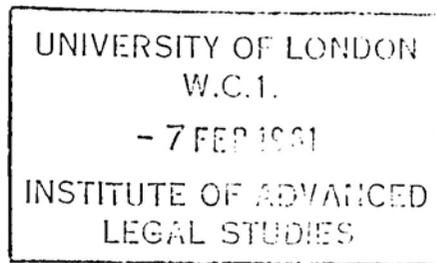


35,1960



50989

IN THE PRIVY COUNCIL

No. 4 of 1959

On Appeal from the Federal
Supreme Court of Nigeria

B E T W E E N

- (1) LAWAL BURAIMAH FATOYINBO
- (2) JARINATU BURAIMAH FATOYINBO
- (3) AMINATU BURAIMAH FATOYINBO and
- (4) SHITTU BURAIMAH FATOYINBO
(Plaintiffs). Appellants

- and -

- (1) SELIATU ABIKE WILLIAMS
alias SANNI
 - (2) ADIJATU AYINKE WILLIAMS
alias SANNI
 - (3) ABIBATU AYOKA WILLIAMS alias
SANNI
 - (4) NUSIRATU ABEKE WILLIAMS alias
SANNI
 - (5) ALIU SANNI WILLIAMS alias
SANNI DAWODU
- and
- (6) SUNMONU AKENBI WILLIAMS alias
SANNI
(Defendants). Respondents

C A S E for the RESPONDENTS

Record

1. This is an appeal from a judgment and order of the Federal Supreme Court of Nigeria (Jibowu Ag. F.C.J. de Lestang F.J. and Hubbard Ag. F.J.) allowing with costs an appeal of the Respondents from a judgment of the Supreme Court of Nigeria (Lagos

pp. 54-
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pp. 46, 47

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pp. 59,
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Judicial Division)(Jobling J.) whereby it was declared that the Appellants were jointly with the Respondents the owners of certain property situate at 42 and 44 Ereko Street, Lagos, Nigeria. Upon allowing the said appeal the Federal Supreme Court of Nigeria dismissed the suit in which the Appellants had claimed such a declaration as had been made by the Supreme Court of Nigeria.

2. This Appeal raises a question of pedigree and relates to the devolution under native law and custom of the said property situate at 42 and 44 Ereko Street, Lagos, Nigeria (hereinafter called "the property") which was originally owned by a woman called Opo (otherwise known as and hereinafter called "Opoola") deceased by virtue of a Crown grant dated the 25th November 1869 and registered as No. 173 in Volume 5 of the Register of Deeds kept at the Lands Registry, Lagos. It is common ground that under native law and custom the property devolved on the death of Opoola upon her children or child who survived her and if more than one in equal shares. It is also common ground that the Respondents are the grandchildren of Aina; that Aina was a daughter of, and survived, Opoola; that the Appellants are the grandchildren of Dada; and that Dada survived Opoola. The question at issue is whether (as the Appellants claim and as the Supreme Court of Nigeria held) Dada was a daughter of Opoola, in which case the Appellants and the Respondents are beneficially interested in the property as tenants in common; or whether (as the Respondents contend and as the Federal Supreme Court held) Dada was not a daughter but a niece or other collateral relation of Opoola, in which case the Respondents alone are beneficially interested in the property and the Appellants have no

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beneficial interest therein.

3. The admitted genealogy, so far as is relevant, may be stated as follows : disregarding Dada, whose parentage is in dispute in this appeal, Opoola had two children namely Aina and Oniyoku the latter of whom predeceased Opoola without issue; Aina died leaving one child only surviving her, namely Sanni; The Respondents are the only surviving children of Sanni; Dada died leaving only one child surviving her namely Buraimah Fatoyinbo; and the Appellants are the only surviving children of Fatoyinbo.

4. These proceedings were started by a civil summons dated the 18th May 1953 issued by the Appellants in the Supreme Court of Nigeria, Lagos Judicial Division, whereby the Appellants claimed against the Respondents in accordance with Particulars of Claim dated the 15th May 1953 a declaration that the Appellants and the Respondents are jointly owners of the property as tenants in common under native law and custom.

