1907.

NEW ZEALAND.

NATIVE LAND COURT AND NATIVE APPELLATE COURT

(DECISIONS OF) RELATIVE TO WILLS IN FAVOUR OF EUROPEANS AND THE ADOPTION AND SUCCESSION OF CHILDREN.

Return to an Order of the House of Representatives dated the 17th July, 1907.

Ordered, "That there be laid before this House a return showing the recent decisions of the Native Land Court and Native Appellate Court in regard to wills by deceased Maoris to Europeans, and in regard to adoption of children and the succession of such children to the adopting parents; together with an outline of facts necessary to explain the principles of such decisions."—(Mr. NGATA.)

COPIES OF JUDGMENTS *IN RE* WILLS BY DECEASED MAORIS TO EUROPEANS.

NATIVE LAND COURT.—THURSDAY, 21ST JANUARY, 1897.

(Before W. E. GUDGEON, Esq., Judge.)

Decision of the Native Land Court in the Matter of the Application of Angela Elizabeth Karaitiana for Probate of the Will of her Deceased Husband, Albert Karaitiana.

IN this case no objection has been raised as to the due execution of the will, nor has it been alleged that there is any impropriety in the fact that a husband has devised his real estate to his wife. The point raised is that the Court has no power to grant probate to a will made by a Maori in favour of a European.

Mr. Scannell, acting for Henare Tomoana and others, the nearest-of-kin to the deceased, contends that section 117 of "The Native Land Court Act, 1894," restricts the alienation of all Native lands, except such as therein mentioned, and that this restriction on alienation includes also land devised by will.

It is not the intention of the Court to deal with this case and its arguments at any great length, for it is, to say the least, unlikely that judgment of this Court will be allowed to settle a point of so much importance to the community.

The general policy of the Act of 1894 is undoubtedly in the direction of restricting the alienation of all lands, and it may be that the Legislature intended that Maoris should not devise their lands to Europeans. But for the Native Land Court to declare that an Act intended to do a certain thing, it must have some grounds on which to base such an opinion. As I have said, the policy and tenor of the Acts are in favour of the theory that the devise of real estate to Europeans was not anticipated, but the absolute wording of the Act does not support the theory. The words of section 117, as amended, read, "Except as in this Act provided it shall not be lawful," &c. The question then is, what does this Act provide? Section 46 enacts, "The Court shall inquire whether the testator has devised land to a person other than his successor." Now, the definition of "person" in the interpretation clause of the same Act is comprehensive: it is "Native or European, and includes a corporation." Here, then, the devise to Europeans is clearly contemplated.

It is admitted that previous to the passing of the Act of 1894 the Maori could and did devise lands held under English tenure to Europeans. This was decided by Mr. Justice Conolly *in re* Mangapai. And by section 33 of "The Native Land Laws Amendment Act, 1895," any doubts are removed as to the application of section 117 of the Act of 1894, for the section in question declared that, subject to section 46, nothing in that Act shall be deemed to have taken away any right of testamentary disposition held by any Maori. It does not say, subject to section 117 as amended by section 3 of the Act of 1895. As I read and understand the Act, section 33 interpreted the Act of 1894 as regards wills, and says in effect that, excepting always the provisions of section 46, the right of the Maoris to make wills in any one's favour is not affected by the Act of 1894, and if this reading is correct then we need not consider what the effect of section 117 might have been under other circumstances.

The notice of the Court has been drawn to the last paragraph of section 51 of the Act. This, however, does not seem to affect the question now at issue; all that the paragraph referred to does is to define a certain class of wills over which the Native Land Court has not exclusive jurisdiction.

It has been held by the Supreme Court that land under restriction and customary lands do not pass by will. At present it seems that there is no such thing as customary land. Mr. Lusk referred the Court to section 73 of the Act, but section 33 of the Act of 1896 would seem to be conclusive on the point. It has not been shown in this case that any portion of the estate of Arapeta Karaitiana is restricted; but if any of it should be, then that land by virtue of the decision of the Supreme Court will not pass by will.

The Court grants probate of the will of Arapeta Karaitiana to Angela Elizabeth Karaitiana as executrix and sole legatee.

The Court has satisfied itself not only as to who are the nearest-of-kin, but also that they are wealthy landholders, and do not require any portion of the estate for their support.

Mr. H. B. Lusk and Mr. A. L. D. Fraser for Mrs. Karaitiana.

Mr. D. Scannell for nearest-of-kin.

WILL OF PIRIHI TUTEKOHE, DECEASED.

THE following judgment was delivered by Judge Jones (Native Land Court), at Gisborne, on Monday, 28th March, 1904:—

Pirihi Tutekohi, an aboriginal Native, died on the 10th October, 1903. Three days previously he executed what is alleged to be his last will and testament. By this will he purports to revoke all previous wills; gives his wife his personal property; gives his shares in five Native blocks to his wife and her little grandchild (who lived with them) in equal shares; gives his interests in six other blocks to Henare Ruru; gives to his namesake Pirihi Tutekohi his share in Torehaua Block; gives the Ruangarehu D Block to his trustees to be dealt with as directed by William Douglas Lysnar as he in his sole discretion may direct (which it is claimed amounts to a gift to Mr. Lysnar); and the residue of his lands he gives to his wife. He appoints Mr. Lysnar and Charles Scudamore (son of wife) executors and trustees of the will.

The will was prepared by Mr. Lysnar, one of the beneficiaries under the will, who has acted as the deceased's solicitor for many years, as well as doing him many kindnesses outside his professional services.

The will is opposed on behalf of the successors according to Native custom on the grounds of fraud, duress, and undue influence coupled with the incapacity of the testator. It has, however, been expressly admitted that these successors are already provided for under the 46th section of "The Native Land Court Act, 1894."

When the Native Land Court was given exclusive jurisdiction over wills of deceased Natives, it could have scarcely been anticipated that the Judges of that Court, acting without juries, would be called upon to decide questions of this nature, involving as they do matters of fact and law which have vexed and puzzled our highest tribunals. However, we have been given the responsibility and must accept it, and our superior Courts have told us that in doing so the rules of the Courts of Probate should be by no means relaxed in the case of alleged testamentary papers executed by Maoris.

Viewing the matter in this light, we think that the will of the 7th October has been executed with all the formalities required by law. We further think that at the time of the execution of such will the testator was of sound mind, memory, and understanding. It is true that he was physically weak, so much so that he could not sign his name, but the evidence of the doctors and of the other independent witnesses who saw him on that day or about that time is conclusive that he was capable of making such a will. With regard to the legacies to the widow and child, it having been proved that the will was executed with due solemnity by a person of competent understanding and an apparently free agent in so far as that portion of his will is concerned, the onus of proof of undue influence and other allegations was on those who alleged it. Nothing has been proved that would lead the Court to infer that the widow, or any one on her behalf, forced the making of the will. It may have been contrary to Maori custom to leave the land from his blood relations, but it is quite natural that he should wish to provide for his wife and the child of their adoption, and all the witnesses agree that he did intend to provide at least something for her. We must therefore find that the testator knew and approved of this portion of his will.

When, however, we approach that portion of the will which gives a benefit to the solicitor who prepared it, we find the onus of proof is altogether shifted. The rules in this matter are two, and are succinctly laid down in Barry *v.* Butlin (2 Moore, P.C. 480): "The first, that the *onus probandi* lies in every case on the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is that if a party writes or prepares a will under which he takes a benefit that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased." This rule has been acted on by all the Courts, and was referred to with approval by our own Court of Appeal in the Broughton *v.* Donnelly case. In the present case we have a solicitor dealing with an aboriginal Native unversed in pakeha methods, and one of a class who in all Native-land laws are jealously guarded and protected by the State. Had the benefit been small the rule above quoted would not have applied, but in this case the benefit must be held to be a substantial one, inasmuch as it is about the only land mentioned in the will which is not restricted by the Native-land laws. We have evidence that the testator financed upon this block, and, compared with his other lands loaded with their Native title, it forms a substantial portion of his assets. It appears from the evidence that the solicitor had the business with reference to such land in his hands. Money was raised by way of mortgage which the solicitor disbursed. The solicitor collected the rents and paid the interest, accounting

to the testator for the balance. It will thus be seen that he had complete control of the block for all practical purposes. The solicitor's explanation of how this land came to be left to him was that he had saved it for the testator when it was in danger of being entirely lost, and that out of gratitude for this and the many kindnesses which he had done him he wished to leave the block to him, and had often spoken of doing so. The solicitor was diffident in taking it. The testator was insistent, and suggested that if he would not take it it should be left to his child. Eventually a compromise was arrived at by which it was left to the trustees, to be administered as the solicitor (one of the trustees) thought fit. It is a pity if such were the intention that the ordinary rules laid down in text-books for obviating suspicion in such cases were not followed. There is nothing illegal in a solicitor receiving a benefit under a client's will, but he must take care if he does so to be prepared with direct and clear evidence of the testator's intention to make the gift in his favour, and, moreover, he must be prepared to show the Court the righteousness of the transaction: Fulton *v.* Andrew (7 H.L. p. 147). Now, besides the fact that the clause in the will is made in the solicitor's favour, there is the important fact that the clause which does so is drawn in a peculiar manner. All the other gifts in the will are to the persons concerned direct: this effects its object indirectly. Nor can we say clearly whether it was intended to convey to the testator's mind that he was giving away the block entirely, or was only endeavouring to secure the continuation of that administration after his death which had been so successful in conserving his property during his lifetime. We think, and we are borne out in our view by a number of cases, that some attempt ought to have been made to explain the purport of that clause to the Maori testator, and it would have been wise to have secured independent evidence that it was so explained. In this case there was no explanation after the preparation of the will. It is true that it was read over twice to him on the occasion of his signing, and the testator having thereupon put his name to it that would, in many cases, be conclusive proof that he understood it. Latterly, however, this rule in the cases of beneficiaries under a will has been departed from, and it is now absolutely necessary for the party taking the benefit to bring clear and convincing evidence that the testator knew and approved of the clauses under which he takes a benefit. We cannot say, seeing the unbounded confidence which the testator had in his solicitor, that what happened after the drawing of the will up to its signature does convince us that the testator approved of that clause. There is certainly some evidence of prior declarations which would have been valuable if unconverted to the effect that the testator had intended such a gift. But, while the testator stated in March, 1903, his intentions to give the land to his solicitor, in April of the same year he told Henare Ruru that he wanted it to be kept as his graveyard, a certain peak on it to be his monument, and then again the following month he is telling his wife not to be sad because he is giving it to his solicitor. Such evidence is of little use in a matter of this kind where the validity of the bequest is put upon the conscience of the Court, nor do we place much weight on the supposed post-testamentary statement of Rawiri te Eke. It is not quite clear what he did hear, nor is his statement in any way corroborated, although, as he states, many were present and must have heard if it had been made. Applying, therefore, the rule laid down by Parke, B., in Barry *v.* Butlin, the Court cannot possibly say that the suspicion attaching to the clause in the will regarding the Ruangarehu property is removed, and that we are judicially satisfied that that clause expresses the true will of the deceased, nor can we say that the onus of showing the righteousness of the transaction has been discharged.

The only remaining question to consider is that of restriction on the land. We are bound by the decision of the Chief Justice in that respect. Two blocks, however, we find have different restrictions which are in effect absolute. These blocks will be excluded—they are the Raikaiketeroa and Tangutuwhanui Blocks.

