JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CRIMINAL APPEAL NO. 163/77

BEFORE: THE HON. MR. JUSTICE ZACCA (Ag. PRESIDENT)
THE HON. MR. JUSTICE MELVILLE, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.

REGINA ATS. DAPHNE THORPE: COMPLAINANT-APPELLANT

VS. EUSTACE MOLYNEAUX: DEFENDANT-RESPONDENT

Mr. W.B. Frankson and Mr. F. Hamaty for the Complainant-Appellant

Mr. F.M.G. Phipps, Q.C. and Mr. Michael Marsh for the Defendant-Respondent

Mrs. M. McIntosh, watching, for the Crown.

May 15, 16, 17, 18, 19, 1978;
January 31, 1979.

CARBERRY, J.A.

We heard this appeal on May 15, 16, 17, 18 and 19, when we allowed the appeal, set aside the order of the Resident Magistrate and adjudged the respondent to be the putative father of the two children involved, and ordered that he do pay the weekly sum of $20.00 for each child commencing from the 18th August, 1977 until such child attain the age of eighteen years. Costs of the appeal were fixed at $50.00 to the appellant. We promised to put our reasons in writing and now do so.

On the 22nd June, 1976, the complainant-appellant, Daphne Thorpe gave birth to twin boys, named Damon Omar and Dean St. Aubyn. They were delivered by caesarean section. She alleges that the defendant-respondent, Dr. Eustace Molyneaux, is the father of these two children, and as such liable for their support. The defendant-respondent denies that the children are his: he does not suggest that their mother associated with any other man apart from the obvious inference that if they are not his children then they must belong to or have been fathered

by some other person.

The complainant was at the material time a divorcee; she got her decree absolute on the 25th April, 1975. She has two children by her previous marriage, and at the time of the conception of the twins these children were living with her at Granville, St. James.

The complainant is by profession a secretary, and was employed as secretary to a team of surgeons at the Cornwall Regional Hospital, in Montego Bay in the parish of St. James. The defendant Dr. Molyneaux was a member of that team and she met him in June 1975. She had had gynaecological problems, was admitted to the hospital in July, and the respondent was one of the doctors who treated her.

The complainant's evidence was to the effect that their acquaintance deepened into friendship and ultimately became intimate. He sometimes took her home from work, and on the 15th October, 1975, she says that having been taken by him to her home she returned with the defendant to his flat or apartment at the Pomco Hotel where sexual intercourse took place between them. They used no contraceptives.

Some few weeks later complainant stated that she felt that she had become pregnant and told the defendant so. He said that she should have a pregnancy test, she took one, and at that stage it proved negative. This was now in November. She went to tell him of the result of these tests and intercourse again took place between them in the second or third week of November.

Some time later on she became convinced she had become pregnant: he suggested abortion which she refused, and their friendship cooled. They ceased to be on speaking terms. The defendant had not contributed anything towards the support of the twins. He had denied paternity.

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The complainant brought two complaints (one for each twin) against the defendant in the Resident Magistrate's Court for St. James, holden at Montego Bay. They were informations numbers 9325 and 9326/1976. They were laid on 24th November, 1976 and they were heard on the 24th February 1977, before His Honour Mr. W.L. Morris, Actg. Resident Magistrate for St. James. This was her first application. She did not on this occasion herself bring any supporting witnesses, though Section 5(1) of the Affiliation Act requires that "the evidence of the complainant be corroborated in some material particular by other evidence to the satisfaction of the Resident Magistrate". She was cross-examined and denied the suggestion that she had ever had sexual relations with any other man since August of 1975.

At the end of her evidence the defendant himself gave evidence. He admitted having had sexual intercourse with the complainant on two occasions, the first of which he put as being on the 15th November, 1975: he admitted having been told by her that she was pregnant as a result thereof, but denied in effect that she could possibly have discovered this so close to the date on which he admitted having had intercourse. If she had these symptoms at that time, they indicated to him that she must have already been pregnant for someone else before he had intercourse with her. It appears that the defendant had been called into the witness box by the complainant: this is permissible. After he had given evidence there were very short addresses, and the Resident Magistrate for St. James dismissed the complaint "for want of corroboration". This appears both in the Notes of the evidence taken at the first hearing, and on the back of the two informations where the results of the trial are formally recorded.

The Resident Magistrate for St. James was wrong in point of law. If he believed the complainant, then the evidence provided by the defendant was in law capable of amounting to corroboration. Although the defendant purported to say that he could not be the father it has been clear since the case of Simpson v Collinson (1964) 2 Q.B. 80; (1964) 1 All E.R. 262 that an admission by a man against whom an affiliation order is sought that he had sexual intercourse with the applicant mother within two to four months of the conception of her child is capable of being "corroboration in some material particular" of the complainant's allegation that he is the father. This was a decision of the Court of Appeal in England, over-ruling the Queen's Bench Divisional Court and the decision of the Lord Chief Justice therein. The acting Resident Magistrate when he erred, erred in good company, but apparently/unfortunately and he was not aware of the decision above, nor of the fact that it has been cited in and accepted as good law in our own Court of Appeal: see Gladys Gilpin v Joseph Allen (1966) 4 G.L.R. 184; Veronica Taylor v Robert Chambers (1965) 5 G.L.R. 184

It was conceded in argument before us by counsel for the respondent that had the complainant chosen to appeal the respondent probably could not have held his judgment.

The complainant however did not appeal. Instead she brought a second or fresh application. Having moved to the adjoining parish of Westmoreland, she filed two new complaints on the 11th May, 1977, alleging that the defendant was the father of the twins and seeking an affiliation order against him from the Resident Magistrate for the parish of Westmoreland. These applications were made within the

period of one year from the birth of the chiidren (22nd June, 1976). The defendant worked in the parish and she resided therein, and no question of jurisdiction arises on either score.

These two informations Nos. 2465 and 2466/1977 (Westmoreland) came on to be heard by His Hon. Mr. B.H.B. Reid, the Resident Magistrate for Westmoreland on the 9th day of August, 1977. The complainant had new attorneys but the defendant retained his former attorney-at-law.

The complainant's evidence was a little fuller, but to the same effect as her previous evidence which has been narrated above. On this occasion however she called additional evidence by way of corroboration which she had not done at the first hearing. She stated that on the first night that she and the defendant had had sexual intercourse on the 15th October, 1975, she had left her two small children with a neighbour, Hepsilda Brown, and she had also done this on the second occasion, in November 1975. She called Hepsilda Brown as a witness, and claimed that that lady had been introduced by her to the defendant. She also called as a witness the doctor who made the pregnancy test and later delivered the twins by caesarian section. She also produced her hospital dockett. In her cross-examination the complainant admitted the previous hearing and its result, namely that at that hearing she had not had any witnesses of her own and the case had been dismissed for want of corroboration.

Hepsilda Brown in her evidence stated that she was a neighbour of the complainant, and had noticed tha defendant driving the complainant home from work, and that he had been introduced to

her. On two occasions one in October and the other November, 1975, complainant had asked her to look after the two children and brought them to her to stay the night.

Dr. Vasanthi Duvur, the complainant's doctor, gave evidence as to having conducted a pregnancy test for her in November, 1975. It proved negative. False negatives were rare, though false positives were frequent. He examined her again in February 1976, when she gave the date of her last period as 6th October (1975), and thought she was then 22 weeks pregnant, though this might be an overestimate as she then had fibroids in the uterus, which might have exaggerated the extent of the pregnancy as might the fact that she was having twins. The expected delivery date was 13th July, 1976, but the actual date was on 22nd June, 1976, by caesarian section. Cross-examined the doctor expressed the view that the first signs of pregnancy usually occurred 26 days after intercourse resulting in conception.

The complainant having closed her case, the defendant's attorney raised two points: (a) that the matter was concluded by the result of the earlier hearing, the notes of evidence of which were by consent admitted in evidence in this case. The defendant relied on Elliott v Elliott (1945) 4 J.L.R. 244; the defendant also took an additional point (b) that the new evidence offered at the second hearing had not been shown to be evidence not available at the first hearing.

The case continued next day, and the defendant offered medical evidence which suggested that symptoms of pregnancy would not normally be experienced by the patient before 4 to 6 weeks after

sexual intercourse, though subjective changes might be experienced in the case of twins possibly within three weeks.

The defendant once again gave evidence admitting two acts of intercourse, one on the 15th November 1975, and the other about two weeks later. He stated that complainant stated she was pregnant for him on the second occasion: he disputed this as it was only two weeks later, and was impossible in his experience as a gynecologist. He admitted having taken the complainant to her home from work at the hospital, but denied he had ever taken her from her home to his apartment as she had alleged. He denied he had ever met or been introduced to Hepsilda Brown (though this was never put to that witness in cross-examination).

On the 17th August, 1977, after addresses, the Resident Magistrate for Westmoreland having considered the case of Elliott v Elliott, (ante) decided that it was binding on him. He held that in as much as there had been evidence which would have justified the Resident Magistrate for St. James in making an Order against the defendant (i.e. that there was evidence offered on the first occasion that was capable of being corroboration in law), there had been a hearing and dismissal "on the merits", and that no further complaint could be brought by the complainant. He therefore dismissed both summonses. He decided that there was corroboration in law at the first hearing, though the Resident Magistrate for St. James had expressly stated that he dismissed the application then for want of corroboration. The complainant has appealed against the decision of the Resident Magistrate for Westmoreland.

In his Reasons for Judgment dated the 26th September, 1977,

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the Resident Magistrate amplified the decision he had made.

He stated that he accepted the complainant's evidence that conception took place as a result of the first act of intercourse which he found took place, as she had stated, in October, 1975. He found that there was corroboration of her story in the evidence of Hepsilda Brown and moreso in the defendant's admission of two acts of intercourse, (albeit at a month later in date). He would have adjudged the defendant to be the putative father but for his finding based on Elliott v Elliott that the matter was already res judicata.

The Resident Magistrate for Westmoreland noted that the Resident Magistrate for St. James had dismissed the complaints "for want of corroboration." Nevertheless he was obliged by Elliott v Elliott to go behind this finding and examine the record and notes of evidence of the previous hearing and notwithstanding his colleague's express finding that there was a "want of corroboration" to see for himself whether there was corroboration or not, and having found that there was in his view of the law evidence capable of amounting to corroboration, to hold on the strength of Elliott v Elliott that that previous hearing had been a hearing and dismissal on the merits and not a non-suit, and that therefore the complainant could not bring a fresh complaint.

On any view of the matter this would appear to be an extraordinary result: the first magistrate who heard the application of the complainant expressly decided to dismiss it on the ground of want of corroboration with the intention this should be a non-suit and that she should be free, according to the accepted practice and even Elliott v Elliott, to file a fresh complaint, while the second magistrate after reviewing the notes of evidence taken by the first

magistrate decides as a matter of law that the first magistrate, despite his expressed intention, and findings had decided the matter and dismissed the complaint "on the merits" and that the complainant was not entitled to bring forward a fresh complaint: the matter was res judicata.

If Elliott v Elliott has produced a situation in which one Resident Magistrate in effect sits as a Court of Appeal upon another, and is free or obliged to review his colleague's decision, find it wrong, and then feel obliged by Elliott's case to deprive the complainant, in whose favour he would otherwise have found of an Order which his colleague had wrongly deprived her of at the earlier trial, thereby leaving her without her just remedy forever, then Elliott v Elliott has produced so extraordinary a result that it must be most carefully reviewed and considered before allowing it to be perpetuated.

If Elliott v Elliott has been correctly applied, a complainant, who, at her first trial offers evidence which is in law capable of being regarded as corroboration, but is told wrongly by the judge that it is not corroboration, is in a worse position than a complainant who offers no such evidence at all. The latter can bring a fresh complaint, or complaints, while the former cannot: she must appeal or stand barred forever.

This appeal concerns then the extent to which the doctrine of estoppel per res judicata applies to affiliation proceedings, (or as it used to be called in older days, Bastardy proceedings). The doctrine of estoppel by record finds expression in two legal maxims, "interest reipublicae ut sit finis litium," and "nemo debet bis vexari pro una et eadem causa."

The party relying on this maxim must be able to show that the matter in dispute has been determined by a judgment in its nature "final": for this purpose it does not matter that the judgment is appealable, or even that an appeal is pending.

The doctrine of res judicata is not a technical doctrine applying only to courts of record: it is a fundamental doctrine of all courts that there must be an end of litigation.

Where res judicata is pleaded by way of estoppel to an entire cause of action, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact. To decide what question of law and fact were determined in the earlier judgment the later court is entitled to look at the Judge's reasons for his decision, and is not restricted to the record.

The statements set out above are taken almost verbatim from 3rd Edition Halsbury's Laws of England Vol. 15, "Estoppel" paragraphs 347, and 357, which are repeated practically unchanged in the 4th Edition, Vol. 16, "Estoppel" paragraphs 1518 and 1527.

That classic work, by Spencer Bower and Turner: "The doctrine of Res Judicata", 2nd Edition 1969, opens with a similar general statement in paragraph 9 which is worth quoting in full:-

> "9. The rule of estoppel by res judicata, which, like that of estoppel by representation, is a rule of evidence, may thus be stated: where a final judicial decision has been pronounced by either an English, or (with certain exceptions) a foreign judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of, the litigation, any party or privy thereto, and, in the case of a decision in rem, any person whatsoever, as against any other person, is estopped in any subsequent litigation from disputing or questioning such decision on the merits, whether it be used as the foundation of an action, or relied upon as a bar to any claim, indic indictment or complaint, or to any affirmative defence."