5. By their Statement of Claim dated the 13th June 1953 the Appellants (in paragraph 1) alleged that Dada as well as Aina was a child of Opoola, and after pleading the genealogy mentioned in paragraph 3 hereof and the said Crown grant alleged (in paragraph 4) that the Appellants and the Respondents were jointly the owners of the property as tenants in common under native law and custom, (by paragraph 5) that as such co-owners the Appellants and the Respondents had jointly let part of the property, namely No.42 Ereko Street, to various tenants from 1933 to March 1953 and had from time to time shared equally per stirpes the rents received, and (by paragraph 6) that by a Lease dated the 1st October 1952 the Respondents without the knowledge or consent of the Appellant let No.42 Ereko Street for a term of ten years and had received three years' rent

p.2

p.1

pp.3,4

p.3.11.
24-30p.3.11.
31-36p.3 1 37
- p.4 1 8

Record

in advance, had refused to give the Appellants a half of the said rent and claimed to be the only owners of the property.

6. By their Defence dated the 11th July 1953 admitted the genealogy mentioned in paragraph 3 hereof and the said Crown grant, and (by paragraph 4) denied that Dada was one of two children of Opoola, (by paragraph 6 alleged that Dada was a child of a distant relative of Opoola, (by paragraph 9) denied that the Appellants and the Respondents had jointly let No.42 Ereko Street, (by paragraph 10 alleged that the Respondents had solely enjoyed as absolute owners all the properties constituting the estate of Opoola without let or hindrance, (by paragraphs 12 and 13) alleged that in 1933 the first Appellant was appointed administrator of the estate of Aina jointly with the fifth Respondent because the first to fourth Respondents were women and illiterates the sixth Respondent was an infant and the fifth Respondent himself was only 22 years old, and that the first Appellant and the fifth Respondent as such administrators collected rents of (inter alia) the property, (by paragraph 14) alleged that the Respondents, their father and grandmother had solely enjoyed the property from the lifetime of Opoola until that day to the exclusion of the Appellants and all others and (by paragraph 15) alleged that Sanni the father of the Respondents in 1903 pulled down the original building erected by Opoola on the property and erected the present building thereon at his sole cost.
7. The hearing of the said action in the Supreme Court of Nigeria took place upon oral evidence before Jopling J. on the 23rd November 1954 and on a number of other
- pp.4-6
p.4 11.
27-29
p.4 1 36
- p.5 1 4
p.5 1.20
p.5 1 22
-26
p.5 11.32
- 42
p.5 1 43
- p.6 1 2
p.6 11.
3-7
pp.6-45
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- 10 days between that date and the 20th June 1955 when Judgment was reserved. On the 27th June 1955 the learned Judge delivered judgment finding as a fact that Dada was the sister of Aina and holding that the Appellants were entitled to a declaration that they were jointly with the Respondents the owners of the property. A declaration was made accordingly with costs to the Appellants. p.45 pp.46,47 p.47 l 43
- 20 8. The evidence given at the hearing of the said action may be divided into three categories, that is to say (a) oral evidence of matters which the witnesses had heard within the family or based on family tradition; (b) oral evidence of facts of which the witnesses had direct personal knowledge; and (c) evidence from documents. These three categories of evidence are referred to in the three succeeding paragraphs hereof.
- 30 9. The Respondents will refer to all the evidence of matters which the witnesses had heard from the family or based on family tradition but respectfully submit that the evidence in that category was inconsistent and wholly inconclusive and that no useful purpose would be served by either summarising or taking extracts from that evidence in this Case.
- 40 10.(a) The first Appellant gave evidence that he and the fifth Respondent obtained a grant of Letters of Administration to the personal estate of Aina and that until March 1953 the Appellants shared the rents of the property with the Respondents; no evidence was given by witnesses on behalf of the Appellants of any specific instances upon which such rents had been shared. p.7 l 23 p. 8 l 30

