may be inquired into, and the goods ordered to be sent back. That is a difference between the rule and the exception, and I think there is enough to make a difference here. I think that the judgment may be confined to the very facts we have to deal with, and these lead to the conclusion that the defender ought to restore the money.

LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK—I have great difficulty in distinguishing this case from those quoted to us, but I dare say that the distinction pointed out by your Lordships is sound law, and certainly I think the judgment proposed meets the justice of the case.

LORD JUSTICE-CLERK—I would wish to say that I quite concur with Lord Young in thinking that our judgment ought to be confined to the circumstances of the case.

The Court pronounced this interlocutor :—

"Find in fact (1) that on 7th October 1886 David Shaw sold a large portion of the stock of his farm, and on the same day paid to the defenders one hundred and one pounds nine shillings and elevenpence out of the price thereof; (2) that at the date of the sale he was a notour bankrupt and defender in an action of *cessio bonorum*, in which an order had been pronounced ordaining him to lodge a state of his affairs by 6th October 1886, which order he failed to obey; (3) that his bankruptcy and the dependence of the said action and the order pronounced thereon were known to the defender when he took payment of the said sum: Find in law that the said payment was improperly made, and that the defenders are not entitled to take benefit thereby; therefore dismiss the appeal; of new decern in terms of the conclusions of the petition; find the petitioners entitled to expenses in this Court," &c.

Counsel for the Appellants—D.-F. Mackintosh—Law. Agents—Philip, Laing, & Trail, W.S.

Counsel for the Respondent—M'Kechnie—Craigie. Agents—Curror, Cowper, & Curror, W.S.

Tuesday, November 15.

SECOND DIVISION.

[Sheriff of Aberdeen.

SCOTT AND ANOTHER *v.* GRAY AND OTHERS.

Property—Waste and Uncultivated Ground—Drying Herring-Nets—11 *Geo. III. c.* 31, *sec.* 11.

The Act 11 Geo. III. c. 31, provides by sec. 11 that all persons employed in the herring-fisheries may dry their nets without paying dues on the shores and forelands "below the highest high-water mark for the space of 100 yards on any waste or uncultivated land beyond such mark, within the land."

The proprietor of a piece of ground about 4 acres in extent, lying between a road and the sea, within 100 yards of high water-mark, brought an action against certain fishermen to have them interdicted from drying their nets there. The defenders founded on the above-mentioned statute. It was proved that the ground in question consisted of shingle and rock, partly bare and partly covered with rough grass and thorns; it was unenclosed towards the sea, and prior to 1868 had been undoubtedly waste and uncultivated. In 1869 and 1870 it was improved by the proprietor. It was levelled, the thorns removed, the bare parts covered or top-dressed with a coat of earth of an inch or two in thickness, and it was then sown out with grass seeds. The expenditure per acre was from £5 to £7. The principal use of the ground in question was for drying nets, and, both before and after the improvements, the fishermen made annual payments for the privilege. *Held* that the ground was not waste or uncultivated, and interdict *granted*.

Hercules Scott, heritable proprietor of the estates of Brotherton, at Stonehaven, and others, in the county of Kincardine, and David Legg, tenant of the farm of Whitehouse on these estates, presented a petition in the Sheriff Court of Aberdeen, Kincardine, and Banff, against William Gray, Alexander Lownie, and Alexander Gove, all fishermen residing in Gourdon, in the county of Kincardine, to have the defenders interdicted from entering upon a piece of ground upon the farm of Whitehouse, lying between a road leading from Gourdon to Johnshaven on the one side, and the sea-shore on the other, and from laying down and drying their herring-nets thereon.

The pursuers averred that the defenders had without leave, and against the remonstrances of Legg, entered upon the ground in question, and dried their nets upon it.

