Counsel for the Complainer (Reclaimer)—Dean of Faculty (Watson)—Balfour—Hunter. Agent—D. Curror, S.S.C.

Counsel for the Respondents—Asher—Jameson. Agents—Auld & Macdonald, W.S.

Wednesday, July 5.

SECOND DIVISION.

[Lord Craighill, Ordinary.

ROBERTSON *v.* BROWN AND OTHERS.

(Before the Judges of the Second Division, with Lords Deas, Ardmillan, and Mure).

Municipal Election—35 *and* 36 *Vict. c.* 33—*Ballot Act* 1872—*Ballot Paper—Rejection of Votes.*

Held (*diss.* Lord Deas) (1) that in conformity with the decision in *Haswell* v. *Stewart*, a ballot paper with a straight line in place of a cross must be rejected; (2) that a cross decidedly to the left of the candidate's name must be rejected.

Held (by the Second Division in applying the foregoing judgment) that a mark on the paper which might be presumed to be a badly formed cross, or an attempt to make a cross, was not a sufficient ground for disallowing the vote.

This was an action of reduction and declarator at the instance of William Robertson, baker in Musselburgh, against William Brown, senior bailie of Musselburgh, and the other members of the town council, and against George Laurie and Alexander Adamson, claiming to be respectively provost and councillor of that burgh. The case against Provost Laurie was after a scrutiny abandoned, but as against William Brown and others was insisted in, to the effect that Robertson should be found and declared to have been duly elected a councillor of the burgh of Musselburgh on 2d November 1875. The town council of the said burgh consists of twelve members, of whom four retire annually by rotation. There were at the election in November 1875 seven candidates for the four vacancies, and accordingly a poll took place, the result being declared by the returning-officer, Bailie Brown, as follows:—Charles Smart, 368; John Mackinlay, 279; George Laurie, 240; Alex. Adamson, 231; The Pursuer, 222; Alex. Wilkie, 209; Ro. Dickson, 55. The four highest were declared duly elected and sworn in as councillors. 67 ballot papers were rejected by the returning-officer, some of them as "utterly bad," and some of them because the cross was placed outside the square printed for it on the ballot paper. 23 of these bore the X on the right hand side of the candidate's name, but not in the space—14 for Robertson and 9 for Adamson. 10 bore the X to the left of the candidate's name—6 for Robertson, 9 for Adamson. 2 bore marks which, though not X's, yet were like bad attempts to make an X—these were for Robertson. 1 bore a mark thus 1—it was given for Robertson. 2 bore a line in place of a cross—these were given one to Adamson and one to Robertson.

The questions raised were as to the rejection of these votes, and the pursuer averred in his condescendence that "by the Act the returning-officer is entitled to reject a ballot paper only on one of four grounds, viz.,—(1) Want of official mark on the back of the paper; (2) Votes given to more candidates than the voter is entitled to vote for; (3) Writing or mark (excepting the number on the back) by which the voter could be identified; and (4) Papers which are unmarked or void from uncertainty. The statute does not prescribe that the voter must mark his vote within any space which may be printed on the ballot paper, or that the ballot paper shall not be counted because he may have happened to mark it to the right hand or to the left hand of the squares. The only direction on the matter which is contained in the Act is that set forth in the form for the guidance of the voter which is given in the second schedule. The second paragraph of the said form is in these words—The voter will go into one of the compartments, and with the pencil provided in the compartment place a cross on the right hand side, opposite the name of each candidate for whom he votes, thus X. The ballot papers which were rejected because the cross or mark was outside of the square spaces printed on the ballot paper with a view to their reception, were all of them duly marked opposite the name of each candidate for whom a vote was intended to be given. The not counting of them by the returning-officer was wrongful and illegal, and if they had been duly counted, the pursuer, who by the declaration of the poll, as made by Bailie Brown, had only nine votes fewer than Alexander Adamson, would have been found to be (as in fact he was) among the four of the seven candidates who truly obtained the most votes at the poll. . . . . Other papers which were rejected not on the ground of the position of the X were illegally so rejected."

