

United States  
Circuit Court of Appeals

For the Ninth Circuit. 9

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HATTIE KULAMANU WARD, LUCY KAIAKA  
WARD and VICTORIA KATHLEEN  
WARD,

Appellants,

vs.

CITY AND COUNTY OF HONOLULU, a Muni-  
cipal Corporation,

Appellee.

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Transcript of Record.

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Upon Appeal from the Supreme Court of the Territory of  
Hawaii.

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FILED

AUG 27 1951

PAUL P. O'BRIEN,  
CLERK



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Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Filed at 2:45 o'clock P. M., Dec. 5, 1930.

Returned at 8:42 o'clock A. M., Dec. 8, 1930.

[4\*]

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

Bill for Injunction.

HATTIE KULAMANU WARD, LUCY KAI-  
AKA WARD and VICTORIA KATH-  
LEEN WARD,

Petitioners,

vs.

THE CITY AND COUNTY OF HONOLULU, a  
Municipal Corporation,

Respondent.

### PETITION.

To the Honorable, the Presiding Judge of the  
Circuit Court of the First Judicial Circuit,  
Territory of Hawaii, at Chambers, in Equity:

Now comes Hattie Kulamanu Ward, Lucy Kai-  
aka Ward and Victoria Kathleen Ward, peti-  
tioners above named, and complaining of the city  
and county of Honolulu, a municipal corporation,  
respondent above named, respectfully shows and  
presents as follows:

#### I.

That the petitioners above named, were and at  
all of the times herein mentioned are residents of

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\*Page-number appearing at the foot of page of original certified  
Transcript of Record.

Honolulu, City and County of Honolulu, Territory of Hawaii. [5]

II.

That the respondent, The City and County of Honolulu, was and at all of the times herein mentioned is a municipal corporation.

III.

That heretofore and on, to wit, the 18th day of July, 1928, the petitioners herein, together with Victoria Ward, became the owners, in fee simple and as Joint Tenants, of Lots E, F and G, of Land Court Application No. 670, subject to a life estate in Victoria Ward; that on said date Transfer Certificate of Title No. 7250 was issued to them out of the Land Court of the Territory of Hawaii.

IV.

That said Lots E, F and G of Land Court Application No. 67 are a part and parcel of the family home of the petitioners herein and Victoria Ward. That the family homestead of the petitioners has been maintained as such for a period of more than fifty (50) years. That the grounds of said homestead have been planted to trees and *has* been set out and cultivated with great care by the petitioners and the said Victoria Ward.

V.

That said Lots E, F and G of said homestead constitute the proposed right of way for the Kapiolani Boulevard, a proposed public highway of the City and County of Honolulu. [6]

VI.

That the said Lots E, F and G are adjacent to each other and constitute a strip running over and across the said homestead of the petitioners, dividing the homestead of the petitioners into two parts.

VII.

That the respondent, The City and County of Honolulu, has threatened, and is now threatening, to trespass upon the said Lots E, F and G, and have threatened, and are now threatening to break down the family fence of the homestead of your petitioners, and enter in and upon said Lots E, F and G.

VIII.

That the respondent, The City and County of Honolulu, has threatened, and is now threatening, to trespass upon the said Lots E, F and G, the property of the petitioners, and then and there fill in the said Lots E, F and G, to a grade considerably higher than the remaining portion of the homestead of your petitioners lying on the mauka side of said Lots E, F and G.

LX.

That if the respondent, The City and County of Honolulu, proceeds to carry out its threat and trespass upon the property of your petitioners, your petitioners will suffer irreparable injury in that the proposed fill which the respondent threatens to place upon said Lots E, F and G, will obstruct the natural flow of surface waters off [7] of the homestead of your petitioners and

would back the flood waters over and upon the homestead of your petitioners, damaging the property of your petitioners lying on the mauka side of said Lots E, F and G, and will kill and injure the plants and trees planted by your petitioners and the said Victoria Ward, and cared for and nurtured for many years. That the stoppage of the flow of surface waters, as aforesaid, will seriously affect the sanitary condition of the petitioners' homestead, and make unsanitary and unhealthful and uninhabitable the premises now occupied by your petitioners as their home.

#### X.

That your petitioners will suffer irreparable injury by the proposed and threatened action of the respondent, in that their homestead will be divided into two parts; that the security of their home will be threatened and that the remaining portion of their homestead situated makai of the said Lots E, F and G, will have to be abandoned and their homestead area curtailed.

#### XI.

That no compensation has been awarded or paid to your petitioners by the respondent, The City and County of Honolulu, for the said Lots E, F and G, and that the said respondent, The City and County of Honolulu, proposes to use said Lots E, F and G, and does now threaten to use the same for public purposes, to wit, for a public highway. [8]

## XII.

That the respondent, The City and County of Honolulu through its agents and servants, has threatened and has trespassed upon, and is now threatening to continue to trespass upon the said Lots E, F and G, and that on, to wit, the 1st day of December, 1930, one Oliveira, whose full and true name your petitioners ask leave to insert at the hearings hereof, purporting to act as the agent of the respondent, The City and County of Honolulu, proceeded to instruct your petitioners to tear down a portion of the boundary fence surrounding your petitioners' homestead, and has informed your petitioners that if the request is not complied with that as the agent of the respondent, he would proceed to break down said fence and to enter upon said Lots E, F and G, and that on, to wit, the 2d day of December, 1930, L. M. Whitehouse, purporting to act as Chief Engineer of the respondent, The City and County of Honolulu, and on behalf of said respondent, threatened to enter upon and break down and demolish said structure, the property of the petitioners, upon the said Lots E, F and G, and grade and roll said Lots E, F and G, and that the said respondent has informed your petitioners that they will proceed and carry out said threat on the 8th day of December, 1930.

## XIII.

That by reason of the acts complained of herein, [9] your petitioners have suffered and are now suffering and will continue to suffer irreparable injury unless restrained by this court.

## XIV.

That your petitioners are without an adequate remedy at law.

## XV.

That it is necessary that a temporary restraining order issue herein, restraining the respondent, its officers, agents and servants, from in any manner trespassing upon the said Lots E, F and G, and committing irreparable injury to the homestead of your petitioners.

WHEREFORE, petitioners pray:

1. That the process of this Court do issue as provided by law summoning said respondent to appear and answer this petition (answer under oath being hereby waived) and to stand to, perform and abide by such orders, directions and decrees as may be made and entered herein.

II. That a temporary restraining order issue restraining said respondent, its officers, agents and servants, from in any manner trespassing upon the said Lots E, F and G, and committing irreparable injury to the homestead of your petitioners.

III. That upon a hearing hereof, a permanent injunction issue out of this court restraining the said respondent, its officers, agents and servants, from in any [10] manner trespassing upon the said Lots E, F and G, and committing irreparable injury to the homestead of your petitioners.

IV. And for such other and further relief in the premises as may be just and equitable.

Dated at Honolulu, Hawaii, this 5th day of December, A. D. 1930.

HATTIE KULAMANU WARD,  
LUCY KAIKA WARD and  
VICTORIA KATHLEEN WARD,  
Petitioners.

By (S.) CHARLES B. DWIGHT,  
Their Attorney.

Territory of Hawaii,  
City and County of Honolulu,—ss.

Lucy Kaiaka Ward, being first sworn, on oath deposes and says:

That she is one of the petitioners above named; that she makes this verification for and on behalf of the petitioners; that she has read the foregoing petition, knows the contents thereof and that the *allegation* therein contained are true to the best of her knowledge and belief.

(S.) LUCY KAIKA WARD.

Subscribed and sworn to before me this 5th day of December, 1930.

[Seal] (S.) HENRY C. HAPAI,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii. [11]

No. ———.                      Reg. ———.                      Pg. ———.

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

At Chambers.

HATTIE KULAMANU WARD, LUCY KAIAKA  
WARD and VICTORIA KATHLEEN  
WARD,

Petitioners,

vs.

THE CITY AND COUNTY OF HONOLULU, a  
Municipal Corporation,

Respondent.

### CHAMBERS SUMMONS.

The Territory of Hawaii: To the High Sheriff of the Territory of Hawaii, or His Deputy; the Sheriff of the City and County of Honolulu, or His Deputy, or Any Police Officer in the Territory of Hawaii:

YOU ARE COMMANDED to summon The City and County of Honolulu, to appear ten days after service hereof, if it reside in the City and County of Honolulu, otherwise twenty days after service, before such Judge of the Circuit Court of the First Circuit as shall be sitting at Chambers in the courtroom of said Judge, in the Judiciary Building in Honolulu, City and County of Honolulu, to answer the annexed petition of Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, and have you then there this writ with full return of your proceedings thereon.



WITNESS the Honorable Presiding Judge of the Circuit Court of the First Circuit, at Honolulu aforesaid, this 5th day of December, 1930.

[Seal] (S.) JOHN LEE KWAI,  
Clerk.

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SECTION 2394 REVISED LAWS 1925. The time within which an act is to be done \* \* \* shall be computed by excluding the first day and including the last. If the last day be Sunday, or a legal holiday, it shall be excluded. [12]

Served the within chamber summons, petition, order allowing issuance of temporary restraining order, temporary restraining order, order of service and order to show cause on James F. Gilliland, Honolulu, City and County of Honolulu, T. H., this 5th day of Decembrr, 1930, by delivering to him a certified copy thereof and of the petition or complaint hereto annexed, and at the same time showing him the original.

Dated Honolulu, December 8th, 1930.

ANTONE MANUEL,  
Deputy Sheriff, Police Officer,  
Deputy High Sheriff, Territory of Hawaii.

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[Title of Court and Cause.]

ORDER ALLOWING ISSUANCE OF TEMPORARY RESTRAINING ORDER.

Upon reading the verified petition herein filed and the prayer of the petitioners for a temporary restraining order,—

IT IS HEREBY ORDERED that a temporary restraining order issue forthwith restraining the above-named respondent, its officers, agents and servants, from in any manner trespassing upon the said Lots E, F and G of Land Court Application No. 67, and committing irreparable injury to the homestead of the petitioners.

Dated at Honolulu, T. H., this 5th day of December, A. D. 1930.

[Seal] (S.) A. E. STEADMAN. [Seal]  
Judge of the Above-entitled Court.

Dec. 6, 1930.

Above order vacated by consent.

