The Curious Case of Land Inheritance: Metaphor and Hawaiian Land Tenure

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I. INTRODUCTION

“Hawai‘i’s land laws are unique in that they are based on ancient tradition, custom, practice and usage.”¹

First stated in In re Ashford² in 1968, the foregoing quote has been subsequently referred to in a number of cases,³ mostly in the context of justifying the use of kama‘aina⁴ witnesses to give testimony regarding

¹ In re Ashford, 440 P.2d 76, 77 (1968) (citing Keelikolani v. Robinson, 2 Haw. 514 (1862) [hereinafter Keelikolani II]).
² Id.
⁴ “Native-born, one born in a place, host.” MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 124 (Rev’d & Enlarged ed. 1986) [hereinafter PUKUI & ELBERT]. A note on the italicization of Hawaiian words: a number of the sources I cite to italicize Hawaiian words as means to distinguish them. Where I have quoted these
ancient tradition, custom, practice, and usage. Such testimony has proven instrumental in maintaining Hawai‘i’s traditions, customs, practices, and usages throughout its legal history. The Hawai‘i Supreme Court\(^5\) has repeatedly recognized the statement’s ongoing applicability, particularly “with the transition to a new system of land tenure.”

Given the importance of this doctrine to modern Hawaiian law, a careful case study of the first time a court applied ancient traditions, customs, practice, and usage to Hawai‘i’s laws may further our understanding of the interplay between native Hawaiian and Western values that exist in modern Hawaiian jurisprudence today. A study of the case, \textit{Keelikolani v. Robinson},\(^7\) raises two issues that appear at first blush to weaken the court’s justification for applying Hawaiian tradition, custom, practice, and usage to modern law.

First, as the first recorded example of land bequeathed from one Ali‘i Nui\(^8\) to another by kauoha, or verbal will,\(^9\) it is unclear whether the practice of land inheritance was sufficiently established to rise to the level of custom or tradition. Rather, it appears that the inheritance practices discussed in \textit{Keelikolani}—generally, passing down land in succession from one generation to the next—were a relatively recent trend. It appears that such practices began superseding the traditional practice of land reversion back to the Mo‘i\(^10\) only after Kamehameha the Great gave his materials, Hawaiian words will be italicized. Otherwise, they will remain in normal typeface.


\(^6\) PASH, 903 P.2d at 1267.

\(^7\) Keelikolani II, 2 Haw. 514. A note on the use of the ‘okina: Where possible, I attempt to punctuate Hawaiian words with the appropriate use of the ‘okina. However, with regards to case names, I forego its use.

\(^8\) “High Chief.” \textit{PUKUI & ELBERT, supra} note 4, at 20. A note on the italicization of Hawaiian words: a number of the sources I cite to italicize Hawaiian words as means to distinguish them. Where I have quoted these materials, Hawaiian words will be italicized. Otherwise, they will remain in normal typeface.


\(^10\) “The paramount Chief of any island, which in European times came to mean king.” \textit{Id.} at 391.
four “Kona uncles” their land in perpetuity.\textsuperscript{11} This being the case, courts such as \textit{Ashford}, citing \textit{Keelikolani} as precedent, would have less of a basis to state that “Hawaii’s land laws are . . . based on ancient tradition, custom, practice and usage.”\textsuperscript{12} Rather, with land inheritance a relatively recent trend, Hawai‘i’s land laws as established in \textit{Keelikolani} would merely be based upon practices established shortly after Western contact.

Second, and perhaps more importantly, the very idea of land inheritance seems to conflict with basic notions of pre-Mahele\textsuperscript{13} land tenure. In concert with the principle that Hawai‘i’s land laws are based upon ancient tradition, custom, practice, and usage, is the principle that prior to the Mahele, all lands were held in public trust:

In 1840 the first constitution of the Kingdom of Hawaii proclaimed that although all property belonged to the crown it was not his private property. It belonged to the Chiefs and the people in common, of whom [the King] was the head and had the management of landed property. Thus, prior to the Mahele, all land remained in the public domain.\textsuperscript{14}

This principle has had, and will continue to have, an immeasurable effect on Hawaiian jurisprudence. However, while the inheritance practices discussed in \textit{Keelikolani v. Robinson} are uniquely Hawaiian, rather than archetypically western, the very concept of inheritance suggests ownership and exclusivity. Can inheritance practices—regardless of form—be reconciled with the notion of public lands? Ultimately, this paper will attempt to address these issues. It should be noted that the problems that appear to arise in \textit{Keelikolani v. Robinson} regarding land inheritance practices do not threaten the principle that “Hawaii’s land

\textsuperscript{11} See \textit{id.} at 52 ("This system [of traditional land tenure] changed in the time of Kamehameha I. After uniting all the islands (except Kaua‘i) in 1795, Kamehameha gave large tracts of conquered ‘Aina on each island to the four Kona Ali‘i Nui who had been instrumental in his rise to power . . . . He gave them these ‘Aina in perpetuity, allowing them to pass their portions on to their children.” (citing SAMUEL M. KAMAKAU, RULING CHIEFS OF HAWAII 175 (The Kamehameha Schools 1961)).

