J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 21 of 1970

BEFORE: The Hon. President
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

****

STANLEY CLARKE v. MADGE CAREY

F.M.G. Phipps, Q.C., and A. Edwards for appellant.

David Muirhead, Q.C., and W.K. Chin See for respondent.

1971

Nov. 1, 2, 3, 4, 5, 22; Dec. 29.

PRESIDENT:

I have read the judgment prepared by Smith, J.A., and I agree with it. The case presented a human problem, which made it difficult to resolve. There were so many factors on either side to be considered. After a close examination of them I am of the view that the learned Master on the evidence before him was not justified in making the Order which he did. In the circumstances it cannot be for the welfare of the children to grant custody of them to the mother.

I would therefore allow the appeal, set aside the Order of the Master, and order that the Summons be dismissed.

SMITH, J.A.:

The plaintiff is the mother of two illegitimate children, a boy and a girl, by the defendant, a married man living with his wife. Since February, 1969, the children have been in the de facto custody of the father. In December, 1969 the mother applied by originating summons for custody of the children. The boy was then aged 8 years and the girl 4 years. The application was made under the provisions of the Guardianship and Custody of Children Law, Law 69 of 1956. The father, on whom the summons was served, opposed the application and himself asked for custody. The applications were heard by the Master commencing on January 13, 1970 and on June 5, 1970 he granted the mother's application awarding her custody. The father appealed against the Master's decision on the broad ground that he wrongly exercised his discretion in granting the mother's application.

Since the enactment of Law 69 of 1956 applications have been made from time to time under that law for the custody of illegitimate children, on the assumption that the law applied to all children. In the Jamaican context this assumption is not surprising. The applicability of the Law to illegitimate children was questioned in Finlayson v. Matthews (S.C. Civil A. No.10 of 1968). This Court decided (on May 6, 1971) that it was competent for the mother of an illegitimate child to apply for and be granted custody of her child under s.7(1) of the Law of 1956, but not for the father. In the case under consideration it was conceded during the argument on appeal that the counter-application of the father for custody must be taken to have been made under the Law of 1956. Counsel for the father attempted to argue that Finlayson v. Matthews (supra) was wrongly decided but was stopped by the Court on the ground that the decision was binding on the Court unless it could be shown that it was given per incuriam. The argument was not pursued. In view of the decision in Finlayson v. Matthews (supra), the Master had no jurisdiction to grant the counter-application.

The liaison between the mother and father began when she was 18 or 19 years old and he 38 or 39. It lasted some 9 or 10 years. She asserts that she did not know he was a married man, that he told her he was a bachelor. He denies this. They lived together at various places, including his matrimonial home for three months in 1962 while his wife was away in England.

The children, the subject of these proceedings, are the product of the liaison. The elder child, the boy, lived with the mother in her parents' home at Above Rocks until he was a year old, when she left him in her parents' care and went to work in Kingston. He was born on October 10, 1961. Apart from visits at week-ends, the boy never again lived with the mother but remained in the care of his grandparents. The father visited the boy from time to time and he claimed that he gave the grandparents a weekly sum for the child's maintenance. This is denied by the mother and grandmother. The younger child, the girl, was born on August 14, 1965. She lived with the mother from birth until January, 1969 when the mother left for the United States of America. The liaison was apparently broken, or started to break, in October, 1968 when there was a violent altercation at the grandparents' home involving the father, the mother's sister and her brother. The mother claimed that the father threatened her and tried forcibly to take the boy away with him. The mother left for the United States of America on January 26, 1969 on vacation and to work, she said. She said that she wanted to make a new start in life as she had discovered that the father was a married man and he would not cease visiting her. On the day before she left she took the two children to Montego Bay and boarded them there with a friend. This, clearly, was done to put them out of the reach of the father. He, however, discovered where they were and with the help of the police took them away on February 2, 1969 to his home in Spanish Town, where they have since lived. The mother was informed that the children had been removed by the father in the same month that they were removed. She, however, took no steps in the matter and remained away for ten months, four months longer than she originally intended. Thus, when she took proceedings the children had been living with the father for over ten months.

The authorities establish that the mother of an illegitimate child has, at least, a prima facie right to its custody. Lindley, L.J. said so in the Court of Appeal in R. v. Barnado [1891] 1 Q.B. 194. He said, at p.211:

> "The child is illegitimate. The consequence is that he has no guardian: Re Ullee. In other words, there is no person who has all the rights of a guardian over either him or his property. But, although this is true, it is now settled, after some fluctuation of opinion, that the mother of an illegitimate child has a prima facie right to the custody of the child up to the age of fourteen in preference either to the reputed father or to any other person: Reg. v. Nash. This right is based on the relation-

> ship which exists between a mother and her child, and on the absence of all superior right on the part of the reputed father or of any one else."

When this case went to the House of Lords (sub. nom. Barnado v. McHugh /1891/ A.C. 388) Lord Halsbury, L.C. did not dissent from Lindley, L.J.'s description of the right (see pp. 395, 396). Lord Herschell (at p.398) affirmed that the mother had a right to the custody of her illegitimate child but said that this right arose from the obligation to maintain the child placed on her by the legislation embodied in the Poor Law Act (4 & 5 Will. 4, c.76, s.71). In Humphrys v. Polak and wife /1901/ 2 K.B. 385, Vaughan Williams, L.J. (at p.389) expressed the view that there was at common law a duty on the part of the mother towards her child and that the series of legislative enactments on the subject, such as the Poor Law Act (supra), did not create that duty but merely recognised and defined it. In the same case Stirling, L.J. said, at p.389,390:

> "It is I think clear, from Barnado v. McHugh /1891/ A.C. 388, that the mother of an illegitimate child has by law imposed upon her obligations in respect of the child, and by reason of such obligations is vested by law with corresponding rights, one of which is the right prima facie to the custody and possession of the person of the child."

In Re G. (an infant) /1956/ 2 All E.R. 876, Lord Evershed, M.R. said that the mother's obligations existed at common law. He said, at p.877: "As the child was illegitimate, according to the common law of the land, the mother was, and is, the person responsible for the upbringing of the child." Whether the right in the United Kingdom arose from obligations imposed at common law or by statute there can be no doubt that the right exists. The position is exactly the same in Jamaica. The statutory obligation upon a mother to maintain her illegitimate child was first imposed by s.1 of Law 31 of 1869, "A Law to provide for the Maintenance by Parents and Step-Parents of children" and the provision is still in force in s.3 of the Maintenance Law, Cap. 232.