(S.) A. R. WHITMORE,  
Clerk. [13]

[Title of Court and Cause.]

### TEMPORARY RESTRAINING ORDER.

The Territory of Hawaii, to the City and County of Honolulu, a Municipal Corporation, Respondent.

Pursuant to the order allowing the issuance of a temporary restraining order heretofore entered herein, you and your officers, agents and servants, are hereby ordered, enjoined and restrained from in any manner trespassing upon the said Lots E, F and G, of Land Court Application No. 67, and committing irreparable injury to [14] the homestead of the petitioners.

This order and injunction shall be and remain in full force and effect until the further order of this court.

Dated at Honolulu, T. H., this 5th day of December, A. D. 1930.

[Seal] (S.) A. E. STEADMAN,  
Judge, Circuit Court, First Judicial Circuit, Territory of Hawaii.

[Seal] Attest: (S.) JOHN LEE KWAI,  
Clerk.

Dec. 6, 1930.

Above order vacated by consent.

(S.) A. R. WHITMORE,  
Clerk. [15]

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Filed at 9:15 o'clock A. M., Jan. 10, 1931.

Service of a copy of the above and foregoing answer is hereby acknowledged this 10th day of January, 1931.

(S.) CHARLES B. DWIGHT,  
Attorney for Petitioners. [16]

[Title of Court and Cause—No. E.-3121.]

### ANSWER.

Comes now the City and County of Honolulu, a municipal corporation, by L. P. Scott, Esq., Deputy City and County Attorney, and for answer to the petition of petitioners herein, alleges and avers as follows:

#### I.

That it admits the allegations contained in Paragraph I of the said petition.

## II.

That it admits the allegations contained in Paragraph II of the said petition:

## III.

That it denies the allegations contained in Paragraph III of said petition, but on the contrary alleges the true facts to be that prior to July 18, 1928, Victoria Ward [17] was the sole owner of Lots E, F and G of Land Court Application No. 670 in said paragraph mentioned; that Victoria Ward held the bare legal title to Lot E, subject to an offer dated January 20, 1902, and an acceptance thereof, constituting a binding agreement to deed the same to the Territory of Hawaii upon the completion by the Territory of certain conditions therein named, a copy of which offer is hereto attached, marked Exhibit "A," and made a part hereof; that said offer was accepted by the aforesaid Territory of Hawaii through its duly authorized Superintendent of Public Works by letter dated February 7, 1902, a copy of which said letter is attached hereto, marked Exhibit "B," and made a part hereof; that under the terms of said agreement the Territory of Hawaii and its successor in interest, the City and County of Honolulu, entered into and took possession of said Lot E, and constructed a road thereon and thereover, which said road ever since for a period of well over twenty (20) years has been a public highway of the City and County of Honolulu, known as Ward Avenue; that the City and County of Honolulu has completed and fulfilled all the terms of the above-mentioned agreement and now

awaits a conveyance of the said Lot E to it. It is further alleged that whatever interest the petitioners obtained by the conveyance to them by Victoria Ward of July 18, 1928, of the various properties therein described of which Lot E was one, was obtained subject to the agreement hereinabove set forth.

Respondent further alleges and avers that as to Lots F and G in the Paragraph III referred to, that prior to [18] July 18, 1928, Victoria Ward was the sole owner of said lots. That on March 19, 1928, a suit in eminent domain was instituted by the City and County of Honolulu against Victoria Ward, which said suit is numbered Law No. 11946 in the records and files of the Circuit Court of the First Judicial Circuit and which said records and files are incorporated in this answer by references and will be offered in evidence upon the hearing of this cause, to condemn the aforesaid Lots F and G for a public use, to wit, for the construction of the Kapiolani Boulevard. On July 26, 1928, Victoria Ward, through her attorneys Peters & O'Brien, filed her answer to the petition in said suit, admitting amongst other things, that she was the sole owner of the premises sought to be condemned; that it appears, however, that on July 18, 1928, and during the pendency of the said suit, Victoria Ward aforesaid, defendant and owner of said parcels of land, executed a deed conveying the said parcels together with other adjacent lands to her daughters, as joint tenants with her, reserving to herself the joint use and occupation of the said

land, that Transfer Certificate of Title No. 7250 was issued to the above-named grantees upon said deed of conveyance.

Respondent herein further alleges that said suit in eminent domain was tried in the First Circuit Court beginning October 1st, 1928, and continuing thereafter until a verdict was rendered condemning the said Lots F and G and fixing compensation therefor October 23, 1928; that Final Order of Condemnation was entered January 7, 1930, which said Final [19] Order was recorded in the office of the Registrar of Conveyances February 13, 1930, as Document No. 20,898, as required by Section 824, Revised Laws of Hawaii, 1925, vesting title to said Lots F and G in the City and County of Honolulu.

Respondent further alleges that on October 29, 1928, in and as a part of the proceedings in the aforesaid condemnation suit, an order was issued out of the Circuit Court of the First Judicial Circuit placing the City and County of Honolulu in possession of said Lots F and G pending appeal pursuant to the terms of Section 825, Revised Laws of Hawaii, 1925, together with full right to use the same for the purpose of constructing a public highway thereon, a copy of which said order is hereto attached, marked Exhibit "C," and made a part hereof, and that the City and County of Honolulu since that time has been and is now in possession of the said Lots F and G, and has been and is now constructing the aforesaid highway across said lots under the terms of said order.

Respondent further alleges that all of the mat-

ters and things in the petition alleged relative to the ownership of the aforesaid subject matter, Lots F and G, have been litigated before the Land Court of the Territory of Hawaii in an action, or cause, or petition, entitled "In the Matter of the Application of Victoria Ward, Application No. 670, etc., Application for Issuance of Certificate of Title upon Final Order of Condemnation," which said petition was brought by the City and County of Honolulu as petitioner, wherein an order to show cause was issued directing Victoria Ward and the present petitioners herein, Hattie Kulamanu Ward, Lucy [20] Kaiaka Ward and Victoria Kathleen Ward, to appear and show cause why the prayer of the petitioner should not be granted, and a Certificate of Title to said Lots F and G should not be issued to it. That the within petitioners appeared upon the hearing of said petition and entered their defense, but that upon a full hearing, the aforesaid Judge of the Land Court entered his decision and decree in favor of the petitioner, the City and County of Honolulu, and against the respondents, Victoria Ward, Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, upon all the matters and things above alleged relative to the same subject matter, Lots F and G, and directing that a Certificate of Title issue to the City and County of Honolulu for said Lots F and G, and that the aforesaid suit in the Land Court is now pending upon appeal before the Supreme Court of the Territory of Hawaii as Supreme Court Docket No. 1989, which record is herein incorpo-

rated by reference and will be produced and offered in evidence upon the hearing in this matter. Respondent further alleges that the decree of the Land Court above mentioned is *res adjudicata* as to all matters alleged in the petition herein relative to Lots F and G and constitutes a bar to any further proceedings herein relative thereto.

#### IV.

Respondent herein denies so much of Paragraph LV of said petition as alleges that Lots E, F and G of Land Court Application No. 670 are a part and parcel of the family home of the petitioners herein and Victoria Ward, but alleges [21] the true facts to be as alleged in Paragraph III hereinabove set forth. That as to the remaining allegations contained in Paragraph IV respondent neither admits nor denies the same but leaves petitioners to their proof thereof.

#### V.

Respondent denies that Lots E, F and G constitute the proposed right of way for the Kapiolani Boulevard, but on the contrary alleges the true facts to be (1) that Lot E constitutes a public highway of the City and County of Honolulu, and has been such for upwards of twenty (20) years; (2) that Lot F is owned by and in the possession of the City and County of Honolulu and constitutes a portion of the completed Kapiolani Boulevard at the point where it enters Ward Avenue aforesaid, and has been and now is in use as a public highway; (3) that Lot G is owned by and in the possession of the City and County of Honolulu as set out



in Paragraph III herein, and is now in the process of construction as a part of the extension of Kapiolani Boulevard from Ward Avenue to Sheridan Street.

VI.

That respondent denies so much of Paragraph VI as alleges that Lots E, F and G constitute a strip running over or across the homestead of petitioners but admits that they are adjacent to each other and divide the homestead of petitioners into two parts.

VII.

Respondent denies the allegations contained in Paragraph VII of said petition. [22]

VIII.

Respondent denies the allegations contained in Paragraph VIII of said petition.

IX.

Respondent denies specifically and categorically all of the matters and things alleged in Paragraph IX of the petition herein, and for answer thereto and as a special defense herein alleges that all the matters and things in said Paragraph IX alleged, and more particularly the allegation that the "proposed fill which the Respondent threatens to place upon said Lots E, F and G, will obstruct the natural flow of surface waters off of the homestead of your petitioners and would back the flood waters over and upon the homestead of your petitioners, damaging the property of your petitioners lying on the mauka side of said Lots E, F and G, and will in-

jure the plants and trees planted by your petitioners and the said Victoria Ward, and cared for and nurtured for many years. That the stoppage of the flow of surface waters, as aforesaid will seriously affect the sanitary condition of the petitioners' homestead, and make unsanitary and unhealthful and uninhabitable the premises now occupied by your Petitioners as their home," have been adjudicated in the condemnation suit above-mentioned entitled "The City and County of Honolulu, a municipal corporation, vs. Victoria Ward, Law No. 11946" in the Circuit Court of the First Judicial Circuit, the judgment wherein was affirmed by the Supreme Court of the Territory of Hawaii as appears in 31 Haw. 184, which said judgment is binding upon the petitioners herein as grantees *pendente lite* and [23] and as privies of Victoria Ward, defendant in the aforesaid suit. Respondent further alleges that no injury, irreparable or otherwise, will result to petitioners' property as a result of the construction of the Kapiolani Boulevard, the improvement complained of.

#### X.

Respondent denies specifically and categorically the allegations contained in Paragraph X of said petition.

#### XI.

Respondent denies the allegations contained in Paragraph XI of said petition, and more particularly as to that portion of said paragraph which alleges that "the City and County of Honolulu proposes to use said Lots E, F and G, and does now

threaten to use the same for public purposes, to wit, for a public highway," but on the contrary respondent avers the true facts to be that Lot E is now and has been for upward of twenty (20) years a public highway; that Lot F is now owned by and in the possession of the City and County of Honolulu and for upwards of one (1) year has been a public highway; and that Lot G is owned by and in the possession of the City and County of Honolulu and is in the process of construction as a public highway.

