proceed on anything short of the best evidence. But it is not necessary to prove in each case that salmon were actually taken; if this were the law it would be very difficult ever to prove a case for interdict against infringers.

As regards each of the respondents, I have examined all the passages in the evidence to which we were referred by counsel, and have also considered the bearing of the evidence as a whole on each case, and the excuses which were offered by the respondents who gave evidence on their own behalf. The general body of the evidence is to this effect—(first), as regards these respondents who are proved to have been in the practice of fishing the Ness, that they made no difference in their mode of fishing on the days when they were not entitled to fish for salmon; (second), that minnow tackle or flies of large size (though not technically salmon flies) were used; (third), that while the early summer months are the months in which trout are taken, these respondents fished in the months of August and September, when, broadly speaking, only salmon and sea-trout are taken with the rod.

I do not think there would be any advantage in examining the evidence as to each separate act of fishing which has been proved against individual respondents, but I may say that in my examination of the evidence I have given the benefit of a doubt to those respondents against whom I think the three points just mentioned have not been all established. All the persons to whom I propose that the interdict should be made to apply have fished in the months of August and September on days that are not open to the public. They have fished in a manner adapted for the taking of salmon, and so far as I am able to judge have fished with the same tackle and lines which they were in the habit of using on days when salmon-fishing was open.

The respondents against whom I propose that interdict should be granted are nine in number, viz., . . .

The LORD PRESIDENT, LORD KINNEAR, and LORD PEARSON concurred.

The Court granted interdict against the respondents named by Lord M'Laren.

Counsel for the Pursuer—Johnston, K.C. —D. Anderson. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Defenders—Hunter, K.C. — Constable. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Friday, July 20.

FIRST DIVISION.

SMITH (LIQUIDATOR OF THE UNION CLUB, LIMITED) *v.* EDINBURGH LIFE ASSURANCE COMPANY.

Lease—Renunciation—Hypothec—Lease at a Yearly Rent for a Period Beginning at a Martinmas and Terminating at a Whitsunday—Year of Lease Current—Whether Lease runs from Martinmas to Martinmas or from Whitsunday to Whitsunday.

A let certain premises to B "for the period from the term of Martinmas 1903 to the term of Whitsunday 1913." B undertook to pay a yearly rent of £1000 "at two terms in the year, by equal portions, beginning the first term's payment . . . at the term of Whitsunday 1904, when the sum of £500 will be payable for the half-year preceding, and the next term's payment of £500 at Martinmas thereafter, and so forth half-yearly and termly during the currency" of the lease. B having renounced the lease as at Whitsunday 1906, a question arose in connection with A's right of hypothec, whether the year of the lease current at the date of renunciation was from Martinmas 1905 to Martinmas 1906 or from Whitsunday 1905 to Whitsunday 1906.

Held that the lease was a Martinmas to Martinmas lease, and that A's hypothec covered the rent for the year from Martinmas 1905 to Martinmas 1906.

Assignation — Company — Bankruptcy — Assignation of Uncalled Capital—Intimation of Assignation—Statement by Committee of Management Made at General Meeting that Uncalled Capital had been Assigned in Security—Sufficiency of Intimation—Club.

A club incorporated under the Companies Acts assigned in security the uncalled capital on its shares, issued and to be issued. A statement that this had been done, contained in a report by the committee of management, was read by the secretary at a general meeting of the club, but no other intimation was given. The club having thereafter gone into voluntary liquidation, the assignee claimed a preference *quoad* the capital assigned. *Held* that the assignation had not been validly completed, and that no preference had been thereby constituted in the assignee.

On 28th June 1906 Adam Davidson Smith, C.A., Edinburgh, liquidator of the Union Club, Limited, registered under the Companies Acts 1862 to 1890, presented under section 138 of the Companies Act 1862 a petition praying the Court to determine certain questions which had arisen in the voluntary liquidation of the said Union Club, Limited.

The petition set forth—". . . The liability

of the shareholders was limited, and the capital of the Club was £10,000 divided into 10,000 shares of £1 each. Prior to the date of the resolution to wind up, hereinafter referred to, 15s. per share had been paid up on the shares issued up to that date. . . . The petitioner entered upon the duties of his office, and has sold, subject to the landlord's hypothec, as the same may be determined as after mentioned, the whole furnishings, &c., in the Club, which have realised a sum of about £1100 subject to expenses. He also, on 5th June 1906, made a call of 5s. per share upon the contributories of the said Club, payable on 29th June 1906, and he anticipates that the proceeds of this call will amount to between £600 and £700. There are practically no other assets. That the debts of the Club, exclusive of the claims of the landlords of the premises occupied by the Club hereinafter referred to, may be estimated at £1420. Questions have been raised by the Edinburgh Life Assurance Company, the landlords of the premises occupied by the Club, claiming a preference over the ordinary creditors in the distribution of the assets of the Club. . . .

