The Court pronounced this interlocutor—

"The Lords having considered the reclaiming-note for the pursuers against the interlocutor of Lord Kincairney dated 14th February 1901, together with the note for the respondent (defender) William Riddell Dick, and the minute (answers) for the reclaimer, and heard counsel for the parties, Refuse the reclaiming-note, and decern."

Counsel for the Pursuer and Reclaimer—Kennedy. Agents — Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defender and Respondent, W. R. Dick — Craigie. Agent—D. Hill Murray, S.S.C.

Counsel for the Defenders and Respondents, Mrs Thomson's Trustees—Fleming. Agents—Forrester & Davidson, W.S.

Saturday, November 9.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

M'NEILL *v.* M'GREGOR.

Title to Sue — Parent and Child — Action by Father for Death of Child Born Illegitimate and Dead before Marriage with Mother — Reparation — Bastard — Legitimation per subsequens matrimonium.

A father raised an action of damages against the proprietors of a tenement of houses in respect of the death of his pupil child, aged 3½ years, who had been killed in consequence of having fallen through a window in the common stair of the tenement. The child was born illegitimate, but about four months after its death the father and mother were married. The pursuer contended that the child was legitimated by the subsequent marriage of its parents, and that he was entitled to sue on account of its death as if the child had been born in wedlock.

Held that the pursuer had no title to sue.

Thomas Chalmers M'Neill, mason, Edinburgh, raised an action in the Sheriff Court there, against William Daniel M'Gregor, James Walker, and Mrs Annie Cairns, the proprietors of the various dwelling-houses of a tenement at 2 South Foulis Close, High Street, Edinburgh. The pursuer prayed the Court to grant decree ordaining the defenders jointly and severally or severally to pay to the pursuer £250 as reparation for the death of his pupil child Annie Swan M'Neill, aged 3½ years, who had died on 22nd August 1900 in consequence of having fallen through a window in the common stair of the said tenement.

The pursuer produced (1) a certificate of the birth of the child, which showed that she had been born on 17th May 1897, and had been registered in the Registry of Births as the illegitimate child of the pursuer and Jemima Barclay, and (2) a certificate of marriage, which showed that the pursuer had been married to Jemima Barclay on 14th December 1900, nearly four months after the death of the child.

The pursuer pleaded—"The pursuer having suffered loss, injury, and damage by the fault or negligence of the defenders, or of one or other of them as condescended on, he is entitled to decree as craved.

The defenders pleaded, *inter alia*—"(2) No title to sue."

On 27th February 1901 the Sheriff-Substitute (MACONOCHIE) sustained the second plea-in-law for the defenders and dismissed the action.

The pursuer appealed, and argued—The second plea for the defenders should be repelled. Where the parents of a child were capable of contracting marriage at the conception of the child, and where thereafter they were lawfully married, the child must be held to be legitimate from the date of its birth. In such circumstances the law of Scotland assumed that the parents were married before the conception of the child—Bankton's Institutes, i., 5, 58; *Crawford's Trustees* v. *Hart's Relict*, January 20, 1802, M. 12,698; opinion of Lord Meadowbank in *Rose* v. *Ross*, July 16, 1830, 5 S. 634; opinion of Lord Chancellor (Cottenham) in *Munro* v. *Munro*, August 10, 1840, 1 Rob. Ap. 601; More's Notes on Stair, i., p. 33 of Appendix. The rights of parties were in exactly the same position as if the child had been born legitimate. The opinions of the majority of the judges in *Kerr* v. *Martin*, March 6, 1840, 2 D. 752, were not antagonistic to this view of the law. They indeed recognised it as a general rule, and made only one exception to it, namely, that if there was an intervening marriage between the birth of the illegitimate child and the subsequent marriage of its parents, the rights of the children of the intervening marriage would not be affected by the subsequent marriage. But this exception was the only one. In all other respects by the subsequent marriage of the parents of an illegitimate child parties had the same rights and obligations as if the parents had been married at the date of its conception. The defenders were attempting to make a new exception to a rule which was founded on justice and expediency. If the accident had not occurred the pursuer would have had a legitimate daughter. He was therefore entitled to solatium for her death.

