*Thursday, July* 9.

## FIRST DIVISION.

[Lord Anderson, Ordinary.

## STEIN *v.* STEIN AND ANOTHER.

*Husband and Wife—Marriage—Nullity—Pregnancy at Date of Marriage—Fraud—Fraudulent Concealment—Essential Error.*

A woman in the knowledge that she was pregnant to a third party went through a form of marriage with a man from whom she concealed her condition and who married her in ignorance of it.

*Held* that the husband was entitled to have the marriage declared null.

Philip Stein, upholsterer, residing at 2 Buccleuch Terrace, Edinburgh, *pursuer*, brought an action against Jeanette Ritchie Ramsay or Stein, residing at 3 Viewforth Square, Edinburgh, and against Elizabeth Doris Ramsay or Stein, a child of the said Jeanette Ritchie Ramsay or Stein, *defenders*, concluding, *inter alia*, for declarator that a pretended marriage between the pursuer and the first-named defender was null and void, and for declarator that the pursuer was not the father of the second-named defender.

The *facts* are given in the opinion of the Lord Ordinary (ANDERSON), who, having allowed on 13th March a proof before answer and having taken it on 23rd May, on 2nd June 1914 reported the case to the First Division.

*Opinion.*—"In this action the pursuer avers that on 6th September 1913, in Edinburgh, he went through a form of marriage before witnesses with the defender Jeanette Ritchie Ramsay. On the same date the marriage was registered on the warrant of the Sheriff-Substitute of the Lothians. The pursuer states that the said defender was at the date of the marriage over four months pregnant to another man, but this was unknown to the pursuer, and said defender concealed the fact from him. He alleges that if he had known this he would not have married her. The parties lived together till 5th October 1913, when they separated on account of differences. The pursuer at that time was still unaware of defender's pregnancy. On 13th January 1914 the said defender gave birth to a female child, who is still alive, and who is registered under the name of Elizabeth Doris Ramsay or Stein. This child was a full-time child, and must have been procreated in April 1913. The pursuer states that he only began to keep company with said defender in August 1913, and avers that he is not the father of the said child.

"In these circumstances the pursuer on 13th March 1914 raised the present action against the defender, the said Jeanette Ritchie Ramsay, and also against her said child, and he craves declarator (1) that the said pretended marriage was null and void, and (2) that he is not the father of said child.

"The summons was served personally on the first-named defender and edictally on the child. No defences have been lodged.

"I allowed the pursuer a proof before answer, which I took on 23rd May 1914. I hold on the proof that the pursuer has proved the foresaid averments.

"With regard to the second declaratory conclusion I see no reason why the pursuer should not obtain the decree which he seeks. He has proved that the said child is not his, and it seems to me he has an interest to have this fact judicially declared so that he may have an answer ready to any demand which may be made against him for the aliment of that child.

"The first declaratory conclusion raises an important and difficult question. In the legal system of this country there is no decided case either for or against the pursuer's contention, while in the institutional writings there are conflicting statements as to the law. In the systems of other countries there is to be found diversity of practice.

"The legal principle on which the pursuer bases his claim to have the marriage annulled is that of fraud. The pursuer's counsel did not maintain the general proposition that antenuptial unchastity would afford a ground of nullity. He founded on the special circumstance that the woman was pregnant at the date of the marriage ceremony. He maintained that this was not a case of error as to accidental qualities, but amounted to an error regarding what is essential which had been induced by the fraudulent concealment of her condition by the defender. He contended that if it be necessary to establish *error personæ* induced by fraud he has done so. He says that the pursuer was under the belief that he was marrying a woman ready to play her part in fulfilling the primary function of marriage, the begetting of children, and he discovered that she was incapable of discharging her matrimonial duty in this respect. On this point a decision of Lord Low's was quoted with effect—*Wilson*, 1904, 11 S.L.T. 702.

"The pursuer's counsel advanced an argument which is peculiarly applicable to Scotland. Referring to Steuart of Pardovan's Collections as to Church Discipline, pp. 240 *et seq.*, he pointed out that antenuptial unchastity may still be visited, under the regulations of Presbyterianism, with ecclesiastical discipline, and that if the pursuer had been a member of a presbyterian congregation he would have been liable to this discipline.