To sum up, we find that the will propounded is the last will of Pirihi Tutekohi; that it was properly executed by him while of sound mind; that at its execution the testator knew and approved of its contents generally, with the exception of that clause dealing with the Ruangarehu D Block; that he did not know and approve of that clause; and that the Rakaiketeroa and Tangutuwhanui Blocks will be excluded from the will but that the other blocks pass.

The grant of letters of administration will be qualified accordingly. We are now prepared to hear the parties as to whom the grant shall be made.

NATIVE LAND COURT.—CHIEF JUDGE JACKSON PALMER.—24TH AUGUST, 1906.

Judgment re *Wi Matua, deceased.*

THIS is an application by Mr. Reardon on behalf of himself and the other executor for probate of the will of Wi Matua, deceased. The application is opposed by the next-of-kin. Dr. Findlay and Mr. Marshall appeared on behalf of Mr. Reardon on a motion to prove the will in solemn form; Mr. Lewis appeared in support of the will as far as it benefited the widow (Kino) of deceased; Mr. Scannell and Mr. A. L. D. Fraser appeared for different parties of the nearest-of-kin to oppose the granting of probate. All parties have intimated to the Court that, as the estate represents a sum of about £20,000, the parties who are unsuccessful will appeal from this Court to the Appellate Court. This Court considers that such an appeal should be permitted on a small deposit being made, in view of the fact of so large an amount being in issue and the questions involved being so intricate—covering questions of law, fact, and Native custom—especially as this case if heard before the Supreme Court would require to be heard before a Judge and jury of twelve persons. This case was first heard before Judge Butler and the present Assessor (Te Aohau Nicholson), and judgment was reserved by them, but before the judgment was arrived at Judge Butler died. Consequently there was a fresh trial of the case before this Court, and on such fresh trial the witnesses were cross-examined as to the evidence given before Judge Butler's Court, and so the evidence at the former hearing became evidence in the present hearing. Probate was opposed on the grounds of (*a*) undue influence; (*b*) that deceased had not a disposing mind when he made the will; (*c*) that

the deceased did not know the contents of the will he signed, and therefore it was not his will; (*d*) that the will was not properly executed.

As to the issues of fact, the Court finds the following to be the facts in the case:—

(1.) That Wi Matua was a chief residing with his people at Porangahau. That as he had no issue the question of who was to succeed to his estate disturbed the mind of Wi Matua and his people for a considerable time.

(2.) The Maori ideas pervaded the minds of Wi Matua and his people, that is the Maori *ohaki* custom of the disposal of his property before his death by arrangement with his people.

(3.) *Ohaki* being dispensed with by statute Wi Matua and his people were holding meetings to decide how the property was to be disposed of, and a committee had been formed to effectuate this and to embody the same in a will by Wi Matua.

(4.) While this was in progress Mr. Reardon arrived at Porangahau; he had previously known Wi Matua. Wi Matua had been a very heavy drinker of alcohol all his life, and he had taken shortly before this a second wife—Kino—who was a heavier drinker still. Kino was from an alien tribe, and had no right to any of these lands. The witnesses on Kino's side of the case briefly describe her as a person who could drink spirits by the bucketful.

(5.) Mr. Reardon says that Wi Matua was neglected and not kept cleanly, and he took pity on Wi Matua and did acts of kindness for him, and Wi Matua acquired a liking for him. Mr. Reardon suggested that Wi Matua should see a tohunga, and so Wi Matua was taken away from his own people to Waitotara.

(6.) While at Waitotara away from his own people Wi made the will (the subject of this case) under the following circumstances: Mr. Reardon engaged Mr. Holdship, the solicitor, to make Wi's will, and instructed Mr. Holdship to engage Mr. Jones, an interpreter, to assist. Wi did not send for a solicitor nor was he consulted about a solicitor, but the solicitor and interpreter were engaged by Mr. Reardon.

(7.) The interpreter (Mr. Jones) and Mr. Reardon went to Wi and took the instructions for drawing up the will, Wi thus having no independent advice and being away amongst strangers and ill.

(8.) The will was drawn up in English, which language Wi did not understand, and was signed by Wi and witnessed by Holdship and Jones. Holdship did not understand Maori. Mr. Reardon being present during the execution.

(9.) It is contended that Wi did not understand what he signed, that there was undue influence used by Mr. Reardon, and that Mr. Reardon maintained that undue influence by being present while the instructions were being given for the will and while it was being executed.

(10.) There were present at the execution of the will the following persons: Wi Matua (the deceased), Mr. Reardon (the chief beneficiary), Kino (another beneficiary), Mr. Holdship, the solicitor, and Mr. Jones, the interpreter (Mr. Reardon's agents), and Kahukaka. Mr. Jones and Wi Matua died before the trial, and the rest gave evidence at the hearing.

(11.) After the execution of the will Wi, being ill, wanted to get back to Porangahau to his own people. He had disinherited his own people from the principal part of his own property and bequeathed it principally to Mr. Reardon and Kino. Wi Matua had not the money to go back, though he received while away from his own people £168 19s. 7d. during his eight months' absence. Almost the whole of this money was disbursed by Mr. Reardon for Wi Matua in paying debts contracted during this eight months at Waitotara. Wi wired one of his relations—Temuera—who was away at Wairoa, to come and take him back to his people, but Temuera was at a Court at Wairoa and could not take him home, and so Wi died at Waitotara. If Wi had received this money into his own hands he need not have wanted funds to take him home, and some of his heavy expenses could have awaited future settlement.

To prove Mr. Reardon's case evidence was adduced as follows:—

(*a*.) The will was produced signed in Wi's own handwriting and witnessed by two witnesses.

(*b*.) Evidence was called to Wi's declarations before the will was made that he could not leave Reardon out of his will on account of what Reardon had done for him.

(*c*.) Evidence was called of declarations by Wi subsequent to the will that he had put Reardon in his will.

This evidence, under the heading of (*a*), (*b*), and (*c*), is separately treated herein as follows:—

(*a*.) When the will was signed the only disinterested witness present was Kahukaka. We do not treat Mr. Reardon's solicitor and interpreter as independent witnesses; we treat Kino (a large beneficiary) as an interested witness. Kahukaka, a disinterested witness, drinks to excess, but it does not follow from this that he is not truthful; however, his evidence given before Judge Butler differs in material points from his evidence given before us. Kahukaka says that Wi Matua knew what he was signing when he made his will, and he was of clear and free mind in what he did.

(*b*) and (*c*). Turua, Wi Ngapaki, and Te Waaka, three other witnesses, were called, and deposed to Wi Matua's statements before and after the will was made—namely, that "he intended to put the pakeha (Reardon) and Kino in the will" and that "he had put the pakeha and Kino in the will." On this the Court is asked to decide that Wi Matua therefore knew the contents of the will, which was in English, and that it gave effect to his wishes.

A great many cases were quoted by the counsel on each side, but there is a later case which was not quoted, which is very similar to the present case—*i.e.*, Tyrrell *v.* Painton (1894, Probate Division 157)—in which Mrs. Bye, an old lady, made her will on the 7th November, 1892, in favour of her cousin, and two days later one Thomas Painton wrote out her will in favour of his father, and got her to sign it before himself and a friend of his (Peter Rowland). Both these deposed that she knew perfectly well what was in the will and she requested that it be made. The case resembles the present case of Wi Matua in very many respects. The Judge of the Probate Court granted probate of the will to Painton. The full Court of Appeal reversed the judgment, and decided that the evidence adduced was not sufficient to remove the suspicion cast upon a will obtained under such circumstances.

We have carefully compared the evidence adduced to remove such suspicion in the case quoted, with the evidence adduced in Wi Matua's case, to see if on the dicta laid down we could grant probate of Wi Matua's will. After very careful consideration we, with a great deal of hesitation, have decided that the evidence adduced before us is hardly sufficient to remove that suspicion, and that we ought not to grant probate.

JUDGMENT of the NATIVE APPELLATE COURT, delivered at New Plymouth on the 29th day of October, 1906, by H. G. SETH-SMITH, Esq. (President), and C. E. MACCORMICK, Esq. (Judge), in the Matter of the Application of C. N. Rowe for Probate of the Will of Eraia Ngamuka, *alias* Pakirihiri; C. N. ROWE, Appellant.

THIS is an appeal from the decision of the Native Land Court, sitting at New Plymouth on the 29th day of May, 1905, refusing to grant probate of the will of Ngamuka, deceased.

The will in question was executed on the 10th October, 1903, in due form in accordance with the provisions of the Wills Act. The testator died on the 22nd October of the same year. By the terms of the will Rowe is made the executor and sole beneficiary.

The grant of probate is opposed on the following grounds:—

(1.) That the testator was induced to make the will by undue influence.

(2.) That the testator had not a disposing mind.

(3.) That the testator did not know the contents of the will.

(4.) That the witnesses to the testator's signature were the paid agents of the beneficiary.

(5.) That one of the witnesses did not understand the Maori language.

There was another ground brought forward which was very properly abandoned by Mr. Damon on the hearing of the appeal—viz., that the date of execution was erroneously described in the Maori translation as the 10th November instead of the 10th October.

There is no conflict of evidence as to the circumstances under which the will was executed. It is admitted that the solicitor, Mr. Wilson, who prepared the will, received his instructions from Mr. Rowe, and that a Maori translation of the contents was indorsed by Mr. Adams. Messrs. Wilson, Adams, and Rowe then proceeded to the testator's house at Wimi and the will was signed by the testator there, no one else besides these four persons being present. We will consider the evidence as to what took place at that time when dealing in detail with the objections to the will. Taking these objections in order.

(1.) Undue influence: In Wingrove *v.* Wingrove (55 L.J. Prob. 7) Sir James (afterwards Lord) Hannan pointed out the common misconception with regard to the meaning of these words, and told the special jury that influence to be undue must amount to coercion, that it must be shown positively or by reasonable inference that the testator did not exercise his own volition, that he made his will at the dictation of some one else and in contravention of his own wishes. There is, in our opinion, nothing in the present case to suggest that coercion was employed, nor any circumstances from which coercion might reasonably be inferred.

(2.) That the testator had not a disposing mind: On this point the evidence is that testator appeared to be in full possession of his mental faculties at the time when he signed the will. We find nothing to suggest that he was insane or imbecile, and, although there is some evidence that he was addicted to the excessive use of intoxicating liquor, it had not been proved that he had thereby permanently injured his mental faculties to such an extent as to make him incompetent to understand what he was doing, nor that he was drunk at the time he signed the will. We must therefore deal with this case as that of a testator in possession of his mental faculties and acting under no compulsion.

(3.) The testator did not know the contents of the will: On this point we have only the evidence of Mr. Adams, the only person present who had a competent knowledge of the Maori language to enable him to depose to the state of the testator's knowledge. Mr. Adams has sworn that he explained the contents of the will to the testator, who assented to them. If, therefore, we are to reject his testimony we must assume that, although he held an interpreter's license, he was in fact incompetent, or that being competent he fraudulently misrepresented the contents of the will. We should not be justified in either assumption.

(4.) The other points of objection do not call for special comment. Where the general circumstances attending the execution of a will are such as justify a suspicion of *mala fides*, the fact that the witnesses to the execution are paid by the beneficiary would be entitled to considerable weight. In this case the agency of the witnesses seems to be the only suspicious circumstance apart from the general suspicion which of necessity attaches to all wills made by Maoris in favour of Europeans.

