COURT OF SESSION.

Tuesday, March 2.

SECOND DIVISION.

[Lord Anderson, Ordinary.

ALEXANDER *v.* ALEXANDER.

Husband and Wife—Marriage—Nullity—Fraud—Pregnancy at Date of Marriage Due to Another Man—Adoption of Marriage—Presumption of Marital Intercourse.

A husband brought an action against his wife for declarator of nullity of marriage on the ground that at the time of the marriage the defender had attributed her pregnancy to her intercourse with him, whereas as he had discovered it was due to intercourse with another man. It was proved that after the child was born the pursuer in full knowledge of all the facts had registered the child as his own, giving it his mother's names, and had slept for some weeks with the defender. The Court dismissed the action, *holding* that even if the marriage were voidable the pursuer had adopted it.

Stein v. *Stein*, 1914 S.C. 903, 51 S.L.R. 774, *distinguished.*

Opinions that the occupying of the same bed by a husband and wife is sufficient proof, without direct evidence, of marital intercourse to establish condonation.

Robert Alexander, clerk, Glasgow, *pursuer*, brought an action against Mrs Ruth Crawford or Alexander and against Isabella Beveridge Alexander, a child of the said Mrs Ruth Crawford or Alexander, *defenders*, for declarator "that the first named defender was at the time of the pretended marriage between her and the pursuer pregnant of a child of which the pursuer is not the father, and that this fact was unknown to the pursuer at the time of the marriage and was concealed from him . . . that the said pretended marriage betwixt the pursuer and the defender was from the beginning, is now, and in all time coming shall be, null and void and of no avail, force, and effect; and that the pursuer is free to marry any free person; and . . . that the pursuer is not the father of the second defender, being the female child born to the first defender on 21st November 1917, and registered under the name of Isabella Beveridge Alexander."

The pursuer *pleaded*—"1. The marriage between the pursuer and the defender Ruth Crawford or Alexander being null and void, decree of declarator of nullity should be granted as concluded for. 2. The defender Isabella Beveridge Alexander not being the child of the pursuer, declarator should be granted to that effect."

The defenders pleaded—"1. The averments of the pursuer being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. 2. The averments of the pursuer so far as material being unfounded in fact, this defender is entitled to be assoilzied from the conclusions of the summons. 3. In any event the pursuer is barred *personali exceptione* from insisting in the present action."

The *facts* are given *infra* in the Lord Ordinary's opinion.

On 15th January 1919, after proof led, the Lord Ordinary (ANDERSON) found and declared in terms of the declaratory conclusions of the summons.

Opinion.—"This is an action of declarator of nullity of marriage at the instance of Robert Alexander, 30 Willowbank Street, Glasgow. The defenders are Ruth Crawford, whom he purported to marry on 2nd November 1917, and a child born of the said Ruth Crawford on 21st November of that year. The legal basis of the action is that which was formulated in the case *Stein*, 1914 S.C. 903, namely, this, that the pursuer had been deceived into entering into the contract of marriage with the defender, a material fact having been fraudulently concealed from him by her, to wit, that at the date of the marriage she was pregnant as the result of intercourse with a man other than the pursuer. The case of *Stein* decided that if those facts be substantiated the pursuer is entitled to have the alleged marriage declared null and void.

"The history of those young people prior to the present litigation is this—I call them young people, because even now the pursuer is 23 and the defender 22—that the parties six years ago or thereby, being then aged 17 and 16 respectively, became acquainted. They were both resident in the city of Glasgow, the pursuer living with his parents and being then an apprentice plumber, and the defender living with a Mr and Mrs Crawford, who had adopted her as their daughter, her own parentage being somewhat obscure.

"The boy and girl became intimate to the extent that carnal intercourse took place frequently between them from the time shortly after they got to know each other until the month of May 1916. They then had a quarrel and ceased to be intimate until the end of that year. On 8th November 1916 the pursuer had a very serious accident. He had his left arm torn from his body, his right arm broken in three places, and he sustained serious injuries to his head, the result of which was that his mental powers were seriously impaired then, and in my opinion have not entirely been recovered even now.

