~~20/62~~ 20/1962

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 MABNUORI
11. SUKURAT DAWODU
12. SATARI DAWODU (Defendants) Appellants

- and -

1. SUWEBATU DANMOLE
2. SAFURATU WILLIAMS
3. TAIWO DAWODU ) By their legal
4. KEHINDE DAWODU ) guardian and next
5. TAUFIKI DAWODU ) friend Safaratu Williams

(Plaintiffs) Respondents

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CASE FOR THE APPELLANTS

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Record

1. This is the Defendants' appeal from a Judgment and Order of the Federal Supreme Court of Nigeria (Foster-Sutton, F.C.J., de Lestang and Abbott F.JJ.) dated the 10th January, 1958, reversing the Judgment and Order of the Honourable Mr. Justice Jibowu, Ag.S.P.J. (as he then was), dated the 21st March, 1955, whereby he adjudged and ordered that the rents from certain property situate at 4 Balogun Square, Lagos, the property of one Suberu Dawodu, deceased, (hereinafter called "the deceased") the father and grandfather of the Plaintiffs (Respondents) and themselves should be divided into nine parts, that being the number of his children by his four wives, and that each of the said children and the children of such of them as should be dead should have a ninth part share.

p.47, l.22 to p.53; p.54.
p.31 to p.36, l.18; p.36, ll.1-8. p.36, ll.1-4.

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2. The deceased had died in September, 1940, leaving surviving him seven children born by his four wives. Two of his children Atiku, a son, and Sariyu, a daughter had predeceased him, but had left children surviving them.

3. The 1st Plaintiff is the daughter and only child by the deceased's wife Morinatu; the 2nd Plaintiff, a daughter, and Basiru (or Bashiru) a son, who has died are the deceased's children by his wife Raliatu (deceased); the 3rd, 4th and 5th Plaintiffs are the minor children of the said Basiru.

4. The 1st Defendant a son, Amusa also a son who died in August 1953, and the aforesaid Atiku were the children of the deceased by his wife Moriamo (deceased); the 2nd and 3rd Defendants and the aforesaid Sariyu were the children of the deceased by his wife Osenatu; the 5th, 6th, 7th and 8th Defendants are the children of the said Atiku; the 9th and 10th Defendants are the children of the aforesaid Sariyu; and the 11th and 12th Defendants are the children of the aforesaid Amusa.

p.32, 11.9-18. 5. For some years after the deceased's death the rents from the said property were divided into four parts according to the number of the deceased's wives, and each part was distributed per stirpes among the children of each wife. So that as a result thereof the 1st Plaintiff being an only child by the particular wife received one whole fourth part share, whereas the more numerous children of the other wives received proportionately less.

p.32, 11.19-28. Ex."A", pp.56-57. 6. In 1949, the 10th Defendant, the son of the aforesaid Sariyu, wrote a letter complaining (inter alia) that their branch (consisting, as aforesaid, of himself and of the 2nd and 3rd Defendants, children of the deceased by his wife Osenatu, and the 9th Defendant another child of Sariyu) was not given a share of the said rents and stated that it was wrong to have shared the rents per stirpes instead of per capita, whereby all the children of the deceased would receive an equal share and that the rents should have been divided into nine parts instead of four according to the number of children the deceased had.

p.32, 11.29-33. p.22, 11.12-14. 7. Family meetings were held at which the aforesaid Amusa, the eldest child of the deceased, and the other children, of the deceased excepting the

1st and 2nd Plaintiffs agreed that future rents should be divided into nine parts instead of four as had been previously done.

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8. Thereafter on the 8th March, 1954, the Plaintiff instituted their action herein claiming partition of the said property. By their statement of claim, however, they claimed in the alternative that the former division into four parts should continue. The allegations made therein in support of this claim were that the deceased had made a Will which was missing and, that it had been directed therein by the deceased that his property both real and personal were to be divided among his children by the number of his wives, the children of one mother having one share, and that the children then decided that the property should be accordingly divided since there was great suspicion that the aforesaid Amusa knew something about the missing Will. By their defence the Defendants denied these allegations and alleged that the deceased had died intestate and that his estate became vested in all the children in equal shares according to Native Law and custom.

pp. 2-3.
p.9, 11.21-23.
p.7, 1.39 to p.8, 1.21.
p.10, 11.10-13.
p.10, 11.14-19.
p.10, 11.35-39.

