the rental at the date of granting it. Even if it could be held to be regulated by the present rental, this was not a process in which the pursuer could recover any sums so paid in excess. (3) This was not a proper case of *condictio indebiti* — to let in that principle the person who made the payments must have made them in ignorance of his rights. Here the pursuer averred that he knew his rights.

At advising—

LORD KINNEAR—I think the Lord Ordinary's judgment is right, and that we ought to adhere to it. Apart from the special grounds on which his Lordship proceeds, I think the averments irrelevant, because I cannot find in the case as stated any legal basis to support the conclusions of the summons. To say that the pursuer paid an amount in full for certain specified years, whereas he might have made deductions from each year's payment, which he did not in fact make, is by no means enough to found a *condictio indebiti*. To recover overpayments under such an action it is necessary that the pursuer should show that they were made in error or ignorance, and in such circumstances as will entitle him to be relieved against his own mistake. But if all that he can allege is that he paid a debt in full, when he might have insisted, if he had thought fit, upon making a certain deduction, and if it appears on his own showing that he did so in full knowledge of his legal rights, and of the facts bearing upon his liability, I see no ground in law on which he should be entitled to recover. The pursuer says nothing as to the reasons which induced him to pay more than he alleges that he was bound to pay, and in the absence of all information on that head it is impossible for the Court to affirm that he paid on grounds and under circumstances which entitle him to repetition.

But I agree with the Lord Ordinary on the special ground on which he rests his judgment. In his Lordship's view the question on which the case depends is whether a certain sum of £427, 12s. 10d. is to be taken into account in ascertaining the amount of the rental for the purpose of satisfying a condition of the entail, that in case the annuities to widows and the interest on provisions to younger children, taken together, should exceed the half of the yearly rent, the annuities should suffer a reduction, so that one-half of the free yearly rents should always remain to the heir in possession for the time. The sum in question is interest accruing under certain bonds and dispositions affecting the fee of the estate for money borrowed in order to satisfy provisions for younger children, and I agree with the Lord Ordinary that the case of *Brodie* v. *Brodie*, 6 Macph. 92, is a conclusive authority for holding that although such bonds may be perfectly good debts, they are not children's provisions in the sense of the deed of entail, because the children's provisions have been satisfied and extinguished, and the debts with which the estate is now charged are due to outside creditors. I think this decision directly in point.

Another ground of deduction was urged in this Court which does not appear to have been maintained before the Lord Ordinary, viz., that £500 a-year exceeds one-fifth of the free rental, which under the deed of entail is the utmost amount allowed for an annuity to a widow. But this is an objection to which, in my opinion, no effect can be given in an action for repetition. The annuity of £500 was admittedly validly charged upon the estate, and it has been paid year by year, and apparently without objection, since the death of the defender's husband in 1878. If the sum charged upon the estate exceeded the sum allowed by the deed of entail, the pursuer's remedy was to take proceedings by petition under the Entail Acts for restricting the amount. But as the annuity has not been restricted by the proper procedure it must be assumed that the unrestricted sum which is actually charged on the estate does not exceed the amount legally chargeable.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Guy—Hamilton. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders and Respondents — Younger — Wallace. Agents — Duncan Smith & Maclaren, S.S.C.

Thursday, November 26.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

THOMSON *v.* WILLIAM BAIRD & COMPANY, LIMITED.

Reparation — Master and Servant — Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 7—*Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. c.* 37)—*Notice —Claim under Workmen's Compensation Act not Notice under Employers Liability Act.*

Held that a letter by the agents of an injured workman to the employers making a claim on the workman's behalf under the Workmen's Compensation Act, and containing no reference to the Employers Liability Act, was not a notice under the Employers Liability Act.

Reparation—Negligence—Master and Servant — Liability at Common Law — Dangerous System.

One of a squad of workmen engaged in repairing a private railway belonging to and adjoining the works of his employers, a limited company of ironmasters, was injured by waggons coming round a curve on the line. In an action of damages at common law by the injured workman, he averred that the accident was caused by the

fault of the iron company, in respect that they adopted a dangerous system in carrying out the repairs of the railway by failing to have someone stationed to warn the repairing squad of the approach of waggons. *Held* that the action was irrelevant at common law, in respect that the employers were not bound personally to see that one of the squad was directed to keep a look-out.

