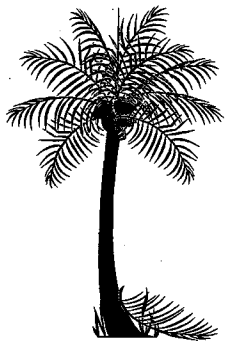
Real Property and Financial Services Section
Hawaii State Bar Association

KA NU HOU

"The News"



January 1997

FROM THE CHAIR

New Year's Greetings! We begin 1997 as the largest section in the Hawaii State Bar Association, with over 300 members, thanks to the efforts of past chair Mitchell Imanaka and Chair–Elect Sheila Sakashita. Our principal goal this year is to serve our large, diverse and growing membership. To that end, the newsletter has established a new "column" on the case of the month. This quarter focuses on the considerable attention which a federal appeals court gives to the substance and scope of easements, a subject which rarely gets to the federal courts at all. Written by a former law school dean and property professor, Preseault v. United States, 100 F.3d 1525 (1996), is a virtual textbook on the subject. We will also report on cases on the way to being decided that will affect the practice of property law. Certainly high on that list is Suitum v. TRPA, 80 F.3d 359 (1996), currently before the U.S. Supreme Court, which will revisit not only aspects of regulatory takings under the Fifth Amendment, but also the thorny issue of when a property case is ripe for decision. Much of the property bar has been appalled at the barrier which ripeness has become to bringing applied regulatory takings challenges in federal court. Many groups have filed amicus briefs urging the Supreme Court to rethink its position.

We will also call to your attention key bills from the 1997 legislative session which are likely to affect the practice of property law in Hawaii. The legislature is likely to begin addressing many critical issues, including state limits on native Hawaiian rights following the PASH decision in 1995. Thus, for example, Senator Iwase has introduced a bill to require a certificate issued by the Land Use Commission to establish such rights (only on undeveloped land) before their legal exercise.

This newsletter will also publish in its last two editions winning essays by William S. Richardson Law School students from their seminars in property and environmental law, addressing thorny legal issues in depth. Of course, the newsletter will continue to publish articles by practitioners, such as a forthcoming piece by John Jubinsky on land title issues. We hope that you will all send us ideas and further articles of interest over the next few months.

A major project of the Section, begun last year under the leadership of Deb Chun and Mark Hazlett, is the publication of a multi-volume treatise on Hawaii property law, edited by Deb Chun and Mitch Imanaka. The editors expect to substantially complete the project in time for the annual HSBA convention at year's end, at which we plan to have a one to two–day seminar on selected topics from the treatise.

We actively solicit the views, comments and participation of Section members beyond your elected Board and Executive Committee. We meet on the third Friday of each month at noon in the large conference room in the HSBA offices in the penthouse at 1136 Union Mall. The dates of the meeting, which are open to all interested persons, are set out below. Bring your lunch and join us!

With Aloha,

David L. Callies, Chair
Real Property and Financial Services Section

1997 BOARD OF DIRECTORS' MEETING DATES

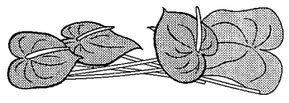
February 21, March 21, April 18, May 16, June 20, July 18, August 15, September 19, October 17, November 21, December 19

FROM THE EDITOR

Thank you to Marvin Dang and Nancy Grekin for their contributions to this issue of the newsletter. We welcome and encourage articles and suggestions to make this an informative and interesting publication. Please contact me at 524–1212 with your suggestions. The newsletter is published quarterly and the next newsletter will be mailed at the end of April. If you would like your article included in the April newsletter, please provide a copy of your article to me by March 17, 1997.

Sheila L. Y. Sakashita

Sheila L. Y. Sakashita,
Chair–Elect and Editor
Real Property and Financial
Services Section



PRESEAULT V. UNITED STATES

100 F.3d 1525 (1996)

(Selected portions of Judge S. J. Plager's majority opinion have been reprinted. Judge Plager is Circuit Judge of the United States Court of Appeals, Federal Circuit.)

A. SUMMARY

In brief, the issue in this case is whether the conversion, under the authority of the Rails-to-Trails Act and by order of the Interstate Commerce Commission, of a long unused railroad right-of-way to a public recreational hiking and biking trail constituted a taking of the property of the owners of the underlying fee simple estate. At this point we shall refer to the railroad's interest in the property by the term "right-of-way." That term is sufficient to indicate that the railroad had obtained a property interest allowing it to operate its equipment over the land involved.

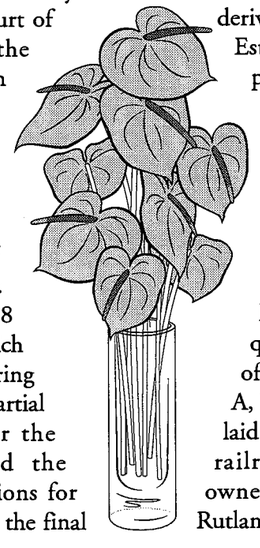
* * * * *

The facts of the case are reported in full in the several opinions already rendered in connection with this matter: the decision of the United States Court of Appeals for the Second Circuit, holding the Rails-to-Trails Act constitutional and the Preseaults without remedy, Preseault v. ICC, 853 F.2d 145 (2d Cir.1988) (Preseault I); the decision of the United States Supreme Court, on certiorari from the Second Circuit, affirming the constitutionality of the Rails-to-Trails Act on its face, but concluding that the Preseaults may have a remedy in the Court of Federal Claims under the Tucker Act for a Fifth Amendment "taking," Preseault v. ICC, 494 U.S. 1, 110 S.Ct. 914, 108 L.Ed.2d 1 (1990) (Preseault II); the initial decision of the Court of Federal Claims, Preseault v. United States, 24 Cl.Ct. 818 (1992) (Preseault 1), in which the trial judge, after hearing and argument, granted partial summary judgment for the Preseaults, and denied the Government's cross-motions for summary judgment; and the final judgment of the Court of Federal Claims, reported at 27 Fed.Cl. 69 (1992) (Preseault 2), concluding that the law was against the Preseault's claim for compensation under the Fifth Amendment, granting the Government's second cross-motion for summary judgment, and ordering judgment dismissing the complaint.