"The following is a statement of the *facts out of which the questions arise*:—By lease (1) dated 17th and 18th February 1896 the Club leased from the Assurance Company, from the term of Martinmas 1895 as regards a portion of the premises, and from the term of Whitsunday 1896 as regards another portion, to the term of Whitsunday 1906 in each case, the premises No. 45 Hanover Street, Edinburgh. The rent under the lease was £1000, payable half-yearly, and the landlords were also bound to expend a sum of £2500 on structural alterations and repairs necessary for the occupation of the premises as a club. By minute of agreement between the Club and the Assurance Company, dated 25th February and 4th and 6th March 1896 . . . the Assurance Company agreed to advance a further sum of £1500 to the Club to be expended on these alterations. . . . By lease (2), dated 18th and 25th November 1903, proceeding on the narrative of the foregoing lease (1) and minute of agreement, and that 'it has now been arranged between the parties that upon implement and performance of all the prestations of the said lease and minute of agreement up to and including the term of Martinmas 1903, the said lease and minute of agreement should be held to be cancelled and rescinded in all the terms and provisions thereof as at the said term, and that these presents should be entered into in substitution thereof,' the said Edinburgh Life Assurance Company let to the said Union Club Limited the same premises, 'and that for the period from the term of Martinmas 1903 to the term of Whitsunday 1913.' On the other hand the Club bound themselves 'to pay to the said Edinburgh Life Assurance Company and the said company's assignees the yearly rent of £1000 for the said premises, and that at two terms in the year by equal portions, beginning the first term's payment of the said rent of £1000 at the term of Whitsunday 1904, when the sum of £500 will be payable for the half year preceding, and the next term's payment of £500 at Martinmas thereafter, and so forth half-yearly and termly during the currency of this lease, with a fifth part more of each term's payment of said rent of liquidate penalty in case of failure, and the interest of the said rent at the rate of five per centum per annum from each of the said terms of payment during the not payment.' By this lease (2) it is, *inter alia*, declared 'that in the event of the said Union Club Limited for any reason renouncing their tenancy of the premises hereby let at any time before the term of Whitsunday 1911, they shall be bound to pay to the said Edinburgh Life Assurance Company a sum of £500 in name of penalty, with interest thereon at the rate of five per centum per annum from the date of such renunciation until payment.' It is also declared by the said lease that 'in security of the obligations hereby undertaken by them the said Union Club Limited hereby assign to the said Edinburgh Life Assurance Company the uncalled capital of 5s. per share, payable by the shareholders of said Club, not only in respect of the shares of £1 each already issued and upon which the sum of 15s. has been paid or has become payable, but also in respect of shares which may yet be issued.' This assignation the petitioner avers has never been intimated to the shareholders of the Club . . .

"On 14th March 1906 the secretary of the Club wrote the manager of the Assurance Company intimating that the Club would give up at Whitsunday 1906 the premises leased by them under the lease (2). On 16th March 1906 the law-agents of the Assurance Company wrote to the secretary of the Club in reply pointing out that by such renunciation the Club became liable for the above penalty of £500, and intimating to him the rights and claims which the company had against the Club under the lease (2), as follows:—'(1) The furniture and all moveables on the premises fall under the landlords' hypothec in security of the whole of the current year's rent from Martinmas 1905 to Martinmas 1906. (2) The Club is liable for payment of the sum of £500 mentioned above. (3) The company has a claim for all loss of rent in respect of the unexpired period of the lease. (4) In security of the tenant's obligations under the lease, the uncalled capital of the Club of 5s. per share is assigned to the company. The amount of such uncalled capital is, it is understood, over £600, and the company claims a preferable right thereto.'

"The following *questions* have accordingly arisen between the petitioner and the Edinburgh Life Assurance Company:—(1) Whether the Club was, under the terms of the lease, entitled to renounce the lease at any time subject only to the obligation for payment of the penalty of £500, and of rent up to the date of renunciation; or on payment of the penalty and the rent for the year current at the

date of renunciation? (2) Whether the current year of the lease is from Whitsunday to Whitsunday or from Martinmas to Martinmas? (3) To what extent the Assurance Company's hypothec is available to them? (4) Whether the assignation in favour of the Assurance Company of the uncalled capital of the Club has been validly completed, and a preference thereto constituted in favour of the Assurance Company to the exclusion of the general body of creditors? (5) Whether the Assurance Company has a claim for all loss of rent in respect of the unexpired period of the lease?

