tive of the question of law in the affirmative and the second in the negative.

The LORD PRESIDENT was absent.

The Court answered the first alternative of the question of law in the affirmative and the second alternative in the negative.

Counsel for the First and Second Parties—Fleming, K.C.—Black. Agents for the First Parties—W. & F. Haldane, W.S. Agents for the Second Parties—Tods, Murray, & Jamieson, W.S.

Counsel for the Third Parties—Blackburn, K.C.—A. J. Nicolson. Agents—Pearson, Robertson & Finlay, W.S.

Counsel for the Fourth and Fifth Parties—C. H. Brown. Agents—Wallace & Guthrie, W.S.

Wednesday, March 19.

FIRST DIVISION.

[Lord Cullen, Ordinary.

CORBRIDGE (SOMERVILLE'S TRUSTEE) *v.* SOMERVILLE AND ANOTHER.

(See also *ante*, 48 S.L.R. 1027, 1911 S.C. 1326).

Husband and Wife—Divorce—Reduction—Reduction on Ground of no Jurisdiction—Title of Creditor of Spouse to Sue.

In an undefended action of divorce at a wife's instance the Lord Ordinary granted decree. Thereafter the husband's trustee in bankruptcy, to whom the divorce proceedings had not been intimated, and who in consequence of those proceedings had been deprived of the income of certain postnuptial marriage contract funds which was formerly payable to the husband, and as a result of the decree of divorce became payable to the wife, brought an action for reduction of the decree on the ground that the husband's domicile was English, and that accordingly the Court had no jurisdiction to grant divorce.

Held that where, as here, the decree was challenged on a ground that did not affect the merits, the trustee had a right to have the question of its validity determined, and action allowed to proceed.

Opinion per curiam that the pursuer had adopted the wrong procedure, his proper remedy being to have brought a petitory action against the marriage-contract trustees for the income, in which the decree of divorce could competently have been set aside *ope exceptionis*.

Opinions that while a creditor may challenge his debtor's divorce on a ground not affecting the merits, he has no title to reduce on its merits a decree determining *status*.

Process — Consistorial Cause — Decree of Divorce in Absence—Rules of Commissary Court—Year and Day.

Held that the rules of the Commissary Court do not apply to the Court of Session, and that it was competent to reduce a decree of divorce in absence even after the lapse of a year and a day.

Greenhill v. *Ford*, February 7, 1822, 1 S. 296, *aff.* June 16, 1824, 2 Shaw's App. 435, *commented on*.

On 27th November 1911 Cooper Corbridge, C.A., London, trustee in the bankruptcy of S. W. May Somerville, Trewithian, Cornwall, *pursuer*, brought an action against Mrs Caroline Stuart Smith or May Somerville, 6 Arlington Street, London, and also against the said S. W. May Somerville for his interest, *defenders*, in which he sought reduction of a decree of divorce, dated 18th June 1910, pronounced by Lord DEWAR (Ordinary) in an undefended action at Mrs Somerville's instance against her husband.

He pleaded—"1. The pursuer, as trustee in the bankruptcy of the said Samuel Wallace May Somerville, is entitled to decree of reduction as concluded for in respect that (1) the said Samuel Wallace May Somerville not having been a domiciled Scotsman at the date of the divorce proceedings the Court of Session had no jurisdiction to grant the pretended decree of divorce, and said decree of divorce is null and void. (2) Said decree was obtained in absence, without the pursuer being informed of the divorce proceedings or having any opportunity of opposing the same, and without the whole facts and circumstances being fully disclosed to the Court. 2. The defences are irrelevant.

The defender Mrs Somerville pleaded, *inter alia*—"1. No title to sue. 2. The action is incompetent in respect that (1) the said decree of divorce having become final on the expiry of a year and a day from the date thereof, is not liable to be reduced. (2) *Esto* that the Court of Session had no jurisdiction to pronounce said decree of divorce, there having been no subsequent change of domicile by the said S. W. May Somerville the Court has no jurisdiction to reduce said decree."

The *facts* are given in the opinion *infra* of the Lord Ordinary (CULLEN), who on 19th June 1912 repelled the defender's first three pleas-in-law, and allowed a proof.

