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

was in possession of matches. *Held* that the presumption that the man's death was caused by an accident arising out of and in the course of the employment had not been displaced, and that accordingly the onus of showing that the deceased had contributed to the statutory contravention lay on the employers, and that that onus had not been discharged.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) in the Sheriff Court at Hamilton between Mrs Annie Barkey, widow of Patrick Barkey, miner, Uddingston, as an individual and as tutor and curator for her pupil children, *appellants*, and A. G. Moore & Company, coal-masters, Uddingston, *respondents*, the Sheriff-Substitute (HAY SHENNAN), on the application of the appellants, stated a Case for appeal.

The Case stated:—"This is an arbitration in an application presented on 15th March 1922 by the appellants, who are the widow and children of the deceased Patrick Barkey, for compensation in respect of his death by accident arising out of and in the course of his employment in the respondents' Blantyre Ferme Colliery. Proof was led before me on 30th May 1922, when the following *facts* were admitted or proved:—(1) The deceased Patrick Barkey was an oncost worker in the employment of the respondents in their Blantyre Ferme Colliery. On Sunday, 17th July 1921, he was working on the night-shift, which begins at 11 p.m. He was engaged with Gillespie, the night-shift fireman, in clearing gas from the east side section of the pit. Shortly after they started work an explosion took place, and both men were killed. (2) In the afternoon of Sunday, 17th July 1921, two firemen, Robert M'Callum and Joseph Reid, were engaged in clearing the gas from the east side section of the pit. In doing such work men always work in pairs. They did not complete the clearing of the gas during their shift, and when they came to the surface they explained to Gillespie, the night-shift fireman, what they had done, and that there was still some gas to clear. When Gillespie and Patrick Barkey went down the pit, Gillespie called on Barkey to assist him in clearing the gas away. He was entitled to do so, and Barkey was bound to comply. Gillespie had a Glennie (oil) safety-lamp, which discloses the presence of gas by burning low or going out altogether. Barkey had an electric safety lamp, which does not disclose the presence of gas. (3) By section 34 (iii) of the Coal Mines Act 1911 it is provided that in any part of a mine in which safety-lamps are required to be used, 'a safety-lamp shall not be unlocked except at an appointed lamp-station (which shall not be in a return air-way) by a competent person appointed in writing by the manager for the purpose, nor, except in the case of electric hand-lamps, shall it be re-lighted except by such a person at an appointed lamp-station after examination by him, and no person other than such person as aforesaid shall have in his possession any contrivance for re-lighting or opening the lock of any safety-lamp.' This enactment was in force in Blantyre Ferme Colliery, and was duly posted. The appointed lamp-station was on the surface. When a Glennie lamp became extinguished below ground, it was necessary to bring it to the lamp-station on the surface in order to have it re-lighted. (4) As soon as the explosion was reported a rescue party went down the pit. They first found Gillespie's body, and then Barkey's body 20 feet further in. Both men had their caps on, and were lying on their faces with their heads outward looking away from the face, and towards the end of the road. The safety-lamp was found in two pieces. This could not have been caused by the explosion, because the lead rivet had been removed, and the bottom of the lamp had been unscrewed from the top. Some one must have taken it to pieces, and the natural inference is that the lamp had gone out and had been unscrewed with the view of re-lighting it. Barkey's electric lamp was found still alight. The men and the lamps were found almost in a straight line in the following positions:—(1) The electric lamp still burning within a few feet of the coal face; (2) the top of the Glennie lamp 15 feet from the face; (3) the bottom of the Glennie lamp 18 feet from the face; (4) Barkey's body 30 feet from the face; (5) Gillespie's body 50 feet from the face. On the following day (19th July 1921), on the occasion of the visit of the mines inspector, a small tin box with matches was found between the two portions of the Glennie lamp. The ownership of this tin box is not proved. The lamp-man is sure that Gillespie left a wooden pipe and a box of matches in the lamp-room on the surface. They were not produced. Barkey's son states that he never knew of his father carrying such a tin box for any purpose. Both men were smokers. It is not proved which of the men had the matches which were used in re-lighting the lamp. (5) The explosion was due to an attempt to re-light the Glennie lamp in breach of the above-quoted section of the Coal Mines Act 1911. It is impossible to say who opened the lamp and who attempted to re-light it. It was Gillespie who had control of the Glennie lamp, but the two men were working together.

"On 5th June 1922 I issued my award, refusing to award compensation. I was of opinion that as the respondents had proved that the accident was due to breach of a provision of the Coal Mines Act, the onus was on the appellants to prove that so far as Barkey was concerned the accident arose out of his employment, and that they had failed to discharge this onus."

The *question of law* for the opinion of the Court was—"On the foregoing *facts* was I entitled to find that the accident to the deceased Patrick Barkey did not arise out of his employment with the respondents?"