We may add that, although we dissent from the final conclusion, we agree with that part of the judgment of the Native Land Court which refers to the suspicions which attach to all wills made by Maoris in favour of Europeans. It would, in our opinion, be advisable for the Legislature to impose restrictions on alienations by wills similar to those which are in force with regard to alienations *inter vivos*, but in the absence of such restrictions we can only apply to Maori wills the same principles which in other Courts are applied to wills of Europeans.

There remains the question whether any successor is entitled to relief under section 46 of "The Native Land Court Act, 1894." The Native Land Court has found that some successors have not sufficient land, but has not determined who they are nor made succession orders in their favour.

The case will therefore be referred back to the Native Land Court with a direction to grant probate of the will to Charles Nicholas Rowe, with such limitation, if any, as may be found necessary in exercise of the power conferred by section 46 of "The Native Land Court Act, 1894."

Order accordingly.

Deposit to be refunded.

NATIVE APPELLATE COURT.—JULY, 1907.

(Before Judge SETH-SMITH and Judge MACCORMICK.)

Judgment.

THIS is an appeal from the decision of the Native Land Court dated the 24th day of August, 1906, refusing probate of the will of Wi Matua, deceased.

The will bears date of the 28th day of February, 1903. It is written in English, with no Maori translation indorsed or annexed, and purports to have been signed by the deceased in the presence of A. R. Holdship, solicitor, and T. C. Jones, licensed Native interpreter. The attestation clause, in addition to the usual statement as to compliance with the formalities prescribed by the Wills Act, &c., further states that the will was explained in Maori to the testator before he signed it, and that he appeared to understand it. The will contains bequests and devises to the testator's wife, Erina Heremia, *alias* Kino, followed by devises of certain specific lands to other persons, and finally a devise of the testator's interest in Whawhakanga Block to Charles William Reardon, a European, who is also appointed one of the executors. The devise to Reardon is subject to a condition that he shall, within twelve months from granting of probate of the will, pay all the testator's debts. There is no residuary devise, but it does not appear that the testator left any property not dealt with under the will.

The case was twice before the Native Land Court. Motion for probate in solemn form was heard in 1903 by Butler, J., and Te Aohau Nikitini, Assessor. Evidence was taken and decision reserved, but the Judge died before the decision was given. The case was reheard by Palmer, J. (subsequently C.J.), and the same Assessor, and on the date already mentioned judgment was given, refusing probate. The Court held that the circumstances attendant upon the execution of the will were such as to cast upon it the suspicion that it was not the last will of a free and capable testator, the onus of removing which suspicion lay upon the propounders of the will; and, further, "with a great deal of hesitation," that the evidence adduced was hardly sufficient to remove that suspicion.

The following facts seem to be established by the evidence: Wi Matua was a very old man, probably not less than eighty years of age, whose permanent residence was at Porangahau, Hawke's Bay District. He had been a leading man among his people, taking a prominent part in any dealings with their lands. In his later years he had become a heavy drinker, and suffered so much from rheumatism as to be practically a cripple. Some two or three years before the execution of the alleged will he, being then a childless widower, married the woman Erina Heremia, or Kino, who belonged to Wanganui. This woman, on her own showing, was an absolute slave to drink. Reardon, who is a surveyor, became acquainted with Wi Matua while engaged in his professional duties at or near Porangahau, and formed a great friendship with him. Wi Matua employed Reardon professionally, and consulted him at times on business matters generally. Reardon at various times paid small attentions to Wi Matua, and supplied him with food, cigarettes, and beer. It is deposed by two witnesses that beer was supplied, and Reardon does not expressly deny it. But it is not shown that any inordinate quantity was supplied.

About the beginning of January, 1903, some one proposed to Wi Matua that he should go to Waitotara. Reardon says Kino first suggested this; Kino says it was Reardon. At any rate, Reardon supported the idea by suggesting that Wi should undergo treatment by a Maori herbalist at Waitotara, with a view to obtaining relief from his rheumatism. Wi decided to go. Some of his relatives and others of his people endeavoured to persuade him not to go, but without success. Then some attempt was made to get him to make a will before going. He was spoken to directly on the subject, and Reardon was also asked to use his influence in the matter. Wi did not comply with the request, but promised to think over the matter at Waitotara. According to Reardon's own evidence, when he mentioned the matter to Wi, the latter said, "There would be too much trouble. Wait until you and I get to Waitotara." It is a fair inference to draw from this remark that Wi intended, at any rate, to consult Reardon with regard to his will. The Natives manifestly regarded Reardon as having then great influence over Wi Matua, or they would not have approached the former in regard to the will. There does not seem to have been any idea among them that Wi was in any way mentally deficient. In fact, one witness in opposition to the will, Rupuha te Hianga, expressly says, "Wi Matua was clear in his mind when he went to Waitotara." The objections to the departure seem to have been on account of his physical condition.

Wi departed for Waitotara on the 20th January, 1903, accompanied by his wife and a native, Kawhena, as his body-servant. Reardon arranged for the journey, and accompanied the party as far as Palmerston. He also arranged for their reception on arrival at Waitotara. The woman Kino had lived at Waitotara with her first husband, and had an adopted daughter, Turua, still living there. Reardon telegraphed to Turua to meet the party and arrange for their accommodation. Wi and party reached Waitotara about the 22nd or 23rd January, 1903, Reardon arriving there next day. Wi, with his wife and servant, stayed first in a settlement a short distance from Waitotara Township, in a house belonging to Kahukaka, a friend of Kino.

After staying there some weeks the party removed to a house in Waitotara Township. Reardon arranged this removal, and also arranged with a storekeeper and a hotelkeeper to supply the household with stores and liquor on Wi Matua's behalf. It is said that the instructions as to liquor were that beer and lemonade only were to be supplied for Wi Matua, and whisky for Kino. This may have been so, but all the liquor went to the one house, and no one could possibly say that any discrimination was observed in the consumption of it. There can be no doubt that on one occasion, at any rate, prior to the execution of the will, Wi Matua was, to use Reardon's own expression, "very much on the wine"—that is, had been drinking to excess. The native Kahu-

kaka was of intemperate habits, on his own showing, and one cannot but conclude that Wi Matua, admittedly given to drink, and with persons like Kino and Kahukaka for his constant companions, would frequently be the worse for liquor.

A very few days after the arrival at Waitotara the question of Wi Matua's will became the discussion between himself and Reardon. The latter says that he then first became aware that Wi intended to make him a beneficiary. Reardon consulted his solicitor as to preparation of the will, and was properly told that Wi Matua ought to have a solicitor of his own. The date of this interview we are able, from the evidence of Reardon and Holdship, to fix as not later than the first week in February. Reardon subsequently met Holdship at Aramoho, and asked him to prepare Wi Matua's will. It is evident he did not explain the circumstances fully to Mr. Holdship, or make it clear to the latter that he was to act as Wi Matua's legal adviser. Holdship could not attend to the matter then, but subsequently, on receipt of a telegram from Reardon, he went to Waitotara on the 27th February, 1903, accompanied by Mr. Jones as interpreter. That evening, Jones and Reardon, without Holdship, went to Wi Matua's house, and the former subsequently brought to Mr. Holdship certain memoranda, partly in Maori and partly in English, as being the instructions of Wi Matua for his will. Reardon admits that he was present when these instructions were taken down by Jones. From these memoranda Holdship prepared a will, Jones assisting him, and Reardon also taking some part in discussion of the exact terms. It is not known what became of the memoranda of instructions subsequently. Next morning, the 28th February, 1903, Holdship, Jones, and Reardon went to Wi Matua's house, where the will was translated to the deceased by Jones. Wi Matua then signed the will, Holdship and Jones attesting it. Reardon was present throughout the proceedings, as also were Kino and Kahukaka. Holdship knew nothing of Maori. He asked Jones to formally put the question in Maori to Wi Matua whether he understood what he was doing. Jones spoke to Wi Matua in Maori, and the latter nodded his head affirmatively in reply. Holdship and Jones then left, the former taking the will with him, as his costs were not paid. It does not appear whether Jones was paid, or, if so, by whom. Jones, unfortunately, died before the application for probate first came before the Court, which was thus deprived of the evidence of a most material witness. He, however, was a man well known and of good repute, and we take it for granted that he would not have signed the attestation clause to the will unless he had read over the will to Wi Matua, and felt satisfied that the latter understood it. Further than that, of course, his duty did not go. It is clear from the subordinate and perfunctory part taken by Mr. Holdship in the proceedings attendant upon the obtaining instructions for and the execution of the will that he did not in any way regard himself as an independent adviser of Wi Matua.

Wi lived between six and seven months after the execution of the will, remaining at Waitotara, or in its neighbourhood, during the whole period. He eventually died there on the 17th September, 1903. During his residence there he appears to have leant greatly on Reardon. He continually sent for the latter, referred to him in all matters of importance, and many others that were not important. Reardon himself testifies to this. Wi permitted Reardon to receive and open the former's letters, and to receive and expend on Wi's account, but largely at Reardon's discretion, considerable sums of money. At one period Wi desired to return to Porangahau, and went as far as to telegraph to one of his relatives to come for him. No response was made to the telegram, and Wi was persuaded by Reardon not to go, the explanation given by the latter being that he advised Wi to wait for warmer weather.

The above facts are clearly proved in evidence, and are, indeed, practically undisputed. Indubitably they bring this case within the rules laid down in the leading case of Barry *v.* Butlin (2 Moore, P.C. 480), which rules have been approved and followed in all subsequent cases of the kind. Those rules are,—

(1.) The *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator.

(2.) If a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper produced does express the true will of the deceased. In Tyrrell *v.* Painton (1894, Prob. Division, 157) Lindley, L.J., said, with regard to the second rule above quoted, that it "extends to all cases in which circumstances exist which excite the suspicion of the Court, and wherever such circumstances exist, and whatever their nature, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will of proving fraud or undue influence, or whatever else they rely on to displace the case made for proving the will." Many other authorities have been cited to us, but the principles to be deduced from them are the same as those we have referred to. Several of them, however, show that, where there are other circumstances exciting suspicion, the fact of a beneficiary under a will being present at the execution greatly strengthens such suspicion.

