to the company. On the contrary, they are attending to their master's business and nothing else, and what I should say was, the relative position of these men and the railway company's servants is precisely this, that the one is giving and the other taking delivery under the contract of carriage. The servants of the dealer are giving delivery, and those of the company are taking delivery. It does not affect the question to say, that they are engaged in a common employment. All that is true of many other cases of giving and taking delivery. For instance, if I send my servant to a shop to purchase something, which he receives from one of the shopkeeper's employées, it is true that they are engaged in a common employment, but one is acting for the shopkeeper, and the other for me. And there is no common employment, in the sense that they are both doing the work of the shopkeeper, and are responsible to him, and that seems to me to be the exact position that the servants of the dealer and those of the company held here respectively. It would have been the same thing if Mr Dunlop had driven the cattle himself, and it would be very difficult to contend that he was, while assisting in trucking the beasts, in the position of a servant of the company. Well then, in the present case he was only doing the same thing by the hand of the pursuer, his servant. Therefore I come to the conclusion, on this second question, that Wyllie was not in a position at the time of the accident which forms any bar to his claim under this action, and being of opinion that there was negligence on the part of the company's servants, I am therefore for adhering to the Sheriff-Principal's interlocutor.

The other Judges concurred.

Appeal dismissed.

Agents for Appellants—Hope & Mackay, W.S.

Agent for Respondent—John Walls, S.S.C.

Friday, January 27.

MRS JANE ANN FRASER OR WALKER *v.* WILLIAM WALKER.

Husband and Wife—Divorce—Process—Competency—Counter action of Divorce—Expenses. After decree of divorce had been pronounced by the Lord Ordinary at the instance of a husband against his wife, and a reclaiming note had been lodged against the Lord Ordinary's judgment, but had not yet been disposed of, the wife raised a counter action of divorce against her husband, in which she alleged that the facts upon which her counter action was laid had only come to her knowledge since the date of the Lord Ordinary's interlocutor in the action at her husband's instance against her. *Held* that, the action at the husband's instance being still in dependence in and under the control of this Court, the pronouncing of decree of divorce by the Lord Ordinary was no bar to the raising of a counter action at the wife's instance against the husband, if otherwise competent.

Observed, that it would have been different had final judgment been pronounced in the husband's action by this Court, and appeal been taken to the House of Lords, as in that case this Court would have lost control of the cause.

An action of divorce had been raised at the instance of Mr Walker against his wife, and decree of divorce had been pronounced against her by the Lord Ordinary (ORMIDALE) on 28th July 1870. Against this judgment Mrs Walker reclaimed; and in November of the same year, before her reclaiming note was heard in the Inner House, she raised a counter action of divorce against Mr Walker, the summons in which was signeted on 19th November, or nearly four months after the date of the Lord Ordinary's decree. She alleged several specific acts of adultery, extending over more than fifteen years, and averred that they had only come to her knowledge during the said month of November.

Against this counter action Mr Walker stated the following preliminary plea:—"The pursuer having been divorced from the defender by decree pronounced by the Court of Session before the raising of the present action, has no right or title to sue for a divorce."

Upon this plea the Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—

"*Edinburgh*, 11*th January* 1871.—The Lord Ordinary having heard counsel for the parties on the defender's first plea in law, and having considered the argument and proceedings, repels said plea in law, and appoints the case to be enrolled to be further proceeded with.

"*Note.*—The defender's plea in law, now repelled, proceeds on the assumption that the pursuer had been divorced from her husband, the defender, before this action at her instance was raised. But this is scarcely a correct or well-founded assumption; for although an interlocutor of the Lord Ordinary divorcing the pursuer from her husband had been pronounced in July last, that interlocutor was in the November following—when the present action was raised and brought into Court—the subject of a reclaiming note to the Inner House. In truth and substance, therefore, the action of divorce at the instance of the defender against the pursuer was when the present action came into Court, and is still in dependence, the reclaiming note referred to not having been yet disposed of. In this state of matters it appears to the Lord Ordinary that the defender's first plea in law must, in conformity with the decision in *Brodie* v. *Brodie*, 11th June 1870, 8 Macph. 854, be repelled, and the cause allowed to be matured for judgment, so as to be ultimately taken up and disposed of at the same time with the reclaiming note in the counter action. The only distinction taken before the Lord Ordinary, between the present and the case of *Brodie*, was, that while in the latter the action at the wife's instance was raised and in Court a few days before the Lord Ordinary's interlocutor divorcing her in the action at her husband's instance was pronounced, the present action was not raised or brought into Court till after the Lord Ordinary's interlocutor divorcing her in the action at her husband's instance had been pronounced, although before judgment in the reclaiming note against that interlocutor. The Lord Ordinary does not think that this distinction is sufficient to render the case of *Brodie* inapplicable as a precedent in point of principle."

Thereafter, on the 24th January 1871, the Lord Ordinary pronounced this farther interlocutor:—"The Lord Ordinary allows the parties a proof of the facts averred by them respectively, and to the defender a conjunct probation thereanent: Appoints the proof to be taken before the Lord Ordinary within the Parliament House, Edinburgh, on Thursday the 23d day of February next, at half-past ten o'clock forenoon; and grants diligence at

the instance of each of the parties for citing witnesses and havers: Farther, on the motion of the pursuer, and not objected to on the part of the defender, as to amount, decerns against the defender to make payment to the pursuer of the sum of one hundred pounds sterling, to meet the expenses of process."

