that statute applies to the present case. Section 8 enacts that the expression "workman" shall mean a railway servant and any person to whom the Employers and Workmen Act of 1875 applies. Section 10 of the latter Act, it is admitted, contains a definition which would cover the employment on which O'Shea was engaged; but the 13th section enacts that "this Act shall not apply to seamen or apprentices to the sea-service." Founding upon this exception, the defenders contend that O'Shea having been engaged at the time of his death on board a screw-steamer, he was a seaman, and as such was excepted from the Employers Liability Act. The Sheriff-Substitute has sustained this plea, and the action accordingly has been dismissed. Hence the present appeal.

Everything, it appears to me, depends upon the facts, which are these—The vessel in question was used exclusively for traffic upon the Forth and Clyde Canal. She never was taken out to sea, and this was the condition on which the argument for the parties was presented. In these circumstances I am of opinion that the Sheriff-Substitute has come to an erroneous conclusion, and that the appeal ought to be sustained.

In the first place, the interpretation of the word "seaman" is not dependant upon the provisions of the Merchant Shipping Act of 1854 (17 and 18 Vict. c. 104). There is no reference to that statute in the Employers Liability Act of 1880, or in the Employers and Workmen Act of 1875. The Court are therefore not only at liberty but are called upon to adopt that which they think is the true meaning of the word to be interpreted, as used in the Act of 1875, unfettered by the provisions of the Merchant Shipping Act 1854.

In the second place, the construction which has been put upon the word by the Sheriff-Substitute is inconsistent with the natural meaning of the word, and its meaning as exclusively used. Men engaged in vessels which are employed exclusively upon a canal are never spoken of as seamen; nor could they be reasonably so described. The vessel never goes to sea. Those employed on board, so long as they are on board, are never at sea, and they have no more connection with the sea than if they were employed on a railway train by which goods or passengers were conveyed from one part of the country to a harbour on the coast. The canal in question is only an artificial line of inland communication, and those who work the vessels upon it are no more associated with seafaring or with sea life than they would be if the element on which the vessel moved was not water but dry land. Dictionary definitions harmonise with this view of the matter. For example, in the "Imperial Dictionary," the last edition of which was published in 1883, a seaman is defined as "a man whose occupation is to assist in the navigation of ships at sea; a mariner or sailor." Again in MacCulloch's Dictionary of Commerce and Commercial Navigation, seamen are defined as "individuals engaged in navigating ships, barges, &c., upon the high seas." It is added, "those employed upon lakes and canals are denominated watermen." The word is defined in precisely similar terms in Wharton's English Law Lexicon, as well as in all other similar works which I have consulted. Thus the sense in which the word is generally used is fully justified, not only by its derivation, but by what may purely be considered authoritative definition. Such being the case, and there being nothing in any of the statutes which have been cited calling upon us to give an unusual or unreal or non-natural meaning to the word, I think on this occasion it must be held to have been used in the clause in question in its usual acceptation. This seems to me to be enough for the decision of the case. I would only add that the reason for which the exception has been introduced into the Act of 1875 is easily discovered. In the Merchant Shipping Act of 1854, part ix, there is a series of provisions by which there is introduced a limitation of the liability of shipowners, and the constitution of a tribunal by which, at least in the first instance, that liability is to be determined. The purpose was to prevent an evasion of those provisions, but when their clauses are examined it is plain that they are absolutely inapplicable to workmen employed on a vessel used exclusively for traffic upon a canal. To me it appears that it was no more the purpose of the Merchant Shipping Act of 1854 to regulate the rights and liabilities of those concerned with boats or vessels employed exclusively for traffic upon canals, than it was to regulate the rights and liabilities of those concerned with traffic upon the roads and railways of the country.

For these reasons I am of opinion that this appeal ought to be sustained, and the interlocutor appealed against recalled.

LORD RUTHERFURD CLARK.—I also concur.

LORD YOUNG was absent on Circuit when the case was heard.

The Court recalled the Sheriff's interlocutor, and repelled the plea above quoted. *Quoad ultra* a proof was allowed on pursuer's motion, to proceed before Lord Craighill.

