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

Duffes at the date of the assignation, in respect of the remaining ten shares, was £77, 0s. 10d. Duffes was the manager of the company and also the clerk, treasurer, and law-agent down to 8th December 1885, when he resigned. No intimation of the assignation was made to the directors of the company. In October 1885 Duffes showed Mr Grigor Allan, one of the pursuers, his pass-book with the company, which was balanced as at 18th May 1885, bringing out a sum of £128, 15s. 2d. as then due to him. On 25th November 1885 Mr Grigor Allan called on Duffes at his private office and asked him if he had entered any note of the assignation in his books, and, on learning that he had not, said it would be better to do so. Duffes then altered the heading of the account for the ten shares in question in the ledger of shareholders, so that as altered it read thus—"ARTHUR DUFFES, solicitor, Forres, now in name of ALEX. GRIGOR ALLAN, WILLIAM CHARLES YOUNG, and JAMES HUTCHESON, Solicitors, Elgin, for behoof of the firm of GRIGOR & YOUNG, Solicitors, Elgin, conform to assignation intimated to me. "ARTHUR DUFFES, *Manager*,

"25th Nov. 1885."

This ledger was the only register of the company. At the same time Duffes handed to Mr Allan a letter in these terms—

"Messrs Grigor & Young, Solicitors, Elgin.

"*Forres, 25th Nov.* 1885.

"DEAR SIRS,—I acknowledge intimation of bond and assignation by myself as an individual to your firm of fourteen shares in the Forres, Burghead, and Findhorn Permanent Investment Company, of date 18th July 1882, and recorded 5th November 1885.—Yours truly,

"ARTHUR DUFFES,
Manager of the said
Forres, Burghead, &c., Co.

"*P.S.*—The said shares have been transferred to your name. "ARTHUR DUFFES, *Manager*."

Mr Grigor Allan paid Duffes another visit on 13th January 1886, when he examined the ledger, and was satisfied that it was then all right. Subsequently, however, this entry was made in the ledger in Duffes' handwriting — "Drawn £100." The sum at his credit was then altered to £23, 19s. 7d. This sum of £100 had been paid by the directors to Duffes on 18th July 1884, as part of the subscriptions at the credit of his shares. Criminal proceedings were taken against Duffes in connection with the affairs of the company, and he absconded.

The rules of the company bearing on the present question were as follows:—

"IV.—*Subscriptions.*—. . . The directors shall furnish the shareholders with pass-books (at the shareholder's expense) in which all payments made to this company shall be signed or marked by the manager, or such other party as may be authorised to receive the money, and which receipt alone shall be binding on the company. The pass-book may be required by the directors to be sent into the manager to be laid before them or the auditors when necessary. The company's books shall be held legal evidence in all cases of dispute.

"VII.—*Balance of Books and Division of Profits.*—The books of the company shall be brought to a balance, and the profits ascertained as on the 30th day of May in each year, and the said profits shall be credited in the books of the company to each shareholder according to the number and value of shares held by him, whether he shall hold advanced or unadvanced shares. So soon as the sum standing in the books of the company at the credit of any shareholder shall amount to £25 for each share he or she may hold, the amount of such share or shares if unadvanced shall be paid over to such shareholder, who shall then cease to be a shareholder in so far as regards such paid-up shares. . . . . It is, however, specially provided that any shareholder withdrawing before the subscriptions and the profits credited thereon have accumulated to the full amount of £25 per share, shall have no claim on the company but for the amount of subscriptions paid by him, and simple interest thereon, in terms of rule eighth.