It was submitted on behalf of the mother that, in the case of an illegitimate child, since the mother is the only person with a legal right to its custody she should not be deprived of its custody unless the court is satisfied having regard to the welfare of the child that she is not a fit person to have custody. The concession that the mother may be deprived of custody if she is unfit to have it was bound to be made in view of the authorities, which clearly establish this (see, e.g. Barnado v. McHugh (supra)

at p.399). Learned counsel for the mother carried his submission further by saying that unless the mother in this case can be shown to have abandoned or deserted the children, as provided in s.14 of the Law of 1956, the court cannot exercise its discretion to deprive her of her legal right to custody. The father tried to make out at the hearing before the Master that the mother had abandoned the children in Montego Bay when she went away to the United States of America and that he had rescued them. The learned Master, however, did not accept this and expressly found that she had not abandoned them.

What counsel for the mother is saying, in other words, is that the only provision in the Law of 1956, or elsewhere, which can operate to deprive the mother of her legal right to custody is s.14. That section provides, inter alia, that where the parent has abandoned or deserted his child "the court shall not make an order for the delivery of the child to the parent, unless the parent has satisfied the court that, having regard to the welfare of the child, he or she is a fit person to have the custody of the child." This contention of counsel was designed to exclude s.18 of the Law of 1956 from consideration. That section provides as follows:

> "Where in any proceeding before any Court the custody or upbringing of a child ..... is in question, the Court in deciding that question, shall regard the welfare of the child as the first and paramount consideration ....."

It was submitted for the mother that this provision is not relevant. It was said that the section contemplates competing claims and there is none in this case as the father has no right to custody under the statute. With all respect to learned counsel, this submission is clearly untenable. According to its plain terms s.18 is applicable to all proceedings in every court, between whatever parties, in which the custody of a child is in issue and whether the proceedings are brought under the Law of 1956 or not. The unlimited application to custody proceedings of the identical counter-part to s.18 in the U.K. legislation (s.1 of the Guardianship of Infants Act, 1925) was made clear in J. and another v. C. and others [1969] 1 All E.R. 788.

Since there is no jurisdiction to award custody to the father under the Law of 1956, this is not a case of competing claims to custody. The issue that the Master had to resolve was whether the welfare of the children overrode the prima facie right of the mother to their custody. It was submitted by leading counsel for the mother that where there is no adverse competing

"position" the welfare of an illegitimate child requires that custody be given to the mother. This was an extension of the submission, already referred to, of junior counsel for the mother that the mother being the only person with a legal right to custody of an illegitimate child she should be deprived of its custody only if she is unfitted to have it. A similar submission was made in the House of Lords in J. and anor. v. C. et al (supra). That was a case in which the parents of a lawful child sought his custody from foster-parents into whose care and control the child had been committed by the court. The argument on behalf of the parents in that case was that united parents are prima facie entitled to the custody of their infant children and that the Court of Chancery as representing the Queen as parens patriae will only deprive them of the care and control of their infant children if they are unfitted by character, conduct or position in life to have this control and that in the case of an unimpeachable parent the court must, unless in the very exceptional case, give the care and control to the parent. Put another way (per Lord MacDermott at p.813), it was argued that the courts were in law bound to presume that the welfare of the child was best served by allowing him to live with his parents unless it was shown that it was not for his welfare to do so because of their conduct, character or station in life. It was contended that these are the principles which the trial judge, Ungoed-Thomas, J., should have applied in coming to his decision and that not having done so he had acted on wrong principles in deciding that the parents should be deprived of their child's custody. It was unanimously held that the contention on behalf of the parents was ill-founded and that Ungoed-Thomas, J. had applied the correct principles, namely, that, while as a general proposition it is for the child's welfare to be in the custody of unimpeachable parents, the paramount consideration is the welfare of the child. This was the principle applied by the Chancery Courts and which was now enshrined in s.1 of the (U.K.) Guardianship of Infants Act, 1925. (per Lord Upjohn at p.832).

In J. and anor. v. C. et al (supra) Lord MacDermott considered the scope and meaning of the words "..... shall regard the welfare of the infant as the first and paramount consideration" in s.1 of the (U.K.) Act of 1925 (and in s.18 of the Law of 1956 except that "child" appears in this section in place of "infant"). The noble and learned Lord said, at pp. 820, 821:

> "Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules on or determines the course to be followed."

Lord MacDermott summarised his views and comments on the ground surveyed in his opinion under four heads "in the hope that they may serve to restrict misunderstanding in this difficult field." The second and third show the way in which the competing interests of the rights and wishes of parents and the welfare of a child should be considered when they arise, and are of particular relevance in the case under consideration. They are stated as follows, at p.824:

> " 2. In applying s.1 (of the Act of 1925), the rights and wishes of parents, whether unimpeachable or otherwise, must be assessed and weighed in their bearing on the welfare of the child in conjunction with all other factors relevant to that issue.
>
> 3. While there is now no rule of law that the rights and wishes of unimpeachable parents must prevail over other considerations, such rights and wishes, recognised as they are by nature and society, can be capable of ministering to the total welfare of the child in a special way, and must therefore preponderate in many cases. The parental rights, however, remain qualified and not absolute for the purposes of the investigation ....."

In this case, it is not contended that the learned Master applied any incorrect principle in arriving at his decision. What is said is that on the evidence which he accepted the Master came to a wrong decision; that there was no evidence, as distinct from the mere wish of the mother, to indicate that the interests of the children would best be served by granting custody to the mother. This calls for an examination of the evidence touching on the welfare of the children presented on one side and on the other, bearing always in mind that an appellate court may interfere with a decision arrived at in the exercise of a discretion only if satisfied that the decision is wrong (see In re O.(Infants), [1971] 1 Ch. 748 at 755 per Davies, L.J.).