"It was further pointed out that if a person in the position of the pursuer makes no challenge as to the paternity of a child borne by his wife shortly after marriage he remains under ignominy as having been antenuptially incontinent, and may be liable to the aforesaid ecclesiastical penance. If he raises the question of paternity and does so successfully, it seems little short of monstrous that he is to be under obligation to continue cohabitation with the woman with whom he has had to contest this point. If the marriage is annulled the father of the child may marry the defender and legitimise the child.

"I do not propose to attempt to set forth the arguments against the pursuer's contention. Everything that can be urged against this contention will be found in the elaborate judgment in the English case of *Moss*, to which I shall subsequently make reference.

"With regard to authority, in our own system Stair is against the contention of the pursuer—Inst., i, 4, 6, i, 9, 9. Bankton, on the other hand, is entirely in the pursuer's favour—Inst., i, 5, 35, and 36. Bankton follows the civilians in the views he expresses, and refers to Voet on the Pandects, ii, 24, tit. 2, and Carpzovius' Ecclesiastical Definitions, p. 228. Lord Fraser does not express an opinion one way or other, but refers to the diversity of practice in different legal systems in Husband and Wife, pp. 451 *et seq.*

"An exhaustive examination of the law of different countries on this point will also be found in the English case of *Moss* v. *Moss*, [1897] P. 263, in which the President, Sir Francis Jeune, decided that according to the law of England circumstances similar to those of the present case did not afford ground for annulling the marriage.

"The impression I have formed is adverse to the pursuer, but I considered it my duty to report the case for these reasons, (1) that there has been no decision in Scotland on the point, (2) that the views of Stair and Bankton are in conflict, (3) that the action is undefended, and (4) that the question of the status of the child is involved."

Argued for the pursuer—Where a bride was pregnant to another man at the time of her marriage and concealed her condition from the bridegroom he was entitled to have the marriage declared null in respect that it was contracted under essential error induced by fraudulent concealment—Bankton's Inst. i, 5, 35. There was no conflict between Stair and Bankton on the point, as Stair did not deal with pregnancy at the date of marriage but only with prenuptial unchastity—Stair, i, 4, 6, and i, 9, 9. If the husband were denied this remedy, then, failing his adopting the monstrous procedure of litigating a declarator of bastardy with a woman he was bound to live with as his wife, he would incur the stigma of prenuptial incontinence, involving ecclesiastical discipline, he would be bound to maintain the bastard, and a bastard would be foisted upon him which would be entitled to the rights of a lawful child to the prejudice of his own legitimate children. The laws of all modern civilised countries, with the exception of England, provided a remedy in such circumstances. Counsel also referred to the following authorities—Stair, iv, 40, 24; Bankton, i, 5, 35, and 36; Fraser on Husband and Wife, 2nd ed., vol. i, at p. 450 *et seq;* Carpzovius, Ecclesiastical Definitions, at pp. 288 and 290; Voet, xxiv, 2, 15; Bishop on Marriage, Divorce, and Separation, vol. i, secs. 484 and 528; Deuteronomy, cap. xxii, verses 13-21; *Moss* v. *Moss*, [1897] P. 263; *Reynolds* v. *Reynolds*, 1862, 3 Allen 605; *Harvie* v. *Inglis*, May 20, 1837, 15 S. 964; *Wilson* v. *Horn*, February 20, 1904, 41 S.L.R. 312.

At advising—

LORD SKERRINGTON—This case has been reported to us by the Lord Ordinary in order that we may decide an important question of marriage law, viz., whether a man is entitled to have his marriage declared a nullity because the woman whom he purported to marry concealed from him the fact that she was at the time with child to another man. The marriage which the pursuer seeks to annul was an irregular one, which was followed by a joint application to the Sheriff for a warrant to register it, all as permitted by section 2 of the Act 19 and 20 Vict. cap. 36. The Sheriff granted the warrant, and the marriage was duly registered. Nothing, however, turns upon the form of the alleged marriage, because the pursuer does not aver that he laboured under any mistake as to the identity of the woman, nor does he allege that he and she did not seriously and deliberately accept each other as husband and wife. Accordingly the question would have been the same if the parties had been regularly married *in facie ecclesiæ*.

