two-eyed employees, there was ample evidence to sustain the view that they failed in their duty to the appellant. I would allow the appeal and restore the finding as to liability of the judge.

Appeal allowed.

Solicitors: *Thomas V. Edwards; W. H. Thompson.*

[HOUSE OF LORDS]

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1950
Nov. 6, 7;
Dec. 14.

PRESTON-JONES . . . . . APPELLANT;

AND

PRESTON-JONES . . . . . RESPONDENT.

Husband and wife—Divorce—Adultery—Birth of child—Husband's absence for period between 360 *and* 186 *days before birth—Child apparently full-time and labour normal—Period between coition and conception—Absence of medical evidence—Judicial notice of facts of nature—Possibility of birth* 360 *days after coition.*

On a husband's petition for divorce on the ground of his wife's adultery, which she denied, it was established by evidence that during the period between 186 and 360 days before the birth of a child to her he had been continuously absent abroad, and that there had been no opportunity for intercourse between them. Evidence given by the wife that her husband had visited her about nine months before the birth was rejected by the court. The child was normally delivered and appeared a normal, healthy, full-time child. The allegation of adultery was based solely on the circumstances of its birth. A general medical practitioner, giving evidence on behalf of the husband, said, in answer to questions by the judge, that in the vagina spermatozoa would not live more than a few days at the most, and that they would be unlikely to get into the uterus; he further said that he could not give an opinion as to the maximum possible interval between the time of sexual intercourse and the time of impregnation of the ovum, but that he thought it would be a few hours; he added that he had never studied that aspect. The judge said that he was not satisfied by the evidence beyond reasonable doubt that adultery had been committed. The Court of Appeal having ordered a new trial, the husband appealed to the House of Lords.

* *Present*: LORD SIMONDS, LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON and LORD MACDERMOTT.

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Held (*per* Lord Simonds, Lord Normand, Lord Morton of Henryton and Lord MacDermott; Lord Oaksey dissenting) that the onus of proof on the husband did not extend to establishing the scientific impossibility of his being the father of the child, and that, on the whole evidence, the wife's adultery had been proved beyond reasonable doubt.

Per Lord Simonds, Lord Oaksey and Lord MacDermott (Lord Normand dubitante, and Lord Morton of Henryton dissenting). In the case of an interval of 360 days between intercourse with her husband and the birth of a child the court cannot, in the absence of further evidence, regard adultery by the wife as established.

Per Lord Simonds. When the interval diverges largely from the normal the onus of proof on the husband is light and easily discharged.

Gaskill v. *Gaskill* [1921] P. 425 considered and explained.

Decision of the Court of Appeal [1949] W. N. 339; 65 T. L. R. 620 reversed.

APPEAL from the Court of Appeal (Bucknill and Asquith, L.JJ.; Denning, L.J., dissenting).

The facts, summarized from their Lordships' opinions, were as follows: The husband (the appellant) was married to the wife (the respondent) on April 14, 1941, at Brymbo in the county of Denbigh. Jean, a child of the marriage, was born on April 15, 1942. On August 13, 1946, a second child was born to the wife. The husband, alleging that this child was not his child and founding on the circumstances of his birth a charge of adultery against the wife, on November 8, 1946, presented a petition to the High Court for the dissolution of his marriage. He alleged "that the said child was conceived some time between August 29, "1945, and February 13, 1946, during the whole of which period "of time [he] was absent from the United Kingdom and . . . "the [wife] was resident in the United Kingdom" and that the child must therefore have been conceived as the result of an act of adultery.

The petition was first heard by His Honour Commissioner Burgis, who dismissed it. The husband appealed to the Court of Appeal and that court allowed the appeal on the ground that the commissioner had largely decided the case upon evidence given by the wife which under the rule in *Russell* v. *Russell* (1) was inadmissible, set aside the order of the commissioner and directed the petition to be reheard before another judge.

The petition was reheard on March 24, 1949, by Mr. Commissioner Blanco White, K.C.

(1) [1924] A. C. 687.

The midwife who attended at the birth gave evidence that she was called at 7.30 a.m. on August 13, 1946, and that the wife was delivered by her at 8.15 a.m. of a full-time male child weighing 8 lbs. 4 oz., which was not forced into the world, the birth being normal.

The only medical evidence was that of William Glyn Evans, whose qualifications were M.D., Edinburgh, and a Diploma of Public Health. He was a general practitioner but there was no evidence of his age or experience. He did not attend the wife in childbirth but first saw her when he examined the baby on October 12, 1946. He formed the view (which was not contested) that the child was normally developed and at birth was undoubtedly a full-time baby. Being told that it was born on August 13, 1946, he expressed the opinion that "the probable "date of conception was on or about November 6. . . . But "allowing for an extension, say, of twenty days—it has been "known—it would bring it to the second or third week in "October. . . . In my opinion the ultimate date of conception "was about October 23. . . . It would be very extraordinary if "it was conceived after November 6".

At the end of his examination in chief the commissioner thus questioned him: Q.—"What you are saying is that after a "woman becomes pregnant her periods might go on?" A.—"That is so occasionally. Once or twice it has been known they "do have periods afterwards". Q.—"Is it possible for the live "spermatozoa to get tucked away in some crevice in the vagina "or the mouth of the uterus?" A.—"Or in the tubes. But "then you do not get a natural . . .". Q.—"Spermatozoa do "live a very long time, do not they?" A.—"Yes, as long as "they are in the body, yes". Q.—"Are there not any crevices "in the vagina and the mouth of the womb where spermatozoa "might lodge?" A.—"No, my Lord, because the secretions "would destroy the spermatozoa after a time. They would in "the fallopian tube which is a tube going from the uterus to the "ovary. They do sometimes live there and develop and you get "a pregnancy in the tube, but in the vagina they would not live "more than a few days at the most". Q.—"I have heard Sir "Bernard Spilsbury speak about a case where he found the "corpse of a woman who had been drowned for three weeks with "live spermatozoa in the vagina. You say that could not happen "in a live woman?" A.—"I should think it could, but I should "think it would be very unlikely that it would ever get into "the uterus".

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This matter was not pursued in cross-examination by counsel for the wife, but the commissioner further questioned the doctor thus: Q.—"When the doctor says twenty days I think . . . he "is allowing the possibility of twenty days from sexual inter-"course to impregnation". A.—"No, my Lord, what I mean "when I say twenty days for the gestation is 280 days, but it has "been known to go to 300 days". At the end of his re-examination the commissioner asked: Q.—"What is the maximum "period, in your view, from the time of sexual intercourse to "the time of impregnation of the ovum?" A.—"I cannot give "an opinion on that, my Lord. I should think a few hours; but "I have never studied that aspect, my Lord". The doctor was not asked anything by counsel on either side as to an interval between coition and fertilization.

The husband called evidence that he was not in Britain between August 18, 1945, and February 8, 1946. There was no evidence against the wife of any suspicious relations with any other man or of any looseness of conduct, nor did anything appear to suggest that she was other than a respectable hard-working woman. Certain letters, from which an inference unfavourable to her might be drawn, were admitted by the commissioner "as "evidence of the respondent's conduct, for what they are "worth", but the rule in *Russell* v. *Russell* (2) debarred her from giving evidence with regard to them so far as they bore on the issue of legitimacy.

The wife in giving evidence in chief, apart from formal questions as to her name and address, was only asked by her counsel: Q.—"Have you ever committed adultery?" A.—"No". Three witnesses were called on her behalf—her mother, her sister, and one Mulhern—and they gave evidence to the effect that the husband was home on leave between August and Christmas, 1945. The dates given by them were vague.