The pursuer pleaded—"1. It is not a good ground in law for rejecting and not counting the votes upon a ballot paper that the voter, while marking his vote opposite to, and on the right hand side of, the name of a candidate for whom he votes, should not have put the mark within a square which happens to be printed on the ballot paper with a view to its reception. 2. The said 67 ballot papers having been rejected and not counted, wrongfully and illegally, and the votes validly given on them having been such that, had the papers been duly counted, it would have appeared that the pursuer was elected as a councillor of Musselburgh, decree should be pronounced as concluded for. (3) The pursuer is entitled to decree in respect that on a proper computation of the votes validly given at the said election he was duly elected to be a councillor of the burgh of Musselburgh."

The defender (Adamson) pleaded—"1. The proceedings at the election of councillors at Musselburgh being in all respects in conformity with the Ballot Act, the defender ought to be assoilzied from the conclusions of the action. (2) At all events, the defender Alexander Adamson having, in any view, obtained more votes at the poll than either the pursuer or the other defender George Laurie, the present defender ought to be assoilzied."

On 27th January 1876 the Lord Ordinary (CRAIGHILL) ordered the transmission of the ballot and other papers by the Town Clerk of

Musselburgh, in whose custody they were, to the clerk to the process, and on 3d February 1876 ordered the ballot papers in question to be removed from the parcels, and to be marked and numbered in the process.

A joint minute was then put in for the pursuer and Provost Laurie, in respect whereof the latter was assoilzied from the conclusions of the libel on 22d February 1876.

The case was reported to the Second Division on 2d March 1876, and the following note was appended to the Lord Ordinary's interlocutor:—

"*Note*—The present action has been raised for the purpose of setting aside the election of the defenders George Laurie and Alexander Adamson, or one or other of them, as councillors of the burgh of Musselburgh, and of having it found that the pursuer ought to have been returned as one of the elected councillors on the occasion of the last election, which occurred on the 2d November 1875. The result depended upon a scrutiny. The ballot papers having been produced and examined, the pursuer became satisfied that the challenge of Mr Laurie's election was groundless, and the latter accordingly, with the consent of the pursuer, has been assoilzied.

"But the litigation between the pursuer and Mr Adamson is still maintained; and the question whether the latter was duly elected, or whether the pursuer ought not to have been returned, depends on the validity or invalidity of the votes, as evidenced by the ballot papers to which parties on the one side and on the other take exception. The questions which have been raised seem to be—(1) Whether the cross or mark when placed on the *left* hand side of the ballot paper is, in the sense of the Ballot Act, a mark by which the elector has marked his vote? (2) Whether marks which are not in the form of a cross, and obviously were not intended to be in the form of a cross, are sufficient? And (3) Whether marks not in the form of a cross, and obviously not intended to resemble or to be parts of a cross, are things written or marked on the ballot papers by which the voters can be identified, and therefore are things by which the ballot papers whereon they appear are rendered void?

"Upon two of these questions at anyrate the Second Division of the Court of Session gave judgment in the case of *Haswell* v. *Stewart* (Wigton burghs election), May 23, 1874, 1 Rettie, p. 925. But since that case was decided, the case of *Woodward* v. *Sarsons*, Law Rep. (10 C.P.), p. 733, has been decided by the Court of Common Pleas in England; and the two decisions, in the opinion of the Lord Ordinary, cannot be reconciled. In these circumstances he considers it better to report the present case, that it may be decided at once by the Inner House. The adoption of this course, it may be added, is likely to conduce to the saving of time, which in a case like the present is a material consideration. The parties therefore were not only willing but anxious that the case should be reported."

The Second Division thereafter appointed the case to be heard before seven Judges.

Authorities cited—*Haswell* v. *Stewart*, May 23, 1874, 1 R. 925; *Woodward* v. *Sarsons*, L. R., 10 C.P. 733.

At advising—

Lord Justice-Clerk—But for the recent judgment in the case of *Woodward* v. *Sarsons*, in the English Court of Common Pleas, we should probably not have requested your Lordships of the First Division to aid in the decision of the present question, but should as matter of course have followed the direct precedent of the previous judgment of the Second Division in the case of *Stewart* v. *Haswell*. But we thought it right, out of respect to the judgment in the English Court, as well as regard to the inexpediency of having a conflict of decisions in the two parts of the island on such a matter, to have the question raised in this case deliberately reconsidered. I took no part in the previous judgment, and I have now very attentively studied the unquestionably grave and authoritative exposition of the views of the English Judges in *Woodwards* case, but I have formed an opinion that, notwithstanding the difficulties attending the subject, the former decision of this Court was right, and should be followed in the present action.