* * * * *

B. FACTUAL BACKGROUND

The Preseaults own a fee simple interest in a tract of land near the shore of Lake Champlain in Burlington, Vermont, on which they have a home. This tract of land is made up of several previously separate properties, the identities of which date back to before the turn of the century. The dispute centers on three parcels within this tract, areas over which the original railroad right-of-way ran. The areas are designated by the trial court as Parcels A, B, and C. Two of those parcels, A and B, derive from the old Barker Estate property. The third parcel, C, is part of what was the larger Manwell property.



The Rutland-Canadian Railroad Company, a corporation organized under the laws of Vermont, acquired in 1899 the rights-of-way at issue on Parcels A, B, and C, over which it laid its rails and operated its railroad. Over time the ownership interests of the Rutland-Canadian passed into the hands of several successor railroads with different names; except as it may be necessary to differentiate among them, they will be referred to collectively as the Railroad.

Meanwhile, ownership of the properties over which the rights-of-way ran passed through the hands of successors in interest, eventually arriving in the hands of the Preseaults.

* * * * *

C. THE PROPERTY INTEREST

In Preseault II, Justice Brennan writing for the Supreme Court noted the importance of determining the nature of the interests created by these turn-of- the-century transfers: The alternative chosen by Congress [the Rails-to-Trails program] is less costly than a program of direct federal trail acquisition because, under any view of takings law, only some rail-to-trail conversions will amount to takings. Some rights-of-way are held in fee simple. Others are held as easements that do not even as a matter of state law revert upon interim use as nature trails. Preseault II, 494 U.S. at 16, 110 S.Ct. at 924 (citation omitted).

* * * * *

Clearly, if the Railroad obtained fee simple title to the land over which it was to operate, and that title inures, as it would, to its successors, the Preseaults today would have no right or interest in those parcels and could have no claim related to those parcels for a taking. If, on the other hand, the Railroad acquired only easements for use, easements imposed on the property owners' underlying fee simple estates, and if those easements were limited to uses that did not include public recreational hiking and biking trails ("nature trails" as Justice Brennan referred to them), or if the easements prior to their conversion to trails had been extinguished by operation of law leaving the property owner with unfettered fee simples, the argument of the Preseaults becomes viable.

The determinative issues in the case, then, are three: (1) who owned the strips of land involved, specifically did the Railroad by the 1899 transfers acquire only easements, or did it obtain fee simple estates; (2) if the Railroad acquired only easements, were the terms of the easements limited to use for railroad purposes, or did they include future use as public recreational trails; and (3) even if the grants of the Railroad's easements were broad enough to encompass recreational trails, had these easements terminated prior to the alleged taking so that the property owners at that time held fee simples unencumbered by the easements.

The Government enriches the case with an argument that would have profound impact on future takings jurisprudence: that the general federal legislation providing for the Government's control over interstate railroad operations as enacted and amended over the years had the effect of redefining the private property rights of these owners, leaving them without a compensable interest in the land.

* * * * *

1. The Interests Created

The question of what estates in property were created by these turn-of-the-century transfers to the Railroad requires a close examination of the conveying instruments, read in light of the common law and statutes of Vermont then in effect.

* * * * *

In this undertaking we have the benefit of careful analysis by the trial judge. With regard to the two parcels, A and B, derived from the Barker Estate, the trial judge examined, as have we, the document referred to as a "Commissioner's Award," dated September 2, 1899, as well as the relevant cases and statutes of Vermont. The Commissioner's Award, which is the only document that memorializes the event, is unlike a deed in that it does not contain the usual premises (the clause describing the parties to and purposes of the transaction) or habendum clause (defining the extent of the ownership interest conveyed). Usually in a deed the habendum clause would define the exact interest to be conveyed, whether a fee simple or a lesser interest, although the premises clause sometimes serves as well.

Here, the Commissioner's Award simply confirms that "the Rutland-Canadian Railroad Company ... for the purposes of its railroad has located, entered upon and occupied lands owned by [the Barkers] ... described as follows [and here follows a metes and bounds description of the

strip of land]." The document then states that the owners of the land and the Railroad have not agreed as to the damages to be paid to the owners, that upon application by the Railroad three disinterested commissioners were appointed by the Supreme Court of Vermont, and that "according to the provisions of the Act incorporating said Company and the Statutes of the State of Vermont" the commissioners "appraise and determine the damage to the said owners of said land occasioned by such location, entry and occupation by the said Company" to be a stated sum.