Further, and as a special defense to the allegation "that no compensation has been paid to your petitioners by the respondent \* \* \* for the said Lots E, F and G," respondent avers that this question has been settled and determined in the Land Court of the Territory of Hawaii in the petition brought by the City and County of [24] Honolulu entitled "In the Matter of the Application of Victoria Ward to Register and Confirm Her Title, etc., Application No. 670, Application for Issuance of Certificate of Title upon Final Order of Condemnation," the record of which said cause will be produced by respondent and offered in evidence at the hearing of this matter, wherein the same controversy involving the same parties, and the same subject matter, was heard and determined by the aforesaid court, which said cause is now pending on appeal before the Supreme Court of the Territory of Hawaii, being Supreme Court Docket No. 1989, and which record is more particularly referred to in Paragraph III of this answers and the de-

creed entered in said cause is a bar to any further proceedings in this court between the parties hereto upon the question of compensation above referred to.

## XII.

Respondent denies specifically and categorically all the allegations contained in Paragraph XII of said petition and alleges the true facts to be as follows:

That on or about December 1, 1930, one John C. Oliveira, an employee of the City and County Engineers' Department, was directed to orally notify Mrs. Victoria Ward and the petitioners herein to remove the fence at present extending along the Waikiki side of Ward Avenue where it crossed the projected line of Kapiolani Boulevard, which said fence the City and County of Honolulu had permitted to remain in the position it then and now occupies, as the [25] City was desirous of opening up free access to Lot G, to which it has title and of which it is in possession, and proceeding with the further construction of Kapiolani Boulevard. That Mrs. Ward and her privies in interest, the petitioners herein, have been duly compensated in full for the replacement of said fence, and have received from the City and County of Honolulu the money therefor. That subsequently, on December 2, 1930, L. M. Whitehouse, then City and County Engineer, addressed a written communication to Mrs. Victoria Ward and petitioners herein, confirming the matters orally communicated by Oliveira. Respondent further alleges, however, that respond-

ents herein have contumaciously and defiantly refused the said request of the aforesaid City and County Engineer, and are here endeavoring by this suit to restrain the City and County of Honolulu from the proper and necessary use of its own property in the furtherance of a great public project.

WHEREFORE, your respondent prays that the order to show cause be quashed, that the prayer for an injunction be denied, and that this bill be dismissed with costs.

Dated: Honolulu, T. H., this 10th day of January, A. D. 1931.

THE CITY AND COUNTY OF HONOLULU,  
Respondent.

By L. P. SCOTT,

Deputy City and County Attorney. [26]

Territory of Hawaii,  
City and County of Honolulu,—ss.

L. P. Scott, being first duly sworn on oath, deposes and says: That he is the duly appointed, qualified and acting deputy city and county attorney of the City and County of Honolulu; that he has been duly and regularly authorized to prepare, subscribe to and file this answer for and on behalf of the City and County of Honolulu by the Board of Supervisors of the City and County of Honolulu and by James F. Gilliland, the duly elected, qualified and acting city and county attorney of the said City and County of Honolulu; that he has read the foregoing answer, knows the contents thereof and

that the facts therein stated are true to the best of his information, knowledge and belief.

(S.) L. P. SCOTT.

Subscribed and sworn to before me this 10th day of January, A. D. 1931.

(S.) EMELIA L. KRAMER,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii. [27]

EXHIBIT "A."

Honolulu, January 29th, 1902.

James H. Boyd, Esq.,

Superintendent of Public Works.

Honolulu.

Dear Sir:

Your favor of the 11th inst., addressed to Mrs. V. Ward, is to hand, and the contents have my careful attention.

In reply thereto I have to state as follows:—

Reverting to the conversation which I had with you some days since, in which this matter was fully discussed, I now beg to put in writing the final proposition which I agreed to submit and to which I ask your usual careful consideration.

On behalf of Mrs. Ward I agree to deed to the Government in fee the following lands for the construction of a proper macadamized road;

1. Starting at a point 125 feet from the Ewa boundary of the premises known as the "Old Plantation," a strip 56 feet wide running the entire length of the aforementioned

premises to the street called "Waimanu," as shown on the tracing hereunto attached.

2. Commencing near the junction of "Laniwai" street and the mauka boundary of Kukulu-aeo, a strip 56 feet wide running through said Kukulu-aeo to Ala Moana; also shown on tracing above referred to. [28]

In consideration of the above, the Government to properly fence the property bounded by the proposed street, curb the sidewalk and fill to street grade such portion of the strip of the "Old Plantation" premises on the Ewa side of the proposed road as is at present below said grade, and as indicated on map heretofore mentioned.

The Government further to abandon the present storm ditch from King Street, held by mutual agreement, replacing same under the sidewalk of the proposed street with a properly covered cement drain.

Awaiting your consideration of this matter, I remain,

Yours faithfully,

(S.) E. H. WODEHOUSE,  
Attorney for Victoria Ward. [29]

EXHIBIT "B."

February 7, 1902.

E. H. Wodehouse, Esq.,  
Attorney for Victoria Ward,  
Honolulu.

Sir:

I have to acknowledge receipt of your favor of the

11th inst., in regard to the application made by the Territory for a roadway and ditch line through the property of Mrs. Victoria Ward on King Street, to the beach, and to say in reply that I cordially agree with you in that had the Board of Health declined to grant their permission for the opening up or selling of lots in Kewalo until the swamp lands had been reclaimed the nuisance would not have occurred.

Your final proposition submitted, namely, on behalf of Mrs. Ward you agreed to deed to the Government in fee the following lands for the construction of a proper macadamized road:

1. Starting at a point 125 feet from the Ewa boundary of the premises known as the "Old Plantation," a strip 56 feet wide, running the entire length of the aforementioned premises to the Street called "Waimanu," as shown on the tracings hereto attached.
2. Commencing near the junction of "Laniwai" street and the mauka boundary at Kukuluaeo, a strip 56 feet wide running through said Kukuluaeo to Ala Moana; also shown [30] on tracing above referred to.

In consideration of the above, the Government to properly fence the property bounded by the proposed street, curb the sidewalk and fill to street grade such portion of the strip of the "Old Plantation" premises on the Ewa side of the proposed road, as is at present below said grade, and as indicated on map heretofore mentioned.



The Government further to abandon the present storm ditch on Queen Street, held by mutual agreement, replacing same under the sidewalk of the proposed street with a properly covered cement drain.

In reply I have to state that in accepting this proposition I am directed to express to you a hearty appreciation of the Territory of Hawaii for this noble concession on your part, by which means you enable this Department to undertake the work of relieving the District of Kewalo and vicinity from its present insanitary condition.

The deeds of transfer for the above property for the purpose stated in your proposition will be prepared by this Department and submitted to you for approval, the same to be executed upon the fulfillment by the Government of the conditions above enumerated.

Very respectfully,

(S.) JAS. H. BOYD,

Superintendent of Public Works. [31]

## EXHIBIT "C."

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.  
January Term, 1928.

## PROCEEDINGS IN EMINENT DOMAIN.

LAW No. 11,964.

THE CITY AND COUNTY OF HONOLULU,  
a Municipal Corporation,

Plaintiff,

vs.

VICTORIA WARD,

Defendant.

ORDER PUTTING PLAINTIFF INTO POS-  
SESSION OF LANDS IN THE ABOVE-  
ENTITLED CAUSE SOUGHT TO BE  
CONDEMNED.

The Court having read the foregoing Petition for an Order Putting Plaintiff into Possession of Lands in the above-entitled cause sought to be condemned, together with certified copy of judgment herein, thereto attached, and affidavit of Henry Smith, Clerk of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, thereto attached and based upon all of the files, records and proceedings in the above-entitled cause and pursuant to the power and authority vested in the Court by Section 825, Revised Laws of Hawaii, 1925; [32]

IT IS HEREBY ORDERED that the City and County of Honolulu, a municipal corporation,

plaintiff in the above-entitled cause, be and hereby is vested with the right to peaceable possession of the lands in this proceedings sought to be condemned, herein generally designated as Parcel 19, and Parcel 21, more particularly described as follows, to wit:

PARCEL 19.

BEING Lot F of Land Court Application No. 670, situated on the northwest side of Ward Avenue, at Kewalo, Honolulu, Oahu, T. H.

BEGINNING at the south corner of this lot, being also the East corner of Lot C of Land Court Application No. 670 and the proposed west corner of Ward Avenue and Kapiolani Boulevard, the coordinates of said point of beginning referred to a Government Survey Street Monument near the east corner of King and Victoria Streets being 949.18 feet south and 1400.06 feet west; said street monument is set on an offset of 10.0 feet to the northeast side of King Street and on an offset of 10.00 feet to the southeast side of Victoria Street and the coordinates of said Street Monument referred to Government Survey Triangulation Station "Punchbowl" being 3876.59 feet south and 139.29 feet east, and running by true azimuths:  
[33]

1.  $143^{\circ} 50'$  150.62 feet along Lot C of Land Court Application No. 670 along the proposed southwest side of Kapiolani Boulevard;
2.  $212^{\circ} 07'$  107.64 feet along fence to the proposed northeast side of Kapiolani Boulevard;

3.  $323^{\circ} 50'$  160.58 feet along Lot B of Land Court Application No. 670 along the proposed north-east side of Kapiolani Boulevard;
4.  $37^{\circ} 12'$  104.37 feet along the northwest side of Ward Avenue to the point of beginning and Containing an area of 15,560 square feet.

PARCEL 21.

BEING Lot G of Land Court Application No. 670. Situated on the southeast side of Ward Avenue, Honolulu, Oahu, T. H.