The arbitrator appended the following *note* to his award—[*After a narration of the facts*]—"What then is the inference to be drawn from these meagre facts. There is a certain presumption that a miner who is found dead in a part of the mine where he was entitled to be (death not having

occurred from natural causes) has been killed through an accident arising out of and in the course of his employment. But here the employers have displaced that presumption by showing that the accident occurred through breach of the Act of Parliament. The burden then falls on the claimants to show that Barkey was not responsible for this breach. The furthest they can go is to show that the oil safety-lamp was entrusted to Gillespie, and that Barkey worked under Gillespie's orders. But this does not carry them very far. The condition of matters after the explosion suggests strongly that both men were concerned in the breach of the statute. After all one comes back to the elementary requirement that the claimants must prove their case, and in my opinion the facts set forth do not prove that this accident arose out of the deceased man's employment.

"Perhaps I may add that this case is clearly distinguishable from *Coltness Iron Company, Limited* v. *Baillie*, (H.L.) 1922 S.L.T. 108. There the breach of rule could be committed only by 'the person firing the shot.' Here, however, there is no such limitation. The prohibition is universal."

The appellants appealed, and argued — The arbitrator had come to a wrong conclusion in law on the question of onus. There was no authority for the proposition that in the case of an accident involving several men where a particular statutory breach was proved to have been committed, there was an onus on the applicant to show that he did not commit the breach. The onus was on the employers to prove that the man did the particular thing which took him out of his employment—*Coltness Iron Company* v. *Baillie*, 1922 S.C. (H.L.) 76, 59 S.L.R. 118; *Costello* v. *Addie & Sons' Collieries*, 1922 S.C. (H.L.) 72, 59 S.L.R. 116; *Donnelly* v. *Moore & Company*, 1921 S.C. (H.L.) 41, 58 S.L.R. 85; *M'Intyre* v. *Stewart*, 1916 S.C. 91, 53 S.L.R. 62. In the present case that onus had not been discharged.

Argued for the respondents — The onus was on the applicant to show that the accident arose out of and in the course of the employment. The known facts being equally consistent with the opposite theory, the claimants had failed to discharge that onus—*Barnabas* v. *Bersham Colliery*, 1910, 48 S.L.R. 727; *Pomfret* v. *Lancashire and Yorkshire Railway*, [1903] 2 K.B. 718; *Lendrum* v. *Ayr Steam Shipping Company*, 1914 S.C. (H.L.) 91, 51 S.L.R. 733; *Marshall* v. *Owners of "Wild Rose,"* [1910] A.C. 486, 48 S.L.R. 701.

LORD JUSTICE-CLERK — The simple and somewhat exiguous facts of this case are summarised by the arbitrator and it is not necessary to rehearse them in detail. The governing facts are these — That two men—Barkey and Gillespie—were engaged in clearing gas from a pit, that an explosion occurred, and that both were killed. The explosion the arbitrator finds in fact was due to an attempt to re-light a Glennie lamp in breach of section 34 (3) of the Coal Mines Act 1911. He then proceeds to state his finding in law thus—"I was of opinion that as the respondents had proved that the accident was due to breach of a provision of the Coal Mines Act, the onus was on the appellants to prove that so far as Barkey was concerned the accident arose out of his employment, and that they had failed to discharge this onus." In other words, the arbitrator has laid upon the claimants the notoriously difficult duty of proving a negative, to wit, that Barkey was not in breach of the Coal Mines Act.

I think this view ignores the fact, or at anyrate it does not give sufficient weight to the fact, that one is concerned here not with one man but with two. As one of your Lordships pointed out, the net result of the arbitrator's judgment, if it were sound, would be that if, say, 50 men were engaged in clearing away gas, and if an explosion occurred through the opening of a safety lamp, the representatives of each one of these men would be obliged in order to secure compensation to prove that their relative was not concerned in the breach of the statute. That seems to me a somewhat extravagant result. For myself I am bound to own that I cannot see any presumption in this case that Barkey was a party to a breach of the statute. There are no facts proved which in my view suggest that inference. The lamp which was open was not his lamp. In point of fact it was Gillespie's lamp. It is not found that at the time Barkey opened the lamp, or indeed meddled with the lamp on that or on any previous occasion. It is not found that the matches belonged to him; and yet the learned arbitrator has held that his representatives must expressly dissociate him from the cause of the accident before they can receive compensation.

The case would obviously have been quite different had it been proved that the lamp belonged to Barkey, that he was in possession of matches, and that he had previously opened the lamp. In my judgment, if any presumption arises from the facts which are proved, the presumption would be against Gillespie rather than Barkey. Whether that is the proper conclusion to draw is not, however, necessary for the purpose of this case to consider. We were invited to draw certain inferences from the position of the bodies and of the lamp after the explosion. I am very clearly of opinion that after an explosion in a mine it would be far from safe to draw any inferences from the position in which the lamp and the bodies were found.