\textsuperscript{12} In re \textit{Ashford}, 440 P.2d at 77.

\textsuperscript{13} The Mahele refers to the land division of 1848, “which transformed Hawaii’s land system from collective to private ownership, modeled after Western concepts.” JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAII 5 (University of Hawai‘i Press 2008) [hereinafter \textit{Van Dyke}]. “Western histories of the 1848 \textit{Mahele} have always defined the term \textit{mahele} as ‘divide,’ referring to a division of the communal rights into individual portions. However, \textit{mahele} has another connotation in Hawaiian that is very different from the idea of ‘divide’ in English. \textit{Mahele} also means ‘to share,’ as one does food or wealth, while the term ‘divide’ in English means ‘to separate, sever or alienate.’” KAME‘ELEHIWA \textit{supra} note 9, at 9 (citations omitted).

\textsuperscript{14} Reppun v. Board of Water Supply, 656 P.2d 57, 65 (1982) (quoting Hawaii Const. of 1840 in \textit{Fundamental Laws of Hawaii} 3 (1904) (internal quotations omitted)).
laws are unique in that they are based on ancient tradition, custom, practice and usage.” The recognition of Hawaiian cultural traditions within the common law is based upon much more than a single case. However, a study of the apparent incongruities that arise within Keelikolani regarding custom and the concept of public lands may help to illuminate the foundations of Hawai‘i’s land laws.

A. Keelikolani v. Robinson

At their core, the Keelikolani v. Robinson cases involve a payment dispute. Ruth Ke‘elikolani presented a bill in equity alleging she was owed payment pursuant to an agreement between Kalanikoku (referred to as “Kalaimoku” in court records) and James Robinson. The agreement gave Robinson, his heirs, executors, administrators, and assigns co-tenancy over a wharf, commonly called the King’s wharf, in Pakaka, Honolulu. Robinson was to occupy and improve the premises and pay Kalanikoku and his heirs one half of the proceeds after deducting half the expenses for wharf alterations, repairs, and improvements. Ke‘elikolani, claiming to have inherited title to the wharf as the lawful heir of John Pitt Kina‘u,Id.

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15 In re Ashford, 440 P.2d at 77.
16 See supra note 5.
17 For the sake of clarity, unless quoting from the court record, I will refer to Kalanikoku as such. Any quotation referring to Kalanikoku should be understood to refer to Kalanikoku.
18 Keelikolani v. Robinson, 2 Haw. 522, 522, 547 (1862) [hereinafter Keelikolani III] (“[T]he relation of Kalanikoku’s representatives to the respondent [is not] that of a lord over a tenant, but, so far as concerns this Court, of one co-tenant towards another. Kalanikoku did not transfer the entire lot to Mr. Robinson, but granted him an estate in it in common with himself.”).
19 Keelikolani v. Robinson, 2 Haw. 436, 437-38 (1861) [hereinafter Keelikolani I] (“Know all men by these presents that I, Kalanikoku, commonly called William Pitt, Esq., do hereby assign unto James Robinson, his heirs, executors, administrators and assigns, one half of the wharf, commonly called the King’s wharf, situated near the southwest angle of the Fort in Honolulu, extending in front one hundred yards or thereabouts, and running back one hundred yards or thereabouts, upon the following conditions: First—The said James Robinson doth hereby bind himself, his heirs, executors, administrators and assigns, to pay one half of all the expenses incurred in altering, repairing or improving the said wharf, and to pay to Kalanikoku, his heirs, executors, administrators and assigns, one half of all the moneys received for the use of such wharf and premises; and I, Kalanikoku, do hereby agree to pay one half of all the expenses incurred in altering, repairing and improving the said wharf. And we do hereby bind ourselves, our heirs, executors, administrators and assigns, to fulfill the above agreement. Given under our respective hands and seals at Honolulu, this 11th day of January, in the year of Our Lord 1827.”).
20 Id. (“Kalanikoku died in 1829, leaving W. P. Leleiohoku; his son, his heir, who died in 1848, leaving an infant son his heir, John Pitt Kinau, who died in 1859, being still a minor, and that the plaintiff was the mother of John Pitt Kinau and his lawful heir”).
petitioned the court for equitable relief. Simply put, Robinson was not paying Keʻelikolani the rent she believed she was entitled to.

What followed was a series of demurrers, a decision by the Chancellor, and its subsequent appeal. In Keelikolani I, the court allowed, and later sustained Robinson’s demurrer on account of a deficient bill. In Keelikolani II, the court overruled Robinson’s demurrer, finding equity in the bill. Finally, in Keelikolani III, the Chancellor held that Robinson had to pay rent to Keʻelikolani, which the full court upheld on appeal.

