Counsel for Pursuers and Appellants—Anderson, K.C.—Patrick. Agent—T. M. Pole, Solicitor.

Counsel for Defenders and Respondents—Roberton Christie, K.C.—MacRobert. Agents—R. & R. Denholm & Kerr, Solicitors.

Thursday, February 18.

SECOND DIVISION.

RANKINE *v.* FIFE COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)—*Acquiescence—Discontinuance of Compensation without Workman taking Proceedings—Personal Bar.*

A colliery company for some time paid compensation for total incapacity to a miner who had sustained an injury to his back. The miner having partially recovered, the amount of the payments was reduced by agreement, although no memorandum of agreement as to either full or partial compensation was recorded. Later on the company ceased payment altogether. Thereupon the miner's agent wrote to the company's agents demanding the continuance of the partial compensation and threatening proceedings, but although the company's agents replied refusing to admit further liability on the ground that the miner's condition was no longer due to the accident, no proceedings were at that time taken by the miner, and no further communications passed between the parties or their agents until more than a year later, when the miner's agent wrote to the company's agents stating that he was totally incapacitated. In an arbitration under the Workmen's Compensation Act 1906 the arbitrator, after a proof, awarded the miner partial compensation for the intervening period. The arbitrator found that the miner had "never fully recovered from the result of said accident and had never returned to work," and "continued partially incapacitated" until he "again became totally incapacitated on account of spinal sclerosis resulting from the accident." He also found that "there was no evidence indicating that the (company's) position had been in any way altered by the delay in taking proceedings for the enforcement of compensation," and the spinal sclerosis "was not diagnosed until within six months of the date of the proof, and the evidence disclosed nothing during the period between" the time when the miner threatened proceedings and the time when the disease was diagnosed, "ignorance of which could have caused prejudice to the company." In a stated case the company pleaded that the miner had acquiesced in the company's refusal to pay compensation, and was personally barred from claiming it.

The Court *held* that on the facts found by the arbitrator he was entitled to make the award.

Observations on the effect of delay in enforcing claim for compensation.

Lochgelly Iron and Coal Company, Limited v. *Sinclair*, 1909 S.C. 922, 46 S.L.R. 665, *distinguished.*

The Fife Coal Company, Limited, *appellants*, and Andrew Rankine, miner, Cowdenbeath, *respondent*, brought, in the Sheriff Court at Dunfermline, an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap 58), in which the Sheriff-Substitute (UMPHERSTON) awarded compensation and stated a Case for appeal.

The Case stated—"This is an arbitration in an application for an award of compensation under the Workmen's Compensation Act by the respondent in respect of personal injury sustained by him by accident arising out of and in the course of his employment with the appellants as a miner in their No. 10 Pit, Kirkford, Cowdenbeath, on 8th April 1910, in consideration of which he had been paid certain compensation by appellants. In his application respondent claimed to be awarded partial compensation at 7s. 2d. per week from 31st August 1912 to 7th February 1914, and thereafter full compensation at 15s. 8d. per week until the further orders of the Court. The claim was resisted by the appellants on the ground that respondent's incapacity resulting from the accident came to an end at or prior to 31st August 1912, and that any incapacity then remaining was due to respondent's failure to engage in light work or in appropriate exercises. The appellants further pleaded that respondent's total incapacity for work as at the date of coming into Court (which was admitted) was caused by spinal sclerosis arising from natural causes unconnected with the accident, and that respondent had acquiesced in the non-payment of compensation between said 31st August 1912 and the raising of the proceedings (20th March 1914).