When the father took the children to live at his home in February, 1969 his wife was away. She returned in April, 1969 and since then the children have been in the care of the father and his wife. They own and occupy what has been described as a large, well furnished, well appointed house. Each child is said to occupy its own bedroom. It is said, and it has not been disputed, that the children are provided with every material comfort. The wife said she happily and willingly agreed with the father to provide a home for the children and she has grown fond of and deeply attached to them. It is said, and it is not disputed, that the children are healthy, happy and well adjusted and have "settled wonderfully" in the environment of the father's home. The father and his wife, though having no children between them, have reared four children whom they had adopted. The children attend school regularly and are sent to Sunday school. Mercibel Turner, the principal of the St. Jago Cathedral preparatory school at which the boy attends, stated by affidavit that his attendance has been regular and he is making satisfactory progress. She said that he is always neatly and tidily dressed, is cheerful and obviously happy, and "gives the impression of enjoying a pleasant, stable and happy home life." Ethel Holt, the headmistress of the Cosmo praparatory school at which the girl attends, stated, also by affidavit, that she is regular in attendance and is always clean and tidy in her appearance. She said that the girl is "a bright and happy child and appears to be very healthy, and her deportment shows she is well cared for, and comes from a happy home." There is also evidence by affidavit from Novetta Perrin, the secretary of the Spanish Town Methodist Sunday school, that the children attend the school "very regularly" and have been so attending since March 1969. The mother knows the house in which the children now live with the father and his wife. She has slept there with the father while the wife was away. The mother agrees that the house is substantial, comfortable and has enough space to accommodate the children comfortably. She said that from what she understands the children are getting on quite well at school. The foregoing is the picture presented on the part of the father.

Up to March 10, 1970, the penultimate day of the hearing before the Master, the picture presented on the part of the mother was as follows. She desired to have the custody of the children who had been in her care and control and that of her mother since birth. She was engaged to be married to Victor

Green, a police constable. The marriage was fixed for March 28, 1970. When married her husband and herself proposed to adopt the children but she had to have custody of them before they could be legally adopted. They would live after marriage in a house at Above Rocks and had arranged to take possession of the house on March 15, 1970. The house was of three bedrooms and the children would have ample accommodation. The house was near to a good Roman Catholic school and church and the children would have a proper educational and religious upbringing. Until the marriage the children would live with the mother at her parents' home. Prior to the children being taken by the mother to board in Montego Bay the boy attended church and school regularly and they were well cared by the mother and her parents.

On the final day of hearing, May 26, 1970, further evidence was presented to the court on affidavit on behalf of the father. This evidence showed that police constable Green, like every other constable, required the permission of his superiors before he could be married and that up to April 11 he had neither applied for nor been granted this permission. No evidence in reply was filed by the mother. So far as was known then the marriage had not taken place on March 28 or at all. This radically altered the picture from the point of view of the mother. If the marriage had taken place, this together with her prima facie right to custody would have provided her with an unanswerable case for the exercise of the Master's discretion in her favour. With the prospect of marriage removed what is she left with apart from her prima facie right? The prospect of a stable home with adequate accommodation for the children and the status of adoption was removed. What did the mother have to offer in place? In cross-examination on March 3 the mother said that if Mr. Green did not go through with the marriage she would still go on taking care of the children by taking them with her and getting a job. She was then unemployed and had been so since November 1969 when she returned from the U.S.A. Since then she has been living at her parents' home. She, apparently, had no income but had savings then of $400.00. She had tried to get a job without success. Until she succeeded in finding employment and rented two rooms in which to live she would take the children to live at her parents' home. That is a house of three apartments - a sitting room and two bedrooms. Her mother, father, adult brother, a grandchild of her parents and herself live in the house. She occupies one bedroom and her mother, father and brother the other. The

children would share her bedroom. She admitted that it would not be convenient to have the children living with her in one room. She said that the house could comfortably take more by the addition of a room and that it is not comfortable enough to take others to live there without addition. There was no evidence that either the mother or her parents intend increasing the accommodation at the parents' home by the addition of a room or have the means to do so. There is no evidence that the mother's circumstances have altered since March 3.

The learned Master stated the relevant findings of fact as follow (at p.42 of the record):

> "The court also accepts that Stanley Clarke's home is a suitable home for the children and that he has the financial resources to take proper care of them. The court also accepts the fact as admitted by him that he is the natural or alleged father of the two children and that he loves them and wishes to have their custody and that at present he sees to their proper schooling and religious upbringing. The court also accepts that Madge Carey loves her children and would like to have the custody and care of them, but that she has not got the financial resources of Stanley Clarke or as substantial a dwelling in which to bring them up."

The Master referred to the evidence that the mother intended to get married on March 28 to police constable Green, that they wished to adopt the children after marriage and had contracted to take a house as from March 15. He observed that both March 15 and March 28 had gone by and referred to the further evidence put in by the father that constable Green required permission before he could be married and that no such permission had been obtained. He then said (at p. 43):

> "To summarise, we have two young children living at the suitable house of their natural father and his wife for the past year, and getting on well at school and attending Sunday school regularly, and with the alleged father financially able to look after the children ..... On the other hand, we have the mother of the two children who had the custody of her two children for approximately 6½ years and 3 years respectively, who, from the evidence that is accepted, did not abandon the children but boarded them out in Montego Bay unknown to the father ....., and where he went and collected them within 9 days after the mother had done so, and unknown to her. Both parents in this regard acting in their own personal interest and supposed pride, and possibly in the best interest of the children. The mother of the children in comparison to the

alleged father is relatively poor."

The learned Master stated accurately the principles to be applied when he said: "Finally on the law, the welfare of the children comes first, then the claim of the mother of the illegitimate children to have her wishes considered. The court in doing this must consider the alternatives presented by the mother and the alleged father and come to a conclusion which is the better plan in the interest of the child." He recognised that the welfare of the children may result in the mother being denied custody when he said: "Then again, after the welfare of the child is placed in a paramount position, the wishes of the mother of the child comes next and her evidence must be considered on an equal footing with the evidence of the natural father to see what is in the best interest of the child, which interest might involve the giving of custody to the father." It is his application of these principles to the facts of the case that is in question.

