wider sense the fact of the teinds being or not being conveyed may make a difference. Thus in the case of the Williamson feu right it is less easy than in the case of the Davidson feu right to apply to the words "teind duties" the view taken of the meaning of these words by the majority of the whole Court in *Pagan*. For as the feuar here became by the grant owner and titular of the teinds conveyed to him, it was inappropriate that the superior should relieve him of claims for surplus teind. We do not, it is true, learn anything about the right or title of the superior to the teinds, and it is abstractly possible that, as was suggested in course of the argument, a relief against claims for surplus teind was inserted in the deed *ob majorem cautelam*. But as the case affords no foundation in fact for this suggestion I think one must construe the obligation of relief in view of the fact that the deed expressly bears to convey the teinds. And on this footing I feel great difficulty in attaching to the words "teind duties" the meaning attached to them in *Pagan*, where the teinds were not conveyed. But this difficulty regarding the words "teind duties" as occurring in the Williamson feu right does not displace the effect of the usage thereunder in demonstrating, in my opinion, that the words "minister's stipend" were used in the sense of including augmentations.

I concur in the judgment which your Lordships propose.

The Court answered the questions of law in the affirmative.

Counsel for the First Parties—Fraser, K.C. —Maconochie. Agents—Pearson, Robertson, & Maconochie, W.S.

Counsel for the Second Party—Brown, K.C.—Scott. Agent—H. Bower, S.S.C.

Counsel for the Third Parties—Mackay, K.C.—Hunter. Agent—Henry Smith, W.S.

Tuesday, July 19.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

SINCLAIR *v.* RANKIN.

Parent and Child — Illegitimate Child — Filiation — Intercourse with Defender and with Another Man about Time of Conception.

In an action of filiation and aliment the evidence showed that the pursuer had connection with the defender and also with another man about the time of conception, and that her usual monthly period occurred between the two dates of connection. *Held* (*dub.* Lord Dundas) that the pursuer had proved the paternity of the child against the man with whom she had had connection after menstruation, and decree *granted* accordingly.

Butter v. *M'Laren* (1909 S.C. 786, 46 S.L.R. 625) *distinguished.*

Lily Sinclair, 62 Hazelbank Terrace, Edinburgh, *pursuer*, raised an action of affiliation and aliment in the Sheriff Court at Edinburgh against James Ewing Rankin, stockbroker's clerk, 10 Lochrin Buildings, Edinburgh, *defender*.

The pursuer averred that during three days from 17th November 1916 she stayed at an hotel with a soldier in the Canadian Army, with whom she had carnal connection, which did not result in pregnancy; that after her return home menstruation took place in ordinary course and lasted from 1st to 6th December; that the defender, who had been in the army since June 1915, and to whom the pursuer was engaged to be married, came while on leave to the pursuer's parents' house on 7th December 1916 and remained there until the 14th December; and that on the occasion of this visit sexual intercourse took place between her and the defender in her parents' house, resulting in her pregnancy and the birth of an illegitimate female child on 4th September 1917. The defender denied the paternity, averring that he broke off his engagement to the pursuer when he became aware of the fact that the pursuer had had intimate relations with another man.

On 9th June 1920 the Sheriff-Substitute (GUY), after a proof (the import of which sufficiently appears from their Lordships' opinions *infra*), granted decree as craved.

On 24th November 1920 the Sheriff (CROLE), on appeal, recalled his Substitute's interlocutor and assoilzied the defender.

The pursuer appealed to the Second Division of the Court of Session. The arguments appear sufficiently from the judgments.

At advising—

LORD JUSTICE-CLERK — In this case the Sheriff-Substitute granted decree in favour of the pursuer while the Sheriff assoilzied the defender. I have found some of the points we have to determine attended with considerable difficulty, but I have ultimately come to be of opinion that we should restore the judgment of the Sheriff-Substitute.

The pursuer admits that she slept two nights with a Canadian soldier called Baxter in Cupar on 17th and 18th November 1916. But she maintains that from 1st to 6th December 1916 she had her usual monthly period, and that therefore what took place at Cupar cannot account for her pregnancy. The defender contends that it has not been proved that menstruation took place early in December. I cannot agree with the defender as to this. I accept the view that the pursuer is not a satisfactory or reliable witness. But the Sheriff-Substitute, who saw the witnesses, found that the occurrence of menstruation had been proved by the evidence of the pursuer and her mother. The pursuer was a woman of about twenty-six at the time in question, and therefore of experience in the matter in so far as a non-medical woman can be. In my opinion we ought not to accept the view that she was mistaken in such a matter, and that there was not menstruation but hæmorrhage as distinguished therefrom.

