In the High Court of the Cook Islands
Held at Rarotonga
(Land Court)

Application Nos 502/94, 138/95

IN THE MATTER of Section 409(f) of the Cook Islands Act 1915

AND

IN THE MATTER of the Makea Nui Title.

AND

IN THE MATTER of applications by Mere Maraea MacQuarie, Inanui Love Nia and Paula Tinirau Lineen respectively to hear and determine the right of a person to hold the office of Makea Nui Ariki.

Parties:

1. Mere Maraea MacQuarie - Applicant.
   Represented by Mr Mitchell and Mr Manarangi

2. Inanui Love Nia - Applicant.
   Represented by Mr Giles QC and Mr Arnold.

3. Paula Tinirau Lineen - Applicant.
   Not represented by counsel and appearing in person.

Dates of Hearings: 3rd, 4th and 5th July 1995

Place of Hearing: High Court, Rarotonga.

Coram: Dillon J, (Presiding), McHugh J

DECISION OF COURT

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1. Introduction

The dispute which arises in these proceedings is over the title of Ariki or Chief of the Makea Nui Family which carries with it the right to hold and control certain of the tribal lands. The following passage from Ostler J's 1941 Appellate Court judgment[1] takes us back in the history and tradition of the tribe:

> "The inhabitants of Rarotonga, the main island of the Cook or Hervey Group, now number some five thousand people, and (except insofar as they have been diluted by white blood) are a pure Polynesian race. They are reputed to have arrived in the island about the middle of the thirteenth century from the Tahiti Islands. They had no written language until the arrival of the missionaries in Rarotonga in 1823, but their historical records were in the keeping of their hereditary high priests who passed them on from father to son. Considering the manifold sources of error that such a method of keeping the records must entail, they were wonderfully full and accurate, as indeed are the records of every branch of the Polynesian race which have been kept in the same way.
>
> There are three separate tribal divisions on the island of Rarotonga, the result of three separate migrations. There is the tribe of Takitumu ruled over by Pa Ariki and Kainuku Ariki; the tribe of Arorangi ruled over by Tinomana Ariki; and the tribe of Te-Au-O-Tonga ruled over in ancient days by the Makea Ariki, but since the beginning of the nineteenth century divided into three chieftainships, the Makea Nui, Makea Karika, and Makea Vakatini. The Makea Ariki was allowed the priority of rank in ancient days on the island, and that priority is claimed now by the Makea Nui Ariki, but is not absolutely acknowledged by the other two Arikis of the clan. The social organisation of the tribes bears some resemblance to the feudal system which prevailed for so long in Western Europe. Next in rank to the Arikis are the Mataiapos of whom there are two grades, the senior grade being called the Mataiapo Tutara. These are independent sub-chiefs who apparently have a right to transfer their allegiance from one Ariki to another. Originally the Mataiapos were the captains or leaders who sailed with the Ariki in his migration in separate canoes. A peculiarity about the Makea Nui tribe is that until recent times it had no Mataiapos, the reason being that the migration of the original Makea from Tahiti to Rarotonga was a hurried flight from a victorious enemy, and there was apparently no time to organise

a large expedition and to attract adventurers in separate canoes. It was not until some time about 1830 that the Makea Nui tribe acquired a certain number of Mataiapos through the transfer of their allegiance to the Makea Nui of the time owing to a quarrel they had had with their own Ariki.

The next in the hierarchy of rank are the Rangitiras which are generally scion of the families of the Arikis but may be persons who are not of the royal family but have been given that rank for special services. In addition there is the rank of Mataiapo Komono which are scions of the families of the Mataiapo Tutara. Next below these come the Kiato, the descendants of the free men who accompanied the Ariki and Mataiapo originally as warriors and members of their crews. Below these again come the Unga, the lowest grade representing servants and slaves. The Ariki lands are vested in the Ariki, his position being that of a trustee for the members of the family."(2)

We shall shortly examine the genealogy of the Makea Nui Ariki and shall in particular be looking at the lines of descent of the last thirteen holders of the title. It is to be noted that there have been disputed successions coming to the courts in respect of the past four holders dating back to 1921.

Disputes over Ariki title rights have not been limited to Makea Nui but have also occurred in other Ariki titles leading to expressions of regret from various judges and litigants over the years that the people have been unable to settle the matter between themselves and within the tribe in accordance with traditional Maori custom. Once again however, and sad to note, the Makea Nui title is at issue in this court.

1.1 *Applicants*

The present proceedings comprise separate applications from three persons, each of whom claims right to the title and opposes the claim brought by the other two. The three applicants, in order of filing claims in court are:

1. Mere Maraea MacQuarie
2. Inanui Love Nia
3. Paula Tinirau Lineen

For the sake of convenience and meaning no disrespect to the applicants, the court may refer to each of these persons from time to time herein by their first Christian name. Formal applications in writing and numbered 502/94 and 138/95 were filed by the first two applicants. Paula Lineen had filed a written objection to the investiture and entitlement of her sister Mere and her cousin Inanui. During the course of these proceedings it was apparent that Paula was herself also seeking the title. With the leave of the court and the courteous consent of counsel appearing for Mere and Inanui respectively, Paula was joined as a party and presented her claim and objection to the court. As the matters in issue were common to all three applications the court decided to hear the three applications together. There was no objection to this procedure.

2. Genealogy

There is no dispute between the parties on the Ariki genealogy going back to Makea Te-Pa-Atua-Kino. This genealogy has been given and accepted in previous court hearings and goes back to the beginning of the nineteenth century when the tribe divided, as we have earlier seen, into three Ariki, the Makea Nui, Makea Karika and Makea Vakatini. Ostler J, in his 1941 judgment already referred to said:

> "It is worthy of note that according to the traditions of the tribe there have been twenty-nine Arikis of the Makea Nui in heathen times".

It is to be noted that a date of tremendous importance in the history of Rarotonga is the date of the introduction of the Gospel and the coming of Christianity in 1823. This event exercised great influence on the manner of life and the customs of the people.

The following table of Ariki holders is based on records previously before the court and on genealogies as supplied by the three applicants before this court. The numbers before each Makea indicate the sequence of succession as Ariki.

The three claimants each seek to be appointed as the fourteenth Makea Nui Ariki by succession to Makea Teremoana.

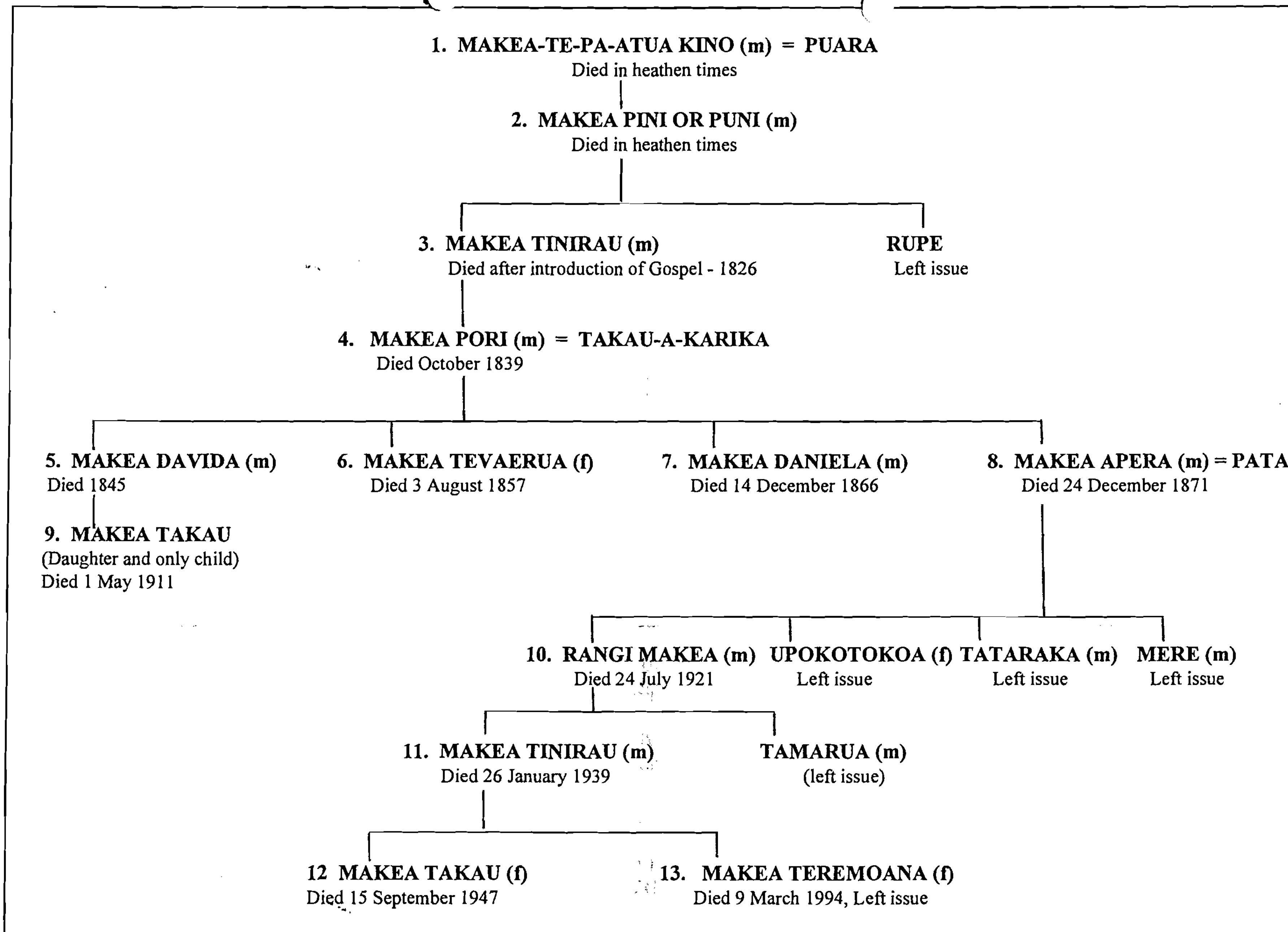


Table 1

In order to position the three applicants in relation to the present proceedings the previous genealogy table is extended as follows:

