

## The Massie Case

### Territory of Hawaii v. Ahakuelo, et. al. (1931) Territory of Hawaii v. Grace Fortescue, et. al (1932)

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#### Introduction

The Massie affair was the last major case of Clarence Darrow's long legal career and is the most unusual, perplexing and troubling. Unlike any of his other famous cases, here Darrow was on the side of the powerful, defending four whites, including a member of an elite family, who had killed a member of minority group. For a substantial fee, Darrow was defending a group of whites who had basically lynched a nineteen-year-old Hawaiian youth named Joseph Kahahawai, who, along with four other minority youths, was falsely accused of assaulting and raping the wife of a junior Naval officer. The alleged attack on the white wife of a military officer by brown skinned Hawaiians and Asian defendants produced immediate and sustained hysteria within the white community in Hawaii and on the mainland. Careless rumors and false information about the safety of white women in Hawaii made it seem like Hawaii, especially Honolulu, was a dangerous locale with native sexual predators roaming at will and attacking white women. The truth was actually the opposite, with white women much safer in Hawaii than in many cities in the mainland. The case soon became a political firestorm as members of Congress and whites on the mainland demanded heavy-handed changes to Hawaii's legal and political systems.

With overwhelming evidence of guilt, one of the defendants basically admitted firing the gun that killed the youth, but Darrow and the defense argued it was justified under the "unwritten law" - a defense usually used by a husband who kills a man immediately after catching him having relations with his wife or raping her. Darrow, his co-counsel and the defendants were shocked when the jury returned a guilty verdict for manslaughter for each defendant. They were sentenced to ten years hard labor, but the jury had recommended leniency and due to overwhelming pressure from the mainland, Congress and powerful whites in Hawaii, the defendants never served their sentence.

Ironically, the much maligned and despised Pinkerton Detective Agency, which Darrow had battled in the Haywood trial, was on the side of justice in Hawaii. The Pinkerton Detective Agency did more than any other entity to clear the names of the minority

defendants wrongfully accused in the alleged rape of the wife of a navy officer. It was this wrongful accusation that led to the murder of the Hawaiian youth. Darrow's position in this case was at odds with much of what he stood for and with his reputation as fighter for the underdog.

On the other hand, Darrow's involvement was entirely consistent with some of his bedrock beliefs. One belief that Darrow held throughout his life was that human beings are driven by forces beyond their control, forces that are larger and more powerful than themselves. In this light, Darrow's defense in the Massie case is more understandable. The defendants who stood accused of murdering Joseph Kahahawai were driven by forces stronger than their own power and thus they were not truly guilty of murder, even if they kidnapped him and one of them pulled the trigger on the gun. Darrow was also intensely interested in the psychological factors that he believed determined human action along with a person's environment. Although Darrow defended Leopold and Loeb because he hated the death penalty, he was also interested in the case because it involved the psychology of crime and human behavior.

Darrow also took the case because he needed the money. He had lost a great deal of money during the depression, much of which he had planned to retire on. The fee he received from the Massie case ensured he could retire as he planned.

But the Massie case remains an enigma. It lies in sharp contradiction with Darrow's defense of the black defendants in the Sweet trials in Detroit in 1925 and 1926 and his support of blacks in general. Kahahawai was the darkest colored of the defendants and one account states he may have been half black. Indeed, it appears that he may have been targeted because he was the darkest colored of the rape suspects. Race played an important role in the case. Kahahawai was murdered by the defendants in what amounted to a lynching. One of the defendants, Grace Fortescue, was a well-off, elite white woman who was openly supported during the trial by other "haolies"<sup>1</sup> in Hawaii and by whites on the mainland. Kahahawai was part of the underclass minority who was clearly considered to be on the lower rungs of Hawaiian society.

The Massie case was the last major trial of Darrow's career. Although President Roosevelt appointed him to head the National Recovery Review Board in 1934, Darrow never stepped into a criminal court again. Yet, of his most important cases, it is perhaps the least well-known to the general public. Dr. David Stannard, a University of Hawaii American studies professor who wrote *Honor Killing*, the preeminent book on the whole Massie case, states that he "has never seen mention of Kahahawai in any history text outside Hawaii. Yet the murder generated such a media storm during the first half of 1932 that The New York Times ran almost 200 stories about it."<sup>2</sup> Furthermore, "Kahahawai's story . . . is almost universally absent from textbooks in this country. His

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<sup>1</sup> The term "haole" means "One who is not a native Hawaiian; a white man." OXFORD ENGLISH DICTIONARY (2nd ed. 1989).

<sup>2</sup> Lydia Lum, *A Dishonorable Killing*, DIVERSE ONLINE (Dec. 23, 2009), available at [http://www.diverseeducation.com/artman/publish/article\\_5522.shtml](http://www.diverseeducation.com/artman/publish/article_5522.shtml)

name isn't even familiar to most history faculty outside Hawaii, much less to the general public."<sup>3</sup>

### **Myles Fukunaga Murder Case**

On September 18, 1928, three years before the Massie case shook Hawaii, a terrible crime occurred on the Islands. Myles Fukunaga, a 19-year-old Japanese-American hotel worker kidnapped Gill Jamieson, a 10-year-old white student from the Punahou School. Jamieson was the son of the vice president of the Hawaiian Trust Company. Fukunaga kidnapped the young boy by tricking the school administrators into believing that the boy's mother had been hurt in an automobile accident. Fukunaga was angered because the Hawaiian Trust was going to evict his family, which included seven children, from a home they rented in Honolulu. Within about an hour of the kidnapping, Fukunaga struck the boy with a steel chisel and strangled him. He then sent a ransom note to the victim's family demanding \$10,000. The boy's father gathered the ransom money and met Fukunaga; he gave him \$4,000 but demanded to see his son before giving the rest. Fukunaga agreed but then took the money and ran off. He was quickly arrested after passing bills which were marked, and he later confessed.

The trial judge in the Fukunaga murder and kidnapping trial was Judge Alva E. Steadman, who would later be the trial judge in the Ala Moana trial. During Fukunaga's trial, "Steadman reduced the legally required ten-day psychological examination of the murder defendant to ninety minutes. The trial lasted two days, with the defense calling no witnesses, and Steadman delivered the sentence three days later: death by hanging."<sup>4</sup>

Fukunaga's appeal was heard by Judge Albert Cristy who was later to play a crucial part in the Massie case. After hearing the appeal, Judge Cristy did not "hesitate in rejecting the insanity appeal on behalf of murderer Myles Fukunaga in 1928, condemning the obviously unbalanced teenager to death by hanging."<sup>5</sup>

An interesting aspect of this tragic case is that the kidnapping and murder were directly influenced by one of Darrow's most important cases, the Leopold and Loeb trial four years earlier. Fukunaga appealed his death sentence all the way to the United States Supreme Court. In a brief filed with the Court, he described the kidnapping and murder plan:

I planned to get money. I didn't think about the kidnapping case until I went to the Library of Hawaii, I saw about the Leopold and Loeb case back in Chicago in 1924. That case I studied. The ransom letter was taken from that same letter as the boys.<sup>6</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> David E. Stannard, *HONOR KILLING* 161 (2005).

<sup>5</sup> *Id.* at 255.

<sup>6</sup> Brief of Respondent at 4, *Fukunaga v. Territory of Hawaii*, 280 U.S. 593 (1929).

Fukunaga's appeal was unsuccessful and he was hanged on November 19, 1929, in O'ahu Prison. He was buried in the Mo'ili'ili Cemetery. The Fukunaga case was one of the most notorious crimes and trials in Hawaii's history. The crime roiled racial tensions on the Island between whites and the Japanese community. Whites were outraged that a young boy was kidnapped and murdered. The Japanese community felt defensive because the murderer was Japanese. They also protested because in two previous cases, whites that murdered Japanese victims were not given the death penalty. The crime caused great tension in Hawaii:

For a moment Honolulu seemed to be on the brink either of lynch law or racial war. The moment passed almost before it was perceived. Fukunaga was tried, convicted, and hanged not as a representative of his race, but as a sad and solitary criminal. Fukunaga's crime was unsettling enough, but one way or another it could be put out of sight. This was impossible when, three years later, Thalia Massie, the twenty-year-old-wife of Tommy Hedges Massie, a submarine lieutenant stationed at Pearl Harbor, told a story which—if it was true—meant that every rule of life at the islands had been broken. And once her story became known the polite conventions and limited agreements that made it possible for men of different races to live together more or less comfortably were rendered meaningless.<sup>7</sup>

### **Hawaii and the U.S. Military**

The presence of a large population of servicemen inevitably brought with it strained relations between the local population and the military personnel. The military presence was important in terms of its size and economic impact. Pearl Harbor was the home of the Pacific Fleet and Schofield Barracks in Honolulu, a large army post. It is estimated that somewhere between fifteen and twenty thousand military personnel were stationed in Hawaii after World War I.<sup>8</sup> This boost of consumers along with construction of the Pearl Harbor dock over the course of ten years, which had a payroll of sixty thousand dollars a month, contributed significantly to the local economy.<sup>9</sup> While many servicemen in Hawaii married local girls, there was great deal of tension between the two different societies and “the dividing line between servicemen and residents could not have been more clearly marked.”<sup>10</sup> According to Gavan Daws a prominent historian on Hawaii:

An officer who was also a Southerner, . . . would have his own sense of rank and station and his own sense of the fitness of things, and he might be unable to see Hawaiians as anything but exotic Negroes, Orientals as little brown men indistinguishable one from the other, and “local boys,” especially those of mixed blood, as the embodiment of all that was worst in human nature.<sup>11</sup>

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<sup>7</sup> Gavan Daws, *SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS* 319 (1968) [hereinafter *SHOAL OF TIME*].

<sup>8</sup> *Id.* at 317.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 318-19.

The situation in Hawaii between the local population and thousands of military personnel was not ideal, but it was not nearly as bad as the racial situation between whites and blacks on the mainland. It was a situation that quickly deteriorated in 1931.

### **September 12, 1931**

The story of the most notorious criminal cases in the history of Hawaii began on the evening of September 12, 1931 when Thalia Massie and her husband Lieutenant Thomas Massie went to the Ala Wai Inn in Honolulu to socialize. The couple was having serious marital difficulties and Thalia did not like socializing with other Navy couples, which always included a considerable amount of drinking despite Prohibition. But she decided to attend anyway. Tommie ignored Thalia while he drank with friends. Around midnight, Thalia got into an argument with a Navy Lieutenant over a seat at a table. Thalia slapped him hard across the face. Sometime after this incident Thalia Massie left the inn.

### **“Are You White People?”**

About an hour later Thalia was spotted walking along an isolated and unlit portion of Ala Moana Road by several people in a car. The car was driven by Eustace Bellinger who was accompanied by his family and some friends. When they stopped, Thalia approached the car and asked if they were white people. When they said yes she said “Thank God” and got into their car. Thalia had to ask if they were white because she had very poor eyesight, although this important fact would not be known for some time to come. Her rescuers could see that her face was bruised and she had a swollen lip. She told them that she had been forced into a car and beaten up by five or six dark-skinned Hawaiians. Significantly, they asked her if anything else had happened to her, but she said no. She told them that since it was dark, she could not see the license plate number of the car and could only identify her assailants by their voices.

### **“Something Terrible has Happened!”**

Thalia’s rescuers suggested she go to the police but she refused and instead had them take her home. Later Tommy Massie called home and Thalia told him, “Tommy, something terrible has happened!” and, “Please come home at once!”<sup>12</sup> When Tommy arrived home, Thalia described a story that was indeed terrible. It would also prove terrible for the territory of Hawaii and its people. Tommy later recounted what happened when he returned home:

I found Mrs. Massie in a state of collapse and weeping hysterically. She explained everything that had happened; that she had been assaulted and had been raped.

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<sup>12</sup> The trial transcript of Clarence Darrow’s direct examination of Tommy Massie uses this phrase. Other accounts vary about the exact words Thalia used. The Pinkerton Report discussed later states that Thalia said, “Something awful has happened. Come home.”

She told me that she had been dragged into a car by five Hawaiians; that they had taken her to a place on the Ala Moana Road and criminally assaulted her.<sup>13</sup>

Tommy wanted to call the police immediately but Thalia begged him not to. But after awhile Tommy did call and several officers came out to interview Thalia. She told the first officers to arrive that while she was walking on John Ena road she was kidnapped by “a bunch of boys that appeared to be Hawaiians, in an old model Ford or Dodge touring car.” She also said the car had a top that was flapping because it was torn. The assailants had stopped the car, jumped out, started beating her, pushed her into the car and beat her as they drove down Ala Moana road. They then drove a little way off the road to rape her. She said she did not know the license number of the car and she could not visually recognize the perpetrators but could recognize their voices. Thalia said she could not recall any of her assailants calling each other by name, except that one was called “Bull.” She could not give any description of her attackers except that they were Hawaiian, which she could tell from their voices.

### **Thalia Cannot Identify License Number**

The officers closely questioned Thalia about the license number of the car, telling her that all local license plates in Honolulu had five numbers and even one or two numbers could help them develop leads. But Thalia clearly stated to several officers that she could not identify the license number of the car.

The first officer to question her described her appearance: “When I saw Mrs. Massie there was blood dripping from her top lip. The only thing I noticed about Mrs. Massie’s face was the busted lip, her hair was all messed up and she was crying.” Another officer said he did not remember her complaining about her jaw and that she could talk clearly.

Several other officers arrived at the house. Another officer described her physical injuries as consisting of blood dripping from her nose. Besides this, he only noticed that she had a busted lip and her hair was all messed up. Another officer who came to the Massie house was asked whether she complained about her jaw. He stated that he could not say she did or did not complain, but that she talked clearly and they could understand her. She told another officer that she could only remember the number of the car as having “55” in it.

There was one key omission during this interview with the police: “What Thalia didn’t say was that without her glasses, even with a full moon, she was blind as a bat.”<sup>14</sup>

### **Physical Examination**

After the police interviews, Tommy took Thalia to the hospital where she was examined by Dr. David Liu at 2:35 a.m. on September 13. Thalia told the doctor and a nurse

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<sup>13</sup> PINKERTON NATIONAL DETECTIVE AGENCY, INC., “ALA MOANA” CASE 8 (1932) [hereinafter PINKERTON REPORT].

<sup>14</sup> HONOR KILLING, *supra* note 4, at 61.

basically the same story, including that she could not recognize her assailants. The doctor did not confirm or rule out that a rape had occurred.

### **Discrepancies in Thalia's Story**

There were numerous discrepancies in Thalia's story that came to light later. Also, there were other witnesses who saw Thalia before the alleged attack whose recollection cast more doubt on Thalia's version of what happened that night.

Thalia had walked past Waikiki Park before the assault. Alice Aramaki, who worked nearby, observed a woman walk by fitting the description of Thalia. Alice saw the woman pass only about a dozen feet from her and remembered her because it was so unusual for a white woman dressed as she was in a green dress gown trimmed with fur to be in that area at that time of night. Alice also noticed a "haole" man dressed in a dark suit walking just a few feet behind the woman. The time was about 12:10 or 12:15 a.m.

Two more witnesses, Mr. and Mrs. George Goetas, saw the same woman and man walk past their car at about 12:10 a.m. The Goetas' description confirmed that the woman they saw was Thalia Massie.

The people who stopped to pick Thalia up that night, Mr. and Mrs. Eustace Bellinger and three of their neighbors, stated that Thalia adamantly refused to be taken to hospital. Mr. Bellinger, who was driving the car, recalled that Thalia stood on the passenger side of the car and when he rolled down the window for her to talk, she had to look inside the car and ask if they were white people. Mrs. Bellinger broached the subject that they were all wondering about when she asked Thalia, "Have you been hurt in any other way?" Thalia replied that she had not. The witnesses noticed that her evening gown was not torn.

### **License Plate Number 58-895**

A seemingly unimportant event that occurred at about 12:40 a.m. in Honolulu the same night Thalia was allegedly assaulted would lead to the most notorious criminal trials in the history of Hawaii. A near-miss traffic accident in which both vehicles stopped after almost colliding led to a brief altercation between Agnes Peeples, the wife of the driver of one car, and a Hawaiian youth in the other car. The youth, Joseph Kahahawai, who was riding with some friends, got out of the car and referring to Peeples' white husband yelled, "Get that damn haole off the car and I'll give him what he's looking for." Mrs. Peeples got out of the car and shoved the youth. As Mrs. Peeples turned to see who was getting out of the other car, the youth who she pushed punched her in the ear. After recovering her balance, Mrs. Peeples grabbed the youth by the throat and hit him in the face. The youths soon drove away, but not before Mrs. Peeples got their license plate number. She went to the police station and reported the incident and the license plate number of 58-895. This information was broadcast over the police radios, and about an hour later the assault on Thalia Massie was also broadcast over police radios.

### **Rush to Judgment**

Numerous police officers concluded that the youths involved in the incident with Agnes Peeples were the same youths that assaulted Thalia Massie. Some of the officers had called by telephone to the police station and received more information about both incidents. Some of these same officers that responded to the Massie home knew about the Peeples incident and the license number of the car involved. The Pinkerton Detective Agency, later hired to conduct an independent investigation would conclude, "There is no doubt that the police officers responding to these calls considered the probability very strong that the youths who had assaulted Mrs. Peeples were involved in the alleged rape of Mrs. Massie. Subsequent effort and developments seem to be confined to these five accused." The rush to judgment to connect these two events would have disastrous ramifications for the lives of several people and Hawaii in general.

While Thalia was being examined at the hospital, a report was broadcast over the police radio about the altercation, stating it involved five dark-skinned youths riding in a car with the license plate number 58-895.

### **Thalia's Memory Improves**

After the hospital examination, Tommy took Thalia to the police station where she was interviewed again, this time by John McIntosh, Inspector of Detectives. Thalia provided much greater detail this time. She seemed more convinced that the youths were Hawaiian. She also said that they assaulted her six or seven times. When asked to clarify, she said they raped her. When asked about the license number of the assailants' car she said, "I think it was 58-805. I would not swear to that being correct. I just caught a fleeting glimpse of it as they drove away."<sup>15</sup> This was one digit different than the license number of the car involved in the Peeples incident. She also said they used the name "Bull" several times and a common name like "Joe." Joe or Joseph was the first name of the youth who slapped Agnes Peeples.

It is believed that there were several ways that Thalia could have learned about the license plate number of the car involved in the Peeples incident. Tommy could hear the police broadcast from the hospital porch where he was waiting because police cars were parked there. Thalia could have heard it broadcast over the police radios while she was at the hospital, or she may have seen it written on a report when she was at police headquarters. The Pinkerton investigation also discovered that there were several people who were in contact with Thalia who knew the license number of the car involved in the Peeples incident. These people had conversations with Thalia before she told the detective that she thought the number was 58-805.

### **Suspects**

The five youths involved in the Peeples incident, now connected erroneously with the assault on Thalia Massie, were later identified as Joseph Kahahawai and Ben Ahakuelo,

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<sup>15</sup> PINKERTON REPORT, *supra* note 13, at 19.

both Hawaiian; Horace Ida and David Takai, both Japanese; and Henry Chang, who was Hawaiian-Chinese.

Joseph Kahahawai, a 20-year-old Native Hawaiian, grew up in an area of Honolulu called Iwilei, a working-class area with a red light district. Big and strong, he was considered the leader of a group of boys who called themselves the “School Street Gang,” but it was not a violent “street gang” as that phrase is recognized today. Kahahawai was nicknamed “Kalani” by other members of his St. Louis College high school football team. He did not finish high school, although he was proud of playing football on the team.

Ben Ahakuelo, 20 years old, was also Native Hawaiian. A very good athlete, he was nicknamed Flash Ahakuelo for his speed on the football field, and his boxing skills earned him a place representing Hawaii in the 1931 National Amateur Boxing Championship Tournament held at Madison Square Garden in New York.

Horace Ida, of Japanese descent, was 24 years old. He had just returned to Hawaii from California to help his mother and sister and to find work. He had been living in California, hoping to find a job. His real name was Shomatsu, but he was usually referred to by his haole name Horace or by his nickname Shorty given to him by his classmates. Horace had borrowed his sister’s car, and it was this car that would implicate all five suspects in the Massie assault.

Henry Chang was 22 years old, part Native Hawaiian and part Chinese. He had recently returned to Hawaii from Alaska where he worked on a salmon farm for thirteen months. His parents needed him home to help work on their farm.

David Takai of Japanese descent was 21 years old. Nicknamed Mack he lived near the other suspects in the Palama district. He would be the only suspect Thalia Massie failed to identify.

### **Earlier Sex Crime**

All five youths came from the lower strata of Hawaiian society and because of the Great Depression they struggled to find work. Some of them had been in trouble before and this would be unfairly emphasized in the coming legal proceedings and by the press. Ben Ahakuelo and Henry Chang had been charged with, tried and convicted of the gang rape of a teenage girl. But the actual facts of what happened in that case were far different from the alleged crime against Thalia Massie. On the evening of March 22, 1929, Ahakuelo and Chang and four other youths had consensual sex with a teenage girl named Rose Younge. Word about this got around and when Rose was confronted by her mother and Aunt, she became frightened and claimed that the boys had attacked and raped her.

The newspapers got wind of this and Rose’s self-serving version got blown into a story about a vicious gang rape by more than a dozen brutes. The public became outraged at such a brutal sex crime and legislation was proposed to make public whippings a mandatory sentence for a sex crime conviction. Amidst the public hysteria, Ahakuelo and

Chang and the four others were tried. The trial was presided over by Judge Albert Cristy. Rose came clean during cross-examination and admitted that she had consented and made up the story about being raped. After Rose's confession, the jury really had no basis for a conviction but to send a message that such immoral behavior by Honolulu's youth would not be tolerated, they delivered a guilty verdict for "assault with intent to ravish," but recommended leniency. The sentence for this offense ranged from four months to fifteen years, and Judge Cristy sentenced them to the minimum four months.

After Ben Ahakuelo served his minimum sentence, Governor Judd paroled him so he could travel to New York to represent Hawaii in a boxing tournament. The conviction of Ahakuelo and Chang would be blown all out of proportion in the weeks and months ahead. The governor's pardon of a gang "rapist" so he could travel to New York would be evidence of lax law enforcement in Hawaii. Both incidents would help fuel the misinformation and hysteria surrounding the alleged attack on Thalia Massie.

### **Arrests**

Horace Ida, one of the youths involved in the Peeples incident was arrested early that same morning. About 3:30 a.m. he was shown to Thalia at the police station under circumstances "which might reasonably be calculated to induce hasty, premature opinion and likely to produce false identification."<sup>16</sup>

Later in the day, the police brought Kahahawai, Chang, Ida and Takai to Thalia's house where she identified Kahahawai and Chang but could not identify Takai. The next day Ahakuelo and others in the group were brought to Thalia while she was at the hospital. Thalia was interviewed several times by the police over the days following the alleged attack. Some of the interviews took place after she had seen the group of boys involved in the Peeples incident. The Pinkerton Report pointed out:

It seems that the more opportunity afforded Mrs. Massie to view the accused the more details she stated she remembered of the identifying marks of her assailants corresponding with similar characteristics of the accused. The record indisputabl[y] shows that prior to seeing the five accused youths, Mrs. Massie could furnish absolutely no description of her assailants to the police but having had brought before her these five youths, understanding them to comprise the group of boys involved in the Peeples near accident, doubt as to the accuracy of the personal identification seems justifiable.<sup>17</sup>

In addition, the police took the car Horace Ida was driving on the night of the Peeples incident to the Massie home later that same day and showed it to Thalia. At the time she could not identify it as the car of her assailants. But later during the trial, she said the car shown to her was "just like the car she had seen the night before."

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<sup>16</sup> *Id.* at 21.

<sup>17</sup> *Id.* at 23-24.

Later she was able to identify Ahakuelo because of his gold tooth filling, even though earlier she had stated several times that she could not identify her assailants except by their voices.

The Pinkerton Report indicated that Thalia’s memory of at “least some of the vital details” should have been “fresh and accurate” during the police interviews at the Massie home. This is especially true since she was described as intelligent, never lost consciousness and was allegedly held captive for long enough to notice details to which she “later volubly testified.” The report goes on to state that:

It is therefore interesting to note the difference between her statements to those who talked to her immediately after the alleged occurrence and her statements of a few hours later, after information of the Peoples incident, involving several native youths, a small car, the license number of which was broadcast to police cars, had become known to many of those interested in this case.<sup>18</sup>

The Pinkerton Report stated: “Throughout all police activity on the morning of September 13, 1931” that was part of the rape investigation, “the police personnel and others evidently were proceeding exclusively on the theory that the boys involved in the Peoples affair were the same ones who had assaulted Mrs. Massie.”<sup>19</sup>

The newspapers did not identify Thalia Massie by name. On September 14, 1931, Hawaii’s two major English language newspapers, the *Honolulu Advertiser* and the *Honolulu Star-Bulletin*, reported the assault without naming Thalia Massie. Instead, the newspapers described her as a “woman of refinement and culture” and the suspects as “fiends.”

### **Something Did Happen**

What complicates the Massie case is the fact that Thalia Massie was physically assaulted by someone. If Thalia did not show any signs of a physical assault it would be easier to conclude that she made the whole story up, lied about it to the police and compounded the lies by continuing the charade during the investigation, throughout the Ala Moana rape trial and the Massie trial. But the fact is she did suffer a physical attack violent enough to cause a serious physical injury—a broken jaw that required surgery to remove a damaged tooth.

