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RANGAHAUA WHANUI NATIONAL THEME P
SUCCESSION TO MAORI LAND,
1900-52

TOM BENNION AND JUDI BOYD

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LIST OF ABBREVIATIONS

ACMB	Appellate Court minute book
AJHR	<i>Appendices to the Journals of the House of Representatives</i>
app	appendix
ch	chapter
doc	document
encl	enclosure
MA	Maori Affairs series, National Archives
MA-MLP-W	Maori Affairs, Maori Land Purchase Department, Wellington
MB	minute book
NA	National Archives
no	number
NZLR	New Zealand Law Reports
NZPD	<i>New Zealand Parliamentary Debates</i>
p, pp	page, pages
pt	part
s	section (of an Act)
sec	section (of this report, or of an article, book, etc)
vol	volume
Wai	Waitangi Tribunal claim

INTRODUCTION

The question of what to do with property on the death of a person is a very old one, and a complicated one. Many factors are involved: the type of property concerned; the capacity of the deceased; whether the deceased has expressed wishes before death about the disposal of property; the nature of relationships to others who may take the property, whether kin, or related by marriage, or adoption, or in some other manner. By 1840, detailed rules existed in both the Maori and English legal systems to deal with these complexities. These rules were particularly attuned to the conditions of the societies in which they arose. Even a slight alteration to the rules would have important consequences for future generations.

This report looks at succession to land in the Maori Land Court in the 20th century. Accordingly, it is concerned with the way in which a court operating largely under an English system of law and legal rules dealt with this particularly delicate and difficult area of Maori law. A key question in the report is how far Maori law survived, adapted or even flourished under this essentially foreign regime.

This report is complementary to the report on the Maori Land Court and Land Boards 1909 to 1952. It is complementary in large part because, as will be seen, the major task of the Land Court on a day to day basis in the 20th century was the making of hundreds of orders determining successions to Maori land. Orders concerning partitions, alienations, exchanges or other such dispositions of land, did not form the bulk of the court's ordinary work, despite their significance to Maori land holding.

While the focus of the report is the twentieth century, considerable material is included from the nineteenth century, as this provides essential background to 20th century events. In fact, the basic approach to Maori succession in New Zealand law was worked out in court cases and legislation in the 1860s and 1870s.

To gain a picture of how the Maori Land Court worked in practice, a random selection of microfiche minute books were examined for each of the districts in the period after 1909. Maori Appellate Court minute books were also examined. They contain many typed up judgments which are particularly helpful in understanding the approach of the land court to succession issues.

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 and such a nephew. My eel-weirs, my potato gardens, my pigs and my male and

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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

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 entitled to the property. Most Maori children were 'illegitimate' by English law

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.

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.

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

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

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.

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

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, scss 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.

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 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

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.

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

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 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

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

36. Section 4

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 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

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

41. AJHR, 1887, sess 2, 1-3c, p 4

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

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

42. Ibid, p 6

43. AJHR, 1890, G-1, pp 17-21

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

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 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

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

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 Maōri 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 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

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.

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

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,

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.

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

60. Ibid

61. Supra note 45.

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

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 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

63. Ibid, p 18

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 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

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

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

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.

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 Urū v Hōhēpa te Rangi* (1904) 24 NZLR 390.

70. *Pōaka 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

CHAPTER 2

SUCCESSION AFTER 1909

2.1 THE 1909 CONSOLIDATION

2.1.1 The prelude to the Native Land Act 1909

In August 1909, as the draft Native Land Bill was being prepared, Apirana Ngata questioned the Chief Judge of the Native Land Court about the current procedure for successions and their proposals for amendments to the existing law. Chief Judge Jones provided a paper which had been prepared on the topic in 1907 by Judge Edgars which examined succession principles in detail. The paper began with a blunt statement about the origin of court rules regarding succession:

There is no ancient Maori custom of succession. The child, upon birth or attaining manhood or womanhood, became as a matter of course entitled to a share of the tribal lands. And upon death such share reverted to the tribe. Such limited custom of succession as existed was confined to personal estate such as greenstone heirlooms, or to the right to occupy small pieces of land as cultivations.

The present Native custom of succession has grown up in the court where it has developed gradually and where it is probably still being modified.¹

The custom developed in the court (called in this paper Maori/court custom) reflected Maori ideas in that the ultimate source of the land which any person held was looked to whenever difficult issues involving intestate successions arose. This was so even for confiscated lands:

It is sometimes held that where confiscated lands have been returned by the Crown to the Natives (loyal or rebel), there is no more remote root of title, and the successor is the next of kin according to the law of New Zealand. But I submit that it is the more proper course to hold that there is a Native custom of succession in regard to all lands owned by Natives howsoever derived; and that the true successor is the next of kin traced through that parent who is of the hapu or tribe to whose members the land was given back to the Crown. This is the view most in accord with Maori ideas and practice.²

As for general intestate successions, Edgar provided a table highlighting the differences between Maori custom as the court had developed it, and English law. By 1907 the harsh scheme of primogeniture for non-Maori succession, which

1. MA 31/28

2. Ibid

Fenton had referred to in the 1867 *Papakura* decision, had been considerably modified. Widows could now inherit an interest in their husbands' estates as a matter of right.³

The gist of Edgar's chart was that, because of the emphasis placed by Maori on the original source of freehold land titles (even though they were Crown granted and not customary land), where in many situations under English law a spouse or children might inherit automatically, under the Maori/court custom, others would be entitled because of their links to the tribe from which the land came. Thus, while in English law a spouse would automatically inherit land where there were no children, siblings or parents of the deceased alive, under the Maori/court custom:

A wife or husband has no right of succession, except where deceased has been put into the title by the tribe as such husband or wife, when, if there be no children or near kin objecting, the wife or husband may be appointed successor.⁴

If a spouse was thus disenfranchised, the land court had a special power to give the wife a life interest if it was required for her support. The reason for the Maori/court custom developing in this way was that:

It was Maori custom to keep the tribes or hapu together, so that where a woman marries into a strange tribe, her children would lose their right to their mother's land, except such as returned to their mother's hapu. . . . Similarly, if a man left his hapu and lived upon his wife's land, his children or descendants would have no right to the lands of his hapu unless they returned to live upon them.⁵

Following this principle, Edgar wondered whether in cases where there were no immediate children or relatives, and where an interest came through both parents, but the next of kin on one side (say the mother's) was nearer than the next of kin on the father's side, should the whole go to the mother's side, or half to each side, or perhaps a larger share (say two-thirds) to the mother's side and a smaller (say one-third) to the father's side? In cases where some of the next to kin had ceased to be fully members of the hapu or tribe owning the land (by reason of their ancestors marrying into a different hapu or tribe, or of having ceased to occupy the land) should the Court consider that important in deciding the succession? Edgars thought that it should, and that the right of succession should not be based solely upon nearness of kin. Such a question would arise only where the next of kin were somewhat remote; 'but where it does arise, I think occupation as well as Whakapapa should be looked at.'

However, in most situations, there were children of the deceased, or if those children had died, then grandchildren of the deceased survived. In such situations it was not a careful application of Maori custom which determined succession, but the court-generated hybrid of that custom, originating in Fenton's *Papakura*

3. See The Real Estate Descent Act 1894, The Administration Act 1879, and Amendment Act 1885, consolidated in the Administration Act 1908. This change is discussed at (1910) 29 NZLR 1150-51.

4. Ibid

5. Ibid

judgment in 1867, which determined that interests should simply be equally shared among all the children of the deceased. Thus, where under English law if a spouse and children survived the deceased, the spouse would take one-third and the children two-thirds of the estate, divided in equal shares among them (known as a 'per capita' division), under Maori/court custom, only the children would inherit, in equal shares. 'All the children share equally although the other parent of some may be a stranger to the hapu or tribe owning the land'.⁶ This sort of distribution meant that in the majority of successions, the intention of Maori custom was defeated and fragmentation resulted. Such was the half-way house the court had created for itself between English and Maori notions of law.