* * * * *

It is clear from the relevant documents and statutes that the actions of the Railroad in this case fall under well-established Vermont laws and procedures for acquisition of rights-of-way by companies incorporated for railroad purposes. In her opinion, the trial judge concluded that, in the context of the Vermont procedure for commissioners' awards for railroad rights-of-way, and in light of the Vermont case law, cited and discussed in the trial court's opinion, "[t]he portion of the right-of-way consisting of the parcel of land condemned from the Barker Estate and taken by commissioner's award is indisputably an easement under the law of the State of Vermont." 24 Cl.Ct. at 827.

As a result of our independent examination of the question we conclude that there is little real dispute about this. That was the rule in the early Vermont cases, and continues to be the rule today.

* * * * *

Determining the provenance of the third parcel, C, derived from the Manwell tract, tests the above stated proposition even further. The operative instrument is a warranty deed, dated August 2, 1899, from Frederick and Mary Manwell to the Railroad. The deed contains the usual habendum clause found in a warranty deed, and purports to convey the described strip of land to the grantee railroad "[t]o have and to hold the above granted and bargained premises ... unto it the said grantee, its successors and assigns forever, to its and their own proper use, benefit and behoof forever." The deed further warrants that the grantors have "a good, indefeasible estate, in fee simple, and have good right to bargain and sell the same in manner and form as above written...." In short, the deed appears to be the standard form used to convey a fee simple title from a grantor to a grantee.

But did it? At the outset it should be noted that the resolution of this issue will not moot the question of the Government's potential liability for its action in creating the recreational trail, since, as held above, the A and B parcels unquestionably involved conveyances of easements and not fee simple estates, and thus the question of a taking of the Preseaults' property remains to be decided. The issue of ownership of Parcel C does go to the question of damages, however. As noted earlier, if the Manwell transfer was a conveyance in fee simple, the Preseaults would have acquired no interest in that strip of land, and can claim no damages for its later use as a recreational trail.

At trial, the Preseaults argued that, although the Manwell deed purports to grant a fee simple, the deed was given following survey and location of the right-of-way and therefore it should be construed as conveying only an easement in accordance with Vermont railroad law. The Government responded that, while it was true that survey and location of the railroad's right-of-way had occurred, no "formal" eminent domain proceedings had taken place, and therefore the deed should be taken at its face as a conveyance in fee simple. Each side cited Vermont cases to support its position. The trial court, after reviewing and discussing at length the cases and other relevant materials, concluded that "[u]nder well-settled Vermont law, the property interests in the parcel ... conveyed following survey and location by warranty deed, amounted to [an] easement[ ]...." 24 Cl.Ct. at 830.

Our independent review of the state of Vermont law on this issue leads us to conclude, despite some uncertainties in the matter, that the trial court is correct.

* * * * *

Thus it is that a railroad that proceeds to acquire a right-of-way for its road acquires only that estate, typically an easement, necessary for its limited purposes, and that the act of survey and location is the operative determinant, and not the particular form of transfer, if any. Here, the evidence is that the Railroad had obtained a survey and location of its right-of-way, after which the Manwell deed was executed confirming and memorializing the Railroad's action.

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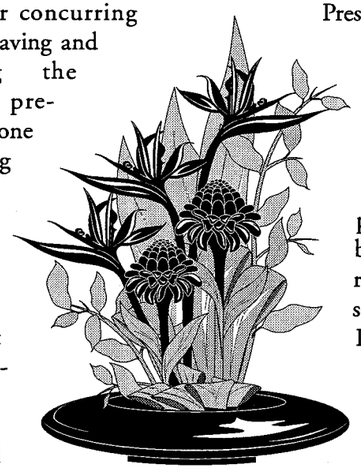
We thus conclude that fee simple title to all three parcels in dispute remained with their original owners, subject only to the burden of the easements in favor of the Railroad. Those titles passed through various hands, coming to rest eventually in the hands of the Preseaults, where they lay in 1986 when the public recreational trail was created by the Government's action.

2. The Impact of Federal Legislation

The United States argues that the property interests in Parcels A, B, and C at the time the Preseaults acquired them are defined not by the original conveyances, as understood pursuant to state law, but by the evolving enactment and implementation of federal railroad law between 1899 and the date (1980 for parcels A and B; 1966 for parcel C) the Preseaults acquired the parcels. As a consequence, says the Government, when the Preseaults bought the land whatever rights might have existed in prior owners regarding possession following abandonment of the easements no longer existed, those rights having been modified or abolished by the Federal Government's plenary authority over rail operations. There are several flaws, both of logic and of law, in this argument.

There can be no denying that the Federal Government, beginning as early as 1920, has occupied the field of regulation of interstate railroad operations, preempting any pattern of conflicting state regulation. See, e.g., Transportation Act of 1920, ch. 91, 41 Stat. 456 (1920); Rail Revitalization and Regulatory Reform Act of 1976, Pub.L. No. 94-210, 90 Stat. 31 (1976) ("4-R Act"); 49 U.S.C.. ss 101 et seq. And there can be no question that if the Federal Government wishes to create a national network of public recreational biking and hiking trails, it is within its power to do so. See Preseault II, 494 U.S. 1, 110 S.Ct. 914, 108 L.Ed.2d 1. And that power includes the power to preempt state-created property rights, including the rights to possession of property when railroad easements terminate. Id. However, as Justice O'Connor succinctly pointed out in her concurring opinion, having and exercising the power of preemption is one thing; being free of the Constitutional obligation to pay just compensation for the state-created rights thus destroyed is another. Id. at 22, 110 S.Ct. at 927.



