

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 ORMDALE—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 NOR-
THERN 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 feudifirmæ divoriis omnium et singlarum ararum prædict. terrarum et Baronie de Barns in feudifirmæ locat per quond. Alexrum Cuningham de Barus cum consensu Gulielmi Cuningham sui patris certis personis burgi de Craill inhabitantibus jacem infra parochiam de Craill 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 fluvii 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 pressos et captos in cadis doliis seu barellis aut alias qualitercunq. ad libitum eorum salendi aut sali condiendi vulgo lie pack et peill vocat. Quæ omnes terræ Westbarns cum Insula et pitivilegiis superscript. 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 infet, 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 infet 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

taking all manner of fish as well within as upon or about the said island, and in the places surrounding the same, with hooks or nets, or in any other manner of way, and of salting or packing with salt (commonly called packing and peeling) the fish so caught or taken in casks, hogsheads, or barrels, or otherwise at their pleasure, and according to the custom of any other persons, with the teinds, parsonage and vicarage, of the said island and pertinents, as formerly comprehended under the Barony of Westbarus, and lying as foresaid, in so far as we have right to the said teinds, together with all right, title, and interest which we or our predecessors and authors had, have, or can anyway claim or pretend thereto in all time coming."

Following upon the said disposition in their favour, the Commissioners of Northern Lighthouses obtained a Crown charter of resignation, dated 20th December 1814, and written to the seal, registered, and sealed 16th February 1815, containing, *inter alia*, the following clause:—"Et cum proficuis privilegiis et pertinentiis earundem quibuscumque jacent in ostio maris et fluminis vel freti de Forth, intra dominium de Pittenweem et vicecomitatum de Fife cum libertate prehendi et captandi omnia genera piscium tam intra vel super quam circa dict. Insulam et in locis eandem circumambientibus cum hamis retibusve seu ullo alio modo ac salendi vel condiendi (vulgo vocat. packing and peeling) pisces prehenso et captos in cadis doliis seu barellis vel aliter uti placeant ac secundum consuetudinem ullarum aliarum personarum cum decimis rectoriis et vicariis dictæ Insulæ et pertinentium uti antea intra baroniam de Westbarus comprehensis et jacent ut prædicitur."

In virtue of a precept contained in the foresaid charter, the Commissioners of Northern Lighthouses were infeft in the subjects above mentioned, conform to instrument of sasine in their favour, dated 12th, and recorded 19th, September 1815.

The Commissioners of Northern Lights contended that in virtue of the titles above mentioned they had exclusive right to the salmon fishings in the sea surrounding the Isle of May, in so far as the right admits of being exercised from the island.

On the other hand, the Commissioners of Her Majesty's Woods and Forests maintained that the Crown is vested with the rights to these fishings notwithstanding the terms of the titles above mentioned, inasmuch as the Commissioners of Northern Lighthouses have not exercised the right by net and coble, or otherwise, for the prescriptive period. The Commissioners of Northern Lighthouses admitted that they have not so exercised the right.

The questions put to the Court were:

1. Whether, in the circumstances above explained, the salmon fishings around the Island of May belong to the Commissioners of Northern Lights? or
2. Whether the said salmon fishings are vested in and belong to Her Majesty?

Authorities cited—Ersk. Inst., ii. 2, 615; Ersk. Prin., ii. 2, 11; *Menzies*, 19 F.C. 531; *Forbes*, M. 14,250, 7812; *Campbell*, M. 14,250; *Gemmell*, 13 D. 854; 8 Macph. 419.

At advising—

LORD JUSTICE-CLERK—This is a question of novelty but of no great difficulty. The title of the Commissioners was acquired from a crown vassal in 1814. The Duchess held the barony of Westbarnes of which the island is a part, with the clause we have here, and the question is, although it is not alleged the Commissioners have ever captured a single salmon, whether these words confer a right of salmon fishing on them? It is plain the right conveyed by the disposition of 1814 cannot be wider than the right held by the Duchess, and so the question is what her right was? Is it different from the right conferred by an ordinary clause *cum piscationibus* without possession following. The same question was raised in the two cases of *Forbes* and *Campbell*. In the case of *Forbes* there was strong proof of possession; both parties alleged possession, and the judgment did proceed on possession, and found possession by wand and spear insufficient. Probably also in 1701 the general rule was not so firmly fixed that a clause *cum piscationibus* was good to constitute prescriptive possession but not a grant of salmon fishings. The case of *Campbell* is so imperfectly reported that the grounds of judgment cannot be ascertained. I think the clause here really relates to those kinds of fishings which can be conveyed as a pertinent of lands, and not as a separate tenement, so that salmon fishings are not included.

LORD BENHOLME—I concur. This is a question of title requisite to constitute the regalia of salmon fishing. I think the title insufficient, and the want of any enjoyment to give colour to doubtful expression makes the case clear.

LORD NEAVES—I concur. I think the general clause without possession insufficient to convey the right of salmon fishing.

LORD ORMDALE concurred.

The Court answered the first question in the negative, but declined to answer the second question.

Counsel for Lord Advocate—Solicitor-General (Millar) and Ivory. Agent—Donald Beith, W.S.
Counsel for the Commissioners—Rutherford and Dean of Faculty. Agent—A. Cunningham, W.S.

Wednesday, May 27.

SECOND DIVISION.

SPECIAL CASE—MATTHEW DYER AND

OTHERS.

Succession—Settlement—Substitution.

By antenuptial contract A conveyed to B, her intended husband, *de presenti* her whole property, and renounced her legal rights, while B assigned to A if she survived him all he might leave at his death, and failing her by decease before or after him, in favour of the lawful children alive on the death of the longest liver. A survived B and died leaving a conveyance of her whole means and estate in favour of C.

In a question with the disponent under the conveyance of A and the issue of the marriage—*Held* (1) that the right of the children was that of substitutes.