also acted on that footing down to 1898—nearly half-a-century after the date of the child's death. It would be strange and unprecedented if such a claim as the present, brought forward in such circumstances after half-a-century, should be sustained. This therefore also strongly favours the view that the opinion expressed by Lord Trayner and assented to by myself is in accordance with the intention of the testator.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor:—

"Recal the interlocutor reclaimed against: Find that the share of his estate destined by the late James Browne to his daughter Mary in liferent, and her issue, whom failing to the survivors of his own children, in fee, falls to such surviving children in respect of the death of Mary Browne's only child, to whom said surviving children of the testator were substituted in said destination: Find the said claimants entitled to the expenses of the reclaiming-note out of the fund *in medio:* Remit to the Auditor to tax the same and to report to the Lord Ordinary: Remit to the Lord Ordinary to repel the claim for Colin Brown's trustees, and thereafter to proceed with the cause and determine the rights of parties now claiming on the fund *in medio*, and with power to him to decern for the taxed amount of the expenses hereby found due."

Agents for the Pursuers and Real Raisers—Campbell & Smith, S.S.C.

Counsel for the Claimants Colin Brown's Trustees—Solicitor-General (Dickson, Q.C.)—Cullen. Agents—Young & Roxburgh, W.S.

Counsel for the Claimants Children of Mrs Smith—H. Johnston, Q.C.—Sandeman. Agents—Dalgleish & Bell, W.S.

Counsel for the Claimant M'Clelland—Leadbetter. Agents—Forrester & Davidson, W.S.

Counsel for the Claimant Anderson—Kincaid Mackenzie—Blackburn. Agents—Bell & Bannerman, W.S.

Counsel for the Claimant Mrs Morgan—Boswell. Agents—H. B. & F. J. Dewar, W.S.

Friday, May 18.

FIRST DIVISION.

MILLAR (LORD NAPIER AND ETTRICK'S TRUSTEE) *v.* LORD DE SAUMAREZ.

Service of Heirs—Extract Decree of Special Service—Right to Obtain Extract Decree—Completion of Title—Titles to Land Consolidation Act 1868 (30 *and* 31 *Vict. cap.* 101), *secs.* 36 *and* 38—*Right in Security—Bond and Disposition in Security.*

Under the provisions of sections 36 and 38 of the Titles to Land Consolidation Act 1868 anyone is entitled, on payment of the prescribed fees, to obtain an extract of a decree of special service pronounced on the petition of some-one else, which he may use as a link, equivalent to a general disposition from the ancestor to the heir, in making up his title under any disposition granted by the person served.

The heir-apparent of an entailed estate granted a bond and disposition in security, whereby he disponed to the creditor the entailed estate. He was afterwards sequestrated. On the death of the heir in possession the trustee in the sequestration obtained decree of special service on a petition in the name of the bankrupt. The heritable creditor obtained an extract of this decree, and expede and recorded a notarial instrument on this extract and his bond. *Held* that he had validly completed his title, and was entitled to a preference in a question with the trustee, whose title to the lands in question was completed after his.

Service of Heirs—Effect of Decree of Special Service—Titles to Lands Consolidation Act 1868, *sec.* 46.

Held by Lord Low (Ordinary), and acquiesced in, that section 46 of the Titles to Land Act 1868, while giving to an extract of a duly recorded decree of special service the effect of a disposition by the ancestor in favour of the heir, does not give the same effect to the decree unextracted, and therefore that a title made up by a notarial instrument proceeding on an unextracted decree was inept.

In 1889 the Master of Napier, who was then heir-apparent to the entailed estate of Thirlestane, granted, in security of a loan of £1500 made to him by Lord de Saumarez, a bond and disposition in security, by which he conveyed the said estate of Thirlestane subject to the entail. The bond contained an assignation of writs in the ordinary form. It was duly recorded in the Register of Sasines on 16th January 1889.

In 1894 the estates of the Master of Napier were sequestrated, and Robert Cockburn Millar, C.A., was appointed trustee. In December 1898 the late Lord Napier and Ettrick died and the Master of Napier

succeeded to the title and to the estate of Thirlestane.

On 20th December 1898 Mr Millar presented a petition to the Sheriff of Chancery in name of the said Lord Napier and Ettrick, praying for his service in special and general as heir of his father the late Lord Napier and Ettrick under the Thirlestane entail, and on 17th May 1899 the Sheriff of Chancery served Lord Napier and Ettrick heir in terms of the petition. Said decree of special and general service was recorded in Chancery on 19th May 1899.

