equal moiety of all sums expended by the Caledonian Company on capital account in connection with the Barrhead Railway," The question raised under this section was, whether the Caledonian Company were entitled to repayment of one-half of the stock, £82,500, which they had issued in 1851, in order to procure the above large deduction in the annual rent they had to pay to the Barrhead Company.

The Lord Ordinary (GIFFORD) held that this sum came fairly within the spirit of the word used in the statute, and that the Caledonian Company ought to be repaid the moiety which they claimed. On reclaiming, the First Division, on 20th March 1872 (*diss.* Lord Kinloch), adhered to the interlocutor of the Lord Ordinary, and held, further, that the nominal value of the stock was that at which it was to be estimated.

The defenders, the Glasgow and South-Western Railway Company, thereupon appealed to the House of Lords.

The Dean of Faculty (Clark), for the appellants, contended that the Court below was wrong in holding that this sum of £82,500 came under the description of sums expended on capital account. It was certainly not in any sense "expended," and there was nothing in the statute to show that the previous arrangements in 1851 were to be taken into account. The very utmost the Caledonian Company could claim was half of the sum actually paid out of pocket in extending or maintaining the line, if any. But if the shares should be taken to represent the sum expended, then the shares should be taken at the real value of those shares held in 1851, which was only about a quarter of their nominal value. This was the only way of construing the words in the statute in a reasonable way, and with due regard to the natural meaning of words.

Mr J. Pearson, Q.C., followed on the same side.

The Solicitor-General (Baggallay) and Mr Cotton, Q.C., for the respondents, were not called upon.

In giving judgment:—

The LORD CHANCELLOR said, that however able were the arguments that had been addressed to the House, they had failed to convince him that the judgment of the Court below was erroneous, and their Lordships felt that it was unnecessary to call upon the counsel for the respondent. The question was extremely short, and turned mainly on the construction of the 4th section of the statute referred to, which was passed in 1869. At the time that Act was passed two rival companies were about to apply each for powers to work a separate line in connection with their respective railways, but, wisely considering that a double line would be of small profit, agreed to share jointly the same line. It was impossible to look at the general aspect of the Act of Parliament which was then passed to give effect to this arrangement without seeing that the appellants were to bear a fair share in the expenses which had been incurred by the Caledonian Company in reference to the Barrhead Railway up to that time. Now, on looking at the position in which the Caledonian Company stood previously, it was obvious that when they became embarrassed in 1851, and felt themselves unable to pay the rent of £16,500 to the Barrhead Company, and when they agreed to give £82,500 stock to the shareholders in order to reduce that annual sum, this was in effect the equivalent of the reduction which they were expending. The main difference was, that instead of the Barrhead shareholders in future receiving a fixed annual sum of £16,500, they were to receive a fixed sum of £11,437, and the rest was of variable value. The difference was a dividend on the Caledonian stock, which might be more or might be less. But such was the bargain between those two companies. The simple way to look at the arrangement was to ask at whose expense was the reduction made of the rent from £16,000 to £11,000. Plainly it was at the expense of the Caledonian Company, and this, therefore, fairly comes within the meaning of sums expended on capital account. The words used in the Act of Parliament were no doubt not the happiest that might have been chosen to express their meaning, but this was, upon the whole, fairly their result. That construction was also in entire harmony with the other provisions of the Act, which a contrary construction would not be.

Lord CHELMSFORD also concurred, on similar grounds, and thought the construction was plain enough.

Lord HATHERLEY also concurred. The words "sums expended on capital account" clearly excluded all sums of the nature of past rent or income, but they would have included any burden, or charge, or mortgage on the concern if it existed; and though the words were not perhaps happily chosen, still they were fairly susceptible of the meaning put upon them by the Court below.

Lord SELBORNE also agreed. The contrary view which had been expressed in the Court below by Lord Kinloch was put on grounds which when examined were not reconcileable with the use of the word "expended," and if any sum was expended, it was clearly that sum represented by the nominal stock of the Caledonian Company, as distinguished from its actual market value, either in 1851 or 1869. The judgment of the Court below was therefore right.

Judgment affirmed.

Counsel for Appellants—Dean of Faculty (Clark) and J. Pearson, Q.C. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Respondents—Solicitor-General Baggallay and Mr Cotton, Q.C. Agents—Hope & Mackay, W.S.

Friday, April 17.

(Before Lord Chancellor Cairns, Lords Chelmsford and Selborne.)

FOWLER *v.* MACKENZIE.

(*Ante*, vol ix., p. 379.)