Argued for defenders—The pursuer had no title to sue. In a question of legitimacy as it affected third parties it was not the date of the birth but the date of the marriage that was to be looked at. All that the institutional writers meant was that the legal rights of a bastard who died before the marriage of his parents accrue to his descendants. And questions between the mother of the bastard and the representatives of the father, whom she married after its death, might probably be dealt with as if the legitimation dated from the date of the birth. But in questions with third parties the fiction of inchoate marriage as at the date of conception had no effect. Thus

the judges in the majority in *Kerr, supra*, were of opinion that the children of an intervening marriage were not to be prejudiced by the subsequent marriage of the bastard's parents. In the same way, in the present case the Court should not allow injustice to be done to the defenders by giving effect to the fiction alleged by the pursuer. The case also fell within the rule laid down in *Clarke* v. *Carfin Coal Company*, July 27, 1891, 18 R. (H.L.), 63, 28 S.L.R. 950.

At advising—

LORD JUSTICE-CLERK—This case is of an entirely unprecedented nature. The pursuer who had an illegitimate daughter, after her death by an accident married the mother of the illegitimate child. He now claims damages for the loss of the child, as having been his legitimate daughter. The tendency of the law has been to give to existing bastards and to descendants of one born illegitimate the status of legitimate descent where the parents of the illegitimate child have entered into a matrimonial contract subsequently to its birth. The law has certainly gone very far in that direction, but it has never gone the length of declaring legitimacy in the case of a person who is not alive or who has not continued the family by being the parent of legitimate children. What the Court is asked here to do is to declare the legitimacy of a young child that is dead. The purpose is to set up by his own act a claim by the pursuer against another which did not exist at the time at which the occurrence said to be the basis of the claim took place. It is thus not in order to establish any right in the child, but for gain to himself in the form of solatium that he desires to establish the child's legitimacy.

Whatever tendency there has been to give the status of legitimacy to children on a subsequent marriage of the parents has been in the interest of the innocent progeny and their descendants, and in their interest only, and it has never been carried so far as to do injustice to others. Thus although it has been carried so far as to legitimise children of a parent who has married the other parent after the dissolution of an intervening marriage, the law has refused to allow the rights of the children of the intervening marriage to be injured by the subsequent legitimation of the offspring of the original illicit intercourse. It is therefore plain that although the fiction may be that there was a marriage from the first, the logical sequences from such a doctrine are not allowed to take effect to the injury of the interests of others.

In this case what is demanded is that one guilty of illicit intercourse by which he has become the father of a bastard, and who during its life has done nothing to repair the wrong, shall when it has ceased to exist be allowed to establish its status as legitimate, and then to make gain to himself by obtaining solatium for its death, to which in fact at the time when death took place he was not entitled. It is not an action in the interests of the child, but solely in his own. I can see no ground for upholding such a demand as equitable in any sense.

In this case there is not a living person to whom the benefit of the law of legitimation *per subsequens matrimonium* can have any real application to himself or herself, or his or her descendants, assuming, as is sometimes maintained, that children of a deceased bastard may have the stigma and disqualification of bastardy removed by the marriage of the parents of the bastard child. And I cannot hold that where an infant dies illegitimate, a status can afterwards be conferred by the marriage of its parents. I therefore am of opinion that the judgment under appeal was right and ought to be affirmed.

LORD TRAYNER—The pursuer here sues for solatium on account of the death of Annie Swan M'Neill who met with an accident which resulted in her death on 22nd August 1900.

It is averred on record that the deceased Annie Swan M'Neill was the lawful child of the pursuer, but the certificate of the registry of her birth shows that at the date of her birth she was illegitimate. It is admitted by the pursuer that she was illegitimate at that date, but he maintains that she was legitimated by his subsequent marriage with the child's mother. That marriage took place on 14th December 1900. The question is, whether in these circumstances the pursuer has any title to pursue an action for solatium. I agree with the Sheriff-Substitute in holding that he has not.

It was conceded by the pursuer that he could not maintain this action unless it were held that his marriage with the child's mother, which took place in fact after the child's death, was held *fictione juris* to have taken place at the date of the child's conception. Whether by reason of this fiction the marriage of the parents of bastards had retroactive effect was long a subject of discussion, but I think it must now be taken that according to our law as it at present stands it has. It does not, however, follow that the pursuer has a good title to sue this action. For although the child may be regarded *fictione juris* as being legitimate from the date of its birth, such legitimation may not be attended with all the privileges of legitimate birth. In the case of *Kerr* v. *Martin* there was considerable authority cited to show that while an intervening marriage of one or both of the parents (that is, intervening between the birth of the illegitimate children and the subsequent marriage of their parents) would not prevent the legitimation of the children born illegitimate, yet it would not confer on the children so legitimated rights of succession to the prejudice of the children lawfully born of the intervening marriage. This view is very forcibly urged by Lord Mackenzie in his opinion in the case cited, and he proceeds upon the ground that no fiction of law is to be allowed an effect

which will be inconsistent with equity. On that view I am of opinion that the pursuer's claim is excluded, because it would be inequitable to allow him by an act within his own power—to do or not to do—to raise up a money claim against the defenders. The interests of morality were, I take it, the prime motive of allowing legitimation of children *per subsequens matrimonium*, and I cannot see that such interests would be advanced by admitting a claim like the present.

