COURT OF SESSION.

Saturday, November 6.

SECOND DIVISION.

(Before Seven Judges.)

[Lord Sands, Ordinary.

LANG *v.* LANG.

Husband and Wife—Nullity of Marriage—Wife Pregnant by Another Man at Date of Marriage—Fraudulent Concealment from Husband—Fraudulent Misrepresentation as to Husband's Responsibility for Pregnancy.

Held that a husband was not entitled to have his marriage annulled on the ground that his wife was at the date of the marriage pregnant to another man, and either fraudulently concealed from her husband, with whom she had been sexually intimate prior to the marriage, the cause of the pregnancy, or deceived him by fraudulent misrepresentation that he was the cause of her condition, and proof of averments *refused.*

Stein v. *Stein*, [1914] S.C. 903, 51 S.L.R. 774, *overruled.*

Walter Lang, seaman, residing at 33a Prince Regent Street, Leith, *pursuer*, brought an action against Violette Trainer Pieroni or Lang and Walter Pieroni or Lang, her pupil child, both residing at 10 Horse Market, Kelso, *defenders*, for declarator "that *prior to* 28th June 1918, being the date of a pretended marriage between the defender Violette Trainer Pieroni or Lang and the pursuer, the said defender *stated to the pursuer that she was pregnant, and fraudulently misrepresented to him that he was responsible for her pregnant condition, and that the defender had never had carnal connection with any man other than the pursuer, and did thus induce him to go through a ceremony of marriage with her on said date; further, that on said last-mentioned date the defender* was pregnant of a child of which the pursuer is not the father, and that this fact was unknown to the pursuer at the date of said pretended marriage, and was *fraudulently* concealed from him by the said defender; and that the said pretended marriage betwixt the pursuer and the said defender was from the beginning, is now, and in all time coming shall be null and void and of no avail, force, strength, and effect; and that the pursuer is free to marry any free person; and that the pursuer is not the father of the defender the said Walter Pieroni or Lang, born on 16th October 1918, and registered under the name of Walter Lang." [The words in italics were added by way of amendment at the bar of the Inner House.]

Violette Trainer Pieroni or Lang defended the action.

The pursuer averred, *inter alia*—"(Cond. 2) In February 1915 the pursuer was in Edinburgh on leave from the Navy. One evening during said leave he was proceeding to the Empire Music Hall, Edinburgh, when he casually met on the street the first-named defender, who was in company with a lady friend. . . . (Cond. 3) . . . On 22nd March 1918 the said defender came to Edinburgh from Dalkeith and met the pursuer and spent the night at his said lodgings, returning to Dalkeith on the following day. This was the only meeting the pursuer had with the said defender from the date of his first meeting with her in February 1915. On this occasion the pursuer had carnal connection with the said defender in his said lodgings. . . . (Cond. 4) After the last-mentioned meeting the pursuer and the said defender occasionally met each other down to 31st May 1918. On that date the pursuer received a letter from said defender intimating that she was pregnant. Thereafter they had several meetings at which said defender stated to the pursuer that she never had sexual relations with any person other than the pursuer and that the pursuer was responsible for her pregnant condition, and the pursuer was induced by the said defender to believe her statements. Acting on this belief the pursuer promised to marry the said defender, and on 28th June 1918 the pursuer went through a ceremony of marriage with said defender at 1 Dalkeith Road, Edinburgh, after publication of banns according to the forms of the Established Church of Scotland. . . . (Cond. 5) After said ceremony the pursuer and the said defender lived together for a few days at 1 Dalkeith Road, at the end of which period the said defender went to reside with her parents at Kelso and the pursuer returned to his ship. Thereafter they regularly corresponded with each other, and on one occasion in July 1918 lived together as husband and wife. (Cond. 6) On 16th October 1918 the said defender gave birth to a male child. The pursuer, who was absent when the said child was born, was much astonished when information of the birth reached him. The said child was registered as a legitimate child by the first defender's mother, the names of the parents being given as the pursuer and the said defender. . . . (Cond. 7) The said child was at its birth a full-grown child, and was the result of an 8½ or 9 months' gestation. Accordingly the said child was born as the result of carnal connection which said defender had in January 1918. The pursuer had no sexual relations with said defender in January 1918, and had sexual intercourse with her only on one occasion prior to going through said ceremony of marriage, viz., the morning of the 23rd of March 1918. The pursuer accordingly avers that he is not the father of said child, and further avers that on the date of said pretended marriage the said defender was five months gone with child to a man other than the pursuer. This last-mentioned fact was deliberately concealed from the pursuer by said defender, who falsely, and in the knowledge that it was false, stated to the pursuer that she never had carnal connection with any man other than the pursuer, and that he was responsible for her pregnant condition, and did thus induce him to go through a ceremony of marriage

with her. Had the pursuer known at the date of said ceremony that the said defender was pregnant to a man other than the pursuer he would not have married her." . . .

The pursuer *pleaded* — "1. The pursuer having entered into a pretended marriage with the first named defender under essential error induced by the *fraudulent* concealment by the said defender of the material fact condescended on and contrary to her duty, decree of nullity of said pretended marriage should be pronounced as craved. 2. The defender Walter Pieroni or Lang not being the child of the pursuer, declarator to that effect should be pronounced as concluded for. 3. *The defender having fraudulently misrepresented to the pursuer that he was responsible for her pregnant condition and that she never had carnal connection with any man other than the pursuer, and did thus induce him to go through a ceremony* of marriage with him, decree of nullity of said pretended marriage should be *pronounced as concluded for.*" [The words in italics were added by way of amendment at the Bar of the Inner House.]

The defender Violette Trainer Pieroni or Lang pleaded, *inter alia* — "1. The averments of the pursuer being irrelevant and insufficient 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 the defender should be assoilzied."

On 2nd March 1920 the Lord Ordinary (SANDS) appointed John A. Inglis, Esq., Advocate, *curator ad litem* to the pupil child called as a defender in the action.