"When he was in the infirmary recovering from these terrible injuries the defender Ruth Crawford visited him, being desirous to renew her friendship with him, and she continued practically daily to go and see him in the infirmary until he left the infirmary about 26th February 1917. Thereafter she saw him on a few occasions at his parents' house, but again, about the beginning of the year 1917, a coolness sprang up between the two and admittedly continued for some months.

"The parties are at issue—and this is an important fact in the case—as to when inti-

macy was resumed between them, but for a time, at all events, in the spring of 1917 the two saw nothing of one another. The pursuer admits that he resumed his intercourse with Ruth Crawford in the summer of 1917, and both in Glasgow and at Rothesay and again later in Glasgow he had frequent connection with her.

"Ruth Crawford became pregnant in the spring of 1917, and she communicated this fact to the pursuer towards the end of June of that year, and the pursuer, believing from her statements that he was the cause of her pregnancy, agreed to marry her and did marry her on 2nd November 1917. A female child was born, as I have said, on the 21st of that month, nineteen days after the marriage. The pursuer on the birth of the child came to the conclusion that he could not be the father of it, and he has accordingly sought this remedy in order to have the marriage declared null.

"Now there is no doubt that in a case of this sort the burden of proof upon the pursuer is a heavy one even in a case more favourable in its circumstances than the present, because he is asking the Court to alter the status not only of the woman who has been made his wife but of a child who is not very directly represented in the process. In the present case I think the *onus* of proof upon the pursuer is exceptionally heavy.

"To begin with, he married this girl knowing that she was pregnant. In most cases I have to deal with, including the case of *Stein*, the pursuer has come into Court averring that he was in the belief that he was about to marry a virgin and he found instead of that he was marrying a woman who was not a virgin and whose loss of virginity was occasioned by a third party.

"It is also a feature in this case unfavourable to the pursuer that he admits that he had carnal connection with this woman prior to the time when the child must have been conceived and subsequent to that date, and it is common ground that there was, at all events, opportunity of connection between the two parties at the time when the child was procreated, because then both were living in Glasgow and their respective residences were well known to each other.

"But the pursuer meets those two points of difficulty by stating frankly that he understood that the pregnancy of Ruth Crawford at the date of the marriage was due to himself, and he maintains as regards the antenuptial intercourse that it was just because he thought that condition of pregnancy was due to intercourse which he admits having taken place between them in the month of May and subsequent months that he agreed to marry her.

"But there is a third unfavourable circumstance, and it is the most serious point which the pursuer has to meet, namely, that after the child was born he went to the registrar, gave the information to the registrar from which the entry of registration was filled up, that information being that the child was legitimate and was his child, and he chose the names, being the names of his own mother, which the female child was to bear.

"Now that undoubtedly is a most serious difficulty which the pursuer has to overcome. But it must not be left out of account that a letter was written, and I hold it proved that that letter was written and was intended to be sent to the registrar but was not sent, in which the pursuer interpels the registrar from proceeding to register the birth of that child until he (the pursuer) has communicated with the registrar; and later on, to wit, in the month of January 1918, I hold it proved that the father of the pursuer, acting on pursuer's behalf, went to the registrar and made an effort to get the entry changed from the entry of a legitimate birth into the entry of an illegitimate birth. He was only interpelled from proceeding to get that carried into effect from considerations of expense, because it was necessary to go before the Sheriff by way of petition, which would cost a considerable amount of money.

"Accordingly I am not prepared, although this is a serious point against the pursuer, to hold the matter concluded against him and adversely to his case because he did go and register the child as legitimate. I accept the explanation that he gives of his action in connection with that matter." . . . [*His Lordship on the evidence held that the pursuer was not the father of the child.*] . . .

