Saturday, March 7.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

A. M. GILLESPIE & COMPANY *v.* JOHN HOWDEN & COMPANY, *et e contra.*

Agreements and Contracts—Impossible Contract—Ship—Breach of Contract—Assessment of Damages.

A customer ordered from a shipbuilder a ship according to specification, which bore, *inter alia*, that the ship was "to carry 1800 tons dead weight, including coals, on 14½ feet draught," and that a model was to be submitted for purchaser's approval. There was no stipulation as to speed. In implement of this contract the shipbuilder submitted a model which was approved of by the purchaser, and thereafter completed and delivered a ship built according to the model. This ship was found to be short of the carrying capacity stipulated for by about 200 tons. In an action of damages against the shipbuilder for breach of contract he maintained that it was impossible to build a steamer according to the model which would carry the specified weight, and further, that the customer had suffered no damage, because a ship intended to carry such a weight, and of the description according to the model, would have been less valuable than that actually delivered. *Held* that the shipbuilder, being in breach of contract, was liable in damages.

Observed that in such a case the true standard of damage is the difference between the earning power of the ship contracted for and that furnished.

In November 1882 A. M. Gillespie & Co., merchants in London, and James Howden & Co., engineers and steamship contractors, Glasgow, entered into a contract set forth in a minute of agreement, whereby the latter undertook to build for the former an iron screw-steamer of certain dimensions therein specified, all as described in specification signed in connection therewith and approved by Gillespie & Co., at the price of £27,000, to be paid by four instalments at certain specified stages of progress.

The specification relative to the above minute of agreement contained the following stipulation—"To carry 1800 tons dead weight, including coals, on 14½ feet draught." Nothing was said in the contract as to the ship's rate of speed.

In terms of this contract, Howden & Co., after having submitted to Gillespie & Co. a model which was approved of by them, built and delivered to Gillespie & Co. an iron screw-steamer known as the "Nanshan" of which they took delivery under reservation of all claims at their instance.

Thereafter Gillespie & Co. complained that the ship was short in carrying capacity and of less value than if she had been of contract carrying capacity. In January 1884 they raised this action in the Sheriff Court at Glasgow against Howden & Co. for payment of £7000 as damages, averring that the "Nanshan," did not carry 1800 tons dead weight, including coal, on a draught of 14½ feet, but only 1530 or thereabout on that draught.

The defenders averred in defence that the vessel had been constructed strictly in terms of the contract between the parties, and was as full in the lines, and had as large a cargo capacity, as was consistent with safety or efficiency. Had she been made fuller in the lines, or with a greater cargo capacity, she would have been unseaworthy and too expensive to propel.

The pursuers pleaded—"The pursuers having sustained loss to the amount sued for by the defenders' breach of contract founded on, are entitled to decree as craved, with interest and expenses."

The defenders pleaded—"The pursuers having suffered no loss through the fault of the defenders, the latter should be assoilzied."

Messrs Howden & Co. raised a counter action for £750 as the balance of the last instalment of the price of the "Nanshan" remaining unpaid to them, which they pleaded was resting-owing to them by Gillespie & Co. under the agreement.

Gillespie & Co. pleaded—"The said vessel being disconform to contract, and the defenders having thereby sustained loss and damage to a greater amount than the sum sued for, decree of absolvitor falls to be granted, with expenses."

The Sheriff-Substitute (GUTHRIE) conjoined the actions and appointed a proof.

It was proved that the "Nanshan" could not carry 1800 tons dead weight including coals on a draught of 14½ feet, but had a shortage of carrying capacity more or less as estimated by the Sheriff-Substitute in his note quoted below. It was also proved by the evidence of engineers and shipbuilders that she was built as what is known as a "full boat," and that had she been made to carry the stipulated amount on the stipulated draught she would require to have been made much fuller in the lines than she was, so as, in the words of one witness, an engineer, to "approach more nearly to the boss type." It was also proved that in that case her speed would have been materially diminished, or that if it were to be kept as high as the speed she could steam at as actually built she would require to carry a greater quantity of coal, thus leaving less dead weight capacity for cargo, besides causing more expense for coal. If not, she would have required more powerful engines to drive her. The filling out of the lines would also have involved a greater weight of hull.

Howden & Co. led the evidence of shipbuilders to the effect that a vessel built as specified would not have been so good a seagoing ship as the one delivered, and that as built she was commercially more valuable than if she had been built according to the specification. One shipbuilder stated that he did not know of any proper seagoing ship of the specified capacity and draught.

The Sheriff-Substitute pronounced this interlocutor, finding in terms of the contract, and further as follows—[*After narrating the contract and the building of the ship*]—"Finds that the screw-steamer so built and delivered does not carry 1800 tons dead weight on 14½ feet draught in terms of the contract, and that the parties James Howden & Company are liable in damages to the parties A. M.

