

1908.

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.

[In continuation of G.-5, 1907.]

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.)

REFERENCE UNDER SECTION 43 OF "THE NATIVE LAND LAWS AMENDMENT ACT, 1895."

QUESTIONS having arisen as to the adoption of European children by Maoris, and it being necessary to have uniformity of decisions by the Native Land Court, the undermentioned questions relating to the subject are referred to the several Judges of the Appellate Court:—

1. Can an European child be adopted under any circumstances under the provisions of "The Native Land Court Act, 1894," or any Act amending the same—(a) Where the child although a relative has no Maori blood; (b) where the child is not a relative?
2. If an European child is adopted as aforesaid, what is its right in regard to succeeding to its adopted parents' property?

13th April, 1908.

JACKSON PALMER, Chief Judge.

Section 43 of "The Native Land Laws Amendment Act, 1895."

43. The Chief Judge shall have power from time to time to refer to the Judges of the Appellate Court, severally or collectively, any question of Native custom, or of practice and procedure, which he may think necessary to have decided for the purpose of securing uniformity in the decisions of the Court; and the opinion of the majority of such judges upon any question referred shall be binding upon the Court and upon all the Judges thereof, and shall be followed in all subsequent decisions of the Court and of the Native Land Court.

PER JUDGE JONES.

The questions referred seemed to have been framed upon an erroneous hypothesis. There can be no adoption, as far as I am aware, under "The Native Land Court Act, 1894," or any of its amendments. The whole question of adoption of children by Maoris, apart from "The Adoption of Children Act, 1895," rests upon Native custom and usage. All that section 50 of "The Native Land Laws Act, 1901," does is to regulate the evidence necessary to prove such an adoption. It is desirable to keep this in view, for, in my opinion, the section implies a *bona fide* adoption according to Native custom, or at least a *bona fide* attempt at such an adoption, before complete effective registration can take place. Assuming, therefore, that a *bona fide* adoption according to Native custom is intended, the first question resolves itself into, Could there under Native custom be an adoption of an European child? I think not. Whatever the other essentials of an adoption by Maoris, I take it that it was a guiding principle that the party adopted should not be of a stranger tribe. To hold otherwise would be to give to the individual a latitude which would not be claimed by or permitted to even a substantial part of a tribe. Much more, then, would an alien in race and colour such as a pakeha be barred. It follows that the party adopted must necessarily have some Maori blood.

If I am correct in the view I take, then, as there can be no effective registration of an alleged adoption of an European, there can be no claim by adoption to the estate of the foster-parent. It is only fair to add that though the question has been raised and incidentally considered before me, it has not been argued or formally decided in my Court.

PER CHIEF JUDGE JACKSON PALMER.

Suppose an European man marries an European woman and they have an European son, A, and then the mother dies and the widower marries a Maori woman and they have a half-caste son, B (by our laws a Maori), A and B are half-brothers, and if the Maori (mother of B and stepmother of A) dies then B will succeed to the whole of her estate, and A will get none of it. If B then dies A will not succeed to his half-brother in any real property that the latter has acquired by inheritance from the Maori mother. If before the Maori mother's death she (willing to allow the half-brother A to succeed with her son B) adopts A as her *tamaiti whangai*, the Court would have to refuse to register such adoption, it being void. She could, however, adopt A under "The Adoption of Children Act, 1895"; but then A would only succeed to a share in her property on the principles laid down in section 7 of the last said Act. The Native Land Court Acts only provide for a mode of registration of a Maori adoption, and before such registration can be effected an actual adoption according to Maori custom must be *in esse*. According to the ancient law of Maori custom, it is obvious that there were no European children to adopt, and *ergo* there could be no custom of adopting European children. A Maori cannot adopt and register under the Native Land Court Acts any child unless such child has Maori blood in its veins.

PER JUDGE RAWSON.

All questions relating to the adoption by Maoris of children, and to the effect of such adoption upon the succession to the adopting parents' lands, should be decided in accordance with Maori custom, the statutory provisions simply requiring registration before effect can be given to the adoption.

