the meaning and effect of the statutory provision. The tenant has a special privilege conferred on him. If he does not use it he is left to his ordinary remedy.

That there might be circumstances in which, especially after a lapse of time, the tenant might be held barred from making a claim like the present may be possible. But we have no such case here. I regard this as a simple case of *condictio indebiti*—money paid which was not due—and which the receiver of that money has no title, moral or legal, to retain. I am therefore for recalling the interlocutor reclaimed against, and remitting to the Lord Ordinary to ascertain to what extent the defender is the pursuer's debtor, for the parties are not agreed as to the amount which the pursuer is entitled to recover, assuming his right to recover anything.

LORD MONCREIFF—The Lord Ordinary has, without inquiry, assoilzied the defender on the broad ground that although the pursuer paid the royalties in question to the defender during his tenancy he did not at the time of payment deduct the amount of income-tax effeiring to the royalties so paid, and that accordingly he is not now entitled to repayment.

The view on which this judgment is rested seems to be that the Income-Tax Acts, and in particular the Act of 1853, sec. 40, having authorised a tenant who pays income-tax to deduct the proportion thereof from his rent when the same becomes payable, the tenant must avail himself of this statutory right under the penalty that if he fails to do so and pays his rent in full he cannot thereafter recover the income-tax from the landlord. I cannot concur in this view, which proceeds on the footing that the income-tax statutes deprive a debtor who makes an over-payment in excusable error of remedies which would be open to him in regard to any other payment at common law. It seems to me that the object of the provisions in the Income-Tax Acts, in particular sec. 102 of the Act of 1842, and sec. 40 of the Act of 1853, was simply to facilitate collection of the tax. With this purpose they provide that the assessment shall be made and enforced against the person liable in an annual payment, but at the same time give such person right to reimburse himself by deducting the proportion of income-tax effeiring to the payment. The prudent course for the debtor undoubtedly is to avail himself of the right of deduction thus given, which avoids the difficulties usually attendant on a claim for repetition.

But it does not follow that if the debtor does not avail himself of the statutory remedy he is absolutely deprived of his common law right of claiming repayment. Of course he can only do so on the conditions under which *condictio indebiti* is recognised in our law; that is, he must show that the payment was made according to the usual course of dealing or under excusable error or misunderstanding.

I have examined the numerous cases in the law of England which were referred to in argument; and in all of them I think it will be found that the judgment proceeded in respect of circumstances which indicated that the payments were voluntary and unconditional. In most cases payment in full was made for a series of years without deduction. Also in the Scotch case relied on by the Lord Ordinary—*Galashiels Provident Building Society*, 20 R. 821, payments of interest without deduction were made for a long number of years.

In the present case we have only to deal with a single payment; and besides, the pursuer's averment is that in making that payment in full he simply followed the practice previously observed during his tenancy of the minerals, under which royalties were paid in full, the landlord subsequently repaying his proportion of income-tax which the tenant had paid.

I am therefore for recalling the Lord Ordinary's interlocutor and allowing inquiry unless parties can agree on the facts and as to amounts.

The Court recalled the interlocutor reclaimed against, found the pursuer entitled to the expenses of the reclaiming-note, and remitted the cause to the Lord Ordinary to proceed.

Counsel for the Pursuer and Reclaimer—Salvesen, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defender and Respondent — Clyde, K.C. — Cullen. Agents — Cairns, M'Intosh, & Morton, W.S.

Friday, June 5.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

BLAIN *v.* GREENOCK FOUNDRY COMPANY.

Reparation—Negligence—Master and Servant—Common Law—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *secs.* 1 (2) (*b*) *and* 7 (2)—*Action at Common Law by Persons not Entitled to Claim under Compensation Act — Previous Award to Dependents under Compensation Act—Bar—Title to Sue.*

The fact that a claim has been made by, and compensation has been awarded to, a person under the Workmen's Compensation Act 1897 does not bar an action for reparation at common law by another person who has no right to claim under the Act.

Proceedings under the Workmen's Compensation Act 1897 were instituted by the widow and the two youngest children of a deceased workman against his employer. The arbitration resulted in a sum being awarded as compensation under the Act to the widow and the youngest child, who were wholly dependent on the deceased, while the second youngest child was

found to have no title to claim compensation, as he was only partially dependent on the deceased. Thereafter the whole children of the deceased workman with the exception of the youngest, none of whom were wholly dependent on the deceased, raised an action at common law against the employer for reparation for the death of their father.

