IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA
(LAND DIVISION)

CA; 8/99

IN THE MATTER of Article (6)(2)(c) of The Cook Islands Constitution Amendment (No. 9) 1980-81

AND

IN THE MATTER of the traditional Maori Title of **MAKEA NUI ARIKI**

AND

IN THE MATTER of an application by **NOOROA SATARAKA MATUA** of Avarua, Rarotonga, Retired.

Appellant

Sir G A Henry for Appellant
Mrs T Browne for the Mere family
Mr Mitchell for Mere Maraea McQuarrie
Mr A Manarangi for Mr T A Manarangi
Mr E Nia for himself and family
Date of Hearing: 7,8 November 2001
Date of Judgment: 16th November 2001

JUDGMENT OF GREIG CJ, HENRY J AND HINGSTON J

Appeal against decision of Smith J that the appellant did not have the right to hold the title of Makea Nui Ariki.

The title is an ancient one dating back many centuries. In recent times the succession to this title has been subject to dispute and litigation in the Land Court, the High Court and in the Court of Appeal.

The present dispute follows the death of Makea Teremoana on 9 March 1994. Since then there have been two distinct disputed appointments or election of her successor. The title has remained vacant and because of an injunction granted some time ago the lands grounds and palace of the Makea Nui Ariki have remained vacant.

We attach as an appendix a genealogical table which is based on the one referred to in the 1995 case where the High Court (Dillon/McHugh JJ) dismissed competing applications for recognition as Makea but expanded to include the present parties. The genealogy is not accepted and is indeed a principle issue in this appeal but it is a basis on which the participants and the dispute can conveniently be understood. The numbers designate the Ariki and the order in which they held office.

The organisation of the Makea Nui family needs to be explained. The head is the Makea Ariki who is said to be first among equals and is chief of the family. The Ariki is supported by Mataiapos who are of two grades. They were originally captains or warriors who came with the Ariki in the original migration to the Cook Islands. The next rank is that of Rangatira. Then in graduation Mataiapo, Kanono, Kiato and Uanga. Apart from these is the Pokitikitaua or Priest who has a particular function in anointing or investing the new Ariki and is at the same time appointed by him as the new Potikitaua. Finally the Kopu Ariki who are members of the Ariki blood line are allowed by custom to participate in the selection process of the Makea.

In appointing or confirming the appointment of a new Ariki the Kopu Ariki its Rangatiras and its Mataiapos have some authority. For some time the Kopu Ariki or assembly of the family has been comprised of representatives of the four families descended from Makea Apera No. 8. This is disputed and is another important issue in this case.

The Kopu Ariki it is said must be summoned and presided over by the Potikitaua.

On the death of Makea Teremoana (No. 13) in 1994 the Kopu Ariki met on a number of occasions. There were a number of claimants namely Inanui Love Nia a daughter of Takau whose family was represented by Eruera Nia, Mere Macquarie the younger daughter of Teremoana who was represented by Mr Mitchell and Paula Lineen Mere's older sister who made submissions in the High Court but did not appear before us. No compromise or settlement was possible so their claims were brought before the Court. The applications were each dismissed, none of them being found entitled to succeed to the title. That was the subject of the Dillon McHugh JJ decision in 1995.

Some time later, Inanui died and thereafter the appellant began his process to obtain title. A number of meetings of the Kopu Ariki were held. It is contended by the respondents that the Kopu Ariki was not properly summoned and was not on some occasions validly constituted; in particular because more than the four families descended from Apera were included and took part and voted.

The Appellant claimed that being of the appropriate blood and having received sufficient support from the Kopu Ariki was entitled to be Makea Nui Ariki.

The Appellant brought proceedings in the High Court to succeed to the title to the lands held by the Makea Nui Teremoana. He withdrew part of the application with respect to three sections of land. Mrs McQuarrie applied pursuant to s. 409(f) of the Cook islands Act 1915 for an order determining the appellant's rights and opposing his claim to the title. Mr Nia filed an objection opposing the applicant on behalf of his family.

Teariki Akamoeau Manarangi filed an application opposing the objection. He was the Potikitaua of Makea Teremoana and was a descendant of Tataraka.

As we have said Paula Lineen presented submissions to the High Court but she has not taken part in this Appeal. Joan Pito Hareraara Pito Apera Sadaraka made an informal claim and presented a written submission by leave of the High Court. She presented a further paper to this Court but did not appear. Smith J dealt with all these applications, objections and submissions together and his decision dealt with and disposed of them all subject to this appeal and to the substantive application by Mrs McQuarrie which was withdrawn by leave.

