Ardwall's opinion. The chief point in the case is that while a variation was made in the manner of bringing in the water in the year 1898, we do not look upon that as beginning a new course of prescriptive right. If that were so, the right which was already in course of being acquired would be entirely lost. I think the true principle is that the possession of the original watercourse and of the watercourse as altered when put together amount to forty years complete, and that the complainer is entitled to put them together, but that only to the effect of getting such a supply of water, and by such means as he and his predecessors had received for the period of forty years.

The Court pronounced this interlocutor—

"Find (1) that the complainer has acquired by prescriptive use a right of servitude to lead water for the use of Dunlappie estate from the stream or ditch on the estate of Lundie at and from the point some 13½ feet or thereby distant from the mouth of the box drain on Lundie estate . . . and that by means of a five-inch tile, or alternatively a square conduit or other water passage, laid under the road, and extending to the said ditch, but find with regard to this servitude no interdict is necessary in respect that it is not proved that the respondent has ever proposed to execute any works which would interfere therewith; (2) that the substitution of other means of aqueduct from Lundie estate to Dunlappie since 1898, and the cessation of the use of the tile drain or conduit above referred to, does not entitle the respondent to have the years from 1898 onwards deducted from the years of prescription as in a question of aqueduct between the two estates, and that for these years the present means of aqueduct must be held to have been a substitute for the aqueduct which the complainer has enjoyed since 1861; (3) that the complainer is not entitled to have on the estate of Lundie any other means of leading water from the said estate than those above mentioned, and in particular is not entitled to have thereon the piping and cisterns or receiving boxes mentioned in the prayer of the note; (4) that for more than forty years the inhabitants of the cottages on the estate of Dunlappie known as the Burnhead Cottages have been in constant and uninterrupted use to draw water for drinking purposes from the mouth of the said box drain at the spot marked 'well,' on the plan No. 38 of process; (5) that the respondent's husband, now deceased, contemplated making a pond at or near the said drain mouth or well, but that this proposal has been abandoned by the respondent, and that no other interference with the said drain mouth or 'well' is at present proposed by the respondent; therefore find it unnecessary to grant any interdict with regard to the said 'well,' under reservation of all questions, and in particular of the question as to whether the supply of water at the said drain mouth or 'well' is capable of being the subject of a servitude to the effect of preventing the proprietor of Lundie from interfering by operations *in suo* with the water in said box drain and 'well'; with these findings, refuse the prayer of the note of suspension and interdict and decern; find the reclaimer entitled to expenses . . . modify said expenses to two-thirds of the taxed amount thereof. . . ."

Counsel for Complainer and Respondent—Blackburn, K.C.—Spens. Agents—Gillespie & Paterson, W.S.

Counsel for Respondent and Reclaimer—Maclennan, K.C.—Lippe. Agents—Macpherson & Mackay, S.S.C.

Friday, November 22.

FIRST DIVISION.

[Sheriff Court at Perth.

LOGAN *v.* M'ROSTIE.

Trust—Bankruptcy—Title to Sue—Non-gratuitous Trustee's Powers—Trust-Deed for Creditors in Favour of Two Trustees, with no Survivorship Clause—Title of Surviving Trustee to Sue—Trusts (Scotland) Acts 1861 (24 *and* 25 *Vict. cap.* 84), 1867 (30 *and* 31 *Vict. cap.* 97), *and* 1884 (47 *and* 48 *Vict. cap.* 63).

Held that the powers conferred on gratuitous trustees by sec. 1 of the Trusts (Scotland) Act 1861 are extended to non-gratuitous trustees by the Trusts (Scotland) Amendment Act 1884, and consequently that the survivor of two trustees nominated in a trust-deed for behoof of creditors, which contained no clause of survivorship, had a good title to sue.

The Trusts (Scotland) Act 1861 (24 and 25 Vict. cap. 84), section 1, enacts—"All trusts constituted by any deed or local Act of Parliament under which gratuitous trustees are nominated shall be held to include the following provisions, unless the contrary be expressed; that is to say, ... power to such trustee, if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees; a provision that the majority of the trustees accepting and surviving shall be a quorum. . . . . ."

The Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), which proceeds on the preamble—"Whereas by the Acts 24 and 25 Vict. cap. 84, and 26 and 27 Vict. cap. 115, certain powers are conferred on gratuitous trustees in Scotland, and it is expedient that greater facilities should be given for the administration of trust-estates in Scotland, ..." in section 1 enacts—"In the construction of this Act, and of the said recited Acts, the words 'trusts and trust-deeds' shall be

held to mean and include all trusts constituted by virtue of any deed or by private or local Act of Parliament; and the words 'gratuitous trustees' in the sense of this Act, and of the said recited Acts, shall mean and include all trustees who are not entitled as such to remuneration for their services, in addition to any benefit they may be entitled to under the trust, or who hold the office *ex officio*, and shall extend to and include all trustees, whether original or assumed, who are entitled to receive any legacy, or annuity, or bequest under the trust. . . . . ."

