perty than a policy of insurance, on which premiums have been paid for twenty or thirty years, and on which bonuses have accrued, it cannot be said that he dies without moveable estate, in a question either with creditors or with heirs and executors. These policies, as they stood at the date of his death, must be taken as part of his estate. Then occurs the question, How is their value to be estimated? Three ways are suggested. The first, the value which would be obtained for them if surrendered to the insurance companies, is not a fair mode. It is a matter of notoriety that the surrender value of a policy is always considerably under what it would fetch in the market. I doubt whether the second and third modes of valuation are really alternative or different at all. What the policies would have sold for at the time of Sir John's death can only be ascertained by taking their actuarial value at that date. The parties will adjust this for themselves.

Lord Kinloch—With regard to the questions put to us in the Amended Case, my opinion is as follows:—

1. With reference to the sums recovered under the policy on Captain Pringle's life, and invested on heritable security by Sir John Pringle's trustees, I think they formed heritable succession of Sir John Pringle, and cannot be included as part of his moveable estate. The trustees were acting as Sir John's mandatories; and I see nothing to induce me to think that they acted against their mandate when investing on heritable security, as they did, with his full assent, with regard to the larger part of the estate. Sir John lived for about three years after the investment, and may be fairly presumed to have been aware of it. No disapprobation being found expressed by him, but approbation rather given, I think that this investment must be taken just as if it was an investment made by Sir John Pringle himself, and so left at the date of his death, when there can be no doubt it would enter into his heritable succession.

2. With regard to the two policies on the life of Lady Elizabeth Pringle, I am of opinion that these formed part of Sir John Pringle's moveable estate at his death, on which the legitim is to be estimated. They were Sir John's property, and by their nature payable to his representatives *in mobilibus*. They were capable of being alienated, sold, or mortgaged by him during his lifetime. The date of payment of the sum in the policy was, indeed, not come at his death, and is not yet come, Lady Elizabeth being still alive. But this only made the debt future; it did not make it contingent, in the proper legal sense. It was a fully vested right. The premium must, of course, be paid, in order to keep up the policies; but this is not a legal contingency. It is a condition or burden often attachable to fully vested claims, such as the condition of paying the price in the case of an article purchased, and the like, which never makes the right contingent in a legal sense. There is no arbitrary discretion in Sir John's executors about paying the premium. This, if not done by them, must be matter of arrangement, or judicial order. The policies have a present value in the market, and that value could be raised by a sale. It appears to me that they are as fully part of Sir John's moveable estate as any part of that estate whatever. If they had been policies on the life of any third party, can there be a doubt that they would form assets of Sir John's executry? But if so, it makes no difference that they are on the life of Lady Pringle. If these policies are not part of Sir John's executry estate, I do not see what they are, or to whose estate they belong, or under what legal category they fall.

That these policies are part of Sir John Pringle's executry estate, on which legitim is to be calculated, flows, I think, directly from the decision of this Division in the case of *Muirhead* v. *Lindsay*, Dec. 6, 1867, 6 M. 95. I think that this is an unquestionably sound judgment, and not overruled by any other since pronounced.

3. With regard to the mode of valuing the policies, I do not understand that either party insists for a present sale. The only question is one of value. I am of opinion that the value to be taken is not the surrender value in the office, for this is not the true value, but a consideration for the office taking them back. I do not see how their value on a public sale could be ascertained, except by an actual sale. I think their true value is what is called their actuarial value, that is, their real value as documents of obligation, with the condition of paying the premium, as estimated by men of skill.

The other Judges concurred.

The Court answered the first question in the negative; the second in the affirmative; and, in regard to the third question, found that the policies should be taken as at their real actuarial value as at the date of Sir John Pringle's death.

Agents—John N. Forman, W.S., Davidson & Syme, W.S., and Robert Smith, S.S.C.

Friday, March 15.

FOWLER *v.* MACKENZIE.

Condictio indebiti—*Marriage-Contract Provisions—Agreement.*

R, by antenuptial contract between one of his daughters and O, became bound to provide the spouses and their issue with certain provisions. R died in 1842, and the sums so provided were subsequently paid in full to O by R's son and successor, the pursuer of the present action. In 1870 the pursuer sued O for repetition of a considerable part of the sums so paid, founding upon a letter granted by O and his spouse to R in 1827, and discovered by the pursuer shortly before the raising of the present action, which the pursuer construed as a binding agreement on them to restrict their marriage-contract provisions.

Held (reversing judgment of Lord Gifford), on a sound construction of the letter of 1827, taken in connection with the whole facts as disclosed in evidence, that the letter in question was of a tentative character, which might or might not be acted on in the option of R, and that R's whole subsequent actings showed that he had resolved not to act upon it; and the defender *assoilzied.*

The following narrative is taken from the opinion of Lord Ardmillan:—

"This action has been brought by the present Mr Fowler of Raddery for repetition of certain payments made by him to the defender, Mr Mackenzie of Ord, in 1843. The summons is dated the 12th of December 1870. The ground of action is, that the payments, of which repetition is sought, were

over-payments, either induced by the fraud of the defender, or made under essential error.

"The case is in all respects peculiar, and deserves the most attentive consideration.

"On the facts necessary for its decision there is, with the exception of a very few points, little difference of opinion. A very brief narrative of the undisputed facts is sufficient to explain the position and procedure out of which the disputed facts have emerged.

"The late James Fowler of Raddery, the father of the pursuer, had several sons, of whom the pursuer is the youngest, and is the only survivor; and had four daughters, viz., Isabella Reid, Anna Watson, Jemima, and Lillias Dunbar. In April 1825 Anna Watson Fowler was married to the defender, Mr Mackenzie of Ord. By antenuptial contract of marriage the defender provided for his intended spouse as liberally as his position as proprietor of the entailed estate of Ord enabled him to do. On the other hand, Mr Fowler bound and obliged himself, his heirs, executors, and successors whomsoever, "To make payment to the said Anna Watson Fowler, his daughter, and to the said Thomas Mackenzie, her intended husband, and the survivor of them in liferent, for their liferent use only, and to the child or children of the present intended marriage in fee, of a sum equal at least to that which he has already provided, or may hereafter provide, to any one of his other daughters, leviable in the same manner, out of the same property, under the same penalties, and with interest, as are attached to such provisions, either made or to be made to them." This was an onerous obligation on the part of Mr Fowler, effectual to Mr and Mrs Mackenzie of Ord in liferent, and to the children of their marriage in fee. In December 1827 Mr Mackenzie of Allangrange, a gentleman of ancient family but small fortune, paid his addresses to Isabella Fowler, the eldest daughter of Mr Fowler of Raddery. During the negotiations for this marriage Mr Fowler undertook to provide a sum of £4000 to his daughter Isabella on her marriage; and of course he was well aware of the effect which such a provision would have on the rights of Mr and Mrs Mackenzie of Ord under their marriage-contract. It is manifest from the correspondence in process that Mr Fowler, or, as he is generally termed, Raddery, was disturbed and perplexed by the difficulty created by his large provision for Isabella, with its effect on the marriage-contract provision to Ord and his wife. He had pledged himself to make the provision of £4000 for Isabella, and Mackenzie of Allangrange,—poor, proud, and honourable,—insisted on fulfilment of the pledge. Accordingly, Raddery being in perplexity between his desire handsomely to provide for Isabella, and his knowledge that he must thereby become bound to increase the provision for Mrs Mackenzie of Ord, whom he was bound to put on an equality with the most favoured daughter, appears to have applied to Ord to assist him, and on the 8th December 1827 Ord and his wife wrote and delivered to Raddery the following letter:—

"'*Raddery House, 8th Dec.* 1827.

