depones that 'it was for permission to make the homewasher, and not for the trademark, that we paid the royalties.'

"That these proceedings must have been attended with serious loss and inconvenience to the defenders is plain from the fact that, since Shackleton & Company obtained this permission, they have not only manufactured and sold the machines, but have also established agencies in various parts of England and Ireland, and have in one instance, viz., at Newcastle, directly supplanted the defenders by employing the agents who formerly acted for them; and that the sales thus made have, in all probability, been attended with a corresponding gain to the parties to the transaction, is also pretty plain from the fact that, during a considerable portion of the period embraced in this action, Shackleton & Company have manufactured at the rate of thirty machines a-week, which, at a royalty of 6s. a machine, would yield to the Home Manufacturing Company, or their agent, a much larger sum, in name of profit, than that claimed from the defenders under the present action.

"In this state of the fact, it was, as the Lord Ordinary conceives, the duty of the Home Manufacturing Company, as granters of the defender's license, as soon as they were made aware of what their agent had done, and if they disapproved of his conduct, to have repudiated his actings, intimated to Shackleton & Company that he had exceeded his powers, and to have concurred with the defenders in taking steps to protect them in the successful working of the patent. This, however, the company have not only declined to do, but they, on the contrary, rather appear to have adopted the proceedings of their agent, by leaving him to attend to their interests in this country in October 1871, after they had been made fully aware of his conduct.

"In these circumstances, the main question raised for decision is, whether the pursuer, as assignee of the Home Manufacturing Company, is now entitled to recover the royalties sued for from the defenders, leaving them to take proceedings against Shackleton & Company in England for infringement of the patent, and against the Home Manufacturing Company for damages for their violation of the agreement; and the Lord Ordinary has come to the conclusion that he is not. It may be that an action of damages, as contended for by the pursuer, is, in the ordinary case, the remedy for breach of contract. But to hold that in the present case that is the only remedy, would, in the opinion of the Lord Ordinary, amount practically almost to a denial of redress; because it is a remedy which the defenders cannot very well avail themselves of, except by going to New York to institute proceedings against Mr Turner; while, as regards Shackleton & Company, it is very doubtful whether proceedings in England can competently be taken against them without the concurrence of the proprietors of the patent, which has here been refused. The defenders are not assignees who have acquired the whole right and interest of every description in the patent; but are the licensees of parties who still retain the property. Now it seems to be settled in England that a special licensee cannot by himself institute an action for infringement (Coryton on Patents, p. 121); and the Lord Ordinary has not been able to find in any of the English authorities referred to at the debate, that a general licensee is in any different position in this respect. The preponderance of the dicta in those authorities seems, on the contrary, to point to this, that in such an action all the parties interested in the patent must concur (Hindmarch, pp. 244, 252).

"In the present case, therefore, which is one of mutual contract, it appears to the Lord Ordinary that the rules laid down as applicable to such contracts in the authorities relied on by the defenders, viz., that one party cannot insist for implement who refuses to fulfil, and still less so one who, as here, directly violates his counter obligations, ought in justice to be followed, and that the Home Manufacturing Company are, in the circumstances, not entitled to demand payment of the royalties in question until they concur with the defenders in taking steps to protect the patent from infringement, and are ready to make good to the defenders the loss sustained by them through contravention of the agreement.

"The Lord Ordinary has therefore dismissed this action, because he does not consider that the pursuer, as assignee of the Home Manufacturing Company, is in any better position, as regards his right to recover royalties during the period libelled, than his cedents. By the ordinary rules of law applicable to assignees, they are held to be open, in the general case, to the same objection arising directly out of the contract into which they are assigned, as those pleadable against the cedent, and in this case the Lord Ordinary has had the less hesitation in applying this rule, inasmuch as the pursuer appears, from the correspondence, to have been fully aware of the existence of the disputes between the defenders and his cedent at the time he took the assignation."

The pursuer reclaimed.

MILLAR, Q.C., and JOHNSTON for him.

SCOTT and MACDONALD for respondents.

The Court unanimously adhered, with additional expenses.

Agents for Pursuer—Menzies & Coventry, W.S.
Agent for Defenders—James Buchanan, S.S.C.

Friday, March 15.

FIRST DIVISION.

SPECIAL CASE—PRINGLE'S TRUSTEES AND OTHERS.

Succession—Heritable and Moveable—Trustee.

A trust was constituted partly for administration of the truster's estate during his lifetime, and partly for its disposal after his death. *Held* that a sum which had been invested by the trustees on heritable security, with the truster's knowledge, and allowed to remain undisturbed till his death, did not form part of his moveable estate in estimating the fund for *legitim*.

Policy of Insurance.

Held that two current policies of insurance, which had been effected for the benefit of a deceased on the life of his wife, who survived him, were to be included in his moveable estate in estimating the fund for *legitim*, and that for this purpose the policies were to be taken at their real actuarial value as at the date of his death, and not at their surrender value at that date.

The late Sir John Pringle of Newhall died on 16th June 1869, survived by his second wife, Lady Elizabeth Pringle, and by children of both his marriages. It is sufficient to state that, the children of the second marriage having claimed *legitim*, their right to the same not being excluded by antenuptial contract, certain questions arose with regard to what should be included in Sir John's moveable estate, in estimating the fund for *legitim*.