Marriage-Contract—Agreement—Condictio indebiti. By antenuptial contract of marriage between A and the daughter of B, in 1825, B bound himself to provide for A "a sum equal at least to that which he has already provided or may hereafter provide to any one of his other daughters." In 1827 another daugh-

ter of B being about to be married, B was desirous to settle £4000 upon her, but was hampered by the marriage-contract provision to A and his wife. B applied to A to assist him, and A wrote a confidential letter to B, saying that he and his wife were content to receive £2000, and would leave the rest to B's honour. The import of the letter was not to be disclosed, and no improper use to be made of it. The letter further set forth that A and his wife were ready to enter upon an agreement on stamp to the effect expressed in the letter. No further use was made of the letter. B died in 1842, and in 1843, his son, C, paid £4000 to A under his marriage-contract. In 1870 C discovered A's letter, and brought an action against him for reduction of the deeds under which the provisions were paid, and for repetition of part of the amount. *Held* (affirming judgment) that the letter in question did not afford ground for reduction, and defender *assoilzied.*

This was an appeal from a decision of the First Division of the Court of Session. The action was brought in the following circumstances:—Mr Fowler, the appellant's father, had four daughters, and on the marriage of Anna with the respondent Mr Mackenzie of Ord, in 1825, he by the marriage-contract engaged to provide to her, and settle on her children, a sum equal at least to that which would be provided to any other of his daughters. In 1827 another daughter, named Isabella, was about to be married to Mr Mackenzie of Allan Grange, and it was the father's desire to give £4000 to this daughter, but he was reluctant to do so, because if he did so he would become bound to pay £4000 also to Mrs Mackenzie. Negotiations took place, and at last, to get rid of the difficulty, Mr Mackenzie the (respondent) wrote a confidential letter, of date 8th December 1827, to Mr Fowler, saying that he and his spouse would be content to receive £2000, "and therefore leave to your own generosity and honourable feelings to put us on an equal footing if your fortune should admit of it. But we grant this letter to you in strict confidence, the import of which not to be disclosed, or any improper use made of it, and on the faith of which we hereby agree to bind ourselves and heirs to enter upon an agreement to this effect on stamp." Nothing more was heard of the letter. The marriage of Isabella then took place, and she received £4000 at Mr Fowler's death in 1842. Mr Mackenzie claimed and received also £4000, the existence of the confidential letter not being known to the appellant, the heir of Mr Fowler. The confidential letter was never discovered till 1870, whereupon the appellant demanded repayment of £2000 as having been paid in essential error, and in ignorance of the confidential letter. An action accordingly was raised for reduction of the deeds under which the provisions had been paid to the respondent, and for repetition of the balance. The respondent stated as a defence that the letter was not binding, and never had been acted on; that the action was excluded by delay and acquiescence; that the payments were made in implement of natural and honourable obligation; and that the sums were *bona fide* received and consumed by the defender. The Lord Ordinary (GIFFORD) found in favour of the pursuer, and held that the respondent was bound to repay the sum of £2000, and 5 per cent. interest. On reclaiming note, however, the First Division, on 15th March 1872, recalled this interlocutor, holding that there was no evidence that Mr Fowler ever acted on the confidential letter and treated it as an obligation, and therefore dismissed the action. The present appeal was then brought.

Counsel for the appellant contended that the judgment of the Lord Ordinary was right, and that the First Division was wrong, and that the confidential letter was as binding as any deed could have been.

Counsel for the respondent were not called upon.

At giving judgment—

LORD SELBORNE said that notwithstanding the full and able arguments of the learned counsel for the appellant, he thought those arguments ought not to prevail, but this was not from any want of ability or zeal on their part. The periods of time in this case were very remarkable. The letter on which the action was founded was dated in 1828, being forty-three years before the date of the action. The payment by mistake was in 1842, about twenty-eight years before the action. Yet those periods, long as they were, did not in point of law operate as any bar to the action, if otherwise the facts could be established. The burden of proof clearly rested on the appellant, and ought to be strictly enforced. The whole merits of the appellant's case consisted in his finding in his father's repositories a confidential letter, dated in 1828, which he never knew of before. But on attending to the facts under which that letter was given, and looking at the words of the letter itself, he thought that it was nothing else than a mere instrument of negotiation which had never been carried out to a final completion, and therefore had never come into operation. It bore on its face strong internal evidence of this. All that it was meant to do was to put into Mr Fowler's power, if he found it necessary, to get a formal deed executed, which would bind not only Mr and Mrs Mackenzie of Ord, but their children, and restrict the rights under their marriage settlement. At that time it was evidently supposed that such a deed could be prepared and executed having such an effect, but the matter never went further than this letter. No subsequent formal contract was drawn up and executed, and from the evidence it appeared that though a draft deed had been prepared, it never got the length of being tendered to the respondent. The whole fabric of the letter thus fell to the ground. It was said the law of Scotland did not allow parole evidence to be admitted to explain these circumstances, but no authority was produced, and none was likely to be forthcoming to the effect that these circumstances could not be inquired into. They did not tend to modify the construction of the letter, and had nothing to do with construction, but they tended to show that it would be a fraud to insist on the letter being acted on when the circumstances under which it could be acted on had entirely ceased. He (Lord Selborne) therefore entirely agreed with the unanimous judgment of the Court of Session, and moved that the appeal be dismissed, with costs.

LORD CHELMSFORD and the LORD CHANCELLOR concurred.

Affirmed with costs.

Counsel for Appellant—Mr Pearson, Q.C., and Mr Mackintosh. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Respondents—Lord Advocate (Gordon), Sir J. B. Karslake, Q.C., and Mr Balfour. Agents—Adam & Sang, W.S.

