SPAINE *v.* SPAINE

COURT OF APPEAL (Bankole Jones, P., Cole, Ag. C.J. and Dove-Edwin, J.A.): December 8th, 1965
(Civil App. No. 11/65)

[1] **Evidence — inspection — observation of persons in court permissible where health in question:** In arriving at a decision on a question regarding the health of a person, a judge may properly comment on the appearance of the person as observed by him in court (page 292, lines 26–33).

[2] **Family Law—custody of children—order for custody in divorce decree —appeal against further order not barred by failure to appeal against decree:** Failure to appeal within time against a decree nisi containing an order for the custody of the children of the marriage until further order of the court does not preclude a party from appealing against a further order relating to the custody of the children (page 292, lines 5–16).

[3] **Family Law—divorce—appeals—appeals against orders for custody of children—appeal against further order not barred by failure to appeal against divorce decree containing original order:** See [2] above.

The appellant applied to the Supreme Court to vary an order, made in divorce proceedings, for the custody of the children of her marriage with the respondent.

A decree nisi in a suit for divorce between the parties made an order for the custody of their children until further order of the court. The appellant did not appeal against the decree. She applied to the Supreme Court for a variation of the custody order, which was refused. In his ruling, the judge expressed an opinion as to the health of one of the children founded on his observation of the child in court. The proceedings in the Supreme Court are reported at 1964–66 ALR S.L. 249.

When the appellant appealed against the ruling, the time for appealing against the decree had passed. In the Court of Appeal, the respondent raised the preliminary objection that since the appellant had lost her right of appeal against the decree nisi, she could not appeal against any other order relating to the children's custody. The appeal was heard and the appellant contended that the decision was unreasonable having regard to the evidence and that the judge had substituted the opinion of the judge who granted the decree nisi for his own judgment, and his own opinion as to the child's health for the medical evidence.

Statutes construed:

Matrimonial Causes Act (Laws of Sierra Leone, 1960, *cap.* 102), s.24(1):
The relevant terms of this section are set out at page 291, lines 33–40.

Courts (Appeals) Act, 1960 (No. 18 of 1960), s.18(2):
"In the case of a decree in a matrimonial cause, the appeal may be brought either against the *decree nisi* or the decree absolute: . . . ."

Marcus-Jones for the appellant;
R. E. A. Harding for the respondent.

BANKOLE JONES, P.:

This is an appeal from a judgment of the Supreme Court (Beoku-Betts, J.) in which the learned judge refused to vary an order made by Marke, J. in a decree nisi in divorce proceedings, giving custody of the children of the marriage to the father—the respondent—with right of access to the mother—the then applicant and present appellant. The order of Marke, J. was made on February 2nd, 1965 and the children are George born on September 7th, 1958, who has always lived with his father, and Godfrey born on February 13th, 1960, who had lived with his mother from his birth and up to the date of compliance with the order of the court.

Mr. Harding on a preliminary objection submitted that this court has no jurisdiction to entertain the appeal because the appellant, having once lost her right of appeal against the decree nisi which contained the custody order, has no remedy except to continue to apply for variation of that order in the Supreme Court, presumably when new facts or new circumstances appear to make this necessary. For this he relies firstly on that part of the decree nisi which contains the order: "It is ordered that George and Godfrey the children of the marriage do remain in custody of the respondent *until further order of the court*. . . ." [Emphasis supplied.] Secondly he relies on s.24(1) of the Matrimonial Causes Act (*cap.* 102) which reads:

> "In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court."

Now s.18(2) of the Courts (Appeals) Act, 1960, which applied

at the material time, provided that an appeal may be brought against a decree nisi. It is conceded that no such appeal was brought and that the time for bringing one has clearly run out. It was also conceded by both counsel that Beoku-Betts, J. had jurisdiction to entertain the application for variation of Marke, J.'s order. But Mr. Harding submitted that not having appealed against the decree nisi which contained the original order, there can be no appeal from any other order of the Supreme Court relating to the same matter. With the utmost respect, I find myself unable to accept such a proposition. The custody order in the decree nisi clearly gave the appellant the right to apply to the Supreme Court to vary that order ("until further order of the court"). If this is so, it therefore also clearly gives to her the right of appeal after the determination of a "further order" by the same court. We allowed the appeal to be argued on its merits reserving our ruling on the preliminary objection. The above is our ruling.

There are two grounds of appeal, namely:

(a) That the learned trial judge was wrong in law in substituting his own opinion for the judgment of medical officers on the health of the child Godfrey and the opinion of Marke, J. in the divorce proceedings for his own deliberate judgment on the issue of custody.

(b) That the judgment is unreasonable having regard to the evidence.

As to the first ground, the record clearly shows that the learned judge did not substitute his own opinion for the judgment of medical officers on the health of the child Godfrey. The learned judge stated that he had taken all the circumstances into consideration including that of the medical reports. He went on to say as follows (1964–66 ALR S.L. at 252): "The health of the child does not appear to have suffered with the father as I saw him in court looking well and happy." Dr. Marcus-Jones quarrels with this passage, but I find that this is a proper comment for the learned judge to have made and it does not seem to constitute a usurpation of the opinions of the medical men who deposed their views in their respective affidavits. Again, when the learned judge referred to certain passages from the judgment of the judge who made the original order, he was merely doing so to support the conclusions he himself had come to upon the new facts relied upon by the applicant for the variation of that order. He accepted from the very beginning the principle that the welfare of the child must be the paramount consideration of the court. He found that in all the circumstances

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