"VIII.—*Shareholders withdrawing: Sale and Transfer of Shares.*—Any shareholder not having received an advance of money, or whose advance shall have been repaid, shall be allowed to withdraw from the society on giving written notice to the manager, and shall be entitled to receive, at the end of three months from the receipt of such notice, the full amount of his subscriptions, together with Savings' Bank interest thereon; provided always that it shall appear from the company's stock, as ascertained at the preceding annual balance or by special minute of the directors, that such payment shall not exceed the value at the time of such shares so withdrawn; and it is specially provided that, notwithstanding the value of said shares so withdrawn shall, with the profits credited thereon, as by rule seventh, exceed the amount of subscriptions paid by the shareholders withdrawing, and simple interest thereon as aforesaid, the shareholder so withdrawing previous to his shares being fully paid, as stated in rule seventh, shall have no farther claim than for said subscriptions and simple interest as aforesaid, or for the value of such shares, should the value be less than said subscriptions and interest. Any shareholder shall be allowed to sell or transfer his shares to any other person, whether a member of the Society or not; provided always that in the case of a sale or transfer, a transfer fee of threepence per share shall be paid to the company at the completion of the transfer, over and above the legal expenses of the same, if any, and that all arrears, fines, penalties, or sums otherwise due to the company, shall be paid previous to the transfer being registered." . . . .

There was no provision made by the rules of the company for a member mortgaging shares held by him.

The pursuers pleaded—"(3) The transfer of said shares being in competent form, and duly intimated to the company, the pursuers are entitled to decree as craved. (4) The alleged payment of £100 to the said Arthur Duffes being *ultra vires* of the company, and in violation of its rules, cannot be pleaded as a set-off against the pursuers' claim."

The defenders pleaded—"(1) The pursuers not being shareholders of the said company have no title to sue for payment of sums due under shares belonging to or in name of a shareholder of the company. (2) No intimation of the bond and assignation in security in question having been made to the defenders, or to the president,

vice-president, and directors of the said company, the present action is unfounded, and ought to be dismissed, with expenses. (3) The said Arthur Duffes being himself the manager of the said company, while at the same time he was the cedent and debtor of the pursuers, intimation to him alone was insufficient, and such intimation, in order actually to reach the proper parties, should have been made to the defenders, and the president, vice-president, and directors of the company. (4) There having been no absolute sale or transfer of the shares held by Duffes in the said company to the pursuers duly completed, they are not entitled to insist in the present action." The defenders also pleaded (5) that they were creditors of Duffes for a much larger sum than ever stood at his credit in connection with the shares in question, and that they were entitled to set off this sum against the pursuers' claim.

On 9th April 1887 the Sheriff-Substitute (RAMPINI) pronounced this interlocutor:—"Finds that by bond and assignation in security for £300, dated 18th July 1882, and registered in the Books of Council and Session 5th November 1885, Arthur Duffes, solicitor, Forres, conveyed to the pursuers, *inter alia*, fourteen shares of the defenders' company in security of the said advances made by the pursuers to him: Finds that the said assignation was not duly intimated to the defenders: Therefore sustains the defenders' 1st, 2nd, 3rd, and 4th pleas-in-law: Dismisses the action, and Finds the pursuers liable in expenses, &c.

"*Note.*—It appears to the Sheriff-Substitute that there are two questions on which his decision is required—(1) Were the shares assignable? and (2) Was the transference completed? These questions arise only as to the shares held by Duffes in his own name. It is admitted that the pursuers have failed to establish any claim to the four held by Mrs Duffes.

"1. It is not disputed that as a general rule, independent of any authority to this effect in the regulations of the company, shares in a benefit society like the present are assignable. But it is objected that the rules do not authorise an assignation in security. This is true so far as the letter of the regulations go, but by rule 8 it is provided, that 'Any shareholder shall be allowed to sell or transfer his shares to any other person whether a member of the society or not.' And in the opinion of the Sheriff-Substitute not only (1) must the greater right hereby conferred be held to include the less, but (2) so far as the company is concerned, the transfer, if a transfer actually took place, was out and out an absolute one. But

"2. Was the transference actually completed? The pursuers' argument is, that if there was no formal intimation, there were at least the equipollents of intimation. And here it is important to keep in view that this is not a case of competition between the assignees and third parties claiming under a duly intimated assignation, but between assignees and the common debtors as creditors of the cedent. It is plain that unless the pursuers can show a completed transference of the cedent's right, they cannot claim to be considered as shareholders of the company, and this they do (1) by asserting private knowledge on the part of the debtor. They allege that the cedent was, if not actually the company,—at least the company's principal officer, and this may be held as proved. But admitting this, is private knowledge on the part even of the principal officer of a company sufficient to do away with the necessity of intimation or its equipollent. The Sheriff-Substitute has been unable to find any authority for this proposition. It may be that private knowledge will raise a personal exception to the debtor paying the cedent, but, as the Sheriff-Substitute thinks, this question does not arise here. In the *Faculty of Advocates'* case (M. 866) private knowledge was found insufficient without a promise to pay, and *Dickson's* case (M. 873) was corroboration of his doctrine. If this view is correct, then there was here no intimation unless (2) the alteration in the ledger and the letter No. 22 of process, both of date November 25, 1885, can be held to have been equivalent to intimation.