On 10th June 1920 the Lord Ordinary repelled the first plea-in-law for the defender and allowed a proof.

Opinion.—"In a passage in the judgment in *Menzies* v. *Menzies* (20 R. (H.L.) 108), quoted by Lord Skerrington in *Stein* v. *Stein* (1914 S.C., 903), Lord Watson says—'Error becomes essential whenever it is shown that but for it one of the parties would have declined the contract.' Essential error so understood does not render a marriage voidable. The marriage is not voidable even though one of the parties has a concealed loathsome disease, is an intermittent lunatic, or has been convicted of an odious offence, although it may be certain that the other party would not have entered into the marriage in knowledge of the fact. According to the older and stricter view, the only essentials, positive and negative, to a valid marriage are:—opposite sex of the parties, non-pupillarity, sanity, potency, not within prohibited degrees, no prior subsisting marriage, no convictions of adultery the one with the other in a divorce action, no error as to identity, residence in Scotland for necessary period, free mutual consent. Where these conditions subsist there is not, I think, prior to the case of *Stein* any judicial authority for the annulment of a marriage. I confess I am disposed, with Lord Anderson in the case of *Stein*, to regard the rule there laid down as an arbitrary exception. The learned examination of the subject by Lord Skerrington appears to me in the circumstances a search rather for grounds to justify making this exception the law of Scotland than for holding it to have been and to be the law of Scotland. Doubtless, concrete propositions that are new may sometimes be deduced from principles that are old. It would be hard, however, to satisfy me that there is a principle from which it can necessarily be deduced that a marriage is voidable where the woman had concealed that she was pregnant to another man which would not apply where one of the parties had concealed the existence of venereal disease from the other.

"Divers grounds have been suggested for treating a marriage as voidable where the woman has concealed her pregnancy to another man, but none of them is in itself sufficient. There is disappointment in the belief in her chastity, but that is not by itself sufficient. Again, there is her physical incapacity immediately to conceive, but that again is not by itself sufficient. Another suggestion is that the husband is saddled with a bastard, whom his wife has to support, but that by itself is not sufficient. The marriage would certainly not be voidable if the bastard had been born a month before the marriage. Can a bunch of inadequate reasons make an adequate one? Certainly, from the legislative point of view; but from the legal standpoint, not in my view without a certain element of arbitrariness.

"The case of *Stein* establishes the rule that concealed pregnancy to another man at the time of marriage renders the marriage voidable. I am asked in this case to recognise an exception to that rule, where the man knew that the woman was pregnant but supposed that it was to himself. The considerations in the two cases are not identical. In the former case the man presumably supposed he was marrying a chaste woman. In the latter he knew he was not. But then error on this head, apart from pregnancy, does not render a marriage voidable. In the former case the man might have expected that he was marrying a woman who in nine months might bear him a lawful child. This argument, noticed by Lord Skerrington, I confess seems to me unsatisfactory, for a temporary impediment to coitus, or even a permanent impossibility of conception, does not render a marriage voidable. In the case of error as to the paternity of the expected child, there is no disappointment of a child within nine months begotten in wedlock, but there is disappointment of the expectation of the birth of a lawful child within less than nine months. The measure of such disappointment must be very much a personal equation. Again, where a marriage has been induced by the representation that the man has caused the woman to become pregnant, this is overt circumvention, which in one aspect is more serious than mere concealment.

"Reviewing these considerations, and having regard to the mixed reasons assigned in the case of *Stein*, and to the fact that, in my view, that decision, how-

ever consonant with particular justice and legitimate sentiment, established an arbitrary exception to the general law, I do not feel warranted in recognising an exception to the rule there established, particularly as I am aware that this exception has not been recognised in several Outer House cases of the kind subsequent to *Stein*. The matter is, however, one which may very appropriately be submitted for the consideration of the authority which established the rule.

"I shall accordingly repel the first plea-in-law for the defender, and allow parties a proof of their respective averments."

The compearing defender Violette Trainer Pieroni or Lang reclaimed, and the Court appointed the case to be heard before Seven Judges.

Argued for the reclaimer—The pursuer's averments were unfounded in fact, and even had they been true would have been irrelevant. *Stein* v. *Stein*, [1914] S.C. 903, 51 S.L.R. 774, was wrongly decided, and in any event was distinguishable. Misrepresentation was not a ground for annulling a marriage unless it brought about a mistake as to identity. The statement of Lord Brougham that personation was the only ground to warrant nullity was sound—see *Stein* v. *Stein* (*cit.*) at 1914 S.C. 911, 51 S.L.R. 778. It was not a material part of the contract of marriage that the woman was chaste. All foreign systems of jurisprudence were agreed that if the man was aware of the woman's pregnancy fraudulent misrepresentations as to who was the father were not a good ground for annulling the marriage—Deuteronomy, chap. 22, vers. 13-21; Stair, i, 4, 6, i, 9, 9, and iv, 40, 24; Bankton, i, 5, 34-36; Erskine, i, 6, 7; Fraser, Husband and Wife (2nd ed.), vol. i, pp. 146, 155, 440, 448, 451, 453, 461, and 462; Bishop, Marriage and Divorce (6th ed.), vol. i, bk. iii, cap. xi, sec. 190 (*a*); *Moss* v. *Moss*, [1897] P. 263, *per* Jeune, P., at 266, 267, 268, 271, 273, 274, 276, and 277; *Wilson* v. *Horn*, 1904, 41 S.L.R. 312; *Macleod* v. *Adams*, 1920, 1 S.L.T. 229.

