of the case including the new facts before him it would not be good to separate the children and that the father was the best person to have custody. In my view he did not act on wrong principles in refusing to vary the original order.

I find no substance in the second ground. I would accordingly dismiss the appeal.

COLE, Ag. C.J. and DOVE-EDWIN, J.A. concurred.

Appeal dismissed.

COLE and ROGERS-WRIGHT *v.* HOTOBAH-DURING

COURT OF APPEAL (Cole, Ag. C.J., Dove-Edwin, J.A. and Marke, J.):
December 10th, 1965
(Civil App. No. 10/65)

[1] **Tort — trespass — trespass to land — documentary title may support action:** To maintain an action of trespass to land, a documentary title commencing with some person rightfully in possession, or who has an admitted or proved right to possession, and connecting itself with the plaintiff, will generally speaking and in the absence of any title in the defendant by adverse possession, be sufficient (page 296, lines 6–13).

[2] **Tort—trespass — trespass to land — title indeterminate between co-plaintiffs does not support action:** To maintain an action of trespass to land by two co-plaintiffs, evidence that either one or other of them had title to the land at the time of the trespass is not sufficient (page 295, lines 16–35; page 296, lines 14–21).

The first appellant brought an action in the Supreme Court, in which the second appellant was later joined as a plaintiff, against the respondent for damages for trespass to land and an injunction.

In her statement of claim the first appellant, then the sole plaintiff, alleged three acts of trespass, the first two terminated and the third, on which the action was founded, undated. During her cross-examination it was established that the land had been conveyed to the second appellant on a date after the second alleged trespass. The first appellant obtained leave to join the second appellant as second plaintiff but the statement of claim was not amended, no further statement of claim was filed and the second appellant's claim and

interest in the action were not disclosed. There was no evidence of the date of the third alleged trespass. The Supreme Court gave judgment for the respondent.

On appeal, the appellants contended that they had established title to the land sufficient to maintain the action and that at a view of the land the judge had refused to allow their witnesses to point out the boundaries.

Case referred to:

(1) *Bristow* v. *Cormican* (1878), 3 App. Cas. 641; 2 L.R. Ir. 118, *dictum* of Lord Cairns, L.C. considered.

Marcus-Jones for the appellants;
Wyndham for the respondent.

MARKE, J.:

This is an appeal from a judgment in an action for trespass for wrongfully entering the plaintiff's land situate at Spur Road, Wilberforce, in the Western Area and putting a fence thereon and for an injunction to restrain the defendant her servants or agents from continuing or repeating any of the acts complained of, and for damages. I propose to consider grounds 1, 3 and 5 together as they are substantially the same.

The first plaintiff in her statement of claim has alleged three separate acts of trespass. In para. 4 of the statement of claim she alleged that in 1958 the defendant entered on her land and started pegging this land. That trespass was terminated by the first plaintiff. By para. 5 of the statement of claim the first plaintiff alleged that some time in January 1961 the defendant entered her land and erected a fence thereon. That trespass was also terminated by the first plaintiff. In para. 6 of the statement of claim the first plaintiff alleged as follows: "The defendant has notwithstanding the said notice again erected the said fence and wrongfully claims the said portion of land. . . ." It is on this allegation in para. 6 of the statement of claim that this action is founded. It is significant that while in the cases of the two previous acts of trespass some effort was made to state the year or the month and year in which they took place, there is no indication in the statement of claim when the third alleged act of trespass did take place. On this point the first plaintiff in her evidence said (quoting the relevant portion):

"I visited the land about twice a month. I saw on the land some fence. When I saw this fence I asked Burah Fonah about it, as she was on the land, and she told me something. In consequence of what Fonah told me I removed the fence from the land. . . . On another visit I saw the fence had been erected and I then left it."

If the first plaintiff had stated in her evidence when that "other visit" was made at which she found the fence had been re-erected it might have been possible to know when this alleged third act of trespass took place. I can find no evidence of such a material fact even though the action was founded on this alleged third act of trespass. The only fair inference to draw is that it took place between the date of the second alleged trespass, some time in January 1961, and the date of the issue of the writ of summons in the action, August 8th, 1963.

After learned counsel for the defendant had in cross-examination elicited evidence that the two plots of land described in para. 1 of the statement of claim and alleged therein to be the first plaintiff's property on August 8th, 1963 (when the writ of summons in this action was issued) had been sold and conveyed by the first plaintiff to the Hon. Cyril B. Rogers-Wright by a deed of conveyance dated July 4th, 1961, learned counsel for the first plaintiff applied for and obtained leave to add the Hon. Cyril B. Rogers-Wright as second plaintiff. The hearing then proceeded with two plaintiffs against the defendant but without any amendment of the statement of claim to show the interest or the claim of the second plaintiff in this action, as learned counsel for the plaintiffs had not applied to amend. The learned trial judge was left in the situation of having before him two plaintiffs, one of whom had filed and delivered a statement of claim, the other of whom had not done so.