"There is only one other matter which perhaps I should allude to. There is a plea of personal bar upon record. Mr Maclaren did not deal separately or specially with the plea, but I understand that it is based upon two things—(1) the fact that this man registered this child as his, and (2) upon the allegation that after he got to know all about Hunter he cohabited with his wife and treated her as his wife. I have already dealt with the birth of the child. I do not think that he is personally barred from sueing this action and from succeeding in it because in the circumstances in which he did act he registered the child as a legitimate child.

"With regard to the other matter, it is a new point, but I do not see why there should not be a condonation in a case of this sort just as in a case *stante matrimonio*. The pursuer admits that he occupied the same bed as Ruth Crawford after the marriage, but he says he did not have intercourse, and I believe him on the point.

"Therefore the *onus* of proof on this matter being on the defender, I reach the conclusion that she has not proved marital intercourse took place subsequent to the date when the pursuer got to know of her lapse with the man Hunter. Accordingly I am prepared to repel this plea of personal bar.

"On the whole matter I propose to grant decree as concluded for."

The defender Mrs Ruth Crawford or Alexander reclaimed, and argued—Assuming that at the time of the marriage the defender's pregnancy was due to her connection with another man, nevertheless that fact was not a ground for declaring the marriage null. (1) The pursuer knew

that the date of his first connection with the defender after intimacy was resumed between them was 20th May; (2) the defender had told him that the other man had had connection with her; (3) yet the pursuer registered the child as his own giving it his mother's names; and (4) resumed sleeping in the same bed with the defender, from which fact it was to be presumed that sexual connection had taken place—*Walker* v. *Walker*, 1911 S.C. 163, 48 S.L.R. 70, *per* Lord President (Dunedin) at 1911 S.C. 170, 48 S.L.R. 75; *X* v. *Y*, [1914] 1 S.L.T. 366. Accordingly the pursuer had condoned the defender's conduct and had homologated the marriage — *Walker* v. *Walker*, *cit.*, *per* Lord President (Dunedin) at 1911 S.C. 168, 169, and 170, 48 S.L.R. 74 and 75; Bankton, Inst., book i, tit. v, section 2, 34; Fraser, Husband and Wife (2nd ed.) vol i, p. 456, and vol. ii, p. 1178; Stair, Inst., i, 4, 6, (referred to by Lord Justice-Clerk).

Argued for the respondent—At the time of the marriage the defender's pregnancy was due to her connection with another man, and her conduct had not been condoned by the pursuer and the marriage had not been homologated. A marriage which was null on the ground of fraud could not be set up by the condonation of the fraud, because there was no contract which could be set up. In any event nothing short of proof of actual intercourse between the pursuer and the defender would amount to condonation—*Hunt* v. *Hunt*, 1893, 31 S.L.R. 244—but there was no such proof in the present case, and apart from such proof it was a question of circumstances as to whether the conduct of the aggrieved party showed that he had remitted the injury—*Edgar* v. *Edgar*, 1902, 4 F. 632, 39 S.L.R. 424; *Collins* v. *Collins*, 1884, 11 R. (H.L.) 19, 21 S.L.R. 579, *per* Lord Watson at 11 R. 39, 21 S.L.R. 589. The *onus* was on the defender to prove intercourse and she had not discharged it.

At advising—

LORD JUSTICE-CLERK —This is in many respects an anxious case, since it raises questions of status, not only in relation to the pursuer and the defender, the alleged wife, but also with respect to the child. The Lord Ordinary, taking a certain view of the decision in the case of *Stein*, 1914 S.C. 903, has held that the pursuer has made out his case—that he was induced by the fraud of the defender to enter into a marriage with her on 2nd November 1917, the fraud consisting in the defender representing to him that she was then pregnant and that he was the father of the child, while in point of fact she knew that her pregnancy was not due to any connection with the pursuer, but was due to an act of connection between her and a man Hunter which took place in March 1917.