Argued for the respondent—The contract of marriage required consent in the same way as did any other contract. The defender's fraudulent representation that the pursuer was responsible for her pregnancy induced the marriage and rendered the contract void. Even if it were not the case that the defender made the fraudulent representation, she in any event had a duty to disclose to the pursuer the fact that another man was responsible for her pregnancy, and the fraudulent concealment was enough to render the contract void—Stair, i, 9, 9; Erskine, i, 6, 2, and iii, 1, 16; Fraser, Husband and Wife (2nd ed.), vol. i, pp. 155, 456, and 461; *Wilson* v. *Horn*; *Stein* v. *Stein* (*cit.*), at 1914 S.C. 906, 908, 909, 51 S.L.R. 776, 777; *Alexander* v. *Alexander*, 1920, 1 S.L.T. 307, *per* Lord Justice-Clerk at 309.

At advising—

LORD PRESIDENT—The substantial question is:—whether it is a fraud entitling a husband to have his marriage annulled that his wife—with whom he had been sexually intimate before he married her, and who was to his knowledge pregnant at the date of the marriage—either (1) did not prior to that date disclose to him that her pregnancy was (as she well knew) due to antecedent sexual relations with another man, or (2) that she falsely represented to him as an inducement to promise her marriage and to marry her that he was the cause of her condition, and that she had never been intimate with anyone but him. The first alternative presents the case of essential error in entering into marriage induced by fraudulent concealment; the second that of fraudulent misrepresentation, inducing both promise of marriage and marriage itself. The issue in either alternative is the same so far as the question of law is concerned.

Marriage shares with contracts in general the characteristic that it requires mutual consent. In his chapter on Conjugal Relations Lord Stair describes it as the "conjunction of minds by mutual consent to the married state"—Inst. i, 4, 6. Consent implies that the parties must have a distinct intention common to both, and accordingly a fraud which procures a consent in words but not in intention is a good ground in the law of Scotland for declaring null a marriage which is such only in form and not in fact.

Personation by one of the parties precludes the possibility of common intention, and it has never been doubted that a marriage procured by personation would be bad, though the reports contain no example of such a fraud. In the recent case of *Stein* v. *Stein* (1914 S.C. 903) it was suggested that pregnancy impairs if it does not destroy the identity of the pregnant woman. This suggestion was drawn from the difference between "a woman who is single in every sense of the word" and "a woman who is integrally united to another human being," and the argument was that the husband's ignorance of the fact that his wife was at the date of her marriage pregnant by another man implied mistake as to her identity, the non-disclosure of her impaired identity amounting to personation. This argument was adumbrated rather than adopted in the judgment. It appears to me to be fanciful and unsound.

The case of *Cameron* v. *Malcolm* ((1756) M. 12,680; see also Fraser on Husband and Wife (2nd ed.), vol. i, 457, where a young girl was put through the form of marriage with a man who desired her fortune, without antecedent promise, and indeed without either design formed on her part or warning or explanation given to her on the part of others; and the case of *Blair* v. *Fairie* ((1766) 5 B.S. 921; see also Fraser on Husband and Wife (2nd ed.), vol. i, 461), where a woman, who desired to secure as a husband a man with whom she had been living on terms of sexual intimacy, arranged for the presence of witnesses in hiding at the place of assignation, and got from him in their hearing while he was *in æstu amoris* either a promise which subsequent carnal connection was supposed to seal, or an acknowlegment of marriage, are examples

of other kinds of fraud which—equally with personation—preclude the common intention indispensable to consent.

But the claim which the present pursuer makes assumes a much wider application to marriage of the ordinary principles of contract law than is involved in any of these cases. Grounds justifying such wider application are stated in the judgment in *Stein's* case, which we must accordingly either follow or overrule.

The decision in *Stein* was supported on the assumption that (using the words of the leading judgment) "the ordinary principles of contract law are applicable" to marriage "unless some valid reason can be adduced in any particular case for deciding otherwise." If this assumption is to be regarded as a proposition in the law of Scotland it is a novelty, and its width endows it with the highest importance. For fraud whether in concealment or in misrepresentation covers a field as extensive as human duplicity. Further, to rest the limitations of its scope on the interpretation by courts of law of such generalities as the good sense of mankind, or the interest of the public (as was suggested in the judgment), is to introduce into marriage law a flood of uncertainty and insecurity, These are qualities which accord but ill with the ideas of finality and stability attached to the married state in the legal conceptions of our own and other Christian countries, for social and religious reasons alike.

It is material to note the distinction pointedly adverted to in this connection, in the part of Lord Stair's chapter on Conjugal Relations already quoted from, between promises *de futuro matrimonio* and promises *de præsenti matrimonio.* The former have always, in one form or another, admitted of a wide application of the ordinary principles of contract law. Pactions of this sort are, as Lord Stair puts it, not only "naturally obligatory," but were "effectual also by the canon law, whereby espoused persons may be compelled to perfect marriage, *unless there arise some eminent discovery of the corruption or pollution of either party, or defect or deformity through sickness or accident.* Yet," his Lordship adds, "by the civil law there is place for either party to repent and renounce the espousal. Which is also the custom of this nation." The words I have italicised are significant, for the defences relevant against proceedings to enforce implement of the promise of marriage under the canon law, as described by Lord Stair, are reflected if not reproduced in the defences relevant against the action for breach of promise of marriage, which action our law admits notwithstanding the right of resilement from the promise. Thus non-disclosure by a woman to her affianced husband of the fact that she had borne an illegitimate child eleven years before has been sustained as a good defence against an action at her instance for breach of promise of marriage —*Fletcher* v. *Grant,* (1878) 6 R. 59.