BEGINNING at the west corner of this lot, being also the north corner of Lot D of Land Court Application No. 670, on the southeast side of Ward Avenue, the coordinates of said point of beginning referred to a Government Survey Street Monument near the east corner of King and Victoria [34] Streets being 996.37 feet south and 1365.57 feet west: said street monument is set on an offset of 10.0 feet to the northeast side of King Street and on an offset of 10.0 feet to the southeast side of Victoria Street, and the coordinates of said Street Monument referred to Government Survey Triangulation Station "Punchbowl" being 3875.49 feet south and 139.29 feet east, and running by true azimuths:

1.  $217^{\circ} 12'$  104.37 feet along the southeast side of Ward Avenue to the proposed northeast side of Kapiolani Boulevard;
2.  $323^{\circ} 50'$  495.43 feet along Lot A of Land Court Application No. 670 along the proposed northeast side of Kapiolani Boulevard;

3. Thence on a curve to the left, having a radius of 1608.0 feet along Lot A of Land Court Application No. 670 along the proposed north-east side of Kapiolani Boulevard, the direct azimuth and distance being  $318^{\circ} 08' 39''$  318.81 feet;
4.  $29^{\circ} 45' 67.30$  feet along the McKinley High School lot; [35]
5.  $29^{\circ} 45' 35.05$  feet along the remainder of L. C. A. 3169, Apana 1, to Koalele to the proposed southeast side of Kapiolani Boulevard;
6. Thence on a curve to the right having a radius of 1708.0 feet along Lot D of Land Court Application No. 670, along the proposed southwest side of Kapiolani Boulevard, the direct azimuth and distance being  $137^{\circ} 45' 59''$  361.02 feet;
7.  $143^{\circ} 50' 465.56$  feet along Lot D of Land Court Application No. 670, along the proposed southwest side of Kapiolani Boulevard to the point of beginning and containing an area of 82,118 square feet, together with full right to use the same for the purpose of constructing a public highway thereon during the pendency of and until the final conclusion of the above entitled cause. [36]

Dated: Honolulu, T. H., October 29th, 1928.

(S.) E. K. MASSEE,

Third Judge, Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Service of a copy of the foregoing order putting plaintiff into possession of lands in the above-en-

titled cause sought to be condemned, is hereby admitted and accepted this 1st day of November, 1928.

(S.) PETERS & O'BRIEN,  
Attorneys for Defendant. [37]

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Filed at 10:31 o'clock A. M., Jan. 13, 1931.

Service is hereby accepted this 13th day of January, 1931.

(S.) L. P. SCOTT,  
Deputy City and County Attorney for Respondent. [38]

[Title of Court and Cause—No. E.-3221.]

### REPLICATION.

Now comes Hattie Kulamanu Ward, Lucy Kai-aka Ward and Victoria Kathleen Ward, petitioners above named, and by way of replication to the answer of the City and County of Honolulu, Respondent above named, allege as follows:

#### I.

Replying to Paragraph III of said answer, petitioners admit that prior to July 18, 1928, Victoria Ward was the sole owner of Lots E, F and G of Land Court Application No. 670, and deny that Victoria Ward held the bare legal title to Lot E. Further replying petitioners aver that on January 20th, 1902, E. H. Wodehouse, attorney for Victoria Ward, made an offer to convey Lot E to the Territory of Hawaii in consideration of certain covenants on the part of the Territory of Hawaii

[39] to be fully observed and performed. The petitioners admit that Exhibit "A" and Exhibit "B" attached to the answer of the respondent, is a copy of the offer and acceptance referred to by the respondent.

The petitioners deny that the City and County of Honolulu entered into and took possession of said Lot E and constructed a road thereon and thereover, and deny that the said Lot E is a public highway and has been used as such by the City and County of Honolulu for more than twenty (20) years, but aver that the use by the Territory of Hawaii, or by the City and County of Honolulu, was permissive, and petitioners further aver that in that certain application before the Land Court of the Territory of Hawaii entitled "In the Matter of the Application of Victoria Ward," the Territory of Hawaii filed its answer and claim, claiming Lot E as a public highway; that the claim of the Territory of Hawaii was rejected and the Land Court confirmed the title of Victoria Ward in and to the said Lot E; that the Territory of Hawaii made no claim in said Land Court Application under the terms of the alleged agreement of 1902, and the City and County of Honolulu is not estopped from in any manner making a claim to said highway pursuant to said agreement of 1902.

Further replying to said Paragraph, petitioners admit that Victoria Ward, prior to July 18th, 1928, was the sole owner of Lots F and G. They further admit that on March 19th, 1928, a suit in eminent domain was instituted [40] by the City and

County of Honolulu against Victoria Ward to condemn the said Lots F and G for a public highway. Petitioners further admit that on July 20th, 1928, Victoria Ward filed her answer, through her attorneys of record, to the petition admitting ownership of the premises, but aver that prior thereto and on, to wit, July 18th, 1928, the said Victoria Ward, by deed, conveyed said Lots F and G to the petitioners herein as joint tenants, subject to a life estate in the said Victoria Ward; that Transfer Certificate of Title No. 7250 was thereupon issued to the above-named petitioners.

Petitioners further aver that on July 20th, 1928, they were the owners in fee simple of the said Lots F and G, subject to a life estate in the said Victoria Ward.

Petitioners admit that on October 1st, 1928, the trial of the eminent domain suit above referred to, was commenced and that thereafter on the 23d day of October, 1928, a verdict was entered, and that thereafter on January 7th, 1930, a final order of condemnation was entered pursuant to Section 824 of the Revised Laws of Hawaii, 1925, but petitioners aver that they were not made parties—defendant in the eminent domain proceedings; that no summons as required by law was served upon them; that no compensation was offered or given to these petitioners by the City and County of Honolulu, or by anyone on its behalf. That no evidence was adduced at the hearing in the condemnation suit as to the true ownership of Lots F and G; and that [41] the said Victoria Ward was not awarded just compensation as required by the Constitution of the



United States and was deprived of property without just compensation.

Petitioners neither deny nor admit that on October 29th, 1928, an order was issued out of the Circuit Court granting to the respondent the right to use Lots F and G, but aver that they were not bound by such order, not being parties to the said eminent domain proceeding and not having been compensated for the taking of their property.

Petitioners admit that the ownership of Lots F and G was litigated before the Land Court in the "Matter of the Application of Victoria Ward" upon a order to show cause based upon a petition of the City and County of Honolulu, but aver that the Land Court was without jurisdiction to issue the said order to show cause, or to entertain the petition of the City and County of Honolulu, and further aver that the Court was without jurisdiction to enter its order.

Petitioners further aver that the matter has not been disposed of by any court of competent jurisdiction, and that the matter is pending before the Supreme Court of the Territory of Hawaii.

Petitioners further aver that the proceedings before the Land Court of the Territory of Hawaii, last referred to herein, deprived them of their private property without just compensation as guaranteed by the Constitution of the United States.

Replying to Paragraph V of the answer petitioners deny that Lot E is a public highway of the City and County of [42] Honolulu, or that Lot F is owned by and in the possession of the City

and County of Honolulu, or that Lot G is owned by and in the possession of the City and County of Honolulu.

Replying to Paragraph VI, petitioners reallege that Lots E, F and G constitute a strip over and across the homestead of petitioners.

Replying to Paragraph IX of said answer, petitioners deny that they are bound by the judgment in the case of the "City and County of Honolulu vs. Victoria Ward" as set forth in 31 Hawaii, 184, but aver that the decision of the Supreme Court of the Territory of Hawaii in 31 Hawaii, 184, conclusively and affirmatively shows that Victoria Ward was deprived of her private property without just compensation as required by the Constitution of the United States.

Replying to Paragraph XI of said answer, petitioners deny that Lot E is, or ever was, a public highway, or that Lot F is owned by and in possession of the City and County of Honolulu, or that Lot G is owned by and in possession of the City and County of Honolulu. And further replying to Paragraph XI, petitioners aver that the Land Court was without jurisdiction to entertain the petition, or to issue the order or decree referred to in said paragraph.

Answering Paragraph XII of said answer, petitioners admit that on December 1st, 1930, John C. Oliveira ordered and directed the petitioners to remove the fence along the Waikiki side of Ward Avenue, or Lot E, where the same crossed the projected line of Kapiolani Boulevard, and deny that these petitioners have been compensated for

said fence. [43] Petitioners further admit that L. M. Whitehouse, City and County Engineer, demanded that the fence be removed, and these petitioners ask leave to insert at the hearing hereof a copy of said letter. Petitioners further admit that they refused the request of the City and County Engineer.

Dated at Honolulu, T. H., this 12th day of January, 1931.

HATTIE KULAMANU WARD,  
LUCY KAIKA WARD and  
VICTORIA KATHLEEN WARD,  
Petitioners.

By (S.) CHARLES B. DWIGHT,  
Their Attorney.

Territory of Hawaii,  
City and County of Honolulu,—ss.

Charles B. Dwight, being first duly sworn, on oath deposes and says:

That he is the attorney for the above-named petitioners and makes this verification for and on their behalf; that he has read the foregoing replication, knows the contents thereof and that the matters and things therein set forth are true to the best of his knowledge and belief.

(S.) CHARLES B. DWIGHT.

Subscribed and sworn to before me this 12th day of January, A. D. 1931.

(S.) SUZANNE G. FISKE,  
Notary Public, First Judicial Circuit, Territory  
of Hawaii. [44]

Filed at 12:10 o'clock P. M., Feb. 4, 1931. [45]

[Title of Court and Cause—No. E.-3121.]

### DECISION.

The petitioners above named bring their bill for injunction against the City and County. They allege in the petition that they are owners in fee simple of certain lots designated Lots E, F and G of Land Court Application No. 670, and that the City and County is threatening to trespass on these lots, break down the family fence, fill said lots to a grade higher than remaining portions of petitioners' land and thereby backing up surface drainage upon the remaining property of petitioners, rendering that property unsanitary and killing and injuring trees and plants. [46]

The answer of the respondent alleges that the City and County has been using Lot E for a public highway known as Ward Avenue for more than twenty (20) years under dedication and consent from Victoria Ward, the predecessor in title to the petitioners. The answer further alleges that the City and County began a suit in eminent domain on March 19, 1928, against Victoria Ward, who on that date was the sole owner of Lots F and G, and duly served summons upon Victoria Ward, carried said proceedings in eminent domain to judgment and paid the judgment to Victoria Ward, getting a final order of condemnation against Victoria Ward; that under said final order and under an order of possession the City and County entered upon and com-

pleted a highway over Lot F and entered upon and filled Lot G to the proposed grade; and that all matters of compensation for the strips taken, including elements of damage to the remaining property were litigated in said eminent domain proceedings for which payment was made. The respondent further denies any irreparable or other damage.