"Proof was heard before me on 8th June 1914, and upon 24th June 1914 I found the following *facts* admitted or proved:—(1) That on 8th April 1910 respondent, who was a miner in No. 10 Pit, Cowdenbeath, belonging to appellants, sustained injury to his back by accident arising out of and in the course of his employment. (2) That his weekly wage prior to the accident was 31s. 4d. (3) That by agreement between the parties respondent was paid compensation at 15s. 8d. per week down to 24th February 1911, when he was certified by the medical referee to be fit for light work. (4) That respondent was thereafter paid and accepted partial compensation at 7s. 2d. per week until 31st August 1912, when appellants ceased payment. No memorandum of agreement as to either full or partial compensation was recorded. (5) That on 9th October 1912 respondent's agents wrote appellants' agent demanding the continuance of partial compensation and threatening proceedings, and that on 21st October

1912 appellants' agent replied in the following terms—'Referring to your letter of 9th instant, I have now considered this case, and must refuse to admit liability for further compensation on the ground that respondent's condition is no longer due to his accident.' (6) That no proceedings were at that time taken by respondent to enforce payment, and no further communications passed between the parties or their agents until 7th February 1914, when respondent's agents wrote appellants' agent stating that respondent was totally incapacitated. (7) That respondent never fully recovered from the result of said accident and never returned to work. He made applications for light work unsuccessfully, and one day went down the pit with the intention of trying work at the face, but felt unable for it and returned home. He continued partially incapacitated from said 31st August 1912 until 7th February 1914, when he again became totally incapacitated on account of spinal sclerosis resulting from the accident of 8th April 1910. (8) There was no evidence indicating that the appellants' position had been in any way altered by the delay in taking proceedings for the enforcement of compensation. The respondent was medically examined on behalf of the appellants on 28th September and 19th October 1912, after payment of compensation had been stopped. The spinal sclerosis which developed and caused supervening total incapacity was not diagnosed until within six months of the date of the proof, and the evidence disclosed nothing during the period between 19th October 1912 and the time when this was diagnosed, ignorance of which could have caused prejudice to the appellants.

"I accordingly found respondent entitled to partial compensation at 7s. 2d. per week from 31st August 1912 to 7th February 1914, and thereafter at the rate of 15s. 8d. per week."

The *question of law* for the opinion of the Court was—"In the circumstances above stated was I right in awarding respondent compensation from 31st August 1912 to 7th February 1914?"

Argued for the appellants—(1) The respondent had acquiesced in the refusal to pay compensation—*Rosie* v. *Mackay*, July 16, 1909, 46 S.L.R. 999; *Lochgelly Iron and Coal Company, Limited* v. *Sinclair*, 1909 S.C. 922, 46 S.L.R. 665. The appellants were entitled to assume, there being no recorded agreement, that the respondent had acquiesced, and were not themselves bound to record the agreement—*Lochgelly Iron and Coal Company, Limited* v. *Sinclair*, *cit.*, *per* Lord Salvesen at 936 (674-5); *M'Ewan* v. *William Baird & Company, Limited*, 1910 S.C. 436, 47 S.L.R. 430. Acquiesence was also to be presumed from a threat of proceedings which was not timeously followed up. (2) The respondent was barred *personali exceptione* from now claiming compensation—*Dempster* v. *Baird & Company, Limited*, 1909 S.C. 127, 46 S.L.R. 119; *Freeman* v. *Cooke*, 1848, 2 W. H. & G. 654, *per* Parke, B., at 663. The arbitrator was not entitled to find that the appellants had not been prejudiced. They had been prejudiced, for it was impossible to say what would have been the result had the respondent taken proceedings in 1912. Moreover the delay had deprived them of their right to have the respondent medically examined from time to time—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule (4) and (14). The intention of the statute was to make an alimentary provision for the injured man in the form of continuing payments, not to pay him a lump sum, as would be the result here if the respondent's claim were granted.

Argued for the respondent—The respondent had not acquiesced in the refusal to pay compensation. Mere delay was not acquiescence—*Barr & Company, Limited* v. *M'Girr*, 1910, 2 S.L.T. 435; *Cairncross* v. *Lorimer*, August 9, 1860, 3 Macq. 827. The employers could and should present an application to record the agreement—*Nelson* v. *Summerlee Iron Company, Limited*, 1910 S.C. 360, 47 S.L.R. 344; *Southook Fireclay Company, Limited* v. *Laughland*, 1908 S.C. 831, 45 S.L.R. 664; *Steel* v. *Oakbank Oil Company*, December 16, 1902, 5 F. 244, 40 S.L.R. 205. (2) The respondent was not barred *personali exceptione*, because the arbitrator had found that appellants had not been prejudiced—*Mackenzie* v. *British Linen Company*, February 11, 1881, 8 R. (H.L.) 8, 18 S.L.R. 333; Bell's Princps. sec. 27 (*a*). The employer was entitled to have the workman examined so long as he had not withdrawn his claim. The intention of the statute was to give the workman compensation for the whole period of his incapacity—*Wishart* v. *Gibson & Company*, 1914 S.C. (H.L.) 53, *per* Haldane, Ld. Ch., at 57; 51 S.L.R. 516.

