Privy Council Appeal No. 61 of 1919.

Hineiti Rirerire Arani - - - - - - *Appellant*

v.

The Public Trustee of New Zealand - - - - - *Respondent*

and

Matilda Lindsay and another - - - - - (*Interveners*)

Same - - - - - - - - *Appellant*

v.

Same - - - - - - - - *Respondent*

and

Same - - - - - - - - (*Interveners*)

(Consolidated Appeals)

FROM

THE NATIVE APPELLATE COURT OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JULY, 1919.

Present at the Hearing:

LORD BUCKMASTER.
LORD ATKINSON.
LORD PHILLIMORE.

[*Delivered by* LORD PHILLIMORE.]

These are appeals brought by special leave from two decisions of the Native Appellate Court of New Zealand, the first reversing and the second affirming the decisions of the Native Land Court.

The power of His Majesty by virtue of his prerogative to hear in his Privy Council appeals from this Court was affirmed by this Board in the case of *in re Wi Matua's Will* [1908], A.C., 448. The questions to be decided are whether a Maori married couple can adopt a European child so as to give the child the legal status of their child, and whether, further, a child so adopted

can succeed as a Maori child could to inalienable native lands, the successions having accrued before the Act No. 15 of 1909 which removed many of the restrictions on the alienation of such lands.

Erueti Arani and Mariana Pine, were two full-blooded Maoris and were husband and wife. According to Maori custom a man may have more than one wife, but in this case there was no other wife. The couple were minded to adopt children, and in about the year 1896 adopted a Maori girl, Hineiti Rirerire Arani, who is the present appellant, and in the following year a European child, Matilda Lindsay, to whom was given the name of Hurihuri Mathilda Arani, who is the principal intervener and respondent in the present appeal. Later on they adopted another Maori child, a boy, who is the other intervener in the present appeal; and still later the husband took some abortive steps to adopt a fourth child, again an European.

Maori custom recognises the practice of adoption which apparently gives the adopted child all the rights of a natural born child; but it is contended that this custom does not admit of the adoption of children who have not Maori blood in their veins.

It does not appear in the case whether there are any special ceremonies or requisites to prove a Maori adoption, but it is stated that the adoption of a child, according to Maori custom, has always been an event of notoriety and made with the expressed or tacit approval of the tribe. There is no doubt that sufficient was done in the case of the Maori children to comply with Maori custom, and it is not denied that if Matilda Lindsay were eligible for adoption sufficient was done in her case to make the adoption good according to Maori custom also.

By "The Adoption of Children Act, 1895," upon the application in writing in the prescribed form to a Judge by husband and wife jointly an order of adoption may be made by the Judge in favour of the applicant. "Child" is defined as any boy or girl under the age of 15 years. By section 7 of the Act,—

> "When an order of adoption has been made, the adopted child shall for all purposes, civil and criminal, and as regards all legal and equitable liabilities, rights, benefits, privileges and consequences of the natural relation of parent and child, be deemed in law to be the child born in lawful wedlock of the adopting parent."

There are certain restricting provisos which are not material in the present case.

On the 11th January, 1900, the husband and wife applied for and obtained an order of adoption under this Act in favour of the respondent, Matilda Lindsay.

After the passing of the Native Land Claims Adjustment and Laws Amendment Act, 1901, and in order to comply if possible with its provisions, the husband and wife, on the 23rd October, 1903, applied for registration of their adoptions in accordance with section 50, and on the 19th November, 1903,

notices of the adoption of the three children, the two Maoris and the respondent, Matilda Lindsay, were gazetted in the New Zealand Government *Gazette* and the Maori *Gazette*.

The husband died on the 21st November, 1907, having made a will by which after the death of his wife his property was to pass to such of his four adopted children as should be living at the death of his wife. He appointed the Public Trustee executor, and the latter having obtained probate, made an application to the Native Land Court to determine who were the successors to the inalienable lands of Erueti Arani. That Court, on the 30th April, 1908, determined that the two Maori children and they only were entitled to succeed, to the exclusion of Matilda Lindsay and the European boy, who had not been effectively adopted. From this decision the Public Trustee appealed to the Native Appellate Court, which varied the order of the Land Court, and on the 8th October, 1908, admitted Matilda Lindsay to share in the succession.