On 28th February and 4th March 1899 Mr Millar obtained from the Lord Ordinary on the Bills an order under section 103 of the Bankruptcy (Scotland) Act 1856 declaring all right and interest in the said entailed estate to which Lord Napier and Ettrick became entitled to be vested in him as trustee, as from the date of Lord Napier and Ettrick's succession thereto.

On 23rd May 1899 Mr Millar completed a title to the said estate of Thirlestane by expeding and recording in the Register of Sasines a notarial instrument on an extract of said decree of special and general service, and on the act and warrant and extract vesting order in his favour.

On 20th May 1899 Lord de Saumarez expede and recorded a notarial instrument bearing to proceed on an extract of the bond and disposition in security, the petition for special service, and the decree thereon.

On 23rd May 1899 Lord de Saumarez obtained an extract of the decree of special service pronounced on the petition presented by the trustee, and expede and recorded a second notarial instrument bearing to proceed on the bond and disposition in security, the petition for service, and the extract decree. The extract decree was obtained after the extract given to the trustee in bankruptcy, but the notarial instrument was entered in the presentment book of the Register of Sasines before that in favour of the trustee.

By section 36 of the Titles to Land Consolidation Act 1868, after providing for the recording of the decree in a petition for special service, it is enacted as follows:—"On such decree being so recorded the Director of Chancery or his depute shall prepare an authenticated extract thereof, and when such decree shall have been pronounced by the Sheriff of Chancery, shall deliver such extract to the party or his agent, . . . and such proceedings and decree shall . . . be at all times patent and open to inspection in the office of the sheriff-clerk and of the Director of Chancery respectively, and certified copies shall be given to any party demanding the same on payment of such fees as shall be fixed by Act of Sederunt." By section 38 it is provided, *inter alia*—"And the said record of services and other proceedings shall be at all times patent and open to inspection in the office of Chancery, . . . and extracts from the said register, or certified copies of the said proceedings, shall be given to anyone demanding the same, on payment of such fees as shall be fixed by Act of Sederunt as aforesaid."

By section 46 it is provided—"On being recorded and extracted as aforesaid every decree of special service . . . shall to all intents and purposes, unless and until reduced, be held equivalent to and have the full legal operation and effect of a disposition in ordinary form of the lands contained in such service granted by the person deceased being last feudally vest and seised in the said lands to and in favour of the heir so served."

Mr Millar, as trustee in Lord Napier and Ettrick's bankruptcy, brought an action of reduction of the two notarial instruments expede by Lord de Saumarez, and of the extract decree of special service obtained by him.

He pleaded—"(1) The notarial instrument first sought to be reduced having been expede without legal warrant is null and void, and the pursuer is entitled to reduction thereof, as concluded for. (2) Said second extract decree having been issued without legal authority, and in breach of the statute, is null and void, and is ineffectual as a disposition, and the pursuer is entitled to decree of reduction thereof, and of the notarial instrument bearing to proceed thereon.

The defender pleaded, *inter alia*—"(5) The notarial instrument first sought to be reduced having been expede according to law, the pursuer is not entitled to reduction thereof, as concluded for. (6) Said second extract decree being valid and having been issued in accordance with law, decree of reduction thereof and of the notarial instrument proceeding thereon should be refused."

On 12th January 1900 the Lord Ordinary (Low) pronounced the following interlocutor:—"Sustains the reasons of reduction in regard to the first notarial instrument libelled, and *quoad* it, Finds, reduces, decerns, and declares in terms of the reductive conclusions of the summons; and *quoad ultra* sustains the defences, repels the reasons of reduction, and assoilzies the defender from the conclusion of the summons for reduction, and also from the conclusion of the summons for declarator, and decerns," &c.

Opinion.—[*After stating the facts*]—"In regard to the first notarial instrument, the question argued was, whether the decree of special service was a sufficient warrant, the contention of the pursuer being that it was not so, a decree of special service not being, under the Titles to Land Consolidation Act 1868 equivalent to a disposition.

"Under the 46th section of that Act a decree of special service, on being recorded and extracted, is declared to be equivalent to and have the full legal operation and effect of a disposition in ordinary form granted by the person deceased in favour of the heir so served. There is, however, no provision in the Act giving to a decree of special service before it has been recorded and extracted the effect of a disposition. So far therefore as the first notarial instrument proceeds upon the decree of

special service, it seems to me to have been expede without sufficient warrant.

"The second notarial instrument proceeds upon an extract of the decree of special service, and while it is not disputed that such extract is equivalent to a disposit on, it was contended for the pursuer that the defender was not entitled to obtain an extract, and that the extract was improperly issued to him.

