The Trusts (Scotland) Amendment Act 1884, enacts, sec. 3, that "Trustees under any trust may, unless specially prohibited by the constitution or terms of the trust, invest the trust funds (*a*) in the purchase of . . . . 7. East India stock, stocks or other public funds of the Government of any colony of the United Kingdom approved by the Court of Session, and also bonds or documents of debt of any such Government approved as aforesaid, provided such stocks, bonds, or others are not payable to the bearer." . . .

The petitioner craved authority to invest the funds in certain Colonial Government stocks. The stocks proposed by him included "(1) Dominion of Canada 4 per cent. stock, redeemable, 1904/1908; (2) Dominion of Canada 3½ per cent. stock, redeemable, 1909/1934; (6) New South Wales 4 per cent. stock, redeemable, 1933; (7) New South Wales 3½ per cent. stock, redeemable, 1924; (8) New Zealand 4 per cent. consolidated stock, redeemable, 1929; (9) Queensland 4 per cent. stock, redeemable, 1915/1924; (11) Victoria Government 4 per cent. railway loan 1881, redeemable, 1907; (12) Victoria Government 4 per cent. loans 1882 and 1883, redeemable, 1908/1913."

The Lord Ordinary (LORD ADAM) remitted to Mr Syme, manager of the British Linen Bank, to inquire and report whether the several colonial stocks set forth by the petitioner, or any of them, were such as the Court should approve of as investment for trust funds.

Mr Syme reported that having inquired from the best informed channels in London, he found that the stocks above mentioned were considered sound investments, and such as might be approved of without hesitation. He reported that he could not recommend certain other stocks named in the petition, being Nos. 3, 4, 5, and 10 of these mentioned in the prayer thereof.

The Lord Ordinary on 20th December 1884 pronounced this interlocutor—"Having resumed consideration of the petition and proceedings, with the report by Mr James Syme, Approves of the petitioner investing the trust fund mentioned in the prayer of the petition, or any part thereof, in the purchase of one or more of the stocks mentioned in the prayer, excepting Nos. 3, 4, 5, and 10, and that in such proportions as he may find expedient, and decerns."

Counsel for Petitioner — J. A. Crichton. Agent—F. J. Martin, W.S.

Tuesday, January 6, 1885.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

THE COATS IRON AND STEEL COMPANY *v.* ROWAN.

Sale—Sale of Patent Article under Patent Name—Disconformity to Contract—Warranty.

An order was given for two "Wilson's Patent Gas Producers of 4 cwt. per hour size." The seller fitted up two of Wilson's Patent Gas Producers of 4 cwt. an hour size, according to the system and plans of the patentee, but the purchaser rejected them on the ground that they did not burn 4 cwt. an hour. *Held* that having furnished the goods described, of the size and construction according to the patent, the seller was entitled to the contract price.

On 29th June 1883 Frederick John Rowan, civil engineer in Glasgow, wrote to The Coats Iron and Steel Company (of which the partners were William Jardine and Matthew D. Goodwin) as follows:—"In accordance with the arrangement entered into with your Mr Jardine to-day, I beg hereby to state that I undertake to supply you with the ironwork, bricks, and brickwork of two 'Wilson's Patent Gas Producers' of the 4 cwt. per hour size, erected as soon as possible at your works, for the sum of £130 each producer, nett cash; this amount includes Mr Wilson's charge for royalty." To this Mr Jardine, for the company, replied on the next day—"We accept your offer of yesterday's date, to supply us with two 'Wilson's Patent Gas Producers' of 4 cwt. size, for the sum of £130 each producer, including royalty." The patent consisted of an apparatus for producing gas by the patent combustion of coal, by the introduction of steam in a particular manner, by the arrangement of the parts of the producer, and by a steam-jet for forcing in air arranged in a certain manner. A producer might be of a size to burn any number of tons of coal.

Rowan thereafter, on Wilson's system, and after obtaining plans from Wilson, proceeded to erect two gas producers in the works, and about the end of August of the same year informed the company that they were ready for use. They were put to work, but the company did not succeed in getting them to burn so much as 4 cwt. per hour or produce the gas they expected. Rowan went out to see them. He thought they were not properly worked.

In the end of December of that year the company's law-agents wrote to Rowan's law-agents intimating that their clients rejected the producers as disconform to contract.

Rowan then raised the present action in the Sheriff Court of Lanarkshire at Airdrie, against the Company, for payment of £260 and interest, as the price of the two gas producers, which he alleged to be due to him by the defenders on his completion of his part of the contract constituted by the offer and acceptance contained in the above-recited letters, and which the defenders refused to pay.

The action was defended by the company, who averred:—The producers were found when used not to consume 4 cwt. of fuel each per hour, and consequently not to supply the amount of gas which they wanted from them. They intimated this to the pursuer, who sent skilled workmen to examine the producers, but was unable to give any explanation of the failure, and refused to do anything further in implement of the contract. The defenders then themselves made a thorough trial of the producers, and found that they would not consume more than 2½ cwt. of coal each per hour. They averred that in supplying them with producers which failed to burn 4 cwt. per hour the pursuer had committed breach of contract.