"The petitioner *maintains* that the clause in the lease (2) above quoted in regard to renunciation had the effect of conferring upon the Club a right to terminate the lease at any time, subject to payment of the rent up to the date of such renunciation, together with the amount of the penalty, or in any event limited their liability in the event of renunciation rendered necessary by liquidation or otherwise to the above-mentioned rent and penalty, and that all that the Assurance Company can claim as being covered by their hypothec is the half-year's rent due at Whitsunday 1906. Moreover, looking to the terms of the original and subsequent leases so far as the period of occupation is concerned, the petitioner maintains that the subsequent lease was a Whitsunday to Whitsunday lease, and that therefore the current year of the lease expired at Whitsunday 1906.

"The petitioner also maintains that the assignation never having been intimated to the shareholders, no preference to the uncalled capital of 5s. per share has been acquired by the Assurance Company over the general body of creditors."

The Edinburgh Life Assurance Company, 22 George Street, Edinburgh, the landlords of the premises at one time occupied by the said Union Club, Limited, lodged *answers*, in which they stated—"(4) The said Club was incorporated under the Companies Acts 1862-1893, as a company limited by shares. No one but a member of the Club could hold shares in the company, and all shareholders in the company were members of the Club. The directors of the company are throughout the articles of association called the committee of management. . . . (5) Following upon the said assignation of the uncalled capital to the respondents in security of the Club's obligations under the original lease and the said minute, formal intimation of the said assignation was duly made to the shareholders liable at the time for the payment thereof by the report of the said committee of management to the first annual general meeting of the members of the club held on 8th April 1896. An excerpt from the said report is herewith produced. [The excerpt was as follows:—'. . . In security of these obligations the committee has assigned to the Edinburgh Life Assurance Company the uncalled capital of 5s. per share. . . .'] (6) In these circumstances the respondents contend (1) that the Club had no right to determine its tenancy of the subjects let as at Whitsunday 1906, and remains liable for the whole rents due and to become due up to Whitsunday 1913; (2) that in the event of it being held that the Club had a right to determine its tenancy at Whitsunday 1906, it is liable in payment to the respondents of (*a*) the rent for the year then current, viz., from Martinmas 1905 to Martinmas 1906, and (*b*) the sum of £500 agreed on as penalty in the lease; (3) that the landlord's hypothec is available to the respondents to secure the rent for the said year from Martinmas 1905 to Martinmas 1906; (4) that the respondents have a preferable right to the uncalled capital."

Argued for petitioner—(1) This was an ordinary lease from Whitsunday to Whitsunday. Under the former lease the termination of the tenancy was at Whitsunday. There was no prohibition against renunciation. All that the Club was bound to do was to pay the rent up to Whitsunday *plus* the £500. (2) The intimation of uncalled capital was invalid. Intimation had not been properly made to the debtors—there was nothing more than an intimation by the committee of management to the members present at the general meeting. That was not enough to complete the assignation. Reference was made to Bell's Com., vol ii, pp. 14, 16, and to *Clark* v. *West Calder Oil Company*, June 30, 1882, 9 R. 1017, 19 S.L.R. 757.

Argued for respondents—(1) The Club had no right to determine the tenancy on payment of £500. The stipulation was in the landlords' favour—*Mackenzie* v. *Craigies*, June 18, 1811, F.C.; *Mackenzie* v. *Gilchrist*, December 13, 1811, F.C.; *Gold* v. *Houldsworth*, July 16, 1870, 8 Macph. 1006, 7 S.L.R. 646. The lease in question was one from Martinmas 1905 to Martinmas 1906, and the whole year's rent was therefore due—*Fraser* v. *Robertson*, January 7, 1881, 8 R. 347, 18 S.L.R. 224. The respondents were entitled to that *plus* the £500; more was not asked for. The lease was unambiguous in its terms. The entry was at Martinmas, and it was to be for nine and a-half years. It was not a renewal of the former lease, for that lease had been expressly cancelled. [Counsel for the respondent stated that they did not ask for more than the rent for the current year *plus* the £500, and did not insist in their claims *quoad* the unexpired period of the lease.] (2) The assignation of uncalled capital was a good mortgage. Intimation had been validly made. Bell's Prin. 1462; *Turnbull* v. *Stewart*, June 12, 1751, Mor. 868; *Paul* v. *Boyd's Trustees*, May 22, 1835, 13 S. 818. The report to the shareholders was sufficient intimation. The fact that the committee of management were parties to the deed was sufficient.