The 1899 conveyances of Parcels A, B, and C established state-created rights in the owners of the underlying land to have unfettered possession upon the termination of the railroad's easements. If those rights were subsequently and sub rosa destroyed by Federal legislation, prior to the acquisition of the properties by the Preseaults, when did it happen? Could the Transportation Act of 1920 by itself have done it?

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The [Government's] argument goes as follows. These regulatory statutes governing railroad operations, at least the original statute enacted in 1920 authorizing ICC jurisdiction, were on the books when the Preseaults began buying the parcels at issue. As a consequence, the Preseaults should have anticipated that at some time in the future the Government might exercise its general regulatory powers in a way that could frustrate the Preseaults' interest in obtaining the land free of the easement upon its abandonment by the railroad. Thus the Preseaults could have no "reasonable expectations" that they would ever get the property free of the encumbering easement even if the railroad ceased to use it. Absent such an expectation, the Preseaults cannot complain that anything was taken from them; the title acquired by the Preseaults in effect has been modified by the history of federal regulatory enactments.

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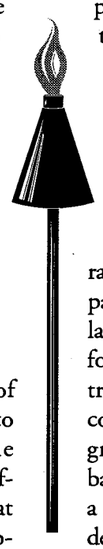
The trial court erred in accepting the Government's effort to inject into

the analysis of this physical taking case the question of the owner's "reasonable expectations." Under the governing law of the State, the Preseaults, successors in title to those who owned the property when the easements were created, owned the same title and interest as they, and are entitled to the same protections the law grants.



D. THE SCOPE OF THE RAILROAD'S EASEMENTS

We turn then to the question of whether the easements granted to the Railroad, to which the Preseaults' title was subject, are sufficiently broad in their scope so that the use of the easements for a public recreational trail is not a violation of the Preseaults' rights as owners of the underlying fee estate. Both the Government and the State argue that under the doctrine of "shifting public use" the scope of the original easements, admittedly limited to railroad purposes, is properly construed today to include other public purposes as well, and that these other public purposes include a public recreational hiking and biking trail. Under that theory of the case, the establishment in 1986 of such a trail would be within the scope of the easements presumably now in the State's hands, and therefore the Preseaults would have no complaint. On the other hand, if the Government's use of the land for a recreational trail is not within the scope of the easements, then that use would constitute an unauthorized invasion of the land to which the Preseaults hold title. The argument on this issue assumes that the easements were still in existence in 1986, and for purposes of this part of the discussion we assume they were.

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When the easements here were granted to the Preseaults' predecessors in title at the turn of the century, specifically for transportation of goods and persons via railroad, could it be said that the parties contemplated that a century later the easements would be used for recreational hiking and biking trails, or that it was necessary to so construe them in order to give the grantee railroad that for which it bargained? We think not. Although a public recreational trail could be described as a roadway for the transportation of persons, the nature of the usage is clearly different. In the one case, the grantee is a commercial enterprise using the easement in its business, the transport of goods and people for compensation. In the other, the easement belongs to the public, and is open for use for recreational purposes, which happens to involve people engaged in exercise or recreation on foot or on bicycles. It is difficult to imagine that either party to the original transfers had anything remotely in mind that would resemble a public recreational trail.

Furthermore, there are differences in the degree and nature of the burden imposed on the servient estate. It is one thing to have occasional railroad trains crossing one's land. Noisy though they may be, they are limited in location, in number, and in frequency of occurrence. Particularly is this so on a relatively remote spur. When used for public recreational purposes, however, in a region that is environmentally attractive, the burden imposed by the use of the easement is at the whim of many individuals, and, as the record attests, has been impossible to contain in numbers or to keep strictly within the parameters of the easement.

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E. ABANDONMENT

Even assuming for sake of argument that the Government and the State are correct and that the so-called "doctrine of shifting public use" is available to permit reading the original conveyances in the manner for which they argue, there remains yet a further obstacle to the Government's successful defense. The Preseaults contend that under Vermont law the original easements were abandoned, and thus extinguished, in 1975. If that is so, the State could not, over ten years later in 1986, have re-established the easement even for the narrow purposes provided in the original conveyances without payment of the just compensation required by the Constitution. See, e.g., Loretto, 458 U.S. at 441, 102 S.Ct. at 3179. It follows that if the State could not in 1986 use the parcels for railroad purposes without that use constituting a taking, then it surely could not claim the right to use the property for other purposes free of Constitutional requirements.

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Typically the grant under which such rights-of-way are created does not specify a termination date. The usual way in which such an easement ends is by abandonment, which causes the easement to be extinguished by operation of law. See generally RESTATEMENT OF PROPERTY §504. Upon an act of abandonment, the then owner of the fee estate, the "burdened" estate, is relieved of the burden of the easement. In most jurisdictions, including Vermont, this happens automatically when abandonment of the easement occurs. Dessureau, 132 Vt. at 351, 318 A.2d at 653; see Preseault 1, 24 Cl.Ct. at 831, 835-36; State v. Preseault, No. S474-87 CnC, slip op. at 5, 7 (Chittenden Super. Ct. Feb. 7, 1992), aff'd on reconsideration (Chittenden Super. Ct. July 15, 1992).

Vermont law recognizes the well-established proposition that easements, like other property interests, are not extinguished by simple non-use.

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Something more is needed. The Vermont Supreme Court in Nelson summarized the rule in this way: "In order to establish an abandonment there must be in addition to nonuser, acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence." Nelson v. Bacon, 113 VT 161, 32 A.2d 140 at 146.