Mrs Browne sought and was granted leave to appear on the Appeal for the Mere family. That is the family of Mere who appears on the genealogy as the youngest daughter of Makea Apera (No. 8). She had taken no part in the earlier hearing but wished to support her family's genealogy in light of the contentions by the Appellant that it was not part of the Kopu Ariki family.

Over the decades the Court has considered and pronounced upon the strict right or entitlement of the claimant in accordance with the accepted and proved custom of the family Makea Nui. In earlier times there were various ordinances and rules promulgated to regulate the manner of appointment. These were all revoked by the enactment of the Cook Islands Act 1915.

As Ayson CJ said in his judgment of 29 September 1923 in the Re Rangi Makea Ariki dec'd MB 9/378, 389:

> "This meant that Ariki succession in regard to Ariki Land,
> and all other functions attached to the office of Ariki,
> except so far as the Island Council was concerned, was

left to be determined according to Native Custom."

The reference to the Island Council is now obsolete.

In addition the Court has pronounced on the suitability of the candidate which Ayson CJ in the above case (at p 396) held referred both to mental condition and moral character of the rival claimants. No question has been raised against the appellant on this head.

The appellant's claim in essence is that he is directly related to the last son of Makea Pori (No. 4), that is Makea Apera (No. 8), who held the title of Makea Nui Ariki. In support of his claim he contends that neither the Rangi Makea No. 10 line or the Mere line and part of the Kopu Ariki or are within the blood which could entitle them or any of their descendants to claim the title.

We deal with the latter first. The appellant claims that Mere was born in 1887 and so cannot be descended from Makea Apera (No. 8) who died in 1871. To support the claim there is produced a certificate under the hand and seal of Rev. Tekere Pereeti President of the CICC Takamoa of a copy of an entry of registration of the date of births kept in his office. The certificate shows:

"3.	Child's name:	Mere. Female
	Father	Apera
	Date of birth.	6th February 1887"

Mrs Browne has produced in support of her claim a number of documents including a death certificate of Mere Pokino who according to the Register book died 3 April1926 age "about 75 years" whose father is named Makea Apera and mother is Teameamea. The appellant's genealogy Table 5 shows Makea Abelaama married to Tehameamea Tamarii. Makea Abelaama is the

Makea Apera (No. 8). Further there is a record (LT Record 151) which is a copy in English, of a signed statement by Makea Takau (No. 9) dated 8 April 1908 and witnessed by Tinomana which recognises Mere to be a child of Makea Abela No. 8. Also produced is a genealogy dated July 28 1921 prepared by persons other than descendants of Davida or Abela which confirms Mere as a child of Abela. This is reconfirmed in a letter dated April 6 1936 from B Uriarau of the Upokotokoa line. The decisions of Ayson CJ on 23 September 1923, noted above, and of 7 February 1940 re Makea Nui Tinirau (No. 11) at p 16 & 17 and the judgment of Ostler J on appeal from the last case 1941 p 10 provide further confirmation of this genealogy.

The Mere family line from Makea Apera (No. 8) has been acknowledged and recognised by the family and the Courts and is recorded and confirmed over a long time by evidence. There seems to have been no challenge to that in the past. The claim now made by the appellant is not supported by any cogent evidence.

The Rangi Makea No. 10 line is put forward in the genealogy and by history as a true line and the senior line.

The appellant contends that Rangi Makea is of uncertain origin that there is no birth certificate or recorded entry and he is not of the line. At the time of his likely birth before 1851 there was no compulsory registration. The London Missionary Society kept records but they are not always reliable. For example the years for 1852 1853 are missing. The first entry was made in 1849. The mere absence of a record at this time is inconclusive. On the other hand, Rangi Makea was recognised as Ariki without opposition in 1911. He was chosen by Makea Takau (No. 9) by her "will." This is dated 26 April 1911 and is supported by a written witnessed statement which as quoted by Ayson CJ is, in part:

> "I desire to tell the Resident Commissioner my wishes regarding the title of Ariki. I feel that I am sinking and want to express my wishes to you, the representative of my King.
>
> Two of my family are left now – myself and Rangi Makea. If I die I wish Rangi Makea, my cousin, to succeed me."