"'My dear Sir,—As there appears to be a difficulty between you and Allangrange in arranging his marriage settlement with your daughter Isabella, in consequence of a clause in Anna's and my marriage-contract, which would imply that she was to be equal with the rest of your daughters; as it is understood to be your intention to exceed by Two thousand pounds the portion to be given with Isabella, I, for myself and spouse, agree to be satisfied with the sum you have bequeathed or may hereafter bequeath to your other daughters, and therefore leave it to your own generosity and honourable feelings to put us on an equal footing should your fortune 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 heir to enter upon an agreement to this effect on stamp.—And we remain, my dear Sir, yours very truly

(Signed) "'T. MACKENZIE.
"'ANNA W. MACKENZIE.

"'James Fowler, Esq. of Raddery."

"This letter is backed in the handwriting of old Raddery as follows—"Letter, Thomas Mackenzie, Esq. Ord, regarding his spouse, Anna W. Fowler, *alias* Mackenzie's, portion of patrimony."

"On the construction and import of this letter I shall afterwards make a few observations. In the meantime, I proceed with the simple statement of the facts.

"After getting this letter Raddery continued his negotiations with Allangrange, suggesting different plans for accomplishing the object which he had in view, viz., the providing £4000 to Isabella without becoming bound to increase the provision to Anna (Mrs Mackenzie of Ord). During the period between the date of the letter by Ord and the date of Allangrange's marriage, on 9th January 1828, Raddery had a great deal of correspondence with his friend and agent, the late Mr Mackenzie of Applecross. To that correspondence I shall afterwards advert. In the meantime, it is sufficient to state that the letter of 8th December 1827 was never to any extent acted on, or relied on, or referred to as an effectual obligation. Other documents, purporting to be acknowledgments or obligations by Ord, were considered and adjusted, and even extended. But none of them were executed, and none of them were ever presented to Ord for signature, or approval, or consideration. In no single instance did Raddery represent the letter of 8th December 1827 as an obligation which he held as complete and effectual. In the marriage-contract of Allangrange the provision for Isabella was ultimately put in the form of an obligation to pay to Allangrange at the date of the marriage £3000 in name of tocher of Isabella Reid Fowler; and, in addition, the sum of £1000 was paid by Raddery to Allangrange, thus fulfilling the pledge that £4000 should be the marriage portion of Isabella. The effect of this provision undoubtedly was that, unless discharged effectually by Ord and his wife, their right, and the right of their children, to an equal portion necessarily arose. I do not think that, apart from the letter, a right to demand immediate payment of £4000 arose to Ord at the date of Allangrange's marriage. The true effect was equivalent to the introducing into Ord's marriage-contract of the sum of £4000 as the provision for his wife and children, with interest added, on the death of Raddery, to produce equality of provision. I am disposed to think that a demand for immediate payment could not have been made, apart from any effect of the letter of 8th December 1827. But on the death of Raddery, when the contract provision became due, I think that Ord would have a claim for the same sum, and for equalizing interest, so as to secure ultimate equality in the provision. As I read the decision in the case of

Macqueen v. *Naysmith*, Jan. 29, 1831, 9 S. and D. 355, it does not support a claim for immediate payment, but only a claim for an equal portion, involving a claim for interest so as to produce equality. If I am right in this view of the effect of the two provisions, then this important fact is introduced into our brief history of the procedure, viz., that Ord could make no demand under his contract during the life of old Raddery, even if no such letter had been written as that on which the present case chiefly turns. Therefore Ord did not, by refraining from making such claim, act on the letter. On the other hand, Raddery never acted on the letter, either between its date and the date of Allangrange's marriage, or during the many years which elapsed between that marriage and his own death in 1842. The letter, therefore, was in point of fact never acted on, nor founded on, nor referred to, by any person from its date in 1827 till Raddery's death in 1842.

"After the death of old Raddery in 1842, the present pursuer, his only surviving son and his heir, paid to the defender £2610, 8s. 2d. and the sum of £1000, these two sums being the amount of interest due on the marriage-contract provision from the date of Ord's marriage to the date of payment. Bond was at the same time given for the principal sum of £4000 due under the contract. This payment was made in 1843. The pursuer was then considerably above majority, and he had the benefit of judicious and experienced advisers. In particular, he had the advice of Mr Mackenzie of Applecross, who had been his father's agent in the adjustment of both marriage-contracts. The defender and the trustees of the late Raddery took the opinion of Mr Adam Anderson.

[This action has been brought for declarator that the provision payable to the defender and his spouse, and their issue, under his marriage-contract, in so far as the defender or his wife had any interest in the said provision, did not exceed the sum of £2000, and was not payable, and did not bear interest, prior to the death of the late James Fowler; and for repetition of all sums paid in excess of this, with interest], "in respect that these sums were paid under mistake, the payment having been induced by fraud or by essential error. The mistake, however induced, is said to have arisen from ignorance on the part of the pursuer of the said letter of 8th December 1827, which letter is said to have been discovered only recently in the repositories of the late Raddery. It is maintained that this letter is a sufficient answer to the claim of Mr and Mrs Mackenzie of Ord under their marriage-contract, in so far as regards their liferent interest. Mrs Mackenzie is now dead, but a son of the marriage survives.

"It thus appears that this action is one of *condictio indebiti*, and the ground of action is that in 1843 there was payment of a debt not due.

"Serious charges of fraud have been made on the record against the defender. I am of opinion that for these charges, whether of fraudulent misrepresentation, or deception, or wilful concealment on the part of Ord, there are no grounds instructed by the proof. On this point I have no doubt, and, indeed, the proof must have satisfied the pursuer, for I do not understand that the charges of fraud were maintained in argument at the bar. Still, if essential error be clearly instructed, there may be ground for this action. But in a case where the settlement took place in 1843, and the action is raised in 1870, and where the payments were made by a gentleman of full age, and having legal advisers, the burden of instructing the existence and the effect of the alleged mistake rest on the pursuer, and must be serious. There is always a certain amount of presumption against a *condictio indebiti*. That presumption is justly and greatly strengthened when fraud is alleged and is negatived on the proof. *It is still* further strengthened here by the long lapse of time, and by the whole circumstances under which the alleged payment was made.

"I do not enter on the question as to the time and circumstances of the discovery by the pursuer —it is said in March 1870—of this letter. The explanations are not altogether satisfactory, but it is, at least, certain that the letter was not found at the usual time or in the usual place for discovery of writings meant by the deceased to be effectual as bearing on the disposal of his estate. The letter had not been placed by the late Raddery where it might have been expected to be if he had considered it an important document. It had not been deposited by him among his family papers of importance, and was plainly not viewed by him as a muniment of family interests, and an aid and support to settled family arrangements. On that letter, and on that letter alone, the present action rests."

After a proof, chiefly consisting of a voluminous correspondence, the Lord Ordinary (GIFFORD), on 23d November 1871, decerned against the defender in terms of the conclusions of the summons.

"*Note.*— . . . . In substance, the action is a *condictio indebiti;* and on considering the whole deeds, the oral evidence, and the voluminous documentary evidence, the Lord Ordinary has come to be of opinion, *first*, that there was *indebiti solutio;* that the sums paid to the defender, or for which he got bonds and securities in 1843, were not *truly due* to the defender at that date; and *second*, that, in justice and in equity, these sums, with interest, must now be repaid to the pursuer, and that there are no legal or equitable grounds sufficient to bar the *condictio*. . . . .