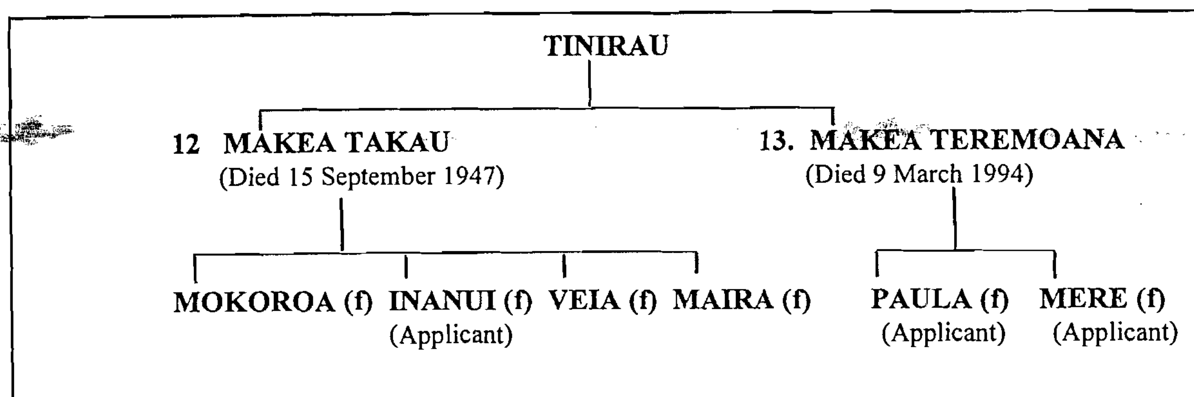


Table 2

3. Summary of Applications

3.1 *Introductory Comment*

To summarise these proceedings is no easy task, particularly in the light of the extensive evidence and submissions presented to the court. Counsel sought leave at the end of the sitting to submit final submissions in writing and did so. Counsel for Inanui presented an extensive but concisely expressed 41 page substantial submission and with it a document bank of source materials. The submission and document bank contained eight court decisions and as well evidence presented in various cases. It also included particulars of a petition to Parliament. It would have been more desirable for this material to have been presented at the commencement of the hearing or during it so that all parties and the court had an opportunity to consider matters which were to form part of the applicant's case and thereby provide a response. It is of course not always easy for counsel in the early stages of a case to know in advance what other applicants may raise in submissions or evidence. The court has no concerns about the submissions and evidentiary materials contained in these final submissions because they are mainly judicial decisions to which the court has access. The court's observations are directed more to convenience and opportunity for response than to the question of admissibility. There is certainly no interference with the duty and ability of the court to come to a just solution of the issues. Having made the foregoing observation we hasten to add that counsel for Inanui has assiduously brought together in one place material that is of great assistance

to the court and counsel is commended for his diligence. It would also be convenient at this point to commend all counsel for the clarity of their submissions and for the dignity and restraint shown in this major case affecting the chieftainship of an important tribe.

3.2 *Questions arising from applicant's submissions*

As has been the case in previous disputed Ariki successions, the arguments for and against the respective candidates for appointment to the Ariki title are directed to these questions.

3.2.1 ***Is the candidate a member of the class eligible for appointment according to customary law or by approved arrangement?***

3.2.2 ***Which body customarily elects the candidate?***

3.2.3 ***Is the candidate suitable or unsuitable for appointment?***

3.2.4 ***Were the meetings at which the candidate were nominated and finally selected validly constituted and conducted?***

3.2.5 ***Did the candidate have sufficient support to justify appointment?***

3.2.6 ***Was the candidate properly invested with the title under customary procedures?***

In this particular dispute one further and unusual issue has arisen. This concerns a purported agreement signed by Mere just prior to investiture imposing terms and conditions which included rotation of the Ariki title and controls on the Ariki, and the setting up of a Board of Trustees under a Power of Attorney to manage the real and personal property belonging to Makea Nui Ariki in consultation with the Ariki. The question posed by this procedure could be expressed thus:

3.2.7 ***What is the effect and propriety of the conditions imposed in the agreement and power of attorney at customary law and in the election of the candidate?***

4. Summary of applicants' arguments and answers to the seven questions above stated

Note: For the sake of brevity and simplicity the court will use the words "Mere says" or "Inanui claims" when in most cases those words should be followed by the further words "through her counsel".

4.1 *As to 3.2.1* *Eligibility for appointment*

4.1.1 Mere claims that a contender for the title must be a member of the "senior line" of the family i.e. a descendant of Rangi Makea. She says that all three applicants are from the "senior line". She says further that early court cases have held that the title should go to the eldest child of the last holder but the decision of the Native Appellate Court(3) in 1948 is to be preferred, namely that the selection be made from the "senior line".

4.1.2 Inanui claims that the traditional and established custom based on the primogeniture rule, i.e "the eldest of the eldest", binds the selecting body and has been consistently applied by the courts from the time of the first disputed succession in 1921 down to the present day. Inanui further disputes that the established custom can be changed at whim or at all, unless possibly in full session of the Ariki, Kopu Ariki, Ui Rangatira and Ui Mataiapo.

4.1.3 Paula claims that the title should go to the eldest child of the last holder. She argues that past practice has demonstrated that when the title shifts from the line of the last holder, for whatever reason, the descendants of the successor become the first line for the purposes of further succession. As the eldest child of Teremoana, the last holder, she claims the title.

4.2 <u>*As to 3.2.2*</u>
Who elects the title holder?

4.2.1 Mere argues it is the function of the Kopu Ariki to select, however long that may take, and not the Ui Mataiapo and Ui Rangatira in the absence of agreement.

4.2.2 Inanui agrees it is the function of the Kopu Ariki to select but if no majority support is forthcoming from the Kopu Ariki then custom requires the Ui Mataiapo and Ui Rangatira to appoint the title-holder.

4.2.3 Paula makes no express submission but from her filed statements she seems to acknowledge that the Kopu Ariki make the selection.

4.3 <u>*As to 3.2.3*</u>
Suitability or Unsuitability?

4.3.1 Mere claims suitability is a matter for the Kopu Ariki to assess and that she must be suitable because she has the Kopu Ariki support. Mere says Paula has lacked the support of the Kopu Ariki which body has found her to be unsuitable in a neutral sense in that Paula has lived all her life and still lives in New Zealand. Mere further claims Inanui has been found unsuitable and lacking support from the Kopu Ariki mainly because she was absent in New Zealand for most of her life; that she had an arrogant attitude best exemplified by the issue of a press statement claiming title was to be held meantime by her and her 3 sisters, that an announcement would in due course be made, and no further discussion was either desirable or necessary; that she had been involved in dispossessing Eric Browne's family from occupied land, an action not in keeping with the Kopu Ariki expectations.

4.3.2 Inanui claims that the kind of unsuitability which may give rise to disqualification is serious misconduct such as murder, theft etc. Inanui further argues that none of the complaints alleged against her are of a nature or degree entitling disqualification. Inanui makes no specific complaints of unsuitability against either Mere or Paula.

4.3.3 Paula likewise makes no complaints of unsuitability against Mere or Inanui but expresses her concern that her fund-raising efforts for the renovation of the palace and her work in fund-raising and attending meetings on her mother's behalf have not been recognised by the Kopu Ariki.

4.4 *As to 3.2.4*
The conduct of meetings

4.4.1 Mere claims that the meetings held were valid and that although the first six meetings were inconclusive and produced no result, the meetings held on 2nd and 4th November 1994 chaired by the Potikitaua were properly constituted and representative of the Kopu Ariki and a unanimous resolution was passed nominating her to the title.

4.4.2 Inanui states that the eight meetings held by the Kopu Ariki were not in accord with traditional Maori custom and were not guided on Maori custom. She says further that the meetings held at her home on 22 and 29 September were proper meetings of the Kopu Ariki and that her nomination was supported by the Ui Rangatira and Ui Mataiapo at a meeting also held at her home on 5 October 1994.

4.4.3 Paula Lineen complains she was not given a chance to attend the important and final meeting on 2nd November 1994.

4.5 *As to 3.2.5*
Did the candidates have sufficient support?

4.5.1 Mere claims that she had the unanimous support of those present at the meeting on 2 November 1994 and was also supported by Ui Rangatira on 4 November 1994. She further claims that this support after allowing for shares favouring Inanui represents about 2.79 shares in her favour and 1.21 in favour of Inanui.

4.5.2 Inanui argues that a decision by the majority of the Kopu Ariki is in accord with custom but only if the Kopu Ariki have applied proper native custom. She asserts the Kopu Ariki failed to act in accordance with custom by not applying the primogeniture rule in this case.

