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In the Privy Council.

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No. 39 of 1949

UNIVERSITY OF LONDON  
W.C.1.

28MAR1951

INSTITUTE OF ADVANCED  
LEGAL STUDIES

ON APPEAL

FROM THE PORT HARCOURT JUDICIAL DIVISION OF THE SUPREME COURT OF NIGERIA.

BETWEEN :

SUNDAY KALA ALAGBA, ISAAC ENYI NGERI, SELE  
ORUAMABO, SATURDAY KWANI, JONATHAN  
GUN, SUNDAY NABUAYE KIRI, DIGBANI  
10 BRAMSON, URIAH OBIKE KALIO and  
AMATAMUNO ORUBOKO (*in forma pauperis*)

UNIVERSITY OF LONDON  
W.C.1.

17 JUL 1953

INSTITUTE OF ADVANCED  
LEGAL STUDIES

- Appellants

AND

THE KING

*Respondent.*

Case for the Appellants.

RECORD.

1. This is an Appeal by Special Leave from a Judgment given on the 30th day of May 1949 by His Honour Mr. Justice Bairamian, Puisne Judge, sitting without a Jury, in the Port Harcourt Judicial Division of the Supreme Court of Nigeria whereby all the Appellants were convicted on a single information of murder contrary to Section 319 of the Criminal Code and the first eight of them were sentenced to death. Evidence was given on behalf of Appellant Number 9 that he was fifteen years of age and this being accepted by the Prosecution he was ordered to be detained during His Majesty's Pleasure under Section 368 of the Criminal Procedure Ordinance.

p. 39, l. 29.  
p. 1.  
p. 44, l. 37.  
p. 44, l. 15.  
p. 44, l. 18.  
p. 44, l. 34.

2. All the Appellants pleaded Not Guilty and were together defended by one Counsel at the Trial.

p. 2.

3. All the Appellants applied to the West African Court of Appeal for leave to appeal against the said convictions. None of them was represented by Counsel upon such Application and on the 2nd day of August 1949 the West African Court of Appeal (consisting of Sir John Verity, Chief Justice of Nigeria, Cecil Geraint Ames, Puisne Judge, Nigeria, and Charles Theodore Abbott, Puisne Judge, Nigeria) refused each of the Appellants Leave to Appeal.

pp. 45 to 62.  
p. 63.

- p. 64. 4. All the Appellants petitioned for Special Leave to Appeal against the said convictions, and His Majesty in Council—on the 21st day of December 1949—upon a Report from the Judicial Committee of the Privy Council dated the 13th day of December 1949 granted all the Appellants Special Leave to Appeal and on the 26th day of June 1950 upon a Report from the Judicial Committee of the Privy Council dated the 6th day of June 1950 granted them Leave to Enter and Prosecute their Appeals *in forma pauperis*.
- p. 66
- p. 1. 5. The Appellants were charged that on or about the 11th day of March 1949 at Elemiama (Old Shipping) in the Rivers Province they 10 murdered Douglas Obene Marian Braide.
- p. 40, ll. 49-50. 6. This Appeal raises principally the question of whether the Trial Judge was right in saying that “In this case it does not really matter which of the Accused did what,” and in trying and deciding the case on the footing that there was no distinction capable of being drawn between the Appellants.
7. The Appellants are all members of the Okrikas Tribe which had been engaged in hostilities with the Kalabaris Tribe, of which the deceased was a member.
8. The case for the Prosecution was that on or about the 11th day 20 of March 1949 the nine Appellants were among eleven members of the Okrikas Tribe who, in revenge for treatment of four Okrikans on that day, congregated in canoes, travelled down the river, saw on land a party of Kalabaris (consisting of Douglas Obene Marian Braide, his wife, two children and a man named Hamilton George) and, well knowing that this party was not the one which had attacked their colleagues, they without provocation attacked the whole party and in the course of such attack Braide was killed as a result of two harpoon-like instruments being thrown or driven into his body.
- p. 2, l. 17 to l. 25. 9. The Prosecution case, as opened by the Crown Counsel, alleged 30 that :
- (A) A common design was formed between the Appellants ;
  - (B) In the execution of that design violence was used ;
  - (C) As a result of that violence death ensued ;
  - (D) The Appellants were the persons or some of the persons who took part in the raid.
10. There were fifteen witnesses called for the Prosecution and their evidence may be shortly summarised as follows :—
- p. 2, l. 28 to p. 3, l. 43. Dr. ONWU, who testified that Braide’s death was due to the wounds caused by two harpoon-like instruments found in the body 40 and that there was also a cut wound of about three inches on the right forearm and a slight bruise on the left side of the neck. He said that he also attended Mrs. Braide and Hamilton George for serious injuries.
- p. 3, l. 22.
- p. 3, l. 25.

