The Court answered the question of law in the affirmative; therefore recalled the dismissal of the claim by the arbiter, and remitted to him to proceed.

Counsel for the Claimants and Appellants—A. S. D. Thomson—Munro. Agents—Patrick & James, S.S.C.

Counsel for the Respondents—Ure, K.C.—Younger. Agents—Webster, Will, & Company, S.S.C.

Friday, February 6.

SECOND DIVISION.

[Sheriff-Substitute at Hamilton.

O'HARA *v.* THE CADZOW COAL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1, *sub-sec.* (2) (*c*)—*Serious and Wilful Misconduct—Coal Mines Regulation Act* 1887 (50 *and* 51 *Vict. c.* 58)—*Additional Special Rule* 9—*Failure to Set Sprags.*

Rule 9 of the Additional Special Rules framed in pursuance of the Coal Mines Regulation Act 1887 provides—"Where holing is being done sprags or holing props shall be set as soon as there is room, and the distance between such sprags or holing props shall not exceed six feet, or such less distance as shall be ordered by the owner, agent, or manager."

A workman was killed by a fall of head coal while engaged with four other men in holing coal in a pit; three of the other men had holed a considerable portion before they were joined by the workman who was killed and the fifth man. The two latter men had holed about three feet when the accident happened. The total space holed by the five men was over twenty feet. No sprags had been set by any of the men although there was ample room for the setting of sprags. In an appeal under the Workmen's Compensation Act 1897, *held* (*diss.* Lord Young) that the workman who was killed was in breach of rule 9, that his injury was therefore attributable to his own serious and wilful misconduct, in the sense of sec. 1, sub-sec. 2 (c) of the Act, and that consequently his representatives were not entitled to compensation under the Act.

This was a case stated on appeal from a determination of the Sheriff-Substitute (DAVIDSON) at Hamilton, in an arbitration under the Workmen's Compensation Act 1897, between Mrs Catherine O'Brien or O'Hara, 6 Burnside Lane, Hamilton, widow of James O'Hara, miner, claimant and respondent, and the Cadzow Coal Company, Limited, appellants, in which the claimant claimed compensation for herself and her five pupil children in respect of the death of her husband, which was caused by a fall of head coal from the roof of one of the appellants' pits.

The following facts were stated as admitted or proved:—"That O'Hara was holing coal with four other men on 25th June 1902 in the appellants' pit, in which additional special rule No. 9 was in force; that three of the men had holed a considerable portion before O'Hara and the remaining man began to hole coal; that at the time of the accident these two had holed only about three feet; that the total space holed where all five men were working was over twenty feet, and no sprags had been erected by anyone although there was ample room for the erection of sprags; that, apart from the consideration of the quantity holed by each man, there was no responsibility on any one of the five more than on the others in regard to propping; that O'Hara's average weekly wages were £1, 6s. 2½d."

The Sheriff-Substitute stated his finding to be as follows:—"I found that the respondent was entitled to compensation, and I awarded £204, 8s. 6d. to be allocated in the proportions of £68, 2s. 8d. to the respondent, and £136, 5s. 10d. to the said pupil children in equal portions."

The question of law for the opinion of the Court, as amended, was—"Was the deceased James O'Hara in breach of additional special rule No. 9 of the Coal Mines Regulation Act 1887; and if so, was his injury attributable to his serious and wilful misconduct?"

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1, enacts—sub-section 2 (*c*)—"If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed."

The provisions of Rule 9 of the Additional Special Rules framed in pursuance of the Coal Mines Regulation Act 1887 are quoted in the rubric.

Argued for the appellants—Every miner was bound to put in a sprag as soon as there was room, and thereafter to put one in at spaces not exceeding six feet. The fact that all five men neglected the rule did not excuse O'Hara; all five men were in breach of the rule, and in particular O'Hara having holed a space sufficient to make room for a sprag was in breach of the rule in failing to put one in. Breach of a special rule framed for his own safety was serious and wilful misconduct on the part of a miner—*Dailly* v. *John Watson, Limited*, June 19, 1900, 2 F. 1044, 37 S.L.R. 782. O'Hara should have seen that the holing was spragged in accordance with the rule before he began to work. In the case of *M'Nicol* v. *Speirs, Gibb, & Company, cit. infra*, the facts were special; knowledge of the rule was to be assumed.