Held that the action was not rendered incompetent by the fact that the employers had already paid compensation under the Act; and that the second youngest child was not barred from suing the present action by the abortive claim previously made by him under the Act.

The Workmen's Compensation Act 1897, section 1, sub-section (2) (*b*), enacts—"When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may at his option either claim compensation under this Act or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act except in case of such personal negligence or wilful act as aforesaid."

The interpretation clause of the Act, section 7, sub-section (2) provides—"Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative, or to his dependants, or other person to whom compensation is payable."

John Blain, rivetter, Glasgow; Mary Blain or Fleming, wife of Robert Fleming, brassfinisher, Greenock, with consent and concurrence of her husband; Catherine Blain or M'Lellan, wife of Dugald M'Lellan, blacksmith, Glasgow, with consent and concurrence of her husband; Robert Blain, labourer, London; Peter Blain, machineman, Gourock; Allan Blain, labourer, London; Jane Blain or Urie, wife of Daniel Urie, Glasgow, with consent and concurrence of her husband; Jessie Blain or Cree, wife of James Cree, civil engineer, Glasgow, with consent and concurrence of her husband; and James Blain, apprentice boilermaker, Gourock, raised an action against the Greenock Foundry Company, engineers, boilermakers, and ironfounders, Greenock, and John Scott and Robert Sinclair Scott, the only known partners of said firm. The conclusion of the action was that the defenders should be ordained to make payment of £25 to each of the pursuers, John Blain, Mary Blain or Fleming, Catherine Blain or M'Lellan, Robert Blain, Peter Blain, Allan Blain, Jane Blain or Urie, and Jessie Blain or Cree, and of £50 to the pursuer James Blain.

The pursuers averred that they were children of the deceased William Blain, boilermaker, Greenock, that William Blain was killed by the fall of a piece of machinery on his head while he was employed in the service of the defenders on 2nd April 1902, and that his death was occasioned by the fault of the defenders. They further averred—"(Cond. 5.) The pursuers have suffered in their feelings, and otherwise sustained damage by the death of their said father. In particular, the pursuer James Blain, who is an apprentice and resided with and was partly supported by his father, has sustained special loss. The defenders have been asked to compensate the pursuers, but have declined to do so, and the present action has thus been rendered necessary."

The defenders denied fault, and (Ans. 5) "explained that on 22nd April proceedings were instituted under the Workmen's Compensation Act 1897 at the instance of Mrs Margaret Thomson or Blain, widow of the said deceased William Blain, residing at No. 60 Drumfrochar Road, Greenock, against (1) the present defenders, (2) William Blain *secundus*, presently an inmate of Smithston Asylum, under the charge of the Parish Council of Greenock, (3) the said Parish Council, (4) the pursuer James Blain, apprentice boilermaker, residing at 67 Shore Street, Gourock. After sundry procedure, in the course of which the said James Blain lodged a claim on the amount admittedly due under the said Act in respect of the death of the said William Blain, the Sheriff, as arbitrator, issued an award, a certified copy of which is produced herewith. The Sheriff awarded the sum of £276, 18s. as compensation due under the Workmen's Compensation Act 1897, by the present defenders in respect of the death of the said William Blain, and he also found that the said James Blain had no title to insist in the proceedings, as he was only partially dependent on the deceased. The present defenders have paid the said sum of £276, 18s. in terms of the interlocutor of the Sheriff-Substitute, and receipts for that amount and for the expenses decerned for are also herewith produced."

The pursuers pleaded—"(1) The pursuers' father having been killed through the fault of the defenders, the pursuers are entitled to reparation. (3) The defences, so far as founded on the proceedings under the Workmen's Compensation Act 1897, are irrelevant."

The defenders pleaded, *inter alia*—"(1) The present defenders having, as condescended on, already paid compensation under the Workmen's Compensation Act 1897 in respect of the death of the deceased William Blain, the present action is incompetent and should be dismissed. (2) *Separatim*—The pursuer James Blain having claimed compensation under the said Act, is barred from now proceeding at common law against the present defenders."

On 27th February 1903 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor—"Repels the first and second

pleas-in-law for the defenders, and assigns Tuesday the 10th day of March next as the diet for the adjustment of issues for the trial of the cause."