> case or allegation, if, but not unless, the party interested raises the point of estoppel at the proper time and in the proper manner. This rule is sometimes expressed in the concise Latin maxim res judicata proveritate accipitur."

Though the rule is of general application it has limits, inherent in the general statements that have been made above. The 3rd Edition of Halsbury, Vol. 15 cited above, was content to say, on its applicability to affiliation proceedings, in a footnote (d) to paragraph 358: "For the application of the doctrine of res judicata to affiliation proceedings, see title Bastardy, Volume 3, p. 115." The 4th Edition Vol. 16, paragraph 1527, is more explicit: it says in a footnote (1) "The principle of res judicata has no application in affiliation proceedings (R. v Sunderland JJ, ex parte Hodgkinson (1945) K.B. 502, (1945) 2 All E.R. 175, D.C.), but magistrates should not entertain a second application if the evidence then led is exactly the same as that led on the first application (Re F (W) (an infant) (1969) Ch. 269, (1969) 3 All E.R. 595)."

It would be tempting to leave the matter there, but we have spent close on five days examining the position in England, and in Jamaica, and in deference to the arguments that have been put forward, the importance of the subject, and the present doubtful state of the law in Jamaica on this issue, it is necessary to deal with the problem at some length.

A review of the English case law discloses that there are in fact two rules dealing with the matter. Bastardy or affiliation cases have been traditionally, (actually by statute), heard initially before the Justices sitting in Petty Sessions. From their decision the early statutes gave a right of appeal to the putative father only,

and that appeal lay only to the Justices sitting in Quarter Sessions. There was no further right of appeal in those days, save that from time to time the prerogative writs of certiorari or mandamus were used by one or other party and did lead to a review of sorts of the decision made at one or other levels. The classification of the nature of these proceedings was a matter of some concern: they were not strictly speaking criminal in nature, though originated by a complaint made to a justice; nor were they purely civil in nature, for in the normal civil case the plaintiff can succeed on the strength of his own evidence alone, if it is believed, whereas in Bastardy or Affiliation proceedings the statutes founding this jurisdiction and granting this relief to the mother of the child specifically provided that the Justices could make the order only "if the evidence of the mother be corroborated in some material prrticular by other evidence to the satisfaction of the said justices".....

The words underlined above have appeared in every successive English Statute dealing with such applications, from the Poor Law Amendment Act, 1844, through the Bastardy Laws Amendment Act, 1872, down to the Affiliation Proceedings Act, 1957. They also appear in the relevant sections of our own Jamaican Statutes dealing with this matter.

What would happen if the mother failed to produce evidence which corroborated her in some material particular to the satisfaction of the Justices? Was she forever barred of her remedy? Or could she re-apply and offer the additional evidence required? It should be remembered in discussing this problem that the mother had a limited period of time following the birth of the child in which to make this application, namely 12 months next after the birth of the child.

Within ten years of each other the English Courts in two cases had established the genesis of two separate rules: In 1726 in the Case of R v TENANT (1726) 2 Ld. Raym 1423; 92 All E.R. 426, Justices in Petty Sessions made an affiliation order against the putative father. He appealed to Quarter Sessions, and there was a re-hearing of all the evidence. The Justices at the re-hearing at Quarter Sessions evidently thought the mother had not produced sufficient corroborating evidence, they discharged the order made against the putative father, but bound the father over to attend at the next sessions, evidently thinking that on that occasion the mother might apply again and this time produce the necessary supporting evidence. The mother went back to the Justices in Petty Sessions, and they again made an order against the putative father: he took out certiorari proceedings to quash the second order. The Court of Kings Bench quashed the second order, holding that the decision made at Quarter Sessions was final: it was a decision "on the merits" and "the defendant was legally acquitted and cannot be drawn in question again for the same fact."

Whatever the Justices at Quarter Sessions may have thought, this case decided that their decision, even when the dismissal was only for want of corroboration, was final and constituted a res judicata. This rule with respect to decisions at Quarter Sessions, or its modern successor the Crown Court, still applies: decisions by those courts are final, and constitute res judicata (even though appeal from the Crown Court is now possible). See Halsbury, 4th Edition, Vol 1: Affiliation and legitimation, paragraph 661, last paragraph: "Where on appeal to the Crown Court there is a hearing on the merits, and an affiliation order is quashed, the decision is final, and no fresh

application may be made by the mother."

In 1736, in the case of R. v Jenkin (1736) Cas K.B./Temp Hard. 301; 95 E.R. 194, the contrary was decided with regard to Petty Sessions orders of dismissal: they were not final, and the mother could make a second or indeed subsequent applications. In this case the Petty Sessions had dismissed the mother's application. She applied again, and this time she got her order. The putative father took out certiorari to have the second order quashed. R. v Tenant, (supra) was cited, but the Court of King's Bench, with Lord Hardwicke C.J., delivering the judgment, distinguished Tenant's case as a decision made at Quarter Sessions, and so conclusive, but ruled that this did not apply to decisions made at Petty Sessions, as such justices could not under the Statute make an order that was in its nature final.

The decision made in Jenkin's case does not seem to have been well known, because in 1849 in a case which bears a striking similarity to the facts in our instant case, two eminent judges were still expressing the view that decisions at Petty Sessions might create an estoppel.

In R. v Buckingham Justices, (1849) 18 L.J. M.C. 113 the mother applied to the Justices of the County of A for an affiliation order against the defendant. They refused to make it. Having moved her residence to the County of B, she made an application to the Justices of the County of B for an affiliation order against the

defendant. The defendant objected that he had already been acquitted by the Justices of County A. This did not impress the Justices of B and they made an affiliation order against him. He appealed to the Quarter Sessions of the County of B, and that court after hearing the same objection over-ruled it, and proceeded to hear the case on the merits, the defendant retiring from the matter at that stage. Quarter Sessions for the County of B affirmed the Order, and the defendant took out certiorari proceedings to quash the second order, as confirmed.

The mother argued that second applications could be made, and that in any event it nowhere appeared why the first application had failed, so the defendant could not prove that it had failed "on the merits". The defendant relied on tha basic estoppel rule nemo debet bis vexari pro eadem causa, observing that mothers had no right to appeal to Quarter Sessions, but allowing her to bring a second application was in effect giving her an appeal. Wightman J. (for himself and Earle J.) observed that a former decision "on the merits" might have been an answer, but the putative father had failed to show that it was made "on the merits", it might have been decided on a technical defect only, and so the defence of res judicata failed, here.

In R v Brisby (1849) 18 L.J. M.C. 157, the point arose again, but in a different context: the first application was dismissed because of a technical defect, and the mother brought a second application. The putative father sought to set up the earlier decision as one in his favour. The justices made the order, and the defendant having been indicted for disobedience to the second order set up that it was invalid because of the earlier dismissal. His argument failed; the mother cited R. v Jenkin to show that second applications

could be made following dismissals at Petty Sessions, but the Court side stepped the issue. Parke B. and Patterson J. found that the first dismissal was not made on the merits, but failed and was void for a technical defect: they left open the question of what would have been the position had it been a decision "on the merits" observing that the matter was currently being argued before the Court of Queen's Bench.

Later on in 1849, the case referred to in R. v Brisby as being then argued came on for decision, and R. v Jenkin was re-established, and the rule firmly laid down that in the case of dismissals at Petty Sessions, the mother could apply again, and that such dismissals did not create an estoppel per res judicata. That was the case of R v. MACHEN (1849) 14 Q.B. 74; 117 E.R. 29. In this case the first application of the mother for an affiliation order was dismissed by the justices in Petty Sessions on the ground that they did not consider her evidence sufficiently corroborated. She afterwards discovered fresh material and corroborating evidence, and applied again to the same justices. The defendant took the objection that there had already been a dismissal by them of her application and the justices refused to hear her new application. The mother then took out mandamus proceedings to compel the justices to hear her second application. The defendant argued that second applications could not be made. He also observed that it was not suggested that the new evidence had not been available at the first hearing, and he relied on R. v Tenant (supra) (the rule re Quarter Sessions).

For the mother it was pointed out that the Statute did not say that second applications could not be brought; the mother had no right of appeal; and dismissal for want of corroboration was in the nature of a non-suit. The plea of "autrefois acquit" which was in

effect being set up applied to criminal cases only. Tenant's case applied to quarter sessions, and R. v. Jenkin was cited as being the rule applicable to dismissals in Petty Sessions. The argument succeeded.

Lord Denman C.J., followed Jenkin's case, distinguishing those cases that referred to quarter Sessions' decisions, said at p. 80:-

> (....the Statute does not say what is to to be done if the case is not made out to the satisfaction of the justices.....) "We cannot, therefore, see that the legislature intended them to have any power to adjudicate finally against the mother; their dismissal of the application is in the nature of a non-suit in an action; in which case the Plaintiff may come again better prepared. We are far from saying that the dismissal is to have no weight: but we think that the justices cannot refuse to hear the second application. If it should appear to them that the matter was fully inquired into on the first occasion, they will reasonably view any new evidence with much suspicion, and sift it accordingly: but we do not think that the dismissal can operate as a bar to further enquiry."

It will be noted that Lord Denman based his decision on an interpretation of the Statute, 7 & 8 Vict. c 101, section 2; this section has not materially altered in the history of the legislation and is the basic foundation of our own Jamaican Statute, via the U.K. Bastardy Laws Amendment Act, 1872, section 3, see the earliest traced Jamaican Bastardy Law. The Bastardy Law, Law 2 of 1881, whose section 2 follows almost verbatim section 3 of the U.K. 1872 Act (set out in Halsbury's Statutes, 2nd. edition, Vol 2: Bastardy and Legitimation, page 478).

There are minor differences: the initiating complaint in Jamaica was to be made to the District Court Judge, who was also the person to hear the complaint, while in the U.K. the complaint was made to a Justice and heard by the Justices in Petty Sessions. This distinction

was lessened when in the next succeeding year by Law 2 of 1881 it was provided that the initiating complaint could be made to a Justice of the Peace or Clerk of Petty Sessions. There were also differences relating to the substitution of the Parochial Board and its Poor Relief Officers as contrasted with the parish guardians in the U.K. In Jamaica appeal lay to the Supreme Court while in the U.K. it lay to Quarter Sessions. In both only the putative father was given the right of appeal. The appeal in Jamaica was to be governed by rules for the purpose made by the Supreme Court whereas in the U.K. it was specifically provided that the Quarter Sessions should re-hear the case. In both instances the appellate body was given the same limited powers, and appear to have had no power to order a re-hearing by the Justices or the District Court Judge.

Having regard to the wording of the Statutes in the U.K. and that in Jamaica, if matters are res integra, the decisions of the U.K. Courts and their reasoning ought logically to apply to the interpretation of the Jamaican Statute which so closely followed the wording of the U.K. Statute, and it ought to be presumed that our own Legislature when it adopted the wording of the U.K. Statutes on this topic also knew of and meant them to be interpreted in a similar manner.

To return to the development of the case law in the United Kingdom, Machen's case had seen the clear establishment of a rule that the dismissal of affiliation actions in the Petty Sessions was no bar to the making of a second application. The rule as laid down did not distinguish between dismissals for want of corroboration and dismissals on the merits.

There followed a series of cases which explored the differences between the rules relating to Petty Sessions and those relating to Quarter Sessions.

In R. v Harrison (1852) 16 Jur. 726, the dismissal of an affiliation application by Quarter Sessions on technical grounds was held no bar to the making of a second application to the Justices in Petty Sessions.

In R. v Thomas (1863) 8 L.T. 460 a Divisional Court comprising Cockburn C.J. and Blackburn J. confirmed once more that a second application could be made following on a dismissal at Petty Sessions of the first application, but pointed out that the second application must itself be brought within the statutory period (one year from the birth of the child) or it would fail on that ground. The complaint founding the first application was spent when it was heard and dismissed, so that the second application must be founded on a fresh complaint laid within the statutory period. This decision was followed by a number of cases to like effect: Staples v Staples (1897) 41 L.T. 347; R. v Robinson (1898) 1 Q.B. 734.

Lord Denman had based his decision in Machen's case on construing the Statute, and applying the analogy of the plaintiff non-suited in a civil case. The search for some other rationale for the exclusion of the doctrine of res judicata however continued, with rather unsatisfactory results.

In R. v Harrington (1864) 9 L.T. 721 the King's Bench Divisional Court, consisting of lord Cockburn C.J. and Blackburn and Mellor JJ. again reviewed the problem. After the dismissal of her first application by the Justices in Petty Sessions for want of

corroboration, the mother brought a second application and succeeded. The putative father took out certiorari to quash the second order and he relied on R. v Buckingham Justices (supra) and also R. v Brisby (supra), and he asked the Court to over-rule Machen's case, and to hold that a decision by Petty Sessions on the merits should be a bar to any subsequent application. Lord Cockburn C.J. upheld Machen's case, but added that he did not regard a dismissal for want of corroboration as a decision on the merits. Blackburn J. felt driven to make the same type of comment unsettling the authority of Machen's case by saying that if it did appear that the first decision was "on the merits" I by no means say that I should not hold it final;" but as the first decision was dismissed for want of corroboration he could not without over-ruling Machen's case hold that the justices had no jurisdiction to hear the second application. Mellor J. observed that dismissal for want of corroboration was not a decision "on the merits" in the sense in which the res judicata rule applied.