The arbitrator in his note says—"There is a certain presumption that a miner who is found dead in a part of the mine where he is entitled to be (death not having occurred from natural causes) has been killed through an accident arising out of and in the course of his employment." I entirely agree with that view, and I demur to the suggestion that that presumption has been displaced to the effect of shifting the onus of proof by anything proved or held to be proved by the arbitrator in this case. There is no proof, in other words, that Barkey undertook an added peril, to use a phrase so often employed in such cases, and in these circum-

stances I am of opinion that the arbitrator's judgment, which one regards with great respect but which is by no means sacrosanct, ought to be recalled, and that the question put by him ought to be answered in the negative.

LORD HUNTER—I also think that the arbitrator here reached a wrong conclusion—not a wrong conclusion on fact, because that is not the question put before us, but a wrong conclusion in law.

The *facts* of the case are these:—The deceased Barkey was engaged in clearing away gas when he was killed by an explosion of gas. Upon that statement of the facts I think a strong presumption is raised that the case is one of an accident arising out of and in the course of the deceased's employment. No doubt it is open to the employers to show that the deceased's representatives are not entitled to get compensation because he had added a peril to his employment by acting in contravention of a statutory regulation. That has been laid down so frequently in the House of Lords that it was a proposition that was not controverted on either side of the bar, and it is quite unnecessary to refer to decisions upon the point. So far as I know, however, the doctrine has always proceeded upon the assumption that it has been established that the person disentitled to compensation has voluntarily added the risk. Now in order to establish a voluntary adding of the risk the onus must, I think, be put upon the employers. If that were not so, as your Lordship has pointed out—and it was pointed out in the course of the argument—it might well be that where an accident had occurred involving the death of many people, and where it was further established that someone must have acted in contravention of a statutory regulation, then the representatives of none of the deceased would be able to recover compensation at all. In the present case the view taken by the learned arbitrator is, that once it has been established that there has been a breach of the regulation which has given rise to the accident, then it is a matter of legal obligation imposed upon the representatives of the parties claiming to prove that the deceased whom they represent was entirely free from any blame connected with the breach of the regulation. That, I think, would be quite an impracticable proposition. I think that in reality the decisions in the House of Lords, when they are carefully read, indicate that where a workman has met his death in circumstances like the present, his representatives would be entitled to recover. And I think, unless the arbitrator had felt himself justified in reaching the conclusion in fact that Barkey had had to do with the breach, he was not entitled to refuse his representatives compensation.

Now I take it from his findings in this case that the arbitrator has not reached the conclusion that Barkey had anything to do with the breach here in question. He says there was no evidence on which he could find one way or the other. If I dealt with the evidence I should reach the same conclusion as your Lordship reached, namely, that *prima facie* at any rate there is nothng to justify an inference adverse to Barkey. I think the learned arbitrator here has erred in throwing the onus upon Barkey's representatives.

LORD CONSTABLE—I am of the same opinion. Upon the facts stated by the arbitrator in this case, and which I need not resume, I think it is reasonably clear that the accident to the deceased man Barkey arose out of and in the course of his employment, and I see no reason to infer that he was a party to the breach of the statute which, in the view of the arbitrator, immediately led to the accident. If contrary views had been expressed by the arbitrator, based upon his particular findings in fact, we should have to consider whether on the authorities quoted by Mr Morton and Mr Russell it was competent for a court of review to reverse inferences in fact which the arbitrator had drawn. But I think it is unnecessary to consider that question, because it appears from his own statement that the arbitrator has really decided the case upon a view of the onus of proof resting upon the parties, which in my opinion is unsound. In other words, he has misdirected himself upon a question of law which this Court is entitled and bound to review.

LORD ORMIDALE and LORD ANDERSON did not hear the case.

The Court answered the question of law in the negative.

Counsel for the Appellants—Wark, K.C.—Paton. Agent—R. D. C. M'Kechnie, Solicitor.

Counsel for the Defenders—Morton, K.C.—Russell. Agents—W. & J. Burness, W.S.

Wednesday, November 1.

FIRST DIVISION.

[Sheriff Court at Dunfermline.

HUTTON AND OTHERS *v.* COLTNESS IRON COMPANY, LIMITED.

Workmen's Compensation—Personal Injury Resulting in Death—Amount of Compensation — Deduction of Weekly Payments—Whether Additional Weekly Sums Payable under the War Additions Acts Deductible—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1), *and First Schedule, Par.* 1 (*a*) (*i*)—*Workmen's Compensation* (*War Addition*) *Acts* 1917 *and* 1919 (7 *and* 8 *Geo. V, cap.* 42, *and* 9 *and* 10 *Geo. V, cap.* 83), *sec.* 1.

A miner sustained injuries through an accident arising out of and in the course of his employment, which subsequently resulted in his death. At the time of his death he was receiving compensation for his injuries in the form of weekly payments, which included the