Note—"This is an action of damages brought against the Greenock Foundry Company by the children of William Blain, who was a boilermaker in the employment of the Greenock Foundry Company, and who was killed by the fall of a piece of machinery on his head when he was in the service of the company. The pursuers aver that his death was occasioned by the fault of the Foundry Company. It is not expressly averred that the pursuers are the whole of the children of William Blain, but I assume that they are, with the exception of William Blain junior, presently an inmate of Smithston Asylum. If there are any other children I suppose the defenders would have said so. William Blain's widow is not a pursuer.

"It is not argued that the action is irrelevant, but the defenders have pleaded—'(1) The present defenders having already paid compensation under the Workmen's Compensation Act 1897 in respect of the death of the deceased William Blain, the present action is incompetent. (2) *Separatim*—the pursuer James Blain having claimed compensation under the said Act, is barred from now proceeding at common law.'

"The proceeding referred to in these pleas is stated in answer 5 of the record. It was a proceeding under the Workmen's Compensation Act at the instance of the widow of William Blain against, *inter alia*, the Greenock Foundry Company, the said William Blain junior, and James Blain, one of the pursuers who lodged a claim in the proceedings, which resulted in an award of £176, 18s., as compensation due under the Act to the widow, and £100 as due to William Blain junior, as a dependant, and in a finding that James Blain had no title to insist because he was only partially dependent on the deceased, and was excluded by the widow and William Blain junior, who were wholly dependent, as decided in *Fagan* v. *Murdoch*, July 18, 1899, 1 F. 1179.

"It has not been averred that any of the pursuers were wholly dependent on the deceased, or would have a title to claim compensation on account of his death under the Workmen's Compensation Act.

"It has been decided that actions of damages for *solatium*, such as this action, by one of several persons having a title to sue are incompetent unless, as I understand the judgment, these are for some sufficient reason unable to sue—*Pollock* v. *Workman*, January 9, 1900, 2 F. 354. The Court in so deciding referred to and adopted the *dictum* (practically to that effect) of Lord Watson in *Darling* v. *Gray & Son*, May 31, 1892, 19 R. (H.L.) 31. In this case all the parties who have a title to sue this action are pursuers except the widow and William Blain junior, who are very clearly barred from suing because they have recovered compensation under the Workmen's Compensation Act. I take it to be quite clear that they could not sue this action, and are in the same position as parties who have given up their claims; and I think that this action complies with the principles affirmed in *Darling* v. *Gray*, and that therefore there is no good objection at common law to its competency.

"But the defenders maintain that it is incompetent because of the proceedings at the instance of the widow under the Workmen's Compensation Act. They cited *Campbell* v. *Caledonian Railway Company*, June 6, 1899, 1 F. 887; *Little* v. *M'Lellan*, January 16, 1900, 2 F. 387; and *Hunter* v. *Darngavil Coal Company*, October 23, 1900, 3 F. 10. But these three cases decide no more than that parties cannot, after following out proceedings under the Workmen's Compensation Act, raise a second action of damages at common law, which seems plain enough. But they do not decide that an action under the Workmen's Compensation Act by one pursuer can bar an action for compensation at common law by a different person. I think, indeed, that a claim under the Workmen's Compensation Act by one person might bar an action, either under that Act or at common law, by another person or persons having the same title to maintain an action under the Act. I think that an examination of the clauses in the Workmen's Compensation Act might warrant that conclusion. But I am unable to see that an action under the Workmen's Compensation Act can possibly bar an action at common law at the instance of pursuers who had no title to sue an action under the Workmen's Compensation Act, and could not possibly be represented by one who adopted proceedings under the Act. I have carefully studied the Act and its schedules, and the Act of Sederunt which followed, and think that they do not warrant any such conclusion. Actions of damages for *solatium* are no doubt not favoured by the law, but must be allowed unless abolished by statute.

"The pursuer James Blain is in a special position, because he made a claim under the former proceedings. But the result was that it was found that he had no title. His claim was not repelled on its merits, but his title was denied, and I think that his position is therefore not different from that of the other pursuers.

"On the whole, I am of opinion that the Act affords no sufficient ground for the defenders' pleas 1 and 2, and that they should be repelled."

