the room and accommodations for the sexual act and standing by as watchman during performance of the act.

Section 309-24, RLH is a broadly described offense which includes as prohibited acts lewd conversation; lascivious conduct; libidinous solicitation; and solicitation, inducement, enticement or procurement of another to commit an act of lewdness, assignation or prostitution with the offender. The maximum penalty is a fine of $1,000 or imprisonment for one year, or both.

Territory v. Gora, 37 H 1 (1944), involved a prosecution under this section before the significant amendments of Act 26, SLH 1949. The court held that the offense of lascivious conduct was punishable whether committed in public or in private and was cognate to "open lascivious conduct" which is an injury to the public under the common nuisance offense, section 267-1. The court interpreted "lascivious conduct" as behavior that is wanton, lewd or lustful, tending to produce lustful emotions and as not being limited to conduct directed toward a person of the opposite sex.

Sec. 11-15. Soliciting for a Prostitute.
RLH, Secs. 309-26, 309-27.

Section 309-26, RLH lists many acts which constitute the offense of soliciting:

(1) offer or offer to secure another for the purpose of prostitution or for any lewd or indecent act;

(2) solicit, induce, entice or procure another to commit an act of lewdness, assignation or prostitution with a prostitute or any other person;

(3) solicit, induce, entice or procure another to attend any place where immoral dances, plays or indecent entertainment is being given;

(4) solicit, induce, entice or procure another to go to or attend any place where a prostitute resides or carries on her business, or where prostitutes are generally known to congregate and assemble;

(5) exhibit any writing, sign, character or in other manner indicate and advertise the business or calling of a prostitute;

(6) do anything tending to allure and tempt another to go to or attend any place mentioned in this section or to a house of prostitution;

(7) lead, conduct or drive any person to any place mentioned in this section or to a house of prostitution;

(8) act as guide or conductor to any place mentioned in this section or to a house of prostitution, or for any purpose mentioned in this section;

(9) procure a prostitute for any person whether or not the prostitute is taken or conducted to the person.

The maximum penalty is a fine of $500 or imprisonment for one year, or both. In addition an offender licensed to operate a vehicle, airplane or boat used in connection with a violation forfeits such license for a two-year period.

Section 309-27, RLH provides special evidence rules in soliciting cases relating to the defendant's means of support, habits and police surveillance record.

Territory v. Santana, 37 H 586 (1947), upheld a conviction under the provision of the soliciting statute making it an offense to "lead, conduct or drive any person to" a place where a prostitute resides and carries on her business. The court interpreted the statute to imply the necessity of prior knowledge on the part of the defendant of the character of the place to which he leads, conducts or drives another.

Sec. 11-15. (Continued)

Territory v. Brown, 39 H 568 (1952), held that the provision of the soliciting statute which prohibits driving a person for the purpose of prostitution was violated when the defendant drove a person to and from premises where prostitution was engaged in.

Sec. 11-16. Pandering.
RLH, Secs. 309-27.5, 309-28, 309-29, 309-30.

Section 309-27.5, RLH provides that the knowing transportation of a female for the purpose of prostitution or with the intent and purpose to induce, entice, or compel her to become a prostitute or to engage in prostitution is punishable by fine of not more than $1,000 or imprisonment not more than twenty years or both.

This statute was enacted pursuant to Act 49, SLH 1961, to prevent the lapsing after August 21, 1961, under the Admission Act of an area of criminal law theretofore covered by the Federal Mann Act governing the transporting of women for purposes of prostitution. The severe maximum was based on evidence that this section is an additional police measure to control not only the enumerated types and classes of sex offenses but also the violation of the narcotic law. The illegal activities within the purview of this section were found to be closely related to violations of the narcotic laws and in many cases an aspect of the total narcotic problem, Standing Committee Report 434 of the House Judiciary Committee on HB No. 661, 1961 Legislature.

Section 309-28, RLH lumps into one offense activities that are variously described as pandering, pimping or procuring. The prohibited activities are as follows:

(1) induce, decoy, procure or compel a female against her will to have sexual intercourse with a person other than the offender;

(2) induce, compel or procure a female to practice prostitution, or to hold herself out as a prostitute, with the intent to obtain and secure from her any portion of the gains earned by her in such practice;

(3) assume, assert or exercise authority or power to advise, direct or compel a woman to practice prostitution or to hold herself out as a prostitute or to live in a house or place of prostitution, with intent to participate in and to obtain a portion of the gains arising from such lewd practices;

(4) knowingly accept, receive, levy or appropriate money or other thing of value without consideration, from a prostitute or from the proceeds or earnings of a woman engaged in prostitution.

The penalty is a fine of not less than $100 nor more than $500 or imprisonment at hard labor not more than five years, or both.

Section 309-29, RLH specifies that "whoever" and "person" in section 309-28, RLH includes members of limited partnerships, joint stock companies and corporations and that partners of limited partnerships and officers of joint stock companies and corporations are severally liable to the penalties for lascivious conduct, prostitution, soliciting, procuring or pimping.

Section 309-30, RLH provides that accessories to the offenses of lascivious conduct, soliciting and procuring or pimping are guilty of the offense and subject to prosecution and punishment therefor.

The Hawaii cases on procuring and pimping, section 309-28, RLH have all included the element of intent "to obtain and secure from the female any portion of the gains earned by her in such practices".

Territory v. Warner, 39 H 386 (1952)
Territory v. Alford, 39 H 460 (1952)
Territory v. Lii, 39 H 574 (1952)
State v. Yoshida, 44 H 352 (1960)

Sec. 11-17. Keeping a Place of Prostitution. RLH, Secs. 155-62, 155-63, 267-1, 267-11 to 267-22, 277-1 to 277-4, 309-29.

Sections 155-62 and 155-63, RLH make a license for a lodging or tenement house, hotel, boarding house or restaurant conditioned on a requirement that no prostitute be allowed to reside therein or resort thereto. The penalty is a fine of not less than $10 nor more than $100 and the possibility of license cancellation.

Section 267-1, RLH defines the offense of common nuisance and lists as an example, "keeping a bawdy house".

Section 267-11, RLH defines as a public nuisance "any room, house, building, structure, boat, vehicle, trailer, conveyance or place used or resorted to for the purposes of prostitution, assignation or lewdness...." The specific prohibited acts in relation to the place are as follows:

(1) keep or maintain such common nuisance;

(2) receive or offer or agree to receive any person into such place for the purpose of prostitution, assignation or lewdness;

(3) permit any person to remain in such place for such purpose;

(4) reside, enter or remain in such place for such purpose;

(5) knowingly let or permit such place owned, leased, rented or controlled to be kept or maintained as such common nuisance;

(6) suffer, as owner or lessor, such place to be kept or maintained as such common nuisance after notification by the chief of police or prosecuting officer that the place is kept for such purpose.

The maximum penalty is a fine of $1,000 and imprisonment for one year.

Sec. 11-17. (Continued)

Section 267-12, in connection with section 309-29, RLH specifies the liability of individuals, corporations, associations, partnerships, trustees, lessees, agents, assignees, limited partnerships and joint stock companies with respect to keeping places of prostitution. The section also provides that "building" includes certain parts of buildings for purposes related to statutes dealing with places of prostitution.

Sections 267-13 to 267-22, RLH provide the procedures for actions to abate, prevent and terminate common nuisances as constituted by a building or place used for the purpose of lewdness, assignation, prostitution, lascivious conduct, libidinous solicitation, procuring or pimping.

Sections 277-1 to 277-4, RLH provide for the offense of keeping a disorderly house which is punishable by a fine of not more than $100 or imprisonment not more than six months. "Disorderly house" includes houses or any part of a building (1) kept for the purpose of public prostitution; (2) in which indecent postures, or indecent, immoral or disorderly shows or sights are exhibited; (3) kept for the sale of intoxicating drink without license; and (4) in which gambling is permitted.

Territory v. Peters, 22 H 132 (1914), held that a single act of illicit intercourse in the house or any number of acts with the proprietor alone do not make the place a house of ill fame, but it must have been used for that purpose more than once by others than the proprietor; however, the statute does not require that the place be used habitually or for any considerable length of time for the prohibited purpose in order to constitute the offense of keeping a house of ill fame.

Territory v. Kimbrel, 31 H 81 (1929), held that the offense of keeping a place of prostitution was committed when the owner of the place was herself the prostitute.

Accord: Territory v. Rogers, 37 H 566 (1947), as to the offense of keeping a disorderly house.

Sec. 11-18. Patronizing a Prostitute.
RLH, Secs. 309-24, 309-25, 309-30.

There is no specific Hawaii statutory provision on patronizing a prostitute. Some of the general provisions, however, of the statutes on lascivious conduct, prostitution, and accessories thereto can be interpreted broadly to cover a person who patronizes a prostitute.

Territory v. Rutherford, supra (under Sec. 11-14, Prostitution) indicated that under the prosecution for assignation for purposes of prostitution under section 309-25, RLH the man involved with the female defendant was made a codefendant.

Sec. 11-19. Pimping.
RLH, Secs. 309-28 to 309-30.

See Sec. 11-16, Pandering.

Territory v. Alford, supra (under Sec. 11-16, Pandering) upheld the conviction of a husband for pimping with respect to his wife and held that she was competent to testify against him.

Sec. 11-20. Obscenity.
RLH, Secs. 154-14, 154-15, 267-1, 267-8, 267-10.

Sections 154-14 and 154-15, RLH prohibit in Honolulu the exhibition, posting or display on a billboard or wall of any obscene, indecent or immoral statement, word sign or picture. The penalty is a fine of not less than $25 nor more than $500 or imprisonment not more than one month, or both.

Section 267-1, RLH makes it a common nuisance to do, cause or promote that which is a public outrage against common decency or morality or which tends plainly and directly to the corruption of the morals of the people.

Section 267-8, RLH prohibits certain publications inter alia as follows:

Sec. 11-20. (Continued)

(1) acts - import; print; publish; sell; offer for sale; put into circulation; distribute; lend; exhibit publicly; introduce into a family, school or place of education; buy, procure, receive or have in possession with intent to sell, circulate, distribute, lend, exhibit or introduce into a family school or place of education;

(2) material - book, magazine, pamphlet, newspaper, story-paper, writing, paper, picture, drawing, print, photograph, lithograph, engraving, daguerreotype, stereoscopic picture, figure, description or representation, written or printed matter of any sort;

(3) definition - obscene; lewd; lascivious; filthy; indecent; disgusting; chief features of which consist of pictures or stories of lust and crime; manifestly tend to the corruption of the morals of youth, or of morals generally.

Section 267-10, RLH makes the maximum penalty for common nuisance a fine of $500 or imprisonment for six months.

The King v. Nawahine, 3 H 371 (1872), held that the use of obscene language on a public highway in the presence and hearing of three persons constituted the offense of common nuisance, an offense against common decency and common morality.

The King v. Grieve, 6 H 740 (1883), held that the defendant was not criminally liable for common nuisance for printing an obscene pamphlet in the Hawaiian language because he did not know the language and was not put on inquiry as to the contents of the pamphlet.

ARTICLE 12. BODILY HARM

Sec. 12-1. Assault.

RLH, Secs. 264-1, 264-6, 264-8.

Section 264-1, RLH defines an assault alternatively as (1) an unlawful attempt, coupled with a present ability, to commit an injury on or to the person of another; (2) the intentional and malicious placing of another in reasonable apprehension of receiving a battery; or (3) an attempt to commit a battery.

Section 264-6, RLH provides the maximum penalty for simple assault as a $500 fine or six months imprisonment or both.

Section 264-8, RLH provides that a person charged with any assault, battery or affray offense may be found guilty of any necessarily included offense.

Territory v. Wong Pui, 29 H 520 (1926), held that an indictment charging a shooting at and against the complainant at least charged an assault as it was equivalent to an attempt by the defendant to do the complainant a corporal injury. The concurring opinion pointed out that discharging a loaded pistol against the person at whom it was aimed constituted contact sufficient to be a corporal injury, or a battery.

Sec. 12-2. Aggravated Assault.

RLH, Secs. 264-3 to 264-5.

The law on aggravated offenses involving assault or battery has generally been applied to situations which include a battery, see Sec. 12-4, Aggravated Battery.

Sec. 12-3. Battery.
RLH, Secs. 264-2, 264-6, 264-8.

Section 264-2, RLH defines battery as an unlawful and intentional (1) injury on or to the person of another or (2) act which directly or indirectly causes a harmful or offensive contact on or to the person of another.

Section 264-6, RLH provides the maximum penalty for a simple battery as a fine of $500 or imprisonment for six months, or both.

Section 264-8, RLH provides that a person charged with any assault, battery or affray offense may be found guilty of any necessarily included offense.

There is little reported law on simple battery since most of the cases involve aggravated battery (see Sec. 12-4) or reckless conduct (see Sec. 12-5).

Territory v. Cox, 24 H 461 (1918), held that a public school principal has a right to inflict reasonable corporal punishment upon his pupil for misbehavior. Such battery was held not to be unlawful.

In re Gaspar, 34 H 484 (1938), involving a prosecution for manslaughter, held that under no possible circumstances can a person commit an assault and battery with a weapon obviously and imminently dangerous to life without also perpetrating the crime of assault and battery.

Sec. 12-4. Aggravated Battery.
RLH, Secs. 264-3 to 264-5, 306-10, 309-16.

Section 264-3, RLH provides that an assault or a battery committed under any of the following circumstances is an aggravated offense:

(1) with a weapon obviously and imminently dangerous to life;

(2) with intent to maim or disfigure another;

(3) with intent to commit a felony; or

(4) while preparing to commit, while in the process of committing, or while leaving or fleeing the scene of the commission of, a felony.

The maximum penalty is a fine of $5,000 or imprisonment at hard labor for ten years, or both.

Section 264-4, RLH makes an aggravated offense the intentional use or attempt to use certain acids, chemicals, drugs or poisons with the intent to injure or disfigure another or with the intent thereby to enable the offender or another to commit any offense.

Section 264-5, RLH provides that an assault or battery, not amounting to an aggravated offense, committed under any of the following circumstances is an intermediate offense:

(1) upon a public officer in the performance of his public duties, with intent to resist, prevent, hinder or obstruct the officer in the performance of his public duties;

(2) by wounding or inflicting grievous bodily harm upon another, with or without a weapon;

(3) by attempting to injure another by use of a weapon or instrument likely to produce grievous bodily harm; or

(4) by any means intended or likely to humiliate, degrade or sicken another.

The maximum penalty is a fine of $1,000 or imprisonment for one year, or both.

Section 306-10, RLH provides that in a prosecution for robbery the defendant can be found guilty of an assault with intent to rob. (No cases were found involving this offense.)

Section 309-16, RLH provides that the malicious assault of a female with intent to rape or of a female under twelve with intent

to ravish or carnally abuse is punishable by a fine of not more than $1,000 and imprisonment at hard labor for life or any number of years.

There is a long line of cases that can be classified under the category of aggravated battery. This listing is exclusive of cases involving "assault with intent to commit rape", but includes other specific intent assaults, such as "assault with intent to murder".

The King v. Howard, 1 H 66 (1851), resulted in an acquittal of assault with a sword or cutlass, with intent to murder since the jury failed to find the specific intent to murder.

The King v. Jones, 3 H 330 (1872), reversed a judgment of conviction of assault with intent to murder, maim and disfigure because of the faulty indictment which joined two complete offenses in one count, assault with intent to murder and assault with intent to maim and disfigure.

