both actions completely under our control, and can stop the one until the other is ripe for judgment. I think we can competently do this, though the objection is made, as a practical distinction between this case and that of *Brodie*, that we cannot proceed with these two cases together, so as to decide them both conjunctly, because, if we affirm the Lord Ordinary's judgment in either, the date of decree will be the date of his interlocutors. Even suppose that we agree with the Lord Ordinary, and are going to affirm his decree of divorce in favour of the husband, while at the same time we are going to give the wife decree of divorce against her husband, what is to prevent our recalling the Lord Ordinary's interlocutors, and ourselves pronouncing decrees of the same date? There can be no difficulty in that.

The farther question of expenses necessarily follows. The actions are to go on together, and it may be that the wife gets decree of divorce and the husband not. That is a quite possible result. And if that is the case, is the wife to be deprived of the means of going on with her case? I think not, for, even if she only succeeds in getting a mutual divorce, she will be entitled to her expenses. There may be hardships, but that is beyond our control.

LORD ARDMILLAN—I cannot at all differ from your Lordships on this question, when I look to previous decisions, and to the position of parties; and I should not add anything farther, were it not that I feel it my duty to repeat an expression of the opinion which I have long held, that divorce is a remedy for the innocent and not for the guilty party. That when one party is innocent, that party should be enabled to obtain divorce, but when both parties are equally guilty—have both broken their marriage vows—divorce is a remedy to which they should have no claim. I think and believe that this opinion is held by some of the greatest legal authorities in other countries. But though I think with them, that there should be no decree of divorce granted to a guilty party, I am aware that this is not the law of this land at present, and I do not therefore feel myself justified in differing from your Lordships.

LORD KINLOCH—There can be no doubt that the husband's action is still a depending process. There is a judgment, but there is no final judgment. In such a state of matters, the principle laid down in the case of *Brodie* directly applies. And therefore I think that the action of the wife against her husband is still brought in time to be insisted in. How we shall dispose of the two actions when they come up before us it is, I think, premature to say. But as at present advised, I consider that it is settled in this country, that when adultery has been committed by both parties, it is only a double reason for divorcing them.

The Court accordingly adhered to the Lord Ordinary's interlocutor, and sisted procedure in the action at the husband's instance, until that at the wife's should be ripe for judgment.

Agents for Pursuer—J. B. Douglas & Smith, W.S.

Agents for Defender—W. G. Roy, S.S.C.

Tuesday, January 31.

SECOND DIVISION.

JACKSON & PEARSON *v.* ALISON.

Decree in Absence—Reponing—Acquiescence—Sheriff-court Act 1853, § 2. The widow of a party against whom a decree in absence had been pronounced in the Sheriff-court, and who had made up no title to her husband's estate, was reponed without any objection being stated. The parties then went on with the litigation, and a proof was led. *Held* that the pursuer could not afterwards maintain that the reponing was incompetent.

This was an action concluding for certain sums alleged to have been advanced as loans and for business accounts, and was raised on 12th August 1859 at the instance of Messrs Pearson & Jackson, against William Alison, seaman in Sinclairtown, and Agnes Taylor or Alison, his mother. The defenders failed to enter appearance, and decree in absence was pronounced against them on 1st September 1859. No steps appear to have been taken on this decree against the defender William Alison. After his death an action was raised against his widow, Mrs Margaret Mitchell or Alison, to have her ordained, as representing her husband, to make payment of the sums decerned for in the decree in absence pronounced against her husband on 1st September 1859. That action stands dismissed in consequence of no procedure having been taken therein. In consequence, however, of the raising of that action against her, Mrs Margaret Mitchell or Alison lodged, on 19th January 1869, a note in the present action, craving to be reponed against the decree in absence pronounced against her husband on 1st September 1859. That note the pursuers, on 19th January 1869, held as intimated to them. On 19th January 1869 the Sheriff-Substitute pronounced an interlocutor, by which he reponed the said Mrs Margaret Mitchell or Alison against the decree in absence of 1st September 1859, and appointed the 26th of January 1869 for hearing parties' procurators in terms of the statute. The parties appear to have been heard on the 26th of January 1869, because of that date the Sheriff-Substitute pronounced an interlocutor, by which he sisted Mrs Margaret Mitchell or Alison as a defender in room and stead of the said William Alison, and appointed a condescendence and defences to be lodged. The record was closed, and parties appointed to be heard. After the parties were heard, the Sheriff-Substitute, on 21st June 1869, pronounced an interlocutor as to the proof to be allowed. This interlocutor was appealed to the Sheriff; and, upon the parties being heard before him, the case was remitted to the Sheriff-Substitute to proceed with the proof, and dispose of the cause. On 6th January 1870, the Sheriff-Substitute appointed the proof to be led on 14th February. On 4th February 1870, Mr Jackson, who alleges that he is now in right of the estate of Pearson & Jackson, raised a second action against Mrs Margaret Mitchell or Alison for implement of the decree in absence pronounced against her husband in this action on 1st September 1859.