"This leads us to consider Duffes' position *quoad* the company, and with regard to this the Sheriff-Substitute only desires to say that the directors, against whose *bona fides* there is not the slightest imputation, undoubtedly erred in judgment apart from any question as to the violation of the rules, in sanctioning the accumulation of the offices of manager, clerk, and law agent, on one person, and they have themselves to blame if, as it has turned out, they have been made the victims of their misplaced confidence. But it does not follow that they were *in mala fide* in making the payment of £100 to Duffes in July 1884, or that even if they had paid away the amount of these shares after the 25th November 1885, they could have been found liable in repetition. The alteration of the heading in the ledger was made by Duffes in his private office (the company's office being apparently the Mechanics' Institute), where also the letter No. 22 of process was written by him in Mr Allan's presence. Was it sufficient to constitute knowledge on the part of the company that Duffes signed this letter and made this alteration in his private office, and added to his signature the word 'manager?' The Sheriff-Substitute thinks that in their own interests, having the suspicion of Duffes which they had, the assignees ought to have taken further steps to have informed the company of this transaction, the more so that this is not one of those cases where the legislation has provided a statutory mode of intimation. In *Keir's* case (M. 738) there was both arrestment and intimation.

"3. It is plain that if the Sheriff-Substitute is right in holding that even at the 25th November 1885 the pursuers were not shareholders of the company, and that they are not so even yet, it is unnecessary to refer to the payment of £100 made to Duffes, very irregularly it must be admitted, in 1884.

"The result, therefore, at which the Sheriff-Substitute has, after a careful consideration of the evidence and the authorities, arrived at, is that in his opinion the pursuers were in error in assuming that no intimation was necessary, and that they have by so doing deprived themselves of a right which would otherwise have been undoubted. It was plain to the Sheriff-Substitute from the first that whichever way this case was decided, hardship would ensue to one or other of two innocent parties. And though, perhaps, if it had been possible to have invoked equity, it would have been more in accordance with the

justice of the case that the directors, who have in so many respects neglected the observance of their own regulations, should have been the sufferers, still as he reads the law on the subject the Sheriff-Substitute has no option. Comment, it appears to the Sheriff-Substitute, is unnecessary upon the entirely unprincipled conduct of the cedent Duffes."

The pursuers appealed to the Court of Session, and argued that there had been what was equivalent to intimation to the company. There was no direct intimation to the directors, because the cedent was the manager, and his private knowledge was a sufficient intimation to the company. In the ordinary course of business the knowledge of the manager was the knowledge of the company. The company ought, therefore, not to have paid the £100 to Duffes. Duffes could not have drawn out this money in respect of his shares, as it was provided by the rules that a shareholder could only draw out a share or shares, whereas it did not appear that Duffes had done this. After November 1885, if intimation was necessary to complete the pursuers' right to the shares, it was then completed, because then the heading in the share ledger had been altered from Duffes' name to theirs. The share ledger was the only register of shares possessed by the company, and such an entry was quite good, as shewn in the *City of Glasgow Bank* cases. There was, therefore, at least £23 due to the pursuers.—*Bradford Banking Co.* v. *Briggs, Son, & Co.*, Dec. 7, 1886, L.R., 12 App. Cases 29; Bell's Conveyancing, 315, 317; *Watson* v. *Murdoch*, Nov. 19, 1755, M. 850; *Faculty of Advocates* v. *Sir Robert Dickson*, July 25, 1718, M. 866; *Murray* v. *Pinkett*, Aug. 13, 1846, 12 Clark & Fin. 764; *Gale* v. *Lewis*, Nov. 5, 1846, 16 L.J., Q.B. 119; Lindley on Partnership, pp. 684, 685, 1151.

