

## MOSS v. MOSS (OTHERWISE ARCHER).

1897

May 20;  
June 4.

*Divorce—Nullity—Fraud—Pregnancy of Wife by another Man at Time of Marriage—Concealment by Wife from intended Husband.*

Concealment by a woman from her husband at the time of her marriage of the fact that she is then pregnant by another man does not render the marriage null and void.

SUIT by the husband for nullity of marriage on the ground of fraud on the part of the respondent.

The petitioner, a groom, had made the acquaintance of the respondent, a nurse in the same service, in 1889. In 1892 the petitioner went abroad, and on his return to England in 1895 became engaged to the respondent. In December, 1895, the petitioner, who was in service in Derbyshire, came to London with his master for three weeks, and while there met the respondent on several occasions. In June, 1896, he saw her at her father's house in Suffolk, when she pressed him to marry her, which he arranged to do in the following September. On September 29 the marriage took place, and on that day the petitioner's suspicions were for the first time aroused as to the respondent's condition, and he taxed her with being pregnant, which she denied at the time; about a week later she admitted her condition, and gave to the petitioner the name of the man whom she alleged to be her seducer. The petitioner then separated from her, and on October 17 a child was born. At the hearing several witnesses were called, relations of the parties, who all stated that they had no reason to suspect the respondent's condition at the time of the marriage. At the conclusion of the evidence in the case, which was undefended, the President intimated that he was satisfied that the petitioner did not know of his wife's condition; and that he had no grounds for making any inquiry as to her character.

Owing to the importance of the case, and its being undefended,

1897 <hr style="width: 100%;"/> MOSS v. MOSS.	the facts alleged in the petition had by direction of the President been placed before the Queen's Proctor with a view to the question of law being argued.
--	---

*Deane, Q.C., Ram, and Marchant*, for the petitioner. Admitting that there is no decision in the English Courts that concealment by the wife from her intended husband of her pregnancy at the time of the marriage is a ground for a decree of nullity, the case nevertheless falls within the principle of law which avoids a contract on the ground that the consent of one of the parties has been obtained by fraud. The validity of a contract of marriage depends upon the same considerations as the validity of any other contract, and must be tested in the same way. There must be consent by both parties, with a knowledge on their part of all material facts; here a material fact was suppressed by the respondent. The respondent's conduct was a fraud on the husband, for the presumption is that any child born in wedlock is his, and he might be called on to support another man's child. The pregnancy of the respondent rendered her incapable at the time of the marriage of bearing a child to her husband, and, being concealed, constituted a fraud in the essentialia of the marriage relation. In certain of the United States it is clear law that concealed pregnancy is a ground of nullity of marriage: *Reynolds v. Reynolds* (1); and in Massachusetts under such circumstances evidence of an express representation of chastity by the wife before marriage is unnecessary: *Donovan v. Donovan*. (2) In Pennsylvania such concealment raises a question for the jury under the direction of the Court whether the facts afford a ground which would entitle the husband to disown the marriage: *Allen's Appeal*. (3)

[They also cited *Scott v. Sebright* (4); *Turner's Marriage Bill* (5); *Foss v. Foss* (6); *Crehore v. Crehore* (7); *Rex v.*

- |                                    |                                    |
|------------------------------------|------------------------------------|
| (1) (1862) 85 Mass. (3 Allen) 605. | 17 Hansard (2nd Series), 787, 875, |
| (2) (1864) 91 Mass. (9 Allen) 140. | 1134.                              |
| (3) (1881) 99 Penn. 196.           | (6) (1866) 94 Mass. (12 Allen) 26. |
| (4) (1886) 12 P. D. 21.            | (7) (1867) 97 Mass. (1 Browne)     |
| (5) (1827) 59 Lords' Jour. 351;    | 330.                               |

*Burton-on-Trent* (1); *Aylesford Peerage Case* (2); Bishop on Marriage, ed. 1891, s. 485; Fraser on Husband and Wife, vol. i. p. 451.]

1897

---

 Moss  
v.  
Moss.