The suggestion that dismissal for want of sufficient corroboration was not a dismissal on the merits naturally brought into question the finality of Quarter Sessions decisions dismissing the application for want of corroboration, why should the mother not be allowed to bring a second application here also? The rationale attempted in Harrington's case applied equally well to Quarter Sessions decisions of the same sort. The attempt to attack the rule with regard to Quarter Sessions enshrined in R. v Tenant (supra) was made in R. v GLYNNE (1871) L.R. 7 Q.B. 16: (1871-73) All E.R. 837. In that case the mother had succeeded before the Justices and got her order. The putative father appealed to Quarter Sessions which

re-heard the evidence. Unfortunately some of the mother's supporting witnesses failed to attend on this occasion, and Quarter Sessions dismissed her application for lack of sufficient corroboration. She took out a fresh summons, but the Justices refused to hear it, saying that the Quarter Sessions decision was final. She then took out mandamus proceedings to compel them to hear it. She argued logically enough that if dismissal for want of corroboration was not a decision on the merits, the rule should apply to Quarter Sessions also, and she should be permitted to make a second application. The defendant relied on R. v Tenant, and pointed out that the re-hearings had been allowed only in Petty Sessions cases. The Divisional Court consisting of Blackburn, Mellor and Lush JJ. affirmed Tenant's case and the rule that Quarter Session decisions are final, even though the dismissal was for lack of corroboration and not because the complainant was disbelieved. Dismissal for lack of corroboration was a dismissal "on the merits" and prevented a second application, though if Quarter Sessions had dismissed for some technical ground or reason, their decision would not have constituted a res judicata, on the merits. The court also re-affirmed Jenkin's case allowing subsequent applications following dismissals by Petty Sessions, but limited it to Petty Sessions cases. Blackburn J. went to great lengths to try to explain away the observations made in Harrington's case as to dismissals for want of corroboration not being dismissals on the merits.

The result of the case was to confirm both rules, but it was now clear that the suggestion that dismissals for want of corroboration were not decisions on the merits would no longer serve as the rationale of the Petty Sessions rule, because logically it would also cover the Quarter Sessions rule, and that rule was not to be changed. One reason for preserving the latter rule was suggested by Lush J.: it would be competent for the Petty Sessions Court on a subsequent application, on the same evidence that Quarter Sessions had held inadequate, to come to a different conclusion, and so the lower Court would in effect over-rule the decision of a superior tribunal.

In the meantime it is as well to notice some glosses or modifications of the rule that Quarter Sessions decisions are final: in R. v Gaunt (1867) L.R. 2 Q.B. 466 it was held that where the putative father had been convicted of perjury in respect to the evidence that he gave at Quarter Sessions and so secured the dismissal of the mother's application there, the decision so obtained by fraud would be no bar to a subsequent application, and would not constitute a res judicata. This was a decision by a Queen's Bench Divisional Court comprising Blackburn, Mellor, Shee and Lush JJ. It affirmed Machen's case and is noteworthy for another effort by Blackburn J. to find a rationale for the rule in that case. He suggested that it could be based in the fact that the Statute allowed an appeal only to the father and that therefore to put the mother on equal terms i.e. to allow her to appeal against a dismissal by the Justices, the Courts had allowed her to bring a fresh application after the dismissal of her first application by the Justices.

If that is the true basis of the rule in Machen's case it obviously applies to the Jamaican situation also, because the 1881

Jamaica Act gave only the putative father the right to appeal.

What however would happen if the Statute was amended and the mother was given a right of appeal also? Would she now lose the right previously enjoyed to bring fresh applications following on dismissals by Petty Sessions?

The point arose for decision in McGREGOR V TELFORD (1915) 3 K.B. 237; (1914-1915) All E.R. 209. The criminal Justice Administration Act, 1914, section 37(2) had at last enabled the mother to appeal to Quarter Sessions from a decision of Petty Sessions dismissing her application for an affiliation order. Did this now abolish her right to bring fresh proceedings? A Divisional Court consisting of Lord Reading C.J., Scrutton and Ridley JJ. decided that the new right of appeal did not affect the mother's right to bring subsequent proceedings, that right continued as before. Lord Reading C.J. did not agree that the mother's right to bring fresh proceedings was founded on the absence of her right of appeal in the original statute. He said at page 240:-

> "The true reason for the decision in R. v Machen was that, inasmuch as the woman failed in her application because of the lack of sufficient corroborative evidence, there was no decision against her except in the sense that her application had failed, and as the Court held that that was in the nature of a non-suit it did not disentitle her from applying again...."

He held that Parliament in granting the right of appeal must be taken to have known the existing law, and that in as much as they had not taken away the pre-existing right to bring fresh applications. Parliament must have intended the mother to have an additional remedy, and did not intend to take away her right to a re-hearing.

It will be noted that in this judgment the Courts reverted to the original idea expressed by Lord Denman in Machen's case, that

a dismissal by Justices in Petty Sessions on the ground of lack of corroboration should be treated as a non-suit.

In 1926 in Jamaica, by Law 12 of 1926, the original Jamaican Bastardy Law, (Law 2 of 1881) and its amendment (Law 26 of 1882) were repealed and re-enacted. Bastardy applications were now to be heard by the Resident Magistrate, the successor to the District Judge. The machinery was modernized, Collection Officers (The Clerk or Deputy Clerk of Courts) were appointed. Appeals were now to lie to the Full Court of the Supreme Court, by section 7(1), but section 7(2) spoke of the Court of Appeal and in effect the two were treated as synonymous. In as much as the appeal was no longer expressly limited to the putative father, it is clear that without express mention the mother or complainant had been given the right of appeal by the new law.

If the reasoning in McGregor v Telford applied, the new right of appeal would not take away the Jamaican mother's existing rights to bring fresh applications instead of appealing, and to anticipate slightly, the only Jamaican authority on this matter, Elliott v Elliott (1945) 4 J.L.R. 244, accepted and followed McGregor v Telford on this point, and on this score Elliott v Elliott is plainly right and has not been challenged.

To return however to glosses on the quarter Sessions rule in England, and to the development of the Petty Sessions rule also. In R. v May (Essex Justices) (1880) 5 Q.B.D. 382 it was held that where the mother mistook the date and failed to turn up at Quarter Sessions a dismissal of her application by Quarter Sessions was no bar to her making a fresh application and did not constitute a res judicata.

R. v Hall & Gillespie (1887) 57 L.T. 306 confirmed the rule in Machen's case, while R. v Seddon, ex parte Hall (1916) 85 L.J.K.B. 806, which followed McGregor v Telford significantly extended the scope of the Petty Sessions rule in Machen's case. In Seddon's case the mother had withdrawn the original application and when she re-applied, it was sought to be argued that the withdrawal constituted a res judicata against her, and that no fresh summons could be heard. Giving the judgment of the Divisional Court, Lord Reading C.J. stated:-

> "An examination of the cases of R. v Machen (supra) Staples v Staples (supra) and a series of plain authorities, shew that the withdrawal, or even the dismissal of an affiliation summons on the ground that there is no corroborative evidence does not prevent a new application for a fresh summons, provided it is made within the period of twelve months. Such a withdrawal or dismissal is in the nature of a non-suit. The present case is an afortiori one, because there being no corroborative evidence, the solicitor asked for leave to withdraw the summons, and the matter cannot be res judicata."

In R. v Howard, exparte DaCosta 1938) 2 K.B. 544; (1938) 3 All E.R. 241 the rule with regard to Quarter Sessions was re-affirmed. Quarter Sessions had dismissed the mother's application on the ground of insufficiency of corroborative evidence, and it was held that this was a decision "on the merits" and was final, no fresh application could be brought. The Divisional Court confirmed both rules, noting that the Petty Sessions rule was regarded as resting on the doctrine that the dismissal there was in the nature of a non-suit, and that there was a fundamental difference between the two rules.

In R. V SUNDERLAND JUSTICES, ex parte Hodgkinson (1945) K.B. 502; (1945) 2 All E.R. 175 the Justices in Petty Sessions dismissed the mother's first application "on the merits" and not merely for want of corroboration. She then made a second application, the defendant objected on the ground of the earlier dismissal, the Justices

over-ruled him, and then, unfortunately decided the case without giving him an opportunity to present his evidence. The defendant took out certiorari to set aside the second order.

Humphreys J. giving judgment said;-

> "I do not think that the consideration applicable in the case of criminal proceedings, or in civil actions, are of any assistance in this matter. Bastardy proceedings are the creation of statute.....
>
> the statute is silent as to any order to be made by the justices if they are not satisfied that the necessary proof has been given.....
>
> R. v Machen has stood for over 96 years.....
>
> It is true that the radio decidendi has been the subject of a somewhat remarkable divergence of judicial opinion. It would seem that some judges have regarded a dismissal for lack of corroboration as not amounting to a dismissal on the merits.....
>
> However I am content to rely on the language of Lord Denman C.J. as reported..... no language could be clearer or more precise.
>
> On a consideration of the authorities I am of opinion that the justices in this case had jurisdiction to hear the second complaint,..... and on fresh evidence being produced to make the order in question."

(Certiorari was however allowed in this event because the justices had refused to hear the defendant's evidence).

Oliver J. agreed, adding:

> "Technically there is nothing to prevent the re-hearing of applications in bastardy cases. That right however should obviously only be exercised in cases where there is fresh evidence of a serious kind. It is unthinkable that, on the same facts, the same tribunal, though perhaps differently constituted, should be invited to reverse a previous decision of its own."

In affirming the rule in Petty Sessions cases that fresh applications can be made after a previous dismissal, even where that dismissal is on the merits, the judgments here pointed out that in actual practice, though not in strict law, the mother at the second application should present fresh or additional evidence so as to

justify a reversal of the previous decision and a finding in her favour. That observation, made in several of the cases, was first made by Lord Denman C.J. himself in Machen's case, see the last paragraph of the extract quoted earlier from his judgment.

Before passing on to the remaining English cases, it is ironic to note that the Decision in the Sunderland Justices Case arrived in Jamaica just after the Court of Appeal in Jamaica decided our only existing case on this matter in Elliott v Elliott and was therefore not before them when they considered their decision.

R. v Leicester Recorder, ex parte Wood (1947) K.B. 726; (1947) 1 All E.R. 928 saw another exception to the Quarter Sessions rule, already established in R. v Gaunt (supra) (which was not cited) i.e. that where the putative father commits perjury and so secures a decision in his favour at Quarter Sessions, that decision will not be regarded as "on the merits" or establishing a res judicata.

In R. v Ashford (Kent) Justices, ex parte Richley (1956) 1 Q.B. 167; (1955) 3 All E.R. 604 the exception established above was restricted: it does not apply when the witness committing perjury was a witness called by the person attacking the judgment!

In Robinson v Williams (1965) 1 Q,B. 89; (1964) 3 All E.R. 12 the Court of Queen's Bench, the Divisional Court, again explored the limits of the rule with regard to dismissals by Petty Sessions. Granted that the mother in her second application should produce "fresh evidence", did she have to satisfy the Court of Appeal rules with regard to such evidence and show that it had not been available when the first application was heard? The Divisional Court, consisting of Lord Parker C.J. Widgery and Stephenson JJ. held that

she did not. The Court of Appeal Rules requiring that the person seeking to call fresh evidence must show that it was not available at the original hearing are themselves founded on the rules of res judicata, and in as much as these rules do not apply to the dismissal of affiliation applications before the Petty Sessions, these rules as to "fresh evidence" not having been available before do not apply either. In affirming the Petty Sessions rule, Lord Parker having noted that the rule was based on the analogy of a non-suit, observed that -

> "in a case such as this quite different consideration arise. To start with, there is a time limit of 12 months; secondly, one is considering the interest and welfare of an infant.....
>
> So here there are no grounds for importing that general principle applied by appellate courts....."

Widgery J. at page 100 said:-

> "I agree. The cases all now show that the fact that justices have refused to make an order in favour of the mother on an earlier occasion does not create any estoppel in the event of her seeking to obtain an order against the same man on a subsequent occasion. It is quite clear that the facts are not res judicata, and there is no provision in any statute which requires either that fresh or additional evidence should be produced on a second or subsequent application."
>
> However, he referred to the passage quoted from the judgment of Oliver J. in Sunderland Justices, earlier above, and added:-
>
> "If the justices are invited in effect to reverse a previous decision of their own upon the same grounds and the same evidence they would obviously take the direction of Oliver J. But if the evidence is different in the sense that it raised different considerations and justifies a re-assessment, it seems to me proper for the justices to embark upon a second consideration of the matter."

In re F (W) an Infant, (1969) 2 Ch. 269; (1969) 3 All E.R. 595, Pennycuick J. giving the judgment of the Court, and after noting the dicta above, stated that though the justices in these cases had

jurisdiction to entertain the second application, they ought not to continue to hear it as soon as they become aware that no evidence is being led on behalf of the mother other than had been before the justices on the prior occasion.

The decision in Robinson v Williams (ante) with which I respectfully agree, answers the second point that was raised by the defendant-respondent at the hearing below in this case, namely that the complainant had not shown that the fresh evidence offered at the second hearing was evidence that had not been available at the first hearing. In affiliation proceedings where the complainant brings a second application after the first has been dismissed for want of corroboration there is no such limitation: such a limitation would be applicable only in circumstances where the rule of res judicata applied and on an appeal leave was sought to present fresh evidence. In the appeal before us counsel for the defendant-respondent made no attempt to argue this point but was content to rely on the decision in Elliott v Elliott, and I now turn to examine that decision in the light of the decisions noted earlier on the U.K. Statutes, and the close similarity between these statutes and the Jamaican Statutes.

Elliott v Elliott, (1945) 4 J.L.R. 244 appears to be the first and only occasion on which the Jamaican Court of Appeal has had to consider the extent to which, if at all, the doctrine of res judicata applies to affiliation proceedings in Jamaica. No local authorities were cited and the case proceeded on the basis that "Both parties admitted that for a considerable period of time there has been a practice in force in Jamaica permitting a mother whose first complaint has not been successful for want of corroboration to make

another complaint with a view to having the matter heard again."