"1. By the defender's marriage-contract the late Mr Fowler, the defender's father-in-law, became bound to provide the defender and his spouse, and their issue, with a sum equal at least to that which he has already provided or may hereafter provide to any one of his other daughters, payable in the same manner, with the same interest, &c., as such other provisions.

"There can be no doubt that this was a binding and onerous provision, constituting the defender, his wife, and family, creditors of Raddery.—See *Macqueen* v. *Naysmith*, Jan. 29, 1831, 9 Shaw, 355. It can hardly be doubted, however, that the defender and his wife might, if they chose, modify or discharge their rights, although they could not affect the interests of their children. This was not seriously disputed in argument.

"2. The defender and his wife wrote, subscribed, and delivered to Raddery the letter of 8th December 1827, shortly before the marriage of another of Raddery's daughters to Mr Mackenzie of Allangrange. The letter is holograph of the defender. It is signed by the defender and his spouse, and it was delivered to Raddery at or about the date it bears.

"3. It was *retained* by Raddery, was *never given up* or *cancelled*, and it remained in his repositories till his death in 1842.

"4. The letter was followed—while it remained in the possession of and was retained by Raddery —by the marriage of Miss Isabella Fowler to Mr Mackenzie of Allangrange, on occasion of which marriage Raddery settled upon Allangrange, his spouse, and family, partly by marriage-contract and partly in another form, the sum of £4000, then instantly paid.

"The letter of 8th December 1827 is the most important document in the whole case—upon which, indeed, the whole case centres and turns. The Lord Ordinary cannot read it otherwise than as a valid and effectual discharge by the defender and his spouse, so far as they themselves were concerned, whereby they relieved Raddery of his obligation to make them equal to Mrs Mackenzie of Allangrange, and bound themselves to be content with a provision equal to what Raddery might give to his other daughters. The terms of the document have been severely criticised; but fair effect must be given to it, according to its true meaning, and keeping in view the surrounding circumstances.

"The fact that, in precise accordance with the narrative in the letter, Mrs Mackenzie of Allangrange was provided with £2000 more than the other daughters—£2000 being the very excess mentioned in the letter—is very striking, and goes far to support the letter, as followed *rei interventu*, in the strongest possible way. But for the letter, and looking no farther at present, it seems fair to hold that Raddery would not have settled £4000 on Isabella, seeing that £2000 was the sum he contemplated each daughter should receive. So far as we have gone, therefore, the Lord Ordinary holds the letter to have been binding and obligatory on the defender.

"5. The Lord Ordinary thinks the letter was acted upon, or must be held to have been acted upon, *during Raddery's life;* for although the defender and his spouse knew that Allangrange had got *instant payment* of £4000, or at least of £3000, they made no claim whatever upon Raddery, which, but for the letter, they would have been entitled to do.

"No satisfactory explanation of this failure to claim from 1827 to 1842 has been given. The theories as to proposed restrictions, postponement of payment, &c., are not sufficiently supported. This, of course, confirms the Lord Ordinary's view that the letter was granted by the defender, was held by Raddery, and, in its nature, constituted a binding and conclusive agreement.

"6. The Lord Ordinary thinks that the defender has failed to show that the letter was passed from, superseded, or became inoperative in consequence of other and different arrangements.

"There the *onus* is on the defender; and he submitted, by his counsel, a very ingenious argument, founded partly upon the oral evidence, but chiefly on the correspondence between Raddery and Applecross, his agent, and others, in 1827 and 1828. To the oral evidence the Lord Ordinary cannot attach much weight. It will never do for the defender himself to say that the letter was passed from, or declared to have been so, by Raddery. Evidence like this is incompetent, just as it would have been if the question had arisen with Raddery himself during his life in an action by the defender to enforce an instant provision of £4000.

"The correspondence and documents are in a different position, though here, too, it may well be doubted how far they can be founded on by the defender. Expressions of opinion of feeling or of apprehension, occurring in communings between Raddery and his own agent, will hardly do to cut down a deed which Raddery deliberately took from the defender, and carefully kept among his muniments. But, supposing the whole documents admissible in evidence, the Lord Ordinary thinks that, fairly read, they have not the effect of cancelling, or of passing from, or declaring void, the letter of 8th December 1827. It is needless to go into detail. Raddery does not seem to have been very straightforward even with his own agent; and the Lord Ordinary thinks that Applecross himself never saw or knew of the letter of 8th December 1827. The Lord Ordinary can find nothing which he can now read as equivalent to a cancellation of that letter. It is to be kept in mind that not a word of all these letters and documents was communicated to the defender. His position was, that he *granted* the letter, and remained as an obligant, bound thereby, the letter being retained by Raddery.

"7. The result is that, at Raddery's death in 1842 the letter was a binding and valid obligation, and barred the defender and his wife from claiming any larger provision than that which Raddery had left to *each* of his two younger daughters.

"8. The provision to each of the two younger daughters was £2000, payable on Raddery's death; and although negotiations for the marriage of one of these daughters had been begun verbally during Raddery's life, and a contemplated provision of £3000 *mentioned*, neither of the two younger daughters could claim, as of right, any larger sum than £2000. . . . .

"9. After Raddery's death, the present defender claimed, *as of right*, a provision equal to Isabella—that is, £4000—with interest from his marriage; and this claim, after consulting counsel (Mr Adam Anderson), was admitted and paid. But

"10. The letter of 8th December 1827 was at that time *not known* to the present pursuer or to his advisers, or, so far as appears, to anybody but the defender himself. This seems sufficiently established. The pursuer was a mere boy when the letter was granted; and whether it was found in 1868 or in 1870 is immaterial for the present point. It was unknown to him in 1843. The letter was not before counsel, it was not mentioned in the memorial, and the settlement proceeded on the footing of no such letter being in existence—that is, that there was nothing to restrict the terms of the defender's marriage-contract.

"Now, the Lord Ordinary thinks that there was here *ignorance* or *error* of an essential point on the part of the pursuer and his advisers. They certainly did what they would not have done had they known of the letter. They paid a debt in full which had been to the extent of one-half discharged; and they did this in mistake, and through ignorance that the discharge existed. Now, the Lord Ordinary thinks that this would have been enough by itself, even although there was no ground for saying that the ignorance or error was '*induced by the defender*.' Suppose the defender *bona fide* believed that the letter had been cancelled, it would then be a case of mutual error, both parties mistaken, and excusably mistaken, *in essentialibus;* and this is the proper case for restoration *in integrum*. It is unnecessary, however, to consider this point abstractly, for

"11. The Lord Ordinary cannot help thinking that the defender was not justified in remaining *silent* regarding the letter. The defender says he was just going to mention it to Applecross in 1843,

when Applecross 'hushed him up,' as if he knew it. The Lord Ordinary thinks Applecross never knew of that letter. He has looked anxiously for evidence of such knowledge, but has found none; and he cannot doubt that, if the letter had been disclosed to Applecross, it would have been laid before counsel, and a very different result reached. Nobody but the defender knew of the letter. Its importance he was not, and does not pretend to have been, ignorant of; and the Lord Ordinary cannot help thinking that, in honour and fair dealing, as well as in law, the defender was bound to have mentioned it. The Lord Ordinary imputes no motives. The defender may quite conscientiously have believed that the letter had been cancelled, or that it was never binding at all, or that it was a mere temporary thing, which flew off by not having been extended upon stamped paper. In short, he may have honestly believed any of the pleas which he now sets up; but he was not to be the final judge of the validity of these pleas; and his honesty and good faith will not relieve him from the fair equitable consequences of a failure to mention or disclose a document so closely bearing upon the claim in which he was insisting.