### **Medical Examinations and Treatment**

Thalia was examined by Dr. David Liu, an emergency room physician, at 2:35 a.m. on September 13, 1931, which was about two and half hours after the alleged assault. During an interview the next day at the City and County Attorney’s office, Dr. Liu stated

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<sup>18</sup> *Id.* at 18.

<sup>19</sup> *Id.* at 84.

Thalia's injuries were "marked swelling of the upper lip. Right cheek markedly swollen. Left cheek moderately swollen."<sup>20</sup>

The hospital records for Thalia's admission contain a "Progress Record" that tracks her recovery. For September 13, 1931 it states: "Patient has fracture lower jaw at the angle of the right side. Considerable displacement. Contusion left elbow. Abrasion six inches long front leg. Starting at ankle extending upward. Contusion right wrist. Patient in fair condition . . . ."<sup>21</sup>

During another examination three days later, on September 16, Dr. Porter noted:

The following injuries with discoloration not noted above were found on examination this morning. Leg below right knee front-bruise two inches, inner knee one inch. Bruise one inch front middle left thigh. Front right bruise one inch. Outer left thigh 1½ inches. Left shoulder bruise 1 inch. Right upper chest 1½ inches.<sup>22</sup>

The fracture of Thalia's right lower jaw required surgery to remove the third molar on that side of her face. The operation was performed on September 17. On September 20, Thalia was discharged from the hospital over the objections of Dr. Porter. He thought she should stay in the hospital because she had an infection in her jaw and was running a temperature.

Thalia underwent an examination and a curetment<sup>23</sup> at the Kapiolani Maternity Hospital on October 14, 1931. Dr. Larson, in charge of the laboratory at Queen's Hospital, told J.C. Fraser during an interview on July 9, 1932 that the examination found no evidence of pregnancy.<sup>24</sup>

The Pinkerton Report found that despite her injuries, there were factors indicating that Thalia had not been raped as she claimed. The condition of Thalia's dress strongly indicated that whatever happened that night did not happen as she claimed. Thalia told the police that she had been beaten and dragged on the ground, yet her dress was not torn in any way.

One of the Pinkerton Report's conclusions stated:

We have found nothing in the record of this case nor have we thru our own efforts been able to find what in our estimation would be sufficient corroboration of the statements of Mrs. Massie to establish the occurrence of rape upon her. There is a preponderance of evidence that Mrs. Massie did in some manner suffer numerous

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<sup>20</sup> *Id.* at 51.

<sup>21</sup> *Id.* at 54.

<sup>22</sup> *Id.* at 55.

<sup>23</sup> "The removal of growths or other material from the wall of a cavity or other surface, as with a curet."

<sup>24</sup> PINKERTON REPORT, *supra* note 13, at 60. Fraser was a Pinkerton detective and California Division Manager.

bruises about the head and body but definite proof of actual rape has not in our opinion been found.<sup>25</sup>

Nor is it possible to place the defendants at the scene of the crime. Despite her broken jaw, the evidence points to the conclusion that Thalia Massie was not raped, and even though she was assaulted by someone, it was not the Ala Moana defendants.

### **Fortescue Family**

Thalia Massie appeared to be part of the wealthy upper social strata of society. Her father was Major Granville Fortescue, a retired army officer. Granville Fortescue was the illegitimate son of Robert Barnwell Roosevelt, Sr. who was the brother of Theodore Roosevelt, Sr., the uncle of President Theodore Roosevelt and the great-uncle of Eleanor Roosevelt. He was not only President Theodore Roosevelt's cousin but had once been one of Teddy Roosevelt's Rough Riders and also served as an aid to him during his presidency. Thalia's mother Grace Fortescue was a niece of Alexander Graham Bell. Grace was thus an heir to the Bell Telephone Company wealth, but that was years ahead. Granville Fortescue, who fancied himself an adventurer, was disinclined to work for a living and preferred to wait until Grace inherited her potential fortune. Thus, the family was often in financial crisis despite their apparently high social status.

When Grace Fortescue heard about Thalia's assault she came to Hawaii to comfort her daughter. Grace's presence in Hawaii would turn out to be a decisive factor in the unfolding events in Hawaii.

### **Ala Moana Trial**

On October 12, 1931, the five youths were indicted for raping Thalia Massie. Their trial, which began on November 16, is officially known as *Territory of Hawaii v. Ahakuelo, et. al.*<sup>26</sup> However, it is most often referred to as the Ala Moana trial because this is the name of the street where Thalia Massie claimed she was assaulted. The trial was by far the biggest news in Honolulu. Many more people tried to observe the trial than could be admitted into the courtroom.

The case was prosecuted by deputy city-county prosecutor Griffith Wight, age forty-one. Wight, originally from St. Paul, Minnesota, was assisted by Attorney General Harry Hewitt. The trial judge was Alva E. Steadman, a thirty-five-year-old Harvard Law School graduate originally from South Dakota. The defense consisted of William H. Heen and William Pittman. Heen, who was part Chinese and part Hawaiian, was contacted by Princess Kawananakoa who requested he look into the case. The Princess had been contacted by Ben Ahakuelo's mother who begged her for help. Heen thought he needed a haole attorney for his co-counsel, so he chose William Pittman. Heen and Pittman had vigorously interviewed each of the defendants and decided to defend them after coming to the conclusion that they were innocent. Both Heen and Pittman took the case knowing

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<sup>25</sup> *Id.* at 67.

<sup>26</sup> *Territory of Hawaii v. Ahakuelo*, Crim. No. 11782 (1<sup>st</sup> Cir. Ct. Haw. 1931).

that the defendants' families did not have the financial resources to pay what the attorneys would normally charge. Another defense attorney, Robert Murakami, was appointed to defend David Takai.

The trial would take place in the Aliiolani Hale, a building originally intended to be a royal palace for King Kamehameha V who gave the building its name, which means "House of the Heavenly Kings."<sup>27</sup> It became known as the Judiciary Building after the overthrow of the Hawaiian Monarchy in 1893. In front of the building is the impressive Kamehameha Statue in honor of King Kamehameha the Great (1756-1819), one of Hawaii's greatest historical figures. Today the building is the home of the Hawaii State Supreme Court, the Hawaii State Judiciary Administrative Offices, the Judiciary History Center, and the largest law library in Hawaii. This building would be the center of attention for months to come.

The defense could not have felt comfortable having Judge Steadman preside over the trial. Judge Steadman was regarded as being "reasonably fair and honest" as a judge; however, he openly viewed whites as "natural leaders" and thus believed whites should always hold superior positions.<sup>28</sup> It was also well-known that his in-laws were prominent in the influential white community that wanted a quick conviction.<sup>29</sup> When Steadman "dismissed out of hand every pretrial motion by the defense—including a request for a bill of particulars stipulating precisely what crimes each of the men was accused of having committed—doubts as to his probably fairness in the case began to surface."<sup>30</sup> To add to the defense's worries, just before the trial, Steadman announced that it would be his last trial because he was taking a well-paid position at a subsidiary of Castle & Cook, one of Hawaii's "Big Five".<sup>31</sup>

This was no ordinary criminal case. There were extensive efforts made to secure a conviction. The Honolulu Chamber of Commerce appropriated \$5,000 to be used to "coax confessions from the defendants, among other purposes, but [this] was not publicly announced."<sup>32</sup>

## **Jury Selection**

The Organic Act of Hawaii which was in effect in 1931 required that "all juries shall hereafter be constituted without reference to race or place of nativity of the jurors" and that "[n]o plaintiff or defendant in any suit or proceeding in a court of the Territory of Hawaii shall be entitled to a trial by a jury impaneled exclusively from persons of any race."<sup>33</sup>

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<sup>27</sup> Some sources translate it as "House of the Heavenly Chiefs."

<sup>28</sup> HONOR KILLING, *supra* note 4, at 160.

<sup>29</sup> *Id.* at 161.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 220.

<sup>33</sup> An Act to Provide a Government for the State of Hawaii, 56 Cong. Ch. 339, 31 Stat. 141 (1900).

For years, juries consisted of adult white males who were literate. But by the time of the Ala Moana trial there was an almost equal number of natives and haoles in Hawaii. In addition, there were a large number of Chinese, Japanese, Portuguese and mixed race individuals eligible to serve on juries. To have such a mix of people on a jury, for “people accustomed to the conventional all-white juries on the U.S. mainland, especially in the South, would soon cause both confusion and outrage in the American press.”<sup>34</sup>

The jury that was picked to hear the case consisted of one Caucasian, one Portuguese, two Japanese, two Chinese and six mixed Caucasian-Hawaiians.

### **Thalia Massie**

Thalia Massie was the first witness to testify on November 18. She would be followed by sixty-three witnesses before the trial ended. As prosecutor Griffith Wight led Thalia through her direct testimony, there were obvious discrepancies in her story compared to what she told witnesses and investigators in the hours, days and weeks after the alleged assault.

### **Defense Cross-Examination**

The defense decided to deal very carefully with Thalia Massie. Although they had gathered evidence that strongly suggested she had not been raped, they did not want to embarrass her because they feared turning the jury against them.

Heen cross-examined Thalia in great detail, forcing her to explain many things she would have preferred to gloss over, such as the time certain events occurred. The defense cast serious doubt on Thalia’s testimony by exposing the vast improvement of her memory since the night of the alleged rape. Only the most biased observer would fail to acknowledge that Thalia constantly changed her story to provide more and more detail as time went on that conveniently implicated the defendants. On the stand Detective Harbottle, who was one of the first to interview Thalia after the attack, recounted that she could not identify her attackers except possibly by their voices, and that it was too dark for her to make out the license plate number. Another officer testified that he had parked his radio patrol car right outside the hospital examining room where Thalia was being examined by doctors; the radio was turned up to its full volume and he clearly heard the repeated broadcast about the car with license plate number 58-895 that was involved in the Peoples incident.

Under cross-examination by Heen, Thalia claimed that any conflict between her current testimony and what she said to investigators after the assault was due to the shock of the attack. She claimed that her husband handled most of the interviews with the police after the assault and she could not remember any of the crucial statements she made, such as not being able to identify her assailants because it was too dark, and describing the assailant’s car as an old touring car with a torn, flapping top. The car the defendants used that night, owned by Horace Ida’s sister, was driven to the Judiciary Building and parked

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<sup>34</sup> HONOR KILLING, *supra* note 4, at 163.

outside. The jury was taken outside to see it. It was a 1929 Model A Ford in very good condition and the top was not torn.

Several police then testified about crucial details that conflicted with what they said or wrote immediately after the alleged crime and during the initial stages of the investigation. One police officer had written in his report to the City and County attorney that while he was at the Massie home in the early morning hours after the attack, he had been given the license plate number of the car involved in the Peeples incident by telephone and had then given the license plate number to a naval officer. But on the stand, the officer denied this. Significantly, the original report could not be found. One officer testified that he heard Thalia state that the license number had "55" in it, but this was the first time he claimed this.

An officer testified that when he picked up Horace Ida, Ida admitted that they were involved in an altercation with Mrs. Peeples, but he denied attacking any white woman. The officer testified that he had not mentioned the alleged attack on Thalia Massie and Ida had denied the attack before anyone informed him about it. But the officer did not mention this incriminating statement to his superior Detective McIntosh, nor did he write it in his report. He did not disclose it to anyone until a month later when he mentioned it to prosecutor Wight, who told him to keep it a secret. The officer had no explanation of why he did not mention such an important statement immediately to his superior and failed to put it in his police report. It should have been obvious to anyone on the jury that this was suspicious. If Ida really made such a statement before being informed about the alleged attack on Thalia, it would have been very incriminating and it is very unlikely that the officer would fail to disclose it for a month.

### **Tire Tracks**

Some of the most damaging information against the police, showing their incompetence and even misconduct, involved the alleged tire tracks at the crime scene where Thalia claimed she was raped. The police concluded that tire tracks found in the mud in this area matched the tires on the car Ida drove that night. An officer who went to the crime scene to photograph the tire tracks testified that the area had been driven over so much it was not worth photographing. But the most damaging testimony came when the defense got the witness to admit for the first time that Chief Detective McIntosh had gotten a mechanic to start the car Ida had driven without a key (the key was still in the possession of the Ida family). McIntosh had driven Ida's car without his knowledge to the scene of the crime and through the mud *before* investigators arrived to look for tire tracks and other evidence. This very suspicious activity had not been reported to the prosecutor or the city attorney's office. The defense put McIntosh on the stand, and he had to admit this was true. Any jury would see this as either a deliberate attempt to frame the defendants, or at best gross incompetence that would contaminate the crime scene and force the police and the prosecution to drop allegations that tire tracks found at the scene were tied to the Ida car.

### **Thalia Describes the Alleged Rape**

The most dramatic moments in the trial occurred when Thalia, on direct examination by Wight, described the rape. Pittman objected just before Thalia described the moment she was allegedly raped because she had not identified which of the defendants she was referring to. Thalia then claimed it was Chang. Wight had Thalia clarify: “When you say assaulted, you mean he had sexual intercourse with you?” Thalia answered “[y]es.” Heen objected, but the judge overruled him. Thalia claimed she knew it was Chang because he had been holding her since she was kidnapped, had never let go and had helped drag her out of the car. Wight also asked Thalia if she had consented to the act, which Thalia absolutely denied. Thalia then said that after Chang had finished another unidentified defendant raped her, followed by Kahahawai.

Wight wanted the jury to get each lurid detail, so each time he had Thalia clarify that each of them forced her into sexual intercourse. She also claimed she knew it was Kahahawai because he sat next to her in the car and it was he who hit her in the jaw. Over Heen and Pittman’s objections, Thalia claimed she was raped four to six times. She said Chang raped her twice. Thalia appeared to be emotionally drained, and the court took a recess for her benefit. At one point during the trial, the jury was taken to the area where Thalia said she was raped.

### **Hawaii Rape Statute Requires Corroboration**

The defense argued that under the rape statute in effect in Hawaii at the time, the defendants could not be convicted because Thalia’s testimony was uncorroborated. Under the statute, “no person shall be convicted of rape, seduction or abduction, upon the mere testimony of the female uncorroborated by other evidence direct or circumstantial.”<sup>35</sup> Hawaii’s statute, which was similar to a few other state statutes, abrogated common law under which “the testimony of the prosecutrix or injured person, in the trial of offences against the chastity of women, was alone sufficient evidence to support a conviction; neither a second witness nor corroborating circumstances were necessary.”<sup>36</sup> In most states these statutes applied to “seduction under promise of marriage; to bastardy; in others, to abortion; and in others, to two or more such offenses having in common the feature that an alleged injured woman is likely to be the principal witness.”<sup>37</sup> In 1923, Iowa, Washington and Hawaii required corroboration in rape cases.<sup>38</sup>

But the defense assumed that Thalia had been raped as she claimed. Instead of challenging the rape claim itself, they focused on showing that the prosecution had charged the wrong suspects.

### **Dr. Porter**

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<sup>35</sup> Rev. Laws Hawaii § 4156 (1925).

<sup>36</sup> JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS 372 (2d ed. 1923) (1905).

<sup>37</sup> *Id.* at 375.

<sup>38</sup> *Id.* at 376-77.

Thalia's physician Navy Lieutenant Commander John Porter was the second witness called by the prosecution. Heen perceptively picked up on the fact that during his testimony, Dr. Porter said he had given Thalia opiates a little after ten o'clock on Sunday morning because of the pain from her broken jaw; she was also given opiates for several days, including those times the suspects were paraded in front of her. This would obviously affect her ability to recognize the suspects and to recall other details of the alleged assault. The defense asked Dr. Porter, "Did she know what she was doing?" Dr. Porter answered, "For the first four or five days I really don't believe she knew exactly what she was doing."

On cross-examination Dr. Porter testified that he knew the Massies, as he had previously treated Tommy Massie. While Dr. Porter gave the defense some valuable information, he withheld two crucial facts. Dr. Porter was friends with Dr. Withington, who had performed the obstetrical surgery on Thalia. Porter knew that Thalia had not become pregnant and he also knew that Thalia had very poor eyesight with out her glasses but he did not disclose this information.

### **Timeline**

The timeline of events the night of the alleged attack was a very important aspect of the trial. It was established with great certainty that the defendants were involved in the incident with Agnes Peebles between 12:35 and 12:40 a.m. on September 13, 1931. But there was considerable uncertainty about what time Thalia had starting walking away from the party. She gave different accounts ranging from 11:35 p.m. to midnight to 12:30 a.m., or even as late as 1:00 a.m. Thalia testified during the trial that she left the dance at about 11:35 p.m. and was walking on John Ena Road at 11:45 p.m.

However, several witnesses saw her between 12:05 and 12:10 a.m. at that location. Significantly, George Goeas, a haole, had read details of the alleged attack on the wife of a naval officer and had gone to the police because he believed he had seen the victim. The prosecution did not use his statement or put him on the stand because his testimony conflicted with Thalia's timeline so the defense called Goeas as a witness. Mr. Goeas testified to seeing a woman matching Thalia's description walking by at about 12:15 a.m., followed by a man who was about a yard behind her. Mr. Goeas' wife confirmed her husband's testimony and both of them identified Thalia's dress, which was a part of the evidence. Another witness, Alice Aramaki, confirmed the testimony of the Goeases.

The defense had many witnesses who testified as to where the defendants were at various times during the night of September 12 and the early morning hours of September 13. Although there was some period of time during which other witnesses could not corroborate the defendants' whereabouts, the defense convincingly showed there was not enough time for the defendants to attack Thalia in the location where she claimed she was attacked. The defense made a strong showing that the five youthful defendants could not have been the assailants. The defense showed that with the Peebles incident firmly

established as occurring at 12:35 a.m., the defendants would only have twelve minutes to get to the scene of the crime, kidnap Thalia and perpetrate the assault.

### **Police Lineup**

Defense attorney Pittman sharply criticized the way the five youths were displayed in front of Thalia in the hours and days following the crime. Pittman pointed out, “This Police Department in establishing the identify of these boys followed a procedure that has been discarded for fifty years.”

### **Frame-up**

Pittman did not accuse the prosecution and police of mere incompetency. He accused them of framing the defendants. Pittman reminded the jury that when he asked Wight to see the statements from Thalia’s first interview with the police right after the assault, Wight responded, “I won’t show you.” Pittman exclaimed, “Never in the history of twenty-five years of practice have I witnessed such a spectacle in a courtroom!” Pittman was angry over how the five youths were being railroaded into the penitentiary:

We knew from the beginning that they were framing these boys and we knew from the beginning that these boys are innocent. Thank God we have proved it regardless of the feeling against these boys . . . . They could not have been there. You cannot if you are honest and upright men convict these men, but you must on your manhood be brave and fearless and acquit them and do it promptly. If you convict them you have got to have no conscience, you have got to have no soul, you have got to be cowardly.

Pittman directly accused the police of wrongdoing, explaining “[t]he tire marks were a frame-up to show that Ida’s car had been in the Ala Moana scene, and Officer Sam Lau, who refused to photography [sic] them, should be commended for showing up this reprehensible frame-up.” He continued, “If the public cannot trust the guardians of the peace, what protection have people?”

### **Surprise Witnesses**

At one point near the end of the trial, as attorney Heen was giving his closing argument, Detective Jardine left the court to have a smoke in the corridor. He was approached by a friend who startled Jardine by telling him that the defense witnesses who testified that they saw Thalia Massie in a green dress with a man following her were mistaken. He told Jardine that the woman and man they saw walking were actually a Mr. and Mrs. George McClellan. The tipster told Jardine how to get in contact with the couple. Jardine relayed this information to City Attorney Gilliland and this development was immediately communicated to Judge Steadman, who called a recess in the trial. The judge and the attorneys on both sides met in chambers, and Jardine repeated the new information. He declined to identify the informant who had given the tip in confidence. Jardine gave a

deposition and a police officer was sent with a subpoena to find the McClellans. Judge Steadman then surprised the court by adjourning for the day.

When court resumed on Wednesday, December 2, instead of beginning his closing argument, Prosecutor Wight surprised observers by calling George McClellan to the stand. Many spectators knew McClellan through his work running sporting events like boxing and football games. McClellan related that while his wife was currently in the hospital, on the night of September 12, 1931 they had gone dancing at the Waikiki Park and afterwards walked down John Ena Road. His wife was wearing a long green evening dress.

Then the court recessed and the attorneys and jury went to the Tripler Medical Hospital where Mrs. McClellan was a patient to hear her testimony. At the hospital, a miniature courtroom was set up with chairs and Mrs. McClellan testified, giving details to corroborate her husband's testimony. Heen decided not to cross-examine the woman. Before they left, Mrs. and Mr. Goeas and Alice Aramaki were called in briefly to look at Mrs. McClellan.

When court reconvened back at the Judiciary Building, George Goeas was put back on the stand. He testified that he recognized Mr. McClellan from his work at sporting events. He also said he had seen Mrs. McClellan with her husband. Mr. Goeas strongly denied having mistaken Thalia Massie and the man following her as the McClellans.

### **Heen Resumes His Closing Argument**

When Heen resumed his closing argument, he dismissed the testimony of the McClellans. Like Pittman, he directly accused the police and prosecution of framing the five defendants:

And now I want to tell you about Officer Benton, the star witness for the prosecution and a bogus expert on tires. The whole thing's a bluff! Why didn't he include the tire marks in his first report, and when he did make a statement he said he found the tire marks at 3 o'clock in the morning? That was before the girl was even taken to the police station! Why didn't Benton mention them earlier? Because there weren't any tire marks! He thought of them later. Lau refused to become a party to this scheme. He has a heart and a conscience. Will you believe Benton or Lau?

Heen was as angry as Pittman was at the conduct of the police and prosecution:

The prosecution was caught red-handed in framing the tire evidence to send innocent men to jail. I charge Officer Benton with committing perjury on the witness stand . . . . I say there are some unscrupulous officers on the force. I agree with Pittman that the Police Department is full of cobwebs I urge a verdict of acquittal as a refutation of manufactured evidence. The defendants have not confessed. If these boys are guilty of this crime, they should be hanged. . . . But

these boys are innocent! I urge the jury to return a verdict of not guilty! I firmly believe an Unseen Power—Providence—is protecting these boys. The public clamor to crucify them on the cross of prejudice and sentiment. Be honest and courageous in reaching your verdict and return a verdict of not guilty on your first ballot!

### **Prosecutor Wight**

Prosecutor Wight followed Heen. He constantly reminded the jury that Thalia Massie had been raped: “Death is preferable to such an assault as was perpetrated. Mrs. Massie is better off dead than to go through life in the condition in which she was left by these lust-sodden beasts. And she knows it.” Wight accused the police who testified for the defense of being double-crossers. He accused the defense of attacking the victim because they were desperate in their defense of “these hoodlums.” Heen and Pittman objected each time the prosecution called the defendants derogatory names, but each time Judge Steadman overruled them. Wight aroused the defense’s anger when he told the jury that there was plenty of time for the defendants, “bestial young hoodlums in the prime of their virility” to “accomplish their purpose” with “this poor young girl.”

### **Jury Deliberations**

After receiving jury instructions the jury retired at 8:42 p.m. on Wednesday, December 2 to begin deliberations. The jury was under tremendous pressure:

The jury was charged with weighing the veracity of a female victim who was young, white, socially prominent, and married to a United States Navy officer against that of defendants who were poor, unemployed, dark skinned, and of dubious social standing. Two of the five men had previous criminal convictions (however undeserved) for “assault with intent to ravish,” while a third had been convicted of assault and battery.<sup>39</sup>

The defense managed through diligent work and trial strategy to seriously undermine the prosecution’s case. But it was far from certain whether they had been able to overcome the social and political pressure the jury faced.

### **“Dynamite Charge”**

During deliberations, there were reports of altercations among the jurors and two jurors did get into a fight. Heen asked for a mistrial, which was denied. The fight might have been caused by a personal grudge unrelated to the trial. When the jury could not reach a verdict after three days of deliberation, Judge Steadman insisted they deliberate further by giving them an “Allen charge,”<sup>40</sup> defined as “[a] supplemental jury instruction given by the court to encourage a deadlocked jury, after prolonged deliberations, to reach a

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<sup>39</sup> HONOR KILLING, *supra* note 4, at 165.

<sup>40</sup> Allen v. United States, 164 U.S. 492 (1896).

verdict.”<sup>41</sup> The Allen charge is controversial and it has been referred to by defense attorneys as a “dynamite charge; dynamite instruction; nitroglycerine charge; shotgun instruction; third-degree instruction.”<sup>42</sup>

But on the fourth day, after having taken one hundred ballots in total and despite the “dynamite charge,” the jury was still unable to reach a verdict. The judge declared a mistrial on December 6, 1931. It was the longest jury deliberation in Hawaii’s history. During a press conference jurors revealed that the biggest spread in the ballots was seven for conviction and five for acquittal. Several months after the trial, Judge Steadman gave an interview with a U.S. Justice Department official in which he admitted that he kept the jury deliberating because he wanted a guilty verdict.<sup>43</sup>

### **Aftermath**

The aftermath of the Ala Moana trial reverberated throughout Honolulu and the mainland. The mistrial outraged Navy personnel and white citizens in Hawaii and government officials throughout the United States.

### **Walter Dillingham (1875 - 1963)**

Before, during and after the Ala Moana case, Walter F. Dillingham was one of the most influential white businessmen in Hawaii. Born in 1875, he took over leadership of the Oahu Railway and Land Co. when his father died in 1918. Later he would found or lead numerous important businesses in Hawaii, including the Hawaiian Dredging Co., Young Brothers, Bishop Trust Co. and the Oahu Sugar Company.

