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In the Privy Council.

No. 25 of 1950.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL

BETWEEN

MEMUDU LAGUNJU ... ... (*Plaintiff*) APPELLANT

AND

1. OLUBADAN-IN-COUNCIL
2. J. ADETOYESE LAOYE ... ... (*Defendants*) RESPONDENTS.

CASE FOR THE FIRST RESPONDENT

RECORD

1.—This is an Appeal from an Order of the West African Court of Appeal dated the 4th December, 1948, allowing with costs an Appeal from a Judgment of the Supreme Court of Nigeria dated the 7th February, 1948, and directing Judgment to be entered for the Respondents with costs in an action in which the Appellant sought an injunction restraining the second Respondent from acting as and receiving the salary of the Timi of Ede, and declarations that by native custom and tradition (i) the first Respondent cannot override the choice of the Ede Kingmakers in the selection of the Timi of Ede; (ii) the first Respondent's selection of the second Respondent as Timi of Ede is null and void; (iii) the Appellant is entitled to the post of Timi of Ede; and (iv) in April or May, 1946, the Appellant was duly selected as Timi of Ede.

p. 131, l. 27
pp. 83–112
p. 4
p. 1, l. 27–
p. 2, l. 12

2.—The Respondents in addition to pleading to the merits challenged the jurisdiction of the Supreme Court to hear the Appellant's claim. The Respondents relied on Section 2 (2) of the Appointment and Deposition of Chiefs Ordinance, 1930, as amended by Ordinance No. 20 of 1945. This sub-section was originally as follows :—

pp. 7–8

> The Governor shall be the sole Judge as to whether any appointment of a chief or head-chief, as the case may be, has been made in accordance with native law and custom.

RECORD

In its amended form the sub-section reads :—

> In the case of any dispute the Governor, after due enquiry and consultation with the persons concerned in the selection, shall be the sole judge as to whether any appointment of a chief has been made in accordance with native law and custom.

pp. 9–11
p. 160
p. 15, ll.1-10
pp. 12–18

3.—Jibowu, J., dealt with the plea to the jurisdiction as a preliminary point. He heard the evidence of the District Officer, Ibadan, who produced a letter approving of the second Respondent's appointment as Timi of Ede (a head chief) by the Senior Resident of Oyo Province, to whom the Governor had duly delegated his powers under the sub-section. After hearing argument Jibowu, J., ruled that the jurisdiction of the Court had been ousted, and that the Appellant's action should therefore be dismissed with costs.

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p. 25
pp. 26–31
p. 29, ll. 36–41

4.—On an Appeal by the Appellant, the West African Court of Appeal on the 10th November, 1947, returned the case to the Supreme Court to determine the issues in the light of the Court of Appeal's interpretation of the Ordinance. This interpretation was set out in the Judgment of the Court. Since allegations were made that there had been no enquiry or consultation or that if there had been they were made *mala fide*, the Court was of opinion that the evidence of the District Officer did not furnish the proof of enquiry and consultation necessary to oust the jurisdiction of the Court; and the Court would be entitled to set aside the Order if this condition precedent to the Governor's being sole judge had not been fulfilled.

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p. 39
p. 39, ll. 29–42

5.—The Respondents contended that the issues to be tried pursuant to this Order were whether there had been due enquiry and consultation; whereas the Appellant contended that all the issues raised by the pleadings, except that of jurisdiction which the Court of Appeal had decided, were to be decided. Jibowu, J., ruled that all the issues raised by the pleadings including the issue of jurisdiction were to be decided. His view was that if the Court was satisfied that due enquiry had been made, the action would be dismissed, but that otherwise the Court would decide the merits.

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pp.40–73; 82
pp. 74–82
pp. 83–112
p. 95, ll. 1–8

6.—After hearing evidence which went fully into the native law and custom respecting the appointment of the Timi of Ede and the dispute which had arisen, and full argument by counsel, Jibowu, J., delivered Judgment in which, after setting out the facts, he held that it was for the Court to determine four issues: (1) what is the native law and custom in regard to selecting a Timi; (2) whether the appointment of the second Respondent is in accordance therewith; (3) whether the Appellant had been properly selected; and (4) whether the Court had jurisdiction.

