70/1962

IN THE PRIVY COUNCIL No. 13 of 1960

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N :

1. YISA DAWODU,
2. NURUDEEN DAWODU,
3. SARATA ONITIRI,
4. GANIYU DAWODU,
5. LAYIWOLA DAWODU,
6. MUTIATU DAWODU,
7. OBEDATU DAWODU,
8. SAMIATU DAWODU,
9. GBADABIYU OLOKO,
10. RAFIYU MABINUORI,
11. SUKURAT DAWODU and
12. SATARI DAWODU

Appellants

- and -

1. SUWEBATU DANMOLE,
2. SAFURATU WILLIAMS,
3. TAIWO DAWODU,
4. KEHINDE DAWODU and
5. TAUFIKI DAWODU

) By their legal guardian and next friend Safuratu Williams

Respondents

CASE FOR THE RESPONDENTS

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1. This is an appeal from an Order, dated the 10th January, 1958, of the Federal Supreme Court of Nigeria (Foster Sutton, C.J., de Lestang and Abbott, JJ.), allowing an appeal from a judgment, dated the 28th March, 1955, of the former Supreme Court of Nigeria (Jibowu, J.) and ordering that the rents receivable in respect of a property known as 4, Balogun Square, Lagos, be divided into four parts and paid to the child or children, or issue of any deceased child, of each of the four wives of one Suberu Dawodu (hereinafter called "the deceased") per stirpes. p.54 pp.31-36

2. The deceased had four wives, Morinatu, Raliatu, Moriamo and Osenatu. The first Respondent is the daughter of the deceased by Morinatu. The second

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Respondent is the daughter of the deceased by Raliatu and the third, fourth and fifth Respondents are children of a son of the deceased by Raliatu, that son having died before these proceedings were commenced. The first Appellant is a son of the deceased by Moriamo. The fourth, fifth, sixth, seventh and eighth Appellants are children of another son of the deceased by Moriamo, that son having died before the deceased. The eleventh and twelfth Appellants are children of Amusa, another son of the deceased by Moriamo. Amusa died before the commencement of these proceedings. The second and third Appellants are children of the deceased by Osenatu. The ninth and tenth Appellants are children of a daughter of the deceased by Osenatu, that daughter having died before the deceased.

pp.2-3 3. The proceedings were commenced by a civil summons issued by the Respondents in the Supreme Court of Nigeria on the 8th March, 1954, claiming partition of 4, Balogun Square.

pp.7-9 The Statement of Claim was dated the 6th May, 1954. In it the Respondents alleged that the deceased had died in September, 1940. A Will which he was believed to have made could not be found after his death, but his children were told that the deceased had stated in the Will that his property was to be divided among his children by the number of his wives, the children of one mother having one share. They then decided that the property should be divided accordingly. The first and second Respondents, the second Appellant and Amusa had obtained Letters of Administration, and the personal effects of the deceased had been divided into four parts, the children of each of the wives of the deceased taking one part. Thereafter the rent collected from 4, Balogun Square had been similarly divided for about ten years, after which the Appellants had refused to continue that division. The Respondents claimed partition of the property or an order that the former agreed scheme of distribution into four parts should continue.

pp.10-11 4. By their Defence, dated the 5th May, 1954, the Appellants alleged that the distribution of the rent in the manner set out in the Statement of Claim had been a mistake, and had been stopped when other beneficiaries protested and it was found to be wrong. They further contended that on the death of the deceased his estate became vested in

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all his children in equal shares according to native law and custom.

5. The Respondents called certain witnesses in an attempt to prove that the deceased had made a Will and to show what the contents of that Will had been. They failed to show either of these things, and the case was then argued on the basis that the deceased had died intestate.

6. After this evidence about the alleged Will had been given on commission, the action came on for trial before Jibowu, J. on the 17th and 25th November, 1954. The first Respondent said that she, the second Respondent, the second Appellant and Amusa had been appointed administrators and administratrices of the estate representing the four branches of the family. The estate had been shared among them in four equal parts, each part to the children according to their mothers. They had made no mistake in dividing the property in this way, it had been done according to agreement between them. They had all agreed to divide their father's properties into four parts according to the number of his wives. There had been no dispute for 11 years, after which Amusa had said that he wanted the rent of 4, Balogun Square divided into nine shares. A family meeting had been held, at which the witness had refused to change the usual practice. The second Respondent said that the rent had formerly been divided into four parts for the purpose of distribution. This had been done as the result of a family agreement, not by mistake. About five years before the trial Amusa had said that he had received a written protest against this method of distribution, and claimed that the rents ought to be divided into nine parts. A family meeting had been held, but there had been no decision to adopt the division into nine parts.

p.19, ll.30-37
p.20, ll.20-22
p.20, ll.40-42
p.21, ll.12-18; p.22, ll.17-34
pp.23-24