Record

- p.8 ll.
39-45 (b) The first Appellant also gave evidence that the Respondents were known as Fanni or Dawodu but were described in the Lease dated the 1st October 1952 (hereinafter mentioned) under the name "Williams" and that he the first Appellant did not know how they came by the name Williams and for that reason had difficulty in finding out about the said lease.
- p.27 ll.
33-40 (c) The fifth Respondent gave evidence that at the time at which he was about to obtain Letters of Administration to the estate of Aina he was the only male adult person among his father's children being then aged 22 and that the first Appellant was older than he. He also gave evidence that when rent for the property was paid by cheques usually the first Appellant cashed the cheques but he the fifth Respondent endorsed them, and that the first Appellant would not hand over the cash but kept it, and whenever the Respondents wanted cash they applied to him and gave him a receipt for the money paid out to them. The fifth Respondent also said that many times the Respondents asked the first Appellant for money and the first Appellant said there was none. 10
- p.28 ll.
40-45 (c) The fifth Respondent endorsed them, and that the first Appellant would not hand over the cash but kept it, and whenever the Respondents wanted cash they applied to him and gave him a receipt for the money paid out to them. The fifth Respondent also said that many times the Respondents asked the first Appellant for money and the first Appellant said there was none. 20
- p.29 ll.
4-8 (c) The fifth Respondent endorsed them, and that the first Appellant would not hand over the cash but kept it, and whenever the Respondents wanted cash they applied to him and gave him a receipt for the money paid out to them. The fifth Respondent also said that many times the Respondents asked the first Appellant for money and the first Appellant said there was none. 20
- p.32 ll.
17-40 (d) In cross-examination the fifth Respondent admitted receiving a cheque for £175 on the 11th July 1950 as rent for the property which he paid into his account at the National Bank of Nigeria Limited, that he subsequently gave a cheque for £87.10.0d. to the first Appellant but that sum was not a half share of rent due to the first Appellant. The fifth Respondent explained that on that occasion the first Appellant said he was going out of town and that he the 30 40

Record

10 first Appellant should have £87.10.0d. for the estate account and that the fifth Respondent should keep the balance in case any expenses arose in the absence of the first Appellan. The fifth Respondent further said that subsequently the first Appellant told him that he should account for the £87.10.0d. and that the fifth Respondent accounted to the first Appellant for his expenses and gave him £80 in cash as the balance then in the hands of the fifth Respondent; that was in accordance with their usual practice. The fifth Respondent further said that the first Appellant used to keep all the money and keep accounts and show the accounts to the fifth Respondent from time to time.

p.32 l 43
- p.33 l 2

20 (e) Evidence was given by one Adaba who said, in chief, "Dada was not the child of Opo Opoola. I knew Dada personally. I was present at her burial. Dada knew me from the time I was born." And later "Opo had two children, Oniyoku and Aina. Oniyoku pre-deceased Aina." In cross-examination the said Adaba said "Dada was not the first child of Opo. Efunte was the mother of Dada and Efunte and Opo were born of the same father." And

30 "Dada and Aina were not children of Opo. She only had two children - Aina and Oniyoku." In answer to the learned Judge the said Adaba said "I was about 20 years of age when Dada died. I knew Efunte myself - nobody told me Efunte was Dada's mother."

p.35 ll.4-6

p.35 ll.16,
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p.35 ll.30-
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p.37 ll.3,4

p.37
ll.14-16

40 (f) One Ipakodo in evidence said "I am a chief. I know the parties to this action. The relationship between Dada and Aina, the grandmothers respectively of the

p.38 ll.
6-14

Record

Plaintiffs and Defendants is that they are children of the same father but different mothers. Dada's mother and Aina's mother are children of the same father. I know Opoola. She is dead. Her children were Aina and Oniyoku. "She had no other children." And further "I know Dada very well. Fatoyinbo was the only child of Dada. Efunte was Dada's mother." In cross-examination the said Ipakodo reiterated that Opoola left Oniyoku and Aina as his (sic) children, that Efunte was female and left Dada, and that he (the witness) knew Opoola personally.

p.38 ll. 24-27 10

p.39 l 17

p.39 l 21

p.39 l 38

(g) Michael Nathaniel Bright Wilson, a solicitor of the Supreme Court, Nigeria, gave evidence that he acted as solicitor for Aina, that Aina had the property and a property in Great Bridge Street, and that Aina mentioned that she had given the Great Bridge Street property to Sanni. He also said that he (the witness) advised the first Respondent to get some one of his relatives who was older to join in taking out Letters of Administration on the death of Aina and that the first Respondent brought the first Appellant to him, the said Wilson. In re-examination the said Wilson gave evidence that Aina told him she had given the property at Great Bridge Street to her sister's son.