Edgars was concerned about fragmentation. He suggested that the land court should be given power to decline to appoint successors where there were no immediate relatives of a deceased, and simply vest the land in surviving owners:

This would be much more in accordance with Maori custom than the admitting of persons not very nearly related, and who have not occupied the land. . . . In such cases there are generally a considerable number of persons who can show an equal right. To admit these as successors aggravates an evil already causing great inconvenience, namely the fact of there being so large a number of owners in each block.⁷

But this missed the majority of situations where there were children of the deceased.

In August 1909, Ngata sought an opinion from Chief Judge Jones on whether these complex hybrid rules should be abandoned, and English rules of descent be adopted for Maori land. Jones replied that this would 'cause a small revolution among the natives'. He continued:

. . . If I were speaking from my own point of view, it would save a heap of trouble, but you know the ordinary native, (except under special circumstances) will no more think of admitting the widow or half brother of deceased not being from the source of the land, than he would a complete stranger.⁸

Jones' preference was that the existing system simply be rationalised towards the English descent laws where possible. In the situations raised by Edgars, where no immediate kin were in evidence, instead of looking to Maori custom as Edgars suggested, English rules should be adopted, 'assimilating the two systems as far as possible'.⁹

Jones also commented on the problem of Maori marriages, which he said were still a 'ticklish' issue. It seems that there was a suggestion that English law should be applied and the longstanding recognition of customary Maori marriages ended. Jones commented:

6. Ibid
 7. Ibid
 8. Ibid
 9. Ibid

No doubt from the moral point of view it is highly desirable to bring about a reform, and if it would not be looked upon as offering a premium to immorality, the case might be met by a provision in the native land acts, that all undisputed or proved children of deceased natives shall for the purpose of succession be treated as legitimate and that the same interpretation should apply to 'children' in a Maori will unless the contrary intention can be inferred.¹⁰

2.1.2 The Native Land Act 1909

In the finish, the 1909 Act did not take Maori succession to land in any significant new directions. It simply provided that, on intestacy, succession to Native freehold land was to be determined 'in accordance with Native custom'.¹¹ It continued the Maori/court custom in relation to spouses, providing that the spouse of a deceased was not to take any interest, except that the land court might give a widow a life interest.¹²

As for wills, these followed English law requirements exactly, apart from a requirement that one of the attesting witnesses had to be a local official from a list of local officials (Magistrates, JPs etc) provided in the Act.¹³ The general ban on Native land being disposed to Europeans by will was continued.¹⁴ Two other provisions should be noted. First, it was provided that unless a will was brought to the attention of the court within 2 years of the testator's death, it became absolutely null and void. This provision (not evident in the law governing English wills) was apparently aimed at preventing wills coming to light after the land court had heard an application and made succession orders on the assumption that there was no will.¹⁵ This provision was applied in at least one case, involving a testator who died in December 1926 whose will was not brought before court until October 1929.¹⁶ Second, following the lead of recent statutes ensuring that men did not leave their families destitute on their death, it was provided that whenever a will came before the court it was under a duty to consider whether the testator had made 'adequate provision' for the maintenance of the widow (or husband), children and any 'orphan grandchildren'. If not, some part of the property, which could include interests in Maori land, was to be transferred to the widow or children.¹⁷ As will be seen, this provision was fairly liberally applied.

10. Ibid

11. Section 139. For personal property, however, it provided that succession be determined as if the deceased were a European.

12. Section 140.

13. Sections 133-134

14. Section 137

15. The provision copies a provision of the Native Land Laws Amendment Act 1895 (s 81) which also provided that a will should prevail against a bona fide purchaser for value of Maori land who had relied on succession orders already made.

16. The court dealt with the case as if it were an intestacy, dividing the property equally among the children. 69 Hauraki MB p 305.

17. Section 141. This provision was not new. It had been enacted first as section 45 of the Native Land Claims Adjustment and Laws Amendment Act 1901 (Salmond wrongly refers to the Maori Land Administration Act 1901 in his memo to the 1931 consolidation).

Perhaps because of the debate over customs relevant to adoption, the Act provided that customary adoptions were no longer to have any force or effect.¹⁸ All adoptions had to be according to English and statute law conventions and had to be properly registered to have any legal impact. This was a harsh change, apparently brought about in the interests of achieving legal certainty.

2.1.3 The Willoughby case and the meaning of 'custom'

In 1910, the Supreme Court considered an important case concerning Maori succession.¹⁹ A Maori woman had died intestate leaving, among other things, both general land which she had obtained by exchange or purchase, and some Native freehold land obtained by orders of the Native Land Court.²⁰ The question was, who was entitled to succeed to these lands? Because the woman died before the 1909 Act came in to effect, the applicable law was the Native Land Court Act 1894, with its provision that the rightful successor was the person who was entitled 'according to native custom' or, 'if there is no Native custom applicable' then 'according to the law of New Zealand'. While the 1909 Act was less ambiguous, it simply stated that succession was to be determined 'in accordance with Native custom', thus assuming such a custom existed. This case was still important for the comments the Supreme Court made about the likely existence and nature of the 'Native custom' which the land court was applying in succession matters.

The majority decision was simply that it was up to the Native Land Court to decide if a custom existed in relation to any category of land, and if so, to enforce it. There was no provision which prevented the land court finding that a Maori custom covered not only succession to customary land, but also former customary land whose title was now derived from a Crown grant, and even land which a Maori had purchased or received in an exchange from others, in which they had never had a customary interest.

The Supreme Court went on, however, to comment about whether such customs might exist. The judges were divided over whether there was any Maori custom for succession relating to land, formerly owned as customary land, but now held under a Crown derived title. Stout CJ thought that a Maori custom for succession did exist because the title to the land was simply transformed, but the original customary owners remained on it. He also remarked that if the law had provided that Maori custom ceased to apply once a Crown derived title was obtained, 'few Maoris' would have even approached the land court to obtain such a title.²¹ This underestimates both the pressures and desire operating to bring land under the Crown system, but Stout was undoubtedly right that Maori expected some

18. Section 161. Section 50 of the The Native Land Claims Adjustment and Laws Amendment Act 1901 had provided that only customary Maori adoptions which were registered were to have any legal effect. Section 161 made customary adoptions redundant for all purposes.

19. *Willoughby v Panapa* (1910) 24 NZLR 1123

20. Also some customary land and former confiscated land Crown-granted by a commission - in essence, Native freehold land. But neither category is relevant to this discussion.

21. *Willoughby v Panapa*, p 1128

customary aspect to be retained with regard to succession. Stout pointed to the haste with which the unfortunate experiment to introduce a purely English law of succession for Maori land was withdrawn in 1882 after its introduction barely a year earlier.²² Stout seems to have resiled from his comments in *Izard v Tamahau Mahupuku*, quoted earlier in this report, that there might not be a Maori custom of succession in relation to this sort of land.

