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.

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-*

tion the truster disponed his whole estate to trustees, and directed them to pay the income of it to himself during his life, and on his death to hold the trust funds for such persons as he should appoint.

The *deed of appointment* was in these terms—"... I hereby appoint and direct that after my decease the trustees acting under the said trust-disposition and assignation shall hold the trust funds conveyed thereby, so far as undisposed of, so that the whole free annual income and produce thereof may be held, applied, and disposed of (*a*) as to three-fifths for the benefit of my wife in liferent for her liferent alimentary use only, paying the same to her half-yearly, quarterly, or at such other times and in such proportions and instalments as the trustees acting under the said trust-disposition and assignation may consider suitable or may find most convenient; and (*b*) as to two-fifths thereof for behoof of my whole children of my present and former marriage, and the survivors and survivor of them equally among them if more than one, and that for their liferent alimentary use only during the lifetime of my wife, the same to be payable to my said children half-yearly, quarterly, and by such shares and instalments as the trustees acting under the said trust-disposition and assignation may find most suitable or convenient; and in the case of any of my children being in pupillarity or minority at or after my death, it shall be within the power and right of the said trustees in paying their shares of revenue to expend the same for their behoof as the said trustees may think most desirable; and subject to the above-written provisions I direct the said trustees, on the death of my wife, to hold the capital of the trust funds under their charge for the benefit of my whole lawful children then surviving jointly with the whole lawful issue of such of them as may have died leaving issue, the division being always *per stirpes* or the issue taking equally among them if more than one the share which their parent would have taken on survivance. And I provide that the provision in favour of my said wife and children respectively shall be in full satisfaction to them of all terce, *jus relictæ*, and legitim, and generally of all claims legally competent to them on my decease, and I declare that these presents shall supersede, so far as inconsistent therewith, the said trust-disposition and assignation, which, however, in all other respects shall receive full force and effect: And I consent to registration hereof for preservation."

At the truster's death the capital of the trust estate consisted of £1000 redeemable debenture stock of James Nimmo & Company, Limited.

In answer to the first three questions submitted, with which this report is not concerned, the Court found (1) that the trust-disposition and assignation was revocable, and that the provisions of the deed of appointment were of a testamentary nature, and (2) that the trust estate was heritable in a question between husband and wife, and that the children were entitled to claim one-half as legitim.

The fourth *question of law* was—"4. . . . (*a*) Is the second party entitled to a liferent of three-fifths of the undivided trust estate, to the effect of postponing any payment of legitim out of the said three-fifths until her death? or (*b*) Are the first parties bound or entitled, during the lifetime of the second party, to encroach annually on the capital of the said estate destined under the said deeds of the truster to the children electing to take legitim to the extent necessary in each year to provide to the second party a sum equivalent in amount to three-fifths of the whole free annual income and produce of the total trust estate? or (*c*) Will the representatives of the second party at her death be entitled to payment out of the said capital of a sum equal to the total amount by which her income from the trust estate has, in consequence of legitim being claimed, fallen short of what she would have received if three-fifths of the whole free annual income and produce of the trust estate had been paid to her?"

Argued for the second party—The widow having received a reasonable provision by a deed *ex facie inter vivos*, that provision was entitled to stand and legitim was excluded from it—Fraser, Husband and Wife, 1009, 1011; *Lawrie* v. *Edmond's Trustees*, 1816, Hume 291; *Balmain* v. *Graham*, 1721, M. 8199; *Johnston* v. *Johnston*, 1697, M. 8198; Ersk. iii, ix, 16. In any event, the trustees were bound to make up the widow's income annually out of the capital of the lapsed shares of children taking legitim to an amount equivalent to three-fifths of the income of the undivided trust estate—*Scott* v. *Graham*, 1913 S.C. 467, 50 S.L.R. 299.

Argued for the third parties—These deeds were testamentary in character, and could not affect a claim for legitim—*Henderson* v. *Henderson*, 1728, M. 8199; More's Notes to Stair, cccliii; Fraser, H. & W., 1005. In regard to equitable compensation, the principle underlying that doctrine was that where a person claimed legitim he must restore to the estate an amount equal to what he had taken out. Here the capital of the estate did not vest till the death of the widow, and the contingent shares of beneficiaries who might never take at all could not be used to compensate the estate. Consequently, until it was ascertained who the ultimate beneficiaries would be, there were no persons liable to compensate the widow and no estate from which she could be compensated.