The defence to the action was founded on the Act 11 Geo. III., c. 31, entituled "an Act for the Encouragement of the White Herring Fishing," which provides by section 11—"That all and every person or persons employed in the said fisheries may fish in any part of the British seas, and shall have and exercise the free use of all ports, harbours, shores, and forelands in Great Britain, or the islands belonging to the Crown of Great Britain below the highest high-water mark, and for the space of 100 yards on any waste or uncultivated land beyond such mark, within the land, for landing their nets, casks, and other materials, utensils, and stores, and for erecting tents, huts, and stages, and for the landing, pickling, curing, and reloading their fish, and in drying their nets, without paying any foreland or other dues, or any other sum or sums of money, or other consideration whatsoever for such liberty, any law, statute, or custom to the contrary notwithstanding."

The defenders pleaded that "the ground in question being waste or uncultivated, and on the sea-coast within the limits prescribed by the statute founded on, the defenders are entitled, in the exercise of their trade, to the free use and possession thereof, for the special purpose authorised by the statute."

The pursuer denied this, and pleaded that the ground in question being improved and cultivated ground, the Act did not apply.

The nature and character of the ground, and the improvements made upon it, are fully explained in the note of the Sheriff-Substitute, *infra.*

The Sheriff-Substitute (DOVE WILSON), after proof, pronounced this interlocutor on 21st February 1887—"Finds that the pursuers have failed to prove that the defenders have exceeded the rights conferred upon them by the statute 11 Geo. III. c. 31, sec. 11, and therefore assoilzies the defenders from the conclusions of the petition: Finds the defenders entitled to expenses, &c.

"*Note.*—This seems to me a very difficult case, and I should not be surprised if differences of opinion were entertained as to it. The piece of ground in dispute lies between a road and the sea. The extent is about 4 acres. It is not, and never has been enclosed; and on the side next to the sea it is plain that it could not be enclosed except at great expense. The ground consists of shingle and rock, and prior to 1868 it was properly designated as beach, and it undoubtedly then lay waste. Its surface was then partly bare and partly covered with rough grass and thorns. It was uneven, partly from natural inequalities, and partly because it had been used as a place for depositing stones from the adjacent lands. The situation of the ground is immediately above high water-mark, and within 100 yards of it. High waves occasionally wash over it, or parts of it, in storms, but this does not make it foreshore. The highest place where the water has left any mark is the steep bank of shingle spoken to by the witnesses, and the bare strip 3 or 5 yards wide along the top of it. No one has produced any title which can apply to the ground, except the pursuers, the one as proprietor and the other as tenant. In the absence of any competing title, the land down to highest high-water-mark must be taken to be theirs—*Macalister* v. *Campbell*, 7th February 1837, 15 S. 490. In 1869 and 1870 it was improved. It was levelled, the thorns removed, the bare parts covered or top-dressed with a coat of earth of an inch or two in thickness, and it was then sown out with grass seeds. This work was done at an outlay to the proprietor of between £14 and £15, the tenant performing the cartages. No estimate of the value of the latter was or probably could be given, but they must have borne a fair proportion to the rest. Assuming that the whole expenditure was from £20 to £30, this makes an expenditure per acre of from about £5 to about £7. The result has been that in place of a piece of beach with very rough pasture, and only partial accommodation for nets, a piece of fairly good pasture and of good net ground has been provided. The object was to improve the ground for both purposes, and it may be doubted whether, if it had not been for the sake of increasing the rents for nets, the improvement would have been undertaken. The improvements alleged to have been made by the fishermen apparently did not amount to much. When spreading their nets they seem to have thrown aside stones brought up by the sea, to have occasionally filled up holes, and occasionally cut away thorns. The principal use of the lands hitherto has been for spreading nets, and the statute now founded on by the defenders having apparently been forgotten, the fishermen appear to have made annual payments for the privilege, both before and after the improvements; and these payments being made to the adjacent tenant, who did the carting, also covered anything that could be claimed either for it or for the ground. The defenders claim the right for spreading their nets on the disputed ground without charge, both under the Statute 11 George III., cap. 31, sec. 11, and on the plea of prescription. The latter may at once, I think, be dismissed. It is inconsistent with the statute, and the defenders set forth no title to any property which could acquire a servitude right by means of prescription. The true question in the case is whether the defenders have a right to use the ground for nets under the statute. What the statute says is that the persons employed in the British white and herring fisheries may use the forelands 'below the highest high-water mark, and *for the space of* 100 *yards on any waste or uncultivated land beyond such mark, within the land*, for landing their nets, casks, and other materials, utensils, and stores, and for erecting tents, huts, and stages, and for landing, pickling, curing, and reloading their fish, and in drying their nets, without paying any foreland or other dues.' Under this statute the defenders have right to use the ground for the purposes claimed, if it be 'waste or uncultivated land.' There is room for a great deal of argument as to whether the ground in dispute comes under the definition of 'waste or uncultivated land.' If it had been land enclosed by a permanent fence it might have been brought under the category of permanent pasture, and thus have been considered to be neither waste nor uncultivated. But it is not enclosed, and, as already pointed out, apparently could not be enclosed, except at great expense, on the sea side. It is not waste land, as it apparently has some annual value; but if it is not 'uncultivated land' within the meaning of the statute, I am at a loss to see what land there is which the statute could have meant to include. If any trace of the exercise of human skill upon land is to be held as taking it out of the category of 'uncultivated,' of course this land is cultivated, because something has been done to it. This, however, is a very strict view, and it does not preclude the possibility of the view that, in the ordinary use of language, this is what would be called 'uncultivated land.' The Legislature must have been thinking of the division of land into cultivated and uncultivated, and it is necessary to see what it meant to include in the latter description. I have consulted a large number of dictionaries, but I have found no better definition of the word 'cultivate' than that contained in the original edition of Johnson, viz., 'to forward or improve the product of the earth by manual industry.' This at once excludes from view all that has been done to the land simply to improve it as a net ground, and to do this seems reasonable under the statute. If the fishermen have a right to use the ground in a state of nature for net ground, the Legislature cannot have meant that they were to be obliged to pay rent for it simply because the proprietor made it better for their purposes than they asked it to be made.

