LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

"Find and declare, in answer to the second query, that the claim of the second parties that the first parties shall make a real burden over the lands of Johnston for the support of the manse, in pursuance of Lord Gardenstone's letter, is excluded by the negative prescription, and that it is unnecessary to answer the first query; and upon the third query find and declare that the first parties are personally bound for their several interests to implement the obligations ordained in the article "*Septimo*" of the deed of mortification of 2nd February 1813; and find and declare that the fourth and fifth queries do not arise on the facts stated; and decern."

Counsel for First Parties—Guthrie—Sym. Agents—Pearson, Robertson, & Finlay, W.S.

Counsel for Second Parties—H. Johnston—Rankine. Agents—Bell & Bannerman, W.S.

Saturday, December 10.

SECOND DIVISION.

MASSON *v.* NICOLSON.

Reparation—Fishings—Trawler—Injury by Trawler to Fishing-Line—Sea Fisheries Act 1883 (46 *and* 47 *Vict. cap.* 22), *Sched., Art.* 19.

On a clear April morning a trawler was fishing round a "dan" or fixed buoy which the crew had put down to guide them while fishing. A fishing-boat came out from port, and while in sight of the trawler the fishermen laid down their lines near the "dan." The trawler thereafter sailed across the place where the lines were laid and damaged them.

Held that the trawlers were liable to the fishermen at common law for the damage sustained by them.

Opinion (by Lord Young) that art. 19 of the convention annexed to the Sea Fisheries Act of 1883 is simply an expression of the common law.

Article 19 of the convention annexed to the Sea Fisheries Act of 1883 (46 and 47 Vict. c. 22), and incorporated in section 2 of that Act, provides—"When trawl-fishermen are in sight of drift-net or of long-line fishermen they shall take all necessary steps in order to avoid doing injury to the latter. Where damage is caused, the responsibility shall lie on the trawlers, unless they can prove that they were under stress of compulsory circumstances, or that the loss sustained did not result from their fault."

On the morning of 22nd April 1892 the fishermen in the fishing-boat "Welcome Home," which had sailed from Port Errol, shot their lines at a distance of from six to ten miles off shore in a south-eastern direction from Buchanness close to a fixed "dan," round which the steam-trawlers "Stephenson" and "Royal Duke" were fishing. A trawlers' dan is an anchored buoy with a stick on the top of it. At the end of the stick, which is from 6 to 14 feet above the water, are placed flags and at night a lighted lantern. When trawlers are engaged in fishing, their practice is to fix a "dan" as a mark to prevent their wandering, and then fish round and round the "dan" within a radius of half-a-mile till the supply of fish is exhausted.

The morning in question was bright and clear, and while the fishermen were shooting their lines the trawlers were engaged in fishing at a distance at which they could easily see what the fishermen were doing if a proper look-out was being kept on board the trawlers' vessels.

Soon after the fishermen had shot their lines, the steam-trawlers trawled over the ground where the lines were laid, and broke and seriously damaged them.

The crew of the fishing-boat raised an action in the Sheriff Court at Aberdeen against the masters as representing the owners of the two steam-trawlers. The sum sued for as the amount of damage was £24.

The defenders lodged defences, in which they alleged that they did not know that the pursuers had shot their lines in that place, and further averred "that if the pursuers shot their lines on the morning of 22nd April, they did so directly in the courses and in the way of the said steam-trawlers, and if any damage was caused to the pursuers' lines, it was caused by the pursuers' fault in so shooting their lines, and also in not indicating sufficiently and correctly both where the lines lay, and also that they had shot or were shooting them."

A proof was led before the Sheriff-Substitute (ROBERTSON). The evidence was very conflicting, but brought out the facts above stated.

On 21st March 1892 the Sheriff-Substitute pronounced the following interlocutor—"Finds (1) that on the morning of 22nd April 1892 the pursuers shot their lines in the North Sea at a distance of from 6 to 10 miles off shore in a S.E. direction from Buchanness; (2) that the lines were so shot close to a "dan" or buoy, which had been fixed by the defender Masson; (3) that while the pursuers were so shooting their lines the defenders' respective vessels were engaged in fishing at a distance at which the defenders could easily see what pursuers were doing if a proper look-out was being kept on board defenders' vessel, it being broad daylight and the morning bright; (4) that soon after the pursuers' lines were shot the defenders' vessels trawled over the ground where pursuers' lines were, and broke and seriously damaged them; (5) that the defenders or those in charge of their vessels failed to take proper precautions to avoid injuring the defenders' lines in terms of Act 19 of the con-

vention annexed to the Act 46 and 47 Vict. c. 22: And with reference to the foregoing findings in fact, Finds the defenders liable to the pursuer in the sum sued for, and therefore decerns against the defenders for the sum of £24 sterling, with interest, as concluded for: Finds the pursuers entitled to expenses," &c.