p.42 ll. 12-15 20

p.42 ll. 34-36

p.43 ll. 5-8

p.44 ll. 4,5 30

11. The evidence in paragraph 8 hereof referred to as evidence of documents was as follows :-

(a) Letters of Administration of the personal property of Aina recording the death of Aina on the 22nd March 1933 and granted by the Supreme Court of Nigeria to the first Appellant and the fifth Respondent described as "the grandsons of the said intestate."

p.64 40

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- 10 (b) A Lease dated the 3rd October 1934 and made between the first Appellant and the fifth Respondent of the one part and one Nouayhid of the other part whereby the first Appellant and the fifth Respondent demised the property for a term of three years from the 15th March 1935 at the rent therein mentioned; the said Lease was executed by the first Appellant and the fifth Respondent as administrators of the estate of Aina. pp.66,67
p.66 l 25
p.67 l 26-32
- (c) A letter dated the 6th June 1933 written by the fifth Respondent to the first Appellant relating to the obtaining of a grant of representation to the estate of Aina. pp.68,69
- 20 (d) A Lease dated the 1st October 1952 and made between the Respondents of the one part and one Shour of the other part whereby the Respondents demised the property for a term of ten years from the 16th March 1953 at a rent of £300 per annum of which £900 was payable in advance as rent for the first three years. pp.70-72
- 30 (e) A Deed of Gift dated the 16th January 1914 and made between Aina of the one part and Sanni (described as Sani Owolabi) of the other part whereby it was recited that the hereditaments and premises thereafter described and intended to be thereby granted for an estate of inheritance in fee simple in possession was the property of Opo who died at Lagos on or about the year 1885 leaving her surviving Oniyoku and the said Aina alias Osenatu her children and that the said Oniyoku had since died about six years ago childless leaving the said Aina his sister and next of kin him surviving and whereby 40 Aina conveyed unto Sanni the property at pp.73,74
p.73 ll. 28-37

Record.

Great Bridge Street, Lagos therein described.

- (f) A letter dated the 10th February 1947 written by the first Appellant to the fifth Respondent by the name "Mr. Williams Ayinde" and enclosing 42/-d.
p.75 ll. 25-43
- (g) A number of letters the first undated and the others dated respectively the 9th December in an unspecified year, the 8th March 1935, the 29th March 1934, the 8th December 1935, the 18th September 1939, the 14th September 1939, and the 16th October 1940 in each case written by the fifth Respondent to the first Appellant and in each case containing requests for money.
pp.77-82 10
- (h) A Lease dated the 29th December 1937 and made between the first Appellant and the fifth Respondent of the one part and the said Nouayhid of the other part whereby the first Appellant and the fifth Respondent demised the property for a term of 15 years from the 15th March 1938 at the rent therein mentioned.
pp.83-85 20
12. In his judgment at the trial of the action the learned Judge after stating that the sole question was whether Dada was sister of Aina or not expressed the opinion that the evidence on that point consisted of contradictory version of family history and the surrounding facts must be examined to see if they threw any light on that matter. In considering the surrounding circumstances the learned Judge first referred to the evidence that on at least one occasion when the fifth Respondent received £175 as rent he paid £87.10.0d. of it to the first Appellant and that the first Appellant collected the rent and took charge of it advancing amounts to the Respondents when requested. The learned Judge held that there was nothing to show whether the first
pp.46,47 30
p.46 ll. 21-26
p.46 ll. 27-41 40

Record

Appellant paid out only half of the rent or was merely acting as the Respondents' banker for the full amount but that the number of begging letters written by the fifth Respondent to the first Appellant was inconsistent with the claim that the fifth Respondent was only demanding payment from his own funds. Secondly, after referring to the fact that when Letters of Administration to Aina's estate were taken out the first Appellant and the fifth Respondent were both described as grandsons of the deceased the learned Judge took into consideration the evidence of one of the Respondents' witnesses (the said Wilson) that Aina told him that certain property had been given to her sister's son and recorded that it was not in dispute that the property in question was given to the first Appellant. Against those considerations the learned Judge set the recitals in the said Deed of Gift executed by Aina in favour of Sanni and the execution of the said Lease dated the 3rd October 1934 by the first Appellant as administrator of the estate of Aina. The learned Judge expressed the opinion that the said Recital was open to the explanatory comment that it was in Aina's interest to declare herself the sole owner of the property she was giving to her son and the execution of the said Lease was open to the explanatory comment that both the first Appellant and the fifth Respondent signed in the capacity of administrators so that the signature in that capacity was as much an admission against the fifth Respondent as against the first Appellant. Finally, the