The case was subsequently compromised by the pursuer's accepting £100 with expenses.

Counsel for Pursuer (Appellant) — Comrie Thomson—Gunn. Agent—Robert Stewart, S.S.C.

Counsel for Defender (Respondent)—J. P. B. Robertson — Jameson. Agents—Drummond & Reid, W.S.

Friday, February 22.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

THE POLICE COMMISSIONERS OF DUNDEE v. STRATON AND YEAMAN.

Superior and Vassal—Feu-Contract — Conjunct and Several Obligation — Original Vassal — Successor in Feu.

By a feu-contract the vassal bound "himself, his heirs, executors, and successors whomsoever, conjunctly and severally," in the various obligations and prestations contained therein. In an action by the superior for implement of the obligations, directed both against the original vassal and his successor in the feu—*held* that the effect of the words "conjunctly and severally" was to constitute the obligations perpetual upon the original feuar, though he

had parted with the feu, to the effect of rendering him and his heirs and executors liable along with the successors in the feu.

The Police Commissioners of Dundee, as heritable proprietors of certain lands in High Street, Dundee, exposed the same to sale in feu-farm by public roup on 14th August 1878, in terms of articles and conditions of roup. A portion of the lands was purchased at the sale on behalf of William Straton, restaurateur, Dundee, at a yearly feu-duty of £250.

The feu-contract following on the sale, *inter alia*, declared a feu-duty of £250, to begin from Martinmas 1879, to be a real and preferable burden, and that Straton was to be bound within two years from Martinmas 1878 to erect and maintain stone buildings of a certain class, under a penalty (declared to be pactional and not penal) of an additional feu-duty, payable along with the ordinary feu-duty, so long as the failure should last; and Straton further undertook obligations as to paving part of the street, "and further bound and obliged himself, his heirs, executors, and successors whomsoever, conjunctly and severally, to content and pay to the said parties of the first part . . . the said yearly feu-duty of £250, . . . and all the other obligations and payments specified in the feu-contract." The two years within which Starton was taken bound to build expired at Martinmas 1880, and no buildings were erected.

Straton conveyed the subjects in March 1880 to David Fleming, and Fleming conveyed them in December 1881 to Robert Yeaman of the Lee, Corstorphine, near Edinburgh. The deed was recorded on 10th February 1882, and the subjects were conveyed by it to Yeaman under all the burdens and provisions specified in the contract of feu.

The present action was raised by the Commissioners of Police of Dundee against Straton and Yeaman, and concluded that they should be decerned and ordained, conjunctly and severally, or at any rate severally, to implement and fulfil the various obligations of the feu-contract (1) by erecting and maintaining buildings; (2) by flagging the footpaths, or alternatively with these conclusions to pay the pursuers a sum of £3000; (3) to make payment to them of (1st) £125 as half-year's feu-duty due at 11th November 1882, and (2nd) £250 as half-year's feu-duty due at May 1883 and half-year's additional feu-duty as penalty due in respect of failure to build.

The defender Straton admitted the purchase of the lands on his behalf at the roup in August 1878, and also admitted that the two years allowed to him to build expired in 1880, but alleged that prior to that date he was discharged, by a sale of the lands, of all personal responsibility for performance of the obligations of the feu. He further alleged that by the terms of the Conveyancing Act of 1874, as notice of the change of ownership of the said feu was given to the pursuers in May 1880, he had long ceased to have any interest in the feu. Sec. 4, sub-sec. 2, of that Act provides—"Every proprietor who is at the commencement of this Act, or thereafter shall be, duly infeft in the lands, shall be deemed and held to be, as at the date of the registration of such infeftment in the appropriate Register of Sasines, duly entered with the nearest superior whose estate of superiority in such lands would according to the law existing prior to the commencement of this Act have been not defeasible at the will of the proprietor so infeft, to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice." It is also provided by the sub-section—"That notwithstanding such implied entry, the proprietor last entered in the lands, and his heirs and representatives, shall continue personally liable to the superior for payment of the whole feu-duties affecting the said lands, and for performance of the whole obligations of the feu until notice of the change of ownership of the feu shall have been given to the superior; but without prejudice to the superior having all his remedies against the entered proprietor under the entry implied by this Act, and without prejudice also to the right of the proprietor last entered in the lands, and his foresaids, to recover from the entered proprietor of the lands all feu-duties which such proprietor last entered in the lands, or his foresaids, may have had to pay in consequence of any failure or omission to give such notice."

