

appeal to this court where the answer to the question of law, whatever it might be, would dispose of the case between the parties. The circumstances under which a judge would take such a course are for him to decide.

5 For these reasons, I have come to the conclusion that as the court below has given no judgment or decision upon the case, and as our opinion would not dispose of the case, this matter is not properly before us, and we have no power to consider the question.

10 It should therefore, I think, be sent back to the court below for the trial to be continued to its conclusion, *i.e.*, final judgment, or to a stage where the judge may think proper to reserve any question of law in accordance with the principle above expressed.

Ruling that case stated properly before court.

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IN THE MATTER OF ZENABAH MUSTAPHA, RIZA MUSTAPHA
and MARIAMA MUSTAPHA

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Supreme Court (Webber, C.J.): July 27th, 1936

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[1] Family law — custody of children — discretion of court — interests and welfare of children paramount consideration: The court has absolute discretion in making a custody order; in considering all the circumstances of the case, it should give paramount consideration to the interests and welfare of the children. In the case of young girls who have lived exclusively with their mother for some years, whose earlier happiness was affected by their father's cruelty, and who have a greater love and affection for their mother than for their father, their interests and welfare are best served by giving custody to their mother with access to their father (page 426, lines 4-7; page 427, lines 3-25).

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The petitioner petitioned the Supreme Court for custody of the children of his marriage to the respondent.

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Eight years after the parties were married relations between them deteriorated and the respondent left the petitioner, taking with her the three children of the marriage, all daughters of the ages of 13 and below. The respondent alleged that the petitioner had turned her and the children out of the house, while the petitioner alleged that the respondent had left of her own accord. The respondent immediately filed a petition for judicial separation on the ground of the petitioner's cruelty, in which she also prayed for custody of the children; the petition was ultimately dismissed

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in 1933 and no order as to custody was made. Three years later the petitioner filed the present petition for custody of his children.

The court reviewed the legislation relating to the granting of custody and considered the principles upon which to exercise its discretion in making an order for custody, having regard to the fact that the petitioner had been guilty of acts of cruelty to the respondent, the relationship of the children to their respective parents and the length of time they had lived with the respondent before the petitioner brought the present proceedings. 5

The petition was dismissed. 10

Cases referred to:

- (1) *In re A. and B. (Infants)*, [1897] 1 Ch. 786; (1896), 66 L.J. Ch. 592.
- (2) *In re Halliday's Estate* (1852), 17 Jur. 56. 15
- (3) *In re Taylor* (1876), 4 Ch. D. 157; 36 L.T. 169.

C.E. Wright and Nelson-Williams for the petitioner;
Hotobah-During and Lightfoot Boston for the respondent.

WEBBER, C.J.: 20

The prayer of the petitioner is that his wife, Lola Mustapha, may be ordered to deliver Zenabah, Riza and Mariama Mustapha into the possession, custody and control of the petitioner, or such other order as to the court may seem meet.

The petitioner and Lola, his wife, were married on April 3rd, 1922. The issue now living are the three girls mentioned above, aged 13, 9 and 7 years respectively. 25

There was an estrangement between husband and wife, and certain acts of cruelty to the wife by the husband are alleged with the result that the petitioner's wife left the petitioner and took away the three children. The petitioner avers that his wife left him but his wife said in her petition for judicial separation that the petitioner "turned her out of his bedroom and eventually awoke her one morning, led her out of the house with her children, locked the door after her, threw her clothes out to her and told her to go away" and that she went to her sister's house where she has been staying ever since. This was in 1930. 30 35

On December 2nd, 1930 the wife filed her petition for judicial separation. This petition was heard and finally determined on February 27th, 1933 when the court dismissed the petition. The respondent (the present petitioner) in his answer had prayed that 40

his wife's petition should be rejected and that it be decreed that he should have the custody of the said three children. In her petition for a judicial separation the wife had also prayed for a decree that she might have the custody of her three children. Being a proceeding under the Matrimonial Causes Acts, this court had an absolute discretion as to whom the custody of the children should be given. The court dismissed the wife's petition and made no order as to the custody of the children although both parties prayed for the same.

It was not until January 7th, 1936 that the petitioner, Salim Mustapha, filed a petition praying as aforesaid and this is the petition now to be considered. It is in effect a petition in the Chancery Court and not arising out of any matrimonial cause.

I will now deal with what I regard as the present law on the subject. Under the common law the father had the absolute right to the custody of his children. The right was, however, modified by legislation. In the first instance the husband's rights were modified by Serjeant Talfourd's Act, 1839 and subsequently by the Custody of Infants Act, 1873. By these Acts the rights of mothers were amended and improved and they were placed in a quite different position (Lindley, L.J. in *In re A. and B. (Infants)* (1) ([1897] 1 Ch. at 790—791; 66 L.J. Ch. at 593)).

Before the passing of the Act known as Serjeant Talfourd's Act you could not take away the custody of a child from its father except by showing either that he was unfit to remain the custodian of the child or that his remaining so would be an injury to the child. This Act gave to the then Court of Chancery an absolute discretionary power as to the custody of a child when the child was under seven years, altered by the Act of 1873 to 16 years; absolute in the sense that the discretion must be exercised "on judicial grounds — not capriciously, but for substantial reasons" (*In re Taylor* (3) (4 Ch. D. at 160)). Talfourd's Act altered the common law only in the sense that the mother acquired new rights. The rule of the court was that it had to keep in mind first of all the paternal rights, secondly, the marital duty, and thirdly, the interests of the children (*In re Halliday's Estate* (2)). It is the two latter considerations which induced the legislature to interfere. I may mention here that the Guardianship of Infants Act, 1886 further restricted the father's rights and considerably increased the mother's rights (for observations on which see *In re*

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A. and B. (Infants) (1)), but this Act is not applicable to this Colony.

Jessel, M.R. in *In re Taylor (3)* (4 Ch. D. at 160—161) said: “... [I]n deciding who is to have the custody of the children, you must have a great regard to the interests of the children.” Now what, as far as can be gathered from the affidavits, are the facts of this case? I am satisfied that although the cruelties alleged did not appear to be sufficient to warrant the granting to the mother of a judicial separation yet there were acts of cruelty and unpleasantness which considerably affected the happiness of the home to which the children belonged. I am satisfied that the wife was turned adrift and sent away from her husband’s house with her three children. I think in this case the interest and welfare of the three children is a paramount consideration — the love and affection they bear to their mother is undoubted. It cannot be said that they bear the same love and affection for their father. He allows the children to leave his house in 1930 and he waits three years after his case was decided in 1933 before he decides to petition for their custody. I have no doubt that their welfare is scrupulously guarded by their mother. It would be a very strange and unusual combination of circumstances that would make it to the interests of these children to be deprived at their ages of association with their mother. It would mean cutting away from them all the tender associations which they have experienced in their young lives.

Having regard to all these circumstances I am exercising my discretion in favour of the wife and accordingly dismiss the petition with costs; but, as was done in *In re Taylor (3)*, I grant to the petitioner liberty of access to the children at reasonable times and, by analogy to Talfourd’s Act, I grant to the petitioner liberty to apply with reference to any scheme for the education of his children which he may be disposed to submit.

I trust that there will be a reconciliation between husband and wife so that the order as to access may become unnecessary.

Petition dismissed.

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