The commissioner, in his judgment, said: "I am satisfied "beyond a reasonable doubt on the evidence adduced on behalf "of the petitioner that the petitioner was not in this country "between August 17, 1945, and February 9, 1946". As to the letters, he said they had been admitted "for what they were "worth, as evidence of conduct only but not as evidence of any "declarations in them bearing directly upon the point whether "the child born on August 13, 1946, was legitimate or not". As to the wife's baby, he found that it "was born to her on

(2) [1924] A. C. 687.

"August 13, 1946, weighing 8¼ pounds, apparently normal in "every way", and added: "I am satisfied beyond a reasonable "doubt that the intercourse from which that child proceeded took "place more than 186 days before the birth of the child". As to the doctor's qualifications, he said: "His business is to bring "children into the world alive and healthy . . . he is not an "academic specialist". As to the conception, he said: "I have "no reasonable doubt that the ovum from which that child was "produced was impregnated somewhere about the normal time "before that child was born. The doubt in my mind is as to "the period which is the longest period that is practicable "between the time of coition and the time of impregnation of "the ovum; and that is a scientific question. . . . I do not "know how long spermatozoa will remain alive in the tucks and "crannies of the female genital tract. I have got no medical "evidence on the subject". He concluded: "I am not satisfied "beyond a reasonable doubt that adultery has been committed. ". . . The question reduces itself to the simple question as to "whether the court's judicial knowledge of natural laws enables "it to say without any satisfactory evidence that 360 days "between coition and birth is an impossible period and whether, "if that period elapsed, a woman, who is, so far as the rest of "the evidence goes, a respectable woman, is to be convicted of "adultery. I think not". He dismissed the petition.

The husband appealed to the Court of Appeal, which on July 22, 1949, set aside the commissioner's order and ordered the cause to be reheard by a judge of the High Court if possible. The husband appealed to the House of Lords, asking that a decree for dissolution of the marriage should be made. The wife cross-appealed, asking that the petition should be dismissed.

Sir Godfrey Russell Vick, K.C., *Mars-Jones* and *Scholfield* for the appellant husband. This petition should be granted and there should not be a new trial. The husband has established beyond a reasonable doubt that the child, born 360 days after the departure of the husband and six months after his return, must have been conceived in adultery. Its weight and development were normal, and the medical evidence that the normal period of gestation is 280 days, but that 300 days had been known, discharged the burden of proof. The doctor's evidence was all one way and precluded the possibility of reasonable doubt. The husband's case was sufficiently established without the letters which the commissioner admitted. Further, the court should

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take judicial notice of the impossibility of a normal child being born 360 days after coition. Moreover, on a question of scientific fact the court cannot consider the evidence given in some other case, even though it be recorded in the reports.

The question raised by the commissioner as to the possibility of an interval between coition and conception was sufficiently dealt with in the doctor's evidence, and reasonable diligence did not require the husband to call medical specialists to deal with it. It was a completely fresh point, since the wife's defence, which the court rejected, had been on completely different lines. She had attempted, without success, to establish a false story of the husband having been on leave about nine months before the birth. This was not consistent with her being a respectable woman with an easy conscience.

Middleton, K.C., and *Henry Brandon* for the respondent wife. The wife has stood twice in peril on a charge which is semi-criminal. The maxims, interest reipublicæ ut sit finis litium and nemo debet bis vexari pro unâ et eâdem causâ apply here, and the petition should be dismissed. It has been found that there was no evidence of loose conduct on the part of the wife. The charge of adultery rests solely on the circumstances of the birth of the child. That charge must be proved strictly. Such a case as this should not be determined on a balance of probabilities. Further, it is not for the wife to prove affirmatively the possibility of the child being the husband's. It is for him to prove the negative. Since an adverse decision would bastardize the child, the onus is on the husband to show that it was impossible for him to be the father, and it is a heavy onus. The presumption is always in favour of legitimacy.

The law was correctly laid down in *Gaskill* v. *Gaskill* (3): see also *Head* v. *Head* (4) and *R.* v. *Luffe* (5). As to matters on which the court will take judicial notice, see *Reg.* v. *Aspinall* (6). The question here is simply whether or not the onus on the husband has been discharged. The onus probandi is the key to this case. No one knows the ultimum tempus pariendi and it has not been established by the evidence: see *Wood* v. *Wood* (7) and *Hadlum* v. *Hadlum* (8). See also Le Marchant on the Gardner Peerage Case (1828); Note E on the Banbury Peerage Case, p. 389 et seq.; and Nicolas on The Law of

(3) [1921] P. 425, 433–4.
(4) (1823) 1 Sim. & S. 150.
(5) (1807) 8 East 193, 205–6.
(6) (1876) 2 Q. B. D. 48, 61–2.
(7) [1947] P. 103.
(8) [1949] P. 197.

Adulterine Bastardy (1836). There was no evidence on the problem of the possible interval between coition and impregnation. It is to be noted that in any case in which there was such an interval the wife would not at first know that she was pregnant.

The commissioner found that the husband had not discharged the onus of proof. He was not " satisfied on the evidence " that the case had been proved and so it was his duty to dismiss the petition: see s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 4 of the Matrimonial Causes Act, 1937. The wife should keep the judgment which she obtained from him and there should not be a new trial. The husband should have called evidence on the problem of the possible interval between coition and impregnation and a new trial should not be granted in order to give him an opportunity of doing so: see *Shedden* v. *Patrick* (9) and *Nash* v. *Rochford Rural District Council* (10). Alternatively, if the House will not refuse the husband a decree then there should be a new trial.

Brandon following. The fact that the wife put forward the defence that her husband had been home on leave in October or November, 1945, cannot affect the possibility of a birth 360 days after coition. This case is concerned not only with alleged adultery but with legitimacy. The child is not represented and should not be prejudiced by the case made by the wife. The reluctance of the court to bastardize a child is the reason for the high standard of proof demanded in cases affecting legitimacy. In this case the wife may have been the victim of a freak of nature and in such a case it would be impossible for her at first to be aware of it. It is legitimate to look at other similar cases to see on what sort of matters evidence should be produced. The court must consider not only the interval between impregnation and birth but also that between coitus and impregnation. The commissioner was right in holding that he had no satisfactory evidence on this point. The husband should have called evidence of the best medical opinion, as in *M-T.* v. *M-T.* (11). Reasonable diligence required it. Though it is sufficient to prove adultery beyond reasonable doubt, when it is sought to prove that it is impossible for a wife's child to be also her husband's a higher test is to be applied. If a new trial is ordered the wife

(9) (1869) L. R. 1 Sc. & D. 470, 545.
(10) [1917] 1 K. B. 384.
(11) [1949] P. 331.

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would have the benefit of the abrogation of the rule in *Russell* v. *Russell* (12).

Sir Godfrey Russell Vick, K.C., in reply. The court can take judicial notice of a natural impossibility: see *R.* v. *Luffe* (13). In the case of adultery the evidence must amount to proof beyond reasonable doubt: see *Ginesi* v. *Ginesi* (14) and *Miller* v. *Ministry of Pensions* (15), which indicate the law as to onus of proof. In this case the doctor in his evidence stated that spermatozoa in the fallopian tube " would not live more than a few days at the " most ". That was evidence to dispose of the suggestion as to a possible interval between coition and impregnation. The case was conducted on the lines that the wife was putting forward a pregnancy resulting from intercourse in November, 1945, and in the circumstances scientific evidence was unnecessary. The best evidence was that of the doctor and the midwife as to the fact that the child was normal.