"12. Nor can the Lord Ordinary refuse all weight to the somewhat confidential relationship which subsisted at that time, and which continued for some time afterwards, between the defender and pursuer.

"This formed a large topic in argument, and was much insisted in. It is enough to say that there seems to have been a greater duty on the defender towards the pursuer than if they had been absolute strangers. . . . .

"15. It is farther thought that the pursuer's ignorance of the document in 1843, and his continued ignorance thereof till 1870, was excusable, or, at least, that any negligence will not avail the defender as a bar. The pursuer is not a business man, his evidence showed that he was not a person of acuteness or of much energy,—at least, this was the impression on the Lord Ordinary's mind. He never had the remotest idea that such a letter was in existence; and nothing ever occurred to make him suspect its exisience, or induce a search. Its discovery was accidental; but the Lord Ordinary thinks that the late period of discovery does not bar the action, for

"16. The document is not prescribed, though forty-four years old. As a discharge, it did not prescribe; and no action could have been founded on it till 1843, when the defender's claim was made.

"*Lastly*, There was no equitable obligation on Raddery sufficient, in the sense of the law, to bar repayment of the sum paid in mistake.

"This bulked largely in argument; and calculations were submitted to show that, in honour and fairness, Raddery was bound to make the defender equal to Allangrange. The circumstances of the family, the increase in the value of property, and other circumstances, have all been pressed into the service, to show that, although Raddery could not have been compelled to pay the defender £4000 and interest, he ought in honour to have done so.

"With every wish to give the defender the benefit of what, in some aspects, may seem an equitable plea, the Lord Ordinary has felt himself unable to go into this view. The letter left the matter to Raddery's 'own generosity and honourable feelings,' and to nothing else. Raddery's feelings, or Raddery's generosity, did not lead him to cancel the letter, or restore the marriage-contract. The Lord Ordinary cannot put himself in Raddery's place, and say that he ought to have had other and more generous feelings. Where would this end? for every appeal on the part of the defender to Raddery's generosity or honour might be made much more strongly for both the younger daughters. It is quite otherwise where there is a natural obligation, though one not legally enforceable."

The defender reclaimed.

WATSON and BALFOUR for him.

SOLICITOR-GENERAL and MACINTOSH for the pursuer.

At advising—

LORD ARDMILLAN—After this statement of the facts [quoted above], I now request attention to the import of the letter—to the conduct and proved opinion and intentions of Raddery himself in regard to it,—to the settlements subsequently made by Raddery, as bearing upon the marriage-contracts of his elder and of his younger daughters respectively, and to the inference to be drawn from these considerations.

The letter subscribed by Ord and his wife is a very peculiar document. I cannot altogether adopt a suggestion of the defender's counsel, that it had no force till followed by an agreement on stamp. But I think it plain from the words of the letter, and plainer still from the proved and admitted circumstances under which it was written, that it was not intended to be acted on immediately and under all events. Further consideration, and further efforts to remove the difficulty with Allangrange, and further communication of some kind to Ord, with strict confidence in the meantime, and the avoiding of "any improper use" of the letter, are evidently contemplated. That Raddery might so arrange the difficulty with Allangrange, or might so adjust his own family settlements, as to find it unnecessary to use the letter, was contemplated as probable. In other words, the discharge by Raddery of all claim which could be made on Ord in respect of the letter, was quite possible; and if Raddery came to that determination, further communication with Ord on the subject was not necessary; Raddery would simply throw the letter aside. If he meant to act on the letter, the natural and proper course for him to take was to communicate with Ord on the subject. This, as I have already explained, Raddery never did. So far as can be gathered from his conduct, and so far as appears from the correspondence, he never did a single thing to indicate that he acted on this letter. It has been suggested that Ord acted on the letter, by not demanding the provision immediately, because, but for the letter, the provision of £4000 to Isabella would have given him a right to immediate payment of the same sum. But this is a mistake. It would only have given him an ultimate right to interest, so as to produce equality. That claim he could not be expected to make during Raddery's life. The letter never was acted on by any one, and no communication of any kind was ever made by Raddery to Ord on the subject of the letter, or on the subject of the effect on Ord's own marriage-contract, during the long period between 1827 and 1842.

In an important letter by Raddery to Mr William Ivory, dated 10th September 1828, we find that, having resolved to provide £2000 to each of his two unmarried daughters, he speaks of the provisions made to his married daughters in

this manner—"My married daughters being already provided for by contract of marriage, beyond the portions to their two younger sisters" (that is, beyond £2000 each), "I would incline that, in failure of issue of my four sons, the succession of my estates should devolve in favour, first, of my said two unmarried daughters, and the survivor and the issue of their bodies respectively, in the order set forth in the draft." Accordingly, in a supplementary deed of entail, executed by Raddery on 27th November 1840, we find that, after his sons in their order, his unmarried daughters Jemima and Lillias, with their heirs, are called in succession, and after them his daughter Isabella, wife of Allangrange, and his daughter Anna, wife of Ord, are called in succession. In this way he fulfilled his intention of compensating the younger daughters for the smaller provision given to them than what he had given to his two elder daughters. Now, as the provision to each of the younger daughters was £2000, it follows that, both in September 1828 and in November 1840, Raddery believed and intended that the provision to Mrs Mackenzie of Ord, as well as the provision to Mrs Mackenzie of Allangrange, must have exceeded £2000. But this it would not have done if the letter of 8th December 1827 received full effect, as contended for by the pursuer. This gives us an insight into the real mind of Raddery, and, I think, instructs his understanding and intention that his elder daughters, the wives of Ord and Allangrange respectively, were on an equality in respect of contract provision, and that the provision exceeded £2000. Looking to these family settlements of Raddery, it is to me not surprising that he did not put this letter up with his settlements, or refer to it in his settlements, or treat it as in any way a family document bearing upon the disposal of his estate. It would have been altogether out of place. It would have been in unnatural and unreasonable association with settlements in regard to which it was altogether inconsistent. It was far more natural, and more in accordance with the real evidence of his intention, that he should have thrown it aside or destroyed it, and I think he had thrown it aside and forgotten it, and that it was a mere accident that he had not destroyed it. Four sons out of five had been removed by death; he had means sufficient to provide for his remaining son and for his daughters, and, looking down the whole course of his life from the date of the letter, I see nothing on his part to indicate an intention of acting on it.

