function of the voter. It is declared that any mark upon the back is to be fatal. Thus, therefore, I think we all agree that No. 468, which has two parallel strokes drawn on the back of the paper, cannot be sustained under the express words of the statute. That is a mark obvious to everybody; because the outside of the ballot-paper is not concealed at all. That I understand is the only voting-paper bearing any mark on the outside, except one with which we have nothing to do, but, which the Judge disallowed at the trial, there being a name written upon it.

With regard, however, to superfluous marks made on the inside in adhibiting the cross to the name of the candidate for whom the elector gives his vote,—I think these stand in a different category. I quite agree with my brethren that in one case, where there is no cross at all, but merely a line, the voter has completely failed to declare his choice. But, on the other hand, where a cross has been made, and where that cross is so placed as to leave no doubt for which candidate the voter intended to vote, I am not able to agree with the principle upon which my brethren have determined to reject several such voting papers. In the first place, I think it is not fatal that the cross is put on the left hand, or above, or immediately below, provided it is so placed as to leave no doubt as to the candidate for whom the vote was intended. Further, where a proper cross has been made designating the intention of the voter to vote for a particular candidate, and leaving no doubt as to what candidate he intended to vote for,—I am not prepared to say that the addition of a score or a double leg to the cross,—which may have been the result of awkwardness or accident, or of not exactly seeing how he was to commence the cross,—ought to be visited upon the voter by nullifying his vote. I think it is very difficult to draw a line (on the principles adopted by my brethren) between such additions to the cross as shall be fatal and such additions as shall not be fatal. It appears to me that what we ought to look to is this, whether the deviations from or additions to what the statute requires can be held to accomplish the desire of the voter to let his choice be ascertained independently of a previous concert of a censurable kind with the candidate. Consider that the smallest tick, such as might escape the eye of even a vigilant officer, might be and most likely would be agreed upon between the candidate and the supposed corrupt voter, in order to satisfy the former that the latter had performed his promise to vote for him. A prominent—a decided mark—would be avoided. But whether it is a score, or whether it is a kind of double leg to the cross, or two crosses instead of one, it does not appear to me that we can lay down any distinct rule except this—that it must be something that indicates in its own nature an improper agreement with the candidate. As an illustration of what I think the danger of ruling that any additional score or cross or double line shall be held to be fatal to the vote,—I may refer to the fact that precisely the same additions have been made by voters on both sides; and certainly I think it is beyond all ordinary chance that the two candidates should have accidently agreed upon the same marks to indicate the votes given for them by electors.

As to the place of the mark, I think the important matter in reference to the validity of the paper is, that the cross shall be so placed as to ascertain the candidate for whom the voter intends to give his vote,—that it shall be so near the name of that candidate as to show the intention of the voter,—whether it is on the left hand, or the right hand, or a little above, or a little below,—I don't think that such circumstances are of any importance. Further, I don't think that a distinct score, which may have been merely the commencement of making a cross, is more suspicious than a small mark, not assuming the proportions of a line, but something that, by reason of previous concert, will equally serve the corrupt purpose of the voter; while, therefore, I have no hesitation in rejecting the two papers, on one of which there is a mark on the outside and on the other of which there is in the inside no cross at all, I am not prepared to reject any of the others.

The judgment of the Court was as follows:—

> "The Lords having considered the Special Case, and heard counsel for the parties, are of opinion and find, in answer to the first question, that of the eleven ballot papers therein mentioned to which objections have been stated for the petitioners, Nos. 57, 634, 61, 1039, and 277, but not any of the others, are, in respect of said objections, invalid, and ought not to have been counted; and find, in answer to the second question, that of the eight ballot papers therein mentioned, to which objections have been stated for Mr Stewart, Nos. 468, 643, and 460, but not any of the others, are, in respect of said objections, invalid, and ought not to have been counted.

Counsel for Petitioners—The Dean of Faculty (Clark), Q.C., and Balfour. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

Counsel for Respondent—The Solicitor-General (Millar), Q.C., and Macdonald. Agents—Tods, Murray & Jamieson, W.S.

Tuesday, May 26.

SECOND DIVISION.

[Lord Ormidale, Election Judge.

HASWELL AND JAMIESON, PETITIONERS.

(WIGTOWN BURGHS ELECTION.)

(*Ante*, pp. 482, 533.)

Election Petition—Procedure—Expenses.

Held that where there was no misconduct on either side at an election, or in the subsequent litigation resulting out of the election, neither party is entitled to costs.

LORD ORMIDALE—The state of the vote at the time the Special Case was ordered left a majority of one in favour of Mr Stewart. There were nineteen votes included in the Special Case for the disposal of the Court, and by their answers to the two questions put to them the Court have sustained five objections taken on the part of the petitioners and three objections on the part of the respondent. The result of this is to give 515 votes for Mr Young, and 514 for Mr Stewart.

Counsel for both parties concurred in this as the result.

LORD ORMIDALE—Then I shall report to the Speaker that Mr Stewart was not duly elected, and

that Mr Young was duly elected and ought to have been returned. I shall probably also send a special report, in which I shall state that Mr Young is now one of the Judges of the Court of Session, and that the seat is not claimed for him.

The DEAN OF FACULTY moved for the expenses of the petition, including the expenses of the Special Case.

The SOLICITOR-GENERAL opposed the motion.