In the present case, the prominent part taken by Reardon in procuring the preparation and execution of the instrument, his failure to insure independent legal advice for Wi Matua, and his presence when the instructions were taken and when the instrument was executed, are grounds for grave suspicion, especially when regard is had to the age, physical condition, habits, and general surroundings of Wi Matua at the time, and the burden of removing such suspicion clearly lies upon the propounders of the will. It is, therefore, necessary to carefully consider whether the evidence is in fact sufficient to discharge that burden. The witnesses called in support of the will were Holdship, Reardon, Manson, and Curry, Europeans; and Kino, Kahukaka, Turua, Wi Ngapaki, and Te Waka Taparuru, Maoris. The position of Mr. Holdship has already been

referred to. His evidence goes to no more than that he, having no knowledge of Maori, neither saw nor suspected anything wrong, not even in the presence of Reardon. The evidence of Reardon himself cannot, for the present purpose, be given any weight to. Mr. Manson saw Wi Matua once only. It was on the 2nd February, 1903, nearly a month before the alleged will was signed. Witness says Wi was very bright in his intellect that day, "a great fellow to talk." There was a discussion about the disposition of Wi's lands, rather a peculiar thing to happen. A Maori of rank, in full possession of his intellect, meeting a European for the first time, would be most unlikely to enter upon such a discussion as that indicated. And it is a noteworthy fact that on the day Manson saw Wi Matua, Mr. Reardon, according to his diary in evidence, found Wi "very much on the wine with Kahukaka." Then there is the evidence of Mr. Curry, J.P., of Waitotara, who was the storekeeper who supplied Wi Matua with provisions, and who is a large creditor in the estate. Mr. Curry says he saw Wi Matua practically nearly every day while in Waitotara, and never saw him drink to excess. He generally considered him as a man of high character, and a very intelligent Native. Mr. Curry, who was not called before Butler, J., has thus given strong evidence in support of Wi Matua's testamentary capacity. But there are two circumstances not, we believe, referred to specially in argument before us which militate against his testimony. First, he does not speak Maori. Second, his means of communication with Wi Matua, and, presumably, the Natives generally, were his man Haddon, husband of Turua. So that Mr. Curry, like Mr. Holdship, was unable to form his impressions from any direct communication with deceased.

We now come to the Maori witnesses, and, as is usual with such testimony, find ourselves at once on very unstable ground. The woman Kino admits having given false evidence. She says her evidence at first hearing was false, being given under the influence of persons opposed to the grant of probate. It is at east equally probable that her first evidence was true, and that, subsequently realising that her statements were against her own interests, she modified them on the second occasion. Kahukaka contradicts himself on several occasions. It was argued before us that the discrepancies were not on material points. But they certainly go to the credibility of his testimony. And there is one very important statement made by him at the second hearing (57/123): "I asked Wi if it was his own wish to put the pakeha in the will. Wi replied: It is my own instructions, my own wish, and I own the land." The witness said nothing of this before Butler, J., giving a very different account of what took place on the occasion referred to (55/302). And the circumstances were then comparatively fresh in his mind. Turua, Kino's adopted daughter, is naturally a strong supporter of the will. She was not called as a witness at first hearing, though present in Hastings at the time. She declares that she was present when the will was read by Jones, and remonstrated with Wi Matua then, and on previous occasions, as to his including Reardon as a beneficiary. Neither Holdship, Reardon, nor Kahukaka corroborate her statement that she was present when the will was read. And her evidence generally is unconvincing. If true, it goes to show that Wi Matua, in answer to her objections, told her practically to mind her own business. The other two witnesses were Wi Ngapaki and Te Waaka. The former gave evidence at both hearings, the latter on the second hearing only. They were called to give evidence as to statements by Wi Matua subsequently to the signing of the will. There is an important difference between Wi Ngapaki's evidence at first hearing and that at the second hearing. On the first occasion he stated that Wi Matua, in reply to a question as to why he had left his lands to Kino and Reardon, replied that the lands were his own, and they two were the persons to whom he chose to leave them. But at the second hearing the witness gave Wi Matua's answer as "It is nobody's business, the lands are mine," which is, at any rate, capable of bearing a very different construction to the statement first attributed to deceased. According to Te Waaka's evidence, Wi Matua said when the matter was mentioned, "I own these lands, and other people have no right to speak about it." This witness is a nephew of Kino. All the Native witnesses say that Wi Matua was clear in his mind, and if their evidence could be accepted as wholly reliable, a case for the will would probably be made out. But we do not find ourselves able to accept it. It seems incredible, as already remarked when referring to Mr. Manson's evidence, that a Maori of Wi Matua's standing, if in full control of his faculties, should freely discuss with strangers, European and Maori, the disposal of his lands in the manner deposed to. There is at least one provision in the will which is most unlikely to have emanated from Wi Matua—that is, the condition as to payment of debts by Reardon.

After the most careful and anxious consideration of this very unsatisfactory case, we do not feel ourselves able to say, so far, at all events, as the devise to Reardon is concerned, that the suspicion excited by the circumstances has been removed, and that it has been affirmatively proved that the instrument propounded is the last will of a free and capable testator, and does express the true will of the deceased. We are of opinion that, in the words used in Dufaur *v.* Croft (3 Moore, P.C. 148), "the proof to be expected and required in such a case as this is defective." It now remains to consider whether, after rejecting the devise to Reardon, probate should be granted of the rest of the will. It is not disputed that there is power for the Court so to do. Apart from the authorities cited to us by Mr. Lewis, the case of Fulton *v.* Andrews (7 High Cases, L.R. 449), which was much referred to in argument before us on the general question, is a clear authority for the proposition that the Court may reject part of a will and admit the remainder to probate.

But there must, of course, be good grounds for making such a distinction. And such grounds do not seem to be present in the case before us. It is true enough, as urged upon us in argument, that the persons named in the will, other than Reardon, are proper objects of the testator's bounty, and that they, so far as is known, took no part in procuring the preparation or execution of the instrument. But the objections to the will, if sound, go to the whole of it. It has not been shown to be the true will of the testator, and we are unable to find in the circumstances any sufficient reason for differentiating between the parts of it.

The decision of the Native Land Court will therefore be affirmed.

ADOPTION OF CHILDREN, AND THE SUCCESSION OF SUCH CHILDREN TO THE ADOPTING PARENT.

In re KARAMU RESERVE.—A. MACKAY, JUDGE.

Synopsis of Evidence given by the Several Witnesses examined relative to the Right of a Foster-child to succeed to Foster-parent's Property in preference to Relatives.

1. *Thomas Fox, of Ngatiporou, Native Assessor.*—A foster-child would not succeed to its foster-father's property, supposing he had no issue, in preference to the nearest-of-kin. If a foster-father died without an *ohaki*, his property, if he had no children, would go to his nearest relatives.

2. *Aperahama te Kume, of Waikato, Native Assessor.*—A foster-child would, under certain circumstances, succeed to the property of his foster-father if he had no children, but if he left issue, it would rest with them. There is no fixed custom. If there was no *ohaki* (bequest) the property would go to the nearest relatives.

3. *Thomas R. Blake, Native Agent, Hastings.*—An adopted child would succeed to foster-father if he died without issue. Always understood this was a recognised principle of Native custom. If the foster-father left children, the foster-child would rank with them. Have not heard the custom questioned until recently.

4. *Henare Matua, of Ngatikere, Porangahau.*—The right of foster-children to succeed to a foster-father's property is correct. A foster-child is looked on as occupying the same position as a foster-father, or his own child would, and a foster-child's right would be generally recognised. In some cases a foster-child would be recognised in preference to the immediate relatives, if these relatives were strangers. If a foster-father left no issue, and other relatives had lived on friendly terms with the deceased, then the foster-child would not succeed alone to the property as a matter of right. In cases where a child was fully adopted, there would be no question about his right to succeed to his foster-parent. I know of a case where land was given to an adopted child, but I do not know of an instance where land would go, as a matter of course, without an *ohaki* (bequest). In the cases cited, if the land had not been given to the foster-child, it would have gone to the nearest relatives.

5. *Hamiora Mangakahia, of Hauraki, Native Assessor.*—There are cases where a foster-child would take his foster-father's property, and there are cases where he would not. It depends very much on the circumstances of the case. If a child was adopted at birth, he would be looked on as if he was the child of his foster-parent, but this would only happen if the foster-child was a near relative. If the foster-father died the foster-child would succeed to the property without an *ohaki* (bequest). If children were adopted after they were old enough to know their own parents, they would derive nothing by the adoption, except by gift or bequest. No cases came before me when I was acting as an Assessor in the Native Land Court. Have heard of some cases in the Hawke's Bay District where foster-children succeeded to their foster-parents.

6. *Hiraka te Rango, Ngatiwhiti, of Patea.*—The custom is that, when a foster-father dies, his property goes to his foster-children. Witness cited a case, in which he was interested, of an ancestor adopting two children, but before his death he gave his land to the adopted children, but they would have succeeded to it in any case, in preference to the nearest-of-kin, even if the relatives were his nephews. The object of adopting a child is that he may become the representative of the person who adopts him. A foster-child would succeed to his foster-father's property, and also to his father's property as well. If the nearest-of-kin disputed the right, the property would go to the relatives according to law, but that is not Native custom. I am not aware that it is necessary for the tribe to acknowledge the adoption of a child to give effect to it. It would be according to Maori custom that a foster-father should make an *ohaki* (bequest) before the foster-child could succeed. An adopted child succeeds in any case. Never heard of a stranger being adopted, but if so the foster-father's property would not go to the foster-child without an *ohaki* (bequest) in his favour. I do not know of any case where a foster-child succeeded to his foster-father's property. If the foster-father made an *ohaki*, the foster-child would take the property. He would also succeed to it without a bequest. I do not know of a foster-child succeeding to land without an *ohaki* (bequest).

7. *Mr. Josiah Hamlin, Native Agent, Hawke's Bay.*—A foster-child does not succeed to his foster-father's property as a matter of course because of his adoption. It would need an *ohaki* to entitle him to do so. If the foster-father made no bequest the adopted child would not succeed.

8. *Teira Tiakitai, of Waimarama, Hawke's Bay.*—There are many modes of adoption. In some cases, if a child was adopted by a person, it would be for the tribe to consent to land being allotted to it. Another case of adoption is when a foster-father on his death-bed asked his relations and the tribe to look after his foster-child. In other cases a foster-father would give his adopted child a piece of land. In other cases, if all the relatives were dead, the foster-child would succeed to his foster-father's land.

9. *Henare Tomoana, of Te Waipatu, Hawke's Bay.*—If an elder brother adopted the child of his younger brother and left no issue, the foster-child would succeed, and the same would happen if the younger brother adopted the elder brother's child. If strange children were adopted, the tribe would object to their being allowed to succeed to the lands of their foster-parents.

NATIVE LAND COURT.—A. MACKAY, JUDGE.—20TH DECEMBER, 1893.—KARAMU RESERVE, *In re* NGAWAHIE, DECEASED.

Judgment.

THE case before the Court has arisen on the application of Renata Tauihu to succeed to a Native woman named Ngawahie in the Karamu Reserve, the land in question being held under the provisions of "The Karamu Reserve Act, 1889." The deceased died in June, 1889, and the object of the present inquiry is to ascertain who is the proper person to succeed to her interest.

Mr. A. C. Lewis, solicitor, appeared for the applicant, Renata Tauihu, and Mr. A. L. D. Fraser, Native Agent, for Reihana te Ua, the adopted child of the late Reihana Wahapaukena.

The applicant traced his relationship to the deceased, and asked that an order be made in his favour as nearest-of-kin.

Mr. Fraser opposed the application on the ground that the applicant was not the proper successor, as the late Reihana Wahapaukena, if alive, would have been entitled to succeed to the deceased Ngawahie, and, as he left no issue, his adopted child, Reihana te Ua, was, according to Native custom, the proper successor.

Evidence was called in support of the contention as to the right of Keihana Wahapaukena to succeed to his aunt Ngawahie, who predeceased him, and also as to Reihana te Ua being his adopted child.