Mrs. BRAIDE, who stated that her husband, herself, two children and Hamilton George landed at Elemiama, and four fishing canoes (containing eleven Okrikans, the nine Appellants among them) arrived and said that they wanted to land to cut coconuts whereupon she caused her husband to be summoned and he told them that the place belonged to the Kalabaris and that they could not land. She stated that they all then went into one canoe and chanted a war-cry, thereafter landing and attacking the whole party with sticks, knives and spears, and having speared her husband, made off with canoes belonging to the party. She identified all the Appellants in general as being of the party and said there were two others besides. She further stated that all had something in their hands. She identified in particular Appellants Number 1, 2, 3, 4, 5, 6 and 7. She said that Appellant Number 5 hit her, that she did not see who injured Hamilton George, that it was Appellant Number 2 who began to strike her husband (doing so with a long stick) and that Appellants Number 3 and 4 had spears. Her evidence as to the actual assault upon her husband was: "They encircled my husband and hit him with a stick and cut him with a knife. They threw a spear at him."

p. 4, l. 1 to p. 6,  
l. 16.

p. 4, l. 29.

p. 5, l. 13.

p. 4, l. 35.

p. 4, l. 36.

p. 5, l. 12.

p. 5, l. 17.

p. 4, ll. 30, 31, 32.

CHAMBERLAIN, the son of Mrs. Braide, a little boy who gave unsworn testimony, told that Appellant Number 2 hit the deceased, that Appellant Number 5 hit everybody in the Braide party, that Appellant Number 6 beat Mrs. Braide with a stick, and that he himself was hit.

p. 6, l. 23 to p. 6,  
l. 36.

HAMILTON GEORGE said that he was with Mrs. Braide and the party when the Okrikans wanted to land and were told by him and by Braide that they must not do so, that they then collected in one canoe, chanted a war-cry and then landed and attacked the Braide party. He said they had a big stick and a spear. After hitting the deceased with the stick, they threw the spear at him. He identified only Appellant Number 2 (whom he said hit him with a machet), Appellant Number 4 (whom he said was the first to strike the deceased and did so with a stick), and Appellant Number 6 (whom he said hit him with a stick).

p. 7, l. 1 to p. 8,  
l. 40.

p. 7, l. 26.

p. 7, l. 27.

p. 7, l. 43.

p. 7, l. 36.

p. 7, l. 42.

GODWIN BROWN was one of the two Prosecution witnesses who had been originally charged with complicity in the alleged murder. He said that Appellants Number 7 and 8 had been rescued by Appellants Number 1 to 6 inclusive and told them that they had been attacked by Kalabaris, whereupon the Appellants went in a party to Elemiama. He did not mention the subsequent picking-up on the way of Appellant Number 9 and the Prosecution witness Luke. When they got to Elemiama he said that the party consisting of himself and the Appellants found the Braide party there and there was a fight. He stated that all the Appellants landed but that he did not. He stated that Appellants Number 3 and 6 speared Kalabaris, that Appellants Number 1, 2, 7 and 9 had a machet each and used it on "someone" and that Appellants Number 4, 5 and 8 had sticks and used them on "someone." He further stated that after the attack the Appellants took away booty from the Braide party and shared it between them.

p. 9, l. 1 to p. 10,  
l. 49.

p. 9, l. 44.

p. 9, l. 37 to l. 43.

p. 11, l. 1 to p. 12,  
l. 39.

p. 11, l. 8.  
p. 12, l. 28.