I confess that having regard to the particular circumstances of this case I do not think that the case of *Stein* does apply to the question we have here to consider. On what I may call the merits of the case—namely, whether the pursuer has made out the case of fraud which he alleges—I have the greatest possible difficulty in agreeing with the result at which the Lord Ordinary has arrived. I think, for example, that he was misled by considerations to which he has given effect in his judgment. He accepts what he calls the explanation which the pursuer gave of his action in connection with the registration of the birth of the child. I do not know what the true explanation was, but certainly I cannot regard what the pursuer stated upon the matter as a satisfactory explanation of what seem to me the more material points connected with the registration. Then the Lord Ordinary points out that in the argument before him, so far as the question of homologation or condonation—adoption seems the better word—was concerned, "Mr Maclaren did not deal separately or specially with the plea, but I understand it was based upon two things — (1) the fact that this man registered the child as his, and (2) the allegation that after he got to know all about Hunter he cohabited with his wife and treated her as his wife." On the question of cohabitation he says — "The *onus* of proof on this matter being on the defender I reach the conclusion that she has not proved that marital intercourse took place subsequent to the date when the pursuer got to know of her lapse with Hunter." I do not agree that the *onus*, in the circumstances here is on the defender, and I am unable to arrive at the same conclusion on the merits of the case as the Lord Ordinary has done.

[*After referring to the pursuer's averments and to certain passages in the Lord Ordinary's opinion his Lordship proceeded*] —The plea to which the Lord Ordinary has referred as not having been very forcibly urged before him seems to me conclusive of this case—I mean the plea of what has been called condonation, or, as I prefer to speak of it, adoption or homologation. It is said that this contract of marriage was brought about by the fraud of the defender. Well, be it so. When a fraud which is sufficient to invalidate a contract has been discovered or explained to the innocent party—and in this respect a contract of marriage is not a bit different from any other contract—the contract will not stand unless the innocent party homologates it; and in that case a plea of homologation will bar that party from getting rid of the contract.

Now there are two points on which this plea of bar is founded in this case. In the first place, there is the fact that this man registered the child on 12th December 1917 as his own, and at that time it is not disputed that he had the facts fully before him. He had then been informed that the defender had had connection with Hunter in March preceding, and he was, as he says, satisfied in his own mind that the connection between himself and the defender which he avers on record took place so late as 20th May. Further, he discussed the question of registration with his father, and he wrote a letter to the registrar from 30 Willowbrae Street in the following terms—"Dear Sir, —If any person should come to register a child named Alexander, from the above

address, please don't do anything in the matter as they have no authority for doing same. I will call at your office to-morrow night and explain matters." He did not call on that night, but three days afterwards, on 12th December, having all the facts fully before him, he went to the registrar and registered the child as follows—"Name and surname — Isabella Beveridge Alexander," these being the Christian names of his mother. Opposite the marginal query—"Name, surname, and rank or profession of father," he wrote — "Robert Alexander, engineer's clerk," that being intended for himself. Then opposite the marginal note "Signature and qualification of informant," &c., he signed his own name and added the word "father." That, it seems to me, was a complete adoption by the pursuer of this child as his own. If he had believed that the child was not his own but that of another man, it is not conceivable that he should have taken for its registered name the name of his own mother — Isabella Beveridge. I cannot regard what was then done as being anything other than a solemn declaration by the pursuer that this child was his child and that it was a legitimate child of the marriage which he had entered into with his wife—legitimate in this sense, that though it was not born in due time, still it was born in wedlock and was accepted by him as his child. The pursuer's explanation which the Lord Ordinary accepts as sufficient is simply this, that he was told by his wife, the defender, that if he did not register the child he was liable to be fined. How that could be accepted by the pursuer as sufficient warrant for him to go and make a false registration of the child which he might have known would lay him open to a severer penalty than would have been imposed upon him for failing to register the child I cannot understand. To my mind that is not an explanation at all of the critical parts of this registration, namely, registering the child as legitimate and giving it the baptismal names of his own mother; and the explanations offered by counsel form no justification for the pursuer acting in this way.