The evidence taken on the 14th January last on the application to succeed Reihana Wahapaukena was also put in, by which it appeared that the deceased Reihana had made an *ohaki* (bequest) at the time of his death by which he bequeathed his interest in his aunt Ngawahie's share to a Native named Whareangaanga, but owing to the provisions of "The Karamu Reserve Act, 1889," prohibiting the disposition of the land comprised in the said reserve by way of devise, the *ohaki* could not be taken into consideration as an indication of the deceased's intention, it was ruled that he died intestate, and the adopted son was appointed successor. This decision has been appealed against.

In this case a difference of opinion appears to exist as to the line of descent through which the land was derived. On the one hand Renata Tauihu contends that it was derived from Pikitoitoi, the father of Reihana Wahapaukena, and on the other hand it is asserted on behalf of Pene te Uamairangi that it was derived from Reihana's mother Rukareia. It would seem that Rukareia, who married Pikitoitoi and begat Reihana Wahapaukena, had been previously married and had had issue, and so likewise had Pikitoitoi. The latter by his first wife begat Paora te Muri, the father of Renata Tauihu, the present claimant. This, according to the evidence furnished, constitutes him a nephew to the deceased, Reihana Wahapaukena, and grand-nephew to Ngawahie. Pene te Uamairangi claims to be a nephew of Kukurehia, the mother of Reihana Wahapaukena, and a second cousin to Reihana.

The chief points for consideration are—(1.) Was the whole or any portion of the interest of the late Ngawahie in Reihana Wahapaukena at the time of his death? (2.) In the case of a Native dying intestate, without issue, leaving an adopted child him surviving, is such child entitled, according to Maori custom, to succeed to the deceased by right of its adoption, in preference to persons more immediately related?

Touching the first point, the Court is of opinion that a portion, if not the whole, of the late Ngawahie's interest in the Karamu Block was in Reihana Wahapaukena at the time of his death.

As regards the second point, which depends entirely on Native custom, it is advisable under the circumstances, as Maoris have no fixed modes of procedure in matters of this kind that will furnish a precedent on which a basis can be established for determining the matter at issue, to adopt the principles so far as they may be applicable on which matters of this kind are determined by the common law of England, which is the embodiment of custom. Custom in English law is either general or particular. A particular custom must, like a general custom, be established as in force for a time—whereof the memory of man runneth not to the contrary. A custom must have been uninterrupted as regards right, though the exercise of it may have been disused; it must have been held without objection and be unopposed to other customs; it must not be unreasonable, nor uncertain in operation. Proof of the existence of a custom must be established by the evidence of experienced witnesses, or by such documentary evidence as the nature of the case may render available.

A number of witnesses have been examined in this case as to the Maori custom in respect of adopted children, but the result of the inquiry has not been to present a very clear idea of what the custom really was. This may be due, in regard to the evidence given by the majority of the Native witnesses, to their inaptitude to take an abstract view of anything, through the habit which prevails amongst the Maoris, if questioned on any matter, of considering some particular case in which they are personally interested, and suiting their evidence so as to correspond therewith. Of the nine witnesses examined on the subject as to whether a foster-child would succeed as a matter of course, only one gave positive evidence in favour of the contention; all the others either directly or indirectly admitted that a bequest was necessary to confer the property on the foster-child, to bar the right of the nearest-of-kin.

The adoption of Reihana te Ua by Reihana Wahapaukena seems to be generally admitted; but, according to the evidence, it does not appear that the deceased viewed it as a matter of course that his foster-child was entitled to succeed him in regard to all his property, nor did he intend that he should do so, as he bequeathed (by *ohaki*) shortly before his death his landed property and personal effects to other persons besides his adopted child, and amongst other dispositions made by

him he left his interests in his aunt's share of the Karamu Reserve to a Native named Te Whareangaanga, and the deceased's relations were disposed to recognise this disposal, had the Act under which the land is held admitted of a devise being recognised. Notwithstanding this, however, it may be accepted as evidence that the deceased did not intend his interest in his aunt's share to go to his adopted child.

The Court, after considering all the circumstances of the case, and weighing the evidence given by the several witnesses examined on the point raised that an adopted child would succeed his foster-father as a matter of course, to the exclusion of other blood-relatives, is of opinion that, excepting in very exceptional cases, an *ohaki* is necessary to vest the foster-father's property in the adopted child to the exclusion of others of a closer degree of consanguinity. Judgment will therefore be in favour of the nearest-of-kin.

NEW ZEALAND NATIVE LAND COURT.—JUDGMENTS delivered by Judges EDGER and MAIR, and APERAHAMA TE KUME and HEMI ERUETI, Assessors, at Hastings, on the 19th June, 1895.

Decision respecting the Rights of an Adopted Child.

THREE cases have come before this Court for rehearing respecting the rights of an adopted child to succeed to the interests of its adopting parent, and also involving a consideration of the Native custom of *ohaki*, or verbal devise. These cases are—(1) Succession to Te Awaawa in the Awarua Blocks; (2) succession to Reihana Wahapaukena in the Karamu Reserve; (3) succession to Henerieta te Hei in Otawhao A. Before giving a decision in each particular case, we will state the general conclusions we have arrived at upon the Native customs of adoption and *ohaki*, after a consideration of the evidence given and the numerous authorities and decisions referred to during the hearing of the three cases.

In the case of Te Awaawa, Mr. Sainsbury argued that the Native custom to be taken into account was the custom existing at the particular time, and not the custom as it may have existed in olden times. As he specially asked for an expression of opinion on this point, we will say that we cannot at all agree with this view, which appears quite contrary to the established meaning of "custom," an essential feature of which is that it must have existed from time immemorial.

Mr. Baldwin, in dealing with this question, contended that there could be no Native custom affecting titles that have been in existence only some twenty or thirty years. To our mind, the custom to be taken into consideration is the custom as it has existed amongst the Maori race from time immemorial. Whether such custom is applicable to the different circumstances of to-day is another question that will be treated lated on in the course of this decision.

First, as to the Native custom of the adoption of children: (1.) Complete adoption would be where the child was taken in early infancy, and lived with its adopting parent up to marriage or manhood. (2.) Where the adoption was not of this complete character, the surrounding circumstances would have to be taken into consideration in determining the rights, if any, of the adopted child. (3.) It does not appear that any special ceremonies or formalities were observed upon the adoption being made. It would be sufficient that the adopted child be generally recognised as such. (4.) The adopted child would almost invariably be a relative by blood of the adopting parent. (5.) If the adoption were made with the consent of the hapu or tribe, and the adopted child remained with such tribe or hapu, it would be entitled to share the tribal or hapu lands. (6.) Under such conditions it would be entitled to succeed to the property of the adopting parent. (7.) If there were no near relatives, and the adopted child had duly cared for the adopting parent in his old age, he would succeed to the whole of the interest of the adopting parent. (8.) If there were near relatives, the adopted child would share in the succession. (9.) The adopted child would lose his rights if he neglected his adopting parent in his old age, or ceased to act with, or as a member of, the hapu or tribe. The rights of adopted children, as above set out, might be modified if the adopting parent made an *ohaki*.

We will now state what appear to be the essential features of an *ohaki:* (1.) It is the verbal expression of the wishes and intentions of a Native, shortly before his death, regarding the disposal of his property. (2.) It must be made in the presence of, or be made known to, his near relatives. (3.) It would seldom or never be made in favour of a complete stranger in residence as well as in blood. (4.) By old Native custom, an *ohaki* would be held binding, and be acted on without question, by the relatives of the deceased after his death. (5.) It has been argued that an *ohaki* must be made *in extremis* or under circumstances when dying depositions would be taken, but we do not consider that this would be an essential condition.

We will now consider to what extent the Native custom of *ohaki* is applicable to the circumstances of the present day. In olden times, inasmuch as the tribal lands were held jointly and not individually, the property to be affected by an *ohaki* was, first, the personal property, and, secondly, such limited rights in land as may have existed by virtue of use and occupation. Under the changed circumstances of to-day, an *ohaki* could have no effect upon land unless it be held to apply to the interests of individual Natives as awarded by the Native Land Court. We think it reasonable that it should be held to apply to such interests, and Natives themselves consider that it does so apply.

A further question is whether a written will can have the effect of an *ohaki*. It will be seen, from the description above set out, that an *ohaki* differs widely in character from a will, as ordinarily executed, and the decision whether it can be treated as an *ohaki* will depend upon whether it has been made with the knowledge of the near relatives. If it fulfil this essential of an *ohaki*, it can, we think, have effect as such. We will give our decision in each separate case.

Karamu Reserve.—Succession to Reihana Wahapaukena.

This is a rehearing of a decision given by Judge Scannell on the 23rd January, 1893, appointing Reihana te Uamairangi successor to Reihana Wahapaukena in the Karamu Reserve. The applicant for rehearing is Renata Tauihu, who claims to succeed his nearest-of-kin.

It is admitted that Reihana te Uamairangi was the adopted child of the deceased, and that Renata Tauihu is the nearest-of-kin.

It was argued that the intention of the special Act under which this land is held is that it should be reserved exclusively for the Ngatihori Tribe, and that therefore to allow an adopted child to succeed would tend to defeat that intention. We consider it sufficient answer that both the disputing parties can claim to be members of that tribe.

We think this is a case where the adopted child should share in the succession with the nearest-of-kin, and our award is in favour of Reihana te Uamairangi and Renata Tauihu in equal shares.

Awarua.—Succession to Te Awaawa.

In this case the orders appealed against were in favour of Pura Rora, as adopted child.

The applicant for rehearing is Ani Paki, one of the next-of-kin, for whom Mr. Baldwin appeared, and contended—(1) That, as the title was under "The Native Land Court Act, 1880," at the time the will was made, the will could not affect it; (2) that Pura was not the adopted child of the deceased, but only of deceased's wife Rora; (3) that an adopted child is not entitled to succeed in the absence of an *ohaki;* (4) that the will in this case had not the essentials of an *ohaki;* (5) that the will, either as will or *ohaki*, was illegal, in view of sections 32 and 33 of "The Native Land Administration Act, 1886."

On the other side, it was contended by Mr. Sainsbury and Mr. A. L. D. Fraser—(1) That Pura was the adopted child of Te Awaawa, and that this has been always admitted until it was denied before this Court; (2) that the essentials of an *ohaki* are fully complied with in the case of this will, as it was made with the knowledge of the near relatives, and agreed to by them; (3) that the fact of the land being held under Native custom, and the prohibition contained in "The Native Land Administration Act, 1886," do not affect this case, as the Court will decide according to the rights of the parties under Native custom; (4) that it was the custom among the tribes of the Patea district to admit adopted children to share in the lands of the tribe; (5) that an adopted child is entitled to succeed even when there is no *ohaki*.

The will had been produced in the Court in 1890, but was then given back to Ani Paki, and it was subsequently lost. The lower Court held, however, that it had been satisfactorily proved that the Awarua lands had, in the will, been left to Pura Rora, and this Court sees no reason to dissent from that conclusion.

We hold that the adoption of Pura by Te Awaawa has been proved: this will entitle her to share in the succession. We also think that the will in this case is sufficient as an *ohaki*, is not illegal, and can apply to the Awarua lands. In it Te Awaawa allotted that part of his property which consisted of his interest in Awarua to his adopted child Pura, other lands being allotted to some of the next-of-kin. We consider that this entitles Pura to be appointed sole successor in respect of these lands. The former orders are therefore confirmed.

Otawhao A.—Succession to Hineipaketia, alias *Henerieta te Hei.*

In this case the order appealed against was in favour of Arihi te Nahu and Tangatake as adopted children.