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As noted, in 1970 the Vermont Railway ceased using the easement for active transport operations and used the tracks solely to store railroad cars, as the only freight customer serviced on that portion of the line had moved from the area. In 1975, Vermont Railway removed the rails and other track materials from the segment of line crossing the Preseaults' property.

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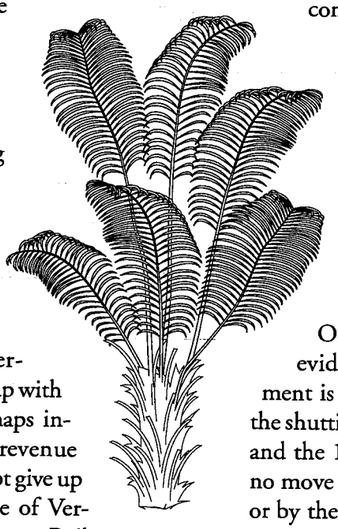
Almost immediately after the tracks were removed, members of the public began crossing over the easement. Perhaps illustrating the difficulty in getting government paperwork to catch up with reality, or perhaps indicating that revenue collectors do not give up easily, the State of Vermont and Vermont Railway, as they had done before the removal of the tracks, continued to collect fees under various license and crossing agreements from persons wishing to establish fixed crossings. In January 1976, the Preseaults executed a crossing agreement with the Vermont Railway which gave the Preseaults permission to cross the right-of-way. In March 1976, the Preseaults entered into a license agreement with the State and the Vermont Railway to locate a driveway and underground utility service across the railroad right-of-way. As late as 1991, 985 Associates (through Paul Preseault) paid a $10 license fee to "Vermont Railroad" (sic), presumably pursuant to one of the 1976 agreements. The Preseaults paid "under protest." Much of this activity suggests that, initially at least, the adjacent property owners decided it was cheaper to pay a nominal license fee to the State than to litigate the question of whether the State had the right to extract the fee. In view of all the contrary evidence of physical abandonment, we find this behavior by the State's revenue collectors unconvincing as persuasive evidence of a purpose or intent not to abandon the use of the right-of-way for actual railroad purposes.



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One uncontrovertible piece of evidence in favor of abandonment is that, in the years following the shutting down of the line in 1970 and the 1975 removal of the tracks, no move has been made by the State or by the Railroad to reinstitute service over the line, or to undertake replacement of the removed tracks and other infrastructure necessary to return the line to service.

F. THE TAKING

The Preseaults had acquired Parcel C, the Manwell Parcel, in 1966. At that time it was still subject to the railroad's easement. In 1975, following the abandonment by the railroad of the easement across Parcel C, the Preseaults owned Parcel C in fee simple free of the encumbering easement. The Preseaults acquired Par-

cels A and B in 1980. At that time the easement had been extinguished for five years; the parcels they purchased were in fee simple, again free of the encumbrance.

Ten years later, in June 1985, the State of Vermont Agency of Transportation, joined by the Vermont Railway, as lessors, and the City of Burlington as lessee, entered into a lease by which the lessors purported to lease the former right-of-way over Parcels A, B, and C to the City of Burlington for use as a bicycle and pedestrian path. A month later the Preseaults and several neighbors filed a petition with the ICC (now the Surface Transportation Board) for a determination of exemption from the jurisdiction of the ICC and for a certification of abandonment of the rail line. (The Vermont Railway had never sought ICC approval before abandoning operations on the line.) The State of Vermont intervened in the ICC proceeding, and petitioned the ICC to permit Vermont Railway to discontinue rail service and to transfer the right-of-way to the City of Burlington for use as a public trail. The authority for such action was section 8(d) of the National Trails System Act, 16 U.S.C. §1247(d), an act establishing a nationwide system of nature and recreational trails.

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The ICC in a January 1986 Order authorized Vermont Railway ex post facto to discontinue service, and approved the agreement between the State and the City of Burlington for trail use of the former right-of-way.

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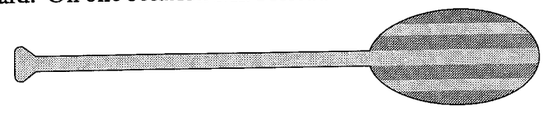
In due course an eight foot wide paved strip was established on the former right-of-way over Parcels A, B, and C. The path is some 60 feet from the Preseaults' front door. On each side of the Preseaults' driveway, where it crosses the easement, two concrete posts and one metal post were installed to block automobile traffic. The city also erected two stop signs on the path and built a water main under and along the path. The Preseaults have been unable to build on the land under the easement or to construct a driveway connecting their land through Parcels A and B to the nearest public street.

The path is used regularly by members of the public for walking, skating, and bicycle riding. On warm weekends up to two hundred people an hour go through the Preseaults' property. People using the path often trespass on the Preseaults' front yard. On one occasion Mr. Preseault



was nearly run over by a cyclist as he walked across the path.

In her concurring opinion in Preseault II, Justice O'Connor made the point that: [t]he scope of the Commission's authority to regulate abandonments, thereby delimiting the ambit of federal power, is an issue quite distinct from whether the Commission's exercise of power over matters within its jurisdiction effected a taking of petitioner's property.... The Commission's actions may delay property owners' enjoyment of their reversionary interests, but that delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights. Any other conclusion would convert the ICC's power to pre-empt conflicting state regulation of interstate commerce into the power to pre-empt the rights guaranteed by state property law, a result incompatible with the Fifth amendment. Preseault II, 494 U.S. at 22, 110 S.Ct. at 927 (O'Connor, J., concurring) (citations omitted).

