internal communication through every part of the building, it seems to follow that the whole building is assessable as an inhabited dwelling-house, unless any part of it can be brought under a statutory exception. I agree with your Lordships that it is impossible to hold that the exemptions established in favour of trades have any bearing on this case, because even if Mr Cooper's observations were well founded that the words "seek a livelihood" only applied to professions and do not apply to trade, yet that is only because it was not necessary to qualify the word "trade," the idea of seeking a profit or a livelihood being inherent in the conception of a trade and not being necessary to be expressed in the statute. This is not a trade. The mere fact that the Council may have given the use of the engines and the services of the men to the county, and that they make a small charge for it, could never alter the fundamental character of this establishment, which is a thing provided and paid for out of the rates, and intended for the gratuitous benefit of the community. Then the other exemption, and the one which seems to weigh with the Commissioners, is the exemption under the recent statute on artisans' dwellings. My opinion upon that is that it is a clause intended to promote the building of commodious and suitable artisans' dwellings by giving the owners a certain relief from imperial taxation. The provisions requiring that the houses should be certified as suitable in sanitary and other respects before the exemption is conceded make this perfectly clear. It does not appear to me that the mere fact that the value of the portions of this residence occupied by the firemen comes under the amount covered by this exempting statute can bring the case within the scope of the exemptions, because these are not artisans' dwellings built for separate occupation in the sense of the Act, but are servants' apartments in a residence provided by the Corporation of Edinburgh for municipal purposes. I am not aware of any other exemption that has been pleaded, and on the whole matter my opinion is that this is an inhabited dwelling-house in its entirety, and that no exception has been established entitling any part of it to exemption.

LORD KINNEAR concurred.

The Court reversed the determination of the Commissioners and sustained the assessment.

Counsel for the Appellants — Solicitor-General (Dickson, K.C.) — A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Respondents — D.-F. Asher, K.C. — Cooper. Agent — Thomas Hunter, W.S.

Wednesday, June 3.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

AGNEW *v.* FERGUSON.

Revenue—Income-Tax—Deduction—Omission to Deduct when Paying Royalties—Right to Repayment—Income-Tax Act 1853 (16 *and* 17 *Vict. c.* 34), *sec.* 40—*Condictio indebiti.*

The lessee of a certain mineral field, who had paid income-tax on the amount of the royalties due by him under his lease, in making payment of the royalties to his landlord paid them in full without deducting the amount of income-tax due in respect of them. *Held* (*rev.* judgment of Lord Kincairney, *diss.* Lord Young) that although the lessee had omitted to exercise the privilege of deduction conferred upon him by section 40 of the Income-Tax Act 1853 he was not thereby debarred from recovering payment of the income-tax from the landlord.

The Income-Tax Act 1853 (16 and 17 Vict. cap. 34) enacts, section 40—"Every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property, or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled and is hereby authorised, on making such payment to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable for every twenty shillings of such payment; and the person liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable; and the person to whom such payment as aforesaid is to be made shall allow such deduction upon the receipt of the residue of such money, under pain of forfeiting the sum of fifty pounds for any refusal so to do."

This was an action at the instance of John Agnew, Viewfield, Carluke, as lessee of certain collieries on the estate of Cleland, Lanarkshire, against Alexander Ferguson, wine and spirit merchant, 108 West Regent Street, Glasgow, the proprietor of the estate of Cleland. The pursuer sought to recover from the defender income-tax which he had paid on the royalties payable by him to the defender under his lease.

The pursuer averred—"(Cond. 3) The pursuer was called upon by the Inland Revenue authorities to make payment of the property and income-tax due in respect of the royalties payable by him to the defender, and of his profits during the financial year from 5th April 1898 to 5th April 1899. The amount of the assessment was £76, 4s. This duty was calculated at the rate of 8d.

per £ on £600, being the amount of his profits for the year as returned, and on £1686, being the amount of royalties payable by him to the defender. As is customary and usual the pursuer made payment to the Inland Revenue of the full sum of £76, 4s. The receipt therefor is produced herewith and referred to. Of this payment £56, 4s. is the proportion applicable to the royalties paid by the pursuer to the defender. This sum, which is the amount concluded for, the defender is bound to refund to the pursuer in terms of the statutes thereanent."

The pursuer further averred that he had paid the royalties in full to the defender without deducting the amount of income-tax applicable to them. He also averred—"In making the said payments to the defender in full the pursuer followed the same practice as he had pursued throughout his tenancy of the minerals referred to."

The pursuer pleaded—"The sum sued for being due and resting-owing by the defender to the pursuer, decree should be granted therefor as concluded for with expenses."