Opinion.—"The pursuer of this action is the trustee on the bankrupt estate of Samuel Wallace May Somerville under an adjudication of bankruptcy in England. He was appointed in January 1910. Mr Somerville was then married to the present compearing defender Mrs Caroline Stuart Smith or May Somerville, the marriage having taken place in 1899. By a postnuptial settlement executed by Mr Somerville in 1900 certain funds belonging to him were put in trust for the purpose, *inter alia*, that in the event of his dying survived by Mrs Somerville the income thereof should be paid to her during her survivance, restrictable to one half in the event of her entering into a second mar-

riage. The trust funds in question are held by trustees in Scotland.

"In May 1910 Mrs Somerville raised in this Court an action of divorce on the ground of adultery against her husband. He did not defend. The action depended before Lord Dewar, who, after hearing the proof tendered by the pursuer, granted on 18th June 1910 decree of divorce. The proof led in the action was directed, *inter alia*, to establishing that the domicile of the spouses was in Scotland.

"It is common ground in the present case that the patrimonial consequence of the decree of divorce is to divert the income of the foresaid trust funds from Mr Somerville the bankrupt to the defender.

"The action of divorce was not intimated to the present pursuer, who states that he was ignorant of it until after the decree in absence had been pronounced. In this action he seeks to reduce that decree. The ground of reduction is that this Court had no jurisdiction to pronounce it in respect that the domicile of the spouses at the time was in England, The pursuer makes detailed averments on this head, which are relevant to be remitted to probation. The question, however, is raised whether he has a title to insist in the action.

"While the action of divorce related to the *status* of the spouses, the present pursuer, had he known of its dependence, might, in respect of the patrimonial interests involved in it, have compeared and obtained himself sisted as a defender. There is, on the authorities, no room for doubt that while the jurisdiction in consistorial causes lay with the Commissaries the right of creditors of a defender in an action of divorce to compear and defend was fully admitted. The latest of the reported cases is that of *Greenhill* v. *Ford*, 1 Shaw 296 (275), 2 Shaw's App. 435. So far as I am aware there is no example of such procedure to be found in any reported case since the transfer of the jnrisdiction to this Court. But neither in the Act of 1830 nor in any subsequent statutes do I find anything to abrogate this right on the part of creditors. There is, it is true, no requirement of intimation to them, but there seems equally to have been no such requirement in the time of the Commissary Court. The right of creditors to defend is stated both by Lord Fraser (H. & W. 1225) and by Mr Mackay (Manual of Practice, 478).

"If I am right in thinking that the pursuer could competently have asked to be sisted as a defender in the action of divorce, the next question which arises is whether it is not competent to him to bring this action of reduction of the decree in absence with the object of urging the plea of no jurisdiction as one which he might have proponed by way of defence to the action.

"The ground of discussion has been so far limited by the position taken up in argument by the defender's counsel, who expressly conceded that the pursuer had a title to challenge the decree of divorce provided he did so on certain grounds. These grounds were stated to be collusion between the spouses or fraud of any kind attending the proceedings for divorce. Now, this being a reduction of a decree in absence, the grounds of reduction competent to the pursuer must, I take it, be commensurate with the grounds of defence which he might have urged had he compeared to defend the divorce action. And, thus, the question is whether the pursuer, had he compeared in the divorce action, could not competently have proponed the defence of no jurisdiction. I have been unable to find any authority for the distinction advanced by the defender. Such authority as there is on the subject goes to negative it. The rule which obtained in the Commissary Court is stated in Lothian's Consistorial Law (p. 168), in these terms—'It is competent not merely to the party accused of adultery, but to creditors interested to prevent a decree of divorce from going out against their debtor, to sist themselves as defenders and to propone *all* defences competent to their debtor.' The italics of the word *all* are the author's. Shand (Practice, I., 435) in dealing with the defence of *remissio injuriæ* remarks that it is available to creditors. Lord Fraser (H. & W. II., 1225) says—'should the husband be bankrupt, his creditors cannot prevent decree of divorce going out in the usual terms, except by stating some of the defences competent to the husband himself.' Mr Mackay (Manual, p. 478) says—'Creditors of the principal defender may also state defences' without adverting to any distinction as to the grounds of defence competent to them. In the latest of the reported cases, *Greenhill* v. *Ford* (*supra cit.*) I find that the grounds of defence put forward by the trustee in bankruptcy of the husband and defender were (1) no evidence of the alleged adultery; (2) collusion; (3) *remissio injuriæ*.