The record in 1908 and the other matters referred to above in respect of Mere also bear reference to Rangi Makea putting him as first in the line from Makea Apera (No. 8).

As to Makea Tinirau (No. 11) it is contended that he is the son of Mere and Selafi Fortes. To support this two papers are tendered. One headed "Appendices 2" is as follows:

> "Note: Rangi Makea and his wife Tapumanoanoa did not have any children of their own. They did take as "feeding children" Tamarua a Moe Ua and Tinirau. They are not Rangi Makea's sons; nor did Rangi Makea formally adopt them."

The other headed "Appendices 3" is described as Makea Apera line. That does not have lines drawn on it in the usual way but may be read to show a Tinirau as a son of Mere and Selafi Fortes. The Mere being a sibling of Upokotokoa, Rangi Makea, Sadaraka and Mere. That would seem to contradict the appellant's claim that only Sadaraka and Upokotokoa are the children of Makea Apera.

Neither of these papers have any provenance. Indeed nothing was proposed about their source or authenticity.

Makea Tinirau (No. 11) is said to have been born on 12 March 1874. We were tendered by Mr Nia a photocopy of an entry in the LMS record showing a Tekao Tinirau born on that day and his father is named Rangimakea. Mr Nia stated that the other names recorded related to the wider family. Tinirau's succession to this Ariki Title was contested and was the subject of the decision of Ayson CJ 29 September 1923. On pp 397 and 398 the learned Chief Judge said this:

> "(a) He has shown, and his genealogy is not disputed, that he is descended from Makea Pini, through the first born of Pini's children. He has traced directly from Takau, the daughter of Pini. The Makea-nui line is from Tinirau, the second born of Makea Pini.
>
> (b) In dealing with the question of succession to the Tinomana title, Col. Gudgeon, Chief Judge of the Native Land Court, and Resident Commissioner, stated that although Tinirau should be the Tinomana, yet he was held back because "he was a promising young man, and would some day be the Makea." These words are in Colonel Gudgeon's own handwriting.
>
> (c) Makea Takau, who reigned 40 years and was a just Ariki, assumed that some day Tinirau would come into the Makea Nui title. From the fact that she did not mention Pori, but said that Rangi Makea was the only other one of the family left, it may be assumed that she

> intentionally passed over Pori, no doubt for the reason that she considered he was under the Karika family holding the Rangatira title of Tepou."

There is an abundance of evidence to satisfy the Court that both Rangi Makea and Tinirau are descended from Makea Apera and are of the senior line. We are not persuaded by the material tendered by the appellant that any other conclusion is open.

In the decision under appeal the Judge held that the appellant was not a member of the class eligible for appointment because he did not come within the primogeniture line. On this the Judge stated at p 3 –

> "It is abundantly clear, that except in those situations where there has been some arrangement adopted by the Kopu Ariki, such as in the case of the Will of Rangi Makea in 1921 and in the case of succession to Pori by his son Tinirau and later Tinirau's siblings, or where there is no person *"suitable"* such as happened when Mokoroa being a minor was passed over in favour of Teremoana, the primogeniture rule applies."

In reading that conclusion the Judge implicitly rejected any claim that the Makea Nui line was not a true or senior line. Nothing has been put before us to persuade us otherwise. We agree that the appellant is not the eldest of the eldest or of the senior line.

The primogeniture rule is said to be a custom in the Makea Nui Ariki which gives precedence of appointment to the eldest of the eldest.

It is said to have been recognised by a line of judicial pronouncements. In the decision on the Rangi Makea succession in 1923 the dispute was between Makea Tinirau and a descendant of Daniela who on the genealogical table attached was senior in line to Abela. Rangi Makea like Makea Takau before had made a will or expressed a death bed wish as to the successor. The decision of the Court was that such a wish if agreed to at the time would become a binding arrangement according to Native Custom (MB 9/396). All that was said about genealogy was that, if the matter came to Court, the Court would consider among other things the respective genealogies of the rival claimants and that the new Ariki must be a recognised member of the Ariki family. (MB 9/396). The competing claim failed because the Chief Judge found that "... there seems to be no doubt that the descendants of Daniela have definitely gone over to the Karika side, and are then precluded from holding the Makea Nui title." They were no longer part of any line which qualified for entitlement.

In the Makea Nui Tinirau deceased succession the disputants were the eldest daughter of Tinirau namely Takau Rio Love and a descendant of the Mere family. It may be observed that though the dispute seems to have been fully canvassed there was no challenge to the Mere right to the Makea Nui line. There was no will or death bed wish so the issue was the comparative strength of the claims.

