

CHAPTER 1

SUCCESSION BEFORE 1909

1.1 Background

1.1.1 English law and terms

In English common law, land is known as ‘real’ property. The common law distinguishes it from all other property, known as ‘personal property’ on the basis that land is immovable, whereas all other property is moveable. The term ‘land’ includes any fixtures to the land such as houses and other immovable structures.

The English common law which was applied in New Zealand from 1840, provided at 1840 that estates in land or real property passed to the eldest son. This rule of primogeniture had its origins in the need to hold estates together for military purposes in Europe in the eleventh and twelfth centuries.¹ Spouses, other children, particularly girls, were of course harshly affected by such a rule. For moveable or ‘personal’ property the common law in 1840 allowed for a slightly more equitable division, in that some property went to the spouse.

These were the rules which applied when a person died without making a written will. Such a person was said to have died ‘intestate’. If a written will had been made, the property (both real and personal) passed according to the will, and the deceased was termed a ‘testator’.

There were various technical rules for ensuring that property of the dead was passed on to the right beneficiaries. These rules differed according to whether a person had died having made a written will or had died intestate. If a will had been made, and a personal representative appointed by the deceased to administer their affairs, the ‘executor’, as they were called, applied to the courts to obtain a ‘grant of probate’, simply a court document noting that a valid will existed and that the executor was the appropriate person to act on behalf of the deceased in all legal matters, such as the disposal of land and other property. If a will had not been made, a personal representative of the deceased would apply for ‘letters of administration’ which had the same basic effect as a grant of probate. A variation on these two situations arose where there was a will, but for some reason (for example, failure to name an executor in the will or the death of the executor), no executor existed. In such a case there would be an application to the court for ‘letters of administration with will annexed’.

1. W S Holdsworth, *A History of English Law*, 1923, vol 3, pp 171ff

1.1.2 Early English ideas about Maori custom

As will be seen, Maori law concerning succession was so quickly subverted by English notions that it is difficult to ascertain exactly what custom existed in a ‘pure’ form prior to the changes brought about by the application of the imported law.² Government views on Maori law were formed as early as 1856 and 1860 when fora of interested persons had met to try and discover Native custom with regard to land tenure. These discussions cast some light on rules relating to succession. In 1856 Governor Gore-Browne convened a board to inquire into the state of Native affairs. After consulting 34 people, including surveyors, settlers, missionaries, various Maori, F D Fenton and Donald McLean, the board issued a report of its findings. It concluded with regard to Native title to land and succession that, ‘Land is inherited in the female line, the constant inter-marriage between the tribes led to the descendants by such lands having claims to land in more tribes than one’.³

By 1860 there was no such consensus. The Bishop of New Zealand told the Governor that any area that was cultivated by an individual Maori became his and this right to cultivate on the particular piece of land could be passed from his children to his grandchildren. This system, according to the Bishop, led to many claimants for one very small area of land. He also thought that there were marriage restrictions, forcing a woman to marry into the tribe of her father, so that her inheritance would not be lost to the tribe. Sir William Martin, in a pamphlet published in 1861, wrote in a similar vein that cultivated land could pass to children and their descendants.⁴ If there were no children, the land reverted to the community.

Busby, former British Resident in New Zealand, claimed that ‘It is certain that the Maoris had no fixed rule to guide them in the disposal of their land. . . . Those who, according to our rules of lineal descent from the common progenitor [ie, the eldest son] ought to have had most to say in the matter had often the least’.⁵ On the other hand, he believed in 1844 that the eldest son chose some part of the land on his father’s death, and the other sons did the same; the daughters received that which their father and brothers left for them.⁶

William Swainson, at one time Attorney-General of New Zealand, had written in 1859 that cultivated land passed from father to son, and this succession could be by way of an oral bequest.⁷ According to his Maori informant, land was passed only to the male children and could be specifically designated:

being on the point of death, his sons and daughters and all his relations assembled to hear his last words and to see him die. . . . ‘[to his younger brothers] be kind to my children. My cultivations are for my sons. Such and such a piece of land is for such

2. Finding and defining this customary law is not in any event within the scope of this report.

3. AJHR, 1856, b-3

4. AJHR, 1890, g-1, p 4

5. AJHR, 1890, g-1, p 11

6. Ibid, p 12

7. Ibid, p 10

and such a nephew. My eel-weirs, my potato gardens, my pigs and my male and female slaves are all for my sons only. My wives are for my younger brother.' . . . The custom as to the female children is not to give them any land, for their father bears in mind that they will not abide on the land.