Thus, if the Preseaults have interests under state property law that have traditionally been recognized and protected from governmental expropriation, and if, over their objection, the Government chooses to occupy or otherwise acquire those interests, the Fifth Amendment compels compensation. The record establishes two bases on which the Preseaults are entitled to recover. One, if the easements were in existence in 1986 when, pursuant to ICC Order, the City of Burlington established the public recreational trail, its establishment could not be justified under the terms and within the scope of the existing easements for railroad purposes. The taking of possession of the lands owned by the Preseaults for use as a public trail was in effect a taking of a new easement for that new use, for which the landowners are entitled to compensation. As discussed previously, some courts consider that the establishment of a use outside the scope of an existing easement has the effect of causing an abandonment, and thus termination, of the existing easement. See, e.g., Lawson v. State, 107 Wash.2d 444, 730 P.2d 1308 (1986). Either way, the result is the same—a new easement for the new use, constituting a physical taking of the right of exclusive possession that belonged to the Preseaults.

Two, as an alternative basis, in 1986 when the ICC issued its Order authorizing the City to establish a public recreational biking and pedestrian trail on Parcels A, B, and C, there was as a matter of state law no railroad easement in existence on those parcels, nor had there been for more than ten years. The easement had been abandoned in 1975, and the properties were held by the Preseaults in fee simple, unencumbered by any former property rights of the Railroad. When the City, pursuant to federal authorization, took possession of Parcels A, B, and C and opened them to public use, that was a physical taking of the right of exclusive possession that belonged to the Preseaults as an incident of their ownership of the land.

* * * * *

A final argument made by [the Government] is based on a 1982 state statute which authorizes, indeed instructs, the State to retain any unused railroad rights-of-way it owns for future transportation uses, and in the meantime to use them for other public purposes not inconsistent with future transportation purposes. That is what the State purports to have done, and presumably would have done with or without the statute. Defendants argue that the statute makes the action proper.

One can hardly fault the State government for complying with its law. However, the statute does not say that such actions are without consequences to the property owners, nor does it say that the property owners will not, or must not, be compensated for such actions. The statute is in fact wholly silent on the question of compensation. The issue is not whether the State or Federal governments had the power or obligation to do what they did, but whether the Constitution requires that just compensation be paid as a consequence. The existence of the statute thus adds nothing to the Government's defense.

* * * * *

G. SUMMARY AND CONCLUSION

It is important to understand what we here decide, and what remains to be dealt with in future cases. The plenary regulatory authority that the Federal Government exercises over the activities, such as cessation of service on a particular rail line, of interstate rail carriers under the Government's Constitutional powers pursuant to the Commerce Clause, U.S. Const., Art. I, §8, is not here challenged. But the exercise of that authority does not dispose of the question of the compensability of state-defined rights of private citizens who own land subject to an easement for railroad use. When state-defined property rights are destroyed by the Federal Government's preemptive power in circumstances such as those here before us, the owner of those rights is due just compensation.

We do not hold that every exercise of authority by the Government under the Rails-to-Trails Act necessarily will result in a compensable taking. Obviously if the railroad owns the right-of-way in fee simple, there is no owner of a separate underlying property interest to claim the rights of the servient estate holder. And even if an easement rather than fee title is the nature of the property interest held by the railroad at the time of the conversion to a public trail, if the terms of the easement when first granted are broad enough under then-existing state law to encompass trail use, the servient estate holder would not be in a position to complain about the use of the easement for a permitted purpose.

PROPOSED REVISION TO POWER OF SALE FORECLOSURE LAW

By Marvin S.C. Dang,
Attorney–at–Law

The Hawaii Financial Services Association ("HFSA") is proposing legislation in the 1997 session to revise Hawaii's statute regarding power of

sale foreclosures. (The HFSA is a trade association of 23 depository and non–depository financial services loan companies.)

Under the current law, there are two types of mortgage foreclosures: (a) judicial foreclosures, and (b) non–judicial foreclosures using the power of sale method ("power of sale foreclosure"). About 30 states, including Hawaii, currently have a power of sale foreclosure law. Hawaii's power of sale statute (Section 667–5, Hawaii Revised Statutes) is based on a Hawaii law enacted 123 years ago in 1874.

Most mortgage foreclosures in Hawaii use the judicial foreclosure process rather than the power of sale foreclosure process. The judicial foreclosure begins with the filing of a complaint in court, continues with the court appointment of a foreclosure commissioner who conducts the sale, and is followed by the confirmation of the sale by the court. The sale is then closed. This process takes between 6 to 9 months to complete.

On the other hand, in a power of sale foreclosure, the court is not involved in the process. The mortgaged real property is sold at a public sale after various notices are given. This process takes about 2 to 3 months to complete. Currently, power of sale foreclosures in Hawaii generally involve only time share unit foreclosures or foreclosures where the real property involved has a low market value.

Despite the lengthy and costly process of a judicial foreclosure, the judicial foreclosure is almost exclusively used in Hawaii by lenders rather than the power of sale foreclosure. One reason is because when there is a power of sale foreclosure, many title companies are reluctant to issue title insurance to the buyer of a property foreclosed through a power of sale. Many title companies believe that Hawaii's current power of sale foreclosure law is not specific enough in certain areas.