But the promise *de futuro matrimonio* stands in law in a completely different position from the promise *de præsenti matrimonio.* In the same part of Lord Stair's chapter on Conjugal Relations his Lordship says a promise of the former kind "is only the espousals which are premised to marriage, that so solemn an act might be with due deliberation." But the "solemn act," of which a promise of the latter kind is the outward sign, is a definitive act of choice—the mutual and irrevocable selection or taking by a man and a woman of each other as the lifelong sharers of the privileges and burdens attached by law to the married state. Marriage is neither more nor less than that. No conditions can be attached to it. No qualifications can be made on its effect. "Errors in qualities or circumstances," says Lord Stair in the same part of the chapter on Conjugal Relations, "vitiate not; as if one, supposing he had married a maid or a chaste woman, had married a whore." This doctrine has never been questioned. It is even accepted as sound law in *Stein's* case. But the whore, by allowing the man to marry her in ignorance of her mode of life, is guilty of fraudulent concealment of the grossest kind. Her duty of disclosure in such a case, and the consequences produced by the success of her fraud, are at least comparable to the duty—and the consequences—flowing from the circumstances disclosed in *Stein's* case or in this. Yet the law of Scotland, while (before marriage) it denies to the woman guilty of this fraud any right to damages for breach of the man's promise to marry her, does not admit (after the marriage—even though it has been induced by the fraud) any appeal by the man to the principles of the ordinary law of contract. On the contrary, it refuses to look behind the definitive act of choice by which the man and the woman took each other, once and for all, for husband and wife—as the phrase goes, for better and for worse. The man's or the woman's choice is regarded as simply *his or her own;* and while the law gives him and her unfettered freedom, *rebus integris,* in ascertaining for himself and herself the truth of the apparent or pretended qualities of the other, it admits neither resilement or annulment once the act of choice is made. This I regard as the established rule of the law of Scotland.

It is not possible to distinguish the cases to which Lord Stair's doctrine applies from cases like *Stein* or this by relegating the former to the chapter of essential error as distinct from fraud. For the cases to which Lord Stair's doctrine applies, and particularly the case of the whore, are cases of pure fraud; and it matters nothing whether the *modus* was the preservation of appearances or pretence—non-disclosure or positive misrepresentation. It was, however, argued in *Stein* (with success), and it was argued again before us, that the cases to which Lord Stair's doctrine applies can be so distinguished; and the argument was founded on a passage in his Lordship's chapter on Reparation under the particular head of Circumvention—Inst. i, 9, 9. In that passage Lord Stair instances the cases of (1) a marriage with Sempronia under the belief that she was Maevia, and (2) a mar-

riage with Sempronia under the mistaken belief that she was a virgin, rich, or well-natured, as examples respectively of error in substantials which vitiates the marriage, and error in non-essentials which does not have that effect. It was said that from the context (which deals with the effect of circumvention or fraud on ordinary contracts) it should be inferred as Lord Stair's opinion that if the mistaken belief as to Sempronia's virginity, wealth, or good disposition, was induced by Sempronia's fraud, the marriage would, like any ordinary contract, be vitiated. If this were the true meaning of the passage it would—as was pointed out in *Stein*—go far further than the Court in that case thought was consistent with the law of Scotland. The passage can certainly be so read though it has never, so far as I can discover, been so read before. It is one often referred to, and it is quoted by the learned author of Husband and Wife (vol. i, 451) without reference to the context, and as reinforcing the doctrine in Lord Stair's chapter on Conjugal Relations which is founded on in this opinion. Moreover, if it were held to have the meaning attributed to it for the first time in *Stein's* case, the result would be to make Lord Stair flatly contradict in his chapter on Reparation the law of marriage as laid down by him in the appropriate chapter on Conjugal Relations. As I have already pointed out, the case of the whore, who concealed from the man she married her mode of life, is precisely one of circumvention, and that of the most cruel character.

In the passage from Bankton (Inst. i, 5, 35), which was founded on in *Stein's* case and in the argument before us, the opinion is expressed that, as concealment by the wife of her pregnancy by a *tertius* at the date of her marriage is regarded by the Mosaic law and by the laws of certain other Protestant countries in his day as a special case entitling the husband to annulment, "there is little doubt of our following these authorities strongly founded in the common sense of mankind." This opinion is entitled to the highest respect. But it stands alone, and it might be described as an opinion *de futuro* rather than *de præsenti*. It foreshadows what Lord Bankton thought might be a probable development of the law of Scotland. It does not profess to state the law as it was in his time. The note in More's edition of Stair, appended to the part of the chapter on Conjugal Relations to which I have alluded so frequently, states that "Lord Bankton is the only authority in our law who appears to contradict this doctrine" (being the doctrine on which the opinion I am delivering is founded). "He holds that if a man ignorantly marries a woman who is with child to another at the time, the marriage is void as being fraudulently contracted on the part of the woman. But in this opinion his Lordship" (*i.e.*, Lord Bankton) "has been generally held to be incorrect." This note supports the conclusion I have already stated, that Lord Stair's doctrine in the chapter on Conjugal Relations covered the case of fraud; and confirms me in the view that the opinion of Lord Bankton in the passage referred to cannot be regarded as authoritative.

It seems to me unreasonable, and indeed impossible, to make either concealment of pregnancy by another man, or misrepresentation of the true source of a disclosed pregnancy, a special ground of relief, while refusing relief—as the law (standing as it does) admittedly requires us to do—in the case of concealment of unchastity, however gross the unchastity be, and even though continued up to the date of marriage. An unchaste mode of life is a fact necessarily known to the wife. Pregnancy, as the result of her unchastity, is a fact that may or may not be known to her; and so is the true source of a disclosed pregnancy. The difficulties attaching to evidence of pregnancy and its true source in such circumstances as those disclosed on record in this case are a warning against relaxation of what is, in my opinion, the established rule of the law of Scotland.

I find myself, accordingly, constrained to hold that the case of *Stein* should not be followed, but, on the contrary, should be overruled; and that the pursuer's averments in the present case are not relevant to support the conclusions for nullity of marriage contained in the summons.

LORD JUSTICE-CLERK—This case, as the record now stands after amendment, raises the question whether, if a woman fraudulently represents to a man that he is the father of the child with which she is pregnant by another man, or fraudulently conceals the fact that she is so pregnant, and so induces the man who is so deceived to go through the ceremony of marriage with her, the marriage is null and void *ab initio*. The point seems to have been decided in the case of *Stein* (1914 S.C. 903), and that case now falls to be reconsidered, though the circumstances of the two cases are not identical.

