constructive delivery should be held to have passed, and to be sufficient. — 1 Bell's Com. 7th ed. 189; *Simson* v. *Duncanson*, 1786, M. 14,204; *Wylie & Lochead* v. *Mitchell*, Feb. 17, 1870, 8 Macph. 552; *Orr's Trustees* v. *Tullis*, July 2, 1870, 8 Macph. 936 (Lord Neaves' opinion, 950); *Woods* v. *Russell*, June 26, 1822, 5 Barnewell and Alderson, 942; Addison on Contracts, 8th ed., 929, 930; *Spencer & Company* v. *Dobie & Company*, December 17, 1879, 7 R. 396 (Lord Gifford, 409); *Wood* v. *Bell*, January 1856, 25 L.J. 148, and (in Ex. Ch.) 321; Benjamin on Sale, 102, 321; Bell on Sale, 17; Bell's Prin. sec. 91; Brown on Sale, 576. In *M'Bain* v. *Wallace & Company*, cited *infra*, the House of Lords decided the question on the Mercantile Law Amendment Act, and left the case of *Simson* v. *Duncanson* untouched. (2) On a sound construction of the contracts and agreement there was a contract of sale of the materials of the vessels in dispute, and they were entitled to have the benefit of section 1 of the Mercantile Law Amendment Act 1856, which protected a purchaser's right to enforce delivery from the seller against the subsequent diligence of the seller's creditors—*M'Bain* v. *Wallace & Company*, Jan. 7, 1881, 8 R. 360; and July 27, 1881, H. of L. 166. Section 1 of the Mercantile Law (Scotland) Amendment Act (19 and 20 Vict. cap. 60), provides: — "From and after the passing of this Act, where goods have been sold but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same; and the right of the purchaser to demand delivery of such goods shall, from and after the date of such sale, be attachable by or transferable to the creditors of the purchaser." (3) The sale was an executory sale—a sale of a thing to be constructed for a particular ship. It was not a deferred sale but a present one. The pursuers had, then, a claim for specific delivery in the sense that there would have been breach of contract on A. Campbell & Son's part if they had delivered a different engine. The case of *M'Meekin* v. *Ross* (*infra cit.*), relied on on the other side, was not an executory contract, because there was nothing to deliver. (4) There was nothing fraudulent in the agreement relative to the contracts.

The defender replied—(1) Only the 2d and 3d contracts contained provisions for payments by instalments, and there was no custom of trade proved to the effect that such payments were usual where the contracts were silent on the matter. But even assuming such payments were actually made in all of them, there was no case where the principle of *Simson* v. *Duncanson* had been extended to the case of engines for a ship. Such payments were not important, except in the case of a ship on the stocks, as passing the property. —*Lawler* v. *Bralinson*, 2 Meeson and Welsby, 602. There could be no property passed till delivery—*Mucklow* v. *Mangles*, 1 Taunton 218; Benjamin on Sale, pp. 280-294. But (2) the contracts were not such as could be brought within the provisions of the Mercantile Law Amendment Act. That Act only applied to the case where an article has been ready for delivery and left with the seller for construction, and was inapplicable to the case of an unfinished article remaining with the seller for the purpose of being completed. There was no immediate obligation here to deliver a specific *corpus*. It was not a case where the purchaser had acquired a *jus ad rem specificam* but had not got delivery.—*M'Meekin* v. *Ross*, November 22, 1876, 4 R. 154 (Lord President, 159); *Wylie & Lochhead* v. *Mitchell*, February 17, 1870, 8 Macph. 563. The pursuers, then, were not in a position to found upon the case of *M'Bain* v. *Wallace*. (3) It was clear from the proof that the object of the agreement was to give the pursuers security for their advances, and this was not an agreement which in law could be sustained in the interest of third parties.

At advising—

Lord Young delivered the judgment of the Court, as follows:—We have, as your Lordships know, considered this case carefully, and have conferred with respect to it more than once, with the result that upon the whole we concur in the judgment of the Lord Ordinary. I desire to say for myself, and I believe also for your Lordships, that we regard the case as a very special one upon the particular facts on which it is presented, and one very far from being unattended with difficulty; and that we decide no question more general than that which is raised by the very special facts of the case before us. Upon these special facts we adhere to the interlocutor of the Lord Ordinary.

The Lord Justice-Clerk was absent.

The Court adhered.

Counsel for Pursuers — Pearson—Dickson. Agent—J. Young Guthrie, S.S.C.

Counsel for Defender—Trayner—R. V. Campbell. Agents—Maitland & Lyon, W.S.

Tuesday, December 9.

FIRST DIVISION.

[Lord Fraser, Ordinary.

DICKSON *v.* ORR.

Process—Failure to Lodge Prints of Record—Reponing—A.S., 2d November 1872.

The pursuer of an action neglected within four days from the closing of the record to lodge two copies of the print of the record as adjusted and closed, as required by the A.S. 2d November 1872. On the 17th day after the closing of the record the case was put out in the Procedure Roll. Neither party having within 21 days from the closing of the record lodged the print, the Lord Ordinary, as required by the A.S., dismissed the action, finding no expenses due to either party. The defender reclaimed, and craved to be reponed. The Court, in the circumstances, *holding* that the defender was justified in believing that prints had been lodged before the case appeared in the Procedure Roll, *reponed* the defender.