The defender pleaded—"(3) The defender not being due to the pursuer the sum sued for should be assoilzied."

On 19th December 1902 the Lord Ordinary (KINCAIRNEY) pronounced an interlocutor in the following terms:—"Finds (1) that the defender was proprietor of the minerals in the Cleland estate, and that the pursuer was tenant of the said minerals from Whitsunday 1898 to Whitsunday 1899; (2) that the pursuer paid to the defender as said proprietor various sums, being royalties on the minerals wrought by the pursuer; (3) that the pursuer avers that he paid said royalties without deduction of the income-tax; and (4) that the sum sued for is the amount of income-tax which he might have deducted from the amount of said royalties on payment thereof, but which he did not deduct; Finds (5) that the pursuer is not entitled to such repayment; therefore assoilzies the defenders from the conclusions of the summons, and decerns," &c.

Opinion. — "The pursuer John Agnew sues the defender Alexander Ferguson for £56, 4s. I gather, not without difficulty, from the record that the defender was proprietor and the pursuer tenant of the minerals in the Cleland estate from Whitsunday 1898 to Whitsunday 1899, and the pursuer avers that the £56, 4s. sued for is the proportion of income-tax paid by him to the Inland Revenue applicable to the royalties paid by the pursuer to the defender.

"It is not said when the income-tax was paid, but it appears from the process that it was paid on 17th February 1899, and I take the pursuer as averring, although the averment is exceedingly imperfect, that the royalties were paid in full without deduction of income-tax. I have no idea when they were paid. The £56, 4s. is said to be the amount which the pursuer might have deducted and retained when he was paying the royalties, but which he did not deduct but paid, and of which he now seeks repayment from the landlord.

"The landlord maintains that, whether the pursuer deducted the income-tax from the royalties or not, he is not now entitled to recover it. Of course he has no claim if he deducted it. But assuming that he did not deduct it, but paid his landlord more by the amount of it than he was bound to pay him, the defender maintains that the pursuer has lost his remedy and cannot claim repetition. The defender maintains that the pursuer's right must depend on the 40th section of the Income-Tax Act of 1853 (16 and 17 Vict. c. 34), but that the only right given by that section is a right to deduct income-tax on payment and not a right to recover it after payment. The defender cited the *Galashiels Provident Building Society*, June 25, 1893, 20 R. 821, where it was decided that when a debtor paid interest on a bond without deducting income-tax he could not afterwards recover the income-tax from the creditor. That seems rather a hard case, and Lord Kinnear expressed a doubt whether it would hold in all circumstances. The case seems, however, to apply, and I cannot give any weight to the vague averments of the pursuer that in paying the royalties in full he had followed his practice throughout his tenancy of the minerals, especially having in view the fact that the defender had been proprietor only since Whitsunday 1898.

"There is, however, a distinction between this case and the *Galashiels Provident Building Society*, which is this, that the payments made in this case were lordships, not interest on bonds, and it might be questioned whether such payments were covered by the 40th section, which refers chiefly to annual payments, which royalties are not. I do not remember that that distinction was taken at the debate, and I have come to think that it makes no real difference. The principle to which the section gives effect applies, and royalties may be held to be embraced by the word rents, and so to fall expressly under the section. If this difference makes no true distinction, I am of course bound to follow the *Galashiels* case, with the result that the defender must be assoilzied."

The pursuer reclaimed, and argued—(1) Section 40 of the Act of 1853 did not apply to royalties; they were not annual payments, but rather in the position of interest on money lent for a shorter period than a year—*Goslings & Sharp* v. *Blake* (1889), 23 Q.B.D. 324. The pursuer was entitled at common law to repayment of what he had overpaid, and the case of *Galashiels Provident Building Society*, June 15, 1893, 20 R. 821, 30 S.L.R. 730, did not apply. Royalties were subject to income-tax by the Income-Tax Act 1842 (5 and 6 Vict. c. 35), sec. 60, Sched. A, No. III., rule 2; *Edmonds* v. *Eastwood* (1858), 2 Hurlstone & Norman, 811; *Edinburgh Southern Cemetery Co.* v. *Surveyor of Taxes*, November 14, 1899, 17 R. 154, 27 S.L.R. 71. (2) Assuming section 40 of the Act of 1853 to apply to royalties, the right of deduction thereby conferred was not an exclusive remedy for a party paying

the income-tax of another; it did not deprive him of his right of action for recovery of the tax from the party liable for it—*Lamb* v. *Brewster* (1879), 4 Q.B.D. 220 and 607. The contrary view would sometimes exclude all remedy—*Coltness Iron Co.* v. *Black* (1881), 6 App. Cas. 315; *Broughton Coal Co.* v. *Kirkpatrick*, 14 Q.B.D. 491. The pursuer was entitled to a proof.