At advising—

LORD PRESIDENT—In this case certain questions were submitted to us to determine in the voluntary liquidation of the Union Club, but they have really been narrowed down to two. The learned counsel on both sides forebore, and I think very wisely, to insist on what might have been their

extreme position, and at the end of the argument they had practically come to this agreement, namely, that the clause in the lease providing for a penalty of £500 in the event of a renunciation of the lease before its ish really meant this, that the parties were to be allowed to renounce at any proper term of the lease and were then to be quit of further liability by paying the current rent and the payment of £500. Where they differed was that while admitting that they were allowed to renounce at any proper term on payment of the current rent, the one party said that they were entitled to break the lease at Whitsunday, whereas the other said it was a Martinmas to Martinmas lease and they must at least pay the whole rent for the currency of the year from Martinmas to Martinmas. Upon that point I think we must take the lease as we find it, and inasmuch as the lease is a lease which stipulates that there is to be a payment of £1000 a-year, and that the first payment is to be made at Whitsunday for the period from Martinmas to Whitsunday, and the second for the period from Whitsunday to Martinmas, I think that that shows that for the purposes of paction between the parties this was a Martinmas to Martinmas lease, and that that is not disturbed by the fact that at the end the ish is not at Martinmas but that there is an extra period of six months added on at the end, bringing it to another Whitsunday. Therefore I think that that first question should be answered in this way, that the party having renounced and gone away, he is due, and consequently the hypothec is good for, the rent for the period from Martinmas to Martinmas.

The other question is this. In security of the obligation of the lease the Club convey and assign to the landlord the uncalled capital which they still had on certain shares and all uncalled capital on other shares that should come into existence. That they had power to do that is not doubtful, because there is a special power taken to that effect in the memorandum. But it is trite law in Scotland that an assignation, in order to make it a perfected security, must not only be an assignation but must be an assignation intimated. There was a somewhat heroic attempt on the part of Mr Watson to show that there had been intimation here, but all he could show was that there had been a general meeting at which some gentleman read out a manuscript report in which he said this thing had been done. There might or might not be a question as to how far that would be a proper intimation to a gentleman who was there and heard it, but to put it, as it was necessary to put it for the purposes of this case, as an intimation to the whole of the shareholders of the Club, many of whom were not there, is, I think, a sheer impossibility. And therefore I think we should answer that question by saying that there has been no good security constituted, and consequently the landlord by this assignation of the uncalled capital has obtained no preference over the general body of creditors.

LORD M'LAREN—I am of the same opinion, and on the question of the amount of the liability of the Club to the Insurance Company, who are the landlords, I think the argument for the Club really resolves itself into a new mode of computing time. It involves the necessity of reckoning the period backwards from the end of the lease and then arriving at a fractional part at the beginning. Such a mode of reckoning is contrary to the rules of arithmetic and receives no support from any rule of law that I am acquainted with.

On the other question of the validity of the assignment of the company's uncalled capital it is perhaps unfortunate that our decision may introduce a difference of practice into the laws of England and Scotland, but then that difference is the necessary and unavoidable result of the common law of the two countries. Under our law intimation is not only necessary to put the debtor in good faith to pay to the assignee and in bad faith if he pays to the original creditor, but it is necessary to transfer the right in a question of legal competition. Now, I agree with your Lordship that it is impossible to say that there was in this case anything which we can recognise as equivalent to intimation. The law does recognise equivalents to the more formal intimation—which I think has almost disappeared in practice—I mean intimation by a notary and witnesses—but it must amount to substantial intimation, so that every one of the debtors, or his agent having authority to act for him, shall be notified that the creditor has assigned his right to another person. I therefore agree that the question should be answered as your Lordship proposes.

LORD KINNEAR and LORD PEARSON concurred.

The Court pronounced this interlocutor—

"Answer the questions in the petition as follows, viz., (first) that the Union Club, Limited, having renounced the lease as from Whitsunday 1906, payment of the current year's rent is due and also the penalty of £500 stipulated for in the lease; (second) that the current year of the lease is from Martinmas to Martinmas; (third) that the Assurance Company's hypothec is available to them for the year's rent of £1000 due for the period from Martinmas 1905 to Martinmas 1906; (fourth) that the assignation in favour of the Assurance Company of the uncalled capital of the Club has not been validly completed, and that no preference has been thereby constituted in favour of the Assurance Company; and (fifth) that the Assurance Company has no claim for any loss of rent in respect of the unexpired period of the lease; and decern."

Counsel for Petitioner—Hunter, K.C.—Scott Brown. Agent—W. C. L. Stark, S.S.C.

Counsel for Respondents—Macphail—Hon. W. Watson. Agents—Mackenzie & Kermack, W.S.