to this Act, the Criminal Evidence Act 1898 shall apply as if in the schedule to that Act a reference to this part of this Act and to the First Schedule to this Act were substituted for the reference to the Prevention of Cruelty to Children Act 1894." The wife of an accused was accordingly a competent witness for the prosecution in the case of the offences enumerated in the First Schedule to the Act of 1908, viz., *inter alia*, offences under the Criminal Law Amendment Act 1885, and "any other offence involving bodily injury to a child or young person." The clause last quoted had been held by Lord Anderson to cover the case of a charge of attempted rape, and though a charge of lewd, indecent, and libidinous practices was not so clearly within the scope of the words quoted as one of rape, it might fairly be said to be covered by the clause, as such practices might involve bodily injury to the child.

Counsel for the accused submitted that where, as here, no personal injury had been done to the child, and where, as here, the medical report admittedly indicated that no damage had been done to her, the Act did not apply, and the witness therefore was inadmissible.

LORD BLACKBURN—I think the question which has been raised is a difficult one. There is undoubtedly a great difference between the offence for which the prisoner is now on trial and the offence of attempt to ravish. I am, however, prepared to hold that if a man places his hand upon the private parts of a young girl of six years old, and takes out his private member and places it in contact with her private parts as charged in the indictment, he commits an offence involving bodily injury to the child within the meaning of the First Schedule to the Children Act 1908. It follows accordingly that the witness is admissible, and I allow her evidence.

Counsel for H. M. Advocate — Fleming, K.C., A.D. Agent—Crown Agent.

Counsel for the Accused—Norman Walker.

COURT OF SESSION.

Saturday, October 28.

SECOND DIVISION

[Lord Morison, Ordinary.

MURISON *v.* MURISON.

Husband and Wife — Aliment — Interim Aliment — Declarator of Marriage — Award of Aliment Prior to Proof—Defender Denying Marriage and Pleading No Jurisdiction—Aliment already Granted by Court of Country where Defender Resident.

A woman brought an action of declarator of marriage in which she averred that in 1888 she was married to the defender by interchange of consent in Scotland, that from the date of the marriage until 1902 she lived with him in Scotland, that in 1902 he obtained an appointment in Natal, whither she accompanied him and where she continued to live with him until 1919, that throughout the whole period of their cohabitation she lived with him as his acknowledged wife, and that in 1890 a daughter had been born in Scotland, whom the defender had registered there as the lawful child of the marriage. She further averred that in 1921 she obtained in the Court of Natal, where the defender continued to reside, a decree against him for aliment at the rate of £25 a month. The defender denied the marriage and pleaded, *inter alia*, no jurisdiction. *Held* (*rev.* judgment of Lord Morison, Ordinary) that the pursuer was not entitled to an award of interim aliment, in respect that (1) her averments did not *prima facie* disclose that the Court had jurisdiction; (2) (*per* the Lord Justice-Clerk and Lord Hunter) the defender had lodged defences denying the marriage; and (3) (*per* the Lord Justice-Clerk and Lord Hunter) it was inexpedient to make the award, the pursuer having already obtained an award in the Court of the country where the defender was resident.

Mrs Florence Smith or Murison, residing in Edinburgh, *pursuer*, brought an action against Patrick Murison, medical practitioner and medical officer of health for the borough of Durban, Natal, South Africa, *defender*, for declarator that the pursuer and defender were lawfully married to each other at Edinburgh on or about 17th August 1888.

The averments of parties were as follows:—"(Cond. 1) The pursuer Florence Smith or Murison resides at 24 Polwarth Terrace, Edinburgh. The defender is medical officer of health of the borough of Durban, Natal, South Africa, and has his office in the Town Hall there. With reference to the statements in answer, it is admitted that the defender was appointed medical officer as aforesaid in 1902 and is at present resident in South Africa, and that the summons in the present case was served on him personally in South Africa. *Quoad ultra* denied. (*Ans.* 1) Admitted that defender is medical officer and has an office as averred. The pursuer's residence is admitted, and also admitted that her name is Florence Smith. *Quoad ultra* denied. Explained that defender was appointed medical officer at Durban in 1902. He many years ago settled permanently in Natal, and acquired a domicile there which he still retains. He is not domiciled in Scotland, and has not resided there since 1902. Reference is made to the execution of the citation herein, from which it appears that defender has not been cited hereto within Scotland. (Cond. 2) The pursuer first met the defender in Edinburgh, at which time he was a medical student in the University there. In the following year, on or about 17th August 1888, the pursuer and the defender at