7. The first Appellant said that 4, Balogun Square had devolved on all the deceased's children at his death, and ought to be divided into nine equal shares. At first, the rents had been shared in four parts, according to the number of the deceased's wives. In 1949 Amusa had received a letter from his son, the tenth Appellant, protesting against this. A family meeting had been held, at which, the witness said, they had decided to divide subsequent rents into nine parts. In cross-examination, the first Appellant agreed that

p.25, l.27 - p.26, l.7
p.26, ll.41-44

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there had been a family meeting before the appointment of the administrators, and they had been appointed from the four branches of the family.

p.27, ll.21-25 He said they had made the division into four parts, not knowing that they were doing wrong; he did not know what was in accordance with the native law and custom of the Yorubas.

pp.27-28 An old lady named Molade, a brother of the deceased, said there had been a dispute among the children of the deceased about six years before the trial, some of them saying the rent should be divided into four parts, and the others that it should be divided into nine. She said that she and two relations of hers had attended a family meeting and decided that the rents should be divided into nine parts. In the olden days property had been shared per stirpes, but that rule, she said, no longer held good, each child now sharing equally. In cross-examination, she said she did not know when the old practice had been swept away.

p.30, ll.31-34 8. After the conclusion of the argument, the parties agreed that the property should be leased, not partitioned, and the rents divided in whatever proportion the Court might decide.

pp.31-36 9. Jibowu, J. gave judgment on the 28th March, 1955. After setting out the evidence, he said

p.32, ll.34-37 that the suggestion by the first Appellant, that the division of the rents into four parts had been

p.33, ll.2-17 made by mistake, must be rejected. The deceased must be taken to have died intestate, and his properties had therefore to be distributed according to rules of inheritance under intestacy. The first Appellant had said that he did not know why the children had agreed that the deceased's effects should be divided into four parts and distributed according to the number of mothers, but the learned Judge had no doubt that he had not been telling the truth. Distribution of the estate according to the number of the mothers of the children had followed principles of native law and

p.34, l.13 - p.35, l.27 custom. The question, Jibowu, J. said, was whether this rule of native law was repugnant to natural justice, equity and good conscience. He said there had been many cases before the Court in which properties of intestates had been distributed among the children, but the basis had always been the number of the children. The properties were distributed equally among them. He referred to certain decisions, and said the trend of the

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decisions was to apply the equitable rule of equality among the children. The old rule of division according to the number of the wives of the deceased was, in his view, outmoded. It did not agree with the modern idea that the basis of distribution was the number of the children of the intestate, affording equal shares to all the children. The learned Judge therefore ordered that future rents of 4, Balogun Square be divided into nine parts, each child, and children of a dead child, having a ninth-part share. p.36, ll.1-4

10. By a Notice of Appeal dated the 25th June, 1955, the Respondents appealed to the West African Court of Appeal. The grounds of the appeal were: pp.36-38

(1) That the judgment had been against the weight of evidence:

(2) That Jibowu, J. had been wrong in holding that the rule of native law providing for distribution per stirpes was inequitable: and

(3) That he had been wrong in failing to direct his mind to the fact that for nearly 11 years the parties had distributed the rents into four parts without any dispute.

11. The appeal came on before Foster-Sutton, C.J., de Lestang, J. and Abbott, J. on the 5th November, 1957. After hearing part of the argument, the Court adjourned the appeal for the purpose of giving Counsel an opportunity to bring further evidence on the question of what was the Yoruba custom. pp.38-40

12. The appeal came on again on the 12th December, 1957, when both sides called witnesses to give evidence on this point. The Respondents called the following witnesses:

(1) Ogunlana, a Chief of Lagos, aged 72, said that if a Yoruba man with many wives and children died intestate, his property was divided into as many equal shares as he had wives. A share could only go to a wife who was living, and had children living, at the date of the intestate's death. The children of a wife who had predeceased him took her share. This method of distribution was known as Idi-Igi, it was still in force; so far as he knew, there had never been any other method of distribution. p.40, ll.13-40

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pp.42-43 (2) Gbajumo, a Chief of Lagos, aged 70, said that in the old days property of an intestate was divided into a number of parts equal to the number of his wives. That custom was still observed, and was called Idi-Igi. Only when a matter went to Court did confusion arise. There was another custom, called Ori-Ojori, under which the property was divided into a number of parts equal to the number of children. If the members of a family did not agree, the head of the family decided which method should be adopted. The real Yoruba custom was Idi-Igi, which was the more important and the older of the two, and the prevailing custom.

pp.43-44 (3) Ajikanle, a Yoruba woman, aged 84, said that if a Yoruba died intestate leaving five wives and many children, his property was divided into five parts; she had heard Ori-Ojori, which was an old custom. The family decided which custom should be adopted, and if they disagreed an elderly person was invited to decide. The more usual custom was according to the number of wives.