At advising—

LORD JUSTICE-CLERK—[*After stating the facts*]—The question raised in the case is whether the respondent is entitled to a weekly payment of 7s. 2d. for the two years between the stoppage by the appellants and the initiation of the present proceedings.

The question really comes to be whether by remaining quiescent for that period the respondent is debarred from making this claim. In considering this it is necessary to look at the arbitrator's findings in fact, which we must take to be correct upon the evidence before him. Now he finds in fact in his seventh finding that "the respondent never fully recovered from the result of the said accident," and that "he continued partially incapacitated from said 31st August 1912 until 7th February 1914, when he became totally incapacitated on account of spinal sclerosis resulting from the accident of 8th April 1910." The arbitrator also finds that no prejudice was caused to the appellants by the respondent's delay in making the demand after they stopped payment. These are findings in fact, and if they are correct findings, which they must be presumed to be, I am unable to see how it can be held that the arbitrator could not award the compensation which he has given. Both parties seem to have acted

imprudently in not bringing matters to an issue in 1912, as either of them could have done, but I cannot hold that the arbitrator was wrong in refusing to hold the respondent had barred himself by the delay, and in awarding compensation.

A number of cases were cited in the debate, but it does not appear to me that any of them go the length of supporting the contentions of the appellants. The case after all may be reduced to this, Do the circumstances as found compel a decision that the stoppage of payment was so acquiesced in as to constitute a bar? In considering this the arbitrator probably did not leave out of view that there was not absolute silence following on the intimation of stoppage of payment, but a distinct intimation of non-acquiescence. Whether I would have come to the same conclusion had I been the arbitrator I need not say, but I do say that I cannot find ground for holding that his decision was one which he was not entitled to pronounce on the findings of fact stated in the case.

LORD SALVESEN—[*After narrating the facts found proved and the award of the arbitrator*]—The appellants do not object to the award of compensation as from 7th February 1914, by which time the workman had become totally incapacitated on account of spinal sclerosis. They maintained, however, that during the intermediate period he had forfeited any claim which he would otherwise have had by his acquiescence in the stoppage of payment.

We were referred to a number of authorities, and especially to the *Lochgelly Iron Company*, 1909 S.C. 922. I took part in the decision in that case, and having re-read my opinion I see no reason for altering or modifying any of the views I then expressed. In particular, I think that *prima facie* a workman loses his right to compensation if, having failed to record any memorandum of agreement, he acquiesces in such stoppage to the employer's prejudice. I also adhere to the view which I then elaborated that such acquiescence which induces the belief in the employer's mind that no further claim will be made raises a presumption of prejudice, inasmuch as the conduct of the workman deprives his employer of his statutory right to have the question of the workman's state of health ascertained by a medical referee. The question, however, remains whether, on the facts here found by the arbitrator, it is possible for us to interfere with his decision.

Now the arbitrator has found in fact that the respondent never fully recovered from the result of his accident, and never returned to work, and that on 7th February he became totally incapacitated on account of spinal sclerosis resulting from the accident. He further finds that there was no evidence indicating that the appellants' position had been in any way altered by the delay in taking proceedings for the enforcement of compensation. We are bound by these findings, and I cannot hold upon them that a case of personal bar or acquiescence has been made out. The presumption of prejudice to which I have already referred may be rebutted by evidence; and we must assume that the arbitrator had such evidence before him, or, at all events, that the presumption was not supported by the medical experts whom the appellants examined at the proof. On these grounds, although I might not have reached the same conclusion as the arbitrator, I cannot affirm that he was necessarily wrong.