1. Keelikolani v. Robinson I

In her original bill, Ruth Keʻelikolani, claiming to have inherited Kalanimoku's wharf property, sought to both collect past rent from James Robinson and evict him from the property. In response, James Robinson demurred on a number of issues, which the court ultimately allowed.

Upon Keʻelikolani’s amendment and Robinson’s subsequent appeal, the court upheld the demurrer, holding that the bill was deficient “in not alleging that the respondent [Robinson] entered into the possession of the premises in pursuance of the contract, and occupied the same at the time of filing the bill, deriving profits therefrom,” and that it failed to set forth “the derivative title of the complainant, by virtue whereof she claims to have inherited the premises described in the contract.” Ultimately, the latter question of Keʻelikolani’s inheritance would cause the court to examine the ancient traditions, customs, practices, and usages of the Native Hawaiians, establishing a precedent for later courts to follow.

2. Keelikolani v. Robinson II

In Keelikolani II, the court again dealt with the question of whether Ruth Keʻelikolani had a sufficient claim against James Robinson, and once again, the question of native Hawaiian land inheritance practices arose. In response to Keʻelikolani’s amended claim, Robinson again filed a demurrer, this time alleging that (1) “there were not at the time of the death of Kalaimoku any inheritable estates in the Kingdom, and, therefore, the agreement is no longer in force as against her”; and (3) “that the entire use of the property is her’s.” Keelikolani I, 2 Haw. at 438.

Id. at 441.
his son, Leleiohoku, could not have inherited the estate in question” and (2) “[t]he title to land in [the] Kingdom is founded upon a Land Commission Award, a Royal Patent, or the Mahele (division) Book of 1848.” Ultimately, the court overruled both grounds of Robinson’s demurrer, finding equity in the bill and allowing it to proceed to trial.

a. First Cause of Demurrer

Upon consideration of the first cause of demurrer, the court authoritatively stated that “there was a common law of inheritance, liable to be modified or defeated, but perfectly good until such an event.” As such, “the title in Leleiohoku was complete” according to the bill. In so holding, the court relied upon the ancient traditions, customs, practices, and usages of the native Hawaiians:

It is a matter of history that when the islands were conquered by Kamehameha I, he divided a portion of the lands among his warrior chiefs, and they divided the lands entrusted to them to inferior chiefs, by whom they were sub-divided again and again. All these persons were considered to have rights in the lands, or the productions of them; all persons possessing landed property paid a land tax to the King, which he assessed at pleasure, and also service, which was called for at discretion. The superior always had the power at pleasure to dispossess his inferior, but it was not considered just and right to do it without cause, and dispossession did not often take place except on the decease of one of the landlords, when changes were often numerous, and the rights of heirs and tenants comparatively disregarded. It is very clear that heirs were recognized, and their rights continued until they in some mode were declared forfeit.

The court went further to “suppose that an inheritance, recognized by the King, as alleged in the bill, would be valid at the time, even upon the theory of the counsel for the respondent.” Thus, even if there were no common law of inheritance in place at the time of the agreement in 1827, the recognition by the King would be sufficient to sustain an inheritance.

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25 Id.
26 Id. at 516.
27 Id.
28 Id.
29 Id. at 519-20.
30 Id. (emphasis added).
b. Second Cause of Demurrer

With regards to the second cause of demurrer, the court examined the scope of the Land Commission award in question. By demurring on the grounds that title to land was founded upon a Land Commission award, Robinson implied that such an award would trump any claim through inheritance. However, the Land Commission award, made in 1851, merely added a new piece of land to the wharf property in compensation for a piece of the original lot that was possessed by the government.  

Furthermore, under the award, “the rights of the parties under the contract were recognized and confirmed.” The court concluded that such a confirmation of the agreement constituted a “clear recognition of the validity of the agreement, and the rights of the parties under it.” Thus, rather than superseding Keʻelikolani’s claim to the property, the Land Commission award strengthened her claim.

Furthermore, because Robinson “recognized by his acts the son and heir of the original party to the agreement” in addition to the confirmation of the Land Commission award, the Court reiterated its statement from the previous case that “a party cannot controvert the title under which he holds an estate, and the same principles applies to the heir when the lessor dies during the term.” As such, Robinson was estopped from controverting Keʻelikolani’s title. As a result, the court overruled Robinson’s demurrer, citing the “principle of equity pleading that if any part of a bill is good, that a general demurrer to the whole bill cannot be sustained.”

31 Id.

32 Id.

33 Id.

34 Id. at 517.

35 Id. at 519 (“The Court feel in their duty to observe that these objections do not come with great force from a party who has been in undisturbed possession for thirty-four years, and especially when the contract was formally recognized on the respondent’s application by the Land Commission as applicable to the ‘King’s Wharf.’”)

36 Id. at 520-21 (“1st. The respondents cannot contest the title of Kalaimoku, as they are the parties to the agreement. 2d. Nor the title of his heir, who is alleged to be his son Leleiohoku; and that he was recognized by the King as the heir; and by the common law of that day could inherit. 3d. Nor can he contest the title of John Pitt Kinau, who is alleged to have been the son and only heir of Leleiohoku; nor the title of the complainant, the mother, whom it is alleged to be his lawful heir, and become entitled to his entire property.”).