But, as I have already explained, the rights under Ord's marriage-contract were to the spouses in liferent, and their children in fee. The obligation was equally onerous in regard to the spouses and to their children. The rights were indeed legally capable of separation. The parents could by writing clearly expressed discharge in whole or in part their liferent interest. They could not validly discharge or restrict the obligation in favour of their children. No attempt is made in the letter by Ord and his wife to distinguish between their own interest as liferenters, and the interest of their children as fiars, and if I am not mistaken, a child was alive at the date of the letter. It is manifest that the terms of the letter were as Raddery wished, and that the letter was received by Raddery, as well as written by Ord, without regard to any such distinction: But, between the date of the letter and the date of Allangrange's marriage, Raddery communicated with his agent Mr Mackenzie of Applecross, and took legal advice, not indeed in regard to the letter itself, which, so far as I can see, he does not appear to have sent or mentioned, but in regard to Ord's power, with concurrence of his wife, to restrict the claim under the marriage-contract; and he was advised by Mr Robert Jameson, Advocate, that the parents could not discharge or restrict the right of their children. The effect of this conclusive explanation of the law on the mind of Raddery is obviously an important element in this cause; and we have the means of ascertaining it. The correspondence between Raddery and his agent Applecross is before us. It is said that this correspondence is confidential, and that the Court cannot consider it. I am humbly of opinion that, under the very peculiar circumstances in which this correspondence is presented to us, our consideration of it is not excluded by the plea of confidentiality. Its date is long prior to any dispute.

Old Raddery is now dead; and he died without once communicating with Ord about this letter, or in any way indicating his reliance on it, or his intention to act on it. We are seeking to know his real mind and feeling and intention on the subject. The letter, on which he himself never acted, is found forty years after its date, in a position and under circumstances inconsistent with his recognition of it as having any relation to his family settlement. So far as we can now judge from his conduct and his settlement, there is nothing whatever to lead us to the conclusion that if he were alive now he would use and enforce this letter as a restriction of Ord's rights. He is gone; but of his true mind and intention we can obtain some amount of evidence or indication from these letters to Applecross. There is no confidentiality in regard to them as in a question with this pursuer, forty years after their date. The great object is to ascertain how Raddery himself viewed this letter—whether he retained it as a document to be acted on, or whether, on finding that it was not a discharge or restriction of the whole provision, he did not give up all idea of acting on it, and betake himself to other modes of adjusting his difficulties with Allangrange. Ord has himself sworn that Raddery told him that he had consulted Applecross, and that he had made an arrangement with Allangrange by which Ord would be relieved from "trouble and bother in the matter;" and the exclusion of the evidence to be found in the correspondence with Applecross would be the shutting out of the light, a thing to be avoided if possible, and to which I think we are not here compelled by any rule of law.

I should be trespassing too long on your Lordships' time if I were to read or even to point out the many passages in the correspondence between Raddery and Applecross, which lead me to the conclusion—(1) that Raddery, without actually communicating the letter to Applecross, spoke of it, not as an immediate binding obligation, but as "an assurance" or "an understanding" to be followed by an agreement not yet obtained, but to be afterwards granted if required; (2) that Raddery understood the assurance, such as it was, to be open to consideration, and contingent on being required, and to relate to the whole provision, fee and liferent; (3) that on being advised by Mr Jameson that the spouses could not discharge or restrict the fee, Raddery suggested and considered different modes of getting over his difficulty with Allangrange, and particularly a plan of putting a

smaller sum in the contract, and giving a present in addition, such plans being irrespective of any surrender by Ord of his marriage-contract rights, and not being very palatable to the high spirit of Allangrange; (4) that Raddary never transmitted to Ord for his consideration or signature any of the drafts of discharges or agreements which from time to time were suggested as devices, instead of the letter which had been ascertained to be unsuitable, and (5) that, on more than one occasion, Raddery stated in these letters that he had come to an arrangement which precluded the necessity of any further agreement with Ord; and more particularly in a letter to Raddary dated 4th Decembbr 1827, Applecross suggests, with reference to a supposed right in Ord to demand immediate payment, that as "the intention of all parties must have had reference to payment after your death, Ord and his lady can scarcely decline to retranscribe and sign the letter of which I annex a form." That form of a proposed letter was annexed, and it related only to the surrender of a claim for immediate payment. To this proposal by Applecross, Raddary replies on 27th December 1827, by making a strange suggestion about leaving the amount of Isabella's portion blank in the contract; and he then adds—"I hope I may obtain from Ord and spouse such a letter as you have proposed, to meet the question of claiming their provision unseasonably"—in other words, claiming immediate payment and during Raddery's life. That proposed letter was never communicated to Ord or sent to him for signature. The ultimate plan adopted was that Mrs Mackenzie of Allangrange got £3000 of marriage-contract provision "in name of tocher," the sum having been left blank in the contract, and the words filled in by Raddery himself; and she also received £1000, thus fulfilling the pledge to give her a portion of £4000.

Now, on considering this correspondence, in addition to the other evidence from the conduct and settlements of Raddary, to which I have adverted, I have come to the conclusion that the letter of 8th December 1827 was not written or received for the purpose, or with the intention, of being immediately and under all circumstances acted on; and that Raddery on ascertaining the true bearing of Ord's contract, and the want of power in the spouses to bind the children, did not thereafter retain that letter as an obligation by Ord and his wife in regard to their liferent, but arranged to his own satisfaction the Allangrange contract without any reference to Ord's letter, and, from that date till he died, never in any way indicated an intention of acting on the letter, while his settlement proceeded on the footing of Ord's marriage-contract provision remaining undischarged.

If, after the date of Raddery's own settlements and entail in 1840, he had, in answer to a demand by Ord, himself produced and founded upon this letter as a bar to Ord's claim for the contract provision, I am disposed to think that he would have had great difficulty in rearing up, *post tantum temporis*, and notwithstanding all his previous conduct, the terms of discharge in that letter as a bar to a demand for fulfilment of his onerous obligation in Ord's marriage-contract.

But, however that may be, we have no such case here. We are here in a very different case. Raddary died without ever attempting to enforce this letter, and nothing was really done on the faith of it; and the attempt by his heir, who says he has found it in his father's repositories, now to use it as a ground for reducing and setting aside a settlement which, not without consideration and not without advice, was made in 1843, ought not, I think, to succeed.

There is no fraud in the case. Ord may honestly have believed,—I do not doubt that he did believe,—that his letter, which had never been acted on, or mentioned to him, had been thrown aside and departed from. Applecross was alive at the date of the settlement in 1843, and was advising the pursuer. He knew better than any one old Raddary's real mind, and all the circumstances which occurred at and after the marriage of Allangrange; and he sanctioned the settlement as advised by Mr Adam Anderson. He did know of a temporary understanding, or an "assurance," though he may not have seen the letter, but he never mentioned it to Ord. I cannot say that there was essential error, the only error being the ignorance of the existence of this old letter. I cannot say that there was *solutio indebiti*, and therefore I do not think that the pursuer ought to succeed in this action, which is *condictio indebiti*.

In a legal point of view, I feel that there is difficulty and delicacy in this case. I have given it my best attention, and the result is my conviction that the truth and justice of the case is with the defender;—that there is no opposing principle or rule of law; and that the interlocutor of the Lord Ordinary should therefore be recalled, and that the defender should be assoilzied from the conclusions of this action.