*Inderwick, Q.C.*, and *Guy Stephenson*, for the Queen's Proctor. All the essentials of a valid contract of marriage were present in this case—namely, intelligent consent, free agency, competent age and physical capacity, and compliance with statutory requirements. Fraud is not a ground for annulling a marriage except where it is of such a nature as to be inconsistent with the idea of there having been a real and intelligent consent by one of the parties. Marriage, although based on the contract of the parties, is not merely a contract in the ordinary legal sense of the term; it creates a status: *Niboyet v. Niboyet* (3), per Brett L.J.; *Sottomayer v. De Barros* (4), per Lord Hannen. The objection that the wife is under the circumstances incapable of bearing children to her husband is answered by the fact of its being at most a temporary disability. The decisions of the American Courts that have been cited are in conflict with the views of English law on the subject, and should not be followed.

[They also cited *Miles v. Chilton* (5); *Andrews v. Ross* (6); *Turner v. Meyers* (7); *Durham v. Durham* (8); *Hunter v. Edney* (9); *Cannon v. Smalley* (10); *Portsmouth v. Portsmouth* (11); *Cooper v. Crane* (12); *Ford v. Stier* (13); *Bartlett v. Rice* (14); *Fielding's Case* (15); *Wakefield v. Mackay* (16); *Ewing v. Wheatley* (17); *Sullivan v. Sullivan* (18); *Swift v. Kelly* (19); *Miss Turner's Case* (20); *Templeton v. Tyree* (21); *Ayliffe's Parergon*, p. 362 et seq.]

*Deane, Q.C.*, in reply.

*Cur. adv. vult.*

- |                               |                                      |
|-------------------------------|--------------------------------------|
| (1) (1815) 3 M. & S. 537.     | (12) [1891] P. 369.                  |
| (2) (1885) 11 App. Cas. 1.    | (13) [1896] P. 1.                    |
| (3) (1878) 4 P. D. 1, 11.     | (14) (1894) 72 L. T. 122.            |
| (4) (1879) 5 P. D. 94, 101.   | (15) (1706) 14 St. Tr. 1327.         |
| (5) (1849) 1 Rob. 684.        | (16) (1807) 1 Phillim. 134, n.       |
| (6) (1888) 14 P. D. 15.       | (17) (1814) 2 Hagg. Cons. 175.       |
| (7) (1808) 1 Hagg. Cons. 414. | (18) (1818) 2 Hagg. Cons. 238, at p. |
| (8) (1885) 10 P. D. 80.       | 246.                                 |
| (9) (1881) 10 P. D. 93.       | (19) (1835) 3 Knapp, 257.            |
| (10) (1885) 10 P. D. 96.      | (20) (1827) 1 Macq. H. L. Pr. 642.   |
| (11) (1828) 1 Hagg. Ecc. 355. | (21) (1872) L. R. 2 P. & M. 420.     |

1897

MOSS  
v.  
MOSS.

June 4. The following written judgment was delivered by  
SIR F. H. JEUNE, PRESIDENT. In this case the petitioner seeks to have his marriage with the respondent declared null and void, on the ground that, without his knowledge in fact, and without any neglect on his part to make himself acquainted with the truth, his wife was pregnant by another man at the time of his marriage with her. I find that these allegations of fact were proved. It was also stated that the connection of the respondent with the father of her child was incestuous. The proof of this was not made complete. I do not know whether it could have been; but the allegation was admitted to be immaterial for the purposes of the present case. Had the connection been with a relative, within the forbidden degrees, of the petitioner, there is high authority for saying that the marriage would have been incestuous and void.

On these facts, the argument before me was that there was fraud by the wife in regard to the essentials of marriage, and that, therefore, the marriage was null and void. It would perhaps be sufficient for me to say that for this proposition no authority in the English law can be found, and it would be impossible for this Court, at the present day, to give assent to a principle of such importance, and so far-reaching, without the sanction of precedent. The absence of English authority was, indeed, almost, if not quite, admitted on behalf of the petitioner, and the argument in his favour was mainly based on the reasoning in decisions of some of the American Courts. But the case was argued by Mr. Deane with so much earnestness and ability that I feel bound to state my view of the English authorities to which he referred, and to indicate the difference, as I conceive it to exist, between the law as understood in England and that laid down in other countries, and especially in certain States of America on the point in question.