Their Lordships took time for consideration.

December 14. LORD SIMONDS. My Lords, your Lordships have to consider an appeal by the petitioner in a divorce suit, whom I shall call " the husband ", and a cross-appeal by the respondent in that suit whom I shall call " the wife ". By his appeal the husband submits that an order of the Court of Appeal, so far as it directed that the cause should be reheard, should be set aside and that in lieu thereof a decree for dissolution of his marriage with the wife should be made. The wife by her cross-appeal submits that the order of the Court of Appeal should be set aside and the judgment of Mr. Commissioner Blanco White, whereby the suit was dismissed, should be restored.

[His Lordship stated the facts and continued:—] The commissioner expressed himself as satisfied beyond reasonable doubt that the husband was not in the United Kingdom between August 17, 1945, and February 9, 1946, and that the child born on August 13, 1946, and weighing 8¼ pounds was apparently normal in every way and could not have been begotten as the result of intercourse on or after February 9, 1946, the day on which the husband returned to the United Kingdom. The commissioner admitted in evidence certain letters written by the wife —to use his own words—" for what they were worth, as evidence

(12) [1924] A. C. 687.
(13) 8 East 193.
(14) [1948] P. 179, 181.
(15) [1948] L. J. R. 203, 204.

" of conduct only but not as evidence of any declarations in them " bearing directly on the point whether the child born on " August 13, 1946, was legitimate or not ". It is clear that the commissioner was not influenced in favour of the husband by these letters but came to the conclusions of fact which I have stated in spite rather than because of them. I do not propose to make any further reference to them except to say that they appear irrelevant to the issue which has now to be determined and that, with great respect to the Lords Justices who thought otherwise, I can see nothing in their admission in the circumstances in which they were admitted which is fairly open to criticism. The question which then presented itself to the commissioner was whether the fact that at least 360 days elapsed between the last possible intercourse between husband and wife and the birth of the child, together with the medical evidence which was given in the case and to which I must later refer in detail, put it beyond reasonable doubt that the child was not the child of the husband. This question he answered in the negative. It is, I think, clear that he did not consider that he would be justified in finding that adultery had been committed merely on the ground of the lapse of time without medical evidence and he found the medical evidence that was adduced unsatisfactory.

The husband appealed from the order of the commissioner to the Court of Appeal, which on July 22, 1949, set it aside and ordered that the cause be reheard before a judge of the High Court if possible. From the order of the Court of Appeal the appeal and cross-appeal have been brought which I have stated at the outset of this opinion. Bucknill, L.J., with whom Asquith, L.J., agreed, expressed himself thus (16): " The com- " missioner in his judgment said it appeared to be a pure " question of law whether 360 days is an impossible period " without any satisfactory scientific evidence to that effect. I " myself see the case not in that light but rather as one where " the court must balance the probabilities one against the other. " On the one hand there is the very great improbability, I will " not put it any higher, that a woman can, 360 days after coitus, " give birth to a normal full-time child of 8¼ pounds without any " difficult labour, and after a pregnancy which, according to the " wife, was not unduly prolonged, but, on the contrary, was cut " short. As against this high improbability there is the fact that " the wife has put forward the case of a visit by the husband to

(16) (1949) 65 T. L. R. 620, 623.

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" her in November, a case which the commissioner has not " accepted. If the matter rested there I should be in favour of " allowing this appeal ".

The Lord Justice, however, found in the admission of the letters to which I have referred a sufficient reason for ordering a re-hearing instead of granting a decree. I have already indicated that in my opinion the admission of the letters and the course taken in regard to them did not in any way prejudice the wife and I do not think that the Lord Justice was justified in the course that he took. It would appear from the passage that I have cited from his judgment that apart from this consideration he would have thought fit to grant a decree, notwithstanding the criticism of the medical or scientific evidence which had led to the commissioner refusing to do so.

Denning, L.J., dissented. He took the view that the child was obviously conceived in November, 1945, and that, once it was proved that the husband had not been in England since August, the irresistible inference was that it was conceived in adultery. " In the absence ", he said (17), " of any evidence " on the matter, I should have thought that, according to the " ordinary knowledge of mankind, a 360-day normal baby is " impossible; and the courts should not assert that it is possible " unless there is direct medical evidence to that effect. None " was produced in this case, nor in any other case so far as I " know." It appears, then, that the Lord Justice did not rely on any medical evidence that was given in the case, but thought proper to assume judicial knowledge of the material facts. This is what is intended by his reference to the " ordinary knowledge of mankind ".

It is plain, my Lords, that these appeals raise a question of peculiar difficulty, which I may state in this way: " If a husband " proves that his wife has given birth to a normal child 360 days " after he could have had intercourse with her, and no proof of " any adulterous intercourse by her is given, what, if any, further " evidence is required that the child is not his child? "

Let me first get one difficulty out of the way. A question was raised as to the standard of proof. The result of a finding of adultery in such a case as this is in effect to bastardize the child. That is a matter in which from time out of mind strict proof has been required. But that does not mean that a degree of proof is demanded such as in a scientific inquiry would justify

(17) 65 T. L. R. 624.

the conclusion that such and such an event is impossible. In this context at least no higher proof of a fact is demanded than that it is established beyond all reasonable doubt: see *Head* v. *Head* (18). To prove that a period of so many days between fruitful coition and the time of conception is in a scientific sense impossible is itself, I suppose, a scientific impossibility. The utmost that a court of law can demand is that it should be established beyond all reasonable doubt that a child conceived so many days after a particular coitus cannot be the result of that coitus. I would add that since writing this opinion I have had the advantage of reading that of my noble and learned friend Lord MacDermott and concur in what he says upon this matter.

The question, then, that I have posed resolves itself into two parts. First, is it permissible for the court to assume judicial knowledge that beyond all reasonable doubt a normal child born 360 days after the last coitus between husband and wife is not the child of the husband? And, secondly, if not, was there evidence in the present case which the commissioner should have accepted as justifying that conclusion?

Upon the first question it has never, I think, been doubted that the court has judicial knowledge of the normal period of human gestation, though that period has from time to time been differently stated—e.g., 270 to 275 days in *Bosvile* v. *Attorney-General* (19); 273 to 280 days in *Burnaby* v. *Baillie* (20). But two doubts at once obtrude themselves. First, the word "normal" has been used, and the use of it suggests that there may be an abnormal period. Can the court altogether, and, if not altogether, within what limits, disregard the abnormal and, fastening on the normal as that of which alone it has judicial knowledge, find as a fact that adultery has been committed if the period of gestation has been abnormal and no evidence to explain it has been adduced on one side or the other? Secondly, while the court has judicial knowledge of the normal period of gestation, i.e., the period between conception (by which I mean the union of the male and female cells), and birth, can it ignore the fact, which in recent cases has been brought to its notice, that there may be that interval between coitus and conception to which I have already referred. In other words, even assuming that the court could without evidence refuse to hold that a normal child was born 360 days after conception, could it without evidence refuse to entertain the possibility of a thirty, sixty or ninety day interval

(18) 1 Sim. & S. 150.
(19) (1887) 12 P. D. 177, 183.
(20) (1889) 42 Ch. D. 282, 296.

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between coitus and conception? These doubts that I have raised are, of course, different aspects of the same problem.