LORD ORMIDALE—The general rule undoubtedly is that the successful party gets his expenses; but there is as little doubt that in many cases the Court does not give the successful party expenses even although it cannot be said against him that he has been guilty of misconduct in carrying on the litigation. In reality, the question of costs is held to be in the discretion of the Court. Here it is not suggested that there was any misconduct on either side either at the election or in the litigation under the present petition. It must be assumed that the Returning Officer, in dealing with the voting papers acted *proprio motu*, without any suggestion on the part of Mr Stewart; and if so the principle on which the Court in Ireland proceeded in the *Athlone* case, to which I have been referred, comes to be of importance. In that case, according to the report contained in the return to the order of the House of Commons, the ground upon which the Lord Chief-Justice held neither party entitled to costs is thus stated:—"It appears that the Sheriff, as far as we can see, of his own instance, without either party insisting on it, ruled that all these votes should be rejected; that being so, we are of opinion that there was no misconduct by either party." Now, that principle of decision arises here exactly in the same way, and is equally applicable. It does not appear that the errors in the ballot papers now given effect to, which have left Mr Young in place of Mr Stewart in a majority, were caused or suggested by Mr Stewart. It is no doubt a misfortune that these errors should have arisen, and that in consequence the parties should have been subjected to, it may be, a good deal of expense; but having regard to the principle, which I think must recommend itself to any Court exercising its discretion in the matter of costs, I do not think I can do otherwise than follow the case of *Athlone* as an example, though not as a binding rule; and I therefore hold that in this case neither party is entitled to costs, but must each bear his own costs.

Counsel for Petitioners—The Dean of Faculty (Clark), Q.C., and Balfour. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

Counsel for Respondent—The Solicitor-General (Millar), Q.C., and Macdonald. Agents—Tods, Murray & Jamieson, W.S.

Tuesday, May 27.

SECOND DIVISION.

SPECIAL CASE FOR THE LORD ADVOCATE AND THE COMMISSIONERS OF NORTHERN LIGHTHOUSES.

Salmon Fishing—Crown.

A disposition conveyed the lands and islands of May "cum potestate omnia genera piscium cum tramis retibusque seu alio quovismodo prendendi et capendi." but was not followed by the exercise of the right of salmon fishing. *Held* that the clause was insufficient to carry the right of salmon fishing.

The facts of this case are as follows:—In 1743 David Scott, Esquire, of Scotstarvet, obtained from the Crown a charter of resignation of the lands and barony of Scotstarvet and others, in favour of himself in liferent and his eldest son and other heirs mentioned in fee. The said charter, which is dated 14th March, and sealed 28th July 1743, comprehends, *inter alia*, "Totas et Integras Terras et Baroniam de Westbarns comhrehenden totas et integras terras et terras dominicales lie Mains de Westbarns cum fortalicio manorii loco domibus ædificiis hortis pomariis molendinis terris molendinariis multuriis et sequelis earund. partibus pendiculis lie outsetts insetts tenen. tenan. et libere tenen. servitiis et singulis pinen. earund. cum feudfirmæ divoriis omnium et singalarum acrarum prædict. terrarum et Baroniæ de Barns in feudifirmæ locat per quond. Alexrum Cuningham de Barns cum consensu Gulielmi Cuningham sui patris certis personis burgi de Crail inhabitantibus jacem infra parochiam de Crail et vic. de ffyfe una cum Insula de May terris insularibus cum mansione hortis et pertubus. ejusd. prout jacent in longitudine et latitudine cum luminaribus et Domo Luminare super ead. ædificat. cum privilegiis et emolumentis usitat. et consuet et iid spectan. cum proficuis privilegiis et pinen quibuscunq. jacen. in ostio maris ffluvii infra dominium de Pittenweem et vtc. de ffyfe cum potestate omnia genera piscium tam infra quam extra Insulam et in locis circum vicinis Insulis cum tramis retibusq. seu alio quovismodo prendendi et capendi ac pisces ipsos sic prensos et captos in cadis doliis seu barellis aut alias qualitercunq. ad libitum eorum saliendi aut sali condiendi vulgo lie pack et peill vocat. Quæ omnes terræ Westbarns cum Insula et pitvivilegiis suprascript, olim et nuper Erect. Unit et Incorporat. fuerunt in unam liberam Baroniam Baroniam de Westbarns nuncupat."

In the lands, fishings, and others above mentioned Mr Scott was infeft, conform to instrument of sasine following on the foresaid charter, dated 4th October, and recorded 2d November 1743.

On the death of the said David Scott he was succeeded by his niece, Miss Henrietta Scott, afterwards Duchess of Portland, who was duly served heir to her uncle, and thereafter infeft in the lands, barony, fishings, and others aforesaid, conform to instrument of sasine in her favour, dated 31st October, and recorded 18th November 1785.

By disposition, dated 18th April 1814, the said Henrietta Scott, then Duchess of Portland, with consent of her husband, and in consideration of the sum of £60,000 sterling, conveyed to the Commissioners of Northern Lighthouses, "All and Whole the island, lands, and island of May, with mansion-house, yards, and ports thereof, as the same lye in length and breadth, with the lights and lighthouse built upon the same, and with the privileges and emoluments used and wont and thereto belonging, and with the profits, privileges, and pertinents of the same whatsoever, lying in the mouth of the sea and river or firth of Forth, within the lordship of Pittenweem and sheriffdom of Fife, with power of catching and