37 Id. at 519.
3. Keelikolani v. Robinson III

In *Keelikolani III*, the bill proceeded to a full presentation before the Chancellor of the court in equity, followed by an appeal before the court. Robinson countered Keʻelikolani’s claim with two arguments: (1) That he was never party to any agreement with Kalanimoku or his heir other than the original; 38 and (2) That another individual inherited Kalanimoku’s estate – not Leleiohoku, Keʻelikolani’s predecessor in interest. 39 As a result, it was again required to examine native Hawaiian inheritance practices to determine the validity of Keʻelikolani’s claim. Upon appeal, the court upheld the decision of the Chancellor.40

Robinson’s first argument—that he was never a party to any other agreement with Kalanimoku or his heirs other than the original—appears to be an attempt to deny any obligations under the Land Commission’s 1851 award, wherein a portion of land was substituted in lieu of the portion of the original parcel that was possessed by the government.

In response, the court concluded that no new agreement was in fact made in the Land Commission’s 1851 award. The court took note of the fact that “[i]t was upon the original agreement that the [Land Commission] award to Robinson was based in lot No. 1, and upon the rights of the heirs of Kalaimoku also in lot No. 2 that the award was based.” 41 Furthermore, the court noted that the substitution of lots “was an effort to carry out the original agreement in good faith.” 42 The court emphasized that the Land Commission “could not grant away the land of the heirs of Kalaimoku upon any terms”, but rather only “decide upon the claims of parties to lands, and confirm them in their rights.” 43 As such, the award merely confirmed Robinson’s title for the land, “subject to certain rights and privileges, and to certain rules and conditions contained in an agreement made by the claimant with the original holder of the land.”44

Second, Robinson argued that while he regarded Leleiohoku as the heir to Kalanimoku,

38 *Keelikolani III*, 2 Haw. 522, 523 (1862) (“The counsel for the respondent says ‘that they admit the presentation of the claim based on the agreement, and that the Board made an award;’ and that they set forth all the proceedings had therein, but deny entering into any agreement with Kalaimoku or his heirs, other than the original one dated 1827, in relation to the premises described therein.”).

39 *Id.* at 526.

40 *Id.*, at 552 (“[W]e are clearly of opinion that the decision of the Chancellor should be affirmed . . . .”).

41 *Id.* at 538.

42 *Id.*

43 *Id.* at 539.

44 *Id.*
[H]e has good reason now to believe that he may have been in error in so treating and considering said Leleiohoku, as he has been informed, and verily believes; that another than Leleiohoku, claimed to be the heir of Kalaimoku, to whom was granted the entire charge of his estate after his decease, in the presence and with the approval of his late Majesty Kamehameha III.45

In response, the court took the opportunity to elaborate on its earlier holding that “there was a common law of inheritance, liable to be modified or defeated, but perfectly good until such an event.”46 Citing the testimony of Kana‘ina, one of the chief councilors of Kamehameha I, the court stated that at the time of the original agreement between Kalanimoku and James Robinson,

[T]he property went to the children . . . [O]n the death of a chief, his children became his heirs; if he had no children, it went to the heirs of his brothers and sisters . . . . “The King would not refuse when the chiefs met and said, this is the child, or these are the children of the deceased, the King consented, as a matter of course.’ He [Kana'ina] says further, ‘that property was divided as the testator wished it; that the King would distribute it according to the wish of the testators.”47

While the court acknowledged the fact “[b]y the evidence given, by the history of the times, and by the resolutions adopted by the Board of Commissioners to quiet land titles, it is very evident that the rights of heirs were disregarded to a greater or less extent, for the purpose of rendering aid to favorites,”48 it would appear that the court viewed inheritance as a rebuttable presumption that a party’s heirs would inherit his or her lands:

Some other witnesses testified on the same subject, and I regard them all as confirming the position which the Court have hitherto taken, that the children were regarded as the rightful heirs, liable to be defeated by will, and by persons of superior authority and power; but in the absence of these,

45 Id. at 526.

46 Keelikolani II, 2 Haw. 514, 516 (1862); see Keelikolani III, 2 Haw. at 526 (“The Court have hitherto examined this question, and while they have given an opinion that there was a common law of inheritance, liable to be modified or defeated, but perfectly good until such an event; at the same time they expressed a willingness to hear testimony upon the subject of the descent of the property, at a period of time before there was any written law.”).