No clear foundation is laid for the practice, and in this statement no limitations are admitted to exist, save that the next sentence of the report implies or suggests one. It reads:-

> "In England the practice is not limited to cases where there is no corroboration but is at large....."
>
> "....The better opinion for the existence of the practice in England is that a refusal to make an order on a complaint under the Bastardy Law is in the nature of a non-suit in a civil action....."

Having then noted that Law 2 of 1881 in Jamaica was based on the English Act of 1872, referred to above, and having noted that in Jamaica as in England the original statute did not give the mother a right of appeal, the judgment continues thus:-

> "It seems clear to us that from that time at least it was intended that a mother of an illegitimate child in Jamaica should have the same right to come back to the Courts as a mother in England, if her first complaint had been unsuccessful."

With this remark I would respectfully agree, but unfortunately the Judgment then proceeds to add:-

> "That practice has existed in England for several hundred years and there can be no doubt that it was adopted here, though it was more restricted in character as we have pointed out earlier."

It is at this point that I would with great respect join issue with the Judgment of Savary Ag. C.J. In the first place this right of the mother of an illegitimate child to make a second application where the first had been dismissed by the Justices at Petty Sessions was not a mere matter of "practice": it was a right based on interpretation of the relevant statutes that had been established by judicial decisions in England going back to 1736 and the decision in R. v Jenkin,

re-affirmed in Machen's case in 1849, and constantly tested and re-established in the decisions ever since. Secondly, there is no authority cited or suggested for the suggested limitation in so far as the Jamaican mother was concerned. Either we in Jamaica adopted the rule with regard to dismissals by Petty Sessions Courts in England, or we did not, and preferred instead the Rule with regard to dismissals by Quarter Sessions. The former allowed fresh or subsequent applications to be brought, the latter did not. In Elliott's case learned counsel for the defendant-appellant suggested that in Jamaica we should adopt the Quarter Sessions rule exemplified in cases like R. v Glynne, and R. v Howard, ex parte daCosta. The judges in Elliott's case did not accept that suggestion, and in that they were clearly right.

The "existing practice" as admitted by both parties was clearly inconsistent with the Quarter Sessions rule and consistent only with that applicable to Petty Sessions.

Unfortunately however, it appears the judges in Elliott's case, unaware of the full extent of the Petty Sessions rule and of the cases on which it rested (for none were cited to them apart from McGregor v Telford, and R. v Sunderland Justices was decided just after their case) thought that they were dealing with a mere rule of practice and that they were free to modify the rule in accordance with a suggested limitation or restriction in character that was not marked out by any reported decision in England or in Jamaica, and which limitation was not a limitation "admitted by both parties" to have been in force in Jamaica. I can find no justification in authority or principle for the suggested limitation. Though the rule

of res judicata is of general application, there are clear cases in which that rule has no application, and this is one of them. To have an exception to an exception though possible, seems to be introducting a refinement unsupported by either reason or authority.

The relevant passage stating the rule limiting second applications in Elliott v Elliott is as follows;-

> "When no Order is made on a complaint because the evidence of the mother is not corroborated in some material particular as required by section 5(1), it is open to the mother to make complaint again and seek an order, but when corroborative evidence is tendered which, if believed, would justify the Resident Magistrate in making an order, and no order is made, there has been a hearing on the merits and there can be no further complaint in respect of the same child."

The learned Judges then examined the facts in Elliott's case. The magistrate had refused to make an order in the first case for lack of corroboration: on examination the Court found that there was evidence offered as corroboration, which if believed, would have justified an order. In those circumstances, they held in effect, that despite the Magistrate saying that he was dismissing the complaint for lack of corroboration, he must be taken to have rejected the corroboration, and the decision was "on the merits".

Elliott's case purported therefore to lay down a rule (1) that if the Resident Magistrate did not believe the complainant and said so, that decision should be final; (2) if however he stated that he was making no order, because there was no corroboration, the mother would be free to apply again; but (3) if the Resident Magistrate stated that there was no corroboration, and there was in fact evidence capable of being corroboration, then the decision should be final. Decisions (1) and (3) would be taken to have been made "on the merits"

and the res judicata rule should apply.

It should by now be obvious that the limitation in Elliott v Elliott is neither the English rule with regard to Petty Sessions nor the Rule with regard to Quarter Sessions. The Petty Sessions rule allows for repeated applications in any event; the Quarter Sessions rule allows for no subsequent application whatsoever (except in a very limited set of circumstances). The attempt to justify the second application where there is no corroboration in the first application by treating the first application as not having been decided "on the merits" has no secure foundation in principle, and as we have seen has been abandoned in the English cases, such as R. v Glynne (1871) and see the comments thereon above - cases which were not cited to the court in Elliott's case. A decision that there is "no corroboration" is clearly a decision "on the merits," and cannot serve as a justification in principle for allowing the mother to make a second application in such a case. The only justification that can be advanced is to say that this type of case is an exception to the res judicata rule; the rule does not apply to affiliation proceedings, and if this is so, then it does not matter on what score the first proceedings failed. The failure is to be treated as in the nature of a non-suit, and the applicant may, in law, apply again. Elliott v Elliott attempted to create a unique rule, unjustified by either principle or authority. Further, the suggested rule is unworkable in practice.

As we have seen it imposes on the magistrate who hears a case in which the mother applies for an affiliation order after her first attempt has been dismissed for want of corroboration, the painful and difficult duty of going behind the decision of his colleague of

of co-equal status and examining for himself Notes of Evidence that he did not take with a view to seeing whether his colleague was wrong, and if in fact there was evidence capable of being corroborationin law. If he finds that this was the case he is then to decide, contrary to the first magistrate's expressed reason for dismissing the application, (i.e. want of corroboration) that as there was evidence capable of amounting to corroboration his colleggue's decision was a dismissal "on the merits" and the second application therefore fails because the first should have succeeded. Further the second application fails even though the second magistrate states that he believes the complainant, finds that there was corroboration offered before him, and would have given judgment for the complainant but for the fact that he thinks that her earlier application before his colleague should have succeeded. Because that first application should have succeeded but did not, the second Resident Magistrate is obliged to dismiss an application that should have succeeded long ago. This surely is to perpetuate one error with another: ought such a rule to be allowed to continue?

I pause here to observe that it should not be thought that to allow a second affiliation application to be brought where the first has failed is to open wide the floodgates of litigation against putative fathers in Jamaica. The Jamaican putative father would be merely put in the same position as his English counterpart, and the Jamaican mother on the same footing as her English counterpart. Second applications ought not to succeed unless new or additional evidence is offered: to say that the rule of res judicata does not

apply to affiliation proceedings is not to abandon all judicial consistency. The evidence offered on the second occasion ought to be such as to justify the result being sought by the applicant, a different ruling in her favour. The dicta cited above in cases such as Machen's case, R. v Sunderland Justices, show that the fresh evidence must be of a serious kind, even though it does not have to satisfy the technical requirements of an application to the Court of Appeal to call fresh evidence: Robinson v Williams and see also the remarks of Pennycuick J. in re F (W) an Infant.

Elliott v Elliott attempted a solution to a particularly intractable problem: it is clear that both in England and in Jamaica Judges faced with the problem of construing the Bastardy or Affiliation Acts, with the basic requirement that there must be corroboration of the mother's story in some material particular - a requirement quite unique in ordinary civil cases - and noting that the Statute was itself silent as to the consequences of a dismissal, decided that mere failure to produce corroborative evidence to support a story that might well be true should not operate as a final and decisive bar to the mother, especially when the decision was being taken at first instance level or the level of justices sitting in Petty Sessions. Nevertheless the feeling that the mother should be barred at some level, and that there should be at some stage an end to such litigation was equally strong.

The cases that we have studied in the English jurisdiction show that for very nearly two hundred years the judges have searched for some rationale that might achieve both objectives, justice to the mother and eventual finality in the litigation. As we have seen,

within 10 years of each other both the Petty Sessions and the Quarter Sessions rules were evolved and have continued ever since. The Quarter Sessions rule may be said to rest on the foundation that once the appellate Court (and for a long time Quarter Sessions was the only such Court) has decided the matter, no fresh application should be allowed, save in very exceptional circumstances. The Quarter Sessions rule may have its place in Jamaica: once the Court of Appeal has determined a particular application, it may be that no fresh application should be allowed. This point is not however before us now and in this connection it is interesting to note that in Bromley's Family Law, 4th Edition (1971) at pages 483 - 484 dealing with "subsequent applications" in affiliation proceedings, the writer describes the Quarter Sessions rule as making "a distinction (that) is quite illogical and indefensible." But it is clear that so far as we are concerned with first instance decisions the Petty Sessions rule ought to apply. Experience has proved that it is not possible to find a rationale for it along the lines of saying that "want of corroboration is not a decision on the merits" and that the only "justification" so far advanced that has stood the test of time is to treat dismissal at first instance level as equivalent to a non-suit, and to apply the rule "across the board" without regard to the cause of the particular dismissal. Assuming that this Court has a choice, it is my opinion that the variant of the Petty Sessions rule attempted in Elliott v Elliott should be abandoned, and that we should apply the rule as it has evolved and been declared in cases such as Machen's case and R. v Sunderland Justices.

It may be a matter of some interest to note that in New Zealand the legislature itself intervened and adopted the Petty Session rule into the Statute itself: The Destitute Persons Act of 1910, which deals inter alia with affiliation orders, expressly provides in section 67:-

> "67. Dismissal of complainant no bar to further proceedings.
>
> The dismissal of a complaint or application under any Part of this Act, or the refusal of a Magistrate to make an affiliation or maintenance order or any other order under this Act, shall in no case be a bar to the making of a further complaint or application in the same matter and against the same or any other defendant by the same or any other complainant or applicant."

It is also of some interest to note that in Doobay v Shivlochnie (1964) 6 W.I.R. 218 the British Caribbean Court of Appeal affirming the decision of the Full Court of British Guyana, as it then was, observed:-

> "The law is that a woman can bring a second or third application before justices in England or before a magistrate in British Guyana. Naturally if her first application is dismissed after hearing all her witnesses either because there is no corroboration or the witnesses are not believed a second application before a fresh panel of justices or another magistrate ought to be carefully scrutinised and fresh evidence required....."

It would appear from this case that the mother in Guyana enjoys the same right that the mother enjoys in England, and as the mother in Jamaica ought to enjoy.

There remains for discussion the question of whether this Court is bound by and ought to follow the decision in Elliott v Elliott in so far as it lays down that a second application by the mother of an illegitimate child is not allowed in the circumstances of this case. It should be noted at the outset that the learned Resident

Magistrate for Westmoreland correctly held that he was bound by that decision, and no other course was open to him than that which he in fact pursued. In practice Elliott v Elliott has frequently been circumvented by the second Resident Magistrate not challenging the finding that the first Resident Magistrate made that there was no corroboration; this course was not open to the Resident Magistrate for Westmoreland here, with the result that this is the first reported case to our knowledge in which the Court of Appeal has had to face the issue as to whether Elliott v Elliott is binding and should be followed.

Mr. Frankson, the appellant's counsel, argued that this Court has a choice and he invited us to over-rule or refuse to follow Elliott's case. He relied on the decision of this Court in Hanover Agencies v Income Tax Commissioner (1964) 7 W.I.R. 300; 9 J.L.R. 29 as establishing that the new post-independence Court of Appeal is not bound by decisions of the old Jamaican Court of Appeal, though they are of course strong and persuasive authority and should be followed unless clearly shown to be wrong. He suggested that Elliott's case could be distinguished on its facts (which we cannot accept), and also that it was decided per incuriam.

Mr. Phipps, the respondent's counsel, in his reply did not challenge or attack the principles evolved in the English cases, and which have resulted in two separate rules being established - one for Petty Sessions' decisions and one for the decisions of Quarter Sessions. He did however argue that in Jamaica we should adopt the rule relating to Quarter Sessions suggesting that that rule was more appropriate to the structure or hierarchy of the

Jamaican Courts. In support of this submission, which is inconsistent with the first part of the decision in Elliott's case, Mr. Phipps was at that stage of the argument content to accept the Hanover Agencies Case as correctly holding that the decisions of the old Court of Appeal were not binding but persuasive only. In short, he here put forward the argument, rejected in Elliott's case, that Jamaica should adopt the Quarter Sessions rule and refuse to allow the mother of an illegitimate child to bring a second application where the first had failed. This submission is not tenable in our view: it was rejected in Elliott's case and we have no hesitation in rejecting it here. Though long and apparently unshakably established in England, it has not lacked for critics, see for example Bromley's Family Law, 4th Edition (1971) p. 483-484.

Respondent's counsel then advanced an alternative argument that raised two points that have proved on reflection to be both interesting and difficult. He submitted that this Court was not bound to follow the English cases, and that we could and should evolve our own rule on this topic: Elliott's case was correct and should be followed: he relied on Lord Dunedin's dictum in Robins v National Trust Co. Ltd.(1927) A.C. 515 at 519; (1927)2 D.L.R. 97; (1927) All E.R. 73 at 76.

Further, for the purposes of his alternative argument, respondent's counsel challenged the correctness of the Hanover Agencies case, as being itself decided per incuriam in that Young v Bristol Aeroplane Co.(1944) K.B. 719; (1944) 2 All E.R. 293 did not appear to have been cited before that Court, and that decisions of the old Court of Appeal were decisions of a Court of co-ordinate jurisdiction and should be followed; Elliott's case was therefore binding and should be

followed.

(It is perhaps a little inconsistent to argue that we should not follow English cases, on the Bastardy Law, but should follow them on stare decisis).