Argued for the respondent—The case was governed by the *Galashiels Provident Building Society* case, *cit. sup.* The pursuer's right to reimbursement depended solely on statute, if not under section 40 of the Act of 1853, under the Act of 1842, sections 102 and 158; he had no common law right, and could not recover from the defender what he had voluntarily paid—*Denby* v. *Moore* (1817), 1 Barnewall & Alderson, 123; *Andrew* v. *Hancock* (1819), 1 Broderip & Bingham, 37; *re Middlesborough Building Society* (1885), 53 L.T. 492.

At advising—

LORD JUSTICE-CLERK—The question in this case being whether an occupier of subjects who is liable in lordships for minerals extracted, and who has paid to the Revenue the income-tax as occupier, and has not in paying his royalties deducted the tax so paid, can sue to recover it from his landlord. The Lord Ordinary has held that he cannot. I am unable to agree with the Lord Ordinary. I am not able to hold that if the pursuer, being compelled to do so by the statute, paid the tax due and for which the landlord is responsible, he loses all right to its return if he does not deduct it from his next payment. The right to deduct in paying is a privilege conferred upon him for his advantage, which is of the nature of a lien, but I cannot see that he having made payment under compulsitor of what is due by the other party he cannot recover from that other as due to him what he has so advanced although he has not deducted it from a sum due by him to his landlord. Such a disability is not I think to be presumed, and whatever may be the authority of the case of *Galashiels* I am not prepared to carry it any further than the case to which it related.

I am therefore in favour of recalling the Lord Ordinary's interlocutor, and remitting to his Lordship to proceed in the ascertainment of the amount due to the pursuer.

LORD YOUNG—It is unnecessary for me to say more than that I differ from the view which your Lordship has expressed and agree with the judgment of the Lord Ordinary.

LORD TRAYNER—If the question raised by this reclaiming-note had been a perfectly open question I should have had no hesitation in coming to a conclusion upon it different from that which the Lord Ordinary has reached. The question, however, cannot be said to be perfectly open, because there are opinions by learned judges to be found in several cases which go to support the view taken by the Lord Ordinary. I cannot, however, concur in those opinions, and I shall state shortly the ground on which, in my judgment, a contrary opinion should prevail.

The income-tax payable in respect of royalties is a burden on the landlord who receives them. The tax is levied in the first instance from the tenant, but that is merely for the purpose of facilitating collection. That it is a tax payable by the landlord is plain from the fact that the tenant is entitled, under statutory provision, to deduct the tax paid by him from the royalties due to the landlord, and the landlord is put under a serious penalty if he refuses to allow the deduction to be made. I agree in the view that the right to deduct depends on the statute, as but for the right there conferred the tenant would be bound to pay the royalties in full. It is said by the Lord Ordinary that the statute gives "a right to deduct income tax on payment, and not a right to recover it after payment." I cannot read the statute in that limited sense. What the statute says is that a person in the position of the pursuer, who has paid income tax on the profits of his landlord, "shall be entitled, and is hereby authorised, on making such payment (*i.e.*, payment of the royalties in this case) to deduct and retain thereout the amount" of the duty. This, I think, confers on the tenant a privilege—the privilege of reimbursing himself to the extent of the duty paid out of the sum due by him to the landlord. It gives the tenant (as it has been expressed) a lien over the royalties for repayment of the duty. But the tenant need not avail himself of the privilege or exercise the lien. He may lose by not doing so, as for example in the case of the landlord's bankruptcy. But it does not appear to me that because a tenant does not use a privilege conceived in his favour alone—provided for his protection and not at all intended for the benefit of the landlord—that he thereby loses his right to enforce what is palpably a just claim. The injustice which arises from the view to which the Lord Ordinary has given effect is made apparent by a simple illustration. Suppose the tenant paid his royalties forgetting that the income-tax thereon had been paid by him. Within a day or an hour after such payment he notices the error, finds that he has omitted to deduct the income-tax, and applies to his landlord for it. Could it be maintained that because he had not deducted it—had not retained it—that the landlord was free from liability. No honest landlord would, I think, in such circumstances, dispute the tenant's claim, but if he did I should not hesitate to find him liable. In such a case the landlord's plea—"not retained and therefore not due," would be as unconscionable as I think it would be unsound. In *Stubbs* v. *Parsons* Mr Justice Holroyd said that if the tenant "parts with the rent without making the deduction he loses his lien, and has only his remedy by action or set off," and that opinion was cited without dissent if not with approval by Mr Justice Mellor in the case of *Lamb*. That appears to me to be

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