LORD DUNDAS—The truster died on 22nd July 1912. He had during his lifetime executed two instruments. The first was a trust-disposition and assignation dated in 1893, duly delivered to the trustees under it, and registered in the Books of Council and Session in 1908. The second was a so-called deed of appointment dated in 1912, and registered in the Books of Council and Session after the testator's death in that year. The truster was survived by his widow, who is the second party to this case, and by four children of the first marriage and two of the second. The third parties to the case are those children, the husbands of such of

them as are married consenting and concurring; and there is a curator *ad litem* appointed by the Court to one at least of those children.

The first matter we have to consider is, whether the import and effect of the two deeds I have mentioned were irrevocably to divest the truster of his whole estate, *inter vivos*, or whether the deeds were truly testamentary in character. I entertain no doubt that the latter is the true view. [*His Lordship then proceeded to deal with the first three questions in the case, which are not here reported.*]

The fourth question presents to us three alternatives for solution. The first branch (*a*) asks—Is the second party entitled to a liferent of three-fifths of the undivided trust estate to the effect of postponing any payment of legitim out of the said three-fifths until her death? I am for answering that question in the negative. Mr Jameson referred us to some authority to show that a reasonable provision to a widow may exclude legitim *pro tanto* if in the form of a disposition *inter vivos*. But that cannot be properly affirmed of the instrument here, and I think it sufficient to say that I am not aware of any case, and none has been cited, where the Court have affirmed the doctrine relied upon in relation to a deed which was regarded by the Court as of a purely testamentary character.

Then we come to branch (*b*), and I think it must be also answered in the negative, because I do not see how the trustees can properly encroach, as the question would have us authorise them to do, upon the capital for the benefit of the widow, seeing that until her death no one can tell who that capital belongs to, or who will form the *stirpes* who will then be entitled to it. It follows, therefore, that the third branch (*c*) ought to be answered in the affirmative, namely, that the question must be postponed until the death of the widow.

LORD MACKENZIE and LORD CULLEN concurred.

The Court answered branches (*a*) and (*b*) in the negative, and branch (*c*) in the affirmative.

Counsel for the First Parties—Candlish Henderson. Agents—Scott & Glover, W.S.

Counsel for the Second Party—Jameson. Agents—Hore & Allardyce, W.S.

Counsel for the Third Parties—Mackenzie Stuart. Agent—T. M. Pole, Solicitor.

Friday, July 17.

SECOND DIVISION.

WESTERGAARD *v.* WESTERGAARD.

Jurisdiction—Husband and Wife—Parent and Child—Foreign—Divorce—Petition for Access.

Under a decree of divorce obtained in Denmark, following on a mutual separation of the spouses for three years in virtue of a deed of separation, the husband obtained the custody of the pupil son, and the wife the pupil daughter, of the marriage. Both parties having come temporarily to Scotland, the wife presented a petition for access to her son. *Held* that the Court had no jurisdiction to entertain the petition.

Opinions that where such an application was presented in the interests of the child, the Court would have jurisdiction to intervene if adequate cause were shown.

Mrs Elisabeth Margrethe Friis or Westergaard, residing at 3 Albyn Terrace, Aberdeen, *petitioner*, presented a petition for access to Reginald Westergaard, a pupil child of the marriage between her and Reginald L. A. E. Westergaard, residing at Liberton, Mid-Lothian, *respondent*, for whom answers were lodged.

The following narrative of the *facts* of the case is taken from the opinion of Lord Salvesen:—"The parties to this case are Danes, and although the respondent has been for many years resident in this country, it is not disputed that he retains his domicile of origin. They were married in 1900, and two children, a girl and a boy, were born of the marriage. On 13th September 1909 the parties entered into a deed of separation, which was obviously intended to be the preliminary to a divorce of consent. Under the deed the parties agreed that the petitioner should have the custody of the daughter, and the respondent that of the son; and the respondent agreed to pay her a yearly aliment for herself and daughter. After the lapse of three years without the parties having become reconciled, it is according to Danish law that either may obtain a dissolution of the marriage. Such an application was duly made, and, notwithstanding a protest at the instance of the petitioner, in which, *inter alia*, she urged that as a condition of her husband obtaining divorce she should have access to the boy in his custody, a royal warrant or authority was issued on 4th October 1912 dissolving the marriage. Under this document, which has the effect of a decree of a competent court, the custody of the female child was awarded to the petitioner, and that of the male child to the respondent, in terms of their prior agreement to that effect. It is matter of admission that the rights of parties in the matter of custody and access to the said children are thereby regulated so far as the law of their domicile is concerned, and that neither can obtain access to the child in the other's custody without consent of the parent to whom the