I have another difficulty in this case, arising from the fact that the child in question was dead before the marriage of her parents. How can you legitimate a child that has no existence? There is no person to receive the status of legitimacy that it is proposed to confer. I know it has been said that if an illegitimate child dies leaving issue, that issue will take the benefit of the grandparents' marriage. But, as Lord Fraser observes, "against this doctrine there are, however, many authorities."

I can figure various equitable considerations in support of the doctrine. For example, the deceased child might be regarded as still alive in the person of the issue, who by virtue of representation would be allowed to take the share of the grandparents' succession which would have fallen to the child who would have been legitimated had he survived. Again, if there were several children born illegitimate, but one of them died before the marriage of his parents, leaving issue, it might be regarded as inequitable to admit existing children to the status of legitimacy, but refuse that status to the child deceased to the prejudice of that child's issue. But these considerations, as well as others of a like kind, can have no place here, because the child whose death is in question was only three years of age. In the present case I cannot see how the act of the parents in December 1900 could confer the status of legitimacy, or any other right or privilege, on a child who had at that date no existence.

LORD MONCREIFF—The pursuer claims £250 damages in respect of the death of his child, a girl three and a-half years of age. The child lived and died illegitimate, but nearly four months after the child's death the pursuer married her mother. He now maintains that by that marriage the child was legitimated, and that he as her father is entitled to damages in name of solatium, as if the child had been born in wedlock.

The case raises an interesting and somewhat novel question as to the application and limitations of the doctrine of legitimation *per subsequens matrimonium*. There are no decisions of this Court directly in point, though there is an abundance of opinions on both sides to be found in the writings of jurists and *obiter dicta* of judges which touch the question under consideration. The salient point in the present case is that at the child's death, when the alleged right to damages arose, the pursuer had no title to sue, the child being illegitimate.

1. The first question is, whether legitimation *per subsequens matrimonium* has any application in the case of an illegitimate child who dies before the marriage of her parents. It is true that opinions have been expressed by writers of authority that if a child born out of wedlock dies before the marriage of his or her parents leaving lawful issue, the subsequent marriage of the parents operates to enable the bastard's children to succeed just as if he himself had been legitimate—Bankton, i. 5, 58; Voet, 25, 7, 7; Pothier, 5, 2, sec. 413; More's Notes to Stair, p. xxxiii. But this can be supported on the footing that the dead child is represented by his issue, and there are manifest reasons of expediency and justice for the doctrine or fiction being extended to such a case. But I know of no case where, an illegitimate child having died without leaving lawful issue, and before the marriage of his parents, the subsequent marriage of his parents has been held to have the effect of conferring on the latter any rights of succession or other rights which they would not otherwise have possessed. In other words, the doctrine is intended to benefit the living and not the dead, and I may add, primarily to benefit the children; and if when the marriage of the parents takes place any child or children begotten of the connection are no longer in existence or represented by lawful issue, I see nothing inconsistent with the doctrine in holding that it does not apply to them. The reparation comes too late to benefit or affect them.

2. While that is my opinion, it is not perhaps necessary to rest the decision of this case upon the ground that the legitimation of the pursuer's family by his marriage did not extend to the deceased child to any effect; because however undefined may be the limits of the doctrine as settled by decision or authority, I am of opinion that the trend of legal opinion is to the effect that it will not be applied to its full extent where the result of doing so would be to interfere with and defeat vested interests of third parties. The case of *Kerr* v. *Martin*, 2 D. 752, affords a good illustration of this, although the point was not expressly decided. It is clear from the opinions of the majority of the Judges that they would not have decided as they did if they had not been satisfied that the result of their judgment would not be to defeat the rights of the children of the intervening marriage. Indeed it was essential to the reasoning on which their judgment proceeded that the rights of the children of the intervening marriage should be recognised. Lord Mackenzie (2 D. 791) quotes with approval a passage in Ersk. i. 6, 52—"It would seem that that kind of legitimation is sufficiently favoured when it puts the bastard in the same condition in a question with his brothers by the full blood as if the father had been actually married to their common mother at the time of his procreation, though it should not have effects with regard to third parties."