He also averred that he had ceased to have any interest in the feu before a feu-duty became exigible under the feu-contract.

The defender Yeaman admitted that the two years allowed by the feu-contract for building expired in 1880, but denied that he was under any obligation to implement its provisions. He alleged that he did not acquire the lands till December 1881, at which date the time for erecting the buildings had long passed. He further alleged that no demand had ever been made upon him by the pursuers to proceed with the buildings, but rather that they acquiesced tacitly in no steps being taken in that direction. He averred that no penal feu-duty was exigible in the circumstances, but admitted liability for the ordinary feu-duty.

The pursuers pleaded that the defenders were liable conjunctly and severally to fulfil the whole obligations imposed upon the second party under the feu-contract.

The defender (Straton) pleaded—"(1) By the entry with the superior, implied by the recording of the foresaid disposition of the said subjects by the present defender in favour of the said David Fleming, and the notice of the change of ownership of the feu given to the pursuers, the present defender ceased to be liable to the pursuers for payment of the whole feu-duties affecting the said subjects, and the performance of the whole obligations of the feu."

The defender (Yeaman) pleaded acquiescence in the delay in making the erections; and that no penal feu-duty was exigible.

On 13th November 1883 the Lord Ordinary pronounced the following interlocutor—"Ordains the defenders, conjunctly and severally, to make payment to the pursuers of the following sums of money:—(*Primo*), £125 sterling, with interest thereon at the rate of £5 per centum per annum from 11th November 1882 until payment; and (*secundo*), £250 sterling, with interest thereon at the foresaid rate from 15th May 1883 until payment; and decerns *ad interim*, &c.

"*Opinion.*—The first question is, whether the original feuar Mr Straton is personally liable to the superior for payment of the feu-duties, notwithstanding that he disponed the subjects to a purchaser in 1880; that his disponee was infeft, and duly entered with the superiors

by the recording the disposition in the Register of Sasines; and that notice of the change of ownership of the feu has been given to the superiors?

"The personal obligation undertaken by the defender is expressed in unusual terms. The ordinary form of feu-contract was not intended to bind the original vassal and his personal representatives after he had been divested, but to give the superior greater facilities for recovering payment from the vassal in possession of the feu, and to enable him to forfeit the right without losing his claim for arrears. For that purpose the personal obligation was introduced with a clause of registration, on which a charge might proceed without a farther constitution of the debt, and when the personal obligation is expressed in the usual form, which is very familiar to conveyancers, it is not disputed that it applies only to the vassal in possession for the time. But in the present case the feuar, departing from the usual style, has bound 'himself and his heirs, executors, and successors whomsoever, conjunctly and severally,' to pay the feu-duties. If the words 'conjunctly and severally' have any meaning, they must mean that the feuar binds himself and his personal successors conjunctly and severally with his successors in the feu. There can be no joint and several obligation if the actual possessor is the only person bound; and the defender's contention, therefore, that by the transmission of the feu-right he has been liberated from all liability denies all force and meaning to the plain terms of the obligation.