Through the work of his Hawaiian Dredging Company, Dillingham significantly changed the shoreline of Honolulu. One of his most significant operations was the draining of the Waikīkī wetlands in the early 1920s and creation of the Ala Wai Canal, where the Hawaii Convention Center was built on a bank. He also played a key role in the creation of Pearl Harbor to support the Navy’s role in the Pacific Ocean.

Dillingham held racist attitudes against the non-whites in Hawaii. He was naturally inclined to believe Thalia Massie and assume that the five Ala Moana defendants had raped the young white wife of a naval officer. At one point while testifying before Congress, Dillingham stated that “God had made the white race to rule and the colored to be ruled.”

The Ala Moana mistrial greatly upset the Hawaiian business community. Walter Dillingham headed a newly-formed “emergency committee” of the Honolulu Chamber of Commerce that was given a charge by the business community to clean up the police department and pursue “legal and other assistance” to track down evidence that could be

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<sup>41</sup> BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>42</sup> *Id.*

<sup>43</sup> HONOR KILLING, *supra* note 4, at 217.

used in a retrial.<sup>44</sup> Just one day after the mistrial, the chamber publicly posted a \$5,000 reward for information leading to a conviction.<sup>45</sup>

Criticism of the mistrial was swift and uncensored. Even though Judge Steadman had done more than he should have to try and obtain a guilty verdict, he was blamed by the Navy Subcommittee for giving the jury instructions that led them towards an acquittal.

### **Admiral Yates Stirling, Jr. (1872 - 1948)**

When the Ala Moana crisis shook Hawaii, Admiral Yates Stirling, Jr. was the commander of the 14<sup>th</sup> Naval District, which included the Hawaiian Islands and strategically important Pearl Harbor. Yates Stirling's father was a naval officer. Stirling Jr. followed in his father's footsteps and graduated from the United States Naval Academy in Annapolis in 1892. He received numerous promotions and by 1930, Stirling had achieved the rank of rear admiral. Stirling was leery of imperial Japan and believed that it would attack Hawaii. He retired from the Navy before his prediction became a reality in the attack on Pearl Harbor in December 1941.

Stirling held racist attitudes towards non-whites. Upon first hearing the news that the young white wife of one of his junior officers had been kidnapped and assaulted, Stirling commented, "[O]ur first inclination is to seize the brutes and string them up on the trees. But we must give the authorities a chance to carry out the law and not interfere."

The allegations of rape along with the mistrial stoked rumors that Hawaii was not a safe place for Navy wives and families. The rumors grew until it was taken as fact that women, more specifically white women, were not safe in Hawaii. Despite any evidence besides Thalia Massie's story, some whites in Hawaii and many whites on the mainland believed that white women were often raped on the Islands, with the perpetrators evading justice.

During this period Navy wives reported receiving prank phone calls from male callers and Navy personnel reported being insulted when off base. Some Naval personnel even reported being followed while driving. These incidents took on new meaning because of the crisis. Governor Judd dismissed these reports:

There probably were crank calls and minor annoyances. But these might occur anywhere at any time, and would arouse no great concern until associated with a time of crisis. I examined reports of Navy cars being trailed by hoodlums, and it seemed to me they were clearly the product of overwrought imaginations. I still think so.<sup>46</sup>

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<sup>44</sup> *Id.* at 220.

<sup>45</sup> *Id.*

<sup>46</sup> LAWRENCE M. JUDD & HAWAII: AN AUTOBIOGRAPHY, 177 (1971) [hereinafter JUDD & HAWAII].

But Admiral Stirling took the reports seriously and given his senior position, he greatly influenced the opinions of decision-makers in Hawaii and those in political power in Washington, D.C. According to Governor Judd:

From that hour on, however, Admiral Stirling seemed intent upon justifying his position that Hawaii was peopled largely by individuals of a very low class, whose presence was, somehow or other, un-American and a danger to defense and a hazard to the womenfolk of the defenders. A whole series of messages was sent by Stirling to the Navy Department to build up this position. Copies of these were supplied by the Secretary of the Navy to the Secretary of the Interior. And these, in turn, were sent to me. I read them with worried fascination.<sup>47</sup>

Like many whites, Stirling blamed the mistrial on racial bias:

I was informed reliably that the vote of the jury began and remained to the end, seven for not guilty and five for guilty, the exact proportion of yellow and brown to whites on the jury . . . . In Hawaii the majority of every jury will be Asiatic or mixed blood with a sprinkling of Hawaiians and whites. Ordinarily, civil justice can be obtained. In this extra-ordinary case the emotion of the races had been aroused to a pitch where sympathies were in favor of the accused men. Conviction thus was impossible.<sup>48</sup>

#### **40 Rapes**

Among the messages from Stirling that Judd came across was the assertion that in the past year there were hospital reports of forty rapes; in several rape cases the perpetrator was on parole after just four months.

Admiral William V. Pratt, Chief of Naval Operations, sent a letter to the Navy Department discussing the situation. Pratt's views were based on Stirling's report and Pratt repeated the charge that there had been 40 cases of sexual assault perpetrated against white women in Hawaii in the past year. Pratt's letter included the observation: "The American men will not stand for the violation of their women under any circumstances. For this crime they have taken the matter into their own hands repeatedly when they have felt the law has failed to do justice." Of course the most extreme act of "taking matters into their own hands" was lynching.

The report that 40 white women had been sexually assaulted would become one of the most sensational and destructive rumors feeding hysteria about the case on the mainland.

#### **Mainland News Reports**

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<sup>47</sup> *Id.*

<sup>48</sup> YATES STIRLING, SEA DUTY THE MEMOIRS OF FIGHTING ADMIRAL 250-51 (1939).

Numerous newspapers and magazines added to the misinformation, hysteria and racial atmosphere surrounding the situation in Hawaii. *Time Magazine* reported in an article titled *Lust in Paradise* a few weeks after the mistrial:

Honolulu, paradisaic melting pot of East & West, was tense with trouble last week. Yellow men's lust for white women had broken bounds. Short sharp disorders brought the tramp of soldiery through the streets. A tremor of apprehension ran through Hawaii's motley population— coolies from China, great Russians from Siberia, little Japanese crowded off their homeland, Portuguese, Porto Ricans, Koreans, Filipinos, sugar and pineapple workers all.<sup>49</sup>

### **Crime in Hawaii**

Despite the uproar throughout mainland USA, the crime rate in Hawaii was remarkably low. Even more importantly, sexual assaults of white women by native Hawaiians or Asian men simply did not occur.

### **Rumors about Thalia and Tommy Massie**

After Thalia Massie was identified as the alleged rape victim, rumors began circulating impugning her reputation. Although those supporting the defendants wanted to believe that Thalia had not been raped by the defendants, she had been attacked by someone, so alternate theories became the source of numerous rumors. During this time some navy wives were friendly with the “beach boys” of Waikiki. This led to a rumor that Thalia had an illicit relationship with one of the five suspects and thus the attack stemmed from a tryst gone wrong.<sup>50</sup> But none of the suspects fit the definition of a “beach boy” as that term was used in the 1930s and it is very unlikely that Thalia and any of the five defendants knew each other.<sup>51</sup> Another rumor that swirled through Honolulu was that Tommy Massie had found Thalia and Jerry Branson, a fellow Navy officer, in a compromising position, threw Branson out of the house and beat Thalia, which resulted in her broken jaw.

The rumors had another effect on subsequent events. Dr. Porter advised Tommy to take his wife and leave Hawaii. The doctor volunteered to ask Admiral Stirling to transfer Massie because of the adverse effects staying would have on both husband and wife’s health. But Tommy insisted on staying so he could clear his wife’s name. If Tommy and Thalia had followed their doctor’s recommendation, subsequent events would likely have turned out much differently and Clarence Darrow would never have gone to Hawaii.

### **“Kalihi Gang”**

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<sup>49</sup> *Lust in Paradise*, TIME, Dec. 28, 1931, available at <http://www.time.com/time/magazine/article/0,9171,753207,00.html>.

<sup>50</sup> Peter Van Slingerland, SOMETHING TERRIBLE HAS HAPPENED 80 (1966).

<sup>51</sup> *Id.* at 81.

Another event that fanned the flames of discontent was the discovery of a crude note in the Submarine Base Petty Officers' Mess which declared "[w]e have raped your women and will get some more" and was signed by the "Kalihi Gang." News of this find quickly spread through the Navy community and prompted a Navy Admiral to alert his superior in Washington that Honolulu was unsafe for white women, advising that dependants not visit during a scheduled naval maneuver. Later the note from the Kalihi Gang was dismissed as a hoax, and it may even have been left by naval personnel.

### **Defendant Kidnapped and Beaten**

The Ala Moana defendants were released on bail to await a retrial. They could not be held because they were not charged with a capital crime. Just twelve days later, on December 12, a group of white men kidnapped Horace Ida at gunpoint as he came out of a bar in Honolulu and drove him to the well-known Pali cliff on Oahu. Here he was stripped and beaten until he appeared to be unconscious. Trying to extract a confession from Ida, they severely beat his face and back, likely with belts and belt buckles. Ida eventually made it to a police station and while he was unable to identify his attackers, it was strongly suspected they were Navy men. The kidnapping and assault of Ida was a serious crime. But it would pale in comparison to what was coming.

### **Lax Law Enforcement**

One of the criticisms of Hawaii that added to the anger over the alleged assault of Thalia Massie and lack of conviction in the Ala Moana trial was that Hawaii's law enforcement was far too lax. This was one of the few criticisms that had some merit, although it really had nothing to do with whether Thalia Massie was assaulted or whether the Ala Moana defendants were guilty and escaped just punishment in the first trial.

Hawaii had a much more relaxed approach to law enforcement and punishment compared to the mainland and this is best exemplified by the administration of Oahu Prison. According to one source, "Oahu Prison was not run according to the rules used by any other prison on earth."<sup>52</sup> In 1931, it was under the administration of the High Sheriff of the Territory of Hawaii, John C. Lane, who was half Hawaiian and half white, and who ran the prison "in a most lackadaisical manner."<sup>53</sup> The prisoners often worked on municipal projects around Honolulu:

It was a standing joke (though true) that jailbirds who did not return from their work assignments to the prison by 6 P.M. were locked out overnight and, hence, denied dinner. Of course, if the prisoners wanted to spend their nights or weekends out on the town, they were more than welcome to do so as long as they checked in and out in the log kept for Lane's inspection.<sup>54</sup>

### **New Year's Eve Party at Oahu Prison**

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<sup>52</sup> *Id.* at 135.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 135-36.

The unusually relaxed administration at Oahu Prison apparently worked to a certain extent. But an incident that occurred just after New Year's Day in 1932, right in the middle of the post-Ala Moana mistrial controversy, further stoked the accusations that Hawaii's law enforcement was seriously defective and Hawaii was dangerous for white women. During the New Year's Eve party at Oahu Prison, where both the jailers and the inmates were drinking, two prisoners, Daniel Lyman, convicted of murder, and Lui Kaikapu, convicted burglary, were chosen to leave the prison to buy more alcohol. But after they left the prison they decided to stay out for awhile and the pair split up, with each going their own way. Kaikapu stole a car on New Year's Day. On January 2, Kaikapu broke into the home of a white couple while the wife was home alone and asleep. He tied her up, raped her and burglarized the house. He was arrested that evening. No doubt because the Ala Moana controversy had Hawaii so tense, within twenty-four hours Kaikapu was tried, convicted and sentenced to life in prison. A large-scale search was initiated to apprehend Lyman.

### **Grace Fortescue**

It appears that besides Tommy Massie, no one was angrier about the mistrial of the Ala Moana defendants than Grace Fortescue. She went to Judge Steadman and begged him to jail the defendants during the wait for a retrial. Grace later stated that Steadman agreed that the defendants were dangerous, but under Hawaiian law bail could only be denied for a capital offense, and rape was not punishable by death. She then asked Admiral Stirling to request that Governor Judd keep the defendants in jail, but Judd was away in Washington. Stirling then demanded that Raymond Brown, the acting governor, do so. Brown gave Stirling the same response—that under the law the defendants could not be jailed, but assured him that authorities were working on putting together a retrial. But he also told Stirling that without new evidence the defendants could not be convicted.

### **Kidnapping Plan to Obtain a Confession**

The rumors about Thalia and Tommy were greatly distressing Tommy and his mother-in-law Grace Fortescue. They eventually planned a way to stop the rumors and help ensure that the Ala Moana defendants would be convicted when they were retried. An enlisted sailor named Albert "Deacon" Jones who had been assigned to guard the Massie home while Tommy was away informed Tommy that Horace Ida had confessed when he was kidnapped and beaten. Tommy brought this up with Eugene Beebe, a private attorney who was assisting the prosecution in the Ala Moana case. Beebe, who several years earlier had help defend Myles Fukunaga, explained that even if Ida had confessed the confession was not legally obtained and would never hold up in a court of law.

Tommy would later testify that he asked Beebe if they could use as evidence a written confession from one of the defendants; Beebe told him it yes "provided no force was used and no marks would show on the one who gave it." Beebe also told Tommy that the Ala Moana case was "in such a condition now that it would be necessary to have a confession."

Tommy and Grace Fortescue began to plan how they could obtain a confession. Tommy had heard a rumor that Joseph Kahahawai was close to cracking under pressure, so they decided to target him. But they had to get him alone so they could scare him into confessing. Grace had heard that the defendants, as a condition of their release, had to report daily, but at separate times, to a probation officer at the Territorial Building. Grace went to the building and learned that Kahahawai was to report at 8:00 a.m. each morning. Grace cut out a picture of Kahahawai published in the *Star-Bulletin* and also learned his address from the newspaper. She drove to the poor neighborhood where Kahahawai lived but decided there would be no way to kidnap him from that area. Some sources imply that Kahahawai may have been selected because he was the darkest-colored of the defendants. At least one source states that he was half Hawaiian and half black. But it is not clear if this is why Kahahawai, who had distinct Polynesian features, was targeted. Horace Ida, the first defendant to be kidnapped and brutally assaulted, was Asian.

Grace and Tommy got Jones and another sailor named Edward Lord to assist in the plan. They also needed to have an independent witness to verify that Kahahawai confessed, so Grace invited Ray Coll, an editor for the *Honolulu Advertiser*, to wait at the house she was renting where they would bring Kahahawai.

### **Fake Summons**

They decided to try and trick Kahahawai into getting into a car alone after he left the Territorial Building. To do this, Grace manufactured a crude fake summons by printing on a piece of paper:

TERITORIAL POLICE  
MAJOR ROSS COMMANDING  
SUMMONS TO APPEAR  
KAHAHAWAI, JOE

In addition to misspelling “Territorial” Grace cut out a paragraph from a newspaper and pasted it to the fake summons. The paragraph contained this totally irrelevant text:

Life Is A Mysterious And  
Exciting Affair, and Any-  
Thing Can Be a Thrill if  
You Know how to  
Look for it and  
What to Do With  
Opportunity  
When it Comes

To complete their amateur forgery, they affixed a seal from a diploma Tommy had received for completing Chemical Warfare School.

## The Murder of Joseph Kahahawai

On the morning of January 8, 1932, Tommy Massie, Grace Fortescue and Albert Jones drove to the Judiciary building in two automobiles; one was a rented Buick sedan driven by Tommy. That same morning, Joseph Kahahawai, who was out on bail while awaiting retrial, went to the Judiciary building to report to his probation officer as required. He was accompanied by his cousin, Edward Ulii. Kahahawai, born on December 25, had just celebrated his twenty-second birthday two weeks earlier. When Kahahawai and Ulii came out of the building they were met by Jones who showed Kahahawai the crudely forged summons that purported to require him to appear before Major Ross, the High Sheriff of Honolulu. The summons tricked Kahahawai into getting into the Buick with Jones at the wheel. Tommy got into the same car which soon drove away. Grace followed in the other car. Ulii was well aware of the kidnapping of Horace Ida and he had heard the strangers referring to the summons, but when he saw that the cars did not go towards the police station, he contacted the police. Edward would recount that one of the abductors wore a false mustache. It was believed that this was Tommy Massie, but Massie would later deny it. The police department sent out a call for police officers to be on the lookout for the Buick.

The kidnapers drove to the cottage Grace had rented and where Lord was waiting for them. Despite the invitation, Ray Coll was not there because he was ill. He would miss one of the biggest stories in the history of Hawaii. Alternatively, his presence might have prevented one of the most sensational crimes in the history of Hawaii. The kidnapers took Kahahawai into the cottage. What happened over the next several minutes is not known for certain, but apparently they tied Kahahawai to a chair and questioned him. One of the group members held a .32 caliber pistol on Kahahawai. Very soon after entering the cottage, Kahahawai was shot through chest. The bullet went through the lower part of his left lung and stopped near his spine. He died from massive internal bleeding. There would a great deal of controversy over who actually fired the fatal round.

The kidnapers turned murderers put Kahahawai's body in the car Grace had rented and pulled down the shades to hide the interior. They started driving towards Koko Head to dispose of the body. Less than half an hour after the broadcast to be on the lookout for the Buick, Detective George Harbottle, who had worked on the Massie rape case, spotted a Buick matching the description with its shades pulled down and gave chase. Harbottle tried to get the female driver to pull over but she refused, even after he fired two shots in the air. He eventually forced the car to the side of the road. He placed the occupants under arrest - Grace, who was driving, Tommy Massie and Lord. Then he opened the back door of the car and saw "a white bundle tied with rope. A human leg was sticking out from under the covering and it was cold. Kahahawai was on his way to being thrown in the sea."<sup>55</sup>

It is believed that Kahahawai's killers were heading to what is known as the "Blow Hole," crevice in the volcanic rock near Koko Head. When waves hit the crevice,

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<sup>55</sup> SHOAL OF TIME, *supra* note 7, at 324-25.

tremendous pressure blasts water up like a geyser. If they had managed to throw Kahahawai into this natural formation, his body might never have been found.

At the Massie household, investigators found Thalia and Albert Jones, who was drunk. Jones had the magazine for a .32 caliber pistol with eight bullets in it as well as the phony summons that lured Kahahawai to his death. Prior to this, Thalia's sister Helen Fortescue had hidden the pistol used to kill Kahahawai. At Grace's cottage, investigators found evidence of the murder, including the same type of rope used to tie Kahahawai's body, the newspaper photos of Kahahawai, bloodstains and signs that someone had tried to clean up the crime scene.

The evidence was overwhelming, and the trio found with the body and Albert Jones were charged with first degree murder. They were booked, fingerprinted and their mug shots were taken as would be done with any other suspects. But the similarities ended there. Admiral Stirling intervened and demanded that the custody of these suspects be handed over to the Navy. After some negotiations, Harry Hewitt, the Attorney General of the Territory of Hawaii, agreed to let the Navy take custody on the condition that it was clear that the civil authorities in Hawaii had jurisdiction and the defendants would be made available when called for. The authorities in Hawaii knew this was risky because the Navy could have spirited the defendants away to the mainland and beyond the reach of law enforcement in Hawaii.

Stirling had the defendants housed on the docked ship USS Alton that was used for visiting VIPs. They were treated more like heroes than felons by the Navy and by many on the mainland. There was so much outpouring of support, especially for Grace Fortescue, that the entire top of the ship and other available spaces were covered in flowers sent by well-wishers. Soon the guards had to refuse to accept any more flowers because there was no place to put them.

The remaining four Ala Moana defendants were taken to jail for their own protection.

### **Joe Kahahawai is Buried**

It is hard to overestimate how traumatic the murder of Joe Kahahawai was for the people of Hawaii, especially those of the Hawaiian race. His funeral was held on January 10, 1932 and more Hawaiians attended his funeral than any other on the Islands since the last queen of Hawaii died in 1917. It has been described as the largest funeral in Hawaii for someone not of royal blood. While his body lay at a funeral home for viewing, perhaps several thousand came to pay their respects.

At the funeral, the victim's father who was also named Joseph Kahahawai said his son was a good boy. He had asked his son repeatedly about the Ala Moana charges: "I asked Joseph to take an oath before God and he said 'Daddy, I swear before God that I never did anything wrong.'"

An estimated two thousand people attended the funeral at the Catholic Cathedral of Our Lady of Peace. Among those who viewed Kahahawai body were his four co-defendants who had been released from jail to attend the funeral. After mass, many mourners followed the funeral procession to the Puea Cemetery. As many as three thousand people may have come to the cemetery.

### **Judge Cristy and the Grand Jury**

The whites who murdered Joseph Kahahawai almost escaped without facing trial. Even though the evidence was circumstantial, the defendants clearly kidnapped and murdered Kahahawai. But a majority of the members of the grand jury convened to examine the evidence were strongly set against returning any indictments in the case. It was essentially one person, Judge Albert M. Cristy, who was responsible for getting the grand jury to indict the defendants.

The grand jury convened on Thursday, January 21, 1932. Based on the names of the grand jury members it appears that nineteen were Caucasian, one was Hawaiian and one was Chinese. The grand jury began deliberations on Friday. Early on during their deliberations, several jurors sent for Judge Cristy because they had questions. It was clear from the questions that the grand jury was looking for reasons not to indict. Judge Cristy re-emphasized the need for them to be impartial. Later the grand jury foreman indicated that the twelve grand jurors had voted that no bill should be presented against any of the defendants for first degree murder or kidnapping. This of course would mean that the four defendants would get away with murder.

### **Judge Cristy Refuses No-Bill**

Instead of accepting the report and dismissing the grand jury, Judge Cristy went to the grand jury room and gave them a legal sermon about their duties. He said:

If a crime had been committed and the identity of the criminals known—that is criminals in the sense of the technical provisions of the law, and the Grand Jury for reasons refused to under their oath to present an indictment therefore, I present to you the question of anarchy in this community. Are you willing to take responsibilities for that situation? You know our racial structure. Whether that is involved in any particular case and in the particular case before you is for your consideration, and not mine. But, really gentlemen, it is a very serious situation which I want you not to act hastily on, and to reflect upon. If there is any juror who cannot conscientiously carry out his oath of office, he should resign immediately from the Grand Jury.

Judge Cristy then adjourned the grand jury until the following Tuesday. One of the grand jurors, E.E. Bodge, asked Judge Cristy, ““Do I understand you are not accepting this report?”” Judge Cristy responded:

There has been nothing presented to me. The Court refuses to accept any further report until the Grand Jury deliberates further upon matters of serious import to the Territory. After Tuesday I will talk to you. I will ask you to seriously deliberate upon it until you return for your deliberations at 10 o'clock on Tuesday next.

The next Tuesday, Judge Cristy excused grand juror E.E. Bodge from the grand jury because Mr. Bodge had just accepted an appointment to the newly-created Police Commission. Mr. Bodge stated he was willing to serve in both positions, but he agreed with the judge's decision because it would be improper to do so.

Judge Cristy then admonished the grand jurors:

Incidents occurring outside of the Grand Jury room and before your consideration of the present case began, indicate to the mind of the Court the possibility that one or more of you entered upon the Grand Jury session in the matters now pending with your minds so fixed and determined on personal view of law and fact that you were prepared to prevent any indictment in matters now pending so far as you are able to, notwithstanding what the evidence might be and notwithstanding what the Court should advise the jury the law might be.

### **“Unwritten Law”**

Judge Cristy assured them that he was not making any accusation against any jury member. But he wanted to make sure they were clear on their duties. They were to judge the credibility of witnesses and the existence of prima facie facts, but they must take the law from the Court regardless of what they individually thought the law should be. Judge Cristy was worried that juror members would side with the defense to justify the kidnapping and murder as an honor killing. He told them that under the laws of the Territory of Hawaii no man can kill another unless in legitimate self defense or unless as a police officer justified by official duties. Judge Cristy explained:

Under the laws of the Territory the taking of human life by private citizens, in the nature of a lynching or its equivalent, is prima facie murder. . . . all who take part in the commission of any offense or being present, aid, incite, countenance or encourage others thereto shall be deemed principals therein.

### **Lay Aside all Race Prejudice**

Judge Cristy then told them the prosecuting attorney was going to present them with three indictments for further deliberation—first degree murder, second degree murder, and kidnapping. Before leaving he said to them:

I ask you gentlemen, as representatives of the Government and the community, to lay aside all race prejudice, to rise above such trivial matters, and apply

yourselves coolly and impartially to the question of whether this government shall exist, and how it shall exist.

A juror then asked Judge Cristy if he could make a public statement that the jury was adjourned last Friday and was not on recess because the newspapers were reporting this incorrectly. Judge Cristy said that the current proceedings were open and there were news reporters present so there was no reason the facts should not be known.

Later that morning the jurors asked Judge Cristy some more questions. After answering their questions he assured them there was no intention by the Court to “coerce the minds of this jury” and the Court was under a solemn duty, as were the jurors. He also told them:

Further, let’s get down to common sense on the situation. You are all religious men, as I know, and God has not left this world for an instant, and if you will sit with your God and your conscience under the evidence, your duties will clarify themselves in your own minds.

### **Right to No Bill?**

A juror insisted they had voted on the indictments on Friday and the foreman was directed to report them to the judge: “I thought that was finished. He reported to you in your Chambers. Have we a right to bring in a bill or no bill?” Judge Cristy responded that he was not trying to coerce their consideration of the facts, however:

No matter is finished by this Grand Jury until a report is received in open Court and filed, and this Court refused at the last session to receive and file a report, feeling it was necessary for the Jury to further consider the facts and the law, so there is no finished business until the jury is ready to make a report in open Court and the Court receives and files that report.