On 20th July the Sheriff (GUTHRIE SMITH) affirmed the judgment of the Sheriff-Substitute, with expenses.

The defenders appealed, and argued—Where trawlers put down a "dan" they were entitled to assume that no fishing-boat would lay its lines near the "dan." The contention that when fishing-boats were in sight trawlers must leave the place over which they were fishing was absurd. It was contributory negligence on the part of the pursuers to put down their lines close to the defenders' "dan." In an ordinary civil action for damages the *onus* which was laid on the trawlers by article 19 of the convention did not apply. The Sea Fisheries Acts of 1883 and 1885 introduced a code for marine offences, and referred only to criminal proceedings. Sec. 15, sub-sec. 1, of the Act of 1883 provided for the recovery of compensation for damage to property. If a fisherman wished to take advantage of the articles of the convention, he must be content with the remedy which the Act provided, and if he had recourse to an ordinary civil action, his case must be judged by the ordinary rules of evidence—Opinion of Lord M'Laren in *Combe* v. *Renton*, June 5, 1886, 13 R. (J.C.) 72. In *Leslies* v. *Walker*, December 18, 1886, 14 R. 288, the question of *onus* was not argued, the trawler having such a clear case.

Argued for the pursuers and respondents—The convention laid down rules with regard to fishing generally, and article 19 applied in a civil action for damages. All the witnesses agreed that the morning was a clear one, and the defenders were fishing in the usual way with buoys attached to the end of their lines. The trawler took no precautions to avoid injuring the fishing-lines, but trawled carelessly over the spot where they had seen the fishermen paying out their lines. They were therefore liable in damages. Lord Young's opinion in *Combe* v. *Renton* was in favour of the pursuer's contention, and in *Leslies* v. *Walker* it had been assumed that the *onus* imposed on trawlers under article 19 of the convention applied in civil actions.

At advising—

LORD JUSTICE-CLERK — A somewhat subtle point on the question of *onus* has been stated during the argument, but in the view which I take I do not think it is necessary to go into that. The facts of the case are simple. The defenders were trawling in a circle round a rod attached to a buoy, which they had fixed as a mark in order that they might not wander over the fishing ground, but keep fishing near a certain area. While they were so employed the pursuer's fishing-boats came out from port, and after sailing a certain distance, began to do their work in the ordinary way by laying down their lines at a place where no one else was fishing at that time. It is plain that fishing is carried on where the nets or lines are, or are in course of, being set. To say that a fishing can be carried on over a whole superficial mile is somewhat extravagant. Any boat coming out to lay its lines must keep out of the way of any actual fishing which is going on. The fishing-boat must not of course cross the bows of a trawler or cross the lines of another boat, but if it keeps out of the way of a vessel actually fishing, no other vessel is entitled to come and wilfully or recklessly lay down nets or lines or drag her trawl over the place where the first vessel has set her net or lines. I see no trace of any ground for the contention that if a trawler sets down a mark it has a right to fish over any place within a radius of half a mile from that mark.

The boats here were seen by the trawlers, and the latter had every reason to believe that the fishermen were engaged in fishing. It is said that the boats were close-hauled, and that the lug-sail hid the men from the trawler. I would have the greatest difficulty in believing that the men of the trawler could not ascertain on a clear April morning that the pursuers were laying their lines, however the lug-sail was placed. I think it is the duty of trawlers when they see a fishing-boat coming out to use a sharp look-out in order to observe whether the fishermen are fishing before trawling across their track. It is certain that if the pursuers' lines were laid there, and the defenders knew it, they had no right to trawl over them. It is all a question of reasonable care. The trawler should have kept a good look-out, and not have crossed when there was fair reason to believe that the pursuers' boats were fishing without ascertaining how the fact stood.

I therefore think the trawlers are wrong in their own contention, for they seem to have thought that by putting the "dan" where they did they had a right to exclude all others from fishing within a radius of half a mile from it. This is plainly an untenable view.

