

Enclosure.

JUDGMENT of the LORDS of the JUDICIAL COMMITTEE of the PRIVY COUNCIL on the Appeal of Donnelly and Others v. Broughton, from the Court of Appeal of New Zealand (District of Wellington); delivered 4th July, 1891.

Present: Lord Watson, Lord Hobhouse, Lord Morris, Sir Richard Clough, Mr. Shand (Lord Shand).
[Delivered by Lord Watson.]

THIS is a competition for the right of succession to the estates, real and personal, of Renata Kawepo, a Maori chief, who resided at Omahu, in the District of Hawke's Bay and Colony of New Zealand, and died there childless, at an advanced age, on the 14th April, 1888. His principal wife predeceased him; but he was survived by two spouses of inferior rank, whose precise legal status has not been explained.

The appellants, defendants in the original suit, are Mrs. Airini Donnelly, who is of pure Maori blood, her infant daughter Maud Donnelly, her two Maori brothers and their infant children, and her sisters. Mrs. Donnelly is the grandniece of the deceased, by descent from his sister-uterine; and, according to Native custom, is the legal successor to his property and tribal position. She was brought up by him in a manner befitting her rank, and had the management of his household until the year 1878, when she was married to her present husband, George Prior Donnelly. Her intermarriage with a foreigner gave great offence to the old chief, and led to an estrangement, which was aggravated by Mrs. Donnelly appearing in the Land Court as a rival claimant of unsettled territory which Renata was desirous of having adjudged to himself. In the beginning of the year 1888 Mrs. Donnelly consented to withdraw her opposition to her granduncle's claim; and in consequence of that concession a reconciliation took place about a month before his death.

The respondent, William Muhunga Broughton, plaintiff in the Court below, is a distant relation of the deceased, being the half-caste son of Te Oiroa, the great-granddaughter of the sister of Renata's maternal great-grandfather. After the marriage of Mrs. Donnelly he lived with the chief until his decease, and took an active part in the management of his property and affairs.

The respondent, on the 24th April, 1888, filed a summons in the Supreme Court of New Zealand, in order to obtain probate of a will executed by Renata on the 24th January, 1887. By the terms of that instrument the deceased appointed the respondent to be his sole executor, and declared that all his property, real and personal, should absolutely belong to the respondent, subject always to the trusts and directions therein expressed. One of these is a direction to realise and invest a sum of money sufficient to yield a clear annual income of £450 sterling, to be held by the respondent in trust, as regarded three ninth-parts, for payment of annuities of £100 and £50 respectively to the testator's two wives, and, as regarded the remaining six ninth-parts, for behoof of three of the testator's relatives in life-rent, and their lawful issue in fee. Another direction is that the executor shall "well, carefully, and faithfully see to the welfare and well-being of my hapu and people, and reserve such of my lands for their use and occupation, and make such provision therefor, as to him shall seem fit." The instrument was prepared by a solicitor, with the assistance of counsel, and was signed and duly executed by the deceased, who thereafter formally acknowledged it to be his last will before a Justice of the Peace.

The application for probate was resisted by the appellants, who, by their counter-claim, propounded as the last will and testament of the deceased a writing bearing date the 12th April, 1888, in these terms: "The persons for my will are Airini and her younger brothers and sisters and their children." At the foot of the document is the signature "Renata x Kawepo," with a cross or mark between the two words; and there are also the signatures of two persons as attesting witnesses, one of them being Te Teira, an uncle of Mrs. Donnelly, and the other Te Roera, who is related to Te Teira, but in what degree does not appear. It is not a matter of dispute that the body of the document, and also the words of the signature "Renata Kawepo," are in the handwriting of Mrs. Donnelly. The appellants allege, but the respondent does not admit, that the interjected cross or mark was made by the deceased.

The appellants do not dispute the genuineness of the will propounded by the respondent, their case being that it has been revoked by the later will in their favour.

Both Courts below were of opinion that the terms of the second will, if it was duly executed by the deceased, are sufficient to carry to Mrs. Donnelly and the other persons therein named the whole estate of the deceased, whether real or personal, which was bequeathed to the respondent by the will of 1887. But the main question submitted for decision was whether the writing of the 12th April, 1888, was duly executed by the late Renata Kawepo as his last will and settlement.

The cause was tried before Sir James Prendergast, C.J., without a jury, when a great mass of testimony was adduced on both sides. The bulk of it has little or no bearing upon the real issue; but, in so far as it is relevant, the evidence led by the parties is on all material points in direct conflict.

The learned Chief Justice pronounced in favour of the second will, and, in delivering judgment, observed that had it not been for the testimony of one witness for the appellants he would "have found much difficulty in arriving at a conclusion that Renata had executed the will propounded by Mrs. Donnelly." In coming to the conclusion at which he did arrive, the learned Judge relied upon the evidence given by the witness, Archdeacon Williams, as to expressions used by the deceased in the course of Friday, the 13th April, the day before his death, indicating an understanding or belief on his part that he had already made his last will in favour of Mrs. Donnelly.

On appeal, the decision of the Chief Justice was unanimously reversed by a Court consisting of four Puisne Judges, whose opinion was delivered by Mr. Justice Richmond. They agreed with the Chief Justice in thinking that, if the evidence of Archdeacon Williams were not taken into account, it would be impossible to hold that the appellants had proved the will; but they differed from his conclusion because, in the first place, they adopted a stricter view of the burden of proof incumbent