The Court adhered.

Counsel for Reclaimer—J. P. B. Robertson—Wallace. Agents—J. & A. Hastie, S.S.C.

Counsel for Respondents—Mackintosh—Baxter. Agent—F. J. Martin, W.S.

Monday, February 18.

OUTER HOUSE.

[Lord Adam.

MARX *v.* NORTH BRITISH RAILWAY COMPANY.

Process—Reparation—Jury Trial—Amount of Damages—Expenses.

This was an action for damages for personal injury, in which the damages were laid at £5400. No tender was made by the defenders, who admitted liability, but maintained that the sum sued for was excessive. The jury awarded to the pursuer £800 as damages. On a motion by the pursuer to apply the verdict and find him entitled to expenses, the defenders maintained that the expenses should be modified, in respect the pursuer had obtained so small a sum in proportion to that sued for. The Lord Ordinary, on the ground that the jury had given a substantial sum to the pursuer, found him entitled to full expenses.

Counsel for Pursuer—J. P. B. Robertson—Darling. Agents—J. & J. Ross, W.S.

Counsel for Defenders—Sol.-Gen. Asher, Q.C.—Comrie Thomson. Agents—Millar, Robson, & Innes, S.S.C.

Thursday, February 21.

FIRST DIVISION.

HOEY *v.* HOEY.

Process—Proof—Husband and Wife—Divorce—Recall of Witness—Evidence Act 1852 (15 *Vict. cap.* 27), *sec.* 3.

In an action of divorce on the ground of adultery, counsel for the defender at the close of the proof moved the Lord Ordinary, in terms of sec. 3 of The Evidence Act 1852, to be allowed to recal G, a witness for the pursuer, who had deponed that she was eye-witness to one of the alleged acts of adultery, on the ground that information had since her examination been received that she had given to other parties a totally different account of what she alleged she had seen. It was proposed to question G as to these different accounts, with the view of leading evidence of the parties to whom defender alleged these different statements had been made. The Lord Ordinary *refused* the motion, being of opinion, looking to the whole circumstances, that no sufficient reason had been adduced in support of it. The case came before the Inner House on a reclaiming note, when the defender renewed his motion to be allowed further to examine G in the manner and to the effect proposed to the Lord Ordinary. The Court, following *Robertson* v. *Steuart*, February 27, 1874, 1 R. 532, *granted* the motion, and pronounced this interlocutor:—"Having heard counsel on the motion of the defender to be allowed further to examine the witness" G "in the manner and to the effect proposed in the course of leading the defender's proof, allows the said witness to be recalled and examined as proposed, and also allows the defender to examine other witnesses for the purpose of and in the terms of the 3d section of the statute 15 Vict. c. 27," and appointed the evidence to be taken before Lord Shand.

Counsel for Pursuer—Party. Agents—Stewart-Gellatly, & Campbell, S.S.C.

Counsel for Defender—R. Johnstone—Ure. Agents—Ronald & Ritchie, S.S.C.

Thursday, February 21.

SECOND DIVISION.

[Sheriff of Lanarkshire.

OAKES *v.* MONKLAND IRON COMPANY.

Master and Servant—Reparation—Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 8—*Employers and Workmen Act* 1875 (38 *and* 39 *Vict. c.* 90), *secs.* 10 *and* 13—*Merchant Seamen* (*Payment of Wages and Rating*) *Act* 1880 (43 *and* 44 *Vict. c.* 16), *sec.* 11—"*Workman*"—"*Seaman.*"

Held that a fireman on board a barge propelled by steam, which plied exclusively on a canal, was not a "seaman" but a "workman" in the sense of the 10th and 13th sections of the Employers and Workmen Act 1875, and therefore entitled to the benefits of the Employers Liability Act 1880.

Section 10 of the Employers Liability Act provides—"The expression 'workman' means a railway servant and any person to whom the Employers and Workmen Act 1875 applies."

Section 10 of the Employers and Workmen Act provides—"In this Act the expression 'workman' does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

Section 13 provides— . . . "This Act shall not apply to seamen or apprentices to the sea-service."

Section 11 of the Merchant Seamen (Payment of Wages and Rating) Act 1880 provides—"The thirteenth section of the Employers and Workmen Act 1875 shall be repealed in so far as it operates to exclude seamen and apprentices to the sea-service from the said Act; and the said Act shall apply to seamen and apprentices to the sea-service accordingly; but such repeal shall not, in the

absence of any enactment to the contrary, extend to or affect any provision contained in any other Act of Parliament, passed or to be passed, whereby workman is defined by reference to the persons to whom the Employers and Workmen Act 1875 applies."

Section 1 of the Merchant Shipping Act 1854 provides, *inter alia*—"'Seaman' shall include every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship." "'Ship' shall include every description of vessel used in navigation not propelled by oars."

Robert John O'Shea, a boy of fourteen years of age, while employed as fireman on board a screw steam canal-boat called the "Helen Crawford," belonging to the Monkland Iron Company, which plied on the Forth and Clyde Canal between Glasgow and Grangemouth, was drowned in the canal in consequence of the collision of the "Helen Crawford" with another steam barge. His mother, who had become Mrs Oakes, raised this action against the Company in the Sheriff Court of Lanarkshire, at common law and under the Employers Liability Act 1880, alleging that the boy's death was caused by the fault of the company, or of those for whom they were responsible.