In the case of *Swift v. Kelly* (1), decided in 1835, the Judicial Committee of the Privy Council, Lord Brougham, Baron Parke, and Shadwell V.-C. being members of the Board, expressed its opinion in the following terms: "It should seem, indeed, to be the general law of all countries, as it certainly is

(1) 3 Knapp, 257, at p. 293.

of England, that unless there be some positive provision of statute law, requiring certain things to be done in a specified manner, no marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances, consent never would have been obtained. Unless the party imposed upon has been deceived as to the person, and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made." It is not necessary to inquire how far the law of other countries may be supposed at that time to have been the same as that of this country; but I think that the above words, unqualified as they are, do represent with substantial accuracy the law of England. While habitually speaking of marriage as a contract, English lawyers have never been misled by an imperfect analogy into regarding it as a mere contract, or into investing it with all the qualities and conditions of ordinary civil contracts. They have expressed their sense of its distinctive character in different language, but always to the same effect. Lord Stowell said that it was both a civil contract and a religious vow—*Turner v. Meyers* (1)—referring, no doubt, mainly to the incapacity of the contracting parties to dissolve it. Dr. Lushington spoke of it as more than a civil contract: *Miles v. Chilton*. (2) Lord Hannen said: "Very many and serious difficulties arise if marriage be regarded only in the light of a contract. It is, indeed, based upon the contract of the parties, but it is a status arising out of a contract": *Sottomayer v. De Barros*. (3) The late President, Sir Charles Butt, said, in the case of *Andrews v. Ross* (4), that "the principles prevailing in regard to contract of marriage differ from those prevailing in all other contracts known to the law." It is not necessary to enumerate all those differences. The most striking of them are familiar. The parties who contract a marriage cannot at their will dissolve it. Excepting for the moment such fraudulent concealment or misrepresentation as is alleged in the present case, no fraudulent concealment or misrepresentation enables the defrauded party who has

1897

Moss

v.

Moss.

The President.

(1) 1 Hagg. Cons. 414.

(2) 1 Rob. 684, 694.

(3) 5 P. D. 94, 101.

(4) 14 P. D. 15.

1897  
 MOSS  
 v.  
 MOSS.  
 The President.

consented to it to rescind it. Incapacity to consent arising from mental weakness is a fatal objection, not only if urged by or on behalf of the person unable to consent, but if put forward by the capable party to the contract: see *Hunter v. Edney* (1); *Durham v. Durham*. (2) Again, if both parties to the contract knowingly and wilfully marry without compliance with the law as to publication of banns, either can have the marriage declared null—*Andrews v. Ross* (3)—a state of the law which drew from the late President the observation above quoted. I do not mean that, regarding marriage as a contract, explanations more or less far-fetched might not be given of these peculiarities, in order to force the law of marriage into line with the law of ordinary civil contract; but English Courts have not resorted to these expedients, and, while not taking a pedantic objection to the use of the term contract as applied to marriage, they have been content to recognise characteristic peculiarities in the nature and incidents of the marriage contract.

The result is that the English law of the validity of marriage is clearly defined. There must be the voluntary consent of both parties. There must be compliance with the legal requirements of publication and solemnisation, so far as the law deems it essential. There must not be incapacity in the parties to marry either as respects age or physical capability or as respects relationship by blood or marriage. Failure in these respects, but I believe in no others (I omit reference to the peculiar statutory position of the descendants of George II.) renders the marriage void or voidable. It has been repeatedly stated that a marriage may be declared null on the ground of fraud or duress. But, on examination, it will be found that this is only a way of amplifying the proposition long ago laid down (*Fulwood's Case* (4)) that the voluntary consent of the parties is required. In the case of duress with regard to the marriage contract, as with regard to any other, it is obvious that there is an absence of a consenting will. But when in English law fraud is spoken of as a ground for avoiding a

(1) 10 P. D. 93.

(2) 10 P. D. 80.

(3) 14 P. D. 15.