The question is, What is the law of Scotland on the subject? and I am not moved in determining that question by what is the law of other countries. By our law, marriage no doubt involves much that is contractual, but in my opinion it is not subject to all the ordinary principles of contract law. There is no doubt a maxim, venerable by antiquity, *consensus non concubitus facit matrimonium*; but it is in my opinion quite wrong to deduce from this that marriage is only a contract. It is much more clearly accurate to say as Lord Fraser does—Fraser on Husband and Wife (2nd ed.), vol. i, p. 155—"It cannot be entered into without the consent of at least two parties, and it is this circumstance—in truth the sole similarity between it and a contract—which has led to the definition that it is simply a contract, like partnership or sale." On the following page the same learned author says—"Marriage makes the husband and wife one flesh." It is in itself an institution, and creates a status which the State recognises as affecting the rights and capacities not only of the parties to the marriage but of many others. To my mind it is most

misleading to speak of marriage as a contract or as subject to the law of contracts.

The pursuer's ground of action is pregnancy to another man, coupled with (*a*) fraudulent misrepresentation, or (*b*) fraudulent concealment, as to the cause of the pregnancy. It was not contended that either of these two elements, if they are separable (pregnancy by another man and fraudulent misrepresentation or concealment regarding it) will suffice to annul the marriage. Both must concur. But such fraudulent misrepresentation or concealment as to pregnancy as is here alleged is so gross, it was argued, that it renders the marriage null. It was not maintained that every fraud would produce this result. The pursuer felt constrained to rely on the conjunction of the two factors to which I have referred in order to limit the scope and effect of the judgment he asks. For, while there is no instance in our records of such a decree having been pronounced on the grounds now advanced before the case of *Stein*, it seems to be recognised that it would be difficult to restrict the logical effects of such a decision to the particular set of circumstances with which we are now dealing. But it is said that this fraud is of such "a peculiarly shocking character" that it cannot be allowed to succeed.

There are two facts in this case which, though not of equal or perhaps even of material importance, may be referred to, viz.—(1) The marriage was a regular marriage after proclamation of banns according to the form of the Established Church of Scotland, and (2) the pursuer avers that there was antenuptial carnal connection between him and the defender within a very short period, but a not unimportant period, after the connection to which he attributes the pregnancy—his own connection being more than six months before the birth.

This being a regular marriage, to use Lord Deas' language in *Robertson v. Stewart* (1874, 1 R. 532, at p. 667), the parties cannot be heard to say they did not mean and understand marriage. They meant to make marriage, and in my opinion they made marriage with all its incidents and consequences. They created the institution, the status, and the relationship, and bound themselves each to the other and both to the State in all that a regular marriage involves so far as outward and formal ceremonial and expressions of consent went.

But then the pursuer avers that the pregnancy and the fraud relied on annul all this. Let us deal with the two factors in the first place separately.

What is the effect of antenuptial pregnancy by another man? The most recent gynecological investigations seem to have established that pregnancy when it takes place is almost simultaneous with coition. While, therefore, marriage with a whore or an unchaste woman would not be affected by the whoredom or the unchastity, is it to be affirmed that if pregnancy follows, though at the time of the marriage it may be impossible for the woman to know of the pregnancy, the husband who himself has been a party to antenuptial incontinence with the woman he has made his wife, or intended to make his wife, can, in his option, get rid of all the obligations that the regular marriage he has entered into imports? In my opinion there is no authority in our law to justify such a resnlt, nor anything either in law or reason to justify it. The parties to the marriage intended to marry, and have created rights and obligations not only *inter se* but to the State and third parties, which, in my opinion, exclude any such right of recission — *vestigia nulla retrorsum*.

Then, as to fraud. I think the view stated by Lord Fraser is right, that our law does not recognise, so far as marriage is concerned, the distinction between the void and the voidable. If the alleged marriage is only a pretended marriage then it is null *ab initio* and never existed. But if there once was a marriage, then in my opinion the maintenance or determination of that relationship cannot, on such allegations as we have here, be in the option of one of the parties to it, other interests—even if there are no children—are involved which cannot, in my opinion, be determined or affected by the volition and at the option of one of the parties. Fraud in the realm of contract does not make the contract void, it only makes it voidable; and I do not think our law permits the relationship created by marriage to be destroyed where the question of its constitution is raised, in such circumstances as are alleged here, at the option of either of the parties, or even at the option of both the parties. As regards fraud, a clear distinction has, I think, been drawn. Fraud in and tainting the actual constitution of the marriage may be fatal. But, as Sir F. Jeune pointed out in the case of *Moss*, this is because of the distinction between fraud which induces a consent, and fraud which procures the appearance without the reality of consent.

It is conceded and, apart from concession, it is clear that antenuptial unchastity on the part of the wife will not affect the validity of the marriage. If discovered after a promise and agreement to marry it will entitle the man to break the promise and agreement, provided that is done before marriage (Confession of Faith, chap. xxiv, art. 5). But the marriage may take place after the state of pregnancy has been created but when it is impossible to know that that is so. In such circumstances, according to the judgment of *Stein*, the marriaage might be assailed, for the judgment is based on the view that the wife knew, or at least suspected, that she was pregnant, and did not believe that the pursuer had knowledge or suspicion of her condition. It is only when the peculiar fraud here alleged is superinduced on the pregnancy that the marriage, it is said, is open to challenge. But fraud in our law does not, as I have pointed out in the case of contract, make the transaction which is tainted with fraud void, it only makes it voidable, and in my opinion that involves the application of a legal principle which does not apply to marriage.