"By the 36th section of the Act of 1868 it is provided that the decree of service shall be transmitted to the Director of Chancery, and shall be recorded by him, and upon being so recorded he shall 'prepare an authenticated extract thereof, and where such decree shall have been pronounced by the Sheriff of Chancery, shall deliver such extract to the party or his agent.' Further on in the section it is provided that 'certified copies shall be given to any party demanding the same.' The pursuer argued that under that section an extract could only be issued to the party in whose favour the decree of service had been granted, or his agent, and that it was incompetent to issue an extract or anything except a certified copy to anyone else.

"That argument would have been formidable if the 36th section had stood alone, but the 38th section also deals with extracts. That section first makes provision for the form in which the record of services is to be kept, and then it is enacted that 'the said record of services and other proceedings shall be at all times patent and open to inspection, . . . and extracts from the said record or certified copies of the said proceedings shall be given to anyone demanding the same.'

"It seems to me that under that enactment the defender was entitled to obtain an extract of the decree of service, and I do not think that the enactment is inconsistent with the 36th section, because while the latter section makes it imperative upon the Director of Chancery to make an authenticated extract of the decree, and deliver it to the party or his agent, it does not say that no-one else is to be entitled to obtain an extract.

"I am therefore of opinion that the extract of the decree was properly issued to the defender, and that that extract formed a sufficient warrant for the second notarial instrument."

The pursuer reclaimed, and argued—The defender's title was bad because he had no right to obtain the extract decree of special service, which was an indispensable link in his title. No-one but a party to the proceedings was entitled to obtain an extract. The provisions of section 36 showed the contrast between the party who was entitled to extract and others who were only entitled to certified copies.

Argued for the respondent—The words of section 38 were plain, and entitled the respondent to an extract of the decree. The contrast in section 36 was not between a party to the proceedings and other parties, but between the decree, of which an extract could be obtained, and the other proceedings of which only certified copies were given. Under section 36 extracts could be given to the petitioner "or his agent." The defender was, in virtue of the bond, Lord Napier's agent or mandatory, and was therefore entitled to an extract on that footing. Even if the defender's title were reducible, the trustee only took the heritable property of the bankrupt *tantum et tale*, and could not therefore stand upon the objection—*Trappes* v. *Meredith*, November 3, 1871, 10 Macph. 38.

LORD PRESIDENT—The Lord Ordinary's interlocutor is not challenged in so far as it reduces the first notarial instrument; it is only assailed in so far as it in effect upholds the second notarial instrument.

We have had several important points argued as bearing upon the validity of that instrument, but I think the short ground upon which the Lord Ordinary has proceeded is quite sufficient for disposing of the question as to its validity. The second notarial instrument is founded upon, *inter alia*, an extract of the decree of special service of the bankrupt as heir to his father, and while the pursuer did not dispute that such an extract is equivalent to a disposition by the deceased to the bankrupt, his heir, he maintained that the defender was not entitled to obtain such an extract, and that it was improperly issued to him. The question depends upon the construction and effect of sections 36, 37, 38, and 46 of the Titles to Land Consolidation Act 1868. Section 36 directs what is to be done after decree of service has been pronounced, and in particular enacts that "on such decree being so recorded the Director of Chancery or his depute shall prepare an authenticated extract thereof, and when such decree shall have been pronounced by the Sheriff of Chancery shall deliver such extract to the party or his agent." It is not merely in the power, but it is the duty, of the Director of Chancery to prepare an extract of the decree and give it to the party or his agent. It is not necessary to consider whether the word "agent" means solely "law-agent." We have had an argument as to whether the term is not wide enough to cover the case of a procurator or mandatory under such a deed as the bond and disposition in security in favour of the defender, but we do not require to decide the point. After dealing with extracts, section 36 proceeds to enact that "such proceedings and decree shall, both prior and subsequent to the said transmission, be at all times patent and open to inspection in the office of the Sheriff-Clerk and of the Director of Chancery respectively, and certified copies shall be given to any party demanding the same" on payment of certain fees. The pursuer submits that in this section there is a contrast between the right of the "party" (petitioner) to the proceedings, which is to obtain an extract of the decree, and the right of other parties, which it is said is only to obtain certified copies of it. But it appears to me that the explanation of the provision as to certified copies is that it is not limited to copies of the decree but includes copies of the whole proceedings mentioned in the