William Thomson, labourer, Old Cumnock, brought this action of damages against William Baird & Company, lime, iron, and coalmasters, Glasgow, in the Sheriff Court of Lanarkshire at Glasgow, for damages for personal injury received by him while in the defenders' employment.

The pursuer craved decree for £500 at common law, or alternatively for £137, 12s. under the Employers Liability Act 1880.

The pursuer averred that on November 20, 1902, he was in the employment of the defenders at their ironworks, and was engaged along with other two workmen in repairing the railway adjoining the said works, the railway and the engines plying thereon being the property of the defenders; that he was engaged in lifting a rail, when suddenly and without the slightest warning he was knocked down by a number of waggons which were being propelled by an engine belonging to the defenders and driven by one of their servants; that the engine was at the hinder end of the waggons, and that the waggons passed over the pursuer's left foot and injured it so severely that it had to be amputated. "(Cond. 5) The said accident was caused by the fault of the defenders or of those for whom they are responsible. The defenders adopted a dangerous system in the conduct of their operations on the said railway. It was their duty to have had a man stationed near the place where the pursuer and the others were working to warn them of the approach of any waggons or engines, but this the defenders negligently failed to do. This precaution was all the more necessary as the pursuer and his mates were working at a curve in the line, and could not therefore get an uninterrupted view of the line along which the engine approached. The precaution aforesaid is usual and necessary in the interests of the safety of the workmen employed; or otherwise it was the defenders' duty to have arranged that one of the shunters should go in front of the waggons, especially seeing that the engine was behind, to give timeous warning of its approach to the workmen. This also the defenders negligently failed to do. Further, the driver of the engine was in fault in failing to whistle, or otherwise to give any intimation of the approach of the waggons. Owing to the nature of the operations in which the pursuer was engaged he could not see the waggons coming. He was holding a wedge which was being driven in above a sleeper on the line, and his face was turned away from the direction from which the waggons approached."

The pursuer also averred that notice of the accident was duly given to the defenders in terms of the Employers Liability Act 1880, and referred to a letter by his agents to the defenders dated 19th December 1902.

This letter was in the following terms:—"We are instructed on behalf of Mr William Thomson, Old Cumnock, to make a claim against your company under the Workmen's Compensation Act of 1897, in respect of the injury which he sustained while in your employment on 20th November last. As you are aware, in consequence of the injury his foot has had to be amputated. We are informed that you have made Mr Thomson an offer of a slump sum in full settlement of all claims, and that this offer is calculated at 6s. a-week for three years, or £46, 16s. in all. This sum our client will not accept. Our instructions are to claim in terms of the Act a weekly payment of 12s. 6d. from 20th November last, being rather less than one-half of his average weekly earnings during the previous twelve months. As you are aware, at the expiry of six months he will be entitled to apply to the Court to have the annual payment redeemed by payment of a lump sum. We do not think in any case that the Court would restrict this to three years' wages. We shall be glad to hear from you that the claim is admitted. While our client is not bound to accept a lump sum in settlement at present, if a substantial offer were made we would advise him to take it, but this sum would need to be at least £150."

The defenders refused to pay damages as claimed, and denied that any notice was given in terms of the Employers Liability Act.

The defenders pleaded, *inter alia*—"(1) The statements for the pursuer being irrelevant, the action ought to be dismissed with expenses. (2) The pursuer not having given notice in terms of the Employers Liability Act 1880, the action, so far as laid under that Act, ought to be dismissed. (3) The pursuer having formally claimed compensation in terms of the Workmen's Compensation Act 1897, is barred from insisting on the present action."

The Sheriff-Substitute (BALFOUR) sustained the second plea-in-law for the defenders and dismissed the action.

Note.—"I am of opinion that this action falls to be dismissed, in consequence of the pursuer not having given notice in terms of the Employers Liability Act. Notice was given by the pursuers' solicitors in Dumfries on 19th December 1902, making a claim against the defenders under the Workmen's Compensation Act, and claiming in terms of that Act a weekly payment of 12s. 6d. from 20th November 1902, said to be rather less than one-half of his weekly earnings during the previous twelve months. The defenders replied to that letter on 25th December 1902 intimating that the pursuer's average earnings during the last period of his employment amounted to 12s. 9d. per week, fifty per cent. of which is alleged to be the compensation to which he was entitled, and which the defenders

were prepared to pay in terms of the said Act.