The only question with which I mean to deal in delivering my opinion is that to which the case was ultimately narrowed, namely, Whether five ballot papers which were tendered at the municipal election at Musselburgh in November 1875 for one of the candidates were invalid by reason of their being marked by a straight line, and not by a cross as directed by the Ballot Act.

It is argued that the provisions of the Act are directory only and not imperative, and that therefore substantial and not implicit compliance with them is all that is required. I do not differ from this as a general proposition, for in regulating the practical exercise of the popular right of election there must of necessity be many things directed in which it would be inexpedient and mischievous to exact literal obedience to the mere words of the direction when the substance and interest of the provision have been fulfilled. But in considering whether the directions of the schedules which form part of the statutory enactment have been substantially followed, regard must be had to the nature and scope of the specific direction, and to the object of the statute in exacting it. Some of these provisions—such as the mere forms of the writs to be used, the election writ itself, the direction, the certificate and indorsement, the notice of election, and the nomination paper, even the form of the ballot paper, and such like—being matters purely of form, are to be as near as circumstances will permit, as given in the schedule. But the directions given to the elector and to the returning-officer as to what he is to do or what he is not to do are of a different class, and, some of them at least, in order to be substantially, must be implicitly followed, especially in those matters which are prohibited. Thus, for example, it is provided that nothing is to be printed on the ballot paper excepting in accordance with the schedule; and again, that the voter is not to vote for more than the proper number of candidates, and the returning-officer is to reject voting papers which present certain appearances. These and other similar enactments are injunctions and prohibitions which must be as specifically complied with as if they had been specially provided in the body of the statute.

The objections which have been taken to the

voting papers before us are two. The *first* is, that the voter has not, as directed by the schedule, placed a cross opposite the name of the candidate for whom he voted, and has therefore not indicated in terms of the statute the person for whom he intended to vote. The *second* is, that even if he has indicated for whom he meant to vote, he has placed a mark on the paper by which he may be afterwards identified, which is expressly prohibited by the injunctions in the schedule.

If the only object of the direction given to the voter to place a cross opposite the name of the candidate for whom he votes (which is expressed in imperative terms) had been to ascertain for whom he intended to vote, the provision would have been construed favourably for the voter; and any mark which sufficiently indicated his intention might have been sufficient. Apart from the direction of the statute, one could have had no difficulty in coming to the conclusion that the straight lines in the voting papers before us were meant to indicate, and do indicate, for whom the elector intended to vote. But we must take this direction along with the prohibition which follows; for if a mark which is not that prescribed in the statute be a mark by which the voter may be afterwards identified, it follows that the object of providing a special mark, and enjoining its use, was not only to enable the voter to indicate for whom he voted, but by prescribing uniformity in such marks to prevent the secrecy of the vote from being violated.

In regard to this most vital prohibition, it seems clear, first, that it is not necessary in order to bring a mark placed in the ballot paper within the scope of the prohibition, that it should disclose the identity of the voter on the face of it. Such a provision would have been futile; for nothing but a signature and designation would have that effect. Even a signature by itself would not do so, as there might be other electors of the same name; and identification by handwriting requires extrinsic evidence. If, in addition to the cross required the elector places a numeral or a letter in the corner of his paper, that of itself would, in my opinion, be sufficient to violate the prohibition, although without inquiry no one could tell who the voter was who had so marked his paper. It must be remembered that this is not an enfranchising statute. It is an Act to regulate, and in some measure to restrict, for great public objects, the way in which an existing franchise is to be exercised; and while we are not to read these restrictions in a narrow and vexatious spirit, we are bound to construe them so as to accomplish the object in view. That object was to secure the secrecy of the elector's vote; to enable him for his own benefit to vote in secret, so as to free him from molestation or undue pressure in the exercise of his right; and, for the benefit of the other electors and of the public, to oblige him to vote in secret in order to prevent his using his vote corruptly. It is for that reason that he is prohibited from putting any mark on the voting paper by which he may be afterwards identified. In the second place, the only question which seems contemplated by the direction is, Whether on the inspection of the ballot paper it bears a mark by which the voter may be afterwards identified? It is here that, with the greatest respect, I chiefly differ from the learned Judges in the case of *Woodward*. They say that the prohibition means that the voter is not to vote "so as to make it possible by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted"— that is to say, that if he cannot be identified by seeing the paper itself, and if no other facts are available, it is immaterial what marks appear on the paper.