It is in respect of this joinder of the Hon. Mr. Rogers-Wright and in view of the conveyance to him by the first plaintiff that it was imperative for the evidence to have disclosed in specific and precise terms the date of the alleged third trespass on which this action was founded. This alleged trespass may have taken place before the conveyance to the Hon. Mr. Rogers-Wright was executed. But there is no evidence of that. And if that were so, what was the necessity of adding the Hon. Mr. Rogers-Wright as a second plaintiff? But all this would be mere speculation. The first plaintiff and her husband in their evidence said that the Hon. Mr. Rogers-Wright had not paid the whole of the purchase price mentioned in

the conveyance. Be that as it may, it would not vitiate the conveyance.

Learned counsel for the appellants has referred us to *Bristow* v. *Cormican* (1). In that case Lord Cairns, L.C. said (3 App. Cas. at 652):

> "Now a documentary title commencing with some person rightfully in possession, or who has an admitted or proved right to be in possession, and connecting itself with a plaintiff in an action of trespass, would, generally speaking, and in the absence of any title in the Defendant by adverse possession, be sufficient to maintain an action of trespass." [These words do not appear in the report of the case at 2 L.R. Ir. 118.]

With this statement of the law, there can be no question; but I go on to say that from the manner in which this case was presented in the lower court—that is, the absence of any evidence as to the particular date or year when the alleged trespass took place; the addition of the Hon. Mr. Rogers-Wright as a co-plaintiff without a statement of claim setting out his claim or his interest in the land; and the existence of the conveyance to him by the first plaintiff—it is out of the power of any court to say that the plaintiffs have discharged the onus of proving possession of the land. By adding the second plaintiff, counsel for the plaintiffs has impliedly admitted that he was a necessary party or, in other words, that he could not succeed in the action unless the second plaintiff was added. And having obtained the order to add the second plaintiff, he made no effort to amend the statement of claim. This omission to file a further statement of claim was in my opinion fatal to the plaintiffs' action.

Learned counsel for the appellants having abandoned his fourth ground of appeal, it only remains to consider his second ground of appeal. In this ground he complains that at the *locus* the learned trial judge refused to allow his witnesses "to point out the boundaries of the property." It was pointed out to learned counsel for the appellants that there was nothing in the settled record of the case to support this and he conceded that. What the record did say was that in court the learned trial judge refused to recall witnesses who had attended at the *locus* at which nothing had been done. The second ground of appeal therefore fails.

Without repeating myself on grounds 1, 3 and 5 of this appeal, I hold that there was not before the court below evidence on which it could have held that the appellants, or either of them, were in

possession of the land in question at the undisclosed material time at which the alleged trespass took place. I feel that the judgment appealed from was right and would dismiss this appeal.

COLE, Ag. C.J. and DOVE-EDWIN, J.A. concurred.

Appeal dismissed.

REGINA *v.* HOLLIST and BANGURA

SUPREME COURT (Marcus-Jones, J.): December 21st, 1965
(Indictment No. 65/65)

[1] **Criminal Law—libel—writer disclaiming belief in statement—statement may still be defamatory:** A libellous statement may still be defamatory although accompanied by a statement of the writer's disbelief in its truth (page 298, lines 29–39).

[2] **Tort—defamation—defamatory statements—writer disclaiming belief in statement—statement may still be defamatory:** See [1] above.

The accused were charged with publishing a defamatory libel.

The libel was a newspaper editorial which contained statements the effect of which was that a brutal assault had been committed on certain supporters of the opposition party and the Prime Minister had authorised it. The editorial also contained the statement: "We do not believe this."

The accused were each charged on two counts, the first alleging publication by despatching a copy of the newspaper signed by the second accused to the Ministry of Information and the second alleging publication by the sale of two copies of the newspaper to a prosecution witness.

The first accused, the editor and proprietor of the newspaper, made the defence that he protested against the publication of the editorial and was overruled by a management committee which in fact controlled what was published, whereupon he left the newspaper office.

The second accused, a financial controller of the newspaper, signed the copy sent to the Ministry of Information. Two other copies of the newspaper were sold to a prosecution witness at the newspaper office next day. The second accused's defence was justification and