(4) (1638) Cro. Car. 482, 488, 493.

marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent. The simplest instance of such fraud is personation, or such a case as that supposed by Lord Ellenborough in *Rex v. Burton-on-Trent* (1) of a man assuming a name to conceal himself from the person to whom he is to be married. In *Portsmouth v. Portsmouth* (2) and *Harrod v. Harrod* (3) the fraud consisted in taking advantage of a mind not absolutely insane, but weak, to induce in the one case a man, in the other a woman, to enter into a contract, which (to use the phrase of Wood V.-C. in the latter case) he or she did not understand. *Browning v. Reane* (4) and *Wilkinson v. Wilkinson* (5) are other cases of the same kind. In all these, and I believe in every case where fraud has been held to be the ground for declaring a marriage null, it has been such fraud as has procured the form without the substance of agreement, and in which the marriage has been annulled, not because of the presence of fraud, but because of the absence of consent. This is illustrated by the imaginary case suggested by Lord Campbell in *Reg. v. Millis* (6) of a mock marriage in a masquerade where the kind of result which fraud might have produced would be produced by mistake. In such an instance there would be no fraud, but for want of real consent the marriage would be declared void. But when there is consent no fraud inducing that consent is material. Lord Stowell has at least three times expressed this in the most emphatic language. In *Wakefield v. Mackay* (7) that learned judge said: "Error about the family or fortune of the individual though procured by disingenuous representations does not at all affect the validity of the marriage"; in *Ewing v. Wheatley* (8): "It is perfectly established that no disparity of fortune or mistake as to the qualities of the person will impeach the vinculum of marriage"; and in *Sullivan v. Sullivan* (9): "The strongest case you could establish of the most deliberate plot, leading to a marriage the most

1897  
Moss  
v.  
Moss.  
The President.

(1) 3 M. & S. 537. (5) (1845) 4 N. of C. 295.  
(2) 1 Hagg. Ecc. 355. (6) (1844) 10 Cl. & F. 534, 785.  
(3) (1854) 1 K. & J. 4. (7) 1 Phillim. 134, n., 137.  
(4) (1812) 2 Phillim. 69. (8) 2 Hagg. Cons. 175, 183.  
(9) 2 Hagg. Cons. 238, at p. 248.

1897  
 MOSS  
 v.  
 MOSS.  
 The President.

unseemly in all disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable this Court to release him from chains which, though forged by others, he had riveted on himself. If he is capable of consent and has consented, the law does not ask how the consent has been induced."

The only authorities which were, before me, referred to as in any degree inconsistent with these views are the case of *Miss Turner's Marriage Act*, and a dictum of the late President in *Scott v. Sebright*. (1) Neither of these deals with such facts as are relied on in the present case, and they can be put forward at most as sanctioning a somewhat wider application of the doctrine of fraud as a ground for annulling marriage than the above authorities indicate. In the case of *Miss Turner* the marriage was annulled by Act of Parliament. It is not possible to say exactly on what ground the votes of the legislators were given; but it is suggested that the marriage was brought about, as indeed it was, by conduct into which fraud largely entered. It might be sufficient to say of this decision that, as was pointed out in *Templeton v. Tyree* (2), it was an Act of the Legislature, not necessarily, therefore, proceeding on the principles of the Ecclesiastical Courts which, in nullity cases, are the guide of this tribunal. It is also to be remarked that, in fact, the case was never brought before the Ecclesiastical Court, though, no doubt, the omission to do so was explained by Lord Eldon in the House of Lords and Mr. Peel in the House of Commons to have been caused by the impossibility of placing the evidence of *Miss Turner*, as a party, before the Ecclesiastical Courts. (3) But a stronger observation, I think, is that duress is distinctly alleged in the petition (4), and that the evidence in the case clearly proved that not only by fraudulent misrepresentations of fact but by duress of threats, such apparent consent as was given was extorted from the victim of this treatment. In *Scott v. Sebright* (5) the late President said: "The Courts of law have always refused to recognise as binding contracts to which the consent of either party has been obtained by fraud or duress,

(1) 12 P. D. 21.

(2) L. R. 2 P. & M. 420.

(3) 17 Hansard (2nd Series), 787, 1134.

(4) 59 Lords' Journ. 308.