My Lords, I have great sympathy with the view expressed by Denning, L.J. It would, I think, appear a fantastic suggestion to any ordinary man or woman that a normal child born 360 days after the last intercourse of a man and a woman was the child of that man and it is to me repugnant that a court of justice should be so little in accord with the common notions of mankind that it should require evidence to displace fantastic suggestions. But, as so often occurs in human affairs, the difficulty lies in drawing the line. I cannot disregard the fact that in *Gaskill* v. *Gaskill* (21) Lord Birkenhead, L.C., held that in the then state of medical knowledge a period of 331 days could not be regarded as impossible, that in *Wood* v. *Wood* (22) Lord Merriman, P., in the absence of any medical evidence came to the same conclusion in regard to a period of 346 days and that in *Hadlum* v. *Hadlum* (23) a period of no less than 349 days was not regarded as impossible. I must, I think, however reluctantly, come to the conclusion that an additional period of eleven days, making 360 days in all, ought not to be regarded as making the vital difference so that the court can without any further evidence regard adulterous intercourse as proved beyond all reasonable doubt. I do not ignore that in *M-T.* v. *M-T.* (24) Ormerod, J., held that a lapse of 340 days between coitus and the birth of a normal healthy baby was impossible, but he did so upon the evidence of Sir Eardley Holland, a distinguished specialist in this branch of medicine, who said that he had never heard of an authentic case of an interval of twenty-one days between coitus and fertilization such as had been suggested as a possibility in *Gaskill's* case (25) before modern methods of examination were available, or even of an interval of fourteen days which had been referred to in *Hadlum's* case (26).

I come then to the second branch of the question that I posed, which concerns the evidence in this case. It is clearly a matter which may be of importance in other cases also. Your Lordships would, I think, regard it as undesirable that the burden should be imposed upon litigants in this class of case of adducing evidence of the character which in *Gaskill* v. *Gaskill* (27) Lord Birkenhead thought it expedient for the Attorney-General to ask for the

(21) [1921] P. 425.
(22) [1947] P. 103.
(23) [1949] P. 197.
(24) [1949] P. 331.
(25) [1921] P. 425.
(26) [1949] P. 197.
(27) [1921] P. 425.

assistance of the court. That may be unavoidable where medical evidence in regard to the period is called by the respondent; there is nothing to prevent a case becoming the battleground of experts. But I am dealing with such a case as that out of which this appeal arises, in which the substantial issue between the parties was whether the husband had at what was considered the relevant times any opportunity of intercourse with his wife and no question of an abnormal period of gestation had been raised until the trial and then only by the commissioner himself.

[His Lordship set out the evidence of Dr. William Glyn Evans and continued:—] The question, as I see it, is whether the court ought to accept this evidence as adequate to justify a finding that beyond all reasonable doubt the child was not the child of the husband. I have no hesitation in answering this question in the affirmative. I do not say that the onus probandi shifts because the period is not a "normal" one, but I think that the onus is a light one and is easily discharged when the period diverges largely from the normal. Here the court had the advantage of hearing a medical practitioner whose training and everyday working practice must have made him familiar with the ordinary problems of gestation and birth. He had, as he said, not studied the problem of the "maximum period from the time of sexual "intercourse to the time of the impregnation of the ovum", but it is sufficiently clear from his earlier answers that, while recognizing the possibility of some interval between coitus and fertilization, he regarded as impossible an interval which would defer the birth of a normal child to 360 days after coitus. That he was, I think, entitled to say as a matter of competent medical opinion without having made a special study of the subject. In these circumstances the learned commissioner was not, I think, justified in disregarding his evidence. He was, as I have said, entitled as a matter of judicial knowledge to know that, just as there is a "normal" period of gestation, so there are "abnormal" cases. But he was not entitled to set his own view of possible or probable abnormality, whether derived from the decided cases or from other sources, against the evidence that he heard. If indeed it had been legitimate for him to do so, I do not understand how he could disregard the evidence given by Sir Eardley Holland in *M-T.* v. *M-T.* (28).

In my opinion, therefore, the commissioner, having found the facts as I have already stated them, should have acted upon the

(28) [1949] P. 331.

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medical evidence that was given in the case and made a decree for divorce. I move your Lordships that the appeal of the husband be allowed, the cross-appeal of the wife dismissed and the cause be remitted to the High Court in order that the proper decree may be made.

LORD NORMAND. My Lords, this is an action of divorce on the ground of adultery. The husband is the petitioner. There has already been one retrial and the Court of Appeal has by a majority ordered a second retrial. Against this order the appellant has appealed and the respondent has cross-appealed. Both parties are anxious to avoid a second retrial, the appellant maintaining that on the evidence he is entitled to a decree nisi of dissolution of the marriage, and the respondent maintaining that the judgment of the commissioner dismissing the action should be restored. Denning, L.J., dissented in the Court of Appeal and was prepared to grant a decree nisi. The majority, Bucknill and Asquith, L.JJ., would have been in favour of granting a decree but found it difficult to do so because certain letters written by the respondent, from which an inference unfavourable to her might be drawn, had been read to the commissioner without the respondent's having had an opportunity of explaining them. The reason for that was that counsel were restrained from putting questions lest they should be thought to infringe the rule laid down in *Russell* v. *Russell* (29). Bucknill and Asquith, L.JJ., were, I think, influenced in favour of ordering a new trial by the expectation that the rule would be abrogated by legislation before a new trial could take place. I respectfully agree with the Court of Appeal that it would be unjust to the respondent to allow these letters to be used against her. But if it is possible without injustice to either party to arrive at a decision of the case upon the other evidence, leaving the letters altogether out of account, that is the course which ought to be taken. For a second retrial would be a hardship both for the appellant and for the respondent, and it might work injustice because the lapse of time since the events to be investigated might result in loss of evidence.

The salient facts are simple. On August 13, 1946, the respondent gave birth without prolonged or difficult labour to a normal full term child weighing 8¼ pounds. The commissioner was satisfied beyond reasonable doubt that the appellant was abroad from August 17, 1945, till February 9, 1946, and that the

(29) [1924] A. C. 687.

respondent was throughout that period resident in this country. There is no evidence against the respondent of any suspicious relations with any other man or of any looseness of conduct or that she was anything but a respectable and hard-working woman.

The submission for the appellant is that the child, born on August 13, 1946, must have been conceived in adultery. His counsel relied on the child's weight and development at birth, the date of birth 360 days after the appellant's departure from this country in August, 1945, and six months after his return, and the evidence of Dr. Evans, a general practitioner who examined the child on October 12, 1946. He relied also on the way in which the defence had been conducted. The last matter may be conveniently dealt with at this stage.

The respondent at the trial adduced certain witnesses to speak to a visit paid to her by the appellant in the late autumn of 1945. The dates given by the witnesses are vague but there can be no doubt that the purpose in adducing them was to show that the appellant and the respondent were or might have been together at a date which would naturally account for the child's birth on August 13, 1946. This evidence was disbelieved by the commissioner. It was said also that the case had been conducted by the respondent on the footing that the only question was whether the respondent and the appellant might have been together in October or November, 1945. This is, however, a point on which the recollection of counsel to some extent differed and I would therefore disregard it.

In divorce proceedings it is for the petitioner to prove his case whether the action is defended or not, and though the putting forward of a false defence may destroy the respondent's credibility that in itself does not establish the truth of the petitioner's case. Apart from that objection of principle, it would in the circumstances of this case be unjust to the respondent to infer or assume that the false defence is tantamount to an admission of guilt. If it is possible that a child may be born 360 days after coitus and if that was what had indeed happened, the departure from the normal course of things is so extraordinary that the mother, conscious of innocence but believing herself the victim of a sport of nature, might, despairing of establishing the true defence, allow herself to palter with the truth, and might induce others closely connected with her to lend themselves to prevarication or worse.