LUKE was the second person called by the Prosecution who had previously been charged with complicity in the alleged murder. He at some points in his evidence referred to himself as being the canoe partner of Appellant Number 9 but it would appear from his evidence and from the general circumstances of the case that Appellant Number 9 was in fact his canoe boy. He stated that he and Appellant Number 9 were in a canoe together when the other Appellants and Brown came upon them and asked them to go down towards Elemiama to investigate with the Kalabaris an attack that had been made upon the Appellants Number 7 and 8. He stated that he and Appellant Number 9 went with the other Appellants and Brown and at Elemiama found the Braide party who fired upon them, whereupon the Appellants' party, including himself and Brown, landed. He stated that there was a fight and that Appellant Number 1 used a knife and Appellant Number 3 had a spear with which he hit a Kalabari, evidently the deceased. He stated that "the rest of us did nothing." He further testified that the Appellants' party took away booty and shared it between themselves. 10

p. 12, l. 19.

p. 13 *et seq.*

FOUR WITNESSES were called to identify as having been in the possession of the Appellants or some of them articles which Mrs. Braide and Hamilton George had identified as belonging to their party, including a gun. It was not disputed by the Appellants that they had taken one canoe and various goods from the Kalabaris whom they said they had defeated in a battle, consisting largely of stick throwing, which was provoked by the Kalabaris. 20

The remaining evidence for the Prosecution was evidence of identification of the deceased, enquiries, arrest and the taking of Statements from the Appellants. Each Appellant made a Statement and each Statement was put in evidence by the Prosecution. 30

11. From the evidence for the Prosecution the following important points emerged :—

p. 5, l. 12.

(1) Mrs. Braide said that it was Appellant Number 2 who began to strike her husband and that he did so with a long stick.

p. 7, l. 36.

(2) Hamilton George said that it was Appellant Number 4 who was the first to strike Braide and that he did so with a stick.

p. 5, l. 17.

(3) Mrs. Braide said that Appellants Number 3 and 4 had spears but neither she nor Hamilton George identified which of the Appellants speared the deceased.

p. 9, ll. 37 to 43.

p. 11, l. 35.

(4) Godwin Brown said that Appellants Number 3 and 6 speared "Kalabaris" and Luke said that Appellant Number 3 had a spear with which he hit the Kalabari who had a matchet, evidently the deceased. 40

(5) There was no other evidence tendered by the Prosecution showing which of the Appellants assaulted the deceased.

12. The case for each of the Appellants consisted only of his own evidence. The amount of evidence which each of them supported may be summarised as follows :—

10 Appellants Number 1 to 6 inclusive together with the Prosecution witness Brown and the Prosecution witness Martins, were out on a fishing expedition when they found in the water Appellants Number 7 and 8 who told them that they and two others had been set upon and attacked by members of the Kalabaris. Appellants Number 1 to 6 inclusive rescued Appellants Number 7 and 8 and two others who were so exhausted that they were sent away with the Prosecution witness Martins. Appellants 1 to 6 inclusive suggested that they should investigate the reason for the attack upon their fellow tribesmen since peace had been declared between the Kalabaris and the Okrikas and they decided to find the Kalabaris who had attacked their colleagues. On the way down the River they met Appellant Number 9 and his master, the Prosecution witness Luke, to whom they told the story and Appellant Number 9 and Luke then joined the party. The nine Appellants said that when they reached Elemiama they saw a party of Kalabaris, a larger number than five and not consisting of any women or children, which party fired upon them whereupon they sheltered in the water and then landed and engaged in a stick throwing fight with the Kalabaris who were defeated without any serious injury being caused to either side. The Appellants took one canoe and certain of the property therein belonging to the party which had retired inland.

13. The Statements of the Appellants showed some divergence from the evidence given by them, notably that in his Statement Appellant Number 1 said he had a spear which he gave to Appellant Number 6 ; that Appellant Number 7 said that Appellant Number 6 had a matchet which he used at the fight ; that Appellant Number 8 said that Appellant Number 6 had a matchet and that Appellant Number 9 said that the Kalabari party consisted of four men and a woman.

14. There is annexed hereto a Schedule summarising (with references) the evidence relating to each individual Appellant.

15. On the evidence the Trial Judge held that Section 8 of the Criminal Code and the Judgments in *Regina v. Coney & Others* (1882) 8 Q.B.D. 534 and *Rex v. Betts & Ridley* (1931) 22 Cr. App. R. 148 compelled him to convict all the Appellants of murder and that there was no distinction between them.