This question was distinctly, but imperfectly, discussed by Bankton. I do not, however, think he expressed any opinion as to what the law of Scotland on the point was. He speaks of mistakes as to qualities or circumstances "not essential to marriage," and adds that when a man ignorantly marries a woman who is with child to another at the time "the case is different," and says "there *is little doubt* of our following" certain authorities to which he refers. That opinion cannot, it seems to me, be accepted as a pronouncement as to what the law of Scotland had been settled to be when Lord Bankton wrote. In the century and a half which have elapsed since his work was published, no case of the kind has ever been raised, so far as our records show, till the case of *Stein*. I do not believe that during that long period cases have not occurred the circumstances of which would have justified the point being taken. In such a matter I am not prepared to be a party to introducing for the first time by judicial decision such a material pronouncement in our law of marriage as we are now asked to make. If that is to be done it must, in my opinion, be done by legislation.

I am therefore of opinion that we should hold the averments of the pursuer as to the nullity of the marriage irrelevant.

LORD DUNDAS—In my opinion (1) the case of *Stein* was wrongly decided, and (2) the pursuer's averments in the case now before us are not relevant to support his conclusion for nullity of marriage.

Our duty is, I take it, to administer the law of Scotland as we find it to have been, and to exist; and to abstain from encroaching upon what is truly the function of the Legislature. The judgment in *Stein* v. *Stein* (1914 S.C. 903) was not, I think, warranted by any previous authority. The passage cited from Bankton (Inst. i, 5. 35) does not, as I read it, state what I may call the doctrine of *Stein* as forming any part of the law of Scotland as it existed when the learned author wrote, but rather expresses his own view that at some future time it might fittingly, and would probably, be introduced into it. The passage from Stair Inst. i, 9, 9) seems to me to be one of those which are to be found in his Institutes, where the great lawyer's meaning appears, probably owing to the condensation of his style, to be ambiguous and uncertain. I am not for my part prepared to read it as announcing that marriage may be annulled on the ground of error induced as to the bride's fortune or other matter of that sort. There being, as I think, no previous authority to support the doctrine of *Stein* v. *Stein*, it seems to me to be little short of incredible that it should nevertheless have been part of our law, although prior to that case no one apparently had ever (even with the encouragement of Lord Bankton's opinion) asked or obtained the redress there accorded to the pursuer; such circumstances as were present in *Stein's* case must surely have occurred not very infrequently before that case arose. I find in a recent text-book of repute (Walton on Husband and Wife, 1893, p. 89, foot) a passage which I quote for what it may be worth—"What more gross fraud is well conceivable than this? A man marries a woman whom he has every reason to believe virtuous, and discovers that she is advanced in pregnancy by another man. Yet it may be assumed to be law in Scotland that he cannot have the marriage annulled on this ground." I believe the writer's words to represent the general understanding of lawyers in Scotland at the date of its publication.

In my judgment, then, the decision in *Stein* v. *Stein* marked a distinct step in advance of any earlier authority, and established an arbitrary exception to the rules of law previously recognised. If it were sound it seems to me that it would open the way to the annulment of marriages upon a variety of other grounds which might be represented with at least equal plausibility as entitling the sufferer to redress. Some of those are suggested by the Lord Ordinary, with whose reasoning I find myself in substantial agreement. I think that if *Stein* were allowed to stand as good law there would be a real danger that a situation might ensue such as was described by Lord President Dunedin (in *Coe*, 1909 S.C. at p. 396, when dealing with a very different region of the law) as one "where one seems almost driven by the course of decisions, each of which gradually goes a little further than the one which preceded it, until at last you reach a point which when the first decision was given was probably not contemplated." It is interesting to notice as illustrating my meaning, that Lord Anderson, who as Lord Ordinary in *Stein* v. *Stein* had formed an opinion adverse to the pursuer, found himself, after hearing the case argued upon his report before the First Division, able to concur in the judgment, but only because in his view it determined "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 was not long, however, before the same learned judge was induced to grant decree of nullity in the case of *Alexander* (1920, 1 S.L.T, 307) upon facts substantially identical with those presented in the case before us. These facts obviously differ from those in *Stein* v. *Stein*, yet Lord Anderson's judgment in *Alexander* bore expressly to proceed upon the authority of that case. The insidious process of extension had unconsciously begun.

I have studied *Stein's* case with the view of ascertaining what precisely was its *ratio decidendi*. It was not, and could not have been, that the case was one of actual personation. Lord Skerrington indeed points out that "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." Quasi-personation is a conception unknown to our law. Nor could the *ratio*

proceed on the footing that the pursuer would be bound to acknowledge and maintain the bastard infant as his own child. Nor, again, do I think it was based upon the view that the deceived husband would necessarily be unable for some time to procreate his own issue with this woman. It seems to me that the predominating ground of judgment in *Stein* v. *Stein* was that it involved "a fraud of a peculiarly shocking character," and that the error was "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 in identity." If that was the ground of judgment, I must respectfully say that I cannot agree with it. The gravity of the fraud cannot surely of itself make it a ground for annulling marriage. Nor can I regard the fraud, heinous though it was, as "peculiarly shocking," or the error as "unique." We have since *Stein* seen *Alexander's* case and the one now before us, involving fraud of a character cognate to, though not identical with, that in *Stein;* and as I have already said—perhaps with unnecessary insistence—I should foresee great difficulty, if *Stein* be sound in law, in refusing to annul marriages upon a variety of grounds based on frauds apparently of an equally, or scarcely less, shocking nature; and the door once opened it might, in my judgment, be difficult to stem the current of accumulating decisions until a point was reached at which marriage might be annulled upon all or any of the ordinary grounds upon which any other contract could be successfully assailed by reason of fraud. But the note of warning I have sounded has, I think, a material bearing; for "in truth" (I quote from the judgment of Sir James Hannen, P., in *Sottomayer* v. *de Barros* (1879, 5 P.D., at p. 101) "very many and serious difficulties arise if marriage be regarded only in the light of a contract. Marriage is indeed based upon the contract of the parties, but it is far more than a contract; it is a status arising out of a contract, and involves inseparable incidents and qualities inherent in and characteristic of itself alone. I believe that the fallacy which, in my judgment, lies at the root of the arguments necessary to the success of the pursuer, both in *Stein* and in the present case, arises from failure to recognise the essential distinction between marriage and any other contract known to our law.

