have." The Lord Ordinary decerned against the defenders for a certain sum and found them "as aforesaid" liable in expenses. On a reclaiming note the Division adhered and found "the pursuer entitled to additional expenses." When the Auditor's report came up for approval the pursuer moved for a joint and several decree against the defenders for his expenses not only in the Inner House but also in the Outer House.

The Court *granted* (1) a joint and several decree for the Inner House expenses, but (2) only a decree against the wife and the husband "as administrator-in-law for his wife and for any interest he might have" for the Outer House expenses.

Reference is made to the preceding report, *ante ut supra.*

In this action James Herriot, solicitor, Duns, sued Miss Isabella Annie Brown (afterwards Jacobsen), 173 Colinton Road, Edinburgh, for repayment of (1) £245, 15s. alleged to have been advanced to her prior to her majority, and (2) £204, 4s. 7d. alleged to have been advanced to her subsequent to her majority. During the dependence of the action the defender married Richard Francis Jacobsen. On 6th May 1908 intimation of the action to Mr Jacobsen was appointed to be made, and on 2nd June the Lord Ordinary, in respect of a minute of sist for him, sisted him "as administrator-in-law for the defender, his wife, for any interest he might have."

On 28th October 1908 the Lord Ordinary decerned against the defenders Mrs Isabella Annie Brown or Jacobsen and her husband Richard Francis Jacobsen, "as administrator-in-law for his wife and for any interest he might have," for payment to the pursuer of the sum of £326, 0s. 11d. with interest thereon, and found "the defenders as aforesaid liable in expenses" to the pursuer. The question as to the husband's liability for pursuer's expenses was not raised.

The defenders reclaimed, and on 27th May 1909 the First Division adhered to the Lord Ordinary's interlocutor, refused the reclaiming note, and found the pursuer "entitled to additional expenses since the date of said interlocutor."

At the motion in Single Bills for approval of the Auditor's report the pursuer moved the Court to grant decree for expenses against the defenders jointly and severally, not only in respect of the Inner House expenses but also in respect of the expenses in the Outer House.

The pursuer argued—The husband had rendered himself personally liable by voluntarily sisting himself as a party to the action when there was no obligation on him to do so. He had taken an active interest in the action, and the Lord Ordinary in his note expressly ascribed to him responsibility for the litigation having continued. In addition he had been present at a commission for the recovery of documents and had personally intervened. These circumstances took the case out of the category of formal concurrence and made the husband liable—*Lindsay* v. *Kerr*, January 15, 1891, 28 S.L.R. 267; *Fraser* v. *Cameron*, March 8, 1892, 19 R. 564, 29 S.L.R. 446; *Macgown* v. *Cramb*, February 19, 1898, 25 R. 634, 35 S.L.R. 494; *Maxwell* v. *Young*, March 7, 1901, 3 F. 638, 38 S.L.R. 443; *Picken* v. *Caledonian Railway Company*, March 10, 1903, 5 F. 648, 40 S.L.R. 460; *Kerr* v. *Malcolm*, 1906, 14 S.L.T. 358.

Argued for the defenders—(1) In all the cases where the husband was found liable he did something active in the conduct of the case. His mere concurrence was not enough—*Whitehead* v. *Blaik*, July 20, 1893, 20 R. 1045, 30 S.L.R. 916. Here the action was raised while Mrs Jacobsen was unmarried in respect of her own estate and the husband really came in quite passively. If pursuer had wished he might have sisted him by minute. (2) In any event it was too late to ask for joint and several decree on approval of the Auditor's report—*Warrand* v. *Watson*, 1907 S.C. 432, 44 S.L.R. 311.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the pursuer on the Auditor's report on the pursuer's account of expenses, No. 331 of process, Approve of said report and decern (1) against the defenders Mrs Isabella Annie Brown or Jacobsen and her husband Richard Francis Jacobsen, as administrator-in-law for his wife and for any interest he might have, for payment to the pursuer of the sum of £230, 9s. 11d., sterling, being the amount of the expenses incurred by him in the Outer House, and (2) against the defenders jointly and severally for payment to the pursuer of the balance of said account, viz., £42, 13s. 9d., being the amount of expenses incurred by him in the Inner House, said two sums amounting together to the sum of £273, 3s. 8d., the taxed amount of said account."

Counsel for Pursuer—Maitland. Agent—J. Gordon Mason, S.S.C.

Counsel for Defenders—J. H. Henderson. Agents—Kelly, Paterson, & Co., S.S.C.

