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

than under the earlier, taking heritage and moveables together, but that is in consequence of the residue being increased by the omission or reduction of legacies to other members of the family, and undoubtedly under the later deed he gets less heritage than by the deed which he alleges to be the true will. I think he is entitled to say—'I prefer to take the heritage left to me by the true will rather than that destined by a will which I believe to be false, even though in other respects the latter is more favourable to me.'"

The defender reclaimed, and argued—1. The pursuer had no title to sue as trustee, as he was only one of three trustees appointed under the earlier settlement of the testator — *Neilson* v. *Mossend Iron Company*, January 9, 1885, 12 R. 499; *Morison* v. *Gowans*, November 1, 1873, 1 R. 116. 2. Nor had he any interest to sue as beneficiary, as his interest under the deed sought to reduced was as great as or greater than his interest under the earlier deed. The larger value of the heritable estate he received under the earlier deed was more than compensated by the larger value of his residuary interest under the deed sought to be reduced. At all events, the pursuer could not qualify such an interest as to entitle him to put the defender to the expense of a jury trial.

Argued for the pursuer—1. The pursuer had a title to sue as one of the trustees under the earlier settlement. The cases of *Neilson* and *Morison* did not apply, as the question raised in both was one of trust administration. Here there could be no administration under the earlier deed unless the pursuer was successful in his action. 2. The pursuer had an interest to sue as a beneficiary. Assuming the pecuniary interest which he took under the two deeds to be the same, he was entitled to insist on his rights under the deed which he alleged to be the true settlement of the testator. He had also an interest in asserting his right to the particular heritable properties bequeathed to him under the earlier deed, even though his whole interest under that deed might not be greater in pecuniary value than his interest under the later deed. As a matter of fact, however, the latest returns to the valuation roll showed that the pecuniary value of the heritage to which he was entitled under the earlier deed had increased, and the greater value of his residuary interest under the later deed would not compensate him for its loss.

At advising—

LORD PRESIDENT—I think the Lord Ordinary's view of this case is sound. His Lordship has proceeded mainly upon the title and interest which the pursuer has as a beneficiary under the first deed. It appears to me that his position in his quality and character of beneficiary cannot be displaced by calculations as to the relative value of his interest under the one deed and the other. The sounder view would seem to be that he has an interest as beneficiary in asserting his right under what he states is the only valid deed of the testator. The contrary argument would seem to result in this, that he was bound to take the interest falling to him under a deed which upon his own showing is a challengeable deed. Accordingly I think the fact that he takes an interest under the first deed is of itself (and irrespective altogether of the relative value of his interest under that deed and under the later deed, which he says is fictitious) sufficient to entitle him to proceed.

I would rather reserve my opinion as to his position *qua* trustee, and the Lord Ordinary has not based his judgment on that point. I do not say that my opinion is adverse to the pursuer in that capacity, but it is, in the view I take of the case, unnecessary to decide the point.

LORD M'LAREN—I was at first disposed to think that the pursuer's title might be sustained on both grounds. But I agree that his position and interest as a beneficiary, as set forth in the condescendence, is sufficient to entitle him to follow out the action, and I think that in a question of title to sue we cannot enter into a calculation to ascertain whether the interest in the one deed or the other as estimated in money is the larger.

On looking at the conclusions of the summons, I think your Lordship has taken the right view as regards the second point, because I see that the pursuer claims in the character of a son and beneficiary, but also as being "nominated and appointed one of the trustees and executors of the said deceased Charles Duncan." Now, if the pursuer had set forth that he was the sole accepting trust disponee or sole disponee willing to take under the deed, I should have held the instance to be *prima facie* good. But I am not prepared to assent to the proposition that one trustee, irrespective of the action of the other trustee, has such a title, because it is quite consistent with the title set out in the summons that there is a majority of the persons nominated as trustees who are opposed to the institution of this action.

LORD KINNEAR—I agree that it is desirable to rest the judgment on the title which the pursuer has as a beneficiary, and I reserve my opinion on the other question as to the pursuer's title to sue in his character of trustee.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuer—Lord Adv. Balfour, Q.C.—Crabb Watt. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for Defenders—Sol.-Gen. Asher, Q.C.—C. S. Dickson. Agents—Reid & Guild, W.S