"It would therefore appear that the distinction advanced by the defender, that is to say, between collusion and fraud and other grounds of defence, does not hold good as regards a defence by creditors to a divorce suit. And if this be so, I do not see why it should obtain in reductive proceedings for opening up a decree of divorce in absence.

"In the ordinary case where someone who has not been called as a defender to an action but who has a sufficient interest to be sisted so that he may defend it, does not become aware of the dependence of the action, and does not therefore come forward, he may plead against the decree that it is *res inter alios acta* and not a judgment binding on him. But it would appear that if creditors of a defender in an action of divorce wish to avert the patrimonial consequences of a decree against him they must oppose the divorce itself. (*Greenhill* v. *Ford, supra cit.*—Fraser H. & W. II., 1225). Standing the decree of divorce, the patrimonial consequences follow *ex lege* in a question both with the defender and with his or her creditors.

"Accordingly, if I am right in thinking that the present pursuer could competently

have asked to be sisted in the divorce action, and have proponed therein his plea of no jurisdiction, it seems to follow that he is *in titulo* to open up the decree in absence by this reduction, so that he may have an opportunity of making his plea good. If he cannot do so, it would appear that he has no remedy at all.

"On the whole matter I am of opinion that the defender's plea of no title to sue fails.

"In her second plea-in-law the defender pleads, *inter alia*, that the action is incompetent in respect that the decree of divorce became final on the lapse of year and day from its date. This plea refers to the 'Instructions' to the Commissaries, and renews the controversy as to whether the finality after year and day thereby attached to decrees of the Commissary Court attaches to decrees of this Court. I had occasion to consider a similar plea in the recent case of *Walker* v. *Walker*, 1911, S.C. 163, when I was of opinion that it was not well founded. The case went to the Inner House, but the plea in question was not resumed there, so that the case does not contain any authoritative judgment on the point. As, however, I do not see any reason to change the view which I there expressed I shall repel the plea.

"The second branch of the second plea for the defender is intended to be founded on the case of *Longworth* v. *Yelverton*, 7 Macph. 70. As, however, the defender is maintaining the existence of a Scottish domicile, and therefore has no plea of no jurisdiction, and as the decree now sought to be opened up is a decree in absence, I do not see the application of that decision.

"Following the views which I have expressed, I shall repel the first three pleas for the defender and allow a proof."

The defender reclaimed, and argued—A creditor had no title to reduce his debtor's divorce. *Esto* that formerly creditors had a right to compear and defend in an action for divorce—Fraser (H. & W.), at p. 1146, 1196, and 1225; Lothian's Consistorial Law, 168-9; Mackay's Manual, 478; *Greenhill* v. *Ford*, February 7, 1822, 1 S. 296, *aff.* June 16, 1824, 2 Shaw's App. 435—that was not so now, for the practice ceased when the jurisdiction of the Commissary Court was transferred to the Court of Session. *Esto* also that before the Commissaries a creditor could sue for reduction of his debtor's divorce, he could only do so within year and day, for after that the decree became final and the matter *res judicata*—*Donald* v. *Thom*, May 16, 1823, 2 S. (n.e.) 275, and case of *Gardiner* v. *M'Arthur* there reported at p. 276, *note*; *Menzies* v. *Menzies*, November 21, 1835, 14 S. 47; *Lockyer* v. *Ferryman*, June 28, 1876, 3 R. 882, 13 S.L.R. 572. The present action, therefore, came too late. It was not now the practice to order intimation of divorce proceedings to a trustee in bankruptcy, and even assuming he could have appeared and opposed this decree, he could not come forward now after decree, especially where, as here, the decree was a decree *causa cognita*. Such a decree was in a much higher position than a decree in absence. *Esto* it was not a decree *in foro contentioso*, it was still a decree *in foro*, and such a decree would not readily be set aside where, as here, the question of jurisdiction was fully considered by the Lord Ordinary—*Walker* v. *Walker*, 1911 S.C. 163, *per* the Lord President at p. 170, 48 S.L.R. 70. Assuming, however, that the question whether a trustee for creditors had a title to reduce his debtor's divorce after year and day was still an open one, it would be inexpedient to hold that he had, for the consequences would be very far reaching. Further, if the Court had no power to grant divorce on the ground of no jurisdiction, it had no jurisdiction to rescind the decree. Where, as here, the decree has become final, the only grounds on which the Court could reduce it were (*a*) fraud, and (*b*) collusion, and neither were present here.