LORD KINLOCH—This action bears reference to rights arising under the marriage-contract of the defender, Mr Mackenzie of Ord, dated 26th April 1825, engaged in on the occasion of his marriage with Anna, second daughter of the late Mr Fowler of Raddery, the pursuer's father. Under this contract, Mr Fowler became bound to pay to the spouses in liferent, and their children in fee, "a sum equal at least to that which he has already provided, or may hereafter provide, to any one of his other daughters, leviable in the same manner, out of the same property, under the same penalties, and with interest, as are attached to such provisions." On 9th January 1828 Mr Fowler's eldest daughter, Isabella, was married to Mr Mackenzie of Allangrange, and received from her father a portion of £4000, payable at the solemnization of the marriage. After the death of Mr Fowler in 1842, the pursuer, his heir, settled with the defender on the footing of his being entitled to a similar sum of £4000, similarly payable; and in May 1843 he granted a bond for that amount, payable to the spouses in liferent, and the children of the marriage in fee, besides otherwise settling for the interest. In 1847 the sums so engaged for were paid; and in 1849 a mutual discharge passed between the parties. In December 1870, twenty-one years afterwards, the pursuer raised the present action, on the ground that on 8th December 1827 the defender and his wife had granted a letter to Mr Fowler, of which, till recently before the date of the action, he was ignorant, agreeing to restrict their claims under the marriage-contract to what the two younger daughters might receive, which was £2000 each: and that therefore the larger sum actually paid had not been due. He concluded, in substance, for repayment of the excess, so far as regarded the personal rights of the defender and his wife. The Lord Ordinary has given effect to his demand.

I am of opinion that the Lord Ordinary has come to an erroneous conclusion; and that the defender is entitled to absolvitor.

The action is, in the proper sense of the word, a *condictio indebiti;* and its decision must be ruled by the considerations proper to such a case. It is necessary to take into view not only the nature of the alleged debt, abstractly considered, but the whole circumstances in which the payment was made; for it is scarcely necessary to say that even a debt not legally due may be so paid as to bar a demand for repayment. An obligation capable of being enforced may have been so dealt with as to be waived or discharged; and he who has settled with another on the footing of such discharge may not be entitled to have himself restored against the settlement by an alleged *condictio indebiti.* Illustrations of this are familiar to every student of law. The pursuer, who has in this case emphatically the *onus* laid on him, must establish, first, that to the extent to which repayment is sought no debt was due by the late Mr Fowler to the defender Ord; secondly, that the payment, notwithstanding made by him, was made in such circumstances as, according to the rules legally applicable to the *condictio indebiti,* entitles him to insist on repayment. His first step is to make out, clearly and beyond a doubt, that no debt was due.

A proof at large was allowed by the Lord Ordinary to both parties, by an interlocutor affirmed by the Court. This was necessary to the determination of the case, which, as already said, involves a consideration of the whole circumstances connected with the payment. The deductions from this proof are now to be considered.

No doubt is stirred as to the completeness of Mr Fowler's obligation in the marriage-contract of the defender Ord to pay to him and his wife a portion equal to that which any other daughter might obtain. Nor is it now disputed that Allangrange received with the other sister a sum of £4000, payable as at the date of the marriage. An attempt was, at the time, made by Mr Fowler to conceal the magnitude of this last-mentioned portion. But no doubt is now stirred on the subject.

Mr Fowler's contemplated arrangement, it is further established, was to give to each of his daughters a sum no greater than £2000. But in negotiating, in the end of 1827, the marriage of Isabella with Allangrange, he had got himself committed to make good to that gentleman, whose circumstances required relief, a sum of £4000, immediately payable. Mr Fowler is shown to have been anxious so to deal with the matter as to make £2000 of this a marriage portion, and to supply £2000 by way of loan to Allangrange. But Allangrange objected to this course, and stood out for £4000 of marriage portion. Mr Fowler was much annoyed by this, because, looking to the necessity of making provision for several sons, and other pecuniary demands, he felt that to pay £4000 to Allangrange, and an equal sum to the defender Ord, would be to undertake a burden beyond his existing capacities.

In this state of things, and while the negotiations with Allangrange were still not finally completed, Mr Fowler took from the defender Ord and his wife the letter of 8th December 1827, on which is laid the whole case of the pursuer. This letter sets out by stating that "there appears to be a difficulty between you and Allangrange in arranging his marriage settlement with your daughter Isabella, in consequence of a clause in Anna's and my marriage-contract, which would imply that she was to be equal with the rest of your daughters, as it is understood to be your intention to exceed by £2000 the portion to be given with Isabella." On this narrative the letter goes on to say—"I, for myself and spouse, agree to be satisfied with the sum you have bequeathed, or may hereafter bequeath, to your other daughters, and therefore leave it to your own generosity and honourable feelings to put us on an equal footing, should your fortune admit of it. But we grant this letter 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 heir to enter upon an agreement to this effect on stamp."

I do not doubt of this being in its terms a restriction of their claims under their marriage-contract by the defender Ord and his wife; and although reference is made to the agreement being put on stamp paper, I do not think that the validity of the obligation was made contingent on the formal deed being executed. But the reference certainly implies that a more formal deed was contemplated. Not only so; the letter in its terms contemplates that a case might occur in which the letter would not be acted on; the case, namely, in which Mr Fowler's own sense of what was generous might prompt him to keep both daughters on the same footing. In such a case, what would happen would be simply that the letter would be thrown aside. In the meanwhile, the letter was "not to be disclosed, or any improper use made of it,"—meaning evidently, as I think, was not to be communicated to Allangrange, so as to fortify him in his demand, by the consideration that to grant it would not now involve such heavy consequences to Mr Fowler.

Allangrange continuing immoveable, draft heads of a contract of marriage, embodying a marriage portion of £4000, were adjusted between him and Mr Fowler on 10th December 1827. These were sent by Mr Fowler, on 12th December, to his agent in Edinburgh, Mr Mackenzie of Applecross. There ensued between them a variety of communications, of great importance in the case. A doubt has been stirred as to the competency of making these evidence, as being confidential communications between agent and client. I do not participate in this doubt. Independently of the principle that in a *condictio indebiti* there is the widest latitude of evidence as to the surrounding circumstances, I think the fact of the letter of 8th December 1827 pointing to the execution of a formal deed, fairly opens up the communications between Mr Fowler and Applecross, as to the execution or non-execution of such a deed, and the reasons for either the one or other. The further circumstance, which will immediately be seen established, of Ord being made cognizant of these communications and their result, makes it, I think, both competent and necessary that their precise tenor should be shown.

Mr Fowler's letter to Applecross, of 12th December, inclosing the heads of the proposed contract with Allangrange, expresses the difficulty which Mr Fowler felt in consequence of the terms of Ord's marriage-contract; and, concealing the letter of 8th December, which Ord and his wife had signed, he says—"This delicate point might be got over by an instrument from Ord in such form as you may deem advisable, renouncing, in the meantime, any claim on the part of himself and spouse, of any further sum in way of portion and

patrimony than £2000, as provided by my settlement and testament to each of my daughters, except so far as my good will or future circumstances will warrant me in doing."

In his answer of 14th December, Applecross gave Mr Fowler the doubtless startling intelligence that any restriction by Ord and his wife would be ineffectual to diminish the claim under the marriage-contract, so far as the capital was concerned, or, as stated by Applecross—"Your obligation in Ord's contract of marriage cannot, I am afraid, be altered or annulled by him or Mrs Mackenzie, as they have merely a liferent interest in the provision thereby stipulated for; the fee or capital belonging to their children, the trustees for whom could not confirm any deed granted by the parents tending to diminish their, the children's, claims under the contract." He, at the same time, suggests an arrangement with Allangrange, which Mr Fowler in reply told him he thought could not be accomplished. With regard to the intimation that any restriction by Ord and his wife could not affect their children's interests, Mr Fowler instructed Applecross to consult counsel. Applecross, on the 20th December, sends him the opinion of Mr Robert Jamieson on an A.B. case, to the effect that "the children of A. (Ord) being the fiars of the provision to be made under this obligation, it is impossible for A. or his wife validly to discharge or restrict the obligation in so far as regards the fee."