Mr. Loughnan appears for Hori Niania, the applicant for rehearing (since dead), and claims for the next-of-kin, who are second cousins. He states that in the case of succession to Renata Kawepo, in the Pukehamoamoa case, the Court drew a distinction between adopted children and foster-children, and held that full adoption must be proved to give a right to succeed, and contends that in this case it has not been proved that Arihi and Tangatake were adopted in such complete sense as to give them a right to succeed. He also urges that the general opinion is that the claim by adopted children to succeed must be supported by an *ohaki*.

At the former hearing, evidence was given of a conversation between Hineipaketia and Hori Niania, in which Hineipaketia was said to have expressed her wish that her interest in Otawhao should go to Hori Niania: this was claimed to amount to an *ohaki*.

In our opinion the adoption of Arihi was fully proved, and Tangatake is admitted by counsel for Arihi to be entitled to share with her.

The evidence of the alleged conversation between Hineipaketia and Hori Niania is, in our opinion, insufficient, and, were it proved, it would not, we consider, amount to an *ohaki*.

We have already given our views at length on the subject of the Native customs of adoption and *ohaki*, and, in accordance therewith, we hold that the adopted children are entitled to succeed in this case.

The former decision is confirmed.

NATIVE APPEAL COURT.—AWAAWA (DECEASED), APPEAL ON APPOINTMENT OF SUCCESSOR.—OWHAOKO D No. 6 AND RANGIPO-WAIU.

(Before Judges SCANNELL and MAIR.)

Judgment.

THIS is an appeal from a decision of the Native Land Court given on the 7th August, 1895, appointing a successor to Te Awaawa, deceased, and those parts of the grounds of appeal now being dealt with are that Pura Rora, the successor appointed, was not a *bona fide* adopted child of the deceased, Te Awaawa, and consequently has no claim as such according to Native custom, and also that an adopted child has not a claim to the whole of the land unless the adopting parent has so devised in

his or her favour by a will or an *ohaki*. The remaining parts of the appeal were dealt with by a decision of this Court given on the 26th May last.

It is urged at this hearing that the deceased made a will omitting any mention of his interest in the Owhaoko Block which was then under hearing, and that therefore it could not have been intended by Te Awaawa to go to Pura Rora. The will itself is not forthcoming, and the evidence of its contents is contradictory, but we cannot see what difference it makes in this case. If any mention was made of the Owhaoko Block in the will it appears to be admitted that the devise would have been in favour of Pura Rora, the adopted child. If no mention was made of that interest we must conclude that, so far as that interest was concerned, Te Awaawa died intestate, and therefore the succession must be decided according to Native custom.

As to the *bona fide* adoption of Pura Rora by Te Awaawa, that appears to have been proved in other cases referred to at this hearing, and we are satisfied that proof is ample, and also that the adoption was such as to exclude all except "near relatives" from sharing in the succession, and that the persons now appealing are not such "near relatives" of the deceased as to entitle them to a share in the interests in those blocks.

The argument that an adopted child has not a claim to the whole of the land unless the adopting parent has so devised by a will or an *ohaki* is one that cannot be entertained. The right by adoption does not require to be supported by a will or an *ohaki;* if it did, adoption in itself would have no effect.

The appeal is dismissed; and of the sum of £10 deposited as security for costs, the sum of £4 will be paid as costs to the respondents, and £6 paid into the Public Account as costs of Court in addition to the ordinary fees for hearing.

Mr. P. E. Baldwin for appellants.
Messrs. Sainsbury and A. L. D. Fraser for respondents.

NATIVE APPELLATE COURT.—AWARUA No. 1, KOHURAU No. 2, AND RANGIPO-WAIU No. 1.
(Before Chief Judge DAVY and Judge SCANNELL.)

Judgment.

APPEAL of Iraia Karauria from decision of Native Land Court appointing Whairiri Renata successor to the interest of Renata Kawepo.

The Court does not consider it necessary to go into the question whether or not the adoption of Whairiri Renata by Renata Kawepo was of such a nature as might under certain circumstances have entitled him to share in the lands of Renata Kawepo, because we hold that, even admitting the adoption to its fullest extent, its value as conferring any right to succession is entirely a question of intention on the part of the predecessor. In the present instance any presumption of intention in that respect which might otherwise be deducible from the fact of the adoption is, in our opinion, conclusively negatived by the terms of the will of Renata Kawepo. Nor can we admit any right on the part of the Native Land Court in dealing with this question to take into account the fact that the provision made by the testator for the benefit of Whairiri has, as is alleged, to a large extent failed. That such might be the case was a contingency which the testator had expressly considered and provided for.

The order appealed from is therefore annulled, and the Court orders that the appellant (Iraia Karauria) and Airini Tonore, Pani Karauria, and Erena Karauria, as next-of-kin of Renata Kawepo, are the persons entitled to succeed to his interest in the lands the subject of this appeal. The amount deposited as security for costs to be refunded to the depositor.

Messrs. T. W. Lewis and A. L. D. Fraser for appellants.
Messrs. Williams and Loughnan for respondent.

NATIVE APPELLATE COURT.—OWHAOKO D No. 6 AND RANGIPO-WAIU.

Judgment.

AN appeal is made from a decision given by the Native Land Court on the 7th August, 1895, appointing a successor to the interest of Te Awaawa, deceased, in each of these blocks, and the grounds of appeal generally are—(1.) That, these blocks being held under a Land Transfer title, at the time Te Awaawa died, the succession must be determined according to the law of New Zealand, and not according to Native custom. (2.) That Pura Rora, the successor appointed, was not a *bona fide* adopted child of the deceased, and consequently has no claim as such according to Native custom; and also that an adopted child has not a claim to the whole of the land unless the adopting parent has so devised in his or her favour by a will or an *ohaki*.

With regard to the first part of the appeal, the Act of 1894, subsection (4) of section 14, gives the Court jurisdiction "to determine any successor," and the interpretation clause of the said Act says, "'Successor' means the person who on the death of any Native is, according to Native custom, or, if there be no Native custom applicable to any particular case, then according to the law of New Zealand, entitled to the interest of such Native in any land or personal property."

The scope of "The Native Land Court Act, 1894," with regard to Native tenure is to bring all lands which have heretofore passed the Court under the Land Transfer Act, where Land Transfer title or Crown grants have not already issued; and in a large majority of all the Native Land Court Acts which have been passed hitherto the succession and hereditaments were to be determined by the law of New Zealand, as nearly as it could be reconciled to Native custom and usage, making Native custom paramount in any conflict between it and the law of New Zealand.

The Act of 1894 has not altered the law of succession in this respect, and the fact of the title to the land being a Land Transfer certificate cannot be held to be a particular case where Native custom is not applicable.

NATIVE APPELLATE COURT.—THURSDAY, 15TH JULY, 1897.—PORANGAHAU No. 2B.

(Before Chief Judge DAVY and Judge SCANNELL.)

Interlocutory Decision on Claim of Karanama Wairoa and Others by Adoption.

THE question of the Court at the present stage of the proceedings is, was there any adoption by Reihana Huripoki according to Native custom of any or either of the persons who now claim to occupy the position of his *tamaiti whangai*—that is to say, Karanama Wairoa, Ratima Wairoa, and the two children of Ratima?

As regards Karanama it is clear to this Court that there were not, up to the date of the making of the will in his favour in May, 1894, such relations between the parties as would satisfy the conditions of adoption according to Native custom. The terms of the will, however valuable they might have been as an admission by the testator, had the question as to the previous relationship been a doubtful one, have, in the opinion of the Court, no value whatever in the present case. We do not, therefore, feel called upon to decide as to the relative credibility of the witnesses who have given evidence as to the circumstances under which that will was prepared and executed.

The decision of the Court is that Karanama is not entitled to be regarded as a *tamaiti whangai* of Reihana.

As regards Ratima Wairoa, the case is even weaker than that of Karanama, seeing that evidence of intention deducible from the will is against him. The same may be said as to the two children of Ratima.

The Court therefore holds that none of the persons who have set up claims to succeed to Reihana Huripoki by virtue of adoption are entitled to such succession.

NATIVE APPELLATE COURT.—FRIDAY, 16TH JULY, 1897.—OTUARUMIA AND OTHER BLOCKS.

(Before Chief Judge DAVY and Judge SCANNELL.)

Judgment.

THE point raised by this appeal is whether a person who has been found by the Court to be entitled to succeed as *tamaiti whangai* to the estate of a deceased Native is, in the absence of children of the body of the deceased, entitled to the whole of the estate as against all other relatives. We think this is so, and that, the right by adoption having by a series of decisions been recognised by the Court, it is impossible to draw the line at any other point. The adoption, if it is anything at all, places the adopted child on the footing of a child of the deceased.

In the present case it has been contended that the Court did not find adoption, and that the evidence was not sufficient to justify it in so doing. It is true that the Court did not in so many words affirm the adoption, but the appellants rested their claim in the lower Court on that ground, and the award of the Court is not explicable on any other supposition than that the Court considered the adoption as proved; nor do we see any sufficient reason to question the action of the Court in this respect.

The judgment of this Court is that the appellants are entitled to succeed to the whole interest of the deceased in the blocks specified in the appeal, or those of them in which deceased was an owner, and that the decision of the former Court be varied accordingly.

NATIVE APPELLATE COURT.—MOTUKAWA No. 2.—APPEAL OF IHAKARA TE RARO.

THE following decisions were given in the Native Appellate Court on Saturday:—

This is an appeal from the decision of the Native Land Court appointing Wera Rawinia successor to Maata te Kohiti in Motukawa No. 2. We have carefully considered the matter, and are of opinion that the Court was justified in recognising the adoption of Wera by Maata, and that the appointment of Wera as successor was in accordance with the intention of the deceased. We further hold that the Court was justified in awarding the interest to Wera to the exclusion of the next-of-kin, the deceased having left no issue. The decision of the former Court is therefore confirmed as to the deposit of £10. The respondents will be allowed their reasonable costs, and the balance will be paid to the Public Account.

NATIVE APPELLATE COURT.—1ST OCTOBER, 1904.—MAUNGATAUTARI No. 5A, ETC.

Decision given by Judges Seth-Smith and Wilkinson.

THIS is an appeal from the decision of the Native Land Court given on the 8th August, 1896, appointing successors to the interests of the deceased in the several blocks mentioned in the appeal. The question in dispute is whether Punia Parata, otherwise known as Punia Woods, is entitled to share in the succession as the adopted child of the deceased.

In the Native Land Court, Punia did not dispute the right of the other successors appointed by the Court as the next-of-kin. She claimed to share with them, and was awarded an interest by the Court to the extent of one-half the estate. The next-of-kin appealed, and the appeal was dismissed by the Native Appellate Court sitting at Otorohanga, for non-appearance of the appellants.

The appeal was, however, reinstated by the Legislature by section 11 of "The Native Land Claims Adjustment and Laws Amendment Act, 1901," and now comes before us for decision.

Another case has also come before the Native Land Court—viz., Puahue—in which the same question arose, and the evidence then given has been used during the arguments on this appeal, and is now before us.

We have also had the evidence of William McLear, who was called as a witness on behalf of the respondent.