### **Not a Threat But Deliberations Are Not Completely Sealed**

A juror then stated that in regard to Judge Cristy’s comments on their being “God-fearing men, and of intelligence and common sense” that “[i]t seems to me that under our oath as jurors some of [us] do not seem to understand or purposely evade our oath of office.” Judge Cristy responded:

Those matters I will have to leave with you in your own consciences. Frankly, this is a thing for your information, and you will please not take it as a threat from the Court, but a thing you are entitled to know, — The deliberations of this jury are not completely sealed from any investigations; that if it appears from this Court on proper motion that there has been a situation requiring action by the Court, the Court can require evidence to be taken as to what transpired in the Grand Jury room. So, don’t for a moment go under the misapprehension there is no way in the world by which matters which are pertinent to the administration of justice

cannot be investigated and disclosed. I am not saying that in any way for the purpose of attempting to coerce you, but so you may understand that the Grand Jury is a body for one purpose and one purpose alone,— that is to listen to the evidence and perform the duties necessary under the evidence . . . .

### **Manslaughter?**

Another juror asked if they voted a “no bill” on all three charges whether they should then vote on manslaughter. Judge Cristy told him that a manslaughter indictment was not before them. Another juror asked if after the Grand Jury was discharged whether any member has “the right to show the records as to how he stood, as a protection for himself and the community in which he lives?” Judge Cristy responded:

The only answer I can give to you on that is that the community and the Court know that it requires the vote of twelve men to bring in an indictment, and if, for reasons that are legitimate and not within the instructions the Court has given this jury, the jury is unable to get twelve men to do what might thereafter appear to be a miscarriage of justice, the juror will have to content himself for the time being with the fact and knowledge that the community has not gone insane, and will recognize the fact that there are some on one side and some on another, and any censure that might be raised, if censure was necessary, which the Court is not indicating any opinion on, it would be of course directed towards those who had committed the censorious act. Whether ultimately the facts as to the sheep and goats, if that condition prevailed, were opened, is a matter for time hereafter to tell and not for the time being.

Judge Cristy then informed the juror that it would be a misdemeanor punishable with a fine to disclose the grand jury procedures.

The grand jury took another vote and it came out the same as the previous week, except that it was nine for and eleven against indictment because one jury member had been dismissed by the judge. But when the judge came to hear the vote, the jury foreman told the judge that he did not have a report to make. They broke for lunch and during this break one of the jurors read an editorial in the *Star Bulletin* which stated that given the evidence, an indictment was the only proper action by the grand jury. This editorial was passed to the other jurors. Another vote was taken, but still there was no indictment and the jury foreman again refused to make a report. Finally, a vote was taken with 12 for and eight against indicting the defendants for murder in the second degree.

### **Judge Cristy Requests Legal Research**

After the Fortescue defense team filed a motion to quash the indictment, Judge Cristy took the unusual step of writing a letter dated January 30, 1932 to the Lawyers Cooperative Publishing company. He asked if their research department could research the legality of his actions before the grand jury, including “[t]he authority of the Court to refuse to receive a report of a ‘no bill’ and call upon Grand Jurors for further calm

reflection so that their judgment ultimately cannot be exercised on the ground of ignorance of the law or hasty judgment.” He also asked about the power of the court to resubmit the matter to the same grand jury as he had done, whether his directions to the jurors were “coercive in a legal sense,” and what the judge’s rights are under these circumstances. Judge Cristy also asked whether the defendants’ attorneys had the right to examine minutes of the Grand Jury’s earlier deliberations, when they had attempted to return “no bills.”

### **Divergent News Coverage**

Very soon after the alleged rape, a divide developed in the public’s judgment of the Ala Moana defendants, with the primary determinate being the source of information. The majority of whites and naval personnel believed the accused to be guilty because their sources of information were the English newspapers and the “haole grapevine.”<sup>56</sup> The two main papers in Hawaii, the *Star-Bulletin* and the *Honolulu Advertiser*, were very vocal in their coverage, believing the Ala Moana defendants were guilty of raping Thalia and needed to be convicted. Whites or haolies, as they were often called in Hawaii, got their news from these two newspapers.

In sharp contrast, native Hawaiians, Japanese, Portuguese and other non-whites believed the men were unjustly accused and they got their news from the *Hawaii Hochi* or the “non-haole grapevine” which included some members of the police department.<sup>57</sup>

### **Hawaii Hochi**

The *Hawaii Hochi* was a Japanese newspaper that also published an English language section. It provided news coverage of the Massie case that was decidedly different from the mainstream haolie press. On September 14, 1931, the *Hawaii Hochi* was the first newspaper to publish Thalia Massie’s name; it was also the first to hint that the five defendants might not have committed the crime. Another source states that Thalia was never mentioned by name in the local papers but that her identity had become a “widely-held secret.”<sup>58</sup> Interestingly, George Wright, the editor of the *Hawaii Hochi*, was Caucasian.

People’s opinions of the controversy depended on their own beliefs and where they got their news:

One segment of the population of Honolulu was getting information as it developed and was gathered by reporters; while the other—by far the larger—segment was getting only what the *haole* newspapers saw fit to print, based entirely on the theory that the five arrested ‘gangsters’ were the guilty parties.<sup>59</sup>

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<sup>56</sup> HELEN G. CHAPIN, *SHAPING HISTORY: THE ROLE OF NEWSPAPERS IN HAWAII* 154 (1996) [hereinafter *SHAPING HISTORY*].

<sup>57</sup> *Id.*

<sup>58</sup> SOMETHING TERRIBLE HAS HAPPENED, *supra* note 50, at 80.

<sup>59</sup> THEON WIGHT, *RAPE IN PARADISE* 120 (1966).

Not surprisingly, whites and non-whites differed in how they saw the controversy: “Because of the class and ethnic segmentation of the community, both communication of information and its interpretation were so structured that two major competing definitions of the situation began to emerge.”<sup>60</sup> The news that a white woman had been attacked, followed by the trial of the suspects and then the murder of Kahahawai was the perfect news story:

From the moment the major dailies broke the story, it was a trial by newspapers and an index of race relations in Hawai’i. The *Massie* case was a combination of the ‘moral disorder’ story, which is a hallowed tradition in journalism wherein those not expected to misbehave do so, and a sensational murder, the most fascinating of all crime stories. Also, the event occurred when the country was gripped by the Great Depression and served as a diversion for the public.<sup>61</sup>

### **Race Card**

Instead of sticking to the facts, the white press in Hawaii and the mainland press played the race card, which only served to further anger whites. Even if they believed Thalia’s story, the press went well beyond reporting just the facts or allegations to support Thalia’s version of what happened. After Kahahawai was murdered, *Time* began its report about the case with this sentence: “From the steps of Honolulu's Court House month ago Joseph Kahahawai Jr., accused with four other young native bucks of raping a Naval officer's wife last September, was lured to his death.”<sup>62</sup>

During the murder trial, *Time* reported: “Mrs. Thalia Fortescue Massie, the big-blue-eyed, 20-year-old wife of the naval lieutenant. She it was who last September had been roughly seized and ruthlessly raped by a band of five brown-skinned bucks near the Ala Moana Road.”<sup>63</sup>

Perhaps no news source outdid the Hearst publications. The following editorial appeared on the front page of all Hearst’s newspapers:

MARTIAL LAW NEEDED TO MAKE HAWAII SAFE PLACE FOR DECENT WOMEN.

The situation in Hawaii is deplorable. It is becoming or has become an unsafe place for white women. Outside the cities or small towns the roads go through jungles and in these remote places bands of degenerate natives or half-castes lie in wait for white women driving by. At least forty cases of such outrages have

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<sup>60</sup> Peter James Nelligan, *Social Change and Rape Law In Hawaii*, 234 (1983) (Ph.D. dissertation).

<sup>61</sup> SHAPING HISTORY, *supra* note 56, at 152.

<sup>62</sup> “*Beautiful, Singing Land*”, TIME, Feb. 08, 1932, available at <http://www.time.com/time/magazine/article/0,9171,743087,00.html?iid=chix-sphere>.

<sup>63</sup> *Mottled Jury*, TIME, Apr. 18, 1932, available at <http://www.time.com/time/magazine/article/0,9171,743557,00.html>.

occurred and nobody has been punished. . . . The whole island should promptly be put under martial law and the perpetrators of outrages upon women promptly tried by court martial and executed. Until such drastic measures are taken, Hawaii is not a safe place for decent white women and not a very good place for self-respecting civilized men.

### **Women on Juries - National Woman's Party (NWP)**

The notoriety of the Massie case prompted the National Woman's Party (NWP) to get involved in an attempt to use the case to further their political goals. During the 1930s, the NWP fought to "make jury service for women a Federal right."<sup>64</sup> That this struggle was even necessary was a surprise because most people thought that after the passage of the Nineteenth Amendment, which was ratified on August 18, 1920 and gave women the right to vote, women would automatically be able to serve on juries. This was the case in many states, but "ten years after the Nineteenth Amendment, only about half the states allowed women to serve on juries. Rural southern states like Virginia and populous urban states like Massachusetts all denied women the right to serve on juries."<sup>65</sup>

The NWP decided that a National Equal Rights Amendment was necessary to achieve "full legal equality of women and men, insuring women the right to serve on juries across the nation."<sup>66</sup> In 1931, the NWP turned to finding a test case involving an all male jury. Their first test case involved a "Boston bootlegger, Genevie Welosky" who was convicted by a jury of men for violating a Massachusetts prohibition statute.<sup>67</sup> The Massachusetts jury service law then in effect provided that qualified voters could serve as jurors, but in actual practice Massachusetts only allowed men to serve on juries. The NWP had doubts that the case would result in a favorable verdict, but they reluctantly approved trying it. They lost the appeal before the Supreme Judicial Court of Massachusetts on statutory interpretation grounds and to a lesser extent on equal protection grounds.<sup>68</sup> They appealed the decision to the United States Supreme Court but the Court denied certiorari.<sup>69</sup>

Right after the Welosky case, the NWP looked to the Massie case in Hawaii, which was generating so much sensational news, as a way to keep the topic of women's rights in the public's consciousness.<sup>70</sup>

After Grace Fortescue and the others were charged with murder, Sarah Pell, who served as Finance Chair of the NWP, contacted NWP leaders and urged them to take a stand on the prosecution of Grace Fortescue by demanding she be tried by a jury of her peers -

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<sup>64</sup> Richard Hamm, *Mobilizing Legal Talent for a Cause: The National Woman's Party and the Campaign to Make Jury Service for Women a Federal Rights*, 9 AM. U. J. GENDER SOC. POL'Y & L. 97 (2001) [hereinafter *Mobilizing Legal Talent*].

<sup>65</sup> *Id.* at 102.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 103.

<sup>68</sup> *Commonwealth v. Welosky*, 276 Mass. 398, 177 N.E. 656 (Mass. 1931).

<sup>69</sup> *Welosky v. Massachusetts*, 284 U.S. 684, 52 S.Ct. 201 (1932).

<sup>70</sup> *Mobilizing Legal Talent*, *supra* note 64, at 111.

which would include women.<sup>71</sup> The NWP moved quickly and just two days after Pell's telegram, the party authorized Elsie Hill to contact the Fortescue family.<sup>72</sup> A meeting was held the next day during which the NWP representatives "suggested that Grace Fortescue's family urge Grace to challenge the jury array, provided them with cookie-cutter constitutional arguments on female jury service, and asked them to secure the approval of the party's entry into the case by her counsel."<sup>73</sup>

Later Grace Fortescue decided to rely on the legal talent of Clarence Darrow and his co-counsel George Leisure, thus ending the NWP's attempts to enter the case.

### **Clarence Darrow and Women on Juries**

Given his reputation for progressive reform in matters of race and inequality, many might believe that Clarence Darrow would have fully supported women as jurors. But Darrow did not favor women serving as jurors, especially in criminal trials. Clarence Darrow was a product of his time and he occasionally expressed views about the ability of women that would be controversial today. In a 1936 article published in *Esquire Magazine* titled *How to Pick A Jury* Darrow made many remarks that would be deemed politically incorrect years later. Speaking about women serving on juries he wrote:

Then, too, there are the women. These are now in the jury box. A new broom sweeps clean. It leaves no speck on the floor or under the bed, or in the darkest comers of life. To these new jurors, the welfare of the state depends on the verdict. It will be so for many years to come. . . . Women still take their new privilege seriously. They are all puffed up with the importance of the part they feel they play, and are sure they represent a great step forward in the world. They believe that the sex is co-operating in a great cause. Like the rest of us, they do not know which way is forward and which is backward, or whether either one is any way at all. Luckily, as I feel, my services were almost over when women invaded the jury box.

### **Lynching**

The sharp contrast between how many whites and blacks viewed the murder of Joseph Kahahawai is illustrated by how the National Association for the Advancement of Colored People (NAACP) covered the story. Many whites viewed the murder as a justifiable "honor killing" or at least thought it understandable that Thalia's husband would avenge the alleged rape of his wife. An NAACP report from that time states: "The only lynching recorded thus far in 1932 by the N.A.A.C.P. is that of Joseph Kahahawai of

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 111-12.

<sup>73</sup> *Id.* at 112.

Hawaii, on January 8.”<sup>74</sup> An editorial in *The Nation* stated that “lynch law in Hawaii is no more to be condoned than lynch law in Mississippi.”<sup>75</sup>

Walter Dillingham prepared a private memorandum describing the situation in Hawaii when Kahahawai was killed, writing that “Honolulu was brought up standing, facing for the first time a lynching.”<sup>76</sup> It appears that Dillingham was against lynching, but not because of any deep moral reason:

Unless one has lived in this community one cannot appreciate the importance of the example to the people that they have no right to take the law into their own hands. While this may be condoned under conditions which prevail where whites are in the majority, it would be a hazardous thing to give any such recognition of lynch law in our community where it is vital to stress the necessity of abiding by the laws of the country.<sup>77</sup>

### **Darrow Enters the Controversy**

In late February, 1932 it was reported that some friends of Grace Fortescue had been negotiating with Clarence Darrow to have him defend Grace and the others. But Darrow did not accept immediately.

### **Money**

Money no doubt heavily influenced Darrow’s decision to take the case. In his 1932 autobiography Darrow mentioned that he lost a lot of money during the Great Depression. Before Darrow agreed to take the case, he let the defendants know he expected the substantial fee of \$40,000 plus expenses, and even more was needed to hire an assistant.<sup>78</sup> A fee of \$40,000 in 1932 is equal to about \$622,000 in 2009.<sup>79</sup> Darrow would earn this sum for about two months of work.

Dudley Field Malone, one of Darrow’s co-counsel during the 1925 Scopes trial, volunteered to serve as co-counsel for \$10,000 but Grace Fortescue did not want to or was unable to pay this sum, and Darrow would not let it come from his \$40,000 fee, so Darrow sought a less expensive assistant.<sup>80</sup> Darrow was able to get George S. Leisure, who was a new partner in the Manhattan law firm of Wild Bill Donovan, to work on the case for free. Leisure, considered a brilliant attorney, had worked as the chief of the U.S. Criminal Division in New York. Darrow wired the defendants that he would take the case, and this news was immediately published by the press. But “almost immediately, the great man had second thoughts” because while the mainstream media was “solidly,

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<sup>74</sup> IN SEARCH OF DEMOCRACY: THE NAACP WRITINGS OF JAMES WELDON JOHNSON, WALTER WHITE, AND ROY WILKINS (1920-1977), 147 (1999).

<sup>75</sup> 134 THE NATION 90 (Jan. 27, 1932).

<sup>76</sup> Memorandum from Walter F. Dillingham 5 (May 17, 1932).

<sup>77</sup> *Id.* at 9.

<sup>78</sup> HONOR KILLING, *supra* note 4, at 298.

<sup>79</sup> CPI Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited April. 18, 2009).

<sup>80</sup> HONOR KILLING, *supra* note 4, at 300.

even hysterically” on the side of the defense, the liberal and black press was not.<sup>81</sup> These were publications that Darrow read and whose readership had supported him in the past. In addition, letters and telegrams “came by the bushel, from friends and from total strangers who had long admired his work, asking how he could possibly consider taking on the defense of whites who had lynched a native Hawaiian.”<sup>82</sup> Moreover, Darrow had just recently withdrawn from the defense in the notorious Scottsboro case because the International Labor Defense (ILD), the legal branch of the Communist Party of the United States of America, had taken over the case to use it for political purposes.

## **Sweet Trials**

Interestingly, Darrow’s defense in the Detroit Sweet trials in 1925 and 1926 came to influence his eventual defense of the defendants in the murder of Kahahawai. About a week after he publicly agreed to defend the accused in Hawaii, he wrote to Harry Elmer Barnes that he had changed his mind and would be informing the defendants that he could not represent them. He told Barnes that race would inevitably come up in the trial, and he had so long defended blacks and “foreigners” that the defense needed counsel who did not have Darrow’s history with regard to racial issues.<sup>83</sup> Darrow asked Barnes to keep this confidential.

When he wrote to Grace Fortescue’s brother-in-law Darrow enclosed a copy of his final summation to the jury in the 1926 Henry Sweet trial as evidence of his views on race, to demonstrate that it would be inappropriate for him to defend these defendants.<sup>84</sup> But Darrow’s correspondence with the defense did not have its intended effect. The defense wrote back that he was correct in his position on race, and they wanted that attitude brought into the trial.<sup>85</sup> As a result, Darrow changed his mind again and decided to go to Hawaii to act as lead counsel.

During the train ride to San Francisco, where Darrow, his wife Ruby, and defense counsel would board a ship to Hawaii, Darrow made frequent press conference appearances in which he discussed various topics - except the Massie case. He even refused to discuss the case with George Leisure, his co-counsel, during their time on the trains and the boat. On March 24, 1932, Darrow, his wife Ruby, George Leisure and T. Louis Johnson of the U.S. Navy, who would assist the defense, boarded the luxury liner Malolo for the trip to Hawaii. Darrow was one month away from his seventy-fifth birthday.

Clarence Darrow’s autobiography *The Story of My Life* was published in 1932 and went on sale before the Massie case, so it did not include a chapter about Darrow’s experiences in Hawaii. The book was on sale in Hawaii when Darrow landed and helped to generate even more interest in his arrival. A 1996 republication of Darrow’s autobiography

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<sup>81</sup> *Id.* at 300-301.

<sup>82</sup> *Id.* at 301-302.

<sup>83</sup> *Id.* at 303.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 304.

includes 26 pages he wrote about the Massie trial. Interestingly, this is longer than the 17 pages Darrow wrote about the Leopold and Loeb trial.

In this addition to his autobiography, Darrow recalled why he went to Hawaii:

Many times I have been asked why I went to Honolulu. I was not sure then, and am not sure now. I had never been to that part of the Pacific; I had heard of and read about its unusual charm, and longed to sometime see it . . . .

But the more I thought of those islands in the Pacific that I had so long wanted to see, and the more I investigated the strange and puzzling case, the more I felt that I had better go. I had read the press reports and I knew that the elements connected with it were absent from most criminal cases. To any one having in mind a composite picture of a criminal, as most men see him, such a picture would be as far from resembling my clients as anything could be. All of them were as high-minded, honest, kindly, and sympathetic as it is possible to find. It was obvious that there was no sordid or common motive back of the weird tragedy that time and fate had woven around their lives. It was a study in psychology beyond any question, and such cases have always interested me.

From the first, like most persons with imagination, as I read the accounts of the tragedy I wanted these people to win. Then, too, the co-called “depression” had swept away practically all the savings that I thought I had for keeping me comfortable to the end, and I needed the fee. This was not at all large, but it was sufficient. I do not know the relative importance of these motives, but I know that these reasons, and others, took me to Honolulu.<sup>86</sup>

The Massie controversy was one of the biggest news events in the United States in 1931 and 1932. The only story more sensational was the kidnapping and murder of 20-month-old Charles Lindbergh, Jr., the son of the famous aviator Charles Lindbergh. The boy was kidnapped on March 1, 1932 and he was found murdered on May 12, 1932.

### **Grace Fortescue Interviewed**

Darrow’s discomfort with the racial aspects of the case was likely made worse when the *New York Times* published an interview with Grace Fortescue, conducted by Russell Owen on the ship where the defendants were held. In her first interview since the murder of Joe Kahahawai, Grace Fortescue displayed an amazing lack of remorse for someone facing a murder trial. Darrow could not have been pleased with how cavalier she was in discussing her part in the death of the young Hawaiian. She told Owen, “I have slept better since Friday, the 8<sup>th</sup>—the day of the murder—than for a long time.”<sup>87</sup> She added,

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<sup>86</sup> CLARENCE DARROW, *THE STORY OF MY LIFE* 459 (1996) [hereinafter *STORY OF MY LIFE*].

<sup>87</sup> Russell Owen, *First Interview with Mrs. Fortescue; Gives Her Reactions to Honolulu Tragedy*, N.Y. TIMES, Feb. 8, 1932, at 3.

“My mind is at peace . . . I am satisfied, and I am not worrying.”<sup>88</sup> She said her biggest mistake was in “pulling the shade down in the car” as this led to their capture.

Darrow probably would have been outraged and may not have even taken the case if he knew what Owen had withheld from publication. Later in 1938, Owen wrote that he asked Mrs. Fortescue why she believed the killing was justified, and “she said that she came from the South and that in the South they had their own ways of dealing with “niggers.””<sup>89</sup> Owen recalled that during the interview:

She said many other things which I will not recall now, but that one word “niggers,” if I had ever revealed it, would have made her position much more unpleasant in Hawaii. Hawaiians are not related to Negroes, and the designation would have been devastating.<sup>90</sup>

Owen had to clear the contents of the interview through the defendants’ local counsel, but he withheld the part about the racial slur.<sup>91</sup> He did reveal that Grace had said her biggest mistake was pulling down the car window curtains, along with other incriminating statements. Much to Owen’s surprise, the attorney did not censor the interview. Owen reports that when the interview was published it also appeared on the local press, and that “[t]he Navy was ready to shoot me on sight, if that had been possible. The captain who had given me access to his prisoners was in a state of dementia for several days, and I was told to avoid him.”<sup>92</sup> Owen felt that he had not betrayed any confidences and none other than Tommy Massie told him after the whole thing was over, ““If anyone ever says you have been unfair to us, refer him to me.””<sup>93</sup>

But there was an unintended consequence of this interview for Owen. He wrote that the prosecutor saw in the interview a reason to obtain a much more serious indictment of the defendants because Grace Fortescue had basically admitted to the murder.<sup>94</sup> The prosecutor informed Owen that he might be called before the grand jury. This would have been a catastrophe for Owen, as he wrote:

That was the last thing I wanted. In all murder cases, properly conducted, witnesses are excluded. I was there to cover a murder case. I begged, pleaded, and cajoled. I promised him everything but the governorship of the islands, if he would not take me before the grand jury. I think he was having a little sadistic amusement in having me in a difficult position, because he finally relented, and left me alone. But for several days I was most unhappy.<sup>95</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> Russell Owen, *HOT LANDS AND COLD*, in *WE SAW IT HAPPEN: THE NEWS BEHIND THE NEWS THAT’S FIT TO PRINT 222* (1938) [hereinafter *HOT LANDS AND COLD*].

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 222-23.

<sup>95</sup> *Id.* at 223.

Russell Owen would later write about Darrow's participation in the case:

When Clarence Darrow arrived at Honolulu to defend the Massies, the whole picture changed. The islanders resented Darrow. They did not know his tolerance. He did not believe in murder, but he believed that there were extenuating circumstances in anybody's derelictions. I have never known a man who had so much sympathy for human weakness as Clarence Darrow.<sup>96</sup>

### **Darrow and Race in Hawaii**

Darrow had a well-recognized reputation for being sympathetic to other races, especially blacks, but he seemed to have been very out of touch with the actual state of race relations in Hawaii. This could be because of two reasons. First, Darrow was very sensitive to the virulent racism suffered by blacks. While there was racism in Hawaii, it was not nearly on the same level as the worst aspects of racism directed against blacks in the United States mainland, especially in the South. Second, Darrow likely got his information from the mainland press and the two main white newspapers in Hawaii that perpetuated misinformation about what actually happened in Hawaii and what race relations were like on the Islands. Darrow believed that whites did not have any prejudices against Hawaiians and Asians. Darrow wrote in his autobiography:

What about "race prejudice"? I found none. Certainly none among the whites against the brown people. Many of the best-known and most intelligent whites have married members of other races in the South Seas. It is not safe to express prejudice against any race whatsoever in the islands; one may suppose a man to be 'pure' white, but he may be blended with something else, or some of his relatives, or his best friends, are almost sure to be of mixed blood.

I trust my figures as to races, proportions, and so forth, will not be taken too seriously. I have not had time and opportunity for making sure, but my statements are near the truth, and in effect are truth, if not literal truth, and they are not carelessly made.

If there is no prejudice on the part of the white people against the brown, how about the attitude of the brown toward the white? This is a very different matter, which I was bound to consider in the trial of the case. Not so long ago the Hawaiians owned all the islands; now they have practically none of the land; most of it is owned by the whites. How did they get it? I don't know. Probably the way we got the United States from the Indians. The white men know more than their brown brothers, for they know that the meaning of life is to get all the property there is. The whites are not bad; they are just made that way. Are the brown people smart enough to understand this? I would say, "Rather!"<sup>97</sup>

Darrow claimed during the trial:

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<sup>96</sup>*Id.* at 225.

<sup>97</sup> STORY OF MY LIFE, *supra* note 86, at 469-70.