9. Failing the discovery of any Will of the deceased Letters of Administration to the deceased's estate were taken out by four of the children each representing children of the four wives. The Administrators and Administratices were Amusa; the 1st and 2nd Plaintiffs; and the 2nd Defendant.

p.32, 11.1-8.

10. Evidence prior to the trial in an unsuccessful endeavour by the Plaintiffs to prove the existence of the said Will was called. An endeavour was also made by the Plaintiffs by evidence taken on commission to prove the said direction in his said alleged Will by the deceased regarding the said alleged division into four parts of his property.

p.13.

11. At the trial evidence only in support of the Plaintiffs' said allegations as set forth in paragraph 8 supra was led by the Plaintiffs, but no evidence of any kind whatsoever to prove what the order of distribution, according to the applicable Native Law and Custom or any Native Law and Custom, of the property of the deceased, as upon an intestacy should be, was called by them. Evidence of such Native Law and Custom was on the other hand called on behalf of the Defendants and is referred to in paragraph 13 infra.

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12. The findings upon the evidence of the learned trial Judge as regards the said Will and the said allegations of the Plaintiffs in regard thereto were as follows :-

p.32, ll.1-5. "It was alleged that (the deceased) made a Will but the Will could not be found so his children agreed that Letters of Administration should be applied for by four of them each representing children of the four wives of their father."

. . . . . .

p.32, l.38; p.33, ll.1-5. "Chief Oluwa's evidence was taken on commission, but I have to rule out his evidence which purported to be what (the deceased) told him as to how his properties should be distributed as a dangerous hearsay. He did not even see the Will alleged to have been made.

It has been suggested by the Plaintiffs that Amusa suppressed the Will which, it must be observed, none of them has ever seen. There is no convincing proof that a Will was made and as Letters of Administration had been applied for and obtained by four of the children of (the deceased); he must be taken to have died intestate. His properties must therefore be distributed according to rules of inheritance, under intestacy."

The learned trial Judge then proceeded to deal with the law as to the order of intestate succession according to the Native Law and custom (referred to in paragraph 13 infra) but having done so he said, however, as follows:-

p.35, ll.28-43. "The Plaintiffs' case in this action was, however, not based on any rule of native law and custom, and the suggestion that it was an attempt to give effect to what they understood to be the wishes of their late father, was denied by the 1st Defendant.

I accept the evidence of the Plaintiffs on this point and disbelieve the 1st Defendant's evidence on the point. I have already found that there was no convincing proof that their father made a Will and I have ruled out the evidence of Chief Oluwa regarding what he was told by their father as to how his estate was to be distributed.

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The bottom has, therefore, been knocked out of the basis for distribution according to the number of the wives."

He then added these words with which he concluded his Judgment:-

"As the other children and grand children besides the Plaintiff have agreed that future rents of properties left by their father and grandfather to be divided into nine parts according to the number of the children, I consider that the modern idea of treating his children equally should be applied. It is therefore ordered that future rents accruing from 4, Balogun Square, Lagos, be divided into nine parts and each child and children of a dead child should have a ninth part share." p.35, l.44 to p.36, l.4.

13. In reaching the conclusion, correctly, as the Defendants submit he did, as regards the Native Law and custom properly to be applied in the distribution of the said rents as upon an intestacy, as stated in the concluding quotation from the learned trial Judge's Judgment in the immediately preceding paragraph hereof, the learned trial Judge said as follows:-

"There must have been some reasons why the children agreed that the personal effects of their father should be divided into four parts and distributed according to the number of their mothers. The 1st Defendant who gave evidence for the defence said he did not know why but there is no doubt in my mind that he was not telling the truth. Distribution of the estate according to the number of the mothers of the childred followed principles of native law and custom; p.33, ll.7-23. p.34, l.5 to p.35, l.27.

Moriamo Molade, who gave evidence for the Defendants, knew about this method of distribution under native law and custom, but she considered that the rule is no longer binding as people have become civilised. She however, could not say, when the rule was abrogated. p.27, l.37 to p.28, l.29; p.28, ll.11-15; ll.19-21.

. . . . . .