Ayson CJ noted that the Court's findings differ in some respects from tradition and history because the Court is bound to a very large extent by sworn evidence rather than unsworn statements which might be affected by the interest of the person making the statement (Judgment 7 February 1940 p. 5). He then referred to the writings of Dr P H Buck (as he then was) in his book "Mangaian Society" published in 1934 which stated that custom required that the Ariki title is vested in the Kiko mua, the first born son of a first born

son. Other like statements were cited from other works of Dr Buck namely Ethnology of Tongareva, Ethnology of Manihiki and Rakahanga and Vikings of the Sunrise (1938).

Then after repeating the conclusions the Chief Judge had reached in the Rangi Makea case (MB 9/395-396) he stated that the Court must give its decision according to "true ancient native custom" which must take the place of the wishes of Kopu Ariki, Mataiapos, Priests and other people affected. He then speculated that Makea Nui Tinirau had not made a will because the Ariki knew:-

> ".... The true native custom was to select the senior line for succession to this Ariki title." (1940 Judgment p. 10).

Two other case were cited as supporting this speculation. These were Manavaroa Mataiapo (Judgment 10 November 1933 MB 11/43) and Tinomana Ariki (Judgment 14 November 1934 MB 11/168). In both these cases Makea Tinirau gave evidence and, as reported in the Tinirau case, supported the custom to vest the title in the eldest son but since Mission times the senior woman could take title. In the Tinomana case there is included in the evidence an extract from an address by Col. Gudgeon to the people of Arorangi in 1909 which is as follows:-

> "You Mataiapos assume that you have a right to select the Tinomana Ariki, a right that you certainly have not had for the last 100 years, and you deny the right of the Ariki family to select the <u>elder born</u> of that family."

The conclusion of the Chief Judge was stated in these words at p 22:-

> The Court holds therefore that Rangi Makea was the rightful successor to Takau, and that Tinirau was the rightful successor to Rangi Makea. Having held that it is the true Polynesian custom and the custom of the Makeas that the eldest surviving child of the deceased Ariki, or in default of issue, the elder of the next branch, whether male or female, (the custom having been altered in Rarotonga in Christian times should succeed the Court holds that the person having the right to hold the office as Ariki is Takau Rio Love."

That judgment was appealed to the Supreme Court of New Zealand the Appellate Court for Cook Island cases at that time. Ostler J in his judgment confirmed the judgment of Ayson CJ saying at p 9:

> "Under these circumstances, in my opinion, both the history of the way in which the title has descended, as I have already stated it, and the judgment of the Court in the Tinirau case, clearly establish that although it is the native custom that the Kopu Ariki should select the new Ariki, it is also well-established native custom that the eldest child of the last Ariki has the right to be elected unless he or she by reason of character or mental or physical incapacity is unfit for the office "

(In re Makea Nui Tinirau Ariki decd (Ostler J 1941).

This custom was applied in Re Makea Takau Ariki Title (Native Land Court 3 May 1948 McCarthy J), re Vakatini Ariki title (Land Court 14 April 1980 Dillon J) and re Makea Nui Title (High Court 502/94 and 138/95 Decision of Dillon: McHugh JJ 18 Sept. 1995).

The appellant contends that the primogeniture rules is not custom but a manufacture of western culture since the advent of Christianity in 1823 which has been seized on by the Courts to explain and rationalise the events of succession. It was further contended that the exception to any such rule in the history of the succession in this title disprove the rule. It is asserted that in any event any custom is not immutable and may change. No evidence was produced or cited in support of the first and third of these propositions. The judgments already referred to explain and justify the exceptional cases of Makea Tevaerua (No. 6), Makea Daniela (No. 7), Makea Apera (No. 8) and Makea Teremoana (No. 13).

The judgments we have referred to have recognised and confirmed what was found as evidence on be the custom. The Court does not create the custom but, acting on the evidence before it, makes a finding as to the existence and the terms of a custom. Since the decisions of Ayson CJ there seems to have been no attempt to challenge the rule by evidence in subsequent hearings. The subsequent decisions have confirmed the rule in the absence of any challenge.

On this appeal there is no challenge based on evidence as to the true custom. On the other hand the authority of the previous decisions remains after almost 80 years. That custom may change over time may be accepted. It may also be set aside by arrangements or agreements among the parties concerned. It requires evidence however before this Court is entitled to depart from what has been held and acted upon for so long.