47 Keelikolani III, 2 Haw. at 527.

48 Id. at 529.
the children entered into possession, and enjoyed all the rights of the father.\textsuperscript{49}

Addressing Robinson’s allegation that Leleiohoku was in fact not Kalanimoku’s stated heir, the court delved into the specifics of Kalanimoku’s will,\textsuperscript{50} which revealed that at one point, Kalanimoku intended to return his property to the King:

[Kalaimoku] was lying feeble and expecting to die; that then a new thought occurred to him. Kaahumanu and Kauikeouli were sitting by him and he thought to \textit{kauoha}\textsuperscript{51} them his property, to \textit{hoihoi} it, return it to the King, and that the King should restore it to the child Kekauonohi.\textsuperscript{52}

However, Naihe and Hoapili objected, stating, “we have children of our own.”\textsuperscript{53} Subsequently, “Kaahumanu and Kauikeouli assented that they should not have the property. Naihe approved it, and the King and Kaahumanu yielded, and it was resolved that it should go to Kekauonohi, according to the first intention.”\textsuperscript{54}

This would seem to indicate that Kekauonohi—not Leleiohoku—was the heir of Kalaimoku. However, regarding the property in question, the court held otherwise. After entertaining testimony regarding the ancient custom of sharing property\textsuperscript{55} and the fact that Kekauonohi never “held or claimed anything in or from Pakaka, and that after Kalaimoku’s death, the lands being occupied by Mr. Robinson, Leleiohoku received the profits,”\textsuperscript{56} the court stated that despite the fact “it is difficult to be satisfied

\textsuperscript{49} Id. at 527-28.
\textsuperscript{50} Id. at 530 (“It is further claimed that Kalaimoku made a will, and that the King approved it, and that by so doing his property became vested in another than the child of his body.”).
\textsuperscript{51} “[A]ssign . . . bequest.” PUKUI \& ELBERT, supra note 4, at 138.
\textsuperscript{52} Id.
\textsuperscript{53} Id. (“He mau keiki no ka makou.”); see KAMEʻELEIHIWA, supra note 9, at 96 (“That was also the famous occasion when Haiha Naihe proclaimed, ‘We all have children,’ meaning that the Aliʻi Nui all had heirs to whom the ‘Aina could descend.”).
\textsuperscript{54} Keelikolani III, 2 Haw. at 530.
\textsuperscript{55} Id. at 530-31 (testimony of Kana’ina) (“By the bequest of Kalaimoku, all the property was to go to Kekauonohi, and Leleiohoku was to have none. But he got property—perhaps the half of it, from his sister—such is the ancient custom here, that the sister should provide for the brother and the brother for the sister. This property eh got from Kekauonohi, and they lived (like) alike on this property, enjoying it in common. The chiefs and the King saw this, and approved of it. They did not do it themselves; but it being according to the ancient custom, the King and the chiefs approved of it.”); see id. at 533 (“Kalaimoku gave his estate to Kekauonohi, with Leleiohoku as his kanaka [meaning thereby one who should participate in it—who had rights in it] . . . .”).
\textsuperscript{56} Id. (“Leleiohoku held this land as the heir of Kalaimoku, and Robinson said
of the exact intentions of the testator by any other means than the conduct of the devisees and heirs themselves,\(^5^7\) it is very evident that it was not the intention that the entire estate should be [Kekauonohi’s]\(^5^8\) and that “Pakaka was clearly an exception.”\(^5^8\)

Taking note of the fact that Robinson had recognized the rights of Kalanimoku and his heirs for roughly thirty-four years, the court noted that “[w]hat was done by the parties interested, on the death of the testator, and mutually acquiesced in for a long period of time, is the best evidence that they are carrying out the intentions of the testator.”\(^5^9\) As such, “[h]ad there been any pretense that [Leleiohoku’s] was not a legitimate title – that there was a devise of the property to another – it would have probably been made known . . . . In this case the will [giving Kalanimoku’s property to Kekauonohi] has not been proved according to the ancient usages, for the alleged devisee declared in her lifetime that she never did claim Pakaka.”\(^6^0\) Thus, because Kekauonohi, or anyone else that might have had paramount title never made claim to the lands held by Leleiohoku,\(^6^1\) the court reiterated its earlier holding that Robinson, as a tenant, could not deny his landlord’s title nor that of his heirs.\(^6^2\)

II. THE CURIOUS CASE OF LAND INHERITANCE

Most accounts of land tenure in Hawai‘i before the Mahele analogize the land as being held in public trust by the king.\(^6^3\) The description of land tenure in Keelikolani v. Robinson seems to echo other

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57 Id. at 533.
58 Id.
59 Id. at 534.
60 Id. at 534-35.
61 Robinson also advanced the argument “that by the law of 1839, the King would take one-third of the lands of the estate on Oahu, and if notice was not given in two months to the King, then would take one-half; and as no notice has been proved, the Court cannot say what lands John Pitt Kinau did inherit [from Leleiohoku].” Id. at 536. However, the court did not feel it necessary to give an opinion on the rights of the King, since Robinson was required to be ousted by paramount title before he could “avail himself of any advantages of an omission in the assertion of the rights of His Majesty, or any one else.” Id.
62 Id. at 535.
63 See infra note 14 and accompanying text; Van Dyke, supra note 13, at 12 (“[I]n old Hawaiian thinking and practice, [the Aliʻi, Aliʻi Nui, or even the Moʻi] did not exercise personal dominion, but channeled dominion. In other words, he was a trustee.”) (quoting E.S. Craighill Handy and Elizabeth Green Handy, Native Planters in Old Hawaii 80-81 (Bishop Museum Press 1972) (internal quotations omitted)). I have chosen not to include all the sources I have found that speak of the land as being in the public domain, as most quote or cite to the 1840 constitution, see supra note 14.
accounts of land tenure in Hawai‘i pre-Mahele. Quoting the declaration of principles made by the Board of Commissioners to Quiet Land Titles, the court stated:

[T]hat when the Islands were conquered by Kamehameha I., he followed the example of his predecessors, and divided the lands among his warrior chiefs, retaining a portion in his own hands . . . . Each principal chief divided his lands anew, and gave them to an inferior order of chiefs, by whom they were sub-divided again and again. All those persons were considered to have rights in the lands, or in the productions of them. These rights were not clearly defined, but were, nevertheless, universally acknowledged. It is expressly declared that the superior always had the power, at pleasure to dispossess his inferior, but it was not considered just and right to do with without cause, and dispossession did not often take place, except on the decease of one of the landlords, when changes were oftentimes numerous, and the rights and tenants comparatively disregarded for the purpose of favoring a new class of persons.⁶⁴

Under such a system of land tenure, the concept of inheritance would seem to contradict the idea of a public interest in the land. Indeed, it would appear that in traditional Native Hawaiian practice, the ‘aina⁶⁵ would revert back to the Mo‘i upon the death of an Ali‘i Nui. This was in keeping with the metaphor that “all ‘Aina and products of the ‘Aina – in fact life itself – proceed from the Akua”⁶⁶, and that the “‘ownership’ of the ‘Aina and all wealth emanating from the ‘Aina rightfully belong to those Akua from whom they proceed.”⁶⁷ This meant returning the land to the Ali‘i Nui, who were Akua on earth, and “had the ultimate duty of regulating the ‘Aina on behalf of the Akua.”⁶⁸ As such, “[l]and inheritance in the Western sense then – that is, from father to eldest son – was virtually unknown, apart from a Mo‘i bequeathing the aupuni⁶⁹ to his highest ranking (not

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⁶⁴ Keelikolani III, 2 Haw. at 526-27 (emphasis added).
⁶⁵ “Land, earth.” PUKUI & ELBERT, supra note 4, at 11.
⁶⁶ “God, goddess.” PUKUI & ELBERT, supra note 4, at 15.
⁶⁷ KAME‘ELEIWIHIA, supra note 9, at 51-52.
⁶⁸ Id. at 51 (“Hence, control of the ‘Aina was ultimately vested in the highest Ali‘i Nui, the Mo‘i, who by birth and political strength had established his or her superiority and, therefore, his or her relative proximity to the Akua.”).
⁶⁹ “Government, kingdom, dominion, nation.” PUKUI & ELBERT, supra note 4, at 33.
necessarily eldest) son.” To leave the land to anyone other than the individual from whom the Akua proceeded would controvert the metaphor of proceeding from the Akua.

All of this changed, however, in the time of Kamehameha I:

After uniting all the islands (except Kaua‘i) in 1795, Kamehameha gave large tracts of conquered ‘Aina on each island to the four Kona Ali‘i Nui who had been instrumental in his rise to power . . . . He gave them these ‘Aina in perpetuity, allowing them to pass their portions on to their children.71

From that time forward, lands began to be passed down in succession from generation to generation among the chiefs.72 As such, inheritance began to supersede the practice of kalai‘aina73 – the redivision of the Lands upon the ascension of a new Mo‘i, explicitly doing so upon the confirmation of Kauikeaouli as Mo‘i in 1825.74 Accordingly, with this shift in practice, so too a shift in metaphor:

No longer was ‘Aina entirely a gift of the Akua to be divided solely according to the discretion of the Mo‘i and tended by his or her chosen Ali‘i Nui. Now ‘Aina was to be somewhat on the order of waiwai (personal wealth), like canoes or precious mats, and as waiwai it could be bequeathed from one Ali‘i Nui to another by kauoha.75

B. Reconciling Land Inheritance as a Custom or Practice

With land inheritance is a relatively recent practice in Hawai‘i, how is it that the courts in the Keelikolani v. Robinson cases could base