The respondent's argument raises fundamental issues in two separate but overlapping fields of law: the relationship between English decisions on the common law or on statutes that have been borrowed from England and re-enacted locally, and decisions of Jamaican Courts thereon; and secondly the problem of stare decisis and whether the Jamaican Court of Appeal has or should follow the practice which the English Court of Appeal laid down for itself in Young v Bristol Aeroplane Co. and regard itself as bound by its own prior decisions, and if so to what extent, and what of the pre-independence Court of Appeal.

As to the relationship between the decisions of English Courts and Commonwealth or Colonial Courts this topic has so far as we know been relatively unexplored, - at least in the Caribbean - and we are familiar only with the Australian decisions on the matter. The topic is discussed by Sir Kenneth Roberts Wray at pages 563 et seq of his book "Commonwealth and Colonial Law," (1966). It has also been explored in two local articles, "The reception of (English) Law in the West Indies" by Professor K.W. Patchett, 1972, Jamaica Law Journal p. 17-35 & 55-67, and "Judicial precedent in the West Indies" by Mr. A.D. Burgess, 1978 West Indies Law Journal, p. 27-36. It is not proposed to enter into a full fledged academic discussion on this topic, but some points should I think be made.

1. This Court is bound by the decisions of the Privy Council; it is our final Court of Appeal: See R. v. Clifford Humphrey (1953) 6 J.L.R. 271 at 280 per O'Connor C.J. at 280.

Allen v Byfield (No. 2) (1964) 7 W.I.R. 69, per Phillips C.J. at 71 (as reported in the judgment of Duffus (Pres.) in the Court of Appeal in that case). Baker v the Queen (1975) A.C. 774 at 788; (1975) 13 J.L.R. 170 at 179B per lord Diplock: "Although the Judicial Committee is not itself bound by the ratio decidendi of its own previous decisions, courts in Jamaica are bound as a general rule to follow every part of the ratio decidendi of a decision of this Board in an appeal from Jamaica that bears the authority of the Board itself. To this rule there is an obvious exception, viz. where the rationes decidendi of two decisions of the Board conflict with one another and the later decision does not purport to over-rule the earlier. Here the Jamaican Courts may choose which ratio decidendi they will follow and in doing so they may act on their own opinion as to which is the more convincing....."

2. As to the decisions of other English Courts, (assuming for the moment that the Privy Council is an English Court rather than our own), this Court, strictly speaking is not bound by the decisions of any other English Court, though in practice we have freely borrowed and cited them (as in this judgment) and in our "colonial" past have even on occasion expressed the view that we were "bound" by decisions of English Courts ranging from the House of Lords to Divisional Courts and even decisions of single judges:
See: Hart v Campbell (1904) 2 Steph 1891 at 1892; R v Garvey (1930) Clarkes Repts. 327; Watson v McLeod (1931) Clarkes Repts. 346; Attorney General v Coconut Marketing Board (1944) 4 J.L.R. 189 at 193; R. v Clifford Humphrey (1953) 6 J.L.R. 271 at 280. Dixon v Francis (1955) 7 J.L.R. 1 at p. 12; Thomas v Garcia (1956) 7 J.L.R. 76 Margaret Simmons v R. (1960) 2 W.I.R. 210 at 211.

3. This Court has an occasion refused to follow English decisions:
See Allen v Byfield (no. 2) (1964) 7 W.I.R. 69 where this Court cited with approval the judgment of Phillips C.J. in the Full Court below, following the Privy Council decision in Robinson v State of South Australia (1931) A.C. 704 rather than the House of Lords decision in Duncan v Cammel Laird & Co. (1942) A.C. 624 on the question of crown privilege. See also R. v George Barber (1973) 21 W.I.R. 343 where this Court refused to follow a series of decisions by the English Divisional Courts which "imported" mens rea into certain offences under the Customs Law.

However, in Douglas v Bowen (1974) 22 W.I.R. 333 this Court preferred to follow the House of Lords decisions in Rookes v Barnard (1964) A.C. 1129; (1964) 1 A.E.R. 367 and Cassells v Broome (1972) A.C. 1027; (1972) 1 A.E.R. 801 rather than the Privy Council decision in Australian Consolidated Press v Uren (1969) 1 A.C. 590; but this was only after

reviewing both sets of decisions, and after both the majority and minority judgments had made the point that the Jamaican Court of Appeal was not "bound" by English House of Lords decisions: see Luckhoo, Ag. Pres. at p. 339B (referring back to R. v Barbar), and Graham-Perkins J.A. at p. 345D.

4. There is of course a distinction between English decisions on the common law, and English decisions on the interpretation of English Statutes. There is a stronger presumption that the common law is the same in all countries which have adopted it, and that English decisions on the common law are therefore more persuasive than English decisions on English Statutes, which may have been adopted in part or whole by Commonwealth countries: in the latter case much will depend upon the extent to which the local legislature has borrowed the English statute, the closeness of the similarity, and of course the context of the local law viewed as a whole.

When considering the extent to which English decisions on English statutes are considered to be binding or persuasive on Commonwealth Courts interpreting local statutes based on English models, it is instructive to review the approach of the Privy Council to this problem.

In Trimble v Hill (1879) 5 App. Case 342, at 344 Sir Montague Smith, giving the judgment of the Privy Council on an appeal from Australia, said:

"Their Lordships think that . in colonies where a like enactment has been passed by the Legislature, the Colonial Courts should also govern themselves by it. "(i.e. a judgment of the Court of Appeal, by which all Courts in England are bound, until a contrary determination has been arrived at by the House of Lords), "and the Headnote baldly states:- "Where a colonial legislature has passed an Act in the same terms as an Imperial Statute, and the latter has been authoritatively construed by a Court of Appeal in England, such construction should be adopted by the Courts of the Colony."

This view echoed the earlier dictum by Dr. Lushington in Catterall v Sweetman (1845) 1 Rob. Ec. 304; 163 All E.R. 1047 at 1052:-

"I conceive (though I know of no direct authority for the position) that the acts of colonial legislatures, where the English law prevails, must be governed by the same rules of construction as prevail in England, and that English authorities upon acts in pari materia are authorities for the interpreation of colonial acts."

(These views were accepted in Jamaica at that time: see Hart v Campbell (1904) 2 Steph 1891).

Subsequently, the Privy Council modified these views in Robins v National Trust Co. Ltd. (1927) A.C. 515. Mr. Phipps in our case relied on a part of the dictum of Lord Dunedin at p. 519. Lord Dunedin said:-

> "When an appellate Court in a colony which is regulated by English law differs from an appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of lords. That is the supreme tribunal to settle English Law, and that being settled, the colonial Court, which is bound by English Law, is bound to follow it. Equally, of course, the point of difference may be settled so far as the colonial Court is concerned by a judgment of this Board."

(This modification was accepted in Jamaica: see Watson v McLeod (1931) Clarkes Reports 346 and the dissenting judgment of Clarke J. at p. 347; and see R. v. Clifford Humphreys (1953) 6 J.L.R. 271 at 280).

In Commissioner of Stamp duties (Straits Settlement) v Oei Tjong Swan (1933) A.C. 378 the Courts below, in interpreting the Stamp Duty Law of that country, had entered on an elaborate comparison of their law and that of the U.K. Lord McMillan, at p. 389 observed:-

> "The difficulty in which the learned judges find themselves in accounting for the terms of sections 73(2) and (3) consistently with their decision is entirely occasioned by their approach to the problem of construction which the case presents. Instead of first considering the terms of the Ordinance itself, they have at once entered upon an elaborate comparison of its provisions with those of the (Imperial) Finance Act of 1894, and proceeded to draw inferences from the variations between the Ordinance and the Imperial statute. This is a perilous course to adopt and one which certainly does not commend itself to their Lordships. Decisions of the Imperial Courts on statutes dealing with the same subject matter may often be useful in the interpretation of similar provisions in colonial measures, and a comparison between similar measures of the Imperial and the Colonial Legislatures may on occasion be helpful..... But it is quite a different thing to institute a textual comparison such as here been made and to rely on conjecture as to the intention of the draftsman in selecting some and rejecting other provisions of his presumed model....."

This admonition was followed in Wallace Johnson v R (1940) A.C. 231 where the Privy Council refused to "interpolate" into the Gold Coast Criminal Code's provisions dealing with sedition English cases on the common law on that topic, holding that the express provisions of the Code were quite clear and needed no such "interpretation".

In Chettiar v Mahatmee (1950) A.C. 481 there was an appeal from Ceylon in a case involving the construction of the Ceylon Money Lending Act, the particular section in question was almost identical with a corresponding section in the English Money Lending Act of 1910. The Courts of Ceylon had followed decisions of the English Courts on the construction of the corresponding English section. The Privy Council, pointed out that there was no presumption that the Legislature of Ceylon in adopting this clause was familiar with the interpretation put upon it by the English Courts. There was no presumption that the people of Ceylon knew the law of England, nevertheless following Trimble v Hill (ante) the Privy Council approved and upheld the decision of the Courts of Ceylon in applying and following the decisions of the English Courts on the corresponding section which was practically identical.

In subsequent cases, the Privy Council, with these admonitions and reservations in mind, has nevertheless continued where appropriate to supply and use English decisions on statutes in pari materia in the interpretation of Commonwealth or Colonial Statutes: See for example: Staines v Victor la Rosa (1953) 1 W.L.R. 474 (a case on the Trade Marks law of Malta where a statute whose provisions were identical to those of the British Patents, designs and Trade Marks Act, 1883 was construed in like manner using English cases on the subject).

Cooray v The Queen (1953) A.C. 407 (a case where the Privy Council construed the Criminal Code of Ceylon dealing with breaches of trust by applying reasoning taken from a series of English decisions on the corresponding sections in the Larcency Act). Giving the Judgment of the Privy Council, Lord Porter at page 419, after remarking that the wording of the Ceylon Act was obviously taken direct from the English Larceny Act, continued:-

> "In the case of an English Act the doctrine is well established that the interpreation put upon an earlier statute by the courts should as a rule be followed in a case where similar words are used in a later statute. So in the case of a colonial statute it has been held by this Board that in colonies where an enactment has been passed by the legislature in the same terms as an English statute, the colonial courts should adopt the construction put upon the words by the English Courts - see Trimble v Hill. It is true that in that case the decision referred to was one given by the Court of Appeal and that the courts which it was said should follow it were courts of a colony, but in their lordship's view English courts should themselves conform to the same rule where there has been a long established decision as to a particular section of an Act of Parliament, and even more so where there has been a series of decisions over a period of years. They accordingly are of opinion that in the case of courts of a member of the British Commonwealth of Nations a similar course should be followed."

It is true that the dictum in Robins v National Trust (1927: ante) was not apparently cited in Cooray's case, but a similar approach was shown by the Privy Council in Chogley v Bains (1955) 1 W.L.R. 877 where in construing the Rent Acts in Kenya Lord Radcliffe observed at page 883:-

> "Their Lordships were rightly reminded that there are significant differences in this respect between English procedure and Kenya procedure..... But for all that it would be deliberate blindness not to recognize that section 16(6) of the Ordinance is a reproduction of an English model..... and its purport must be understood in the light of its English origin."

In Nana Atta II v Nana Bonsra II (1958) A.C. 95 the Privy Council extended the principle of estoppel per res judicata or standing by into the field of litigation concerning the right to a paramount stool in West Africa.

The effect of these decisions, along with others shortly to be noticed, appears to be that while there is no necessary assumption that the Commonwealth Legislature knew and meant in borrowing from an English statute that its own statute should be interpreted in the light of English decisions, those decisions may offer valuable assistance in such interpretation, and depending upon the context, the extent of the borrowing, and local conditions, English decisions may be an invaluable guide.

Having considered the views of the Privy Council on the relationship between English decisions on the common law and English Statutes and the guidance that they may give to Commonwealth or Colonial Courts, it is of interest and highly instructive to see how the Commonwealth Courts themselves have reacted, and in this connection to study the reaction of the High Court of Australia.

The position of the Australian High Court may be thus summarized:-

(1) The Australian High Court has always reserved the right to review and if necessary to refuse to follow its own previous decisions (see post).

(2) The High Court, during the period in which appeals from it lay to the Privy Council, accepted that it was bound by Privy Council decisions, but always emphasized that it was not technically bound by the decision of any (other) English Court.

(3) The High Court has on occasion reversed its own previous decisions in order to follow the decisions of English Courts, attaching great importance to the principle in Trimble v Hill i.e. the desirability of uniformity of decisions in countries adopting the common law.

For these propositions see: Australian Agricultural co. v Federated Engine drivers and firemens association of Australia (1913) 17 C.L.R. 261. The Tramways case (1914) 18 C.L.R. 54; Sexton v Horton (1926) 38 C.L.R. 240; Skill Ball Pty Ltd. v Thornburn (1936) 55 C.L.R. 292 following a long series of decisions of the English Divisional Courts on the English Betting Acts in interpreting a corresponding set of provisions in its own statute, though they might have reached a contrary conclusion on the words of the statute itself. Dixon and Evatt JJ. remarking at p. 303 "In this state of authority we do not think we should give effect to our individual views as to the construction which ought to be placed upon the provisions. Like so many other enactments of the British Legislature, they have been transcribed with more or less fidelity in many jurisdictions within the Empire. To reject an interpretation so firmly established in England would involve a departure from the practice hitherto prevailing in our courts....."