This oral bequest was known as an ohaki. It was a key Maori custom in matters of succession. White, an interpreter in the Native Office, speaking in 1859, seems to have been discussing ohaki when he gave a lengthy exposition on the subject of hereditary tenure.⁸ He said that the land came through the grandfather. A chief portioned out land to each of his children on his deathbed, but the sons' claim was derived from the grandfather. A chief's granddaughter has equal claim to land with her male cousins, but this claim expired with her granddaughter.

Dr Edward Shortland also discussed ohaki in a work published in 1856 when he wrote that the head of a family had a recognisable right to 'dispose of his property among his male offspring and kinsmen, and that his will expressed shortly before his death in the presence of his family assembled for the purpose, possesses the solemnity of a legal document'.⁹

Thus in the years before the formation of the Native Land Court, there was no consensus as to what the actual rules regarding succession to Maori land and personal property were. Each 'expert' had a particular interpretation based on his experience in a particular region of the country. While there seemed to be a custom of deathbed oral statements, with some similarities to the English concept of *donatio mortis causa*,¹⁰ there was no clear conception of what occurred when no such disposition had been made, either because the deceased chose not to make an ohaki, or when death was sudden.¹¹ Another concern was what occurred when Maori property held by custom was clothed with an English title, a situation growing more common as more Maori land came to be held by Maori under a title from the Crown.

1.2 Nineteenth-Century Legislation and Case Law

1.2.1 The first legislation

The coincidence of these last two concerns prompted the first statute dealing specifically with Maori succession in 1861. The Intestate Native Succession Act provided that where a Maori died intestate with Crown granted property in their possession, that property was to go to successors appointed according to 'Native custom' or 'most nearly in accordance therewith', despite the acknowledged lack of a clear, applicable custom. The Act was required because, for Crown granted property, the English rules of intestate provided that only legitimate children were

8. Ibid, p 12

9. Ibid, p 23

10. A gift of personal property made in contemplation of, and conditional on, death.

11. For example, death by drowning was very common in New Zealand in the last century.

1.2.2 Succession to Maori Land, 1900–1952

entitled to the property. Most Maori children were ‘illegitimate’ by English law standards in 1861 and would therefore not qualify. The land would revert back to the Crown.¹²

Because there was no clear understanding of what ‘Native custom’ was in succession, the Act further provided that a commissioner could be appointed by the Governor to decide who should succeed to the land where there was a dispute.¹³ Subsequent acts followed this pattern of having a European official determine what ‘Native custom’ was. This was problematic in more ways than one. Even if the official could form an accurate view of what Maori custom required where traditional Maori property was involved, how should that custom be applied to property which had recently been given a completely new legal form?¹⁴ It was hoped that the Act would ‘tend to form a custom among the Natives, which, when once generally recognised, could be stereotyped, and a law of descent based upon it.’¹⁵ Parliamentarians at the time spoke with regret about the Maori reluctance to make written wills, which would have solved this dilemma.

1.2.2 Early native land legislation

The laws regarding succession prior to the Act of 1909 are confused and difficult to summarise. Apart from the major acts that legislated specifically for succession and Maori land, there were numerous other statutes that had a bearing on the matter. There were constant amendments. In a judgment in a case before the Supreme Court in 1902, Sir Robert Stout commented that: ‘The number of statutes now dealing with Natives and their affairs is legion and some of their provisions are by no means clear . . . A Native land law is passed almost every year, and how Natives can understand what the laws are that affect them and their interests I do not know. I find great difficulty in understanding Native legislation.’¹⁶

The Native Lands Act 1865 gave the newly constituted Native Land Court the jurisdiction to deal with succession both to land owned by Maori under their customs and usages and land which had been clothed with English title. Such land was termed ‘hereditaments’ in the Act,¹⁷ and is defined today as ‘Maori freehold land’. Succession was in both cases to be determined ‘according to law as nearly as it can be reconciled to native custom.’¹⁸ The wording is telling, because it recognised the difficulty the court faced, in finding an existing custom for what in the case of ‘hereditaments’ or Maori freehold land was a new form of legal property for Maori.

12. See *Willoughby v Panapa Waihopi* (1910) 24 NZLR 1123 at 1133.

13. Section 2

14. In this regard, a commissioner could recommend ‘any special Trusts or conditions’ which might apply when the Governor made a grant of the land to the appropriate successors found by the commissioner.