It is only the industry which has gone to improve or forward the product of the earth—in this case the pasture—which can be taken into account. This view probably throws out of consideration the bulk of the improvement which was done, as but for the chance of drawing rents for the nets, the ground would probably not have been worth the touching. Then as to the agricultural improvement, if a little top-dressing with earth and the sowing of some seeds is enough to take away the statutory right, it can be taken away wherever it is valuable. This consideration would be immaterial if it appeared that such a treatment of the land could be called cultivation in the ordinary sense of the word. I do not think it can be so called. It is only land still in its natural condition, though somewhat improved. Of cultivation in the ordinary sense the land indeed seems incapable, and it does not occur to me that anyone desirous of describing this piece of ground, apart from any ulterior motives, would think of describing it as a piece of cultivated land adjoining the sea-shore. It seems to me that, while he would naturally speak of the farms on the other side of the road as being cultivated land, he would speak of this as a bit of still uncultivated land between them and the sea Whatever a more persevering system of improvement may have been able to do with the adjacent lands, the mere skin of soil which overlies the shingle seems as yet uncultivated, and incapable of anything that could be called tillage. If it can be cultivated, in the ordinary sense of the word, the pursuers are at liberty to do so, and the statutory rights of the defenders to its use would at once end."

On appeal the Sheriff (GUTHRIE SMITH), on 9th March 1887, recalled this interlocutor, and found that the defenders had failed to prove that the ground to which access was claimed was waste or uncultivated land within the meaning of the Act of Parliament; repelled the defences, and granted interdict as craved; and found the defenders liable in expenses.