In Waghorn v Waghorn (1942) 65 C.L.R. 289 the High Court reviewed and reversed a previous decision on whether supervening adultery would necessarily halt the running of the period of desertion in order to follow the English Court of Appeal decision in Herod v Herod. Dixon J observed at page 297:

> "The common law is administered in many jurisdictions, and unless each of them guards against needless divergences of decision its uniform development is imperilled. Statutes based upon a common policy and expressed in the same or similar forms ought not to be given different operations. In this court some trouble has been taken to preserve consistency of decision, not only with English Courts, but also with those of Canada and New Zewland....."

In Piro v Foster (1943) 68 C.L.R. 313 the High Court reversed a previous decision of its own and followed the House of Lords decision of Caswell v Powell Duffryn Assocd Collieries which held contributory negligence could be a defence to breach of statutory duty to fence dangerous machinery; Latham C.J. at page 320 observed:-

> "This Court is not technically bound by a decision of the House of Lords, but there are in my opinion convincing reasons which lead to the conclusion that this Court and other Courts in Australia should as a general rule follow decisions of the House of Lords....." He then referred to Robins v National Trust and Trimble v Hill.

Indeed the High Court went further and laid it down as a "wise general rule of practice" to follow the House of Lords in cases of a conflicting previous decision of its own. The other judgments were to like effect.

(4) The High Court has however refused to follow English decisions where (i) the decision itself has been the subject of serious criticism in England, or (ii) for reasons of policy seemed inapplicable to Australian conditions.

See Brown v Holloway (1909) 10 C.L.R. 89, Griffiths C.J. at p. 98, and O'Connor J at p. 102-103.

Smith v Australian Woolen Mills (1933) 50 C.L.R. 504

Cowell v Rosehill Racecourse Co. Ltd. (1937) 56 C.L.R. 605 (not following the English Court of Appeal decision in Hurst v Picture Theatres Ltd. (1915) 1 K.B. 1).

In Davison v Vickery's motors Ltd. (1925) 37 C.L.R. 1 Isaacs J at p. 13 - 14 refusing despite Trimble v. Hill, to follow an English Court of Appeal decision, observed:-

> "While fully conscious.....of the importance of securing uniformity of interpretation in the Empire, that purpose must not be pressed too far..... But, short of emanation from a supreme source, every ~~potion~~ POTION should at least be tasted and appraised before being swallowed..."

In Wright v Wright (1948) 77 C.L.R. 191/the High Court refused to follow the English decision of Ginesi v Ginesi (1948) P. 179 as to the standard of proof of adultery in a divorce case (and were followed by Lord Denning in Gower v Gower (1950) 1 All E.R. 804).

In Parker v The Queen (1963) 111 C.L.R. 610 the High Court was dealing with the problem of whether the formation of an intent to kill was inconsistent with the defence of provocation where the provocation had led to the formation of the intent. The majority judgment decided that the two were not inconsistent, manslaughter should have been left to the jury and refused to follow the House of Lords decision in D.P.P. v Smith (1961) A.C. 290. Speaking of that decision Dixon C.J. said at p. 632:-

> "Hitherto I have thought that we ought to follow decisions of the House of Lords at the expense of our own opinion and cases decided here, but having carefully studied Smith's case I think that we can not adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring mayself to accept....."

This view was endorsed by all the other members of the High Court, and when the case went to the Privy Council (1963) 111 C.L.R. 665 (1964) A.C. 1368; (1964) 2 All E.R. 641, the majority judgment of Dixon C.J., was affirmed without mention of either Smith's case or Dixon C.J's comment on it. This case marked the reversal of the policy of unquestioning following House of Lords' judgments laid down in Piro v Foster (1943) ante.

The High Court has subsequently refused to follow some English Court of Appeal decisions on the measure of damages in personal injury cases in Skelton v Collins (1965-6) 115 C.L.R. 94 and the dicta in that case of Kitto J. at p. 104 and Windeyer J. at p. 133, 136 are highly instructive. The latter expressly states that the proposition of Lord Dunedin in Robins v National Trust (1927) ante does not apply to the Commonwealth of Australia, and observes that "how far the reasoning of judgments in a particular case in England accords with common law principles that are Australia's inheritance is a matter that this Court may have sometimes to consider for itself." While Owen J. at p. 138 remarked of Dixon C.J's comment cited above:-

> "This statement is not to be taken to have meant that Judgments of the House of Lords are not to be treated by this and every other court in Australia with all the respect that is rightly due to decisions of the ultimate appellate tribunal in England. But it does mean that if the High Court comes to the firm conclusion that a decision of the House of Lords is wrong it would act in accordance with its own views."

Perhaps the best known examples of the High Court's policy with regard to the following of House of Lords or other English decisions are the twin cases of Uren v John Fairfax & Sons Pty Ltd. (1966) 117 C.L.R. 118; 40 A.L. Jo. R. 124 and Australian Consolidated Press Ltd. v Uren (1966) 117 C.L.R. 185. The latter case went to the

Privy Council and is reported at (1966) 117 C.L.R. 221; (1969) 1 A.C. 590; (1967) 3 All E.R. 525. In these cases the High Court refused to follow the House of Lord's decision in Rookes v Barnard which severely curtailed the award of exemplary damages, observing that the common law of Australia recognized and awarded such damages and had developed differently to that in England. The Privy Council in the judgment of Lord Morris observed that while uniformity in the growth and development of the common law was desirable "in matters which may considerably be of domestic or internal significance the need for uniformity is not compelling." He concluded that the issue that faced the High Court was whether the law as it had been settled in Australia should be changed; and that "Their Lordships are not prepared to say that the High Court was wrong in being unconvinced that the changed approach in Australia was desirable."

(As remarked earlier, our own Jamaican Court of Appeal considered this problem in Douglas v Bowen (1974) 22 W.I.R. 333 and decided by a majority to follow Rookes v Barnard rather than the two Australian cases).

The High Court of Australia continued its policy as shown in Geelong Harbour Trust Commissioners v Gibbs Bright & Co. (1970) 122 C.L.R. 504 where it preferred to follow the earlier House of Lords decision in River Wear Commissioners (1877) 2 App. Case 734 to later House of Lords decisions in Great Western Railway v SS Mostyn (1928) A.C. 57 and the Worthington Harbour Dock Board Case (1951) A.C. 112. The Privy Council in a decision reported at (1974) A.C. 810 affirmed the High Court's decision. The High Court in its decision had preferred to follow the earlier House of Lords decision and a series of its own

cases following it. The Privy Council, at p. 818-9 noting that the High Court had always possessed the power which the House of Lords itself only assumed as recently as 1966, to refuse to follow its own previous decisions if it thinks fit, observed that that power had been used sparingly, and that the decision whether or not to exercise it was one of legal policy into which wider considerations entered than mere questions of substantive law, and that since the High Court sitting in Australia was better qualified than the Privy Council to assess the effect of the earlier decision in practice and the resulting effect of reversing it, the Privy Council would not reverse the High Court decision.

The Geelong Harbour Trust case thus illustrates not only the Australian view or reaction to English decisions on comparable statues, but in its turn the reaction of the Privy Council to a choice made by the Commonwealth Court in a matter involving the effect of legal policy in relation to the peculiar circumstances of Australia (the case involved liability of shipping for accidental damage done to port facilities by a sudden storm driving a ship against harbour facilities). The High Court had chosen to follow its own prior decision, though it had the power to "depart", and the Privy Council declined to say that it was wrong. The case illustrates the overlap already referred to between the complex of relationships between Commonwealth law and decisions and those of England, and the doctrine of stare decisis. This case also illustrates, as does Australian Consolidated Press Ltd. v Uren, that the Privy Council's view has altered over the years whether in relation to subject matter or to the competence and development of the commonwealth Courts, and that the assumptions made in Trimble v Hill

(1879) modified somewhat in Robins v National Trust (1927) no longer have the same force, and that the Privy Council now recognizes that there are areas of legal policy making in which it recognizes that the need or desirability for uniformity in the development of the common law is no longer so compelling and that the Commonwealth Court may find it necessary to decline to follow English decisions in the light of their effect on the local scene.

Applied to our own case this means that in our consideration of the basic problem, the extent to which the rule of estoppel per res judicata applies to applications made for the support of illegitimate children, there is now a wider field of choice than that which existed at the time that Elliott's case was decided in 1945. In my view however, Elliott's case, for the reasons given earlier, was wrong then so far as it decided that the mother in those circumstances could not bring a further application. Nothing that has transpired since has made it correct: it is still capricious in operation and creative of unnecessary hardship in application. I think that we should follow the English line of cases dealing with bastardy applications made to Petty Sessions Courts. This brings us to the last problem raised by counsel for the respondent, does the rule of stare decisis laid down in Young v Bristol Aeroplane Co, by the English Court of Appeal apply here, and if so are we bound by Elliott's case even though we think it wrongly decided?

The English doctrine of stare decisis was first clearly established for the House of Lords in the single judgment delivered by the Earl of Halsbury L.Ch. in London Street Tramways Ltd. v. London County Council (1898) A.C. 375 at 379:-

> "A decision of this House once given upon a point of law is conclusive upon this House afterwards, and that it is impossible to raise that question again as if it were res integra and could be reargued, and so the House be asked to reverse its decision."

and at 381 -

> "A decision of this House upon a question of law is conclusive, and that nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House."

This judgment settled a conflict of views in that august body where for example the lord Chancellor, Lord St. Lennard, had stated in Bright v Hutton (1852) 3 H.L.C. 341 (10 All E.R. 133) -

> "... you are not bound by any rule of law which you may lay down, if upon a subsequent occasion you should find reason to differ from that rule; that is, that this House, like every Court of Justice, possesses an inherent power to correct an error into which it may have fallen...."

while his successor, Lord Campbell, in the same case had said:-

> "....This House cannot decide something as law today and decide differently the same thing as law tomorrow; .....after there has been a solemn judgment of this House, laying down any position as law, I apprehend that it is binding upon the rights and liability of the Queens subjects until it is altered by an Act of (Parliament)...."

The Judicial Committee of the Privy Council unlike the House of Lords, has always asserted and still does, its right to review and if necessary to depart from its own previous decisions. For example in Read v Bishop of Lincoln (1892) A.C. 644 Lord Halsbury L. Ch. at p. 655 remarked:-

> "Whilst fully sensible of the weight to be attached to such (previous) decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest, and to give effect to their own view of the law...."

Over the years the Judicial Committee of the Privy Council has continued to express this view: Transferred Civil Servants (Ireland) Compensation (1929) A.C. 242 at 247, 251, 252; Mercantile Bank of India

India v Central Bank of India (1938) A.C. 287 (where the Privy Council refused to follow its own previous decision in Commonwealth Trust v Akotey (1926) A.C. 72); Attorney General, Ontario v Canada Temperance Federation (1946) 62 T.L.R. 199 at 200; and most recently in Baker v The Queen (1975) A.C. 774, at 788 (an appeal from Jamaica which involved the reconsideration of some of its own previous decisions).

While the House of Lords was conducting its own debate and settling the nature of the doctrine of precedent that their Lordships intended to apply, other English Courts, both before and after, were still asserting the right to review and if necessary to correct their own previous decisions:

See Mills v Jennings (1880) 13 Ch. D. 639 (C.A.) at p. 648 (correcting a decision of their predecessors, the Court of Appeal in Chancery); The Vera Cruz No. 2 (1884) 9 P.D. 96 (C.A.) (Brett M.R. at p. 98: "But there is no statute or common law rule by which one Court is bound to abide by the decision of another of equal rank, it does so simply from what may be called the comity among judges. In the same way there is no common law or statutory rule to oblige a Court to bow to its own decisions, it does so again on the grounds of judicial comity...") Kelly & Co. v Kellond (1888) 20 Q.B.D. 569 (C.A.) at 571 Lord Esher M.R. referring to ex parte Stanford (1886) 17 Q.B.D. 259 as reviewing and correcting previous decisions on the Bills of Sale Acts); Kruse v Johnson (1898) 2 Q.B. 91 (Divisional Court) at p. 102; Wynne Finch v Chaytor (1903) 2 Ch 475.

However it appears that gradually the stricter view of stare decisis ennunciated by the House of Lords gained ground in other courts, partially by default, as judges were content to justify

instant decisions by "distinguishing" them from previous decisions (or developing exceptions to the rule: Velasquez v Inland Revenue Commissioners (1914) 3 K.B. 458 at 461; Glaskie v Watkins (1927) 2 K.B. 181 (C.A.); Ratinsky v Jacobs (1929) 1 K.B. 24; Phillips v Copping (1935) 1 K.B. 15 (C.A.); Lancaster Motor Co. London) Ltd v Bremith (1941) 2 All E.R. 11 C.A.): Re a Solicitor (1944) K.B. 427.

It should be noted however that the rule was never applied in all its strictness to cases in the criminal law, though the device most often employed there was the setting up of a Full Court to review and over-rule the previous decisions: see for example R.v Power (1919) 1 K.B. 572, and subsequently R v Taylor (1950) 2 K.B. 368; R.v Hallam (1957) 41 Cr. A.R. 111; R v McVitie (1960) 44 Cr. A.R. 201; R v McBridge (1961) 45 Cr. A.R. 262; R. v Flynn (1961) 45 Cr A.R. 268; R.v Gould (1968) 2 Q.B. 65; R v Newsome & R v Brown (1970) 2 Q.B. 711.

Finally, in 1944, in Young v Bristol Aeroplane Co. Ltd. (1944) K.B. 718; (1944) 2 All E.R. 293 Lord Greene M.R. delivering the single judgment of a Court of five, ennunciated the present rule by which the Court of Appeal in England applies the doctrine of stare decisis. Lord Greene said (at p. 729):-

> "On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of co-ordinate jurisdiction. The only exceptions to this rule..... are those already mentioned which for convenience we here summarize: (i) The Court is entitled and bound to decide which of two conflicting decisions it will follow. (ii) The Court is bound to refuse to follow a decision of its own which, though not expressly over-ruled, cannot in its opinion stand with a decision of the House of Lords. (iii) The Court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam."