Even if the pursuer cannot be accepted as in herself reliable, she is in my opinion sufficiently corroborated by her mother, and I can find no reason sufficient in my opinion to alter the conclusion arrived at by the Sheriff-Substitute on this point.

The bearing of this fact is matter of serious controversy between the parties. I do not think it can be maintained that menstruation cannot occur during pregnancy. In my opinion it is clearly proved that it may. But, on the other hand, in the vast majority of cases menstruation does not occur after conception. One of the witnesses for the defence put the percentage of cases where it occurs as ½ per cent., and I think they may quite correctly be spoken of as rare. In ordinary life the occurrence of menstruation is accepted as excluding the existence of pregnancy, but that cannot be accepted as universally true.

The defender maintains that complete connection did not take place between him and the pursuer while he was living in her parents' house in December 1916. He admits, however, acts of great sexual familiarity, which he speaks of as "indiscretions," and while it may be probable that he thought he had prevented these "indiscretions" from going so far as to account for the pursuer's pregnancy, I think he came to be of opinion that by "mistake" or "accident" he had failed in this respect. I quite appreciate the significance of the fact that the defender was engaged to be married to the pursuer, that he was evidently very fond of her, intended to marry her, and believed her to be in every way deserving of his affection and worthy to be his wife. But still I cannot, with all these considerations in view, find that we are entitled to reverse the finding of the Sheriff-Substitute and to hold that the pursuer has not proved that she and the defender had connection sufficient to account for the pregnancy and the birth of the child.

Assuming then that the pursuer had connection with two men—Baxter in November, and the defender in December (for I think the pursuer must be held as practically admitting that she had the double connection)—and that the dates of connection are such that, so far as the period of gestation is concerned, either of these men might have been the father of the pursuer's child, what is the result?

I do not doubt in any way the soundness of the decision in the case of *Butter* v. *M'Laren*, 1909 S.C. 786. But I do not think that the existence of such a state of facts as I have set out in the immediately preceding paragraph in itself necessarily prevents the woman from obtaining a decree establishing the paternity of the child against either of the men. The double connection is a relevant and material circumstance to which due weight must be given, but it is not in my opinion in and by itself conclusive of the question. It may even give rise to doubts, but as has been more than once said in affiliation cases the Court has often to give a judgment which it is constrained to give and which yet may not be in accordance with the real facts. But I do not think that the fact that doubts may exist as to a question of fact, even if the doubts are due to the pursuer's own conduct, is sufficient to compel us to find the case she seeks to establish has not been proved. There are many cases in the books where the conduct of the pursuer in an action of affiliation has given rise to doubt and difficulty, and where the Court has yet found itself entitled on the evidence to pronounce decree in her favour. In this case, taking the evidence as a whole, and especially having regard to the evidence as to menstruation, I am of opinion that the pursuer has sufficiently instructed that the defender is the father of her child, and that she is therefore entitled to the decree she asks for.

LORD DUNDAS—The proof in my judgment discloses the pursuer to be an utterly unreliable witness and a wanton and worthless woman. She is constrained to admit that during the absence of the defender, to whom she was engaged to be married, and with whom she professes to have been in love, she had sexual intercourse with a Canadian named Baxter. Within a short period thereafter she voluntarily entered the defender's bed and permitted indecent familiarities, which both the learned Sheriffs consider were such as might result in the conception of a child. She afterwards gave birth to a child, "at a date"—to quote the Sheriff-Substitute's words, with which the Sheriff agrees—"which might quite correspond with either Baxter or the defender being the father of it."

Prima facie, therefore, the pursuer's conduct would, in my judgment, result in such uncertainty as to the child's paternity as would debar her from fixing it upon either of the two men. This result would be in entire accordance with opinions expressed in this Division in *Butter* v. *M'Laren*, 1909 S.C. 786. The exact point here (*ex hypothesi*) raised was not present in that case, for the woman there did not admit connection with the third party, Mann; but the judgments to which I refer, though in a sense *obiter*, were very carefully considered by the Judges of the Division as it was then constituted, of whom as it happens I am now the sole survivor. I adhere to but refrain from quoting the opinion I expressed in *Butter's* case (at pp. 801 ft., 802) which had not only the authority of Lord Bankton but also the cordial support of the then Lord Justice-Clerk, and I think the concurrence of Lord Low. The Lord Justice-Clerk, dealing with the view that if a woman (as he puts it at p. 803) "indulges her passions with several men she can choose the most satisfactory one from the aliment-paying point of view"—and I cannot help observing that in the case before us while Rankin is available as defender, the Canadian appears to have departed beyond the pursuer's ken—says "that idea is intelligible, but it is not justice. The opposite doctrine is expressed distinctly by Bankton, when he says that 'the woman by her own viciousness has rendered the father uncertain.' That seems to me to be sound common sense." Lord Ardwall dissented from the majority of the Court. I need not refer to my own observations in regard to that learned judge's views, but I think that they will be found to be conclusively disposed of by the judgment of the Lord Justice-Clerk.