15. 1861–63, NZPD, p 72

16. *Izard v Mahupuku* 22 NZLR at 424

17. Section 2

18. See ss 30–35, 45

In addition, the statute provided that the names of only 10 owners were to be listed on the title to land which had been investigated by the court if it was under 5000 acres in extent, regardless of the number of owners in the block. Reducing the undefined Maori customary ownership to a list of owners had immediate implications for succession. English law provided that, if the listed owners were regarded as ‘joint’ owners (the legal term was ‘joint tenants’), then on the death of an owner, their share in the land passed to the surviving owners. If the listed owners were regarded as owners in ‘common’ (the legal term was ‘tenancy in common’), then on the death of an owner, their share passed to their next of kin. According to one commentator, until October 1867, the land court applied the law as if the owners were joint tenants, and Maori freehold land was thus not available on succession to descendants of the deceased.¹⁹ The injustice was compounded by the fact that the land court judges ignored the provision of the Act that land over 5000 acres should be vested in a tribe rather than 10 individuals.²⁰ Further research would be required to ascertain how widespread this practice was and how many acres of Maori land were affected.²¹

In 1876 the Intestate Native Succession Act extended the powers of the land court in succession matters by empowering the court to determine succession to the personal property of Maori dying intestate. The bill was drawn up in response to the case of a chief in Thames, who on his demise had £7000 in the bank. His widow applied for letters of administration so that she could have access to these funds, but was refused because she could not prove legally that she was married.²² This case convinced the authorities that the general courts were not equipped to or ought not to deal with such matters and so the power passed to the Native Land Court. The measure appears to have received bipartisan support.

1.2.3 The *Papakura* decision

Apart from these legislative changes, the most significant legal event to affect succession to Maori land was a decision of the Native Land Court in 1867 which set the pattern for all future discussion and action on succession to Maori land. The case, published by Chief Judge Fenton in his book, *Important Judgments of the Native Land Court*,²³ concerned a Maori male who had been Crown-granted an estate of 1,120 acres and who had died intestate. His widow applied to the land court to succeed on behalf of herself and her three children, one girl and 2 boys. Her application was contested by a cousin of the deceased and other members of his tribe.

19. The Native Lands Act 1867 became law on the 10 October 1867. Section 17 provided that all owners of any block of land should be put on the title, not just 10 names. A tenancy in common arrangement was implied. The Native Lands Act 1869 s12 made this explicit.

20. AJHR, 1884, sess 2, ‘Memorandum by Mr W L Rees’, pp 1–2

21. 23 June 1881, vol 23, NZPD, pp 176–177. The practice and some specific examples were discussed during the passage of the Native Succession Bill 1881.

22. 1876, vol 23, NZPD, p 559

23. Published in Auckland in 1879.

Fenton interpreted the Act of 1865 to mean that ‘English law shall regulate the succession of real estate among the Maoris except in a case where a strict adherence to English rules of law would be very repugnant to native ideas and customs.’ Land, once under a Crown grant, should not be considered tribal land. It would indeed be ‘highly prejudicial’ to allow ‘the tribal tenure to grow up and affect land that has once been clothed with a lawful title.’ There were ‘no equities in favour of the tribe’ and the ordinary law, that is, primogeniture, should apply – but with one exception. Fenton thought that the ‘the descent of the whole estate upon the heir-at-law could not be reconciled with native ideas of justice or Maori custom.’ The court awarded the land in favour of all the children equally.²⁴ Fenton did not give any detailed reasons for deciding this way, apart from his comment that primogeniture would not reconcile with ‘native ideas of justice or Maori custom’. In 1871 another land court judge was to write firmly that there was ‘no indefeasible hereditary right limited to any one member of a family at all answering to our ideas of inheritance by primogeniture’.²⁵

It should be noted that there was no question of illegitimacy in terms of English law – Fenton referred to the wife as a widow, and the children as ‘born in wedlock’. Whether there had been a formal marriage in English law terms or not is unclear. Fenton may have been reflecting on the fact that an 1847 marriage ordinance exempted ‘Native marriages’ from English law rules. John Salmond in his note on the 1909 Native Land Act²⁶ said that:

By Maori custom the contract of marriage was created without any formality of celebration, and polygamous marriage was allowed. Such customary marriages were recognised by law as sufficient for the purposes of succession to the estates of Maoris and half-castes, whether the estate consisted of land or personal property, and whether the land was customary or freehold. No such marriage, however, was valid for any other purpose.