It seems to me that we could not uphold the judgment in *Stein* v. *Stein*, or hold the present pursuer's averments to be relevant to support his conclusion for nullity of the marriage, unless we affirm what in my opinion it is impossible to affirm, that there is some sort of implied condition arising from the very nature of the contract of marriage which permits and favours such a course. In *Stein's* case the implication must, I apprehend, be that the marriage should be void if the woman had in her womb at the date of the ceremony the fruit of any carnal intercourse. In the present case the implied condition must, I suppose, be that the marriage should be void if the child, which at the time of his marriage the pursuer knew to have been conceived, was in fact not of his own creation. I know of no warrant for importing any such conditions. To do so would, in my judgment, be fundamentally contrary to the legal conception of marriage. Lord Fraser (Fraser on Husband and Wife, 2nd ed., vol. i, p 155) points out the essential differences between marriage and any other kind of contract—"it cannot be separated from its legal incidents. When entered into it is no longer governed by the contract of parties, but by the law of husband and wife, which tramples down all private stipulations." Those who marry enter upon that status with all its incidents, which they must needs accept; they cannot stipulate or adject conditions or reservations in regard to these as they might be free to do in making any ordinary contract or bargain. *Stein's* case was one of fraudulent concealment; the case before us (as the pleadings were amended at our bar) includes one of fraudulent misrepresentation. In both, if the pursuer's averments are true, he was the victim of an infamous imposture. But in both cases the spouses married each other, being of full age, free to marry, sane, subject to no physical incapacity, and not barred by reason of relationship or affinity. They took each other as spouses for better or for worse. I am unable to see how the fraudulent concealment, or fraudulent misrepresentation of the woman can annul the marriage. The fraud, if proved, may have been such as induced the husband's consent; but not, as was well put by Sir F. Jeune, P., in *Moss* .v. *Moss* ([1897] P., at p. 209), "such fraud as procures the appearance without the reality of consent." The man in each case accepted the woman he meant to marry as his wife. He could not, in my judgment, lawfully adject in doing so any condition, express or implied, that the marriage should only be valid if, in the one case, she had then in her womb no fruit of carnal intercourse, or, in the other case, if the child he knew to have been conceived should in fact be of his own begetting. I can see no legal basis for the implication of such conditions which if expressed would, in my judgment, have been illegal and inept. Antenuptial unchastity in a wife is not recognised by our law as a ground of nullity. I do not think that fraud as proved in *Stein's* case or as here averred can be so either.

It may be that our law must now and then refuse a remedy in what may appear to be very hard cases. It may be that frauds, such as that disclosed in *Stein*, or that which is here averred, or some of those suggested by the Lord Ordinary, ought, from the point of view of general policy in the interests of morality, to be made grounds upon which marriage may be annulled. But if it be so, as to which I express no opinion, such considerations are, in my judgment, for the Legislature to deal with and not for us. We must administer the law as we find it.

For these reasons I think that the Lord

Ordinary's interlocutor, pronounced in a sense contrary to his own opinion, cannot stand, and that the pursuer's averments in support of his conclusion for nullity of the marriage are not relevant to be admitted to probation.

LORD SALVESEN—I have had the privilege of reading the opinion of your Lordship in the chair, and I desire to express my entire agreement with every part of it. The case was remitted to Seven Judges because the judges of the Second Division were of opinion that the law laid down in *Stein* v. *Stein* (1914 S.C. 993) had such far-reaching consequences, and introduced so novel an element into the law of Scotland, that it required to be reconsidered on the first opportunity. Now that we have had a full argument on both sides of the bar, my first impression that the decision in *Stein's* case is erroneous has been amply confirmed. That decision is now seen to be unsupported by anything that is worthy to be called authority, and the fact that there had been no previous decision on the same lines during the centuries which have followed the exposition by Lord Stair of the law is almost conclusive when regard is had to the fact that the contract of marriage is one of the commonest of human relationships. I am glad that it will now be authoritatively settled that by our law no marriage between parties who have validly consented to enter into the contract can be annulled on the ground of fraud on the part of one or both of the parties who entered into the contract. In this respect the contract of marriage differs radically from every other kind of contract. Parties who enter into such a contract must be presumed to have made all the necessary inquiries to satisfy themselves of the truth of the inducements which have led them so to contract, and that whether the truth could have been ascertained by inquiry or not. Were it otherwise I cannot see how we could stop short of annulling at the instance of one of the parties any marriage where it was shown that, but for the misrepresentation or non-disclosure of some material fact which the other had a duty to disclose, the pursuer would have declined to contract. Were this principle, which is recognised in other contracts, held applicable to the contract of marriage the stability of our whole social structure would be gravely imperilled. The Legislature may introduce exceptions of an arbitrary character which can be strictly confined to the particular circumstances mentioned in the enactment, but when a court of law lays down principles it cannot foresee and guard against the consequences of these principles being carried to their logical conclusion. The only safe course is to maintain our common law as to the indissolubility of marriage (apart from well-recognised exceptions, mostly of a statutory origin), in accordance with what has been the universal view of the people of Scotland and of the legal profession in that country. I only desire to add that it is satisfactory to know that our law as now declared is in entire accordance with the law of England as laid down in the case of *Moss* ([1897] P. 263).

LORD MACKENZIE — I agree with the opinion of the Lord President.