A proof was led before the Lord Ordinary. He has not pronounced formal findings of fact, but from his opinion it appears that he held the following facts to be proved, viz.—That the parties went through the form of a marriage in Edinburgh on 6th September 1913, that the defender was at that time pregnant to another man of a child which was procreated in April 1913, was born on 13th January 1914, and is still alive, that she concealed her pregnancy from the pursuer, and that if he had known of her condition he would not have married her. The action is undefended. His Lordship has further found facts to be proved which negative any suggestion of condonation on the part of the pursuer. My interpretation of these informal findings is that on or before 6th September 1913 the defender knew, or at least suspected, that she was pregnant, and that she did not in fact believe that the pursuer had any knowledge or suspicion of her condition. In exceptional circumstances a woman might be ignorant of her pregnancy, and might not even suspect its existence, notwithstanding that she was four months gone with child. That might happen in the case of a young and innocent girl who had been the victim of violence. Again, in exceptional circumstances a woman who knew or suspected herself to be pregnant might believe that the man whom she had promised to marry either knew of the pregnancy or suspected it, and had waived all inquiry on the subject. That might happen if a man chose to marry a woman within nine months of her husband's death, or a woman who had recently and notoriously been leading an unchaste life, or a woman whose appearance suggested that she was either pregnant or suffering from some disease. In the present case no facts have been proved which displace the *prima facie* inference to the effect that the defender knew or suspected herself to be pregnant on 6th September 1913, and that she did not believe that the pursuer shared her knowledge or

suspicions. In these circumstances I hold that a duty of disclosure lay on the defender, and that she acted fraudulently towards the pursuer by not informing him that she knew or suspected herself to be pregnant.

According to the law of Scotland marriage is something more than a mere contract. Its terms and conditions are regulated by the law and not by the agreement of parties. Once a marriage has been entered into it produces results which are independent of the volition of the spouses, and which may be described as a legal status. None the less it is true that unless there is a valid contract these legal results do no follow. Given the contract, the status follows as matter of necessity. It is universally admitted that a mistake by one of the spouses as to the identity of the other nullifies the contract and therefore the status. The mistake under which the pursuer laboured came as near to being a mistake as to identity as it possibly could without actually coming within that category. There is an obvious difference between marrying a woman who is single in every sense of the word and a woman who is integrally united to another living human being. The idea of sharing his bed with a woman who was pregnant to another man would be repugnant to most husbands. If, however, such a marriage is binding upon a man who has entered into it in ignorance of his wife's condition, he cannot on discovering her condition treat her as one who has been guilty of a matrimonial offence, or who has forfeited her right to share his bed and board and to receive the care and consideration to which her physical condition entitle her. Further, he must make due provision according to his means for her approaching confinement. Though not bound to maintain the child after its birth, unless *lucratus* by the marriage, or to allow it to reside permanently in his house, he would not be entitled to separate it from its mother unless and until that could be effected without risk of injury to the mother or to the child. Unless his wife was willing to join with him in a conspiracy of silence as regards the existence of the child the unfortunate husband would be subjected to constant humiliation and ignominy. On the other hand, if he made some arrangement which saved his own reputation and his wife's feelings he would incur a serious risk of being held to be the legal father of his wife's child. Though the maxim *pater est quem nuptiæ demonstrant* does not apply to a child who was not born *justo tempore*, a presumption of fact might easily arise to the same effect — *Gardner* v. *Gardner*, (1876) 3 R. 695, 13 S.L.R. 463, *aff.* 4 R. (H.L.) 56. All these consequences are so serious and so destructive of matrimonial happiness that I am not surprised that Lord Bankton in his Institute (title v, sections 34-36, vol. i, p. 115) drew a sharp distinction between a case such as the present one and all other examples of error except error as to identity. He says (section 34) — "Mistake in the person no doubt annuls the marriage, unless it is homologated by the party after he is undeceived, which was the case of the patriarch (Gen. xxix, 15 *et seq*), but a mistake in the fortune or other quality or circumstance not essential to marriage will not give ground for annulling it, because, tho' 'tis probable, if the party had truly known that circumstance, he or she would not have married, yet it was incumbent upon them to have inquired into these matters, as when a man marries a woman with whom he expected a portion and happens to be disappointed." Section 35 — "But the case is different when a man ignorantly marries a woman that is with child to another at the time, for then it would seem lawful for him to insist that the marriage may be declared void as being fraudulently contracted on the part of the woman. This is conform to the Mosaic law, the civil law, and that of other Protestant countries at this day, and there is little doubt of our following these authorities, strongly founded in the common sense of mankind—(L. 2, sec. 5, ff. de act. empt.; Lewen, lib. i, c. 15, sec. 10; Voet. tit. de divort. sec. 15 [Lib. xxiv, tit. ii, sec. 15]; Carp. Defin. Eccles. 193; Deut. xxii, 20 *et seq.*); and the presumption is that if the man had known the condition of the woman he would not have married her, and for the most part it is not in the man's power to discover the matter before marriage, nor has one ordinarily any suspicion of that kind; but if he cohabit with her in conjugal society as man and wife after he knows that circumstance he is understood to pardon that offence; in the same manner, as in the case of adultery, when the innocent party allows the defender the dues of the marriage bed, after knowledge of the guilt, he or she cannot insist for divorce." Section 36 - "But the man's having other women with child to him at the time of his marriage gives no ground to the wife for annulling it upon that head, because a breach of chastity in a man before marriage is not so heinous or scandalous as in a woman, nor is there a presumption that the woman would have refused the man on that ground though she had known it."