4.5.3 Paula says customary appointment is an autocratic and not a democratic process and is not decided by a popularity vote. She acknowledged she had only one person in Rarotonga supporting her nomination.

4.6 *As to 3.2.6*
Was the candidate properly invested?

4.6.1 Mere was invested in a ceremony held on 30 March 1995 and Inanui was invested on 28 October 1994.

There are no customary procedural objections lodged by any of the three applicants but each maintain the others were not entitled at customary law to be invested with the title. However Paula claimed there was some doubt whether Nono Manarangi had the right to invest the title.

4.7 *As to 3.2.7*
What is the effect and propriety of the agreement and power of attorney signed by Mere prior to her investiture?

4.7.1 Mere claims her election was not vitiated by the document that she signed. She further claims that the agreement as to rotation of the title was not an actuality but a democratising development not yet adopted and by which the Kopu Ariki expressed a desire for greater people participation in matters relating to the title. Mere also argued she still retained control as Ariki and no action could be taken by the Board of Trustees set up under the documents without consultation with, and the agreement of the Ariki.

4.7.2 Inanui said the document was structured to be binding on the Makea and effectively destroyed the mana and status of the Makea by transferring control to attorneys and a Board of Trustees. This was a

departure from custom. The document, referring to rotation of the title and setting out other administrative restraints, even if intended as a proposal for discussion, was intended to abandon tradition and custom. Inanui stated the matters were of such enormous significance to the whole Ngati Makea that they required full and careful discussion before fully representative meetings of the Kopu Ariki.

4.7.3 Paula opposed the conditions contained in the documents as being against Maori custom.

5. Jurisdiction

Before proceeding to examine and make findings on the seven grounds here at issue, the court proposes to look briefly at the jurisdiction and role of the courts in Ariki Title claims.

5.1 ***Statutory provision***
Section 409(f) of the Cook Islands Act 1915 gives the court jurisdiction

"To hear and determine any question as to the right of any person to hold office as an Ariki or other Native Chief of any island."

5.2 This provision does not give the court jurisdiction to appoint an Ariki. In the 1948 decision of the Native Appellate Court(4) it was held:

> "It is not the function of the Native Land Court itself to appoint an Ariki or other Native Chief to the office. Any such appointment can only be made by the persons entitled to make the appointment under the ancient custom and usages of the Natives of the Cook Islands."

5.3 The court is required to act only when a dispute or question arises in connection with an appointment or proposed appointment. The court action then is directed to ascertain the right of a person to hold office. If the court reaches a conclusion that a person has not been properly elected to office according to custom then its course is to issue a declaration that there has

been no election and a fresh election would then be necessary. This jurisdiction of the court is well established and set out in another 1948 Native Appellate Court case concerning the Tinomana Ariki Title.(5)

> "The most that the court can do is to declare for the guidance and assistance of the people what it believes to be the custom governing such an appointment. ...Even if the applicant had appealed against this decision the court could not have appointed him as ariki; the most it could do if it found that Te Pai had not been properly elected according to custom would be to declare that there had been no election, and then a fresh election would have been necessary." (Emphasis added)

The court of Appeal decision dealing with disputes in respect of Kainuku(6) and Tinomana(7) Ariki Titles also held that the function of the court under Section 409(f) is not to appoint but to ascertain the right of a person to hold the Ariki title.

Counsel appearing in this case agree this court has no jurisdiction to appoint an Ariki.

6. Review of and findings on seven issues

In paragraph 3 (supra) this court sets out the seven principal issues which it sees as arising in these proceedings and in paragraph 4 summarises the submissions and arguments of the three applicants. The major issues relate to the question of eligibility for election (paragraph 3.2.1) the constitution and conduct of the Kopu Ariki meetings (paragraph 3.2.4) and the effect and propriety of firstly, an agreement entered into between Mere and certain members of the Kopu Ariki and secondly, a power of attorney supporting that agreement and signed by Mere. It will be necessary to examine these three issues in some depth. The other four questions concerning who elects the candidate, suitability, degree of support and investiture, whilst important issues, which need attention, are not substantially contested inter se by the applicants.

We propose therefore to deal with the major areas of dispute first and to make findings thereon. The court turns to the first question.

7. Eligibility for appointment

7.1 *The primogeniture rule or custom*

There is no dispute between the parties as to the custom applied by the tribe and recognised by the courts from the turn of the 19th century when Makea-Te-Pa-Atua Kino held the title down to the succession of Makea Takau on the death of Makea Tinirau on 26 January 1939. In paragraph 2 above, the table lists the thirteen Ariki successions. Evidence presented to and accepted by the Native Land Court in 1923 in re Rangi Makea(8) and to the Supreme Court in 1941 in re Makea Tinirau(9) clearly shows the system of succession and the relationship of the successors.

We have not shown Teremoana on the table as she was not appointed Ariki until the 3rd May 1948 by order of the court on succession to her mother Takau. The court will refer to her succession later. She was the younger of Tinirau's two daughters. Table 2 is now extended to show the relationship of the successor to the deceased Ariki.

1.	Te Pa-Atua-Kino	
2.	Pini	**Eldest son** of Te Pa
3.	Tinirau	**Eldest son** of Pini
4.	Pori	**Eldest son** of Tinirau
5.	Davida	**Eldest son** of Pori
6.	Tevaerua	**Sister** of Davida
7.	Daniela	**Brother** of Davida
8	Apera	**Brother** of Davida
9	Takau	**Eldest daughter** of Davida
10	Rangi	**Eldest son** of Apera
11	Tinirau	**Eldest son** of Rangi
12	Takau	**Eldest daughter** of Tinirau

Table 3

The above table shows that in succession down to Davida, the eldest son succeeded. There was a break in 1845 when Makea Davida was subsequently succeeded by his sister Tevaerua. At this point the

primogeniture custom was interrupted as the title succession moved across to siblings of Makea Davida. Ayson CJ in re Makea Nui Tinirau Ariki[10] explained that the four children of Pori held the title because of an arrangement and not because it was the custom. The reason for this arrangement is explained fully in the 1923 decision referred to earlier in this paragraph and will be explained further later herein. In the 1940 decision the court rejected argument that the move of the title across the four children meant that the Kopu Ariki had the right to elect from a class other than the eldest child. This was further supported by the Supreme Court in the decision of Ostler J when Ayson J's 1940 decision was appealed. Ostler J said:

> "The native custom has been clearly proved that the eldest child has the right to succeed if suitable, and it is only if unsuitable that the Kopu Ariki have any right to pass him or her over and confer the title on another member of the family."[11]

It is also noted by both Ayson J and Ostler J in their respective 1940 and 1941 decisions that upon the death of Makea Apera the title went back to the senior line and was vested in Makea Takau, the eldest child of Daniela. Upon the death of Makea Takau, who had no children, the title passed to Rangi Makea, a cousin of Takau's and the eldest son of Apera. Ostler J records that Takau:

> "Shortly before her death expressed a wish that the title should go to her cousin Rangi, the eldest son of Makea Apera. The wish was respected and Rangi succeeded."

It is interesting to note that Makea Daniela had a son, Ngoroio, who applied to succeed Rangi Makea in opposition to Tinirau, the eldest son, in the 1923 Rangi Makea Ariki Title dispute.[12] Ngoroio claimed that the application of the well established primogeniture custom gave him precedence over Tinirau. The court held however that the descendants of Daniela had gone over to the Karika side and were thus precluded from holding the Makea Nui Title.[13]

The decisions of Ostler J and Ayson CJ referred to above clearly apply the primogeniture rule as the custom. This rule was also applied by McCarthy J in re Makea Takau Ariki Title[14] where he held against an argument that custom determined the title did not go to the senior line as of right and that the family could decide the matter and were entitled to select any member as

Ariki. McCarthy J held that the senior line was to be preferred provided there was one suitable in that line and that was the custom. The Judge supported Ayson J's earlier decision in the claim to Tinirau's title and found it was bound by it and the subsequent appeal decision in the High Court before Ostler J. We shall return to this decision and the appeal from it shortly. The primogeniture rule was again confirmed by the Land Court in re Vakatini Ariki Title[15] wherein the learned judge cited Ostler J's statement already referred to herein.[16]

Down to and including McCarthy J's decision in 1948, the courts have regarded eligibility for appointment to the title as being governed by the custom of primogeniture. The only exception to this rule was the agreement or arrangement made by Makea Pori that upon his death the children of his union with Takau would each have the right to the title.

The court proposes to examine the "exception" rule and its relationship with the customary primogeniture rule shortly. At this point it is convenient to pass to the argument of Mere MacQuarie that eligibility turns on membership of the "senior line" as distinct from the "eldest child of the eldest child" eligibility advanced by Inanui.

7.2 *The 'Senior Line' Argument*

In support of this view counsel for Mere has argued that the pronouncement of the Native Appellate Court in Makea Nui Takau title case[17] moved the custom away from the "eldest child" rule to give qualification to the "senior line" which of course is a much broader base for selection. Mere claims that the senior line includes all those who descend from Rangi Makea. Mere relies on this passage from the Appellate Court decision:

> "During the hearing of the appeal the conductors for the parties in their argument referred the court to various authorities on the question of the ancient customs and usages governing different aspects of the selection and appointment of an Ariki. It was not necessary for this court to traverse these authorities in this judgment, but the court considers that it is desirable to place on record its opinion as to the preference, if any, given to the senior line of the Ariki family. After considering the various authorities to which the court has been referred, it is of the opinion that the custom generally adopted has been to elect the Ariki from the senior line of the Ariki family unless there is no member of that line who is considered suitable to hold the office." (Emphasis added).

