forenoon, till which time grants interim interdict as craved." The complaint goes on to state that service was made accordingly. There is no doubt that the alleged breach of interdict did not take place before August 4, and so was not committed during the period for which interdict was originally granted, but the interdict was continued by the interlocutor of August 4. This was not the granting of a new interdict, and by that time the respondent entered appearance. Now, after a party has entered appearance, and been represented by his procurator, he must be held to have known personally all the orders pronounced by the Court in the case, and I can see no reason why the same rule should not be held to apply here. The interlocutor of August 4 was as follows:—"Having heard the procurator for the petitioner, no appearance being made for the respondents,—on the craving of the petitioner's procurator, Continues the interim interdict already granted till the future orders of Court, and appoints parties' procurators to be heard on the grounds of action and defence to-morrow, in chambers, at half-past 12 o'clock afternoon." From this it appears that the respondents' procurator was not present on that occasion, but in obedience to the order pronounced on that day for a hearing on the following day, the procurator appeared and was heard on the grounds of action, so that it is quite clear that parties' procurators were aware on August 5 that the interdict had been continued. Now the presumption is, that a party knows all that his procurator knows. It may be as a matter of fact that this is not always the case, for the procurator may not always communicate to him that which is being done, but I cannot think that in such a case as this an allegation of personal ignorance could be enough; the party must say that he was excusably ignorant; but to say that it is necessary for the complainer to say that the defender has personal knowledge is absurd, after the latter has entered appearance. As soon as he has done so he must be held to know everything which takes place in the cause.

Lord Deas—I am of opinion that the Sheriff-Substitute went wrong in October 1873, and that the Sheriff went equally wrong in February 1874. The question of relevancy, I think, does not necessarily involve the question whether personal knowledge is essential. The question at present is, whether enough has been stated to bring the case into Court. To say more would be inconsistent with practice. I agree also with your Lordship as to the presumption that the party knows all that his agent knows, and all that takes place in Court. I do not wish to say any more at present on the question of relevancy, but I must say I think the mode of procedure here is, to say the least of it, very doubtful. It seems extraordinary to say that in a *quasi* criminal proceeding a party is first to be judicially examined and then afterwards the complaint to be found irrelevant. I agree with your Lordship that the part of the Act of Sederunt referred to (July 1839, § 66) does not apply here.

Lord Ardmillan—I agree with Lord Deas in thinking that the Sheriff must have been following some established practice, but I think that the judicial examination of the respondent should not be taken until the Sheriff is satisfied of the complaint. But that does not relieve us from the necessity of considering the question of relevancy here. The continuance of the interdict created no change in the existing state of things, and the original interdict having been duly intimated, its continuance required no further intimation.

Lord Jerviswoode concurred.

The Court pronounced the following interlocutor:—

"Recall the interlocutors of 29th October 1873 and 18th February 1874 complained of, Repel the objections to the relevancy of the petition and complaint, and remit to the Sheriff to allow the parties a proof in common form, and decern: Find the appellant entitled to expenses: Allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuers—Dean of Faculty (Clark) Q.C., and Alison. Agent—T. F. Weir, S.S.C.

Counsel for Respondents—Watson and Asher, Agents—Maconochie & Hare, W.S.

Saturday, May 23.

SECOND DIVISION.

(Before Lords Benholme, Neaves, and Ormidale.

SPECIAL CASE—HASWELL AND JAMIESON, AND NOTE FOR MARK J. STEWART.

(WIGTOWN BURGHS ELECTION.)

(*Ante*, p. 482.)

Election—Ballot Act, 1872—35 *and* 36 *Vict. c.* 33—*Objections to Votes.*

Under the Ballot Act, 1872,—*Held* (1) That any mark on the back of voting papers other than the number of the paper vitiates the vote. (2) That it is essential to a valid vote that the cross prescribed by the Act should be made to the right hand of the candidate's name, and without the addition of any other mark.

This case was adjusted in terms of Lord Ormidale's interlocutor of 7th April 1874, in order to obtain the judgment of the Court on objections to eleven voting papers for Mr Stewart and to eight voting papers for Lord Advocate Young.

