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

himself of the meaning and effect of said proceedings."

The following narrative of the facts that led to this action is taken from the opinion of the Lord Ordinary (Low)—"The pursuer and the defenders are proprietors of lands in favour of which there is a servitude of pasturage over the Hill of Kilry belonging to Mrs Wedderburn Ogilvy, who is not a party to this action. Only one of the defenders, Mr Yeaman, has appeared and lodged defences.

"In 1893 an action of souming and rouming was raised in the Sheriff Court of Forfarshire at the instance of the present defenders except Mrs Coutts, against her and the present pursuer. The petition was in the ordinary form, and craved that the defenders should be ordained to produce their titles to the pasturage, and, should they establish a right of pasturage, that it should be declared that 'they are not entitled to pasture on the said muir or hill more bestial than they can fodder on their dominant tenements during the winter season.' There were then conclusions for fixing the number of animals which each owner of a dominant tenement was entitled to pasture. Now, the declaratory conclusion which I have quoted is in the recognised form for such a summons and accurately expresses the measure of a right of common pasturage—Bell's Prin. sec. 1013; Ersk. ii. 9, 15—*Lord Breadalbane* v. *Menzies*, 5 Brown's Sup. 710 and 724.

"A remit was made to a man of skill, and upon his report the Sheriff pronounced an interlocutor in which he found 'that the bestial which the muir or hill of Kilry is sufficient to pasture or graze continuously throughout the year is sheep, and that to the number of 410 ewes with lambs, or otherwise 614 wedders or yeld sheep.' That number of sheep was then apportioned among the dominant tenements, including the lands belonging to the present pursuer and the compearing defender Yeaman.

"In 1896 Yeaman brought another action in the Sheriff Court against the pursuer. It appears that the pursuer had obtained from some of the other proprietors of dominant tenements leave to exercise the rights of pasturage effeiring to their lands, and he accordingly claimed right to graze upon the common pasturage more sheep than the number to which he was entitled under the decree of souming. The main object of Yeaman's action was to put a stop to that practice, but he also sought, judging from the conclusions of the prayer, to have the pursuer's right restricted to something less than that to which he had been found entitled by the decree of souming. Thus the first conclusion asked for declarator that the present pursuer was only entitled to pasture 'such sheep as he has respectively foddered on either of his said farms.' That conclusion differed only in one word from the declaratory conclusion to which practical effect had been given in the decree of souming. The word 'has' was used instead of the word 'can,' the declarator asked being that the pursuer should be restricted to the number of sheep which he 'has' foddered, and not (as in the action of souming) to the number which he 'can' fodder upon his dominant tenements — a very material difference.

"After the declaratory conclusions to which I have referred, the petition contained conclusions to the effect that it was incompetent for the pursuer to acquire and exercise rights of pasturage effeiring to other dominant tenements, and finally, there was a conclusion for interdict against the pursuer "pasturing on said hill any sheep except such as he may have foddered on any of the dominant tenements during the winter season." That conclusion for interdict just followed the terms of the first declaratory conclusion.

"In addition to pleas upon the merits, the present pursuer stated a plea of *res judicata*, and pleas to the relevancy and competency of the proceedings.

"On 7th July 1896 the Sheriff-Substitute repelled the preliminary pleas and allowed a proof. In a note to his interlocutor, however, the Sheriff expressed the opinion that the first declaratory crave of the petition was really the same as the crave in the action of souming which I have quoted, and that accordingly that question was *res judicata*. The Sheriff, however (apparently by an oversight) did not sustain the plea of *res judicata* to that extent, but, as I have said, repelled all the preliminary pleas.

"Then on 3rd September 1896 the Sheriff-Substitute pronounced the interlocutor of which reduction is sought. The material part of the interlocutor is as follows:—'Finds in law that a predial servitude goes with the land and not with the person: Finds that the dominant owner of such a servitude cannot communicate the servitude to others not possessing the dominant tenement: Finds that the defender has not right to pasture more sheep on the Hill of Kilry than was fixed as his proportion by the process of souming and rouming lately decided in this Court: Grants interdict as craved.'

"The pursuer does not object to the findings in the interlocutor, as he does not now maintain that he is entitled to acquire and exercise rights of pasturage effeiring to dominant tenements other than those belonging to him. What he objects to and seeks to set aside is the decree of interdict.

"The consequence of the interdict having been granted in general terms was that the pursuer was found guilty of breach of interdict because he had grazed sheep upon the Hill of Kilry which had not actually been foddered upon his farms during the preceding winter, although since the date of the interlocutor he has not sought to exercise rights acquired from owners of other dominant tenements, nor has he pastured more sheep than the number specified in the decree of souming."

