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

to the following effect:—"I had charge of the rivetting machine . . . I had labourers under me, perhaps six or eight, or perhaps three at a time. There were just three on the morning of the accident. These labourers are supposed to do what I tell them. If they do not I have just to go to the foreman and get others in their places . . . I instructed the pursuer to go into the furnace; that was his work . . . I understood my duties to be that when I got a job at the machine, or whatever it was to put together, I might get it in separate pieces or plates and rivet it, and tell the men what they had to do. I had to work with my hands. I worked the machine." His wages were 28s. a-week.

The pursuer himself stated—"I had to do what M'Avenue told me. He was the gaffer over me. I heard him give orders to the other men. He was in full charge of the men. It was he who told me to go into the furnace that morning. I could only get out of it by crawling out; it was too high to climb . . . I never gave M'Avenue any orders. He told me what to do, and I did it. If I had not done what he told me he would have got me sent from the job." His wages were 17s. a-week.

Samuel Carson, the defenders' foreman, deponed that it was his duty to look after all the men in the place. He was not present that morning when the furnace was slung, or when the accident happened. On the question of M'Avenue's position his evidence was not consistent. He said, "M'Avenue worked the rivetting machine. (Q) What do you mean by worked the rivetting machine?—(A) Well, there are sometimes three, four, or five men who work together. He works with the others. (Q) Does he work like an ordinary labourer?—(A) Yes, they all work together. When the machine is not working he just labours through the shop." While in cross-examination he said, being asked—"Do the labourers work to his orders?—It is the case that the man who works the rivetting machine has the labourers who are working at it under his charge." Being re-examined on this answer, he said—"He has charge just on the very same footing as the man inside has charge over him. He has charge in this way, that when he gives orders to the man inside to stop putting in the rivets, so that he can squeeze perhaps a wide joint or anything he may want done outside, he does so to the man inside, and he has at once to obey them. Then the man inside, on an equal footing, may cry to the man outside to stop putting in the rivets as he wants to stop the joint, or wants to heave or lower, or to shift a die. If the men do not do that the work would not go on, and they would come and appeal to me, but that is no superiority in the position . . . Having charge is just simply that the one is bound to conform, or to do what the other tells him if the work has to be done, or the thing comes to a standstill . . . The machineman has a higher rate of wages than the other men because he is responsible for the machine. It is not because he is in a position of authority." He engaged workmen for the defenders, but he could not say who engaged the pursuer. If pursuer was told to come in by witness, as pursuer stated, it would be by his (Carson's) orders that witness did so. He was not present when the rivetting machine was worked on the night-shift.

The machineman on the night-shift stated that he had four or five men at a time working "under" him, who were bound to do what he told them; and a labourer who was working at the job with the pursuer at the time of the accident gave similar evidence. M'Avenue, he said, was just the foreman for the time being.

John Turnbull, civil engineer in Glasgow, partner of Turnbull, Grant, & Jack, boilermakers, who had a rivetting machine, stated that their machineman had a squad of men working with him, who were under his control, and bound to obey his orders. If they refused to do so, the machineman could not dismiss them, but could complain to the general foreman. This was also to his knowledge the case in other works.

Similar evidence was given by two other witnesses in the employment of other firms of boilermakers.

Evidence to a contrary effect as to the position of the machineman was given by several witnesses.

James Wilson, a labourer in the defenders' employment, who had occasionally worked inside a furnace-box, stated that M'Avenue did not give him any orders. He did not consider himself bound to obey M'Avenue, but only Carson, the foreman.

Alexander Dallas, a labourer with defenders, who had occasionally worked as machineman himself, gave similar evidence. When he worked at the machine he had nothing to do with the placing of the men or telling them what they had to do. Carson, the foreman, did that. He might say to a certain man to do a certain thing, but he had no power to enforce the order. His wages were then 34s. a-week, while those of the men working with him were from 18s. to 20s.

Other witnesses gave like evidence as to the standing of the machineman in other works being on an equality with the other workmen, and ascribed his having higher wages to the fact of his being responsible for the machine, and not to his having authority over the other men.

John Lyall, one of the defenders, deponed—"There was no obligation upon these men to obey the orders of M'Avenue. The work could have been conducted though the orders had not been obeyed. (Q) What would have been the result if the men that morning had refused to do anything that M'Avenue told them?—(A) It would just have been a case of going to the foreman. If the foreman had not been there they would have waited; they would sit and smoke."

The Sheriff-Substitute (LEES) pronounced this interlocutor—"Finds as matter of fact that the injuries received by the pursuer were not received by him through the negligence of any person in the service of his employers, to whose orders and directions at the time of the injury he was bound to conform: Therefore sustains the second plea-in-law for the defenders; assoilzies them from the conclusions of the action, and decerns," &c.