If it is proper to exclude the letters written by the respondent and the way in which the case was conducted, there remains the

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evidence of the dates of birth and of the appellant's absence and the evidence of Dr. Evans. My Lords, the possibility that a full term child born on August 13, 1946, could have been the fruit of a coitus which took place as late as February 9, 1946, may be disregarded. I do not think that evidence is required to prove that that is not possible, but if it is required it is given by Dr. Evans who says that the latest date of conception of this child according to the date of its birth and its weight was November 6, 1945. Accordingly, the only question is whether the child could be the result of a coitus which took place as early as August 17, 1945, or 360 days before birth.

If the only period to be considered were the period of gestation, I have myself no doubt that ordinary men and women would unhesitatingly say that a 360-days gestation is beyond the limits of what is possible, and a court of law could so decide without evidence. So far at least judicial knowledge may be allowed to reach. In this case Dr. Evans gave evidence in answer to a question put to him in examination in chief that the ultimate, by which he meant the earliest, date of conception was about October 23, 1945. If evidence were required, there it is.

But it appears from the cases cited by the commissioner and the Court of Appeal that the Divorce Court has in the present century entertained the question whether before impregnation there may not be a period during which the spermatozoa after insemination may maintain life in the female genital tract, and after an indefinite lapse of time enter the uterus and impregnate the ovum. This new aspect of the rule pater est quem nuptiæ demonstrant has given rise to great difficulties, which have hitherto been solved by evidence in each particular case. The evidence in other cases, of course, cannot competently be used in this case. But it is unsatisfactory to find that in one case (*Hadlum* v. *Hadlum* (30)) 349 days were found not to be too long and that in another case (*M-T.* v. *M-T.* (31)) in the same year 340 days were found to be excessive. This was the result of the differing evidence of medical men in the two cases. When doctors disagree the courts cannot claim such judicial knowledge about the viability of spermatozoa in the female body and the limit of time after which they would be unable to enter the uterus as would enable them to fix the precise time after coitus within which conception can take place and beyond which it cannot take place. In *Wood* v. *Wood* (32), Lord Merriman, P., said: "You

(30) [1949] P. 197.
(31) [1949] P. 331.
(32) [1947] P. 103, 106.

" can say that it is impossible to know where to draw the line; " yet you can say that one case or another must plainly be on " the wrong side of any line you can possibly draw ". In *Williamson* v. *M'Clelland* (33), a filiation case, Lord President Dunedin said that in such a case he thought himself entitled to consider the possible duration of gestation " in the light of what " had been said by learned judges in other cases and of what one " knows to be the opinion of experts as disclosed in medical " books ", and not to restrict himself to the evidence of the single medical witness in the case. I am satisfied that the Lord President would not have allowed himself this latitude in an action of divorce, for Scottish law has always allowed in filiation cases a latitude of probation, which it has not allowed even in ordinary actions.

His conclusion, however, is of interest in the present case for it deals with the issue of proof or disproof of paternity on general lines and agrees closely with the opinion of Lord Merriman. The Lord President said: " It is absolutely clear that " neither in law nor in medical science is it possible to fix an " actual number of days as the extreme period of gestation. In " certain systems of law the matter has been dealt with by " statute, and a limit has been arbitrarily fixed, but in our system " there is no such limit. That does not lead to the conclusion " that a period might not be submitted to the consideration of " the court of such length that the court would refuse to hold " that the parentage had been proved. The court is left free to " deal with each case as it occurs ".

In another Scottish case, *Gray* v. *Gray* (34), Lord Blackburn thought that the onus should be on the defendant to prove that a gestation of 331 days was possible. It will be observed that in these two cases it was the period of gestation that was being considered; and so far as I am aware the Scottish courts have not specifically had to consider whether there might be a period between coitus and conception nor how long such a period might be.

I have felt great doubt whether the House ought not to say that, though it is not possible to draw the line at an actual number of days, 360 days is too long a period, unless evidence of medical knowledge is adduced by the respondent to show the contrary. We have, however, the testimony of Dr. Evans and it is, in my judgment, sufficient for the disposal of the case. I can

(33) 1913 S. C. 678, 680. (34) (1919) 1 S. L. T. 163.

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deal with it briefly because it has already been analysed by my noble and learned friend on the woolsack. The doctor said that the spermatozoa could not live in the vagina for more than a few days and still be able to enter the uterus. In answer to a further question he said that he was not able to say what was the maximum period which might elapse between coitus and impregnation because he had never studied that aspect. Because he gave this answer the commissioner treated his evidence as valueless and indicated that he would not be satisfied by anything short of the evidence of an " academic specialist ". I think that the commissioner has misunderstood Dr. Evans. A medical man may not know what the maximum period may be and yet be able to say that according to existing medical knowledge and belief it cannot be more than a few days. That, I think, is the effect of Dr. Evans' testimony.

In the Court of Appeal, Bucknill, L.J., said (35): " Surely the " practical experience of a general medical practitioner is likely " to give him a valuable working knowledge of what is normal in " such cases, and if he has never known of a case where sperma- " tozoa remained alive and fertile in the female for over two " months before fertilizing the ovum, such an absence of " experience has a definite practical value ". This observation of the Lord Justice is, if anything, an understatement of the effect of the authorities. In *Gaskill* v. *Gaskill* (36), Lord Birkenhead, L.C., stated the principle on which a judge should act in coming to a conclusion of fact upon the possible duration of the period between coitus and birth. He had considered first the relevant authorities and in particular the opinion of the judges in the *Banbury Peerage* case (37) and the judgment of Lord Lyndhurst, L.C. (38), in *Morris* v. *Davies* (39), from which he made extensive citations which it is needless to repeat. He summed up the result thus (40): " I can only find her guilty if I come " to the conclusion that it is impossible, having regard to the " present state of medical knowledge and belief, that the " petitioner can be the father of the child ". The existing state of medical science and belief is the standard which has been since applied. In *M-T.* v. *M-T.* (41) the evidence of the medical witness spoke of what happens " as a rule " and " normally "

(35) 65 T. L. R. 620, 622.
(36) [1921] P. 425.
(37) (1811) Le Marchant's *Gardner Peerage Case*, 389, 437–9.
(38) When sitting in the Court of Chancery.
(39) (1837) 5 Cl. & F. 163, 215.
(40) [1921] P. 425, 434.
(41) [1949] P. 331, 333.

and of the absence of his knowledge of any case in which so long a period as twenty-one days had elapsed between coitus and impregnation. That evidence rightly, in my opinion, satisfied the learned judge who tried the case.

In the present case the commissioner, if he had proceeded upon the evidence and not upon his own speculations of what may be possible, and if he had not misdirected himself that he should not be satisfied without the evidence of a scientist, could not reasonably have arrived at any other conclusion than that the child was not the child of the appellant.

There can be no suggestion that the respondent's case has been prejudiced by excluding from consideration the letters written by her or the false defence put forward by her. There can, therefore, be no injustice to her on that score in granting a decree nisi. I am for allowing the appeal and granting to the appellant the remedy for which he petitions.