Lord Greene in his judgment explored the question of per incuriam ("where the Court is satisfied that the earlier decision was given in ignorance of the terms of a statute or a rule having

the force of a statute" also "ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covers the case before it" and "Where it has acted in ignorance of a decision of the House of Lords which covers the point - in such a case a subsequent court is bound by the decision of the House of Lords"). He also noted that a full Court (five) had no greater power than a court of three. (This has not however stopped the Court of Criminal Appeal from using a "full Court" to over-rule previous decisions).

With great respect to the doctrine so laid down, it appears to me that it may properly be characterised as a rule of practice: rather than a rule of law. That this is so is borne out by the manner of its abolition by the House of Lords in the "Note" of July 1966, reported at (1966) 3 All E.R. 77 and (1966) 1 W.L.R. 1234. (And see Salmond's Jurisprudence, 3rd. Edition (1970) p. 52). It cannot be said to be part of the common law of Jamaica as originally "received".

This also appears to be the view of the rule in some at least of the other Dominions. It appears that as long ago as 1910, the Supreme Court of Canada in Desormeaux v Ste Therese (1910) 43 Can. S.C.R. 82 decided that it could and did over-rule one of its own previous decisions.

The High Court of Australia has claimed repeatedly and consistently over the last 70 years that it is not bound by its own previous decisions: it reserves the right to review and if necessary to over-rule or not follow them, if they are manifestly wrong: see the judgment of Isaacs J. in Australian Agricultural Co. v Federated Engine Drivers etc. Association (1913) 17 C.L.R. 261 at pages 274 to 279.

Isaacs J. observed that the High Court was bound by the Privy Council, and that it afforded "the appropriate model for our guidance". The Privy Council had never contenanced the doctrine that its own decisions were not reviewable, and the House of Lords had done so in London Street Tramways because of its peculiar position in the constitutional and juristic history of England. "Unless, therefore, this Court is to be regarded as possessing a nearer approach to infallibility than the Privy Council, ... no reason presents itself to my mind for refusing to follow the guidance of that august tribunal whose determinations are final in a higher and more decisive sense than any we are empowered to give." After noting that the Supreme Court of both Canada and the Supreme Court of the United States reserved the right to review and if necessary reverse their previous decisions, Isaacs J observed that his oath of office required a Justice of the High Court to do right to all manner of people according to law. "It is not, in my opinion, better that the Court should be persistently wrong than that it should ultimately be right." He added ".... where a former decision is clearly wrong, and there are no circumstances conterv ailing the primary duty of giving effect to the law as the Court finds it, the real opinion of the Court should be expressed. In my opinion where the prior decision is manifestly wrong, then, irrespective of the consequences, it is the paramount and sworn duty of this Court to declare the law truly." This view of the duty of the Court was supported by other members of the High Court, see Higgins J. at p. 288 Gavan Duffy and Rich JJ. at 290, and Powers J. at 292, (though he thought that a prior decision should only be reversed by a "Full Court").

The High Court has over the years reaffirmed this position:

R v Commonwealth Court of Conciliation & Arbitration ex parte Brisbane Tramways (1914) 18 C.L.R. 54. See Griffiths C.J. at page 58:

> "In my opinion it is impossible to maintain as an abstract proposition that the Court is either legally or technically bound by previous decisions. Indeed, it may in a proper case be its duty to disregard them. But the rule should be applied with great caution, and only when the previous decision is manifestly wrong, as, for instance, if it proceeded upon the mistaken assumption of the continuance of a repealed or expired statute, or is contrary to a decision of another Court which this Court is bound to follow; not, I think, upon a mere suggestion that some or all of the members of the later Court might arrive at a different conclusion if the matter were res integra,"

And see Barton J. at p. 69; Isaacs J. at p. 70, Gavan Duffy and Rich JJ. at p. 83, and Powers J. at p. 86 to 87. Powers J. added the rider that the previous decision must not only be wrong, but that it must be in the public interest to reverse it.

See also Sexton v Horton (1926) 38 C.L.R. 240 (over-ruling a previous decision in order to follow a later English Court of Appeal decision); Waghorn v Waghorn (1942) 65 C.L.R. 289 (over-ruling a previous decision of its own to follow a later English Court of Appeal decision); Cain v Malone (1942) 66 C.L.R. 10 (where it declined to over-rule its previous decision); Perpetual Executors and Trustees Association v Federal Commr. of Taxation (1949) 77 C.L.R. 493; Attorney General for New South Wales v Perpetual Trustee Co. (1952) 85 C.L.R. 237 (Notable for the dictum by Dixon J. that the High Court did not accept Young v Bristol Aeroplane Co. "Certainly the rigid rule accepted in the Court of Appeal in Young v Bristol Aeroplane Co is incompatible with the practice of this Court and is inappropriate").

See also Geelong Harbour Trust Commissioners v Gibbs Bright & Co. (1974) A.C. 810, (affirming the Australian High Court (1970) 122 C.L.R. 504), where the Privy Council, per Lord Diplock at page 828 observed:-

> "The High Court of Australia has always possessed the power, which the House of Lords itself only assumed as recently as 1966, to refuse to follow its own previous decisions if it thinks fit."

It is interesting to see that the Privy Council accepts this policy and practice of the High Court of Australia, while the House of Lords is firmly of the view that the English Court of Appeal should continue to follow the rule laid down in Young v Bristol Aeroplane Co. Since the decision in Young's case, the Master of the Rolls, Lord Denning, has conducted what Lord Diplock in Davis v Johnson (1978) 1 All E.R. 1132 at 1137 describes "as a one man crusade with the object of freeing the Court of Appeal from the shackles which the doctrine of stare decisis imposed on its liberty of decision by the application of the rule laid down in the Bristol Aeroplane case to its previous decisions....." Lord Diplock then continues to discuss and to justify the continued application of the rule to the English Court of Appeal, observing inter alia on the reasonable access available from the English Court of Appeal to the House of Lords, and also commenting on the questions of delay and expense and the possibility that exists in England of reducing them. His observations do however suggest that the rule in Young's case might be abrogated if Lord Denning was ever able to persuade his colleagues in the Court of Appeal to abolish it, as did the House of Lords.

Without pursuing here the many cases in this battle or "one man crusade" so waged (and Lord Denning himself has noted that though failing in the battle the actual decisions, dissenting or otherwise, that he has made have almost always been affirmed on appeal), it does appear clear that the cases show that the rule in Young's case is indeed a rule of practice, and I now turn to ask whether it has ever been adopted in Jamaica, and if so to what extent.

It is not easy to determine whether this Court has ever decided to follow the rule of practice laid down by the English Court of Appeal in the Bristol Aeroplane case in 1944. There are, I think, several factors at work, and I may mention a few of them: our advocates and judges (before the fusion of the legal professions in Jamaica and the setting up of our faculty of law and professional law school in 1973) were trained almost exclusively in English schools of law, at the Inns of Court and elsewhere. Familiar with English cases and English Law Reports, these have been used indifferently with our own in the argument and decision of cases in Jamaica. As was noted earlier in the section of this judgment dealing with the relationship between Jamaican and English law, though our statutes are different - particularly in the land law where we use the Torrens system of land registration and the pre 1925 English common law of real property - by and large most of them were based on English models, and we have tended to rely principally on English cases in interpreting them. Not until independence in 1962 was much conscious thought given as to the extent to which our Courts would follow or not follow English cases on any topic. Since then we have had, as already mentioned, at least three cases in which the problem was

canvassed, Allen v Byfield No. 2, (1964) 7 W.I.R. 69; R v George Barbar (1973) 21 W.I.R. 343 and Douglas v Bowen (1974) 22 W.I.R. 333 and from the dicta in the latter case of Sir Joseph Luckhoo, then Acting President of the Court of Appeal at P. 339B and those of Graham Perkins J.A. at p. 345D we appear to have arrived at a position fairly similar to that in the Australian High Court.

This means that it should not be automatically assumed that this Court necessarily will adopt or has adopted the rule in the Bristol Aeroplane Co. case.

It is perfectly possible to have a system of following previous decisions as a matter of course, without necessarily going further and abrogating for all time the right to review them critically and if necessary to refuse to follow them. Both the Bristol Aeroplane Co. case in 1944 and the London Street Tramsways Case in 1908 are compararively modern, particularly the former, and the latter would not have greatly affected Jamaica as our Court of last resort is the Privy Council which has never adopted either case, but has always reserved the right to review its own previous decisions.

An additional factor to be mentioned is that the bulk of litigation in Jamaica has by and large been so far as the Appellate Courts are concerned criminal cases. Civil cases have been largely negligence actions (primarily questions of fact) and land disputes involving the Registration of Titles Law or the common law. There has therefore been little or no occasion to discuss the problem of stare decisis in depth. Counsel in the instant case were able to refer us to only one such case, Hanover Agencies v Income Tax Commissioner (1964) 7 W.I.R. 300; 9 J.L.R. 29.

There have in fact been a few others which our own subsequent efforts have discovered. They are mentioned below. We know of no others.

In R.v Wee Tom (1943) 4 J.L.R. 127 a criminal case in which there was a prosecution for a breach of the Defence Regulations, selling controlled goods above the price fixed by law, the Court of Appeal in effect over-ruled its own previous decision on the issue of proof of the regulations in R.v Daniel Lee (1940) 3 L.L.R. 237, but this may not be a true case of "over-ruling" as the Court contended that the point had not really arisen in that case.

In R.v Icilda Monolal (1956) 7 J.L.R. 67, again a criminal case in which there was a prosecution for breach of the Dangerous Drugs Law, the Court of Appeal over-ruled a previous decision - R.v Brown, 4 J.L.R. 241 which had required proof of the signature of the Government Chemist on the certificate certifying that the exhibit was ganga, on the ground that in Lloyd Brown's case the attention of the Court had not been drawn to a relevant section in the Evidence Law that made such proof unnecessary. Giving the judgment of the Court, McGregor J. cited Young v Bristol Aeroplane Co. Ltd. and termed the previous decision a decision made per incuriam within the exception delineated by Lord Greene M.R. in that case.

The next case in chronological order is the Hanover Agencies case, but this is deferred for fuller treatment below.

In R.v Howard (1970) 16 W.I.R. 67, again a criminal case in which there was a prosecution under the Dangerous Drugs Law for possession of ganga, the drug had been found on the accused by a search not made in conformity with the Law, and it was argued that the

evidence so obtained had been obtained illegally and unconstitutionally and was not admissible. The authorities, including cases from the United States, were carefully reviewed in the judgment of Fox J.A. who dismissed the argument, noting that in any event both the Court and the Privy Council had dismissed the argument in a previous case King v R (1969) 1 A.C. 304 12 W.I.R. 268. Though Fox J.A. at page 73 of his judgment uses the magic words stare decisis, the case merely shows this Court following the decision of the Privy Council, binding on it, as well as its own. It does not necessarily involve the acceptance of the Bristol Aeroplane Co. case.

In Clarke v Carey (1971) 18 W.I.R. 70 there was for the first time some discussion in this Court as to whether or not the Bristol Aeroplane Co. case had been adopted in Jamaica. The discussion was inconclusive. The mother of two illegitimate children applied to the Court for custody: the children had, during her absence abroad, been taken from the relatives to whom the mother had entrusted them by their natural father, a married man, who took them into the home where he and his wife lived. He countered the mother's application with an application of his own. The children were aged eight and four years respectively. Before their father's intervention they had largely been reared by their maternal grandparents. Before her departure their mother moved them to other relatives or friends with whom she left them. Shortly after this their father took them away to live in his own home. They had been there for some ten months before the application and had made a good adjustment.

Smith J.A. in his judgment saw the case as one in which the Court had to decide whether the mother's right to the custody of her illegitimate children was to prevail over the interests of the children for he accepted that at this period of time their father was able to offer to them a better home than their mother. He accepted Finlayson v Matthews (1971) 17 W.I.R. 69 a previous decision, of a divided Court, that under The Guardianship and Custody of Children Law while a "mother" (including the mother of an illegitimate child) could apply for custody, the putative or natural father could not. There was therefore no possibility of making such an order in his favour. After reviewing the English cases on the mother's right to custody and on The English Guardianship of Infants Act (which corresponded closely to that in Jamaica), he concluded that the welfare of the children over-rode all other interests including the mother's right to custody. He declined therefore to make an order in her favour, or (following Finlayson v Matthews)in favour of the father. The result was therefore to leave the children in the de facto custody of the father, but with the mother being left free to apply again if her circumstances changed and she could offer a better home. Smith J.A. in his judgment did not refer to the Bristol Aeroplane Company case, but he did indicate that in his view the Court was bound by Finlayson v Matthews so far as the father's application was concerned, unless it could be shownto have been decided per incuriam. The Trial Court's award of custody to the mother was therefore set aside. Henriques P. approved the judgment of Smith J.A. (though he had been the dissentient judge in Finlayson v Matthews he now accepted and followed that decision). (It should be added that Smith J.A. was one of the majority judges in Finlayson v Matthews).

The other leading Judgment in Clarke v Carey was delivered by Graham Perkins J.A. It is not an easy judgment to follow. The learned Judge also arrived at the same position as that of Smith J.A. by a rather different route. He agreed that the welfare of the children was paramount, and that the award of custody to the mother could not be justified. But he disagreed strongly with Finlayson v Matthews. It would appear that in his view neither the putative father nor the mother of an illegitimate child could apply under The Guardianship and Custody of Children Act. He would therefore have held that not only ought the mother not to get custody, but that she had no right to even apply for it.