The case being at issue a hearing was had. At said hearing the evidence showed that for more than twenty (20) years the City and County had been using, repairing and improving Lot E as Ward Avenue"; that, altho petitioners had the record title in fee simple to Lot E, there had never been any interference with the use of Lot E as a part of the public highway system until this proceeding was filed. There was no evidence of any new or other entry upon Lot E (Ward Avenue) than had been [47] so continuously maintained for more than twenty (20) years without interference. There was also no evidence that the use of Ward Avenue (Lot E) had any reference to the present elements of damage complained of by petitioners.

The evidence further showed that after the City and County had properly commenced the proceeding in eminent domain in March 1928 involving Lots F and G, the then owner, Victoria Ward, *pendente lite* in July, 1928, executed a conveyance of gift to the three petitioners in this proceeding, granting a joint tenancy with herself in the fee to the premises known as the Homestead and including the area known as Lots E, F and G, to the

petitioners in this suit. The petitioners, at the time of this deed of gift, knew that their mother, Victoria Ward, was the party defendant in the condemnation proceedings; were acquainted with the subsequent proceedings and hearings, verdict and judgment against Victoria Ward; and at no time sought to intervene either to protect what interest they may have or to secure any part of the payment for the taking of the Lots F and G in question.

Also under the evidence adduced at the hearing the elements of claimed damage, other than removing a strip of fence separating Lot G from Ward Avenue, involve solely the question of whether or not the fill already on Lot G obstructed surface waters so as to result in intermittent flowage upon the remaining portions of petitioners' lands and thereby creating unsanitary conditions and affecting some of the trees and plants. [48]

In other words the sole question relied by the pleadings and the evidence so far as Lot E (Ward Avenue) is concerned is one of title and right of continued user of the same character that has been allowed without interference for more than twenty (20) years. This question of disputed title and right of continued user subject to the fee presents no equity supporting the purposes of the Bill. Under guise of injunction proceeding it is sought to accomplish an ejection.

The evidence as to Lot F also shows that this parcel has no connection with the claim of irreparable damage forming the background of the purposes of

the bill. The evidence shows in that connection that a completed highway has been constructed by the City and County under claim of title derived from eminent domain proceedings. The inclusion of Lot F in this proceeding is in no way connected up with the claim of irreparable damage affecting surface waters or destroyed trees, but solely involves the question as to whether or not petitioners' land have heretofore been properly condemned. Whether or not petitioners were or are entitled to any part of the compensation ordered in that proceeding is a matter that either should have been litigated therein or pressed now against the grantor of petitioners' title.

As to Lot G the evidence shows also that the City had filled said Lot to the approximate proposed grade in connection with the contemplated improvement forming the background of the eminent domain proceedings against Victoria Ward. [49] Assuming that the petitioners are right that this fill to grade does back up surface flow at intermittent times so as to destroy some of the trees formerly grown upon the lower homestead, such result would be the inevitable consequence of changing conditions. It would be the kind of damage referred to in Section 821, Revised Laws of Hawaii 1925, being ". . . . damages which will accrue to the portion not sought to be condemned by reason of . . . . the construction of the improvements in the manner proposed by the plaintiff . . . ."

In that respect the damages complained of, if petitioners are entitled to compensation, are the kind of damages assessable and recoverable in an action at

law, which should either have been litigated by intervention in the eminent domain proceeding or pressed against petitioners' grantor.

In other words under the evidence and pleadings the Court is unable to find any equity in the bill supporting injunctive relief as distinct from adequate remedies at law. Especially is this true in relation to the allegation and evidence affecting the petitioners in connection with Lots E and F. If by some stretch of the imagination, the use by the city of Lot G could be construed as creating a kind of damage that might have been considered in this kind of proceeding, the record shows a complete bar against petitioners.

The city acquired its title to Lots F and G under an eminent domain proceeding properly served upon Victoria Ward while she was the sole owner and the only proper defendant. The subsequent deed of gift to the present petitioners [50] in this suit created no more than a right in these petitioners to intervene if they so desired to secure an adjustment between themselves and Victoria Ward in the compensation thereafter found to be due and owing.

Even if the petitioners had been *bona fide* purchasers for value *pendente lite* they would be bound by the judgment against the prior grantor with whom they were in privity of interest. Drinkhouse vs. Spring Valley Waterworks, 87 Cal. 253, 25 Pacific, 420; City of Chicago vs. Messler et al., 38 Federal, 302; 2 Lewis, Eminent Domain (Third ed.), section 537, page 965; Trogden vs. Winoua, 22 Minn. 198; Board of Education vs. Van Der Veen,



169 Mich. 470, 135 N. W. 241; 20 C. J. 925, also 1065, 1067.

Indeed, the principle is concisely stated in a case cited on behalf of petitioners.

“In a condemnation proceeding the rights of the parties are fixed at the time the petition is filed.” (A conveyance *pendente lite* would only affect the question as to whom compensation should be paid.) Dept. of Public Works vs. Engel, 146 N. E. 521, 522.

For the foregoing reasons the bill herein will be dismissed for want of equity.

Dated at Honolulu, Hawaii, this 4 day of February, 1931.

(S.) ALBERT M. CRISTY. (Seal)  
Second Judge, 1st Judicial Circuit, Territory of  
Hawaii. [51]

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\$17.00—46/67.

Filed at 9:50 o'clock A. M., Feb. 6, 1931. [52]

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

Bill of Injunction.

HATTIE KULAMANU WARD, LUCY KAIKA  
WARD and VICTORIA KATHLEEN WARD,  
Petitioners,

vs.

THE CITY AND COUNTY OF HONOLULU, a  
Municipal Corporation,  
Respondent.

## DECREE.

This cause having come on for hearing before the Honorable A. M. Cristy, Judge of the above-entitled court, sitting at Chambers, in Equity, on Tuesday the 27th day of January, A. D. 1931, on the bill or petition and order to show cause of petitioners, and the answer and return of respondent, and the replication of petitioners thereto, Charles B. Dwight, Esq., appearing for petitioners, and L. P. Scott, Esq., Deputy City and County Attorney, appearing for respondent, and the Court having considered all the evidence adduced upon said hearing and having heard argument of [53] counsel and having considered the petition or bill and order to show cause and the answer and return and replication thereto, and all the other records and files and the evidence adduced herein, and being advised in the premises, and the Court having found all the allegations of the answer to be true and that the petitioners are not entitled to the relief prayed for in the prayer of their petition, for the reason that the bill or petition shows a want of equity in the premises, and having found that the prayer of the answer that the bill or petition be dismissed, should be granted,—

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the prayer of the answer herein, be granted, and that the order to show cause be quashed; that the prayer of the bill for an injunction be denied; that all restraining orders or agreements hereinbefore entered into, be set aside,

and the bill for injunction be dismissed with costs against petitioners.

Dated at Honolulu, T. H., this 5 day of February, A. D. 1931.

(S.) A. M. CRISTY, (Seal)  
Judge of the Above-entitled Court.

Approved as to form.

(S.) CHARLES B. DWIGHT,  
Attorney for Petitioners. [54]

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[Title of Cause—No. E.-3121]

At Chambers—11:00 o'clock A. M., Saturday, December 6, 1930.

Present: Hon. A. E. STEADMAN, First Judge,  
Presiding.

A. R. WHITMORE, Clerk.

J. L. HORNER, Reporter.

Counsel:

CHAS. B. DWIGHT, Esq., for Petitioners.

L. P. SCOTT, Esq., Deputy C. & C. Attorney, for Respondents.

MINUTES OF COURT—DECEMBER 6, 1930—  
ORDER ALLOWING ISSUANCE OF TEMPORARY RESTRAINING ORDER.

By consent of respective counsel the above two orders were this day by the Court vacated.

By order of the Court:

A. R. WHITMORE,

Clerk. [55]

At Chambers—10:00 o'clock A. M., Monday, December 15, 1930.

Present: Hon. A. E. STEADMAN, First Judge,  
Presiding.

A. R. WHITMORE, Clerk.

Respondent's Counsel:

CHAS. B. DWIGHT, Esq., for Petitioners.

L. P. SCOTT, Esq., Deputy C. & C. Attorney, for Respondent.

MINUTES OF COURT—DECEMBER 15, 1930—  
ORDER OVERRULING DEMURRER.

After argument by counsel the Court overruled respondent's demurrer, and respondent was given ten (10) days within which to answer or otherwise plead. Counsel for respondent noted his exception to the Court's ruling.

By order of the Court:

A. R. WHITMORE,

Clerk. [56]

Tuesday, January 20, 1931. At Chambers—9:00 o'clock A. M.

Present: Hon. A. M. CRISTY, Second Judge,  
Presiding.

L. R. HOLT, Clerk.

H. R. JORDAN, Reporter.

[Title of Cause—No. E-3121.]

MINUTES OF COURT—JANUARY 20, 1931—  
MOTION TO STRIKE REPLICATION.

Counsel: CHARLES B. DWIGHT, Esq., for Petitioners.

LESLIE P. SCOTT, Esq., for Respondent.

Counsel for respondent argued on the merits of his motion to strike the replication filed by counsel for petitioners argued.

The Court, after listening to the argument of counsel, granted the motion to strike over objection of counsel for petitioners. The case was set for Tuesday, January 27, 1931, at 9:00 A. M. for hearing.

By the Court:

(S.) L. R. HOLT,  
Clerk. [57]

At Chambers—9:00 o'clock A. M. Tuesday, January 27, 1931.

Present: The COURT.

H. R. JORDAN, Reporter.

Counsel: Same.

MINUTES OF COURT—JANUARY 27, 1931—  
HEARING.

Counsel being ready to proceed with the hearing on the bill for injunction, counsel for petitioners moved to amend Paragraph 3 of the petition by striking out the numericals “#67” on line 4 and in-

serting in lieu thereof the numericals “#670” and also moved to add after the figures 670 the following insert “subject to a life estate in Victoria Ward.” The amendments were granted by the Court, entered and initialed in the petition.

Counsel for respondent made a statement to the Court.

Counsel for petitioners acquainted the Court with the facts of the case and called as a witness (1) Abraham V. Akana, who, upon being duly sworn, testified.

No cross-examination.

Counsel for petitioners offered in evidence, A map of Land Court Application #670, which was received by the Court without any further numerical identification.

At 9:25 A. M. counsel for petitioners called as a witness (2) Victoria K. Ward, who, upon being duly sworn, testified.