10 p.46 ll.42-45

20 p.47 ll.1-5

p.47 ll.6-13

30 p.47 ll.14-22

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Record

- learned Judge referred to the grant by
- p.47 11. the Respondents in their own names of the
23-33 said Lease dated the 1st October 1952
without informing the first Appellant
and held that such conduct was not what
one would expect from persons who had a
clear title to the property. In the
result the learned Judge concluded that
the family history was too contradictory
to be relied upon but the other evidence
to which he had referred was consistent
with the Appellants' claim and that the
facts relied upon by the Respondents did
not throw any doubt upon it. 10
13. On the 28th June 1955 the Respondents
served upon the Appellants a Notice of
Appeal to the Federal Supreme Court of
Nigeria (then the West African Court of
Appeal) against the Judgment of the Supreme
Court of Nigeria, Lagos Judicial Division,
on the grounds therein set forth. 20
14. The said Appeal was heard in the Federal
Supreme Court of Nigeria (Jibowu Ag. F.C.J.
de Lestang F.J. and Hubbard Ag. F.J.) on the
5th and 6th November 1956 when judgment was
reserved. On the 15th November 1956
judgment was delivered by de Lestang F.J.
(in which Jibowu Ag. F.C.J. and Hubbard Ag.
F.J. concurred) allowing the said Appeal
and dismissing the said Appellants' action
with costs in the Court below and in that
court. An order of the Federal Supreme
Court of Nigeria was made accordingly. 30
15. In delivering judgment in the Federal
Supreme Court the learned Federal Justice
first referred to the principles upon which
an Appellate court dealt with an appeal on
questions of fact as set forth in the opinion
of Lord Thankerton in *Watt or Thomas v Thomas*
(1947 A.C. 484 at 487 and 488) and then dealt 40
- pp.48,49
- pp.49-53
- p.53 1 33
- pp.54-59
- p.59 1 3
- pp.59,60
- p.55 11.
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Record

with the other evidence upon which the learned
 t rial Judge had relied seriatim. The p.55 1 3 -
 learned Federal Justice first held that p.56 1 14
 there was nothing inherently strange in
 the first Appellant collecting income of p.56 1 25
 the estate of Aina and paying out sums of p.57 1 6
 money to the fifth Respondent on request
 since the first Appellant was the older
 man and had been brought in especially to
 10 assist in the administration of the estate,
 that it was dangerous to draw adverse
 conclusions from those facts and from the
 fifth Respondent's begging letters and
 that, although the occasion on which the
 fifth Respondent paid to the first
 Appellant a sum of £87.10.0d. out of a sum
 of £175. received by way of rent - a payment
 for which the fifth Respondent gave an
 unconvincing explanation - was some evidence
 20 that the first Appellant was entitled to
 share in the estate of Aina, nevertheless
 those circumstances were not conclusive of
 the fact that rent was invariably shared.
 Secondly the learned Federal Justice held p.57 11.7-12
 that the description in the Letters of
 Administration of the first Appellant and
 the second Respondent as grandsons of Aina
 was obviously wrong and did not assist the
 Appellants. Thirdly, referring to the
 30 evidence of the said Wilson the learned
 Federal Justice was of opinion that the
 statement that Aina had told the said
 witness that she had given her property at
 Great Bridge Street to her sister's son
 could not be right because it was plain
 from the documents that the property was
 given to Sanni who was her only son, that
 there was no evidence to show that Aina
 ever gave any property to the first
 40 Appellant and that the learned Judge was