In re Titcomb, 9 H 131 (1893), held that the offense of assault with a dangerous weapon in which the character of the weapon is essential is a different offense than assault with intent to murder in which the intent to commit the greater offense is the essential ingredient.
Accord: Lo Toon v. Territory of Hawaii, 16 H 353 (1904); Territory v. Regusira, 26 H 84 (1921); State v. Travis, 45 H 435 (1962).

Republic of Hawaii v. Gallagher, 9 H 587 (1894), held that biting off a portion of another's ear constituted the aggravated offense of maiming and that the seriousness of the offense was to be considered only in relation to the severity of the punishment imposed.

Territory v. Maga, 19 H 157 (1908), held that an assault and battery with a sheathed sword was an assault and battery with a weapon obviously and imminently dangerous to life.

In re Gaspar, supra (under Sec. 12-3, Battery) held that a person on trial for murder or manslaughter can not be convicted of assault and battery with a weapon obviously and imminently dangerous to life but may be convicted of assault and battery.

State v. Sorenson, 44 H 601 (1961), held that the offense of assault and battery with intent to maim or disfigure is a single offense which may be consummated by alternative means. The court stated that the 1949 revision of the law of criminal assault and battery was intended to extend the offense of assault and battery involving disfigurement beyond the confines of the old common law understanding of the term "mayhem" by removal of the restrictions limiting the offense to destruction, mutilation or impairment of specified functional bodily members or organs.

Several reported cases have involved the offense of assault with intent to rape and the distinction between that offense and attempted rape.

The King v. Erickson, 5 H 159 (1884)
Territory v. Schilling, 17 H 249 (1906)
Territory v. Bodine, 32 H 528 (1932)
Territory v. Noguchi, 38 H 350 (1949)

Territory v. Silva, 27 H 270 (1923), in overruling Territory v. Schilling, 17 H 249 held that a prior conviction for assault and battery was a bar to a subsequent prosecution for rape, arising out of the same transaction. The court stated that the offense of rape cannot be committed without an assault with an intent to do the act; and that all offenses such as battery, mayhem, rape, robbery, as well as assaults with intent, necessarily include an assault.
Accord: Territory v. McGrew, 34 H 505 (1938)

Territory v. Hamilton, 39 H 14 (1950), held that the evidence in the prosecution for rape would support a verdict of guilty as

Sec. 12-4. (Continued)

charged, guilty of attempt to commit rape, guilty of assault with attempt to commit rape, guilty of assault and battery, or not guilty. The court did not distinguish the offenses of attempt to commit rape and assault with attempt to commit rape.

The latest opinion to clarify the distinction between assault with intent to rape and attempted rape is State v. Gager and Histo, 45 H 478 (1962). The court held that any assault with intent to rape is attempted rape but the fact that the legislature defined one particular type of attempted rape does not preclude other types varying in the degree of execution of the intent to commit rape although not constituting assault with intent to rape.

Sec. 12-5. Reckless Conduct.

See Sec. 4-6, Recklessness.

Sec. 12-6. Intimidation.

RLH, Secs. 261-1, 265-6, 283-1 to 283-8, 304-1.

Section 261-1, RLH dealing with anarchistic publications inter alia prohibits printing, publishing, selling, distributing or circulating of any matter which directly or indirectly advocates or incites or is intended to advocate or incite the use of force, fear, intimidation, threat, ostracism or blackmail with respect to a person's right to engage in business or employment or his rights of liberty or property. The maximum penalty for a first offense is a fine of $1,000 or imprisonment for one year; for a second conviction within five years, a fine of $5,000 or imprisonment for one year, or both.

Section 265-6, RLH prohibits obstruction of legislation or of the administration of the law by threats of violence against, or intimidation of, legislative, judicial or executive officers. The maximum penalty is a fine of $500 or imprisonment for one year.

Sec. 12-6. (Continued)

Section 283-1, RLH defines extortion as the wresting of anything of value from another by duress, menaces or any undue exercise of power.

Section 283-2, RLH prohibits extortion by charging or threatening to charge a person with a crime regardless of the guilt or innocence of the victim of the extortion. If the crime charged is punishable by imprisonment for five years or more, it is first degree extortion; if the crime charged is of a lower grade, it is second degree extortion.

Section 283-3, RLH makes extortion by charging a secret deformity or disease to another extortion in the second degree.

Section 283-4, RLH makes extortion by threatening to injure another's property or to do malicious injury extortion in the second degree.

Section 383-5, RLH makes extortion by compelling or inducing another to sign or acknowledge any writing affecting his or others rights extortion in the second degree.

Section 283-6, RLH makes extortion with knowledge that he does not have legal authority by a public officer or employee for his own benefit and profit extortion in the second degree.

Section 283-7, RLH makes extortion with knowledge that he does not have legal authority by a public utility officer or employee for his own, his corporation's, or any third person's use and benefit extortion in the second degree.

Section 283-8, RLH makes the maximum penalty for first degree extortion a fine of $1,000 or imprisonment at hard labor for five years; for second degree, a fine of $1,000 or imprisonment at hard labor for two years.

Section 304-1, RLH prohibits force or threats of force to prevent or attempt to prevent a person from engaging in work, from entering or

Sec. 12-6. (Continued)

leaving a public place, or from exercising any other lawful right. The maximum penalty is a fine of $1,000 or imprisonment for one year, or both.

The King v. Thornton, 4 H 45 (1877), held that in a prosecution of conspiracy to charge a felony with intent to extort money, evidence of the charging of a felony was admissible to show the motive of the conspiracy.

Territory v. Wills, 25 H 747 (1921), held that an acting special policeman without pay was a public officer under section 283-6, RLH before the statute was amended to include a public agent or employee as well as a public officer. The statute was also interpreted to require that the "thing of value" extorted must be for the public officer's "own benefit and profit" and must in fact be so obtained by him. Accord: Territory v. Wong, 30 H 819 (1929).

Territory v. Park, 39 H 670 (1953), held that the offense of extortion under sections 283-1 and 283-4 requires that a threat be made to the intended victim that the threat need not be a single act but may be the cumulative effect of many acts; that the reaction to the threat which motivates the victim may be either physical or mental.

Sec. 12-7. Compelling Confession or Information by Force or Threat.

Hawaii does not provide for the specific offense of compelling confession or information by force or threat.

Sec. 12-8. Dueling.
RLH, Secs. 280-1 to 280-4.

Section 280-1, RLH makes a killing in a duel fought in pursuance of an appointment with, or with the assent of the person killed, manslaughter.

Sec. 12-8. (Continued)

Section 280-2, RLH prohibits engagement in a duel with a deadly weapon, challenging to a duel, or sending or delivering a message of a challenge to a duel. The maximum penalty is a $1,000 fine. A person convicted is also barred from holding any office or place of honor, profit or trust under the laws of the State.

Section 280-3, RLH prohibits acceptance of a challenge to duel; knowing delivery of a challenge to duel; presence as an aid, second or surgeon at a duel fought with deadly weapons; or advising encouragement or promotion of a duel. The maximum penalty is a $500 fine. A person convicted is also barred for ten years from holding any office or place of honor, profit or trust under the laws of the State.

Section 280-4, RLH prohibits denouncement of another for not fighting a duel or for not sending or accepting a challenge. The maximum penalty is a $250 fine.

ARTICLE 13. VIOLATION OF CIVIL RIGHTS

Sec. 13-1. Definitions.

Hawaii does not have civil rights legislation in the area of public accommodations.

Sec. 13-2. Elements of the Offense.
Article I, section 4, Hawaii Constitution; RLH, Secs. 3-1, 3-22, 9-50.

Article I, section 4, of the Hawaii Constitution provides:

> No person shall be deprived of life, liberty or property without due process of law, nor be denied the enjoyment of his

Sec. 13-2. (Continued)

civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

Section 3-1, RLH lists as one of the merit principles governing civil service, equal opportunity for all regardless of race, religion or politics.

Section 3-22, RLH provides that no person holding any position in the civil service shall be suspended, demoted or dismissed from his position on racial, religious or political grounds.

Section 9-50, RLH provides that only a citizen of the United States and the State, or a person eligible to become such citizen, shall be employed on any public works. Exceptions are provided for this rule.

Secs. 13-3 and 13-4, Sanctions and Enforcement.

Hawaii does not have legislation in this area of civil rights.

ARTICLE 14. EAVESDROPPING

RLH, Sec. 309A-1.

Section 309A-1, RLH prohibits the recording of a telephone conversation without informing the conversants of the recording and the identity of the person making the recording. An exception is provided for a telephone company operating in its regular course of business. The offense is a misdemeanor carrying a maximum penalty of a $500 fine.

PART C. OFFENSES DIRECTED AGAINST PROPERTY

ARTICLE 15. DEFINITIONS

There are no definitions generally applicable to offenses against property.

ARTICLE 16. THEFT AND RELATED OFFENSES

Sec. 16-1. Theft.

Statutory offenses which would fall within the Ill. CC classification of theft are listed by categories, each followed by any reported decisional law.

Grave Robbing

Section 276-3, RLH prohibits willful "grave robbing". The maximum penalty is a $1,000 fine or imprisonment at hard labor for two years.

Embezzlement

Sections 118-5(d) and 119-11(f), RLH provide that a person authorized to collect compensation taxes or consumption taxes commits embezzlement if he appropriates or converts the tax collected to a use other than the payment of taxes. The maximum penalty is a fine of five times the amount embezzled or imprisonment at hard labor for ten years.

Section 178-102, RLH provides that a bank officer, director or employee who embezzles or commits certain other irregular banking acts involving any property owned or held by the bank shall be fined not more than $1,000 or imprisoned not more than twenty years, or both.

Section 181-397(b), RLH provides that an insurance agent, subagent, solicitor or adjuster commits embezzlement if he diverts or appropriates insurance funds to his own use. The punishment is as provided in the criminal statutes.

Section 281-1, RLH defines embezzlement as follows:

> If any person who is intrusted with, or has the possession, control, custody or keeping of a thing of value of another, by the consent or authority, direct or indirect of such other, without the consent and against the will of the owner, fraudulently converts or disposes of the same, or attempts so to convert or dispose of the same, to his own use or benefit, or to the use or benefit of another than the owner or person entitled thereto, he is guilty of the embezzlement of that thing.

Sections 281-3 and 281-4, RLH make embezzlement of public property by a public officer or employee or a person who has lawful possession, control or custody of the public property punishable by a fine of not more than five times the value of the property embezzled or imprisonment at hard labor for not more than ten years. The offense of embezzlement of public property is committed by the mere act of conversion; fraudulent intent is not an element of the offense. (Section 83-10, RLH deals with failure of a state prison superintendent to turn over to his successor prisoners' records. The offense is punishable as embezzlement under section 281-4, RLH.)

Section 281-5, RLH provides the following maximum penalties for embezzlement of private property:

Sec. 16-1. (Continued)

(1) If the property embezzled is in the amount of $100 or more, a fine of five times the value of the property embezzled or imprisonment at hard labor for ten years;

(2) If the property embezzled is to the amount of $20 and less than $100, a fine of $300 or imprisonment for one year;

(3) If the property embezzled is in an amount less than $20, a fine of $100 or imprisonment for six months.

Section 281-7, RLH authorizes the court to mitigate the punishment for embezzlement for offenders under the age of sixteen.

The King v. Swinton, 1 H 92 (1852), decided before enactment of statutes specially applicable to embezzlement by public officers and employees, held that embezzlement of public moneys by a customs collector required proof of fraudulent intent.

Territory of Hawaii v. Wright, 16 H 123 (1904), held that in a case of embezzlement by a public officer or employee, the offense may be committed by one who is in charge of public property by reason of a regulation or appointment, as well as by statutory authorization.
Accord: Territory of Hawaii v. Richardson, 16 H 358 (1904); Territory of Hawaii v. Clark, 20 H 391 (1911); Territory v. Kealoha, 22 H 116 (1914).

Territory of Hawaii v. Richardson, 17 H 231 (1905), held that the element of fraudulent intent is essential to the offense of embezzlement.
Accord: Territory v. Awana, 28 H 546 (1925); Territory v. Miyamoto, 29 H 685 (1927).

Territory v. Overbay, 23 H 91 (1915), held that the offense of embezzlement of property

in the value of $20 but less than $100 is a misdemeanor, is not an infamous offense and cannot be subject to the penalty of imprisonment at hard labor.

Territory v. Hart, 24 H 349 (1918), held that the defendant stockbroker had control of stock when he purchased it on margin for a client upon instructions to accumulate the dividends to be applied on the purchase price and that the defendant's conversion of the stock to the account of another client constituted conversion to the use and benefit of the defendant.

Territory v. Burns, 27 H 253 (1923), which held unconstitutional a statute that authorized a conviction of embezzlement under a charge of larceny, distinguished the two offenses. Larceny, a common law offense, involves a felonious taking. Embezzlement, a purely statutory offense, involves a lawful taking. Both offenses, however, include the element of a final wrongful use and disposition of the property taken.

Territory v. Yoon, 36 H 550 (1943), held that a determination of whether a check was embezzled, or only its proceeds, depends upon the point of time at which the fraudulent intent was first conceived.

Extortion

See Sec. 12-6, Ill. CC.

Gross Cheat

Section 289-1, RLH defines gross cheat as obtaining money, goods or any other thing of value from another by any false pretense with intent to defraud. The definition includes two examples: (1) obtaining money or other property from another under the false pretense of being sent for the money or property by a friend or acquaintance of his and (2) obtaining money by means of a letter fabricated in the name of another.

Section 289-2, RLH defines gross cheat committed by obtaining a signature to a written instrument the false making whereof would be punishable as forgery. An example is given of falsely reading a promissory note or other pecuniary obligation with intent to have it signed by a person unable to read.

Section 289-6, RLH provides a maximum penalty for gross cheat of a $1,000 fine or imprisonment for ten years, or both, where the money or value of the thing obtained exceeds $100. The maximum penalty for any other gross cheat is a fine of $1,000 or imprisonment for one year, or both.

Section 289-7, RLH provides that in a prosecution for gross cheat where it is proved that the defendant committed larceny, he is not entitled to an acquittal, but the prosecution is a bar to subsequent prosecution for larceny upon the same facts.

Sections 289-3 to 289-5, 289-9 to 289-22 include within the chapter on gross cheat the following miscellany of offenses: use of false weights or measures or fraudulent use of legal weights or measures in the sale or purchase of merchandise or property ($1,000 or one year, or both); knowing sale of unwholesome food for human consumption without disclosure to the buyer ($1,000 or one year, or both); knowing adulteration of food, drink or medicine for human consumption so as to make it injurious to health ($1,000 or one year, or both); labeling, advertising or offering for sale as Hawaiian coffee any coffee unless it was entirely raised in the State ($1,000 or one year, or both); knowing sale as butter of oleomargarine unless it is marked "oleomargarine" ($200 or twenty days, or both); knowing sale as butter of any other substance unless it is marked under an appropriate name ($250 or thirty days, or both); concealment of an assured with intent to procure life insurance benefits ($3,000 or five years); knowing making of a false financial statement with intent that it be

relied on ($500 or six months, or both); several false advertising provisions ($500 or three months, or both); ship stowaways ($1,000 or one year, or both); scalpers' sales of amusement tickets ($1,000 or one year, or both); confidence games ($1,000 or ten years, or both); and bunco steerers ($1,000 or five years, or both).