Perusal of the evidence in this case shows that the contest for Takau's title was between two claimants Browne Uriarau (applicant) on the one side and Mokoroa Love (eldest child of Takau) and Teremoana Cowan (sister of Takau) jointly on the other. Claimant Browne was one of the six children of Upokotokoa who was the sister of Rangi Makea (see earlier table herein and also genealogical table set out in Ostler's decision.[18] It is more significant however that Mokoroa was the first born of Takau and the court would have awarded her the title but because she was not of age the court with Mokoroa's consent appointed Teremoana to the title. Counsel for Inanui in his written final submission at paragraph 3.25 submits that the reference to "senior line" in the 1948 Appellate Court decision recognised the fact that Teremoana was not the "eldest of the eldest" but a younger sister of Takau and linked to the primogeniture rule as she was the next person entitled at customary law. The court accepts that argument and rejects Mere's claim that the "senior line" as referred to in the 1948 decision moved the established customary rule based on primogeniture to a wider class.

7.3 *Finding*

It is this court's finding that in all of the court cases involving the Makea Nui Ariki title from 1923 up to 1948 the courts recognised and adopted the primogeniture rule as Maori customary law governing eligibility for the Makea Nui Ariki title

7.4 ***The rule that the eldest child of the last Ariki has the entitlement***

7.4.1 This is the argument put forward by Paula Lineen. She accepts the custom of primogeniture but claims that when the title passes from one family to another for some good reason "such as incompetent or unsuitability of character", the right of succession passes to the eldest child of the new holder. Paula submits that as her mother Teremoana was the last holder and she is the eldest child she is now entitled to the title.

7.4.2 The record of succession to the Makea Nui Title does not disclose any single instance where a title having passed away from the eldest child, customary law has been interpreted as allowing the title to pass to the eldest child of the new holder. We have seen the arrangement

entered into prior to 1839 which resulted in that title moving across the siblings of Makea Davida. If the rule postulated by Paula was the custom, Rangi Makea would have succeeded Makea Apera but the title reverted to Makea Takau and continued the primogeniture custom. Further, in the second exception to the customary election of the eldest child, when Paula's mother Teremoana succeeded her sister Takau, the Native Land Court and the Native Appellate Court had the primogeniture rule firmly in focus. Indeed, the Appellate Court heard new evidence from Potikirua Ringiao that the award of the title by the Kopu Ariki to Teremoana, because of the minority of Mokoroa, was in accordance with the ancient custom. This court rejects any contention that the courts intended to establish a new customary rule giving title rights to the child of the last holder despite the literal meaning that might be given to the words "last holder" or last Ariki".

7.4.3 We therefore find that Paula's argument is unsound. She has no prior rights to the title as Teremoana's eldest child.

It is convenient to consider now the question of "arrangements" or "agreements" that have been held by the courts to postpone or set aside the primogeniture rule or provide an exception to that rule. This review is limited to the Ariki titles referred to in evidence or submission to this court.

7.5 *Exceptions to the customary primogeniture rule*

7.5.1 *Makea Nui Ariki Title successions*

There have been three occasions in these successions where the eldest child principle has not been followed.

Firstly: The compromise in respect of Makea Pori successions where the Kopu Ariki apparently accepted the lateral move of the title across the children of Pori and Takau.(19)

Secondly: The exclusion of Ngoroio from succession to Rangi Makea. Ngoroio claimed primogeniture rights as the eldest child of

Daniela and ahead of Tinirau. Ngoroio rights were not recognised because the Daniela family went over to the Karika side.(20)

Thirdly: The appointment of Teremoana instead of Mokoroa on succession to Makea Takau.

These three exceptions illustrate respectively that the primogeniture rule can be set aside in cases of agreements entered into by the Ariki in his or her lifetime with endorsement by the Kopu Ariki; or where a person has left the tribe; or in cases of unsuitability, in this instance minority.

It would seem, however, that although the primogeniture custom was not applied, the action taken in these instances was regarded as falling within tribal custom.

7.5.2 *Tinomana Ariki Title and the system of title rotation adopted by that tribe*

In 1975 an application was heard by the Land Court to appoint Napa Tauei as Ariki as successor to Te Pai. The election by the Kopu Ariki followed a series of meetings which resulted in the tribe reaching an agreement signed by members of the Kopu Ariki and filed in court. This agreement supported a principle of rotation of the title among the descendants of the three wives of Erua Rurutine who comprised the Kopu Ariki Tinomana. The agreement provided that each of the three families would, in turn, upon death of the Ariki, have the right to nominate their choice. The agreement gave the order of rotation and stipulated it was to be the system forever. The court declared Napu Tauei to be the holder in line with the agreement. The Land Appellate Court upheld that appointment, despite argument from an objector that Napa Tauei was not from the senior line and there was a breach of custom.(21) In 1993 the Land Court again followed the 1975 agreement and upheld the appointment from the Akaiti-a-Rua family.(22) This decision was upheld in the court of Appeal.(23)

It should be noted here that although the arrangement of rotating title was not advanced by any of the three applicants as supporting their eligibility in these proceedings nevertheless rotation of title has been put forward as a future possibility in Makea Ariki elections. We shall consider that question when we later refer to the conduct of the Kopu Ariki election meetings. Rotation of title has been accepted in Tinomana Title cases as providing an eligibility base for Ariki selection. The court of Appeal in 1994 inferred that the 1975 agreement could be cancelled or varied if a properly constituted meeting of all the Kopu Ariki decided to do so.[24]

7.5.3 This court finds there is no rotation agreement in existence in Makea Nui governing eligibility for selection.

7.6 ***The principle of democratisation in liberalising customary law***

7.6.1 Counsel for Mere referred the court to observations made by Sir Thaddeus McCarthy in the Kainuku case[25] as indicating a process of evolution in which customs should not be seen as invariably monolithic, immutable, and demanding rigid compliance in detail. Sir Thaddeus said that in more recent years there was an emphasis:

> "on the rights of individuals and democratic voices in the selection of tribal hierarchies and over their administration".

Counsel suggested these comments might well fit in with the developing process of rotating title. Both counsel for Mere and Inanui respectively drew notice to the further cautioning words of McCarthy J that extensive departure from previously observed procedures might render custom ineffective or even destroy it, in which case the courts may intervene.

In the court's respectful view, the word 'custom' is capable of wide and general interpretation. Not only does it embrace cosmogenic origins but it descends down to ritual and protocol from which flow policy. At the top end there are customs which are immutable and at the other end ritual and practices which may be subject to change and indeed vary from tribe to tribe. It is for each tribe, in its own circumstances, to determine the practice and policy which best suits

it but if this means change from a practice or procedure which has been followed for many generations then obviously there needs to be full consultation with and substantial support from within the tribe.

It was put to the Land Court in 1948[26] in re Makea Nui Title that the Kopu Ariki were entitled to decide the matter of selection and were entitled to select any member as Ariki. That view was rejected. In 1976 however, in Tinomana Ariki Title case the Native Appellate Court found that the Kopu Ariki had the sole power to elect Tinomana Ariki and went on to make this statement:

> "Apart from the fact that the evidence does not clarify which of the families is the senior line, this 'senior line' principle has been explored by the Appellate Court in a previous decision and discarded".

The 1976 Appellate Court cited a passage from the 1948 decision upon which it relied. We respectfully disagree with the Appellate Court's view that the 1948 decision discarded the senior line principle. Analysis of the 1948 decision, which was a rehearing application and not an appeal, shows that the Appellate Court was looking at a direction given by the court in its 1934 decision that upon the death of John Pirangi the title should revert to the senior line. In fact, in 1948 upon the death of John Pirangi, the title went back by Kopu Ariki agreement to the senior line and Te Pai was appointed Ariki. There was no appeal from that decision. In 1948 the Appellate Court simply drew reference to the 1934 direction and said the court had no power to bind the people to a future appointment. In essence the 1948 Appellate Court was actually supporting the view that the primogeniture rule applied. It is important to observe that the same 1948 Appellate Court sat two days later on the Makea Takau Title claim and, as we have earlier seen, recorded its opinion that the custom generally adopted was to elect the Ariki from the senior line.

Perhaps the 1976 Appellate Court was seeking authority to support its finding that the Native Land Court had acted correctly in finding Napa Tauei was the rightful holder. Again, as earlier recorded, the choice of Napa Tauei, who did not come from the senior line, was

supported by the 1975 agreement on rotation so the lower court was not required to apply the primogeniture rule.

This court mentions the 1976 Appellate Court decision as the inference might well be drawn that the courts were leaning to a view that the Kopu Ariki were not to be restricted to a primogeniture rule.

Whether the 1976 decision had any influence on the court of Appeal in 1991 and on Sir Thaddeus McCarthy's leaning towards an evolving democratic voice in tribal hierarchies cannot be assumed. McCarthy J cited the 1976 decision, referring to it as helpful.

This court takes the matter no further. It is really not an issue in these proceedings but it is evident from views expressed at some of the 1994 meetings that the people are ready to discuss customary procedures and whether changes should be made.