Whether on a strict rule of primogeniture or a rule which gives priority to the members of the senior line the appellant cannot qualify. The hurdle he faced has not been lowered or removed by anything before this Court or the Court below. There is no evidence of an arrangement or agreement allowing departure from established custom therefore, in those circumstances as the judge found the appellant fails at that hurdle.

That disposes of the appeal and it is not necessary to deal with any other issue raised. It is plain however that the decision on this case is unlikely to resolve the succession to the title of Ariki. It may be useful to add something about other issues.

The Kopu Ariki has been in the past composed of members of the four families of Makea Apera (No. 8). We have confirmed that each of those four families are descended from that Makea Apera and that the Rangi Makea line is the senior. The earlier senior line from Makea Daniela (No. 7) has been excluded by past actions confirmed by decisions of the Court. Another earlier line from Rupe a half brother of Makea Tinirau (No 3) has not in the past been considered part of the Kopu Ariki though there have been occasions when descendants of Rupe have been present, without objection at Makea Nui ceremonies.

The appellant purported to include both of these lines in meetings of the Kopu Ariki which he convened and representatives of their lines are recorded as taking part in those meetings.

Whether and in what method and after what process persons may be admitted and become members of the Kopu Ariki we cannot say. That would require evidence which was not available to us. It would seem likely that any decision on such a matter would be taken by the existing members of the

Kopu Ariki and such other Priests Matalapo and other parts of the family entitled to take part. It would not be usual for the prospective additions to take part on the question of their own admission.

It is contended that the meetings of the Kopu Ariki which voted on the appellant's appointment were incorrectly convened and improperly conducted. The rule is said to be that the Potikitaua must call the meeting. In the present case it is alleged the Potikitaua did not act on the appellant's request and so the appellant had no recourse but to call the meetings himself. The matter is now further complicated since three persons now claim to hold title as Potikitaua.

The impropriety of the meeting arises from the extended membership to include representatives of the Daniela and Rupe lines.

It is not the Court's function to impose on the Makea Nui or its Kopu Ariki any rules or guidelines as to its constitution composition or procedure. These must be left to the family as a whole to decide.

All that can be said is that after the new Ariki is appointed or assumes office if there is opposition or disagreement then it will come before the Court. On the evidence and submissions then given the Court will find what the relevant custom or customs are, whether they have been correctly applied and under the Act the right of any person to hold the office of Makea Nui Ariki.

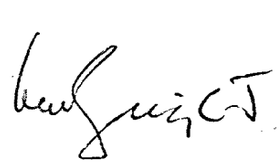
We were invited to deal with the injunction granted in the High Court. That matter is not properly before us: there being no appeal against the decision in the High Court. Whether or not the injunction is to continue should be brought before the High Court by separate proceedings.

The decision of the Court is that the appeal is dismissed.

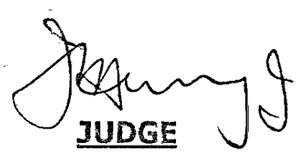
Costs follows the event and are awarded as follows:

Mere McQuarie interests	$2750
T A Manarangi interest	$2750
Mere family	$1500

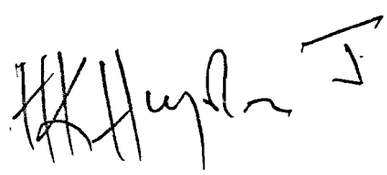
Mr E Nia appearing for himself is not entitled to costs.



