There are thousands of cases of this kind in an election. [LORD ORMIDALE—It just comes to this, then, in plain language, that it does not matter where you put the cross.] We must show that this was a mistake, otherwise we cannot get the benefit of this clause.

Petitioner's counsel contended that the paper had been so marked that it might lead to identification of the voter, and there was nothing that more affected the result of an election than the question whether A or B was or was not a good vote, and the matter under discussion was, therefore, brought directly under the operation of the Act.

LORD ORMIDALE—This paper must stand over with the others. I do not desire in this way to protract the discussion or the trial of the petition, but I shall consider whether or not to pick out a particular voting paper, and prepare a special case for the opinion of the Court on the general principle, so as to regulate most of this kind of cases. Meantime, parties may just state their other objections of the same kind, and call attention to any peculiarities, when, if necessary, I will hear counsel on them.

The petitioners then objected to various voting papers on the following grounds—that the cross was on the left-hand side of the candidate's name—that the cross was below the name—that the cross was above the name, and that it was marked in a special form—that there was a cross on both sides of the name, each upon the official mark—that the voter had marked his vote by a stroke merely, and not by a cross—that in two voting papers crosses were marked with ink, instead of pencil as in all the other cases, and in one of them the cross was marked in a special form; that in two instances there was a distinctive mark on the lower limb of the cross; that the cross had a mark at each end of it.

On the other hand, the respondent objected to voting papers on these grounds—that the cross was on the left of the candidate's name; that part of the paper was torn off, and that this might lead to the identification of the voter, and also that there was a full stop after the cross; that in addition to the cross, there was a peculiar mark on the paper; that one of the limbs of the cross was made to open out in the form of a loop; that there was a pencil mark beside the cross, and also that the paper was marked on the back; that the position of the cross was peculiar, being in the right-hand corner of its allotted space; that four voting papers were marked, in addition to the cross, with slight pencil marks in peculiar places; and that seven papers were similarly marked over and above the necessary cross.

Certain objections having been repelled as too critical, and as falling under no general rule by which guidance for a future election might be secured, Lord Ormidale ordered counsel to prepare a Special Case, dealing with the reserved objections for the Court, at its ensuing Spring Sittings.

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.

HOUSE OF LORDS.

Friday, March 27.

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

THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY *v.* CALEDONIAN RAILWAY COMPANY.

(*Ante*, vol. ix., p. 407.)

Railway—Obligation—Clause—Construction.

The Caledonian Railway Company had in 1849 leased the Barrhead Railway for 999 years at a rent of £16,500. In 1851, under the Caledonian Railway Arrangements Act, it was agreed that this rent should be reduced to £11,250 per annum, and that the Caledonian Company should issue to the shareholders of the Barrhead Company £82,500 of the ordinary stock of their Company, which was then selling in the market at from 27 to 30 per cent., as the price of the redemption of the £5250 of yearly rent. In 1869 an Act was passed admitting the Glasgow and South-Western Company to share equally with the Caledonian Company in the benefits of the Barrhead lease, upon the condition that the South-Western Company should pay one-half the year's rent, and should repay to the Caledonian Company "a sum equal to one equal moiety of all sums expended by the Caledonian Company on capital account in connection with the Barrhead Railway."

Held that the £82,500 stock issued by the Caledonian to the Barrhead Company in redemption of rent was to be considered a payment on capital account, in terms of this section, and that the Glasgow and South-Western were bound to relieve the Caledonian of one-half, taken at its nominal value.

This was an appeal from a decision of the First Division of the Court of Session. The Caledonian Railway Company raised an action of declarator and payment against the Glasgow and South-Western Company in the following circumstances:—In 1849 the Caledonian Company had taken a lease of the Barrhead Railway for 999 years, and guaranteed a certain dividend on the capital, the annual rent being £16,500. In a year or two later the Caledonian Company, being in depressed circumstances, were anxious to reduce this annual payment, and in order to obtain a reduction from £16,500 to £11,250, they issued to the Barrhead shareholders part of their shares of the nominal value of £82,500. At that time the Caledonian stock was worth only from £27 to £30 in the market. In 1869 the Caledonian agreed with the Glasgow and South-Western Company to share the Barrhead Railway between them, and an Act of Parliament was passed to authorise the arrangement. This Act provided that thenceforth the Glasgow and South-Western Railway Company were to pay half of the rent formerly paid by the Caledonian Company to the Barrhead Company, namely, £11,437; and, besides this, the 4th section enacted that the Glasgow and South-Western Company should "repay to the Caledonian Company a sum equal to one

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-