13. The Appellants called the following witnesses on this point:

pp.44-45 (1) Gbadesiri, a Chief of Lagos, aged 61, said that if a Yoruba died intestate leaving several wives and children his property was divided according to Ori-Ojori. It had formerly been done according to Idi-Igi, but the custom had changed more than 60 years before. Ori-Ojori had grown up later than Idi-Igi, in order to maintain cordial relationships between children. He said he did not know if anyone still used Idi-Igi.

pp.45-46 (2) Tijani, a member of the Royal House in Lagos, aged 71, said he knew a little about the native law and custom of the Lagos Yorubas. Ori-Ojori had been their system of distributing intestate estates since his birth. Idi-Igi had been the custom at one time, but it had changed about 80 years previously. He said Idi-Igi could not now be practised, unless the children all agreed among themselves.

p.46 (3) Batunla, a Chief of Lagos, said Idi-Igi was sometimes found, but Ori-Ojori more frequently. Ori-Ojori was adopted to avoid litigation if division by Idi-Igi was refused.

pp.48-53 14. The Federal Supreme Court delivered judgment

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on the 10th January, 1958. The first judgment was given by Abbott, J. After setting out the facts, he said that Jibowu, J. had been justified in rejecting the evidence of the first Appellant that the division into four parts had been by mistake and that he (the first Appellant) did not know why that method had been adopted. Abbott, J. also said he was in complete agreement with Jibowu, J. that distribution of the estate according to the number of the mothers of the children had followed principles of native law and custom. After setting out further passages from the Judgment of Jibowu, J., Abbott, J. said that when the appeal had first come on it had been pointed out that there was some evidence that the former custom of dividing an intestate's property according to the number of his wives had been replaced by division equally between the children. The evidence had been scanty, so the Court had decided to hear further evidence as to the native law and custom. After referring to that evidence, the learned Judge held:

p.49, ll.17-28

p.50, l.50 - p.51, l.12

p.51, l.50 - p.52, l.15

(1) That Idi-Igi was an integral part of Yoruba native law and custom relating to the distribution of intestate's estates;

(2) that it was in full force and observance and had not been abrogated;

(3) that it was the universal method of distribution, except where there was a dispute among the descendants of the intestate as to the proportions into which the estate should be divided;

(4) that, if there was such a dispute, the head of the family should decide whether Idi-Igi or Ori-Ojori should be adopted;

(5) that such a decision prevailed;

(6) that Ori-Ojori was a relatively modern innovation, adopted to avoid litigation.

Idi-Igi, in Abbott, J.'s view, was not repugnant to natural justice, equity and good conscience. Such repugnance would rather in the present case be the consequence of adopting a different method of distribution, because all the interested parties had originally agreed to Idi-Igi and it had been

p.52, ll.16-24

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p.52, ll.25-32 observed for 10 years. If the learned trial Judge had heard the witnesses competent to give evidence of native law and custom, he might, Abbott, J. said, have come to the conclusion that Idi-Igi, not Ori-Ojori, was the prevailing custom and ought

p.52, ll.33-43 to be adopted. The appeal ought to be allowed, and an order made for the division of the rents of 4, Balogun Square into four parts, one part to be paid equally between the descendants of each of the four wives. Foster-Sutton, C.J., and de Lestang, J. concurred.

15. The Respondents respectfully submit that the findings of the Federal Supreme Court about the prevalence and applicability of Idi-Igi and Ori-Ojori were correct according to native law and custom and were proper findings upon the evidence. The Supreme Court and the Federal Supreme Court found concurrently, accepting the evidence of the first and second Respondents, that upon the death of the deceased his children agreed that his property should be divided among the issue of his four wives per stirpes. It therefore followed from the findings of the Federal Supreme Court upon native law and custom that the proper division of the rents of 4, Balogun Square was that ordered by that Court.

16. The Federal Supreme Court was right, in the Respondents' respectful submission, in holding that the native law and custom which it found to be established was not repugnant to natural justice, equity or good conscience. Idi-Igi is not a rigid custom of invariable application, but, as the Court found, is subject to modification if any party interested upon an intestacy objects to its governing the distribution of the intestate's property.

17. The Respondents respectfully submit that the order of the Federal Supreme Court of Nigeria is right and ought to be affirmed, and this appeal ought to be dismissed, for the following (amongst other)

R E A S O N S

(1) BECAUSE the findings of the Federal Supreme Court upon native law and custom are right.

(2) BECAUSE the native law and custom so found

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are not repugnant to natural justice, equity or good conscience.

(3) BECAUSE the children of the deceased agreed that Idi-Igi should govern the distribution of his property.

(4) BECAUSE of the other reasons given by Abbott, J.

J.G. LE QUESNE.