Williams J thought that the legislature did not require that the land court actually find a pre-existing custom relating to Crown granted land – an impossibility – but rather apply a pre-existing custom to a new situation, by asking: ‘Suppose this feudal land had been held by the deceased under native customs and usages, to whom according to such customs and usages would it descend?’²³ Williams was supported by Judge Chapman, who likewise assumed that, as a matter of practicality, the land court had been asked to mould pre-existing customs to a new order, but Chapman also thought that the court could consider genuine new customs which had ‘grown-up’ among Maori in the 70 years or so of active colonisation.²⁴

One judge, Edwards, however dissented from this discussion, holding that the legislature was indeed asking the land court to find a pre-existing ‘pure’ custom relating to Crown granted land. Of course, such a thing did not exist. It was ‘legally impossible of existence’. Edwards concluded:

What is really for the most part meant by those who refer to Native custom is the uncertain, varying and unrecorded practice of the Native Land Court in the administration of the statutes under which that Court derives its authority. That practice, unknown except in that Court itself, is not Native custom, and is of no authority either in itself or by virtue of any statute referring to Native custom.²⁵

Edwards used Stout’s comments in *Izard v Tamahau Mahupuku* to support his conclusion. This was no less than a wholesale attack on the land court’s approach to succession. The other judges clearly thought Edwards’ approach too radical and disruptive of the scheme that had been operating for some 50 years.²⁶

As for land in which a Maori never had a customary interest, but was simply purchased or obtained in an exchange with others, Stout argued that it was ‘improbable’ that there was any custom for succession for such land. Purchasing of land was unknown in 1840.²⁷

The judgment contains perhaps the most considered discussion by the superior courts in New Zealand of the philosophical issues raised when judges were asked to find Maori customary law in a colonial context. It confirmed that the land court approach, partly investigative and partly creative, was the correct one. The 1909

22. Ibid

23. Ibid, p 1131

24. Ibid, pp 1149, 1151

25. Ibid, p 1142

26. Ibid, p 1149

27. Ibid, pp 1127, 1129

Act in effect cemented this approach in place when it simply assumed that there was a Native custom to be applied in all succession matters involving Maori and Maori land.

2.2 SUCCESSION IN PRACTICE AFTER 1909

2.2.1 The general practice

After some 50 years of the application of a hybrid Maori/court custom, Maori themselves seem to have been happy enough to adopt it as their own. Justice Chapman had indeed noted in the 1910 case:

It is a known fact that in practice inquiries into Native custom with respect to succession to freehold land are made without difficulty by the NLC and in a vast number of cases the Natives assume that it will devolve a certain way and often in a way different from the way in which it would descend by the law of NZ, *and so treat the ownership in anticipation of the judgment of the Court.* [Emphasis added.]²⁸

The majority of succession cases indeed, followed the standard pattern as outlined by Judge Jones in his notes to Ngata. Where there were children, they succeeded equally, and so on. Almost every page of the court minute books in the twentieth century have abundant examples of this. In most of the orders there were no objectors and the entry simply records the name of the deceased, the fact that there was no will, whether there were any children or siblings, the distribution, and the fact that there were no objectors. Typical minute book entries read as follows:

died, no will, 5 children, one child had 2 children, children all get one-sixth, grandchildren one twelfth.

grandmother, died about 30yrs ago, no will, 3 children, portioned to children, one third, one sixth to 2 children of a dead child.

died, one daughter, no will, order to daughter.

son died, no will, 2 children – minors, applicant asked to be appointed Trustee, granted.

applicant's daughter deceased, no will, 4 children, minors, granted trusteeship.

son died 1908, no will, no children, derived interest from 'me' . . . , succession order made.

28. Ibid, p 1154

applicant's son dead, died 1918, no will, no children, interest from me, succession order made in applicant's favour.

applicant's daughter died 1917, no will, no children, interest from me, succession order in favour of applicant.

died 1920, no will, 3 children, equal succession.

contested succession, 2 wives, rights to children of each.

applicant's sister died 3 years ago, no will, no children, 6 brothers and sisters, shared out equally.²⁹

The sheer bulk of orders made by the court each year indicate the regularity and machine-like repetition of the decisions made, and that, in comparison with partition and title orders, in the period after 1909 succession orders formed the overwhelming bulk of the court's work.³⁰

Year	Title	Partition orders	Succession orders
1913	61	783	5065
1914	82	1019	5146
1915	24	2083	5288
1916	22	2172	6240
1917	23	1617	6255
1918	10	1247	4764
1919	33	1119	4649
1920	11	904	8511
1921	14	813	6642
1922	15	898	5969
1923	12	911	7871
1924	16	701	6218
1925	8	755	5139
1926	8	853	5081
1927	22	696	5912
1928	8	727	6216

29. Taken from 24 Tokaanu MB (1928), pp 274-306. Also see for example 22 Tokaanu MB (1927-28), pp 274-284, 68 Hauraki MB (1921-25), pp 39-66.

SUCCESSION AFTER 1909

2.2.1

Year	Title	Partition orders	Succession orders
1929	4	416	6122
1930	10	444	6605
1931	17	345	5897
1932	10	216	6129
1933	7	310	5612
1934	3	189	3446
1935	8	307	4325
1936	0	389	5116
1937	144	469	4527
1938	0	400	5183
1939	0	471	4602
1940	2	378	5956
1941	10	229	4433
1942	5	240	5068
1943	1	291	4270
1944	16	431	5154
1945	1	576	5267
1946	32	564	5165
1947	0	680	5823
1948	0	624	5236
1949	1	1118	6497
1950	3	1369	6998

While most court minutes and these figures do not reveal much of the background to each succession order made, some patterns can be noted and conclusions drawn.

There are no indications that Maori rejected the hybrid Maori/court custom; instead, it seems that they regularly anticipated it and objected when it was not closely followed. As Justice Chapman suggested, applications for succession were commonly organised by the family in advance. Indeed, of those Maori who made wills, one wonders how many followed the example of a woman who left a will in favour of her daughter and her daughters' children but that if they had predeceased

30. AJHR, 1910-1950, G-9 series

her then the interests should be 'determined according to Native custom', adopting the wording of the 1909 Act.³¹

2.2.2 Manipulation of the Maori/court custom

While Maori generally appeared to be happy with the 'custom' being applied, there is evidence of people arranging successions to avoid further fragmentation of interests. In some courts this was more apparent than in others. In the South Island in particular there seemed to have been more willed land and also more agreements amongst successors as to the distribution of interests, but it also happened in other areas. For example, in 1935 two families came before the land court at Hauraki to deal with succession to relatives who had died in 1915, 1912, 1916, and 1896. The court tried to share the interests of one of these deceased, 8 perches of land worth about 12/6, between 2 families, but one of the families said that it was not worthwhile and handed it to the other family.³² In 1922 in Kaipara, the court, at the request of a family with 4 children, ordered that the 2 boys succeed in one block and 2 girls succeed in another, even though all the children had rights in both blocks.³³ In the South Island in 1915 where 3 children were to succeed, a brother and sister stood down in favour of another brother.³⁴ In another case in Rawene the applicant had handed to the court an authority signed by the other successors describing how the shares were to be divided.³⁵ In another case in the South Island in 1917, the deceased had made an informal will leaving all lands to one of their seven children. While all acknowledged that the will had no legal validity, the other children agreed to carry out its intentions and the order was made accordingly.³⁶ In a 1911 decision the land court noted, apparently with approval, discussions outside the courtroom which had led to an agreement about who to admit to a succession order once the parties came into the court.³⁷

Such variations from the general Maori/court custom would not be passed by the court, however, unless there was consent from the other entitled successors. This was sometimes sought quite explicitly, in one case the court giving an applicant 2 months to gain the written consent of other rightful successors to a proposed distribution.³⁸ The 'natural' successors had to state clearly that they agreed to this handing over of their rights. And there were limits to the flexibility of the court. In 1909 the Appellate Court rejected a proposed succession agreement:

It is not contended that the persons appointed as successors by the Lower Crt were not the next of kin of dec'd but it is claimed that the court ought to have given effect to an arrangement apparently come to by all parties that Henau Kaihau should take an