"It is said that the personal obligation in a feu-contract is merely accessory to the real right, and that this is so in general is not disputed. But it is quite intelligible, and it is not unlawful, that a proprietor who grants a feu for building purposes, and who stipulates for no other price but the payment of an annual feu-duty alone, should in such a case as this require a more permanent obligation from the original feuar, who is the only person with whom he directly contracts. Until the buildings are erected the land produces no fruit from which the feu-duties can be recovered; and if the first feuar chooses to transfer the feu unbuilt upon to an insolvent purchaser, the superior loses his land, and has no effectual remedy for payment of the price. If in order to avoid that risk he intended to insist upon his original vassal continuing bound, jointly and severally, with any purchaser to whom he might dispone, he could adopt no form of words more clear or effectual for that purpose than those which are employed in the obligation in question. He might, no doubt, have taken a separate bond, as in the case of *The King's College of Aberdeen* v. *Lady James Hay*, 1 Macq. 596. But if the construction of the obligation is clear and ambiguous, it can make no difference that it is embodied in the feu-contract. The observations of the Lord Chancellor in the case cited appear to me directly applicable. The pursuers say they desired to have an obligation which should bind the defender and his representatives after they might have parted with the land, and such an obligation they have obtained. 'It was for the party granting the obligation, if he did not intend it to operate to the full extent, which its language imported, to introduce words qualifying its generality.' This he has not done, and I must therefore assume that he intended his words to have their ordinary construction.

"There is no question as to the liability of the other defender for the original feu-duty. But it is maintained that the additional feu-duty stipulated until buildings shall be erected is a penalty which can only be demanded to the extent of such actual loss and damage as the pursuers can instruct. The plea is in my opinion untenable. It is a condition of the feu-right that double feu-duties shall be paid so long as they are unsecured by the erection of buildings. The feu-duty payable under such a condition is a part of the stipulated reddendo for the feu-right, and has nothing of the character either of penalty or of liquidated damages, nor is it in any sense a casualty, so as to be struck at by the Conveyancing Act of 1874. There is nothing uncertain in the mention of the payment, nor is it dependent upon any fortuitous event. But the vassal may relieve himself of his obligation to pay the double feu-duty, exigible so long as the ground remains unbuilt upon, by performing the obligation to build."

The defender (Straton), reclaimed and argued—This was the first time it had been suggested that the original vassal was to remain liable for the feu-duty after he had been divested of the subjects. It was not intended by the use of such a phrase to impose so heavy a burden upon the original feuar; and no such liability could be created by the use of such words. The only fair way to read the contract wss to attach no meaning to the words "conjunctly and severally," and to view it as an abortive attempt to create an unreasonable obligation. The original vassal had certain obligations, and his successors in the feu had others, but the phrase "conjunctly and severally" could never be interpreted as making a temporary obligation permanent—Conveyancing (Scotland) Act 1874, sec. 4, sub-sec. 2; *King's College of Aberdeen* v. *Lady James Hay*, 1 Macq. 596.

Argued for the respondents — The words "conjunctly and severally" as used in a deed such as this would only admit of one interpretation, and their effect must be to make the original vassal and his heirs and executors liable for the feu-duties along with any successors in the feu —Juridical Styles, 6th ed. p. 56.

At advising—

LORD PRESIDENT—The obligations undertaken by the feuar here appear from the terms of the feu-contract to be both serious and heavy.

In the first place there is an obligation upon him to make payment of an annual feu-duty of £250, then there is to be a duplicand of the feu payable every twenty-fifth year, thirdly there is to be an additional feu-duty exigible, equal and in addition to the annual sum above-mentioned, so long as the contemplated buildings are not erected, and then follow certain stipulations as to the renewal of buildings, which are equivalent to an obligation on the part of the feuar to erect and maintain up to a requisite value buildings producing a rent equal to double the annual feu-duty. Now, the question of interest in the present case comes to be, on whom are all these obligations to be laid after the original feuar has parted with his feu? and that, I think, must depend upon the meaning attached to the words of the opening

part of one of the clauses in the feu-contract. The provision is in these terms:—"For which causes and on the other part the second party hereby binds and obliges himself and his heirs, executors, and successors whomsoever, conjunctly and severally, to content and pay to the said parties of the first part, and their successors or assignees whomsoever, the said yearly feu-duty of £250 hereinbefore stipulated," and other obligations.