Record

- mistaken in saying that there was no dispute that the property had been given to the first Appellant. Fourthly, the learned Federal Justice held that by granting the
- p.57 ll. 11. said Lease dated the 1st October 1952
27-41 independently of the Appellants the Respondents were asserting their title and not acquiescing in the Appellants' title to the property and that the inference drawn by the learned Judge from that circumstance was manifestly incorrect. Finally the learned Federal Justice thought that the learned Judge erred in holding that the
- p.58 ll. 11. recital in the said Deed of Gift dated the
2-13 16th January 1914 did not throw any doubt on the Appellants' claim because the Recital was in a Deed made over 40 years before and long before any dispute arose and in its terms contradicted the Appellants' claim and afforded strong support to that of the Respondents. In those circumstances the
- p.58 ll. 11. learned Federal Justice was of opinion that
22-24 the Federal Supreme Court was entitled to examine all the evidence in the suit, that the evidence of the said Ipakodo and the said Adaba (referred to in paragraph 10 hereof) being evidence of witnesses speaking
- p.58 ll. 11. of their own knowledge established a pre-
32-41 ponderance of direct evidence of relationship in favour of the Respondents, that in any event even if the direct evidence was inconclusive the other evidence did not tip the scales in favour of the Appellants and that
- p.58 1 45 the Recital in the said Deed of Gift carried more weight than the dubious inferences
- p.58 ll. 11. sought to be drawn from the other evidence.
46-49
16. On the 17th December 1956 the Federal Supreme Court of Nigeria made an order dismissing with costs the application of the Respondents for conditional leave to appeal
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Record.

to Her Majesty in Council.

17. On the 31st July 1957 special leave to appeal to Her Majesty in Council was granted to the Appellants by Her Majesty in Council. pp.62,63

10 18. The Respondents respectfully submit that the criticisms of the judgment of the learned Trial Judge made in the Judgment of the Federal Supreme Court of Nigeria were well founded and that the conclusions drawn by the Federal Supreme Court from the evidence were justified. The Respondents will rely upon the reasoning of the learned Federal Justice in delivering the Judgment of the Federal Supreme Court. In addition the Respondents submit that the learned Trial Judge misappreciated the effect of the execution of the said Lease dated the 3rd October 1934 by the first Appellant as one of the administrators of Aina. For the execution of the said Lease by the administrators of Aina was capable of explanation only on the footing that the property was the property of Aina for her sole use and benefit and not jointly with any other person, a conclusion wholly inconsistent with the claim put forward on behalf of the Appellants; on the other hand the execution of the said Lease by the fifth Respondent as administrator of Aina so far from being an admission against the fifth Respondent, was wholly consistent with the Respondents' case. p.67

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19. The Respondents humbly submit that the Judgment and Order of the Supreme Court of Nigeria Lagos Judicial Division was wrong and that the Judgment and Order of the Federal Supreme Court of Nigeria were right and ought to be affirmed for the following amongst other pp.46,47 pp.54-59

Record

REASONS

- (1) BECAUSE the claim of the Appellants to be entitled to beneficial interests in the property as tenants in common depends upon their establishing affirmatively that Dada was the daughter of Opoola and the sister of Aina.
- (2) BECAUSE the direct evidence of witnesses who knew personally Opoola, Aina and Dada sufficiently established that Dada was neither the daughter of Opoola nor the sister of Aina and the learned trial Judge misdirected himself in holding that the direct evidence was too contradictory to be relied on. 10
- (3) BECAUSE there was no or alternatively no sufficient evidence that the Respondents ever shared the rents of the property with the Appellants equally or at all.
- (4) BECAUSE the learned Trial Judge misdirected himself in holding that the "other evidence" of surrounding facts to which he referred was consistent with the Appellants' claim and that the facts relied on by the Respondents did not throw any doubt on it. 20
- (5) BECAUSE the documentary evidence, and in particular the execution of the said Lease dated the 3rd October 1934 and the Recital in the said Deed of Gift, was inconsistent with the Appellants' claim and wholly consistent with that of the Respondents. 30
- (6) BECAUSE Dada was neither a daughter of Opoola nor a sister of Aina and accordingly the Appellants are not entitled to any beneficial interest in the property.
- (7) BECAUSE the conclusion of the learned

trial Judge was wrong and the reasoning and conclusion of the Federal Supreme Court of Nigeria are right and ought to be affirmed.

ARTHUR BAGNALL.