16. Section 8 of the Criminal Code reads as follows :—

“ Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

17. It is respectfully submitted that the Trial Judge did not properly direct his mind to the question of what common intention the Appellants formed or when each formed it. Further that he did not properly direct his mind to considering whether each Appellant regarded murder as a probable consequence of the prosecution of the purpose and whether in fact it was.

18. The Trial Judge nowhere adverted to, and it is respectfully submitted, did not appreciate, the unsatisfactory nature of the evidence relating to each Appellant's individual part in the incident in question and the doubtful nature of the evidence as to what part each particular Appellant actually played. The Judge did not seek to decide who did what but said early in his Judgment that it was an immaterial question. It is respectfully submitted that it was a most material question and that there was no satisfactory evidence as to which of the Appellants did what and in particular as to which of them actually injured Braide. 10

p. 40, ll. 49, 50.

p. 40, ll. 49, 50.  
p. 44.  
p. 2.  
p. 39, ll. 21, 22.

19. The Appellants were tried and convicted as a body, without a Judge, Crown Counsel or Defending Counsel drawing any distinction between them or considering their positions individually.

p. 40, ll. 49, 50.

p. 39, ll. 21, 22.  
p. 2.

20. The Judge in coming to the conclusion that "in this case it really does not matter which of the accused did what" was, it is humbly submitted, wrong, and had not but should have considered the position of the Appellants individually. It may be that he felt excused from so doing by reason of Defending Counsel saying that he could draw no distinction between the Appellants and by having the Prosecution case opened and conducted on such basis. 20

21. The Judge in his Judgment adopted the method of the main prosecution witnesses (Mrs. Braide and Hamilton George) of constantly referring to the Appellants in terms of "they." The Appellants were referred to collectively when it was possible to assess their particular activities individually. 30

22. There were various distinctions to be made between the Appellants. In the first place there was different evidence relating to each, as is shown in the Schedule annexed hereto; secondly, Appellant Number 6 was the partner of and in the same canoe as Prosecution Witness Godwin Brown; thirdly, Appellants Number 7 and 8 had been attacked by Kalabaris and were brought straight to Elemiama by Appellants 1 to 6 inclusive; fourthly, Appellant Number 9 was the canoe boy of the Prosecution Witness Luke, was fifteen years of age and only joined the party after it had started on its way and did so with the concurrence of and inferentially upon the orders of Luke; fifthly, the only evidence regarding spears was against Appellants Number 1, 3, 4 and 6; sixthly, the only evidence of assault upon the deceased was against Appellants Number 2, 4 and 5. 40

23. The learned Trial Judge it is submitted took, and was wrong in taking, the evidence of each Appellant as being evidence against all the others and likewise took the Statements of each Appellant as evidence

against the rest. This, it is submitted, was probably an inevitable and certainly an unfortunate consequence of the way in which the case was presented to and conducted before him as not being capable of distinction between the Appellants.

24. The Trial Judge said in his Judgment " what Godwin Brown said about each particular person of his party is not of importance in this case, nor what Luke said either about any particular member of the party," but it is evident from his Judgment that the Judge placed some reliance upon their evidence and particularly upon the evidence of Godwin Brown, who was the most damaging witness called against the Appellants and the only one whose evidence completely and fully implicated all of them. It is respectfully submitted that the Judge should have, but did not, wholly discount the conflicting evidence of these two witnesses and that he did not even treat their evidence with the suspicion and caution it merited.

25. The Trial Judge did not consider, and it is submitted should have considered, the question of Manslaughter in respect of each or at least some of the Appellants.

26. The position of Appellants Number 7, 8 and 9, was worthy of particular individual consideration but did not receive it.

27. The Appellants each Appeal to His Majesty in Council and humbly pray that the Judgment of the Trial Judge be reversed and their respective convictions quashed or that such further or other Order be made as is just for the following, amongst other

## REASONS

- (1) BECAUSE the position of each of the Appellants is capable of having, should have had, but did not have, individual consideration.
- (2) BECAUSE the Trial Judge's failure separately to consider the position of each Appellant rendered the Trial and Judgment unsatisfactory.
- (3) BECAUSE upon individual consideration a case of Murder was not made out against each of the Appellants.
- (4) BECAUSE the Trial Judge misdirected himself in not specifically deciding what common design each of the Appellants formed and when each formed it and whether in the case of each Murder was the probable consequence of the purpose formed in the mind of the particular Appellant.
- (5) BECAUSE the Trial Judge in trying the Appellants collectively took their evidence and Statements as being evidence against each other.