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31. 11 Aotea ACMB (1934-59), p 135
 32. 70 Hauraki MB (1930-37), p 205
 33. 15 Kaipapa MB, p 24
 34. 19 South Island MB, p 115
 35. 15 Kaipapa MB, p 14
 36. 20 South Island MB (1917-19), p 159
 37. AJHR, 1911, G-14C, p 3
 38. 17 Kaipara MB (1928-31), pp 223-224

interest in the succession. We are of opinion that the order of the NLC was a proper one and should not be interfered with. It is abundantly clear that Henau Kaihau has no right to succeed and to carry out the proposed arrangement would mean using the process of the court as an irregular method of conveyancing. To our minds this would be altogether undesirable and improper. Our view is strengthened in the present case by the fact that this land is especially restricted against alienation.³⁹

The court added, however, that it was not saying that it would be impossible for Maori to have arrangements that varied the lines of succession.⁴⁰ Indeed at times that the court was willing to involve itself in 'irregular conveyancing' where a sale of land was in contemplation when succession orders were applied for. In one South Island case in 1914 the court deliberately altered a previous succession order and appointed only 2 successors out of 35 to facilitate a sale of the land and allow for distribution of the proceeds to the other rightful successors.⁴¹ In a case in 1911 involving an area just over one acre, and with a large number of possible successors, since the land was about to be sold 'it was decided to put in one person for the purpose of sale, such person to hand over the purchase money to the court for the purpose of being distributed amongst the persons entitled.' The court accordingly ordered the succession in one name only, then noted that: 'The persons whose names appear below have been selected to succeed to Erenora Tungia and Pirihana Tungia regarding the distribution of purchase money accruing from the sale of the interests of the two deceased persons.'⁴²

The minute books also show that in a few cases the court of its own volition avoided the normal Maori/court custom to prevent an estate becoming too fragmented. In 1938 an application came before the court for an owner who had died in 1903 and whose land had subsequently been sold. The money to be distributed was £2.9.0 and although there were 4 lines of eligible descendants, the court simply awarded it to the eldest member of the family.⁴³ In another case in the same year, where a deceased woman had left 6 children and 2 1/4 acres, the applicant, one of the children, applied to be the sole successor and this was granted with 'too small to be doubled up' scribbled in the margin of the minute book.⁴⁴ It is unclear in these cases whether there was agreement from those excluded, or whether the court simply convinced the parties of the desirability of the arrangement, or whether it felt confident that it could proceed in this way without challenge.

39. 7 Auckland ACMB, p 168

40. Ibid, p 168

41. 19 South Island MB (1914-17), p 124

42. 18 Wellington MB (1911), pp 11, 16

43. 71 Hauraki MB, p 52

44. 21 Kaipapa MB, p 301

2.2.3 Delays in obtaining succession orders

Many succession orders were made more than 5 years after the death of the deceased. A perusal of minute books shows that 10 years was not unusual, and in some cases orders were made more than 20 years after a person had died.

In 1913 the land court was given power to make succession orders if no applications had been received six months after the death – a clear indication of the delays in applications for succession orders. Another indicator was the huge numbers of succession orders that had to be made before the consolidation schemes could come into effect. In the Waikato some 6000 orders were required in connection with the start up of schemes.⁴⁵ For the Urewera schemes, some 1000 orders were required covering the interests of over 300 deceased.⁴⁶ By 1930 the backlog of succession applications was the subject of some discussion. By this time interests in land could be very scattered and all of the interests of one deceased in various blocks were not always known by the successors, if in fact successors had appeared to claim for a deceased's interests. There was correspondence between the registrar of the Aotea District Maori Land Board and the Maori Trustee about the large numbers of files where the person was known to be dead but no applications had been lodged for their interests. Some of the courts started a campaign to clear up 'dormant accounts' and the registrar of the land board spoke of lodging over a thousand applications; 'our cards are being cleared up in great style', he wrote.⁴⁷ These references appear to be to interests in money held after alienations of Native land rather than to interests in Native land itself. Nevertheless, they indicate how difficult it was for Maori to obtain benefits from land even after sale, because of fragmentation. The registrar also noted that the Trustee Office must be holding a large sum of money on behalf of the unknown beneficiaries of these interests, and offered to help them clear up their files. The court was also trying to institute a system of dealing with all the interests of a deceased person at the same time, streamlining their search process so that the interests of a deceased came only once before the courts – something which had been suggested in 1907 by Judge Edgars.⁴⁸

This failure to gain succession orders shortly after a death could have significant consequences in periods when land purchasing was at its height. In 1916 the Supreme Court found that even where succession orders had been made, if those orders had not been registered against the title to the land, then those successors had no right to participate in decisions of owners to sell the land.⁴⁹ What is not clear, however, is whether this decision represented a common situation, and whether many owners missed out on discussions about the land because they were

45. See AJHR, 1932-33, G-9, section, reporting large number of succession orders made in connection with these schemes, over 6000 in the Waikato area, also AJHR, 1940, G-9.

46. AJHR, 1921-22, G-9

47. The registrar was presumably acting under a general power as registrar of the land board to act on behalf of the owners.

48. MA series 1, 8/0/10/1, succession orders procedure, 1925-39. See Edgars comments on this in MA 31/28.

unregistered or unheard successors. No written evidence of ongoing protest along these lines has been located in research for this report.

2.2.4 Difficult issues in intestate succession

In cases where there were no immediate relatives, the land court would embark on an investigation of the original 'source' of the land, considering the sort of issues and early Maori custom which Edgars had outlined in his memo in 1907. In 1935 the Auckland Appellate court had to deal with an appeal against an order where the deceased was an unmarried minor who had died intestate. The succession order had been made in favour of an aunt and uncle only, but on further investigation of the source of these land interests, more relatives were revealed and the original orders were amended. The Appellate court commented:

it is established practice of the NLC in all cases where a deceased dies intestate without issue whose parents are dead and whose brothers and sisters are also dead without issue, to ascertain by evidence or by a search of its own records the source or side from which the interests held by the deceased were derived. The Court must be satisfied on this point before it will be in a position to order succession in accordance with Native Custom.

Where the interest came from a deceased father's side, only the relatives on that side could succeed. This approach meant that in situations where there were no immediate kin to succeed, each block in which a deceased person had interests had to be investigated and the successors for one block were often different to the successors appointed for another block. Consequently, sometimes applicants would come forward for the interests of one block only and the interests in the other blocks of land might lie unsucceeded to for many years.

In another case in 1923 the Native Appellate Court commented:⁵⁰

According to Maori custom where there is no issue of the deceased, the next of kin are usually traced through the father. There are cases however when the mother would succeed either with the father or to his exclusion. This always happens where the land affected is derived either partly or wholly through her. In many cases it is impossible to trace the source. In such cases it is usual to include both father and mother unless for some special reason such as the interest being small or the mother having married again into some other tribe. In this case the mother did not apply to the NLC to succeed nor did she take part in the proceedings in the NAC. We think however there is some ground for her claim to be included in accordance with native custom but not for her claim to be treated in the same manner as if the deceased were

49. *Foster v Waiariki Maori Land Board* (1916) NZLR 1006. In the particular case the land board had refused to confirm a resolution to sell unless a meeting of assembled owners was held because there were 22 owners according to succession orders (a meeting was required where there were more than 10 owners). The Supreme Court held however that only eight persons were actually registered as owners, so that the resolution could be confirmed. The plaintiff in the case appears to have been a European who had bought up the unregistered interests in the hope of influencing a meeting of owners.

50. 10 Wellington ACMB, 15 January 1923

a European. . . . It does not follow that the division should be necessarily equal under all circumstances if one third is granted to the mother and two thirds to Pēkahou Parata we think it will do substantial justice.