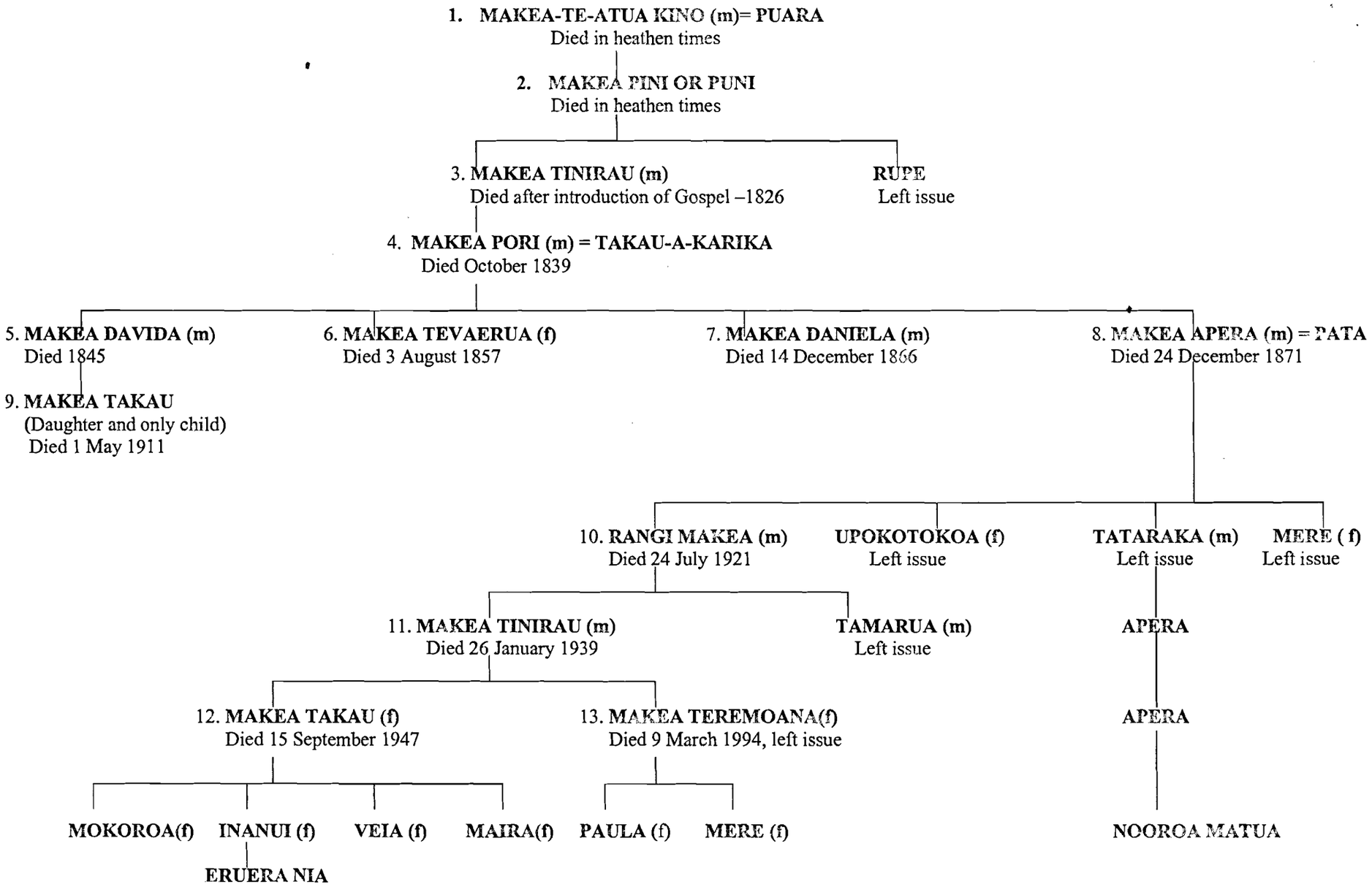
CHIEF JUSTICE



JUDGE



JUDGE


1. MAKEA-TE-ATUA KINO (m)= PUARA
Died in heathen times
2. MAKEA PINI OR PUNI
Died in heathen times
3. MAKEA TINIRAU (m)
Died after introduction of Gospel –1826
RUPE
Left issue
4. MAKEA PORI (m) = TAKAU-A-KARIKA
Died October 1839
5. MAKEA DAVIDA (m)
Died 1845
6. MAKEA TEVAERUA (f)
Died 3 August 1857
7. MAKEA DANIELA (m)
Died 14 December 1866
8. MAKEA APERA (m) = PATA
Died 24 December 1871
9. MAKEA TAKAU
(Daughter and only child)
Died 1 May 1911
10. RANGI MAKEA (m)
Died 24 July 1921
UPOKOTOKOA (f)
Left issue
TATARAKA (m)
Left issue
MERE (f)
Left issue
11. MAKEA TINIRAU (m)
Died 26 January 1939
TAMARUA (m)
Left issue
APERA
12. MAKEA TAKAU (f)
Died 15 September 1947
13. MAKEA TEREMOANA(f)
Died 9 March 1994, left issue
APERA
MOKOROA(f)
INANUI (f)
VEIA (f)
MAIRA(f)
PAULA (f)
MERE (f)
NOOROA MATUA
ERUERA NIA