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7.—Dealing first with the issue of jurisdiction, Jibowu, J. referred to the evidence of the Senior Resident that he held an enquiry into the chieftaincy dispute on the 19th July, 1946, and had held an enquiry and consultation with the first Respondent. The learned Judge considered that the enquiry must not be made from the persons connected with the selection and must be an independent action from the consultation. He also accepted the Appellant's contention that "due enquiry" involves giving the persons concerned the opportunity of being heard. The Ordinance, in his view, substituted another tribunal for the Courts, and 10 the persons who would have been the parties to a lawsuit were the parties to be invited to the enquiry, with their supporters as witnesses. The Governor or his delegate should hear the claimants and the witnesses, should consult with the persons concerned in the selection, and should give his decision as the sole Judge. Unless this were done honestly and impartially, Jibowu, J. thought there would be no decision.

p. 95, l. 9–
p. 99, l. 20
p. 96, ll. 1-49
p. 97, ll. 1-17
p. 97,
ll. 18–33

8.—Jibowu, J. then examined the evidence of meetings at which the Resident was present of the Ede District Council on the 19th July, 1946, and of the first Respondent on the 9th May, 1946, and found that neither of them constituted "due enquiry," and that accordingly the jurisdiction 20 of the Court to determine the dispute had not been ousted. Under native law and custom it was for the Kingmakers to select the Timi from one of four ruling houses, though not necessarily in strict rotation. Two Timis had, however, never been appointed successively from the same house. Jibowu, J. then considered the contradictory evidence concerning the number and identity of the Kingmakers, and held that they were five in number: the Balogun, Jagun, Ikolaba, Ayope and Areago, and no others. He went on to state how, in his view, the Kingmakers made their selection. There was a great conflict of evidence, and after reviewing it, Jibowu, J. found nine principles established: (1) The Kingmakers decide which 30 ruling house shall be asked to recommend a candidate; (2) That house puts forward a candidate; (3) Ifa oracle says whether or not the candidate is acceptable; (4) If acceptable to Ifa, there must be sacrifice; (5) The Kingmakers must be unanimous in appointing the candidate, and upon appointment the minor chiefs and townspeople are informed; (6) The Olubadan's approval is sought, with customary gifts; (7) The selected candidate is installed when the Olubadan's approval is received; (8) The Timis are not appointed from the same house; and (9) A man with a living father is not appointed.

p. 97, l. 34.–
p. 99, l. 20
p. 99,
ll. 21–4
p. 99, l. 42–
p. 101, l. 37
p. 101, l. 38–
p. 104, l. 41

9.—Purporting to apply these principles, Jibowu, J. found the 40 appointment of the second Respondent not to be in accordance with native law and custom, whereas the Appellant was, in his view, properly selected, but the first Respondent was entitled to approve or reject a candidate, although not capriciously or arbitrarily. Accordingly, Jibowu, J. refused to make the first declaration for which the Appellant asked; but he set aside the selection of the second Respondent; declared the Appellant entitled to the post; and granted the injunction sought.

p. 104, l. 42–
p. 111, l. 30
p. 111, l. 37–
p. 112, l. 7

pp. 120–122
p. 123, l. 16

10.—The Respondents appealed to the West African Court of Appeal, and challenged the findings of Jibowu, J. both on the facts and the law. The Court of Appeal, however, asked that the question of jurisdiction be first argued; and in the event found it unnecessary to consider any other point.

pp. 127–129

11.—Lewey, J.A. delivered the first Judgment. The purpose of the Ordinance was to make the Governor sole judge in disputes such as the present. The words " after due enquiry and consultation with the persons " concerned in the selection " could be read (it had been argued) either as conditions precedent to the Governor's becoming sole judge thereby 10 ousting the jurisdiction of the Court; or as directions to the Governor, the Court's jurisdiction having already been unconditionally ousted. The learned Trial Judge had originally taken the latter view, but the case had on appeal been sent back to him because he had placed too wide a construction on the words of the Ordinance. The Judge, however, was wrong in then holding that the Court had full jurisdiction unless there had been due enquiry and consultation. There had been an unconditional transfer of jurisdiction, and such proceedings as the present action could not be entertained, although the Courts might have power in appropriate cases to intervene by prerogative writ. The Court of Appeal, therefore, 20 had not considered the merits, but on the question of jurisdiction allowed the appeal, set aside the Judgment and discharged the injunction.