A more common issue in intestate successions was the role that a spouse, particularly a widow, should play in the final distribution. As has been seen above, spouses of the deceased were considered to have no inherent right to succeed, but from 1901, if circumstances required it a widow could at least inherit a life interest. However, next of kin had a right to appeal against an order of this kind. For example, in a case in 1921 a widow was granted a life interest in an estate, but leave was granted for the next of kin to apply at any time to change this order as they were not represented at the hearing.⁵¹

The Appellate court had to consider a complicated case of intestacy in 1916 involving an appeal from an order made 16 years earlier where the deceased had been married twice but all his interests had been awarded to the children of his first wife. The order had been made this way because his second wife was a Moriori and, as the Moriori had been slaves to the Maori, it was apparently obvious that the children of the first wife would be preferred. The appellants, descendants of the second family, claimed for equal interests. The court considered that:

No doubt such would logically be the case were we dealing with European land but Maori custom does not afford such a ready and easy method of assessing relative interests since the position of the parties, their occupation or want of it, their connection with alien tribes and many other circumstances have to be taken into consideration.

They awarded equal interests to the 'pure' Maori children (ie children of the first marriage), stating: 'According to Maori custom there are many cases where the children of one wife are preferred to those of another because they have associated themselves wholly with their mother's people.'⁵²

It should not be thought, however, that the land court was simply sexist in its approach in cases such as this. In a 1923 case, for example, the father of a deceased 20 year old applied for an order to have the son's interests succeeded to by his three other sons, but the mother appeared in court claiming that the land came through her and the order was revoked.⁵³ This was a situation where the Maori custom that land should remain with the source from whence it came was paramount to other considerations. As the Native Land Court noted as late as 1941: 'Maoris were and still are in many districts, very jealous of any encroachment by one married partner on the rights of the other.'⁵⁴ The sex of the partner was not the determining factor.

51. For a similar situation involving a will see 68 Hauraki MB 1921-25, p 74. A similar order was made where all interests had been willed to one person, and the land court, after satisfying itself that the others had sufficient to live on, made the order to this person, but again with leave reserved for the next of kin to apply against this order, within 14 days.

52. 4 Wellington ACMB, pp 58-62

53. 18 Tokaanu MB (1923), p 228

54. 6 Wellington ACMB, p 193

2.2.5 Wills

While the majority of cases before the land court involved an intestacy, a perusal of the minute books show that wills were by no means uncommon. Indeed, their use seems to have been growing with each passing decade. The 1909 Act required that Maori wills be executed in the same manner as for a will made by a European,⁵⁵ which included requirements that they be reduced to writing and be formally witnessed by people who would not be beneficiaries under the will.

The court made the most of its power under native land legislation to adjust wills to ensure that adequate provision was made for spouses and children. It viewed the leaving of property by will to a spouse as 'natural'⁵⁶, and thus contrary dispositions were open to amendment. In a typical case in the South Island, the probate for a will was contested on the grounds that it treated the legal widow and children of the first marriage unfairly. The deceased had married twice, the first time legally and the second time a customary union, and had willed more to his second family than the first. In this hearing, which took place in 1920, Judge Rawson ordered the family to come to an agreement and inform the court, otherwise the court would make the orders. Some provision had to be made for the first family as it had been found that some were living in impoverished circumstances.⁵⁷

In 1930 an appellant had been excluded from her father's will because she was supposed to inherit from an aunt but she had seven children, little property, and the aunt was still alive. The court awarded her an interest in her father's estate to be divested when the aunt died.⁵⁸ In 1942 a will was changed because the court considered that not enough provision had been made in the will for the orphan grandchildren of the deceased.⁵⁹ In a different kind of case in 1909, a succession order had been made to the deceased's daughters, although in fact he had made a will leaving half his lands to his daughters and half to his sisters, because his sisters had looked after him while his daughters had neglected him. The will had not been read in the land court but the Native Appellate Court did not change the original order as the daughters were practically landless.⁶⁰ In an appeal in 1942 the will of a prominent husband and wife who had large shares of family lands was found valid, but the court believed that it was 'inequitable to the Maori mind that the next-of-kin [of both the husband and the wife] should be shut out of the valuable interests of both'. This view was shared by the parties entitled under the will and they agreed to return some of the interests to the next of kin of both sides. A lengthy discussion took place and an agreement was reached, listing all the blocks and orders to be made – some receiving a 1/384th share in the land, and the land court recommended that legislation be enacted to overturn the will to allow appropriate succession orders to be made.⁶¹ These cases suggest that the land court viewed its requirement

55. Section 133

56. See for example 26 Tarawhiti ACMB (1933-47), p 89

57. 21 South Island MB (1919-21), p 229

58. 7 Wellington ACMB (1927-41), 18 December 1930

59. 11 Aotea ACMB (1934-59), p 135

60. 7 Auckland Appellate Court, p 99

to look to the interests of children and spouses as, partly at least, a matter of applying Maori custom where wills tried to avoid the application of such custom. But there was also an English law influence. The statutory requirement to look to spouses and children had its origins in legislation introduced by Robert Stout to ensure Pakeha men did not leave their wives destitute.⁶²

There were limits to the amendments the court would make to wills in such situations.

In 1923 a man died leaving two wills, in the second of which left everything to his wife and his wife's granddaughter. His relatives contested that he was of weak intellect and influenced by his wife but the court accepted the will and Chief Judge Jones, reviewing the petition against this ruling, commented that there was 'no law forbidding a Native to will his land to a stranger, provided it is not to a European.'⁶³ In a 1935 case, involving a will made by a father in favour of his three sons only, the widow appeared in court and explained that it had been organised that she would will her interests to her three daughters and that she had approximately the same amount of land as her husband. The case was in court because one daughter objected to this arrangement. The court reluctantly upheld the will after establishing that the daughter was not destitute, finding that it doubted 'the justice of the will but cannot make a will for the deceased. It will be open to any of the daughters later on to apply for an order for portion of the estate for her maintenance if circumstances warrant'.⁶⁴ In a case in 1917, the deceased had married twice and had four children and left an 'unequal' will. One of the children protested but after an investigation of the circumstances the court concluded that the plaintiff child had not been forgotten in the will and furthermore was not in destitute circumstances. The will was allowed to stand.⁶⁵

Where wills were contested on the basis that the testator (the person making the will) lacked sufficient mental capacity or that coercion was involved, which arose intermittently, the land court seems to have applied the standard English law tests to each case, not developing any special features for the Maori situation. In a case in 1921 a will drawn up by an elderly woman was contested, and it was established that the main beneficiary of the will did all the translating for the solicitor who drew up the will. The solicitor was aware there were other properties outside the will (ie the main beneficiary would only receive part of the woman's total estate), and did not consider the will fraudulent, although the old woman was feeble. The court granted probate, stating that undue influence had to mean threats, not just persuasion.⁶⁶ In a case presented to the land court at Tokaanu in 1927, the court upheld a will made by an elderly woman, even though it passed her lands to an unregistered adopted son and distant relatives. The court found that although the woman was eccentric, she had the necessary capacity to make a will.⁶⁷

61. AJHR, 1942, G-6, pp 1-4

62. See DNZB, vol 2, p 487

63. AJHR, 1931, G-6A

64. 70 Hauraki MB (1930-37), p 198

65. 20 South Island MB, pp 132-33

66. 68 Hauraki MB, p 47

Some wills were disallowed for technicalities. In such cases the court could make succession orders in substitution for the provisions of the will. In a 1936 case, probate was refused for a will because it was not witnessed properly, but the court told the next of kin that it could still be given effect to by ordinary succession orders, and court officials were instructed to draw up a schedule of the proposed arrangements so that they could be agreed to.⁶⁸ In a South Island case in 1914, a woman's will was declared invalid because of a technical breach concerning one of the witnesses, but the next of kin wanted the lands to go as devised and the necessary succession orders were made.⁶⁹