LORD OAKSEY. My Lords, the respondent in this appeal has twice been successful in the courts of first instance and now for the first time she is by your Lordship's House to be found guilty of adultery and her child is in effect to be bastardized. She is a wife against whose marital conduct nothing has been said or suggested except that her child was born 360 days after her husband had access to her. In such circumstances the law, as I understand it, has always been that the onus upon the husband in a divorce petition for adultery is as heavy as the onus which rests upon the prosecution in criminal cases. That onus is generally described as being a duty to prove guilt beyond reasonable doubt but what is reasonable doubt is always difficult to decide and varies in practice according to the nature of the case and the punishment which may be awarded. The principle upon which this rule of proof depends is that it is better that many criminals should be acquitted than that one innocent person should be convicted. But the onus in such a case as the present is not founded solely upon such considerations but upon the interest of the child and the interest of the State in matters of legitimacy, since the decision involves not only the wife's chastity and status but in effect the legitimacy of her child: see *Russell* v. *Russell* (42).

This appeal not only involves the application of the rule of proof in such a case as the present; it also involves difficult

(42) [1924] A. C. 687.

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questions as to the facts of which the court should take judicial notice. The cases to which reference has already been made have decided that the birth of a child many days after the normal period of gestation and up to as many as 349 days after access of the husband did not prove adultery.

It is important, I think, to consider carefully what taking judicial notice of facts means. It cannot, in my opinion, mean assuming the truth of a fact in issue, for that would be to beg the question. Doubtless there are some facts almost universally accepted of which, if not denied and put in issue, the court can take judicial notice, but it is essential to be certain of the fact of which you assume the truth. As the noble Lord on the woolsack has pointed out, to take judicial notice of the fact that the normal period of gestation is 270 or 280 days, apart from its own vagueness, affords little or no assistance when the question is what is the greatest abnormal period of gestation. In one sense the court takes judicial notice of the decisions in other cases but it does not, unless bound by the decisions, assume their correctness. As to the evidence given and the facts found therein the court no doubt takes notice of the fact that the evidence was given and certain facts were found, but not in the strict sense of taking judicial notice or assuming that they are correct. In the present case it was the main question in issue whether the respondent's child was the result of an abnormal period between coitus and birth and the court could not, in my opinion, assume judicial knowledge of the length of that period, nor is your Lordships' House bound by the decisions in the cases cited upon the possible length of that period. On the other hand, it seems to me that great weight must be attached to the decision of Lord Birkenhead in *Gaskill* v. *Gaskill* (43), proceeding as it did upon medical evidence specially called by the Attorney-General. Denning, L.J., in the Court of Appeal took judicial notice of other matters which he described (44) as the facts of nature, which appear to me to conflict with these decisions and of which I at any rate have no knowledge.

In my opinion it is necessary, as Lord Birkenhead held, for a husband or the court in such a petition as the present to call medical evidence that the child could not, according to the medical opinion of the day, be the child of the husband. The question is, therefore, whether such evidence was called in this case. The evidence of Dr. Evans did not satisfy the commissioner

(43) [1921] P. 425.

(44) 65 T. L. R. 620, 623.

and I must say does not satisfy me. Even in a criminal case, apart altogether from any question of legitimacy, if such evidence had been given in a case entirely dependent upon medical considerations, I should not have allowed the case to go to the jury.

The question in this case and the question in the cases above referred to was whether there are abnormal cases in which birth may take place many days beyond the ordinary period of gestation, either because spermatozoa can live after coitus and before conception or for other unspecified reasons. It is a question of medical science on which I imagine much must have been written and many opinions held by the most eminent medical authorities. Yet Dr. Evans does not refer to any authorities and when asked "What is the maximum period in your view from the time of "sexual intercourse to the time of the impregnation of the "ovum?" he answers, "I cannot give an opinion on that, my "Lord. I should think a few hours; but I have never studied "that aspect, my Lord". Now that aspect was in this case, as it must have been in the other cases in which a period of 331 days to 349 days between coitus and birth was in question, the crucial aspect of the matter, and to hold that such evidence discharges the onus which rests upon the prosecution in criminal cases or upon any party who seeks to prove illegitimacy is, in my respectful opinion, to depart altogether from the practice in such cases. If a man wishes to divorce his wife and to stigmatize with bastardy her child born during their marriage it seems to me a small thing to require that he should call a medical witness who has an opinion on the main question at issue. Such cases as this do not arise every day and if there were any case of real hardship from the point of view of expense I think the court should call expert evidence, as Lord Birkenhead did. But in the present case, the petitioner having already failed at two hearings, I am in favour of allowing the cross-appeal and dismissing his petition.

LORD MORTON OF HENRYTON. My Lords, in my view the commissioner ought to have granted to the appellant a decree nisi for the dissolution of his marriage on the ground of the adultery of the respondent with a man unknown.

The appellant called evidence which satisfied the commissioner that the appellant was not in this country between August 18, 1945, and February 8, 1946. He also called the midwife who attended the respondent when she gave birth to a male child at 8.15 a.m. on August 13, 1946. The commissioner clearly accepted

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the uncontradicted evidence of the midwife that the child was a full-time child weighing 8 lbs. 4 oz., that the child was a normal one and that there was no question of the child being "forced "into the world". He was satisfied that the child could not have been the result of intercourse between the petitioner and the respondent in February, 1946.

There remained only two possibilities—that the child was the result of intercourse between the appellant and the respondent 360 days before his birth, or that the respondent committed adultery during her husband's absence from this country.

In addition to the evidence just mentioned, the appellant called Dr. Evans, whose evidence has already been set out by my noble and learned friend on the woolsack. Apart from formal questions as to her name and address, the respondent was asked only one question by her counsel, "Have you ever committed "adultery?", and she answered, "No, Sir". Three witnesses were called on her behalf, her mother, her sister and a Mr. Mulhern, and they gave evidence to the effect that the appellant was home on leave between August and Christmas, 1945. The commissioner did not believe the evidence of these three witnesses.

My Lords, what was the burden of proof upon the appellant, and did he discharge it by the evidence to which I have briefly referred? Section 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, in the form which it now takes by reason of s. 4 of the Matrimonial Causes Act, 1937, provides, so far as material, that: "(1) On a petition for divorce it shall be the duty "of the court to inquire, so far as it reasonably can, into the facts "alleged and whether there has been any connivance or condona-"tion on the part of the petitioner and whether any collusion "exists between the parties and also to inquire into any counter-"charge which is made against the petitioner. (2) If the court "is satisfied on the evidence that—(i) the case for the petition "has been proved . . . the court shall pronounce a decree of "divorce . . .".

In *Ginesi* v. *Ginesi* (45) the Court of Appeal, after a survey of the authorities, held that a petitioner must prove adultery "beyond reasonable doubt". In my view the burden of proof is certainly no heavier than this, and counsel for the appellant did not contend that it was any lighter. Assuming that this burden lay upon the appellant, did he discharge it?

(45) [1948] P. 179.

My Lords, the appellant proved that the birth took place 360 days after the end of his leave in August, 1945, and that the birth was a normal one. If one adds to this the evidence of Dr. Evans, I am of opinion that the appellant amply discharged the burden of proof upon him. I would add that the commissioner did not say that he believed the wife's statement that she had never committed adultery; he dismissed the petition because, as he said: "I am not satisfied beyond a reasonable doubt that "adultery has been committed". I think that he applied the right test, but that he ought to have been so satisfied.