With this opinion Applecross sends the draft of a deed of restriction, which he thinks Ord and his wife might still be asked to execute, "trusting to their children confirming the solemn and voluntary deed of their parents." Mr Fowler, in reply, writes on the 22d December that "Allangrange and I have come to an arrangement to reconcile and obviate the pending difficulty." He adds, "The post has just handed me your esteemed favour of the 20th current, covering counsel's opinion on the clause in Ord's contract, which is decisive on that point. Hence, it is well I had yesterday come to an arrangement, as above stated, to meet the delicate point, which arrangement precludes the necessity of any further agreement with Ord."

It is not, I think, necessary to say much on the arrangement with Allangrange here referred to. It seems to have amounted to this—that the sum to be inserted as marriage portion in his contract was left blank in the extended deed till the contract came to be signed, when Mr Fowler filled it in with his own hand as £3000, giving Allangrange a separate letter of obligation for the additional £1000. It is difficult to see how this arrangement should have contented Mr Fowler, as it still gave to Allangrange the full £4000, although only £3000 were ostensibly given in the contract as marriage portion, and might, perhaps, be represented as all that the marriage-contract gave. But whatever Mr Fowler might think on this point, I can only put one interpretation on his statement that the arrangement was such as "to reconcile and obviate the pending difficulty," and, again, "which precludes the necessity of any further agreement with Ord." These last words can have only one meaning attached to them. It cannot be maintained with any reason, as argued before us, that all that Mr Fowler intimated was that no further agreement was necessary beyond what was contained in the letter already obtained. For Mr Fowler had never mentioned that letter to Applecross, and so could not allude to any additional deed. What he meant was that it was not now necessary to have any agreement at all with Ord. And this conclusion was by no means an extraordinary one, after the opinion of Mr Jamieson as to the inefficacy of any restriction by Ord and his wife of the obligation in the marriage-contract, which opinion Mr Fowler said "is decisive on that point."

In conformity with this conclusion, there is nothing more done with the draft deed of restriction transmitted by Applecross. But in his letter of 22d December a new view was struck out by Mr Fowler, which he thus expressed—"Another question arises in my mind, whether Ord could, in virtue of his marriage-contract, claim, in the same way, immediate payment of Mrs Mackenzie's portion, which will fall to be fixed by that of Allangrange, which would be extremely inconvenient for me to do, if insisted on." This raised a question independent altogether of that arising as to the capital of the provision, being whether, from the provisions being held, as in the case of Allangrange, payable as at the date of the marriage, the amount could be immediately exacted, or, at least, interest would run against Mr Fowler from that date? The matter of interest was, of course, a point as to which Ord and his wife, the liferenters, could competently transact; and it is here brought before the notice of Applecross. That gentleman, in replying on the 24th, sent the draft of a document to be signed by Ord and his wife, postponing all demand till Mr Fowler's own death. This draft distinctly, and in so many words, assumed the substance of the obligation as in the marriage-contract, and only agreed to the non-fulfilment of the obligation during Mr Fowler's lifetime. The very circumstance of the document to be signed being now restricted to one of this sort forms strong evidence that the letter of 8th December was no longer to be insisted in, and nothing else to be sought than this newly conceived letter. It was plainly the capital, and that alone, to which the letter of 8th December referred, the interest separately from the capital never having occurred to anybody. And the circumstance of a new letter confined to interest being contemplated, fairly infers abandonment of the first document. The same is to be inferred from Mr Fowler's reply of 27th December, in which he no longer speaks of any letter about the capital of the provision, but simply says—"I hope I may obtain from Ord and spouse such a letter as you have proposed, to meet the question of claiming their provision unseasonably."

The proposed letter about the date of payment of the provision never was turned into an executed document. In point of fact, Ord never claimed the provision during Mr Fowler's lifetime. And the latter having no difficulty raised on that point, may be not unreasonably supposed to have abandoned all thought of doing more, leaving the letter of December 1827 an entirely dropped and abandoned document, and nothing substituted in its room. This is strongly confirmed by the evidence of Ord, given, and I think with perfect competency, in the present case, which shows both that Mr Fowler had communicated to Ord the fact of his correspondence with Applecross, and the result at which it arrived. He depones that about the middle of December 1827 Mr Fowler said to him—"I find that letter that you gave me is of no use, but I am in correspondence with Applecross on the subject." Again he depones to Mr Fowler, telling him, about Christmas, "I would be very

glad to hear that he and Allangrange had come to an arrangement, by which I would have no more trouble or bother in the matter, or something to that effect."

The marriage of Allangrange with Isabella Fowler took place on 9th January 1828. Mr Fowler survived till August 1842. There is no record of any communication passing on the matter between Mr Fowler and Ord during all this interval. But in the course of that same year, 1828, Mr Fowler engaged in certain arrangements as to his *mortis causa* settlements, of great importance as showing how he carried out into act his abandonment of all claim on the letter of 8th December 1827; and this in regard to a matter directly affecting the interests of Ord and his wife. To understand these arrangements, it is only necessary to remember, that on the assumption of all claims under the letter of 8th December 1827 being abandoned, the two elder daughters had a provision by their marriage-contracts of £4000, or at all events of £3000 each, while the two younger daughters, who were unmarried, and had no marriage-contract, had no claim beyond the £2000 each which Mr Fowler intended to give them. If the letter of 8th December was maintained in force, Ord and his wife were in no better position than the younger daughters would be. Now, it is a remarkable fact, and one difficult to explain on any other supposition than that the letter of 8th December was wholly thrown aside, that, in settling his landed estates, Mr Fowler brought the younger daughters into the destination preferably to the two elder, the wives of Ord and Allangrange. He has not left his object in doing so to be merely guessed at. For in his letter of 10th September 1828 to Mr William Ivory, then managing clerk of Applecross, he expressly says, "My married daughters being already provided for by contract of marriage beyond the portion to their two younger sisters, I would incline (as once stated before) that, on failure of issue of my four sons, the succession of my three estates should devolve in favour, first, of my said two unmarried daughters and the survivor, and to the issue of their bodies respectively, in the order set forth in the draft, in doing which I have cogent reasons to influence my parental views." These words plainly imply that, in Mr Fowler's conviction, Ord and his wife were on the same footing with Allangrange and his wife, and were not on the footing of the younger daughters. In other words, they imply Mr Fowler's abiding consciousness that the letter of 8th December possessed no remaining efficacy.

Mr Fowler's death, as already said, took place in August 1842. Previously to that event, three out of his five sons in life in December 1827 had died. A fourth son survived his father only a few days. The present pursuer, as the only surviving son, took up Mr Fowler's estates. It is fairly enough stated by the defender that this alteration in the condition of his family afforded Mr Fowler ampler means for providing for his daughters; and diminished the necessity for a restriction on the portion of any one of them. The pursuer, as before mentioned, settled in 1843 with the defender Ord for the claims under his marriage-contract, by granting a bond for £4000, the sum in Allangrange's contract, to Ord and his wife in liferent, and their children in fee; reckoning also with him for interest from the date of Ord's marriage in 1825. The whole of these claims the defender paid off in 1847. In 1849 a mutual discharge was executed between them.