Section 17 of the Supreme Court Ordinance makes

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it possible for native law and custom to be applied to cases between natives if the native law and custom is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any law for the time being in force.

The question is whether the above rule of native law is repugnant to natural justice, equity and good conscience. This Court has always treated female and male children of an intestate in the same way and the rule that equality is equity has always been applied so that the female child gets an equal share of her father's property as any male child.

The question of division according to the number of mothers of the children of an intestate has never, so far as I can discover been considered by this Court.

There have been many cases in which the properties of intestates had been distributed among the children of the intestates, but the basis of distribution had always been the number of the children and their relationship with the intestates. In these days no one ever thinks of the number of the wives of an intestate in order to ascertain into how many parts the properties left are to be distributed. When the number of the children has been ascertained, the properties are distributed equally among them.

In Lewis versus Bankole, 1, N.L.R. 82, at page 96, the Chiefs of Lagos invited to give opinion on native law and custom in answer to question by the Court as to whether they would make the shares of the children equal replied in the affirmative, without any reference to the number of their mothers.

In Abudu Wahabi Phillip versus Sanni Phillip and Tunder Phillip, 18, N.L.R. 102, the intestate left three children by three different mothers, and the Court ordered distribution between the three children without reference to their mothers.

Mr. Kotun, one of the Counsel for the

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Defendants, referred the Court to the case of Alayaki vs. Alayaki, No. 19 of 1952, in which the properties left by the intestate were ordered to be distributed equally among the children without considering the number of their mothers.

It therefore appears that the trend of the decisions in this Court is to apply the equitable rule of equality and each child gets the same share as any other.

The old rule of division according to the number of the wives of the deceased and mothers of the children therefore seems to be out-moded, and there can be no doubt that it was neither fair nor equitable to the children.

The idea behind the old rule was that each wife who had a child was given no cause for jealousy as it was understood that the number of wives would determine the distribution of the properties of the intestate. Under the rule an only child of a wife got the same share as many children of another wife, with the result that the children did not get equal shares of their father's estate. This does not agree with the modern idea that the basis of distribution is the number of the children of the intestate, which assures equal shares to all the children."

14. The Plaintiffs appealed against the said Judgment of the trial Judge to the Federal Supreme Court and, upon the said appeal coming on for hearing on the 5th November, 1957, and Counsel on both sides having been heard, their Lordships, in purported and in the Defendants' respectfuly submission wrongful, exercise of their powers under Rule 30 of the Federal Supreme Court Rules adjourned, for the purpose, as they said, "of giving Counsel time to bring further evidence on the question: What is the Yoruba custom". p.39 to p.40, l.4.

15. On the 12th December, 1957, the evidence, in accordance with the said direction of the Federal Supreme Court, of both sides, was heard, and on the 10th January, 1958, Judgment was delivered by Abbott F.J. in which the other members of the Court, Foster-Sutton F.C.J. and de Lestang F.J., indicated

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their concurrence. In regard to the said direction the learned Federal Justice said:-

p.50, l.50 to p.51, l.12.

"The appeal first came before this Court on the 5th November, 1957, when it was pointed out to us, quite correctly, that there was evidence that, at some time in the past the former custom of dividing an intestate's property according to the number of his wives had been abrogated and that a division equally between, the children, without regard to the number of wives, had been substituted therefore. Such evidence as there was is scanty, and there was no evidence of the date of abrogation of the old method of distribution, so this court decided to hear evidence as to the native law and custom applicable."

16. The said Rule 30 of the Rules of the Federal Supreme Court provides as follows:-

"30. It is not open as of right to any party to an appeal to adduce new evidence in support of his original case; but, for the furtherance of justice, the Court may, where it thinks fit, allow or require new evidence to be adduced.

Such evidence to be either by oral examination in Court by affidavit or by deposition taken before an examiner or commissioner as the Court may direct. A party may by leave of the Court allege any facts essential to the issue that have come to his knowledge after the decision of the Court below and adduce evidence in support of such allegations."

17. The Defendants respectfully submit that there existed no grounds, or any sufficient or proper grounds for, and the purported exercise by the Federal Supreme Court of their powers under the said Rule, was wrongful and contrary thereto and was a manifest injustice to the Defendants inasmuch, as aforesaid:-

(1) The Plaintiffs in support of their claim for a division of the said rents into four parts according to the numbers of the deceased's wives and irrespective of the number of their children, was based solely and entirely on the allegations:

(a) that the deceased made a Will and, that it

was suppressed by the said Amusa.