Another case concerned a will where the wife left an interest to her husband, provided he did not marry again. He did marry and the land court upheld the will and nullified the interest left by the wife. However, the appellate court found that the husband's new marriage, being a customary one, was not a marriage enforceable at law, and gave the interest back to the husband.⁷⁰ This proved a technical difficulty in more than one case. In another case, a soldier left his property to a woman, provided she had not married before he died. She in fact had married one week before his death but as it was a customary marriage without a legal status, the court granted succession to her. The court found that the word marriage meant legal marriage and to make any other award would be an attempt to 'amend the provisions of the NLA relating to wills'. The court continued: 'The Legislature has empowered Natives to make wills and the exercise of that privilege in accordance with requirements of the NLA creates a legal effect from which there is no escape'.⁷¹

Another case concerned a will that had been made in Maori and there was a dispute over the interpretation of one section of it. The deceased woman had left some land to her husband with either a suggestion or a direction that upon his death he should return this land back to her descendants. However he did not do this. The court decided that the relevant passage in the will should have been interpreted as an order.⁷²

In cases where the status of a will was unclear, sometimes because the court was not sure if the lands could be willed or not (for example where the land was reserve land), the judges tended to make their own awards based on their own judgement of the circumstances. In one case a wife left her interests to her husband in lands in the Pariroa Native Reserve that possibly could not be passed by will. The husband was, however, according to the court, a 'decent hard-working man and a skilled butter-factory hand', so the will was allowed to stand.⁷³ In another case in 1924 where the court reluctantly granted probate, the judge commented:

67. 22 Tokaanu MB, p 13

68. 21 Kaipapa MB (1936-38), p 13

69. The deceased had six children but had willed lands to only two of these as the other children were living in comfortable circumstances. 19 South Island MB (1914-17), p 128.

70. 6 Ikaroa ACMB (1926-45), p 60

71. 12 Auckland ACMB, p 151

72. 25 Tarawhiti ACMB (1928-33), p 146

73. AJHR, 1937-38, G-6C

The Court deplores as much as anybody the mistakes it thinks natives make in the distribution of their property by will but while the law remains as at present it is mandatory. . . . otherwise there would always be some uncertainty as to the effect of a will of a native.⁷⁴

This is a telling statement, indicating that the move from the traditions of ohaki to the quite different legal complexities of written wills was in some cases frustrating the intentions of Maori testators. Sometimes frustration was openly expressed. In 1920 an infuriated relative tore up a will that left everything to the niece of the deceased, and was sentenced to prison as a consequence.⁷⁵

A particular issue which caused some problems in the early part of the century was whether restrictions on alienation applying to land held by Maori applied in respect of dispositions of the land at death. In other words, was a will an alienation of land, and contrary to these restrictions? Cases decided by the courts suggested that restrictions had to be precise in their wording to prevent land passing by will.⁷⁶ The issue created great difficulty in the Kaiapoi Reserve lands in the South Island. These lands had been passed under wills for many years without comment. The women of Kaiapoi were left out of the original grants of the reserves. When this was questioned, they were told that their husbands could will the lands to them. The tendency among reserve owners to make wills seems to have resulted from this advice. In 1899 the wills were challenged as breaching restrictions on alienations in the original grants of the reserve lands. Some wills were subsequently declared invalid and alternative succession orders made. A group of owners petitioned Parliament to uphold the wills on the grounds of 'ancient right, protection of parents against undutiful children, and to enable husbands to make provision for their wives.'⁷⁷ Later court judgments reinstated the wills. By the time the validity of the restrictions was finally upheld in a Court of Appeal judgment in 1909,⁷⁸ the ownership of the reserves had become thoroughly confused. Some of the lands had been leased and there was confusion amongst the tenants as to whom the rents should be paid. In 1911 W E Rawson provided a report on the situation, finding that there could be no hard and fast rule deciding which wills should be validated or not, but that each case should be dealt with individually. Counsel for some of the Maori affected contended that the wills should be validated because succession orders would make the sections too small.⁷⁹

74. 10 Aotea ACMB (1910-1933), p 388

75. 4 Wellington ACMB, p 150.

76. For example, see *Mutu v Public Trustee* 10 Sup Ct LR 200 and *In Re Rawinia Takeke (deceased)* 2 Gazette LR 368 held that general restrictions against 'sale, lease or mortgage or other disposition' did not prevent disposition by will. This was upheld in *King v Price* 24 NZLR 291.

77. AJHR, 1911, G-5, p 5

78. *Attorney-General v Te Aika* 28 NZLR 1100

79. AJHR, 1911, G-5, sec 3. Because these proceedings commenced before 1909 the restrictions on alienation on these reserve lands were not affected by the 1909 Act, which generally removed all restrictions on alienation of Native freehold land.

2.2.6 Mistakes by the land court and fraud

Considering the thousands of succession orders passing through the courts in these years, there were not a large number coming through the Native Appellate Court for rehearing. While this may indicate the expense of an appeal, misunderstanding of the process involved, or the length of time involved in waiting for an appeal case to be heard, it also strongly suggests that there was general acceptance of most court decisions.

But occasional appeals were to be expected. The land court minutes demonstrate that outright fraud was sometimes attempted. On occasion, succession applications were made for people who were not yet dead. This was discovered when a witness disclosed, for example, that they had seen the deceased 'in Napier the other day'.⁸⁰ Occasionally less blatant fraud, such as coercion to sign a will, seems to have been attempted.⁸¹

The court also made clear mistakes, and occasionally was called to answer for them, although sometimes it was too late to restore the situation. In 1919, for example, there was a petition presented to Parliament asking for an investigation into a succession order made in 1887. Judge Jones admitted that there had been an error, and some successors had been left out, but as the orders were over 30 years old, he did not think they could be changed.⁸² In 1924, another petition was considered involving a succession order made in 1894, where the interests of a deceased were divided equally between two sons. Reinvestigation revealed that one of the 'sons' was not in fact a son, so that half of the estate had gone to the wrong successors. However, the original petitioner was now dead and since no-one else was petitioning on her behalf, no further action was taken.⁸³ In another case in 1912 an order was made and, due to a mistake over names, a succession order was made in favour of a grandson. However, the land had been sold, the money had all been spent and so nothing could be done.⁸⁴ Investigation into another petition in 1911 revealed that a wrong order had been made, but it would be difficult to change without disturbing the rights of others due to subsequent partition and other orders subdividing and giving others interests in the land.⁸⁵

Amendments to succession orders were made however when they could be, and particularly in cases of suspected fraud. For example, a 1927 petition seeking a rehearing of an order made in 1910 led to a change in the succession order when it was discovered that, at the original hearing for succession orders, the applicant had sworn that the deceased had no children, but in a later inquiry in 1916, a child appeared.⁸⁶ In another example, an appeal was made against an order made in 1883. At the time of the order, an interested person told the court who the deceased had

80. See for example 18 Tokaanu MB, pp 202ff.

81. Several examples are given under 'Wills' above pp 44-45.

82. AJHR, 1919, G-6. Section 38 of the Native Land Act 1909 provided that orders could not be questioned 10 years after they had been made.

83. AJHR, 1924, G-6A

84. AJHR, 1917, G-6C

85. AJHR, 1911, G-5

86. AJHR, 1927, G-6C

wanted the lands to go to and this evidence was accepted without question. As a result, one branch of the family was left out entirely, but knew nothing of the order until 1908 when one of the petitioners was grazing cattle on the land and an intending lessee drove the cattle off. In this case the court had power to change the order.⁸⁷

One interesting example of a 'mistake' by the court was the reversal of a succession order in favour of certain Taranaki Maori in 1911. It was successfully argued that the court found it had wrongly awarded the land to the descendants of former 'rebels' against the Crown. The land had originally been awarded to loyal Maori, but in a recent application for succession, dispossessed rebels used their old whakapapa links into the land to secure an interest. It was said that they had tried this only 'now that Te Whiti is dead', suggesting how pervasive Te Whiti's boycott of the land court process had been.⁸⁸

2.2.7 Gifts and ohaki

Although outlawed as a means of passing property in 1895,⁸⁹ the court continued to have regard to them to decide whether land passed in a will was intended merely as a gift for life. In effect, the court was bypassing the legislation in 1895 in order to give force to a continuing custom in the community.