In re Bevins, 26 H 570 (1922), held that a false representation relating to the title to real estate is within the false pretense provision of the definition of gross cheat and that the two examples in section 289-1, RLH relate to the means or methods by which money or other property of another is fraudulently obtained. The court stated that if the means were knowingly false and were used to cause the other party to part with his property when he would not otherwise have done so, the statutory offense has been committed.

Territory v. Taok, 33 H 560 (1935), construed the term "false pretense" in the statutory definition of gross cheat as a false representation of an existing fact or past event and not of something to take place in the future.

Larceny

Section 293-1, RLH defines larceny or theft as the felonious taking of a thing of marketable, saleable, assignable or available value, belonging to or being the property of another.

Section 293-3, RLH provides especially for larceny of a chattel or a fixture from a rented house or lodging by a tenant or lodger.

Section 293-4, RLH authorizes joining in a single indictment the offenses of larceny and of receiving stolen property.

Sec. 16-1. (Continued)

Sections 293-6 to 293-9, 293-16 to 293-18, RLH provide the following rules on larceny:

(1) The thing taken must have pecuniary value or valuable of economical utility;

(2) The thing taken must be movable or removable;

(3) A part of real estate may be the subject of larceny;

(4) The thing taken must be the subject of property and possession;

(5) A writing of value may be the subject of larceny.

Section 293-10, RLH provides for two degrees of larceny. First degree, larceny of property of a value in excess of $100, is punishable by imprisonment at hard labor for not more than ten years. All other larceny is in the second degree and carries the maximum penalty of a $1,000 fine or imprisonment for one year, or both.

Section 293-20, RLH provides that offenders who have been convicted of three or more larcenies at the same term of a court or who have been convicted of a second larceny shall be subject to an additional punishment up to one-half of the punishment provided by law.

Section 293-21, RLH provides that gross cheat, including gross cheat by false or fraudulent representation, statement or pretense, together with a promise or undertaking of future performance, is punishable as larceny. The property obtained may be money, labor, services, or real or personal property.

Section 293-22, RLH provides that larceny from the person, whereby the victim receives any corporal injury but is not put in fear or subjected to force sufficient to constitute robbery, is subject to a maximum penalty of $2,000 fine or imprisonment at hard labor for two years, or both.

The King v. Asegut, 3 H 526 (1874), held that a felonious intent must be found to constitute the crime of larceny and that taking property openly under a claim of right was not larceny.

The King v. Chop Tin, 7 H 383 (1888), held that a search warrant was a writing of value having utility and thus could be a subject of larceny; and that the conduct of the defendant in concealing the papers and denying that he had them was sufficient to show that the taking was felonious.

Republic of Hawaii v. Pahu, 10 H 74 (1895), held that mere possession of stolen property is not larceny, but if accompanied by false explanations of the possession, a prima facie case is made.
Accord: Republic of Hawaii v. Kahoohanohano, 10 H 97 (1895); Territory v. Robello, 20 H 7 (1910).

Territory v. Marks, 25 H 219 (1919), enumerated the elements of larceny to include the following: the thing taken must have been the property of another; the taking must have been feloniously, i.e., with the intent to deprive the owner of the thing taken and to appropriate it to the use of the one taking; and the mere possession of stolen property does not constitute proof of larceny.

Territory v. Lee, 29 H 30 (1926), held that one who cashes a check at a bank and, through a mistake by the teller, is handed a larger sum of money than called for by the check does not come into possession of the overpayment with the consent of the owner and is guilty of larceny if he conceals the overpayment and appropriates it to his own use with intent to defraud the owner.

Malicious Conversion of Vehicle or Boat

Section 295-1, RLH defines malicious conversion of any motor driven vehicle, vessel or aircraft as maliciously moving it, taking it away, carrying it away or converting it to one's own use maliciously and without the consent of the person entitled to possession. The maximum penalty is a $1,000 fine or imprisonment for five years, or both.

Receiving Stolen Goods

Section 303-1, RLH defines receiving stolen goods as any fraudulent taking, accepting, detaining, keeping, concealing or disposing of goods of another that have been stolen, embezzled, illegally extorted or otherwise illegally obtained.

Sections 303-4 to 303-7, RLH provide the following rules on receiving stolen goods: it is not an element of the offense that the receiver intend any profit or benefit to himself; the offense is committed when one, without fraud, obtains possession or control of goods knowing them to be stolen, and afterwards fraudulently detains, keeps, conceals or disposes of them with the intent to deprive the owner; receiving a specific part of a stolen thing is receiving stolen goods; in a prosecution for receiving stolen goods, it is not necessary to prove conviction of the person who stole the goods.

Section 303-9, RLH makes the maximum penalty where the stolen goods are of the value of $100 or more a $1,000 fine or imprisonment at hard labor for five years, or both; for other offenses, a $500 fine or imprisonment for one year.

Section 303-10, RLH defines a common receiver as one who is convicted of receiving stolen goods after a previous conviction of that offense or one who is convicted at the same term of court of three or more distinct acts

Sec. 16-1. (Continued)

of receiving stolen goods. The maximum penalty for a common receiver is a $1,000 fine and imprisonment at hard labor for ten years.

Territory v. Witt, 27 H 177 (1923), held that an indictment for receiving stolen goods in the language of the statute was good notwithstanding the failure to allege that the accused had knowledge of the fact that the goods were stolen or embezzled at the time of the receipt.

Sec. 16-2. Theft of Lost or Mislaid Property. RLH, Secs. 293-11, 293-13 to 293-15.

Section 293-11, RLH provides that the identity of the owner of the property taken is not an element of larceny as long as the property is not the taker's and is not derelict. In case of doubt, the presumption is that the property is not derelict.

Section 293-13, RLH provides that domestic animals of value are subjects of larceny even if not within the keeping or control of the owner. The examples given are estrays and cattle ranging the commons or mountains.

Section 293-14, RLH provides that animals which are not usually domesticated are subjects of larceny when in the custody, possession or control of the owner and when they are so distinguishable by the taker. The examples given are fish in pond or particular creeks or portions of the sea and doves in a dove cote.

Section 293-15, RLH provides that wrecked property, estrays and lost property are deemed to be in the constructive possession of the owner. The taking of any of them with felonious intent is larceny, but the taking of derelict property is not larceny.

Sec. 16-2. (Continued)

The King v. Manu, 4 H 409 (1881), held that wild turkeys are not the subjects of larceny in the absence of proof of ownership and identification.

Territory v. Robello, supra (under Sec. 16-1, Theft) cited a jury instruction which defined "derelict", in connection with cattle, to mean "abandoned or deserted".

Territory v. Ferguson, 23 H 714 (1917), held that section 293-11, RLH was intended to relate to cases where the owner of stolen property is unknown and does not apply to a case where the owner of property is known; therefore in the latter case ownership is a material fact which must be proved.

Territory v. Thompson, 26 H 181 (1921), stated the rule that wild animals not belonging to anyone are not subject to larceny but that tame animals which are the property of someone are subject to larceny.

Sec. 16-3. Theft of Labor or Services or Use of Property. RLH, Secs. 271-1, 271-2, 272-1, 289-7, 309B-1.

Section 271-1, RLH provides that a person who obtains transportation on a vehicle licensed to carry passengers for hire and then refuses to pay the legal fare shall be fined not more than $100 or imprisoned not more than thirty days, or both.

Section 271-2, RLH exempts from the provisions applicable to refusal to pay transportation fares persons who have opened accounts with the owners of the licensed vehicles and persons in charge of such vehicles at the time of transportation.

Section 272-1, RLH provides that a person who obtains food or accommodation at a hotel or inn without paying for it with intent to defraud the proprietor or manager shall be fined not more

Sec. 16-3. (Continued)

than $100 or imprisoned not more than thirty days, or both. The offense extends to obtaining credit by false pretense and to absconding or surreptitiously removing baggage without paying for food or accommodation.

Section 289-17, RLH the maximum penalty for a ship stowaway who lands in the State is a $1,000 fine or imprisonment for one year, or both.

Section 309B-1, RLH provides that a person who willfully obtains telecommunications service by (1) charging the service to a telephone number or credit card without authority to do so or (2) by charging the service to a nonexistent telephone number or credit card shall be imprisoned not more than one year or fined not more than $1,000, or both.

Sec. 16-4. Offender's Interest in the Property. RLH, Secs. 281-2, 293-12.

Section 281-2, RLH provides that embezzlement of a thing of value by a co-owner is subject to a maximum penalty of a $1,000 fine or imprisonment for five years, or both.

Section 293-13, RLH provides that larceny of his spouse's property cannot be committed by a spouse.

The Queen v. Len Tai, 9 H 71 (1893), held that in a prosecution for embezzlement where there was evidence that the defendant was interested as a partner in the money alleged to have been embezzled, the defendant could be found guilty if he acted as an agent in the transaction and disposed of the money without the authority or consent of its owners.

Territory v. Yim, A.K.A. Akina, 39 H 214 (1952), held that "it is immaterial whether the property belongs to X, Y or Z" so far as the

Sec. 16-4. (Continued)

commission of embezzlement is concerned and that the purpose of alleging ownership of another is primarily to negate the ownership by the defendant, to give the defendant fair notice and to constitute a bar to other proceedings against the defendant for the same offense.

ARTICLE 17. DECEPTION

Sec. 17-1. Deceptive Practices.
RLH, Secs. 286-1 to 286-4, 287-1 to 287-7, 289-14, 314-7.

Sections 286-1 and 286-2, RLH provide that making bad checks with intent to defraud is subject to a maximum penalty of $1,000 fine or imprisonment for one year, or both.

Section 286-3, RLH states the rule that insufficient funds or credit with the drawee of a check is prima facie evidence of intent to defraud and of knowledge of such insufficient funds or credit unless the maker pays the drawee the amount due plus costs and fees within five days after the making of the check.

Section 286-4, RLH prohibits issuance of a note, bill, order, check or certificate of deposit with the intent that it circulate as currency. The penalty for each offense is a $50 fine or imprisonment not more than one month.

Section 287-1, RLH prohibits the sale of real property, knowing that it is subject to an encumbrance which is not noted in the deed, without informing the grantee of the encumbrance. The maximum penalty is five years imprisonment at hard labor.

Section 287-2, RLH prohibits the removal or concealment of personal property with fraudulent intent beyond the control of the mortgagee

or other person having a legal claim for the property. The maximum penalty is a $500 fine or imprisonment for one year.

Section 287-3, RLH prohibits the sale or conveyance of personal property by a mortgagor without the consent of the mortgagee and without informing the vendee or grantee of the mortgage. The maximum penalty is a $100 fine or imprisonment for one year.

Section 287-4, RLH prohibits the sale or conveyance of personal property by a hirer or lessee without the consent of the owner or lessor and without informing the vendee or grantee that the property is hired or leased. The maximum penalty is a $100 fine or imprisonment for one year.

Section 287-5, RLH prohibits the sale or other disposition of collateral security before the debt for which security is due, without the authority of the depositor. The maximum penalty is a $500 fine or imprisonment for two years.

Section 287-6, RLH prohibits buying, receiving or concealing, with intent to defraud, personal property, knowing it to be hired or leased or held as collateral security. The maximum penalty is a fine of $100 or imprisonment for one year.

Section 287-7, RLH prohibits sale conveyance or concealment by one in possession of personal property received under a conditional sales contract before the performance of the conditions precedent to acquiring title to the property. The maximum penalty is a fine of $100 or imprisonment for one year.

Section 289-14, RLH the basic false advertising section was construed in Territory v. Lerner, 36 H 244 (1942). The court held that the statute was enacted to protect the public from being imposed upon by false and misleading advertisement only as to the character and quality of the things offered for sale or use, which

advertisements, if acted upon by the public, would result in damage or detriment to the purchasers or users of such things.

Section 314-7, RLH makes fortune telling for money or other valuable consideration subject to a maximum penalty of $1,000 fine or imprisonment for one year, or both.

Territory v. Tsunekichi, 23 H 813 (1917), involved a prosecution under section 287-2, RLH before it was amended, and when the prohibition covered only fraudulent removal or concealment of mortgaged personal property. The court held that the offense was not committed because the agreement, an executory contract for the sale of sugar cane, was not a chattel mortgage.

Territory v. Forrest, 26 H 695 (1923), a prosecution under section 286-1, RLH for fraudulently drawing on a bank, analyzed the essential ingredients of the offense as (1) issuance of a check, (2) lack of funds in the bank at the time of issuance, (3) knowledge by the maker of the check of the lack of funds, and (4) an intent, at the time of the issuance of the check, to defraud. The court reversed the conviction because the defendant should have been permitted to introduce evidence to show the absence, at the time of the issuance of the check, of an intent to defraud. The offer of proof was that the check had been post-dated in the belief that the funds would be in the bank on the date of the check. The court also held that the fact of subsequent payment was not relevant; however, this holding preceded the amendment of section 286-3, RLH which provided that the prima facie rule does not apply if the maker or drawer pays the drawee within five days.

Territory v. Chong Pang Yet, 27 H 693 (1924), held that the offense of fraudulently drawing on a bank, as defined in section 286-1, RLH was committed where the check was given in part payment of an existing indebtedness.

Sec. 17-1. (Continued)

In addition to the criminal law on fraudulent commercial paper, fraudulent conveyances and fortune telling, Hawaii has many provisions which proscribe various fraudulent practices:

Sections 11-149, 11-197 and 11-210 to 11-215, RLH election frauds (misdemeanors, $500 or thirty days, or both, or $500 or six months, or both; felonies, $1,000 fine or two years);

Section 22-51, RLH misrepresentation as to food ($500 or six months, or both);

Section 49-37, RLH fraud or misrepresentation to circumvent or defeat vaccination and immunization provisions ($25 or thirty days, or both);

Sections 88A-11 and 88A-20, RLH fraud by commercial employment agencies ($1,000 or six months, or both);

Sections 93-140 and 93B-12, RLH falsely obtaining benefits under the employment security law ($200 or thirty days, or both);

Section 97-113, RLH falsely obtaining workmen's compensation benefits ($250);

Section 97-120, RLH falsely obtaining benefits of self-insurance for workmen's compensation ($500);

Section 106C-25, RLH fraud by a carrier, shipper, or consignee in connection with the motor carrier law ($500 first offense and $2,000 for subsequent offense);

Section 108-20, RLH fraudulently obtaining public assistance ($500 or one year, or both);

Sections 115-38, 115-43, 124-16, 125-14, RLH fraudulent tax returns ($1,000 or one year, or both, plus tax penalty);

Section 123-2.5, RLH fraud by a retail fuel dealer in connection with the fuel tax law $5,000 or one year, or both);

Section 130-11, RLH fraudulent use of motor vehicle plates ($500);

Sec. 17-1. (Continued)

Sections 158-5, 158-9, 158-14, RLH fraud or misrepresentation in connection with the sale of gasoline, fuel and motor oil ($500 or six months, or both, each day of violation being a separate offense);

Section 170-35, RLH fraud in connection with offer, sale or lease of property in a real estate subdivision ($1,000 or one year, or both);

Section 178-11, RLH misrepresentation in use of terms implying conducting of banking business ($100 for each day of violation);

Sections 178-100 and 178-101, RLH fraud by a bank officer, director or employee in connection with bank statements, entries or reports ($1,000 or two years, or both);

Sections 181-18, 181-137, 181-145, 181-641 to 181-643, RLH false exhibits, corrupt practices at shareholders' meetings, and unfair practices and fraud in connection with insurance business ($1,000 or one year, or both);

Section 181A-838, RLH misrepresentation in connection with insurance by fraternal benefit societies ($500 or one year, or both);

Sections 199-17 and 199-20, RLH fraudulent practices in connection with the sale of securities ($5,000 or three years, or both);

Section 201A-30, RLH fraudulent injury, destruction, concealment, removal, or disposal of goods by the buyer under a retail installment sales contract ($500 or one year, or both);

Sections 205-40 to 205-45, RLH fraud or misrepresentation in connection with the sale of United States surplus goods ($50, each sale being a separate offense);

Section 323-7, RLH fraud or misrepresentation to circumvent or defeat premarital examination provisions ($1,000 or one year, or both);

Section 357-7, RLH fraud in connection with shipping during emergency periods ($1,000 or six months, or both).