(b) that therein the deceased directed the division of his estate including the said rents into four parts as aforesaid.

(2) That the issue that the deceased died intestate and that his estate should accordingly be distributed according to the native law and custom applicable thereto was clearly raised by the Defendants in their defence.

(3) That the Plaintiffs relying entirely on the said allegations called evidence in an endeavour to obtain, and to prove the existence of the said Will of the deceased and, having failed in doing so, called evidence, taken on commission, in an endeavour to prove that the deceased had directed the division of his estate to be as aforesaid claimed by them.

(4) That the Defendants called evidence in proof of the native law and custom regarding intestacy according to which, as found by the learned trial Judge, the said rents were to be divided among all the children equally as he adjudged and ordered as aforesaid they should be.

(5) That the learned trial Judge fully considered and dealt with the issues raised as aforesaid and gave his Judgment thereon as aforesaid.

(6) That the learned trial Judge dealt fully and adequately as aforesaid with the whole question as to the native law and custom to be applied as upon an intestacy (which the Plaintiffs denied existed), and reached a conclusion in accordance with law and justice in all respects thereon.

18. The principle which ought, as the Defendants respectfully submit, to be adopted and applied as to when the said power should be exercised by the Federal Supreme Court in such a case as the instant one is stated in these words by Lord Loreburn L.C. in Brown v. Dean (1910) A.C. 373 at p. 374 viz:-

".....When a litigant has obtained a Judgment in a Court of Justice, whether it be a

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county Court or one of the High Courts, he is by law entitled not to be deprived of that Judgment without very solid grounds;"

With this Lord Shaw of Dunfermline p.36 agreed but with a reservation not inapplicable, the Defendants submit, to the instant case in saying:-

> "My Lords, I concur, but I hope your Lordships will forgive me for expressing doubt upon a single point, ..... it is upon the subject of res noviter veniens ad notitiam. Speaking for myself, I do not at present see my way to go the whole length of the proposition my noble and learned friend the Lord Chancellor has proposed, to the effect that res noviter veniens must, if believed, be conclusive. It is possible to figure cases in which it might be so gravely material and so clearly relevant as to entitle the Court to say that that material and relevant fact should have been before the jury in giving its decision".

19. The Defendants furthermore in support of their submission that the Federal Supreme Court should not have exercised their said power, respectfully call attention to the Plaintiffs' grounds of appeal to the Federal Supreme Court. It is only in the second ground that the learned trial Judge's Judgment, holding that the old rule of division according to the number of the children seemed to be outmoded, and that there could be no doubt that it was neither fair nor equitable to the children, is challenged and in these words:-

p.37, ll.24-28. p.35, ll.7-15.

p.37, ll.24-28.

> "2. That the learned trial Judge was wrong in law in holding that the native law and custom which establishes that distribution shall be by stirpes and not per capita is inequitable."

And they also call attention to the third ground of appeal by which the ruling out by the learned trial Judge as hearsay of the evidence (referred to in paragraph 12 supra) by which the Plaintiffs endeavoured to establish that the deceased had said that his properties were to be divided according to the number of wives, is challenged and this issue again raised in the appeal.

20. Except that the two systems of native law and

custom by which the order of intestate succession determining the method of distribution of a deceased's property in cases where the intestate had several wives and children by each of them, were identified by name as Idi - Igi, and Ori-Ojori respectively, the former being the one described by the learned trial Judge as "The old rule of division" and held by him to be "outmoded" and "neither fair nor equitable to the children", and the latter being the one applied by the learned trial Judge and described by him as "the equitable rule of equality", the evidence called, at the instance of the Federal Supreme Court (or, as it is respectfully submitted, might quite properly be described as the re-trial by the Federal Supreme Court), resulted, it is submitted, in the correctness of the Judgment of the learned trial Judge being fully confirmed in every way.

p.51, 11.13-18.
p.35, 11.11-15.
p.35, 11.7-10.