Against both these interlocutors the defender, Mr Walker, reclaimed with the leave of the Lord Ordinary.

LANCASTER and MACDONALD, for him, pleaded—That though the case of *Brodie* v. *Brodie*, referred to by the Lord Ordinary, came very near to this one, it did not do so sufficiently. Though there was not much difference in point of time, there was a great distinction in point of fact and law. There must be some point of time at which a counter action of divorce becomes incompetent; the practical bearing of the question being this, that there must be a point of time at which the husband ceases to be liable for the expenses of an action raised by his wife against himself. That point of time, they submitted, was the date of the Lord Ordinary's interlocutor; as a matter of principle it must be fixed at the date of pronouncing an interlocutor, which is final if not reclaimed against. The reasons for this will best be seen by considering certain practical results, which the application of this or of an opposite principle would have respectively. For, first, what is the position of a person against whom a decree of divorce has been pronounced, though that decree be still liable to be brought under review. Surely such party is in the position of a divorced person, for consider the result either of the reclaiming note being withdrawn or of the party reclaiming dying, or of the party holding the judgment dying. In any of these cases a result follows which must have its foundation in the previous state of matters. In the second place, consider this, Does any and what effect follow from the judgment of the Lord Ordinary though under review by reclaiming note in this Court — see the analogous case of *Forster*, 7 Macph. 546. Thirdly, could Mrs Walker have relevantly charged against her husband acts of adultery, alleged as committed after the date of the Lord Ordinary's interlocutor, and before raising her own summons. Fourth, the question is brought to a practical test by the second interlocutor reclaimed against, pronounced by the Lord Ordinary on the 24th January as a consequence of that of the 11th. He therein orders the defender to pay a large sum to account, to meet the pursuer's expenses of process. Now, the Lord Ordinary's decree of divorce against her has taken away all absolute right to expenses of process even in reclaiming against that decree (see the cases of *Stewart*, 1 Macph. 449; *Donald*, 1 Macph. 741; and *Craig*, 14 D. 829). Much more so then where she is attempting to pursue a counter action of divorce after she has herself had decree pronounced against her. To hold that the Lord Ordinary's decree did not prevent her getting interim expenses in her own action, while it cut away her right to expenses in her husband's action, which before that decree was absolute, would be a most manifest absurdity, and proves practically the necessity of fixing the date of the Lord Ordinary's decree as the point of time at which this action of Mrs Walker became incompetent.

SOLICITOR-GENERAL and BALFOUR, for the respondent Mrs Walker, were not called upon.

At advising—

LORD PRESIDENT—There has been much stress laid in the argument before us upon the hardship which the sustaining of Mrs Walker's counter action in the present circumstances would bring upon Mr Walker. But I am afraid that it must always be a case of hardship, and one that is inevitable, for the husband is obliged to pay for both sides, and it may be in both actions. There may be indeed, in this case, an unusual amount of hardship, in consequence of the apparent delay upon the part of Mrs Walker in bringing forward her action, but at the same time we must contemplate the other side of this question as well. It is a possible result that Mrs Walker may succeed in her counter-action, and at the same time may induce us to recall the Lord Ordinary's decree of divorce against her in Mr Walker's action. I cannot therefore, see that we should be meeting the requirements of equity by dismissing Mrs Walker's action at this time, provided always that the summons is raised under such circumstances and at such a time as to entitle her to insist. Now, no doubt Mrs Walker's action was only raised upon 19th November 1870, while on 28th July 1870, decree of divorce was pronounced by the Lord Ordinary against Mrs Walker at the instance of her husband. But this decree of divorce has been reclaimed against in proper time, and therefore is not final, even in this Court, but is subject to review within the Court of Session. Now, notwithstanding the extreme ingenuity of Mr Macdonald's arguments, I cannot find any distinction in principle between this case and that of *Brodie* referred to in the Lord Ordinary's note. I am therefore for adhering to the Lord Ordinary's interlocutor of 11th January last, repelling the defender's first plea in law. And then it rather appears to me that his subsequent interlocutor of 24th January follows as a matter of course. It is quite obvious that the amount which he has given to meet Mrs Walker's expenses in this case is not at all too much, in fact it is not even represented as such; and as to Mr Lancaster's proposal, I am afraid it is not only unprecedented, but quite out of the question. The wife is not in such a position that she can find caution, and it is not to be expected that she should be, unless she has private property of her own, apart from her husband.

LORD DEAS—The chief import of the question before us is, whether these cases are to be dealt with in the same way and upon the same principle as that of *Brodie*, lately decided in this Court? I quite agree with your Lordship that there is no sufficient distinction between the two cases, to take this one out of the rule applied in the other. No doubt a decree had been pronounced by the Lord Ordinary in the suit at the husband's instance, but that decree was not final. It is under review of this Court at the present moment. It may be adhered to, or it may be altered, according to the view which we take of the proof. This puts the case in quite a different category from that which it would be in had we pronounced in the husband's action a final decree in this Court; and did our judgment lie under appeal to the House of Lords —in that case we should have lost all control over that action. If we had proposed to stop proceedings in it, pending the prosecution of the counter action, we could not have done it. It could only have been done by an application to the House of Lords. But as matters stand now, while the first action has got no farther than a reclaiming note against the Lord Ordinary's interlocutor, we have

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