Counsel for petitioners offered in evidence [58] Owner's Transfer Certificate of Title #7250, issued out of the Land Court of the Territory of Hawaii, and was received by the Court without any further markings.

At 9:52 A. M. cross-examination.

At 10:00 A. M. redirect examination.

At 10:02 A. M. recross-examination.

At 10.10 A. M. the Court took a recess.

At 10:20 A. M. the Court reconvened whereupon counsel for petitioners called as a witness (3) Lucy K. Ward, who, upon being sworn, testified.

At 10:24 A. M. cross-examination.

Counsel for petitioners offered in evidence, Proceedings in Land Court Application #670, and by order of the Court was received and made a part of this record.

Counsel for respondent offered the following documents in evidence,—

The entire record in Law No. 11946, being the case of the City and County of Honolulu vs. Victoria Ward in Eminent Domain Proceedings: Certified Copy #3114—Judgment and Final Order of Condemnation in L.—#11946; certified to by A. A. Dunn, Acting Commissioner of Public Lands—(Exhibit “I”)

and by order of the Court was received and made a part of the record. [59]

At 10:35 A. M. counsel for respondent called as a witness (4) John H. Wilson, who, upon being duly sworn, testified.

At 10:41 A. M. cross-examination.

At 10:30 A. M. redirect examination.

At 10:54 A. M. recross-examination.

At 10:55 A. M. counsel for respondent called as a witness (5) Louis M. Whitehouse, who upon being duly sworn testified.

At 11:20 A. M. cross-examination.

At 11:30 A. M. redirect examination.

At 11:35 A. M. recross-examination.

At 11:40 A. M. counsel for respondent called as a witness (6) Daniel F. Balch, who, upon being duly sworn testified.

At 12:01 P. M. the Court took a recess.

At 1:45 P. M. the Court reconvened whereupon

Mr. Balch resumed the witness-stand on further direct examination.

At 1:46 P. M. cross-examination.

At 2:00 P. M. redirect examination.

At 2:05 P. M. counsel for respondent rested.

At 2:06 P. M. counsel for petitioners recalled Miss Lucy K. Ward in rebuttal.

At 2:20 P. M. cross-examination.

At 2:40 P. M. counsel for petitioners rested.

At 2:41 P. M. counsel for petitioners delivered his opening argument to the Court. [60]

At 3:55 P. M. the Court suggested that counsel supply him with a memorandum of authorities in lieu of further argument. This suggestion being agreeable to counsel, the Court continued the matter until said briefs are submitted.

By the Court:

(S.) L. R. HOLT,  
Clerk.

At Chambers—10:00 o'clock A. M., Wednesday,  
February 4, 1931.

#### MINUTES OF COURT—FEBRUARY 4, 1931— DECISION.

On the above day and hour, the Court rendered a written decision in favor of the respondent and against the petitioners and dismissed the petition for "want of Equity."

By the Court:

(S.) L. R. HOLT,  
Clerk. [61]



Filed February 27, 1931, at 10:08 o'clock A. M.  
[62]

In the Supreme Court of the Territory of Hawaii.  
October Term, 1930.

No. 2002.

HATTIE KULAMANU WARD, LUCY KAIKA  
WARD and VICTORIA KATHLENE  
WARD,

vs.

THE CITY AND COUNTY OF HONOLULU, a  
Municipal Corporation.

Appeal from Circuit Judge First Circuit.

Hon. A. M. CRISTY, Judge.

Argued February 24, 1931.

Decided February 27, 1931.

PERRY, C. J., BANKS and PARSONS, JJ.

Equity—Jurisdiction—Adequate remedy at law—  
Ejectment.

When the City and County of Honolulu is in possession of a piece of land as a public highway, claiming the title thereto, a suit in equity presenting no equitable features and the sole purpose of which is to obtain an injunction to restrain the further possession and use by the city and county of the land as a highway, will not lie, the remedy by an action of ejectment being adequate to try the title.

*Lis Pendens*—Purchase *pendente lite*—Operation and effect.

A purchaser *pendete lite* is bound by the result of the suit.

Eminent Domain—Action for condemnation—Damages to accrue to adjacent land not condemned.

Damages caused, as by the overflowing of lands, by the construction of a roadway over a piece of land judicially [63] condemned after trial by jury, are recoverable under our statute in the action for condemnation; and if a claim for such damages is not presented or adjudicated in the action for condemnation the injury cannot be made the ground of a subsequent suit in equity to restrain the continued use and occupation by the Government of the land condemned for road purposes. [64]

#### OPINION OF THE SUPREME COURT BY PERRY, C. J.

This is a suit in equity in which the complainants pray for an injunction restraining the respondent from in any manner trespassing upon land described as "lots 'E,' 'F' and 'G,' of land court application No. 670," which are included in the land described in transfer certificate of title No. 7250 issued by the Land Court of this Territory. After trial, a decree was entered by the Circuit Judge refusing the relief prayed for and dismissing the bill. From that decree the case comes to this court by appeal.

Lot "E" was originally a part of a larger tract of land owned by Victoria Ward. It is now a part of what is known as Ward Street, leading from King Street in a southerly direction towards the

ocean. The City and County of Honolulu was at the date of the commencement of the suit in possession of lot "E" as a public highway and it and its predecessor in interest, the Territory of Hawaii, have been in possession of it for a period of more than twenty years last past, using it at all times as a public highway. The claim now advanced by the complainants is that lot "E" first came into the possession of the Territory under a conditional contract and that the Territory and the city and county did not comply with the terms of the contract and therefore did not acquire the title. On the other hand it is claimed by the respondent that the terms were complied with in part and waived in part and that in any event there has been a statutory dedication of the land for highway purposes. The merits of this controversy we need not consider. The respondent is in possession and the complainants are out of possession. Their purpose in securing the injunction is to eject the respondent [65] from the land. This can be adequately accomplished in an action of ejectment. No equitable features are presented in the petition. Irreparable damage is not alleged, as to this lot. Jurisdiction in equity is therefore not maintainable.

The further claim is made that certificate No. 7250, issued by the Land Court prior to the verdict in the condemnation case, is an adjudication to the effect that the city and county has no title to lot "E" as a highway. We do not so understand it. The certificate is silent on the subject of roadways, but under section 3229, R. L. 1925, a successful applicant in whose favor a certificate of title is issued holds

it subject to the possible encumbrance of "any highway \* \* \* laid out under the provisions of law, when the certificate of title does not state that the boundary of such way has been determined," as this certificate does not. In other words, if there is a highway running over registered land, the existence of the highway may be proven, even though it is not noted in the certificate as an encumbrance, when as in this case there has been no express adjudication on the subject. In any event, if the certificate of title can be properly construed as claimed by the present complainants that claim will be equally available to them in an action of ejectment.

The same is true in substance of lot "F." That lot is now a part of the recently constructed Kapiolani Boulevard and is in the possession of the respondent. It was awarded to the city and county in condemnation proceedings brought against Victoria Ward, the grantor of the three complainants. As held in the Land Court case entitled "*In re Application No. 670 of Victoria Ward to Register Title to Land,*" *ante*, p. 781, the present complainants who received a deed of certain interests from Victoria Ward during the pendency of the action for condemnation [66] of lot "F" and other lands are bound by the results of that action. No irreparable damage or other equitable features are alleged.

Lot "G" likewise is one of the pieces of land condemned in the action brought against Victoria Ward. As held in the Land Court case above referred to, *ante*, p. 781, the present complainants are bound by the judgment rendered in the action for condemnation. The alleged irreparable damage is

that the construction of the road over lot "G" caused an overflow of water upon other lands of the complainants (acquired from their mother and not condemned) and the destruction of trees which had been planted and cared for by the complainants and their mother, The respondent denies that the injuries complained of were caused by the construction of the roadway and contends that they were temporary in their nature and were the result of the acts of a dredging company which was making a fill of marshy lands either in lot "G" or elsewhere in the vicinity. Section 821, R. L. 1925, of the chapter on eminent domain, provides that "If the property sought to be condemned constitutes only a portion of a larger tract, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvements in the manner proposed by the plaintiff shall also be assessed." If the overflowing of the uncondemned land of the complainants was caused by the acts of the dredging company or even if those acts were attributable to the respondent, damages therefor could be recovered in an action at law or, conceivably (but we do not decide), it might, with equitable circumstances, justify an injunction to restrain the nuisance; [67] but certainly would not justify the relief prayed for in this suit which is that the respondent be restrained from "trespassing" upon lot "G,"—the equivalent in effect of a writ of possession. On the other hand, if the injuries complained of resulted from the construction of the road on lot "G," the claim for damages in that respect should

have been presented, under the statutory provision just quoted, in the action for condemnation. If through neglect or for any other reason the owners of the land failed to include that element of damages in their claims for compensation when the action for condemnation was being tried before the jury, the defect cannot be remedied in a new proceeding, whether at law or in equity. The owners have had their day in court. There must be an end to litigation.

The decree appealed from is affirmed.

(Signed) ANTONIO PERRY.

(Signed) JAS. J. BANKS,

(Signed) CHARLES F. PARSONS,

C. B. DWIGHT (also on the briefs), for Petitioners.

L. P. SCOTT, Deputy City and County Attorney  
(also on the brief), for Respondent. [68]

Filed March 2, 1931, at 11:56 o'clock A. M. [69]

In the Supreme Court of the Territory of Hawaii.

No. 2002.

Appeal from Circuit Court, First Judicial Circuit,  
Hon. A. M. CRISTY, Presiding.

HATTIE KULAMANU WARD, LUCY KAIA-  
AKA WARD and VICTORIA KATHLENE  
WARD,

Petitioners-Appellants,

vs.

THE CITY AND COUNTY OF HONOLULU, a  
Municipal Corporation,

Respondent-Appellee.

JUDGMENT ON APPEAL.

In the above-entitled cause pursuant to the opinion of the above-entitled court rendered and filed on the 27th day of February, A. D. 1931, the temporary restraining order issued in this court and cause on the 10th day of February, A. D. 1931, is hereby vacated and set aside and the judgment of the Circuit Court of the First Judicial Circuit, dated February 5, 1931, is affirmed. Costs amounting to \$14.00 to be paid by the petitioners-appellant.

Dated: Honolulu, T. H., March 2, 1931.

By the Court:

[Seal]

(Sgd.) J. A. THOMPSON,  
Clerk, Supreme Court.