I would only add that this is not a very favourable case for the appellants, because within six weeks of the stoppage of the compensation proceedings were threatened by the respondent's agents. It would then have been quite open to the appellants to have taken steps to have the compensation ended on the ground that the respondent's partial incapacity did not result from the accident. They could have done this without registering the verbal agreement—*Southhook Fireclay Company, Limited*, 1908 S.C. 831. They did not do so, but contented themselves with the intimation that they refused to admit liability for further compensation. The delay of the respondent to take proceedings for eighteen months thereafter, while it might quite well have justified the arbitrator in disallowing compensation until proceedings were actually raised, is, I think, not a sufficient ground by itself for our holding, in face of the findings in fact already referred to, that the arbitrator erred in law. I think, therefore, we should answer the question of law, not in terms of the question actually put, but in the sense that in the circumstances stated in the case the arbitrator was entitled to award the respondent compensation from 31st August 1912 to 7th February 1914.

LORD GUTHRIE—The dispute between the parties relates to the respondent's right to payment from the appellants of partial compensation at the rate of 7s. 2d. a week for a period of seventeen months, from 31st August 1912 to 7th February 1914. The respondent was paid compensation for total incapacity at the rate of 15s. 8d. a week from 8th April 1910, when he sustained an injury to his back by accident arising out of and in the course of his employment with the appellants, to 25th February 1911, when he was certified by the medical referee to be fit for light work. Thereafter he was paid partial compensation at 7s. 2d. per week until 31st August 1912, when the appellants ceased payment. The arbitrator's award, so far as it finds that the respondent is entitled to payment of 15s. 8d. per week from 7th February 1914, is not disputed. The respondent's agents wrote to the appellants' agents on 7th February 1914 stating, as the arbitrator has now found to be the fact, that respondent was totally incapacitated.

It appears from the arbitrator's 7th and 8th findings that the appellants were not entitled to stop payment of partial compensation on 31st August 1912, but that they should have continued partial compensation from that date to 7th February 1914, that is to say, for the whole period in dispute. Indeed, had the full facts been known and

proper proceedings taken, it appears as if the appellants could have been made to pay total compensation for the whole or a large part of that period. The case is thus an unfavourable one for the appellants, being sharply distinguished in this particular from the cases of *Lochgelly Iron Company* v. *Sinclair*, 1909 S.C. 922, and *Rosie* v. *Mackay*, 1908 S.C. 174.

But the respondent's claim for the period in question is said to be excluded, first, by his acquiescence, which the appellants say must be inferred from his silence and failure to raise any proceedings from 21st October 1912 when the appellants' agents (in answer to a demand made on 19th October by the respondent's agents for a continuance of partial compensation) refused to admit liability for further compensation on the ground that respondent's condition was no longer due to his accident; and second, because the appellants have been prejudiced by the respondent's failure to follow out the proceedings threatened by his agents in their letter of 9th October 1912, and the respondent is therefore, it is said, personally barred.

The appellants argued their case alternatively on acquiescence and personal bar. I do not think the facts found by the arbitrator will support either plea. As to acquiescence either in the appellants' stoppage of payment on 31st August 1912, or in their refusal to admit liability for partial compensation contained in their agents' letter of 21st October 1912, it is clear, as matter of fact, that the respondent never intended to abandon his claim. The cases quoted by the appellants are clearly distinguishable. In the *Lochgelly* case the workman had recovered; in this case the arbitrator finds that "the respondent never fully recovered from the result of said accident, and never returned to work." In the *Lochgelly* case an action had been raised at common law, which was held inconsistent with a belief in a subsisting right to payment under the statute; in this case the respondent had taken no such proceedings—his agents' letter of 9th October 1912 makes clear his belief in the subsistence of the agreement; and that letter was never withdrawn. As to the reason why proceedings were not taken sooner, the arbitrator has found that the spinal sclerosis from which the respondent suffered was developing during the period in question, although it was not diagnosed till within three months of the end of the period, namely, in December 1913. It was not unreasonable that proceedings should be delayed till the malady which prevented the respondent's return to work should have developed so as to make its nature precisely ascertainable. It might have turned out (as the appellants stated in their agent's letter of 21st October 1912) to be a malady which could not be referred to the accident. In these circumstances, while it is hopeless, as the appellants seemed to feel, to found on the respondent's silence from 31st August to 21st October 1912 as involving acquiescence on his part or raising against him a plea of personal bar, it seems to me equally impossible to maintain either plea in reference to the period from 21st October 1912 to December 1913, when the disease was diagnosed with certainty. The respondent's silence is therefore reduced to the period of one or two months from December 1913, when the disease was diagnosed, to 7th February 1914, when intimation was made. If the case be taken on this footing the appellants did not maintain that they could succeed either on acquiescence or personal bar.