Now, in the present case, when this child was killed the pursuer had no title to put

forward such a claim, and therefore the defenders, assuming them to have been otherwise liable, were free from such a claim being made by the pursuer. In my opinion it was not in the power of the pursuer thereafter to subject them to it by marrying the mother of the child, and thus, so to speak, acquiring a title which he did not previously possess. The marriage took place within four months of the death, but it might have been delayed for years, or possibly the mother of the child might have in the meantime married another man, as in *Kerr* v. *Martin;* and the pursuer's argument would have been just the same if on the termination of that marriage by the death of the husband he had married the mother of the child.

There is no hardship in imposing this limitation. The pursuer abstained from marrying the child's mother during the three and a-half years that the child lived; and if he has thereby lost rights which he would otherwise have possessed as the father of a child lawfully begotten, he had himself to blame. The nature and basis of the pursuer's claim makes this all the more clear. How could a claim which depends on reciprocity of rights and obligations between parent and child (*Clarke* v. *Carphin Coal Company, Limited*, 18 Ret. (H.L.) 63) be reared up after reciprocity had become impossible through the death of one of the parties?

It remains to notice the old case of *Crawford's Trustees* v. *Hart's Relict*, M. 12,698 (January 20, 1802). The question was between the widow claiming terce and the husband's trustees. Now, at the date when the claim for terce arose the widow had been lawfully married and was the mother of lawful children by her deceased husband. I do not see how the Court could have arrived at any other decision. In the eye of the law the children were lawfully begotten as if they had been born in wedlock, and the interests of third parties, that is, parties other than the husband's representatives and the children of the marriage, were not affected. The heir-at-law, who owed his legitimacy to the marriage, could not have challenged his mother's right to terce, and equally, I apprehend, the husband's trustees could not question it.

In the opinion of the minority in *Kerr* v. *Martin*, 2 D. 767, the following passage occurs—"Indeed, there must be a fiction of some kind in every view of the matter, for how are children to become legitimate so as to be accounted equally so with others afterwards born in lawful wedlock, or born previously of a lawful marriage, except by some fiction or presumption of the law by which the subsequent marriage obliterates the stain on their birth, and makes for them a status of actual and full legitimacy which does not exist by the natural course of things." I am disposed to accept this, with the qualification that the fiction is not inflexible. It yields to and will not be applied so as to defeat vested rights. Lord Gillies says, in the case of *Rose* v. *Ross*, 5 S. 649—"It is an invariable maxim that no fiction shall extend to work an injury. But on the other hand it may be held to be a general maxim that a fiction shall be so far extended as to accomplish its object, and to work out the rule with a view to which it was adopted." The solution of such questions is to be found in reconciling these maxims.

Now when this claim, which is made against third parties, emerged, the pursuer had no title to sue, and the defender's right of immunity from any claim at the pursuer's instance was as fully vested in them at the date of the marriage as was the right of priority vested in the children of the intervening marriage in the case of *Kerr* v. *Martin*. It may sound strange to speak of a vested right not to be sued in respect of what I assume to have been a civil wrong, but that phrase expresses the defenders' position with sufficient accuracy. When the child was killed there was no one who in the eye of the law had suffered a legal wrong through her death, and was thus entitled to sue the defenders.

I am therefore of opinion that the pursuer has no title to sue, and on that ground that the Sheriff-Substitute's judgment should be affirmed.

LORD YOUNG was absent.

The Court dismissed the appeal, affirmed the interlocutor appealed against, of new dismissed the action, and decerned.

Counsel for the Pursuer—John Wilson, K.C. — J. W. Forbes. Agent — William Finlay, W.S.

Counsel for the Defender M'Gregor — Salvesen, K.C.—D. Anderson. Agent—J. S. M'Culloch, W.S.

Counsel for the Defenders Walker and Cairns — Salvesen, K.C. — Crurie Steuart. Agents—Coutts & Palfrey, S.S.C.

Tuesday, November 12.

SECOND DIVISION.

[Sheriff Court at Glasgow

HIGGINS *v.* CORPORATION OF GLASGOW.

Reparation—Negligence—Safety of Public — Safety of Street — Defective Gutter—Burgh—Road—Street.

In an action of damages by the tenant of a house in Glasgow against the Corporation of the city, the pursuer averred that on 3rd November 1900, between 9·30 and 10 p.m., when returning home and crossing the street to her house, she placed her foot in a grating situated in the gutter of the street, and fell and broke her left leg; that at the time of the accident, and as she had since ascertained for at least four weeks previous thereto, the grating, which should have been flush with the street, was sunk about 4 inches below the level of the street, and was thus in