Mariana Pine, the wife, died in the year 1908, and upon her death the succession to certain other inalienable lands became open. Application was again made to the Native Land Court to determine the succession, and the Court, this time following the previous decision of the Appellate Court, on the 15th November, 1909, admitted Matilda Lindsay to share. Thereupon the present appellant appealed to the Native Appellate Court, which on the 18th July, 1910, dismissed the appeal. It is from these two orders of the Native Appellate Court that the present appeal has been brought.

The reason for the first decision of the Native Land Court was expressed in the following words :—

> "The Native Land Court Acts only provide for mode of registration of a Maori adoption, and before such a 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. Within the last few years there have been many attempts to adopt European children, but the Court has not countenanced this. A Maori cannot adopt and register under the Native Land Court Acts any child unless such child has Maori blood in its veins."

On the other hand the judgment of the Appellate Court was as follows :—

> "We are of opinion that, as the case was presented to the Native Land Court, the decision of that Court was correct; but it has now been proved to us that this child was on the 11th January, 1900, adopted under the provisions of 'The Adoption of Children Act, 1895,' by the deceased Erueti Arani and his wife Mariana Arani. Presumably, in order to avoid any question being raised as to the effect of section 50 of 'The Native Land Claims Adjustment and Laws Amendment Act, 1901,' the adoption was in 1903 registered in terms of that section. We do not see anything in 'The Adoption of Children Act, 1895,' excluding Maoris from its operation. . . . The Order of Adoption under that Act gives the adopted child the legal status of the child born in lawful wedlock of the adopting parent. Having acquired such status, it follows that according to Maori custom the child is entitled to succeed to its adopting parent's estate in common with his other children, if any."

It was pointed out by Counsel for the appellant that the Native Land Court had found that the Maori custom of adoption did not admit of the adoption of European children, and that the Appellate Court had accepted this view, and that consequently their Lordships had to treat this as a settled matter. This may be so, and therefore it may be that Matilda Lindsay was not and could not have been adopted according to Maori custom, but she may well have been adopted according to the general law of New Zealand.

In this connection it may be well to notice that by Act No. 11 of 1865, section 2, " Every person of the Maori race within the colony of New Zealand . . . shall be taken and deemed to be a natural born subject of Her Majesty to all intents and purposes whatsoever." These provisions are re-enacted by the consolidating Act of 1908, No. 126.

It would, therefore, appear that a Maori has the same rights of availing himself of the Adoption of Children Act as a person of European descent. The maxim " generalia non derogant specialibus " was relied upon on behalf of the appellant, but this is no case of derogation but of facultative addition. The right of the Maori to adopt according to his own custom is not interfered with by giving him a further right to adopt in the form and under the conditions provided by the Act.

Under this Act " child " is defined as meaning any boy or girl under the age of 15 years, " adopted child " as meaning any child concerning whom an Order of Adoption has been made as in the Act provided, and section 7 already quoted gives to a child for whom an Order of Adoption has been made the same privileges as if it were a natural born child of the adopting parents.

In this state of the law the Appellate Court held that, as the child had acquired the legal status of a child born in lawful wedlock, it was, according to Maori custom, entitled to succeed to the adopting parents' estate in common with any other children. This may be interpreted as meaning that the paramount Maori custom is that an adopted child has the same capacity of succession as a natural born child, and that, given that the child has been adopted, Maori custom does not look behind the fact of adoption, but gives the adopted child its full rights.

Their Lordships think that the judgment can be supported on this ground. They have been referred by Counsel to an interesting series of judgments in the Native Courts reported in the form of a return to the House of Representatives in 1907 in which there are several cases about adoption and succession well worth examination. In one of these cases decided by the Native Appellate Court in 1906, called " The Blake-Wellwood Appeal," children mainly of European descent, but having some Maori blood in their veins, were held to be capable of adoption according to Maori custom, and it was admitted at the Bar that this

was the true state of the law. In that case the Appellate Court said :—

> "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."

It may well be that this is a sound view of the law, and that the Maoris as a race may have some internal power of self-government enabling the tribe or tribes by common consent to modify their customs, and that the custom of such a race is not to be put on a level with the custom of an English borough or other local area which must stand as it always has stood, seeing that there is no quasi legislative internal authority which can modify it. There is another decision of the Appellate Court in an appeal regarding the succession to Heni Hekiera from which a similar principle may be deduced.