Certain letters written by the respondent were read to the commissioner and were considered by the Court of Appeal. Bucknill, L.J., said (46): "[They] seem to me to be adverse to her "credibility and tend to prove that her husband was not the "father of the child". I see no reason to differ from this observation, but I have entirely disregarded these letters in forming my conclusion in this case, as your Lordships have heard no argument as to whether they were or were not admissible in evidence. Sir Godfrey Russell Vick, for the appellant, was content to submit that the case was proved without them.

So much for the case now before your Lordships' House, but I go further, in the hope that my views may meet with your Lordships' approval and may be of assistance in other cases. In my opinion the court is entitled to take judicial notice of the fact that the normal period from fruitful coitus to birth does not exceed 280 days. That is one of the ordinary facts of nature as to which no evidence is required. If a husband proves that a child has been born 360 days after he last had an opportunity of intercourse with his wife, and that the birth was a normal one, and if no expert evidence is called by either side, I am of opinion that the husband has proved his case beyond reasonable doubt.

As to the possible period of time between coitus and conception, to which the commissioner attached so much importance, if evidence is given, in any case hereafter, that this period may be substantial, it will of course be duly taken into account by the judge before whom it is given. In the present case I cannot find that any evidence was given which should have raised any reasonable doubt in the mind of the commissioner. And if it had been legitimate for him to consider the latest medical evidence in any reported case, the evidence of Sir Eardley Holland, a past President of the Royal College of Obstetricians and Gynæcologists

(46) 65 T. L. R. 620, 623.

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and consulting gynæcologist to the London Hospital, is to be found in *M-T.* v. *M-T.* (47). Sir Eardley said, inter alia, that the spermatozoa did not as a rule remain capable of effecting fertilization for more than two or three days after being deposited in the female genital tract. Fertilization normally took place at the time of insemination, that is, of coitus, and he had never heard of an authentic case of an interval of fourteen days between coitus and fertilization, which had been referred to in the evidence given in *Hadlum* v. *Hadlum* (48). Sir Eardley's evidence certainly gives no support to the theory that an interval of 360 days between coitus and birth is even a remote possibility.

The burden of proving adultery is, of course, on the petitioner, but there must surely come a time when a husband is entitled to say: "Having regard to the ordinary course of nature, and to "the interval between intercourse and birth, there is no reason-"able doubt that my wife has committed adultery. It is for "her to raise a reasonable doubt, if she can, by calling expert "evidence". I am glad to note that this view coincides with the view expressed by Lord Blackburn in the Scottish case of *Gray* v. *Gray* (49).

It may be said: "If 360 days is enough, why not 350, 340, "330 or 320 days or less?" For my part I think that, in the absence of any expert evidence on either side, an interval of 320 days should be enough to satisfy the court. I select that particular interval because I think that forty days beyond the upper limit of the normal period puts the matter beyond reasonable doubt if the birth is proved to be a normal one and no further evidence is offered on either side. Evidence of loose conduct on the part of the wife might well lead a court to regard a shorter interval, coupled with such evidence, as proving adultery beyond reasonable doubt.

There are, however, cases in which a longer interval than 320 days has been held insufficient to prove adultery. In *Gaskill* v. *Gaskill* (50) the interval was 331 days. Lord Birkenhead, L.C., who tried the case sitting as a judge of first instance, said, in regard to the wife (51): "I can only find her guilty if I come to "the conclusion that it is impossible, having regard to the present "state of medical knowledge and belief, that the petitioner "can be the father of the child. The expert evidence renders "it manifest that there is no such impossibility. In these

(47) [1949] P. 331, 332–4.
(48) [1949] P. 197.
(49) 1 S. L. T. 164.
(50) [1921] P. 425.
(51) Ibid. 434.

" circumstances I accept the evidence of the respondent, and find " that she has not committed adultery, and accordingly I dismiss " the petition ".

My Lords, in the case of *Gaskill* v. *Gaskill* (50) the birth was far from being a normal one, but I think that Lord Birkenhead placed too heavy a burden of proof upon the husband. It is not the law to-day, in my view, and with all respect to Lord Birkenhead I do not think it was the law in 1921, that a husband is bound to prove that he cannot possibly be the father of the child; and I do not think that the case of *Morris* v. *Davies* (52), cited by Lord Birkenhead, established the strict rule which he laid down.

In *Wood* v. *Wood* (53) the interval between cohabitation and birth was 346 days, and in *Hadlum* v. *Hadlum* (54) it was 349 days. In each of these cases the court refused the husband a decree, and I gather that in each case the court took the view that the husband must prove that he could not possibly have been the father of the child. In *M-T.* v. *M-T.* (55) Ormerod, J., had to try an issue as to the paternity of a child born 340 days after the husband had gone overseas. Medical evidence was given which satisfied the learned judge that the husband could not have been the father of the child. The learned judge said nothing as to the burden of proof, and I think that his decision was beyond criticism.

My Lords, I have already stated my view as to the position when no expert evidence is given on either side. When such evidence is given it must, of course, be weighed with care in order to ascertain whether the husband has proved his case beyond reasonable doubt. But I think that the cases of *Gaskill* (50), *Wood* (53) and *Hadlum* (54) put an unwarranted and increasing burden upon a husband who seeks to prove his wife's adultery. If these decisions were right, a husband would have to incur the expense of calling expert medical evidence in every case in which a child was born to his wife ten months or more after he last had intercourse with her. And, even if he did call such evidence, absolute impossibility is a matter which is almost, if not quite, incapable of proof.

I agree with the motion proposed from the woolsack.

LORD MACDERMOTT. My Lords, I do not find anything to further the husband's appeal either in the letters written by the

(50) [1921] P. 425.
(52) 5 Cl. & F. 163.
(53) [1947] P. 103.
(54) [1949] P. 197.
(55) [1949] P. 331.

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wife or in the manner in which her case was conducted at the retrial. Excluding these matters and excluding also, as one must on the undisputed findings of the learned commissioner, any possibility of the husband having had access to his wife between August 17, 1945, and February 9, 1946, or of the child being conceived on or after the latter date, the evidence relevant to the appeal and cross-appeal is confined to—(a) that establishing the fact that the wife was delivered of a normal full-term child, without unusual difficulty, on August 13, 1946, or 360 days after the last relevant opportunity of intercourse with her husband; (b) the medical testimony adduced by the husband; and (c) the wife's denial of adultery.

The duty of the court, on hearing a petition for divorce is, in so far as material, to pronounce a decree if "satisfied on the "evidence" that the case for the petition has been proved, and to dismiss the petition if not so satisfied: see s. 178, sub-s. 2, of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 4 of the Matrimonial Causes Act, 1937. The standard of proof to be observed by the court in exercising this jurisdiction was the subject of controversy in the present case. For the husband it was argued that the adultery alleged had to be proved beyond reasonable doubt. For the wife, on the other hand, it was submitted that, as the result of a finding of adultery would, in effect, be to bastardize the child, the petitioner, in order to succeed, would have to go further and show that it was impossible for him to be the father. This, in my opinion, is putting the onus too high. Though Lord Birkenhead, L.C., in *Gaskill* v. *Gaskill* (56) said, "I can only find her guilty if I "come to the conclusion that it is impossible, having regard to "the present state of medical knowledge and belief, that the "petitioner can be the father of the child", I do not think he intended to set up the proposition advanced here on behalf of the wife by Mr. Middleton. Lord Birkenhead had previously indicated (57) his unqualified acceptance of the views expressed by Lord Lyndhurst, L.C. (58), in *Morris* v. *Davies* (59), and I do not find in that case or in the *Banbury Peerage* case (60), also referred to by Lord Birkenhead, warrant for Mr. Middleton's contention.