I find no such qualification in the words of the statute, nor do I think it harmonises with the reason of the prohibition. The statute does not appear to me to contemplate that the presiding officer shall refer to any facts excepting those which he finds on the paper itself. He is to look at it, and if he finds (1) that it is without the official mark; or (2) that the voter has voted for more candidates than he should; or (3) that it has a mark on it by which the voter can or may be identified; or (4) that it is uncertain— he is then and there to reject the vote. With the intent or object of these things, save what the paper discloses, he has and can have no concern. In regard to marks, he is to decide merely on their character; and if he finds that they are such as can or may lead to the voter being afterwards identified, he is to reject the vote; and if he does not so find on inspection of the paper he is to admit the vote. Whether the mark would, in point of fact, enable him to identify the voter is of no consequence, and he can have no means of knowing. A committee of the House of Commons or a Court of Justice might inquire for months into the identity of the voter, and not discover it; and yet all the time the mark on the paper may have disclosed it to the only person to whom the facts were available, and for whose information it was placed there. To hold that before this prohibition is to receive effect there must be proof, either absolute or *prima facie*, of the intent with which the paper was so marked, would be to nullify altogether a provision which seems vital to the operation of the statute. The direction is not designed against the public notoriety of the voter's identity, but against those occult and concealed arrangements which might so easily frustrate the design of the Ballot Act. Such devices, in short, as, while the identity of the voter is concealed from the public, may lead to its being disclosed to a confederate—a confederate it may be who has paid the voter for his vote, and wishes to be assured that he has received value for his money, or one who has unduly used the influence of his position to compel the voter to take this way of informing him how he voted. A provision that these arrangements when disclosed and proved should nullify the vote, would have been entirely illusory, for the ballot was resorted to mainly because these secret and corrupt transactions would not be detected; and the provision I am now considering had, in my opinion, no other object but to baffle such practices by prohibiting absolutely, whatever the motive of the voter, marks which might aid in their perpetration.

It is this view which gives importance to the present case; but if it is well founded it follows that the only mark which the voter is permitted to place on his voting paper is the simple and

easy but uniform one of a cross; and that the direction to this effect is imperative. In cases in which it is plain from inspecting the paper that the voter had attempted, although ineffectually or imperfectly, to follow the direction of the statute, such misadventure should not invalidate his vote; but in the present case the paper discloses an intention not to follow the directions of the statute, but to substitute a different mark for that directed. I am of opinion that this is such a mark as may lead to the voter being afterwards identified, and that therefore the voting paper is invalid; and I am glad to find that in coming to that conclusion I not only concur with the views of Lord Neaves and Lord Ormidale in the Wigtown case, but with those of Lord Benholme also; for while the latter differed in regard to some of the votes which were rejected by the majority, he concurred in thinking that a voter who had placed a straight line opposite the name of the candidate had not thereby indicated for whom he intended to vote in terms of the statute.

Lord Deas—I do not need to say much, as I have no doubt that the whole question is as to the mode of marking the voting papers. The enactments raise great difficulties as to whether they have or have not been complied with. I have been very anxious to find a distinction between a straight line and a cross, and without going into the matter at any length the conclusion at which I arrive is the same as that in the case of *Woodward;* the reasons on that side are more satisfactory to my mind than those on the other. The question then is, Has there been intentional departure from the statutory provisions? I lean to Lord Benholme's views in the Wigtown burghs election petition, except as to the remarks his Lordship made on the question of the straight line, and these I do not understand. I confess that I cannot find any substantial distinction between a straight stroke and a zigzag.