earlier part of the section—the petition and other steps of process as well as of the proof, possibly of the productions, and decree. The section does not declare that no extract of the decree shall be given to a person who is not a party to the proceedings. Section 37 declares that the extract decree shall be equivalent to an extract retour. Section 38 provides that the book or books in Chancery in which a decree of service shall be recorded shall be entitled the "Record of Services," and that "the said Record of Services and other proceedings shall be at all times patent and open to inspection, . . . and extracts from the said record or certified copies of the said proceedings shall be given to anyone demanding the same." This is not inconsistent with, but supplementary to, the provisions of section 36, and makes it competent for anyone to obtain an extract of the decree. The pursuer maintained that such an extract as is here referred to was only equivalent to a certified copy, but I find no warrant in the statute for this view. On the contrary, certified copies were spoken of as something different from extracts of the decree. This being so, it appears to me that the defender was entitled to obtain, as he did obtain, an extract of the decree of service of the bankrupt to his father. But by section 46 it is declared that a decree of special service, on being recorded and extracted, shall have the effect of a disposition of the lands from the person last feudally vested in them to the heir who is served, and to the assignees of such heir. The result is that anyone can obtain an extract which is equivalent to a disposition from the ancestor to the heir, thus taking the lands out of the *hæreditas jacens* of the ancestor and vesting them in the heir. The extract having been lawfully obtained by the defender was in my view a proper warrant for the second notarial instrument.

Upon this short ground, which is the same as that adopted by the Lord Ordinary, I think that his Lordship's interlocutor should be adhered to.

If these views be correct, it is not necessary to consider the question whether the pursuer as a trustee in bankruptcy took the estates of the bankrupt only *tantum et tale* as they stood in the person of the bankrupt, *i.e.*, subject to such prior rights as that created in favour of the defender by his bond and disposition in security. The defender does not require to rely on that doctrine, as he stands on the priority of his own completed title to that of the pursuer.

LORD ADAM concurred.

LORD M'LAREN—I think it is fortunate for the heritable creditor here that he is able to make up a title through the service of the debtor, for while I am partly responsible for the establishment of the principle that the heritable estate of the bankrupt vests in his trustee *tantum et tale*, I am not such a partisan of that doctrine as to propose to extend it to the case where the bankrupt holds an absolute title burdened only with an obligation to convey. That point, however, does not necessarily arise, because the position of the heritable creditor is that he is entitled to take advantage of Lord Napier's service, and to use it as a link by which he can complete his title under his bond. That argument would be sound but for the objection which has been raised, founded on the limitation of the right to obtain extract of the decree of special service which is said to be implied by section 36 of the Titles to Land Act 1868. Now, I think it must be taken that the clause of assignation to writs in a bond carries to the bondholder such of the debtor's writs as may be necessary for the completion of his title. There is no clear definition in the Act of 1868 of the effect of the short clause of assignation of writs, because all that is said is (sec. 119) that it "shall be held to import an assignation to the creditor to writs and evidents to the same effect as in the fuller form generally in use in a bond and disposition in security with power of sale prior to 30th September 1847." But this much is clear, that the language of the clause of assignation is consistent with the construction, according to which the granter of the bond binds himself to give the creditor the benefit of all writs which may be acquired by him, and which are necessary for the completion of the creditor's title. The clause ought to receive a liberal construction, and therefore I think it is sufficient to carry to the disponee the right to all writs of the disponer. Now, there were two persons who were in a position to make Lord Napier serve as heir to his father—Lord de Saumarez and the trustee—and the trustee has taken service. That is a very favourable position for Lord de Saumarez, because although the trustee had the conduct of the petition for service, it is difficult to say that by so taking conduct of the case he excluded Lord de Saumarez from using the service of his debtor. But no doubt the creditor must make up his title, and he has done so by obtaining a second extract of the decree, and by expeding and recording a notarial instrument thereon. Now, I am not of opinion that the extract is the vital point in the transmission of the estate from the ancestor to the heir. I think that depends upon the decree, just as the retour of a service under a brieve of inquest constituted the essential part in the old process of service. For public convenience the decree is preserved in the registry, and only the extract is given to the party. The matter does not however end there, because by section 46 there is a provision that an extract decree of special service shall be equivalent to a general disposition from the ancestor to the heir, and section 38 empowers the Director of Chancery to give an extract of the decree to anyone demanding the same. The observation has been made that this latter provision occurs in an administrative clause dealing with the transmission of records within the office of Chancery. But it is to be observed that while in this administrative clause (sec. 38)

we find the authority to the Director of Chancery to issue an extract of the decree, in the previous clause we have the provision that the extract of such decree and any second extract thereof shall be equivalent to and have the full legal effect of the certified extract of the retour formerly in use. It is not in section 38 that we look for the legal effect of a second extract, but in section 37, where it is placed on the same footing as an extract of the retour under the older practice.