No lawyer on either side raised the question of color or race, and I knew it would have been fatal to our side to let anything of that sort creep in. I was morally certain that the majority of the jury would be brown men. I knew that the white men had no prejudice against the brown ones, nevertheless the brown men were prejudiced against the white. I was quite sure that had I been a brown man, and a native living under the circumstances that they met in Hawaii, I should have felt as our Indians do about the ‘pale-faces’ who now own the land over which their ancestors reigned so long.<sup>98</sup>

### **Politics in Washington D.C.**

The events in Hawaii became an urgent crisis in Washington, D.C. and caused an uproar among politicians in Congress and the White House. On January 12, 1932, four days after Kahahawai was murdered, President Hoover met with his top advisors, with the first order of business being the matter in Hawaii. Attorney General Mitchell stated that there was no legal basis for extraditing the defendants. President Hoover instructed the Justice Department to investigate and report on the situation in Hawaii. The Attorney General later sent Assistant Attorney General Seth Richardson to Hawaii to investigate and make a report. Secretary of the Interior Ray Lyman Wilbur, whose office was responsible for the civilian government in Hawaii, was adamantly against removing the defendants from Hawaii. But Wilbur was concerned enough to send his executive assistant William A. Du Puy to Hawaii to “observe the facts and report his findings.” Du Puy reported his findings in a book titled *Hawaii and its Race Problem*, which glossed over the race issues and the Ala Moana and Massie controversies. The book appeared to be more like a travel industry publication than an objective report.

Congress was so concerned that it held weekend sessions to address the situation because of Hawaii’s strategic importance in the Pacific. Some members of Congress wanted to introduce legislation that would change Hawaii’s political status as a territory and appoint a commission to govern the islands. One meeting held by the Senate Committee on Territories and Insular Affairs included participation and testimony from numerous politicians and military personnel, such as the U.S. Attorney General, the Secretary of the Interior, the Secretary of War, the Secretary of the Navy, and the U.S. Chief of Naval Operations.

During a hearing, Hawaii’s delegate to Congress Victor S.K. Houston testified but he could not explain the failure of the jury to convict the defendants of rape in the Ala Moana trial. He did inform members of Congress that he and other politicians proposed two changes to Hawaii’s rape laws that were enacted on January 29, 1932—eliminating of the corroboration requirement for a rape accusation and making rape a capital crime. After Admiral Pratt repeated the statistic that there had been forty rapes in one year, Houston challenged the Admiral, stating that there had only been one other reported case.

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<sup>98</sup> *Id.* at 471.

One of the most vocal critics of the situation in Hawaii was Tennessee Senator Kenneth McKellar, who presented a resolution calling for a congressional investigation. When word reached Washington, D.C. that Massie, Fortescue and the two sailors had been indicted for murder, McKellar demanded on the floor of the Senate that Judge Cristy be impeached. Other senators thought it best to await the report from Seth Richardson, who would soon depart to begin his investigation in Hawaii.

Lawrence Judd recalls that Victor Houston told him that both he and Senator Hiram Bingham of Connecticut requested “that a special session of the legislature be held for better administration of sex cases, and to strengthen law-enforcement machinery in Hawaii.”<sup>99</sup> When Judd pressed him for details, Houston told him they would “[t]entatively propose that legislature should provide the death penalty for rape. Sterilization to be added to other penalties in other cases of sex crimes, at the discretion of the court.”<sup>100</sup>

### **Politics in Kentucky**

The events in Hawaii also prompted the Kentucky legislature to get involved. Tommy Massie was born in Kentucky and politicians in that state were especially outraged about the situation in Hawaii. On January 18, 1932, the Kentucky House passed H.R. 11, a “[r]esolution memorializing the President of the United States in the matter of lawlessness in the Hawaiian Islands.” The Senate concurred in the resolution. The resolution is a nutshell version of all the misinformation that dominated the reports and discussion about the situation in Honolulu. It states in part:

In September last the wife of Lieutenant Thomas Hedges Massie, an officer in the United States Navy, a native and citizen of Winchester, Kentucky . . . was kidnapped, assaulted, beat, mangled, her jaw broken, and raped six times by five Oriental native Hawaiians, resulting in pregnancy, confining her to a hospital, and making an operation for abortion imperative, and although she identified four of the five rapists, the jury which tried them, failed to convict, leaving this foul and horrible crime unpunished . . . .

The resolution went on to repeat the common belief that Ben Ahakuelo was involved in a gang rape but was let out of jail and allowed to take part in a boxing match. It also briefly mentioned the “killing of one of the five rapists” by Grace Fortescue and the other defendants. The resolution then petitioned:

His Excellency, the Honorable Herbert Hoover, President . . . and Commander in Chief . . . to use the power vested in him . . . to demand that the rapists who so dastardly, beat and raped the Wife of Lieutenant Massie, be brought to justice and to insist that a full measure of the law be meted out to them, and . . . use every arm of the Government to insure the immediate release of . . . Massie, Mrs. Fortescue, E. J. Lord and A.O. Jones, and to insure this end, we petition and

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<sup>99</sup> JUDD & HAWAII, *supra* note 46, at 190.

<sup>100</sup> *Id.*

request, if such result cannot otherwise be secured, that the President declare a state of martial law in Honolulu . . . and thereby exercise direct control from the seat of government in Washington, until such time as the territory of Hawaii can be made safe for women, and especially for the wives of our men in the Army and Navy . . . .

The resolution was sent to the President under the Seal of the Commonwealth of Kentucky.

### **Politics in Hawaii**

The Ala Moana case and the fallout from the mistrial created a great deal of political action and maneuvering in Hawaii. One important result was that the legislature changed the selection of the city and county prosecutors from election to appointment, giving the mayor the power of appointment with the consent of a board of supervisors. The Hawaii Bar Association recommended forty-six-year-old John Carlton Kelley for the position and he was eventually approved. Kelley was originally from Montana and graduated from the University of Michigan Law School. After traveling around the world he landed in Hawaii and in 1923 became Deputy City and County Attorney, a position he held under City Attorney William H. Heen. In Kelley's first trial as a prosecutor he would face Clarence Darrow, the most famous lawyer in the United States.

A law was passed creating a police commission consisting of five prominent members of the business community. Shortly thereafter, Charles W. Weeber was appointed the first chief of police and he immediately ordered a shakeup and reform of the police force.

### **Rape Statute Drastically Amended**

The Ala Moana rape allegations and mistrial prompted the legislature and the Governor to drastically amend Hawaii's rape statute. One change eliminated the need to corroborate a female victim's allegations. Prior to the amendment, the statute read in part: "no person shall be convicted of rape, seduction or abduction, upon the mere testimony of the female uncorroborated by other evidence direct or circumstantial."<sup>101</sup> The amendment deleted this entire corroboration requirement.

The second change allowed a person convicted of rape to be sentenced to death. Prior to the amendment, the punishment for rape was "imprisonment at hard labor for life or any number of years."<sup>102</sup> After the amendment, new language was added so the statute read: "suffer the punishment of death or shall be imprisoned at hard labor for life or any number of years, in the discretion of the court." The amendments were signed into law on January 29, 1932, just twenty-one days after Kahahawai was murdered.

When he arrived in Hawaii, Darrow was asked what he thought about the amendments to Hawaii's rape statute. He was very critical of both amendments. Before taking the Massie

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<sup>101</sup> Rev. Law Hawaii, Chapter 238, Sec. 4156.

<sup>102</sup> Id. Sec. 4147.

case he was critical of making rape a capital offense, which he mentioned in the original version of his autobiography written before he took the Massie case: “In some States rape is also subject to the death penalty; this, too, is a direct inducement for a ravisher to kill as well as rape; if caught, he must die anyhow, so he is persuaded by the law to kill the evidence of his guilt.”<sup>103</sup>

### **Honolulu Citizens' Organization for Good Government**

Politicians and military personnel were not the only people driven to action by the events unfolding in Hawaii. A group of whites, sponsored in part by the League of Women Voters, formed the Honolulu Citizens' Organization for Good Government. They were led by Mrs. Anne Kluegel who called a meeting soon after news of Kahahawai's murder became known. The measures they discussed to help clean up Hawaii included amending the rape law to make rape eligible for the death penalty, prohibiting obscene material and movies, and putting Hawaii under military rule.

### **Public Perception**

Part of Darrow's success was that he understood the power of public perception to shape the pre-trial atmosphere during a sensational case. He was well aware of the antagonism that many Hawaiians and other non-whites felt against the white community in Hawaii:

Darrow had been besought by those connected with the case not bring up the racial issue. But the wily old lawyer realized that this was just what he must do. Some of the Hawaiian beach boys had asked me to invite him to ride the surf in one of their big canoes, and Darrow, despite his age, put on a bathing suit, wrapped a towel about his shoulders, and came in riding a roaring wave. He knew that would make a good impression with the natives.<sup>104</sup>

### **Psychiatric Defense**

Darrow reached back to his strategy in the sensational Leopold and Loeb trial in 1924 and employed two prominent “alienists” to aid in the defense. The term “alienist” is a noun, a “former term for psychiatrist” and specifically refers to “a psychiatrist who assesses the competence of a defendant in a court of law.”<sup>105</sup> *Black's Law Dictionary* defines an alienist as a psychiatrist, especially “one who assesses a criminal defendant's sanity or capacity to stand trial.”<sup>106</sup>

At about the same time that the Massie-Fortescue case was heading to trial, another murder case was being tried in Arizona. Winnie Ruth Judd was on trial for the murder and dismemberment of two people. Her defense had employed two “alienists” named Dr. Tommy Orbison and Dr. Edward Huntington Williams. News of this trial and the

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<sup>103</sup> STORY OF MY LIFE, *supra* note 86, at 362.

<sup>104</sup> HOT LANDS AND COLD, *supra* note 89, at 226-27.

<sup>105</sup> THE NEW OXFORD AMERICAN DICTIONARY, (Erin McKean ed., 2d ed. 2005).

<sup>106</sup> BLACK'S LAW DICTIONARY (8th ed. 2004).

defense's use of psychiatric testimony reached Darrow and he informed his clients that they needed to raise more money to employ these same alienists. The two psychiatrists were soon secretly hired and they would later make their way to Hawaii. When Darrow had first met with John Kelley, the prosecutor had raised the possibility of an insanity defense, but Darrow had dismissed the idea.<sup>107</sup>

It was not until after jury selection was complete that Kelley learned from the newspapers that the defense had indeed hired the two psychiatrists to aid in the trial. Kelley was furious at himself because Darrow had tricked him into believing that he would not bring in psychiatrists. Darrow was under no obligation to inform the prosecution of his plan and Kelley "naively, had believed him."<sup>108</sup> Now there was almost no time or money to bring in psychiatrists from the mainland to counter the defense experts before the trial started.<sup>109</sup>

### **Territory of Hawaii vs. Grace Fortescue, et al.**

The most notorious trial in the history of Hawaii began on April 4, 1932 and was titled Territory of Hawaii vs. Grace Fortescue, et al., Crim. No. 11891. The trial would be presided over by forty-two year old Judge Charles "Skinner" Davis. As with many whites at this time, Davis was not born in Hawaii although he lived there a good portion of his life. He was born in New Brunswick, Canada and obtained a law degree from Stanford University. The defense had successfully disqualified Judge Cristy by filing an affidavit of prejudice based on allegations he forced the grand jury to indict the defendants.

Besides Darrow, the Massie-Fortescue defense team consisted of George S. Leisure, Montgomery Winn, Frank Thompson and T. Louis Johnson of the U.S. Navy. On the prosecution side Kelley was assisted by Barry Ulrich, a Honolulu attorney, and Charles E. Cassidy, the first assistant public prosecutor. Harold T. Kay, the assistant territorial attorney general, served as an advisor to the prosecution.

The trial captivated residents of the Islands. There was intense interest in the case and people lined up during the night to try to get a seat or even be able to stand somewhere in the courtroom. Most of those who stood in line for hours were Hawaiians and Asians. Only those with passes were allowed in, and after that there were 200 seats available for those who waited in line.

The trial was also followed on the mainland. The *New York Times* ran nearly 200 stories on the case. The only event that eclipsed it in terms of public attention was the kidnapping of the 20-month-old child of Charles Lindberg on March 1, 1932.

### **Picking a Jury**

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<sup>107</sup> HONOR KILLING, *supra* note 4, at 313.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

In many high profile cases, many potential jurors are eager to be on the jury. They think they will have the best seat to watch an important event. But in the Fortescue case, the prosecution and defense learned that most potential jurors wanted to avoid sitting on the jury. Many whites were related to someone of Hawaiian descent, and there were too many interrelations between families, acquaintances, employers and employees that could be strained if a juror decided one way or the other in such a trial. During jury selection many potential jurors claimed to have already decided whether the defendants were guilty in order to get excluded. But there were exceptions. Many potential jurors such as working-class Asians did not want to serve on the jury while many upper-class whites were eager to serve.

Part of the reason that people on the United States mainland were fearful that the defendants would be convicted was that under the law of Hawaii, they would be tried by a mixed-race jury.

### **Ala Moana Rape Case**

A heated controversy developed over whether prospective jurors could be questioned about the Ala Moana rape case. The controversy began when Kelley asked a potential juror, “Are you willing to return a verdict, understanding that the guilt[] or innocence of Joseph Kahahawai in the Ala Moana Case has nothing to do with this trial?” This angered Darrow, who at first strongly argued against questioning jurors on this topic, because he did not want potential jurors dismissed who would be sympathetic to the defendants for taking the law into their own hands to avenge Thalia Massie. Kelley insisted that even if Kahahawai was guilty of the rape, it was no justification for his murder. Darrow soon changed tactics and began asking jurors himself about the Ala Moana case. Judge Davis did not approve of raising the Ala Moana case: “I cannot see how the earlier case can be legally injected into the trial, but the Court will rule on it if the occasion arises.”

A constant theme of Kelley’s questioning was whether potential jurors would “give due weight and consideration to circumstantial evidence” because all the evidence against the defendants was circumstantial. Darrow tried to root out jurors who had arrived at a fixed opinion as to whether the defendants had murdered the deceased.

### **Unwritten Law of Honor Killing**

Darrow’s defense would rely in part on the “unwritten law” of “honor killing.” This defense was used by husbands after killing another man who had sexual relations with their wives. It was “unwritten” because it was not found in case law or statutes but was nonetheless often used to convince a jury to acquit a defendant. It could be seen as a form of jury nullification, in which the jury decides to find a defendant who has committed murder not guilty or guilty of a lesser charge because the defendant was so outraged at what had occurred to his wife.

Darrow wrote about this defense:

Of course, all the attorneys for the prosecution, and those for the defense, as well as the judge, knew that legally my clients were guilty of murder. Yet, on the island, and across the seas, and around the earth, men and women were hoping and praying and working for the release and vindication of the defendants. As in similar cases, every one was talking about ‘the unwritten law.’ While this could not be found in the statutes, it was indelibly written in the feelings and thoughts of people in general. Which would triumph, the written or the unwritten law, depended upon many things which in this case demanded the most careful consideration.<sup>110</sup>

### **Killing Must Be Immediate to Invoke the Unwritten Law**

The unwritten law defense to murder or attempted murder has generally been more common in cases of adultery. In a 1934 article, the author states, “It is generally true that a husband who slays his wife’s adulterer on surprising them in the unlawful act, is deemed to have been given adequate provocation, and that proof of the circumstances is competent testimony under a charge of voluntary manslaughter.”<sup>111</sup> The defense can also be used “when the killing occurs immediately upon hearing of the marital indiscretion if the offense is committed in the heat of passion engendered thereby.”<sup>112</sup> But when the cooling period sets in and immediate passion give[s] way to sober reflection the killing becomes murder.”<sup>113</sup>

Another scholar describes the “unwritten law” as applied to a husband:

[H]e had that right only if he had found his wife and her lover together, in a seriously and unquestionably compromising position. And only if he had acted immediately. Time was of the essence. The privilege demanded an act “in the heat of passion.” Otherwise, if he dawdled, if he planned, if he thought about what he should do, he became a premeditating murderer. He became someone who should have looked to his remedies at law for the harm the seducer had done him but who, instead, had taken the law into his own hands, subverting the peace of the community. His situation was no longer distinguishable from that faced by other men, all of whom faced provocations, all of whom were expected to resist the impulse to violence, all of whom were expected to look to the law rather than to selfhelp and to arms.

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<sup>110</sup> STORY OF MY LIFE, *supra* note 86, at 468.

<sup>111</sup> *Recognition of the Honor Defense under the Insanity Plea*, 43 YALE L.J. 809, 810 (1934) [hereinafter *Honor Defense under the Insanity Plea*].

<sup>112</sup> *Id.* at 810 (Citing *State v. Stewart*, 278 Mo. 177, 212 S. W. 853 (1919) ; *Hannah v. Commonwealth*, 153 Va. 863, 149 S. E. 419 (1929); *cf. Eden v. State*, 24 Ala. App. 37, 129 So. 797 (1930) (killing of one who insulted defendant's wife) ; *Campbell v. Commonwealth*, 88 Ky. 402, 11 S. W. 290 (1889) (killing of husband of accused's daughter for brutality to the daughter); *McHargue v. Commonwealth*, 231 Ky. 82, 21 S. W. (2d) 115 (1929) (killing of one who had assaulted accused's brother) ; *State v. Flory*, 40 Wyo. 184, 276 Pac. 458 (1929) (killing by husband after learning of rape of his wife)).

<sup>113</sup> *Id.* (Citing *Brunson v. State*, *supra* note 6, at 572, 103 So. at 665; *People v. Garfalo*, 207 N. Y. 141, 100 N. E. 698 (1912) ; *cf. Rogers v. State*, 117 Ala. 9, 22 So. 666 (1898) ; *McWilliams v. State*, 178 Ala. 68, 60 So. 101 (1912)).

This was the unwritten law. That is, there was, within the general domain of the criminal law, a particular practice called ‘the unwritten law,’ a practice that survived as a written unwritten law in the statute books of a few American states until the very recent past. The Texas Penal Code declared: ‘Homicide is justifiable when committed by the husband upon one taken in the act of adultery with the wife, provided the killing take place before the parties to the act have separated.’ The unwritten law existed if we take what American criminal courts did as our guides. And American lawyers and judges talked about it as if it were a recognized part of the law. And yet, its status as law-as a part of the doctrinal structures of marriage and crime-was always uncertain and contested.<sup>114</sup>

A 1929 Wyoming murder case involved a defendant who killed his father-in-law after his wife informed him that her father had raped her. The state argued that the testimony about the alleged rape and incest was not admissible because ample time—at least a day and probably longer - had elapsed after the defendant had been informed of the acts of the decedent. The Supreme Court of Wyoming ruled that even if the deceased raped the defendant's wife this did not justify his murder, but that evidence of the rape may be admissible to reduce the murder to manslaughter.<sup>115</sup> As to how much time can elapse before the murder cannot be mitigated, the court ruled:

The crime of deceased, if true, was most heinous and was calculated to create a most violent passion in the mind of the defendant, and it is hardly to be expected that it would, as a matter of law, subside within so short a time, especially when, as testified, a situation arose by which past facts were clearly recalled. Courts are not altogether agreed as to whether the question of cooling time is one of law or one for the jury. Some hold it to be a question of law and that 24 hours is sufficient for the mind to cool.<sup>116</sup> We think, however, that the weight of authority is that, in cases like that at bar, the question of cooling time depends on the circumstances and is ordinarily one for the jury.<sup>117</sup>

In addition, the court ruled that in terms of the time delay:

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<sup>114</sup> Hendrik Hartog, *Lawyering, Husbands' Rights, and "the Unwritten Law" in Nineteenth-Century America*, 84 THE JOURNAL OF AMERICAN HISTORY, 67-68 (1997) (the author states “[i]t became written law in Texas, Utah, and New Mexico.” [hereinafter *Lawyering, Husbands' Rights, and "the Unwritten Law"*]. Tex. Penal Code Ann. Art. 1220 (Vernon 1961); N.N. Stat. Ann. sec. 780, 401 (1948); Utah Code Ann. sec. 76-30-10 (5) (1953).

<sup>115</sup> *State v. Flory*, 40 Wyo. 184, 276 P. 458 (Wyo. 1929),

<sup>116</sup> Citing *People v. Halliday*, 5 Utah, 467, 17 P. 118; *Brewer v. State*, 160 Ala. 66, 49 So. 336; *Wickham v. People*, 41 Colo. 345, 93 P. 478; *State v. Merrick*, 171 N. C. 788, 88 S. E. 501.).

<sup>117</sup> Citing *State v. Grugin*, 147 Mo. 39, 47 S. W. 1058, 42 L. R. A. 774, 71 Am. St. Rep. 553; *State v. Gounagias*, 88 Wash. 304, 153 P. 9, L. R. A. 1916C, 581; *Haley v. State*, 123 Miss. 87, 85 So. 129, 10 A. L. R. 462; *McDaniel v. State*, 90 Tex. Cr. R. 636, 237 S. W. 297, and cases cited; *Ferguson v. State*, 49 Ind. 33; *Biggs v. State*, 29 Ga. 723, 76 Am. Dec. 630; *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781; *People v. Barberi*, 149 N. Y. 256, 43 N. E. 635, 52 Am. St. Rep. 717; *State v. Thomas*, 169 Iowa, 591, 151 N. W. 842.

[I]t is to be remarked that there is no definite time within which the passions when aroused by such a wrong may be said to have so far subsided and reason to have resumed its sway to such an extent as that thereafter the killing may be denounced as in vengeance alone. The question is one of reasonable time and dependent on all the facts of the case. While the time may be so long as to exclude all doubt on the subject and exact the exclusion of the evidence in so far as offered in extenuation, more frequently it should be submitted to the jury under proper instructions.<sup>118</sup>

### **Only the Husband Could Use Unwritten Law**

Darrow and the defense would argue that Tommy Massie fired the bullet that killed Kahahawai. But the prosecution disputed this. Darrow needed to get the jury to think Tommy Massie fired the fatal shot, because the “unwritten law” could only be used by the husband:

Other men in protective or patriarchal roles-fathers, brothers, sons, fiances-possessed no articulated exemption from prosecution for murder if they killed seducers found in the arms of their dependents. Nor were wives entitled to kill their husbands' lovers. All of them-wives as well as fathers, brothers, sons, and fiances-often escaped conviction and punishment when juries refused to convict. But only a husband had a developed legal privilege.<sup>119</sup>

### **Temporary Insanity**

In the Massie-Fortescue trial, far too much time had passed from the time of the alleged rape and identification of the suspects on September 13, 1931 and the murder of Joseph Kahahawai on January 8, 1932 to use the unwritten law as a defense. In other cases that lacked adequate “heat of passion” or self-defense arguments, “trial lawyers have resorted to the plea of insanity to get before a jury all circumstances of the so-called honor defense.”<sup>120</sup> This is what Darrow did in the Massie-Fortescue trial “to bring before the jury a description of the assault on the defendant’s wife, committed long before the killing of her assailant. Here again no question of immediate provocation was present in the sense of a killing in the heat of passion, and probably no question of actual insanity.”<sup>121</sup>

Besides the long time delay between the alleged rape of Thalia Massie and the murder of Joseph Kahahawai, another unusual aspect of the use of the unwritten law in the Massie case is that Darrow seems to have tried to use it to excuse Grace Fortescue’s involvement in the murder.

### **Richardson Report**

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<sup>118</sup> *Id.*

<sup>119</sup> *Lawyering, Husbands' Rights, and "the Unwritten Law," supra* note 114, at 67.

<sup>120</sup> *Honor Defense under the Insanity Plea, supra* note 111, at 810.

<sup>121</sup> *Id.* at 812-13.

On January 11, 1932, prompted by the Ala Moana trial and the murder of Joseph Kahahawai, the United States Senate adopted a resolution requesting the Attorney General to report to the Senate as early as possible on the administration and enforcement of criminal laws in the Territory of Hawaii, and whether there should be any changes in the organic law to improve the administration of justice. The Attorney General sent U.S. Assistant Attorney General Seth Richardson to Hawaii to conduct the investigation, and Richardson was assisted by FBI agents and Justice Department officials. The result of Richardson's investigation, called the *Richardson Report*, was submitted to the Senate in April, 1932.

Richardson and those working under him conducted a massive investigation that resulted in 3,380 pages that filled fifteen volumes but were not published. The investigators interviewed over four hundred people in various positions, such as lawyers, judges, business leaders, politicians, law enforcement, and news editors.<sup>122</sup> The report also included a separate 300 page summary of conclusions and recommendations. The entire work was conducted in two months. During the first day of the trial, which began with jury selection, the federal government released the *Richardson Report*.

Residents of Hawaii were very interested in the report, but the initial news reports were misleading. Newspaper headlines made it look like Richardson was calling for dramatic changes and federal control over the Islands' government. However, the report was much less drastic than these initial reports suggested.

In the beginning of the report's summary, Richardson refuted some of the rumors that had been circulating and prompting hysterical reactions on the mainland, and also criticized law enforcement in Hawaii:

We found in Hawaii no organized crime, no important criminal class, and no criminal rackets. We did not find substantial evidence that a crime wave, so called, was in existence in Honolulu, either disproportionate with the increase in the population or when viewed in comparison with crime records in cities of similar size on the mainland. We found, however, ample evidence of extreme laxity in the administration of law-enforcement agencies.