The pursuer pleaded that the amount sued for was resting-owing to him by the defenders.

The defenders pleaded—"The pursuer having failed to supply two producers, each of a size capable of consuming 4 cwt. of coal per hour, as contracted for, and the defenders having timeously rejected those actually erected, the defenders are entitled to absolvitor, with expenses."

The following facts were elicited on proof—The producers were built in accordance with Wilson's patent, and on the plans furnished by him. From these plans the pursuer stated he could not, as Wilson's representative, though a principal in this contract, depart. The pursuer stated that 4 cwt. per hour size meant a size capable of burning 4 cwt. per hour. Previous to the erection a model was submitted to Mr Jardine, according to which, with a slight alteration made at the latter's request, they were erected. Alfred Wilson, the patentee, stated in his evidence—"A 4 cwt. per hour producer is intended to do anything from a small quantity up to 4 cwt. per hour. That is what it is known in the trade to do. (Q) If it does not do that, would you consider it a 4 cwt. producer?—(A) Yes, certainly, because it is the most simple matter in the world to prevent a 4 cwt. producer burning 4 cwt. an hour . . . . (Q) Assuming that very great care has been taken in firing, and every attention possible paid to it, if it does not burn 4 cwt. per hour, would you say it was a 4 cwt. producer?—(A) Yes, certainly. It is a nominal size. (Q) Then it has nothing to do with the amount of coal burned?—(A) Yes, it is the basis of consumption which it has done. I have tested it. . . . (Q) What was the average consumption?—(A) I can only say over 4 cwt. an hour. I tested it. I cannot give you the figures. There is no patent in the size. I can make them any size. (Q) Were these tests carried out in order to fix the size, or were the sizes fixed in accordance with experiment?—(A) If I remember rightly, the sizes were fixed before the experiments were made. When the experiments were made, I found that they confirmed the capability which I fixed. They were fixed upon theory, and a practical test was made, and that test confirmed the capability of the producer." He had supplied plans for the erection of several hundreds of these producers.

The defenders led proof to show that the producers after being erected in their works failed, even when worked by skilled workmen from other works — one of whom was recommended by the pursuer — where Wilson's patent was in use, and under the personal inspection of the pursuer himself, to gassify more than $2\frac{1}{3}$ to $2\frac{1}{2}$ cwts. per hour. The defenders had no other objection to them except that their capacity to make gas was too small.

The Sheriff-Substitute (Mair) after certain findings in conformity with the above-stated facts, found "(2) that it is proved and is admitted by the pursuer, that by gas producers of 4 cwt. per hour size is meant producers each capable of consuming 4 cwt. of coal per hour; (3) that the pursuer caused to be erected at the defenders' works two gas producers, and about the end of August 1883 informed the defenders they were ready to be used; (4) that immediately thereafter the said producers were found not capable of consuming 4 cwt. of coal each per hour, and consequently did not and could not supply the gas required for heating the puddling furnaces at the defenders' works; (5) that notwithstanding several trials afterwards of the gas producers, it was found they would not consume the quantity of fuel required, and they were therefore rejected by the defenders on 20th December 1883 as disconform to contract; finds that the pursuer has failed to supply two producers, each of a size capable of consuming 4 cwt. of coal per hour as contracted for, and that the defenders having timeously rejected those erected, the defenders are entitled to absolvitor; therefore assoilzies the defenders from the action."

The pursuer appealed to the Court of Session, and argued—All he undertook to do was to erect a patent machine of the name of a 4 cwt. per hour gas producer, according to plans furnished by the patentee, and having done this he had fulfilled his contract. He gave no guarantee that they would actually consume the amount, and in the time according to which they were described by the patentee. The seller of a patent article never does guarantee more than merely that the article sold is the article patented—*Ollivant* v. *Bayley*, 5 Q.B., Ad. and Ell. 288; *Prideaux* v. *Bunnett*, 1 C.B. (N.S.) 613; *Chanter* v. *Hopkins*, 4 Mees. & Wels. 399; Ross's Leading Cases, ii., Com. Law, 368. And these cases were all *a fortiori* of the present, for in all of them the patentee himself (and not as here his agent) had contracted with the buyer, and had been a party to the case. Alternatively, he had proved that when properly worked, the machine supplied would consume 4 cwt.

The defender replied—The question of patent did not enter into the case except as furnishing a description of the article. They had no objection to the article supplied as far as the patented process was concerned. The question was purely one of the sale of article guaranteed to do a certain amount of work which it had failed to do, and failing, proved disconform to contract. The circumstances were thus not those of any of the cases relied on by the pursuer.

At advising—

Lord Young—This is an action for the price of two patent machines called "Wilson's Gas Producers," with which the pursuer avers that he according to contract supplied the defenders. It is admitted that he did supply the defenders under a contract, specifying the price, with these articles, but it is averred that the machines were not capable of consuming fuel at a certain rate per hour, and therefore that they are not according to contract. The question substantially is, whether the capacity was an element of the contract, or, in other words, whether the pursuer, the seller, warranted the capacity?