"The pursuer now maintains that the notice is a valid claim under the Employers Liability Act, and that it contains all the elements provided for by section 7 of that Act. That may be the case in respect of its containing the name and address of the person injured and the cause and date of the injury, but it nevertheless is a notice under the Workmen's Compensation Act, and was dealt with by the defenders as such, and it cannot now be converted into a notice under the Employers Liability Act.

"I do not think that the provision dealing with 'any defect or inaccuracy' in the notice not rendering the notice invalid unless the defender is prejudiced applies to a case like the present, because the objection to the notice is not on any ground of defect or inaccuracy, but that it is a notice under another Act, and not under the Employers Liability Act."

The pursuer appealed, and argued—(1) The letter of the pursuer's agents to the defenders dated December 19, 1902, was a valid and sufficient notice of the accident under the Employers Liability Act. It included all the essential elements—the name and address of the person injured, and the cause and date of the injury—required by section 7 of that Act. If anything was wanting in the form of the notice, it did not amount to more than a "defect or inaccuracy" within the meaning of section 7, which did not prejudice the defenders in their defence, and which therefore did not render the notice invalid. In *Campbell* v. *Caledonian Railway Company*, June 6, 1899, 1 F. 887, 36 S.L.R. 699, and *Little* v. *P. & W. M'Lellan, Limited*, January 16, 1900, 2 F. 387, 37 S.L.R. 287, stress was laid not on a claim having been made under the Workmen's Compensation Act, but on compensation under that Act having been paid and received, as barring action under the Employers Liability Act. (2) There was a relevant case at common law, based on defective system. It was specifically averred that the defenders in their system of repairing this railway adopted a plan which was dangerous, and failed to employ the usual and necessary precautions to secure the safety of their workmen.

Argued for the defenders—(1) The letter of December 19, 1902, was a claim under the Workmen's Compensation Act and nothing else. It bore to be so in every part, and that claim was still in dependence—*Powell* v. *Main Colliery Company* [1900], A.C. 366. The question of election between the remedies under the Workmen's Compensation Act and the Employers Liability Act respectively fell to be determined *in limine*—*Hunter* v. *Darngavil Coal Company*, October 23, 1900, 3 F. 10, 38 S.L.R. 6; *Campbell* v. *Caledonian Railway Company* (*supra*); *Little* v. *M'Lellan* (*supra*); and the letter of the pursuer's agents stated the election in perfectly clear terms. It was not a case of defective notice under the Employers Liability Act; it was a case of the absence of such notice. A claim—such as this was—under the Workmen's Compensation Act was quite distinct in purpose and effect from a notice—*Bennett* v. *Wordie & Company*, May 16, 1899, 1 F. 855, 36 S.L.R. 643; *Edwards* v. *Godfrey* [1899], 2 Q.B. 333. (2) The pursuer's averments were irrelevant to establish a case of liability at common law. The only fault alleged was the fault of the fellow-servants, viz., that the fellow-servants did not keep a proper look-out. The fault was in the distribution of the work of the members of the squad among themselves, not in the system of administration adopted by the employer—*Harper* v. *James Dunlop & Company*, December 5, 1902, 5 F. 208, 40 S.L.R. 174.

LORD ADAM—This is an appeal from a judgment of the Sheriff-Substitute of Lanarkshire in an action at the instance of a workman against his employers. The circumstances in which it arises are these—the workman, who is the pursuer in this action, was in the employment of certain iron and coal masters in Glasgow, and on 20th November 1902 when engaged in their employment he met with an accident. After the accident his agent, on 19th Dec. 1902, wrote a letter which is said to be a claim under the Employers Liability Act. The next thing he did was to raise this present action against his employers for damages at common law and under the Employers Liability Act. Three pleas-in-law have been discussed before us. The second of these was the one that was sustained by the Sheriff-Substitute, viz.—"The pursuer not having given notice in terms of the Employers Liability Act 1880, the action, so far as laid under that Act, ought to be dismissed;" but that plea did not cover the whole ground of action, and we have to consider the first plea to the effect that the action is irrelevant.

I shall allude first to the second plea. The first question arises in this way, whether the letter dated 19th December 1902 can be taken as a notice under the Employers Liability Act. If it is not to be so read, then it is not disputed that no notice was given under that Act, and that the action is incompetent so far as laid upon it. Now, as to that notice, I think it is not a notice under the Employers Liability Act, but is a notice under the Workmen's Compensation Act and nothing else. The letter makes a claim under the Workmen's Compensation Act, and there is not a word in it about the Employers Liability Act. I cannot treat that as a notice under the Employers Liability Act. It makes no reference to that Act, and therefore it comes to this, that this being a notice entirely under the Workmen's Compensation Act it cannot be treated as a notice under the Employers Liability Act. Therefore I am prepared to move that your Lordships should sustain the second plea-in-law.