What is of interest so far as the present case is concerned is however his view of stare decisis. The learned judge attacked Finlayson v Matthews as having been delivered per incuriam, and indicated that within the exception in the Bristol Aeroplane Company case it ought not to be followed. He then went further, in two directions: (a) He warmly supported the "one man crusade" waged by Lord Denning against the rule in the Bristol Aeroplane Company case, and rejoicing in the abolition of the rule in London Street Tramways v London County Council (1898) ante by the House of Lords Practice Statement of 1966, he looked forward to the English Court of Appeal achieving a similar freedom of decision in a day not too remote. (The judgment was of course written before the decisions in Miliangos v George Frank (Textiles) Ltd.(1975) Q.B. 487 (C.A.): 1976) A.C. 443, Farrell v Alexander (1976) Q.B. 345 (C.A.) and (1977) A.C. 59 (H.L.) and Davis v Johnson (1978) 1 All E.R. 841 (C.A.) and 1132 (H.L.).

Of more importance (b) Graham Perkins J.A. carefully reviewed the judgment of this Court in the Hanover Agencies case at page 85, where he said:-

> "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 is so bound. It has been suggested that this assumption rests on the decision of this court in Hanover Agencies, Ltd. v Income Tax Commissioners. I confess that the ratio of that conclusion 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 . 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 that the true reason for holding that this court was not bound by the Hendriks' case 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."

I turn now to the Hanover Agencies Case.

Hanover Agencies Ltd. v Income Tax Commissioner (1964) 7 W.I.R. 300; 9 J.L.R. 29 was a case concerned with the Income Tax Law of Jamaica; it involved two points: (a) was a company formed for the purpose of acquiring and renting certain properties "carrying on a business"? - when is renting houses a business? (b) if so were the premises that were rented out "used" by the company for the purpose of its business and so entitling them to set off against the rent depreciation, wear and tear et cetera? A previous decision, Hendricks v (Income Tax) Assessment Committee (1941) 4 J.L.R. 60 had in effect answered both questions in the negative. It was a decision of the then Court of

Appeal, and in the instant case the Revenue authorities relied on it and argued that the decision was binding on this Court. For reasons that are more than adequately set out in their judgments the three judges of the Court were of opinion that the Hendricks case was wrongly decided on point (b) and possibly on point (a) as well, though this was a mixed question of law and fact and in the instant case had been decided in the taxpayer's favour.

The new Jamaica Court of Appeal was therefore faced with a precedent of several years standing decided by one of its predecessors, wrongly in its opinion: did that case bind them? Were they obliged to follow it though in their view it was clearly wrong?

Young v Bristol Aeroplane Company does not appear in the list of cases cited by the Court in the judgments but, it is inconceivable that so well known a case was not cited and relied on in argument, and inquiries made confirm this fact. Our law reports unfortunately neither report the arguments of counsel nor the cases cited but not mentioned in the Judgments.

Dealing with this problem at pages 306/7 Waddington J.A. said:-

> "It is with regret therefore that I find myself in respectful disagreement with the decision, on this aspect of the case, of the learned judges in the Hendriks case, and I would accordingly answer the second question posed above in the affirmative.
> The question arises, however, as to whether this court is bound by the decision in the Hendriks case. I am satisfied that this court is not bound by the decisions of the former Court of Appeal. This court was established by s. 103 of the Constitution of Jamaica as a superior court of record, and although by s. 8 of the Judicature (Appellate Jurisdiction) Law, 1962 (J.), the jurisdiction and powers of the former Court of Appeal were vested in this court, the court is separate and distinct from the former Court of Appeal, which ceased to exist on the coming into operation of the Judicature (Appellate Jurisdiction) Law, 1962 (J.). If it was possible for the two courts to exist together they would

> be courts of co-ordinate jurisdiction and whilst as a matter of judicial comity one court would ordinarily follow the decisions of the other neither would in law be bound by the decisions of the other. This court, however, will always regard the decisions of the former Court of Appeal with the greatest of respect and as being of strong persuasive authority and will follow them unless of opinion that they are clearly wrong and that in refusing to follow them the principle of stare decisis will not be offended. Although the decision in the Hendriks case has stood for over twenty-three years no other case has been cited to this court, nor have I been able to find any, in which this case was followed or affirmed. In my judgment, therefore, there is no uniform current of authority which would be disturbed if this court refused to follow the decision in that case and I am of the opinion that in refusing to follow that decision the principle of stare decisis would not be offended."

It would appear from his remarks, though once again the records do not disclose whether the case was cited, that Waddington J.A. was clearly referring to "The Vera Cruz No. 2, (1884) 9 P.D. 96 and the remarks of Brett M.R. at page 98, which were quoted earlier. His reference to courts of co-ordinate jurisdiction not binding on one another, save by comity comes from no other known source. Certainly I think it may be fairly said that if he accepted those dicta and that case, then he could not possibly accept the doctrine of stare decisis laid down by Lord Greene M.R. in the Bristol Aeroplane Company case: the rule laid down gives to precedent a binding force, not one based on comity, in which courts of the same status may or may not follow each other's decisions as they please.

J.A.

In his judgment Duffus/dealt with the history and constitution of the Old Court of Appeal, the constriction of its powers in the shortlived West Indian Federation, and the setting up of the new and present Court of Appeal. He said at p. 134:-

"This brings me to the matter of stare decisis - Is this court bound to follow the decision of the former Court of Appeal, even though it is satisfied that that decision was clearly wrong? The former Court of Appeal of Jamaica was a part of the Supreme Court of Judicature (see Cap. 178, s. 3 (1) (J), and the judges who constituted the Court of Appeal were any three judges of the Supreme Court sitting together (Cap. 178, s. 4 (1) (J.). The jurisdiction of the former Court of Appeal was considerably reduced when its jurisdiction to hear appeals from the Supreme Court was transferred to the Federal Supreme Court of the Federation of the West Indies which was established by the West Indies (Federation) Order in Council, 1957.

The Federation of the West Indies was dissolved by The West Indies (Dissolution and Interim Commissioner) Order in Council, 1962, and the jurisdiction previously vested in the Federal Supreme Court was vested for a short period of transition in the British Caribbean Court of Appeal.

The Federal Supreme Court and the British Caribbean Court of Appeal were therefore the immediate predecessors of this court.

The present Court of Appeal was constituted by The Constitution of Jamaica made by Her Majesty on July 23, 1962, who, in the same instrument revoked the appointment of the British Caribbean Court of Appeal for Jamaica. By Law 15 of 1962 which came into operation on Aug. 5, 1962, the jurisdiction and powers of the former Court of Appeal immediately prior to the appointed day were vested in this court, and the court was also given all the powers, authority, and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958.

The present Court of Appeal is a completely new Court of Appeal for independent Jamaica and is not part of The Supreme Court or any other court. It derives its jurisdiction and powers initially from the Constitution. Its judges are not the judges of the Supreme Court.

The Court of Appeal does not consider itself bound by a decision of these earlier Courts of Appeal which existed when Jamaica was a colony and had not yet attained the status of an independent nation. It will, however, regard the decisions of those courts with the utmost respect and will only depart therefrom if it is satisfied that such decisions were clearly wrong.

In the instant case all three members of this court are satisfied that the decision in the Hendriks case was wrong and ought not to be followed. Following the language used by the Privy Council in Chisholm v Hall (1959), 7 J.L.R. at p. 178), there has not been in our judgment any such uniform current of authority as would be required to justify us in departing from our views on the true meaning and interpretation of s. 8 (o) of the Income Tax Law, 1954, in deference to the principle of stare decisis which in our judgment has no application here."

Though Duffus P. does not mention the Bristol Aeroplane Company case specifically, he does refer to the Privy Council judgment Chisholm v Hall (1959) 7 J.L.R. 164 at 178; 1 W.I.R. 413 at 423. In that passage Lord Jenkins refers to the principle of stare decisis in very general terms, and to the well known principle that a decision on which people may have acted in property matters for a very long time should not lightly be disturbed, and went on to say that the precedent being over-ruled did not fall into that class. (For an apt example of the principle involved see Governors of Campbell College v Commr. of Valuation, Northern Ireland (1964) 2 All E.R. 705).

It is once again I think clear that the learned President did not accept that the Bristol Aeroplane Company case applied, at least so far as decisions of the Old Court of Appeal were concerned.

Henriques J.A. in his short judgment said this, at p. 316:-

> "The question which now arises is as to whether this court is bound by the decision of the former Court of Appeal in the Hendriks case.(1). After listening to the arguments so ably presented on both sides I am of the view that this court which was set up on Independence by s. 103 of the Jamaica (Constitution) Order in Council, 1962, is not bound by any decision of any former Court of Appeal. It is free to follow it or not at will. I am aware that this is the policy in other Commonwealth courts, and I am reinforced in this view by the provisions of s. 14 (i) of the Jamaica (Constitution) Order in Council which are as follows:
>
> "14. (i) Any proceedings pending immediately before the commencement of this Order on appeal may be continued after the commencement of this Order before the Court of Appeal established by the Constitution"."

It seems unlikely that he could have regarded the case as so ably presented on both sides if the Bristol Aeroplane Company case was not canvassed, He did not accept it.

In the result then I am of the opinion that this Court has not yet, or so far, adopted the strict rule of stare decisis laid down in Young v Bristol Aeroplane Company. Mr. Phipps' ingenious argument that the decision in the Hanover Agencies case is itself per incuriam because it fails to mention Young v Bristol Aeroplane Company and should not be followed rests on the assumption that this Court has adopted that case. I respectfully agree with Graham Perkins J.A. that an analysis of the cases does not reveal any decision of this court to the effect that it is bound by its own previous decisions in the manner indicated by Lord Greene M.R. I think that what is at issue is not the general question of whether this Court will in practice follow its own previous decisions: the Judicial Committee of the Privy Council, the High Court of Australia, the Supreme Court of Canada, and now the House of Lords all follow in general their own previous decisions. What is in issue is whether the Court will follow its previous decision even when it thinks that decision is wrong, on the ground that it is irrevocably bound thereby, and only the decision of a Higher Court or an Act of the Legislature can correct an admittedly wrong decision, (leaving aside for the moment the possibility of putting the decision under the rubric of one of the exceptions in The Bristol Aeroplane case). In my opinion the rule in Young v Bristol Aeroplane Company is a rule of practice that does not form part of the common law received into Jamaica. If it is to be adopted here, then I would respectfully suggest that this should be done only in the manner in which it was itself adopted by the English Court of Appeal, viz. by a "full court" of five judges of appeal. In the meantime I am of opinion that the doctrine of stare decisis as

practised by the Privy Council, (our final Court of Appeal), and now by the House of Lords, and by the High Court of Australia should be and remain our guide. This court should reserve the power to correct its own mistakes and to refuse to follow previous decisions when they are manifestly wrong, and it is in the public interest that they should be corrected. I think that this Court has already said as much in relation to the Old Court of Appeal in the Hanover Agencies case.

A careful reading of the recent judgment of their Lordships in cases such as Miliangos v George Frank (Textiles) Ltd. (1976) A.C. 443, Farrell v Alexander (1977) A.C. 59 and most recently Davis v Johnson (1978) 1 All E.R. 1132 in which several of their Lordships in the House of Lords have strongly expressed their views that the central position of the Court of Appeal in England, and the ready availability of the House of Lords to correct their errors, if any, justify the retention by the Court of Appeal of the rule in The Bristol Aeroplane Company case while commanding my respect, (and I am obviously unqualified to express any considered opinion on the wisdom of English legal policy) do not seem applicable to the position of the Jamaican Court of Appeal, a Court which may one day find itself a Court of last resort, and it would seem to me to be wiser to adopt the same stance and outlook that has been adopted by the Australian High Court and others similarly circumstanced. That the reservation of the right not to follow a previous decision which is manifestly wrong does not open the floodgates of uncertainty is clearly borne out by the approach of the House of Lords itself since 1966 as shown in cases such as Jones (& Hudson) v Secretary

of State (1972) A.C. 944, and Knuller (Publishing etc.) Ltd. v D.P.P. (1973) A.C. 435, while its beneficial effects are demonstrated in cases such a Miliangos v George Frank (Textiles) (Ltd.) (1976) A.C. 443.

I am of opinion therefore that we are not bound by the second part of the decision in Elliott v Elliott and that the appellant mother in this case was entitled to bring her second application for the support of these children. I think that we are entitled to follow our own decision in the Hanover Agencies case, and to hold that the decisions of the Old Court of Appeal while entitled to our greatest respect are not binding upon this Court. I am also of opinion that this Court has not adopted the rule of practice laid down for the English Court of Appeal in Young v Bristol Aeroplane Co. and that we should reserve the right to review our own previous decisions and to correct them where they are clearly wrong. I should add that even if we had adopted the rule in the Bristol Aeroplane case, I should regard the second part of the decision in Elliott's case as per incuriam and within the exception as laid down in cases such as Younghusband v Luftig (1949) 2 K.B. 354 and Nicholas v Penny (1950) 2 K.B. 466. On the basis of the English decisions both before and after, Elliott's case was wrongly decided as to the limitation it placed on second applications by the mother of an illegitimate child. These applications are a clear and well established exception to the rule of Res Judicata, and contain their own in built limitations. The Jamaican mother should be in no

worse a position than her English counterpart. Recent legislation such as the Status of Children Act shows an increasing public concern as to the position of illegitimate children and a desire to see that the responsibilities of parenthood are brought home to those responsible. For these reasons I would allow the appeal.

ZACCA, J.A. : I agree.

MELVILLE J.A.: I agree.