On the whole matter I agree with the Lord Ordinary that Lord de Saumarez was quite entitled to obtain an extract of the decree, and that he has completed a valid title by the notarial instrument he has expede upon it.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Reclaimers—W. Campbell, Q.C.—Chree. Agents—J. A. Campbell & Lamond, C.S.

Counsel for the Respondent—H. Johnston, Q.C. — Clyde — Grainger Stewart. Agents—W. & F. Haldane, W.S.

Friday, May 18.

SECOND DIVISION.

[Lord Low, Ordinary.

MATHEWSON *v.* YEAMAN.

Process — Sheriff — Reduction of Sheriff Court Decree — Competency — Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 64-67 — *Act of Sederunt, March* 10, 1870, *sec.* 3, *sub-sec.* (5).

Where a Sheriff Court interlocutor has been pronounced in error, and has not been appealed against, the common law remedy of reduction of the decree is not taken away by the Court of Session Act 1868, or the Act of Sederunt of March 10, 1870.

Circumstances in which the Court *reduced* a Sheriff Court decree, which had not been appealed against to the Court of Session, on the ground that, as appeared from the views expressed by the Sheriff-Substitute in his note, it was not the judgment which he intended to pronounce.

Taylor's Trustees v. *M'Gavigan*, July 3, 1896, 23 R. 945, *followed.*

Watt Brothers v. *Foyn*, November 1, 1879, 7 R. 126, *distinguished.*

James Mathewson of Little Kilry, Benty, and Wetloans, in the parish of Glenisla, raised an action against William Yeaman of Scruschloch, and six other proprietors of lands in said parish, in which he asked (1) for reduction of an interlocutor dated 3rd September 1896, by Alexander Robertson, Sheriff-Substitute at Forfar, interdicting the pursuer from pasturing on the Hill of Kilry any sheep except such as he might have foddered on any of his said farms during the winter season; an interlocutor, dated 9th October 1896, pronounced on appeal by John Comrie Thomson, Sheriff of Forfarshire, dismissing said appeal, and adhering to the Sheriff-Substitute's interlocutor, and an extract, dated 29th October 1896, of said last-mentioned interlocutor; and (2) for decree that in virtue of his titles and the possession following on them, and in terms of a decree of souming and rouming pronounced on 7th May 1895 by the Sheriff-Substitute at Forfar, the pursuer was entitled to pasture continuously throughout the year on the Muir or Hill of Kilry 102 ewes with lambs, or otherwise 153 wedders or yeld sheep, or alternatively one horse for every eight wedders or yeld sheep (being nineteen horses), or one cattle beast for every four wedders or yeld sheep (being thirty-eight cattle beasts), and in addition to said sheep to put upon the said muir or hill during the period from Martinmas in each year to the middle of May following thirty-eight cattle, and that in the exercise of said right the pursuer was not restricted to pasturing on said muir or hill sheep, cattle, or horses which had been exclusively foddered on his lands and estate of Little Kilry, Benty, and Wetloans during the winter preceding, but was entitled so to pasture sheep, cattle, or horses forming part of the stock of said lands and estate which, in so far as not foddered on said lands and estate during the preceding winter, had been foddered on said muir or hill, and further or otherwise, and in any event, was entitled to pasture on said muir or hill sheep, cattle, or horses not exceeding the numbers respectively before written, and not exceeding the number actually foddered by him on his said lands and estate of Little Kilry, Benty, and Wetloans during the preceding winter, and whether or not the animals thus pastured had themselves been actually foddered on said lands and estate during the preceding winter or not.

The pursuer pleaded—"(1) The decrees specified in the summons being inconsistent with the pursuer's rights as determined by his titles, and the immemorial usage following thereon, and as defined by the decree of souming and rouming, and being unfounded in so far as inconsistent with the declaratory conclusions of the summons, the pursuer is entitled to decree of reduction as concluded for. (2) The pursuer, in virtue of his titles and of the possession following thereon, and in terms of the decree of souming and rouming, is entitled to decree in terms of the declaratory conclusions of the summons."

The defender William Yeaman lodged defences, and pleaded, *inter alia*—"(5) The action cannot be maintained in respect (1st) There was no irregularity or want of jurisdiction in the proceedings before the Sheriff; (2nd) of the proceedings which have followed on the decree in the process of interdict. (6) The pursuer having been fully heard in the interdict is not entitled to decree of reduction on the ground that he omitted competent arguments therein, or that he did not satisfy