21. In so far as the evidence called before the Federal Supreme Court is, as stated in their Judgment, to be interpreted as differing in any substantial way from that of the learned trial Judge and, as justifying the application of the system of Idi-Igi, contrary to the reasoning and Judgment of the learned trial Judge, it is submitted the Judgment of the learned trial Judge is right and should accordingly be upheld, and the Judgment of the Federal Supreme Court is wrong and should be set aside.

22. The effect of the evidence called before the Federal Supreme Court is stated by them to be as follows:-

> "The witnesses for the Defendants/Respondents substantially agreed that Idi-Igi was always observed in former times, but stated that it has now been to some extent superseded by Ori-Ojori, the change having come about to preserve cordial relationships between the children. Those who, under Idi-Igi, received a smaller share than their half-brothers and half-sisters felt aggrieved and this often resulted in the estate of the intestate being depleted by the expense of litigation. To avoid this, therefore, Ori-Ojori was adopted in some instances. The upshot of this evidence is, in my opinion, that Ori-Ojori is a fairly recent innovation introduced to avoid litigation.

p.51, 11.35-39.

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Leaving aside for the moment the odd, as it is respectfully submitted, conclusion, stated in the last sentence of the quotation, but for immaterial and slight verbal differences and presentation this might well be a statement of the learned trial Judge's own views which led him to the conclusion - so strongly pointed to in this quotation by the Federal Supreme Court themselves - it did in holding that the system to be applied according to the native law and custom was that of Ori-Ojori, that is to say, that the deceased's property should be divided equally among all his children irrespective of the number of his wives. This is, moreover, what the due administration of section 17 of the
p.34, ll.5-12. Supreme Court Ordinance which, though strongly borne in mind by the learned trial Judge, is not referred to anywhere in their Judgment by the Federal Supreme Court, required, it is submitted. It would be hard, the Defendants would comment, to find a better argument or reason in favour of the application of the said Ori-Ojori method of distribution of a deceased intestate's property.

It would seem that the Federal Supreme Court were much too concerned, as the last sentence in the quotation would appear to indicate, with when the said Ori-Ojori system came to be applied, rather than whether there existed - as it is submitted there did not - any good, real or substantial ground for their differing from the fully and carefully considered and soundly and well reasoned and quite unchallengeable Judgment of the learned trial Judge.

23. In their Judgment the Federal Supreme Court, with regard to the evidence called before them say:-

> "The learned trial Judge did not have the advantage, as we did, of hearing the evidence of competent witnesses as to the native law and custom applicable. Had he had that, I am inclined to the view that he might have come to the conclusion, as I have, that Idi-Igi, and not Ori-Ojori, is the prevailing custom and should be adopted in this case."

This is somewhat mixed up, but the defendants would submit that the prediction as to the learned trial Judge's coming to the conclusion, that the custom of Idi-Igi should be adopted in this case is

completely negatived and falsified by the learned trial Judge's Judgment in every way and, indeed, in substance, and in all the essentials, the evidence called before the Federal Supreme Court, and its Judgment in regard thereto, was almost parallel to that of the learned trial Judge's Judgment, that the Federal Supreme Court should have upheld it: for this is curiously what the Federal Supreme Court in their Judgment say:- Record

"Having very carefully considered all the evidence before us, I would hold (i) that Idi-Igi is an integral part of the Yoruba native law and custom relating to the distribution of intestate's estates; (ii) that Idi-Igi is in full force and observance at the present time, and has not been abrogated; (iii) that Idi-Igi is the Universal method of distribution except where there is a dispute among the descendants of the intestate as to the proportions into which the estate should be divided; (iv) that where there is such a dispute, the head of the family is empowered and should decide whether Ori-Ojori ought in that particular case, to be adopted instead of Idi-Igi; (v) that any such decision prevails; (vi) that Ori-Ojori is a relatively modern method of distribution adopted as an expedient to avoid litigation." p.51, l.50 to p.52, l.15.

The Judgment proceeds:-

"I would further hold that, although, as the learned Judge says, 'Equality is equity', Idi-Igi is not repugnant to natural justice, equity and good conscience. In this particular case to hold otherwise, would be in my view, to take a decision bearing the stamp of that repugnance because all interested parties originally agreed to Idi-Igi being adopted, and it was thereafter observed for ten years." p.51, ll.16-24.