Friday, July 16.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

ROSIE *v.* MACKAY.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Sched. I* (1) (*b*)—*Compensation—Bar—Acquiescence—Suspension of Charge upon a Recorded Agreement—Discontinuance of Weekly Payment—Actings Incompatible with Existence of an Agreement.*

A workman who sustained injury by an accident arising out of and in the course of his employment received a weekly payment of compensation under the Workmen's Compensation Act 1897

for about six months after the accident, when the payments were discontinued. The workman then raised a common law action against his employer for damages in respect of his injury, which action was dismissed on the ground that the workman had elected to take compensation under the Act. Thereafter a memorandum of agreement under the Act was recorded and a charge given by the workman to the employer to pay compensation from the date when the payments were discontinued. *Held*, in a suspension by the master, that the workman had acquiesced in the discontinuance of the weekly payments during the subsistence of the common law action, and that he was therefore barred from claiming compensation for the period prior to the recording of the agreement.

On 10th December 1908 George Rosie, builder, 52 East Crosscauseway, Edinburgh, presented a bill of suspension seeking to suspend a charge at the instance of Alexander Mackay by virtue of an alleged extract registered memorandum of agreement and warrant thereon dated 1st December 1908, to make payment of £73, 16s.

On 20th November 1906 Mackay, a workman in the employment of Rosie, sustained injury by an accident arising out of and in the course of his employment, and compensation at the rate of 18s. a-week under the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) was paid to him till 4th May 1907, after which date the weekly payments were discontinued. Mackay then raised against Rosie in the Court of Session an action at common law concluding for damages in respect of the injury. On 21st November 1907 the First Division affirmed the judgment of the Lord Ordinary, dismissing the action on the ground that the pursuer had elected to take compensation under the Act (see *Mackay* v. *Rosie*, 1908 S.C. 174, 45 S.L.R. 178). Mackay, who in the action denied that he had agreed to take compensation, then presented a petition to the Appeal Committee of the House of Lords for leave to appeal *in forma pauperis* against the judgment of the Court of Session. Leave was refused on 29th July 1908. On 15th May 1908 Rosie had lodged a memorandum of agreement under the Workmen's Compensation Act 1897, with the Sheriff Clerk at Edinburgh, and on 25th May Mackay had intimated objections to the recording. These objections were withdrawn on 24th August 1908, and on 26th August 1908 Rosie intimated withdrawal of the memorandum and got delivery of it from the Sheriff Clerk on a borrowing receipt. On 2nd November 1908 the memorandum was returned to the Sheriff Clerk at his request. On 13th November the Sheriff-Substitute (GUY) found, after a hearing, that the memorandum fell to be recorded as at the date when Mackay's objections were withdrawn, viz., 24th August 1908, and warrant was granted for its recording. Mackay then charged Rosie on the extract registered agreement to pay the sum of £73, 16s., being compensation at the rate of 18s. a-week from 4th May 1907 to 28th November 1908.

On 16th June 1909 the Lord Ordinary (MACKENZIE) suspended the charge in so far as regarded the period from 4th May 1907 to 24th August 1908, and repelled the reasons of suspension as regarded the period subsequent to 24th August 1908.

Opinion.—"The complainer seeks to have the charge suspended, first, on the ground that the Sheriff-Substitute had no jurisdiction to order the memorandum of agreement to be recorded.

"The ground of this objection is that the complainer, who had lodged the memorandum of agreement on 15th May 1908, with a signed request addressed to the Sheriff-Clerk to record it, intimated withdrawal of the memorandum on 26th August. The respondent had on 25th May objected to the recording, but withdrew his objection, and intimated this to the Sheriff-Clerk on 24th August. The complainer's agents on 26th August got delivery of the memorandum from the Sheriff-Clerk on a borrowing receipt. On 27th August they intimated to the respondent's agent that they had withdrawn the memorandum. On 2nd November the complainer's agents returned the memorandum to the Sheriff-Clerk at his request. There was thereafter a hearing, and the Sheriff-Substitute on 13th November found that the memorandum fell to be recorded as at the date when the respondent's agent intimated withdrawal of his objections, viz., 24th August. The memorandum of agreement was recorded in the terms it bore when originally lodged by the complainer's agents.

"I am unable to hold that the Sheriff-Substitute in these circumstances exceeded his jurisdiction. As he had jurisdiction I do not think objection can be taken in the present proceedings to his direction that the memorandum should be recorded as of an earlier date. Nor can objection be taken to the terms of the agreement as recorded. The Sheriff-Substitute must be held to have satisfied himself as to that.

"It was contended that whereas the agreement provides for the payment of compensation at the rate of 18s. per week, it was an admitted fact that the statutory maximum to which the respondent is entitled is 13s. This is a matter, however, which can only be rectified by an application to vary the terms of the agreement.