It was only on 12th December 1870, twenty-one years afterwards, when of course it was less easy to obtain the explanations which fresher recollections and still living persons might afford, that the pursuer brought this discharge judicially under challenge by the present action. His claim in this action is rested on an alleged *solutio indebiti*, and he concludes for repayment of the money said to have been unduly exacted. But he makes no demand for repayment of the capital sum of £4000 settled in the contract on the spouses in liferent and their children in fee, and for which he granted bond in 1843. In the face of the clear law laid down in Mr Jamieson's opinion, he could have no pretence for alleging that this was a debt not due, or that the letter of 8th December 1827 restricted to any effect that capital, as due to the children of the marriage. That of which he claims repayment is the interest drawn by Ord and his wife beyond the interest on an assumed portion of £2000, due from Mr Fowler's death. The question in the case is, whether he is entitled to such repayment.

I cannot help feeling it to be of some consequence that, *ex concessis* of the pursuer, no claim for repayment of the capital sum of £4000 lies. In other words, the letter of 8th December 1827 is admitted to have formed no restriction of the claim for this capital. Yet it is impossible to dispute that in its terms this letter refers, and refers exclusively, to the capital of the contemplated portions. No idea of interest seems to have been in the mind of anybody when this letter was written. As regards the capital of Ord's marriage-contract provision, it can scarcely, I think, be disputed that all idea of founding on this letter had departed from the mind of the late Mr Fowler; as, indeed, Mr Fowler himself stated it had done, in his commuications both with Applecross and Ord.

The question, therefore, in this case,—at least the leading and primary question, which the pursuer must solve in the affirmative before he can proceed a step further,—is, Whether at the time of the settlement in 1843 the letter of 8th December 1827, although admittedly inoperative as to capital, was in subsisting validity as to interest, so as to make the payment of interest, beyond that on £2000, from Mr Fowler's death, a payment which was not due. Unless this is established, the pursuer was only paying what was truly due by him; because undoubtedly, unless by force of the alleged restriction, the pursuer, as representing his father, was indebted to the defender Ord and his wife in the full amount of what he paid.

The pursuer has not satisfied me that, to the effect in question, any restriction of the claim was remaining in operative validity at the date of the settlement of 1843. The *onus* lay on the pursuer of clearly establishing a *solutio indebiti*, by proving to the satisfaction of the Court the continuing subsistence of a restriction to the effect alleged by him. I think he has failed in doing so; and has therefore failed in establishing his case. This would be enough for our decision. But it is right that I should further say that I am satisfied, from the proof, that, whatever was Mr Fowler's original intention in taking the letter of 8th December 1827, he abandoned all purpose of using and enforcing it, both as to capital and interest, and intentionally left matters to remain on

the same footing as if the letter had never been signed. I consider it clearly established, both by the correspondence with Applecross, and the oral communications with Ord, that so soon as Mr Jamieson's opinion, to the effect that the parents could not restrict the capital payable to their children, was communicated to Mr Fowler, he threw aside the letter of 8th December 1827 as no longer to be rested on. And although, for a time, he talked of a new letter limited to the matter of interest, he alike abandoned all thought of this. He was satisfied with his arrangements otherwise (whatever may now be thought of these arrangements), and intentionally left the rights of Ord and his wife to remain on the footing expressed in their marriage-contract. This being my conviction on the proof, I cannot adhere to the Lord Ordinary's interlocutor. I consider the defender entitled to absolvitor.

Having this view on the primary question in the case, I find it unnecessary to consider some of the questions ably argued before us. In the view which I take, it is, of course, out of the question to impute fraud to the defender, who was only, in that view, taking payment of what was truly due to him. But it is right that I should say that in no view whatever could I have imputed fraud to the defender, but, at the very utmost, only a misconception of his legal position. Again, as to the alleged ignorance, on the pursuer's part, of the existence of this lettter of 8th December 1827 at the time of making the settlement of 1843, and down to a short time prior to raising the action in 1870, I see no ground to question the accuracy of his statement that he did not know of this letter till a comparatively recent period. A nicer question might arise, Whether it was not so within his means of knowledge as to deprive his ignorance of all legal efficacy in the present question? On this point a great deal has been said, and a great deal more might be said, unfavourable to the case of the pursuer. But it is unnecessary to enter into the question. For, whether done ignorantly or knowingly, I think it must be held that the pursuer was not paying anything but what was due by him; and therefore is not entitled to repayment to any extent whatever.

Lord Deas, after observing that even if the Lord Ordinary's interlocutor was right in its result, he should be very clearly of opinion with their Lordships that there was no room for any charge of fraud or bad faith on the part of the defender, stated that he had arrived at a conclusion opposite to that of the Lord Ordinary, on the following grounds,—viz., that the letter of 8th December 1827 was in its terms a tentative letter, which contemplated on the part of Raddery, who took it, that it might not be carried out, and next, that there was sufficient evidence that he resolved not to carry it out.

In regard to the admissibility of the correspondence between Raddery and his agent, his Lordship said—"A question has been suggested as to the competency of the correspondence between Raddery and his agent, and it is said to be open to the objection of confidentiality. I am not disposed to think that any such objection applies. I do not think that either that objection or the case generally stands in the same position as if Raddery had brought an action of this kind in his own lifetime. If Raddery had done that, we should then have had his own evidence that he construed the letter differently from what the evidence now leads us to hold that he did. Until Raddery died, the evidence in favour of the construction of that letter which I am disposed to adopt, was not complete. But his death, without going back upon the matter in any way, completes that evidence, and the question now is, in what mind did he die? In what mind was he in 1827 and 1828, and did he die in the same mind? Now, in that question it would be a very strong thing to say that this correspondence cannot be looked at, because it was confidential between him and his agent. If we were to hold that, we would not be holding it in favour of Raddery, or of any plea that there is any reason to suppose he would have maintained. We would be using it against him, to prevent his intentions taking effect. In a question of this kind I cannot hold that the objection taken by the heir is precisely the same thing as the objection taken by the party himself. I think it is very different. The question is, what was Raddery's view, and what was his intention? for that is the intention which we are to follow out. I am not prepared to say that even if all that correspondence were out of the case, the necessary result would be that the pursuer would succeed. There would be a great many things to be considered even then, before we could arrive at that result. But, no doubt, the case is very much clearer when all that is taken into view, and when I look at the whole of that evidence taken together, I confess I have no doubt at all upon the matter of fact which alone is in dispute, namely this, that from the time that Raddery took that obligation, contemplating that he might either insist or no on carrying it out by a formal deed, he had resolved not to follow it out in that sense, and, if it be so, there is no ground in fact to support this action."

The Lord President concurred.

The Court recalled the interlocutor of the Lord Ordinary, assoilzied the defender from the whole conclusions of the summons, and found him entitled to expenses.

Agents for Pursuer—Tods, Murray, & Jamieson, W.S.

Agents for Defender—Adam & Sang, W.S.

Friday, March 15.

MAGISTRATES OF ABERBROTHOCK *v.* DICKSON.

Personal and Real—Real Burden—Burgage Holding—Feu-duty.

The magistrates of a royal burgh "sold, alienated, and in feu-farm disponed," certain parts of the burgh muir, to be holden of the Crown in free burgage, for service of burgh used and wont, and for payment to the magistrates and their successors of a feu-duty, and duplication thereof at the entry of each heir and singular successor. *Held*, in an action by the magistrates against a singular successor of the original disponee, in whose titles the obligation to pay the sums before mentioned was engrossed, that the attempt to ingraft a feu-duty on a burgage holding was not an effectual creation of a real burden, but that the defender, as proprietor for the time being