Approved:

A. PERRY,  
Chief Justice. [70]

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[Title of Court and Cause—No. 2002.]

NOTICE OF JUDGMENT ON APPEAL.

To the Honorable the Judges of the Circuit Court  
of the First Judicial Circuit, Territory of  
Hawaii:

YOU WILL PLEASE TAKE NOTICE that in  
the above-entitled cause the Supreme Court has  
entered the following judgment on appeal:

“JUDGMENT ON APPEAL.

In the above-entitled cause pursuant to the opinion of the above-entitled court rendered and filed on the 27th day of February, A. D. 1931, the temporary restraining order issued in this Court and cause on the 10th day of February, A. D. 1931, is hereby vacated and set aside and the judgment of the Circuit Court of the First Judicial Circuit, dated February 5, 1931, is affirmed. Costs amounting to \$14.00 to be paid by the Petitioners-Appellant.”

Dated: Honolulu, T. H., March 2, 1931.

By the Court:

[Seal] (Sgd.) J. A. THOMPSON,  
Clerk, Supreme Court. [71]

The form of the foregoing notice is hereby approved and it is ordered that the same issue *for*-with.



Dated: Honolulu, T. H., March 2, 1931.

[Seal] (Sgd.) ANTONIO PERRY,  
Chief Justice. [72]

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Wednesday, February 11, 1931.

Court convened at 10:00 o'clock A. M.

Present in Chambers:

Hon. ANTONIO PERRY, C. J., Hon. JAMES  
J. BANKS, and Hon. CHARLES F.  
PARSONS, JJ.

MINUTES OF SUPREME COURT—FEBRU-  
ARY 11, 1931—HEARING UPON MOTION  
BY APPELLEE TO SET ASIDE RE-  
STRAINING ORDER.

Appearances:

L. P. SCOTT, Deputy City and County At-  
torney, for the Motion.

CHARLES B. DWIGHT, *contra*.

In the above-entitled matter, counsel for the respective parties appeared this day at 10:00 o'clock A. M. at the Chambers of the Chief Justice *re* hearing of the above-entitled motion. When said matter was called, Mr. Scott proceeded to read the motion and then followed with his argument in support thereof.

Mr. Dwight addressed the Court stating, that the record on appeal be filed in this court Friday morning; and after discussion between the Court

and counsel, the Court rendered its oral ruling—ordered the restraining order stay.

(Sgd.) ROBERT PARKER, Jr.,  
Assistant Clerk. [73]

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Tuesday, February 24, 1931.

Court convened at 10:00 o'clock, A. M.

Present on the Bench: Hon. ANTONIO PERRY,  
C. J., Hon. JAMES J. BANKS and Hon.  
CHARLES F. PARSONS, JJ.

1989.

Error to Land Court.

In the Matter of the Application of VICTORIA  
WARD to Register and Confirm Title to  
Certain Land Situate at Kewalo, Honolulu,  
Oahu, Territory of Hawaii.

2002.

Original Petition for Injunction and Proceedings  
from Circuit Court First Circuit.

HATTIE KULAMANU WARD, LUCY KAIKA  
WARD and VICTORIA KATHLEEN  
WARD,

vs.

THE CITY AND COUNTY OF HONOLULU,  
a Municipal Corporation.

MINUTES OF SUPREME COURT—FEBRUARY 24, 1931—HEARING.

Appearances:

C. B. DWIGHT, for the Appellants.

L. P. SCOTT, Deputy City and County Attorney for Appellee.

The above-entitled causes having been ordered set for this day for argument, when *the convened*, Mr. Dwight addressed the court and proceeded to state the facts in the above-entitled causes and then followed with his argument concluding at 11:20 A. M.

At 11:21 A. M. Mr. Scott commenced with his argument and called the court's attention to Lewis Eminent Domain, Volume 1, Section 65, page 56 (what constitutes a taking), and also the provisions of Section 823 of the Revised Laws of Hawaii 1925, concluding at 11:50 A. M.

At 11:51 A. M. Mr. Dwight replied concluding at 11:59 A. M.

Case submitted and taken under advisement.

At 12:00 Noon the Court adjourned until tomorrow morning at 10:00 o'clock, Wednesday, February 25, 1931.

(Sgd.) ROBERT PARKER, Jr.,  
Assistant Clerk. [74]

Friday, February 27, 1931.

[Title of Cause—No. 1989.]

MINUTES OF SUPREME COURT—FEBRUARY 27, 1931—HEARING (CONTINUED.)

At 10:07 o'clock A. M. this day the Court handed down its written opinion in the above-entitled cause affirming the decree of the Land Court.

(Sgd.) ROBERT PARKER, Jr.,  
Assistant Clerk.

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[Title of Cause.—No. 2002.]

MINUTES OF SUPREME COURT—FEBRUARY 27, 1931—HEARING (CONTINUED.)

At 10:08 o'clock A. M. this day the court handed down its written opinion in the above-entitled cause affirming the decree appealed from.

(Sgd.) ROBERT PARKER, Jr.,  
Assistant Clerk. [75.]

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Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June, 1931.

L. P. SCOTT,  
Deputy City and County Attorney,  
Attorney for Respondents-Appellee. [76]

[Title of Court and Cause — No. 2002.]

PETITION FOR APPEAL.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the Territory of Hawaii:

Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, petitioners-appellant herein, deem themselves aggrieved by the judgment of the above-entitled court in the above-entitled matter, which judgment of the Supreme Court of the Territory of Hawaii, was made and entered on the 2d day of March, 1931, and hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from said judgment, for the reasons specified in the assignment of errors hereto attached, and they pray that this appeal may be allowed, and that a transcript of the record and proceedings upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit and that said judgment may be reversed.

[77]

Dated at Honolulu, Hawaii, this 1st day of June, A. D. 1931.

HATTIE KULAMANU WARD,  
LUCY KAIAKA WARD and  
VICTORIA KATHLEEN WARD,  
Petitioners-Appellants.

By CHARLES B. DWIGHT,  
Their Attorney. [78]

Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June, 1931.

L. P. SCOTT,  
Deputy City and County Attorney,  
For the Respondents-Appellee. [79]

[Title of Court and Cause—No. 2002.]

### ASSIGNMENT OF ERRORS.

Now come Hattie Kulamanu Ward, Lucy Kaiaka Ward and Kathleen Victoria Ward, petitioners-appellant, and file the following assignment of errors, upon which they will rely in the prosecution of their appeal in the above-entitled cause from the judgment entered herein on the 2d day of March, A. D. 1931, in the Supreme Court of the Territory of Hawaii.

#### I.

That the Supreme Court of the Territory of Hawaii erred in overruling the appeal of the petitioners-appellant and affirming the decision of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, made and entered in the 5th day of February, 1931.

#### II.

That the Supreme Court of the Territory of Hawaii erred in holding and finding that the petitioners-appellant were not entitled to the relief prayed for in their petition.

#### III.

That the Supreme Court of the Territory of Ha-

waii [80] erred in holding and finding that the petitioners-appellant were bound by the judgment in the eminent domain proceeding entitled "The City and County of Honolulu vs. Victoria Ward."

IV.

That the Supreme Court of the Territory of Hawaii erred in failing to grant the relief prayed for by the petitioners-appellant in their petition.

V.

That the Supreme Court of the Territory of Hawaii erred in failing to hold and find that the petitioners-appellant would be deprived of their private property without just compensation if the prayer of the petitioners-appellant was not granted.

VI.

That the Supreme Court of the Territory of Hawaii erred in failing to hold and find that the petitioners-appellant were not bound by the final order of condemnation in the eminent domain proceeding entitled "The City and County of Honolulu vs. Victoria Ward."

WHEREFORE, the said Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, petitioners-appellant, pray that said opinion and decision and judgment be reversed and that the Supreme Court of the Territory of Hawaii be ordered to enter a judgment sustaining the appeal of petitioners-appellant from the decree of the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Dated at Honolulu, Hawaii, this 1st day of June,  
A. D. 1931.

HATTIE KULAMANU WARD,  
LUCY KAIKA WARD and  
VICTORIA KATHLEEN WARD,  
Petitioners-Appellant.  
By CHARLES B. DWIGHT,  
Their Attorney. [81]

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Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June,  
1931.

L. P. SCOTT,  
Deputy City and County Attorney, Attorney for  
Respondent-Appellee. [82]

[Title of Court and Cause—No. 2002.]

#### NOTICE OF APPEAL.

Now comes Hattie Kulamanu Ward, Lucy Kaiake Ward and Victoria Kathleen Ward, petitioners-appellant above named, by their attorney, Charles B. Dwight, and gives notice of appeal from the judgment of the Supreme Court of the Territory of Hawaii, dismissing the appeal of the petitioners from the decision of the Circuit Judge of the First Circuit, of the Territory of Hawaii, and sustaining the decree of the said Circuit Judge, to the United States Circuit Court of Appeals for the Ninth Circuit.



Dated at Honolulu, Hawaii, this 1st day of June,  
A. D. 1931.

HATTIE KULAMANU WARD,  
LUCY KAIAKA WARD and  
VICTORIA KATHLEEN WARD,  
Petitioners-Appellant.  
By CHARLES B. DWIGHT,  
Their Attorney. [83]

ORDER ALLOWING APPEAL.

Upon filing by the petitioners-appellant, Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, of a bond in the sum of Five Hundred Dollars (\$500), with good and sufficient sureties, the appeal in the above-entitled cause is hereby allowed.

[Seal]

ANTONIO PERRY,  
Chief Justice. [84]

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Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June,  
1931.

L. P. SCOTT,  
Deputy City and County Attorney,  
Attorney for Respondent-Appellee. [85]

[Title of Court and Cause—No. 2002.]

COST BOND.

The United States of America,  
District of Hawaii.

We, Hattie Kulamanu Ward, Lucy Kaiaka Ward

and Victoria Kathlene Ward, as principals, and New York Indemnity Company of New York, as surety, jointly and severally acknowledge ourselves indebted to the United States of America, in the sum of *Five Hundred and/100* (\$500.00), to be levied on our goods, and chattels, lands and tenements, upon this condition:

WHEREAS, the above-named petitioners-appellant have taken an appeal from the Supreme Court of the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment dated and entered in said cause on the 2d day of March, A. D. 1931,—

NOW, THEREFORE, if the above-bounded petitioners-appellant shall prosecute their appeal without delay and shall [86] answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 1st day of June, A. D. 1931.