As will be seen, however, Maori marriages did cause some legal problems later in the century.

It also worth noting that at English law, a wife was entitled to a limited estate in her husband’s land known as a right of ‘dower’.²⁷ This was the right to live for the rest of her life on one-third of the husband’s land which any heirs of the husband might inherit. Fenton made no mention of this.

The judgment raises several interesting questions by what it does not say. What was it in Maori terms about the interest of the girl and her younger brother that meant Fenton did not simply vest the land in the eldest son? Why was he able to so easily ignore the widow without any protest from her or others?²⁸ And what would an ‘equity in favour of the tribe’ have looked like anyway? Presumably this refers

24. Ibid, p 20

25. AJHR, 1890, g-1, p 21

26. See 1931 Consolidation of New Zealand Statutes, vol 6

27. Holdsworth, pp 189ff

28. As will be seen later, this approximated Maori custom in some areas.

to the possible existence of a trust in favour of the tribe – of which, as will be seen, in future years only one or two very limited examples were ever recognised.²⁹

1.2.4 The attempt to replace Maori custom

Fenton's *Papakura* judgment introduced some elements of English law to Maori succession. In 1881 the Native Succession Act attempted to take the matter further. While the Act provided that succession to land still held by Maori custom was to be decided according to custom, succession to 'hereditaments' or land held under a title derived from the Crown, was to be 'guided by the law of New Zealand' – with the proviso that marriages according to Maori custom were to be recognised. Another concession to custom was that informal wills or writing in the nature of a will could be given effect to.³⁰ Personal property was to pass according to Maori custom.³¹

The change was not made without some debate about its merits. The reasoning in favour of the measure appears to have been that once Maori held land under a Crown grant, this signified their consent to bring their lands under the rule of English law. However, at least one MP spoke against the bill, arguing in favour of subjecting all Maori property to the rules of Maori custom. He highlighted the difference between Maori and European law in relation to male and female inheritance. Under Maori custom, 'The property of Maori women descended according to well-regulated usage' and should not go to husbands, as under English law.³²

As to the provisions recognising informal written wills, the Maori MP Ngatata welcomed this measure, but pointed out that *ohaki*, the primary means of passing property, should also be explicitly recognised.³³ There was some discussion of how joint tenancy arrangements were defeating the intentions of Maori owners in some parts of the country. Ngatata noted a case involving land at Te Aro where women in particular were being excluded from titles by the application of the joint tenancy rule, that is, where the deceased was a woman, the interest in the land of the deceased was not being passed to her descendants, but to the surviving other owners in the land.³⁴ This suggests that there was some discrimination against women. The landed interests of women were poorly protected by the English law of succession and this attitude was to cause trouble in the South Island – as will be seen later.

This attempt to extend English law rules more generally to Maori succession lasted only a year. This was apparently because the 1881 legislation was found to be 'repugnant to the ideas of the Natives and . . . contrary to their customs',³⁵ the

29. See under the heading 'Tribal Equity' below.

30. Section 4

31. Section 6 and preamble

32. 1881, vol 38, NZPD, p 176

33. *Ibid*, p 177

34. *Ibid*, p 177

35. *Willoughby v Panapa* (1910) 24 NZLR at 1128

Native Land Acts Amendment Act 1882 amended the 1881 Act to provide that the court should decide succession of land with a Crown derived title ‘according to the law of New Zealand as nearly as can be reconciled with Native custom.’³⁶

According to a comment of the Chief Justice in 1910, this provision ‘apparently [made] the Native custom subordinate to the law of New Zealand’.³⁷ That would certainly seem to follow from the approach taken by Fenton in the *Papakura* case. However, in a decision in 1890 the Supreme Court thought that the phrase ‘according to the law of New Zealand as nearly as can be reconciled with Native custom’ meant that Maori custom should in fact be paramount. The court held that if the ‘law of the colony respecting descents and successions cannot be reconciled with Native custom, the latter it would seem must prevail.’ Ordinary colonial law was to be allowed ‘at most, a qualified operation’.³⁸ So what was the approach of the land court to succession in these years?