I have hitherto assumed that mere silence for a sufficiently long period, and especially if unexplained and unjustifiable, might involve acquiescence or support a plea of personal bar. This view, however, is inconsistent with all the law quoted to us from the text writers and from the cases—*Cairncross*, (1860) 3 Macq. 827; *Mackenzie*, 8 R. (H.L.) 16; *Freeman* v. *Cooke*, 2 W. H. & G. 654. It seems to me that mere silence, however long continued, will not be enough, but that the circumstances must be such as either to show distinct and unequivocal consent, or such as make it unfair or contrary to good conscience to hold that the person who is said to have acquiesced is not bound.

The question remains, Whether the facts expressly found by the arbitrator or involved in his findings warrant the appellants' plea of personal bar on the ground that the appellants were materially prejudiced by the respondent's delay? It seems to me that the first and last sentences of finding 8 are decisive on this point in the respondent's favour. It was indeed maintained by the appellants that they were induced by the respondent's delay to cease keeping a check on the respondent's movements, that the respondent's delay made it impossible for them to have him medically examined between 31st August 1912 and 7th February 1914, and that had the respondent gone on with his threatened proceedings he might have been unable owing to the non-development or the merely partial development of the symptoms of sclerosis to prove his case. The first and last of these points depends on questions of fact in regard to which the appellants have failed to ask the arbitrator to pronounce findings, and they are in addition inconsistent with finding 8. That finding seems to me to exclude the application of a passage in Lord Salvesen's opinion in the *Lochgelly* case on which the appellants founded. Lord Salvesen said—"After an interval of time, during which the workman's health may have suffered from other causes, such a reference cannot be of the same value as it would have been when the dispute actually emerged." It is right to add that in the *Lochgelly* case the delay was for eighteen months and in *Dempster*, 1909 S.C. 127, for seven years. The second point is unsound in law, because it was in any case open to the appellants to have taken steps to have the liability terminated, in which case they would, of course, have been entitled to have the respondent medically examined.

I therefore think that the arbitrator was entitled to come to the result at which he arrived.

LORD DUNDAS was absent, being engaged in the Extra Division.

The Court pronounced this interlocutor—

"Find in answer to the question stated that in the circumstances stated the arbitrator was entitled to award compensation from 31st August 1912 to 7th February 1914: Therefore dismiss the appeal, affirm the determination of the arbitrator, and decern. . . ."

Counsel for the Appellants—Horne, K.C.—Carmont. Agents—Wallace & Begg, W.S.

Counsel for the Respondent — George Watt, K.C. — Macdonald. Agent — D. R. Tullo, S.S.C.

Friday, February 19.

FIRST DIVISION.

[Lord Hunter, Ordinary.

ADAM *v.* RIO GRANDE RUBBER ESTATES, LIMITED.

Expenses — Taxation — Action One of a Series all Raised on same Grounds where Combination Impossible—Principles to be Followed by Auditor in Taxing Account of Expenses in such Circumstances.

In remitting to the Auditor to tax the account of expenses in an action which was one of a series of 121 in which the question at issue, though identical in each case, could not be tried in a combined action, the Lord Ordinary directed the Auditor that "in fixing the amount of said expenses he shall take into consideration that the action is one of a series of 121 actions raised by different pursuers against the same defenders on the same grounds, the pursuers in all the actions being represented by the same counsel and agents." *Held* that such was a proper direction in the circumstances. *Mode* of giving effect to the direction.