Argued for the respondent—It was not stated that O'Hara knew the rule, and knowledge was essential to fault—*M'Nicol* v. *Speirs, Gibb, & Company*, February 24, 1899, 1 F. 604, 36 S.L.R. 428. Assuming knowledge of the rule on the part of O'Hara, he was not guilty of serious and wilful

misconduct if his view of the rule was that he was responsible only for the space holed by himself. The Sheriff found in fact that that was the extent of his responsibility. Though the space holed by O'Hara was sufficient to make room for a sprag, it was not sufficient to leave room for him to work if he had inserted one.

At advising—

LORD JUSTICE-CLERK—In this case the question is whether the miners in the pit in question must be held to be excluded from the benefits of the Workmen's Compensation Act in respect that they disobeyed a rule of the pit and were therefore guilty of "serious and wilful misconduct" in terms of the Act. That rule is—"When holing is being done, sprags or holing props shall be set as soon as there is room, and the distance between such sprags or holing props shall not exceed six feet, or such less distance as shall be ordered by the owner, agent, or manager."

Now, the fact is that the workers at the place where the accident happened had not put in any props, although holing-out had gone to the extent of twenty feet, which was in direct breach of the rule. The deceased had holed out about three feet of that space. I do not see how it can be held that he was not in breach of the rule, which is distinct to the effect that a prop must be put up whenever there is room. Being in breach of the rule, I am of opinion that he must be held to have been guilty of serious and wilful misconduct. For the rule is an imperative one, and is plainly made to insure the safety of the worker, and the failure to carry it out is plainly serious misconduct, as adding greatly to danger. That it was wilful is also plain, for there is no suggestion of an excuse for the disobedience.

I am therefore of opinion that the question put to the Court must be answered in the affirmative.

LORD YOUNG—I regard this as a serious and important case. This was a workman in the sense of the statute, and he sustained an injury in the course of his work by which he was instantly killed, and the consequence of his death was that he left behind him a widow and five children. They, as wholly dependent upon him, are entitled to compensation under the statute unless it is shown that his death was attributable to his serious and wilful misconduct. The Sheriff who tried the case was of opinion that it was not attributable to his serious and wilful misconduct, and has therefore allowed compensation to the deceased's widow and children. The appeal to us is on a question of law which involves two questions. Stated generally, it is whether the Sheriff was wrong in law in not finding that this man's death was attributable to his serious and wilful misconduct. *Prima facie* the question whether the accident was or was not attributable to the serious and wilful misconduct of the workman himself is a question of fact. But we were referred to a case of some importance—*Dailly* v. *John Watson, Limited*, 2 F. 1044, in which the facts stated by the Sheriff were that a workman who suffered through an explosion had himself occasioned it by proceeding through the mine with a lighted lamp on his head, carrying cartridges in his hand which were not enclosed in a case or canister. The Court held there that the Sheriff was wrong in law in not attributing that calamity to the serious and wilful misconduct of the man who, contrary to the rules of the pit, was proceeding along with a lighted lamp on his head and these explosives in his hand. In the opinion which I expressed in that case—for I was one of the Judges—I concurred in the judgment, but I think my impression was that I could not say that a question of serious and wilful misconduct was exclusively a question of law, though in that case I held with my brethren that law was involved in the question. But to say that it is exclusively a question of law in every case is a proposition to which I could not assent. But I observe that two errors in law are imputed to the Sheriff here. One is that he did not hold that there was a violation here of Rule 9. I am disposed to hold that upon the facts stated to us we cannot hold that there was a breach of the Coal Mines Regulation Act. We have no facts except those which are stated here. Your Lordship has read the Rule of the Coal Mines Regulation Act, which is that props shall be put in at no greater distance one from another than six feet, or such less distance as may be ordered by those in charge of the pit. Now, here there were at the time of the accident five men engaged holing, the space holed being over twenty feet in all. The man O'Hara, who was killed, was at the time of the accident working at one end of a continuous line of holing, and three of the five men "had holed a considerable portion" of that continuous line "before O'Hara and the remaining man began to hole coal;" and "at the time of the accident these two had holed only about three feet," so that the other three men had holed up to within three feet of the twenty feet at the time when O'Hara began. What was the state of the holing immediately at the place where O'Hara and his companion began to work at the time when they began we are not told.