During the course of the argument at their Lordships' Bar an affidavit by a distinguished New Zealand Chief was tendered as furnishing additional evidence of Maori custom. Their Lordships were not required to decide whether it was admissible at this stage or not. They have looked into it to see whether it would furnish any guide for further enquiry, but upon careful perusal it adds nothing to the statements as to Maori custom as they are to be gathered from the several decisions in this case and those contained in the report to the House of Representatives.

The judgment of the Appellate Court in this case may also be supported as based upon the express provisions of the Adoption of Children Act. So far, therefore, as any points were raised in the first case, the judgment under appeal in that case seems to their Lordships to be right.

But upon the second appeal when the question of succeeding to the wife's estate arose, a further point was taken against the claim of the respondent, which was based on the Native Land Claims Adjustment and Laws Amendment Act, 1901.

> "Sect. 50.—'No claim by adoption to the estate of any native dying after the 31st day of March One thousand nine hundred and two shall be recognised or given effect to unless such adoption shall have been registered in the Native Land Court in accordance with regulations to be made as hereinafter provided.
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> . . . . . .
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> "'The Governor in Council is hereby empowered to make such regulations as to the form and manner of such registration and the fees to be payable in respect thereof as he may deem necessary or expedient.'"

Regulations made by the Governor under this Section were gazetted in December, 1901, and provided (Regulation 1) that notice of adoption in the following form should be gazetted

in the Government Gazette and the Kahiti (or Maori Gazette), viz.—

"To the Registrar of the Native Land Court.
"District.
"I (We) of
hereby give notice that I (we) have taken
a child of and to be my (our)
adopted child according to Maori custom, and I (we) request that such adoption be registered under the provisions of section 50 of The Native Land Claims Adjustment and Laws Amendment Act, 1901.
"As witness my (our) hand(s) this day of
19 .
"Signed by the said
in the presence of ."

The Regulations also required (Regulation 5) the Registrar of the Native Land Court after registration of such notice to gazette the same in the Government Gazette and the Kahiti (or Maori Gazette).

The actual notice of adoption has not been produced to their Lordships, but their Lordships have been asked to infer that it followed the form provided by the regulation. It is contended that such a notice must be bad, as the form purports to state that the parents have adopted a child according to Maori custom, and this child could not be adopted according to Maori custom. The Appellate Court rejected this contention, and their Lordships think correctly rejected it. The matter may be looked at from either of two points of view. Either the section must be taken to be confined to cases of adoption according to Maori custom, and, if this be so, this child was not deprived of her right to claim against the estate of her native adopting parent by the restrictive provision of the Act; and this was probably the intention of the Legislature; or the form of notice prescribed by the regulation is too restrictive in its terms, and is not without modification applicable to such special circumstances as occur in this case. But the right of the parent and of the child to be able to comply as they are intended to be able to comply with the provisions of the statute is not to be taken away by a defect in the form of notice provided by the regulation.

It may be that the notice which, as has been said, their Lordships have not seen, was modified so as to adapt it to the particular circumstances and was accepted as so modified. It may be that it was strictly followed, though as followed it contained a misstatement which was not of importance. Their Lordships accept the language of the Appellate Court upon this point as sound:—

> "If registration was under the circumstances necessary at all we think there has been a sufficient compliance with the Statute. A mere error in describing the adoption as being one by Maori custom instead of by an Order of Adoption then actually in force, could not, in our opinion, have the serious effect which Mr. Treadwell asks us to give to it. The fact of there having been an adoption of this child by the deceased was duly registered; there was at the time no adoption according to Maori custom and the mischief which section 50 was manifestly aimed against was effectually guarded against by the notice given."

Upon the whole their Lordships are of the opinion that the decisions of the Native Appellate Court are right and should be affirmed, and that these appeals should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

HINEITI RIRERIRE ARANI

v

THE PUBLIC TRUSTEE OF NEW ZEALAND

AND

MATILDA LINDSAY AND ANOTHER.

SAME

v.

SAME.

(*Consolidated Appeals.*)

DELIVERED BY LORD PHILLIMORE.

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