(5) 12 P. D. 21, 23.



and the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract." Standing by themselves, these words may appear capable of a wider effect than any other English authority of which I am aware would warrant. But read in connection with the facts before the Court, which shewed a case of deception and force acting on a weakened mind, they do not appear to me to go further than to lay down that in the case of marriage, as in that of other contracts, fraud and duress may be so employed as to render an apparent consent in truth no consent at all.

The principles thus long and uniformly asserted by the English Courts, and the very fact that the point has never been raised, appear to me to be so conclusive on the present question that, even if it could be shewn that authority to the contrary could be found in the Canon law, I should say that that authority has not been accepted in this country. But as a fact I think that the principles above indicated may be traced back to the Canon law. I do not propose to enter into any detailed examination of the Canon law on this subject, and I am well aware that the question has been considered not to be free from doubt, but my own opinion is that the Canon law clearly refuses to allow a marriage to be declared null on the ground of previous unchastity of the wife, and goes far to declare that the only fraud which vitiates marriage is that which goes to the consent. I will quote only one authority, but that a high one. Ayliffe in his Parergon, p. 361, says: "Matrimony ought to be contracted with the utmost freedom and liberty of consent imaginable, without fear of any person whatsoever; for matrimony contracted through any menace or impression of fear is null and void ipso jure; . . . for marriages contracted against the will of either of the parties are usually attended with very bad and dismal consequences . . . I have just now observ'd that the principal thing required to a legal marriage is the consent of the parties contracting, which is sufficient alone to establish such a marriage. And tho' there is nothing more contrary to consent than error, yet every error does not exclude consent. Wherefore I shall here consider what kind of error

1897  
MOSS  
v.  
MOSS.  
The President.

1897

Moss

v.

Moss.

The President.

it is, according to the canon law, that hinders or impeaches a matrimonial consent and renders it null and void ab initio. Now there are four species of error, which are hereunto referr'd. The first is stiled error personæ, as when I have thoughts of marrying Ursula; yet by my mistake of the person I have marry'd Isabella. For an error of this kind is not only an impediment to a marriage contract, but it even dissolves the contract itself, through a defect of consent in the person contracting. For deceit is oftentimes wont to intervene in this case; which ought not to be of any advantage to the person deceiving another. A second species is stiled an error of condition; as when I think to marry a free woman, and through a mistake I have contracted wedlock with a bondwoman and so vice versa; for by the canon law such an error is an impediment to a matrimonial contract. But as there is now no such thing among Christians as persons that are truly bondmen or bondwomen (this kind of bondage or servitude being now abolish'd among us by the advantage of the Christian religion) I shall not long insist on this head. But if a freedman marry'd a bondwoman, knowing her to be such, the Church did not dissolve such a marriage. And thus we read that the marriage between Abraham and Agar the handmaid was a true and valid marriage. The third species is what we call error fortunæ; and is when I think to marry a rich wife and in truth have contracted matrimony with a poor one. But this error does not, even by the canon law, dissolve a marriage contract made simply and without any condition subsisting. But 'tis otherwise by that law if I have contracted with a person to marry her upon condition that she is worth so many thousands pounds, and the condition is not made good. The last species is stiled an error of quality—viz., when a person is mistaken in respect of the other's quality, with whom he or she contracts. As when a man marries Berta, believing her to be a chaste virgin, or of a noble family and the like, and afterwards finds her to be a person deflower'd or of a mean parentage. But according to the common opinion of the doctors this does not render the marriage invalid; because matrimony celebrated under such kind of error, in point of consent, is deem'd to be

simply voluntary as to the nature and substance of it, though in respect of the accidents 'tis not voluntary."