Lord Neaves—I concur in the views of your Lordship in the chair. As to the result upon the election, we are not at present called to consider that, but merely the questions raised on record. I take it that the best model to be found is on voting paper No. 434, where there is a straight line on the right-hand side of the candidate's name. I cannot suppose that the directions to voters which the Ballot Act orders to be put up should be for no purpose whatever, or merely to be disregarded. This Act made a great change in the constitution of the country, and by it a contrivance at once ingenious and able was given effect to—a contrivance which goes a great way to secure the object of the Legislature—namely, the protection of electors from interference of every kind, both before the election and after it. It cannot be denied that these directions to voters form a part of the statute, and if there be a specific direction to make a cross (it may not be fatal if it be to the right or left), will the making of a line such as this on the paper alluded to be a compliance with the statutory enactment? I am unable to suppose that any person of sufficient intelligence and position to be a voter at all can be ignorant of what is meant by a cross. A cross is made by *two* lines crossing one another. Now here the elector makes not *two* lines, but *one* line.

It is not at all an unreasonable supposition here to take the case of a voter who is enjoined to make a cross, and knows perfectly well what a cross is and how to make one. Well, the voter wishes to make a cross, and begins to do so, drawing a line, and then he stops and leaves it so and does not vote at all. He may have been driven to the poll, and there (though when he entered the booth he meant to vote), protected by the secrecy, he only makes this straight line as a sort of half vote, intending no vote at all. The voter has either failed or has purposely abstained from completing this vote No. 434, and it is accordingly only an inchoate vote, and of no electoral value whatever. There is not an *enixa voluntas,* but merely the semi-vote, as it stands; whereas the cross is a sign, simple and known all over the world, but above all in a christian country. The Act says the paper is to be invalidated by any mark made on it by which the voter may be identified. Now, by a secret understanding a line might be the means of shewing the candidates or their agents who voted for them. The only difficulty I feel is that such a line may be objected to upon two grounds, viz., that either it is no vote at all, only an attempt at voting, or that it is marked in a manner so characteristic that the voter may be identified. As, however, either ground is sufficient for the decision of the case, I do not feel it necessary to decide which has the most force.

Lord Ardmillan—The peculiarity in this case consists in the marking of the voting paper with a straight line instead of a cross. Taking the question to be solely upon this point, I entirely agree with the majority of your Lordships. This is not an enfranchising statute, but a procedure Act to protect the voter from undue influence by securing secrecy. The Act lays down certain rules for voting, and these are to be found partly in the body of the Act and partly in schedules appended thereto. Reading the Act and the schedules together, I am not able to say the provisions in the schedule are so strict as to preclude any deviation, however trifling. I think that where there is an evident desire on the elector's part to make a cross, a slip must not be too hardly judged. But where a party makes a mark which is not a cross at all, and which might enable his vote to be identified, then I quite agree with all that has been said.

The Act intended that the marks on every paper should be alike, or as nearly alike as possible, so that it may be impossible to identify the voter marking his ballot paper. Applying this rule to what we have now to consider, and supposing a landlord to have threatened and coerced his tenants into voting for A B, it would be a ready mode of ascertaining their compliance that all their papers bore a line in place of a cross. This is a violation of the principle of the statute to which I cannot assent.

Lord Ormidale—In this action the pursuer concludes for a reduction of the election of the defenders Robertson and Laurie as town councillors of the burgh of Musselburgh, on the ground that according to the true meaning and effect of the Ballot Act 1872 he had a majority of votes over both, or at any rate over one of them. The case having been given up as against

Laurie, it now depends between the pursuer and the other defender Robertson.

No objection has been taken to the competency or form of the action; and indeed there is no other form of action provided by statute or otherwise, so far as I am aware, in relation to a municipal election in Scotland which could have been adopted by the pursuer.

The question to be determined is one of importance and interest, and all the more considering the conflicting judgments on the points upon which it turns—of this Court in the Wigtown Burghs Parliamentary Election case (*Haswell* v. *Stewart*, vol. i. 4th series of Court of Session Cases, 225), and the Court of Common Pleas in the Birmingham Municipal Election case (*Woodward* v. *Sarsons*, July 9, 1875, Law Reports, Com. Pleas, vol. ix. p. 733). In consequence of this conflict I have very carefully examined the grounds upon which the two Courts have proceeded, and although I was one of the majority of the Court by which the Wigtown case was decided, I need scarcely say that I should, if satisfied I was then wrong, have had no hesitation in now deciding differently.