It is submitted that the effect of the evidence given before the Federal Supreme Court is not correctly stated by them. The evidence given by the three witnesses called by the Plaintiffs, and who were then the appellants, was as follows:-

D.A. OGUNLANA the first witness called said that there has never been any other method of distribution than Idi-Igi. pp.40-42. p.40, ll.37-40.

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p.43, 11.2-12. A. GBAJUMO the second witness called in cross-examination only said that the two customs of Idi-Igi and Ori-Ojori co-existed and that the Head of the family decides which method of distribution is adopted if the family members are not in agreement.

p.43, 11.22-25; p.43, 11.33-36. S. AJIKANLE, the third witness called said that when a Yoruba dies intestate leaving five wives and many children the property is divided into five parts.

And in cross-examination he said, that he had heard of the Ori-Ojori custom and that it is an old custom.

p.43, 11.37-41. In answer to the Court he said, that the Family decides which custom is adopted. If they disagree, an elderly person is invited by somebody to arbitrate.

The following three witnesses were called by the Defendants then the Respondents, namely:-

p.44, 11.22-3; A. GBADESIRI, who was the Chief Elete - Odibo of Lagos, said that the custom changed from that of Idi-Igi to that of Ori-Ojori more than 60 years ago and that Ori-Ojori is more often found now.

p.44, 11.31-33. p.45, 11.1-3. And in re-examination by way of correcting an asnwer he gave to the Court he said that Idi-Igi was the prevailing custom in olden days but that Ori-Ojori is the prevailing custom now.

And in answer to the Court he said, "I don't know if anyone uses Idi-Igi now."

p.45, 11.15-17; 25-28; 33. p.46, 11.9-15. A. TIJANI, the Chief Imam, then 71 years of age said, that Ori-Ojori had been the system of distribution of intestate Estates, of Lagos Yorubas since he was born; that Idi-Igi and Ori-Ojori are one and the same thing, the former is an old name for the latter; that Idi-Igi is devised according to the number of wives - Ori-Ojori according to the number of children and equally between them. In cross-examination he said that Idi-Igi was at one time the custom of Lagos Yorubas Ori-Ojori was the present day custom, and that the change

took place about 80 years ago and Ori-Ojori was used by all Yorubas in Lagos; that Pagan Yorubas had now adopted Ori-Ojori and had done so before he was born; that Idi-Igi cannot be practised unless all the children all agree among themselves and that Ori-Ojori is now used to give equal shares to each child to ease expense of litigation. Record

M.S. BATUNLA said that Idi-Igi is found sometimes today and Ori-Ojori is also found and more frequently; that it was found more often and more frequently because under Ori-Ojori each child gets an equal share and that Ori-Ojori has been the prevailing custom at least since he became of age. In cross-examination he said that if Idi-Igi is refused, Ori-Ojori is adopted to avoid litigation. p.46, ll.24-28. p.46, ll.30-31.

This evidence, it is submitted, if it had been given before the learned trial Judge could only have confirmed him in the view he took and the conclusion he reached, as to the application of the said custom called Ori-Ojori. In reaching the conclusion he did as is set forth in paragraph 11 supra, the learned trial Judge found that the Plaintiffs' case was not based on any rule of native law and custom, but that it was an attempt to give effect to what they understood to be the wishes of the deceased, their father; that he found that there was no convincing proof that the deceased had made a Will and he ruled out the evidence of Oluwa, the Plaintiffs' witness, regarding what he was told by the deceased and that therefore, as the learned trial Judge held, the bottom had been knocked out of the basis for distribution according to the number of wives. Having made this finding he then, in the words quoted at the end of paragraph 12 supra, reached the conclusion that the modern method of treating the children equally should be applied. In reaching such conclusion he ended by saying :-

> "As the other children and grandchildren besides the Plaintiffs have agreed that future rents of properties left by (the deceased) be divided into 9 parts according to the number of children, I consider that the modern idea of treating the children equally should be applied".

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And he accordingly ordered the said rents to be divided into nine parts and each to have a ninth share.

It is submitted that the Federal Supreme Court have not had any regard to, or given sufficient consideration to this or the evidence on which it is based in saying as they do:-

p.51, ll.29-34.