It is unnecessary for us to examine in minute detail the evidence that has been given on the question whether Punia was adopted by Punia Kaikino or not. The view we take of the case as a whole renders that question unimportant. We shall also not attempt to reconcile the discrepancies with which the evidence abounds as to facts and dates. We are of opinion that the relation that existed between Hakiriwhi and Punia was in the nature of an adoption, which, had it continued until the death of Hakiriwhi, might have entitled Punia to succeed to the interests of the deceased; but we are quite satisfied that that relation was determined. For this we rely chiefly on Punia's own evidence, in which she describes her return to her own people with Maori ceremonial and in accordance with Maori custom. Punia seems to have accepted the position. She soon afterwards married a European named Clifford, without taking any steps to obtain Hakiriwhi's consent, and from that time to the death of Hakiriwhi did nothing to suggest that she regarded herself as his adopted child. Although Hakiriwhi on more than one occasion begged her to go and see him, she did not do so. To the end of his life Hakiriwhi seems to have had a strong affection for Punia, and towards the end had some thoughts of making a will in her favour, as appears from the postscript to the last of the three letters that have been produced. No will was made, and the letters are insufficient to establish a renewal of the adoption.

Regarding the case as a whole, we consider the correct view of the evidence is that there was an adoption, which was afterwards revoked.

The decision of the Native Land Court will be varied by striking out the name of Punia, and distributing the half-share among the other successors in proportion to their present interests.

NATIVE APPELLATE COURT.—KARAMU, ETC.—SUCCESSION TO MERE TAKI, DECEASED.

(Chief Judge SETH-SMITH and Judge JONES.)

Judgment delivered 31st January, 1905.

AFTER careful consideration of "The Karamu Reserve Act, 1889," we find nothing in it to oblige us to apply different principles to the determination of succession to the Karamu Reserve from those by which we must be guided in determining the succession to the other blocks before us—viz., the Native Land Court Act of 1894.

The references to succession are contained in sections 13 and 14. Section 13 provides a method of finding successors to alienees who might die before the conveyance referred was executed, and directs the Native Land Court to determine them according to Native custom. Section 14 defines the restrictions under which the original alienees, their successors, and the successors of successors should hold the land. There is nothing to support the suggestion that successors must be members of the Ngatihori, and if that had been the intention of the Legislature it would have been clearly expressed.

The question we have to consider is, what is Maori custom with regard to succession by an adopted child?

We agree with the Native Land Court that no rule can be laid down applicable to all cases in all parts of the country. Each case must be dealt with on its own merits.

In this case we think the merits are with Hinetauaraia, the adopted child of the deceased. There can be no question that if Mere Taki's child had survived her mother she would have been entitled to succeed to the whole of her mother's interest. The circumstances attending the adoption satisfy us that it was the intention of Mere Taki that her adopted child should take the place of her dead child, and that whatever the rights of the true child might be, the adopted child should have the same. If, therefore, as has been said, the intention of the adopting parent is the test by which cases of this kind are to be determined, we have no hesitation in saying that Hinetauaraia ought to take the whole.

The same result will be arrived at if we follow the precedents of the Native Appellate Court where the whole was awarded to an adopted child, but we prefer to rest the decision in this case on what appears to us the manifest intention of the deceased.

We wish it to be clearly understood that we regard the intention of the adopting parent only as one of the determining elements in cases of this kind, not as a necessary ingredient in all cases. We consider it sufficient for the purposes of this case, and there being no definite evidence or ruling to the contrary, we decide this case accordingly.

The decision of the Court as to the interest of Mere Taki in the Karamu Reserve will be annulled, and an order made determining Hinetauaraia to be the successor.

As to the other blocks, we have nothing before us to show that the award of a life interest to Hinetauaraia is in accordance with Maori custom, and it is not based on the law of New Zealand. Those orders will therefore be varied by striking out all reference to the life interest and to the remainder over. The order so varied will determine Hinetauaraia as the successor to the interests of Mere Taki in the several blocks.

We should have been glad if the case had been more fully argued on behalf of the respondents, but we do not think it is at all likely that it would have affected the result.

NATIVE APPELLATE COURT.—18TH MAY, 1906.—BLAKE-WELLWOOD APPEAL.

(Before Judges EDGER, MAIR, and JOHNSON, and HEMI ERUETI, Assessor.)

THE Native Appellate Court gave judgment at Hastings this morning in the Blake-Wellwood appeal case. Following is the full text of the judgment:—

"The question is, who are entitled to succeed the deceased in respect of lands that admittedly do not pass under the will, being inalienable lands? Applications for probate of the will, and for succession as regards lands not passing by the will, were dealt with by Judge Jones in February, 1905. Under the will, part of the estate is left to Eliza Hastings Blake, and part to Conrad Bryan Heatley, the husband of Hiraani. Probate of will was granted without dispute. As to lands not passing by the will, there was dispute between Hakopa te Ahunga, the next-of-kin, and the representatives of two children alleged to have been adopted by the deceased, Hiraani. Notices of adoption under section 50 (of 1901) had been registered in respect of both these children under the regulations then in force, which did not require any inquiry to be made by the Court prior to the registration of such adoption. Kathleen Hiraani Blake, one of the alleged adopted children, is a daughter of Mrs. Blake (a pure European), one of the devisees under the will, and of John T. Blake, a half-caste Maori. Hiraani, the deceased, was not related in any way to Kathleen, nor to either of her parents. Ralph Holden Wellwood, the other child alleged to have been adopted, is a second cousin to Hiraani.

Judge Jones held that the registration of adoption under section 50 was not conclusive evidence of the adoption, but that the onus of proof lay upon the party denying the adoption. He then proceeded to take evidence as to whether or not one or both of such children had in fact been adopted as alleged, and decided that Hiraani had expressed her intention to adopt both children, had endeavoured to carry out such intention, and that there was a *bona fide* adoption in each instance. Orders were accordingly made in favour of the two adopted children.

Hakopa te Ahunga, the next-of-kin, appealed. Upon the appeal coming on for hearing before Chief Judge Seth-Smith and Judge Palmer that Court agreed with the view held by Judge Jones, that registration was not conclusive, and that the Court was entitled to hear evidence to show whether or not the children had as a fact been adopted, but held that neither of the children had been effectually adopted, and that the orders made by the former Court must be reversed, and award made to the next-of-kin.

Upon this, application was made on behalf of the alleged adopted children that further evidence be received to prove the adoption, as such evidence, though available in the lower Court, was not called because Judge Jones intimated that it was unnecessary.

After consideration, that Appellate Court decided to allow the case to be reopened, and, in order that there might be finality, referred the case to be heard before a fresh Appellate Court consisting of three Judges and an Assessor not previously concerned on the case. An application to the Supreme Court for a writ of prohibition to prevent such further hearing before a fresh Appellate Court was refused, that Court holding that the Native Appellate Court had power to regulate its own procedure free from interference by any other Court. The matter thus comes before the present Court as an appeal from the original decision given by Judge Jones.

Two questions have been submitted to this Court for decision—(1.) Were the two children as a fact adopted? (2.) What effect must be given to registration of a notice under section 50? We deal with the latter question first.

The argument that such a notice is conclusive evidence of adoption was argued at the two previous hearings, and, with somewhat less confidence, before us. We have been referred to the cases of Barraclough *v.* Greenhough, and Hewitt *v.* Taylor, as bearing upon the distinction between "conclusive" evidence and "sufficient" evidence. The words used in section 50 are "sufficient evidence." We see no reason to dissent from the opinion expressed both by Judge Jones and Chief Judge Seth-Smith and Judge Palmer, that such registration is not to be taken as conclusive, at any rate, where such registration has been effected under the regulations as first issued, which did not require any inquiry to be made by the Court prior to the registration. Under the new regulations made under section 50, an inquiry is to be made by the Court as to the fact of such adoption according to Native custom; and where such inquiry has been held, and a certificate given by the Court to that effect, the registration may rightly be held to be conclusive. It is, however, open to question whether or not such amended regulations are *ultra vires*, as going beyond the statutory provision under which they are made. It is, in our opinion, necessary that this doubt be cleared away, and that the law be made certain, to the effect that to enable a claim by adopted children to succeed there must have been a prior order by the Court declaring the fact of the adoption after inquiry made in open Court. That would put the adoption of children by Maoris upon a similar footing to that by Europeans under "The Adoption of Children Act, 1895."

We now deal with the second question, whether these two children were as a fact adopted. This Court has read the evidence given before Judge Jones, and has also taken fresh evidence. As to the relationship existing between the parties to the case: Hiraani te Hei was, prior to her marriage, living in the Blakes' house as a member of the family; she was given in marriage by Mr. Blake, and there have been the closest ties of friendship existing between herself and Mr. and Mrs. Blake, both prior to and since her marriage. Hiraani was also an intimate friend of the mother of Ralph Holden Wellwood; they were in fact brought up together by Mr. Holden and his wife Keita Ruta, who was the mother of Mrs. Wellwood, and great aunt of Hiraani. Hiraani has never, on the other hand, had any close association with her next-of-kin, who belong to inland Patea, and with whom it is asserted she was not on the best of terms. There is clear evidence of the intention of Hiraani to adopt both children—in fact, this is not denied. The child Wellwood was bespoken by

Hiraani before or soon after its birth, and, so far as there was time for steps to be taken, the adoption of that child seems to have been conducted in compliance with the conditions that have been laid down by the Court. It is stated that the child was to be left with its mother until weaned; that was not an unreasonable arrangement, and we are not entitled to assume that the child would not have been taken possession of by Hiraani so soon as it could leave its mother. When that time arrived, however, Hiraani was too ill to assume charge of the child, and died a few weeks later.

There is a good deal of evidence that Hiraani looked upon Kathleen Hiraani Blake as her own child. It was named after her, and was a great deal with her during several years, although the child continued to live with its parents, in the next house but one. We do not think this latter fact alone sufficient to disprove the adoption. As to what is required to constitute adoption under Native custom, we do not wish to disturb what has so far been laid down by the Court in former cases.

It is, however, abundantly clear that Native custom, and especially the Native custom of adoption, as applied to the title of lands derived through the Court, is not a fixed thing. It is based upon the old custom as it existed before the arrival of Europeans, but it has developed, and become adapted to the changed circumstances of the Maori race of to-day. The publication to the tribe, laid down as one of the essentials of adoption, is fully satisfied by the registration and gazetting of the notice of adoption under section 50.

There has been no attempt to prove any fraud or undue influence; the very clear and straightforward manner in which Mr. Scannell, as Hiraani's solicitor, conducted the business of registering the notice of adoption made it not feasible to question the *bona fides* of the claim for the adopted children. The will is evidence that Hiraani did not intend her property to devolve upon next-of-kin. It is specially drawn to apply only to such lands as can pass by device, and it can fairly be inferred that Hiraani had in view the fact that her adopted child (there was then only the one) would be provided for out of lands that could not pass under the will.

Having now passed in review the salient facts of the case, we are constrained to agree with the opinion expressed by Judge Jones that there was a *bona fide* adoption of both children, and the orders made by him are therefore affirmed.

The Court has been much assisted by the able presentation of the case by Mr. H. D. Bell and Mr. A. L. D. Fraser, for the adopted children; and by Mr. C. P. Skerrett and Mr. J. M. Fraser, for the next-of-kin.

The deposit, £10, will be paid to Mr. David Scannell, solicitor, on behalf of the respondents.

Native Appellate Court.