In the Wigtown case this Court held that according to the sound construction of the Ballot Act it is obligatory on a voter to mark the ballot paper with a X, thus, to the right of the candidate's name for whom he intends to vote, while in the Birmingham Municipal Election case it was held by the Court of Common Pleas that this was not obligatory, but merely directory, and that it was sufficient if the voter indicated the candidate for whom he intended to vote by a mark, whether a X or not, on the front or face of the ballot paper. Again, while it was decided by this Court that any substantive writing or mark by the voter other than a X, making allowance for what might reasonably be held the various ways in which different persons, from age or otherwise, might make such a mark on the ballot paper, would invalidate it, the Court of Common Pleas held that other marks, whatever might be their form, made by the voter on the ballot paper, would not void the vote, provided it was not marked so as to shew that he intended to vote for more candidates than he was entitled to vote for, or so as to leave it uncertain whether he intended to vote at all, or for which candidate he intended to vote.

Such is, stated generally, the difference betwixt the decisions of this Court and the Court of Common Pleas in regard to the marking of ballot papers by voters. But another and a very important difference—one indeed upon which the question which of them is right very much if not entirely depends—arises in regard to the true interpretation and effect of that part of section 2d of the Ballot Act which enacts that the ballot paper on "which anything except the number on the back is written or marked by which the voter can be identified shall be void and not counted." It was held by this Court that according to the sound construction of this enactment it was enough to invalidate the vote that the mark other than a cross in some reasonable form is of a description whereby the voter might be identified—not that he shall be identified, which of course could only be done by a separate proof or investigation in which a great deal of evidence on the one side and the other might be necessary to be gone into; while according to the contention of the pursuer the Court of Common Pleas held that such proof or investigation was indispensable, and must be gone into and be found sufficient to identify the voter. Whether this is the construction put upon the Act by the Court of Common Pleas does not appear to me to be clear; and that it is a sound construction I am not prepared to admit. As to this matter I shall afterwards have some observations to make.

But let us see what is the nature of the ballot papers which the pursuer says were improperly rejected in the municipal election at Musselburgh, and which if counted would have resulted in his election in place of the defender Robertson. There are numerous ballot papers having marks upon them of various descriptions other than a cross, and on parts of the paper other than to the right of the candidate's name intended to be voted for—all as set out and exhibited by the state in the appendix to the closed record. It is unnecessary at present to inquire whether all of these marks are of a character to invalidate the votes. We can only at present deal with the papers having a straight line, thus | on them in place of a X to the right of the favoured candidate's name. That was the only matter which has as yet been argued at the bar; but how far that may be sufficient to determine the case may require consideration afterwards. The result, however, at which the Court may now arrive will not unlikely be of much service, if not conclusive of any other point or points which may yet be raised.

According to the decision of this Court in the Wigtown case, voting papers not having a cross on them at all, but merely a single straight line, are invalid, and have been property rejected; while according to the decision of the Court of Common Pleas in the Birmingham Municipal case, they are valid and ought to have been counted.

In considering the conflicting question which has thus arisen, I think it is of much importance that it should be kept in view that the object of the Ballot Act is not to enfranchise or admit voters to the electoral roll, but to enable those who are already on the roll to give their votes in secrecy, and in that way to afford them what was thought to be a necessary protection in the exercise of the franchise. In this view, the Ballot Act ought I think to be construed so as its object may be accomplished as far as practicable. This, as it appears to me, for the reasons stated at length by the majority of the Court in the Wigtown case, may be done by a X on the right hand of the candidate's name intended to be voted for—a mark which, in the words of Lord Neaves, is "well devised for the purpose, easy of execution by men of the most moderate intelligence, and at the same time perfectly neutral in its character, so as to be practically incapable of betraying its authorship by its appearance." But if various other marks, quite different from a cross, or even one on the left, were, as according to the judgment of the Court of Common Pleas, admissible, it cannot, I think, be doubted that the identification of the voters might thereby be established, and the great object of the Ballot

Act entirely defeated. For example, let it be supposed that by pre-arrangement an understanding has been come to between a candidate, or some party acting for him, and a number of the electors, that they should put upon their voting papers a mark different from a cross, or even a cross but on the left hand in place of the right hand of the candidate, it is plain that the candidates, or their agents present, as they are entitled to be, at the counting of the votes, could easily see how the electors with whom the arrangement had been made voted, and whether they had, or had not, adhered to that arrangement. In this way the voters might be identified, and the protection intended to be afforded by the Ballot Act defeated. Nor do I see how it would be possible for any party, other than those participant in the improper arrangement, to know anything about it, so as to be able by the necessary evidence to expose and frustrate its object.