The defenders reclaimed, and argued—If their first and second pleas were repelled employers would be held to be liable both under the Workmen's Compensation Act and independently of it. It was contrary to the policy of the Act that an employer should pay twice over. The Act supplied not an additional but a substituted remedy. The Act defined the employer's liability; and proceedings taken under the Act determined the liability of the employer for all time. Partial dependants had been ruled out where compensation had been found due to persons wholly dependent on the deceased—*Fagan* v. *Murdoch*, July 18, 1899, 1 F. 1179, 36 S.L.R. 921. Further,

independently of the Act there could be only one action at the instance of relatives for reparation in respect of the death of their husband and father. The proceedings under the Act had therefore excluded any additional action—*Pollock* v. *Workman*, January 9, 1900, 2 F. 354, 37 S.L.R. 270. In any event, the pursuer James Blain having claimed compensation under the Act of 1897 was barred from insisting in the present proceedings.

Argued for the pursuers and respondents—The Workmen's Compensation Act 1897 did nothing to abrogate the employers' liabilities either at common law or under prior statutes. The title to claim under the Act of 1897 was quite different from the title of a pursuer at common law or under the Employers Liability Act. The title under the Act of 1897 was propinquity plus dependence. The title at common law was relationship plus the mutual right of support. At common law the remedy was based on fault, while under the Act of 1897 the remedy was based on employment. Common law remedies were not taken away by the Act of 1897; indeed, they were expressly reserved in section 1 (2) (*b*). The section where it provided that the employer should not be liable to pay compensation both independently and under the Act dealt solely with the workman himself or with dependants who were entitled to compensation under the Act. But the common law rights of parties who were not entitled to compensation under the Act were left untouched. The title to claim of James Blain had been negatived in the proceedings under the Act. He therefore had never been a party to them, and was in the same position as the other pursuers.

At advising—

LORD JUSTICE-CLERK—In this case the pursuers sue for *solatium* for the death of their father, on the allegation that he was killed by the fault of the defenders. It is clear that they have a good title to sue such an action, but it is maintained by the defenders that they are debarred from the right to sue by the fact that as between the dependants of the deceased and the defenders claims have been settled under the Workmen's Compensation Act, and that this excludes any further action, the plea being based on certain decisions to the effect that where reparation is to be sought in such a case as this there can be one action only. I do not think that these cases have any application. The Workmen's Compensation Act introduced a new liability, not based on fault, and available to dependants in a case of death. I cannot hold that if the dependants take advantage of that Act, others who would be entitled to *solatium* in a case where the death is alleged to have been caused by fault can be excluded from suing. They could not have joined in with the dependants in taking proceedings under the Workmen's Compensation Act, for they had no legal claim to compensation under that Act, and I cannot hold that their rights are taken away as regards *solatium* by there having been proceedings under that Act, if they can prove that the death was caused by fault. It may have been the interest of the widow and other dependants to take compensation under the Act, seeing that they were certain of an amount fixed by the Act in proportion to the deceased's earnings, while even if they could prove fault the sum that a jury might give was problematical.

I therefore agree with the Lord Ordinary that the pursuers cannot be excluded from their right to sue by there having been an ascertainment of the compulsory compensation under the recent statute.

LORD TRAYNER—I agree with the Lord Ordinary.

LORD MONCREIFF—The question raised in this case is novel and of some difficulty, but I think that the Lord Ordinary is clearly right. The deceased workman William Blain was survived by a widow and ten children, of whom the pursuers are nine, The widow and the Parish Council of the parish of Greenock on behalf of one of the children, William Blain junior, claimed against the defenders and reclaimers under the Workmen's Compensation Act 1897 on the ground that they were wholly dependent upon the deceased, and they succeeded in obtaining an award of £276, 18s., apportioned thus—£176, 18s. to the widow and £100 to the Parish Council for William Blain junior. The pursuers were not entitled to claim under the Workmen's Compensation Act, as they were not wholly dependent upon their father, but they raise the present process, suing for *solatium* at common law on the ground of *culpa*.

The defenders plead that this claim is excluded by the fact that compensation was claimed and awarded to the widow and William Blain junior under the Workmen's Compensation Act, and they rely on the section of the statute, section (1) (2) (*b*), that "the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act." They also rely on the general rule that there can only be one action in respect of the death of a husband and father at the instance of those relatives who are entitled by law to sue for damages and *solatium* in respect of his death.

Now, I agree with the Lord Ordinary that this rule can only apply when the same remedies are open to all the parties who are entitled to sue and ought to sue together. Now, in the present case the statute conferred on two of the relatives, the widow and William Blain junior as dependants, right to sue for damages without proof of fault. But the pursuers had no such right, as they were not dependent on the deceased. They could only recover damages at common law by proof of negligence, and although, no doubt, the widow could have joined with them in suing at common law, she wisely did not choose to do so, probably for the double reason that under the statute no proof of fault is re-

quired, and also that as only she and one of the children were entitled to claim under the statute, she might obtain a larger award than if she joined the rest of the family in an action at common law.