I should have thought that was sufficient in itself to prove the adoption of the marriage, but if support to that view were necessary we find it in the pursuer's evidence. He says, when examined as a witness—"After I came home from registering the child I told my wife I had registered the child. She knew I was going to register the child. I slept with my wife that night and slept with her every night after that until she eventually left me for good. During that time I did not have sexual intercourse with her. There was only the one bed. I had no other bed to go to bar sleeping on a couch. (Q) Why didn't you turn your wife out of the house?—(A) I did not think about that. I never thought about sending her home to her foster parents." As regards this episode the pursuer was in the position of having full knowledge of everything that he now avers. He elects to sleep, not in the room where he had been sleeping apart from his wife, but having registered the child and told his wife that he had done so he elects to sleep in his wife's bed; he claims the rights and privileges of a husband and exercises them by going to bed with his wife every night for four or five weeks. Unless he was accepting the position that the marriage was a good one, he had no right or duty or privilege whatever to occupy the same bed with this woman. It was only on the footing that he was her husband that he was entitled to do so, and it was only on that footing that she allowed him to do so. To my mind this is as clear an adoption of the contract of marriage, in full view of all that is now alleged to have been fraudulent about it, as could well be.

It is said that it is not proved that though he occupied the same bed as his wife for four or five weeks, there was ever marital intercourse between them. The evidence on that matter stands thus — the pursuer denies there was any such intercourse; the defender, on the contrary, swears that there was. It is in my opinion a matter of indifference whether intercourse was actually proved or not. It has, I think, long been settled that if a husband occupies the same bed as his wife, that fact is recognised as sufficient proof without direct evidence of marital intercourse. From the time of the case of *Watson* (1681, M. 330) it has been held that in order to prove condonation it is not necessary to prove more than that the persons did in fact occupy the same bed. That was held sufficient whether there was proof of marital intercourse or not.

I cannot help saying that it seems to me that the actings of this pursuer in registering the child and occupying the same bed as his wife throw on the disputed question of the merits of this case a very strong light adverse to the contention of the pursuer. But as I have said, it is quite sufficient for the judgment of absolvitor that we should find that these actings constituted an adoption of this marriage; and I propose that we should recal the judgment of the Lord Ordinary and assoilzie the compearing defender.

LORD DUNDAS—I am of the same opinion. The Lord Ordinary emphasises, and there I agree with him, the exceedingly heavy *onus* which lay upon the pursuer to prove his case. His Lordship goes on to say that he accepts the pursuer as a witness of credit, and grants him the decree which he asks. In the view which I take of the case, agreeing with your Lordship in the chair, it is not necessary to determine whether or not the Lord Ordinary is right in the view which he takes of the facts. I only wish to say that I should have had great difficulty in agreeing with his conclusions.

There is a preliminary ground on which the case must fail. I cannot help thinking that the Lord Ordinary has failed to appreciate the tremendous weight of some of the facts proved as barring the pursuer from obtaining the declarator which he seeks. On 9th December the pursuer was fully aware of the whole of the facts as fully as

we have them now before us, including the defender's statement about her immoral relations with Hunter. He wrote on that day the letter addressed to the registrar. It was composed with his father's assistance but was never sent. It told the registrar that if anyone came to register a child from the address from which he wrote, the registrar should do nothing in the matter, as they had no authority for doing it, and that the writer would call at the registrar's office and explain matters. Three days later, having had ample time to consider and make up his mind on the matter, he deliberately went to the registrar and registered the child as a child born to him and the defender in lawful wedlock, registering it in the two baptismal names of his own mother.