While the above is, as I believe, the correct view of the English law, there is no doubt, not only that the law of other countries is not the same on the point in question, but also that in America the difference has been arrived at by arguments which proceed on principles common to the American law with ours. It is not, of course, necessary to examine in any detail the positive enactments of any other country, nor the law of any country whose system of jurisprudence is not the same as our own. The law of the Civil Code of France, the German Protestant Ecclesiastical law, the Prussian, Austrian, and Italian Codes will be found collected in Fraser on Husband and Wife According To The Law Of Scotland, vol. i. p. 453. It is, however, curious to observe how the tribunals of some of these countries have deduced from the principle of nullity of marriage on account of error in the person (which English law treats only as a question of identity) the conclusion that concealed pregnancy, or even loss of virginity, vitiate marriage. Thus, a French Court, applying the language of the Code *erreur dans la personne* to the case of *erreur sur la personne morale* has held a marriage void on account of concealed pregnancy, a view rejected by the commission which prepared the Italian Code; and a Prussian tribunal appears by a similar interpretation of similar (perhaps somewhat wider) words in their Code to have included the case of unchastity. There is a remarkable decision on the Roman-Dutch law in the Supreme Court of the Cape of Good Hope: *Horak v. Horak*. (1) The facts there were the same as those in the present case, and the Court held the marriage void, following, it would seem, the authority of Voet against what Voet admits to be the authority, though he disputes the reasoning, of the Canon law. I will only point out that the learned judges feel compelled to repudiate the length to which Voet carries his argument—namely, the annulment of marriage on the ground of unchastity alone, and the language of their judgment recognises what difficult questions their decision raises and leaves for future solution. Although, however, the

(1) (1861) 3 Searle, 389.

1897

Moss

v.

Moss.

The President.

1897

Moss

v.

Moss.

The President.

question of annulment of marriage by reason of concealed unchastity has been discussed by Scotch text-writers, one authority only, Bankton, appears to have given in his adhesion to the doctrine of Voet as regards ante-nuptial incontinence in a wife, but he courageously overcomes the difficulty of parity between the sexes by remarking: "A breach of chastity in a man before marriage is not so heinous or scandalous as in a woman; nor is there a presumption that the woman would have refused the man on that ground, though she had known it." Lord Stair, on the other hand, has laid down: "If one married Sempronia supposing her to be a virgin rich or well natured, which were the inductives to his consent, though he be mistaken therein, seeing it is not in the substantials, the contract is valid" (see Fraser, vol. i. p. 451). There is no decision, as far as I am aware, of any Scottish tribunal annulling a marriage on the ground either of concealed unchastity or concealed pregnancy, nor has any distinction between the two ever been suggested.

The decisions in the American Courts on which the learned counsel for the petitioner places his main reliance do no doubt cover the present case, and the more important of them are, I think, decisions professing to be based on the same principles that we recognise. Speaking with all respect, these Courts have, in my opinion, introduced a novelty into the law common to the two countries, and have broken in on the principle that the only fraud which annuls a marriage is that which renders the mind of one of the parties not a truly consenting mind. They repudiate equally with English tribunals the idea that any other fraudulent representation vitiates a marriage; but they lay down that there is one fraudulent representation, or fraudulent concealment, which renders a marriage void, and that is the representation or concealment by which a woman induces one man to marry her when she is pregnant by another. The leading decision to this effect was given by the Supreme Court of Massachusetts in 1862: *Reynolds v. Reynolds* (1)—a case decided on demurrer. It is not quite clear whether the Chief Justice, by whom the case was decided, conceived himself to be

(1) 85 Mass. (3 Allen) 605.

deciding according to the principle of the Ecclesiastical law of England, because he was acting under a statute of the State (Stat. 1855, c. 27, re-enacted by Gen. Stats. c. 107, s. 4), which authorized a decree of nullity "when a marriage is supposed to be void or the validity thereof is doubted either for fraud or any legal cause," and he stated that "this statute was founded on the assumption that a marriage into which one of the parties was induced to enter through the fraud and deception of the other is null and void, and, like other contracts, may be annulled and set aside by the defrauded party." The learned and eminent American text-writer, Mr. Bishop, however, considers that this statute was "merely jurisdictional" (Bishop on Marriage, ed. 1891, vol. i. § 485), and I think, therefore, that it may be assumed that this enactment was not considered to enlarge the law.