7.6.2 *Koutu Nui Report on Lands and Tradition*

In 1970 the House of Ariki placed before the Legislative Assembly a paper entitled "Maori Customs approved by the House of Ariki 1970" and recommended legislative action. In 1977 a further paper on Ancient Customs was debated by the House of Ariki and submitted to the Legislative Assembly. The report went to the Select Committee which reported on the paper with certain amendments. Counsel have not adverted to this report. It certainly does not appear to have been embodied in statute. In several cases from 1976 onwards the courts have made reference to this report acknowledging that it lacks statutory endorsement but because it expresses the views of Cook Islands Ariki is helpful as a guide to Maori custom. It is referred to several times in the authorities cited before this court.

The court notes that it gives power to the Ariki families (Kopu Ariki) to name the new Ariki. When the decision is made that decision of the Kopu Ariki is then announced to the Ui Mataiapo.

No decision was made by the House of Ariki on the custom pertaining to the election of the Ariki. The question was left "in suspension".

7.7 *Additional findings on eligibility rule*

The court has reached the following conclusions and findings.

7.7.1 That succession to the Makea Nui Ariki Title has been by way of application of the primogeniture rule in more than half of the thirteen title successions and that the balance have been made pursuant to arrangements.

7.7.2 That at the time of elections to appoint the present three applicants the primogeniture customary rule applied. Under that custom the children of Makea Takau were eligible for appointment as there was no arrangement or agreement in place which varied the primogeniture rule.

7.7.3 That no present arrangements or agreements exist which vary the primogeniture rule.

7.7.4 That the Kopu Ariki must apply the primogeniture rule unless the Kopu Ariki have entered into an arrangement which varies that rule.

7.7.5 That if there is no member of the eligible family suitable for appointment the Kopu Ariki may choose from the eldest suitable member of the family nearest in blood line. Note: The court proposes to deal with the meaning of "suitability and unsuitability" shortly.

8 The conduct of the meetings at which the elections were made

8.1 Makea Nui Teremoana died on the 9th March 1994. On 22 March a declaration was published in the Cook Island Press to the effect that:

> "the title of Makea Nui was now held by the four daughters of Makea Takau ie. Mokoroa, Ina, Veia and Myra and at some future date advice would be given which daughter would succeed".

Teariki Manarangi, Potikitaua of Makea arranged a meeting on the afternoon of the 22nd March at which concern was expressed over the declaration. This discussion resulted in a further press statement issued by Potikitaua stating the declaration was not recognised, its intent rejected by the Kopu Ariki, and after the customary period of a month's mourning the Kopu Ariki-O-Makea would meet to consider succession.

8.2 The first meeting of the Kopu Ariki was held at Para-O-Tane on 7 June 1994. The minutes (Exhibit A3) disclose

1. There were initially 70 and at the conclusion 120 persons present.

2. The meeting was chaired by Rangi Moekaa who had been asked by the Potikitaua, with the consent of each family, to take his place as chairman as he was a candidate for office. Rangi Moekaa was later in evidence referred to as an authority on Cook Islands language and culture and not related to the Makea family.

3. Speakers were chosen for each of the 4 descendant families from Makea Apera.

4. The following nominations were put forward

    1. Eric Browne
    2. Nono Manarangi (Potikitaua)
    3. Inanui Love
    4. Mere MacQuarie
    5. Paula (Darling) Lineen

8.3 The second meeting 15 June 1994 chaired by Rangi Moekaa (Exhibit A3) Minutes said:

1. Chairman's right to convene meeting questioned and eligibility issue raised.
2. Chairman agrees and tells Potikitaua he should call meeting and advise meeting of his deliberations.

3. Potikitaua responds that title should rotate now among the 4 clans.
4. Point raised by Carla that title does not rotate.
5. No agreement on selection.

8.4 The <u>third</u> meeting <u>29 June 1994</u> chaired by Rangi Moekaa (Exhibit A3) Minute note:

1. Lionel Brown seeks clarification on eligibility.
2. No agreement on selection.

8.5 <u>Fourth</u> meeting held on <u>18 July 1994</u> chaired by Rangi Moekaa (Exhibit A3). Minutes reveal

1. About 30 present.
2. Adjourned because one line not present
3. No agreement on selection.

8.6 <u>Fifth</u> meeting held on <u>14 September 1994</u> chaired by Rangi Moekaa (Exhibit A3). Minutes say:

1. About 40 present.
2. No agreement on selection.
3. Chairman says now only 2 candidates Inanui and Nono, but meeting corrects him and repeats five names.

8.7 <u>Sixth</u> meeting held on <u>21 September 1994</u> chaired by Rangi Moekaa (Exhibit A3). Minutes say:

1. The five candidates' names were given.
2. Rotation among 4 families urged by several speakers.
3. Mere MacQuarie opposes rotation.
4. No agreement reached as to selection from 5 candidates.
5. Chairman resigns.

At this point two factions developed within the Kopu Ariki which led to meetings attended by different groups. For the sake of continuity the court proposes to follow the chronological order of these meetings.

8.8 Meeting held at Inanui's home on 22 September 1994 chaired by Nooroa Matua (Exhibit A5). Minutes say:

1. There were 11 present.
2. The purpose of the meeting was to report on Kopu Ariki meetings, to plan for the Rangatira, Ui Mataiapo to meet and to plan for Inanui's investiture.
3. Inanui apparently chosen as Ariki although no formal resolution put to the meeting.

8.9 Meeting held at Inanui's home on 29 September 1994 chaired by Nooroa Matua (Exhibit A3). Minutes say:

1. Meeting to which Ui Rangatira and Ui Mataiapo invited. (see Inanui evidence Exhibit 6)
2. There were 17 present. Duration 1½ hours.
3. Purpose of meeting was to discuss investiture.
4. Meeting endorsed Inanui's selection and agreed to invest Inanui at a date to be advised.

8.10 Meeting held at Inanui's home on 5 October chaired by Nooroa Matua (Exhibit 7). Minutes reveal meeting attended by 7 Mataiapo who had come from Arai-te-Tonga. The Mataiapo supported Inanui's selection.

8.11 Meeting of Kopu Ariki held at Para-o-Tane on 25 October 1994 to consider Inanui's proposed investiture on 29 October 1994.

8.11.1 There are no minutes of this meeting but the Potikitaua refers to it in his evidence. Potikitaua Manarangi says the meeting was chaired by Teariki Jacob and says it was clear Inanui's investiture was not supported by the Kopu Ariki. Inanui was not present at the meeting. Potikitaua was requested to go and see Inanui and invite her to a meeting and did so. A meeting took place at which Inanui was asked to cancel the investiture. She declined but agreed to a delay only if Kopu Ariki selected her as the successor. Potikitaua says this condition was unacceptable and Inanui proceeded with her investiture.

8.11.2 Inanui in her evidence does not refer to this meeting but says that as preparations were being made for her investiture various attempts at disruption occurred. The investiture ceremony was brought forward to 28 October and held.

8.12 Meeting of Makea Nui Ariki, Ui Rangatira and Ui Mataiapo held on 3 November 1994 at Inanui's home chaired by Nooroa Matua (Exhibit A4).

The minutes are short and the business appears to be a reconciliation for the investiture disruptions and also for the Mataiapo to be brought back together.

8.13 Meeting of Kopu Ariki at Potikitaua's home on 2 November 1994 chaired by Potikitaua (Exhibit A4). This was the meeting at which Mere MacQuarie was selected.

1. The meeting was attended by 14 people. None of the 3 present applicants were present but the four families were represented.

2. Two candidates, namely Potikitaua and Eric Browne, withdrew their nominations. They said they did so in the interests of unity and in order to choose one candidate.

3. Potikitaua produced Annexure 1 (later identified as Exhibit A8).

   This was a statement which provided for the rotation of the title among the four Kopu so that each Kopu had the opportunity to hold the title. Rotation was to be in order of seniority. The statement also contained further conditions on enua taonga, the setting up of a Board of Trustees, control of money and other administrative matters.

4. It appeared that the annexure had been put to Mere who had agreed to it.

5 It was agreed the manner in which rotation was to be fixed would be decided at a point in the future.

6 It was agreed unanimously that Mere be nominated as the selection for Makea Ariki subject to the annexure conditions being accepted by Mere before investiture.

8.14 A meeting of Kopu Ariki and Rangatira was held at Potikitaua's home on 4 November 1994 chaired by Potikitaua. Representatives of the Rupe family were in attendance.

1. There were 30 present including Mere.

2. Potikitaua sought approval of the Rangatira,

3. The meeting approved Mere's selection and requested Potikitaua to proceed and invest Mere.

8.15 Mere was invested on the 30 March 1995. It is to be observed that on 29 March, Mere signed an agreement with representatives of Upokotoroa, Mere, Tataraka and Tamarua which was in general terms following the annexure (A8) presented to the meeting on 2 November but with extended provisions and including an accompanying irrevocable power of attorney.

9. Review of meetings and events from 7 June 1994 to 30 March 1995 and the court's findings thereon

9.1 The first six meetings were inconclusive. They were well attended and could be said to represent the Kopu Ariki but the family, consisting of the descendants of Apera's four children, could not agree on a selection. The meetings were chaired by Rangi Moekaa who did his best but was unable to get an agreement and withdrew.