Now, that leads us to consider whether there remains any relevant averment at common law to sustain the action. I am of opinion that there is not. The facts as they appear here were that this workman and, as he calls them, a squad of other men

were engaged in repairing a portion of the railway in the private works of this company for the carriage of their minerals. He alleges that while he was engaged in lifting a rail a train came along the rails, and that, he being engaged in his work, it ran over him and he was hurt. It is said that when a man with his squad are engaged in that way it is a part of the duty of the company to provide a superintendent to look after them, and that the absence of such a person is a vice in the system, and that therefore there will be liability as for defect in the arrangement of the system. Now, I do not think there is any relevant averment of any such thing here. I think there was quite a relevant averment here against the company under the Employers Liability Act, because I should say that in such a case as this the responsibility lay with the squad and their foreman to look after their own safety, and if the foreman in charge of this squad neglected his duty, if they were in a dangerous part of the work, and did not appoint one of the squad to look after their safety, that would have been a relevant averment, and the company would have been liable for that under the Employers Liability Act. But I can see no duty on a railway company or great manufacturing company like this to have a superintendent or somebody to go out with all the squads and all the workmen and to see and look after their safety. It does not occur to me that any such duty is laid on such a company. There may be a duty laid on their manager and servants to see that proper instructions are given, when men are so engaged, to secure the safety of the men under their charge, but that is a very different thing from saying that the company itself is liable. Therefore on these grounds I am prepared to sustain the first as well as the second plea, and if that is done, that disposes of the whole case.

Lord M'Laren—I agree with all that is said in the excellent note of the Sheriff-Substitute disposing of the action as a claim under the Employers Liability Act. It seems to me that it is there demonstrated that the notice given, which purported to be a notice of a claim for compensation, could not possibly also be a notice of what would be an entirely inconsistent claim—a claim under the Employers Liability Act. Indeed, I should be inclined to go further, and to say that it was equivalent to a notice that the workman had no intention of proceeding under the Employers Liability Act. But this case has also been maintained to us as a claim at common law. I should infer that that claim had been only faintly argued in the Inferior Court, because the Sheriff-Substitute, who has dealt so carefully with the claim under the statute, takes no notice of any other claim except the one under the Liability Act. The point has, however, been very fully argued to us, and I agree with Lord Adam that there is no relevant statement here of a claim which would at common law render the employers responsible. In saying "no relevant statement" I do not mean that the claim is insufficiently stated, or that it could be made better by amendment. I think there is not the substance of a claim against the employer at common law. It appears to me to be a claim of the same nature as that which was disallowed in *Harper* v. *Dunlop*, 5 F. 208. The alleged liability there was that the employer had not provided a sufficient staff of men for lifting rails from a waggon and putting them into their places in the permanent way. It was said that he had only provided four men when there should have been five. Now, I look upon the case of *Harper* as a very important decision. At least it would be very important if there could be any doubt regarding the principle of law applied in the case. There was no averment that Dunlop & Company, the employers, had been unduly parsimonious in the provision of men. It was not said that they had not provided a sufficient staff of men for all their requirements, but one of the men had been taken away to other duty for the moment. Now, while an employer must provide men, materials, and a system, he cannot in the nature of things be responsible for personally seeing to all the details of the organisation of labour, and the averments did not show a case of defective system, but only a case as to the distribution of the men who were engaged in the common employment. I consider the case here is of the same generic character. The case is different in its circumstances, but to say that when several men are engaged as platelayers it is the duty of the employer, or of the directors of a company, personally to see that one of the gang is deputed to keep a look-out is to my mind altogether preposterous. It is impossible that such a duty ever could be performed by the employer, and therefore the case resolves itself into this, that some-one whose business it was to superintend the different parts of the organisation was at fault in not having directed one of the men to keep a look-out. But that is a question not of administration but of distribution, and therefore it seems to me not relevant to raise the question of liability at common law.

The Lord President and Lord Kinnear concurred.

The Court dismissed the appeal.

Counsel for the Pursuer and Appellant—Salvesen, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders and Respondents—Campbell, K.C.—Hunter. Agents—W. & J. Burness, W.S.