On 21st December the Lord Ordinary pronounced the following interlocutor:—"Finds that the pursuer is entitled to reduction of the interlocutors or decrees and extract specified in the reductive conclusions of the summons in so far as he was thereby interdicted from pasturing upon

the Muir or Hill of Kilry in his own right as proprietor of the lands of Little Kilry, Whitesheal, now called Benty, and part of the lands and barony of Craig, commonly called Wetloans, the full number of sheep, cattle and horses which he was found entitled to pasture thereon by decree of souming and rouming pronounced in the Sheriff Court of Forfarshire on the 7th day of May 1895 mentioned in the summons, subject to the conditions contained in said decree: Therefore to that extent and effect only, and especially reserving and excepting from this decree of reduction the whole interlocutors, decrees, and proceedings in a process raised in the Sheriff Court of Forfarshire on 6th June 1898 at the instance of the defender William Yeaman against the present pursuer to have him found guilty of breach of interdict: Sustains the reasons of reduction; and finds, reduces, decerns, and declares in terms of the reductive conclusion of the summons: *Quoad ultra* dismisses the said conclusion, and decerns: Further finds, decerns, and declares that in terms of the said decree pronounced on 7th May 1895 the pursuer as heritable proprietor of the said lands and estate of Little Kilry, Whitesheal, now called Benty, and part of the lands and barony of Craig, commonly called Wetloans, is entitled to pasture or graze 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 is further entitled 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 is not restricted to pasturing on said muir or hill sheep, cattle, or horses which have been exclusively foddered on his lands and estate of Little Kilry, Benty, and Wetloans during the winter preceding," &c.

Note.—"It was not seriously disputed by the defender in this case that reduction is still a competent mode of bringing a sheriff court decree under review, but his argument was that when the pursuer of the reduction might have appealed against the decree, he will not be allowed to proceed with the action unless he can give a sufficient and reasonable excuse for not having exercised his right of appeal; that in this case the only excuse which the pursuer gave for not having appealed was that he did not understand the effect of the Sheriff's interlocutor, and that was not sufficient, because there was no ambiguity in the interlocutor.

"It may be and probably is the case that a party who might have brought a decree under review by way of appeal must give a reasonable explanation of his failure to do so as a condition of being allowed to proceed by way of reduction, but in this case it appears to me that there is a reasonable explanation, and further, that to throw out the reduction would result in a grave injustice being done to the pursuer.

[*His Lordship here stated the facts of the case as quoted in the narrative.*]

"The pursuer says that he understood the Sheriff-Substitute's interlocutor as determining no more than that he was not entitled to acquire and exercise the rights of other dominant owners.

"It seems to me that it is not surprising that the pursuer took that view of the interlocutor. The Sheriff-Substitute in his note to his first interlocutor expressed the opinion that the measure of the pursuer's right of pasturage had been finally settled in the action of souming, and the findings in the second interlocutor, and also the note appended to that interlocutor, refer only to the question whether the pursuer was entitled to acquire and exercise the rights of other dominant owners. In these circumstances the pursuer assumed that interdict was only granted to the extent required to give effect to the preceding findings. It seems to me that the interdict ought to have been limited to that extent and effect, and I think that it is doubtful whether the Sheriff-Substitute intended to grant interdict to any greater extent and effect.

"According to the opinions which he expressed in the notes to his interlocutors, the Sheriff-Substitute ought to have sustained the plea of *res judicata* as regarded the first declaratory conclusion of the petition and dismissed that conclusion, and granted interdict only against the pursuer using rights of pasturage derived from other dominant owners. The interdict actually granted, however, went far beyond that, and what the pursuer seeks in this case is really only to be put in the same position as he would have occupied if the interlocutor had been in accordance with the views expressed by the Sheriff-Substitute in his notes.

"To that extent I think that the pursuer is entitled to have the interlocutor set aside. As I have already pointed out, it is settled that the measure of a right of pasturage of this kind is the number of cattle or sheep which each dominant tenement is capable of foddering in winter, and the object of an action of souming and rouming is, first, to fix the total number of sheep or cattle which the common pasturage can maintain, and secondly, to fix the proportion of that number effeiring to each of the dominant tenements. When that proportion is fixed by decree, it is no longer competent to inquire what number of cattle or sheep have in fact been foddered upon a dominant tenement in any particular winter, although the Court might interfere to prevent an abuse of the servitude right as was done in the case of *Breadalbane*, to which I have already referred, in which it was ultimately held that the servient owner was not entitled to let the whole of his own summer grass to drovers, and send all his cattle on to the servient tenement.

"I shall therefore grant decree of reduction in so far as the interlocutors under review interdict the pursuer from pasturing in his own right as owner of some of the dominant tenements the full number of animals which he was found entitled to

pasture by the decree of souming and rouming."