The case presented by the mother was mis-stated by the Master when he said: "In this case the mother wishes to have custody and later, if she gets married and the husband puts no obstacle in the way, to adopt the child, not part with the child to a stranger." It is on this inaccurate premise that he exercised his discretion in favour of the mother and granted her custody. He said:

> "Looking at the matter in this way and on this submission one must take into account that an alleged father cannot as of right stop an adoption though his evidence can have a bearing on the question whether the court will allow an adoption to a particular individual, while on the other hand consent of the mother of an illegitimate child is required to any adoption. The best interest therefore of the children apart from any other consideration is that they should not have anything placed in the way of their later adoption, either by the mother and any future husband, whoever he may be, rather than leaving the children with the alleged father who cannot adopt them without their mother's consent. If there should happen to be a possibility of a stable adoption by the mother of these two children, then in equity or under the statute, the best interest of the children would be served by giving custody to the mother as early as possible so that the children can grow up with her prior to any possible adoption."

As has been stated, the mother's case was that she was to be married to a named man on a named date and he had agreed to their joint adoption of the children.

There was no evidence of the prospect of any other marriage or adoption. The learned Master, when he came to exercise his discretion, appears to have given no thought to the welfare of the children while the mother waited for a marriage and adoption which may never take place. Having exercised his discretion on a wrong premise, the matter is at large for this Court to say whether or not on the evidence accepted the Master's order giving custody to the mother can be supported.

In deciding this question it must be said at once that this is not a case of balancing, what has been called, the wealth of the father against the "relative poverty" of the mother. In Re McGrath (Infants) [1893] 1 Ch. 143 Lindley, L.J. said, at p.148:

> "The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

And in R. v. Gyngall [1893] 2 Q.B. 232 Lord Esher said, at p. 243:

> "The Court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child ..... Again, it cannot be merely because the parent is poor and the person who seeks to have the possession of the child as against the parent is rich, that, without regard to any other consideration, to the natural rights and feelings of the parent, or the feelings and views that have been introduced into the heart and mind of the child, the child ought to be taken away from its parent merely because its pecuniary position will be thereby bettered. No wise man would entertain such suggestions as these."

It would be very unfortunate indeed if the idea was put out in this Country that a well-to-do father can take away and deprive the mother of an illegitimate child of the custody of her child merely because he is financially better off than she is and able better to provide for the child's material welfare. A child's physical comfort is, however, an important consideration when deciding what is in the child's best interests. A child can be made comfortable in a poor home though he might be more comfortable in a rich one. And if the comfortable poor home is his mother's (in the case of an illegitimate child)

it would be difficult, if not impossible, to justify an order removing him to a rich home. But if he is in a comfortable rich home from which it is sought to remove him care has to be taken to see that his general welfare is not prejudiced by such removal.

The evidence in this case shows that the children are in a suitable and comfortable home with all their material needs being met. This home is their father's. There is no evidence that living away from their mother has, at any stage, affected them in any way. Their teachers say they are happy and seem to be enjoying a happy home life. When the Master's decision was given they had been in their new environment for some sixteen months. It is now going on three years. The Master's order would remove them from this into their grandparents' home where, it is admitted, there is inadequate accommodation and where, in the words of the mother, it will not be comfortable for them to live without the addition of a room to the house. Though it is not uncommon in this Country for mothers to share one room with several children, this surely cannot be in the best interests of the children especially where this state of affairs is being balanced, with the welfare of the children in mind, against children who now each occupy his/her own room. Added to this, their future welfare will be quite uncertain with the mother being unemployed and clearly unsettled. True she can obtain affiliation orders against the father but this does not alter the evidence presented by her on which the Master had to make a decision.

In my judgment, after the most anxious consideration, the decision of the Master awarding custody to the mother is not justified on the evidence he had to consider. In my opinion, it will not be for the welfare of the children to remove them into the custody of the mother at this time. This is a decision reached with great regret. The father is, however, not being granted custody and it is open to the mother to re-apply whenever she is settled and can offer proper accommodation to her children. Of course, the longer the children remain in their new environment the more difficult it will be to satisfy a court that it will be for their welfare to remove them from it.

I would allow the appeal, set aside the Master's order and order that the summons be dismissed.

GRAHAM-PERKINS, J.A.:

The respondent is the mother of two illegitimate children of whom the appellant is the admitted father. On the 21st of January, 1969 the respondent who, up to that date, had had the custody of her children boarded them with a friend, a Miss Ruby Faulkner, in Montego Bay and left for the United States of America the following day. There she remained for some ten months before returning to Jamaica. Within nine days of the respondent's departure for America the appellant removed the children from Miss Faulkner's home to his own home where he lived with his wife. The appellant has had the two children - Christopher Clarke aged 10, and Marlene Clarke aged 6, in his custody since.

In December, 1969 the respondent applied by way of originating summons for an order that she be granted custody of Christopher and Marlene. The summons came on for hearing before Master Chambers (as he then was) who, on the 5th of June, 1970 ordered, inter alia, that the respondent be awarded the immediate custody of the two children. From this order the appellant appealed to this court seeking, among other things, to have the Master's order set aside.

Mr. Phipps, at the outset of the hearing of this appeal sought to challenge the Master's order on the ground that the respondent was not competent to proceed under S. 7 (1) of Guardianship and Custody of Children Law No. 69 of 1956, as that section did not sanction an application for custody by the mother of an illegitimate child. This challenge to the Master's jurisdiction necessarily involved a very direct attack against a decision of this court on precisely the same point in the case of Finlayson v. Matthews on the 6th May, 1971.

/In these.....

In these circumstances at least one member of this court was constrained to the view that it was not open to Mr. Phipps to impugn the authority of Finlayson v. Matthews unless he could show either that that case could be distinguished from the instant case, or that the decision therein was arrived at per incuriam. The former, of course, he could not do; the latter he appeared somewhat unwilling to undertake. For myself I must say, with profound humility and with the greatest respect for the majority judges in Finlayson's case (supra), that I am compelled to the conclusion, after the most anxious examination of the reasoning in their judgments, that the decision therein is demonstrably per incuriam. I remain unconvinced that there is any circumstance in the history or the nature of the 'doctrine of precedent' that requires this court to hold itself bound by Finlayson's case. Having said that I apprehend that I must attempt to justify my view.