"It was further contended for the complainer that the charge should be suspended in so far as it relates to arrears before 24th August, and the case of *Lochgelly Co.* v. *Sinclair*, 46 S.L.R. 665, was founded on. The complainer's argument was that it was established in the present case that the respondent had acquiesced in the discontinuance of compensation, and that a proof was unnecessary.

"The facts here, about which there is no doubt, are that from the date of the accident on 20th November 1906 down to 4th May 1907 the complainer paid the respondent compensation at the rate of 18s. a week, and then stopped. The respondent

then brought an action of damages at common law against the complainer in the Court of Session. On 21st November 1907 the First Division affirmed the Lord Ordinary's judgment dismissing the action, on the ground that the respondent had elected to take compensation under the Workmen's Compensation Act. The respondent in that action denied that he had agreed to take compensation under that Act. He then endeavoured to get on to the poor's roll and appeal to the House of Lords. The application to the Appeal Committee was refused on 29th July 1908. It was only after this that the respondent withdrew his objections to the recording of the memorandum of agreement.

"In these circumstances it is, in my opinion, impossible for the respondent to deny that he had acquiesced during that period in the discontinuance of compensation. As the Lord President points out in the *Lochgelly* case, the common law action was absolutely inconsistent with the idea of there being a subsisting agreement to pay compensation. If this be so, then the respondent cannot now be allowed a proof, as was asked, in order to show that during that period he was incapacitated from work.

"In these circumstances it does not appear to me that there is any necessity for a proof. The complainers are entitled to have the charge suspended in so far as regards the period from 11th May 1907 to 24th August 1908. As regards the period subsequent to 24th August, the note will be refused. . . ."

The respondent reclaimed, and argued—In the previous litigation between the parties (*Mackay* v. *Rosie*, 1908 S.C. 174, 45 S.L.R. 178) the Court had decided that the reclaimer was barred from suing at common law, because he had elected to take compensation. There was therefore a subsisting agreement during that period, and the reclaimer was entitled to compensation for the whole period covered by the charge. The raising of the common law action was no bar to the reclaimer's receiving the compensation due to him in virtue of the agreement. The case of *Lochgelly Iron and Coal Company, Limited* v. *Sinclair*, 1909 S.C. 922, 46 S.L.R. 665, was distinguishable. In that case there was unexplained delay, and it was averred that the workman had recovered. Here it was admitted that the reclaimer was incapacitated during the whole period for which compensation was claimed, and there was no such delay as would bar the claim—*Finnie & Son* v. *Fulton*, 1909 S.C. 922, 46 S.L.R. 665. With regard to the amount of compensation, review was not competent so long as there was no change of circumstances — *Crossfield & Sons, Limited* v. *Tanian*, [1900] 2 Q.B. 629. The Sheriff had no option but to grant warrant for the recording—*Macdonald* v. *Fairfield Shipbuilding and Engineering Company, Limited*, October 20, 1905, 8 F. 8, 43 S.L.R. 1—and there was no appeal from his judgment—*Binning* v. *Easton & Sons*, January 18, 1906, 8 F. 407, 43 S.L.R. 312.

Argued for the complainer (respondent)—The respondent did not now dispute the liability as to the period subsequent to 24th August 1908 or as to the amount of the weekly payment. As to the period from 11th May 1907 to 24th August 1908 no compensation was due. Under the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) compensation could only be due where there was either a subsisting agreement or the award of an arbiter. Neither of these requisites was present here. There had been no arbiter's award, and the finding in the common law action was not that there was a subsisting agreement, but simply that the reclaimer had made an election. That was perfectly consistent with the agreement having been varied or ended. In point of fact the reclaimer had maintained throughout the common law action that there was no subsisting agreement during the period in question, and the fact of his pursuing the action was itself inconsistent with the subsistence of any agreement. It was therefore not open to the reclaimer now to go back on his previous position or to deny that he had acquiesced in the discontinuance of the weekly payments.

LORD JUSTICE-CLERK — This is a most extraordinary case and the circumstances are these:—After the accident happened to the reclaimer, his master paid him eighteen shillings a-week, that being a sum in excess of what he was entitled to under the Act. The reclaimer maintained that he had entered into no agreement with his master, and brought an action against his master for damages at common law. That is of course quite inconsistent with the idea that the master was liable under the statute. The Court held that the reclaimer could not proceed with his action because he had agreed to accept compensation under the Act. Thereafter a memorandum of agreement was recorded which fixed the amount of the compensation. The question which we have to decide is whether the reclaimer, having acquiesced in the discontinuance of compensation, can now turn round and claim compensation for the period prior to the recording of the memorandum. I think that the Lord Ordinary was right in holding that he cannot. The agreement must be held to be an agreement to pay compensation as from the date of recording. I have no doubt that the Lord Ordinary's judgment is right.