This approach was, however, called in to question in 1924 in the Supreme Court,⁹⁰ when a woman, who had been willed land absolutely by her husband, died intestate, and the relatives of the husband argued that the land had merely been gifted according to custom and must be returned to them. Chief Justice Stout, who had already in previous cases made his doubts known about the existence of Maori custom in relation to English law instruments, found that there could not be any Maori custom in relation to wills, since they were 'not known to the Maoris.' The will was simply an alienation of the land. Ohaki, having been abolished in 1895, could not alter the situation.

This seems to have been a situation where at least some sectors of the Maori community were incensed that written wills were being used to defeat a customary practice. Comments by Stout CJ in the judgment, suggest that there was indeed a custom that gifts were to be returned on the death of the donee.⁹¹ There certainly was a custom of 'aroha', where people were said to be put into land on the basis of obligations and/or sympathy felt for them either in a previous succession, or when title to the land was originally converted from customary title to a title derived from the Crown. The claim that persons were not entitled to succeed because the 'aroha' interest was a lifetime interest only, often arose in the land court. Judge Holland remarked in exasperation in 1911:

87. AJHR, 1910, G-2, p 2. Section 39/1894 applied, which gave the Chief Judge the power to amend orders in certain situations.

88. 17 February 1911, 18 Taranaki MB

89. Apparently for reasons outlined above.

90. *In Re Hokimate Davis* [1925] NZLR 18

91. *Ibid*, p 21

I have at various times expressed myself strongly upon the attempts made to divert the natural line of succession by claims thru 'aroha' and have stated that before I would make any order to other than the next-of-kin I must be satisfied beyond doubt that the inclusion was one of true 'aroha'.⁹²

The outcome was that in following judgments the land court ruled that the custom applying for gifts could indeed be defeated by written wills.⁹³ This generated such a 'large volume' of protests,⁹⁴ that in 1927 an amendment to the Native Land Act provided that succession to the property of an intestate Maori who received some land under a will should be determined as if that land had been received as a gift and 'Native custom' applicable to gifts would apply.⁹⁵

By the 1940s there was a practice in some areas of approaching the court well before death to have it noted that a gift had been made, thus avoiding any confusion over the status of the gift once the giver had died.⁹⁶

2.2.8 Adoption

The Native Land Act 1909 provided that 'no adoption in accordance with Native custom' was to be of any force or effect 'whether in respect of intestate succession to Native land or otherwise',⁹⁷ thus effectively wiping out an important element of custom law. The consequences of that law require a separate study.

However this provision did not entirely prevent the court from considering the Maori custom of adoption, or whangai, since the 1909 Act contained a saving provision that where a duly registered adoption existed, in determining who should take property on intestacy, the court could still look at custom law.⁹⁸

In many ways the most difficult succession issue for the land court to deal with was succession for whangai. Here the Maori custom law was at its most subtle and complex, whereas the English law provided a relatively straightforward legal regime enshrined in statute. The essential difficulty was defining in a satisfactory way what constituted a proper whangai relationship for the purposes of succession. If a serious relationship could be established, the court usually had no difficulty in awarding succession to whangai. More difficult questions arose when a whangai died intestate and childless. Judge R N Jones, writing in 1920 commented:

my personal opinion is that the question of adoption has been carried much too far, but I am quite aware that on this point I am out of harmony with the other Judges.

92. 4 May 1911, 53 Otorohanga MB, p 32

93. See AJHR, 1925, G-6A, a case where the deceased had been given lands through the aroha of the claimant, who upon this death wanted the lands returned. Jones refused, quoting the recent decisions ruling that the custom applying under gifts did not apply under wills.

94. 25 Tarawhiti ACMB (1928-33), pp 98-100, where it was said that this law was changed as result of the 'large volume' of protests received.

95. Section 4 of the Native Land Amendment and Native Land Claims Adjustment Act 1927

96. See 23 Kaipara MB pp 90ff

97. Section 161/1909 and repeated s 202/1931

98. Section 168/1909 and repeated s 209/1931 and see comment at 12 Auckland ACMB, pp 66-67, that s 209 'expressly preserve[s] any recognised custom'.

[In this case the] original order was made in 1894, and at that date there was no thought of the tamaiti whangai getting more than she did, and according to the then lights, Judge Gudgeon was quite justified in awarding this interest to the next of kin. However, shortly afterwards a series of decisions began in the Native Appellate Court, which culminated in enunciating the principle of the adopted child being treated as equal to the natural child of the foster-parent and taking as such to the exclusion of other next of kin. This was quite a reversal of what I believe was the true Native custom, viz. that the adopted child took only what the foster parent directed, or, failing that, what the next of kin or the tribe allotted to him. But latterly the Appellate Court has gone even further and decided that not only is the adopted child and his descendants entitled to succeed to his foster-parent but also to all the next of kin of the foster parent extending back for an unlimited period.

I have always held, and I still think that I am right, that the adopted child can only succeed to what the foster-parent has brought into possession in the legal sense – ie has himself succeeded to. This, I believe, is consonant to the old Roman law, and is certainly more consistent with Native custom. Under the Appellate Court decisions a whole family might be exterminated by disease or calamity and their total possessions go into the hands of one of alien descent. What in my opinion has misled Appellate Court is the confusing of the rules of the English law of devolution of property with the Native custom of succession – two entirely different things. Personally, I do not think that before the Act of 1909 any successor according to Maori custom had what is called a vested right to succeed. It was certainly on the contrary assumption that a Native successor was first held not to be responsible for his predecessor's debts.⁹⁹

The general approach of the court can be discerned in a complicated case heard in 1942 in which land had been willed to a man who had no children but had adopted a son. In the original will the devise had been to the man for his life and the remainder to his children. In the land court it had been argued that the words 'ana tamariki' referred not to the children of the devisee but to the grandchildren of the original testator and succession orders on the intestate death of the devisee had been made to these children. The Auckland Appellate court, however, reversed this decision and granted equal shares to all. The lawyer for the grandchildren had contended that under the 1909 Act customary adoptions had been abolished, therefore the adoptions were not customary there could be no Maori custom of succession for adopted children. The court disagreed:

This contention however, disregards the custom that an adopted child does succeed on intestacy, recognised and applied by the NLC and accepted in *Re Pareihe Whakatomo*, 1933, GLR 567. It also disregards the opening words of Sec 209 of the NLA 1931. 'Subject to the rule of Native custom as to intestate succession of N Land' which in our opinion expressly preserve any recognised custom. Mr Hogben [lawyer] further contends that this Court is not bound to adopt the custom accepted and followed in the past by the NLC but may if it thinks fit find and apply some other rules as to custom. We have no evidence before us of any different custom from that referred to above and even if we or either of us held other views as to what was and should be the custom in cases of succession by adopted children, we should

99. AJHR, 1920, G-6K

nevertheless feel bound to act upon the doctrine of stare decisis and leave undisturbed what must be accepted as a well established rule. The NLC has found that it is custom for an adopted child to succeed as a natural child, and the rule has been applied in very many cases over a long period of years.

The court annulled the succession orders, and ordered half of the estate to the adopted child and the other half to the two grandchildren; '... the adopted child. ... entitled to succeed to the interest that descends from him by N custom through his adoptive father'.¹⁰⁰

2.2.9 The Maori Trustee

The Maori Trustee was often appointed to look after the interests of a deceased when succession orders were made. Power existed under the 1909 Act to appoint any person the court thought fit as an administrator, and even to override the wishes of a testator, appointing an alternative executor as it saw fit.¹⁰¹ In a case in 1935 the court pointed out that the interest of the beneficiaries took priority in such situations.¹⁰² By the 1920s the Maori Trustee was complaining to the Chief Judge that often the Trustee was appointed and letters of administration granted, but without the information as to who was entitled to the property. Also, the trustee was not always informed when he had been appointed trustee for minors. The trustee wanted to institute a search of land court files – both to ensure that beneficiaries were properly catered for, and to find out lands which could be revenue generating or which had already been sold. The trustee presumably had his eye on management fees from these.