The other three men were working at the portion of the continuous line which had been holed before O'Hara began. And how long O'Hara had been working—whether for an hour, or half-an-hour, or for ten minutes, or for five minutes before the accident happened we are not told. He and the man who was with him had during the time that they were working holed about 3 feet, about 1½ feet each if the total is divided equally between them. You cannot tell how long before the accident happened O'Hara began to work. In the course of the discussion I put the question—"What should O'Hara have done; what is that which it was serious and wilful misconduct on his part to omit doing?" It was said he should not have begun his work at all but should have

informed the authorities at the mine that the propping had not been attended to by the three men who had been working, and that he should have refused to begin work until that was done, and that it was serious and wilful misconduct on his part to undertake the job without having it seen to. I cannot assent to that. Was it his duty to examine all the holing that others had been engaged on and to inform the mining authorities of the state of their work, and to see that all was put right which they had neglected before beginning his own work? I cannot read the Coal Mines Regulation Act as meaning that, and I cannot attribute serious and wilful misconduct to him for not having so acted. I think he would have found the mine a very disagreeable place if he had so acted, and probably not a place for him.

But where should he have put up a prop? Is there any requirement on a workman to put up a prop except where he has holed the place himself? Must he put up a prop or props at his neighbouring workmen's place, or is he to put up a prop only where he is holing himself? And where is he to put it? Is he just to make room for a prop and then put one in? I really cannot pronounce the Sheriff's judgment wrong in point of law upon the facts which are stated.

We have heard a long argument from counsel, and taken the case to avizandum to see whether we could hold on the information given to us that this workman during the short time he was engaged in holing had violated the statute. Now, the result of hearing that argument and consideration at avizandum is that we differ in opinion on the subject, at least I differ from your Lordship, for I agree with the Sheriff. Then are we to affirm that it was serious and wilful misconduct on the part of this miner to take the view that he did and begin his work? I cannot so hold. I think, in order to set aside a judgment of this kind, we should have distinct and clear grounds for affirming that, taking the facts to be as stated by the Sheriff, it was pronounced upon such an erroneous view of the law that we must recal it and impute the accident that happened to this workman's serious and wilful misconduct. I cannot do that, and must therefore express my distinct opinion to be that there are no grounds for interfering with the judgment of the Sheriff.

The Sheriff says, "that the total space holed where all five men were working was over 20 feet, and that no sprags had been erected by anyone, although there was ample room for the erection of sprags." I think his statement that there was ample room for the erection of sprags is applicable to the 20 feet. I do not understand him as meaning, and there is nothing to indicate that he meant, that there was room, ample room, for sprags in any space that had been holed by O'Hara. No doubt, where you have a space of 3 feet holed, there is room to put up a sprag, and it may be that after 1 foot is holed you could put up a sprag there; but the question is whether O'Hara had room to put up a sprag before the 3 feet were cleared, and if so, what quantity of the 3 feet had been cleared when there was room for a sprag and it became his duty to put it up? After the 3 feet were out he may have been proceeding to put up a sprag—there was plenty of room for it then—when the accident happened.

LORD TRAYNER—The second branch of the question put to us is not well expressed, but it was stated at the bar that it would be corrected. Taking the question put to us to be, whether O'Hara was in breach of special rule No. 9, and if so, whether what happened was attributable to his serious and wilful misconduct, I am of opinion that the answer to both branches of the question should be in the affirmative. I think it plain on the facts as stated that the deceased was in breach of No. 9 of the additional special rules framed in pursuance of the Coal Mines Regulation Act at the time when he was killed, because he was working at an open face, opened up to the extent of 17 feet, before he began, and thereafter to the extent of 3 feet by himself and his companion without any sprag being put in by himself or others. Now, the rule is quite explicit that where holing is being done sprags or props shall be set up as soon as there is room. I think this man's plain duty was, if he saw 17 feet of holing without a sprag, to put up a sprag before he began. The Sheriff says there was ample room for the erection of sprags. But if he did not put up a sprag before beginning, he had plenty of room to put one up in the space which he opened before the accident occurred. His failure so to sprag his working was a wilful violation of the statutory rule, and amounted to wilful and serious misconduct on his part.

I would like to say that a strict enforcement of these rules appears to me to be a duty on the part of the Court. The rules are devised for the express purpose of protecting the miners themselves. The result of these miners working 3 feet with a 17 feet hole behind might have been to bring down the roof on the whole five men. The neglect of any one of these men was not merely a neglect of his own safety but a neglect of the safety of every man at that particular place, and in the interest of the miners themselves I regard it as a duty to enforce these rules with the greatest strictness.