Argued for respondent—A trustee in bankruptcy had a good title to reduce his debtor's divorce—*Watson's Creditors* v. *Cruickshank*, [1681] M. 330; *Greenhill* v. *Ford*, *cit.* Especially was that so where, as here, the trustee had no notice of the divorce proceedings, and where the decree was a decree in absence. The trustee in the present instance was in a much stronger position than a creditor with a contingent claim, for he was vested with the protection of all the creditors' interests at the date when the action was raised. It was clear that the spouses themselves could sue such a reduction—*Blake* v. *Blake*, July 6, 1826, 4 S. 795; *Stewart* v. *Stewart*, February 27, 1863, 1 M. 449. *Esto* that the right of the trustee was not so high a right as that of the injured spouse, he had a good title to sue, where, as here, the Court had no jurisdiction to pronounce the decree. The English Courts had power to examine any decree, and if they thought the Court had no jurisdiction they would ignore it—*Bonaparte* v. *Bonaparte* [1892], P. 402. [The LORD PRESIDENT referred to *Pemberton* v. *Hughes* [1899] 1 Ch. 781]. *Esto* that in cases of collusion the Court might reduce a decree that had become final—Fraser (H. & W., 1236-8); Lothian (*sup. cit.*), 168; *Walker* (*cit. sup.*)—reduction on the ground of no jurisdiction was equally competent, for in neither case was there any valid decree, and the matter therefore was not *res judicata*. The case of *Greenhill* (*cit. sup.*) had ground in principle and should be followed, for there was no reason why a trustee for creditors should not be allowed to reduce an unwarranted decree. The year and day rule of the Commissary Court was no longer good.

At advising—

LORD PRESIDENT—The pursuer in this case is the trustee on the bankrupt estate of a Mr Somerville, under an adjudication of bankruptcy in England. Mr Somerville was married to the present compearing defender Mrs Somerville, and by a post-nuptial settlement executed by him certain funds belonging to him were put in trust for the purpose, *inter alia*, that in the event

of his dying survived by his wife the income thereof should be paid to her during her survivance. These trust funds are held by trustees in Scotland, and naturally, during the subsistence of the marriage, the interest of them was payable to him, and consequently became payable on his bankruptcy to the present pursuer. In 1910 Mrs Somerville raised an action in the Court of Session for divorce on the ground of adultery against her husband. The action was undefended, and decree was granted. In the proof which was led in the action certain facts were inquired into with a view of showing the Lord Ordinary that he was entitled to pronounce the decree in respect that the domicile of the husband was Scotch. That decree having been pronounced, the trustees under the marriage contract intimated to the pursuer that they could no longer pay to him the interest of these funds, because, the effect of divorce being the same as that of death, the income was now payable to the wife and not to the gentleman who had been her husband.

The present action is raised by the pursuer as trustee in bankruptcy, and takes the form of an action of reduction of the decree of divorce, the ground being that there was truly no jurisdiction, the domicile of Mr Somerville being not Scotch but English. The pursuer sets forth that the action of divorce was undefended, and that if he is allowed to go into the matter he will bring before the Court certain circumstances which were not before the Court on the former occasion, tending to show that the decision was wrong in so far as it was found that the domicile of the husband was Scotch. The Lord Ordinary has allowed a proof, and he has repelled the first three pleas-in-law for the compearing defender, who is the wife. Those pleas are—no title to sue, irrelevancy and incompetency in respect that a year and a day have passed from the date of the divorce, and another plea which is put in the form of a dilemma—"*Esto* that the Court of Session had no jurisdiction to pronounce said decree of divorce, there having been no subsequent change of domicile by the said S. W. May Somerville the Court has no jurisdiction to reduce said decree."