(56) [1921] P. 425, 434.
(57) Ibid. 434.
(58) When sitting in the Court of Chancery.
(59) 5 Cl. & F. 163, 215.
(60) (1811) Le Marchant's *Gardner Peerage Case*, 389, 437–9.

The evidence must, no doubt, be clear and satisfactory, beyond a mere balance of probabilities, and conclusive in the sense that it will satisfy what Lord Stowell, when Sir William Scott, described in *Loveden* v. *Loveden* (61) as "the guarded discretion of a "reasonable and just man"; but these desiderata appear to me entirely consistent with the acceptance of proof beyond reasonable doubt as the standard required. Such, in my opinion, is the standard required by the statute. If a judge is satisfied beyond reasonable doubt as to the commission of the matrimonial offence relied upon by a petitioner as ground for divorce, he must surely be "satisfied" within the meaning of the enactment, and no less so in cases of adultery where the circumstances are such as to involve the paternity of a child. On the other hand, I am unable to subscribe to the view which, though not propounded here, has had its adherents, namely, that on its true construction the word "satisfied" is capable of connoting something less than proof beyond reasonable doubt. The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognize this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be "satisfied", in respect of a ground for dissolution, with something less than proof beyond reasonable doubt. I should, perhaps, add that I do not base my conclusions as to the appropriate standard of proof on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate since the decision of this House in *Mordaunt* v. *Moncreiffe* (62), that the two jurisdictions are other than distinct. The true reason, as it seems to me, why both accept the same general standard—proof beyond reasonable doubt—lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned.

The next question is whether the commissioner should have been satisfied, on the material to which I have referred, that the wife had committed adultery. My Lords, I agree that he should. To get to the real issue it will be convenient to refer first to several connected matters in order to get them out of the way. The commissioner applied the correct standard of proof and kept it before him throughout. He also kept in mind that the wife had denied on oath that she had committed adultery. But he does not say that he accepted her denial and I think it is clear

(61) (1810) 2 Hag. Con. 1, 3.

(62) (1874) L. R. 2 Sc. & D. 374.

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from his judgment that the doubts which led him to dismiss the petition arose on the petitioner's case and that, had it been fortified with the expert testimony which the commissioner found lacking, he would not have regarded the denial as sufficient to prevail against it. Further, it is plain that the commissioner was satisfied that the period of actual gestation was normal. This, and what was for him the real point of difficulty, are indicated clearly in the passage in his judgment where he says: "I have "no reasonable doubt that the ovum from which that child was "produced was impregnated somewhere about the normal period "before that child was born. The doubt in my mind is as to the "period which is the longest period that is practicable between "the time of coitus and the time of impregnation of the ovum; "and that is a scientific question".

My Lords, had Dr. Evans, the petitioner's medical witness, sworn that he had made a scientific study of that particular question and that the period between a fruitful coition and the resulting conception must, at longest, be a matter of weeks and not of months, then, as I understand his judgment, the commissioner would have been relieved of his doubt and would have given a decree, for the interval running from August 17, 1945, to the date of conception was one of between two and three months on any reckoning. Dr. Evans, however, did not speak in those terms and it is obvious that the commissioner did not regard his testimony of value on the point that was troubling him. As he says in his judgment: "I do not know how long spermatozoa "will remain alive in the tucks and crannies of the female genital "tract. I have got no medical evidence on the subject".

For the husband, Sir Godfrey Russell Vick challenged the ruling of the commissioner on two main grounds. First, he said that the evidence of Dr. Evans (who admittedly is a competent general practitioner and a credible witness) proved enough to preclude any reasonable doubt on the point on which the petitioner's case foundered. And, secondly, he submitted that what he contended was the impossibility of a normal child being born 360 days after coition was a fact of which judicial notice ought to be taken.

My Lords, after a careful consideration of Dr. Evans' testimony I am satisfied that the first of these contentions is sound. Dr. Evans gave the probable date of conception as on or about November 6, 1945, and was not asked anything by counsel, either in his examination-in-chief or on cross-examination, as to an interval between connexion and fertilization. His answers on

that subject were made to questions asked by the commissioner. This part of the evidence I need not repeat. It has already been set out in the opinion just delivered by my noble and learned friend on the woolsack which I have had the advantage of reading in print. I entirely agree with what he has said regarding the substance and effect of this testimony and, in particular, its adequacy, in the circumstances of this case, as proof beyond reasonable doubt that the husband was not the father of the child. I would only add two observations. One is that I find nothing in the authorities to suggest that, in the present state of knowledge on this particular matter, the final and convincing word must necessarily be that of " an academic specialist "—the term used by the commissioner—to the exclusion of medical evidence based on practical experience and the learning and literature of the profession on the subject. The other is that Dr. Evans' last answer—that in which he replied with a diffident " I should think a few hours " when asked as to the maximum interval between intercourse and impregnation—has to be read with his earlier answers; and from those I take it to have been his definite opinion that spermatozoa would not live long in the genital tract on account of its secretions, and that if they survived for as much as three weeks they would be very unlikely ever to get into the uterus. The result, in my opinion, must be that, even if one were to discard the witness's " few hours " as hesitant, the maximum period that could be substituted therefor would, at most, be one of weeks and not months.

As this conclusion is enough to dispose of the appeal and cross-appeal I do not propose to deal at length with the second and, as it seems to me, more difficult submission advanced on behalf of the husband. Apart from the medical evidence altogether, was his case proved beyond reasonable doubt by the normal delivery of a normal child 360 days after the relevant coition? There is no doubt that judicial notice will be taken of the fact that, in the ordinary course of nature, delivery occurs in or about nine months after fruitful intercourse. And it is, I think, no less clear that judicial notice will also be taken of the fact that the normal period is not always followed in nature and that the actual period may on occasion be considerably less or considerably more. But the law of this country has not fixed limits of deviation from the normal period in the sense that more than a certain period or less than a certain period is to be deemed impossible, or impossible until the contrary is proved. The question which then arises—I refer from now on only to periods longer than the normal—is

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whether the court, without instruction on the matter, may ever regard an abnormally long period as impossible and, if so, at what point of time this may be done.

My Lords, I do not think it open to doubt that a time must come when, with the period far in excess of the normal, the court may properly regard its length as proving the wife's adultery beyond reasonable doubt, and decree accordingly. But, as has so often been pointed out, the difficulty is to know where to draw the line. The reported cases naturally tend to creep up on each other and there is little sound guidance to be gleaned from authority. If a line has to be drawn I think it should be drawn so as to allow an ample and generous margin, for it may be as difficult for the wife to prove a freak of nature as for anyone else; and it need hardly be added that, before acting on the length of the period, due regard must be paid to any other relevant evidence. But I do not find it possible to go further and lay down any hard and fast rule capable of general application. In my opinion there is nothing in the testimony here, or in the facts of which judicial notice may be taken, to justify fixing a specific period and holding that, in the absence of evidence to the contrary, anything more would, but anything less would not, prove adultery beyond reasonable doubt. If, in the light of a full and exhaustive inquiry, the line could be thus fixed it might well be that the period of 360 days would come near or even cross it. But, however that may be, I am not prepared to decide this case merely on the fact that a period of that duration has been established. I prefer to relate my conclusion to the evidence as a whole and, for the reasons already given, I think it should have satisfied the learned commissioner beyond reasonable doubt.

I would therefore allow the appeal and dismiss the cross-appeal.

Appeal allowed.

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