- (6) BECAUSE the Trial Judge placed too great reliance upon the evidence of the Prosecution witnesses Godwin Brown and Luke.
- (7) BECAUSE the Trial Judge should have considered but did not consider whether Manslaughter was a proper verdict in regard to at least some of the Appellants.
- (8) BECAUSE the position of Appellants Number 7 and 8 was worthy of and should have received special consideration.
- (9) BECAUSE the position of Appellant Number 9 was 10 worthy of and should have received special consideration.
- (10) BECAUSE the Judgment of the Trial Judge and the decision of the West African Court of Appeal not to interfere therewith were wrong.

JAMES COMYN.



**SCHEDULE**

Appellant Number	Specifically mentioned by Mrs. Braide, Chamberlain or Hamilton George	Specifically mentioned by Brown or Luke	Specifically mentioned as participating in the fight	Evidence of having a spear	Specific evidence of using a weapon	Evidence of actually assaulting the Deceased	Own evidence and statement	Specifically mentioned in Statement of another Appellant in relation to the fight	Specifically mentioned in the Judgment	Miscellaneous
1.		p. 9, l. 19, l. 46 (Brown) p. 11, l. 30 (Luke)	p. 9, l. 46 (Brown) p. 11, l. 30 (Luke)	pp. 6, 7, 8 (own statement) p. 70 (statement of No. 8) p. 75 (statement of No. 3)	p. 9, l. 46 (Brown) p. 11, l. 30 (Luke)		Evidence, p. 21 Statement, p. 67	pp. 69, 70 (by No. 8) p. 71 (No. 9) p. 75 (No. 3)	p. 40, l. 47 p. 41, l. 19, l. 37 p. 42, l. 25 p. 43, l. 14	
2.	p. 5, l. 12, l. 14 (Mrs. Braide) p. 6, l. 29 (Chamberlain) p. 7, l. 43 (Hamilton George)	p. 9, l. 15, l. 17 p. 10, l. 1 (Brown)	p. 5, l. 12, l. 14 (Mrs. Braide) p. 6, l. 29 (Chamberlain) p. 7, l. 43 (Hamilton George) p. 10, l. 1 (Brown)		p. 5, l. 12, l. 14 (Mrs. Braide) p. 6, l. 29 (Chamberlain) p. 7, l. 43 (Hamilton George) p. 10, l. 1 (Brown)	p. 5, l. 12, l. 14 (Mrs. Braide) p. 6, l. 29 (Chamberlain)	Evidence, p. 24 Statement, p. 77		p. 40, l. 42 p. 41, l. 2, l. 18 l. 25, l. 38	
3.	p. 5, l. 17 (Mrs. Braide)	p. 9, l. 16, l. 40 (Brown) p. 11, l. 33, l. 35 (Brown) p. 12, l. 21, l. 25 (Luke)	p. 5, l. 17 (Mrs. Braide) p. 9, l. 40 (Brown) p. 11, l. 33, l. 35 (Luke)	p. 5, l. 17 (Mrs. Braide) p. 9, l. 40 (Brown) p. 11, l. 33, l. 35 (Luke) p. 70 (statement of No. 8)	p. 5, l. 17 (Mrs. Braide) p. 9, l. 40 (Brown) p. 11, l. 33, l. 35 (Luke)		Evidence, p. 26 and p. 18 Statement, p. 74	p. 70 (No. 8)	p. 40, l. 43 p. 41, l. 19, l. 37 p. 42, l. 23	
4.	p. 5, l. 17, l. 38 (Mrs. Braide) p. 7, l. 36 (Hamilton George)	p. 9, l. 20 p. 10, l. 3 (Brown)	p. 5, l. 17 (Mrs. Braide) p. 7, l. 36 (Hamilton George) p. 10, l. 3 (Brown)	p. 5, l. 17 (Mrs. Braide)	p. 5, l. 17 (Mrs. Braide) p. 7, l. 36 (Hamilton George) p. 10, l. 3 (Brown)	p. 7, l. 36 (Hamilton George)	Evidence, p. 28 Statement, p. 79		p. 40, l. 44, l. 47 p. 41, l. 11, l. 20, l. 39	