The Lord Ordinary has gone upon a consideration of what used to be the law in the time of the Commissaries, and he has found that the title of creditors to intervene in actions of divorce was sustained by that Court. He has also gone upon this, that it has already been decided that the year and day rule which the Commissaries laid down for themselves was not binding upon the Court of Session and has not been in existence since the jurisdiction of the Commissaries was transferred to the Court of Session. He has not gone at length into what I have called the dilemma plea, but merely said that it does not fall to be sustained.

I confess that I do not think that this matter can be dealt with upon any view of the rules of the Commissaries. The rules of the Commissaries were not in any way binding upon the Court of Session, and since the jurisdiction was transferred to the Court of Session I think no instance is to be found of the application of those rules in this Court. Of course that naturally justifies the conclusion to which the Lord Ordinary has come as to the inappropriateness of the plea of a year and a day, but it has an equal bearing upon the ground of his Lordship's judgment as a whole, and if the action rested upon that ancient practice alone—I mean if it were an application by a creditor to reduce a decree of divorce—I think the plea that is founded upon the dilemma would give rise to some difficulty. But in this case I do not think the plea does give rise to difficulty. I think the pursuer has really taken an unfortunate course of action. I do not think this action ought to have been brought in this form at all. The pursuer was a person to whom money was being paid by the Scottish trustees in virtue of the assignation of bankruptcy. Now when the trustees came to say that they proposed no longer to pay that money I think the proper retort would have been an ordinary petitory action. To that the only answer which the trustees could have made would have been to put forward the decree of divorce, and to that I think the pursuer could have made this triumphant reply—"That decree so far as I am concerned is worth nothing, because it is a decree that is pronounced by a Court which had no jurisdiction, in an undefended case."

I come to that conclusion because of the law which is laid down by Lord Watson in the case of *Le Mesurier* ([1895] A.C. 517). I think it is now perfectly certain that the domicile of the spouses is that of the husband, and that unless the husband is domiciled within the jurisdiction the Court has no right to pronounce a decree of divorce. Obviously a decree pronounced by a Court which had no jurisdiction is a decree which no other Court can acknowledge. It is quite clear also on the averments that this was an undefended case—it is so said—and an undefended consistorial case, even although there is a certain duty on the Court which is not put upon it in an ordinary petitory action, still remains an undefended case.

If the action had taken the form I have suggested, and if the pursuer had met the defence in the manner I have indicated, it is quite evident that this so-called dilemma would never have arisen. The pursuer would necessarily have had to resort to the Scotch Courts, because the trustees—who upon his view ought to pay the money—are resident in Scotland and can only be reached through the Scotch Courts, and when the decree was tabled in defence, which according to the defenders had the effect of transferring the money notwithstanding the assignation in bankruptcy from the husband to the wife, he would be quite entitled to answer—"That decree is not worth the paper it is written on, because it was pronounced by a Court which had not jurisdiction over the man

against whom it was pronounced." That I think would have been the proper procedure, and if that procedure had been followed this dilemma would have been avoided.

If that is so, the matter resolves itself into this—Would it be a proper proceeding for us to dismiss this action in order that practically the same action should be brought at once in another form? The Court nowadays is always anxious to avoid unnecessary procedure, and accordingly I am of opinion that the action must be allowed to go on.

LORD KINNEAR—I agree. I cannot accept the reasoning on which the Lord Ordinary has based his interlocutor. I think that it would be extremely dangerous and contrary to all principle if we were to sustain the right of a creditor, who was not required to be cited as a defender in an action of divorce, to come in after decree of divorce had been pronounced and challenge a decree which has determined the status of the two spouses upon any question affecting its merits; and that, I think, is the necessary result of the Lord Ordinary's view.

I am not very much moved by the consideration which his Lordship thinks of so great effect—that by the practice of the Commissaries creditors were entitled to appear in actions of divorce. I think all the information we have as to that practice is extremely meagre and unsatisfactory; and although there is some evidence tending to show that the creditors might state a defence to divorce upon any ground, I think it is meagre evidence, and that it would be rash to express anything like a fixed and definite opinion as to what place they were allowed to take in the Commissary Court. But that is not material, because I agree with your Lordship that whatever the rule of the Commissaries was no such rule has been introduced into the practice of the Court of Session.