It is, however, maintained for the pursuer that she has succeeded in putting herself outside the doctrine of *Butter's* case by proving that between the dates at which she had intercourse with Baxter and with the defender respectively she had a full and regular menstruation; and I admit that if she has established this point beyond reasonable doubt it would have an important though not, I think, necessarily conclusive bearing in her favour. I am aware that Lord Salvesen, as well as your Lordship, considers that the pursuer has fully established her point. A dissent by myself in regard to a matter of evidence peculiar to this particular case would be undesirable and indeed futile. But I am bound in honesty to confess that upon the proof my own judgment would have gone rather with that of the learned Sheriff than with those of my brethren. The burden of proof upon this crucial point is on the pursuer, and would surely, under the circumstances, require to be fully and clearly discharged by her. Now in the first place we must, I think, take it on the evidence as a fact known to and accepted by the medical profession that a woman may menstruate though she is at the time pregnant. Such an occurrence may not be common but it is very far from being unknown. In the second place, the proof, I think, establishes that the mere occurrence of bleeding at a time corresponding to the menstrual period may be, and often is, erroneously attributed by unskilled persons to menstruation. Now proof of the pursuer's alleged menstruation depends, I think, upon the testimony of the pursuer's mother, for her own is, to my mind, utterly unreliable, and I am unable to say that in my judgment the testimony is satisfactory or sufficient. It is given after an interval of years, and in a very vague and general way. I refer, without going into detail, to the learned Sheriff's analysis of it, and I confess that if I had been sitting alone I should have been disposed to adopt his conclusion that "the result of the medical evidence is this, that it is impossible to say whether the bleeding in the case of the pursuer was bleeding or true menstruation, and that the weight of the evidence seems to be that in either case she might have been pregnant on 1st December as the result of the intercourse with Baxter." I am content, however, without formally dissenting to express my difficulty in concurring with my brethren on this crucial point in the evidence, and the grave doubts I have felt, and still feel, in regard to it. I am not satisfied that the pursuer's case is an honest one. When she instructed a law agent, Mr White, to bring proceedings against the defender, which were subsequently abandoned, it appears, though the point is perhaps not absolutely proved, that the pursuer cannot have informed her agent of what she now alleges as a fact about her menstruation, and the inference to my mind is significant.

On the law applicable to the case my views are in harmony, as I understand, with those of the other members of the Court.

Lord Salvesen—But for the admitted fact that this pursuer had connection with a man called Baxter within a possible period of gestation her task in this action would have been very easy. She swore that she had intercourse with the defender between 7th and 14th December of 1916, and the defender in his letters, written at the time when she communicated to him her fear that she had become pregnant as the result of that intercourse, admitted that there had been familiarities of a sexual character which might have led to the pregnancy. In these circumstances her case would have been established, according to the ordinary rules on which we proceed in such cases, by her own evidence coupled with the letters that the defender had written at the time and which expressed his fear that he had been the cause of the pursuer's pregnancy, because they were tantamount to an admission that what he had done might result in pregnancy. But then it is said that the ordinary rule did not apply here because of an admitted prior intercourse, somewhere about the 18th or the 20th of November, with Baxter.

I am of course bound by the case of *Butter* v. *M'Laren* (1909 S.C. 786), to which both your Lordships have referred. But I think it establishes no more than this, that where intercourse has occurred with two different men and it is impossible for the Court to say that the pregnancy is the result of the one intercourse rather than of the other the pursuer must lose her case. It is said that the pursuer in an action of filiation, in the same way as every other pursuer, must prove her case. That is quite true, subject to this, that very much less proof has according to our practice been held to establish paternity than would be required to prove, for instance, adultery; because paternity, according to a long series of decisions, has been held to be established by the oath of the woman plus evidence of opportunity, plus evidence of familiarity, especially if such familiarity has been denied by the defender and the Court thinks that he has given a false denial. All that, while it leads in the ordinary case to a decision in favour of the pursuer, might not be sufficient to establish a criminal charge or even to establish adultery. Therefore when it is said that a pursuer in an affiliation case must prove her case in the ordinary way, it does not mean that the same amplitude of proof is required as in other cases involving sexual intercourse where the consequences may be more penal. I apprehend that the reason of that is one of public policy. It is desirable in the interests of the child that the mother should be able to establish the child's paternity; possibly also in the interests of the community, upon whom the burden of the maintenance of the child may be thrown if no father can be found to contribute towards its support. However that may be, it seems to me that *Butter's* case does not establish that where the Court think that one of the persons who has admittedly had intercourse with the pursuer is much more likely to be the father than the other, they are precluded from giving effect to that view merely because it is impossible for the woman to exclude the chance of the other man being the father. I for my part think that no such onus is put upon her. All the onus that is put upon her is to show that there are adequate reasons in fact for holding that the defender was the father rather than the other person to whom paternity might possibly be attributed.