The defender Yeaman reclaimed, and argued—The pursuer not having appealed against the decree of interdict complained of, the judgment had become final under sections 64 to 69 of the Court of Session Act 1868 (31 and 32 Vict. cap. 100), and section 3, sub-section 5, of the Act of Sederunt of 10th March 1870, and he was not now entitled to have the decree brought under review as to the merits of the case in any manner, either by appeal, supervision, or reduction —*Watt Brothers* v. *Foyn*, November 1, 1879, 7 R. 126; *County Council of Roxburgh* v. *Dalrymple's Trustees*, July 19, 1894, 21 R. 1063, opinion of Lord Young, 1069. Before the passing of the 1868 Act the judgment of a sheriff could be reviewed by advocation, suspension, or reduction, but after the passing of that Act and the Act of Sederunt, if no appeal was taken, the judgment became final and not subject to review on the merits by any process of law. The Act of 1868 was a code regulating the matter of review as regards ordinary actions. The case of *Taylor, subter*, relied on by the other side, could not stand as against the case of *Watt Brothers*, as the former was an Outer House judgment. The decision in *Taylor* was not warranted by the authorities quoted by Lord Kincairney in giving his judgment. *Taylor* could also be differentiated from the present case, as it did not deal with an extracted decree. The action of reduction was therefore incompetent.

Argued for pursuer—It was admitted by the other side that prior to the passing of the 1868 Act reduction was a competent remedy when suspension and advocation were not available. The 1868 Act abolished advocation (section 64) but did not take away the remedy of reduction either expressly or by implication. The case of *Taylor* v. *M'Gavigan*, July 3, 1896, 23 R. 945, which was an Outer House judgment reclaimed to the Inner House but acquiesced in on this point, was thus practically an Inner House decision and ruled the present case. Express words in a statute were necessary to exclude jurisdiction, and review could not be excluded by implication—*Marr & Sons* v. *Lindsay*, June 7, 1881, 8 R., opinions of Lord President Inglis, p. 785, and Lord Mure, p. 786. But even by implication the 1868 Act did not interfere with reduction as a process of review. The case of *Watt, supra*, had no application in present circumstances. The decision in that case dealt with a case where an appeal had been taken and had thereafter been abandoned. It was founded on section 71 of the 1868 Act, and section 3, sub-section (5), of the Act of Sederunt of 1870, and only decided that where an appellant has appealed to the Court of Session and then failed to proceed with his appeal the Court is entitled to dismiss the appeal just as if the case had been heard *in foro*, and that thereafter the appellant will not be entitled to get his case brought under review by another process. In this case no appeal had been taken in the Sheriff Court action to the Court of Session, so that the case was under review for the first time. The Lord Ordinary's interlocutor should be affirmed.

LORD JUSTICE-CLERK—But for this being a case touching a somewhat important point in procedure, I do not think it would have been necessary to hear the long debate we have listened to, but perhaps it was advisable that it should be fully discussed. The right to proceed in this Court by reduction is one which has subsisted for a very long time, and is certainly applicable to a case such as we have here. The question is, whether or not the right to obtain redress by reduction in circumstances such as we have here has been cut off by anything that has been done either by Act of Parliament or by Act of Sederunt following upon an Act of Parliament. It is not contended that that has been expressly done in that way. The contention is that it is to be implied from something that is contained in the Act of Parliament or Act of Sederunt that the right of the citizen to have a judgment, which has been pronounced and in the ordinary sense has become final, brought before this Court in order that it may be set aside upon just grounds, has been cut off. I think it would be a very strong thing to say that that could be done by implication. I think if such a right were to be taken away, it would—as was expressed by the Lord President in the case of *Marr*—be expressly taken away, and it is not to be suggested that it could be taken away merely by implication. But I am satisfied further that the only case which has been quoted to us is a case which does not at all detract from the authority of a subsequent case, which I think practically rules this case. I think the case of *Watt* v. *Foyn* was decided upon a special point applicable to a special deliverance of the Court of Session by Act of Sederunt, and it was not intended and could not be intended to affect general rules as regards obtaining redress by reduction. Now, in the case of *Taylor* v. *M'Gavigan*, in which the case of *Watt* was cited, the Lord Ordinary deciding the case—I think upon just grounds—came to the conclusion that reduction was not excluded in such a case. It appears that that was not brought under the review of the Inner House, but it certainly must have been before the Inner House in that case that the question had been raised and had been decided, and they certainly must have had grounds for holding that there was no substantial reason for differing from the Lord Ordinary upon that matter, because if there were a question of the inherent jurisdiction of the Court, I do not see how they could well pass it over. Although the point was not argued to them, they apparently held that they had jurisdiction, and decided the case, and, speaking for myself personally, I should have been very much surprised if they had done anything else. On the whole matter I am satisfied that the objection to the Lord Ordinary's judgment is not substantiated. There is no objection, as I understand,

except the technical objection, and it is admitted that if the process is competent it will correct what is a manifest injustice. I am for adhering to the Lord Ordinary's interlocutor.