Even a cursory glance through land court minute books of last century suggests that its approach to succession orders generally followed Fenton’s 1867 ruling. Interests in land were regularly split equally among all the children of the deceased. This was not however the only approach. The court was dependent on applicants for succession bringing before it a list of the children entitled, or successors to the children if they had died before the deceased. Splitting the land between many successors could not only make future dealings with the land complicated, it could also complicate sales or leases which were already in contemplation when the succession orders were applied for. For example in 1877 Henry Mitchell reported from Rotorua that in one block of land a ‘successor had to be appointed to a deceased grantee, and we obtained a unanimous application in favour of one individual as this successor, who signed the deeds’.³⁹ How widespread the practice was of deliberately reducing the number of persons listed in a succession order either to facilitate alienations or limit future fragmentation of the land cannot be gauged without a careful study of land court minute books and orders last century. However, as these practices were relatively common in the twentieth century, as will be seen, it is likely they were also common before 1900.

In 1883, in response to Maori demand, the Native Committees Act set up committees of Maori to arbitrate on various issues involving Maori, including succession. The powers of these committees were very limited, as they could only ascertain successors and report their findings to the land court.⁴⁰ Research has not been undertaken to show how often this provision was used. Possibly committee meetings would have formalised any informal arrangements which Maori made among themselves before taking succession applications to the land court.

The land court judges themselves admitted there was not total unanimity in their rulings on Maori custom. In 1887, before a commission established to investigate

36. Section 4

37. *Willoughby v Panapa* (1910) 24 NZLR at 1130

38. *Pahoro v Cuff* (1890) 8 NZLR at 757

39. AJHR, 1877, g-7, pp 11, 7

40. Section 14

certain land claims, Judge Alexander MacKay agreed that each district adopted its own view as to what Native custom was, within the bounds of broad guiding principles.⁴¹ Chief Judge John Edwin MacDonald, also speaking before the same commission, argued that there was general uniformity but that every judge ‘must have his own decisions in the first case to guide him, and then he would have the decisions of other Judges in a most handy form. Judge Fenton’s book touches almost every subject.’ The Chief Judge said that it was from this book, and the reports of judgments in the newspapers, that he had received most of his knowledge. On being asked if he thought the court should have fixed rules regarding native customs, he replied that this was not necessary, as his judges could be guided by precedents, as Supreme Court judges were.⁴² Judge Manning, writing to the Chief Judge in the same year, said that:

The requirement made of the Judges of the Native Land Court is one much more easy to make than to fulfil, not that the questions put are unanswerable, but that they, in effect, contain a requisition that the Judges, or each of them, do enunciate and fix in writing a hitherto unwritten law, parts of which are still doubtful and subjects of debate. . . . A mere series of dicta by a Judge affirming the nature of Maori title, the customs affecting land held under it, and the modes by which it may be acquired, ceded or forfeited, would be, unless accompanied by quotation of precedents established in the Courts, or by the acts and proceedings of the Natives themselves for some considerable time back, entirely without authority.⁴³

He added that while the Native Land Court determined claims strictly according to custom and the individual judge must be a master of that custom, there was no fixed principle. Where knowledge of that custom was lacking, the gap was filled by the principle of ‘natural equity’.

1.2.5 The 1891 commission

The lack of clear guidelines on what was to happen with Maori succession is apparent in the report of the Rees Commission of 1891. The commission was established in response to complaints about the operation of Native land legislation generally. The laws regarding Maori land were said to be chaotic, contradictory and unworkable and the processes of the land court were said to be expensive and time consuming. One problem area was the sheer number of successions with which the court was expected to deal. The commission commented that:

deaths are occurring at the rate of at least fifteen hundred a year. To these there will be certainly three thousand successors. Even now the undecided claims to succession are exceedingly numerous. Frequently the applicant dies before his claims to succession are heard . . .⁴⁴

41. AJHR, 1887, sess 2, i-3c, p 4

42. Ibid, p 6

43. AJHR, 1890, g-1, pp 17–21

44. AJHR, 1891, g-1, p xvii

Accordingly, a recent requirement that the land court define in all new titles and in partitions the exact shares of all the Maori owners appeared more as a ‘gigantic practical joke’ than a serious proposition imposed by the Parliament for an area that was ‘notoriously in arrears’.⁴⁵

Other evidence presented to the commission indicates that succession orders made by the court in accordance with the court-generated ‘custom’ had begun the process of Maori land fragmentation. Judge Puckey told the commissioners that the ‘greater the number of owners who fall out through death, the more difficult it becomes to acquire, on account of successions.’ A private purchaser would have almost no hope of obtaining all the necessary signatures to a large block in one lifetime, although the Crown might be able to.⁴⁶