The Lord Ordinary says, quite rightly, that the rule of the Commissaries was recognised in actions of appeal in the Court of Session, and he refers to the case of *Greenhill* v. *Ford* (1 Shaw 296), which he says is the latest case, for the purpose of showing that the practice is recognised. I cannot say that I think any really valuable inference upon the point can be drawn from that decision. A creditor who had appeared before the Commissaries appealed against the judgment. His appeal was heard, but dismissed; and the significant point of the case, I think, for the present purpose is that his appeal upon its merits was rested upon an allegation of collusion, and that he expressly stated that he did not desire to interfere with the sentence of divorce, but only to obtain a judgment as to the pecuniary effects of that sentence. The appeal was rejected, as I have said, but the Court of Session held that the allegation of collusion came too late, after the wife, who was the pursuer in the action, had taken the oath of calumny and been examined by the creditor himself, and that his right to object to the decree without disturbing the merits was not tenable. The decision was affirmed in the House of Lords without any reported expression of opinion, and on the whole I am unable to draw any certain conclusion as to the extent of a creditor's right to interpose in actions of divorce. It was decided in this Court that a creditor who had no interest in the question of status must submit to the legal consequences of a divorce so far as it affects the property of the spouses. But the case is certainly no authority for saying that a creditor can be allowed to reduce a decree of divorce upon its merits, for he expressly disclaimed any intention to do so.

Before leaving the reasoning of the Lord Ordinary I ought to make one further observation. His Lordship says that if the pursuer could competently have asked to be sisted as a defender, the next question is what pleas he could competently urge in an action of reduction. And his Lordship says—"It would . . . appear that the distinction advanced by the defender, that is to say, between collusion or fraud, and other grounds of defence, does not hold good as regards a defence by creditors to a divorce suit." I am not prepared to agree that that has been found; but suppose it were, his Lordship goes on to say—"And if this be so, I do not see why it should obtain in reductive proceedings for opening up a decree of divorce in absence."

Now I agree with your Lordship that a proof should be allowed, just because there is all the difference in the world between an action of reduction of what purports to be a decree of a Court of Justice founded upon an allegation of fraud upon the Court or upon an allegation of no jurisdiction, and an attempt to reduce the decree of a competent Court upon grounds which might have been pleaded before the Judge who pronounced it and which affect the merits of the question that he decided. I think this action is maintainable just because the pursuer has made a relevant averment that the Court had no jurisdiction. I agree that he has made an unnecessary difficulty for himself by his form of action, because it may seem to encourage the notion that a creditor could come in to reduce a decree determining status. I do not think he can. But he can come in for the purpose of maintaining that there is no decree at all, which is all that would be a necessary consequence of the pursuer's action. I think his natural course would have been to sue the trustees for payment of this money, and upon the decree of divorce being tabled as being equivalent to a transfer of the money from his debtor—the husband—to somebody else, to maintain his case that there is no such decree, because what purports to be a decree was pronounced by a Court having no jurisdiction. His ground of action is, not that the judgment is wrong, but that what purports to be a judgment is not pronounced by a Judge in that matter, but by a Court which was going beyond its jurisdiction and pronouncing a judgment which could be of no effect.

It is quite clear, I think, in law, that if the judgment in question were really a judgment pronounced for the divorce of an English husband not domiciled in Scotland, it could have no effect either here or elsewhere. It certainly would not be recognised as a good divorce by the courts of any other country. I think the creditor is entitled to have that matter inquired into, because anybody who disputes that an alleged judgment can affect his pecuniary interests must have a right to challenge it upon the ground that it is not a real judgment pronounced by a court having jurisdiction.

LORD JOHNSTON—I entirely agree with your Lordship in the view that the old rule of the Commissaries does not apply to consistorial actions before this Court, and I have nothing further to say on that subject.