Now, the facts are clear enough. Wilson is the patentee of the article in question. His patent gas producers are not kept in stock; it does not even appear whether he manufactures them himself, but they are erected to order by engineers with the patentee's licence; and the pursuer took the defenders' order to erect two of

"Wilson's Patent Gas Producers" of the 4 cwt. per hour size, and I think it is according to the evidence that the machines supplied were "Wilson's Patent Gas Producers." The only objection stated to them by the defenders is that they are too small, and do not in fact consume 4 cwt. per hour. I think it was no part of the contract that they should. I think it is not doubtful that the 4 cwt. an hour size was a name given to his articles by the patentee according to tests of his own. It was the description of them according to his view. The defenders expected that they would literally answer that description, and were honestly disappointed to find that they did not. But I think that the pursuer exactly executed the defenders' order. It appears that the patentee had two sizes of these producers, described in the same way as the 4 cwt. per hour and the 8 cwt. per hour sizes respectively, which were sold by persons having his licence. When the defenders' order was given, the pursuer, an engineer having the patentee's licence, obtained from the patentee plans of the 4 cwt. per hour size, which I must assume was a well-known size, the term being used in that way in the defenders' order. These machines have been made and sold in hundreds of the same kind and under the same description for other works. Could the pursuer in the execution of this order have done anything else than obtain plans for that size and erect a perfect machine according to them? And this he did. It is true, according to the testimony of the defenders, that they did not in their hands, though honestly used, consume the amount of fuel by reference to which they are described. That does not lead me to discredit the patentee's testimony that they did by his tests, and according to which he describes them, consume 4 cwt. per hour. Many things might have interfered with their productive capacity in the defenders' hands. I think the pursuer could have done nothing but what he did do, and that having completely executed the defenders' order he is entitled to payment of the price.

I am therefore of opinion that the Sheriff-Substitute's judgment should be recalled, and that we should find that the pursuer completely executed the contract to supply to the defenders "two Wilson's Patent Gas Producers of the 4 cwt. per hour size," and is therefore entitled to payment of the contract price.

Lord Craighill—I am of the same opinion. The contract here was for the erection in the defenders' works of two of "Wilson's Patent Gas Producers" and it is not in dispute that what was furnished by the pursuer to the defenders was "Wilson's Gas Producers." But there was a further condition that these producers should be of the size known as the 4 cwt. per hour size; and the controversy is, Are the articles supplied of this size or not? It appears that the articles are of a kind that have been supplied under that description in large numbers to other works, and according to anything in the evidence those supplied to the defenders were not different from those supplied to others. There is therefore nothing to shew that the pursuer departed from the terms of the contract, but, on the contrary, he took the best means of fulfilling it. But it is found that when tested by the defenders the machines did not in fact consume 4 cwt. of fuel per hour, and the defenders maintain that the contract was that what was furnished to them should not only be of the size known as the 4 cwt. per hour size, but should actually consume that amount of fuel. But I agree with your Lordship that that was no part of the contract, because the thing to be furnished was merely the thing known as "Wilson's Patent Gas Producers" of 4 cwt. per hour size.

I therefore think the Sheriff-Substitute was wrong in his view of the case. He did not consider what the parties meant by the contract, and I agree that his judgment should be recalled and decree given for the pursuer.

Lord Rutherfurd Clark concurred.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor:—

"Find that the pursuer, in execution of his contract with the defenders, supplied them with two 'Wilson's Patent Gas Producers' of the 4 cwt. per hour size: Therefore sustain the appeal, recal the judgment of the Sheriff-Substitute appealed against, ordain the defenders to make payment to the pursuer of the sum of £260, with interest thereon," &c.

Counsel for Pursuer (Appellant)—Trayner—Dickson. Agents—J. & J. Ross, W.S.

Counsel for Defenders (Respondents)—J. P. B. Robertson—Lang. Agent—Thomas Carmichael, S.S.C.

Tuesday, January 6.

SECOND DIVISION.

[Lord Adam, Ordinary.

MITCHELL *v.* DUNNETT.

Public Company — Fraud — Process — Title of Shareholder to Sue Action of Damages for Loss by Taking Shares and Debentures of Company, induced by Fraudulent Misrepresentations of Promoter—Relevancy.

A shareholder in a limited joint-stock company registered under the Companies Acts raised an action of damages against the promoter of the company, alleging that he had been induced to take shares and pay calls on them, and to take debentures of the company, to his loss and damage, on the faith of certain false and fraudulent statements made by the defender, which had led to the formation of the company and to his becoming a member of it. In that action he obtained decree in absence in his favour. In a suspension of the decree in absence by the defender, the Lord Ordinary granted suspension, on the ground that the pursuer as an individual member of the company had no title to sue. *Held* that as regarded the alleged loss from having taken debentures of the company, the pursuer had a title to sue in his own person, and that as he had made averments relevant to infer falsehood and fraud on the part of the defender, the Lord Ordinary's interlocutor should be recalled and the action remitted back to him for probation.