The following judgment was delivered at Spring Creek by Judges H. F. Edger and Jackson Palmer, and Hemi Eruiti, Assessor, upon rights under Native custom of adoption and succession:—

This is an appeal against a decision of the Native Land Court regarding the succession to Heni Hekiera, an owner of Wairau, Block 12, Subdivision 13, and other lands. The facts are as follows:—

Heni Hekiera was the daughter of Hekiera Paora and his wife Amiria. Tapata Wiremu, one of the claimants, was the child of Amiria and a European, having been born in 1866. The next year, 1867, Amiria became the wife of Hekiera Paora, by whom she had several children, and with whom she lived until his death in 1891. When Hekiera Paora married Amiria, he took the child Tapata Wiremu also, who thereafter grew up in Paora Hekiera's household. It is alleged that he was adopted by Hekiera Paora. Hekiera Paora and his wife Amiria had several children, all of whom are now dead. One of such children, Heni Hekiera, the succession to whom is now in dispute, was born in 1886, and was in infancy adopted by Hapareta Rore and his wife Mere te Hiko, who were relatives of Amiria, the mother of Heni Hekiera. This adoption is admitted by all parties. Hekiera Paora died in 1891; in 1892 his two surviving children, Heni Hekiera and Te Manihera, were appointed his successors, no claim being then made—so far as the minutes show—by Tapata Wiremu. Tapata was, however, appointed trustee for the two children. Amiria died in 1892. Heni Hekiera died in 1903, her brother and co-successor Te Manihera having predeceased her.

Heni Hekiera derived interests in lands through both her father and mother. It is admitted that, as regards the interests derived from Amiria, Tapata Wiremu is entitled to succeed. The present dispute is confined to the interests derived from Hekiera Paora, the father.

Claims were made in the Court below—(1) by Tapata Wiremu, as being the adopted child of Hekiera Paora, and therefore entitled to succeed his foster-sister Heni, who is also his half-sister; (2) by Hapareta Rore and Mere te Hiko, as being the adopting parents of Heni; (3) by several parties of next-of-kin to Hekiera Paora.

The Court whose decision is appealed against gave a preliminary judgment, deciding—(*a*) that Tapata Wiremu was not adopted by Hekiera Paora—at any rate, not in such a way as to entitle him to succeed to Heni Hekiera's lands; (*b*) that, although Heni Hekiera was adopted by Hapareta Rore and Mere te Hiko, that did not entitle them to be appointed successors to their adopted child Heni.

That Court made no formal succession orders, merely giving the above preliminary decision.

The rights of adopted children to succeed to interests in land under the Native custom of adoption have been the subject of a number of decisions during the last fifteen years. As a preliminary it may be remarked that there was no ancient Maori custom of succession to tribal lands. When a man died his interests in the tribal lands reverted to the tribe; on the other hand, every child, either at birth or upon arriving at manhood or womanhood, became *ipso facto* entitled to a share in the tribal lands. Succession was in those ancient times confined to certain personal property or occupational rights to small pieces of land used for cultivation or some similar purpose.

The present so-called Native custom of succession has grown up or become defined in the Native Land Court since the time when ancient tribal rights to land began to be converted into a European recorded title. The earlier decisions respecting the rights of adopted children considered that adoption alone did not necessarily entitle an adopted child to succeed to the whole of the property of the adopting parent, but that such complete right might need to be supported by an *ohaki* (verbal will), or might depend partly upon the circumstances of the case. Later decisions have, however, ruled that where the adoption is considered proved an adopted child is to be looked upon in the same light as a child of the body, and is, in the absence of children of the body, entitled to succeed to the whole of the property of the adopting parent. Such rule may, therefore, be now considered as fixed, and to have become a part of the present Native custom of succession.

But this Court is now asked to enlarge or further define the Native custom of adoption as applied to succession, by deciding—(*a*) that an adopted child would be entitled to succeed his foster-sister; (*b*) and this notwithstanding that such foster-sister had been herself adopted into a different family; (*c*) that adopting parents are entitled to succeed the child they have adopted.

There certainly never was any ancient Native custom of succession under the conditions named. The most that can be urged is that the Court should now rule that such further rights following upon adoption logically grow out of the custom as hitherto defined, and can be now made a part of Native custom as recognised by Court. Where there is a Native custom applicable, the Court is to decide according to the law of New Zealand. It may also be said that it would be expedient to bring Native custom, as regards ownership of land, into line as far as possible with European law.

By "The Adoption of Children Act, 1895," an adopted child does not acquire the right to succeed a foster brother or sister, nor can he take property from the lineal or collateral kindred of the adopting parent by right of representation. His right is confined to acquiring property directly through the adopting parent. It appears, however, that the adopting parents can succeed to the property of their adopted child dying intestate without issue—*Vide In re* Carter (VII Gazette Law Reports, 577)—as by the adoption all rights between the child and its natural parents are terminated, except the right of the child to succeed its natural parents; and, therefore, the only persons left who could succeed to the adopted child are the adopting parents.

The Native Land Court has already extended the rights of adopted children under the Native custom of succession further than the law of New Zealand would authorise, and we think it neither expedient nor necessary to further enlarge such custom in divergence from the law of New Zealand. There has not hitherto been any decision by the Native Land Court that under the Native customs of adoption and succession adopting parents are entitled to succeed to the lands of the child they have adopted, but who predeceases them; but, as it agrees with the law of New Zealand, we see no reason why it should not be incorporated into the present Native custom of succession, more especially as natural justice would seem to require that adopting parents should have even more right to succeed to the child they have adopted, and upon whom they have expended their substance and fostering care, than the adopted child would have to succeed them.

Coming, now, to the present case: We do not consider it proved that Tapata Wiremu was adopted by Hekiera Paora. Not much evidence was given in the Court below on that point, and the decision then given was occupied more with discussing what right an adopted child would have than in determining whether or not Tapata Wiremu had been adopted. But, even supposing the adoption of Tapata Wiremu by Hekiera Paora to be proved, it would not, under the law of New Zealand, entitle him to succeed Heni Hekiera; nor do we think that the Court should rule it to be a part of Native custom that an adopted child has any right to succeed his foster-sister. It thus becomes a question who are entitled to succeed Heni, the parents who adopted her, or the next-of-kin to her father, Hekiera Paora. The next-of-kin are all remote, none being nearer than second cousins.

We decide that the persons entitled to succeed Heni Hekiera, as regards the interests derived through her father, Hekiera Paora, are her adopting parents, Hapareta Rore and Mere te Hiko.

Lest it should be contended at some future time that the logical effect of this decision would be to entitle the adopting parents to claim also the rights derived through Amiria, we will say that, in our opinion, the claim of the half-brother, as regards interests derived by the deceased through the common parent, is to be preferred under the Native custom of succession to any claim by the adopting parents. The deposit of £5, less £2 retained for fees of Court, to be paid to Alfred L. D. Fraser, agent for Mere te Hiko.

JUDGMENT of the APPELLATE COURT, delivered at New Plymouth on the 29th October, 1906, by H. G. SETH-SMITH, Esq., President, and C. E. MACCORMICK, Esq., Judge.—In the Matter of the SUCCESSION to ROERA RANGI, deceased.

IN this case Hohepine Love and Tini J. Clements have separately appealed against the decision of the Native Land Court given on the 30th May, 1905, determining the successors to Roera Rangi, deceased.

The facts of the case so far as material to the present proceedings are that Ngarongo Kahu was in early infancy adopted by Roera Rangi in accordance with Maori custom; that Ngarongo lived with Roera, and continued to do so both before and after marriage; that Ngarongo was twice married, and had children by both marriages, four of whom are the subject of the present inquiry. Ngarongo and the majority of her children continued to live with Roera to the time of her death. Tongouri, the eldest, left when married, and two others appear to have gone away. When Roera was at an advanced age, and, as is alleged on behalf of the appellants, in an enfeebled state of mind, she registered four of Ngarongo's children as her adopted children, and these four children

have been declared by the Native Land Court to be the successors to Roera's interests in the lands in question.

Exception has been taken on behalf of the appellants to the validity of the registration, on the ground that Roera Rangi was at the time she signed the notice required by the regulations then in force mentally incompetent to appreciate the meaning of her own act. It seems to us unnecessary to express any opinion on this point, as there are sufficient grounds to justify the conclusion at which we have arrived without inquiring into the state of Roera's mind during the latter days of her life.

It was decided in the case of the succession to Hiraani te Hei (the Blake-Wellwood case) that the words "sufficient evidence" in section 50 of "The Native Land Claims Adjustment and Laws Amendment Act, 1901," are to be taken as equivalent to "*prima facie* evidence," not "conclusive evidence," and the Court must therefore be satisfied that there was a *bona fide* adoption according to Maori custom before giving effect to a "claim by adoption." We shall follow that decision, the registration having been made under the same regulations as in the case just cited, but we abstain from expressing any opinion as to the effect of the regulations now in force.

We have therefore to decide whether these children were adopted according to Maori custom, bearing in mind that the burden of proof is shifted by the statute from those who affirm to those who deny the adoption.

On carefully examining the evidence before the Native Land Court and before this Court, we can find no direct evidence of adoption. We are in effect asked to infer such adoption from the fact that the children lived in the same kainga, in the same house as Roera, and that she provided for their maintenance and support. Such an inference would be reasonable enough in a case where, as usually happened in olden days, the child alleged to be adopted was an orphan, or was, with the parents' consent, transferred from their custody to that of the alleged adoptive parent.

But there are in the present case several facts which militate strongly against the validity of such an inference. Ngarongo, the mother, was herself the adopted child of Roera, and as such was living with Roera when the children were born, and continued with her while the children grew up. The children thus remained in the custody of their mother, and their residence in Roera's house becomes an ambiguous fact from which no inference in favour of their adoption can be safely drawn.

In dealing with questions of Maori custom, the difficulty is becoming daily more pronounced of disentangling genuine custom from the incrustations which have grown round it under the influence of pakeha ideas. There seems, however, to be good authority for believing that an ancient Maori adoption was a public act, known to and approved by at least all those members of the hapu with whom the adoptive parent resided, and who, on the death or inability of the adoptive parent, might themselves become charged with the maintenance and support of the child. We need not stay to inquire whether, under the changed conditions of modern life, the assent of the hapu is in every case essential to the validity of an adoption, but enough of the old custom still remains to justify us in looking with grave suspicion on an alleged adoption that was not well known throughout the neighbourhood. Such an adoption, which we believe would have been impossible in earlier times, is now in the highest degree improbable.

When we look for evidence of knowledge in the present case we find practically none. Several witnesses have alleged that they knew nothing of it before they saw the notice of registration in the *Kahiti*. Those who have alleged knowledge are, without exception, unable to say how or when the adoption was effected. One witness, Wiremu Jenkins, alleged that he knew of the adoption of the eldest child Tongouri, but when pressed as to the source of his knowledge he admitted that he knew she was adopted because she lived with Roera—an inference which we have already said we regard as fallacious.

There is one other circumstance in the case which deserves special attention. When signing the notice for registration in Mr. Fisher's presence, Roera appears to have been uncertain as to which of Ngarongo's children she wished to register—an uncertainty which she could not have entertained if she had really adopted some or any of them.

For these reasons we are of opinion that none of these four children was adopted, and that the decision of the Native Land Court must be annulled. It will be for that Court to determine who as next-of-kin is entitled to the succession.

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