One result of this search was that officials from the trustee's office searching the files of the South Island court found that: 'It is quite clear that it is not the policy of the SI court to appoint the Native Trustee if any native guardian is available'. Whether this finding reflected the wishes of Maori themselves or the court's view of the administrative capabilities of the Native Trustee office would be interesting to find out.¹⁰³

2.2.10 Tribal equity

The net result of this approach of the court and legislation, and also Maori adaptation to this system, was that the 'equities in favour of the tribe' which Fenton had hinted at in his 1879 judgment, and which were very much a factor in succession by ohaki prior to 1879, only rarely emerged in decisions of the land court. Such a rare case involved a few acres close to the Patea River in Taranaki, which had been reserved in favour of the local 'Pakakohe' tribe, but the title recorded a single owner, and the land had subsequently been willed to a single

100. 12 Auckland ACMB, pp 66-67

101. See ss 145-147/1909.

102. 11 Aotea ACMB (1934-59), p 18

103. See MA series 1 10/1/1 NLA 1909 General 1922-30

successor. The Chief Judge in reviewing the case considered that the background to the grant, and the fact that the original grantee had not attempted to alienate the land in his lifetime, provided a 'reasonable inference' that the grantee regarded himself as trustee for the tribe. The judge also found it significant that the grantee's next of kin wished the land to pass on to the tribe, whereas a stranger in blood under the will desired it for himself.¹⁰⁴ A similar case was reported in 1937,¹⁰⁵ but these were rare occurrences.

2.2.11 Conclusion

There was no systematic attempt made to understand the Maori law concerning successions prior to the enactment of Native land legislation in the 1860s. The importance of an essential feature of Maori law, the ohaaki, which was like an oral will, was therefore not properly appreciated, nor the notion that, on succession, land interests were arranged taking into account the ongoing existence of the hapu or iwi grouping from which the interests had arisen in the first place.

It was therefore left to the Native Land Court to determine what Maori custom was in this area. The court was dealing with a form of property, freehold land, which was foreign to Maori law. A basic issue was what sort of custom law could be said to attach to this new form of property right. The court, beginning with the *Papakura* case of 1867, settled on a basic rule of equal division of any freehold land among all children, where there was no will. This was a crude attempt to apply English common law of the time, while making some small concession to Maori sensibilities. The ruling was also intended to prevent land being reclaimed by the Maori group from which the interests arose. In this report the resulting law has been called Maori/court custom, to reflect its dual origins, but also its artificial nature in relation to original Maori law. In the important case of *Willoughby v Panapa* in 1910 the Supreme Court accepted that when legislation referred to Maori custom in relation to succession, this meant the 'custom' created by the land court rather than any pre-existing Maori customary law.

The repeated application of this Maori/court custom had, within a few decades, begun the process of fragmentation of Maori freehold land. There were also other problems with it. There were continuing concerns about how Maori marriages should be viewed, what legislation applied in the case of wills, and variations between the court districts in their approach to difficult cases, where results often depended on the application of the judge's view of what constituted 'natural equity'.

Towards the end of the 19th century, several efforts were made to have English law simply supercede those aspects of Maori law which continued to be recognised (albeit in a modified form) and which were causing difficulty. However, there were strong Maori objections to the Native Succession Act 1881 which sought to apply English law principles in all matters of Maori succession, and it had to be amended.

104. 1936, AJHR, G-6F

105. AJHR, 1937-38, G-6C

Legislation in 1895 seeking to outlaw ohaki failed to prevent the land court continuing to have regard to them when it came to consider the intentions of deceased Maori with regard to gifts and whangai.

A minor review of succession laws, consisting of no more than some correspondence between the judges of the Native Land Court and the Native Minister, was undertaken as part of the preparation for the consolidation of Native land legislation in 1909. In the finish, there was virtually no change to the existing law. Perhaps the only significant change was that the court was required to consider the interests of surviving spouses and children when giving effect to wills – but this ‘change’ merely continued an amendment to Native land legislation in 1901 in any event.

Land court minute books show that the Maori/court custom continued to be applied throughout the first half of the twentieth century as it had been in the previous 40 years. The court made on average about 5000 succession orders per year, but even these were insufficient to cope with the growing number of potential successors. There is evidence that the court and those Maori entitled to succeed often colluded to limit the number of names appearing on succession orders so that the number of owners could remain within manageable limits. However, there was no official law or sanction for this, and it is a wonder that there were not more appeals about the legal rights forfeited in such arrangements. In fact, Maori seem to have accepted the Maori/court custom and some found their own means to incorporate it into their social arrangements, whether by drawing up wills to avoid an equal distribution among all children, or by allowing limited numbers to go to the court to seek succession, or by arrangements among those entitled.¹⁰⁶ For the remainder, they came to regard the Maori/court custom as expressing important Maori preferences and desires. Butterworth records that an attempt in the 1960s to get Maori men to make wills and sensibly dispose of their landed interests came up against the ‘deep-seated conviction among elderly Maori that they must will their entire property, however small, in equal shares to all their children’.¹⁰⁷

Wills were in common use in the first half of the twentieth century. From minute book evidence, the court considered a will in approximately 1 in every 20 to 40 successions. The land court was not backward in using its power to alter wills to provide for spouses and children where it felt equity demanded some provision or some extra provision should be made for them.

Succession orders by the land court did not generate a large number of appeals in relation to the tens of thousands of orders made which went unchallenged. Minute books and AJHRs show that no more than a few dozen succession matters were appealed each year.

Two areas which gave particular concern were the use of ohaaki and Maori adoptions. These were both areas where Maori custom law was strongly asserted by Maori, and the land court made some concessions to Maori practices. However, in

106. More research would be required to discover how often informal arrangements were made and what was their precise nature.

107. *The Maori Trustee*, pp 90–91

both areas, enacted principles of English law provided the basic framework against which concessions were made.

The consequence of a century of Native Land Court policy in Maori land succession were vividly illustrated in 1961 in the Hunn Commission findings on fragmentation. Hunn estimated that the number of successors (32,861) added to titles in a single year was equivalent to 20 percent of the total Maori population.¹⁰⁸ As a result of this constant proliferation of owners, he considered the consolidation schemes had never really worked either. While Hunn clearly demonstrated that fragmentation had arisen from the land court process, his conclusion was to insist that while it could be understood that 'turangawaewae is an important feature of Maori culture', hopefully Maori would 'come to regard the ownership of a modern home in town (or country) as a stronger claim to speak on the marae than ownership of an infinitesimal share in scrub country that one has never seen.'

Yet a more realistic conclusion seems to be that, despite the best efforts of the court, Maori consistently sought to retain an identity with a hapu or iwi, albeit that that desire had now been converted into the wish to retain absurdly fragmented interests in hapu or iwi land. Measures introduced in 1953 (conversion of uneconomic interests), 1957 (vesting in a single owner), and 1967 (aggressive 'live buying' by the Maori Trustee) to force Maori to give up these fragmented interests were fiercely resisted. It was not until 1980 that this desire of Maori to retain links to ancestral land, even if in minute form, was acknowledged as a desirable feature of Maori landholding and as a path to the eventual regrouping of hapu and iwi interests.¹⁰⁹

108. AJHR, 1961, G-10, p 54

109. 'Royal Commission of Inquiry Maori Land Courts', 1980, AJHR, H-3, p 36

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