LORD ARDWALL—I agree with the opinion delivered by your Lordship in the chair. It seems to me that this is a case in which we have to apply the ordinary principles of law, and, applying these, I have no hesitation in holding that the reclaimer has barred himself by his own actings from claiming arrears of compensation alleged to have become due prior to the recording of the memorandum of agreement. That is a short and sufficient ground of judgment, and no useful purpose can be served by speculating as to what the results in law might have been had the respondent or the reclaimer acted otherwise than they

did with regard to the memorandum of agreement and the recording thereof. I therefore think the judgment of the Lord Ordinary ought to be affirmed.

The Court adhered.

Counsel for the Complainer (Respondent)—Constable, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for Respondent (Reclaimer)—Anderson, K.C.—Hendry. Agent—John S. Morton, W.S.

Tuesday, July 20.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

NEW MINING AND EXPLORING SYNDICATE, LIMITED *v.* CHALMERS & HUNTER AND OTHERS.

Company — Process — Expenses — Caution for Expenses by Limited Company (Pursuers) — Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 278.

The Companies Consolidation Act 1908, section 278, enacts—"Where a limited company is plaintiff or pursuer in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."

Per the Lord President—"Where a statute entrusts a judge with such a power and he exercises it, though I do not say that his exercise of it will never be open to review, yet before the Court will interfere it must be shown that he has gone completely wrong."

Circumstances in which *held* that pursuers, a limited company, had been rightly ordained to find caution for defenders' costs.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), section 278, is quoted *supra in rubric.*

On 13th January 1909 the New Mining and Exploring Syndicate, Limited, 13 Rutland Street, Edinburgh, brought an action against Chalmers & Hunter, W.S., Edinburgh, then dissolved, and H. B. Hunter, W.S., Edinburgh, as partner thereof and as an individual, and R. M. Maclay, C.A., Glasgow, trustee on the sequestrated estates of R. S. Chalmers, the only other partner thereof, for recovery of a sum of £1400 admitted to have been embezzled by R. S. Chalmers when acting as secretary to the company.

The pursuers were incorporated in May 1907, when the said R. S. Chalmers was appointed secretary and law agent of the company. On 1st August 1907 Mr Chalmers assumed the defender H. B. Hunter as his partner, and on 17th December Messrs Chalmers & Hunter were appointed secretaries to the company and continued to act as such until 26th February 1908, when Mr Chalmers left the country. The defenders denied that they were responsible for the sums embezzled by R. S. Chalmers prior to the firm's appointment as secretaries, which sums, they averred, amounted to £1200. *Quoad* the balance, viz. £200, they admitted liability.

The closed record contained the following *averments* by the parties—"(Cond. 9) The defenders have been repeatedly called upon by the pursuers to make payment of the sum sued for, but they refuse or delay to make payment. A claim is about to be lodged by the pursuers upon the estate of the said Robert Scott Chalmers, but it is not anticipated that any dividend will be received in respect thereof. The present action has accordingly been rendered necessary. With reference to the averments in answer it is admitted that the defender H. B. Hunter acted as secretary of the pursuers for the period, and at the salary stated, and that they are due to him the two sums of £94 and £8, 6s. 8d. mentioned. The pursuers have no knowledge of the sums of £59, 9s. 8d. and £300 referred to, for which no account has been rendered to them, and they make no admission with regard thereto. The business account mentioned has also not been rendered to them, but they are prepared to admit liability for the taxed amount thereof, assuming it to represent business done on their behalf. *Quoad ultra* the averments in answer are denied. The pursuers are willing and offer to deliver to the said defender a certificate for the shares for which he applied. (*Ans.* 9) Admitted that the present defenders have refused to admit liability except to the extent mentioned in the preceding answer, and that only a small dividend, if any, is at present likely from R. S. Chalmers' sequestrated estates. *Quoad ultra* denied. No claim has yet been lodged. The defender H. B. Hunter acted as secretary to the pursuers' company from the date of his said appointment until 2nd February 1909, when he ceased to hold said appointment. The said defender's salary was fixed on 23rd May 1908 at £100 per annum as from the date of his appointment. The pursuers are due the said defender £94 in respect of salary, and £8, 6s. 8d., being one month's salary, in lieu of notice. Further, they are due the said defender a sum of £59, 9s. 8d., being the balance on his petty cash account as their secretary, as per account herewith produced. There are also due by the pursuers to the said defender a sum of £100 paid by him to them on 21st October 1907 for shares, which they declined to give to him, and £300, being the balance still owing on four advances amounting to £350, made by the said defender on pursuers' behalf between 3rd July and 14th November 1907 inclusive, as per statement produced. The pursuers are also due the said defender a business account of £22, 14s. also herewith produced (subject to taxation) in connection