Gillespie & Company: Assesses the damages at two thousand two hundred and fifty pounds sterling (£2250): In respect of the foregoing findings decerns against the parties James Howden & Company for one thousand five hundred pounds sterling (£1500) in the action against them, with interest, as craved; and in the action at their instance against the parties A. M. Gillespie & Company, assoilzies the defenders and decerns."

"*Note.*—There has been no controversy here as to certain questions which were raised and settled in *Spencer & Company* v. *Dobie & Company*, 1879, 7 R. 396; and the sole issues are (1) whether Messrs Howden & Company have failed to fulfil their contract; and if so (2) in what amount of damages they are liable.

"I think that Messrs Howden & Company cannot successfully contend that the bargain to supply a steamer of the carrying capacity agreed for has been fulfilled. Nor was it very strenuously maintained that the alleged impossibility of building a steamer of the specified dimensions and with the carrying capacity required was such as to discharge or annul their obligation. It would indeed have been difficult to urge such a plea in the face of various authoritative decisions.

"Holding it to be established that there is a deficiency of carrying capacity, the amount of loss to the shipowner is a question of degree. Taking the weight of the ship and engines at 1200 tons, there appears to be a short capacity of at least 250 tons. The purchasers in course of the proof have agreed to allow 50 tons for various increases of structural weight above the contract claimed by the contractors in their defences, and it seems to me probable that a jury would not fix the real deficiency at any figure far off 200 tons. I proposed, however, to take 180 tons as the shortage for the purposes of this case, in order to leave no doubt upon my mind as to the justice of my assessment. A good deal of evidence was adduced on the part of the purchasers to show how much they have lost by this breach of contract, and they have even attempted to claim an annuity on the ship's life to the amount of the earnings which they have lost. This, it humbly seems to me, though the evidence is not without its use in confirming the estimate of the damages, which may be otherwise reached, is not only a somewhat unreasonable but an inconvenient and hazardous way of assessing the loss. I prefer—and it is more according to the analogy of other kinds of claims of damages—to take as the measure of damages the depreciation of the steamer's saleable value by reason of the short carrying capacity, viz., £15 per ton on 180 tons, or £2700.

"It is right, however, to allow the seller's deduction for the loss of speed which they would have suffered if the vessel had been built according to contract. Upon the pursuers' own evidence (*e.g.* Mr Lawrie's) it appears that she would have lost considerably—the defenders seem to hold so much as to make her really not a seagoing ship. I take it that the loss of speed would have been very material, and that the earning power of the ship would thereby have been materially diminished, not only by loss of time but by having to carry coals for consumption during the longer voyage, displacing an equal weight of cargo. I take 30 tons as the quantity of coals so added, and of cargo so displaced; and, deducting £450 from £2700, assess the damages at £2250."

Howden & Co. appealed, and argued—They admitted that the carrying capacity was not according to the contract, but the purchasers had suffered no damage thereby, but the reverse, for they had got a better article than they would have got had the contract been fulfilled. It was not disputed that the ship delivered was according to the model of which they had approved, and they could not now challenge it because the approval of the model was a subsequent condition superinduced on the original contract, and must rule if inconsistent with the original contract. Damage for breach of contract meant only that the party damnified must be kept *indemnis*; he was not entitled to make money out of it.

Replied for A. M. Gillespie & Co.—The builders undertook to make a ship on the lines given them which would fulfil the stipulations as to carrying capacity, and in doing anything else they were in breach of contract. The case was not altered by the submission and approval of the model. If they submitted a model which was incompatible with the contract they must themselves bear the prejudice arising therefrom. The contract and not the model must rule. If they undertook an impossible contract, it was at their own risk if damage were thereby caused to the opposite party. It was no answer to an action for breach of contract to say that the defender had made a contract which he found it impossible to execute—*James* v. *St John's College, Oxford*, November 18, 1870, L.R., 6 Q.B. 115; *Thom* v. *Mayor and Corporation of London*, February 17, 1876, L.R. App. Ca. 120.

At advising—

Lord Rutherfurd Clark—The defenders contracted to build a steamer of certain specified dimensions according to a model to be approved of by the pursuers, and it was a term of the contract that the steamer was to "carry 1800 tons dead weight on 14½ feet draught."

In execution of that contract, the defenders submitted a model to the pursuers, which was approved of by them. The result in my opinion was, that the defenders undertook to build a steamer on that model which could carry the stipulated weight.

It is clearly proved that the steamer which was delivered to the pursuers could not carry this weight, and I do not think that the Sheriff has overestimated the shortage in fixing it at 180 tons. The consequence is that the defenders have failed to fulfil their contract, and are therefore liable in damages.

The defenders urged that it was impossible for them to build a steamer according to the model which could carry the guaranteed weight. But this is no defence. The fact remains that the defenders undertook a contract which they could not fulfil and they are consequently liable in damages for the breach.