The Sheriff (CLARK) on appeal pronounced this interlocutor—"Finds that the person M'Avenue is not proved to have been a person to whose orders or directions the pursuer was bound to conform in terms of the 3d sub-section of section 1 of the Employers Liability Act: Therefore adheres to the interlocutor appealed against," &c.

The pursuer appealed to the Court of Session,

and argued—It was proved that M'Avenue was in the position of a gaffer of the squad of men of whom the pursuer was one, and it was just men in that position at which sub-section 3 of section 1 was directed. It included any superior labourer who was in a position at the time in which he could give orders to another workman, which the nature of the operation in which they were engaged made it necessary for the latter to obey—*M'Manus* v. *Hay*, January 17, 1882, 9 R. 425. The accident was a direct result of the pursuer's having conformed to the order, for his coming out was a necessary consequence of his having gone in, since he could not get out any other way, and, besides, M'Avenue's order to raise the furnace was for no other purpose than to let him out.

The defenders replied—The pursuer had failed to bring his case under sub-section 3 of section 1. It was not proved that M'Avenue was, or was regarded by the defenders themselves or the workmen in their employment or in other works as one in a position to give orders which his fellow workmen were bound to obey. It was true he had higher wages, but that was accounted for by his having charge of the machine, and not his being in a position of authority. The proper test was not difference of wages, but power of engagement and dismissal of the workmen said to be under him, and this power he had not. He was at least no more than *primus inter pares*. He and the other men were alike under the authority of the foreman.

At advising—

Lord Craighill—The action which is brought before the Court by this appeal was raised by the appellant in the Sheriff Court at Glasgow to recover damages from the defenders for injuries sustained by him while a workman in the defenders' employment. The Sheriff-Substitute was of opinion that the ground of action had not been substantiated, and therefore he assoilzied the defenders. The Sheriff adhered to this interlocutor, and these are the judgments which are now submitted to our review. The action is laid upon the Employers Liability Act (43 and 44 Vict. c. 42). The ground upon which liability was rested was the 3d sub-section of section 1, which provides that "wherever by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed, the workman . . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work." It is admitted that the accident occurred in the way described by the pursuer, and that in consequence of fault on the part of M'Avenue the pursuer was seriously injured, and that if sub-section 3 applies to the circumstances of the case the pursuer is entitled to reparation. For the determination of this question it is necessary to consider, *first*, whether M'Avenue, the machineman and principal man of the squad with which the pursuer worked, was a person in the service of the defenders to whose orders or directions the pursuer at the time of the accident was bound to conform; *secondly*, whether he gave an order to which the pursuer did conform; and *thirdly*, whether the injury for which damages were sought resulted from his having so conformed.

Upon the *first* of these questions I have come to a different conclusion from the Sheriffs. There is a conflict in the proof upon the point; but the weight of evidence appears to me to be in favour of the view that M'Avenue was a person to whose orders or directions the pursuer at the time of the injury was bound to conform. That he was the head of a squad, that he gave orders or directions to the other members, that the exercise of this authority never was challenged till after the accident, and that, on the contrary, the orders or directions he gave were obeyed by those to whom they were addressed, are things which are clearly established. There is thus real evidence which supports the testimony of the witnesses for the pursuer on the point under consideration, and renders improbable the accuracy of that which has been given by those examined for the defender. The gist of what is told us by the latter, consists, indeed, rather of theory than of facts. They think M'Avenue could not give orders which others were bound to obey, because he himself was under authority, and those to whom he was subject, the general foreman or superintendent of the works, were the only persons to whose orders or directions the pursuer and others like him were bound to conform. But the subordination of M'Avenue to those who were over him is not inconsistent with his power to give orders or directions to those who were under him. Forgetfulness of this is, I think, an explanation of the discrepancies in the evidence on this part of the case.

The defenders, however, in their argument on the appeal have contended that even if orders or directions might be and were given by M'Avenue to those working under him, he was not in such a position of trust and responsibility as the person must necessarily occupy whose orders are covered by sub-section 3 of section 1 of the statute. I see in the terms of the enactment no foundation for any distinction of classes upon this subject. The question is not whether the person who gave the orders or directions occupied a high or a humble position in the works. It is simply whether, whatever was his position, he was one to whose orders or directions at the time of the accident the workman injured was bound to conform. If he was, the words of the statute are satisfied, and a limitation of their operation for the purpose of restricting the benefit the statute was intended to confer would be, not an interpretation of the words of the clause but a capricious interference with its application. Apart from authority on the subject, this would be my reading of this part of the Act, but the view of its import which I have adopted is strengthened in my reading of the statute by the proceedings in an English case which came before the Queen's Bench Division—*Millward* v. *Midland Railway Co.*, December 15, 1884, reported in vol. 14 of the Law Reports (Q.B.D.) There the question was dealt with, not as one to be determined by the class of workmen to which the person giving the order or direction belonged, but as one to be determined according to his authority to give orders as established by the evidence. Once we are satisfied by the evidence which has been ad-

duced that M'Avenue was entitled to give orders or directions to which the pursuer was bound to conform, the fundamental question in the case as to which parties are in controversy must be held to be determined.