There was no discussion on the custom to be applied in making the selection. Right from the first meeting the question of rotating the title was raised by Apera descendants who did not descend from Rangi Makea. Potikitaua was also criticised for not leading the way by convening the meeting and making known his deliberations. Nono Manarangi responded that his candidacy required him to get an outside chairman and in the only authoritative direction he made at any time stated

"the title should rotate now among the four clans".

As was put to this court by counsel for Inanui the custom is for the Potikitaua to convene and conduct the meeting. Because that person is possessed with knowledge of custom and genealogy, he is expected to guide and explain the relevant custom and procedures to the meeting. Potikitaua did not do so. The stand-in chairman, although an authority on Cook Islands' culture, was not in a position to give guidance to another tribe.

9.2 Inanui, who admitted during cross-examination that she was single minded about her right to the title and that her mind could never be changed no matter how many meetings or selection processes occurred or what Mataiapo or Rangatira said, then proceeded to distance herself from the Kopu Ariki by having her own meetings. She held a meeting on 22 September 1994 which appeared to be of those who favoured her. She was selected as the Title Holder. She then held two further meetings with Ui Rangatira and Ui Mataiapo present on 29 September 1994 and 5 October 1994. The Kopu Ariki members at these meetings generally differed from those attending the six first meetings. Inanui frankly admitted in her evidence (see written statement page 18) that she did not feel able to invite to the meeting those who, in a succession of meetings, had purported to disregard custom with regard to succession.

The meeting held on 22 September selected her in short time. The meetings held on 29 September and 5 October sought approval from the Mataiapo and Rangatira on her selection and investiture. She received that endorsement. However, it must be recorded that the minutes of the meeting of 29 September disclose a number of misstatements of facts as well as half truths which call into question whether those Rangatira and Mataiapo present at the meeting were properly aware of the previous events and perhaps misguided. The court now refers to these extracts:

1. Veia Love at page 2 (Exhibit 6)

> "We have all of Apera's family in agreement. We have elected our Ariki ... it is Inanui .... Now all Apera's family want Inanui. During all 7 meetings of the Kopu Ariki, only one name has always been put to the meeting, Inanui."

2. The statement of the chairman (page 2 Exhibit 6)

> "Since June we have had 7 meetings of the Kopu Ariki. I nominated Inanui at the first meeting. At the second meeting there were 11 candidates, at the third meeting there were only 2 candidates - Inanui and Nono Manarangi."

3. Tereapii Strickland (page 3 Exhibit 6)

> "I would like to clarify that the last meeting of the Kopu Ariki had only 2 candidates - Inanui and Nono."

4. Tereapii Strickland (page 4 Exhibit 6)

> "The 4 families of Ngati Makea have met again - we have met here and chosen Inanui."

9.3 On the 2nd November 1994 the other part of Kopu Ariki met. No invitation was extended to Inanui or those supporting her nomination to attend this meeting. Counsel for Mere submitted that it was:

> "A little unrealistic to expect the Kopu Ariki to invite her to participate in that meeting of the 2nd and 4th November when she had only a few days before become invested with the title."

That may be so but the fact is that a section of the tribe were denied the right to attend and express a view. Furthermore Paula received her notice in New Zealand on the day of the meeting. She faxed a request for it to be adjourned as she was coming to Rarotonga on the 8th but the meeting proceeded.

Apart from the question of notice as it affects the selection process, there was another new intervening event. There had certainly been some discussion about rotation of the Ariki Title at the earlier meetings but on 2 November 1994 Potikitaua produced a document (Annexure 1 later identified as Exhibit A8) which said the title was to rotate. It contained other restrictive controls on the Ariki. Potikitaua read out the terms and called for comment. Lionel Browne said Mere accepted the principles (A4 page 3). This was a surprising change of attitude as Mere had expressed her opposition strongly to rotation at the Kopu Ariki meeting held on 21 September (Exhibit A3 page 18). An inference can be drawn from her change of mind that obviously to win support from the Kopu Ariki she had to give way on rotation and also allow her powers as Ariki to be restricted. The court proposes to look at the further

documentation that followed in the next section of this judgment. Suffice it to say here that an important document, proposing a new system of election, is presented to a meeting of only part of the Makea tribe, endorsed by those present and used as a tool not only to extract consent from the candidate but perhaps also to persuade some members of the Kopu Ariki to vote for a candidate abiding the terms. This court considers the whole process casts considerable doubt on the election process of the 2nd November 1994.

9.4 It is necessary to discuss Paula Lineen's position in relation to these election meetings.

Paula was a candidate for appointment but at no stage was she elected by the Kopu Ariki. She was certainly denied opportunity to attend the respective meetings called on Inanui's behalf and also the meetings held on 2nd and 4th November 1994.

9.5 Having now considered the process of election the court concludes and find as follows:

9.5.1 The meeting held on 22 September 1994 was not a properly notified, constituted and conducted meeting of the Kopu Ariki sufficient to support a declaration in Inanui's favour. Only a section of the Kopu Ariki were notified of the meeting and took part in the discussions and election thereat.

9.5.2 The meeting held on 2 November was likewise not a properly notified, constituted and conducted meeting of the Kopu Ariki sufficient to support a declaration in Mere's favour in that:

(i) insufficient advice on customary law guiding election of the Ariki was given to the Kopu Ariki;

(ii) notice was not given to all persons entitled to attend the Kopu Ariki meeting; and

(iii) there is sufficient evidence of inducement caused by the presentation of the Annexure document (A8) and the change of mind of Mere to conclude that the voting at the meeting was influenced by self motive and not in accordance with custom.

9.5.3 No election has been validly made by the Kopu Ariki in favour of Paula Lineen.

9.5.4 Having concluded that none of the three candidates has been elected, it is unnecessary for this court to look at the other questions. However, because the function of the court is to guide and help the people in the application of customary law, we propose to express a view on those matters. This may be helpful when Ngati Makea meet to consider future action.

10. Agreement and Power of Attorney dated 29 March 1994

10.1 These documents were Exhibits A8 and A9 and were annexed to the written evidence of Mere MacQuarie handed in to the court. In fact Mere was not called as a witness nor was her filed statement of evidence with exhibits attached formally withdrawn or sought to be struck out of the record. Indeed both counsel for Inanui and Mere have made submissions as to the content and effect of the documents. These documents give purported legal effect to an earlier document called "Annex 2 and A8" in the document bank of exhibits filed by counsel. Annex 2 was identified during the hearing as Annex 1 referred to by Potikitaua Manarangi in the minutes of the meeting held on 2 November 1994. The documents marked as Exhibit A9 were prepared subsequent to a meeting held with Mere MacQuarie on 10 March 1995. The Agreement and Power of Attorney were signed by Mere on 29 March 1995 the day before she was invested. As counsel for Mere has raised no objection to the Agreement and Power of Attorney being referred to and also because those documents flow from and give effect to the proposal (Exhibit 8) put to Mere before the 2 November 1995 meeting, this court has no problem in looking at the content of those documents.

During cross examination of Nono Manarangi (page 58) counsel for Inanui suggested the documents were a very un-Maori way of achieving the results of proposals discussed at the 2nd November meeting. Mr Manarangi agreed.

So too did another witness, Eric Browne (page 13 of record), who agreed that such a proposal should be publicly discussed before the whole Kopu Ariki as part of the custom. These persons were witnesses called to support Mere's case.

10.2 The contents of Exhibits A8 and A9 raise two matters of considerable importance.

1. Whether rotation of title by an arrangement is in accord with Maori custom; and

2. Whether a tribe through its Kopu Ariki can curb the customary and traditional powers of the Ariki by agreement.

10.2.1 These matters have not been argued in these proceedings and the court does not propose to answer them here. Both matters in our view are so important that they should be examined by the tribe. Rotation of title has been recognised as an acceptable arrangement in Tinomana. Rotation may suit the circumstances of one tribe and not another. It may be a practice or procedure on the lower level of customary importance that in more modern democratic times would permit a change.

10.2.2 The second proposal to limit an Ariki's control of the tribal estate, in the court's view, strikes much more deeply into traditional custom. Reference to the Report and Recommendations of the Koutu Nui in 1970 and 1977 shows a changing attitude in the seven year gap. In 1970 the Koutu Nui accepted that the power of right of control was vested in the head of the tribe or clan ie the Ariki. <u>This power or right determines the right of distribution, occupation and use of land by members of the tribe</u>.

In 1977 the Koutu Nui modified this custom to state that the control of land <u>rests with the head of the family and all the children have a right to that support, as well as the others of the family who may be in distress from sickness, weakness, or old age</u>.

The agreement (A9) seems to go much further than the custom stated by the Koutu Nui. A Board of Trustees is appointed to manage the real and personal estate. Other powers are bestowed on the Trustees. On behalf of Mere it was claimed she still reserved control in that all matters were subject to her consent and consultation. It was also argued for Mere that the document may not be binding at law but it is obvious that it was intended to be binding. The fact it was signed the day before investiture indicates that pressure was being applied to get Mere's agreement prior to election. It is observed that the Board of Trustees includes two members of Mere's family and on the face of it does not appear to be properly representative of the Kopu Ariki.

Another disturbing feature of this attempt by "European" legal process (as submitted by Inanui's counsel) to enforce rotations and restrictive controls on the Ariki, which might also set a precedent for future holders of the title, is that it was done without a full meeting of the Kopu Ariki to consider the documents and their effect. Such action seems, as put by Inanui's counsel, to fly in the face of a well established custom and to threaten not only the mana and status of the Makea but also the custom itself. Again, this second question going to control of Makea rights, needs full exposure to the tribe before a change can be contemplated. It may even be a matter which should be placed before the House of Ariki. The court makes no finding but only expresses concerns which should be debated by the tribe. It is a matter for the people, not the court.