70 Id. at 52.
71 Id.
72 See KAME‘ELEIHIWA, supra note 9, at 72-73 (recounting the decision of Ka‘ahumanu to allow the Ali‘i Nui to keep the ‘Aina distributed as they had been under Kamehameha); id. at 85-87 (recounting the decision by the Ali‘i Nui to make land inheritance a new law and end the process of Kalai‘aina).
73 “The redivision of the Lands upon the ascension of a new Mo‘i.” KAME‘ELEIHIWA, supra note 9, at 389.
74 See id. at 85-87; VAN DYKE, supra note 13, at 25 (“The council of Ali‘i that met on June 6, 1825, to confirm the young Kauikeaouli as Mo‘i also accepted the proposal of the high chief Kalanimoku that ‘Aina should not revert to the new king according to the tradition of the Kalai‘aina but should continue to be held by the chiefs as before and could be passed on to heirs under the principle of hereditary succession.”) (citing RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854: FOUNDATION AND TRANSFORMATION 119 (University of Hawaii Press 1938, 7th printing 1989) [hereinafter KUYKENDALL]).
75 KAME‘ELEIHIWA, supra note 9, at 96.
their holdings upon it as an “ancient tradition, custom, practice and usage”). The short answer is that ultimately, the courts in Keelikolani did not base their holdings regarding land inheritance upon ancient traditions, customs, practices, or usages, but rather upon the practices at the time of Kalanimoku’s death.

While the court stated at various stages of the dispute that “there was a common law of inheritance” at the time of Kalanimoku’s death in 1827, the court acknowledged in its final ruling (upon Robinson’s appeal) that the transmission of property by inheritance “was not governed by well defined rules or custom.” Rather, the court based its ruling upon the fact that the “general transmission of the possession of lands seems well established, and that “among the higher class of chiefs at least, the possession and use of lands usually descended from one set or generation of holders to another.” Thus, it would seem that regarding land inheritance, the court based its holding upon the practices in place at the time of Kalanimoku’s death, not upon any basis in ancient custom or practice.

Indeed, it would seem that even the land inheritance practices at the time of Kalanimoku’s death were unclear. Upon a study of the testimony given during the Keelikolani proceedings, Lilikala Kameʻeleihiwa outlined three theories as to land inheritance practices: (1) “that the Moʻi did not have the authority to divert descent”; (2) “that land inheritance was entirely subject to the will of the sovereign”; and (3) that “[t]he King would not refuse when the chiefs met and said, this is the child, or these are the children of the deceased, the King consented, as a matter of course.” Ultimately, the court appears to have interpreted land inheritance as a rebuttable presumption on behalf of a party’s heirs.

The long answer, however, is that the land inheritance practices in place at the time of Kalanimoku’s death were still keeping to ancient tradition, custom, and practice:

While the Aliʻi Nui now were allowed to retain ‘Aina as
waiwai\textsuperscript{84} and to kauoha such waiwai to their designated heirs, the kauoha still had to be confirmed by the sovereign. This suggests that while the ‘Aina might be nominally controlled by individual Ali‘i Nui, their right to do so still emanated from their sovereign, as it had in traditional times . . . . The new practice confirmed the traditional Hawaiian idea that ‘Aina was to be utilized, and the Mo‘i could direct who should control and benefit from the ‘Aina, i.e., from usufruct rights. The only change was that each Ali‘i Nui had a right to propose who should succeed him or her. What was being inherited was not ownership of ‘Aina but merely the control of it. Despite these new rights, ‘Aina was not to be bought or sold, in the Western sense, only given from one Ali‘i Nui to another with aloha.\textsuperscript{85}

In order to view the court’s holding regarding land inheritance in the Keelikolani v. Robinson cases as consistent with ancient traditions, customs, and practices, one must view the shift from kalai‘aina to inheritance as merely an expansion of authority from the Mo‘i to the Ali‘i Nui under him. One must realize that “the ancient right of the sovereign to represent Akua and be the sole source of ‘Aina had been dispersed to include many of the Ali‘i Nui, especially the Kuhina Nui.”\textsuperscript{86} As such, inheritance would not controvert the metaphor of ‘aina proceeding from the Akua, as was earlier suggested, but maintains the metaphor, albeit with a greater number of entities channeling the power and dominion of the Akua.

C. Reconciling Land Inheritance with a Public Land System

Land inheritance is reconciled with the Native Hawaiian system of land tenure in much the same way as it was reconciled with ancient tradition, custom, and practice. As Prof. Kame‘elehiwa notes:

[While the idea of Land inheritance was gaining favor (in principle and only among the Ali‘i Nui), ‘Aina was never thought of as private property in the Western sense wherein it could be bought and sold, or forever alienated. ‘Aina were bequeathed like waiwai and held in trust and cared for by on Ali‘i acting as a kanaka for his superior, and so on down the line to the maka‘ainana. To that extent, the traditional system which mandated that the Ali‘i Nui should control the ‘Aina, in order to malama it and to direct its use for the benefit of the entire society, was still intact.\textsuperscript{87}]

\textsuperscript{84}“Goods, property, assets, valuables.” PUKUI & ELBERT, supra note 7 at 380.

\textsuperscript{85}KAME‘ELEHIWA, supra note 9, at 97; see Keelikolani III, 2 Haw. at 530 (recounting the approval of Kauikeouli and Kaahumanu regarding Kalanimoku’s kauoha).

\textsuperscript{86}Id. at 134.