### **Ala Moana Rape Case Jury Investigation**

The *Richardson Report* tried to dispel the accepted wisdom that the jury in the Ala Moana rape trial was racially biased in favor of the defendants and against the white victim, but it concluded with an observation that likely did not help:

The jury panel which tried the Ala Moana rape case was thoroughly investigated and found to be fair-minded, of intelligence, honest, and utterly lacking in any trace of racial bias. The deliberation of the jury after the case was submitted to it consumed 96 hours, which, for length of deliberation, sets a record for the courts of Hawaii, if not for the United States. During all of that time, though the

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<sup>122</sup> HONOR KILLING, *supra* note 4, at 320.

argument was heated, it was sincere, and members of the panel indicated the possession of an open mind sufficiently that the vote changed materially up until the last few hours. This jury consisted, with one exception, of men of mixed and oriental blood, and was an unusual jury in that there were on it so few men of white blood.

### **Sex Crimes in Hawaii**

The report refuted the sensational and often repeated allegations that Hawaii, and particularly Honolulu, was plagued by rampant sexual crimes. Significantly, the report exposed as untrue the frequently-cited statistic of “40 cases alleged rape or rapial assault reported in Honolulu” in the past year by stating, “We investigated this charge and were unable to substantiate it. The hospital records do not indicate any such condition. In fact, it was conceded by Captain Pfeiffer, of the Navy police, that such report had been inadvertently made and could not be substantiated.”<sup>123</sup>

Significantly, the report denied that Hawaiians were to blame for the sex crimes, and pointed out that Hawaii was safer than many areas on the mainland:

We do not think the public reports with respect to alleged proclivity of member of the Hawaiian race in sexual crimes is substantiated by the facts. The investigation which we made and the crime tabulations which we prepared do not show that crime, including sexual crime, in the islands can properly be laid at the door of the Hawaiian. He has his place in the picture, of course, but there are other races in the Territory which give more trouble in that regard. After all, the amount of sex crime in the Territory seemed less than reported from many cities and localities of similar population on the mainland.<sup>124</sup>

Hawaii’s Attorney General Harry R. Hewitt also investigated the claim of 40 sexual assaults. He found that the actual number was two rapes and 11 attempted assaults. The rest of the cases were consensual acts with a minor under sixteen.

### **Racial Animosity**

The report acknowledged that “a certain amount of friction existed” between civilians and military personnel but that this was “due to competition for local women and girls” and was not a serious problem. Richardson wrote:

I can find no reason for concluding, however, that the resulting situation is any different than is always present when such a large body of single young men live in proximity to an urban population. A certain amount of trouble is bound to exist between portions of the civil population and the service men, due to various activities which bring them in contact.<sup>125</sup>

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<sup>123</sup> Law Enforcement in the Territory of Hawaii, at 32-33 (Senate Doc. 78) (1932).

<sup>124</sup> *Id.* at xi.

<sup>125</sup> *Id.* at 35.

With regard to racial tension, Richard explained: “I made a very thorough effort to investigate the charge that deep racial resentment existed between the civil population and the service man, but I was unable to verify the charge. What the future may bring forth, no one can tell.”

### **Federal Control**

Addressing calls for the federal government to take over the governance of the Islands, Richardson stated, “I am unwilling, at this late date, to agree that the time has now come to take away the right of self-government from the people of the Territory.”<sup>126</sup>

### **Jury Selection Continued**

Jury selection took the rest of the week. Darrow had considerable experience picking juries; however, according to one writer Darrow faced difficulty in Hawaii:

From the first it was clear that Darrow was uneasy with jurors whose faces he could not fathom. No one could play on a jury’s emotions better than he—his towering reputation had been made that way—but a Honolulu jury was an unfamiliar instrument. Would Hawaiians and Orientals be able to understand that a white man tortured by strain might crack and commit a crime and then have no knowledge of it? The case for the defense hung on that single point.<sup>127</sup>

Because the murder victim was Hawaiian, the defense naturally wanted to exclude Hawaiians from the jury. It is not surprising that they challenged more Hawaiians than any other group. Darrow recalled:

Nothing was more important to the case than picking a jury, and in this task we used all possible care. In spite of the fact that many more brown men were called than white men, when we finally accepted the panel it was made up of six white and six brown jurors--though, later on, we learned that two of the white men had Hawaiian wives. Nearly all of the nationalities to be found on the island were represented. Most of the men in the jury box were intelligent; for scholarship and native ability they would compare very favorably with a jury gathered in the United States.<sup>128</sup>

On Thursday April 7, 1932, after questioning more than 100 prospective jurors, twelve were selected. The jury consisted of seven whites, three Chinese, and two Hawaiians. In an article titled “Mottled Jury” published by *Time* magazine, the jury was described as: a Chinese certified public accountant educated at the University of Illinois; a German potato chip maker; an American bank clerk educated at Princeton; a Hawaiian manager of a chain store; an American pump expert; a Chinese clerk to a contractor; an American

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<sup>126</sup> *Id.* at 45.

<sup>127</sup> SHOAL OF TIME, *supra* note 7, at 326.

<sup>128</sup> STORY OF MY LIFE, *supra* note 86, at 471-72.

steamship clerk; a Portuguese clerk; an American clerk; a Danish assistant manager in a railroad's land department; an American civil engineer; and a Chinese clerk with a grammar school education.<sup>129</sup> The jury had more whites than their proportion in the general population and did not have any Japanese.

After the jury was selected and sworn in, court was then adjourned until the following Monday. Judge Davis told the jurors to pack pajamas and toothbrushes because they would be sequestered. This was the first time in the history of Hawaii that a jury had been sequestered.

Clarence Darrow, who was born April 18, 1857, would turn 75 years old in eleven days. Because of his age, the court was in session only until noon each day of the trial, except for the last day.

### **Kelley Opens for the State of Hawaii**

On Monday, Prosecutor Kelley opened for the state by telling the jury that what they intended to prove:

On the eight[h] of January, 1932, Joseph Kahahawai came to this building to report to probation officers, according to Judge Steadman's order. On that last journey, he was accompanied by his cousin, Edward Ulii. As they approached this building, three persons were outside who were soon to put into action forces that were to end Kahahawai's life. Those persons were Mrs. Fortescue, sitting in an automobile. A second was Albert Jones, lounging by the building. The third was Thomas H. Massie, waiting in a blue sedan. Two of these, Mrs. Fortescue and Jones, were noticed by Edward Ulii. When the two Hawaiian boys had arrived almost to the statute of Kamehameha, under the shadow of its outstretched hand, the finger of doom pointed at one of the members of the King's people. And we will prove that it was the finger of Mrs. Grace Fortescue that pointed that doom—that, in the common vernacular of these days, she was the one who put Joseph Kahahawai on the spot.

Kelley then recounted what the evidence showed had happened and how it all led to the kidnapping and murder of Joseph Kahahawai. When the defense's turn came to give an opening statement, Darrow told the court the defense would reserve its statement until the state had presented its case.

### **Edward Ulii**

The state's first witness was Edward Ulii, Kahahawai's cousin, who described how Kahahawai was kidnapped after leaving the Judiciary Building. Under cross-examination by Darrow, Ulii provided some unintended humor to the proceedings. When Darrow asked if Ulii was Kahahawai's cousin, he replied that he was a related cousin because his

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<sup>129</sup> *Mottled Jury*, TIME, Apr. 18, 1932, available at <http://www.time.com/time/magazine/article/0,9171,743557,00.html>.

sister was married to one of Kahahawai's cousins. This confused Darrow, who asked if Ulii was related by blood to Kahahawai; when Ulii expressed confusion over the question, Judge Davis stepped in to explain to Darrow that a cousin-in-law was considered a family relation in Hawaii.

### **Tommie Massie on the Stand**

The night before the defense was to present its case, excitement intensified and many people waited outside the courthouse all night to try to get one of the 75 tickets available for spectators. Those lucky enough to get in on the eighth day of the trial heard the name "Thomas Massie" called to the stand as the first defense witness.

### **Testimony about Rumors**

An important factor that led to the murder of Kahahawai was the rumors that circulated about Thalia and Tommy. Tommy testified that he began hearing the "vilest and lowest type of rumors about myself and my wife." He thought the first rumor he heard was that he did not believe Thalia's story about the rape, which was why he did not attend the Ala Moana trial and the couple was going to divorce. Tommy related another rumor about what happened that night: "I came home after the dance that night in September and found my wife with a Naval officer and that I had thrown him out of the house and beat my own wife up." The Naval officer was Lieut. Branson. Another rumor that Tommy endured was that his "wife had never been assaulted at all and that she was simply a seeker of notoriety and wanted to get into the headlines."

Tommy then testified to the event that became the origin of the murder plan. He went to Mr. Beebe and asked "if I got some written evidence from one of those people if it would be evidence. He told me that it would provided no force was used and no marks would show on the one who gave it." Beebe also told Tommy that the Ala Moan case was "in such a condition now that it would be necessary to have a confession."

Kelley cut in because Darrow was filling into many details and asking leading questions: "I don't want to make unnecessary objections; but if Mr. Darrow wants to testify in the case, let him take the stand and testify."

It appears that Joseph Kahahawai was chosen as the target of the kidnapping and confession plan because of rumors. Massie testified that he heard that "Kahahawai was getting shaky and he was getting ready to crack."

Tommy gave his version of what happened when they held Kahahawai at gunpoint at the house. Tommy threatened to have him beat up worse than Horace Ida had been, and he acted like there were several men waiting outside to get the word to come in and work Kahahawai over. Tommy had repeatedly demanded that Kahahawai tell the truth while holding a pistol on him, and Tommy claimed that suddenly Kahahawai said, "Yes, we done it." Tommy testified: "The last thing I remember was that picture that came into my mind, of my wife when he assaulted her and prayed for mercy and he answered with a

blow that broke her jaw.” This was the moment that Kahahawai was shot, but Massie testified he had no memory of it.

### **Motherhood**

To Darrow, the defendants were driven by forces beyond their control. Their actions were wholly consistent with his views about crime. It was a justified “honor killing.” Darrow wrote of Tommie Massie and Grace Fortescue:

It was simply a question of what a husband and mother were justified in doing under the circumstances of the case. It was a contest over the question of whether it was a duty of one to obey the dead letter of the law, or the living emotions upon which all life rests. I have heard few people seriously say that they would not have done the same thing in either situation as husband or mother. Whatever the husband’s feelings, they are not so interwoven with living as the mother’s. All animal life depends upon the instincts of the mother, and automatically she forgets herself in protecting the life of the offspring. The emotion is not wholly love; it is biological.<sup>130</sup>

Darrow appeared to believe that the defendants had actually assaulted Thalia. Besides believing what his clients told him, he was likely influenced by mainstream press accounts of the Ala Moana defendants, including Joseph Kahahawai:

Throughout the islands the feeling amongst the brown people against the defendants was strong. The slain man was a Hawaiian, and, though none too popular in life, a host of his friends rallied to his funeral, the largest ever assembled in Honolulu, excepting that of a prince or princess once upon a time. That Kahahawai had been in prison and was generally known as a hoodlum seemed to be forgotten by his followers, and their feelings were strengthened by the circumstances of the strange tragedy surrounding his death. With the complexion of the jury, and the intense sentiment for the deceased, the situation seemed none too good. The cruel assault against Mrs. Massie seemed lost sight of in the spotlight which created a sort of halo around the head of Kahahawai.<sup>131</sup>

### **Darrow Hung-over**

The day after Tommie Massie testified, courtroom spectators were severely disappointed when the judge announced that court would adjourn until the next day because Clarence Darrow was ill. Several accounts claim that Darrow called in sick because he had a hangover after staying out late drinking with reporters. When he returned the next day having recuperated from his “illness” he found he had to be frisked by a bailiff before entering the court. This was a new rule from the police chief and it applied to everyone.

### **Trial Resumes**

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<sup>130</sup> STORY OF MY LIFE, *supra* note 86, at 475.

<sup>131</sup> *Id.* at 472.

When the trial resumed, Darrow attempted to clarify some aspects of Tommie Massie's testimony. During Darrow's direct examination of Tommy Massie, there was some confusion about whether the defense was going to argue insanity. This prompted Darrow to say:

There seems to have been some little misunderstanding between the attorneys on the other side and ourselves and I want to set it right. We believe that the plea of not guilty puts this full question in issue and it is not necessary then or now to say who fired the shot; but we are perfectly willing to do it to save any more time or controversy on the subject. The evidence will show in this case that the defendant, Massie, now on the stand held the gun in his hand from which the fatal shot was fired in this case.

Darrow and Kelley argued back and forth about whether Darrow was going to argue that Massie was insane when the murder occurred. The judge asked Darrow, "It becomes necessary for the Court to inquire, in order to rule on the objection and motion, that counsel for the defense state at this time whether he is relying on the defense of insanity as far as the witness on the stand is concerned."

Darrow replied:

Your Honor, that is what we are relying on. We expect the evidence to show that this defendant was insane. I did not say that he would testify that he killed the deceased. We will show that the gun was in his hand when the shot was fired but that the question as to whether he knew what he was doing at the time was another question.

This prompted Kelley to demand, "If the defense is ready to admit at this time that the defendant, Massie is sane; if he is not, he can't testify." But the court ruled it was not necessary to require such a statement from the defense, and the matter was dropped. Kelley demanded that the defense reveal what type of insanity they intended to show so the prosecution could utilize its own medical experts. Darrow replied:

No, your Honor; I don't think anybody on earth can tell. People who are familiar with books and have made a study of the question know that doctors disagree as to type. There is nothing in the type except the name that different doctors give different symptoms. Of course, this may have occurred before but I have never heard of any such request being made. Doctors almost always disagree as to the name because they give the name that they think are the symptoms. There is no rule whatever as to that question.

Kelley objected to any evidence about what Tommy Massie knew about the outcome of the Ala Moana rape trial, because that evidence went to the mental condition of Tommy Massie at the time of the murder.

## **Defense Alienists**

On April 8, the same day the jury was impaneled, the luxury ship Malolo brought a group of passengers to Hawaii. Among the passengers to disembark were the prominent alienists Dr. Thomas J. Orbison and Dr. Edward Huntington Williams, along with their wives. Their presence had been kept secret. They did not mingle with the other passengers and their names were not on the passenger list. Clarence Darrow had hired them to help save his clients from prison. Darrow wanted to keep the prosecution in the dark, but a reporter recognized them and soon news of the doctors' arrival was known to the public and the prosecution. The defense would undoubtedly be making arguments that the defendants, especially Tommie Massie, had been temporarily insane when Kahahawai was murdered.

Kelley had been fooled by Darrow into believing that such mental issues would not be raised, so he had to scramble to find alienists to testify as prosecution experts.

## **Defense Alienists Testify**

During the trial, Dr. Edward H. Williams testified that he believed that at the time of the murder, Tommie Massie was suffering from a "chemical insanity" caused by abnormal functioning of his adrenal glands because of the severe stress he was suffering. Dr. Thomas Orbison believed Tommie suffered from "delirium with ambulatory automatism." The jury endured a whole morning of complicated psychiatric testimony by competing experts. At one point during Darrow's direct examination of Dr. Orbison, Judge Davis stepped in and said, "The questions are becoming interminably long. I wish you would shorten them." At the end of his testimony Darrow asked Dr. Orbison if Tommie Massie was insane at the time of the shooting. Dr. Orbison replied, "He was insane and didn't know what he was doing." Dr. Edward Williams stated that at the time of the murder, Tommie Massie "was legally and actually insane."

Dr. Williams endured a tough cross-examination by Barry Ulrich. Ulrich asked if Williams had not written a book in which he claimed that most insanity pleas were spurious. Dr. Williams denied this, but to his surprise and chagrin, Ulrich picked up a book and read the title aloud: *Crime, Abnormal Minds and the Law* by Earnest Bryan Hoag and Edward Huntington Williams. Dr. Williams confirmed it was his book. Ulrich then began to read passages that indicated most insanity pleas were spurious. Ulrich also read excerpts from the book in which the authors criticized the current state of medical testimony in trials by partisan medical experts, which was the "antithesis of the method employed by reputable medical men in their usual attempts in the diagnosis of disease."

## **Thalia Massie Testifies**

Clarence Darrow called Thalia to the stand on Wednesday, April 20. Darrow led Thalia through her testimony about what happened the night she was attacked, and about important events after that. Kelley cross-examined Thalia. Unlike the defense attorneys in the Ala Moana rape trial, Kelley did not refrain from grilling Thalia.

## **Thalia's Psychological Records**

Prior to the trial, Kelley had heard rumors that Thalia Massie had been seen by a psychologist named Dr. E. Lowell Kelley at the University of Hawaii. After news that the defense had brought alienists to testify, Kelley decided to find out what he could about Thalia's visits to the psychologist. Kelley discovered that the psychologist was away in Maui, so he contacted the president of the university, informing him that the records of Thalia's treatment could be relevant to the murder trial. The president agreed but was concerned about confidentiality. Kelley assured him the information would not be made public. By the time Dr. Kelley had returned, prosecutor Kelley already had Thalia's file. Dr. Kelley later stated that after Kahahawai was murdered he struggled with the fact that his knowledge of Thalia's mental problems might be relevant to the case, but he was also greatly concerned about patient confidentiality.

## **Thalia Angered**

After a few questions, Kelley hit Thalia with a question that stunned her: "Did you have a psychopathic examination at the University of Hawaii last summer?" Thalia admitted that she did go to see a psychology professor. As he asked if she remembered her responses to questions during the session with the psychologist, he unfolded a piece of paper. An angry Thalia said, "Do you realize this is a confidential document? This is a matter between a doctor and his patient. You have no right to bring this into the courtroom." Kelley responded, "I'm asking the questions, not answering them." He then handed the paper to her and asked if it contained her handwriting.

In the most dramatic event of the trial, Thalia snatched the paper from Kelley and proceeded to tear it up into pieces. The dramatic act of defiance prompted court observers to begin clapping, requiring the judge to call for order. Kelley simply said, "Thank you, Mrs. Massie, you appear in your true colors at last!" Darrow objected to Kelley's statement and the judge admonished Kelley, telling him, "Your language is objectionable. It may be stricken."

Darrow's description of what was in the document differs from other accounts. Darrow recalled the moment Thalia was handed the paper:

Mrs. Massie read the paper in her hand, and in answer to the question told the attorney general that it was a privileged communication, at the same time proceeding to tear it to ribbons and then to little bits so that it could not possibly be put together. The action caused a profound sensation in the courtroom. Neither lawyers nor judge said anything whatever; they seemed too dazed to utter a sound. Mrs. Massie walked away from the witness-chair to where her husband sat at the side of the other defendants, slipped her arm about his neck and wept aloud on his shoulder most pitifully. Many others in the courtroom had to resort to their handkerchiefs. Every one seemed to be on her side; they felt that it was an outrage that a matter of this nature should be dragged forth in court, and all admired and

approved her courage in tearing up the paper beyond further use. Personally, I did not consider it of special importance one way or another; I certainly did not feel that it hurt our case.<sup>132</sup>

Kelley was done with his cross-examination, although it had only taken about eight minutes. When Thalia left the stand she hugged her husband and cried, “What right has he go[t] to say that I don’t love you? Everybody knows I love you.” Darrow then announced that the defense would rest.

Darrow later recalled the testimony of Tommie and Thalia Massie:

I have listened to a great many witnesses in courts. I cannot recall any whose testimony was more impressive than that of Lieutenant Tommy H. Massie and his wife, Thalia. The realization of the torture they had been compelled to endure, through no fault of their own, could not but make a profound impression among the islanders and the mainland public as well. I am sure their release was due to this more than anything else. From the nature of the case, there was nothing we could do but bring home to people, so far as possible, the inherent rightness of our clients, and the human element and action in it all.<sup>133</sup>

There were a few more days of the trial for rebuttal witnesses that provided some excitement, but nothing as sensational as Thalia’s testimony. The prosecution put an alienist on the stand named Dr. Paul E. Bowers, who testified that Tommie Massie was sane at the time of the murder. Darrow’s cross-examination of Dr. Bowers consisted of just one question: “I assume you have been paid or expect to be paid for coming down here?” Bowers replied in the affirmative. The prosecution would also call Dr. Joseph Catton to testify. Darrow had refused to let Dr. Bowers and Dr. Catton examine Tommie Massie, so the two doctors prepared by reading transcripts of the trial up to that date and getting familiar with all the evidence they could.

### **Prosecution Alienists**

Both Dr. Bowers and Dr. Catton appeared to have been alienists of some reputation. They were both called on to comment about another notorious murder case a few years earlier. On December 14, 1927, 12-year-old Marian Parker, the daughter of a banker in Los Angeles, was kidnapped from school by her father’s former employee William Edward Hickman. Hickman, who was not yet identified, made arrangements to meet Marian’s father to collect a ransom demand. Mr. Parker went to the meeting point and saw his daughter in a car, but she was sitting like she was immobilized. The kidnapper took the money from Mr. Parker, drove away, and further down the street shoved Marian out of the car. She was already dead. Hickman had murdered Marian on about December 17, cut off her arms and legs, disemboweled her, stuffed her body with rags, wired her eyes open, and then wrapped her in blankets to make her appear still alive.

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<sup>132</sup> STORY OF MY LIFE, *supra* note 86, at 474-75.

<sup>133</sup> *Id.* at 475.

Before Hickman's identity was known and before his arrest, psychiatrists including Dr. Bowers and Dr. Catton gave opinions on the case, including possible motives. In an early form of profiling, they tried to identify the type of person the killer was. Dr. Catton warned against concluding the killer was insane and told the press, "'Society's impulse to do away with this type of offender, sane or insane, should be acted on. In this Christian age we are inclined to want to remove from our reactions to such offenses as these all elements of vengeance, but I feel that this case cries out for vengeance.'"<sup>134</sup> Dr. Bower believed the killer was a sexual sadist but was not a moron.

Within a week, Hickman was identified and arrested. After his arrest Hickman asked a reporter, "Don't you think I will get as much publicity as Leopold and Loeb?" During his trial, Hickman tried to mount an insanity defense but he was convicted of murder and hanged at San Quentin prison in 1928.

### **Dr. Joseph Catton**

Apparently, it was the testimony of a prosecution alienist Dr. Joseph Catton of Stanford University, a reputable psychiatrist, which upset Darrow more than anything else during the trial. Catton had testified in the same Winnie Judd murder case in Arizona that Darrow's alienist had testified in. After preliminaries about his background, Catton went through all of the evidence that had been introduced so far and other aspects of the case. This angered Darrow, who objected to testimony about all the details that had already been introduced. Catton proved to be a very effective witness.

### **Darrow Angered**

Catton got under Darrow's skin more than any other witness. At one point the following exchange took place:

Darrow: "I object to the manner of this witness. Why can't he sit in his chair like any other witness instead of making an argument to the jury. He might just as well stand up. This is not the manner of a witness who is trying to enlighten the jury or who is trying to give honest testimony before a jury."

Catton: Have I any right to say anything in reply to an allegation made that I am not honest in offering this proof.

Darrow: I did not say you were not honest; I said that is not the proper attitude to take on the witness stand.

Catton: You used the word 'honesty' and I resent it.

Darrow: All right, come down and resent it.

Judge: Cease arguing back and forth. That will accomplish nothing. These remarks between counsel and the witness will be disregarded by the jury."

Later during a recess, both Darrow and Catton were seen having a friendly conversation.

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<sup>134</sup> MICHAEL NEWTON, *STOLEN AWAY: THE TRUE STORY OF CALIFORNIA'S MOST SHOCKING KIDNAP-MURDER 96* (2000).

## **Kahahawai Did Not Die Immediately**

Kelley called one more witness to the stand, Dr. Robert B. Faus, the City and County Physician who had performed the autopsy on Kahahawai. Kelley asked Dr. Faus, “In your opinion how long after Kahahawai was shot would it take before death would ensue?” Dr. Faus answered, “It was reasonable to assume that he retained consciousness from three to five minutes, and it would be 15 to 20 minutes before he could be pronounced dead.” Dr. Faus was also of the opinion that during the three to five minutes of consciousness, Kahahawai may have been able to move about. Kelley concluded with a final question: “A man of Kahahawai’s build, as you found it, would he be able to struggle[?]” Dr. Faus answered, “He would.”

This was sobering testimony because it is likely that many people assumed Kahahawai had died right away after he was shot. Darrow asked Dr. Faus a few questions and then testimony ended.

## **Closing Arguments**

Barry Ulrich gave the first closing argument for the state on Tuesday, April 26. Ulrich repeatedly stressed to the jury that there was no excuse for the murder, even if the defendants believed Kahahawai had assaulted Thalia Massie. Emphasizing the testimony of Dr. Faus, he told the jury the defendants made no attempt to save Kahahawai’s life even though they claimed they had no intention to kill him, only to get him to confess. Ulrich also raised doubts about the defense’s claim that Tommie Massie had fired the fatal shot. Ulrich argued that the evidence did not line up because Massie testified that he was sitting next to Kahahawai while interrogating him, but the gunshot came from above and traveled down through the victim’s body. The evidence showed that whoever shot the gun was standing and some distance away, so Massie’s testimony was false, and the “Court will instruct you that you may disregard all uncorroborated evidence of a witness if you doubt his truthfulness and in this case there is no corroboration.”

## **Mocks Psychiatric Defense**

Like the prosecution in the 1924 Leopold and Loeb case, Ulrich mocked the defense’s insanity arguments and testimony. He told the jury that when suspects are caught “red-handed” with a body the defense of insanity is “a last resort.” Ulrich also raised an argument of class and race discrimination somewhat similar to the one that Darrow had used in other trials, such as the Sweet trials in Detroit in 1925 and 1926, where he defended several black defendants on trial for murdering a white man during a siege of their house by a white mob. Ulrich told the jury, “Suppose Kahahawai had taken a person of Massie’s station into his poor home and had tried to extort a confession or money, then had lapsed into insanity and killed him, how would he be treated? His plea of insanity would be laughed out of court.”