There were other issues. Theophilus Cooper, a barrister and solicitor practising in Auckland, spoke of confusion as to which statutes actually applied to succession. Not only the native land acts, but also the Land Transfer Act 1889 dealt with Maori probate and Maori wills.⁴⁷ Another solicitor discussed the confusion surrounding the provisions for wills and in the powers of trustees appointed to look after the interests of minors:

With regard to the question of wills generally, I may point out that ‘The Native Land Laws Amendment Act 1890’ gives the Native Land Court concurrent jurisdiction with the Supreme Court as to probate of wills. . . . Under sections 44 and 49 of the Native Land Court Act of 1886 there is power given to the Native Land Court to recognise an instrument, which though not a formal will, is considered by the Court as intended for such, and this peculiarity might arise: application might be made to the Supreme Court for probate of the will and probate might be refused on the ground that it was not an instrument on which probate could be given by the Court; and yet the same instrument might be afterwards taken to the Native Land Court and be given effect to, under sections 44 and 49 of the Native Land Court Act of 1886. I cannot help thinking that the whole question of testamentary dispositions with regard to Native matters deserves more attention than it has received from the Legislature.⁴⁸

He went on to speak of the ‘very wide question’ of Maori marriages, particularly after the case of *Rira Peti v Ngaraihi te Paku*, in which the Supreme Court held that Maori marriages were not valid.⁴⁹ According to the lawyer, ‘we are gradually getting into a state of hopeless confusion by associating English ideas with matters of this kind.’ In *Rira Peti*, Chief Judge Prendergast ruled that simply exempting Maori from the statutory rules governing English marriages did not mean that Maori custom with regard to marriage applied. Rather English common law applied. That decision threw into doubt any wills which Maori might have made

45. Ibid. An interpreter working in the land court also commented on the long delays in hearing succession cases, and of the death of many successors before the court heard their applications – ibid, p 125.

46. Ibid, p 67

47. Ibid, p 85

48. Ibid, pp 106–107

49. (1888) 7 NZLR 235

naming a spouse as a beneficiary, where that spouse was not married according to English common law. It also apparently had implications for the level of succession duties paid.⁵⁰ There was the further issue of who was liable to pay succession duties, since a recent decision had determined that successors in Maori terms were not heirs in terms of English law, and therefore not subject to the usual English laws about the liability of an heir to pay debts of the deceased.⁵¹

In 1894, as a result of the report of the Rees Commission, an attempt was made to clear up the many issues surrounding succession. The Native Land Court Act 1894 gave the court exclusive jurisdiction over probate and administration. In all succession matters, Maori custom was clearly to predominate. The definition of a ‘successor’ in the legislation provided that the term applied to the person who ‘according to Native custom, or, if there be no Native custom applicable to any particular case, then according to the law of New Zealand’ was entitled to any land or personal property.⁵² This essentially enacted the Supreme Court view in *Pahoro v Cuff*.

1.2.6 Ohaki

Given this approach, it is odd that the only major legislative change in succession law from 1894 to the turn of the century was an amendment in 1895 ending the ability to pass land or personal estate on the basis of perhaps the best known ‘pure’ Maori custom in relation to succession – ohaki.⁵³ According to the land court judges,⁵⁴ its essential features were:

- a verbal expression of wishes and intentions made shortly before death;
- made in the presence of or made known to near relatives;
- seldom or never made in favour of a complete stranger; and
- held binding and to be acted on, without question, on death.

Note that there are several important differences between the donatio mortis causa and an ohaki. A key difference was that a donatio mortis causa could only dispose of personal property. An ohaki could pass both land and personal property. Also, an ohaki concerned much more than a simple disposition of property rights. It might cover political and social arrangements also, as well as instructions on the burial of the deceased.⁵⁵

Valuable evidence about the court’s dealings with ohaki in this period is revealed in a judgment concerning a ‘Ngatiawa’ man who died in 1885 and left his property to his wife from another tribe, his daughter, and several close relatives who had occupied his kainga, including the person who brought the matter before the land court, a first cousin once removed. There was debate over whether, before he had died, the deceased had made an ohaki in favour of the cousin. Alternatively, the