The following were the grounds of the first class of objections:—It was objected (1) to the ballot papers, Nos. 64 and 1146, that they were not marked with a cross in terms of the Ballot Act and relative schedules, and contained marks whereby the voter could be identified; (2) No. 57, that instead of being marked with a single cross to the right of the candidate's name, it was marked with two crosses, neither being in the proper place, but one diagonally below the name to the right, and the other diagonally below the name to the left, and was so marked that the voter could be identified; (3) No. 634, as not being marked with a cross at all, but with a single stroke, whereby the voter could be identified; (4) No. 143, that it was not marked with a cross at the right hand of the candidate's name, and outwith the space for the candidate's name, and void from uncertainty, but with a cross above the name, and was so marked that the voter could be identified; (5) No. 61, that it was not marked with a cross on the right of the candidate's name,

and that the only mark on the paper was a mark, not a cross, to the left of and outwith the space for the candidate's name, whereby the voter could be identified; (6) No. 402, that it was not marked with a cross on the right of the candidate's name, but with a cross below the name, whereby the voter could be identified; (7) Nos. 1039 and 277, that they were not marked with a cross on the right of the candidate's name, but only with crosses or marks on the left of the name, whereby the voters could be identified; and (8) Nos. 840 and 922, that they were not marked with the materials provided by the returning officer—viz., black-lead pencils, but with ink, whereby the voters could be identified.

The following were the grounds upon which the eight objections were stated for Mr Stewart:—It was objected (1) to Nos. 35, 37, and 1160, that they were not marked with a cross in terms of the Act and relative schedules, and contained marks whereby the voters could be identified. (2) No. 468, that instead of being marked with a cross to the right of the candidate's name, it was marked, 1st, with a cross containing marks whereby the voter could be identified; 2d, the cross was not placed in the proper place, but above and over the candidate's name; 3d, there were two parallel strokes drawn on the back of the voting paper in the corresponding place to the left of and over the candidate's name, as the cross to the right, whereby the voter could be identified. (3) No. 643, that it was marked with an angular stroke opposite the cross to the right of the candidate's name, whereby the voter could be identified. (4) No. 460, that it was not marked with a cross to the right of the candidate's name, and that there was a cross to the left of and under the candidate's name, whereby the voter could be identified. (5) No. 556, that it was not a ballot paper as issued by the presiding officers, and even if it was a ballot paper, it was mutilated, so that the voter could be identified. (6) No. 814, that it was not marked with the materials provided by the returning officer—viz., black-lead pencils, but with ink, whereby the voter could be identified.

At advising—

Lord Neaves—The questions here raised are important and delicate, and on this account, in particular, that while a certain form of exercising the franchise is pointed out in the statute on the subject, some deviations from the strict letter of the directions therein contained may be so trifling as to be immaterial, while others may be more serious, and thus may be fatal. The merits of each vote therefore may turn on questions of degree which it is always difficult to distinguish, as the one class may run almost imperceptibly into the other. This is the old puzzle, as to how many grains of corn make a heap, or at what stage a little thing grows into a big one.

In this state of matters, the important point is to look to the great objects and principles of the statute and to take care that we do every thing necessary to follow these out, and nothing that can defeat or endanger them.

The great object in view, I take it, in the Ballot Act, is the double result of facility in the exercise of the franchise, and perfect secrecy as to the vote of individual voters. This double purpose is by the Act sought to be accomplished by not allowing a vote to be given *viva voce*, as it used to be, nor in writing (properly speaking), in either of which cases secrecy would be impossible or would be imperilled, for by writing, though not setting forth the writer's name, yet through the *comparatio literarum* the writer might be discovered. Nor would it have done perhaps to leave the voter to put any mark he pleased to shew the candidate for whom he voted. A mark has been pointed out and represented in the statutory directions, that of a cross, thus X. It is, I think, a mark 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. I think it is scarcely possible that a ballot paper strictly in terms of the statute should lead to the voter's identity—one man's cross being in general undistinguishable from another man's. In these circumstances, I think it essential to a good vote that the voter should make the cross thus pointed out, and that any mark materially different would be a deviation from what is prescribed, and a failure to fulfil the requirements of the statute. For any one to put, instead of a cross, a circle or an oval, or any other geometrical or anomalous figure, would not be a compliance with the law, independently of the consideration that such a plain and wilful departure from what was intended would suggest strongly the suspicion that some sinister purpose was intended.