The respondents argued that it was certain that no intimation had been made to the company, and the private knowledge of the manager was not equivalent to intimation to the company. By the law of Scotland intimation was necessary for two reasons—first, to put the debtor of the cedent in bad faith to deal with anyone but the assignee, and secondly, for the divestiture of the cedent. The transfer here was never completed by intimation. It was not in the power of an official to dispense with the condition precedent to a transfer, namely, the payment of the money due upon the shares, so that no transfer could have taken place.—*Adamson* v. *Mitchell*, 1624, M. 859; *Westran* v. *Williamson, &c.*, 1626, M. 859; *Hill (Alexander's Trustee)* v. *Lindsay, &c.*, Feb. 10, 1846, 18 Jur. 218; Lindley on Partnership, 686.

At advising—

Lord Justice-Clerk—This case of Grigor Allan relates to the assignation of certain shares in a friendly society, the trustees of which are the defenders in the action. The cedent who assigned the shares in security to the pursuers, was the manager of the company—a manager with very ample and indeed unusual powers. The shares, the value of which is the cause of the present dispute, belonged to Duffes, and he assigned them to the pursuers in security of an advance made by them to him. There was no formal intimation of the assignation of the shares made to the company, and no transfer of the shares was made in the register of transfers. In fact there was no register of transfers belonging to the company. There was a rule permitting members to sell or transfer their shares to others, and on the ground that these were transfers of the shares they were entered in the share ledger. I have doubts whether shares in a friendly society like this were capable of being assigned in security for money advanced.

But I do not wish to decide the case on that ground, as in my opinion the assignation of these shares was never completed by intimation to the company. It is said that the granter of the assignation was the manager of the company, and that it was therefore unnecessary to intimate to the company. I do not agree with that view, and think that the fact of the granter of the assignation being the manager of the company made it all the more necessary that the intimation should be made in a public manner. No one had any other opportunity of knowing the fact that the assignation had been made. I think, therefore, the assignation cannot receive effect, although I have considerable sympathy with the assignees.

Lord Young—I am of the same opinion, but I confess I have not much sympathy with the assignees, and do not regret that they fail in their action. It was an experiment to assign shares in a friendly society in security for such an advance. I don't think such a thing had ever been done before. It is not necessary to decide the question—though one cannot help having an opinion on the subject—whether shares in a friendly society such as this could legally be made the security for a money debt, but my own opinion is rather that they could not be so used, otherwise than by a complete transfer of the shares—that is, by the debtor substituting his creditor as a member of the company.

The defenders are the trustees of the friendly society, which has a code of rules framed under the Friendly Societies Acts, under the orders of Government officials, and by the authority of statute. According to the rules these shares are of the value of £25 each, which has to be paid up by the owner of the shares in small fortnightly instalments, and when the money so paid into the society amounts to £25 on each share, then the owner of the share goes out. Before he has paid up the whole value of the share he may go out upon giving notice of his intention to do so, taking the value of his shares as at that date. He never can get more than the amount he has paid in, with simple interest upon it, but he may get less if the society has not the money to pay him. That is one of the two ways by which a shareholder can get out of the society before he has fully paid up the value of his shares. The only other way is to transfer them to some one else; and it is provided that that mode of getting out cannot be followed until everything that is due upon the shares has been paid up. I can see nothing in these provisions consistent with making these shares security for a debt. I do not doubt that there is nothing in these rules inconsistent with this, that if the society should have some money in its hands which is due and immediately payable to any member, that that member could assign his interest in that money, and that then the society should make payment

of the money to the assignee. But that would be an assigment by a creditor of a debt due to him as security for an advance.