Edinburgh interchanged consent and accepted each other as husband and wife. The defender had by this time qualified to practice in medicine. With reference to the explanations in answer, it is admitted that prior to her marriage to the defender the pursuer was an actress. *Quoad ultra* denied. (*Ans.* 2) Admitted that pursuer and defender first met in Edinburgh when the latter was a medical student, and that defender subsequently qualified as a medical practitioner. *Quoad ultra* denied. Explained that when parties first met pursuer was an actress. She had been living, before meeting defender, with another man, and the defender was aware of that. (Cond. 3) Following on the said interchange of consent, the pursuer and the defender went to Dundee, where the defender had been born and was educated prior to his matriculation as a student of Edinburgh University. (*Ans.* 3) Admitted that defender was born in Dundee and was educated there, and that the parties lived together in Dundee. *Quoad ultra* denied. (Cond. 4) The defender took rooms in Dundee in the house of a Mrs Webster there, where he lived with the pursuer as his wife, having introduced her to the said Mrs Webster as his wife. (*Ans.* 4) Admitted that the parties lived together in Dundee in rooms. *Quoad ultra* denied. (Cond. 5) Shortly thereafter the defender, having obtained a temporary post as *locum tenens* to Dr Watkins, Newton-le-Willows, Lancashire, England, proceeded with the pursuer there. The pursuer lived with him as his wife in the house of the said Dr Watkins, and was acknowledged by the defender as his wife. (*Ans.* 5) Admitted that the defender acted as *locum tenens* to Dr Watkins. *Quoad ultra* denied. (Cond. 6) In a few months time, in the end of the year 1888, the defender bought a medical practice in Dundee, and the pursuer returned with him to Dundee. The pursuer and the defender lived together as aforesaid for a short time in lodgings in Dundee in the house of a Mrs Souter there. Thereafter they set up house together in Dundee at 14 Nethergate there for several years, and thereafter at 4 Airlie Place, Dundee. During this period, which lasted for eleven years, the defender carried on practice as a medical practitioner in Dundee and the pursuer lived with him at bed and board as his wife. She was publicly avowed by the defender as his wife, and was given the position of wife by him in his home. She presided at his table and received his friends as his wife, and was so received by them on her visiting them, and was habit and repute the wife of the defender. The defender effected an insurance on his life with the New York Life Insurance Company for £1000 for behoof of the pursuer, therein designated as his wife. (*Ans.* 6) Admitted that the defender bought a practice as averred, and that the parties returned to Dundee, where they lived in lodgings, and afterwards at 14 Nethergate and at 4 Airlie Place, and the defender carried on practice in Dundee, while the pursuer lived with him. The policy of insurance is referred to for its terms. *Quoad ultra* denied. (Cond. 7) The defender on his arrival in Dundee to take up practice there introduced the pursuer to his mother as his wife, and from time to time while the pursuer and the defender were resident in Dundee the defender's mother resided with the pursuer and the defender in their home in Dundee and regarded the pursuer as the defender's wife. The pursuer similarly from time to time visited the defender's mother at her home in Broughty Ferry. The pursuer was also introduced to the defender's relatives in Dundee by the defender as his wife. She was so introduced to an uncle of the defender, brother of the defender's mother, a farmer named Ritchie, and to his family, consisting of three sons and two daughters, cousins of the defender. (*Ans.* 7) Admitted that defender's mother occasionally resided with the parties in Dundee, and the pursuer visited her. The pursuer is called upon to give the names of the uncle and cousins referred to. *Quoad ultra* denied. (Cond. 8) On 11th June 1890 a daughter Winifred Murison was born to the pursuer and the defender. The defender registered the birth of the said daughter as that of his lawful child, giving the date of his marriage to the pursuer as 17th August 1888. (*Ans.* 8) Admitted that on 11th June 1890 a daughter Winifred was born to the parties. (Cond. 9) The defender became a member of the Town Council of Dundee, and as a public man owned and avowed the pursuer to be his wife and the foresaid Winifred Murison to be his lawful daughter. The said daughter lived in family with the pursuer and the defender and was treated by defender as in all respects his lawful daughter. She was educated by him in the High School, Dundee. The said daughter lived from time to time on short visits with the defender's mother until the latter's death in 1915, including visits from South Africa, where as hereinafter detailed the pursuer and the defender proceeded. (*Ans.* 9) Admitted that defender was a member of Dundee Town Council, that pursuer and Winifred lived with him, and that Winifred was educated at Dundee High School, that defender paid her fees and maintained her, that she visited defender's mother from time to time, and that defender's mother died in 1915. *Quoad ultra* denied. (Cond. 10) In 1900 the defender, who had qualified in public health, was appointed Medical Officer of Health for Sutherlandshire, and took up house at Golspie. On leaving Dundee the defender received various presents from friends, associates in public work, and colleagues. In these the pursuer was associated with him, receiving among other things certain articles of plate and a silver tea service inscribed to her as the wife of the defender. (*Ans.* 10) Admitted that defender in or about 1900 became Medical Officer of Health for Sutherlandshire, and took up house in Golspie, that he received various presents on leaving Dundee, and that the pursuer also received various presents. *Quoad ultra* denied. (Cond. 11) The defender acted as Medical Officer of