Section 5 of the A.S., 2d November 1872, provides:—"Within four days from the date of the interlocutor closing the record, the agent for the pursuer, or for the party appointed to print the record, shall lodge with the clerk to the process two printed copies of the record as finally adjusted and closed. . . . And failing the said agent lodging such copies within the prescribed period, the clerk shall record such failure by a note on the interlocutor-sheet. . . . And failing the two copies of the printed record being lodged as aforesaid the cause shall be deleted from the debate or procedure roll as the case may be, and shall be restored to the roll only on motion made to the Lord Ordinary by any party to the cause lodging the said two printed copies as aforesaid: Provided that if none of the parties to the cause move the Lord Ordinary to restore the same to the roll and lodge the two printed copies as aforesaid within twenty-one days of the date of the interlocutor closing the record, the Lord Ordinary shall pronounce an interlocutor dismissing the action and finding neither party entitled to expenses, which shall not be recalled by the Lord Ordinary of consent, but may be recalled only in the manner and on the conditions foresaid."

Francis Dickson, C.A., liquidator of the Gael Iron Company (Limited), raised an action of count, reckoning, and payment against Robert Orr, commission agent, residing at 8 Tower Hill, London, who had been an agent for the company. The defender, besides pleading on the merits that he was not indebted to the pursuer, and had not refused to account, pleaded that the Court of Session had no jurisdiction. The Lord Ordinary on 19th November 1884 closed the record and sent the case to the Procedure Roll. On the 24th the pursuer wrote to the defender's agent in these terms:—"The record, I understand, falls to be printed and boxed to-day, and before the further expense of printing is incurred I am willing to meet you to see if we cannot come to an arrangement." The proposed arrangement was to remit the case to an accountant. On the same day the defender's agent replied refusing to refer the matter. The letter concluded thus—"To talk of remitting the whole matters in dispute to an accountant is somewhat premature, as until the defender's plea of no jurisdiction is disposed of adversely to him there is nothing to refer." The case was put out on Saturday 6th December (being the seventeenth day from the closing of the record) in the Lord Ordinary's Procedure Roll for the following week. No prints of the closed record had been lodged, and no marking had been made by the clerk on the interlocutor-sheet as required by the Act of Sederunt. On Tuesday (9th December) the defender's agent inquired at the office of the clerk to the process in the Register House whether prints had been lodged, and was told that he could not say for certain that they had, as the process was in Court, but that he believed they had. On Wednesday 10th December, the twenty-first day after the closing of the record, the defender's agent for the first time learned that the prints had not been lodged. The matter was brought under the notice of the Lord Ordinary on the morning of Thursday the 11th, when his Lordship pronounced this interlocutor:—"The Lord Ordinary, in respect of the pursuer having failed to lodge two printed copies of the record as finally adjusted and closed, in terms of the Act of Sederunt 2d November 1872, appoints the cause to be deleted from the Procedure Roll."

The defender's agent then had the adjusted record printed, and on Tuesday 16th December, being more than 21 days after the record was closed, moved the Lord Ordinary to restore the case to the Procedure Roll, tendering two prints. His Lordship pronounced this interlocutor:—"The Lord Ordinary having heard counsel, in respect parties have failed to lodge two printed copies of the record as finally adjusted and closed, within twenty-one days of the date of the interlocutor closing the record, in terms of the Act of Sederunt 2d November 1872, dismisses the action: Finds neither party entitled to expenses, and decerns."

The defender reclaimed, and moved the Court to remit the case to the Lord Ordinary to restore it to the roll. He submitted that in the circumstances this should be done without any condition as to expenses. The Lord Ordinary, he stated, would have reponed him if he had had the power, and he desired to be reponed in order to move for expenses against the pursuer.

The pursuer argued that the motion should not be granted in respect the difficulty had been caused by the defender's own neglect. The pursuer did not in any event mean to persevere with the action, but to abandon it and bring a new one, so that the whole question was one of expenses.

At advising—

Lord President—It is obvious that if the regulations laid down in the Act of Sederunt are not followed a considerable amount of confusion must necessarily arise. In the present case all the difficulty has arisen from the letter of the Act of Sederunt not having been followed. If this is the practice, as it has been stated to us to be, and any such case comes before us again, the Court will take some stringent measures to secure that the provisions of the Act of Sederunt shall be strictly carried out. As regards this particular case I think that the defender is entitled to have this interlocutor recalled, because although he cannot be altogether absolved from negligence, yet he was not the party primarily in default. It was the pursuer who was the party most in default, and the originator of all the mischief, while the defender's mistake consisted in his allowing too long a time to elapse without satisfying himself as to the true state of the facts regarding the lodging of the prints. I am therefore for recalling this interlocutor without making any conditions as to expenses, and remitting to the Lord Ordinary to proceed in the cause.

Lord Mure concurred.