By various trust-deeds Sir John Pringle conveyed property, both heritable and moveable, to trustees, partly for administration of the same and payment of debts during his life, and partly for the disposal thereof after his death. The trust in operation at his death was constituted by a trust-disposition in 1850, and a supplementary trust-disposition in 1855. Various deeds of direction, and other deeds in connection with the trust, were executed from time to time by Sir John. By assignation dated December 1853, three policies of insurance, each for £5000, were conveyed to the trustees, two of them being on the life of Lady Elizabeth Pringle, dated 16th March 1841 and 8th January 1850, and the third on the life of James Pringle, the truster's eldest son, also effected 8th January 1850. The latter died in 1865, and the proceeds of the policy on his life, with bonuses, were paid to the trustees, who invested the whole in heritable securities on or before Martinmas 1866. These investments have remained undisturbed. They were expressly referred to in a deed of assumption of new trustees, executed in 1867, to which Sir John Pringle was a consenter.

The following questions were submitted to the Court:—

"(1) Whether the £5888, 16s., received under the policy on Captain Pringle's life, and invested on heritable security by Sir John Pringle's trustees, ought to be included as part of the moveable estate of Sir John Pringle in estimating the fund for *legitim?*

"(2) Whether the two policies on the life of Lady Elizabeth Pringle with the North British Insurance Company and the Edinburgh Life Assurance Company respectively, ought to be included as part of the moveable estate of Sir John Pringle before estimating the amount of said estate forming the fund for *legitim?*—And if so

"(3) Whether, in estimating the moveable estate of Sir John Pringle for *legitim*, the said policies should be taken (1) at the amount which would have been obtained for them if surrendered to the respective insurance companies as at the date of Sir John Pringle's death; or (2) at the amount which would have been obtained for them if publicly sold as at the date of Sir John Pringle's death; or (3) at their real actuarial value at said date, as the same may be ascertained by a remit to the respective offices, or otherwise?"

ADAM, PAUL, WATSON, MILLAR, Q.C., and MARSHALL, for the various parties.

At advising—

LORD PRESIDENT—The first question is, Whether the sum received under the policy on Captain James Pringle's life, and invested on heritable security, ought to be included as part of the moveable estate of Sir John Pringle in estimating the fund for *legitim?* James Pringle died in 1865, and the proceeds of the policy of insurance which had been effected on his life, in favour of Sir John Pringle, were paid by the insurance company to Sir John Pringle's trustees. They proceeded to invest it in heritable security. The whole was invested on or before Martinmas 1866, and the investments have remained undisturbed. We are also informed that in a deed of assumption of new trustees in 1867, reference was made to the heritable securities, upon which large portions of the trust-funds were invested. Sir John Pringle was a consenter to this deed, and it must be inferred that he was acquainted with the state of the investments. The ground on which it is maintained that this sum is to be treated as moveable is that nothing which the trustees did in the administration of the estate can be held to have had the effect of altering the nature of the estate in a question of succession. The principle to which the parties appeal is well known, but I doubt whether it is applicable to the case before us. The position of Sir John Pringle's trustees was peculiar. They were in a much more proper sense than usual the mandatories of the truster. They were administering the estate, not as a trust for behoof of creditors, though one of the objects was the payment of debt, but in the best way for Sir John's interests, and also for the disposal of the estate after his death. This is not the case of trustees doing an act which should have the effect of altering the succession of an intestate. Sir John did not die intestate, and moreover, it was quite inconsistent with the object of the trust that he should die intestate to any extent, although, no doubt, the event which has happened of some of the children claiming *legitim* has, to a certain extent, disturbed the trust. The trustees draw a perfectly fair inference from the fact that Sir John was a party consenter to the deed of 1867, which distinctly brought under his notice the mode of investment. This mode of investing the money must be held just as much the doing of Sir John as it would have been had it been done under his superintendence and authority. I am therefore for answering this question in the negative.

The second question is in regard to two policies of insurance on Lady Elizabeth Pringle's life, the first dated 16th March 1841, and the other dated 8th January 1850. The peculiarity of the question raised here is that Sir John Pringle, for whose benefit the policies were effected, predeceased his wife, and in fact she is still alive. The question is, Whether these current policies are part of the moveable estate of Sir John Pringle? I am of opinion that they are, and on much the same grounds as those on which the decision in *Muirhead* v. *Lindsay*, 6th December 1867, 6 Macph. 95, was based, which I take leave to say was a very well considered judgment. In that case the policy was not a current policy; the event had occurred on which it became payable. Even there it was contended that the policy was not part of the moveable estate of the deceased at his death, inasmuch as the policy was not payable till three months after his death. The difference in the present case is that Lady Elizabeth Pringle is still alive, and was of course alive at the date of Sir John's death, when his moveable estate falls to be ascertained. Beyond question, a policy effected in 1841 and another in 1850 were, during Sir John's life, valuable portions of his estate. He survived the commencement of the policies for many years. At the time of his death these valuable policies belonged to him through his trustees. They were of marketable value, they could be sold or surrendered—in short, they were capable of being converted into money. I cannot say that a subject thus capable of present value is not an asset of the person to whom it belongs. Even if a man dies without any other pro-

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