Sec. 17-2. Impersonating Member of Fraternal or Veteran's Organization. RLH, Secs. 284-5, 284-6.

Section 284-5, RLH proscribes inter alia the unlawful wearing of the badge or other insignia of the Grand Army of the Republic, the Veterans of Foreign Wars of the United States, the American Legion, any fraternal society, the United Spanish War Veterans. Also proscribed is the unauthorized wearing of such badge or insignia in order to obtain aid or assistance. The maximum penalty is a $20 fine or imprisonment for twenty days or both.

Section 284-6, RLH provides that half of any fine collected under section 284-5, RLH may be paid to the person giving information of the offense and that such informer is a competent witness upon the trial for the offense.

Sec. 17-3. Forgery.
RLH, Secs. 285-1 to 285-19, 285-21.

Section 285-1, RLH defines forgery as fraudulently making or altering a writing with intent to deceive another and prejudice him in some right.

Section 285-2, RLH defines a writing to include manuscript, print, inscription, figures, marks and other modes of indicating upon paper or other substance, words, sense or meaning.

Section 285-3, RLH specifies that making initials of one's name, a mark as a signature or a stamp as a signature with intent to defraud is a forgery to the same extent as signing one's name.

Section 285-4, RLH provides that an intent to deceive is a necessary element of forgery but that it is not necessary that any one in fact be deceived.

Section 285-5, RLH provides that to constitute forgery, the making or altering of the writing must purport to be another's, except in the case of an alteration by the maker of a writing in which others have a property or direct interest.

Sec. 17-3. (Continued)

Section 285-6, RLH provides that a forgery may be committed in the name of a fictitious person.

Section 285-7, RLH provides that to constitute forgery, the writing must be apparently valid.

Section 285-8, RLH provides that forgery may be committed by the deceptive and fraudulent making of one's own signature as being that of another.

Section 285-9, RLH makes the maximum penalty for forgery of any instrument involving a value of $100 or more a $1,000 fine or ten years imprisonment at hard labor, or both. The maximum penalty for any other forgery is a $1,000 fine or five years imprisonment at hard labor, or both.

Section 285-10, RLH provides that the maximum penalty for any forgery offense after a prior forgery offense conviction is subject to an increased penalty of up to one-half of the maximum for the last offense.

Section 285-11, RLH makes the offense of deceptively passing a forged writing knowing it to be forged subject to the same penalties prescribed for forgery of the writing.

Section 285-12, RLH defines the offense of canceling, destroying, secreting or obliterating a writing in which another has a property or direct interest with intent to defraud another or prejudice him in his person, property, rights or interest and whereby another might be defrauded or so prejudiced. The offense is subject to the same penalties prescribed for forgery of the writing.

Section 285-13, RLH defines the offense of knowingly and fraudulently filling up a signed blank without authority with intent to defraud or prejudice the signer or any other person and whereby the signer or another might be defrauded or prejudiced. This provision does not affect the validity of the writing as against parties liable on it. The offense, and the offense of knowingly and fraudulently uttering the writing, are subject to the same penalties prescribed for forgery of the writing.

Section 285-14, RLH defines the offense of false and fraudulent alteration of a writing by the maker of it after it has been passed or delivered where the alteration may tend to deceive or defraud any person. The offense is subject to the same penalties prescribed for forgery of the writing.

Section 285-15, RLH defines the offense of fraudulently and deceitfully procuring a signature to, or authentication of a writing under pretense that it is a different writing, whereby the person signing or authenticating the writing is deceived. The offense, and the offense of knowingly and fraudulently uttering the writing or authentication, are subject to the same penalties prescribed for forgery of the writing.

Section 285-16, RLH defines the offense of an officer or magistrate knowingly and corruptly falsely taking or certifying any testimony, declaration or statement. The offense, and the offense of knowingly and fraudulently uttering the testimony, declaration, statement or certificate are subject to the same penalties prescribed for forgery of the testimony, declaration, statement or certificate.

Section 285-17, RLH defines the offense of an officer, such as a registrar of conveyances or a notary public, falsely and corruptly certifying that a deed was acknowledged to him or that proof was given to him of the genuineness of a deed. The offense, and the offense of knowingly and fraudulently uttering a false certificate, are subject to the same penalties prescribed for forgery of the certificate.

Section 285-18, RLH defines the offense of any officer with legal custody of a public record corruptly and falsely making or certifying any record or copy of a record. The offense, and the offense of knowingly and fraudulently uttering a false record or certificate, are subject to the same penalty prescribed for the forgery of the record, copy or certificate.

Section 285-19, RLH defines the offense of forgery, procuring to be forged or assisting in forging the seal of the land court or stamping any document with a forged seal or unauthorizedly with a genuine seal. The maximum penalty is ten years imprisonment.

Section 285-21, RLH provides that in any forgery, gross cheat or malicious injury offense that requires an intent to defraud or injure, it is not necessary to prove an intent to defraud or injure any particular person.

Sec. 17-3. (Continued)

In addition to the forgery offenses set forth in chapter 285, RLH Hawaii has a few forgery provisions elsewhere in the Revised Laws:

Section 11-37, RLH forged election ballots ($500 or six months, or both);

Section 51-6(j.), RLH forged identification devices under the Food, Drug and Cosmetic Act ($500 or one year, or both);

Section 52-32, RLH forged prescription to obtain narcotic drugs or forged label on narcotic drugs ($1,000 and one year first offense and $2,000 and one year for subsequent offense).

The King v. Kalaluhi, 3 H 417 (1873), relied on section 285-7, RLH in holding that a forged order to deliver cloth was an apparently valid writing although the value and quantity of the goods was not stated. The Hawaii statute does not require that the forged instrument should be so made that if genuine it would be valid; it merely requires that the instrument should not be obviously invalid, void and of no effect. Accord: The King v. Heleliilii, 5 H 16 (1883); The King v. Mahukaliilii, 5 H 96 (1884).

The King v. Nahakualii, 3 H 472 (1873), interpreted sections 285-1 and 285-4, RLH and held that falsely, fraudulently and feloniously forging a deed with intent to deceive the grantor's heirs necessarily includes an intention to prejudice those heirs.

Territory v. Forrest, 27 H 209 (1923), held that where a purchasing agent is empowered by his principal to draw on his principal's bank account by checks signed in the principal's name as maker to pay for purchases made for and on account of his principal, and the agent by means of such a check draws on his principal's bank account not for the purpose authorized, but for the purpose and with the false and fraudulent intent of converting the money to his own use and benefit, such agent is guilty of forgery.

ARTICLE 18. ROBBERY

Sec. 18-1. Robbery.
RLH, Secs. 306-1 to 306-7, 306-11.

See Sec. 16-1, Theft, with respect to section 293-22, RLH larceny from the person.

Section 306-1, RLH defines robbery as the stealing of a thing from the person of another or from his custody in his presence by force or by putting him in fear.

Section 306-2, RLH specifies that the force or fear element of robbery must be to prevent or overcome resistance; to prevent or hinder the escape of the victim; to prevent the conveying away, securing or guarding the subject of the larceny from being taken; to induce the victim to surrender the subject of the larceny; or to prevent detection of the crime.

Section 306-3, RLH provides that a taking by force is not robbery if there is no intent to steal.

Section 306-4, RLH provides that taking a thing from another by forcibly imprisoning him or forcibly putting him under personal restraint or duress until he surrenders the thing is robbery.

Section 306-5, RLH provides that in robbery by putting the victim in fear, the ground of the fear must be adequate and not merely trivial and frivolous.

Section 306-6, RLH defines adequate cause of fear as either that which would cause fear in a person of ordinary firmness of like age, sex and health and induce such person to part with property to avoid the apprehended injury or danger; or that which the taker of the thing believes or has reason to believe will cause and which does in fact cause that degree of fear.

Section 306-7, RLH provides that in robbery by putting the victim in fear, it is immaterial whether the fear is excited by words, menacing gesture, presenting a weapon or other act causing fear.

Section 306-11, RLH provides that the maximum penalty for robbery in the second degree is twenty years imprisonment at hard labor.

Sec. 18-1. (Continued)

Territory v. Kim Ung Pil, 26 H 725 (1923), interpreted section 306-1, RLH in connection with the use of the disjunctive "or" in an indictment for robbery which charged that the taking was "from the person or from the custody and in the presence" of the person robbed. The court held that the statutory words: "or from the custody and in the presence" were added from abundance of caution and that this addition does not add anything to the common law meaning of "from the person" in the definition of robbery. The court stated "The essence of our statute is that it prohibits a taking from the person and that a taking from the custody and in the presence means the same thing." The court also held that the requirement of section 306-3, RLH that the taking must be with intent to steal is sufficiently charged in an indictment that alleged the taking was done "feloniously". Finally, the court stated the allegation that the defendant was armed with a revolver "with intent in him", "if resisted, to kill or maim or wound or inflict other severe corporal injury upon" the party robbed and that being so armed he "did make an assault' and the defendant "in bodily fear and danger of his life then and there did put'. It was held that this is a sufficient charge that the force was used to put in fear and to overcome resistance as required in section 306-2, RLH.

State v. Peters, 44 H 1 (1959), held that the gist of robbery is the stealing of a thing from the person of another by force or putting him in fear, according to section 306-1 RLH and that the amount taken is not an essential element of the offense.

State v. Pokini, 45 H 295 (1961), held that robbery consists of larceny with added elements and that stolen money can be the subject of a robbery.

Sec. 18-2. Armed Robbery.
RLH, Secs. 306-8, 306-9 and 306-11.

Section 306-8, RLH defines first degree robbery as robbery committed by one armed with a dangerous weapon with intent, if resisted, to kill, maim, wound or inflict other severe corporal injury upon the person robbed; or where, being so armed, the robber in

Sec. 18-2. (Continued)

committing the offense wounds or strikes or inflicts other severe injury upon the person robbed or any other person.

Section 306-9, RLH states the presumption that a person who commits a robbery while armed with a dangerous weapon shall be presumed to be so armed with the intent specified in section 306-8.

Section 306-11, RLH makes the penalty for robbery in the first degree imprisonment at hard labor for life or any number of years in the discretion of the court.

State v. Pokini, supra (under Sec. 18-1, Robbery), held that under the presumption of section 306-9, RLH the intention to use the guns did not have to be shown by the prosecution since there was no evidence to the contrary.

State of Hawaii v. Shon, 47 H 145 (1963). See Sec. 5-2, When Accountability Exists on the question of the degree of robbery, in the case of an aider and abettor.

ARTICLE 19. BURGLARY

Sec. 19-1. Burglary.
RLH, Secs. 266-1 to 266-4.

Section 266-1, RLH defines burglary as entry by night or day into a dwelling house, room, building, store, mill, warehouse, outhouse or vessel of another with intent to commit therein larceny in the first or second degree or any felony.

Section 266-2, RLH provides that entry is an essential element of burglary and that entry may be made by any part of the body or by discharging or throwing any missile or introducing any instrument or part of an instrument into the house, room, structure or vessel.

Section 266-3, RLH divides burglary into two degrees. First degree burglary is burglary at night, by a person armed with a deadly weapon, or when any person with a right to be there is within the place burglarized. All other burglary is in the second degree.

Sec. 19-1. (Continued)

Section 266-4, RLH provides the maximum penalty of twenty years imprisonment at hard labor for first degree burglary and ten years imprisonment at hard labor for second degree burglary.

State v. Hale, 45 H 269 (1961), held that the degree of the offense of burglary merely reflects the gravity of the offense as determined by the manner in which the burglary was committed, and that the elements of the crime of burglary in the first degree are not synonymous with the corpus delicti of the offense. The details which merely increase the degree of the crime, it was held, are not included in the corpus delicti but do aggravate the offense and are material to the higher degree. The court interpreted section 266-1, RLH to mean that the intent which must accompany the entry is the gist of the offense of burglary and that proof of the intention to steal or commit a felony is included in the corpus delicti of burglary. It was also held that proof of commission of a felony is the best evidence of the felonious intent.
Accord: State v. Evans, 45 H 622 (1962).

Sec. 19-2. Possession of Burglary Tools.
RLH, Section 314-1.

Section 314-1, RLH makes it vagrancy for any person to possess "without lawful excuse (the proof of which excuse shall be upon such person) any false or skeleton key or any implement of house breaking". The penalty for vagrancy is a fine of not less than $10 nor more than $500 or imprisonment not more than one year, or both.

ARTICLE 20. ARSON

Sec. 20-1. Arson.
RLH, Secs. 263-1 to 263-8, 263-10, 263-11, 296-8, 313-1, 313-2.

Section 263-1, RLH defines burning within the meaning of arson and malicious burning. It provides that it constitutes burning if any part of the building, structure or other thing burnt is on fire though no part is absolutely consumed.

Sec. 20-1. (Continued)

Section 263-2, RLH defines arson as the willful and malicious burning of the dwelling house of another.

Section 263-3, RLH defines first degree arson as arson committed at night and when there is an occupant or inmate in the dwelling burnt. The penalty is imprisonment at hard labor for life not subject to parole, or imprisonment at hard labor for life subject to parole.

Section 263-4, RLH defines second degree arson as arson in the day time or night time. The penalty is imprisonment at hard labor for life or any number of years.

Section 263-5, RLH defines malicious burning as burning anything, whether it belongs to the offender or another person, with intent to injure another, or without any legal or justifiable motive or object, and with a reckless disregard of the life or personal safety, property, or legal rights, or interests of another where the same are obviously, immediately and imminently endangered by the burning.

Section 263-6, RLH states the presumption that where the thing burnt or attempted to be burnt is that of another, malice is presumed. If the thing belongs to the offender, malice must be shown.

Section 263-7, RLH defines first degree malicious burning. It is the willful and malicious or fraudulent burning at night of a building, vessel or structure or their contents or any portion of them, whether partly or wholely the property of the offender or of another, whereby another might be injured, and where the value of the building, vessel or structure with its contents is $1,000 or more. The penalty is imprisonment at hard labor for life or any number of years.

Section 263-8, RLH defines second degree malicious burning. It is the same as first degree malicious burning except that the burning is in the day time or the burning either in the day time or night time is of a building, vessel or structure of a value with contents of $500 or more and less than $1,000. The maximum penalty is imprisonment at hard labor for ten years.

Section 263-10, RLH provides that the willful burning of an insured building or chattel with intent to injure the insurer whether or not the offender is the owner of the property is subject to a maximum penalty of ten years imprisonment.

Sec. 20-1. (Continued)

Section 263-11, RLH provides that the provisions relating to arson and malicious burning are fully applicable to a married woman even though the property burnt may belong partly or wholly to her husband.

Section 296-8, RLH provides that the unlawful use of explosives for the purpose of inflicting bodily injury upon, or terrifying and frightening any person, or to injure, destroy, or damage any property is subject to a penalty of a fine of not less than $250 nor more than $5,000 and not more than twenty years imprisonment at hard labor. (See section 285-21, RLH under Sec. 21-1, Criminal Damage to Property.)