S. 7 of Law 69 of 1956 provides:

> "(1) The Court may, upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent having regard to the welfare of the child, and to the conduct of the parents, and to the wishes as well of the mother as of the father ...
>
> (2) The power of the Court under sub-section (1) of this section to make an order as to the custody of a child and the right of access thereto may be exercised notwithstanding that the mother of the child is then residing with the father of the child."

In his judgment, Smith, J.A., accepting and following the reasoning of Roxburgh, J. in In re C.T. (An Infant) (1956) 3 W.L.R. 826, held that the words "child" and "father" in S. 7 (1) bore their prima facie meanings of lawful child and lawful father respectively. The meaning

/to be.....

to be attributed to the word "mother" involved, in his view, quite different considerations. He said:

> " In my opinion, it will not offend against any principle of construction or any binding authority if, in construing the provisions of Law 69 of 1956, 'mother' is given its ordinary meaning where that meaning is not restricted by the context in which it occurs."

He went on to hold that there was nothing in the context of S. 7 (1) to restrict the meaning of "mother". The analytical process by which Smith, J.A. arrived at this conclusion would, he thought, obviate the very real difficulties encountered by Roxburgh, J. in his careful examination of the problem in In re C.T. (An Infant) (supra). But in his valiant attempt to remove these difficulties Smith, J.A., in my very respectful view, succeeded in creating even more fundamental and far-reaching problems. I mention but a few. If "father" means, as I too hold, the father of a legitimate child then it would appear to do extreme violence to language to hold that when S. 7 (1) speaks of "the mother or father of a child" it is permissible to attribute to "mother" an unrestricted meaning. The sub-section, in unmistakably clear terms, envisages either the one or the other of two parents of a child. Is it possible that a child can be the legitimate child of its father and, at the same time, be the illegitimate child of its mother? Again, if the prima facie meaning of "child" is not to be taken to be displaced, must it not inevitably follow that "mother" can have no sensible meaning other than that of mother of a legitimate child? Or again, when S. 7 (2) says "notwithstanding that the mother of the child is then residing with the father of the child", is it not very obviously treating with the mother and father of the same child? If this is so, and if "father" means the father of a legitimate child, then it would seem quite impossible, in my respectful view,

/to argue.....

to argue against the obvious that that legitimate child cannot have as its mother a woman who is not the lawful wife of its father. No useful purpose will be served by cataloguing the several other insuperable problems posed by the judgment of Smith, J.A. The truth is that Smith, J.A. quite unfortunately overlooked what he himself had already concluded, i.e. that the word "child" in S. 7 (1) was to be taken to mean a legitimate child. It is, I think, clear that Smith, J.A. did not advert to the conclusion which inescapably followed from that premise, namely, that "mother" could only mean the mother of a legitimate child.

Fox, J.A. in his judgment, said:

> "At common law, an unmarried mother is prima facie entitled to the custody of her illegitimate child. This right may be enforced by habeas corpus proceedings."

In support of this dictum he cites Barnado v. McHugh (1891) A.C. 388. A careful study of the speeches in this case will reveal that none of their lordships accepted or recognized that there was any such right at common law in the mother of an illegitimate child to its custody. Indeed, their lordships do not appear to have attached any importance to the existence or otherwise of such a right. I confess a very great difficulty in appreciating the connection between some supposed right at common law and the "right" of the mother of an illegitimate child to invoke the provisions of S. 7 (1) of Law 69 of 1956. Fox, J.A. proceeded to hold that there was "no objection to construing the word mother in S. 7 (1) of the Law to include an unmarried mother". He advanced no reasons for, as distinct from emphasizing the desirability of the consequences of, this conclusion. It is clear, I think, that, like Smith, J.A., Fox, J.A. overlooked the consequences that followed from the admitted meaning

/to be.....

to be attributed to "father" and "child" in S. 7 (1).

Now I pose the question: In what circumstances can it be said that a given decision was delivered per incuriam? Clearly there is no easy answer. Indeed, I am not aware of any authority that seeks to define those circumstances in terms that may fairly be described as precise or exhaustive. In the nature of things it would be quite impossible, and equally undesirable, to attempt to ennunciate any formula. In Young v. Bristol Aeroplane Co. Ltd. (1944) 2 A.E.R. 293 Lord Greene, M.R., said, at p. 300,

> "This was clearly a case where the earlier decision was given per incuriam. It depended upon the true meaning (which in the later decision was regarded as clear beyond argument) of a rule of the Supreme Court to which the court was apparently not referred and which it obviously had not in mind. The Rules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statute. Where the court has construed a statute or a rule having the force of a statute, its decision stands on the same footing as any other decision on a question of law. But where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam. We do not think that it would be right to say that there may not be other cases of decisions given per incuriam in which

/this court .....

> this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts."

In Morelle Ltd. v. Wakeling (1955) 1 A.E.R. 708, the implication of the meaning and scope of "per incuriam" were the subject of a somewhat searching analysis by Sir Raymond Evershed, M.R. At p. 718 the Master of the Rolls said:

> "As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene, M.R., of the rarest occurrence. In the present case, it is not shown that any statutory provision or binding authority was overlooked, and while not excluding the possibility that in rare and exceptional cases a decision may properly be held to have been per incuriam on other grounds, we cannot regard this as such a case. As we have already said, it is, in our judgment, impossible to fasten on any part of the decision under consideration, or on any step in the reasoning on which the judgments were based, and to say of it: 'Here was a manifest slip or error'."

/The Master .....

The Master of the Rolls had said earlier, at p.713,

> "We have carefully considered the judgments and the report of the arguments in the first Morelle case. We have also have available to us the notes made during the hearing of that case by Denning, L.J. and Morris, L.J. With this material before us it has been impossible, in our judgment, to fasten on anything in the judgments in the first Morelle case or on any step in the reasoning on which those judgments were based, and to say of it: 'here was a manifest slip or error'."

It is worthy of some note that the judgment makes it clear that if the Court of Appeal were disposed to find that S.23 of the Land Registration Act, 1925, prohibited the forfeiture of registered land where a company was registered as proprietor and where that company had no authority to hold land in mortmain, that court would have held that its decision in Rodnal Ltd. v. Ludbrook, (1954) 2 A.E.R. 673 was given per incuriam.