pp. 129–131

12.—Sir John Verity, C.J. agreed with the conclusions of Lewey, J.A., subject to certain observations. In his view Section 2 (2) of the Ordinance did not unconditionally oust the jurisdiction of the Supreme Court so that in no circumstances can proceedings be taken relating to the appointment of chiefs. The Court could grant appropriate relief. As party to the previous Judgment of the Court of Appeal, he thought it unfortunate, however, that that Judgment could be read as implying that if the Court below found there had been no enquiry it could itself make the enquiry, 30 investigate the merits and, if it found in favour of the Appellant, grant the relief sought. The Court of Appeal had not been concerned with whether the form of action was appropriate or whether the remedy had been misconceived. In fact the form was inappropriate and the remedy misconceived.

p. 131

13.—Sir Henry Blackhall, P. thought that Section 2 (2) enjoins the Governor that in discharging his functions he shall make due enquiry and consult those concerned in the election, but the Governor remains sole judge, and the Courts have no jurisdiction. Possibly a prerogative writ might issue but in no case could the Court assume the powers vested in 40 the Governor to decide whether the appointment of a chief has been made in accordance with native law and custom.

14.—The first Respondent submits that the West African Court of Appeal were right in holding that the action was misconceived and should

be dismissed. If the Judicial Committee of the Privy Council should take a different view, and hold that the Supreme Court rightly went into the merits of the dispute concerning the appointment of a Timi of Ede, the first Respondent respectfully submits that the case should be remitted to the West African Court of Appeal for that Court to deal with the grounds upon which the Respondents contend that the learned trial Judge reached wrong conclusions both of fact and law. The matters for determination (to quote Lewey, J.A.) " are not, in the strict sense, questions of law or fact " but call rather for a practical knowledge of native law and custom."

RECORD

p. 128, l. 27

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15.—The first Respondent, however, submits that the Ordinance in clear terms deprives the Supreme Court of Nigeria of jurisdiction to determine the dispute, that the Appellant's action was misconceived, that Judgment has rightly been entered for the Respondents in the action, and that, therefore, this appeal should be dismissed for the following amongst other

REASONS.

1. BECAUSE the Appointment and Deposition of Chiefs Ordinance makes the Governor the sole judge in any dispute about the election of a chief.

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2. BECAUSE the learned trial Judge ascribed to the Judgment of the West African Court of Appeal dated the 10th November, 1947, a meaning which it does not bear, and was not intended to bear.
3. BECAUSE the Supreme Court of Nigeria had no jurisdiction to grant to the Appellant any part of the relief claimed.
4. BECAUSE the learned trial Judge made erroneous findings of fact and law, whereas (if he was entitled to entertain the action) he should on the merits have dismissed the Appellant's action.

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5. BECAUSE if the Kingmakers selected the Appellant as Timi of Ede the first Respondent was entitled to override and did override their decision.
6. BECAUSE the evidence established that the Governor by his duly appointed deputy had made due enquiry, and had consulted with the persons concerned in the selection, and had adjudged that the second Respondent had been appointed Timi of Ede in accordance with native law and custom.

FRANK GAHAN.

In the Privy Council.

No. 25 of 1950.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

BETWEEN

MEMUDU LAGUNJU (*Plaintiff*) APPELLANT

AND

1. OLUBADAN-IN-COUNCIL
2. J. ADETOYESE LAOYE (*Defendants*) RESPONDENTS.

CASE FOR THE FIRST RESPONDENT

BURCHELLS,
9 Bishopsgate, E.C.2,
Respondents' Solicitors.

GEO. BARBER & SON LTD., Printers, Furnival Street, Holborn, E.C.4, and Cursitor Street, Chancery Lane.
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