Friday, April 17.

(Before Lord Chancellor Cairns, Lord Chelmsford, and Lord Selborne.)

MACBETH AND OTHERS *v.* ASHLEY AND OTHERS.

(*Ante*, vol. x, p. 513.)

Licensing Acts (*Scotland*) 16 *and* 17 *Vict. c.* 67, § 11; 25 *and* 26 *Vict. c.* 35, § 2—*Hours of Closing*—"*Particular Locality within any County or District or Burgh.*"

Under 25 and 26 Vict. c. 35, the hours for opening and closing licensed houses are fixed at 8 a.m. and 11 p.m. Section 2 gives a discretionary power to the licensing magistrates to vary these hours "in any particular locality within any county or district or burgh requiring other hours for opening and closing." The magistrates of a burgh defined by metes and bounds a certain part of the same, which included all the licensed houses therein, and passed a resolution that it was requisite that licensed houses in the particular locality thus defined should be closed at 10 p.m. This hour they inserted in the certificates. *Held* (affirming judgment of C. of S.) that the resolution was *ultra vires* of the magistrates, their discretionary power being to select a "particular locality," whereas they had virtually applied the exceptional rule to the whole burgh, an evasion of the statute, and opposed alike to the spirit and the letter thereof.

This was an appeal from a judgment of the First Division of the Court of Session, as to the extent of the power of magistrates to vary the hours of opening and closing public-houses in Scotland.

The Acts relating to public-houses in Scotland now in force are the Home-Drummond Act, (9 George IV.) the Forbes Mackenzie Act (16 and 17 Vict., cap. 67) and the last Act, (25 and 26 Vict., cap. 35). By the first Act no time was defined for opening and closing public-houses. But in the Forbes Mackenzie Act there were certain forms of certificates which specified definite hours for opening and closing the houses, one of the conditions being that the publican should not open his house before 8 o'clock in the morning or after 11 o'clock at night of any day; and that on Sundays the house was to be shut the whole day, except to lodgers and *bona fide* travellers. There was, however, a proviso in both the two last Acts which gave the licensing magistrates a limited power of varying the hours of opening and closing in particular localities. This proviso, as it stands in the latest Act, is as follows:—"Provided always that in any particular locality within any county or district or burgh requiring other hours for opening and closing inns and hotels and public-houses than those specified in the forms of certificates in said schedule applicable thereto, it shall be lawful for such justices or magistrates respectively to insert in such certificates such other hours, not being earlier that 6 of the clock or later than 8 of the clock for opening, or earlier than 9 of the clock or later than 11 o'clock in the evening for closing the same, as they shall think fit." Accordingly, on the occasion of renewing the certificates, the hours of 8 A.M. and 10 P.M. for opening and closing were inserted. The limits of the burgh described in the resolution of the magistrates were so drawn as to include all the public-houses and grocers' shops in the burgh. Though not including the whole of the area in the burgh, this resolution, or rather the proposal to alter the hours in the certificates in conformity therewith, was opposed by the various applicants for the certificates, who appealed to Quarter Sessions against it, but that Court dismissed the appeals, with costs.

The hotel-keepers next raised the present action against the magistrates, contending that the resolution and the certificates founded thereon were illegal and unwarranted by statute, and seeking to reduce and rescind the same so far as regards the alteration of the hours of closing from 11 to 10 o'clock. The defenders replied that the resolution was legal, and within the statutory powers; and further, that such an action was excluded by express sections in the Act, which enacted that no warrant, order, judgment, or decision made by any quarter sessions, justice or justices of the peace, or magistrate, in any cause, prosecution, or complaint, or in any other matters under the authority of the said Acts, should be subject to any form of review or stay of execution on any ground or for any reason whatever. Further, that by section 35 every action or prosecution against any sheriff, justice or justices of the peace, magistrate, or judge, &c., should be commenced within two months after the cause of action. The magistrates passed their resolution on 15th April 1872, and the summons in the action was served on 15th June 1872.

The Lord Ordinary (GIFFORD) held that the action was incompetent, and that the magistrates had acted within the powers given to them by the statute. He thought that it was enough that the area dealt with was only part of the burgh of Rothesay, and that it was immaterial that in point of fact all the public-houses were included in that part. But on reclaiming note against this interlocutor, the First Division were of a different opinion, and held that as the statute gave power only to the magistrates to vary the hours as to a particular locality within the burgh, they had in effec exceeded this power, and had altered the hours as to the whole of the burgh, and this they were not empowered to do. The LORD PRESIDENT, LORDS DEAS and JERVISWOODE, joined in this judgment, while LORD ARDMILLAN hesitated, and was inclined to support the Lord Ordinary, though he did not formally differ from the majority of his Court.

The Magistrates thereupon appealed to the House of Lords.

Argued for the appellants, The question is whether the justices in a county or burgh in Scotland have power to alter the time of closing all the public-houses within their county or burgh, or can only alter the hours as to some of those houses. The Court below has proceeded on the theory that the Legislature intended to allow fifteen hours for the keeping open of houses, and that the magistrates had no power to reduce these hours, except