In one of the votes before us, being, I think No. 634, there is no cross or attempt at a cross, but merely an oblique straight line. I think that the voter who made this mark has not exercised his franchise under the Ballot Act, and that his ballot paper ought not have been counted.

On the other hand, there are ballot papers in which a cross is made, or attempted to be made, but is not very well made—whether from unsteadiness of hand, or accidental disturbance, the cross lines are not clean or steady, but somewhat shaky and irregular. I am of opinion that such imperfections and defects are not fatal, and that it would be harsh and unjust to disfranchise a voter for such appearances. Neither am I inclined to punish with disfranchisement one voter here who has made a very respectable cross, but who has thought that it might not be the worse of small feet or claws to support it and make it like a printed capital X. That seems to me an innocent idea, and at any rate not a sufficiently serious or suspicious addition to make his vote bad. I do not know whether this voter may not have been reading Johnson's Dictionary, and referring to a word which he is very fond of using—the word "to decussate," which he explains as meaning to intersect at an acute angle—and he quotes some passages which show that decussating is used by lines having the form of the letter X decussating one another long ways. Now this voter has decussated these lines, and in doing so has made very small feet or resting-places for them. I would not advise that system to be carried too far, but where it is done as appears here, I would not hold that it operates a disfranchisement of the voter.

On the other hand, where there has been put on the ballot paper a substantive and separate addition to the voter's mark, this seems to me to be a good objection, and to be struck at expressly or virtually by one of the clauses of the 2d section of the Ballot Act, Part I, by which any ballot paper is declared void on which anything but

the number on the back is written or marked, by which the voter can be identified. This clause is one which is not perhaps expressed with the precision that would have been desirable, for it is not exactly clear upon the face of it what is meant by the nullity or vice here indicated. But I think that under this enactment any plain and palpable addition on the ballot paper, unconnected with the actual mark of the vote, is a fatal objection. We have among these ballot papers one which has a black line drawn on the back, and others on which there is a plurality of crosses on the front, and it is undoubtedly a nice and important question whether these unnecessary things are merely superfluous and innocent, or whether they fall under the category of being marks by which the voter can be identified.

I think that this declaration of nullity does not require that there should be absolute proof of a design or intention on the part of the voter to be identified. That is not said, and it is not to be expected, and considering the secrecy of the proceedings, it cannot be supposed that either the Returning Officer or the Election Judge should be able to say what was the intention of the party or parties in thus adding to the statutory expression of his vote. But it is plain that such additional marks may be used as a means of communicating information such as might lead to identification; and where they are plainly done not by mere carelessness or want of skill, we are naturally led to ask, Why are they there at all, except for some sinister purpose? If we allow any superfluous additions of this kind, we may be obliged to pass them over, however numerous they may be, and thus a door would be open to evasion of the essentials of the Act. If a voter puts the cross strictly in terms of the statute there is scarcely a possibility of identification from the ballot papers; but if a voter, besides his proper cross, puts one or more additional crosses, or puts circles or ovals *ad libitum*, he raises a strong suspicion against himself, and has himself to blame if his ballot paper is rejected.

All such superfluities are the less excusable, as the Act provides for having a new ballot paper if one has been spoiled or rendered unfit or unsuitable for the purpose in the course of voting.

With regard to the position of the cross, it is directed to be put on the right hand side, opposite the name of the candidate. I think some latitude must be allowed on this subject, and that if the mark is opposite the candidate's name or towards the right hand side the paper should be sustained; but not so if it is decidedly at the left hand side, which seems a gross as well as a suspicious deviation from the statute.