In my opinion it is not one of the warranties of the contract upon which the status of marriage is based that the woman is not pregnant as the result of intercourse with another man. She does warrant her identity, and her capacity, both legal and physical. The man gives the same warranty on his part. Neither party gives any warranty in regard to quality. That is the law of Scotland as administered down to the decision in *Stein's* case. Whether it should continue to be the law is for the Legislature, not for a court of law. I may say I am unable to see how, if warranty as to quality is to be introduced, it is possible to confine it to one matter, viz., that the woman is not with child to another man. Other matters are equally material, of which certain forms of disease are examples.

LORD SKERRINGTON—I think it due to the three judges who concurred in the opinion which I delivered in the case of *Stein* (1914 S.C. 903) to say that they held as firmly as do your Lordships that marriage, although a contract, stands on a different plane from other contracts, and that for reasons which are obvious and which have deen indicated by your Lordships to-day. Indeed, the existence of that distinction actually formed a condition of the problem which they had to solve. If marriage could be regarded as an ordinary contract there was no problem and no difficulty. And yet the question was one which had been debated not only seriously but also keenly by lawyers who lived in different centuries and in different countries. Lord Bankton expressed a confident opinion that the view which he favoured would be adopted in Scotland, seeing that it was "strongly founded in the common sense of mankind." In modern parlance no reasonable man could view the matter differently.

Speaking for myself, I do not pretend that I ever saw the matter in so clear and strong a light as did Lord Bankton. I always thought that the question was one which had two sides, that it was one of impression, and that it struck different people differently. At the same time I was of opinion—and I have heard nothing to-day which shakes that opinion—that the question was an open one so far as Scotland was concerned, and that one might adopt Lord Bankton's view if one approved of it without doing violence to any principle of our matrimonial law. I approved of it because I thought that it was both reasonable and just, and because I did not think that its adoption would introduce uncertainty into our law of marriage. In other words, the *species facti* which were supposed to entitle the victim of fraud to an exceptional remedy in the case of *Stein* seemed to me to be so simple and so peculiar that a judge would have no difficulty in answering "yes" or "no" to the question whether a pursuer had succeeded in bringing himself within the exception.

Such was the position of matters in the year 1914. The situation to-day is different. A distinction which appeared to four Judges to be substantial and also workable in practice is condemned by Seven Judges (I include the learned Lord Ordinary) as unsubstantial, fanciful, and unworkable. That is a weighty opinion, not only for the reasons adduced in support of it, but also from the number and authority of the Judges who express it. I should be both arrogant and obstinate if I did not admit that the opinion of these Seven Judges—a majority of the Supreme Court of Scotland—suggests to me a serious doubt as to the soundness of the view approved in the case of *Stein*. Moreover, we are told that our brethren of the Outer House have found it impossible to take their stand upon the line of demarcation which was there laid down. The case of *Lang* v. *Lang*, in which we have now to give judgment, affords a striking illustration. If I had been asked six years ago to instance a case where a marriage ought not to be declared void on the ground of fraud, I should have selected the case of a man who contracted a marriage with a woman whom he knew to be pregnant, and who did so upon the faith of a false and fraudulent representation that he was the father of her unborn child. I trust that my reference to what has happened in the Outer House will not be misunderstood. I refer to the topic solely because it throws doubt, from a practical point of view, upon the soundness of the decision in *Stein's* case. For these reasons I think it my duty to express my adherence to the judgment about to be pronounced, in which *Stein's* case will be overruled. I do so all the more readily because I think that the judgment will be a beneficial one, in respect that it will tend to produce certainty in regard to the principles and the practice of our matrimonial law.

LORD ORMIDALE—I have had the opportunity of reading the opinion of Lord Dundas and I concur therewith.

The Court pronounced this interlocutor—

"... In conformity with the unanimous opinions of the Seven Judges, recal the said interlocutor in so far as it allows parties a proof of their averments as regards the conclusion for nullity: *Quoad ultra* adhere to said interlocutor, and remit the cause to the Lord Ordinary to proceed therein as accords. . . ."

Counsel for the Reclaimer (Defender)—MacRobert, K.C. — MacLean. Agent — Herbert Mellor, S.S.C.

Counsel for the Respondent (Pursuer)—Maclaren. Agent—John G. Todd, Solicitor.

Saturday, November 6.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

JOHNSTON *v.* ABERDEEN MASTER PLUMBERS' ASSOCIATION.

Trade Union—Rules in Restraint of Trade—Legality of Association at Common Law.

The rules and bye-laws of an association composed of master plumbers and firms of master plumbers contained certain provisions which curtailed to a large extent the freedom of the individual trader in his methods of conducting business. He was, *inter alia*, forbidden to order goods from wholesale merchants or manufacturers who were not members of the association. He was not allowed to do jobbing work at his own price, but only at rates fixed by the association. He was unable to tender for work unless the plumber's furnishings and fittings were supplied by the plumber-contractor, or to tender for competitive work unless it were measured and scheduled in accordance with the model schedule of the association. In estimating for plumber work he had to add 2½ per cent. as an estimate fee, and hand this over to the association. *Held* that the association was illegal at common law, its purposes being in restraint of trade.

Limitation of Action — Trade Union — Agreement—Enforcement—Declarator of Membership—Competency—Trade Union Act 1871 (34 *and* 35 *Vict. cap.* 31), *sec.* 4 (1).

The Trade Union Act 1871 (34 and 35 Vict. cap. 31), enacts, sec. 4—"Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely, (1) any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed. . . ."

A trade union having intimated to one of the members who had sold his business to a new firm that he had ceased to belong to the union, he brought an action against the union for declarator that he was still a member, and to restrain it from publishing any list of its members which did not contain his name. *Held* that the action was not excluded by section 4 of the Trade Union Act 1871, it not having been instituted with the object of directly enforcing an agreement between members.

Trade Union—Rules—Membership—Construction—"Ceasing to Carry on Business as a Master Plumber or Firm of Master Plumbers"—Sale of Business by Master Plumber.

The rules of a trade union composed of master plumbers or firms of master