It will be observed that Bankton bases his opinion not upon essential error alone but upon fraudulent concealment. As a general rule essential error is not in itself enough, according to Scots law, to nullify a contract. It must further be proved that the error was mutual, *i.e.*, common to both parties, or alternatively, that it was induced by misrepresentations, either innocent or fraudulent, made by the other party to the contract, or that it was induced by fraudulent concealment. The facts in the present case raise no question as to mutual error or as to misrepresentation whether innocent or fraudulent. But they do give rise to the inference that the error was induced by fraudulent concealment, and the Lord Ordinary has found that the pursuer would not have married the defender if he had known of the defender's condition. It seems to me to follow that if this case had related to an ordinary contract in which the cir-

cumstances or the nature of the contract created a duty of disclosure the pursuer would have been entitled to relief. While the tendency of modern decisions in Scotland has been to restrict the class of cases in which essential error alone will nullify a contract, the tendency, on the other hand, has been to enlarge the definition of essential error—*Stewart* v. *Kennedy*, (1890) 17 R. (H.L.) 25, 27 S.L.R. 469; *Menzies* v. *Menzies*, (1893) 20 R. (H.L.) 108, 30 S.L.R. 530. In this latter case Lord Watson said—"Error becomes essential whenever it is shown that but for it one of the parties would have declined to contract." Of course this observation was made with reference to a case where the error was induced by the other party.

Lord Stair lays it down that error "in the substantials makes void the consent unless future consent supervene," and he refers to the case of the patriarch Jacob. He adds—"But errors in qualities or circumstances vitiate not, as if one supposing he had married a maid or a chaste woman had married a whore"—i, 4, 6; see also iv, 40, 24. There is here no conflict with the opinion subsequently expressed by Bankton. In i, 9, 9, dealing with "circumvention," he repeats that a marriage would be void "if one married Sempronia supposing she were Maevia. . . . But if he married Sempronia supposing her to be a virgin, rich, or well-natured, which were the inductives to his consent, though he be mistaken therein, seeing it is not in the substantials the contract is valid. But if the error or mistake which gave the cause to the contract were by the machination, project, or endeavour of any other party than the party errant it would be circumvention." He concludes that "*errore lapsus* and *dolo circumventus* are distinct defects in deeds." In this passage Stair goes far beyond Bankton, because he seems to say that a mistake as to the bride's fortune would nullify the marriage if it was induced by fraud.