In order to address the concerns of the title companies, the proposed legislation seeks to amend the power of sale foreclosure law to provide more specific details about notices to be given, the public sale procedures, and the recordation of the conveyance document. The proposed legislation would make it clear that subordinate liens on the foreclosed property are extinguished when the conveyance document and the required affidavit are recorded at the Bureau of Conveyances and/or Land Court, as appropriate. The proposed legislation also provides that a lender who chooses to use the power of sale foreclosure process will generally not be able to obtain a deficiency judgment against the borrower. These additional provisions are safeguards which make the use of power of sale foreclosures more attractive.

Currently, lenders can choose to use either the judicial foreclosure process or the power of sale foreclosure process. That situation will continue under the proposed legislation. Of course, if a lender chooses to use the power of sale foreclosure in the appropriate circumstances, this process will be much faster and less costly than the judicial foreclosure process.

The provisions in the proposed bill will undoubtedly benefit both the consumers and the lenders. Because a power of sale foreclosure is faster and less costly than a judicial foreclosure, these savings could conceivably reduce the costs of mortgage loans.

Please contact Marvin Dang at 521–8521 if you have any questions or would like a copy of the proposed legislation.

(Marvin Dang has been an attorney in Hawaii since 1978. As a solo practitioner, he handles matters involving real estate, banking, foreclosures, collections, legislation, estate planning, and probate.)

LIMITED LIABILITY COMPANY AND UNIFORM PROBATE CODE UPDATE

By Nancy N. Grekin, Esq.

"Check–the–Box" Regulations

Until May of 1996, limited liability companies were required to comply with IRS classification rules in order to be eligible for pass–through taxation. Formation under a flexible limited liability company ("LLC") statute did not necessarily assure partnership tax treatment unless the LLC lacked at least two of the corporate characteristics of limited liability, continuity of life, centralized management and free transferability of interests. Since limited liability was always present, the entity had to lack at least two of the remaining three characteristics in order to be eligible for partnership taxation. At that, partnership taxation was not assured because a variety of typically quirky IRS interpretations of whether the entity lacked the other characteristics had evolved. As a result, the IRS was continually being asked to render Revenue Rulings interpreting individual state laws.

Finally, in May of 1996, Treasury proposed the so–called "check–the–box" Regulations which provided that any entity which was not formed under a corporation statute would be classified as a partnership, or the entity ignored, unless it elected to be taxed as a corporation. In December of 1996, the final Regulations were adopted and became effective on January 1, 1997, just in time for the Hawaii LLC law which takes effect on April 1.

The Regulations do not restrict the characteristics of LLCs in any manner, therefore LLCs can possess all of the characteristics of a corporation without risking corporate taxation. Hawaii's LLC law is a flexible statute which permits the LLC to have all the characteristics of a corporation if the members so choose when forming it. Under the Regulations, even single–member LLCs and sole proprietorships will be ignored for tax purposes. Under the classification rules which existed prior to the "check–the–box" Regulations, single member LLCs could not be taxed as partnerships since a partnership must have at least two partners. Unfortunately the Hawaii LLC law does not permit single–member LLCs so this benefit of the Regulations will not be realized in Hawaii unless we amend our LLC law to permit single member LLCs.

Conveyancing and the Uniform Probate Code

Concern among conveyancing attorneys has arisen over the "augmented estate" concept contained in the Uniform Probate Code ("UPC") which took effect January 1. This concern is the result of an erroneous interpretation of the UPC.

Under the previous UPC, a spouse had the right to "elect against the will" of a deceased spouse, however the decedent could remove assets from the decedent's estate by conveying property to a trust or to others prior to death. Under the new UPC, the value of the estate against which the surviving spouse has a right of election is calculated differently and is called the "augmented estate." The augmented estate includes the value of certain non–probate transfers by the decedent prior to death, including transfers for less than fair market value and transfers which under the prior law would have resulted in the value of the asset being excluded from the estate.

The concern which has arisen over this provision is that the assets included in the "augmented estate" might have to returned to the estate, and that attorneys should require that a spouse who does not hold title execute the conveyance of property held solely by the other spouse. This concern is unwarranted however because the UPC does not require that the assets so transferred be returned, nor is the third party owner's right in the property impaired or subject to a lien. The UPC requires only that the value of such assets be included in the augmented estate for purposes of calculating the size of the estate against which the surviving spouse can elect.

The drafters of the UPC did not intend that any dower–type rights would remain, nor that a spouse who did not hold title would be required to release an interest in the asset transferred. Indeed dower rights were abolished in the revised UPC, however, the Hawaii Legislature failed to repeal the 1977 provision which preserved dower rights existing as of July 1, 1977 when it adopted the new law. So, for the present, pre–1977 dower rights continue to exist although they are not now supplemented by other rights which must be released.

(Nancy Grekin is a shareholder and director in the law firm of Gerson, Grekin & Wynhoff and was the 1994 Chair of the Section.)

SECTION GOALS

On October 18, 1996, the Board adopted a Long Range Plan for the Real Property and Financial Services Section. We thank Grant Chun and Mitchell Imanaka for all their hard work in drafting the Long Range Plan. The idea behind the Plan is to assist the Section in setting goals that will provide direction to the Section over the next few years.

LONG RANGE PLAN

Mission Statement:

To provide section membership with opportunities for professional growth through continuing legal education. To provide a forum for discussion of issues and recent developments in the area of real property and financial services law. To serve the community as a resource for legal information and knowledge.

Goals:

- Establish and maintain continuing legal education programs that meet the needs of the legal community and instill pride in the section.

  Conduct and/or sponsor at least four seminars each year.

- Monitor new developments in the law which arise through the legislative process and assist in the clarification of issues pertaining to pending legislation.