Section 313-1, RLH provides, inter alia, that unlawfully placing explosives upon or near a railroad track with the intention of blowing up or derailing a train, car or engine is subject to a maximum penalty of a $1,000 fine or ten years imprisonment at hard labor.

Section 313-2, RLH provides, inter alia, that the act of blowing up or derailing a train, car or engine by unlawfully placing explosives upon or near a railroad track with the intention of such blowing up or derailing is subject to a maximum penalty of imprisonment at hard labor for life not subject to parole, or imprisonment at hard labor for life subject to parole.

Territory v. Palai, 23 H 133 (1916), held that in a prosecution for the unlawful use of dynamite with intent to injure property under section 296-8, RLH it is not necessary to prove an explosion or actual damage.

Sec. 20-2. Possession of Explosives.
RLH, Chapter 96, Part II, Secs. 267-1, 296-9, 296-10.

Chapter 96, Part II, RLH deals generally with explosives regulation under the industrial safety jurisdiction of the department of labor and industrial relations. The maximum penalty for violation of any of these regulatory provisions is a $500 fine or six months imprisonment, or both.

Section 267-1, RLH prohibits as a common nuisance the making or storing of gunpower contrary to law. The maximum penalty is a $500 fine or six months imprisonment.

Sec. 20-2. (Continued)

Section 296-9, RLH prohibits possession of explosives, other than ammunition for firearms, with intent to use them to inflict bodily injury upon, or to terrify and frighten any person, or to injure, destroy or damage any property. The maximum penalty is a $3,000 fine or five years imprisonment at hard labor. (See section 285-21, RLH under Sec. 21-1, Criminal Damage to Property.)

Section 296-10, RLH states the presumption that proof of possession of explosives is prima facie evidence of the unlawful intent. The burden of proof is put on the defendant to show that the possession was lawful.

ARTICLE 21. DAMAGE AND TRESPASS TO PROPERTY

Sec. 21-1. Criminal Damage to Property.
RLH, Chapter 262, Secs. 263-9, 263-10, 274-1, 285-21, 296-1 to 296-7, 296-13 to 296-15, 311-4.

Chapter 262, RLH includes a number of misdemeanor offenses involving cruelty to animals. The maximum penalty for the offense of carrying an animal on the running board or fender of a moving automobile is a $25 fine. The maximum penalty for the other offenses is a $100 fine or three months imprisonment, or both.

Section 263-9, RLH defines third degree malicious burning. It is either the same as second degree malicious burning (See Sec. 20-1) except the burning is of a building, vessel or structure of a value, with contents, of less than $500; or it is the willful and malicious burning of wood, timber, lumber, grass, grain, cane, or other vegetable product, severed or not, or any tree, brush, underwood or other standing product of the soil of another. The maximum penalty is a $500 fine or five years imprisonment at hard labor.

Section 263-10, RLH defines willful burning with intent to injure an insurer. (See Sec. 20-1.)

Section 274-1, RLH prohibits destruction, defacement, change or removal, without consent of the [State] surveyor, of any survey monument. The maximum penalty is a $500 fine or four months imprisonment, or both.

Section 285-21, RLH specifies that in an indictment for any offense under Chapter 296, Malicious Injury, Injury by Explosives, etc. the allegation of intent to defraud or injure need not be to defraud or injure any particular person; and that it is not necessary to prove intent by the defendant to defraud or injure any particular person.

Section 296-1, RLH defines malicious injury as the willful or malicious destruction or injury of real or personal property of another, or injury or disturbance of another in any of his rights or privileges of person or property. The maximum penalty is a $1,000 fine or one year imprisonment, or both.

Section 296-2, RLH states that an act done in the fair exercise, assertion or vindication in good faith of a supposed legal right shall not be punishable as malicious injury. The question of good faith is a matter to be determined by the trier of fact.

Section 296-3, RLH prohibits the malicious taking away; willful and malicious defacement, alteration or mutilation or wrongful detention of any public record. The maximum penalty is a $1,000 fine or one year imprisonment, or both.

Section 296-4, RLH prohibits any unlawful or malicious injury to any item in a collection belonging to any public or educational institution. The maximum penalty is a $1,000 fine or one year imprisonment, or both.

Section 296-5, RLH prohibits the unauthorized removal of any item in a collection belonging to any public or educational institution. The maximum penalty is a $1,000 fine or one year imprisonment, or both.

Section 296-6, RLH prohibits the willful and knowing detention of any public or library book beyond the time authorized by regulation. The maximum penalty is a $50 fine.

Section 296-13, RLH prohibits placing poison in any street, field or inclosure wantonly or maliciously or for revenge or with the intent to destroy any domestic animal or fowl. The penalty is a fine of not less than $100 nor more than $500 or imprisonment not more than one year, or both.

Sec. 21-1. (Continued)

Sections 296-14 and 296-15, RLH prohibit willful or malicious tampering with electrical equipment or conspiracy to do so. The maximum penalty is a $1,000 fine or imprisonment for one year, or both.

Section 311-4, RLH prohibits the traffic violation of frightening an animal. If the act endangers the safety of a person, the penalty is a fine of not less than $5 nor more than $500; if a person's safety is not endangered, the maximum fine is $100.

The King v. Wansey, 8 H 115 (1890), was a case of malicious injury wherein defendant had injured a dog, the property of another, while chasing the animal off his premises. The court held that malice toward the animal does not constitute malicious injury, but that the offense is committed by injuring the animal without legal justification and with a reckless disregard for the property of another. The defendant was discharged on the ground that there was adequate legal justification for his acts and in reliance on section 296-2 which states that "an act done in the fair exercise, assertion, . . .vindication in good faith of a supposed legal right . . .shall not be punishable as a malicious injury."
Accord: In Re Bevins, 26 H 570 (1922).

Sec. 21-2. Criminal Trespass to Vehicles.

No Hawaii law was found on criminal trespass to vehicles.

Sec. 21-3. Criminal Trespass to Land.
RLH, Chapter 20, Part III; Chapter 142; Secs. 312-1 to 312-6.

Chapter 20, Part III, RLH includes several provisions relating to trespass to land by animals. The criminal offenses involved are misdemeanors with the greatest maximum penalty being a $100 fine or one year imprisonment.

Chapter 142, RLH deals with highways, sidewalks, parks, use of streets, etc. Offenses such as malicious injury to road or highway guideposts or markings, violation of sidewalk, curb and street regulations, and malicious injury to shade or ornamental trees on public highways are misdemeanors with the greatest maximum penalty being a $100 fine.

Sec. 21-3. (Continued)

Section 312-1, RLH defines trespass as ". . .without right, enters or remains in or upon the dwelling house, buildings, or improved or cultivated lands of another, or the land of another about or near any buildings used for dwelling purposes, after having been forbidden to do so by the person who has lawful control of such premises, either directly or by notice posted thereon, and any person who willfully tears down or defaces any such notice. . ." The maximum penalty is a $250 fine or three months imprisonment, or both. Entry upon or passing over roads, paths or trails leading to public beaches does not constitute trespass.

Section 312-2, RLH provides that entry on to land by United States agents while doing government surveying does not constitute trespass.

Section 312-3, RLH prohibits trespass on a railroad right of way, bridge, cut, fill or tunnel.

Section 312-4, RLH makes such railroad trespass subject to a maximum fine of $10.

Section 312-5, RLH defines "railroad", for the trespass sections, to include temporary or portable steam railroads and steam railroads operating upon a permanent right of way, but to exclude street railroads.

Section 312-6, RLH requires posting of sections 312-3 to 312-6 at all railroad stations and permanent railroad crossings.

PART D. OFFENSES AFFECTING PUBLIC HEALTH, SAFETY AND DECENCY

ARTICLE 22. UNIFORM NARCOTIC DRUG ACT

RLH, Secs. 52-10 to 52-39.

Hawaii enacted a modified version of the Uniform Narcotic Drug Act, effective July 1, 1931.

ARTICLE 23. ABORTION AND RELATED OFFENSES

Sec. 23-1. Abortion.
RLH, Secs. 309-3 and 309-4.

Section 309-3, RLH defines abortion as "maliciously, without lawful justification, administers, or causes or procures to be administered any poison or noxious thing to a woman when with child, in order to produce her miscarriage, or maliciously uses any instrument or other means with like intent." The maximum penalty if the woman is pregnant is a $1,000 fine and five years imprisonment at hard labor; if she is not pregnant, $500 and two years imprisonment at hard labor.

Section 309-4, RLH provides that where means of causing abortion are used for the purpose of saving the life of the woman, the surgeon or other person using such means is lawfully justified.

Territory v. Hart, 35 H 582 (1940), stated that there is no presumption of good faith or legitimate purpose where a layman performs an abortion and that the accused must raise and prove such an affirmative defense as a plea in confession and avoidance.

Territory v. Young, 37 H 150 (1945), stated that the gravamen of abortion is the malicious administration of drugs to, or the use of instruments upon, a woman with child in order to procure a miscarriage. Section 309-3, RLH was interpreted as defining the period within which the crime of abortion may be committed, "from the moment the womb is instinct with embryo life and gestation has begun until expulsion or delivery". The court held that it is not necessary to the crime of abortion that the fetus must have had vitality and that vitality of the fetus is pertinent only as it might affect the defense of lawful justification.

Territory v. Young and Nozawa, 37 H 189 (1945), stated that the malice element of the offense of abortion is as defined by section 247-4, RLH.

Territory v. Decorion, 38 H 121 (1948), stated by way of dicta that the word "instrument" in section 309-3, RLH does not necessarily denote some scientific or surgical tool or implement but includes all devices of the abortionist, and that the term "any instrument or means whatsoever" is not limited by the rule of ejusdem generis.

Sec. 23-2. Distributing Abortifacients.

No Hawaii law was found on the distribution of abortifacients.

Sec. 23-3. Advertising Abortion.
RLH, Secs. 155-73 and 155-75.

Section 155-73, RLH prohibits inter alia outdoor advertising giving or purporting to give information from whom or where medicines may be obtained for abortion or miscarriage.

Section 155-75, RLH prescribes the penalty for violation of section 155-73 as a fine of not less than $50 nor more than $250 for each offense.

ARTICLE 24. DEADLY WEAPONS

Sec. 24-1. Unlawful Use of Weapons.
RLH, Secs. 157-1 to 157-4, 157-6 to 157-8, 157-13 to 157-15, 264-9, 267-25, 296-12, 314-1.

Sections 157-1 to 157-4, RLH require registration of all firearms except rifles and shotguns,require permits to acquire any firearm, and prohibit, with certain exceptions, transfer of a rifle or shotgun to a minor or possession of a shotgun or rifle by a minor or by an alien. The maximum penalty for violation of the registration provisions is a $250 fine, and the maximum penalty for violation of the other provisions is a $500 fine or one year imprisonment, or both.

Sections 157-6 to 157-8, RLH require firearms to be kept at the possessor's business or residence, prohibit unlicensed possession of loaded firearms, prohibit possession of firearms or ammunition by fugitives from justice or by persons who have been convicted of certain crimes, and prohibit the manufacture, possession, sale, barter, trade, gift, transfer or acquisition of machine guns, sub-machine guns, automatic rifles, cannon, mufflers, silencers, bombs or bobmshells. The maximum penalty for violation of any of these provisions is a $1,000 fine or one year imprisonment, or both.

Sections 157-13 to 157-15, RLH provide for revocation of permits and licenses under the firearms and ammunition law and for reports by the permit and license

authorities. The maximum penalty for any falsification in connection with the general regulations of the firearms and ammunition law is a $1,000 fine or one year imprisonment, or both.

Section 264-9, RLH prohibits the knowing manufacture, sale, transfer, possession or transportation of a switchblade knife. The maximum penalty is a $1,000 fine or one year imprisonment, or both.

Section 267-25, RLH prohibits the unauthorized carrying on the person, or within a vehicle used or occupied by the person, of a dirk, dagger, blackjack, slug shot, billy, metal knuckles, pistol, or other deadly or dangerous weapon. The maximum penalty is a $250 fine or one year imprisonment, or both.

Section 296-12, RLH prohibits the willful discharge on a public highway of any firearm or other weapon capable of causing death or inflicting serious personal injury, including air guns and sling shot, except in the lawful defense of life or property or in the performance of official duty. The penalty is a fine of not less than $10 nor more than $250 or one year imprisonment, or both.

Section 314-1, RLH includes within the definition of "vagrant" a person who is dangerous by reason of his going offensively armed. The penalty is a fine of not less than $10 nor more than $500 or one year imprisonment, or both.

Sec. 24-2. Exemptions.
RLH, Secs. 157-3 to 157-6, 157-9, 157-11.

The Hawaii exemptions, apart from the general license and permit requirements, include target shooting and hunting activities and peace officers, members of the armed services, mail carriers, and other officers specifically authorized to be armed in connection with their official duties or activities.

Sec. 24-3. Unlawful Sale of Firearms.
RLH, Secs. 157-3 to 157-5, 157-7, 157-30 to 157-33.

Sections 157-3 to 157-5, RLH specify those persons who may and those who may not acquire firearms generally and rifles and shotguns for target shooting or hunting purposes. Aliens over twenty and minors are permitted,

Sec. 24-3. (Continued)

with restrictions, to acquire, possess and use rifles and shotguns only for target shooting or hunting purposes.

Section 157-7, RLH prohibits ownership, possession or control of any firearm or ammunition by a fugitive from justice or by a person who has been convicted of a crime or attempted crime of violence or of a narcotics offense.

Section 157-30 to 157-33, RLH provide for licensing of firearms sellers and manufacturers. A condition of the license is that the licensee shall comply with all provisions of law relative to the sale of firearms. The penalty for violating the licensing provisions is a fine of not less than $100 nor more than $1,000 or imprisonment not less than three months nor more than one year.

Sec. 24-4. Register of Sales by Dealer.
RLH, Section 157-3.

Section 157-3, RLH requires a permit from the chief of police for anyone to acquire a firearm other than a rifle or shotgun having a barrel length of eighteen inches or over. The maximum penalty for violation of the requirement is a $500 fine or one year imprisonment, or both.

Sec. 24-5. Defacing Identification Marks of Firearms.
RLH, Section 157-10.

Section 157-10, RLH prohibits the willful defacement of identification on firearms and ammunition and makes possession of a firearm or ammunition so defaced presumptive evidence that the possessor defaced it. The maximum penalty is a $500 fine or one year imprisonment, or both.

Sec. 24-6. Confiscation and Disposition of Weapons.
RLH, Secs. 21-6, 157-12, 267-25.

Section 21-6, RLH provides for seizure and forfeiture of fishing and hunting gear used in violation of the fish and game law.

Sec. 24-6. (Continued)

Section 157-12, RLH provides that ammunition of firearms carried or possessed contrary to law shall be forfeited to the State and destroyed or retained by the chief of police.

Section 267-25, RLH provides that weapons carried in violation of the law shall, upon conviction of the one carrying or possessing them, be destroyed by the chief of police or sheriff.

ARTICLE 25. MOB ACTION AND RELATED OFFENSES

RLH, Secs. 261-2 to 261-4, 264-6, 264-7, 305-1 to 305-3.

Sections 261-2 to 261-4, RLH deal with various offenses of criminal syndicalism, defined as the doctrine which advocates crime, sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political ends. It is provided that two or more persons assembled for the purpose of advocating or teaching the doctrines of criminal syndicalism constitutes unlawful assemblage. The maximum penalty for voluntary participation in unlawful assembly by presence, aid or instigation is a $5,000 fine or ten years imprisonment, or both.