Erskine (i, 6, 2) states that "marriage is truly a contract, and so requires the consent of parties, of which *infra*, iii, 1, 16." In the later passage he distinguishes between essential error which excludes consent, *e.g.*, error as to the person of the other contracting party, and fraud. He lays it down quite generally that *ubi dolus dedit causam contractui* a person "is justly said not to have contracted but to be deceived." On the other hand, if he had adverted to the point he would doubtless have added that such a contract is not voidable where the rights of *bona fide* third parties would be prejudiced. For this reason I should doubt whether a marriage like the present one could be annulled after a child had been procreated and born of such marriage, even though the husband had from first to last been ignorant of his wife's pregnancy by another man, and of the subsequent birth of an illegitimate child. Equally, Erskine might have added that a marriage induced by fraud must stand valid if the interests of society would be prejudiced by its rescission. Bell in his Principles (section 1506) insists upon the fundamentally contractual character of marriage, but otherwise does not throw any light upon the present question. We were referred to a decision by Lord Low in the Outer House—*Wilson* v. *Horn*, (1904) 41 S.L.R. 312—where in an undefended action he gave decree of nullity on the ground of "false and fraudulent representations and personation used by the defender towards the pursuer." If the facts justified the finding that there had been personation, the judgment presents no difficulty; but if the facts amounted simply to fraudulent misrepresentations in regard to the husband's social and financial position, the decision goes further than, as at present advised, I am prepared to follow.

Lord Fraser discusses with his usual learning the subject of error in the constitution of marriage—Husband and Wife, vol. i, pp. 448-456—and also that of fraud (*ibid.* 456-463), but I cannot agree with him in thinking that there is any conflict between Stair and Bankton. He cites a number of authorities, both American and foreign, and also the Codes of France, Prussia, Austria, and Italy. Unfortunately he does not express any decided opinion of his own upon the question raised in the present case. Though I attach no importance to foreign legislation as regards the present question, I shall supplement the information given by Lord Fraser by quoting two sections from the German Civil Code as translated and annotated by Chung Hui Wang, D.C.L. (1907). Section 1333—"A marriage may be avoided by a spouse who at the conclusion of the marriage was under a mistake as to the identity of the other spouse, or as to such personal characteristics (*m*) of the other spouse as would have deterred him from concluding the marriage with knowledge of the state of affairs and with intelligent appreciation of the nature of marriage." Note (*m*)—"Other characteristics may be taken into consideration only in the case provided for by 1334." Section 1334—"A marriage may be avoided by a spouse who has been induced to conclude the marriage by fraud concerning such circumstances as would have deterred him from concluding the marriage with knowledge of the state of affairs and with intelligent appreciation of the nature of marriage. If the other spouse was not guilty of the fraud, the marriage is voidable only if the latter knew of the fraud at the conclusion of the marriage. A marriage may not be avoided on the ground of fraud concerning pecuniary circumstances (*n*)." Note (*n*)—"The majority opinion of the Reichstags Kommission was that a marriage should not be degraded into a mere 'business affair' (Handelsgeschäft), and so this paragraph has been added, while the words 'or such personal circumstances,' after the words 'personal characteristics,' have been struck out from 1333."

In the absence of legislation, judicial decision, and institutional authority to the contrary in Scotland, the question as it presents itself to my mind is whether there exists any reason arising either from the peculiar character of the marriage tie or from considerations of social policy which makes it imperative to deny to the pursuer the relief to which the ordinary principles of con-

tract law would otherwise entitle him. It is merely begging the question to say that in the case of marriage nothing short of a mistake as to identity can be regarded as essential. The real question is whether a fraud of a peculiarly shocking character must necessarily be successful. The only reasonable way of regarding the matter is in my opinion to assume that the ordinary principles of contract law are applicable unless some valid reason can be adduced in any particular case for deciding otherwise. I have already pointed out that the error in the present case is something quite unique, and also different both in its nature and in its consequences from any other error which one can figure short of mistake as to identity. Accordingly I am not in the least embarrassed by the question whether a marriage should be annulled if it could be proved that one of the parties had been induced to contract it by fraudulent misrepresentations made by the other party in regard to his or her pecuniary circumstances. The good sense of mankind, as illustrated by section 1334 of the German Code, has answered this question in the negative. Logically there is no reason why a marriage should not be annulled on this ground, but the case is obviously one where the rights of the private individual must yield to the public interest, and logic must give way to common sense. Again it may be asked whether a marriage should be annulled because one of the spouses had fraudulently concealed (*a*) his or her antenuptial unchastity, or (*b*) the birth and existence of a child whether legitimate or illegitimate, or (*c*) a temporary physical incapacity for fruitful intercourse. The fraud in the present case partakes of the nature of all these frauds with many aggravations. Accordingly it does not follow that if relief is given in the present case, relief must also be given in any or all of the three cases which I have figured. After carefully considering the only question which we are called upon to decide, I have failed to discover any satisfactory ground for denying to the pursuer the relief which he demands.