11. Which body customarily elects the Makea Ariki

11.1 *The right to select*

There is no substantial disagreement between the parties that the Kopu Ariki have the right to select the Ariki. Counsel for Inanui suggest that if a majority vote is not forthcoming the custom is for the Ui Rangatira and Ui Mataiapo to appoint the title-holder. In the present proceedings, after 6 meetings spread over a period from 7 June to 21 September 1994, there was no agreement as to a candidate. But the minutes show also that no vote was put to the meeting. This is understandable as the people in their desire to keep unity strived to talk the issues through and agree on an appointment.

Unfortunately on 22 September one group went off on its own and held its own meeting and unilaterally and against the wishes of the other members made a decision and proceeded to an investiture. Perusal of the minutes of the remaining group's meetings show that two candidates withdrew on 2 November 1994. So the field had narrowed down to 3 and this seems to suggest there is merit in carrying on meetings until the point is reached where one person is chosen before a vote is taken. Counsel for Mere stated the process should continue for however long it may take to select a candidate. Returning to the question of the ultimate right to appoint, the court is of the view that the Ui Rangatira - who are of blood issue and belong to the tribe - are entitled to join in the process as being part of the Kopu Ariki by descent from the common ancestor not as Rangatira but as members of the Kopu Ariki. On the other hand, for reasons well known and recorded, Ngati Makea have not the same traditional involvement with Ui Mataiapo as some of the other tribes. The history has been earlier referred to herein - see Ostler J's decision[27] he said:

> "With regard to the Arikiship of the other two tribes the Mataiapo by ancient custom had a right to attend and give their voice in the selection, but as in Makea Nui tribe there were no Mataiapo until little more than a 100 years ago the Mataiapo of that tribe had no voice in this election in ancient times, and have not since obtained that right unless it should be granted to them as a matter of courtesy by the Kopu Ariki."

The sole right of the Kopu Ariki to select has been applied in several decisions.

In re Ariki Title of Tinomana[28] the Land Appellate Court determined that the Kopu Ariki had the sole power to elect Tinomana Ariki and accepted evidence that once the Kopu Ariki had been selected the Ui Mataiapo were to be informed and asked to arrange an investiture. This 1976 decision was referred to by McCarthy J in 1991 in re Ariki Title of Kainuku[29] when he said:

> "Nevertheless, it is beyond question in my mind, that the spirit of the custom has always been apparent and is that the selection and appointment of an Ariki is the right and responsibility in each instance of the Kopu Ariki."

In a further approving reference to the 1976 Appellate Court decision McCarthy J noted the court's decision that the election by the Kopu Ariki was to be made on a majority vote.

In 1977 the Koutu Nui(30) confirmed the Ariki Nui as the body to elect a new Ariki and determined that Ui Rangatira with blood rights were included in the Kopu Ariki. The Koutu Nui amended a previous recommendation that a majority vote sufficed and left the decision in the Kopu Ariki hands. The decision of the Kopu Ariki was to be final.

Perhaps in their wisdom the House of Ariki preferred the Kopu Ariki to hold meetings until such time as a unified decision emerged rather than encourage an early majority decision.

The decision of the Appellate Court binds this court so that the authoritative findings by that court firstly, that the Kopu Ariki have sole power to elect and secondly that the majority decision of the Kopu Ariki determines selection, would seem to state present law.

11.2 *Constitution of the Kopu Ariki*

Having determined Kopu Ariki's right to select, there is the ancillary question: Who makes up the Kopu Ariki?

The general view on this question is that the term 'Kopu Ariki' includes all the families who descend from the Ariki's common ancestor.(31) Another general view is given in the 1991 Appeal Court(32) by McCarthy J.

> "But what is the Kopu Ariki? In my view the answer is again reasonably clear. The term embraces all in a tribe who are the descendants of a particular tribal ancestor who, again according to Rarotongan practice within the Kainuku tribe at least, was the Ariki living at the time when Christianity was brought to the island by the first missionary, John Williams in 1823."

This question came to attention in the succession to Tinirau(33) where Ostler J said:

> "In this case both parties have agreed as to who are the members of the Kopu Ariki who have the right to attend on the selection of a new Ariki. They are the members of four families."

The judge was referring to the four families descending from Makea Apera. During the present proceedings Potikitaua Manarangi stated there were four branches comprising the Ariki Kopu. This was further confirmed by witness Eric Browne. However another witness called by counsel for Mere, William Estall, claimed that descendants of Rupe (see Table 1) regard themselves as part of the Kopu Ariki. This witness confirmed he attended the meeting on 4 November along with Tom Marsters who was speaker for Ngati Rupe as representatives of the Rupe family. Counsel for Inanui argued Potikitaua had given evidence that the four families made up the Kopu Ariki and Rupe was not included. Counsel suggested that Rupe had not been represented at any of the earlier meetings and the sudden appearance of Rupe arose from the call for further support issued at the meeting on 2 November.

Two exhibits, A13 and A14, being minutes of meetings of the Ariki families in September 1947 to elect a successor to Takau, referred to Rupe. The court has been unable from the evidence submitted in these proceedings to get a suitable explanation as to whether or not the Rupe representation indicated a fifth family group as part of the Kopu Ariki. Rupe's descendants, on the face of the genealogical table, are common descendants from the founding ancestor. Unless satisfactory explanation is forthcoming that family would appear to be part of the Kopu Ariki.

It is a matter the people must settle or have resolved.

12. Suitability or Unsuitability

Counsel for Inanui asked the court to address this issue.

12.1 *The view of the courts so far*

12.1.1 Ayson J in his 1923 decision(34) referred to the old position in 1905 where it had to be shown the candidate was mentally or morally unfit. In 1908 an ordinance provided that

> "The person chosen for the Arikiship shall be of good character, and of pure Maori blood, and a recognised member of the Ariki family."

12.1.2 *Judge Ayson's decision in re Mataiapo Title of Manavaroa*[35]

This case was referred to the court by counsel for Mere and although it relates to a Mataiapo election the findings of the judge are relevant.

Judge Ayson held that a Mataiapo could only be deposed "for some very grave offence such as murder or adultery with the wife of a brother or other close relation".

12.1.3 In his 1940 judgment in re Makea Nui Ariki Title[36] Ayson J gave the following criteria going to suitability or unsuitability:

1 Sound character,
2 Adultery if proven beyond doubt.
3 Akateitei - ie arrogant or overbearing behaviour.
4 Leaving the country with full intention of staying away.

Ayson says the person must measure up to what is required as to fitness, taking present day conditions and all circumstances into account.

12.1.4 In a more recent decision Dillon J said the candidate should be elected:

> "unless by reason of character or mental or physical incapacity he is unfit for the office.[37]

12.2 *The view of the Koutu Nui - 1977*

The 1977 report does not specify what would render a candidate unsuitable for office but has this to say:[38]

> "SINS OF AN ARIKI
>
> If the behaviour of the Ariki and the manner in which he controls his Vaka is unacceptable according to Ancient Customs, and he is not good to his Ngati or to the Vaka, the Ariki Family and the Ui Rangatira, with the Ui Mataiapo can remove title from him.

These are some of the sins of the Ariki.

1. Cohabiting
2. Murder
3. Insanity
4. Ill treating his family and the tribe
5 Overbearing over the people in the Vaka or in his own Kopu Ariki."

12.3 *View of this court*

There is a common thread running through the judicial decisions and the views of the House of Ariki. The connecting link is the requirement of the Ariki that he or she must be of good character and good disposition. The above list may not be exhaustive but it indicates clearly that there must be serious misconduct or disability before action can be taken. It is certainly not just a matter of popular choice.

In the court's view the allegations made against Inanui and referred to earlier fall well short of the criteria necessary to disqualify her as "unsuitable or unfit" to hold office as Ariki.

Again in the court's view there is no evidence that would disqualify any of the three candidates. On the evidence presented they are all "suitable" persons to hold office within the meaning given to that word as a qualification for appointment. No doubt if there are say, two candidates equally eligible for appointment and the Kopu Ariki members have to make their choice there would be possibly a large number of factors which would influence their respective selections. That is the way of things. On the other hand, if there are serious matters alleged the court will require proper notice to be given to the candidate, evidence to be submitted and proper opportunity for response. And of course when a person's good standing and character is under attack the court will require to be completely satisfied that sufficient cause has been established before it will intervene.

13. The issue of whether the candidates have sufficient support

The three parties before this court accept the view that a decision by a majority of the Kopu Ariki binds the parties and is in accord with custom. Counsel for Inanui qualified this by submission that, in reaching a majority

decision, the Kopu Ariki must act also in accordance with Maori custom in the selection process itself. It is of course desirable that the Kopu Ariki endeavour to reach a unanimous view by persevering with the meeting process. This may take some time and often may require a nominated candidate to withdraw in the interests of family unity. The process of going to a vote should not be peremptory or sudden. There should be discussion on the custom or arrangement binding on or agreed upon by the tribe. The election of Ariki is not just an election on a popularity vote. The election must be conducted in accordance with established custom or arrangement or agreement previously reached by the people after full consultation and debate.