Without entering on the question of *onus*, I therefore think that the defenders are wrong, and that the Sheriff-Substitute has properly found them liable in damages

LORD YOUNG—I agree with the Sheriff-Substitute's findings in point of fact. [*Here his Lordship read the 3rd, 4th, and 5th findings.*] I think no question arises about *onus* under article 19 of the convention annexed to the Act 46 and 47 Vict. cap. 22. This article declares that "where damage is caused by trawl fishermen to long line fishermen who have shot their lines in sight of the trawlers, the responsibility shall lie on the trawlers unless they can prove that they were under stress of compulsory circumstances, or that the loss sustained did

not result from their fault." There is to be no presumption that the line fishermen were in sight of the trawlers, or that the trawlers failed to take precautions in order to avoid doing injury to the line fishermen, but these things being proved, the trawlers may escape liability if they show "that they were under stress of compulsory circumstances, or that the loss sustained did not result from their fault." I think that the declaration in article 19 is all simply an expression of the common law. In order to recover damages for injury the pursuers must show what the Sheriff-Substitute has held to be proved, that the trawlers were not out of their sight, that the trawlers failed to take all necessary steps in order to avoid doing them injury, and that their lines were broken by the trawlers, and it is not suggested that the latter were under stress of compulsory circumstances, or that the loss was not attributable to their fault. I therefore think that the judgment of the Sheriff-Substitute should be affirmed.

LORD RUTHERFURD CLARK—I am of the same opinion. I proceed entirely on the common law, and do not think it necessary to give my opinion on the law under the convention.

LORD TRAYNER was absent.

The Court found in fact in terms of the Sheriff-Substitute's interlocutor, and dismissed the appeal, with additional expenses to the pursuers.

Counsel for Pursuers and Respondents—Jameson — G. Watt. Agent — Andrew Urquhart, S.S.C.

Counsel for Defenders and Appellants—Orr — Guy. Agents — Macpherson & Mackay, W.S.

Wednesday, December 14.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

DUNCAN *v.* DUNCAN.

Title to Sue — Beneficiary — Interest — Reduction of Trust-Disposition and Settlement.

A beneficiary under a trust-disposition and settlement brought an action for reduction of a later settlement of the testator which he alleged had been executed when the testator was of unsound mind. Objection was taken to the pursuer's title, on the ground that the value of his interest under the later settlement was as large as under the former.

The Court *repelled* the objection, *holding* that the pursuer had a title to assert his right under what he alleged to be the only valid settlement of the testator.

Title of One of Three Trustees Nominated in a Testament to Sue for Reduction of a Testament of Later Date.

Opinions reserved as to whether one of three trustees nominated in a trust-disposition and settlement has a title to sue for reduction of a later settlement by the testator.

This was an action for reduction of a trust-disposition and settlement, dated 11th June 1890, bearing to be signed by the deceased Charles Duncan, farmer, on the ground that the said settlement had been executed when the testator was of unsound mind. The action was at the instance of Charles Duncan junior, "son of the said deceased Charles Duncan, and nominated and appointed one of the trustees and executors of the said deceased Charles Duncan conform to trust-disposition and settlement by him dated 8th April 1881," and was directed against James Duncan, the sole trustee and executor appointed in the deed sought to be reduced, and the said James Duncan and certain other persons, the beneficiaries under the said deed.

The pursuer was one of three trustees nominated and appointed under the settlement of 1881, one of the other two trustees being the defender James Duncan. The pursuer was also a beneficiary under both settlements, being entitled under each to a conveyance of certain heritable subjects and to a share of the residue. The heritage to which he was entitled under the earlier deed was larger, and the share of residue smaller, in value, than under the deed sought to be reduced.

Defences were lodged by James Duncan, who objected that the pursuer had no sufficient title or interest to sue, in respect (1) that he was only one of three trustees appointed under the settlement of 1881, and (2) that his interest as a beneficiary under the deed sought to be reduced was at least as large in pecuniary value as his interest under the earlier settlement.

On 12th November 1892 the Lord Ordinary (STORMONTH DARLING) repelled the preliminary defences, and decerned.

"*Opinion.*—I regret that there should be a litigation between two brothers about this small estate, but I cannot sustain the plea of no title to sue. The pursuer comes forward in the character of both beneficiary and trustee under the will of 1881. It is said that as a trustee he has no title because he is only one of three, the others being the defender and the law-agent who prepared the deed. I am not prepared to say that even in this character he may not have a sufficient title, looking to the fact that this is not a question arising in the course of trust administration, but a question as to which of two deeds is the genuine settlement of the deceased, and also looking to the pursuer's averments about other members of the family who are either abroad or incapable, and whose interests are prejudiced by the later deed. But I think it is enough that he has a title and interest as a beneficiary. It may be that under the later deed he actually gets more