But it is out of the question to say that because the statute has conferred upon dependants an exceptional remedy, other relatives who are not entitled to that remedy, but who have a legal title to claim *solatium* at common law, are thereby deprived of their right.

At first sight there seems to be some hardship in the defenders being subjected in a full award of compensation under the Act and also to this claim at common law. But I do not think that there is much substance in this objection for two reasons. First, damages under the statute are fixed on the footing that it is not necessary to prove fault, and if fault is proved the complainer can scarcely complain if some additional damages are awarded. Secondly, the claims which were sustained under the statute have exhausted all or almost all claims on the head of patrimonial loss, and as all but one of the pursuers were not dependent to any extent on the deceased at the date of his death, even if they succeeded in proving fault they will all (except perhaps one) only recover damages in name of *solatium*.

I am for affirming the Lord Ordinary's interlocutor.

LORD YOUNG was absent.

The Court adhered, and remitted to the Lord Ordinary to proceed.

Counsel for the Pursuers and Respondents—Orr—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders and Reclaimers—Salvesen, K.C.—C. D. Murray. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Friday, June 5.

SECOND DIVISION.

[Sheriff Court at Glasgow.

SELLARS *v.* CAMPBELL.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7, *sub-sec.* 1—*Scaffolding—Ladder Used for Work Generally Done by Means of Scaffolding.*

A workman sustained injuries while engaged in silicating and painting the wall of a house more than 30 feet high by means of a ladder. The work of silicating is generally done by slaters by means of a scaffolding suspended by a rope from the roof of the building, but where the work is limited to particular portions of the building it is frequently done by painters by means of ladders, which are in that case much more convenient.

Held that the ladder was not a scaffolding within the meaning of section 7 (1) of the Workmen's Compensation Act 1897—*diss.* Lord Trayner, who was of opinion that the ladder being supplied in the place of scaffolding was *pro hac vice* a scaffolding in terms of the Act.

By section 7, sub-section 1, of the Workmen's Compensation Act 1899 it is enacted that the Act shall apply, *inter alia*, to employment "on in or about any building which exceeds 30 feet in height, and is either being constructed or repaired by means of a scaffolding." . . .

This was an appeal upon a stated case against the decision of the Sheriff-Substitute (STRACHAN) at Glasgow in an arbitration under the Workmen's Compensation Act 1897 between Mary Ann Matthew or Campbell, widow of the late Donald Campbell, Donald Campbell, and the said Mary Ann Matthew or Campbell as tutrix for her pupil children Isabella Campbell, Andrew Campbell, William Campbell, and Catherine Campbell, claimants and respondents, and George W. Sellars, painter and decorator, Glasgow, appellant.

In the case stated the Sheriff-Substitute found that the following facts were admitted or proved:—

"1. That the respondent Mrs Mary Ann Matthew or Campbell is the widow, and the said Donald Campbell, Isabella Campbell, Andrew Campbell, William Campbell, and Catherine Campbell are children of the deceased Donald Campbell, and were all totally dependent on his earnings.

"2. That the said deceased Donald Campbell was a painter in the employment of the appellant.

"3. That on 14th August 1902 he was engaged in silicating and painting a wall of a house No. 25 Belhaven Terrace, Glasgow, and while engaged at that work he fell and sustained such injuries that he died very shortly afterwards.

"4. That the work of silicating consists in washing or cleaning stones in the walls of a house which have begun to decay, and painting or covering them with a preparation known as silicate, for the purpose of preserving them.

"5. That the work is generally done by slaters by means of a scaffold suspended by a rope from the roof of the building, but that where the work is limited to particular portions of the building it is frequently done by painters by means of ladders, which are in that case much more convenient.

"6. That in the case in question the work was confined to the cornices on the roof, the rybats of the windows, and the balustrades above the door, and that it was done by painters using ladders for the purpose.

"7. That there were three men engaged at the work, and there were three ladders used by them, from 16 to 60 feet in length.

"8. That the house in question was over 30 feet in height, and that the deceased Donald Campbell was employed in repairing it at the time of his death.

"9. That the ladders used by the deceased and the other workmen kept them in position, and afforded them the necessary support while working at a height above the