LORD YOUNG—I am of the same opinion. I do not think this is a case of review at all. The case is not brought here to review the Sheriff's judgment. It is brought here to correct an error—serious in its operation if allowed to stand uncorrected. The expression of the error is in the words "grants interdict as craved." Now, it is conceded that it is clear from the whole proceedings and from the Sheriff's judgment as expressed by him—I do not mean the written out interlocutor—that he did not mean to grant interdict as craved, but to grant interdict only conform to a decree, which is most distinctly referred to, and which is not interdict as craved at all. It is objected that that was the Sheriff's judgment—that there was nothing to review in his judgment, but only in the erroneous expression, "grants interdict as craved." I put the case by way of illustration—Suppose the conclusion of the prayer of a petition or of a summons is for decree for £10,000 or £20,000, and the proceedings before the Sheriff, and the expression by him of his opinion and judgment, admittedly show that he meant to give decree only for £500, but that there is an error in the writing out of the interlocutor, "grants decree as craved," which if it stood would be a standing judgment against the defender for an enormous sum. Surely the law must afford a remedy for a case of that kind, apart altogether from the review of the judgment. Now, I am of opinion that by the common law of Scotland, as it has been acted on for many generations, although such cases are not of frequent occurrence, when there is such an error in a decree there may be a remedy by reduction, that is, by restoration against it—not review of the judgment—but restoration against the blundered expression. Reduction has been the common law remedy for such a case of hardship for which in any civilised country there must be a remedy. Now, the question which has been argued before us is, whether that has been taken away by recent legislation, and I am of opinion with, I hope, all your Lordships that it has not. I should give no countenance to the notion that we should allow actions of reduction to be substituted for and come in the place of appeals as provided for by the legislation which has been referred to. I think the Court would not entertain, and I should not myself be at all prepared to assent to the Court entertaining, an action of reduction to serve the purpose of an ordinary appeal as provided by the legislation referred to. But I think this is a case of another sort altogether, and that a reduction is the common law mode of having an error rectified and injustice avoided, that common law not being at all affected by the legislation which has been founded upon in argument.

LORD TRAYNER—I am of the same opinion. As your Lordships have observed, the right of review by reduction is a common law right which has existed for a very long time, and is a mode of review which cannot be taken away except by statutory enactment. It certainly has not been so taken away by the Act of 1868, and I see no inconsistency between maintaining the judgment in the case of *Watt* v. *Foyn* and the view I am now expressing, because the circumstances in the case of *Watt* v. *Foyn* are different from those we are here dealing with. *Watt* v. *Foyn* was decided in circumstances in reference to which there existed special provisions in the Act of 1868 and in the Act of Sederunt. Whenever the circumstances that are provided for in the 71st section of the Act of 1868 and the following Act of Sederunt, occur as they did in *Foyn's* case, then *Foyn's* case would probably be followed; but where you have a question to deal with which is other than that specially provided for in the sections I have referred to, then you must apply the law, not of these sections, which are special in their application, but the law which is general. Applying the general principle and rule of law to this case I am of opinion that the present action of reduction is competent.

LORD MONCREIFF—I am of the same opinion. This is an action of reduction, and the pursuer in the action of reduction has not previously brought an appeal against the interlocutor which he seeks to have reduced. That being so, neither the Act of 1868 nor the Act of Sederunt of March 1870 applies to the case. The statute and the Act of Sederunt apply to the case where an appeal has been taken and noted; and the judgment in the case of *Watt* amounts to no more than this, that where that has taken place—where the appellant has selected his remedy and lodged a note of appeal, and fails to carry out the injunctions of the statute or Act of Sederunt regarding the lodging of papers, then the decree of dismissal which the Court is empowered to pronounce shall be held to be equivalent to a decree *in foro*. It is as if the case had been heard on the merits and decided on appeal to the Court of Session. I do not think we touch that decision, which I assume was well decided, because in this case the present pursuer has not selected the remedy of appeal. He has brought an action of reduction, and as I have said, neither the Act of Parliament nor the Act of Sederunt take away, or profess to take away, the right of reduction. In these circumstacnes, therefore, I think the interlocutor of the Lord Ordinary should be affirmed.

The Court adhered.

Counsel for Pursuer—W. Campbell, Q.C. —Chree. Agents—J. & J. Galletly, S.S.C.

Counsel for Defender—Jameson, Q.C.—A. S. D. Thomson.—Agent—Arch. Menzies, S.S.C.