I also agree with your Lordship that the pursuer here has taken a wrong course in matter of procedure, but I regret to say that I feel much greater doubt as to whether we are justified in a case of this sort in allowing it to proceed instead of dismissing it and leaving the pursuer to take the proper course. This is an action for reduction of a decree of divorce. It is quite true that the pursuer says that though he was not a party to the action of divorce he has a patrimonial interest in getting rid of the decree of divorce, because that will open to him a claim to funds which otherwise he cannot touch. But supposing him to be successful, there is nothing to oblige him to proceed after he has got his decree of reduction—there is nothing to compel him to go on and make good his pecuniary claim. Yet the reduction will stand as a reduction of the decree of divorce as regards all concerned and in all time unless it again be set aside.

Now I have difficulty there, and I have difficulty also in this, that I cannot dispossess my mind of the feeling that this Court is being asked to commit the same offence against international law that it is alleged to have already committed in the original divorce. It seems to me that, taking the action as it is laid, we have no more jurisdiction in an action at the instance of a third party pursuer to deal with the status of this lady or of this gentleman than we had before. It might be that we could entertain an action to deal with the validity of the decree of divorce if raised at the instance of the husband, because I think that by an extension of the principle of prorogation of jurisdiction we should be entitled to deal with a lady as defender in a reduction who came here as pursuer to take advantage of the jurisdiction of this Court. But I cannot see that any such power goes beyond the actual parties to the previous action.

I think, therefore, that the pursuer has undoubtedly done wrong in raising the action in the way he has done, and that he ought to be sent back, if he wants to get these funds, to raise his ordinary petitory action against the trustees. When the trustees produce, in their defence, the decree of divorce, I think it will then be open to him in reply to object that it is a decree which is of no avail against him, because it was pronounced without jurisdiction—and I do not think that any decree of reduction will be found to be necessary. If that procedure were to be followed, I think that the decree of divorce obtained in absence of the husband would be examinable *ope exceptionis* just in the same way as a decree of a foreign court would be if produced in this Court, and that then the matter would be disposed of as one touching the pecuniary interests of the third party pursuer only, who has right to have the pecuniary question determined between him and the trustees who hold the money, leaving the validity of the decree as touching the status of the spouses to be determined between themselves. I say that the more readily because I feel that this Court by allowing this action to proceed may involve our successors in difficulty. For a decree of divorce even in absence may be followed by consequences and by the creation of new interests which would make it very difficult to follow the precedent here being created. Nor do I see how this precedent is to be treated in its application to a decree in absence. But as your Lordships are satisfied I content myself with expressing my doubts, and do not push them to the point of dissent.

LORD MACKENZIE—This is an action of reduction of a decree of divorce pronounced in Scotland in an action brought in May 1910 at the instance of a wife against her husband. The husband had been made bankrupt in England in January 1910, and his estates had vested in his trustee in bankruptcy, the pursuer, before the decree of divorce. Prior to the divorce the husband was entitled to the income of certain settled money. In consequence of the divorce payment of this income was refused to the trustee in bankruptcy. Hence the present action, which was brought on 27th Nov. 1911. The ground upon which reduction is sought is that the Scotch Court had no jurisdiction to grant the decree. There is this further averment in cond. 7—"The bankrupt concealed the fact of said divorce proceedings from pursuer, and abstained from opposing same with the object of depriving his creditors of the income of said trust funds, and in the hope and expectation that the defender Mrs Somerville would, after divorce, make him an allowance for his maintenance from said income." The action of divorce was undefended. The pursuer says neither he nor the trustees of the settlement got intimation of the divorce proceedings, that the wife failed to disclose in the summons or at the proof that her husband was bankrupt, and he avers that the defender was at the date of the bankruptcy and of the divorce proceedings a domiciled Englishman. He further details certain statements made by the bankrupt in his public

examination in bankruptcy which he says were not disclosed to the Court when a preliminary proof of the question of jurisdiction was taken in the divorce action.

In these circumstances I am of opinion that there must be inquiry into the facts. The pursuer desires to vindicate a fund which vested in him for behoof of the creditors of the husband before divorce was granted. In answer to his claim the decree of divorce is tabled. If his reply is sound this decree is null, because the first essential for the validity of the decree is that it should have been pronounced by a court of competent jurisdiction between parties who are *bona fide* subject to it. None of the authorities referred to by the Lord Ordinary really apply to a case of this kind. The decree was in absence. The pursuer, in my opinion, has a title to reduce a decree which he says is null, and which is pleaded as a bar to recovery by him of property which had vested in him prior to its date.