\textsuperscript{87}Id. at 135.
Just as one must view the shift from kalai‘aina to inheritance as a dispersion of the Mo‘i’s power to channel Akua among the ali‘i nui in order to reconcile land inheritance as consistent with ancient tradition, custom, and practice, one must similarly expand the same metaphor to reconcile the practice of land inheritance with the public lands system. As such, it appears that while land was now held in perpetuity by a particular ali‘i nui, such possession was not one of alienation, but of stewardship. This may explain why Kalanimoku, one of the chief proponents of inherited succession in 1825, wished to ho‘iho‘i his ‘aina back to the Mo‘i upon his death.

III. Conclusion

At the outset of her book, Native Land and Foreign Desires: Pehea La E Pono Ai?, Professor Lilikala Kame‘eleihiwa stresses the importance of using appropriate cultural metaphors to describe a native history, as opposed to the foreign models that a historian might bring to the table. Using Hawaiian metaphor, it would appear that land inheritance—on its face a new practice inconsistent with traditional Hawaiian land tenure—could be reconciled as an extension, and, in some ways, an expansion of traditional Native Hawaiian land tenure.

Within the same metaphor, however, one begins to see how the practice of land inheritance laid the foundation for the disfiguration of traditional metaphor. Upon the dispersion of the duty to regulate the ‘aina on behalf of Akua to the ali‘i nui, the Mo‘i also dispersed much of his own dominion and political power. As a result, there was no longer an effective check upon the regulation of the ‘aina. Before, when the power of Akua was channeled through one being, the Mo‘i, he or she could be removed by those under him if he was no longer pono. This was because the Mo‘i was dependent upon the ali‘i nui to keep him in power. After dispersing the power of Akua to the ali‘i nui, however, the system of political dependency ended. The ali‘i nui were now their own masters, in a sense.

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88 KUYKENDALL, supra note 93, at 119.

89 See Keelikolani III, 2 Haw. at 530; KAME‘ELEIHIWA, supra note 9, at 112, 134-35.

90 KAME‘ELEIHIWA, supra note 9, at 4-8.

91 “[M]oral, fitting, proper, righteous, right, upright, just virtuous, fair,”. PUKUI & ELBERT, supra note 7 at 340. See DAVID MALO, HAWAIIAN ANTIQUITIES 53 (National B. Emerson, trans., 1898, republished by Bishop Museum Press, 2d Edition 1951) (“The king was appointed (hoonoho ia mai; set up would be a more literal translation) that he might help the oppressed who appealed to him, that he might succor those in the right and punish severely those in the wrong. The king was over all the people; he was the supreme executive, so long, however, as he did right.”); VAN DYKE, supra note 13, at 12 n.18.

92 See KAME‘ELEIHIWA, supra note 9, at 52.
They could decide what it was to malama\textsuperscript{93} ʻaina without a higher authority, for the Moʻi no longer had the political strength to say otherwise.\textsuperscript{94}

While Prof. Kameʻeleihiwa states that with the implementation of land inheritance, “the traditional system which mandated that the Aliʻi Nui should control the ‘Aina, in order to malama it and to direct its use for the benefit of the entire society, was still intact,”\textsuperscript{95} there was no longer any way to ensure that such a system was adhered to. The scene at Kalanimoku’s death is telling:

As Kalanimoku lay dying in the circle of his Chiefs, the idea arose within him to hoʻihoʻi all his ʻAina to the Moʻi – as was the traditional custom and, no doubt he felt, was pono behavior. Haiha Naihe and Hoapili, sons of Kona Uncles, objected, declaring, “He mau keiki o ka makou,” that is, “We all have children of our own,” meaning that they had heirs to whom they wanted to pass their ʻAina and felt that Kalanimoku’s suggestion to hoʻihoʻi might threaten their newly acquired Land inheritance right.\textsuperscript{96}

It would seem that the benefit of heirs began to take prominence over what might be the benefit of all; that a number of aliʻi nui did not wish to relinquish to the Moʻi their ability to channel the dominion of Akua over their ʻaina. However, therein lies the problem. While land inheritance is consistent with traditional Hawaiian metaphor, it also granted the aliʻi nui dominion over their ʻaina. While such dominion was a channeling of the dominion of the Akua, in practice there was no way to distinguish or regulate the nature of an alii’s control, particularly with the political weakening of the Moʻi upon the advent of the practice of land inheritance. To return to a western model for a moment, the notion of dominion over one’s land normally implies one thing – private property. Can a practice be both consistent with traditional Hawaiian metaphor and a catalyst for its disfiguration?

\textsuperscript{93} “To take care of, tend, attend, care for, preserve, protect, beware, save, maintain.” PUKUI & ELBERT, supra note 7 at 232.

\textsuperscript{94} See KAMEʻELEIHIWA, supra note 9, at 74, 87 (discussing the decisions to not perform a kilaʻaina at the ascension of Liholiho and Kauikeaouli and its ramifications upon their respective reigns).

\textsuperscript{95} Id. at 135.

\textsuperscript{96} Id. at 112.