The argument of the Chief Justice, as I understand it, is that fraud vitiates a marriage just as it does other contracts, but that the fraud must be "in the essentialia of the marriage relation," and that the fraud of a woman in concealing her pregnancy by a man other than her intended husband at the time of her marriage is such a fraud. It is, he considered, a fraud in the essentialia of marriage for two reasons—first, because a child may be born which, according to the presumption of law, will be the husband's, though not really his; and, secondly, because the woman, at the time of marriage, is incapable of bearing a child to her husband. The departure, as I venture respectfully to think, from the law of England consists not only in unduly extending the analogy between the law of marriage and the law of other contracts, but more especially in declaring a circumstance to be of the essence of marriage which the English law does not so hold. According to English law, as I have above said, the only material circumstance by operating on which fraud vitiates a marriage is the reality of consent. The law of Massachusetts appears to me to add another—not, indeed, the want of chastity in the wife, but such want of chastity as results in pregnancy at the time of the marriage. But are the grounds upon which this circumstance is singled out sufficient? The most effective

1897

MOSS

v.  
MOSS.

The President.

1897

Moss

v.

MOSS.

The President.

criticism of them appears to me to be supplied by the writer, Mr. Bishop, whom I have above mentioned. He analyzes the judgment in *Reynolds v. Reynolds* (1) with great minuteness, and with regard to both the points above mentioned he gives what appear to me to be conclusive answers. He points out, as to the presumption of paternity, that a man who has evidence to prove the marriage void can prove the child not to be his. It may be added that the birth of the child after marriage makes but little difference, according to English law, in the pecuniary liability of the husband, as the statute 4 & 5 Will. 4, c. 76, s. 57, throws on him, at least during his wife's life, the maintenance of her illegitimate children whenever born. As to the incapacity of the woman at the time to become pregnant by her husband, he replies that such incapacity (unlike the sexual incapacity for which the Courts annul marriages) is temporary only; and I think it might be added that incapacity to bear children, even if permanent, has never in our law been considered a ground for annulling a marriage. He is of opinion, therefore, that the reasoning, when looked at in all its parts, is unsatisfactory. In this opinion I respectfully agree. It appears to me impossible to say that it is immaterial that a wife has been unchaste and immaterial that she has become pregnant by that unchastity, but it is material if such pregnancy continues till the marriage. I could understand a broad principle that unchastity before marriage should vitiate the contract, as some legislatures have, I believe, enacted that it shall, on the ground that a man believes he is making a pure woman his wife. But that is assuredly not the law of England, and, unless there is to be one law for a man and another for a woman, it is impossible to suppose it ever could be. But I do not understand why the accidental circumstances—first, of misconduct resulting in pregnancy, and, secondly, of that pregnancy continuing to the marriage—should constitute the momentous difference between a valid and invalid marriage. I think I ought, in fairness, to add that, although Mr. Bishop disapproves the judgment of the Court of Massachusetts when looked at in

(1) 85 Mass. (3 Allen), 605.

its parts, he nevertheless approves of it as a whole. "Though the reasoning," he says (§ 494), "when thus examined, step by step, seems inadequate, few in our American profession will reject its conclusion. The true view plainly is that here is a cord of several strands, no one of which has strength enough to sustain the heavy consequence when put upon it alone. But duly combined they do sustain it. This effect of combination pervades equally the law of nature and the law of the land. In the latter it is frequently manifest, for example, in conspiracy, both civil and criminal, and it appears in every part of the law where there is occasion for its presence." I will only say that metaphor and analogy in legal reasoning are apt to be dangerous guides.

The above decision was followed, though under special statutes, in the cases of *Morris v. Morris* (1), *Ritter v. Ritter* (2), and *Carris v. Carris*. (3) Some of the American Courts have, however, felt bound to limit the application of the principle that concealed pregnancy at the time of marriage vitiates it. In *Scroggins v. Scroggins* (4) the husband would not swear that he believed his wife chaste at the time of the marriage. Both parties were white. After marriage a mulatto child was born. The marriage was, however, held to be valid on the ground, it would appear, that the husband should have detected his wife's condition. In a later case, *Scott v. Shufeldt* (5), it appears to have been suggested as the reason for this decision that the woman could not be proved to have deceived her husband, as she might not, at the time of marriage, have known whether he or the negro were the father. In *Crehore v. Crehore* (6) and in *Foss v. Foss* (7) the wife was pregnant at marriage by a man other than her husband; but the husband had been guilty of ante-nuptial incontinence with her, and it was held that he was "put on his guard" or "put on inquiry," and so a decree in his favour was refused. On the other hand, in a case in California—*Baker v. Baker* (8)—it would appear that

1897

MOSS

v.