The Trusts (Scotland) Amendment Act 1884 (47 and 48 Vict. cap. 63), which in the preamble recites, *inter alia*, the Acts 24 and 25 Vict. cap. 84, and 30 and 31 Vict. cap. 97, enacts:—Section 1—"This Act may be cited as the Trusts (Scotland) Amendment Act 1884, and the said Acts and this Act may be cited as the Trusts (Scotland) Acts 1861 to 1884, and shall be read and construed together." Section 2—"In the construction of the said recited Acts, and of this Act, 'trust' shall mean and include any trust constituted by any deed or other writing, or by private or local Act of Parliament, or by resolution of any corporation or public or ecclesiastical body, and the appointment of any tutor, curator, or judicial factor by deed, decree, or otherwise. . . . . ."

Archibald Clark, grazier, Perth, whose affairs had become embarrassed, granted, on 18th May 1906, a trust-deed for behoof of creditors in favour of Thomas Logan and William S. Davidson, both solicitors in Perth. The trust-deed contained no survivorship clause. Davidson died on 29th October 1906. On 4th December 1906 Logan, the surviving trustee, with the consent and concurrence of Clark, raised an action against Peter M'Rostie, farmer, then residing in Comrie, for payment of £80, 14s. alleged to be due to Clark.

The defender pleaded—"(1) No title to sue."

On 7th March 1907 the Sheriff-Substitute (SYM) sustained the defender's first plea-in-law and dismissed the action, and on appeal the Sheriff (JOHNSTON), on 10th April 1907, affirmed his Substitute's interlocutor.

Note.—"I reach with reluctance the same conclusion as the Sheriff-Substitute upon the case at common law. The dicta in the case of *Dawson* v. *Stirton*, 2 Macph. 196, have been quoted for forty years as establishing the proposition that a nomination of trustees in a trust deed for creditors is joint, and that the appointment falls when one of the trustees fails, and I think that these dicta are binding in the Sheriff Court. There is force in the pursuer's contention that if the powers to assume new trustees and act by a quorum contained in sec. 1 of the Trusts Act of 1861 be read into this trust deed this displaces the rule, because the rule being based upon presumed intention the conferring of such powers may reasonably be held to shift the presumption as being indicative that it was not regarded as vital that the trust should be administered by both the two trustees named and by nobody else. I doubt, however, whether it is warrantable in the Sheriff Court to treat a well-established rule of law as displaced by such an implication. Further, it is doubtful whether sec. 1 of the Act of 1861 applies to such a trust as the present. The matter has been treated as an open one by more than one commentator. It seems to stand thus—the Act of 1867 deals with trusts generally without specifying that its application is limited to trusts where the trustees act gratuitously. In the case of *Mackenzie*, 10 Macph. 749, it was held (apparently with some difficulty) that the Act is so limited owing to its relationship to the Act of 1861. The Act of 1884 defines trusts for the purposes of the Trusts Acts generally, and it makes the word 'trustee' to include certain officers who do not act gratuitously. It provides, further, that the Trusts Acts 1861 to 1884 are to be read as one Act. Now in the case of the *Royal Bank*, 20 R. 741, it was held that this is sufficient to get rid of the inferential limitation to gratuitous trusts in the Act of 1867 when that Act speaks of trustees and trusts without qualification. But section 1 of the Act of 1861 deals specifically with 'trusts under which gratuitous trustees are nominated.' It is not clear that reading into the Act of 1861 the definition of a trust in the Act of 1884, it becomes necessary to read the words 'under which gratuitous trustees are nominated' out of the Act of 1861. The question is a narrow one, which might be decided either way without obvious error.

"The present case stands thus. There is a judgment of the Sheriff-Substitute, the affirmance of which enables the pursuer to take the case to the Court of Session without the expense of further procedure, and does not deprive the interest which he represents of another remedy if he does not think fit to take that course. On the other hand, a reversal of the Sheriff-Substitute's judgment infers (1) the disturbance of a hitherto recognised rule of law upon the strength of inferential deductions from statutory provisions not framed with any direct reference to that rule; (2) the decision in pursuer's favour of what has hitherto been regarded as a narrow question of statutory construction as to the intended application of the Act of 1861; (3) the probability of further procedure and a proof in the Sheriff Court which may be rendered nugatory by a decision of the Court of Session that the pursuer has no title to sue.

"In these circumstances I conceive it to be my duty to affirm the Sheriff-Substitute's interlocutor, not being clearly satisfied that the result at which he has arrived is erroneous in law."