My view is that under no circumstances could there be an adoption of an European child according to Maori custom.

Even where the child, although not of Maori blood, is a relative, the fact that it belongs to a different race seems to me to prevent the application of the custom of adoption.

There is no relationship between the Maori mother and the European child in the case submitted, and in my opinion an adoption by the mother of such child would not be in accordance with Maori custom.

This being my opinion, an answer to the second question is not required.

PER JUDGE MACCORMICK.

In my opinion, the legal status of an European child cannot be altered except by an order under the provisions of "The Adoption of Children Act, 1895." I am quite unable to see how the child could lose its right to the protection of the Act because the proposed adopting parent happened to be a Maori. The child is the dominant factor in the question, which must be determined by the law of New Zealand, and not by Maori custom. "The Native Land Court Act, 1894," and its amendments, do not create any method of adoption, but simply provide means of proving an adoption according to Maori custom.

My answer to the first question submitted must therefore be in the negative, both as to part (a) and part (b). In the view I take of the matter it is, of course, useless for me to refer to the second question.

PER JUDGE BATHAM.

1. I do not think that the adoption by Natives of European children is sanctioned or contemplated by "The Native Land Court Act, 1894," and its amendments. As "The Adoption of Children Act, 1895," does not except Natives from its operation, they are apparently within its scope and may adopt European children. This effect may not have been contemplated by the Legislature in passing the Act.

2. Requires no answer.

PER JUDGE EDGER.

In giving an opinion on this matter, I assume that the later regulations, dated 15th March, 1905, regarding adopted children are of full force and effect, though there is some doubt whether they are not *ultra vires*, as going beyond the provisions of section 50 of the Act of 1901.

As the existing law (including the regulations) provides that an inquiry shall be held to ascertain whether an adoption proposed to be registered is a *bona fide* adoption according to Native custom, the answer to the questions submitted is to be found in considering what are the essentials of an adoption according to "Native Custom."

So far as I am aware, there is only one judgment of the Court attempting to define those essentials (decision given at Hastings on the 19th June, 1895, *re Te Awaawa*, deceased, and other cases). It is there laid down that a child adopted will almost invariably be a relative by blood.

It is to be remembered that the main idea at the root of most Native customs has been the strengthening and consolidating of the tribe. The adoption of a child belonging to an alien or strange tribe could hardly be said to conduce to such strengthening or consolidating of the tribe of the adopting parent. Hence the rule above referred to.

A child of pure European blood would stand in the same relative position as the child belonging to an alien tribe.

I am therefore of opinion that a child of pure European blood cannot be adopted if unrelated by marriage to the Maori proposing to adopt.

Where, however, the child, although of pure European blood, is related through marriage, I think it would be in accordance with Maori custom to allow adoption.

Such a case might perhaps be looked on as somewhat similar to the taking of a wife from an alien or strange tribe. The children of such a wife would be members of the husband's tribe (except such as might return to the tribe of the wife—usually the eldest daughter).

Apart from the question whether Native custom, or the existing law, now permits a child of pure European blood to be adopted by a Maori, there is, I think, no doubt that such a practice is likely to lead to grave abuse, especially in the hands of an unscrupulous European.

With regard to the second question submitted, I think the right of an adopted child to succeed is not absolute. The existing law provides for the revocation of an adoption; and even where there is no revocation, an adopted child is liable to lose his right to succeed if he fails in his filial duties (see decision already quoted; also decision of Appellate Court in case of Punia Parata, given on 1st October, 1904).

If he does not so fail, he will share equally with the other children (if any).

Where there are no such children, it has been held by the Appellate Court that he will take the whole (see decision of 16th July, 1897, in Otuarumia and other blocks); and this decision has been followed, so far as I am aware.

But I am not clear that it is according to Native custom that an adopted child should always take the whole to the exclusion of near relatives, such as a brother or uncle.