Health in Sutherlandshire from 1900 to 1902. The pursuer and the said daughter lived with him there in his house at Golspie, and the defender openly avowed the pursuer to be his wife, and his said daughter to be his lawful daughter. The pursuer was received by the defender's friends and their families in their houses as the wife of the defender, and as his wife presided over his house and received his friends, and was habit and repute his wife. (*Ans.* 11) Admitted that defender was medical officer as averred, and that pursuer and Winifred lived with him at Golspie. *Quoad ultra* denied. (Cond. 12) In 1902, at the instigation of the pursuer, the defender applied for and obtained his present position as Medical Officer of the Borough of Durban, Natal, South Africa. The pursuer and the defender with their said daughter proceeded to Durban, Natal, and took up house there, residing at 103 Cato Road, Durban, where the pursuer was avowed by the defender as his wife, and was so treated in his house, in public, and by his friends. Since going to South Africa the pursuer and the defender have twice returned to Scotland on leave. (*Ans.* 12) Admitted that in 1902 the defender was appointed Medical Officer of Health of Durban, that he resided with pursuer and their daughter at 103 Cato Road, Durban, and that pursuer and defender have since paid two temporary visits to Scotland. *Quoad ultra* denied. (Cond. 13) The pursuer so lived with the defender in Durban for nineteen years at bed and board as his wife until 1919, when in consequence of the behaviour of the defender, disagreement arose between the pursuer and the defender. On 15th April 1920 the defender went through a ceremony of marriage in Johannesburg with a woman named Freda Andrews. On discovering this, and also in consequence of the defender's drunken habits, the pursuer and her said daughter ceased to live with the defender. Since 10th March 1921 pursuer has not lived with defender. (*Ans.* 13) Denied. (Cond 14) The defender has sold the house and furniture at 103 Cato Road, Durban, and has refused to support the pursuer, although making provision for his said daughter. (*Ans.* 14) Denied. (Cond. 15) In consequence of the defender failing to support her, the pursuer took action against him on 10th December 1921 under section 2, Act (Natal) No. 10 of 1896, whose terms are as follows:—'When any husband unlawfully deserts his wife or leaves her without means of support, or when a father deserts any child being under 15 years of age or leaves it without any adequate means of support, if complaint thereof be made on oath to the magistrate of the division in which such wife or such child shall respectively reside by the wife or by any reputable person on her behalf, or in case of the child by the mother or any reputable person, such magistrate may issue his summons to such husband or father to show cause why he should not support his wife or child; and in cases of desertion, where such husband or father is absent from the colony, the magistrate may direct service of the summons to be made by publication thereof in the *Natal Government Gazette*, and in some newspaper circulating at any place in South Africa where such magistrate shall have reason to suppose that such husband or father resides or is.' By order of the Court the defender was ordained to make payment to the pursuer of £25 per month. (*Ans* 15) The order and the Act are referred to for their terms. *Quoad ultra* denied. (Cond. 16) The defender now denies that the pursuer is his wife, and the present action has been rendered necessary. The explanations in answer are denied. (*Ans.* 16) Admitted that defender denies that pursuer is his wife. From the first the pursuer frequently suggested to defender that they should be married. The defender has always refused to marry the pursuer. He was aware of her career prior to her relationship with him, and on several occasions he had good reason to suspect that she was having relations with other men. This led to disputes between them and they separated on several occasions. Since the birth of said child the defender has only resumed cohabitation with pursuer out of consideration for the child."