I think that it is not essential that the cross should be made with pencil. The directions, indeed, contain this (paragraph, p. 120 of the book we have in our hands) that the voter will take the pencil in the compartment and mark his vote; but this is not a substantive enactment, and is not expressed in imperative words. The 25th section in the body of the Act, part I., says merely that he shall put his "mark"; and the 20th section speaks of materials to be provided. The use of the "pencil" provided in the directions cannot be enforced. It would be impossible to inquire whether a mark was made by the pencil of the presiding officer or by the pencil of the voter, and therefore it seems impossible to object to that. A good cross with any pencil, or with any ink, not peculiar, seems unobjectionable, and not contrary to any purpose contemplated by the Act.

Besides, it is impossible to say whether the ink used here may not have been used by the presiding officer under some of the clauses of the statute which permit his interference.

Upon these principles, I have formed my opinion that certain of the votes here objected to should be sustained, and that to others—the votes disallowed—the objections should be sustained. It will be the duty of the Election Judge to follow out the findings which we may pronounce, and to apply them to the numerical question on which the result of the election depends.

Lord Ormidale—I think it right to explain that, while I disposed of various points relating to the validity of ballot papers which were discussed before me as Election Judge in this petition, I considered it desirable to reserve for the determination of the Court the objections referred to in the Special Case now before us. I was induced to do so as well by the difficult and perplexing nature, in some respects, of these objections, as by the obvious desirability of having, as far as practicable, some rules or principles established by the more authoritative judgment of the Court than that of a single Judge, for the guidance of parties who may be concerned in future elections. This appeared to me to be all the more desirable as there is reason to believe that the opinions entertained and given effect to by the Presiding and Returning Officers in the recent elections throughout the country were far from uniform.

The particular sections of the Ballot Act upon the true construction of which the questions now to be determined chiefly depend, are referred to in the Special Case.

The great object of the Act appears to be to prescribe such a mode of procedure as, while it would enable the electors to give their votes in a ready and simple form, will at the same time ensure that this is done with as much secrecy as is attainable in such a matter. Accordingly, in the second schedule to this Act there is what is called "Form of directions for the guidance of the voter in voting;" and, among other things, it is there prescribed that "the voter will go into one of the compartments" (at the polling place) "and with the pencil provided in the compartment place a cross on the right hand side, opposite the name of the candidate for whom he votes, thus 'X' And in the same schedule it is declared that if the voter places any mark on the paper by which "he may be afterwards identified, his ballot paper will be void, and will not be counted." Although these statutory provisions are in one of the schedules to the Act, and not in the body of the Act itself, and are under the title "Form of directions for the guidance of the voter in voting," it must be kept in view that by section 28 it is enacted that the schedules and directions therein "shall be construed and have effect as part of this Act." Not only so, but to denote the imperative nature of the prohibition against the placing by a voter on a ballot paper anything by which he may be identified, it is by the 2d section of the Act itself expressly enacted that any ballot paper "on which anything except the said number on its back" (the number previously mentioned in the same section) "is written or marked by which

the voter can be identified, shall be void and not counted."

What then are the objections to ballot papers now to be determined by the Court, and are they, or any of them, of a nature which must be held to be fatal to the votes? They are generally to the effect that the ballot papers contain marks or writings which are not only prohibited by the Act, but are of such a description that the voter may or can be thereby identified.

Now, while it would be desirable that some precise and well-defined rules were established for the determination of all such questions, in their various specialties and modifications, I do not see how this can be adequately done by the Court. I do not, for myself, see that I can do more in this direction than to state that, while, on the one hand, there must be a reasonable and substantial compliance with the provisions of the Act, on the other hand, trivial or unimportant deviations, such as might not unfairly be held to be incidental to the performance of the piece of work in question, by different individuals, of different ages, habits, and conditions, ought to be disregarded, provided that the true object and intention of the voter is free from serious doubt, and that there is not sufficient ground for holding, in a fair and reasonable sense, that there is any mark or writing on the ballot paper whereby the voter can be identified. There is one thing, however, as to which I am clear, viz., that in order to shew that any writing or mark on a ballot paper, unauthorised by the statute, is of a description whereby the voter can be identified, it is not necessary that an inquiry should first be gone into for establishing the identification, or for the purpose of showing that the voter had by previous concert with others intended to make it known for whom he voted. Not only does the statute not provide for or make any allusion to such an inquiry, but it is plain, I think, from the only interpretation that can be given to its provisions, that it is enough that the mark, if any, other than the authorised ones appearing on a ballot paper, is of a description whereby the voter might be identified.