Lord Shand—I do not think that the reclaimer can claim in such a case to be reponed as a matter of right, but in the circumstances I agree with your Lordships that he is entitled to great indulgence. Under the Act of Sederunt it is obviously as much the duty of the defender as of the pursuer after four days have elapsed to see to the lodging of the prints. In the present case the defender seems to have allowed seventeen days to elapse after the closing of the record without making any inquiry as to whether or not

the prints had been lodged. If matters had been allowed to run on in this way until the twenty-first day without the defender having any reason to believe that the prints were lodged, then clearly the defender would have had no case, but the appearance of the cause in the Lord Ordinary's Procedure Roll gave him good reason to believe that the prints had been timeously boxed. Upon that ground I agree with your Lordships that the Lord Ordinary's interlocutor should be recalled.

LORD DEAS was absent.

The Court recalled the interlocutor and remitted the case to the Lord Ordinary.

Counsel for Defender (Reclaimer)—Gillespie. Agent—W. B. Rainnie, S.S.C.

Counsel for Pursuer (Respondent)—Watt. Agent—P. H. Cameron, S.S.C.

Tuesday, December 9.

FIRST DIVISION.

[Lord Adam, Ordinary.

WILLIAM LAIRD & COMPANY *v.* LAIRD AND RUTHERFURD.

Trust—Declarator of Trust—Proof—Partnership—Act 1696, *cap.* 25.

A firm and two of its partners brought an action against the remaining partner and another person to have it declared that a patent which had been taken in the defenders' names truly belonged to the firm. The pursuers averred that it had been taken in defenders' names merely to satisfy the patent laws. *Held* that the action was a declarator of trust, which could be proved only by writ or oath of the defenders.

John Laird senior, George Milne Laird, and John Laird junior were at the date of this action partners of the firm of William Laird & Company, manufacturers in Forfar. They had been in business together for a number of years. William Rutherfurd had been in their employment as manager prior to June 1882.

The action was raised by William Laird & Company and John Laird and G. M. Laird, as two of the partners of the firm, against the other partner John Laird junior, and also against Rutherfurd, for declarator "that a patent for an invention of improvements in weaving bags, sacks, and other tubular and double fabrics, also single fabrics, and in the means employed therefor, under letters-patent to said defenders John Laird junior and William Rutherfurd, numbered No. 671, in the year 1884, and which letters are dated 23d February 1874, the final specification being filed in the Great Seal Patent Office, in pursuance of the conditions of the said letters-patent, on 20th August 1874, is the property of the said firm of William Laird & Company, and that the said John Laird junior and William Rutherfurd hold the same for behoof of the said firm."

They stated—"(Cond. 2) Part of the pursuers' business consists in the weaving and manufacturing of sacks and other like fabrics. In the year 1873 the defender William Rutherfurd, in course of his duties in the pursuers' works, suggested an improvement in the method of weaving bags, sacks, and other like fabrics. The pursuers accordingly adopted the said suggestion, and the same was wrought out and perfected by them in their works, at their sole expense, under the supervision of the defender William Rutherfurd as their manager. Various alterations and improvements were effected upon the said principle in the course of its being thus perfected. The pursuers, in order to secure a monopoly of the said invention for their business, in or about the month of September 1873 resolved to patent the said invention, and they accordingly put themselves in communication with patent agents for this purpose. Through said agents a patent was taken out and letters-patent obtained, which bear date 29th October 1873, and are numbered No. 3508 of that year. The defender John Laird junior, as a partner of said firm, took the principal management in negotiating the said patent. He, in name of the firm and for its behoof, communicated with the patent agents and gave them instructions. He also paid the expenses connected with the said patent out of the funds of the said firm, and charged the same to the firm in the books. The name of the defenders was put in said patents by the pursuers on the suggestion of the patent agents, and merely to comply with the requirements of the patent laws."

They further stated, that to follow out and perfect the first patent they took out a new one in 1874, No. 671, in the same way and under the same conditions as the former, and that the firm and the defenders used and regarded both as the property of the firm; that the patent No. 671—being that referred to in the summons—being found to serve the purpose, the other was allowed to drop; that claims to the patent as individual property had now been set up for the first time by defenders, which rendered the action necessary.

The defenders stated that they were the sole inventors, and that the patents were taken by them in their own name and for their own behoof.

The pursuer pleaded, that as the patents were their property, they were entitled to decree of declarator as concluded for.

The defenders pleaded, *inter alia*—"(3) The pursuers' averments as to the said patent being held in trust for the firm of William Laird & Company can be established only by the writ or oath of the defenders."

By interlocutor of 30th October 1884 the Lord Ordinary sustained the defenders' third plea-in-law.

"*Opinion.*—Letters-patent, dated 23d February 1874, were granted to the defenders John Laird junior and William Rutherfurd for 'Improvements in weaving bags, sacks, and other tubular and double fabrics, also single fabrics, and the means employed therefor.'

"The object of the action is to have it found and declared that the said John Laird junior and William Rutherfurd hold this patent for behoof of the pursuers William Laird & Company, and that it belongs to and is the sole property of the pursuers.

"It appears to me that this is clearly a declarator of trust, and therefore can only be proved by the writ or oath of the defenders, unless there be facts and circumstances averred which take the case out of the ordinary rule.