The pursuer *pleaded*—"A valid marriage having been constituted between the pursuer and the defender as condescended on, declarator in terms of the conclusions of the summons should be pronounced."

The defender pleaded, *inter alia*—"1. The defender being neither domiciled in, nor resident in, nor cited within Scotland, the Court has no jurisdiction to try the action."

On 18th July 1922, before proof led, the pursuer having moved for an award of aliment, the Lord Ordinary (MORISON) pronounced this interlocutor—"The Lord Ordinary having heard counsel on the motion of the pursuer for an award of aliment, decerns against the defender for payment to the pursuer of the sum of £25 per month as interim aliment, provided that the pursuer shall impute towards the amount of aliment hereby decerned for any payment made to her in terms of an order of Court under section 2, Act (Natal) No. 10 of 1896: Grants leave to reclaim."

The defender reclaimed, and argued—The pursuer was not entitled to an award of interim aliment, because (1) the action was brought during the lifetime of the alleged husband, and he had put in defences denying the marriage. In circumstances such as these there was no case where the Court had made an award of interim aliment—*Petrie* v. *Petrie*, 1910 S.C. 136, 47 S.L.R. 151, *per* Lord President (Dunedin) at 1910 S.C 138, 47 S.L.R. 152; *Campbell* v. *Sassen*, (1826) 2 W. & S. 309, *per* Lord Gifford at 327; *Browne* v. *Burns*, (1843) 5 D. 1288; *Forster* v. *Forster*, (1869) 7 Macph. 546; Maclaren, Court of Session Practice, p. 715; Walton, Husband and Wife (2nd ed.), p. 103; Fraser, Husband and Wife (2nd ed.), pp. 846 and 850. (2) The pursuer's averments were not sufficient to show that the Court had jurisdiction. *Ogden* v. *Ogden*, [1908] p. 46, was referred to. (3) The pursuer was already in receipt of alimony from the Court of Natal.

Argued for the respondent—The pursuer was entitled to receive an award of interim aliment, because (1) the pursuer's averments disclosed a good *prima facie* case, and the decision in *Browne* v. *Burns* (*cit.*), referred to by the Lord President (Dunedin) in *Petrie* v. *Petrie* (*cit.*), did not preclude the Court from making an award in circumstances like those of the present case—(see Lord Cunningham's opinion in *Browne* v. *Burns* (*cit.*) at p. 1293). (2) The Court had jurisdiction. In an action of declarator of marriage jurisdiction was not determined by the domicile of succession, but by the domicile of the alleged husband at the date of the marriage. Moreover, in cases where the domicile of the woman depended on the marriage being set up, she was not to be subjected to the jurisdiction of a court which would only be the court of her domicile in the event of the marriage being established—*Sottomayor* v. *De Barros*, (1877) 2 P.D. 81. In *Mayberry* v. *Mayberry*, (1908) 15 S.L.T. 1016, it was held that the Court had jurisdiction to entertain the case. The pursuer in the present case was just as much entitled to have her case entertained.