> "There was clear evidence before the Court below that there was in this instance a family meeting at which the method of distribution was discussed. No agreement was reached but apparently the head of the family did not then decide, all these proceedings began."

This clearly shows, it is submitted, that there was a finding by the learned trial Judge that the other children and grandchildren besides the Plaintiffs did agree that the future rents of property left by the deceased were to be divided into nine parts according to the number of children, and the Federal Supreme Court were wrong in their view as expressed by them that no agreement was reached and that the Amusa (who was at the time the head of the family) did not then decide. And the finding by the learned trial Judge was reached by him after seeing and hearing the witnesses on both sides, and has not been challenged by the Plaintiffs in their grounds of appeal to the Federal Supreme Court or in their argument thereto; and it does not appear in anywise that the Federal Supreme Court itself was taking any different view from that of the learned trial Judge as a finding of fact by him.

24. It is furthermore submitted that, if (contrary to the Defendants' submission) the Federal Supreme Court are right in holding that (as set forth in paragraph 23 supra) where there is a dispute among the descendants of the intestate as to the proportions into which the estate should be divided, the head of the family is empowered to, and should, decide whether Ori-Ojori ought, in that particular case, to be adopted instead of Idi-Igi, and that any such decision prevails, a dispute did occur, as is hereinbefore set forth in paragraphs 6 and 7 supra, and Amusa, who was the eldest son and the head of the family, did decide that (what is called) Ori-Ojori ought to be adopted (and as by agreement among the descendants of the deceased, as found, as

aforesaid, by the learned trial Judge, was adopted).

25. The Federal Supreme Court in allowing the appeal of the Plaintiffs ordered that the said rents of 4 Balogun Square, Lagos, due as from the 8th March, 1954, when the writ in the action was issued, be divided into four parts one to be paid equally between the descendants of each of the four wives of the deceased.

26. It is respectfully submitted that the Judgment and Order of the Federal Supreme Court is wrong and should be reversed or varied or that in the alternative a new trial should be ordered between the parties for the following, amongst other

R E A S O N S

(1) BECAUSE the claim of the Plaintiffs failed and the defence of the defendants succeeded.

(2) BECAUSE upon the issues raised at the trial and the facts either proved or admitted thereat, the Defendants in law and justice were rightly entitled to the judgment as given in their favour.

(3) BECAUSE the decision of the learned trial Judge as to the application of the native law and custom known by the name of Ori-Ojori was, upon the evidence at the trial before him, and in conformity with the trend of the decisions in the Nigerian Courts and the present times and thoughts and requirements of the people, and the provisions of Section 17 of the Supreme Court Ordinance and in all other material respects, right in law and justice.

(4) BECAUSE the native law and custom known as Idi-Igi had lost ground and became discredited and had fallen into desuetude and had been replaced by the more equitable, fair, just and up to date and litigious discouraging native law and custom known as Ori-Ojori.

(5) BECAUSE in law and in justice the method of division of the rents from 4 Balogun Square, the property of the deceased intestate, Suberu Dawodu, equally among his children irrespective of the number of his wives, was in

accordance with the native law and custom, and that which is known as Ori-Ojori was to be applied.

(6) BECAUSE the Judgment of the learned trial Judge, for the reasons contained therein and other good and sufficient reasons was right and ought to be restored.

(7) BECAUSE the Federal Supreme Court in directing and in hearing further evidence acted wrongly and in excess of and contrary to their powers under Rule 30 of the Federal Supreme Court Rules.

(8) BECAUSE the further evidence as directed and heard by the Federal Supreme Court (if legally and properly so directed and heard) confirmed the correctness of the Judgment of the learned trial Judge.

(9) BECAUSE the Judgment of the Federal Supreme Court was erroneous, in fact and in law.

(10) BECAUSE Amusa the eldest son and head of the family had decided and all the children and grandchildren of the deceased except the 1st and 2nd Plaintiffs had agreed that the method of division according to the native law and custom known as Ori-Ojori should be adopted and applied to the division among them of the said rents, and such custom was, therefore, according to the Judgment of the Federal Supreme Court properly adopted and applied.

(11) BECAUSE the Judgment of the Federal Supreme Court was wrong and ought to be reversed and the Judgment of the learned trial Judge restored.

S.N. BERNSTEIN.