In this particular case it seems to me that we have adequate grounds on which to go. The Sheriff-Substitute held it proved that the pursuer had menstruated between the 1st and the 7th of December in the ordinary way. That conclusion in fact did not rest entirely upon the pursuer's evidence, because it was corroborated by the mother, who gave very good reasons why she remembered this particular menstrual period. I do not know how the fact of menstruation could be more completely established than by the evidence of the woman herself and by her credible mother, because it is the kind of fact that is generally known only to these two persons, and very often known to no one except the party herself. Now that being established I think the medical evidence for the defence goes no further than that there are known cases where women have menstruated after they become pregnant, and also that there may be bleeding at the menstrual period after pregnancy which may sometimes be mistaken for normal menstruation. These cases are extremely rare, and I think every doctor who gave an unbiassed opinion would concur in this, that if menstruation had occurred as stated by the pursuer between the 1st and the 6th of December her pregnancy is much more likely to have occurred after that date than to have been existent at that date. In addition to the extreme rarity of the cases of menstruation after pregnancy I found upon the testimony of the medical witness for the pursuer, who I think states what is ordinary common sense. He says that intercourse midway between menstrual periods is least likely to result in pregnancy. Intercourse immediately following menstrual periods is extremely likely to result in pregnancy. Further, the normal period of gestation more nearly coincides with the 7th or the 8th December as the beginning than it does with the 18th or the 20th November. All these things point to what I think is a reasonable conclusion in common sense—that the defender was the author of this woman's condition and the father of her child.

While it is said in evidence that it is quite a common occurrence for a woman to menstruate after pregnancy, I have great difficulty in discovering how that can be medically established seeing that the very same doctor who said it states that neither doctors nor patients can distinguish between the menstrual discharge and the bleeding which is said sometimes to occur. Here I accept the evidence of the medical witness for the pursuer, that if this had been a threatened abortion and had gone on for five days it is very unlikely that any child would have been born at all. The pursuer and her mother speak to it being the ordinary menstrual period, while if there had been threatened abortion it would have been accompanied in all probability with pain in excess of that which ordinarily accompanies menstruation. But all these things are questions of fact, and I think that all that the defender succeeded in proving was that notwithstanding that the evidence pointed to the conclusion of his being the father, there was yet a medical possibility that he might not be, but that the paternity might be due to the other man. Such a possibility could never be excluded in any judgment in such a case, and if we never pronounced a judgment unless we were certain it was right, I am afraid we would feel ourselves incapable of disposing of a great many cases where there is a division of opinion on the Bench. But our duty is to arrive at the conclusion which we think is supported by the evidence, and not to entertain mere possibilities as disturbing the conclusion at which we would otherwise have arrived.

On these grounds I agree with your Lordship in the chair that the pursuer has established her case, and that she is entitled to the decree which she seeks.

Lord Ormidale did not hear the case.

The Court recalled the interlocutor of the Sheriff and granted decree.

Counsel for the Pursuer—J. G. Jameson—Fisher. Agents—Herbert Mellor, S.S.C., and R. D. C. M'Kechnie, Solicitor.

Counsel for the Defender—Wark, K.C.—Fenton. Agent—Charles T. Nightingale, S.S.C.

Wednesday, July 20.

FIRST DIVISION.

GLASGOW EDUCATION AUTHORITY, PETITIONERS.

Charitable and Educational Bequests and Trusts—Administration—Alteration of Scheme—Poverty Test.

The governing body administering an educational bequest under a scheme framed in terms of the Educational Endowments (Scotland) Act 1882, by which bursaries tenable at intermediate and secondary schools were provided to children attending schools in a certain district "whose parents or guardians are in such circumstances as to require aid for giving them higher education," presented a petition for alteration of the scheme. By the alteration proposed the class of institution at which the bur-