LORD MONCREIFF—The ninth additional special rule is framed for the purpose of protecting miners from danger when holing is being done of the head coal of the roof coming down upon them. The seriousness of the danger is sufficiently shown by the accident which occurred in this case. In this case the respondent's husband James O'Hara was killed instantaneously by a fall of head coal from the roof.

The questions which are put to us are first, whether James O'Hara committed a breach of the rule; and secondly, whether in doing so he was guilty of serious and wil-

ful misconduct in the sense of the Workmen's Compensation Act, section 1 (2) (*c*). On both these questions I am in favour of the appellants.

I think that O'Hara committed a distinct breach of additional special rule No. 9. That rule provides that where holing is being done sprags or holing props shall be set as soon as there is room, and the distance between such sprags or holing props shall not exceed 6 feet. Now, when O'Hara went to work three other men of the gang had holed a considerable portion before he arrived. O'Hara and a fifth man set to work and had holed 3 feet when the fall took place. By that time no less than 20 continuous feet had been holed and no sprags erected. This cannot but have been apparent to O'Hara, and the question of law put to us, which the Sheriff and the parties concur in presenting as a question of law is, I understand, in substance this, whether, on a proper construction of the rule, he was excused from propping, because the danger and accident was in part caused by work which had been done by others before he arrived. I cannot hold that to be a sufficient excuse. The danger must have been apparent to him, and he must have worked for an appreciable time before the accident occurred. I think he was bound either himself to insert a prop, or at least to stop work and complain to the oversman or other superior official.

The statute fixes on employers heavy liability without proof of fault on their part. But in order to protect them from gross negligence on the part of the workman it is provided that they shall not be liable if, after they have taken all reasonable care for the protection of the workman, the workman wilfully disregards and neglects the rules for his safety which they have established. The result is that in my opinion the deceased clearly committed a breach of the 9th additional special rule, and it follows from what I have said that he must have done so wilfully as the danger was apparent.

The Court answered the question as amended in the affirmative.

Counsel for the Claimant and Respondent—Watt, K.C.—A. Moncrieff. Agents—Simpson & Marwick, W.S.

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

Saturday, February 7.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

BLOW *v.* ECUADORIAN ASSOCIATION, LIMITED.

Process—Mandatary—Mandatary Resident in England—Judgments Extension Act 1868 (31 *and* 32 *Vict. cap.* 54).

Held that it was sufficient for a foreign pursuer to sist a mandatary who was resident in England, in respect that the decree of the Scots Court for expenses could be enforced against him in England under the Judgments Extension Act 1868.

Albert Allmond Blow, geological and mining engineer, brought an action against the Ecuadorian Association, Limited, concluding for payment of the sum of £2949, 1s. 7d., alleged to be due under a contract of service.

The defenders averred (Ans. 1)—"The pursuer is only temporarily resident in London, and has no permanent place of business or residence in this country."

The pursuer admitted that he had no permanent residence in this country, but stated that he had an office or place of business at 120 Bishopsgate Street Within, London.

A minute was lodged (No. 11 of process) for Frederick William Salisbury Jones, merchant, 120 Bishopsgate Street Within, London, sisting himself as mandatary for the pursuer.

On January 13, 1903, the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties on the minute for Frederick William Salisbury Jones (No. 11 of process), and considered the cause, refuses to sist him as mandatary for the pursuer; grants leave to reclaim."

Note.—"In this case a minute has been lodged by the pursuer purporting to sist a mandatary who is admittedly resident in England. I am asked to sustain that minute. Of course the motion is made on the assumption that the pursuer cannot proceed without a mandatary. On that assumption the pursuer maintains that it is a legitimate deduction from the Judgments Extension Act that a person resident in England may be received in our Courts as a mandatary. Before the Judgments Extension Act no one would have thought of tendering an Englishman as a mandatary, and I have no doubt that up to that date mandataries were always Scotchmen. That must have been settled practice, and I have not been told that there has been any alteration in that practice since. I am asked to alter that practice. There may be a good deal to be said in support of the pursuer's contention, but I think that if a uniform practice of that kind is to be settled it should be done in the Inner House, not in the Outer House, so that practice on the point may be uniform. There is no provision in the Judgments Extension Act