Having regard then to these general considerations, it appears to me, after giving all due effect to the argument which was addressed to the Court, and after a personal examination of the ballot papers in dispute, that two crosses neither of them being in the proper place; or a cross or crosses or other mark or marks on the ballot papers to the left of the candidate's name; or in addition to a cross, a separate distinct stroke on the ballot paper to the right of the candidate's name; or instead of any cross at all, a mere stroke on the ballot paper; or two parallel strokes on the back of the ballot paper besides a cross on the front, cannot in any reasonable sense be held to be trivial or unimportant deviations from the statutory directions, but, on the contrary, must be held not only to amount to a substantial failure to comply with the statutory directions, but are also marks or writings of a description whereby the voter may or can be identified. And if so, it follows that the 13th section—or what may be called the saving clause of the Act—is inapplicable, and indeed I did not understand that that clause was contended to be, in the circumstances of the present case, of any material importance.

In the views which have now been stated by me, and which I believe are in unison with those which have been expressed by Lord Neaves, the ballot papers Nos. 57, 634, 61, 1039, and 277, objected to by the petitioners, Messrs Haswell & Jamieson, and the voting papers Nos. 468, 643, and 460, objected to on the part of the respondent Mr Stewart, are invalid.

On the other hand, I am of opinion, although not without difficulty as regards some of them, that the objections taken to all the other ballot papers on either side cannot be held to amount to such a departure from the requirements of the statute as to invalidate the votes. And in reference to the ballot papers Nos. 840 and 922, objected to by the petitioners on the ground that ink and not a pencil was used by the voter; and the voting paper No. 814, objected to by the respondent on the same ground, I may explain that I do not see how these objections can be sustained, because the use of a pencil is not positively and directly enjoined by the statute, although some reason for holding it to be implied is afforded by the phraseology used in part of the first schedule to the Act, and also because the only positive and direct enactment on the subject is that in section 20th, to the effect merely that "the Returning Officer shall provide each polling station with materials for the voters to mark the voting papers;" but what materials—whether pencils or pens and ink—are not specified. Besides, even if it were to be held that, having regard to what is said in the directions in the second schedule to the Act as to a pencil, the using of ink is not allowable and might afford means for identification, it would be necessary, I think, for a party taking such an objection to support it by proof to the effect that the ballot papers referred to were not marked by the Presiding Officer for voters who were unable to do so for themselves, in terms of the 25th section of the Act, which neither expressly nor by implication makes it requisite that in such cases a pencil and not ink must be used by the Presiding Officer.

The result is, that for the reasons I have now stated, the two questions submitted for the determination of the Court in the Special Case ought to be answered as follows—(1) That of the eleven ballot papers referred to in the first question, to which objections have been stated for the petitioners, Nos. 57, 634, 61, 1039, and 277, are, in respect of said objections, invalid and ought not to have been counted, and (2) That of the eight ballot papers referred to in the second question, to which objections have been stated for Mr Stewart, Nos. 468, 643, and 460, are, in respect of said objections, invalid, and ought not to have been counted.

Lord Benholme—As my two brethren are agreed in regard to the disposal of the objections to the votes now before us, my opinion becomes of little consequence; but I confess I think they have gone too far in sustaining the objections. It appears to me that two of the votes are clearly objectionable. One of these falls under that part of the Act which enacts that any ballot-paper "on which anything except the said number on the back is written or marked by which the voter can be identified shall be void and not counted." Now, any mark on the back of a voting-paper (by which it is patent to all and sundry) seems to me to be marked out as censurable, and as fatal to a very different extent from marks within the voting-paper (and, consequently, concealed) that may be extraneous to the proper

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