"*Note.*—The ground in question lies between the sea-beach and the road leading from Gourdon to Johnshaven. Beyond doubt it is part of the pursuer's estate, and without his consent no one is entitled at common law to enter upon it for any purpose whatever. The question whether the defenders, being fishermen, are entitled to use it during the herring fishing for the purpose of spreading and drying their nets turns on the construction of the Act 11 George III., cap. 31, sec. 11. The Sheriff-Substitute has thrown on the pursuer the burden of proving the negative. In my opinion there is no *onus* on the pursuer at all. The field—if it may be so called—is embraced in his title, and having established this much, it is not for him, but for the defenders, who are claimants *in solo alieno* to make out their case. The Act on which they found applies to 'waste or uncultivated land' within a certain distance of the sea. We all know what these words mean in popular speech. All along the sea-coast there are great stretches of rocky shingly barren land, void and worthless, but excellent for the spreading and drying of nets; and it is enacted that wherever this may be found the fishermen may take it for net ground without asking anybody's leave. It is assumed that no one will object, or rather that no one will have any interest to object, for it is supposed to be lying unoccupied and valueless in its natural state. But when by a little expenditure the proprietor has been able to reclaim it to the extent at least of making it worth something for agricultural purposes, it was never contemplated that it should remain subject to those uses which the Act sanctions for the benefit of the fishermen when it was in a state of nature. The operations carried out by the pursuer consisted in first filling up the holes, levelling down the hummocks, and spreading any soil which they contained on the surface. This occupied the witness Caird and three assistants six or seven weeks. Some carts of soil were then strewn on the levelled ground wherever it was required, and the whole sown over with grass seeds. These grew abundantly, and there is now a good sole of grass upon it, worth, according to the skilled witnesses, 10s. or 12s. an acre. In my opinion ground which has been treated in this manner is properly called pasture and not waste. I attach no importance to the fact that it is still unenclosed, for it lies along the sea-beach, and it is not necessary to fence against the sea; nor that it has no depth of soil sufficient to bear the plough, for when grass is the crop to be cultivated no ploughing is required. In my opinion all the evidence tends to show that the field in question has by the judicious operations of the pursuer ceased to be the description mentioned in the Act of Parliament, and that in a question with the public he is entitled to be protected in this property."

The defenders appealed and argued—Fishermen were, under the Act 11 George III. cap. 31, entitled to use waste and uncultivated ground along the sea shore, within the specified limits, for the purpose of drying their nets, as an encouragement to the fishing trade. The ground in question had admittedly up to 1869 been waste ground. After that a very small sum of money and a little labour had been expended upon it, with the result of taking it out of the category of waste land, but it still remained uncultivated ground. The fishermen could not be excluded from exercising their statutory rights, or made to pay rent, because the ground had been made more suitable for their purpose.

The respondent argued—Waste and uncultivated land was one and the same thing—that is to say, land that could not be used for any agricultural purpose. Here substantial improvements had been made upon the land, which turned it from waste and uncultivated into cultivated land, and if fishermen were to use it for drying their nets they must pay rent. Any other reading of the statute would allow fishermen to dry their nets upon any cultivated ground along the sea-shore, within the specified limits, if it was not fenced in—*Hoyle* v. *M'Cunn*, Dec. 10, 1858, 21 D. 96 (Lord President, p. 101); *Stephen* v. *Aiton*, Feb. 27, 1875, 2 R. 470.

At advising—

LORD YOUNG—The question which this case presents is one of pure fact, and is solely, whether the piece of ground about which the present dispute has arisen, is waste and uncultivated, or whether it is not. If it is waste and uncultivated ground, then the pursuers must fail; if it is not, then they must succeed. Upon that question of

fact the Sheriffs have differed, and the Sheriff-Substitute at the outset of his thoughtful and well considered judgment says that he should not be surprised if differences of opinion should be entertained about it.

Now there was expended upon this ground some money and some labour, not very much perhaps, but still some, and it was thereby converted into what the Sheriff-Substitute in his note describes "as a piece of fairly good pasture and of good net ground." With great deference to the Sheriff-Substitute, that language which is applicable to this piece of ground is inconsistent with holding it to be waste and uncultivated. It was cultivated to some extent and at some expense, and with the result of making it a piece of "fairly good pasture." That being the condition in which it is, the pursuer lets it along with the farm of which it forms a part, and his tenant partly pastures it, but also draws a rent from it by letting it out to fishermen to dry their nets upon, as it is a "good net ground." But if the terms "waste and uncultivated" are inapplicable to this piece of ground, then the pursuer must succeed. That being my view upon the matter of fact I think that the judgment appealed against ought to be affirmed.