Sections 264-6 and 264-7, RLH provide for the offense of affray. It is defined as unauthorized fighting of two or more persons. The maximum penalty of a $500 fine or six months imprisonment, or both, expressly covers a person who takes part in, encourages or promotes an affray.

Section 305-1, RLH defines riot as the use, or the attempted or threatened use, of force or violence disturbing the public peace, if accompanied by immediate power of execution, by six or more persons acting together without authority or justification by law.

Section 305-2, RLH provides the maximum penalty of a $1,000 fine or two years imprisonment at hard labor, or both, for a person who participates in a riot.

Section 305-3, RLH prohibits the remaining at a place of riot after being ordered to disperse. The maximum penalty is a $500 fine or one year imprisonment, or both.

ARTICLE 26. DISORDERLY CONDUCT

Sec. 26-1. Elements of the Offense.
RLH, Secs. 267-1 to 267-25, 277-1 to 277-4, 278-1, 296-16, 296-17, 302-1, 302-2, 307-1, 314-1 to 314-7.

Sections 267-1 to 267-25, RLH deal with the offense of common nuisance. The examples used to define the offense and the specific offenses, all public acts, include the following:

1. Carrying on a trade, manufacture or business in places so situated that others indiscriminately, who reside in the vicinity, or pass in a highway or public place, or resort to a schoolhouse, meetinghouse or any other place of legal and usual resort or assembly, are liable to be thereby injured, annoyed, disturbed or endangered by deleterious exhalations, noisome vapors, hideous, alarming or disgusting sights, intolerable noise, or otherwise;
2. Spreading small pox or other infectious disease;
3. Carrying an infected person through a frequented street;
4. Opening a hospital or pesthouse to endanger neighbors;
5. Making or storing gunpowder contrary to law;
6. Blasting with excessive charge of explosives;
7. Making loud and troublesome noises by night;
8. Keeping animals that disturb the neighborhood by night;
9. Permitting ferocious animals to go abroad;
10. Keeping a bawdy house;

11. Open lewdness or lascivious conduct, or indecent exposure;

12. Keeping a common gambling house;

13. Keeping a disorderly house;

14. Selling, dealing in, having in possession or using sneezing powder other than snuff;

15. Obstructing a highway, channel, harbor entrance, harbor town, navigable stream, public place (with seven specific examples);

16. Putting glass and other substances on a highway, street, road, alley or lane;

17. Unauthorized use of fireworks;

18. Various acts involving obscene publications;

19. Keeping places of prostitution;

20. Loud noise by night, e.g., hallooing, or street singing;

21. Intruding, loitering, loafing or idling on school premises; and

22. Carrying deadly weapons.

The maximum penalties for these offenses vary from a $100 fine to a $1,000 fine or one year imprisonment, or both.

Sections 277-1 to 277-4, RLH deal with disorderly houses, i.e., houses kept for purposes of prostitution; indecent, immoral or disorderly shows; sale of intoxicating liquor without a license; or gambling. The maximum penalty is a $100 fine or six months imprisonment.

Section 278-1, RLH prohibits drunkenness in a public place. The maximum penalty is a $100 fine or three months imprisonment, or both.

Section 296-16, RLH prohibits the willful or knowing false representation of the unlawful use or threatened unlawful use of an explosive. The maximum penalty is a $1,000 fine or one year imprisonment, or both.

Sec. 26-1. (Continued)

Section 296-17, RLH prohibits a threat to use an explosive with intent to inflict bodily injury or frighten any person or to damage property. The maximum penalty is a $1,000 fine or one year imprisonment, or both.

Section 302-1, RLH prohibits the use of vulgar, profane or obscene language in any public place. The maximum penalty is a $20 fine or one month imprisonment.

Section 302-2, RLH prohibits the use of obscene or lascivious language over the telephone. The maximum penalty is a $100 fine or three months imprisonment, or both.

Section 307-1, RLH prohibits the willful interruption or disturbance of a religious assembly. The maximum penalty is a $15 fine or thirty days imprisonment.

Section 314-1, RLH specifies the following conduct as constituting vagrancy:

1. A person without visible means of living who has the physical ability to work and does not seek employment, nor labor when employment is offered him;

2. A person who roams about without any lawful business;

3. A known pickpocket, thief, burglar or confidence operator with no visible or lawful means of support when loitering around a steamboat landing, railroad depot, banking institution, broker's office, amusement place, billiard parlor, auction room, store, shop or crowded thoroughfare, car or bus, or public gathering;

4. An idle, lewd or dissolute person, or associate of known thieves;

5. A person who is wanton or lascivious in speech or behavior;

6. A person who practices hoopiopio, hoounauna, hoomanamana, anaana, or pretends to have the power of praying persons to death;

7. A person who has on his person without lawful excuse a false or skeleton key or implement of house breaking;

8. A person without lawful excuse on the dwelling-house, building, yard or land of another near any building used as a dwelling or on any vessel;

9. A person who wanders about the streets at late or unusual hours of night without any visible or lawful business;

10. A person who lodges in any place not kept for lodging without permission;

11. A person who lives in and about houses of ill-fame;

12. A common prostitute;

13. A common drunkard;

14. A person who is dangerous by reason of being a rioter, disturber of the peace, going offensively armed, uttering menaces or threatening speech, or otherwise is a vagrant.

The penalty for vagrancy is a fine of not less than $10 nor more than $500 or one year imprisonment, or both.

Section 314-2, RLH defines disorderly conduct as any of the following acts committed with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned:

1. Use of offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;

2. Congregation with others on a public street or sidewalk and refusal to move on when ordered by the police;

3. Causing a crowd to collect, except when lawfully addressing the crowd;

4. Shouting or making noise at night to the annoyance or disturbance of three or more persons;

Sec. 26-1. (Continued)

5. Interfering with any person by jostling against him or unnecessarily crowding him or placing a hand near such person's pocket, pocketbook or handbag;

6. Unlawfully soliciting alms on public streets or sidewalks;

7. Frequenting or loitering about a public place to solicit men for the purpose of committing a crime against nature or other lewdness;

8. Causing a disturbance in a public conveyance by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees;

9. Standing on sidewalks or street corners making insulting remarks to or about passing pedestrians or annoying pedestrians;

10. Making or causing to be made repeated telephone calls with intent to annoy and disturb another person or his family; and

11. Wearing clothes of the opposite sex in a public place with intent to deceive other persons by failing to identify his or her sex.

Section 314-3, RLH sets the maximum penalty for disorderly conduct as a $1,000 fine or one year imprisonment, or both.

Section 314-4, RLH prohibits begging in a public place. The maximum penalty is a $500 fine or one year imprisonment, or both.

Section 314-5, RLH prohibits loitering on a public highway, street or sidewalk thereby impeding or rendering dangerous passage by pedestrians and others or imperiling the public welfare or tending to cause a breach of the peace. The penalty is a fine of not less than $25 nor more than $250 or imprisonment not less than thirty days nor more than ninety days, or both.

Section 314-6, RLH prohibits the attempt to cure another by sorcery, witchcraft, anaana, hoopiopio, hoounauna, hoomanamana, or other superstitious or deceitful methods. The penalty is a fine of not less than $100 nor more than $200 or imprisonment not more than six months.

Section 314-7, RLH prohibits pretending to tell fortunes for money or other valuable consideration. The maximum penalty is a $1,000 fine or one year imprisonment, or both.

Hawaii decisional law involving the offense of common nuisance includes the following cases:

The King v. Nawahine, 3 H 371 (1872), held that the use of obscene language on the highway to a girl in the presence of two other persons constituted the offense of common nuisance although it might also be a violation of the statute prohibiting (section 309-24, RLH) lewd conversation. The court stated that the injury to public morals element of the offense of common nuisance requires only that the act must be injurious to more than one person.

The King v. Kekaula, 3 H 378 (1872), held that there is no offense of common nuisance by obstructing a highway unless it is a legally established public highway.

The King v. Grieve, 6 H 740 (1883), held that the offense of committing a common nuisance by printing an obscene pamphlet is not committed by one in utter ignorance of even its possible meaning, who could not ascertain its meaning of his own knowledge, and had the best of reasons not to suppose that there was the slightest impropriety.

Territory of Hawaii v. Martin, 14 H 304 (1902), held that the offense of common nuisance by indecent exposure is committed if done in a public place where it may be seen by others if they pass by even though it is actually seen by only one person.

Territory v. Peter, 22 H 132 (1914), held that the gist of the offense of common nuisance by keeping a bawdy house is the keeping and use of the house for purposes of prostitution and lewdness and that a single act of illicit intercourse in the house or any number of acts with the proprietor alone would not constitute the offense but it must have been used for that purpose more than once by others than the proprietor.

Territory v. Kimbrel, 31 H 81 (1929), held that the offense of common nuisance by keeping a place of prostitution is committed if the owner of the building practices

prostitution in the building and conducts the building for the purposes of prostitution without the aid of other prostitutes.

Territory v. Fujiwara, 33 H 428 (1935), held that the offense of common nuisance by making loud and troublesome noises by night may constitute a mixed nuisance being both a public and a private nuisance and that the offense need not be a continuous act but may consist of a single act.

Territory v. Gora, 37 H 1 (1944), distinguished the offenses of common nuisance by open lewdness or lascivious behavior or indecent exposure and lascivious conduct under section 309-24, RLH. (At the time, the common nuisance offense carried a maximum penalty of $500 or six months, and the lascivious conduct offense a fine of between $2 and $10 or ten days.) The court held that the gravamen of the private act was the bare conduct of lasciviousness and that the gravamen of the common nuisance act was the injury to the public resulting from open lasciviousness.

The offense of keeping a disorderly house was involved in the following case:

Provisional Government v. Wery, 9 H 228 (1893), held that a single sale of intoxicating drink does not constitute the offense of keeping a disorderly house for the sale of intoxicating drink without license.

The offense of profane and obscene language was involved in these two cases:

Republic of Hawaii v. Ben, 10 H 278 (1896), held that in the offense of using vulgar and obscene language in a public place, a place becomes public according to circumstances and the mischief to be prevented. The court found that the veranda of defendant's home, close to a public street, within hearing of passers-by was a public place within the meaning of the statute.

Territory of Hawaii v. Kaaikaula, 22 H 204 (1914), held that the words "you big fat buffalo, you damn son of a bitch" constituted a violation of the prohibition against use of vulgar language. The court interpreted section 302-1, RLH as intended to protect modesty from that which is indecent and to prevent the use of

language in public places which will shock the sensibilities and tend to cause breaches of the peace, whether the language is vulgar, profane or obscene.

The following cases involve vagrancy:

The King v. Liilii, 8 H 199 (1891), held that the vagrancy law comprises both vagrancy as a status and specific offenses which are acts, such as soliciting alms or entering without lawful excuse property of another. The court held that a person convicted of the latter offenses is not convicted of vagrancy.

Accord: The King v. William Joe, 8 H 287 (1891).

Republic of Hawaii v. Palea, 12 H 159 (1899), held that under the vagrancy statute to constitute a lawful excuse for visiting the house of married persons at night at the request of the wife, there must be an invitation by her for a lawful purpose, and if accepted, the acceptance must be for a lawful purpose.

Territory of Hawaii v. Lo Kam, 13 H 14 (1900), held that under the vagrancy statute one who goes upon the premises of another by night for a lawful purpose and on the invitation of one rightfully occupying the premises without the knowledge or consent of the owner, remains over night, is not there without lawful excuse. The court stated that the statute was enacted to cover a "multitude of sins" but that it could not have been intended to declare a simple trespass to be an offense and punishable as a misdemeanor.

ARTICLE 27. CRIMINAL DEFAMATION

Sec. 27-1. Elements of the Offense.
RLH, Secs. 176-20, 180-67.5, 180-69, 294-1, 294-3 to 294-5, 294-7 to 294-14.

Section 176-20, RLH prohibits the malicious and knowing spreading of false reports about the finances or management of an agricultural cooperative association. The penalty is a fine of not less than $100 nor more than $1,000 for each offense.

Sections 180-67.5 and 180-69, RLH prohibit the willful or knowing making, circulating or transmitting of untrue and derogatory statements, written or spoken,

concerning the finances of a building and loan association. The maximum penalty is a $1,000 fine or one year imprisonment, or both.

Section 294-1, RLH defines libel as a publication, other than by spoken words, which directly tends to injure the fame, reputation or good name of another and bring him into disgrace, abhorrence, odium, hatred, contempt or ridicule, or cause him to be excluded from society.

Sections 294-3 to 294-5, RLH define the making, publishing and malice elements of libel.

Section 294-7, RLH provides the maximum penalty for libel of a $1,000 fine or one year imprisonment.

Sections 294-8 and 294-9, RLH provide that libel may be of the dead and of a group.

Sections 294-10, 294-12 and 294-13, RLH provides for privileged statements of public officers, witnesses, and parties to suits and attorneys.

Section 294-11, RLH exempts radio station or network owners, licensees, operators, agents and employees from liability for defamatory statements over radio facilities by candidates for public office.

Section 294-14, RLH prohibits the willful and knowing making, circulating or transmitting of untrue and derogatory statements, written or spoken, concerning a bank or trust company. The maximum penalty is a $1,000 fine or one year imprisonment, or both.

Waterhouse v. Spreckels, 5 H 246 (1884), a tort action for libel, distinguished civil and criminal defamation. The court stated that criminal punishment is attached to libel because it is believed to tend to a breach of the peace and that slander has never been so punished because from its comparatively ephemeral nature it was held not to endanger such a breach.

The King v. Gibson, 6 H 310 (1882), held that it is libel to say of a government official that his conduct is treason to the State and that to constitute the crime of libel malicious publication must be charged and proved. The court also held that section 294-1, RLH does not confine libel to publications which impute a criminal offense.
Accord: Provisional Government v. Smith, 9 H 257 (1893).

Sec. 27-1. (Continued)

Territory v. Ota, 36 H 80 (1942), approved a jury instruction which stated the principle behind the offense of libel as follows: "The publication of a libel has a tendency to provoke a breach of the peace, which the law is solicitous to maintain and preserve. Persons feeling themselves injured by such publications are incited, in many instances to seek satisfaction by personal violence inflicted upon the supposed libeler. It is the precautionary policy of the law, in the interest of the preservation of the peace of society, to discourage such violent remedies, involving a breach of the peace; and the law has therefore provided for the punishment of the libeler, as being one who wantonly puts the public peace at hazard, by printing and publishing untrue and malicious attacks on private character." The court also dealt with the matter of the conditional privilege attached to publications concerning public officials. It was stated that acts and conduct of public officials and candidates for public office and their character and reputation are legitimate subjects of comment and criticism which may descend to ridicule, sarcasm and invective, without sacrifice of the immunity of privilege, but that the right to comment does not include the right to make false statements of fact. The penalty provisions are similar, but the maximum fine under the Hawaii statute is $1,000 in contrast to the Ill. CC maximum of $500.

Sec. 27-2. Justification.
RLH, Section 294-6.

Section 294-6, RLH provides that truth is a defense to libel, but that it is not a justification unless the matter was published with good motives and for justifiable ends.

The King v. Gibson, supra (under Sec. 27-1, Elements of the Offense) in discussing section 294-6, RLH pointed out that the Hawaii provision on truth as a defense to libel is based on a Massachusetts statute. The court stated that the burden of proof is on the defendant both as to the truth of the matter published and as to the good motives and the justifiable ends of the publication.
Accord: Territory v. Crowley, 34 H 774 (1939); Territory v. Ota, supra (under Sec. 27-1, Elements of the Offense).