Now, if this clause had stood, as it usually does, without the words "conjunctly and severally," it is not suggested that anybody would have been bound but such parties as are usually bound in a feu-contract. The obligation upon the party himself, his heirs, executors, and successors, bound the feuar himself in a payment of feu-duties so long as he lived, and after his death it rendered his heirs and executors liable for arrears, and made his successors in the feu responsible for all future duties. But the introduction of the words "conjunctly and severally" into this clause materially alters the number of persons affected thereby; for a conjunct and several obligation of necessity binds a plurality of persons, each to perform the whole obligation. The parties are bound, each for the whole, and it is in the option of the creditor in the obligation to enforce the whole obligation against any one of those so bound. In other words, all are liable *singuli in solidum*, and therefore whenever these words occur the parties bound in the same obligation must be bound to the same extent, and jointly as well as severally. In an ordinary feu-contract the vassal is liable in feu-duties so long only as he holds the lands, and when he parts with them his successor in the feu undertakes the liability; the heirs and executors of the original vassal are liable only in arrears, because they were only bound severally; and successors in the feu could not be called upon for anything for which the original feuar was liable.

In the present case, however, the result of the interpretation which must be put upon the words "jointly and severally" is that the original feuar and his representatives are to continue liable for the feu-duty along with the proprietor of the the lands, and that a personal obligation has been thereby undertaken which is not terminated or affected by a notice of a change of ownership under the statute. According to the ordinary form of such a clause, the obligations are all "several," but under this clause they are "conjunct and several," which in other words means that the whole parties are liable for the same feu, and exactly in same amount.

That being so, it is clear, as the Lord Ordinary says, that the obligation against the original feuar and his heirs and executors is perpetual, and that his heirs and executors are to be liable equally with the successors in the feu.

I do not suppose that the original feuar in any way realised the burden he was undertaking, but looking to the nature of the obligation imposed by the words conjunctly and severally, I have come to be of opinion that the Lord Ordinary is right in the opinion which he has expressed, and I cannot find any flaw in his argument.

Lord Mure—I am of the same opinion as your Lordship. It is quite plain, I think, that the words "conjunctly and severally" bring in as liable for this feu-duty a different and very much wider set of persons than such as are usually brought in under the terms of an ordinary feu-charter. Nor, I think, does it make any difference that the obligation is not made effectual by a separate bond, as was done in the case of *The King's College of Aberdeen* v. *Lady James Hay*, 1 Macq. 596, to which we were referred in the course of the discussion, for the contract must be viewed as a whole, whether the obligation be undertaken in one or in separate deeds. The effect of the words "conjunctly and severally" must be to make the heirs and executors of the original feuar liable for this feu-duty equally with the successors in the feu.

Lord Shand—The obligations undertaken in this feu-contract are, no doubt, of a most serious character, for it is only too clear that the original feuar cannot free himself or his representatives from the burden which it imposes. The words "conjunctly and severally" are, I think, susceptible only of the meaning contended for by the pursuers, and I have come to be of this opinion after a most careful examination of the deed, to see whether any less burdensome interpretation could be put upon them. The only meaning which can be attached to the words "conjunctly and severally" is that the original feuar and his successors in the feu, or the heirs and executors of the original feuar, and his successors in the feu, are each to be liable for the feu, and each *singuli in solidum*. With the personal obligation expressed in such unusual terms, I feel shut up to the construction adopted by the Lord Ordinary. I cannot, however, agree with him when he says to attain the present result the proprietor "could adopt no form of words more clear or effectual for that purpose than those which are employed in the obligation in question," but I do agree with him in thinking that the words used are effectual to bind the feuar and his personal successors conjunctly and severally with his successors in the feu.

Lord Deas was absent.

The Court adhered, and remitted to the Lord Ordinary to decern in terms of the conclusions of the summons.

Counsel for Pursuers — Mackintosh — Hay. Agent—J. Smith Clark, S.S.C.

Counsel for Defenders — Gloag — Strachan. Agent—Alexander Gordon, S.S.C.

Wednesday, February 27.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

SIMPSON v. MASON AND M'RAE.

Superior and Vassal — Servitude — Agreement — Rei interventus—*Decree of Removing.*

Two proprietors were for each other's benefit restricted by their titles from building above a certain height. They entered into negotiations for the departure from these restrictions and the substitution of others, and while the agreement between them remained