Here we have an assignation of this friendly society's shares tried in 1882 as an experiment. What was that assignation supposed to comprehend? We find that at the date of the assignation there was only £77, 0s. 10d. paid upon the shares. Did the pursuers expect to become assignees for more than that as security for their debt? I do not think they can have contemplated becoming members of the society. Then was that an assignation to the sums to be afterwards paid by their debtor so as to make up the value of the shares? Did he make these payments as payments for himself, or as the representative of his creditor? The debtor did go on paying, and in July 1884 he got £100 from the society, which was due to him on his shares. That payment was characterised as a payment in fraud of the pursuers' rights. Now, that affects the question of the necessity of intimation to the society. The assignation of these shares was never intimated to the society. Certainly there was no intimation before the 25th of November 1885, and I do not think that what occurred then was intimation to the society. What is relied on by the pursuers in regard to that is that the cedent was the manager of the society, and it is said that his private knowledge was equivalent to intimation. Now, intimation is for two purposes—the one is to complete a title, and the other is to put the debtor of the assignor in bad faith to pay to any other person than the assignee. Now it was not here necessary for the first purpose, but it was necessary in order to put the debtor in bad faith if he paid to anyone else than the assignee, that is to say, to make the payment by the debtor to the cedent a fraud upon the assignee. Therefore the pursuers say that the payment of £100 made by the society to Duffes was a fraud upon them after the party making the payment was put in the knowledge of the assignation. But what does that come to? The cedent Duffes was manager of the society, but he was also a creditor, and the purpose of intimation was to put the society in bad faith to pay the debt to Duffes. His knowledge was not theirs in that relation of debtor and creditor, and the pursuers ought to have had it in view that to put the society in bad faith in dealing with Duffes as their creditor they must have knowledge of the assignation. But how could Duffes' knowledge be theirs? Take the case of any bank manager. He has a large private credit, and in ignorance of anything having been done to affect that balance the bank pay over to him the debt which is due—honestly due, by them. Then up starts a third party and says, "You paid this money to the manager in bad faith, as he has assigned it to me." They answer that they were not told of this so as to be in bad faith in paying the money to him; but the assignee says, "Your manager knew that he had granted an assignation to me, and his knowledge is yours." I do not think that will do.

Then it was said that the pursuers had become members of the society in November 1885, when it appears that an alteration had been made in the ledger upon the heading of Duffes' account. It is said that in this manner the shares were transferred to them, and that they were put in the room of Duffes as shareholders. I do not think that any transfer of the shares was received by the society. I cannot regard this alteration in the ledger as a transfer of the shares, accepted by the society, and putting the pursuers in the place of Duffes, although even if that were so they would take nothing, because they could only take the shares subject to all payments made before that time. But suppose they did become shareholders, then they are subject to the rules of the society, and must pay up the value of their shares till their full value is reached, and then they may go out, or they may go out before according to the rules. But they are not paying up the value of their shares, nor have they given notice of their withdrawal, so that even if they were shareholders they could take nothing by their action. In my view the action is unfounded.

Lord Rutherfurd Clark—I agree. I do not think that this assignation was intimated by its execution and delivery so as to put the society in bad faith in paying to Duffes. That being so, the interest in the case is diminished to £23. If the pursuers have any right it is as shareholders only, and if they have not taken the necessary steps under the rules, then the action is unfounded. Whether they could make themselves shareholders, is, I think, very doubtful.

Lord Craighill was absent on circuit.

The Court pronounced this interlocutor:—

"Find that the assignation founded on by the pursuers was not duly intimated to the defenders: Therefore dismiss the appeal, and affirm the judgment of the Sheriff-Substitute appealed against," &c.

Counsel for the Appellants—Sol.-Gen. Robertson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondents—Balfour, Q.C.—Shaw. Agents—Philip, Laing, & Trail, S.S.C.

Wednesday, November 16.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

SCHOOL BOARD OF NEILSTON *v.* BARNS GRAHAM.

Superior and Vassal—Redemption of Casualties—Composition—Statute 1469, *c.* 36—*Agricultural Rent.*

By contract of ground-annual a school board acquired, for the purpose of building, land which had previously been let for grazing. *Held* that in fixing the sum to be paid to the superior in redemption of the casualties, the measure of the composition was the rent payable to the vassal by his tenant at the date of entry, not the sum payable under the contract of ground-annual.

By contract of ground-annual, dated 2nd February 1886, the School Board of the parish of Neilston, Renfrewshire, acquired from Admiral Fairfax, of Fereneze and Ravenswood, a piece of ground on