ARTICLE 28. GAMBLING AND RELATED OFFENSES

Sec. 28-1. Gambling.
RLH, Secs. 288-2 to 288-8, 288-10, 288-14, 288-15, 310-1.

Sections 288-2 to 288-8, RLH prohibit the following: maintaining, conducting or assisting a lottery; participating in transactions involving lottery chances or interests; conducting, playing, betting, or being present at a game in which money or anything of value is lost or won; exhibiting any gambling device in a barricaded place where three or more persons are present; being present in a barricaded place where any gambling device is exhibited; fraudulently obtaining money or anything of value by any bunco game, trick, device or betting at such play or game; and betting on any race, game, sport or contest.

Section 288-10, RLH provides the maximum penalty for violation of these gambling prohibitions, a $1,000 fine or one year imprisonment.

Sections 288-14 and 288-15, RLH provide that a person called as a witness for the prosecution of any gambling or lottery offense who refuses or neglects to attend as required is subject to the maximum penalty of a $1,000 fine or one year imprisonment. Such witnesses are not entitled to the self-incrimination privilege but they are granted immunity from prosecution for any offense concerning which they testify.

Section 310-1, RLH prohibits the sale or exchange of property upon a representation that dependent upon chance other property will be received in connection with the transaction. The penalty is a fine of not less than $20 nor more than $500.

Hawaii Supreme Court decisions under former gambling statutes include The King v. Ah Lee and Ah Fu, 5 H 545 (1886); The King v. Yeong Ting, 6 H 576 (1885); In Re Ah Mook, 6 H 664 (1887); The King v. Lum Hung, 7 H 344 (1888); The Queen v. Kaka, 8 H 305 (1891); The Queen v. Alani, 8 H 533 (1892).

Territory v. Apoliona, 20 H 109 (1910), held that a dice game of seven-eleven at which money was lost and won is included in the gambling prohibitions of section 288-4, RLH.

Territory v. Furomori, 20 H 344 (1911), held that a purchaser of a lottery ticket by his presence and offer to buy may induce the proprietor of the lottery to make the sale, but cannot be said to "assist" him in it within the meaning of assisting in maintaining and conducting a lottery prohibited by section 288-2, RLH. The court also stated that under section 288-2, RLH one who merely plays a lottery does not assist in maintaining the lottery.

Territory v. Tsutsui, 39 H 287 (1952), held that the gambling prohibitions of section 288-4, RLH are to be distinguished from section 288-1, RLH dealing with lottery in which the result of an event or game must be dependent more upon chance than skill. The court also held that section 288-4, RLH prohibits betting on games in which money or anything of value is lost or won, and makes no distinction whether it is a game of skill or chance; and the fact that there was a dispute as to who won or that the game was crooked does not excuse the defendants.

Accord: Territory v. Bolllanday, et al., 39 H 590 (1952).

Territory v. Ah Fook Young, 39 H 422 (1952), held that section 288-6, RLH prohibiting presence of persons in a barricaded place where any gambling device is exhibited, does not require that such devices be in actual use in a gambling game at the time of arrest. The court interpreted the statutory intent as directed at facilitating the detection and arrest of persons in such places designedly barred or barricaded or otherwise built or protected in a manner to make it difficult of access or ingress to police officers.

Accord: Territory v. Wong & Hong, et al., 40 H 423 (1954).

Territory v. Wong, et al., 40 H 257 (1953), held that the prohibition in section 288-4, RLH against being present at a place where a gambling game is being played does not violate the due process clause of the Fifth Amendment to the United States Constitution, because of vagueness and uncertainty. The court found that the statute contains an ascertainable standard of proscribed conduct, and that in order to avoid absurdity in specific factual situations, the provision must be interpreted to prescribe intentional presence at gaming in progress with knowledge that the game constitutes gaming.

Sec. 28-1. (Continued)

Territory v. Uyehara, 42 H 184 (1957), held that setting up and permitting a pinball machine on which free games may be won constitutes a violation of section 288-4, RLH which prohibits games in which money or anything of value is lost or won. (See Territory v. Shinohara, infra, under Sec. 28-2, Definitions.) Accord: Territory v. Naumu, 43 H 66 (1958), also holding that the statutory phrase in section 288-4, RLH "anything of value" is not so vague and uncertain as to violate the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

State v. Prevo, 44 H 665 (1961), reviewed in detail the history of section 288-4, RLH and concluded that it is intended to prohibit all forms of gambling and is directed at those who conduct the game, players and spectators. The court held that gambling includes all games upon which money or other things of value are staked or wagered on the outcome with no distinction between games of chance or games of skill but excluding athletic contests, except when utilized for gambling purposes as provided in section 288-8, RLH.

Sec. 28-2. Definitions.
RLH, Section 288-1.

Section 288-1, RLH defines lottery as a scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining the property, or a portion of it, or for any share or any interest in the property upon an agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, chefa, pakapio, gift enterprise or whatever name.

Territory v. Beeson, 23 H 445 (1916), held that a slot machine containing a system of chance for the distribution of merchandise is a lottery within the meaning of section 288-1, RLH.

Territory v. Sur, 39 H 332 (1952), enumerated the requisite elements of a lottery: prize, consideration and chance; plus the predominance of chance over skill. The court held that a betting scheme wherein the bettor attempts to select a certain number of winning football teams, the amount of winnings being dependent upon the amount of consideration paid, the number of winning

teams selected, and the odds established by the operator, constitutes a lottery within the statutory definition even though the result of the football games themselves may depend upon the skill of the players and even though the skill of the wagerer in selecting winners predominates in the scheme. The fact that the amount which the bettor will receive is exclusively dependent upon chance establishes the scheme as one predominantly of chance and not of skill.

Territory v. Shinohara, 42 H 29 (1957), held that a pinball machine is not a lottery within the statutory definition of section 288-1, RLH because only one person may play it at a time and he alone reaps the reward. The court interpreted the statutory words "among persons who have paid or promised to pay any valuable consideration" to contemplate a scheme in which more than one person pays or promises to pay a valuable consideration for the chance of obtaining the prize. (See Territory v. Uyehara, supra, under Sec. 28-1, Gambling.)

Territory v. Pierce, et al., 43 H 246 (1959), held that the statutory definition of lottery in section 288-1, RLH covers a bingo type of game which the defendant attempted to disguise by requiring the successful contestant to answer a question before receiving his money prize.

Sec. 28-3. Keeping a Gambling Place.
RLH, Secs. 155-39, 155-40, 267-1, 267-10, 277-1 to 277-3, 288-9, 288-10.

Sections 155-39 and 155-40, RLH prohibit issuance of a billiard or bowling alley license to any person who has been convicted of gambling within three years prior to the license application date. The maximum penalty for violation of billiard or bowling alley regulations is a $250 fine and, in the discretion of the court, forfeiture of the license.

Sections 267-1 and 267-10, RLH make the keeping of a common gambling house a common nuisance with a maximum penalty of a $500 fine or six months imprisonment.

Sections 277-1 to 277-3, RLH provide that a house in which gambling is permitted is a disorderly house with a maximum penalty of a $100 fine or six months imprisonment.

Sec. 28-3. (Continued)

Sections 288-9 and 288-10, RLH prohibit the keeping of a place for gambling purposes with a maximum penalty of a $1,000 fine or one year imprisonment.

Territory v. Aki, 28 H 514 (1925), held that the offense specified in section 288-9, RLH of knowingly permitting gambling to be carried on, is not committed if it is proved only that the defendant as a reasonably prudent man ought to have known that gambling was being carried on. The court interpreted the statute as requiring knowledge as an essential element of the offense.

Territory v. Harada, 29 H 244 (1926), held that the offense specified in section 288-9, RLH of knowingly permitting gambling to be carried on requires as an essential ingredient that the accused own or rent the premises in which the gambling is permitted to be conducted. If the defendant merely occupies or controls the premises, it is not sufficient to constitute the offense.

Sec. 28-4. Registration of Federal Gambling Stamps.

No Hawaii law was found relating to registration of federal gambling stamps.

Secs. 28-5. Seizure of Gambling Devices and 28-6. Seizure of Gambling Funds.
RLH, Secs. 288-11 to 288-13.

Sections 288-11 and 288-12, RLH provides for the seizure and forfeiture of moneys and personal property used in violation of the gambling and lottery statutes.

Section 288-13, RLH provides that an innocent owner of property seized pursuant to section 288-11 and 288-12, RLH may bring an action to recover the property within sixty days after entry of judgment of forfeiture.

Sec. 28-7. Gambling Contracts Void.
RLH, Section 288-19.

Section 288-19, RLH provides that gambling contracts are void except as to persons who hold or claim under them in good faith and without notice of the illegality. It also provides that when a mortgage or other conveyance of land is void under this section, the land shall go to the person who would be entitled to it if the mortgagor or grantor were dead.

Sec. 28-7. (Continued)

Rego v. Bergstrom Music Co., 26 H 407 (1922), held that a party in a civil action may not resort to an illegal contract, a raffle prohibited under section 288-1, RLH to establish ownership of the article raffled.

Sec. 28-8. Gambling Losses Recoverable.
RLH, Secs. 288-16 to 288-18.

Section 288-16, RLH authorizes the gambling loser to sue the winner for recovery.

Section 288-17, RLH provides that a witness in an action by the loser to recover gambling losses, other than the plaintiff or the defendant, is not entitled to the self-incrimination privilege but is granted immunity from suit or prosecution authorized by any of the lottery or gambling provisions.

Section 288-18, RLH provides that if the gambling loser does not in good faith and without collusion pursue his remedy, any policeman, officer or person may sue for and recover treble the amount of loss and costs. Half of the amount goes to the person prosecuting and the other half to the State for the use of public schools.

Agnew v. McWayne, 4 H 422 (1881), held that money still in the hands of a stakeholder and not paid over to the winner of the bet can be recovered by the depositor in an action for recovery of money had and received.

ARTICLE 29. BRIBERY IN CONTESTS

RLH, Secs. 265-7 to 265-11.

Section 265-7, RLH prohibits the offering, soliciting or accepting of a bribe in connection with a professional or amateur game, sport or contest. The maximum penalty is a $10,000 fine or five years imprisonment, or both.

Sections 265-8 to 265-11, RLH provide for forfeiture of money or property offered, received or accepted as a bribe and for recovery of such money or property by innocent owners.

PART E. OFFENSES AFFECTING GOVERNMENTAL FUNCTIONS

ARTICLE 30. TREASON AND RELATED OFFENSES

Sec. 30-1. Treason.
RLH, Secs. 275-1 to 275-8, 298-1, 308-1 to 308-12.

Sections 275-1 to 275-8, RLH deal with disloyalty to the United States and various flag offenses. The prohibitions include language or acts that are contemptuous or disloyal to the United States or mutilation or insult of a United States flag (fine of between $100 and $1,000 or ten years at hard labor, or both); language calculated or tending to discourage or prevent vigorous prosecution of war by the United States ($1,000 or one year, or both); unlawful possession during war of the flag of an enemy ($1,000 or one year, or both); knowing disrespect to a United States flag ($1,000 or one year, or both); contemptuous or abusive language concerning an ally of the United States during war or mutilation or insult of a United State's ally's flag ($1,000 or one year, or both); and desecration of a United States flag by using it for advertisement purposes and other desecrating acts ($100 or thirty days, or both).

Section 298-1, RLH prohibits any unauthorized association of two or more persons for military purposes. The penalty is a fine of not less than $100 nor more than $500 or six months imprisonment, or both.

Sections 308-1 to 308-12, RLH deal with sabotage offenses. The prohibitions include willful damage or interference with property intending or having reasonable grounds to believe that such act will hinder, delay or interfere with the preparation of the United States or any state or territory for defense or for war, or with the prosecution of war by the United States ($10,000 or twenty years at hard labor, or both); willful defective workmanship on an article intending or having reasonable grounds to believe that the article is to be used in connection with the preparation of the United States or any state or territory for defense or for war, or for the prosecution of war by the United States ($10,000 or twenty years at hard labor, or both); attempts to commit any sabotage offense (one-half the penalty prescribed for the principal offense); conspiracy to commit any

Sec. 30-1. (Continued)

sabotage offense (same penalty prescribed for the principal offense); and willful entry without permission of premises or restricted highways used for public utilities or for the manufacture, transportation or storage of products to be used in the preparation of the United States or any state or territory for defense or for war, or for the prosecution of war by the United States ($500 or six months, or both).

Sec. 30-2. Misprision of Treason.

No Hawaii law was found on the offense of misprision of treason.

Sec. 30-3. Advocating Overthrow of Government.
RLH, Secs. 261-1 to 261-5.

Section 261-1, RLH prohibits the printing, publishing, selling, distribution or circulation of any matter which advocates, incites or is intended to advocate or incite:

1. An act of violence, such as sabotage, incendiarism, sedition, anarchy, riot or breach of the peace;
2. Use of force, fear, intimidation, threat, ostracism or blackmail, in connection with engaging in business or employment or the enjoyment of rights of liberty or property; or
3. By deliberate misrepresentation, distrust or dissension between peoples of different races or between citizens and aliens. The maximum penalty for a first conviction is a $1,000 fine or one year imprisonment, and a $5,000 fine or one year imprisonment, or both, for a second conviction within five years of the first conviction.

Section 261-2, RLH defines criminal syndicalism as a doctrine which advocates crime, sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political ends.

Section 261-3, RLH prohibits the criminal syndicalism by the following means:

1. Word of mouth or writing;
2. Printing, publishing, editing, issuing or knowingly circulating, selling, distributing or publicly displaying any written matter;

Sec. 30-3. (Continued)

3. Open, willful and deliberate justification; and

4. Organizing or becoming a member of a group which advocates or teaches the doctrines of criminal syndicalism.

The maximum penalty is a $5,000 fine or ten years imprisonment, or both.

Section 261-4, RLH prohibits voluntary presence, aid or instigation of an assembly of two or more persons for the purpose of advocating or teaching the doctrines of criminal syndicalism. The maximum penalty is a fine of $5,000 or ten years imprisonment, or both.

Section 261-5, RLH prohibits the owner, agent, superintendent, janitor, caretaker or occupant of any place from willfully and knowingly permitting therein an assembly prohibited by section 261-4. The maximum penalty is a $500 fine or one year imprisonment, or both.

ARTICLE 31. INTERFERENCE WITH PUBLIC OFFICERS

Sec. 31-1. Resisting or Obstructing a Peace Officer. RLH, Secs. 282-12, 282-13.

Section 282-12, RLH makes it an offense willfully to interfere or attempt to interfere with a sheriff, deputy sheriff or police officer while the officer is making an arrest or legally performing any other official duty. The maximum penalty is a $500 fine or one year imprisonment.

Section 282-13, RLH provides for the offense of section 282-12 in the case of arrests or other duties by fish and game wardens. The maximum penalty is a $50 fine or thirty days imprisonment, or both.

Sec. 31-2. Resisting or Obstructing a Peace Officer While Armed.

No specific provision in the Hawaii law was found to increase the seriousness of the offense of interference with a peace officer when committed while armed.

Sec. 31-3. Obstructing Service of Process.

No Hawaii law was found providing for a separate offense of obstructing service of process.

Sec. 31-4. Obstructing Justice.
RLH, Secs. 265-6, 268-1, 282-9, 284-7.