Ulrich continued:

They killed him and wrapped his body in a sheet, a deed that shocked the world and made the dignity of the Hawaiian government and justice in Hawaii a by-word and a reproach. Now they ask you to make Hawaii's shame complete. They have money and one of the greatest attorneys money can obtain . . . .

Ulrich concluded by asking the jury to return a verdict of murder in the second degree.

### **Clarence Darrow's Closing Argument**

Darrow gave his closing argument on Wednesday, April 27, 1932. The last major courtroom argument of his career, it was heard live on radio stations across the country. Anxious to hear Darrow speak, many people waited in line the night before and some places in line were bought and sold.

Darrow began to speak at about 8:30 a.m. He began by telling the jury:

Gentlemen, we are getting close to end of this case. It has been a long, serious, tedious trial, and you of the jury probably have had the worst of it. This case illustrates the working of human destiny more than any other case I have handled. It illustrates the effect of sorrow and mishap on human minds and lives, and shows us how weak and powerless human beings are in the hands of relentless powers.

As in his other closing arguments, Darrow's emotions and moods changed numerous times:

The old man spoke at times with the ringing words of a prophet of old, calling upon the inescapable power of the human conscience. At times his voice was scathing in denunciation of "man-made laws" and those who would place these before the human needs of man. At other times he spoke as a friend, a neighbor or minister might speak, talking of human destiny and the ills that befall men and women.<sup>135</sup>

### **Motherhood**

In addition to delving into the mind of Tommy Massie, Darrow also wanted the jury to focus on the feelings of Thalia's mother, Grace Fortescue:

Here is the mother. What about her? They wired to her and she came. Poems and rhymes have been written about mothers. I don't want to bring forth further eulogies which are more or less worth while, but I want to call your attention to something more primitive than that. Nature. It is not a case of the greatness of a mother. It is the case of what nature has done. I don't care whether it is a human mother, a mother of beasts or birds of the air, they are all alike.

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<sup>135</sup> RAPE IN PARADISE, *supra* note 59, at 258.

To them there is one all-important thing and that is a child that they carried in their womb. Without that feeling which is so strong in all life, there would be no life preserved upon this earth. She acted as every mother acts. She felt as your mothers have felt, because the family is the preservation of life. What did she do? . . . . I don't care if a mother is seventy-five and her daughter fifty, it is still the mother and the child.

Everything else is forgotten in the emotion that carries her back to the time when this was a little baby in her arms which she bore and loved. Your mother was that way and my mother, and there can be no other way. The mother started on a trip of 5,000 miles, over land and sea, to her child. And here she is now in this courtroom waiting to go to the penitentiary.

Darrow put pressure on the jury not to convict:

Gentlemen, let me say this: If this husband and this mother and these faithful boys go to the penitentiary, it won't be the first time that a penitentiary has been sanctified by its inmates. When people come to your beautiful Islands, one of the first places that they will wish to see is the prison where the mother and the husband are confined because they moved under emotion. If that does happen, that prison will be the most conspicuous building on this Island, and men will wonder how it happened and will marvel at the injustice and cruelty of men and will pity the inmates and blame Fate for the cruelty, persecution and sorrow that has followed this family.

### **Insisted Tommy Massie Fired Fatal Shot**

The defense needed to convince the jury that Tommy Massie shot and killed Kahahawai. Darrow told the jury:

When Kahahawai said, "Yes, I done it," everything was blotted out—here was the man who had ruined his wife. No man can judge another unless he places himself in the position of the other before he pronounces the verdict. If you can put yourself in his place, if you can think of his raped wife, of his months of suffering and mental anguish; if you can confront the unjust, cruel fate that unrolled before him, then you can judge—but you cannot judge any man otherwise.

The prosecution made a strong showing that one of the other defendants killed the victim. Darrow had to get the jury think it was Tommy Massie in order to use the unwritten law:

I cannot understand why the prosecution raises a doubt as to who fired the shot and how. Massie was there! He rose! The picture came before him! He doubtless shot! One bullet was shot and only one. Massie saw the picture of his wife pleading, injured, raped—and he shot. There could have been nobody else.

### **Wise Man from the East**

At one point, Darrow borrowed a phrase that prosecutor Robert Crowe used several times when he argued against Darrow in the 1924 Leopold and Loeb case. While trying to convince a judge to sentence Leopold and Loeb to death, Crowe repeatedly scoffed at the defense alienists who tried to convince the judge that Leopold and Loeb were mentally defective and should receive a life sentence instead of death. Several times Crowe referred to the alienists as the “Wise men from the East.” Referring to Dr. Catton, Darrow said, “This wise man from the East, from San Francisco, said Tommy had the emotions of fear or it may have been any one of the emotions which these experts carry around in a valise. He knows that is so because he is paid to know it.”

Darrow concluded:

I have looked at this Island, which is a new country to me. I’ve never had any prejudice against any race on earth. I didn’t learn it, and I defy anyone to find any word of mine to contradict what I say. To me these questions of race must be solved by understanding—not by force.

I have put this case without appeal to the nationality or race of any juror, asking them to pass on it as a human case. We’re all human beings. Take this case with its dire disasters, written all over by the hand of fate, as a case your own, and I’ll be content with your verdict. What we do is affected by things around us; we’re made more than we make. I want you to help this family, to understand them. If you understand them, that’s all that’s necessary. I’d like to think I had done my small part to bring peace and justice to an Island wracked and worn by strife.

You have not only the fate but the life of these four people. What is there for them if you pronounce a sentence of doom on them? What have they done? You are a people to heal, not to destroy. I place this in your hands asking you to be kind and considerate both to the living and the dead.

Darrow’s summation to the jury took four hours and twenty minutes. As he had done many times in the past, he spoke without any notes.

### **Prosecutor Kelley**

John Kelley would give the final argument for the state of Hawaii. He began, “Gentlemen of the jury, I would imagine that you are approaching a state of argument amnesia, or verbal psychosis. I will not detain you with a long plea.” True to his word, he spoke for less than an hour.

Setting a sharp contrast between the prosecution and defense he said, “I stand for the law and opposed to those who have violated the law, and ask you to do so. You have been presented with an argument of passion, not reason, a plea of sympathy, not sanity.”

### **Criticizes Clarence Darrow**

Kelley did not shy away from criticizing Darrow's unwritten law defense:

I submit to you that we have presented only the facts in this case, and those facts lead to the un-refuted fact that the defendants killed Kahahawai. Are you going to decide the case on the plea of a man who for fifty years has stood before the bar of justice which he belittles today, or are you going to decide this case on the law?

Later he asked, "Are you going to follow the law of the Territory of Hawaii or the plea of Clarence Darrow and George Leisure?"

### **Criticizes and Blames Tommie Massie**

Kelley was very critical of Tommie Massie. He disdained Massie and all the sympathy the defense tried to generate for him: "They ask you why should Massie take upon himself the blame for shooting Kahahawai. Because he couldn't hide behind the skirts of his mother-in-law. He couldn't stand up and blame these two men whom he had inveigled into this affair." Kelley blamed Tommie Massie for much of the trouble, going all the way back to the night of the party before Thalia's alleged assault: "I am going to paint you a conceited, vain, egotistical individual who is responsible for what has happened since September 12, the selfishness of the man who insisted that his wife go to this party when she did not want to go."

Kelley directly blamed Massie for the murder:

Clarence Darrow tells you he was a brave, frank witness on the stand, but I can show you evasion after evasion in that testimony and in his other testimony before he conveniently got insane. His action is the basis of everything that happened and his action caused the death of Joseph Kahahawai.

### **Scoffs at Psychiatric Defense**

Kelley openly scorned the defense's attempts to show Tommie Massie was temporarily insane: "Since the case of Harry Thaw, the defense had been the screen for the rich and influential, so they could get liars and experts to put on a defense of insanity—as it has in this case. The defense is not insanity, but sympathy."

### **Joseph Kahahawai**

Kelley did not want the jury to forget about the victim:

The same presumption of innocence that clothes the defendants in this case at this time clothes Joseph Kahahawai way down deep in his grave. They have removed by their act the possibility of his ever being anything but innocent in the Ala Moana case and 'not guilty' on the records of this court.

Kelley told the jury, “They almost got away with it—another five minutes, a shade up in the rear window of the car—and the body of Joseph Kahahawai would have been consigned to the deep forever.” He continued, “But an omnipotent God said, ‘Thou shalt not kill’ and the hand of fate saved Kahahawai’s body from the sea that it might rest in a Christian grave.”

Kelley pulled no punches in criticizing the defendants, especially Tommie and Grace: “Three able men and a cold, calculating woman let a man bleed to death in front of them, inch by inch. They aren’t kids! They’re brought up in an atmosphere of guns. . . They’re taught the art of killing, also of first aid. But they let him die, dragged him into the bathroom like a dog and let him die . . . .”

### **Makes Fun of Darrow**

Kelley, like some other prosecutors before him such as Robert Crowe in the Leopold and Loeb case and William Jennings Bryan in the Scopes trial, was familiar with Darrow’s legal career and used this knowledge in his argument. Darrow had criticized Dr. Catton during his closing argument, saying he was a spider in his web waiting for the first fly, and that Dr. Catton was wearing diapers when the defense alienists were practicing psychiatry. Kelley told the jury, “Well, I was wearing diapers, if any, when Brother Darrow was winning his spurs in Chicago debating for the single tax as a follower of Henry George.” Darrow and others in the courtroom laughed. Darrow reportedly whispered, “That’s good” to Thalia’s sister who was seated by him.

Kelley gave Darrow and the audience another laugh when he said, “Dr. Williams had to swallow a good deal of his book. Dr. Catton will be practicing medicine when Drs. Orbison and Williams are perambulating around in automatism.” He went on, “And I’ll be practicing law when Mr. Darrow will have rejoined William Jennings Bryan to discuss fundamentalism in a place where they’ll know more about it.”

### **Back to Tommie Massie**

Kelley’s humor was not on display for Tommie Massie. He repeatedly placed much of the blame on Massie. He said, “The most you can say about Massie is that he lied like a gentleman.” Kelley had taken note of several times during Massie’s testimony where he slipped and revealed things he would not have known had he blacked out like the defense contended he did. “If he remembers that, he remembers everything—and their insanity plea, like the dove of peace, flies out the window.”

Kelley also pointed out the long time lag between the alleged assault of Thalia Massie and the murder of Kahahawai, which seriously undercut the unwritten law of defense. Picking up a pistol from the evidence exhibits he said, “Lieutenant Massie, if he had taken this gun and mowed these men down in the hospital when his wife identified them, would at least have had the respect of the community, however wrong, by law, that act might have been.” But instead of a more understandable rash act, “He waited months and

dragged in these enlisted men. But they were free and voluntary parties to the act and are therefore fully responsible.”

Kelley also used Darrow’s words from one of his most famous cases: “In the Loeb-Leopold case Darrow said he hated killing, regardless of how it was done, always had and always will. And now he comes before you and says a killing is justified and is not murder.” He reminded the jury that Darrow had said that Dr. Catton’s testimony could be summed up in one word. But Darrow’s “own plea c[ould] be summed up in the same word, ‘Pay.’ A lawyer doesn’t work without something on the line.”

### **Lynch Law**

Kelley warned the jury:

Hawaii is on trial. Is there to be one law for strangers and another for us? Are you going to give Lieutenant Massie a walk-away ticket in this case? They’ll make him an admiral! They’ll make him chief of staff! He and Admiral Pratt are of the same mind, they believe in lynch law! If one man is allowed to take the law in his own hands, others will do so. I tell you, if the serpent of lynch law is permitted to raise its head in these islands, watch out—watch out!

### **Navy Brass**

Kelley referred to the pressure exerted by the Navy and Admiral Stirling since the Ala Moana case began: “As long as the American flag flies on that staff, without an admiral’s pennant over it, you must regard the Constitution and the law.”

Kelley impressed upon the jury the responsibility they had by referring to each of them by name and saying:

Each of you has the most vital duty to perform of any twelve men who ever sat in a jury box under the United States flag. Do your duty without being swayed by influences of sympathy. Pay no heed to what the admirals say, because with General Smedley Butler, I say, ‘To hell with the admirals!’ If you do it, you will have nothing to fear. Your loved ones will have nothing to fear. I put this case in your hands fully convinced that you will do your duty.

### **Racial Lines**

Kelley asked the jury not to let race influence the decision:

Deliberately, calmly, dispassionately reach a verdict not based on color lines. I pray to God you men will not be divided along racial lines because some of you are white and others are not. There is no reason on earth why you cannot render a unanimous verdict.

## **Where is Kahahawai?**

Kelley then concluded with a powerful remark to focus the jury on the victim: “Mr. Darrow has spoken of mother-love. Repeatedly, he has spoken of Mrs. Fortescue as ‘the mother’ in this courtroom. Well, there is another mother in this courtroom. Has Mrs. Fortescue lost her daughter, has Massie lost his wife? She sits there.” Kelley then looked towards the two saddest observers in the courtroom, the victim’s parents, and asked, “But where is Kahahawai?”

## **Jury Instructions**

As with many of his important cases, Darrow’s success or failure would depend to a great deal on the jury instructions given by the judge. Judge Davis began by reading the indictment to the jury. According to one account he took an hour to give the instructions, while another account says he spoke for about 35 minutes. The possible verdicts for Grace Fortescue and the two navy sailors were second degree murder, manslaughter or not guilty. The possible verdicts for Tommie Massie were the same with the addition of not guilty by reason of insanity. Judge Davis explained the various legal concepts involved, such as the degrees of murder, burden of proof, and the definition of insanity. He also addressed the “unwritten law,” telling the jurors that the issue of whether Kahahawai was guilty of raping Thalia Massie must not be a part of their deliberations.

## **Verdict**

The jury began its deliberations at 4:40 p.m. on Wednesday afternoon. Deliberations continued all day Thursday and then into Friday. After 47 hours of deliberation, Judge Davis called the jurors to the courtroom and asked the jury foreman if they had reached a verdict. The answer was no. He asked if there was any prospect of agreement on a verdict and the foreman said yes, but he qualified this with “I think so.” This shocked the defendants and their attorneys even though they believed that the jury was close to voting for acquittal. The jury went back to continue deliberations.

At about 5:30 p.m. on Friday, just an hour after Judge Davis had summoned the jury to ask if they could reach a verdict, the defense and prosecution were called back to court. The last to arrive was Prosecutor Kelley. The jury had reached a verdict. The jury’s ballot was given to the judge, who gave it to the clerk to read. The clerk began:

We, the jury, find the defendant, Thomas H. Massie, guilty of manslaughter.  
Leniency recommended.

The clerk continued reading the same verdict for the other three defendants. Darrow recalled that he and the defendants were stunned when the verdict was read:

At last we went to the courthouse to receive the verdict; but it was not an acquittal. The jury returned a verdict of manslaughter, with a recommendation for leniency. We could hardly believe that we had heard aright! Mrs. Massie shook

with sobs. Lieutenant Massie tried to console her. Mrs. Fortescue sat bolt upright, her face as unemotional as Fate itself.<sup>136</sup>

Darrow blamed the guilty verdict on the Judge's repeated emphasis on the law and the jury instructions. He also believed the verdict was based on race:

I feel that I know why and how the jury found the verdict. A jury of white men would have acquitted. This in no way prejudices me against the brown section of Hawaii; they feel that the white men get everything but a few offices.<sup>137</sup>

Masaji Marumoto, a retired associate justice of the Hawaii Supreme Court, was an associate in the law firm of Frank Thompson during the Ala Moana and Fortescue trials. Thompson worked as private counsel for Tommy and Thalia Massie in the Ala Moana case and he worked as co-counsel with Clarence Darrow and Robert Leisure in the Fortescue case. According to Marumoto, "There was little merit to Darrow's statement. Six of the jurors were white men. Only one negative vote would have hung the jury. There were neither Hawaiians or Japanese on the jury."<sup>138</sup>

Marumoto gave credit to the juries in both cases:

The Ala Moana and Massie-Fortescue trials whipped racial and social tensions to a furor in the Territory of Hawaii. Both prosecutions were conducted in a climate ill-suited to fair and impartial deliberation, yet the juries resisted external pressures to resort to lynch law or to apply the 'unwritten law.' Despite the fact that many of the jurors were employed by firms that had a stake in placating the military forces, they faithfully discharged their duties to conform their verdicts to the law as delivered by the court, rather than as dictated by public opinion.<sup>139</sup>

Darrow recounted that after the verdicts,

[W]e all began preparing alibis, as lawyers always do. I indicated that I was the only one who needed an alibi, as they had let me try the case practically alone. We finally agreed that the judge was to blame. This is always a first-rate alibi: the judge should not have instructed them so much on the side of the State; judges should talk awhile on our side, and then on the other. Then we wondered how he came to do as he did, for we all agreed that he was a good fellow, and would have acted the same as our clients did under similar circumstances. Then we sighed, and modified it, and said that anyhow he would have acted the same if he had not been a judge.<sup>140</sup>

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<sup>136</sup> STORY OF MY LIFE, *supra* note 86, at 477.

<sup>137</sup> *Id.* at 479.

<sup>138</sup> Masaji Marumoto, The Ala Moana Case and the Massie-Fortescue Case Revisited, 5 U. Haw. L. Rev. 271, 283 (1983) [hereinafter Massie-Fortescue Case Revisited].

<sup>139</sup> *Id.* at 287.

<sup>140</sup> STORY OF MY LIFE, *supra* note 86, at 477.

The defense contemplated whether they should appeal. They decided to wait until they heard what the public reaction would be to the verdict. Darrow wrote, “We heard right away. The whole world seemed up in arms: what?—send men and women to prison just because they violated a law?—when every one knew that any one would have done as these people did, if they had the courage.”<sup>141</sup>

A 1932 *Time* article reported:

The testimony of the alienists was generally discounted on both sides. The jurors agreed Lieut. Massie was sane. Some jurors expressed large doubts about Kahahawai's alleged confession, others that Lieut. Massie had done the actual shooting. Mrs. Massie's fit of temper on the witness stand where she tore up evidence did the defense no good with the jury.<sup>142</sup>

None of Clarence Darrow's three major defense weapons worked: the psychiatric testimony claiming Massie was temporarily insane, the unwritten law, and his closing argument. Referring to Darrow's closing argument, one juror later said, “He talked to us like a lot of farmers. That stuff may go over big in the Middle West but not here.”<sup>143</sup>

Judge Davis announced that he would sentence the defendants one week later on Friday, May 6.

### **Political Storm**

The guilty verdicts inflamed the already caustic political atmosphere. Mainland politicians saw it as the second or third miscarriage of justice in the whole sordid case. They were already angry that Hawaii's justice system had failed to convict the Hawaiian and Asian rapists who had attacked Thalia Massie. They did not think Grace Fortescue, Tommie Massie and the two sailors should have even been charged for Kahahawai's murder. Now the same corrupt justice system was going to send them to prison for taking action to find justice and protect women.

The White House was flooded with telegrams protesting the verdict and asking President Hoover to issue immediate pardons. Those angered by the verdict were not aware or did not care that only the Governor of Hawaii had the power to pardon. Dudley Field Malone, who worked as co-counsel with Clarence Darrow in the 1925 Scopes anti-evolution case, wired the President urging that the newly-convicted defendants be put on a warship and taken to the mainland so “they can get a fair trial!” Senator Kenneth McKellar of Tennessee wanted to impeach Judge Albert M. Christy because he forced the grand jury to indict the defendants. McKellar also proposed a bill that would give the President full power to pardon the defendants immediately. A message signed by 106 members of the 106<sup>th</sup> Congress was sent to Governor Judd:

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<sup>141</sup> *Id.* at 478.

<sup>142</sup> “*Manslaughter, with Leniency*,” *TIME*, May 9, 1932, available at <http://www.time.com/time/magazine/article/0,9171,743670-2,00.html>.

<sup>143</sup> *Id.*

We, as members of Congress, deeply concerned in the welfare of Hawaii, believe that the prompt and unconditional pardon of Lieutenant Massie and his associates will serve that welfare and the ends of substantial justice. We therefore most earnestly request that such a pardon be granted.

The Senate also sent a message suggesting that a pardon was the “wisest solution of a most tragic situation, both for the Territory and all concerned.”

Senator William King of Utah was compelled to issue a statement saying, “I cannot help feeling that the verdict was a miscarriage of justice.” Representative John E. Rankin, a Democrat from Mississippi, was one of the more outspoken critics of the situation in Hawaii. Rankin called for placing Hawaii under direct control of the federal government until “white women are secure from such brutal attacks as that made on Mrs. Massie. That seems to be the only way to put a stop to such mockeries of justice as have grown out of this horrible incident.” In 1933, Rankin would introduce a bill that would remove the three year residency requirement to hold the position of Governor and allow the President to appoint a non-resident.

Delegate Victor S.K. Houston, Hawaii’s representative in Washington D.C., was a focus of mainland political pressure. Trying to stave off federal intervention, Houston wired Governor Judd:

Since justice seems to have been served by recent findings, may I as an individual, urge you to exercise your pardoning power at the appropriate time. I also recommend allowing the present defendants to remain in Navy custody till the matter is finally disposed of. I am convinced that Hawaiian interests will be best served by the suggested action.

### **Sentencing and Legal Sham**

The defense waited two days and began to hear from the jurors that they had wanted to acquit “but the judge’s instructions did the mischief.”<sup>144</sup> So great was the outcry over the guilty verdicts that sentencing was moved up two days, but this was unannounced except to the defendants and the attorneys on both sides. Judge Davis sentenced each defendant to ten years at hard labor in Oahu prison. The defendants left the courthouse with their lawyers and Attorney General Hewitt and walked across the street to the Iolani Palace. Reporters were confused as to why the defendants, who had just been sentenced to ten years at hard labor, were in such a good mood. Unknown to anyone but the attorneys, the defendants, and a few others, a legal sham had been agreed upon by those in power in Hawaii. A petition for clemency was written and signed by the defendants. Then Governor Judd held a press conference and read the commutation of sentence that he gave to the four convicts:

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<sup>144</sup> STORY OF MY LIFE, *supra* note 86, at 478.

The undersigned, defendants in the matter of the Territory of Hawaii vs. Grace Fortescue, et al, and their attorneys, do hereby respectfully pray that Your Excellency, in the exercise of power of executive clemency in you vested, and further in view of the recommendation of the jury in said matter, do commute the sentences heretofore pronounced in this matter.

Then it was announced that the ten year prison sentence had been reduced to *one hour* in the custody of the High Sheriff. The hour had already been served and the defendants were free.

According to Darrow, on the third day after the verdict the attorney general came to see him and stated that the prosecution did not like the verdict; he also said the governor could help them. After several conferences it was decided that the governor would grant a pardon, but then it was changed to a commutation with the defendants sentenced to one hour to be spent in the sheriff's office. Darrow was convinced that "it was not the governor but the public that was responsible for the commutation of the sentence. I do not believe it would have been granted at the time save for the almost universal demand from America, and the general sentiment all over the world."<sup>145</sup>

Masaji Marumoto believed that "at the time Governor Judd commuted the sentences, he really did not have any choice. The future of self-government in Hawaii was at stake, as public officials pressured the Governor to grant pardons."<sup>146</sup>

### **Governor Judd's Version of Commutation Decision**

In his autobiography, Governor Judd provided his version of the commutation decision. Judd recalled the following exchange with Darrow after the verdict:

Then, to my official residence at Washington Place, came Clarence Darrow, the still tousled and rumpled defense attorney. "What are you going to do?" he asked. "Full pardons are indicated in the circumstances. I'll commute the sentences to one hour," I informed him. "I can do nothing more." Darrow bowed his head a moment, in seeming assent, and took his leave. "So be it," were his parting words.<sup>147</sup>

Darrow came back to Judd's office the next day with a different attitude:

[P]resumably after a conference with Admiral Stirling. He "turned on" his courtroom presence as he stood before my desk demanding, not asking, that full pardons be issued, in the interest of justice, to each of the three Navy men and to Mrs. Granville Fortescue, mother of Thalia. "You are breaking a pledge if you do not pardon them," he insisted. "Whose pledge?" I snapped. "Not mine certainly. I have never given even an intimation, anywhere at any time, that I would grant

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<sup>145</sup> STORY OF MY LIFE, *supra* note 86, at 479.

<sup>146</sup> Massie-Fortescue Case Revisited, *supra* note 138, at 285.