(Signed) HATTIE KULAMANU WARD,

By CHARLES B. DWIGHT,

Her Attorney.

LUCY KULAMANU WARD,

VICTORIA KATHLENE WARD,

By CHARLES B. DWIGHT,

Her Attorney,

Principals.

Reaffirmed.

NEW YORK INS. CO.  
H. A. TRUSLOW,  
Agent: Atty.-in-fact.

June 1, 1931.

NEW YORK INDEMNITY COMPANY,  
H. A. TRUSLOW,  
Agent and *Agency-in-fact*,  
Sureties.

Taken and acknowledged before me the day and  
year first above written.

SUZANNE G. FISKE,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

The foregoing bond is approved as to amount and  
sufficiency of sureties.

(Signed) ANTONIO PERRY,  
Chief Justice, Supreme Court.

The foregoing bond is approved as to form.

(Signed) L. P. SCOTT,  
City and County Attorney.

Reaffirmed 3:45 P. M., June 1st, 1931.

LUCY K. WARD,  
HATTIE KULAMANU WARD,  
KATHLENE VICTORIA WARD.

By CHARLES B. DWIGHT,  
Their Attorney. [87]

Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June, 1931.

L. P. SCOTT,  
Deputy City and County Attorney. [88]

[Title of Court and Cause—No. 2002.]

### CITATION ON APPEAL.

The United States of America,—ss.

The President of the United States of America to the City and County of Honolulu, a Municipal Corporation, and James F. Gilliland, City and County Attorney, Its Attorney, GREETINGS:

You are hereby cited and admonished to be and appear at the Ninth Circuit, to be held at the City and County of San Francisco, State of California, within thirty (30) days from the date of this writ, pursuant to an order allowing appeal, filed in the office of the Clerk of the Supreme Court of the Territory of Hawaii, wherein Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward are the petitioners and you are respondent, to show cause, if any there be, why the judgment in such appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf. [89]

WITNESS, the Honorable CHARLES EVANS HUGHES, Chief Justice of the Supreme Court of the United States of America, this 1st day of June,

A. D. 1931, and of the Independence of the United States the 15th.

ANTONIO PERRY,  
Chief Justice.

[Seal] Attest: J. A. THOMPSON,  
Clerk of the Supreme Court of the Territory of Hawaii.

Received a copy of the within citation June 1st, 1931.

L. P. SCOTT,  
Deputy City and County Attorney.

Let the within citation issue.

[Seal] ANTONIO PERRY,  
Chief Justice. [90]

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Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June, 1931.

(S.) L. P. SCOTT,  
Deputy City and County Attorney,  
Attorney for Respondent-Appellee. [91]

[Title of Court and Cause—No. 2002.]

PRAECIPE FOR TRANSCRIPT OF RECORD.  
To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Petition and chamber summons, order allowing issuance of temporary restraining order. Temporary restraining order.
2. Answer of the City and County of Honolulu.
3. Replication.
4. Decree.
5. Transcript of the evidence had and taken of the proceedings herein, and all original exhibits.
6. Minutes of the Clerk of the Circuit Court of the proceedings had and taken herein.
7. Opinion of the Supreme Court of the Territory of Hawaii, dated February 27th, 1931.  
[92]
8. Judgment on appeal of the Supreme Court of the Territory of Hawaii.
9. All *minute* in the above-entitled cause.
10. Petition for appeal.
11. Notice of appeal and order allowing appeal.
12. Assignment of errors.
13. Citation on appeal.
14. Bond for costs on appeal.
15. This *parecipe*.
16. Clerk's certificate to transcript.

Said transcript to be prepared as required by law, and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the Clerk of said Circuit Court of Appeals, at San Francisco, in the State of California, before the 1st day of July, A. D. 1931.

Dated this 1st day of June, A. D. 1931.

HATTIE KULAMANU WARD,  
LUCY KAIKA WARD and  
VICTORIA KATHLEEN WARD,  
Petitioners-Appellant.  
By CHARLES B. DWIGHT,  
Their Attorney. [93]

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Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June,  
1931.

L. P. SCOTT,  
Deputy City and County Attorney,  
Attorney for Respondent-Appellee. [94]

[Title of Court and Cause—No. 2002.]

ORDER EXTENDING TIME TO AND IN-  
CLUDING JULY 1, 1931, TO PREPARE  
TRANSCRIPT AND RECORD ON AP-  
PEAL.

IT IS HEREBY ORDERED that the time in  
which to prepare and file the record on appeal in  
the above-entitled cause be extended up to and  
including the 1st day of July, A. D. 1931.

Dated at Honolulu, T. H., this 1st day of June,  
A. D. 1931.

[Seal]

ANTONIO PERRY,  
Chief Justice. [95]

Received and filed in the Supreme Court June 24, 1931, at 2:10 o'clock P. M. [96]

[Title of Court and Cause—No. 2002.]

ORDER EXTENDING TIME TO AND INCLUDING JULY 31, 1931, TO PREPARE TRANSCRIPT AND RECORD ON APPEAL.

IT IS HEREBY ORDERED that the time in which to prepare and file the record on appeal in the above-entitled cause be extended up to and including the 31st day of July, A. D. 1931.

Dated at Honolulu, Hawaii, this 24th day of June, A. D. 1931.

[Seal]

ANTONIO PERRY,  
Chief Justice.

Approved.

L. P. SCOTT,  
Deputy City and Cty. Atty. [97]

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[Title of Court and Cause—No. 2002.]

CERTIFICATE OF CLERK OF SUPREME COURT OF TERRITORY OF HAWAII TO TRANSCRIPT OF RECORD.

Territory of Hawaii,  
City and County of Honolulu,—ss.

I, Robert Parker, Jr., Assistant Clerk of the Supreme Court of the Territory of Hawaii, DO



HEREBY CERTIFY, that the documents hereto attached and enumerated hereunder, viz.:

1. Fly-leaf and index to transcript of record;
2. Copy of petition, dated December 5, 1930;
3. Copy chambers summons, issued December 5, 1930, with return of service;
4. Copy of order allowing issuance of temporary restraining order, dated December 5, 1930;
5. Copy temporary restraining order, dated December 5, 1930;
6. Copy answer of City and County of Honolulu, a municipal corporation, by L. P. Scott, Deputy City and County Attorney, and attached thereto as exhibits thereof are the following, viz.: Exhibit "A," copy letter from James H. Boyd, Esq., Superintendent of Public Works, dated January 29th, 1902; Exhibit "B," copy of letter from James H. Boyd, Superintendent of Public Works to E. H. Wodehouse, Esq., Attorney for Victoria Ward, dated February 7, 1902, and Exhibit "C," copy of order putting plaintiff into possession of lands in the above-entitled cause sought to be condemned, dated and filed Jan. 13, 1931;
7. Copy petitioners' replication, dated and filed Jan. 13, 1931;
8. Copy decision of Hon. Albert M. Cristy, Second Judge, First Judicial Circuit, Territory of Hawaii, filed Feb. 4, 1931;
9. Copy decree entered in the Circuit Court, First Judicial Circuit, filed Feb. 6, 1931; [98]

10. Copy clerk's minutes of the Circuit Court, First Judicial Circuit;
11. Copy opinion of the Supreme Court, Territory of Hawaii, dated and filed Feb. 27, 1931;
12. Copy judgment on appeal, filed March 2, 1931;
13. Copy notice of Judgment on appeal, dated March 2, 1931;
14. Copy clerk's minutes of the Supreme Court;
15. Original petition by petitioners-appellant for appeal to the United States Circuit Court of Appeals for the Ninth Circuit, filed June 1, 1931;
16. Original assignment of errors, filed June 1, 1931;
17. Original notice of appeal and order allowing appeal, filed June 1, 1931;
18. Cost bond on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, dated June 1, 1931, for the sum of \$500.00; Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, Principals; New York Indemnity Company of New York, Surety, and United States of America, obligee;
19. Original citation on appeal, filed Jan. 1, 1931, with acknowledgement of service of a copy thereof by L. P. Scott, Deputy City and County Attorney;
20. Copy praecipe for transcript of record, dated and filed June 1, 1931;
21. Original order granting petitioners-appellant to and including July 1, 1931, within which

to prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, record on appeal, dated June 1, 1931;

22. Original order granting petitioners-appellant to and including July 31, 1931, within which to prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, record on appeal, dated June 24, 1931,—

are all full, true and accurate copies of the original documents, filed in the above-entitled cause and now on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii.

I FURTHER CERTIFY that the

23. Original transcript of evidence, volume 1, numbered 695, filed February 13, 1931;
24. Petitioners' Exhibit "A," Letter from L. M. Whitehouse, Chief Engineer, to Mrs. Victoria Ward et al., dated December 2, 1930, and
25. Respondent's Exhibit "1," certified copy of judgment and final order of condemnation in the Circuit Court First Judicial Circuit, Territory of Hawaii, in a cause entitled Law No. 11946, The City and County of Honolulu, a Municipal Corporation, Plaintiff, vs. Victoria Ward, Defendant; [99]
26. Original Land Court Record, No. 670, Three (3) Volumes,—

are the originals, and are herewith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California; excepting number 15—petition for appeal, number 16—assignment of errors, number 17—notice of appeal and order allowing appeal, number 19—citation on appeal, number 21—order extending time to prepare transcript and record on appeal, dated June 1, 1931, and number 22—order extending time to prepare transcript and record on appeal, dated June June 24, 1931, are the originals and are herewith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California,

In pursuance to the praecipe filed June 1, 1931, in the above-entitled cause, the foregoing are herewith transmitted to the Circuit Court of Appeals for the Ninth Circuit.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the above-entitled Court, at Honolulu, City and County of Honolulu, Territory of Hawaii, this 22d day of July, A. D. 1931.

[Seal]

ROBERT PARKER, Jr.,

Assistant Clerk of the Supreme Court of the Territory of Hawaii. [100]

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[Endorsed]: No. 6546. United States Circuit Court of Appeals for the Ninth Circuit. Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, Appellants, vs. City and County of Honolulu, a Municipal Corporation, Ap-

pellee. Transcript of Record. Upon Appeal from the Supreme Court of the Territory of Hawaii.

Filed July 29, 1931.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Frank H. Schmid,  
Deputy Clerk.