The *second* question is, whether the order was given. Upon this I have no doubt. Nor does it appear to me to be material whether the order was given by word of mouth or by a sign, or in any other way in which it could be communicated. The point is not the mode of giving the order or direction, but whether, whatever the mode adopted was, an order or direction was given. Upon this subject I again refer to the case of *Millward*, which has been already cited.

The *third* question is, whether the pursuer obeyed the order or direction? Upon this also I have a very clear opinion. The pursuer did obey the order, and this leaves consequently for determination the only other question, whether obedience to the order was the cause of the accident? What is said by the defenders is that though the pursuer may have obeyed an order in going into the furnace, he acted upon no order when he attempted to get out. But going in upon an order, and having finished the work for which he went in, his plain duty was to come out when his services within were no longer required. The original order must, I think, be held to involve this as an implication.

On the whole matter my opinion is that the grounds of action upon sub-section 3 of section 1 of the statute have been established and that the pursuer therefore is entitled to the judgment of the Court.

Lord Young and Lord Rutherfurd Clark concurred.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor:—

"Find in fact (1) That the accident by which the pursuer was injured was due to fault on the part of James M'Avenue, the gaffer or foreman of the squad with which the pursuer worked when in the employment of the defenders; (2) That the said James M'Avenue was entitled to give orders or directions to the pursuer and the other workmen who wrought along with him, to which they were bound to conform; and (3) That on the occasion in question the said James M'Avenue gave an order or direction to which the pursuer conformed, and that the pursuer suffered the injury for which compensation is sought in consequence of his having so conformed: Find in law that the facts being as above set forth, the defenders are liable to the pursuer in damages." The Court assessed the damages at £100, therefore recalled the interlocutors in the Court below, and decerned for that sum, with expenses in both Courts.

Counsel for Pursuer (Appellant)—Ure. Agents—Dove & Lockhart, S.S.C.

Counsel for Defenders (Respondents)—James Reid. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, March 11.

SECOND DIVISION.

HARVEY *v.* THE DISTILLERS COMPANY (LIMITED).

Public Company—Rectification of Register—Payment of Shares in Cash—Registered Contract—Companies Act 1867, *sec.* 25—*Cancelment and Re-Issue of Shares.*

A contract providing that shares should be issued to the vendor as paid up, to the amount of the value of vendor's property taken over by the company, having been omitted to be entered into and registered in terms of Companies Act 1867, sec. 25, the Court *granted* a petition by him to cancel from the register the entry of shares in his name, to ordain the company to enter into and register the contract, and thereafter issue the shares as paid up.

J. B. Harvey presented this petition under the 35th section of the Companies Act 1862, for an order to rectify the register of the Distillers Company (Limited) by deleting his name as holder of 1750 £10 shares, and to ordain the company to concur with him in executing and filing with the Registrar of Joint-Stock Companies a contract providing, *inter alia*, that the shares to be issued to him should be fully paid-up shares, and to ordain the company, on the contract being so executed and filed, to issue to him 1750 £10 fully paid-up shares, and deliver certificates thereof, and to order notice to be given to the Registrar of Joint-Stock Companies.

The company was formed in 1877 for the purpose of taking-over six distilleries, with their premises, business, and plant. The owners of these distilleries were the promoters of, and vendors of their premises to, the company. By the preliminary agreements between them, dated in 1876 and 1877, it was agreed that the distilleries should be made over to the company as at 1st May 1877, the heritable property to be paid for in debentures of the company, and the moveable property by the issue to the respective owners of shares of the company to be held as paid up to the extent of the valued amount of such property. The proportions in which the owners of the six distilleries should take up the 12,000 shares of £50 each which it was proposed to issue were also fixed, the petitioner's firm being allotted 2540, and no shares were issued to the public.

Agreements, all dated 18th April 1877, were entered into between the owners of each distillery and a law-agent contracting on behalf of the company, providing for the ascertainment by arbitration of the value of each distillery, including its heritable and moveable property, &c., and also for the mode in which the consideration money so ascertained should be paid by the company to the respective vendors. It was provided that the consideration money for the moveable property should be paid by allotment to the vendors, or as they should direct, of (in the case of the petitioner's firm) 2540 shares, and that they should get credit on the said allotted shares up to the value of the moveable property. It was specially provided by the said agreement that "at or before the issue