<sup>147</sup> JUDD & HAWAII, *supra* note 46, at 203.

pardons in these cases. For your information, even to commute the sentences will be considered by some to be a miscarriage of justice.”<sup>148</sup>

Judd recounted in his autobiography:

I did not admit to him, nor have I admitted to anyone else until now, the full extent of my feeling of personal guilt in granting commutation in the face of threats by scores of congressmen and assorted public officials and newspaper publishers from coast to coast. I felt I should scrub my hands afterwards, even though the jury had recommended leniency.<sup>149</sup>

According to Judd, at this time Senator Bingham of the Senate Territorial and Insular Affairs Committee, who was born in Hawaii, introduced into the U.S. Senate:

[W]hat seemed on the face of it to be a bombshell in the form of seven bills calling for numerous changes in the judicial and police systems of Hawaii. Perhaps the most drastic of the measures, in the opinion of many in Hawaii, was a provision which would have removed residence and citizenship qualifications for appointment to territorial and federal office in Hawaii. This was denounced in Hawaii as a step toward carpetbagging.<sup>150</sup>

Judd wrote that it was only later that he found out that Bingham introduced the bills as a way of taking pressure off of the situation; he had no intention of pushing the bills to passage and they were not enacted.<sup>151</sup> Judd stated that at the time he was preoccupied “with the activities of Clarence Darrow, who was spreading the report among newspapermen that I had promised to pardon Massie and his codefendants.”<sup>152</sup>

Following the confrontation with Judd when Darrow demanded pardons for his clients, Darrow, his associate counsel and the defendants went to Judd’s office. Judd recalled: “I signed the commutation papers prepared by Hewitt, the formalities were observed and we parted. Major Ross took the party in charge, and drove all four to Pearl Harbor. Their token time of one hour in custody expired almost at the time the party entered the naval station.”<sup>153</sup>

Most likely referring to the Pinkerton Report that he would receive in October, Judd stated:

I acted under the heaviest congressional pressure and against my better judgment. Had I possessed facts which I learned later, I doubt if I would have commuted the sentences. That would have flung the issue back into the hands of an infuriated

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<sup>148</sup> *Id.* at 203.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 204.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

Congress. Punitive legislation against Hawaii was being considered in that body at the time. Had I not acted as I did, I believe that the form of government here might have been changed to some form of government by commission. It might not now be a state of the Union.<sup>154</sup>

Russell Owen believed that in regard to the commutation of the sentence, “the majority of people in Hawaii do not realize that this was what Darrow was striving for from the beginning.”<sup>155</sup>

### **Not Lenient Enough**

Some whites believed that the defendants should not have been convicted at all. So, they did not think the commutation was lenient enough. Since they were convicted in an unfair trial, they should at least have their full civil rights restored. The Honolulu Citizens' Organization for Good Government met the same day as the commutation and created a petition asking the governor for “an immediate, unconditional pardon” of the defendants, thus restoring their full civil rights. The petition drive got about 1,780 signatures. Governor Judd accepted the petition, but he did not act on it.

Despite their felony convictions, Massie, Jones, and Lord were immediately put back on active duty by the Secretary of the Navy. Admiral Stirling defended this decision: “The question has been asked why the Navy allows Lieut. Massie, convicted of a felony and not pardoned, to remain in the service. The only answer that can be given is that the naval authorities tacitly have refused to consider legal either the trial or the conviction.”

### **Two Sets of Laws**

The commutation to just one hour of custody was seen for the farce it was by non-whites in Hawaii. Princess Kawanakoa spoke for many when she asked: “Are we to infer from the governor's act that there are two sets of laws in Hawaii—one for, the favored few and another for the people in general?”

### **Hawaii's Legal System**

To understand the pressure on the legal system in Hawaii before and during the trials and on Governor Judd after the Massie-Fortescue convictions, it helps to understand what type of government existed in the Territory of Hawaii. Hawaii was formally annexed by the United States in 1898, pursuant to the terms of the Joint Resolution of Annexation of July 7, 1898 also known as the “Newlands Resolution.”<sup>156</sup> Acting under the authority of the Joint Resolution, the President of the United States appointed a five member commission which was given the responsibility to prepare and recommend to Congress

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<sup>154</sup> JUDD & HAWAII, *supra* note 46, at 168.

<sup>155</sup> HOT LANDS AND COLD, *supra* note 89, at 227.

<sup>156</sup> Joint Resolution of Annexation of July 7, 1898, 30 Stat. 750, 2 Supp. R.S. 895; see Anne Feder Lee, THE HAWAII STATE CONSTITUTION: A REFERENCE GUIDE, 5 (1993) [hereinafter Hawaii State Constitution].

legislation to establish the territory and its governance.<sup>157</sup> The commission submitted its recommendations as a draft act in December 1898 but congressional action was delayed.<sup>158</sup> Congress passed the “Act to Provide a Government for the Territory of Hawaii, known as the Organic Act of Hawaii on April 30, 1900.”<sup>159</sup> President McKinley signed this “constitution” on June 14, 1900 at which time it went into effect.<sup>160</sup>

Although it had some political autonomy, as a territory Hawaii had far less political power than a state:

Though it created a structure similar to that of state governments, the Organic Act allowed the territorial citizens only limited self-government, a factor that led many in the islands to advocate statehood for Hawaii. While members of the territorial house of representatives and senate were popularly elected, the governor, secretary, territorial supreme court justices, and circuit court judges were appointed by the U.S. president with the advice and consent of the U.S. Senate. Ultimate power and control remained in the hands of Congress, for it could specifically legislate just for Hawaii, it could nullify legislation passed by the territorial legislature, and it alone could amend the Organic Act. The governor was given wide powers, enhanced by the fact that, as a presidential appointee, the governor was not dependent on local support. Although voters could elect a delegate to the U.S. Congress, that delegate had no vote on the floor of the House of Representatives.<sup>161</sup>

Hawaii remained a territory until August 21, 1959 when it was admitted to the Union as the 50<sup>th</sup> state.

### **Who Actually Killed Joseph Kahahawai?**

One question that was never satisfactorily answered throughout the Massie-Fortescue trial was who actually shot and killed Joseph Kahahawai. The most definite answer to this mystery came in the mid 1960s when Peter Van Slingerland interviewed Deacon Jones as part of his research for his forthcoming book *Something Terrible Has Happened*, published in 1966.

During the trial, Clarence Darrow insisted that Tommy Massie pulled the trigger, which was necessary to utilize the "unwritten law" defense. But Jones confessed to Slingerland that he actually shot and killed Kahahawai.<sup>162</sup> Jones revealed that Kahahawai never confessed to having raped Thalia Massie and it was not an accident that he shot the victim as he “lunged” or “leaned forward.”<sup>163</sup> Jones referred to Kahahawai as the “black bastard” and Slingerland specifically asked, “You shot him?” And Jones replied, “You're

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Hawaii Organic Act, ch. 339, 31 Stat. 141, 153 (1900).

<sup>160</sup> Hawaii State Constitution, *supra* note 174, at 6

<sup>161</sup> *Id.*

<sup>162</sup> SOMETHING TERRIBLE HAS HAPPENED, *supra* note 50, at 318.

<sup>163</sup> *Id.*

God damn right I did.”<sup>164</sup> Jones also said he told Darrow near the end of the trial that he had shot Kahahawai.<sup>165</sup> Jones recounted “That seemed to me Mr. Darrow's idea to let Tommie take the rap, because, if it had been either Lord or I . . . they'd say, ‘What in hell was he doing in it, anyway.’ But Tommie had a motive and the reason. After all, it was his wife.”<sup>166</sup>

Other evidence tends to support Jones’ confession. Even the defense admitted the fatal shot came from Jones’ handgun; when Jones was arrested he had the magazine with one bullet missing and the empty shell casing from a fired round, and these matched the bullet removed from Kahahawai’s body. Kelley, the other prosecutors, and some commentators strongly suspected that someone other than Tommy Massie fired the fatal shot.

### **Aftermath**

The commutation of the Massie-Fortescue sentences did not appear to end the legal aspects of the Ala Moana rape case. Soon after the commutation, Prosecutor Kelley announced that he would retry the four Ala Moana defendants and set a tentative trial date of May 23, 1932. Kelly believed if they were guilty they needed to be tried and punished and if they were innocent they needed the chance to clear their names. Darrow recounted, “I had been asked by the attorney general if I would . . . help prosecute the assailants of Mrs. Massie, for which I was offered a fee; but I explained that I never had prosecuted any one, and it was too late for me to begin now.”<sup>167</sup>

### **Another Controversy**

The Navy transferred Lieutenant Massie to San Francisco and it was reported that Thalia and her mother planned to travel with Tommy aboard the liner Malolo on May 8.<sup>168</sup> Kelley stated that Thalia Massie would be kept in Hawaii by the restraint of law if need be because she was the main witness in the retrial of the Ala Moana defendants. On Sunday, May 8 there were numerous people present during the boarding of the Malolo, but there was no sign of the Massies or Mrs. Fortescue. A Navy mine tender drew up to a cargo hatch on the other side of the ship and slipped the trio in from that side. Clarence and Ruby Darrow were also traveling with them, but it is not clear if the Darrows also slipped in through the cargo hatch. Upon learning that Thalia was trying to skip out, Governor Judd asked Attorney General Hewitt to have a subpoena served on Thalia to prevent her from leaving, as she was needed as an important material witness in the upcoming trial.<sup>169</sup> A police sergeant tried to serve Thalia with the subpoena, which involved a chase through the passageways and a physical “tussle” between the police offer and the navy captain who delivered the defendants aboard the mine tender.<sup>170</sup>

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<sup>164</sup> *Id.* at 318.

<sup>165</sup> *Id.* at 322.

<sup>166</sup> *Id.*

<sup>167</sup> STORY OF MY LIFE, *supra* note 86, at 481.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 212.

<sup>170</sup> *Id.*

Thalia took refuge in a cabin. It is not clear if she was ever served with the papers. In any event, “The Malolo sailed, and with it went all hope of retrying four men charged in her assault. The law had done what it could to keep her in Hawaii, but those attempts were futile.”<sup>171</sup>

The Navy and the War Department formally declared that they were against military rule in Hawaii in late May. As a result, the bills in Congress aimed at imposing martial law or commission-based government were never enacted.

### **“Honolulu Martyrdom” by Grace Fortescue**

Beginning in July, 1932, Grace Fortescue wrote a three-part series for a magazine giving her side of the story.<sup>172</sup> Very early in the first part, she addressed the question: “Would you do the same thing again, Mrs. Fortescue?” To this she responded:

No, I would not. Could I have looked into the future but a few hours, nothing would have persuaded me to go to the courthouse that fatal day in January. I sincerely regret the death of Kahahawai. I do not believe in lynch law. I cannot state that too emphatically. My upbringing, family traditions, early religious training make the idea of taking another’s life repugnant to me. I am opposed to capital punishment. My conviction no one has the right to take another’s life was more strongly fortified when, during the first years of the World War, I followed my husband on his war-corresponding journey through Belgium, France, Russia, Greece, and Serbia. At that time I learned all too well the horrors of killing. No, I repeat, I do not believe in lynch law.<sup>173</sup>

She went on to claim:

In our efforts to obtain a confession from Kahahawai, we were not breaking the law. We were endeavoring to aid the law. Our actions were not, to our way of thinking, illegal. A confession, we were convinced, would instantly kill the rumors and gossip blackening my daughter’s name . . .<sup>174</sup>

Grace Fortescue recounted that on January 5, 1932 she went to the courthouse and spoke with the clerk of the court and asked why the retrial would be delayed until February or even March. The clerk told her: “They are afraid of a second hung jury. The defense so effectively riddled the prosecution and nullified the known evidence that it will be practically impossible to bring about a conviction unless one of the defendants confesses.”<sup>175</sup> Furthermore, if there was another mistrial, the defendants could not be retried and would be set free.

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<sup>171</sup> *Id.*

<sup>172</sup> Grace Fortescue, *The Honolulu Martyrdom: Mrs. Granville Fortescue Tells Her Story At Last* LIBERTY, July 30, 1932, 5-10; Aug. 6, 1932, 10-14; Aug. 13, 1932, 12-16.

<sup>173</sup> Mrs. Granville Fortescue, *The Honolulu Martyrdom*, 9 LIBERTY, July 30, 1932, at 5.

<sup>174</sup> *Id.* at 6.

<sup>175</sup> *Id.* at 7.

Grace Fortescue recalled, “The words ran in my brain: *unless one of the defendants confesses.*”<sup>176</sup> She also learned that Kahahawai had to report to the courthouse every day. She then went to a newspaper office to get a copy of Kahahawai’s picture so she could study it and be able to recognize him. She found out Kahahawai’s home address and drove by his home, but decided it was not a good area in which to kidnap him.

Grace was the one who created the fake summons. She handwrote it because the typewriter was at Thalia’s house. After she printed it, she looked at it and it seemed scant, so she cut out a piece of a newspaper and pasted it on the summons. That is why the fake summons contained the nonsensical words, “Life Is A Mysterious And Exciting Affair . . . .”

### **Grace Fortescue Recalls Clarence Darrow**

After Mrs. Fortescue and the others were arrested, a lawyer from New York who was on vacation in Hawaii suggested that Grace try to hire Clarence Darrow for the defense. Grace recalled:

Clarence Darrow. His name to me then just meant a criminal lawyer who had defended the two boys in the Loeb-Leopold case; an atheist who had defended Scopes in the evolution case in Tennessee. I knew he was a great man, the best known criminal lawyer in the United States. But I did not know then that he was a true friend of humanity.<sup>177</sup>

She described Darrow’s questioning of potential jurors:

The prospective jurors, the battery of lawyers, the judge in his high chair, the spectators, the courtroom itself seemed suffused with that gentle old voice. It breathed a feeling of human love and deep understanding, a feeling akin to reverence; the appeal to old age, but above all kindness. One man, by his personality alone, had stamped out the hate and the bitterness of the earlier days in court. In their place was understanding.<sup>178</sup>

### **Pinkerton Report**

When Prosecutor Kelley was still going forward with the Ala Moana retrial, he looked into introducing Thalia’s sworn testimony from the first trial even though he would have to find a hearsay exception. But after looking at the investigation and trial records, he became convinced that the prosecution was hopelessly tainted and a new investigation would be needed. In addition, the new investigation would have to be done by an independent agency outside of Hawaii which could not be accused of bias. Judd informed Kelley that he had already tried to get the FBI to investigate, but they had refused. So

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<sup>176</sup> *Id.*

<sup>177</sup> Mrs. Granville Fortescue, *The Honolulu Martyrdom*, 9 LIBERTY, Aug. 6, 1932, at 14 (Part II).

<sup>178</sup> Mrs. Granville Fortescue, *The Honolulu Martyrdom*, 9 LIBERTY Aug. 13, 1932, at 12-13 (Part III).

Kelley suggested that the Pinkerton National Detective Agency be hired to conduct the investigation. Judd along with the mayor of Honolulu persuaded the territorial legislature and the board of supervisors to fund the Pinkerton investigation.<sup>179</sup> Judd requested the investigation “to obtain the truth about the Ala Moana case, in order to combat the rampant misinformation on the mainland United States about the case.”<sup>180</sup> The results of the investigation, which became known as the Pinkerton Report, were given to Governor Judd on October 3, 1932.

Since 1850, the Pinkerton Detective Agency has earned different reputations depending on the political, legal and social views of the people reviewing the Pinkerton’s actions. They had a notorious reputation with some segments of society, especially among the labor movement, during Clarence Darrow’s time. They also had a reputation for conducting thorough investigations. They continued this in investigating the events in Hawaii. The investigation took three months during which time the statements of the defendants and their accuser were exhaustively examined, the physical movements of all involved were retraced and timed to check the veracity of claims, witnesses were interviewed, and the police and hospital reports and trial testimony were examined. The investigation clearly showed that the identification of the accused was in no way reliable.

This time, the Pinkerton Agency supported the weaker party in the events. The Ala Moana defendants’ alibis and claims were strongly supported by the Pinkerton Report:

An analysis of the reports of our representatives, together with the reports and statements of the Attorney General’s office, the office of the Public Prosecutor, and the Police Department, also the testimony at the trial of the defendants, makes it impossible to escape the conviction that the kidnapping and assault was not caused by those accused, with the attendant circumstances alleged by Mrs. Massie. We can only assume that the reason Mrs. Massie did not give to the authorities, immediately after the alleged offense, the same details of information she was able to furnish by her testimony at the trial is because she did not possess it at the time she was questioned by those she came in contact with immediately after the alleged offense.<sup>181</sup>

The report also stated that the defendants’ alibis and their description of their movements that night remained precisely the same as they initially stated.

In October, Governor Judd, Prosecutor Kelley and Attorney General Hewitt met with the General Manager of the Pinkerton agency Asher Rossetter in New York, where Rossetter gave them a draft of the report.<sup>182</sup> The report asserted very strongly that the Ala Moana

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<sup>179</sup> HONOR KILLING, *supra* note 4, at 366.

<sup>180</sup> Massie-Fortescue Case Revisited, *supra* note 138, at 272.

<sup>181</sup> Letter from Asher Rossetter, Vice President & General Manager of the Pinkerton National Detective Agency, to Governor Lawrence Judd of Hawaii..3 (Oct. 3, 1932) (this letter is included in the Pinkerton Report).

<sup>182</sup> HONOR KILLING, *supra* note 4, at 396.

defendants did not rape Thalia Massie. Someone leaked the findings to the press and reporters converged on the group when they left the Pinkerton's building. They refused to comment and Judd directed Kelley and Hewitt not to comment either. Soon the territorial legislature and the board of supervisors in Hawaii were demanding that the report be made public because it was financed by taxpayer money.

At this time the Navy was also pressuring Judd to give a full pardon to the defendants.<sup>183</sup> Pressure also came from the secretary of the interior, Ray Lyman Wilbur, who contacted Judd via a coded cable demanding that the Pinkerton Report be suppressed because it would adversely affect the pardon requests and it would reveal that the Ala Moana defendants were indeed innocent and that an innocent man had been murdered.<sup>184</sup>

While it cleared the Ala Moana defendants of raping Thalia Massie, the Pinkerton report reflected an antiquated view of rape:

It is a debatable point whether the rape of a woman of Mrs. Massie's size and strength is possible by one man or several men, unless she be rendered helpless beforehand, without the clothing of herself and the person and clothing of her assailants clearly showing the effects of her struggle to prevent the rape.

Such a woman possession all her faculties is capable of offering resistance to the original force adopted to gain control and further to resist thru the raping operating, struggling with arms, legs and body, delaying, if not preventing the completion of the act.

It is the obligation of the woman to resist with all the force and power of which she is capable and when such resistance has been strenuous and adequate to her physical strength signs of violence are left not alone on her person but on that of her ravishers as well. The absence of such signs, however, cannot be taken as conclusive proof that full resistance was not offered to a violent attack for the obvious purpose of rape may cause a temporary psychic paralysis and account for the failure to make outcry and to use strenuous physical resistance.<sup>185</sup>

## **Nolle Prosequi**

Thalia Massie's departure from Hawaii left the prosecution without a complaining witness, but it was not until February 1933 that the Ala Moana defendants were discharged from custody. Prosecutor Kelley requested the discharge on a motion of *nolle prosequi*<sup>186</sup> and supported the request with information taken from the Ala Moana investigation and trial and the Pinkerton report:

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<sup>183</sup> *Id.* at 397.

<sup>184</sup> *Id.*

<sup>185</sup> PINKERTON REPORT, *supra* note 13, at 48.

<sup>186</sup> *Black's Law Dictionary* defines *nolle prosequi* as Latin for "not to wish to prosecute" and as "[a] legal notice that a lawsuit or prosecution has been abandoned."

1. A careful examination of the evidence adduced at the former trial shows clearly the following principal weaknesses in the prosecution's case.

a) The methods employed in securing the identification of the defendants by the complaining witness.

b) The lack of medical, physical and material evidence of the alleged rape upon the complaining witness.

c) The lack of evidence to overcome the alibi presented by the defendants.

The complaining witness at her home after the alleged rape repeatedly told police she could not identify the car in which they abducted her, and did not know the license number. The only feature she could recall was a loose flapping top.

In view of statements of the complaining witness, it is believed that the belief of the police that the accused were perpetrators of the alleged crime was made obvious to her through the manner in which the accused were brought before her for identification, and that the ability of the complaining witness to subsequently identify four of the accused, resulted from the suggestion contained in the method that was pursued.

It can only be assumed that the reason the complaining witness did not give to the police authorities immediately after the alleged offense was reported to them the same details of information regarding her assailants that she was able to furnish by her testimony at trial is because she did not possess it at the time, and it is entirely within reason to believe that her knowledge of the appearance, dress and other identifying marks of the accused, as furnished by her at the trial, was acquired by events which occurred in the interim.<sup>187</sup>

### **Thalia and Tommie Massie**

Named for the Greek muse of comedy, Thalia Massie was a troubled individual before and after the Ala Moana and Massie-Fortescue trials. Thalia never showed any regret or acknowledgement that her allegations implicated the wrong men leading to the murder of Joseph Kahahawai. On February 23, 1934 Thalia filed for divorce in Reno, Nevada. She later remarried, but that marriage also ended in divorce. Over the years, she made several suicide attempts. On July 2, 1963 Thalia committed suicide in her home in Palm Beach, Florida with an overdose of barbiturates.

Tommie Massie married Florence Storms in 1937. His new wife made international headlines in 1938 when she was slapped by a Japanese sentry while in Japanese-occupied Tsingtao, China. The Japanese sentry, angry but unaware that Florence did not understand his orders, slapped her across the face. The matter was diplomatically resolved when representatives from the Japanese naval department expressed regret for the incident and assured the United States Consul in China that the sentry would be punished.

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<sup>187</sup> JUDD & HAWAII, *supra* note 46, at 213.

Tommie eventually exhibited severe mental problems:

In 1940, while serving aboard the USS Texas, he began to exhibit bizarre and unsettling behavior. He appeared disheveled while on duty; his behavior became irrational and erratic punctuated with violence. He displayed delusions of grandeur, hallucinations, and incoherent speech. His mental health had also disintegrated into believing that he was under the direction of supernatural forces to the point of carrying an empty bottle which he believed could be filled with powerful liquids that could give him untold abilities.<sup>188</sup>

Tommie Massie was admitted to St. Elizabeth's Hospital for psychiatric evaluation in April, 1940. A few months later, a naval retirement board found Massie was manic depressive and not capable of continuing on active duty in the Navy. For the next forty-seven years Tommy lived as a civilian until he died on January 8, 1987. It was the 55th anniversary of the murder of Joseph Kahahawai, Jr.

### **Later Crimes**

The specter of the Ala Moana and Massie-Fortescue cases has risen several times since 1932. In 1948 another crime revived some of the more sensational aspects of the controversies of 1931 and 1932. Two Hawaiian men, 21-year-old James E. Majors and 19-year-old John Palakiko, escaped from a prison work crew. Later they broke into the home of Theresa Wilder, a 68 year old widow from one of the most prominent white families in Hawaii. The two convicts bound and strangled Wilder, and she may have been raped.<sup>189</sup> As described in an appellate opinion, the victim had been “gagged and bound, her jaws having been broken, and the position and condition of clothing having indicated that rape had been committed or attempted.”<sup>190</sup>

Majors and Palakiko, who were of limited education and came from troubled homes, were arrested, tried, convicted and sentenced to death. Labor attorney and activist Harriet Bouslog took up their case a week before they were scheduled to be executed, and she won a stay of the execution. Bouslog specifically got involved because she believed there was a double standard in how the Massie defendants were treated compared to the two Hawaiian men accused of the murder of the white victim Theresa Wilder.

In 1954, six years after the murder, Governor Samuel Wilder King, who was part-Hawaiian, commuted the killers' sentence to life imprisonment. In 1957, Governor King signed into law legislation abolishing the death penalty in Hawaii. Majors and Palakiko were pardoned by Governor Burns in 1962.

### **Another Notorious Rape**

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<sup>188</sup> Raymond E. Spinzia, *Those Other Roosevelts: The Fortescues*, THE FREEHOLDER: MAGAZINE ONLINE, 2006, <http://www.oysterbayhistory.org/freeres.html> (last visited Feb. 18, 2009).

<sup>189</sup> SHAPING HISTORY, *supra* note 56, at 157.

<sup>190</sup> *Ex parte* Palakiko, 39 Haw. 141, 1951 WL 7081 (Haw. Terr. 1951).

In 1979 another crime shook Hawaii. This time some Hawaiian youths did brutally gang rape a white woman. The sensational crime began when a Finnish dental student named “Anna” voluntarily joined a group of nine Hawaiian youths to smoke marijuana in a tent at Nanakuli Beach Park. Anna was held in the tent against her will all night and gang raped by the youths over the course of many hours. It was one of the most notorious crimes in Hawaii since the Ala Moana and Massie cases.

The Honolulu police arrested nine boys who ranged in age from 12 to 17. Several of the youths confessed and five of them who were under 17 years of age were sent to juvenile detention homes for sentences of several months. Four of the older boys were charged with rape and held for trial as adults. The prosecution knew the fact that Anna voluntarily accompanied the youths to the tent was a problem for their case. According to an account of the trial that ended on March 13, 1981: “The prosecutor asked, ‘How much torture must a woman endure before she is believed?’ But Anna’s imprudence was apparently enough to stir a shadow of doubt in the jurors’ minds. After deliberating for only five hours, they found all four teenagers not guilty.”<sup>191</sup>

The judge accepted the verdict and said of the jurors: “They were very conscientious. They followed the law.”<sup>192</sup> But the not guilty verdict was loudly denounced by the public. Two thousand protesters picketed outside the state capitol and the Judiciary Building. The mother of 17-year-old Robert Faubion, one of the acquitted defendants, seemed to imply that her son deserved to be convicted when she said, “Justice is unreal.”<sup>193</sup> In the face of the uproar a few members of the jury sounded apologetic and one said, “Most of us thought they were probably guilty.”

Just as the Ala Moana rape case prompted calls for amending Hawaii’s rape statute, the 1979 rape case prompted calls for change, although not as severe as those that occurred in 1932. Governor George Ariyoshi called on the Hawaiian legislature to amend the state’s rape law to bring it into conformity with the laws of many states on the mainland. If the law was amended, rape victims would only have to prove that force was used or threatened against them, and not that they tried to fight off attackers.

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<sup>191</sup> *“I Feel Sorry for Hawaii,”* TIME, Apr. 6, 1981, available at <http://www.time.com/time/magazine/article/0,9171,951653-2,00.html>.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*