MOSS.

The President.

(1) Wright, 630.

(2) (1839) 5 Blackford, 81.

(3) 9 C. E. Green, 516.

(4) 3 Dev. 535.

(5) (1835) 5 Paige, 43.

(6) 97 Mass. (1 Browne) 330.

(7) 94 Mass. (12 Allen) 26.

(8) 13 Cal. 87.

1897

MOSS

v.

MOSS.

The President.

the decision in *Scroggins v. Scroggins* (1) was disapproved of. I refer to these cases chiefly to shew that it has been felt that even the comparatively narrow principle that a marriage is voidable by pregnancy of the wife at the time of it by a man other than her husband must receive still further limitations. I venture to think that such limitations could not stop at the point indicated by the above decisions. What would be said if the husband did not become aware of his wife's pregnancy at marriage for a long time after it, and perhaps after the birth of legitimate children, as well might happen if a sailor left his wife for a voyage soon after marriage, and before his return there was a miscarriage or the child died? Could he many years after annul the marriage? It is difficult to see why not, if he had no means previously of discovering the truth. Could he bastardize his children? It is also difficult to see why not, unless some further refinement be introduced into the law. My belief is that to assent to the proposition for which the petitioner contends would be to introduce into a law which now is, and beyond question should be, and he believed to be, certain, a new principle not resting on any sound basis, and, develop as it must in several directions, sure to give rise to many doubts and much confusion. To shew that this apprehension is not visionary, I venture to quote the experience of the American text-writer to whom I have already referred, expressed in the last edition of his work (Bishop, vol. i. § 452). Speaking of the subject of fraud in relation to marriage, he writes: "Such judicial utterances upon it as we have are largely conflicting, and otherwise muddled. So that, should an author discussing it present all the views, and those only, which have occurred to the judges and found embodiment in their utterances, he would lead his readers into a labyrinth of contradictory and chaotic things, out of which the practitioner could not readily discover a path." I hope that I may be pardoned for declining to take a step which, apparently, leads to such consequences. I have to express my acknowledgments to the learned counsel on both sides for the great aid which their researches have afforded to me. I am sorry for the

(1) 3 Dev. 535.



undeserved misfortune of the petitioner, but the petition must be dismissed.

1897

Moss

v.  
MOSS.

*Petition dismissed.*

Solicitors for petitioner: *Gedge, Kirby & Millett.*

Solicitor for Queen's Proctor: *Solicitor to the Treasury.*

W. J. B.

[DIVISIONAL COURT.]

THE THEODORA.

1897

March 23;  
April 8;  
July 8.

*Admiralty—County Court—Practice—Action in rem—Freight—Counter-claim for Wrongful Arrest—Trial by Jury—32 & 33 Vict. c. 51, s. 2, sub-s. 1—51 & 52 Vict. c. 43, s. 101.*

In a proceeding in rem in a county court, under s. 2, sub-s. 1, of the County Courts Admiralty Jurisdiction Amendment Act, 1869, by a ship-owner against cargo owners, for balance of freight, the defendants counter-claimed, under the same sub-section, for 100*l.* damages for wrongful arrest of the cargo, and, under s. 101 of the County Courts Act, 1888, required a jury to be summoned for the trial of the action. The judge refused to allow the jury to be sworn. On appeal:—

*Held*, by the Divisional Court (Sir F. H. Jeune, President, and Gorell Barnes J.), affirming the decision of the county court judge, that, this being an Admiralty cause, the defendants were not entitled as of right to a jury, for the word “actions” in s. 101 of the County Courts Act, 1888, did not include Admiralty actions.

APPEAL by defendants from a refusal of the judge of the Hampshire County Court to allow a jury to be sworn to try an Admiralty action for balance of freight and counter-claim for wrongful arrest of cargo.

The material facts were shortly that:—

By charterparty, dated Rotterdam, January 21, 1897, it was agreed between the plaintiff, Jos. de Poorter, owner of the steamship *Theodora*, and the charterer's agents, that the vessel should load there a cargo of moss litter to be delivered at Portsmouth on payment by the consignee of the freight in cash, the master to have a lien on the cargo for the freight, and the ship