LORD JUSTICE-CLERK—This is an action of declarator of marriage in which the pursuer avers that she was married to the defender as far back as August 1888 by interchange of consent, since which time they have lived together, and craves the Court to hold that she is the wife of the defender. The defence to the action is that the pursuer was the mistress and not the wife of the defender. The Lord Ordinary after the record had been closed pronounced a decree awarding £25 per month to the pursuer against the defender in name of interim aliment, and against that interlocutor a reclaiming note has been taken to this Division. We have not the advantage of an opinion from the Lord Ordinary indicating the grounds upon which he reached the conclusion which his interlocutor bears. But after hearing argument on the subject I am of opinion that the interlocutor of the Lord Ordinary falls to be recalled. It was maintained, in the first place, on behalf of the defender that that result ought to be reached in respect that there was a plea of no jurisdiction tabled by the defender in the action, and it was contended before us that in respect of that plea the Lord Ordinary was disabled equally from pronouncing an award of interim aliment as from deciding the action on the merits. It was admitted by pursuer's counsel that he knew of no case of this character where, a plea of no jurisdiction having been tabled, the Court made an award of interim aliment. In any case I think it inexpedient that the Court should make such an award in this case. To begin with, the pursuer has made no relevant averment of a Scottish domicile, and none of the averments on record establishes, in my view, a *prima facie* case of jurisdiction. In point of fact the pursuer admits in condescendence 1 that the defender was appointed a medical officer in 1902 in Natal, and in condescendence 13 she states that she until 1919 lived with him at bed and board in Natal, where he held this apparently permanent employment. Accordingly, so far as the record discloses, there is—I agree with what Lord Hunter said in the course of the argument—no *prima facie* case of domicile established. It was argued that in respect either of the marriage having taken place in Scotland, or the birth of the child having taken place in Scotland and been registered there, some sort of jurisdiction was constituted. I am unable to agree with or to give effect to that argument; and accordingly so far as jurisdiction is concerned, even if it be competent, which I think is doubtful, to give an award of interim aliment in a case where no jurisdiction is pleaded, I am clearly of opinion it ought not to be given in this particular instance.

The second argument maintained to us was that in a case of declarator of marriage where the marriage is denied by the husband in Court and where no proof has been adduced, it is incompetent to make such an award as that which the Lord Ordinary has made. Here it is quite true that the husband is in Court denying the marriage and no proof has been led. The pursuer's counsel admitted at the bar that he was unable to cite any case where, these circumstances concurring, the Court had made an award of interim aliment. Without holding that it is necessarily incompetent in such a case to make such an award, I again think that in this particular case it is inexpedient to do so, if for no other reason than this, that the pursuer has elected in Natal to make an application to the Court for aliment and has been awarded by that Court £25 a-month. In these circumstances I think it is undesirable that a further award should be made in this Court, even assuming—what may be doubtful in the circumstances I have mentioned—that such an award could competently be made.

I am of opinion that the Lord Ordinary's judgment should be recalled and the case remitted back to proceed.

LORD HUNTER—I agree. A woman who is the wife, or a woman claiming to be the wife, of a man has no absolute right to aliment or interim aliment pending the decision of the case. The question whether she should get aliment or not is always a matter within the discretion of the Court. I am entirely in agreement with your Lordship in saying that in this case, as it appears to me upon several grounds, it is inexpedient that the Court should exercise the discretion in her favour. Among the different reasons that appeal to me, as they appealed to your Lordship, are these—the defender in this case has put forward a plea that a Court in Scotland has no jurisdiction to determine this action of declarator in respect that he is domiciled in Natal. Now I do not wish to say absolutely that wherever a plea of no jurisdiction is put forward by the defender it is incompetent for the Court before determining jurisdiction to make any award of interim aliment. It might be that, on the face of the defender's pleas, the plea was so frivolous and unfounded and the