I have so far confined this review to the position as it has existed in England in relation to the per incuriam rule, at least since 1944. Remarkable though it may appear, there was not, prior to 1944, any uniform body of juristic opinion on the question whether the English Court of Appeal was bound by the doctrine of precedent or stare decisis. A relatively vast area of conflict among judges and, indeed, textbook writers contributed to this state of uncertainty, a state which encouraged the most prodigiously intellectual feats of distinguishing one case from another on tenuous grounds of fact or law, or by recourse to the doctrine of incuria. It is on this background of the 'fogs' and 'tangles' of precedent and the ever growing judicial tendency to find a shortcut through them that the Court of Appeal, in Young v. Bristol Aeroplane Co. (supra) sought to avert the consequences of what was thought to be an embarrassing situation. And so were

/born the...

born the "rules" enunciated in that case. But, not surprisingly, Young's case (supra) did not find universal favour, and it has been so interpreted as to open any doors that were previously only ajar. See, for example, Nicholson v. Penny (1950) 2 K.B. 466.

In Boys v. Chaplin (1968) 1 A.E.R. 283, Diplock, L.J., dealing with Young's case (supra) said, at p.296,

> "Young's case, which I loyally, if regretfully, accept as binding on me, does not, as I think, preclude this court from declining to follow the ratio decidendi of a previous interlocutary order of the Court of Appeal if this court thinks that (it) was wrong. In the present state of juristic opinion, I would not extend the doctrine of stare decisis any further."

At p.289 (ibid) Lord Denning said:

> "It is unnecessary to consider today the position of final decisions of this court: though I foresee the time may come when we have to reconsider the self-imposed limitations stated in Young's case, especially in view of the recent change in practice in the House of Lords."

The following year, in Gallie v. Lee (1969) 1 A.E.R. 1062, Lord Denning said, at p.1072,

> "We are, of course, bound by the House of Lords, but I do not think we are bound by prior decisions of our own, or at any rate, not absolutely bound. We are not fettered as it was once thought. It was a self imposed limitation: and we who imposed it can also remove it. The House of Lords have done it. So why should we not do likewise? We should be just as free, no more and no less, to depart from a prior precedent of our own ..... It is very rare that we will go against a previous decision of our own, but if it is clearly shown to be erroneous, we should be able to put it right."

Salmon, L.J. though not adotping Lord Denning's conclusions, expressed a similar view. At. p.1082 he said:

> "Surely today judicial comity would be amply satisfied if we were to adopt the same principles in relation to our own decisions as the House of Lords has recently laid down for itself by a pronouncement of the whole House. It may be that one day we shall make a similar pronouncement. I can see no valid reason why we should not do so and many why we should."

Views similar to those above quoted had, in the decade between 1940 and 1950, been advanced in perhaps more cogent terms by Paton, Lord Wright and Professor Goodhart, among others, to the effect that a final appellate court in any jurisdiction should be free, in clear cases, frankly from its own previous decisions. With those views I would very respectfully agree. They are certainly the views and the practice, of the Supreme Court of the United States, and of many Commonwealth appellate courts. Those views recognize the two essential requirements that are the sine qua non of the studied development of any system of jurisprudence, namely, the constant awareness that no court is omniscient, and the acknowledgement that judicial comity and loyalty cannot always maintain the balance between organic development and stunted growth.

It is unmistakably clear now, I think, that the rules formulated in Young's case (supra) will, in the very near future, cease to have any particular significance in the very court in which they were declared.

The opinions advanced by Lord Denning, M.R. and Salmon, L.J., and indeed by other appellate judges

/in the.....

in the English Court of Appeal reflect the glaring absurdity of what has been called the absolute rule of precedent and "an unhappy blot on English jurisprudence". When in 1898 the House of Lords finally decided, in London Street Tramways Co. Ltd. v. London County Council (1898) A.C. 375, that it was absolutely bound by its own decisions, Lord Halsbury, L.C., sough to justify the decision in these terms:

> "What is that occasional interference with what is perhaps abstract justice as compared with the inconvenience - the disastrous inconvenience - of having each question subject to being reargued and the dealing of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal?"

As Professor Goodhart points out with his usual penetrating force and clarity (47 C.L.J. at p.349)

> "It is strange that the Lord Chancellor did not refer to the fact that although the Judicial Committee of the Privy Council is, for constitutional reasons not absolutely bound by its own judgments, nevertheless no one 'disastrous inconvenience' has followed from this. In practice the Judicial Committee follows its own prior judgment unless they are clearly wrong, but it does so on the ground of reason rather than on that of absolute authority."

In his very illuminating essay on 'Precedence' Lord Wright sums up his criticism of the rule of precedent thus:

> "As to Lord Campbell's constitutional argument, I shall only say that I feel that it is at best artificial and at worst

/doubtful.....

> doubtful. As to Lord Halsbury's quite different jusitification, I feel that there is greater public inconvenience in perpetuating an erroneous judicial opinion, than the inconvenience of the court of having a question, disposed of in an earlier case, reopened."

It was the decision in London Street Tramways Co's case (supra) that directly influenced the English Court of Appeal in Young's case (supra) to hold that it too was bound by its own previous decisions subject to the three qualifications therein named. It is, however, important to note that in holding as it did the court refrained from any discussion as to the wisdom of the rule or the grounds on which it was based. One would have thought that in reaching a decision of such far-reaching importance the court would have made some attempt at reasoned justification. On the contrary, it was content to rely on the following short passage from the judgment of Lord Cozens-Hardy, M.R., in Velazquez Ltd. v. Inland Revenue Commissioners (1940) 3 K.B. 458,

> "When there has been a decision of this court upon a question of principle it is not right for this court, whatever its own views may be, to depart from that decision. There would otherwise be no finality in the law."

But, if I may again quote Professor Goodhart (ibid) at p. 351 -

> "When the Court of Appeal follows a precedent, which is recognized by everyone including itself as erroneous, the finality only lasts until the appeal can be heard in the House of Lords. Perhaps a more accurate word would be uniformity, because if the Court of Appeal always decided the same problem in the same way it will have achieved complete uniformity. Whether this uniformity is such an absolute virtue that reason and justice must be sacrificed to it in all cases is perhaps a doubtful question."

/Not only .....