The Sheriff (CRICHTON) pronounced certain findings, allowing some of the pursuers' claims and repelling others, and in his note he says—"At the hearing before the Sheriff it was maintained that

the interlocutor pronounced by the Sheriff-Substitute on 19th January 1869, reponing Mrs Margaret Mitchell or Alison, was incompetent, and that all the proceedings which had taken place in this action subsequent to that date can receive no effect. It was contended that she could not be reponed against a decree which had not been pronounced against her, and that she had not at that date made up any title to her husband. If these objections had been stated at the time, a very grave question would have been raised; and the Sheriff is inclined to doubt whether it was competent for the Sheriff-Substitute to pronounce the interlocutor of 19th January 1869. But no objection was stated by the pursuers to that interlocutor being pronounced, nor was any objection stated to the interlocutor of 26th January sisting Mrs Margaret Mitchell or Alison as a party to this action being pronounced. The parties join issue, a record is made up, and a proof is led. No plea in law as to the competency of reponing or sisting Mrs Margaret Mitchell or Alison is stated on record. In these circumstances, the Sheriff has come to be of opinion that the pursuers are not now entitled to insist in the objections to the reponing and sisting. The objections should have been stated at the time, and they should have been disposed of or reserved by the Sheriff-Substitute in the interlocutor sisting Mrs Mitchell or Alison."

The pursuers appealed.

SCOTT, for them, maintained that it was incompetent for the Sheriff to have reponed Mrs Alison when she had made up no title to her husband's estate. No consent will validate the reponing if it was not in the power of the Court to do it. No power was given by the A. S. 1839, § 24, and the Sheriff-court Act of 1853, § 2, to repone any one but the defender against whom the decree had been pronounced. Even one who properly represented the defender could not be reponed. A vitious intromitter could not be reponed.

STRACHAN, for respondent, was not heard in reply.

The Court adhered to the Sheriff's judgment.

Agent for Appellants—James Barton, S.S.C.

Agent for Respondent—David Hunter, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, January 16.

(Before Lords Justice-General, Deas and Ardmillan.)

HER MAJESTY'S ADVOCATE *v.* JOHN SMITH.

Forgery—Uttering—Agent. A forger having inclosed by post a bank cheque to a friend, with instructions that he should cash it—*Held* that the uttering was complete the moment that the letter was posted, although it had never been presented for payment.

John Smith was placed at the bar and charged with the crime of forgery under the following indictment:—

"That albeit, by the laws of this and of every other well-governed realm, forgery, as also the using and uttering as genuine any forged bank cheque or order for money, having thereon any forged subscription, knowing the same to be forged, are crimes of an heinous nature, and severely punishable; yet true it is and of verity, that you the said John Smith are guilty of the said crimes, or of one or other of them, actor, or art and part; in so far as you the said John Smith having, on or about the 11th day of January 1870, procured and filled up, or caused to be filled up in writing, a blank bank-cheque or blank order for money, partly printed or engraved, which, after it had been so filled up, or caused to be filled up by you, ran in the following terms:—

"'No. 1/25. 'January 11th 1870.

"'To the Agent for the British Linen Company Bank, North Berwick.

"'Pay to Mr John Smith or Bearer the sum of Twenty-five pounds sterling.

"'£25.'

did, on the said 11th day of January 1870, or on one or other of the days of that month, within or near the town of North Berwick, in the county of Haddington, or at some other place within the county of Haddington, the particular place being to the prosecutor unknown, wickedly and feloniously forge and adhibit, or cause or procure to be forged and adhibited, upon the face of the said bank-cheque or order for money, the subscription 'Franke Yewls,' or a similar subscription, intending the same to pass for and be received as the genuine subscription of Francis Eeles, farmer, now or lately residing at Williamstone, in the parish of Dirleton, and county aforesaid, or of some other person to the prosecutor unknown, as the drawer of the said bank-cheque or order for money; and you did, then and there, indorse the said bank-cheque or order for money with your own subscription, 'John Smith:' further, on the 18th day of January 1870, or on one or other of the days of that month, you the said John Smith did, wickedly and feloniously, use and utter as genuine the said bank-cheque or order for money, having thereon the said forged subscription, knowing the said subscription to be forged, by posting the same, or causing it to be posted at the post-office at Dunbar, or at one or other of the receiving-offices of the post-office at Dunbar, inclosed in an envelope, addressed by you to 'Mr W. Weir, saddler, North Berwick,' meaning thereby William Weir, saddler, now or lately residing in Quality Street, North Berwick, aforesaid, along with a letter written or caused to be written by you in the following terms:

"'Mr Weir, Dunbar, 18*th Jan.* 1870.

"'Dear Sir,—Please cash this check for me and come up first train tomorrow morning or hire a convance at my expense. I am, yours truly,

"'JOHN SMITH.'

you the said John Smith, wickedly and feloniously intending thereby to represent to the said William Weir that the said bank-cheque or order for money, having thereon the said forged subscription, was genuine, and further intending that it should be received and presented by him on your account for payment, and cashed, as genuine, at the branch of the British Linen Company's Bank at North Berwick; and the said letter so posted, or caused to be posted by you, containing the said bank-cheque or order for money and letter above quoted, was in due course of post received by the said William Weir at North Berwick aforesaid; but the said William Weir, suspecting that the subscription 'Franke Yewls,' adhibited by you as aforesaid, was a forged subscription, did not present the said bank-cheque or order for money for payment at the said branch bank but delivered it to the police: And you the said John