I cannot help thinking, therefore, that the interpretation adopted by this Court in the Wigtown case, of clause second in the Ballot Act, to which I have referred, is the sound one. Nor am I able with certainty to discover from the report whether this may not have been also the view of the Court of Common Pleas in the Birmingham case, for while in some parts of the judgment in that case extensive evidence of the identification of voters would appear to have been desiderated, in other parts this would rather seem not to have been considered necessary. Thus, I find that two voting papers having the name of one of the candidates written upon them were held to be bad without any extrinsic evidence of the actual identification of the voter who so wrote on the papers, merely because it "might give too much facility by reason of the handwriting to identify the voter."

Without entering further into the matter, which is amply explained in the reports of the two conflicting decisions in question, I have merely to add that I continue to be of opinion that the rules of construction of the Ballot Act given effect to in the Wigtown Parliamentary Election case, although stricter than those adopted in the Birmingham Municipal Election case, are sound and not too strict, and therefore ought to be adhered to.

Lord Mure—The only question we have here to consider is, Whether a straight line marked on a ballot paper is a compliance with the Act? Reading ? 28 with the schedule, I think it is not. I do not go into the grounds of my opinion, as I entirely concur with the Lord Justice-Clerk, but I will only add that the schedule and the directions in it are to be construed as part of the Act.—[*His Lordship read the schedule*]. I cannot conceive that the Legislature ever intended that a straight line should be a compliance with those instructions. If it had been otherwise, the statutory words might have been expected to be "a cross or other distinctive mark." That is not so; it was not intended; and I cannot give to the words as they stand such an interpretation.

Lord Gifford—If the purpose of the Ballot Act had been to confer an electoral franchise, or even to provide a convenient mode in which electors exercising the franchise should record their votes, I should have been disposed to hold that the directions as to filling up the voting papers were rather directory than imperative, and that if it fairly appeared upon the face of the ballot paper who the candidates were for whom the voter intended to vote, I would be disposed to sustain the vote even although the voter had to a very considerable extent deviated from or failed to comply with the provisions or directions of the statute.

But I cannot lay out of view that one of the principal objects of the statute, if not the leading end which it had in view, was to secure absolute secrecy in voting, so that it should not be known for which candidate or candidates any elector voted, and that this should not be discoverable from the voting papers either by the candidates or their agents, although necessarily for the purpose of checking the counting and otherwise the voting papers are open within certain limits to the scrutiny of those interested.

Now, in this point of view I agree with the majority of your Lordships. I think that the directions for filling up the voting papers, so far as necessary to or conducive to secrecy of voting, are not merely directory but really imperative, and therefore must be at least substantially observed. I agree that much in the statute may be directory, but whether non-observance does or may destroy secrecy, I think the case is different. If a variation is made in the mode of marking the votes of such a nature that it possibly and by means of preconcerted arrangement may identify the voter to the candidates or their agents, I think this is enough to vitiate the vote, although there be no actual proof of such preconcerted arrangement. Thus, it is admitted on all hands that if the voter write his own name or initials, or even write the candidate's name instead of marking a cross, the vote will be bad, and I think the same principle will apply to any other mark differing substantially and essentially from the cross required by the statute. I agree that if there be substantially a cross or an obvious effort to make a cross, this will be enough, and the Court will always incline to sustain rather than to reject a vote *in dubio;* but I am of opinion that it is not too strict a reading of the statute to hold that the voter who refuses to make the statutory cross, but substitutes therefor a line or a circle, or a square, or a triangle, or any other figure which may obviously be made the means of identification, loses his vote.

I concur therefore in the result reached by the majority of the Court, that a mere straight stroke is not equivalent to the cross required by the statute.

Thereafter the Second Division proceeded to consider the effect of the foregoing decision upon the election. In accordance therewith, votes Nos. 434 and 388, bearing a straight line only on the right of the name, were disallowed. Nos. 415 and 327, given for Robertson, were then objected to. The objection was disallowed and the votes admitted, the Lord Justice-Clerk observing that there was no indication of a determination not to follow the Act; on the contrary, that the voter by marking on the right of the candidate's name a line with another line

leaning against it, seemed to have been making an effort to follow the Act, though rather a clumsy one.