In the present election, if the court applied a percentage support calculations test as the basis for selection, Mere MacQuarie would have been the successful candidate with majority support. The court, however, has not applied that majority calculation because it was not satisfied that such a majority vote was obtained on a proper basis, having regard to the manner in which the meeting on 2 November 1994 was convened and conducted. The court was also of course not satisfied that such election was carried out in accordance with established custom or arrangement.

Shortly expressed the court accepts that a majority decision of the Kopu Ariki will be an important element provided it is properly reached and in accordance with established custom or protocol. As was noted earlier in Paragraph 11(1), the courts have recognised decision by a majority of the Kopu Ariki.

The court was invited by counsel for Inanui to confirm the validity of "fractional interests" in the voting process. All parties were agreed there were 4 votes, 1 vote for each of the four families of Rangi Makea. It was on this basis that Mere claimed a majority vote of 2.79 shares in her favour and 1.29 against her and in favour of Inanui.

During the hearing, however, questions arose as to whether or not the descendants of Rupe were part of the Kopu Ariki. If that was found to be so then the four votes might well extend to five. The court dealt with the Rupe family issue in paragraph 11.2 herein and came to the view that it was not able to reach a firm conclusion on the conflicting evidence presented, although on the face of accepted common descent from the founding

ancestor, Rupe's descendants might be able to claim rights. The court has referred this matter back to the people for resolution.

In answer to counsel's question the court sees no difficulty in accepting a voting process based on 1 vote per family with fractional division of the 1 vote if necessary.

14. Was the candidate properly invested?

The investiture ceremony is an important part of the process of appointing Ariki. When the Kopu Ariki have selected the candidate, the decision is announced to the Ui Mataiapos who then fix the date and undertake the ceremony. The ritual is described in some detail in the 1977 Recommendation of the House of Ariki.(39) It would seem that there may be some variations in procedure from tribe to tribe. The relationship of the investiture process to the actual selection of the Ariki was considered in the 1976 Land Appellate Court case earlier referred to herein concerning the Tinomana Ariki Title.(40) One of the grounds of appeal was that the lower court erred in not considering the mode of investiture of the Ariki. The Appellate Court said this:

> "We conclude that at the best, investiture could be a step in confirming the authority of the ariki to act, but it certainly is not a pre-requisite for election which is the sole prerogative of the Kopu Ariki."

Apart from the point raised by Paula Lineen as to her doubt whether Nono Manarangi had the right to invest her sister Mere, there was no formal argument or objection raised by the three parties as to the propriety or otherwise of the investiture ceremonies.

Investiture is and no doubt will continue to be regarded as an important custom accompanying the appointment of an Ariki.

It is not an issue in these proceedings.

15. Conclusion

The recognised history of the Makea Title from pre-Christian times establishes the predominance of succession to that Title by the application of the primogeniture rule. Nevertheless there have also been instances in which succession to the title has been by way of an arrangement approved by the Kopu Ariki as in the successions to Makea Pori. It could also be said that the appointment of the late Teremoana was pursuant to an arrangement made that saw a departure from the primogeniture rule. It must be added, however, that even in this instance the court recognised the existence of the prior customary right of Makea Takau issue as the senior family.

This court has rejected the claim of Mere MacQuarie based on the senior line descending from Rangi Makea. That contention would not seem to be any part of customary law as recognised and applied in this title or in other Ariki Title disputes in the Cook Islands. During the course of this hearing argument was advanced by counsel for Inanui criticising Mere's failure to be called to give evidence. Whilst recognizing the right of any party to determine the procedure to be followed in presenting a case, this court observes that it is usual for an applicant to give evidence. The court would certainly have been in a better position to understand why Mere had changed her attitude to the system of title rotation if she had given evidence of her reason for so doing. In the absence of that evidence the court was entitled to draw the inference that her acceptance of rotating title and restriction on the Ariki's control was to win over support from the Kopu Ariki.

Section 409(f) of the Cook Islands Act 1915 does not provide this court with jurisdiction to direct the Kopu Ariki as to how, and in what manner, and on what terms a successor to this important Title should be elected. The function of this court is to give 'guidance and assistance' to the people to help them determine the matter themselves and decide the future policy they should follow.

Unless and until the people decide for themselves whether they wish to bind themselves to an arrangement or agreement then the established custom must be followed. In the absence of an arrangement or agreement, and this court finds no such position presently obtains, established custom must prevail.

We have set out this court's views on a number of issues which now need to be considered by the people. For the reasons and findings set out in paragraph 9 we conclude there has not been a valid election of any of the three candidates by the Kopu Ariki which would sustain a declaration that any one of them is entitled to hold office as Makea Nui Ariki.

This court declares there has been no valid election of Mere MacQuarie or Inanui Love or Paula Lineen as Makea Nui Ariki and a fresh election is therefore necessary.

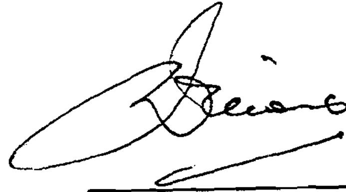
The three applications are hereby dismissed.

In his final submissions counsel for Inanui submitted that the role of Mr Nono Manarangi would need to be clarified in the event of this court's decision leading to further meetings of the Kopu Ariki.

The court is not prepared to intervene on this matter. The Kopu Ariki have a customary procedure for the conduct of meetings. Mr Manarangi saw his nomination as a candidate as preventing him from chairing the six early meetings of the Kopu Ariki. It seems that the appointment of an independent chairperson outside the family was not a success. That is no reflection on the chairperson. This is essentially a matter within the Makea family and should be addressed by that family as it has been done in the past applying its customary procedure. There are serious issues to be worked through and decided. Although it will be disappointing to the people that they have to go through the process again it is to be hoped that the decision of this court and the views it has expressed may help the people to understand the issues and reach a consensus. It will be disappointing to the court if there is a need for further judicial involvement in the election of Makea Nui Ariki.

In the circumstances the court is not disposed to make any order for costs but leave is granted for application to be made by any parties within 30 days of this decision.

Promulgated at Wellington this 18th day of September 1995 by Judge McHugh on behalf of the Court.



J D Dillon
Judge

A G McHugh
Judge

Case References

1. Ostler J, Supreme Court of New Zealand. Decision in re Makea Nui Tinirau Ariki Appeal, 19 June 1941

2. ibid. See pages 3 and 4 of decision.

3. Decision of Native Appellate Court of the Cook Islands in re Makea Nui Takau, 16 October 1948. Morison CJ (presiding) C , Morgan J and Harvey J.

4. ibid. Page 1 of decision.

5. Decision of Native Appellate Court of the Cook Islands in re Tinomana Ariki Title, 14 October 1948. Morison C.J Harvey J and Morgan J AMB1/140.

6. Decision of the Court of Appeal of the Cook Islands in re Ariki Kainuku Title, 29 November 1991 before McCarthy J, (presiding) Roper CJ and Chilwell J.

7. Decision of the Court of Appeal of the Cook Islands in re Tinomana Ariki Title, CA 5/93, dated 8 August 1994 before Barker J (Presiding), Hillyer J and Henry J.

8. Decision of Native Land Court in re Rangi Makea Title, 29 September 1923 before Chief Judge Ayson.

9 op.cit. See Note 1 and refer to page 6 of decision.

10 Decision of Native Land Court in re Makea Nui Tinirau Title, 7 February 1940 before Chief Judge Ayson. See paragraph 6 of decision.

11. op.cit. See Note 1 above and page 16 of the decision.

12. op.cit. See Note 8.

13 ibid. See page 19 of decision.

14. Decision of the Native Land Court, 3 May 1948 in re Makea Nui Takau, before McCarthy J.

15 Land Court decision in re Vakatini Ariki Title, 14 April 1980 before Dillon J.

16 op.cit. See Note 1. Actual quote is set out in paragraph 7.1 of this decision.

17. op.cit. See Note 3

18 op.cit. See Note 1 and page 10 of that decision.

19 op. cit. See Note 8 paragraphs 3-6.

20 ibid. Paragraph 6.

21 Decision of the Land Appellate Court of the Cook Islands in re Ariki Tinomana Title, 19 June 1976 before Donne C.J (Presiding) Smith J and Cull J.

22. Decision of High Court (Land Court). 25 June 1993 before Dillon J.

23. op.cit. See Note 7 and page 7 of the decision which sets out in full the text of the 1975 agreement.

24. ibid. See page 9 of the decision.

25. op.cit. See Note 6 and pages 1, 3 and 15 of the decision.

26. op.cit. See Note 14 and page 2 of decision.

27. op.cit. See Note 1 at page 5.

28. op.cit. See Note 2 and foot of page 4.

29. op.cit. See Note 6.

30. Recommendations of the House of Ariki on the Koutu Nui Report 1977, page 6.

31. ibid. See Election of Ariki, page 6, paragraph 1.

32. op.cit. See Note 6 at page 4.

33. op.cit. See Note 1 at page 5.

34. op.cit. See Note 8 at page 11.

35. Decision of Native Land Court in re Mataiapo Title of Manavaroa, 10 November 1933.

36. op.cit. See Note 10, pages 22-23.

37. op.cit. See Note 15, page 15

38. op.cit. See Note 30, page 8, paragraph 3.

39. See Note 30 and page 7 of Report.

40 op.cit. See Note 1 and pages 7-8 of decision.