Lord Rutherfurd Clark concurred.

Lord Justice-Clerk—I do not wish to dissent from your Lordships' opinion, although my impression rather leans to the other view, but I think the line of demarcation is very slender.

Lord Craighill was absent on circuit when the case was heard.

The Court pronounced this interlocutor:—

"Find that the ground to which access is claimed by the defenders is not waste or uncultivated: Therefore dismiss the appeal and affirm the judgment of the Sheriff appealed against: Find the pursuer entitled to expenses," &c.

Counsel for the Appellants—Pearson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondents—D.-F. Mackintosh.—Johnston. Agents—Cowan & Dalmahoy, W.S.

Wednesday, November 16.

SECOND DIVISION.

[Sheriff-Substitute at Elgin.

ALLAN AND OTHERS *v.* URQUHART AND OTHERS (TRUSTEES OF THE FORRES INVESTMENT COMPANY).

Assignation — Intimation — Shares in Friendly Society.

The manager of a friendly society, who was also the clerk, treasurer, and law-agent, assigned, on 18th July 1882, certain shares in the society belonging to him in security of a loan. There was no intimation to the directors, and no change was at the time made upon the ledger of the society, which was the only register. Under the rules of the society a member might withdraw on giving three months' notice, and might sell or transfer his shares, but there was no provision for mortgaging shares. On 25th November 1885 the assignor, at the suggestion of one of the assignees, altered the heading in the ledger of shareholders, so that, as altered, the shares stood in the name of the assignees, "conform to assignation intimated to me." At the same time he handed to the assignees a letter signed by himself as manager of the society acknowledging intimation, and adding that the shares had been transferred to the names of the assignees.

In an action at the instance of the assignees against the trustees of the society to recover the value of the shares, the defenders pleaded that the assignation had not been intimated, and that they were entitled to set off against the value of the shares, debts due by their manager to them. *Held* that the assignation had not been duly intimated to the defenders, and action *dismissed*.

Opinions that under the rules of the society the shares could not be assigned in security for a loan.

This action was raised in the Sheriff Court at Elgin by Alexander Grigor Allan, William Charles Young, and James Hutcheson, the individual partners of the firm of Grigor & Young, solicitors, Elgin, as trustees for behoof of the firm and the partners thereof, against Robert Urquhart, James Hamilton, and Alexander Cunningham, trustees nominated by and acting for the Forres, Burghead, and Findhorn Permanent Investment Company, registered under the Acts of Parliament relative to friendly societies, to recover the sum of £200, or such other sum as might be due on fourteen shares of the company, which had been assigned to the pursuers by Arthur Duffes, solicitor, Forres, in security of a loan. The amount claimed was afterwards restricted to £128, 15s. 2d., exclusive of interest, as the sum due in respect of the shares.

The facts of the case were these—By bond and assignation in security, dated 18th July 1882, and registered in the Books of Council and Session 5th November 1885, Arthur Duffes, solicitor, Forres, granted him to have instantly borrowed and received from the pursuers as trustees, the sum of £300, which sum he bound and obliged himself to repay to them at the term of Martinmas 1885, with interest and penalty in case of failure, as therein stipulated, and for the further security of the pursuers, and more sure payment of principal, interest, and penalty, he assigned, bargained, transferred, and conveyed to the pursuers, as trustees, *inter alia*, fourteen shares standing in his name in the defenders' company. The sum sued for was the balance of this loan remaining unpaid,

The shares were of the value of £25 each. With regard to four of the shares assigned it appeared in the course of the action that they belonged to Mrs Duffes, and any claim to them was given up. The amount at the credit of