Section 265-6, RLH prohibits the willful obstruction or attempted obstruction of public legislation or the administration of the law by threats or intimidation of any legislative, judicial, executive or other authorized officer. The maximum penalty is a $500 fine or one year imprisonment.

Section 268-1, RLH includes inter alia in the definition of conspiracy, two or more persons who conspire to bring or maintain any suit or proceeding knowing the same to be groundless; or to cause another to be arrested, charged or indicted for any offense, knowing him to be innocent (see Sec. 8-2, Conspiracy).

Section 282-9, RLH prohibits the rescue of any thing under legal seizure or detention, with the intent to defeat the seizure or detention or impede, oppose or defeat the process whereby it is seized or detained. The maximum penalty is a $500 fine.

Section 284-7, RLH prohibits the willful or knowing false report of crime. The maximum penalty is a $1,000 fine or one year imprisonment, or both.

Sec. 31-5. Concealing or Aiding a Fugitive.
RLH, Section 252-5.

Section 252-5, RLH provides two penalties for accessories after the fact. If the principal offense is punishable by imprisonment for life, subject or not to parole, the maximum penalty for the accessory is a $2,000 fine or ten years imprisonment at hard labor. The maximum penalty for accessories after the fact of any other offense punishable by imprisonment for five years or more, is a $500 fine or two years imprisonment at hard labor.

Territory v. Low, 23 H 108 (1916), held that the exemptions of specified relatives in the statute on accessory after the fact apply to offenses punishable by imprisonment for five years or more as well as to the more serious category of offenses.

Sec. 31-6. Escape.
RLH, Secs. 282-1 to 282-3.

Section 282-1, RLH prohibits escape from imprisonment or detention against the will of the officer in custody by a prisoner, a person detained on conviction or charge of an offense, or a witness in a capital case. The maximum penalty if the offense is capital or punishable by imprisonment for life or for ten years or more, is a $500 fine or three years imprisonment at hard labor.

(Note: This section was not amended by Act 282, SLH 1957, which abolished capital punishment and generally substituted the penalty of "imprisonment for life not subject to parole" for "death".)

Section 282-2, RLH provides a maximum penalty of a $100 fine or one year imprisonment for an escape from imprisonment by a person convicted or charged, or a witness, with respect to offenses other than those described in section 282-1.

Section 282-3, RLH provides a maximum penalty of a $10 fine and three months imprisonment for an escape by a person detained by an officer or other authorized person in any case other than as provided in sections 282-1 and 282-2.

The King v. Sin Fook, 8 H 185 (1890), held that the offense of escape under section 282-3, RLH requires that the defendant must have been legally arrested and be a prisoner lawfully detained.

Sec. 31-7. Aiding Escape.
RLH, Secs. 80-28, 82-13, 259-10, 282-4 to 282-8.

Sections 80-28 and 82-13, RLH prohibit the knowing or intentional enticement away of a child from the training school or of a ward of the Waimano training school and hospital, or harboring of one who has been enticed away or deserted. The maximum penalty in the case of the training school is a $100 fine or three months imprisonment; in the case of the Waimano training school and hospital, a $1,000 fine or one year imprisonment, or both.

Sec. 31-7. (Continued)

Section 259-10, RLH provides that an officer who voluntarily or negligently permits a person in his custody for the payment of a fine, forfeiture or costs to escape is liable for the amount to be paid plus twenty per cent interest and costs of suit.

Section 282-4, RLH prohibits the concealing or harboring of a person who has escaped or is escaping from custody, or detention on conviction or charge of any offense. The maximum penalty is a $500 fine or one year imprisonment, or both.

Section 282-5, RLH provides that a jailor or officer who voluntarily permits a prisoner in his custody on conviction of or charged with any offense to escape shall suffer the same penalty the prisoner was sentenced to or would be liable to upon conviction for the offense charged.

Section 282-6, RLH provides that a jailor or officer who negligently permits a prisoner in his custody on conviction of a charge with any offense to escape or who wilfully refuses to receive a prisoner into his custody shall be subject to a maximum penalty of a $500 fine or two years imprisonment at hard labor.

Section 282-7, RLH defines rescue to include rescue of a person in custody on conviction or charge of any offense as a witness on a criminal charge; aiding a plan to escape whether or not an escape is effected or attempted; and conveying anything into a prison with intent to facilitate an escape. If the offense or charge is capital, or punishable by life imprisonment or imprisonment for ten years or more, the maximum penalty is a $500 fine and three years imprisonment at hard labor. In all other cases, the maximum penalty is a $100 fine and one year imprisonment.

(Note: This section was not amended by Act 282, SLH 1957, which abolished capital punishment and generally substituted the penalty of "imprisonment for life not subject to parole" for "death".)

Section 282-8, RLH provides a maximum penalty of a $50 fine and six months imprisonment for aiding an escape from the custody of an officer or other person by a prisoner imprisoned for any cause other than those described in Section 282-7.

Sec. 31-8. Refusing to Aid an Officer.
RLH, Secs. 255-12 to 255-15, 282-11.

Sections 255-12 to 255-15, RLH provide for the surrender by the commanding officer of a ship of a person who has committed an offense on shore and escaped on board; prohibition of secreting a prisoner on a ship; and the prohibition of refusal to permit a search of a ship. The maximum penalty for violation of these provisions is a $1,000 fine.

Section 282-11, RLH prohibits refusal or neglect to assist a sheriff or policeman in case of emergency, in execution of his office in a criminal case, in preservation of the peace, or in apprehending or securing any person for a breach of the peace. The maximum penalty is a $50 fine.

ARTICLE 32. INTERFERENCE WITH JUDICIAL PROCEDURE

Sec. 32-1. Compounding a Crime.
RLH, Section 265-5.

Section 265-5, RLH prohibits giving or receiving of money, service, gratuity or reward to compound or conceal an offense, or not to prosecute, or not to give evidence. If the offense is punishable with death or by imprisonment for life, the maximum penalty is a $500 fine or five years imprisonment at hard labor; in cases of other offenses, the maximum penalty is a $100 fine or one year imprisonment.

(Note: This section was not amended by Act 282, SLH 1957, which abolished capital punishment and generally substituted the penalty of "imprisonment for life not subject to parole" for "death".)

Sec. 32-2. Perjury.
RLH, Secs. 299-1, 299-5.

Sections 299-1 and 299-5, RLH define perjury as a willful, knowing and false statement, orally or in writing, of a material fact under an authorized or required, duly administered oath or affirmation. The maximum penalty is twenty years imprisonment at hard labor.

Sec. 32-2. (Continued)

The King v. Papa, 1 H 346 (1855), held that there can be no conviction of perjury for a false statement made in a proceeding which is irregular and unauthorized.

The King v. Angee, 8 H 259 (1891), held that the judicial oath used in the courts is a legal oath required or authorized by law within the meaning of the provisions of the perjury statute. The court also held that the question of materiality of the false statement as an element of perjury is satisfied by a statement which has a direct and immediate connection with, or which is pertinent to, a material fact to be proved. Accord: The King v. Ah Fook, 8 H 265 (1891); The Queen v. Chee Wai, 8 H 728 (1892).

Territory v Kawano, 20 H 469 (1911), held that a judicial oath administered without the words "so help you God" which was correctly interpreted to the witness, the interpreter adding the omitted words, is a valid oath.

In re French, 28 H 47 (1924), held that false testimony by an attorney is grounds for disbarment whether the subject matter of the alleged perjury was material or immaterial. The court, on the question of materiality, held that false testimony is deemed material not only when directly pertinent to the main issue, but also when it has a legitimate tendency to prove or disprove any material fact in the chain of evidence.

Territory v. Kaahanui, 30 H 176 (1927).

Territory v. Tamashiro, 37 H 552 (1947), held that an indictment for perjury must set forth with reasonable certainty the materiality of the facts upon which the alleged perjury is assigned.

Sec. 32-3. Subornation of Perjury.
RLH, Secs. 299-3, 299-5.

Sections 299-3 and 299-5, RLH define subornation of perjury as willfully and corruptly procuring another to commit perjury. The maximum penalty is twenty years imprisonment at hard labor.

Sec. 32-4. Communicating with Jurors.
RLH, Section 265-3.

Section 265-3, RLH prohibits corrupt influencing, or attempts to corruptly influence, any one serving or summoned as a juror. The maximum penalty is a $500 fine or one year imprisonment.

Sec. 32-5. False Personation of Judicial or Governmental Officials. RLH, Secs. 217-14, 217-15, 284-2 to 284-4.

Sections 217-14 and 217-15, RLH prohibit the unauthorized practice of law. The maximum penalty for a first offense is a $250 fine and for any subsequent offense a $1,000 fine or one year imprisonment, or both.

Section 284-2, RLH prohibits falsely assuming to be and acting as any government officer or employee. The maximum penalty is a $100 fine or one year imprisonment.

Section 284-3, RLH prohibits the unauthorized wearing or displaying of a policeman's badge or uniform with intent to deceive. The maximum penalty is a $50 fine.

Section 284-4, RLH prohibits the unauthorized wearing or displaying of a badge or uniform resembling that of a police officer with intent to deceive. The maximum penalty is a $100 fine.

Sec. 32-6. Performance of Unauthorized Acts. RLH, Section 284-1.

Section 284-1, RLH prohibits the following acts performed by a person in an assumed character:

1. Causes a marriage license to be granted by false representation as a parent or guardian of a minor;
2. Performs a marriage ceremony by false representation as authorized to perform the ceremony;
3. Does any act before a public officer by falsely personating another; or
4. Becomes bail or surety for any person, confesses any judgment, acknowledges the execution of any instrument which may be recorded, or any other act by false representation whereby the person represented or personated may be liable or his rights or interests may be affected.

The maximum penalty is a $1,000 fine and five years imprisonment at hard labor.

Sec. 32-7. Simulating Legal Process.

No Hawaii law was found specifically on the point of simulating legal process.

Sec. 32-8. Tampering with Public Records.
RLH, Section 296-3.

Section 296-3, RLH prohibits the malicious taking away; the willful and malicious defacement, alteration or mutilation; or the wrongful detention of any book, paper, map or document belonging to the records or files of any public office in the State. The maximum penalty is a $1,000 fine or one year imprisonment, or both.

Note that under section 296-16, RLH a public record may be the subject of larceny.

Sec. 32-9. Tampering with Public Notice.
RLH, Section 273-1.

Section 273-1, RLH prohibits the malicious destruction or defacement of a public notice. The maximum penalty is a $100 fine.

Sec. 32-10. Violation of Bail Bond.
RLH, Chapter 256.

No Hawaii law was found within the provisions of Chapter 256, RLH or elsewhere to prohibit expressly a violation of the term of a recognizance or bond.

ARTICLE 33. OFFICIAL MISCONDUCT

Sec. 33-1. Bribery.
RLH, Secs. 265-1, 265-2, 265-4, 265-8 to 265-11.

Section 265-1, RLH prohibits the corrupt giving or promise of a gift, gratuity, service or benefit to any executive, legislative or judicial officer, master in chancery, juror, appraiser, referee, arbitrator or umpire with intent to influence his vote, judgment, opinion or other act in any case, question, proceeding or matter. The maximum penalty is a $500 fine or two years imprisonment at hard labor.

Section 265-2, RLH prohibits the corrupt acceptance of a bribe or promise of a bribe by any person described in section 265-1 (or a civil officer) with an understanding that he will act in any particular manner in any cause, question, proceeding or matter. The maximum penalty is a $1,000 fine or five years imprisonment at hard labor.

Section 265-4, RLH prohibits the giving of a gratuity or reward, or promise thereof, to anyone with intent to prevent or obstruct justice by suppressing evidence in any

civil or criminal proceeding. The maximum penalty is a $500 fine or one year imprisonment.

Sections 265-8 to 265-11, RLH provide for forfeiture of money or property offered, received or accepted as a bribe and for recovery of such money or property by innocent owners.

Tong Kai v. Territory, 15 H 612 (1904), held that a promise of a gift of money to influence a deputy attorney general, as an executive officer, before the commission of an offense in his decision and action in the matter falls within the proscriptions of section 265-1, RLH. Accord: Territory v. Wong, 30 H 819 (1929) as to police officer, detective lieutenant and certain investigators of the county attorney; Territory v. Achuck, 31 H 474 (1930).

Territory v. Scully, 22 H 618 (1915), held that the prohibitions in section 265-4, RLH with respect to suppressing evidence are not limited to suits and proceedings in a court but extend to obstructing the course of justice in proceedings on applications for a liquor license before a board of commissioners.

Territory v. Lau Hoon, 23 H 616 (1917), described the gist of bribery as the corrupting or attempt to corrupt an official in the discharge of his duty, and stated that when a defendant has done all that he can to consummate such purpose, he has committed the offense whether he brings about the desired result or not. It was also stated that a corrupt intent on the part of the party accepting the bribe is not necessary and that a bribe may relate to a future offense as well as to a present one.

Territory v. Caminos, 38 H 628 (1950), held that the term "corruptly" in an indictment for violation of receiving a bribe, prohibited by section 265-2, RLH means an intent, motive and design by the defendant to pervert the public office and trust reposed in him as a police officer by not performing his official duties.

Sec. 33-2. Failure to Report a Bribe.

No Hawaii law was found on the matter of the duty to report bribes.

Sec. 33-3. Official Misconduct.
RLH, Secs. 259-9, 259-10, 281-3, 281-4, 282-5, 282-6, 282-10, 283-6, 283-8, 285-16 to 285-18.

Section 259-9, RLH provides that any public officer or employee who receives fines, forfeitures or costs imposed by a court and neglects to pay them over or under proper accounts shall be subject to removal and liable for the amount of the fines, forfeitures or costs with interest at twenty per cent and costs.

Section 259-10, RLH--see Sec. 31-7, Aiding Escape.

Sections 281-3 and 281-4, RLH prohibit embezzlement by public officers or employees. The maximum penalty is a fine of five times the value of the thing embezzled or ten years imprisonment at hard labor.

Sections 282-5 and 282-6, RLH--see Sec. 31-7, Aiding Escape.

Section 282-10, RLH prohibits the willful and corrupt refusal, neglect or delay by an officer in serving process requiring apprehension or confinement of a person if the result is that the person convicted or charged with an offense avoids arrest. The maximum penalty is a $300 fine or one year imprisonment.

Sections 283-6 and 283-8, RLH prohibit willful and corrupt extortion of anything of value by a public officer or employee under color of office knowing that he does not have legal authority. The maximum penalty is a $1,000 fine or two years imprisonment at hard labor.

Sections 285-16 to 285-18, RLH--see Sec. 17-3, Forgery.

Hawaii cases involving misfeasance or malfeasance in the performance of official duties include the following:

The King v. Kumuhoa and Kekoa, 5 H 021 (1886); In Re Mahelona, 8 H 296 (1891); In Re Kaaa, 8 H 298 (1891); Territory v. Kauhane, 25 H 381 (1920); In Re Bevins, 26 H 570 (1922); In Re Soares, 27 H 509 (1923); In Re Bevins, 28 H 752 (1925).

The following cases involve the offense of embezzlement of public property by a public officer or employee:

Territory of Hawaii v. Wright, 16 H 123 (1904); Territory of Hawaii v. Richardson, 16 H 358 (1904); Territory of Hawaii v. Clark, 20 H 391 (1911); Territory v. Kealoha, 22 H 116 (1914); Territory v. Awana, 28 H 546 (1925); Territory v. Oneha, 29 H 150 (1926).

The following case involves the offense of extortion by a public officer or employee:

Territory v. Wills, 25 H 747 (1921).

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