50. Surviving spouses paid different duties than ‘strangers in blood’. AJHR, 1891, g-1, p 107

51. *Poaka v Driver* (1890) 9 NZLR 765 and see AJHR, 1891, g-1, p 107

52. Section 2 and *Willoughby v Panapa* (1910) 24 NZLR at 1130

53. Section 33 of the Native Land Laws Amendment Act 1895

54. AJHR, 1907, g-5, reports on a discussion in 1895 by Judges Edger and Mair.

55. Firth, p 358 quoted in Law Commission report, p 27 and see example there p 27.

court was invited to treat a document dated 1880 as a will. The case involved a full discussion of the way in which ohaki worked in the lower North Island. One witness said that in earlier times only chiefs made wills (ie ohaki). The chief would observe who was trustworthy, such a person would usually be a relative and would be relied on to look after the chief's dependents. An ohaki might be given long before, or immediately before death. It was customary after death for relatives of a chief to meet and talk about the ohaki. Another witness argued that an ohaki would usually make some provision in favour of the chief's wife, and that if any property were left to a young child, the child would not hold it, but some responsible person whom the chief trusted. If the chief had a child by a wife of a different tribe and a child by a wife of his same tribe, the child of the same tribe would be preferred, and a male preferred to a female. The witness also stated that in some tribes, in earlier times, a wife from another tribe would be told to return to her former tribe, with any children of that union, but that now, 'following European custom' the wife remained. Legal counsel in the case explained that the many Maori customs in this area which appeared at variance from English customs were explained by the fact that it was never forgotten that the needs of the tribe had to be taken into account.⁵⁶

This case confirms that the land court had caused some change in the custom law, but also illustrates that custom had been adapted to fit the requirements of the land court system.

The reason for the change in 1895 appears to have been a Native Appellate Court decision in that year confirming that Maori freehold land could pass by means of an ohaki.⁵⁷ Comments in the Native Appellate Court in 1923 suggest reasons for the change:

It is without question that there was no such thing as a written will in use amongst the ancient Maori. The nearest approach there was to a post mortem disposition was the 'ohaki'. . . . The wishes as expressed were generally religiously respected and it has been the practice for the purpose of subsequent succession to treat property so derived in the same manner as would be done in the case of an ordinary gift. As time went however and the Native holding converted into European title, property became more valuable . . . disputes difficult to settle arose as to what was really meant on the cession of the 'ohaki'. The donor would often express himself in cryptic language and give names, boundaries and descriptions of land and qualified directions that were by no means clear and it became incumbent to place this kind of disposition upon a more satisfactory footing. By a few words added at the latter part of section 33 of the Native Land Laws Amendment Act 1895⁵⁸ the custom of ohaki as a founding title to land was done away with and thereafter the written will executed with the ordinary solemnities in addition to the special safeguards laid down by the Native Land Act became the sole means of post mortem distribution.⁵⁹

56. 7 Wellington, ACMB, 16 October 1900

57. Law Commission p 41. Not located.

58. The section provided 'No interest in land or personal estates shall pass by an unwritten will or ohaki.'

59. 10 Aotea, ACMB, p 387.

Simple abolition did not, however, end the use of such an important Maori law. The judges of the land court in effect continued to apply it for some years after 1895. For while an ohaki could no longer operate to pass real property to another, it could qualify the nature of any other disposition, and the court had to consider what effect this qualification would have. For example, if land was held under a gift, the land court had to determine on death whether the property was ‘to be treated as if it were acquired by gift and on the strength of old Maori custom affecting gifts to return to the donor in case of the donee’s death?’⁶⁰ Evidence of an ohaki and instructions about what should happen to the property after death would help to resolve this issue. The land court also used the existence of ohaki as evidence where disputes concerning the rights of whangai arose, for example, whether it was intended that a foster child should inherit property. The judges also seem to have continued to use ohaki to determine how undivided interests in land, as opposed to the ownership of whole blocks, might pass. They also appear to have treated wills in some instances as ohaki. It was said in 1907 that:

Under the changed circumstances of today, 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 fulfils this essential of an ohaki, it can, we think, have effect as such.⁶¹

1.2.7 Whangai

Another matter of Maori custom law which gave the land court judges some problems was ‘whangai’. The land court generally upheld the Maori custom law. In a 1906 case, it was said:

In dealing with questions of Maori custom, the difficulty is becoming daily more pronounced of disentangling genuine custom from the encrustations 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 parents 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 enquire 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

60. Ibid

61. Supra note 45.

1.2.7 Succession to Maori Land, 1900–1952

believe would have been impossible in earlier times, is now in the highest degree improbable.⁶²

The land court understood that by treating custom in this way, it was partly enshrining it in English law, but also modifying it. As the Native Appellate Court put it:

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.⁶³

There were limits to how far the court would go however. Where Maori custom might produce a rule which varied considerably from English law rules, the English law prevailed. In the case that the following quote is from, the court had to consider whether to ‘enlarge or further define’ Maori ‘custom’ by agreeing that (a) a whangai would be entitled to succeed his foster-sister, notwithstanding that such foster-sister had been herself a whangai of a different family; and (b) that foster-parents of a whangai were entitled to succeed to interests of the whangai. The court held:

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.