Native custom is seldom a hard-and-fast rule. When it becomes rigidly defined it ceases to be Native custom. In my opinion, many of the present so-called Native customs are changing, or (especially as regards succession) have gradually grown up in the Court. Under the existing law, the decision in each case has still to be governed by Native custom, in view of the inquiry prescribed in the regulations of 15th March, 1905. But it is open to question whether the Native custom of adoption should not now be assimilated to the European law of adoption, and defined in a code, thereby, of course, becoming a law, and ceasing to be a Native custom.

PER JUDGE FISHER.

The term "Native" is clearly defined in the Act of 1894, and means "an aboriginal Native of New Zealand," while the term "European" is stated to mean "a person other than a Native."

Therefore, if a Native holds property free from restrictions there is nothing to prevent him alienating by will, subject, of course, to sections 46 to 51 of the Act of 1894 and its amendments, to a person other than a Native. As to Native land subject to restrictions, no alienation can be given effect to without confirmation under sections 53, &c., after removal of restrictions under section 52, or under section 14 of the Act of 1903.

The whole trend of Native-land Legislation is in the direction of preventing land being disposed of, except upon compliance with certain formalities. The adoption of an European child would most certainly not be in accordance with recognised Maori custom, and I think no child other than a Native can be adopted.

In the supposed case stated, I take it it is assumed that the parties have married in accordance with European law, and, therefore, while the children by the father would divide equally, the children by the mother (Native) only could succeed to her interests in Native land.

PER JUDGE MAIR.

As far as I am aware, the first reference to adoption is contained in section 50 of the Act of 1901. The adoption of children of their own race is an ancient Maori custom, and it conferred full rights; but it seems to me that the rights of Maoris to adopt European children, or the rights of such children to be adopted, has been assumed because there was no law forbidding it.

Given the rights of adoption, I suppose a white child would have the same right as a child possessing Maori blood, but I do not think that the Legislature, in the reference to the Act of 1901, contemplated the adoption of children other than those of Maori blood. In any case, the law should be more definite, and I am of opinion that European children should be distinctly barred; it does not seem just that Europeans should come into possession of Maori land in this manner.

I think that the above answers all the questions raised in the circular, but I would like to refer to one or two other vital questions affecting the Maori people.

It has been held that adopting parents have the right of succession to children by adoption. This seems to me a total reversal of the principle of adoption, and if permitted it will be abused, and delicate Maori children possessed of property will be adopted for selfish ends.

Another matter is the making of wills by Maoris in favour of Europeans. It is an established fact that old, childless Maoris possessed of property have been taken in and cared for by Europeans, who have in the end induced them to make wills in favour of themselves, or members of their own families,

to the exclusion of the next-of-kin. Though opposed to Maori custom, these wills, judged by English precedents, are good in law when made with the prescribed formalities. But the precedents of a civilised people who have been will-making for a hundred generations are of little value as applied to a people with different modes of thought, and very different methods as to the devising of property. A Maori of the old school usually takes an exaggerated view of a personal obligation, and, if a *rangatira* is prepared to make great sacrifices of property in return.

I am of opinion that Maori will-making should be limited to those who are educated, and have a good knowledge of the English language, and that no European should be a beneficiary.

With regard to ordinary succession to tribal or hapu land, where the next of-kin is not nearer than, say, five removes, I think that the estate in question should go to the hapu, or be used for its benefit.

PER JUDGE JOHNSON.

I do not think that there is anything in the Act of 1894, or amending Acts, to prevent the adoption of any child, whether European or Maori, so long as the Court is satisfied that the adoption was *bona fide*, and “in accordance with existing Native custom.”

In the case of an European child so adopted, it would have the same right to succeed to the adopting parents’ property as would a natural child of the body, unless there should be a special Act in force in any particular district restricting succession to Maoris and half-castes.

PER JUDGE SIM.

No adoption by a Maori of an European is under any circumstances an adoption according to Maori custom, and no such adoption can confer any right of succession to lands of deceased Maoris.

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