necessities of the pursuer might be so great that the Court might consider it just and equitable at once to make an interim award. But no such case is presented here on the pleadings. On the contrary, the pursuer herself admits that for something like nineteen years prior to 1921 she was resident in Natal with her alleged husband, who has got an apparently permanent post there. During that time she says she was acknowledged and recognised by him as his wife. All that points at all events to this, that *prima facie* the permanent domicile of the defender is Natal. No doubt an argument has been presented to us or suggested to us—because it has not been developed, and I think it would require a much greater citation of authority to its development before we could possibly determine it—that in respect that the alleged consent to marriage (which is alleged to have been given by words *de presenti* in Scotland) was interchanged in Scotland, and in respect that the first years of the cohabitation of these parties were spent in Scotland, the Scottish Courts have jurisdiction to determine the matter. As I say, that is a matter that would require argument or may require argument. As at present advised I shall not express any opinion one way or the other upon it. But at all events it does not *prima facie* satisfy me that the Scottish Court has jurisdiction. That being so, I think it would be inexpedient for this Court to pronounce any decree for aliment.

There is an equal inexpediency, I think, created by the circumstance that in this case while the pursuer is alleging marriage, the defender, who has put in defences, is denying marriage. Although there are certain circumstances apparently favourable to the pursuer's contention in this case, I am not satisfied that they are so strong in degree as would entitle us to set aside what is apparently recognised as more or less of a rule of expediency, that an award of aliment should not be given, in the ordinary case, to the pursuer in an action of declarator of marriage where the defender is present, puts in defences, and denies the existence of the marriage.

There is a further ground that appears to me to be adverse to the exercise of our discretion in the manner asked by the pursuer, and that is the circumstance that I do not think a decree in this Court in favour of the pursuer would do her any good. She has already got a decree in her favour from the Court where her husband is resident and where his goods so far as we know are situated. Under those circumstances I do not see how a further decree from a Court which is situated thousands of miles from the defender's residence and property would assist her in any way. It would not assist her in giving her immediate subsistence, because in order to make any decree we grant effective the pursuer would apparently have to go to the Court of Natal, and she has already gone there and has got a decree.

I am therefore clearly of opinion that, without deciding any general proposition, as a question of expediency we ought to refuse the motion made by the pursuer and recal the interlocutor of the Lord Ordinary.

LORD ANDERSON—I had always understood, since the well-known case of *Le Mesurier* ([1895] A. C. 517) was decided, that the doctrine of matrimonial domicile had ceased to exist. But it is just this doctrine, as I understood Mr Watson's argument, that was founded on as justifying the decree of the Lord Ordinary, because I can find no other circumstance which warranted him in pronouncing a decree against a South African except this, that the defender who is now a South African is said to have interchanged matrimonial consent in Scotland with a woman who is either a Scotswoman or an Englishwoman. In my opinion that is not sufficient ground upon which a judge in this Court could exercise jurisdiction, even to the extent of pronouncing a decree for an interim award of aliment. It is to be noted that the pursuer does not relevantly aver that the defender has his domicile in this country, and his averments show *prima facie* that his domicile is in South Africa. Therefore I agree with your Lordships that on that ground the judgment falls to be recalled.

That is sufficient support for the judgment which we are now pronouncing. I express no opinion upon the second point argued, but it is to be noted that no case was cited where, the alleged husband appearing and defending the action and denying that the marriage had been constituted, the Court has ever made an award of interim aliment.

LORD ORMIDALE was absent.

The Court recalled the interlocutor of the Lord Ordinary and remitted the cause back to him to proceed as accords.

Counsel for the Reclaimer (Defender)—W. H. Stevenson. Agents — Mitchell & Baxter, W.S.

Counsel for the Respondent (Pursuer)—J. C. Watson. Agents — Warden, Weir, & Macgregor, S.S.C.

Tuesday, October 31.

SECOND DIVISION.

[Sheriff Court at Hamilton.

BARKEY *v.* MOORE & COMPANY.

Workmen's Compensation—Accident Arising Out of and in Course of Employment—Contravention of Statutory Rule—Presumption—Onus—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1.

Two men while engaged in clearing gas from a pit were killed by an explosion, which was due to an attempt to re-light a Glennie lamp, in breach of the Coal Mines Act 1911. In an arbitration at the instance of the representatives of one of the men, it was not found that the deceased opened the lamp, which as a matter of fact belonged to the other man, or that he attempted to re-light it, nor was it proved that he