The conclusion at which I have arrived conflicts with the judgment of Sir F. H. Jeune, President of the Probate, Divorce, and Admiralty Division, in *Moss* v. *Moss*, [1897] P. p. 263. He quotes and adopts a dictum of Lord Brougham, concurred in by Baron Parke and Shadwell, V.C., in a case before the Privy Council in 1835, to the effect that according to the law of England a marriage cannot be held void merely on proof that it had been contracted in consequence of false representations, and that no decree of deception would avail unless the party had been deceived as to the person with whom he contracted. In his Principles of Contract, 6th ed., p. 540, note (p), Sir Frederick Pollock referred to this dictum as "one of Lord Brougham's doubtful or more than doubtful generalities." The learned President also founds upon certain dicta of Lord Stowell in cases before the English Ecclesiastical Courts, and upon a passage from Ayliffe, an 18th century writer upon Anglican canon law. The rest of his opinion consists of a criticism upon the foreign and American authorities which were quoted in support of the suit for nullity. If the President was right, as I assume him to have been, in holding that "the English law of the validity of marriage is clearly defined" any citations of foreign codes and decisions of American Courts were beside the mark. For my own part I attach no importance to such citations except for the purpose of showing that the view contended for by the pursuer is not in conflict with the idea of marriage as understood in other civilised countries. Nor do I attach much importance to the law of England in view of the differences between the two systems as regards marriage. I confess, however, that I have had some difficulty in reaching a conclusion which conflicts with the opinions of eminent commentators on the Roman canon law—a system which, in my judgment, is the foundation of the Scottish law of marriage. I refer primarily to the Roman canon law as it stood before the marriage legislation of the present Pope in the year 1908, and as it was administered by the Pontifical Courts in cases which came before them from countries such as England, Scotland, Norway, Sweden, Denmark, Belgium, Holland, Germany, Canada, and most of the United States of America, in which the decrees of the Council of Trent concerning clandestine marriages had never been promulgated or had fallen into desuetude. I cannot accept the theory contended for by Lord Fraser to the effect that the similarity between the Scottish municipal law in regard to the constitution of marriage as it still exists and the Roman canon law in regard to the same subject as it existed until the recent legislation was due to a blunder on the part of an English Judge. Appeals to Rome from the Scottish Ecclesiastical Courts were abolished in the year 1560, and yet the two systems were remarkably similar as regards the constitution of marriage until the year 1908. Although marriage between Christians is a sacrament according to the canon law, it is a sacrament which depends for its validity upon the validity of the contract. The contracting parties are the ministers of this sacrament, and the officiating priest is present merely as a witness and for the purpose of giving the nuptial blessing. While the canon law in regard to the constitution of marriage was altered in regard to certain countries by the Council of Trent, and as regards most countries by the present Pontiff, these changes do not, so far as I know, affect the present question, which has reference not to the form but to the essentials of matrimonial consent.

The tribunal known as the "Sacra Rota Romana" was re-established in the year 1908, and disposes of a great number of matrimonial cases by way either of opinion or decision. I should have attached importance to an opinion or a decision of a Court composed of lawyers specially conversant with this branch of canon law, but I have been unable to discover any opinion or decision bearing upon the present question either by the Rota or by any earlier tribunal. Un-

doubtedly, however, the opinions of Sanchez and other canonists are unfavourable to the pursuer. They regard any error which does not in substance affect the identity of the spouse as non-essential and as affording no ground for nullifying a marriage even when induced by fraud. On the other hand, they admit that by agreement the possession of some particular personal quality may lawfully be made a condition of the contract. Possibly at this point there is such a fundamental divergence between the two systems as makes it impossible to argue from the one to the other.