The Court looked at existing legislation on adoption, which provided that adopted children did not have rights to succeed to their foster sisters or brothers, but could only succeed to property directly from the adopting parent. Parents could succeed to the property of children they had adopted who died before them. The Maori custom of whangai had different rules. However the court found that:

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

62. 1907, AJHR, g-5, p 19

63. Ibid, p 18

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 would 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.

Once again, ‘natural equity’ seemed to be a consideration.

1.2.8 The position up to 1909

By the end of the nineteenth century, the position with Maori custom in relation to succession was as follows:

- Native custom was to be paramount in succession questions, and the Native Land Court was the body designated to determine that custom.⁶⁴
- Native land held under custom and not Crown granted could not be devised by will to a European. This would be equivalent to making a European an owner according to Maori custom, which would create an impossible situation on the death of the European as ‘succession to his interest could not be determined in any way’.⁶⁵
- Crown granted Native land owned by a Maori could, however, be succeeded to by a European.⁶⁶

Strangely, this issue did not arise until 1891 when it was referred by the Native Land Court to the Supreme Court, suggesting that there were very few wills and/or dispositions to Europeans by will before this time. There is no evidence to suggest that this decision resulted in a flood of land leaving Maori hands by way of will in favour of Europeans. Any such arrangements would have been caught anyway in the general restrictions on the alienation of Maori land to other than the Crown, beginning with the Native Land Court Act 1894, which forbade anyone but the Crown from ‘acquiring’ land, a term which seems to have included any ‘testamentary disposition’ ie will.⁶⁷ There were, however, instances where Europeans obtained personal property of Maori under a will. In 1906 the land court considered the case of Wi Matua, who died with an estate valued at £20,000. Because ohaki were no longer valid, before his death Wi Matua and his people had held meetings to decide how to dispose of the property and a committee had been formed to embody these decisions in a will. Then the chief took a second wife who was a heavy drinker, as he was, and a Pakeha settler had ingratiated himself with

64. *Pahoro v Cuff* (1890) 8 NZLR 751

65. *Robertson v Wilson* (1890) 9 NZLR 602

66. *In re The Mangapai Block* (1891) 10 NZLR 321

67. See s 117, Native Land Court Act 1894

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the chief and had a will drawn up in English, which Wi Matua did not understand, and which left his property to his wife and the settler.⁶⁸

There were doubts whether lands subject to specific restrictions against alienation could be passed on by will.⁶⁹ As will be seen, these sort of rulings caused particular trouble in the South Island.

A succession order was not granted according to the English rules of inheritance but according to Maori custom or usage and therefore a successor appointed by the Native Land Court for any deceased Maori under the Native Land Acts was not liable for the debts of the deceased, ie the English rules of an heir-at-law did not apply.⁷⁰

Two particular Maori customs, ohaki and whangai, were recognised in the courts, but in a limited fashion.

For all this apparent acceptance of custom, albeit in a somewhat modified form, there remained in the general courts (ie courts other than the land court) a fundamental doubt about whether there could be any ‘real’ Maori custom in relation to properties held under a title derived from the Crown. As Stout J put it in a 1902 case:

I do not know how there can be said to have been any Native custom relating to the devising of lands held in fee-simple. Such a title was unknown to the Maoris, and the mode of devising such land was therefore unknown. The Maoris had ordinarily no individual holdings – their land was tribal land; though I understand that in some rare instances a chief or some favoured individual was allowed certain separate rights regarding certain parts of the tribal land.⁷¹

This ambiguity towards Maori custom was to be a feature of succession law in the coming years.

68. AJHR, 1907, g-5. See at the same reference other decisions on wills made in favour of Europeans which were attacked as fraudulent.

69. *Mahupuku v Australian Mutual Provident Society* (1894) 13 NZLR 247, which decided land with a restricted title is not alienable by will. And also *Henare Whakatau Uru v Hohepa te Rangi* (1904) 24 NZLR 390.

70. *Poaka v Driver* (1890) 9 NZLR 765. This applied to debts such as monetary debts only however. Debts owed which attached to the land itself, such as survey leins, were subject to a different regime.

71. *Izard v Tamahau Mahupuku* (1902) 12 NZLR 424–425