(See *Mair* v. *Rio Grande Rubber Estates, Limited*, 1913 S.C. 183, 50 S.L.R. 125, 1913 S.C. (H.L.) 74, 50 S.L.R. 876.)

William Adam, clerk, 128 Oxford Street, Glasgow, *pursuer* and *reclaimer*, brought an action of reduction against the Rio Grande Rubber Estates, Limited, 30 George Square, Glasgow, *defenders* and *respondents*, which was one of a series of 121 actions brought by shareholders against the Company to obtain a recision of their agreements to take shares in the Company, the actions being all based on the same allegation that the prospectus of the company contained false and fraudulent statements.

The actions were settled by letters between the parties' agents, dated 30th March 1914 and 2nd April 1914, in the following terms:—

"29 Queen Street,
"Edinburgh, *30th March* 1914.

"Messrs Mitchells, Johnston & Co.,
"Solicitors, Glasgow.

"Dear Sirs,

"*Rio Grande Rubber Estates Ltd.*
"*in Liquidation.*

"Referring to your letter of 12th inst., and the meetings and correspondence which have taken place between Mr Rankin and Mr MacLeod, we now beg to confirm the settlement of this case on the footing that your clients pay our clients full judicial expenses in all the actions, together with a contribution of £250 towards the extra-judicial expenses, and that no further claims are made against any of our clients in respect of calls on the shares of the Company held by them. Our clients on the other hand to waive all claim to participate in any surplus assets which may remain after payment of the creditors of the Company. This settlement is, of course, subject to the approval of the Court being obtained, and to our obtaining the approval of our clients individually.

"We are calling a meeting for this purpose within the next few days,—Yours faithfully, ST CLAIR SWANSON & MANSON.

"*P.S.*—Of course it is understood that the expenses paid to your agent on 16th January 1913 under the Court of Session decree are repaid.—ST. C. S. & M."

"*2nd April* 1914.

"Messrs St Clair Swanson & Manson, W.S.,
"29 Queen Street, Edinburgh.

"Dear Sirs,

"*Rio Grande Rubber Estates Ltd.*
"*in Liquidation.*

"We were duly favoured with your letter of the 30th ulto. confirming the settlement herein on the terms arranged, subject to the approval of the Court being obtained and to your obtaining the approval of your clients individually. It is of course understood that the expenses paid to Mr Stuart Macdonald on 16th January 1913 under the Court of Session decree shall be repaid,—We are, yours faithfully,

"MITCHELLS, JOHNSTON, & CO."

In accordance with the said settlement the Lord Ordinary (HUNTER) on 14th July 1914 pronounced the following interlocutor:—" . . . Finds the defenders liable to the pursuer in expenses and remits the account thereof when lodged to the Auditor to tax and to report, with the direction that in fixing the amount of said expenses he shall take into consideration that the action is one of a series of 121 actions raised by different pursuers against the same defenders on the same grounds, the pursuers in all the actions being represented by the same counsel and agents."

The account of the pursuer's expenses as taxed by the Auditor was as follows:—

"*Feby*. 1912.

Taking instructions - - - - -				£0	13	4	£0	10	0
Framing summons (fresh matter, say 2 shs.) - - - - - -				0	12	0	0	4	0
Instructing counsel to revise	£0	6	8 1/x	0	6	8			
Paid him fee and clerk -	1	3	6 1/x	1	3	6			
	£1	10	2						
Instg. printer to print - - - - -				0	3	4	0	3	1
Paid him (proportion) - - - -				0	2	3			
Revising proof print (7 pp.) - - -				0	10	0	0	8	6
Attce. signetting - - - - - -									
Paid dues - - - - - - -				0	2	6			
Serving on defenders and posts - -				0	3	9			
Making up process and lodging - -									
Writing duplicate inventory - -				0	1	6	0	1	6
Paid dues - - - - - - -				0	10	0			
Borrowing defences - - - - -				0	3	0	0	2	6
Making up papers for printer - -				0	6	8	0	5	8
Carry forward,				£4	18	6	£1	15	3