If I am well founded in thinking that as a matter of abstract right no distinction can be drawn in this matter between marriage and any other contract, and that any differences which we are forced to admit must be attributed to expediency, the result at which I have arrived in the present case seems to me unobjectionable from the point of view of good sense and public policy. I accordingly propose to your Lordships that the case should be remitted to the Lord Ordinary with instructions to pronounce decree of declarator as concluded for. The decree will be a decree in absence, and will pass both against the mother, whom I have hitherto called the "defender," and also against her child. The Lord Ordinary appointed a curator *ad litem* to the latter, but the curator, acting apparently on the authority of the case of *Mackenzie's Trustees* v. *Mackenzie*, 1908 S.C. 995, declined to lodge defences. I do not doubt that he exercised a wise discretion by following this course, because if he had lodged defences on behalf of the child any decree which the Court may pronounce in the present action might have been regarded as a decree *in foro*.

LORD ANDERSON—I entirely agree, and desire to add only a word or two in explanation of the view I expressed in the opinion I submitted to your Lordships in reporting the case. I there said that the impression I had formed was adverse to the pursuer. The difficulty I had was in basing a judgment for the pursuer on a legal ground which would not open a wide door of attack upon the institution of marriage. It seemed to me that what the pursuer really complained of was the antenuptial unchastity of his wife, and I am unable to hold that recognition can be given to this as a legal principle upon which a marriage may be annulled. Your Lordships are, however, deciding the case on a narrower ground, and are determining nothing beyond this, that it is a ground of nullity of marriage if it be proved that at the time a woman purports to contract marriage with A she is in a condition of pregnancy caused by B, and fraudulently conceals that circumstance from A. It may be urged that this is a purely arbitrary rule, in the operation of which anomalies may be figured. This may be true, but it is a rule which other nations have seen fit to adopt in order to avoid the perpetuation of injustice. In declaring authoritatively now that this rule is part of the law of Scotland we are providing a basis of decision for cases like the present which obviously call for remedy.

I accordingly readily concur in the judgment proposed by your Lordships, and in the reasons therefor which Lord Skerrington has stated.

LORD JOHNSTON—I have had the advantage of perusing Lord Skerrington's opinion, and I desire to adopt it.

LORD PRESIDENT—I also concur in the judgment of Lord Skerrington, and we shall issue an interlocutor in the form which his Lordship proposed.

The Court remitted to the Lord Ordinary to pronounce decree of declarator as concluded for.

Counsel for the Pursuer—Ingram—Smith Clark. Agent—Isaac Fürst, S.S.C.

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*Wednesday, July* 15.

## EXTRA DIVISION.

## M'LEOD'S TRUSTEES *v.* M'LEOD AND OTHERS.

*Succession — Legitim — Compensation — Claim for Legitim where Three-fifths of Estate Liferented by Widow and Fee only Divisible on her Death.*

A directed his trustees to hold his estate after his death (*a*) as to three-fifths for the benefit of his wife in liferent, and (*b*) as to two-fifths for his children in liferent, and on the death of his wife to divide the capital among the surviving children and the issue of predeceased children *per stirpes*. The children claimed half of the estate as legitim. *Held* (1) that the provision in favour of the widow had not the effect of postponing the payment of legitim out of three-fifths of the estate, and (2) that the trustees were not entitled annually to encroach on the capital of the trust remaining after payment of legitim so as to provide to the widow in each year a sum equivalent to the income from three-fifths of the whole estate, but any question of compensation must be postponed till the widow's death.

A Special Case was presented by (1) Malcolm Ferguson, farmer, Iona, and others, the testamentary trustees of the late John M'Leod, stableman, Partick, *first parties*, (2) Mrs Elizabeth Scott or M'Leod, the widow of the said John M'Leod, *second party*, and (3) Mary M'Leod or Love and others, the whole surviving children of the said John M'Leod, *third parties*. John M'Leod died on 22nd July 1912, leaving (1) a trust-disposition and assignation, dated 18th January 1893, duly delivered to the trustees thereunder and registered in the Books of Council and Session on 20th October 1908, and (2) a deed of appointment, dated 18th March, and registered in the said books on 30th July both in the year 1912.

By the said *trust-disposition and assigna-*