~~105~~ 487

Not only did Lord Greene, M.R., avoid any attempt to justify the rule, but he was at pains to highligh a number of cases in which the Court of Appeal had expressed the sincere hope that the judgments they were delivering would be overruled by the House of Lords. That any system of jurisprudence could tolerate and encourage this "unhappy blot" must involve, in my respectful view, an unfortunate infidelity to reason in the cause of justice. The House of Lord has now resolved, consonantly with that same reason and justice to remove that blot. It is not too much to hope, I think that the English Court of Appeal will again follow this lead to its great credit. As Salmon, L.J., said in Gallie v. Lee (supra) at p. 1082,

> "But that day is not yet. It is, I think, only by a pronouncement of the whole court that we could effectively alter a practice which is so deeply rooted."

It is clear, however, that the day is not too remote when that court will be able to repudiate the rule of precedent and say of some decisions of its own which it recognizes to be erroneous exactly what Stirling, L.J., said in Wynne-Finch v. Chaytor (1903) 2 Ch. 475, at p.485,

> "With the greatest respect, we are unable to agree with Daglish v. Barton ((1900) 1 Q.B. 284) and think that it ought not to be followed; and it is, therefore, over-ruled."

Having reviewed the rule of precedent in general and the per incuriam rule in particular, I come now to the position in Jamaica. Our final appellate court is but nine years old having been brought into existence by the Constitution of Jamaica in 1962. My researches have failed to reveal any decision of this court to the effect that it is bound by its own previous decisions. It is, perhaps, assumed that it

/so bound.....

so bound. It has been suggested that this assumption rests on the decision of this court in Hanover Agencies Ltd. v. Income Tax Commissioners (1964) 7 W.I.R. 300. I confess that the ratio of that conclusions escapes me. In the Hanover Agencies case this court held that it was not bound by a certain aspect of the decision in Hendriks v. Income Tax Assessment Committee (1941) 4 J.L.R. 60. The reason advanced for this conclusion was that this court was not bound to follow the decisions of the former Court of Appeal. This court did not say that it was bound by its own previous decisions. Neither as a matter of logic nor as a matter of interpretation does the latter proposition follow from the former. It is manifest from the judgments in the Hanover Agencies case (supra) that the true reason for holding that this court was not bound by the Hendriks' case (supra) was not so much because this court was a new creature of the Constitution, but because, in the view of this court, the decision in that case was clearly wrong.

For the reasons that I have advanced I hope that this court will demonstrate that 'judicial valour' of which Lord Mansfield spoke and never allow itself to suffer the indignity of becoming an absolute slave to any absolute or rigid rule of precedent.

As I have attempted to demonstrate, the majority judgments in Finlayson's case (supra) involved, in my respectful view, a manifest and fundamental error in their reasoning, an error which proceeded from the proposition that having construed "child" and "father" as they felt compelled to, both learned judges inadvertently allowed the consequences of that construction to escape their attention. In the result I am of the firm view that Finlayson's case (supra) should not be followed. I may add that I find myself in complete agreement with the minority judgment therein and would accordingly hold that it was not

/competent .....

competent to the Master to entertain the application of the respondent herein. I would, therefore, allow the appeal on this ground.

I am not unmindful of the fact that the conclusion at which I have arrived is one reached without full argument on the point by counsel who appeared before us. I do not, however, accede to the view, sometimes advanced by counsel and some judges, that it is not permissible for a point to be the subject of decision unless it has been fully argued. Such a view flies in the face of the paramount duty of the courts of the land to declare the law, and I have not the least doubt that courts fail in this clear duty if they permit themselves to be placed in a jurisprudential straight-jacket to the extent that they are required to sit silently and allow the perpetuation of undebatable error. As Allen so aptly said in his 5th edn. of "Law in the Making" at pp. 274-275,

> "It is constantly to be observed that a precedent, of whatever origin, which is based on error, has the greatest possible difficulty in fighting against the current of legal doctrine. If it be derived merely from a strained or fanciful interpretation, it may succeed in perpetuating an anomalous or, so to say, an eccentric doctrine; but if it offends against one of the axiomatic precepts of law or reason, it may maintain itself for a short and harassed existence, but the collective displeasure of the profession will kill it in the end:"

In the now famous (or infamous) case of Rookes v. Barnard (1964) 1 A.E.R. 367, the House of Lords had the benefit of the most thoroughly informed arguments of the counsel who debated the question of damages before their Lordships. Not a single counsel argued or suggested that the right in a judge/or jury to award exemplary damages was or could

be limited to the three categories formulated by Lord Devlin in a speech with which the other Law Lords concurred. What may be thought to be even more remarkable is that during the argument not a single member of the House even hinted at the existence of these categories so as to afford counsel the opportunity of addressing the House on the dramatic change it was about to effect in the law.

Salmon, L.J. in Broome v. Cassell & Co. Ltd. (1971) 2 A.E.R. 187, said at p.203,

> "In this country, what is sometimes called the adversary system rather that the inquisitorial system of administering justice is normally adopted. As a rule no point, certainly no important point, is decided by our courts without counsel on both sides having the fullest opportunity of being heard on it. It seems a pity that this rule was not followed in Rookes v. Barnard - particularly as Lord Devlin's opinion was open to the devastating criticism to which it was later subjected....."

I do not interpret the guarded language of Salmon L.J. as involving any attempt to define an inflexible rule. Undoubtedly it will, more often than not, be desirable and indeed necessary to adhere to the general rule. Any departure therefrom must inevitably depend on the particular circumstances of a given case. The wholesale condemnation of Rookes v. Barnard (supra) by the Court of Appeal in Broome's case (supra) rested explicitly on the premise that the former should not be followed because it was per incuriam; it had changed the law in circumstances in which there was no authority in the House to effect that change, the House being, in 1964, bound by its previous decisions. It had overlooked two earlier decisions of its own. None of the judges in Broome's case (supra) questioned the right of the House of Lords to conclude a point that had

~~189~~ 491

/not been .....

not been argued. I have been unable, in spite of my researches, to find any authority that seeks to deny what I would have thought was an inherent right of an appellate court. Salmon, L.J. could go no further than to say that it seemed a pity to him that the rule was not followed in the particular circumstances with which the House was concerned.