Ten ballot papers bore the cross on the *left* of the candidate's name, six of these being for Robertson and four for Adamson. The authority of *Haswell* v. *Stewart* was cited on the one side against these votes, where the election Judges held them not good, Lord Benholme dissenting. On the other side, the case of *Woodward*, an English authority to the opposite effect, was cited.

LORD JUSTICE-CLERK—The point here is not one beyond controversy, but I am inclined to follow the decision in *Haswell* v. *Stewart*.

LORD NEAVES—I am of the same opinion as I was at the time when *Haswell* v. *Stewart* was decided. The voter has transgressed an express provision of the Act.

LORD ORMIDALE—This point was very carefully considered in the Wigtown case, and I think the decision then arrived at was right; I cannot help regarding this, if allowed as a very simple way to make collusive arrangements for the identification of the voter.

LORD GIFFORD—I concur. The statute says the voter shall mark his ballot-paper with a cross on the right hand, and that cannot, it appears to me, be got over.

The Court accordingly disallowed these ten votes, and struck them off.

The Court pronounced the following interlocutor:—

> "The Lords having resumed consideration of the cause, . . . Sustain the votes under class I of this state; reject the votes under class II; sustain the vote under class III; sustain the vote under class IV; under class V sustain the vote under ballot paper No. 415; reject the votes under ballot papers Nos. 434 and 388: Find that the result of applying these findings to the election in dispute is to leave the defender Adamson in a majority of one: Therefore sustain the defences for the defender Alexander Adamson, and assoilzie him from the whole conclusions of the summons, and find him entitled to expenses: Remit to the Auditor to tax the same and to report, and decern."

Counsel for Pursuer—Mair. Agents—Legat & Shield, W.S.

Counsel for Defender (Adamson) — Rhind. Agents—Ferguson & Junner, W.S.

Thursday, July 6.

SECOND DIVISION.

[Lord Shand, Ordinary.

YOUNG *v.* NITH NAVIGATION COMMISSIONERS.

Navigable River — Ship — Obstruction— Damages— Liability—Trustees.

The Commissioners, as statutory trustees for the navigation of a river, made additions to a dyke in the bed thereof. This dyke was covered at high water, and a perch was placed to indicate the extent of the additions. Heavy floods having carried away the perch, a vessel was injured by coming into collision with the dyke.—*Held* that as the Commissioners were bound to indicate by some means or other the sunken dyke, they were liable in damages, though they averred that the insufficiency of funds had been the cause of the delay in replacing the perch.

Process—Expenses—Personal Liability of Statutory Trustees.

The Commissioners for navigation of a certain river defended an action for damages arising out of injury to a vessel, inflicted by certain operations conducted by their orders in the bed of the river.—*Held* that such defence, though unsuccessful, did not subject them in personal liability, and decree given against them *qua* trustees, reserving all questions as to personal liability should the statutory funds prove insufficient.

This was an action at the instance of Robert Young and others, owners of the "Arabian" steam-tug, against the Commissioners of the Harbour of Dumfries and of the Nith Navigation, under 51 Geo. III. c. 147. The summons concluded for £200 in name of damages for the stranding of the "Arabian," which on 21st November 1874 left Carsethorn for Dumfries, towing a timber-raft. The tug proceeded safely to a point on the Dumfries side of the river at high water, and half-a-mile above Kelton. The raft was then disengaged, and the tug turned to go down stream, when it stranded on a stone dyke in the fairway of the river, about 3 or 4 feet above the river bed, but at the time covered with water. As the tide was ebbing, the tug settled down and was not able to be floated off till next tide, when she was found to be strained considerably and damaged.

The pursuers averred that it was the duty of the Commissioners to keep the river in a fit state for navigation, and to exercise reasonable care in so doing. Particularly, the pursuers said that the dyke in question should have been properly indicated by buoys, perches, or beacons to warn vessels off it, and that the defenders had culpably neglected to do this, though an addition, some 70 yards in length southwards, had been made to the dyke by them only shortly before the accident to the "Arabian." There was one perch, but it was some 30 yards above the spot where the tug grounded, although since the accident another perch has been placed at the southmost end of the dyke.