That seems to me a very difficult fence for the pursuer now to surmount, but as if further to homologate the contract of marriage and to establish the defender as his wife he goes and occupies the same bed with her for a period of weeks. I confess I can hardly conceive stronger evidence than the facts to which I have alluded of deliberate adoption or homologation of the contract of marriage which he had entered into with this woman.

It seems to me that the Lord Ordinary has made too little of this part of the case. That may have been, and I think very likely was, because it was not so fully and ably argued to him as it was at our bar. As regards the registration, he merely says that he accepts the explanation the pursuer gave of his action in connection with that matter. But when I look at the proof the explanation seems to be this—"(Q) Will you explain how you came to do that?—(A) Well, it was just that my wife told me that if I did not go and register the child I would be heavily fined. I did not know about these things at the time." That seems to me to be a most inadequate explanation. I do not think the Lord Ordinary has really grasped the importance of that fact, not merely as a topic in the case but as a bar to the success of the action.

As regards the cohabitation, the Lord Ordinary deals with that in a way which is not to my mind satisfactory. He says—"The pursuer admits that he occupied the same bed as Ruth Crawford after the marriage, but he says he did not have intercourse, and I believe him on the point. Therefore the *onus* of proof on this matter being on the defender I reach the conclusion that she has not proved that marital intercourse took place subsequent to the date when the pursuer got to know of her lapse with Hunter." I cannot understand why the Lord Ordinary places the *onus* on the defender, instead of placing it, as I humbly think he should have done, on the pursuer. If it were necessary I should be prepared to assert, as your Lordship has asserted, that by our law it is not necessary to have proof, on such a point, of actual intercourse, and if the parties are found together in bed, that, as a rule, will be quite enough. I rather think that that has been the law of Scotland at least from 1681, in which year the case of *Watson* (M. 330) was decided. I doubt very much whether the Court could be called upon to go into matters of so intimate a nature as an inquiry into what passed in the bed, or whether such proof if attempted could lead to any satisfactory result. In my opinion, therefore, the action fails.

I may add that, like your Lordship, I consider that the case of *Stein*, on which the Lord Ordinary bases his judgment, could in no view be held as an authority in this case. Its facts were radically different from these here present.

LORD GUTHRIE concurred.

LORD SALVESEN was absent, being engaged in the Valuation Court.

On 2nd March 1920 the Court recalled the interlocutor of the Lord Ordinary, sustained the third plea-in-law for the defender Mrs Ruth Crawford or Alexander, and assoilzied the defenders.

Counsel for the Reclaimer (Defender)—MacRobert, K.C.—Duffes. Agent—James G. Bryson, Solicitor.

Counsel for the Respondent (Pursuer)—Fraser, K.C.—D. P. Fleming. Agents—Clark & Macdonald, S.S.C.

HIGH COURT OF JUSTICIARY.

Friday, May 23, 1919.

(Before the Lord Justice-General, Lord Mackenzie, and Lord Hunter.)

STIRRAT *v.* CAMERON.

Justiciary Cases—War—Statutory Offences—Emergency Legislation—Relevancy—Charge of Making Unreasonable Demand in Addition to Fixed Maximum Price—The Milk (Winter Prices) Order 1918, *Dated 17th September* 1918, *secs.* 1, 3, *and* 12 (*S.R. and O.* 1918, *No.* 1165).

The Order of 17th September 1918 prohibits the selling, directly or indirectly, of milk at prices exceeding certain maximum prices which are fixed by the Order. The Order also provides that "no person shall in connection with the sale . . . of any milk . . . make or demand any unreasonable charge." An accused was charged with having in connection with certain specified sales of milk made and demanded at certain times and places and from certain persons the unreasonable demand that these persons should pay him, in addition to the maximum prices for the milk, certain sums of money, contrary to the provision of the Order in question. He objected to the relevancy of the complaint on the ground that the Order was *ultra vires* of the Food Controller "in respect that the reasonable charges have not been fixed for which the accused made the demand." That objection was repelled and the accused was convicted and sentenced. *Held*, in a bill of suspension,