Although one is reluctant to sanction a course which may have the result of affecting the status of the husband and wife in order to secure merely patrimonial interests of others, it is necessary to point out that if the pursuer succeeds in establishing that the decree of divorce was not pronounced in accordance with the rules of public international law it would have no extra territorial effect whatever. This is stated by Lord Westbury in *Shaw* v. *Gould*, 3 E. & I. App. 55 at p. 81; *Bonaparte* v. *Bonaparte*, 1892, P. 402; *Le Mesurier*, 1895, A.C. 517; *Pemberton* v. *Hughes*, 1899, 1 Ch. 781. Although, therefore, in one view the present proceedings may involve hardship, it is in the interests of both Mr and Mrs Somerville that the question now raised should be finally determined.

The reclaimer did not argue plea 2 (2) before us.

The Court adhered.

Counsel for Pursuer (Respondent) — M'Lennan, K.C.—J. B. Young. Agents—Forbes, Dallas, & Co., W.S.

Counsel for Defender (Reclaimer) — Fleming, K.C.—Macmillan, K.C.—Howden. Agents — Fraser, Stodart, & Ballingall, W.S.

Tuesday, March 18.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

LOCHGELLY IRON AND COAL COMPANY, LIMITED *v.* CRAWFORD (SURVEYOR OF TAXES).

Revenue — Income Tax — Profits — Deductions — Levies Paid to Coal-owners' Association — Conciliation Board Expenses — Subscriptions to Mining Association of Great Britain — Experimental Work Done at Government's Request — Money Wholly Expended for Purpose of Trade — Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 53), *sec.* 100, *Schedule D, Rules Applying to First and Second Cases, No.* 1.

A colliery company paid annual levies to an association of coalowners. Part of these levies was applied by the association for the following purposes —(1) in defraying the expenses of the Conciliation Board (Scotland), (2) in paying the subscriptions to the Mining Association of Great Britain, and (3) in experimenting with coal dust for the purpose of devising means to prevent explosions in mines, the experiments having been made at the request of the Home Secretary with a view to legislation.

Held that the levies, so far as they were applied to meeting Conciliation Board expenses, constituted a good deduction, but so far as applied to the other two purposes they were not a good deduction.

The Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 100, enacts — Schedule D — Rules applying to First and Second Cases—"*First*, In estimating the balance of the profits or gains to be charged, . . . no sum shall be set against or deducted from . . . such profits or gains for any disbursements or expenses whatever not being money wholly and exclusively laid out or expended for the purpose of such trade, manufacture, adventure, or concern. . . ."

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held at the Inland Revenue Office, Edinburgh, on the 16th January 1912, for the purpose of hearing appeals under Schedule D of the Income Tax Acts, the Lochgelly Iron and Coal Company, Limited, of Lochgelly, Fife, appealed against an assessment of £60,148—less wear and tear allowance £9693—for the year ending 5th April 1912, made upon them under section 60, Schedule A, No. III, rule 2, and section 100, Schedule D, of the Income Tax Act 1842 (5 and 6 Vict. cap. 35), as amended by the Income Tax Act 1853 (16 and 17 Vict. cap. 34) and the Revenue Act 1866 (29 and 30 Vict. cap. 36), sec. 8, in respect of the profits of the concern.

The only point in dispute was as to the admissibility or non-admissibility of the deduction for Income Tax purposes of the following sums, which were debited in the profit and loss accounts of the appellants in respect of their contributions in the form of levies to the Fife and Clackmannan Coalowners' Association, of which they were members:—

Year ended 31st May	1906 . .	£22
,, ,,	1907 . .	£74
,, ,,	1908 . .	£59
,, ,,	1909 . .	£74
,, ,,	1910 . .	£720

It was agreed (1) that should the deductions in question be held to be inadmissible, the correct liability of the appellants to income tax, Schedule D, for the year ending 5th April 1912 was £60,163, less wear and tear allowance £9693.

The Special Commissioners being of opinion that the contributions (or levies) in question were not admissible deductions