  Submit testimony and advice, as needed, with regard to pending or proposed legislation.

- Inform the membership of noteworthy developments in the law, and inform the membership of section business.

  Publish a quarterly newsletter for section members and others, as directed by the section Board.

  Foster the open discussion of emerging issues which impact the area of real property and financial services law.

- Maintain a stable, dynamic, diverse and committed membership.

  Strive to increase membership.

  Conduct a survey of the membership to identify perceived needs and desires.

- Promote the section and its activities.

  Continue scholarship giving.

  Promote the section at all section-sponsored seminars.

- Ensure the section 's financial health and stability.

  Strive to increase membership.

  Adopt a fiscally responsible budget.

- Provide a smooth transition of each administration.

  Keep all board members and officers informed of the goings-on of the section.

DID YOU KNOW THAT...

Carl Watanabe, Acting Registrar of the Bureau of Conveyances issued a Notice dated January 16, 1997, informing the public that the Hawaii Administrative Rules, Chapter 13–16 relating to conveyances was recently amended. Some of the significant amendments include:

- Adding definitions for "Board", "Grantee", "Signature", and amending the definitions for "Record," "Recorded," and "Recordation."

- Clarifying the methods, format, and endorsement requirements for instruments submitted to the Bureau of Conveyances for recordation such as single–sided pages sequentially numbered, position of return addresses on documents, etc.

- Increasing the recordation fee from $20 to $25 for the first twenty pages and $1 for each additional page.

- Allowing counties to continue to record documents at no charge and provide for acceptance of Discover Card charges, in addition to VISA and Master Card.

- Identifying the time share interests by time share periods.

This Notice reported that in order to facilitate a smooth transition, the recordation fee increase will become effective **FEBRUARY 1, 1997.**

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WHAT HAS YOUR BOARD BEEN UP TO?

The Board of Directors of the Real Property and Financial Services Section generally holds its meetings on the third Friday of each month. The following is a brief summary of Board Minutes.

October Meeting:

◆ Mitchell Imanaka met with Grant Chun to discuss and revise the Long Range Plan for the Section. The Board adopted the Long Range Plan which will appear in the January newsletter.

◆ Randy Brooks reported that he and Harrilynn–Joy Kameenui were still in the process of reviewing and working on proposed amendments to the Section's By–Laws. Randy indicated that they have identified a number of issues that need to be addressed.

◆ Carla Poirier indicated that the Civil Rights Law Seminar was scheduled for November 15, 1996 at the Hilton Hawaiian Village.

◆ The annual membership meeting is scheduled for December 9, 1996 at 12:00 noon at the Plaza Club with Melvin Kaneshige as the guest speaker.

◆ Mitchell Imanaka reported that the Real Property Conveyancing Manual is being updated. The target completion date is the 1997 HSBA Bar Convention at which time it will be presented at a full–day seminar.

◆ Randy Brooks also reported that satellite dish companies prevailed with the FCC to allow satellite dishes up to 18 inches in condominium projects. These dishes would be allowed even though condominium documents prohibit such dishes.

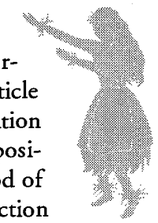
December Meetings:

◆ The annual membership meeting was held on December 9, 1996 at the Plaza Club. Melvin Kaneshige, Chief Operating Officer of Outrigger Enterprises, Inc., made an informative presentation entitled "Waikiki at the Crossroads—Stagnation or Renewal?" He discussed development plans for Waikiki focussing on the proposed new ordinance which seeks to permit existing building owners to redevelop aging inventory in Waikiki.

A Board meeting was also held on December 20, 1996 and the following matters were discussed.

◆ Marvin Dang reported that the Hawaii Financial Service Association is proposing legislation in the 1997 Session to revise Hawaii's statute (HRS §667–5) regarding power of sale foreclosures. The goal of the legislation was to address issues of concern raised by title companies.

◆ Randy Brooks reported that he and Harrilynn–Joy Kameenui have reviewed the Section's By–Laws and distributed a draft along with questions/issues for discussion. The Section discussed the draft and made several suggestions. The Committee reported that this was only a preliminary draft and further work was needed. Some of the issues and areas that need further work/discussion include: (i) whether past Chairs should continue to have voting rights; (ii) the definition of "honorary members" in Article IV; (iii) the continuation of the Vice Chair position; and (iv) method of nomination and election of directors and officers (Article IX).



◆ Nancy Grekin reported that in December 1996 the final "check–the–box" Regulations were adopted and will become effective on January 1, 1997, just in time for the Hawaii LLC law which takes effect on April 1, 1997.

◆ Ms. Grekin also reported that the website for the Section has been established and she passed out a copy of the page.

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Real Property and Financial Services Section
Hawaii State Bar Association
1136 Union Mall, PH 1
Honolulu, HI 96813

REAL PROPERTY AND FINANCIAL SERVICES SECTION HAWAII STATE BAR ASSOCIATION BOARD OF DIRECTORS -1997

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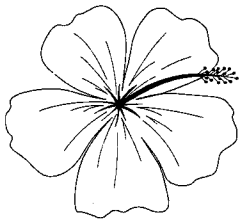

CALENDAR OF EVENTS

Feb 21	Board of Directors' Meeting 12:00 HSBA Offices
Mar 17	Deadline to submit articles for April newsletter
Mar 21	Board of Directors' Meeting 12:00 HSBA Offices
Apr 18	Board of Directors' Meeting 12:00 HSBA Offices