5.	p. 4, l. 36 (Mrs. Braide) p. 6, l. 31 (Chamberlain)	p. 9, l. 19, l. 26 p. 10, l. 4 (Brown)	p. 4, l. 36 (Mrs. Braide) p. 6, l. 31 (Chamberlain) p. 10, l. 4 (Brown)		p. 4, l. 36 (Mrs. Braide) p. 6, l. 31 (Chamberlain) p. 10, l. 4 (Brown)	p. 6, l. 31 (beat "everybody" says Chamberlain)	Evidence, p. 29 Statement, p. 81	p. 71 (No. 9)	p. 40, l. 28, l. 49 p. 41, l. 2, l. 20, l. 24, l. 40 p. 43, l. 10, l. 15	p. 41, l. 24 (mentioned in Judgment as person who suggested investigation)
6.	p. 5, l. 38 (Mrs. Braide) p. 6, l. 33 (Chamberlain) p. 7, l. 42 (Hamilton George)	p. 9, l. 7, l. 27, l. 31, l. 37 p. 10, l. 12, l. 28 l. 38 (Brown)	p. 5, l. 38 (Mrs. Braide) p. 6, l. 33 (Chamberlain) p. 7, l. 42 (Hamilton George) pp. 9 and 10 (Brown)	p. 9, l. 31 (Brown) p. 67 (Statement of No. 1)	p. 6, l. 33 (Chamberlain) p. 7, l. 42 (Hamilton George) pp. 9 and 10 (Brown)		Evidence, p. 31 Statement, p. 84	p. 67 (No. 1) p. 75 (No. 3) p. 82 (No. 5) p. 87 (No. 7)	p. 40, l. 48 p. 41, l. 3, l. 20 l. 31 to l. 36 p. 42, l. 24	p. 9, ll. 7, 8 p. 10, l. 28 Brown says this Appellant is his Master. p. 41, l. 34, l. 5 suggested to be the leader.
7.	p. 5, l. 38 (Mrs. Braide)	p. 9, l. 14, l. 22, l. 24 p. 10, l. 5, l. 47 (Brown) p. 11, l. 13 p. 12, l. 14 (Luke)	p. 5, l. 38 (Mrs. Braide) p. 10, l. 5, l. 47 (Brown)		p. 10, l. 5 l. 47 (Brown)		Evidence, p. 33 Statement, p. 86		p. 40, l. 48 p. 41, l. 22, l. 38 p. 42, l. 23, l. 41 p. 43, l. 16, l. 26	p. 10, l. 47 (Brown cross-examined as to)
8.		p. 9, l. 14, l. 22, l. 24 p. 10, l. 6 (Brown) p. 11, l. 13, l. 43 p. 12, l. 14, l. 32, l. 33 (Luke)	p. 10, l. 6 (Brown)		p. 10, l. 6 (Brown)		Evidence, p. 35 Statement, p. 69		p. 41, l. 22, l. 40 p. 42, l. 41 p. 43, l. 18, l. 26	
9.		p. 10, l. 7 (Brown) p. 11, l. 8 p. 12, l. 28 (Luke)	p. 10, l. 7 (Brown)		p. 10, l. 7 (Brown)		Evidence, p. 36 Statement, p. 71		p. 41, l. 39 p. 42, l. 25, l. 30, l. 34 p. 43, l. 21, l. 34	p. 12, l. 28 (Luke says "my canoe boy")

In the Privy Council.

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**ON APPEAL**

*from the Port Harcourt Judicial Division  
of the Supreme Court of Nigeria.*

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BETWEEN

**SUNDAY KALA ALAGBA**

**and eight Others - - Appellants**

AND

**THE KING - - Respondent.**

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**Case for the Appellants.**

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**HARRY F. STROUTS,**

**Monument Station Buildings,**

**London, E.C.4,**

*Solicitor for the Appellants.*