It was suggested that they might, under the contract, have built a ship of the requisite carrying capacity, but that as a ship so built would have been less valuable than the one which they actually furnished, they are not liable in damages. The defenders urged very little in support of this

view, nor is it surprising. I do not think that a seaworthy ship could have been built of the specified dimensions which would have had the guaranteed carrying capacity. But further, any such question is excluded from our consideration by the fact that the contract came to be a contract for building a steamer according to the model which was approved of, and if the ship so built is deficient in carrying capacity the damages must be assessed in reference to this contract.

I doubt if the Sheriff proceeds upon a right method in estimating the damages. I am disposed to think that the true standard is to be found in the difference between the earning power of the ship contracted for and the ship furnished. But it is not necessary to examine this question further, because in my opinion the damages on this view, would not be less than the damages, which the Sheriff has allowed, and because the pursuers are content with the judgment which they have obtained.

Lord Craighill and Lord Young concurred.

The Lord Justice-Clerk was absent.

The Court affirmed the Sheriff's judgment.

Counsel for A. M. Gillespie & Co.—J. P. B. Robertson—Pearson. Agents—J. & J. Ross, W.S.

Counsel for Howden & Co.—Trayner—Dickson. Agents—Davidson & Syme, W.S.

Saturday, March 7.

SECOND DIVISION.

[Sheriff of Lanarkshire.

DOLAN *v.* ANDERSON & LYALL.

Reparation—Master and Servant—Negligence—Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 1, *sub-sec.* 3—*Person to whose Orders or Directions Workmen are Bound to Conform.*

A workman, while working at a job along with several others, one of whom had higher wages than the others, and was in use to give directions which they obeyed, was injured through conforming to one of these orders, which was, in the circumstances, negligent. The defence to an action against the employer under sec. 1, sub-sec. 3, of the Employers Liability Act was, that the person in fault was in no position of superiority entitling him to give an order. *Held* that this question was one of fact, and that the workman in fault, though in a humble position, was truly a person to whose orders, according to the practice of the work, the pursuer was bound to conform, and therefore that the employer was liable.

Frank Dolan, a labourer, raised this action against his employers, Anderson & Lyall, engineers and boilermakers, Govan, for compensation for bodily injury sustained by him while working in their employment. He averred that on the date of the accident he was working as an assistant to a rivetting machineman in the defenders' employment. On that occasion he was ordered by the machineman, John M'Avenue, to go inside a furnace or firebox for the purpose of rivetting an additional piece to it, and that after he had done so, and was in the act of crawling out from below the furnace, which was slung about eighteen inches from the ground, the chain with which it was slung broke and the furnace dropped on his feet and caused injuries which permanently disabled him. He further averred that the accident was occasioned through M'Avenue having used a chain for slinging the furnace which was quite unfit for the purpose.

The defenders admitted that the pursuer had been ordered by M'Avenue to go inside the furnace, but averred that he had not been ordered to leave it. They also admitted that the accident occurred through M' Avenue having used an insufficient chain to sling the furnace. They denied fault on their part, and averred that the defect in the chain was due either to the fault of M'Avenue or of the pursuer, or of the other workmen, whose duty it was to see that a sufficiently strong chain was used for the work of slinging the furnace.

The pursuer pleaded—"The said accident having occurred by reason of the negligence of a person in the employment of the defenders to whose orders the pursuer was bound to conform, and the pursuer's injuries having resulted from his having so conformed, decree should be granted as craved."

A proof was led at which the following facts were proved—On the morning of the injury pursuer was wanting a job, and James Wilson, a labourer then working in the defenders' works, finding him at the gate, told him to go in and work with M'Avenue, who was the machineman or man in charge on the day-shift of a rivetting machine which was then being used to bolt or rivet on the additional piece to the furnace. Three (pursuer and two others) were working at the job along with M'Avenue. The furnace, which was standing on end, was slung by a chain, selected and affixed by M'Avenue, attached to a crane, by which it was raised from the ground high enough to enable a man to get inside for the purpose of inserting the rivets from the inside through the holes punched for them, which were then "squeezed" by the machine on the outside. M'Avenue told pursuer to go inside the furnace for this purpose, and he did so, in safety, and it was then lowered down upon the piece which was to be bolted to it. After the pursuer had done the work which he was sent to do, the whole furnace, with the new piece affixed, was hoisted up about eighteen inches or two feet from the ground to enable him to crawl out. He was in the act of doing so when the chain broke and the furnace fell on his feet or ankles, causing the injuries complained of. M'Avenue had used an insufficient chain, though the defenders had given an ample supply of sufficient chains.

Much evidence was led by both parties on the question of the position of M'Avenue in relation to the other men who were working at the job along with him, that given by the pursuer's witnesses conflicting with that given by those of the defenders. All, however, agreed in one particular, namely, that in such jobs the machineman always got higher wages than the other workmen.

M'Avenue's own account of his position was