On the assumption (however unwarranted) that this court must follow Finlayson's case (supra) I proceed to an examination of the Master's decision, and for this purpose I set out in summary from the factual situation as disclosed in his written judgment,

Both Christopher and Marlene have lived (and are still living) with the appellant and his wife from February 1969. Prior to that date Marlene had lived with the respondent from birth, except for some ten months during which the respondent was in the United States of America on a working vacation. Christopher had, at all material times, up to February 1969, lived with his maternal grandparents. In the respondent's view it was always more desirable for Christopher to live with his grandparents than with her. Nothing is known about Christopher's history up to February 1969, except for a few details of no particular importance. When the appellant found the two children at Miss Faulkner's Hone they appeared distressed and unhappy. The learned Master does not appear to have reached any firm conclusion from this finding. He asserts, however, that the appellant "set out to take charge of them for their benefit....." The Master goes on:

> "The court accepts that Stanley Clarke's home is a suitable home for the children and that he has the financial resources to take proper care of them. The court also accepts the fact ..... that he loves them, and wishes to have their custody and that at present

he sees to their proper schooling and religious upbringing.

"The court also accepts that Madge Carey loves her children and would like to have the custody and care of them but that she has not got the financial resources of Stanley Clarke or as substantial a dwelling in which to bring them up."

Later in his judgment the Master says:

"To summarise, we have two young children living at the suitable house of their natural father and his wife for the past year, and getting on well at school and attending Sunday School regularly, and with the alleged father financially able to look after the children. The wife of Mr. Clarke says she very happily and willingly agreed with her husband that they should provide a home for the children particularly when she learnt that their mother had virtually abondoned them .....

Both parties desire to have custody of the children. The (appellant's wife) is happy to have them along with her husband, particularly when she learnt that their mother had virtually abandoned them. (It does not seem from the evidence that the mother abandoned them.) While on the other hand the mother wishes to have the custody of the children, and later with her future husband to adopt them. The then future husband, a constable, expressed to the court such a desire and that he and his then future bride had already made attempts to adopt the children. What this young constable's salary is, is unkown to the court, but in any event, it could be no-where near the earnings of Mr. Clarke. Since the beginning of this case no marriage has yet taken place."

The Master then examined the law as to custody at some considerable length and concluded as follows:

"One must look at what are the paramount interests of the children, other interests are subordinate unless they either coincide with them or unless there is some exceptional

/reason for ....

> reason for giving effect to them. Looking at the matter in this way and on this submission one must take into account that an alleged father cannot as of right stop an adoption though his evidence can have a bearing on the question whether the court will allow an adotpion to a particular individual, while on the other hand, consent of the mother of an illegitimate is required to any adoption. The best interest therefore of the children apart from any other consideration is that they should not have anything placed in the way of their later adoption, either by the mother and any future husband, whoever he may be, rather than leaving the children with the alleged father who cannot adopt them without the mother's consent. If there should happen to be a possibility of a stable adoption by the mother of these two children, then in equity or under the statute, the best interest of the children would be served by giving custody to the mother as early as possible so that the children can grow up with her prior to any possible adoption."

I confess the gravest difficulty in following the reasoning of the Master in the passage last-quoted, but it is, I think, manifest that the exercise of his discretion in awarding custody of the children to the respondent was dictated entirely by the consideration that "they should not have anything placed in the way of their later possible adotpion." This approach necessarily involved the very obviously questionable consequence of removing these children from a well-defined area of certainty in which, on the Master's own findings, their welfare was well and adequately secured, into a nebulous area of ill-defined possibilities with their patently inherent risks. This result the Master allowed in spite of the following factors emerging from the evidence of the respondent:

(a) it would require a sum in excess of £1000 p.a. "to look after myself and the children, including schooling:

(b) when she worked as a steno-typist (presumably her only

/real ...

real qualification) she earned £624 p.a. and that she had not worked since her return from the United States of America;

(c) it would not be convenient for her to have both children living with her in the same room;

(d) if the children came to live with her at her parent's home they would be required to share her bedroom;

(e) without the addition of another room to her parent's home it would be quite inconvenient to have the children live there;

(f) there is no suggestion of such another room being added;

(g) there is no suggestion that her parents would be willing to have the children at their home even for a short time;

(h) before leaving Jamaica she could, she said, have afforded two rooms so as to have the children with her and care them adequately, but she did not do so;

(i) the appellant is a fit and proper person to be a father, with a good and comfortable home for the children;

(j) the children are getting on very well at their school;

(k) her own future in terms of securing a job, getting married, finding suitable accommodation for herself and the children, and her being able to maintain them (inter alia), is beclouded with uncertainty, to put it at its very highest.

There are certainly many other factors that emerge but I do not advert to them. Nor do I find it necessary to catalogue the several factors that stand out in favour of the appellant and which, in my view, point inescapably to the conclusion that the welfare of these children has been eminently well protected and indeed advanced since they have been in his custody and care.

If, as is conceded, the welfare of these children was the paramount consideration to which the Master was required to direct his attention in the exercise of his discretion one is driven to an enquiry in these terms: One knows the present circumstances of the children--in a happy and very comfortable home in which they are loved and cared for by their father and his wife, happy and progressing exceedingly well at school, exposed to a satisfactory (to both parents) religious up-bringing, and with an eminently reasonably secure and happy future. As against all this what can one say of their future

(both immediate and distant) if the Master's order is upheld? The simple and, indeed, the only answer is that one does not know. Can it really be argued that this was a proper exercise by the Master of his discretion? I have not the least reservation in giving the most emphatic NO by way of an answer. In this circumstance I respectfully adopt the view of the Court of Appeal in Re O (Infants) (1971) 2 A.E.R. 744, as stated, quite accurately I think, in the headnote thus:

> "On an appeal against the exercise of a judicial discretion, it is the duty of the appellate court to set aside the decision of the court below not only in cases in which the court below has erred in principle but in any case where the appellate court is satisfied that the decision of the court below is improper, unjust or wrong."

In the result I would allow the appeal on this ground also, since in my view the decision of the Master was clearly wrong. Since it is conceded that the father cannot invoke the provisions of Law 69 of 1956 it follows that he will retain the de facto custody thereby preserving the status quo ante.