The defenders denied fault, and subsequently to the closing of the record they obtained leave to add this plea-in-law—"The said Robert John O'Shea having been engaged at the time of his death as a seaman on board the defenders' screw-steamer 'Helen Crawford,' and not being a workman in the sense of the Employers Liability Act 1880, the said Act does not apply, and the action falls to be dismissed *quoad* said Act."

The Sheriff-Substitute (ERSKINE MURRAY) on 11th August 1883 pronounced this interlocutor—(Finding that the action was raised to recover damages for the death of a person "acting as fireman on a screw-steamer belonging to the defenders, which usually plied on the Forth and Clyde Canal)"; (2) "That such a person is not one of those to whom the Employers' Liability Act applies. He therefore dismissed the action so for as founded on the Employers Liability Act.

"*Note.*—The Employers Liability Act in defining a workman refers back to the Act of 1875. That Act expressly excludes seamen. Now, the Merchant Shipping Act of 1854, which is the leading authority on all points connected with those employed on board ship, defines as a seaman every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship, and 'ship' is said to include every description of vessel used in navigation not propelled by oars. Clearly, therefore, a person employed as fireman on board a steamer plying on a canal is a 'seaman' in terms of the Merchant Shipping Act. Now, though it is true that a definition in an Act is for the purposes of that Act, and does not alter the common law, yet it cannot be doubted that such a definition in an Act of such importance and extent as the Merchant Shipping Act has a tendency to bring the common idea in conformity with the term, and to make its definition thus a general definition, and that therefore in a subsequent Act the Legislature may rationally in using the term 'seaman' be understood to refer to the term as defined in the Merchant Shipping Act. On this footing, which on the whole the Sheriff-Substitute is inclined to hold is the sound one, the pursuer's son was not a workman in the sense of the Employers Liability Act. That Act, moreover, by its own terms, clearly is not intended to refer to persons employed on board ship, for it lays down, sec. 3, that the amount of compensation exigible shall not exceed three years earnings of a person in the same grade during those years, in the like employment, and in the district in which the workman is employed at the time of the injury. To be employed in a district is utterly inapplicable to the case of a seaman, including the case of a fireman in a steamer, who may be employed all the world over. Nor would sec. 4, laying down that notice must be given to an employer within six weeks after an accident, be applicable to the case of a party on board ship who might not have a chance of getting home so as to serve such a notice for many months. The Employers Liability Act thus shows by its own terms that it is not intended to apply to parties employed on board ship, and that thus the term 'seaman,' *quoad* it, is really intended to mean, as in the Merchant Shipping Act, anyone employed on board ship.

"There was a case, *Wilson* v. *Zulueta*, Law Journal Reports, Common Law, New Series, vol. 19, decided on 24th November 1849, seven years previous to the passing of the Merchant Shipping Act, in which Lord Coleridge held, for the purposes of a Stamp Act, that an agreement as to ten men engaged as fireman or stokers on board a sea-going steamer fell under a clause as to 'labourers' rather than under a clause as to 'mariners.' The agreement set forth that they were to obey the engineers, the captain being apparently ignored. Lord Coleridge held—'I do not think they made themselves ordinary seamen, but that they engaged for the particular duty of doing the work of firemen or stokers, subject to the orders of the engineers.' Erle, J., also puts his judgment on the grounds that 'These persons appear to be placed in a very different condition from that of ordinary seamen, being liable to the engineer only,' adding, 'But though I put this limitation upon the present agreement under the words of the Stamp Acts, I do not mean to say that the same words may not, as is known to be the case, have a more extensive meaning under other Acts, nor that persons in the same situation going to sea may not agree to take upon themselves the duties and liabilities of mariners in some respects.' This case, it will be observed, was special, and before the passing of the Merchant Shipping Act, and though quoted by Lord Fraser in his work on Master and Servant, does not seem really to show that a fireman on board ship is a person entitled to the privileges of the Employers Liability Act in the face of the other arguments against that conclusion."

The pursuer appealed to the Sheriff, who adhered, and remitted to the Sheriff-Substitute for further procedure.

The pursuer appealed to the Court of Session, and argued—The deceased was not a seaman in the sense of the Merchant Shipping Act 1854, if recourse must be had to that Act for the definition of "seaman" as the term is used in the Employers and Workmen Act. A "seaman" was there defined as a person employed "on board a ship." The Act dealt only with registered sea-going

vessels, and no other vessel was a ship or could have "seamen" on board of her. This barge was neither registered nor sea-going, but merely a floating waggon. Its being "not propelled by oars" did not make it a "ship." A ship must go to sea, since it was defined by reference to "navigation"—*Ex parte Ferguson*, L.R., 2 Q.B. 280, *per* Blackburn, J., 291; *The C. S. Butler*, L.R., 4 Adm. and Eccl. 338, *per* Sir R. Phillmore, 241; *Grainger* v. *Aynsley*, L.R., 6 Q.B. Div. 182. In *Wilson* v. *Glasgow Tramways Company*, June 22, 1878, 5 R. 981, the Lord Justice-Clerk spoke of a canal boatman as a "labourer." (2) But the question was really one as to the meaning of the simple English word "seaman," which was absolutely inapplicable to a man who never went to sea at all. The policy of the Act of 1880 was in pursuer's favour.