The pursuer appealed, and argued—The pursuer had a good title to sue. The dictum in *Dawson* v. *Stirton*, December 4, 1863, 2 Macph. 196, that the nomination of trustees in trust-deeds for creditors was joint, had been displaced by the Trust Acts. These Acts, if read together as provided for by the Trust Act of 1884 (47 and 48 Vict. c. 63), applied, under the definition of "trust" in section 2 of that Act, both to gratuitous and

non-gratuitous trusts. That being so, a surviving trustee in a non-gratuitous trust had by implication under the Trusts Act 1861 (24 and 25 Vict. c. 81), sec. 1, a good title to sue. The Act of 1884 was applicable both to gratuitous and non-gratuitous trusts, and the limitation of the powers conferred by the 1861 Act to gratuitous trusts which had been read into the Act of 1867 (30 and 31 Vict. c. 97) in the case of *Mackenzie*, May 28, 1872, 10 Macph. 749, 9 S.L.R. 478, was not to be read into the Act of 1884, as it was inconsistent with the Act and their being read together as one Act. Apart from statute the pursuer had a good title at common law to sue on the ground of survivorship.

Argued for respondent—(The Court asking argument on the statutes only)—The judgment of the Sheriffs was right. The case of *Mackenzie* (*cit. sup.*) had limited the Act of 1867 to gratuitous trustees. Accordingly, neither under the Act of 1867 nor that of 1861 had this surviving trustee a good title to sue. The Act of 1884 had not altered this. *Esto* that in the case of the *Royal Bank of Scotland*, May 31, 1893, 20 R. 741, 30 S.L.R. 675, the Court took the view that with regard to the matter with which it was dealing, the Act of 1867 was no longer limited to gratuitous trustees; that case was dealing with a totally different matter from the present.

LORD PRESIDENT—I think that this case is exceedingly clear on the statute, although there is a difficult point that might arise at common law, which, however, we are not called on to decide. The facts are that a certain gentleman granted a trust-deed for behoof of his creditors in which he appointed two trustees, but there was no survivorship clause in the trust-deed. One of these trustees has died, and the other trustee, with the consent of the truster, now sues for a debt due to the truster. The plea taken by the defender is the plea of no title to sue, and that plea has been upheld by the Sheriff-Substitute, and affirmed, though with obvious hesitation and dislike, by the Sheriff, on the ground that where a trust for behoof of creditors is created in favour of joint trustees and one of them dies the trust thereupon falls. At common law that situation presents a very difficult question, but I think upon the statutes it is clear. By the Act of 1861 undoubtedly a title was given to a trustee in this position, but that Act is limited by the expression in the first section to those classes of trust-deeds under which gratuitous trustees were appointed. Then came the Act of 1867, and the Act of 1867 probably in the eyes of its authors was really meant to extend the scope of the beneficial legislation of 1861 to trusts of a wider class, but unfortunately there was a very slovenly definition clause which one cannot help thinking had not the effect which its authors wished. Among the clauses of the Act of 1867 was a certain clause 12, which provided that when any trustees cannot be assumed under any trust-deed application should be made to the Court. Now, shortly after that a case was brought in this Court—the case of *Mackenzie*, 10 Macph. 749,—where application was made under that section in the case of a trust where the trustees were not gratuitous. The Court there held that although the word trust in section 12 was unqualified in that section, yet that it was qualified when you took the two Statutes of 1861 and 1867 together, and that consequently the application could not be granted. The plain meaning of that was that, upon the true construction of section 12 of the Act of 1867, you really had to read "trust" as if it repeated the qualification of "trust" given in the Act of 1861, namely, not all trusts, but only trusts such as are constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated. Then came the Act of 1884, and in the Act of 1884 there was a definition of "trust" in a much wider sense. There was a provision that all Trust Acts should be read together, and there was not repeated the bungle that had been committed in the Act of 1867. Accordingly, shortly after the Act of 1884, there came the case of the *Royal Bank* (20 R. 741). The *Royal Bank* case exactly repeated the application which had been made in the *Mackenzie* case, but with an entirely opposite result, because the Court in that case held that the Act of 1884 succeeded in enacting what the Act of 1867 did not—in other words, the Act of 1884, by means of its general definition, read back the word "trust" in the general sense and took away the qualification of the Act of 1861. That seems to me to settle the matter, because if that qualification is read out then we have the permissive provision of section 1 of the Act of 1861 applied, not to trusts qualified as they were qualified in that section by the words which I have read, but to trusts amplified by the larger definition of the Act of 1884. Accordingly I think that that ends the matter. I am therefore for allowing the appeal and remitting the case to proceed upon the merits.

LORD M'LAREN—I concur.

LORD KINNEAR—I agree. I think the case of the *Royal Bank* is directly in point.

LORD PEARSON—I also concur.

The Court sustained the appeal, recalled the interlocutors of the Sheriff and Sheriff-Substitute dated 10th April and 7th March 1907, repelled the first plea-in-law for the defender, and remitted to the Sheriff-Substitute to proceed.

Counsel for the Pursuer (Appellant)—Morison, K.C.—Jas. Macdonald. Agents—P. Morison & Son, S.S.C.

Counsel for the Defender (Respondent)—Chree. Agents—Dove, Lockhart, & Smart, S.S.C.