The defenders replied—The deceased was a "seaman" engaged on board a "ship." There was nothing in the Act to show that "seamen" were those only who were engaged on sea-going ships. The test of a "ship" in the Act was the mode of propulsion, not the use to which it was put, or the place to which it was sent. The application of the Act (sec. 109) "to all sea-going ships" showed that it contemplated the existence of ships which were not sea-going; so also the expression "British ship," in section 291, covered more than "sea-going" ships. Mere want of registration did not exclude a vessel from the category of "ship," for there were some "ships" which were exempted from registration (sec. 19).

Authority—*Grace* v. *Cawthorne*, April 25, 1883, Q.B.D., reported in Journal of Jurisprudence, vol. 28, p. 110.

At advising—

Lord Justice-Clerk—The Sheriff-Substitute in this case has very clearly explained its nature in the note which he has appended to his judgment. The plea which we are now to consider, and which alone, in the meantime, has been sustained by the judgment appealed from, is an additional plea-in-law stated for the defenders in the following terms—[*reads*]. The interlocutor of the Sheriff on this plea is as follows—[*reads*].

I am of opinion that this judgment is erroneous. I think the deceased was not at the time of his death acting as a seaman in any acceptation of that term, but was a workman in the sense of the Employers Liability Act 1880. The general ground on which I differ from the result of the judgment before us will be best elucidated by a short summary of the statutory provisions on which it proceeds.

Clause 10 of the Employers and Workmen Act 1875 contains a definition of the word "workman" as used in that statute in the following terms—[*reads*]. And sec. 13 provides—[*reads*].

So stood the law prior to the passing of the Employers Liability Act 1880, which is that under which this action proceeds. By the definition clause (8) the expression "workman" means a railway servant, and any person to whom the Employers and Workmen Act 1875 applies.

This by itself would have left the question as it stood under the Act of 1875; but in the same session of Parliament, and prior to the last-mentioned statute, there was passed an Act, c. 18 of that year, entitled "Merchant Seamen Act 1880," by sec. 11 of which it is provided—[*reads*].

It thus appears that in 1880 the Legislature had come to be satisfied that there was no good reason for maintaining the exemption of seamen which had been introduced into the Employers and Workmen Act 1875, and accordingly all the provisions of the Merchant Shipping Act of 1854 must be read in conformity with that statute. It may, I think, admit of doubt how far the subsequent statute, c. 42 of 1880 (the Employers Liability Act), is effectually qualified to any extent by the proviso in sec. 11 of the previous Merchant Seamen's Act 1880. Meanwhile, however, I am of opinion that a servant employed on board a vessel solely used on a canal is not a seaman. A barge, or lighter, or vessel of any kind, used on an inland artificial waterway cannot be brought within the provisions or intendments of the Merchant Shipping Acts to any effect. The mercantile marine of this country consists of a seafaring population, and the merchant navy substantially is composed of sea-going vessels only. A ship in ordinary language means a vessel which goes to sea, and a seaman means what the name imports—one whose ordinary employment is on the sea. If he go to sea on any craft not propelled by oars, he is a seaman under the Merchant Shipping Acts, but not otherwise.

A structure meant to float on a private aqueduct, artificially constructed, however propelled, whether by horse power, such as a track boat, or manual labour, as many canal-boats are, or by steam on board the floating structure, or by a fixed pulley, belongs to a different although a very large and important branch of industry. A ship is defined in the Merchant Shipping Act 1854, to include "every description of vessel used in navigation not propelled by oars." But "used in navigation" means here, as I think clearly, used in navigating the seas. In the Merchant Shipping Act of the preceding year 1853, the word "ship" was defined more accurately perhaps, "every sea-going vessel," and probably in the Act of 1854 the definition was altered to exclude boats propelled by oars only. But as far as I can read the Merchant Shipping Acts, they are all applicable only to sea-going men plying their vocation in sea-going vessels. I know of no provisions which they contain which could be applied, for example, to the driver of a track-boat horse, or one employed to haul a barge along a canal, who might never quit the shore from one year's end to the other. Such persons are landsmen, not seamen; they are workmen, and nothing else, and clearly within the original definition of the Employers and Workmen Act 1875.

My remarks have been confined to artificial inland waterways. The case might differ in some features, although not in principle, if it arose in regard to great natural inland waterways, such as that of men employed on a flotilla on an inland lake. But even then such persons would form no part of the mercantile marine, nor would they come under the Merchant Shipping Acts, or the great code of laws by which it is regulated. I think, therefore, that to this effect the judgment appealed from must be altered, and the plea in question repelled.

Lord Craighill—[*After narrating the facts*]—In the discussion upon the appeal the sole ground of liability maintained was that furnished by the Employers Liability Act. The question is whether

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