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

declaring expressly or by implication that Englishmen may be received as mandataries. On that ground I think I must refuse this motion. I do not think the objection to the minute removed by the offer to subject the mandatary to the jurisdiction of this Court. That would make no difference, for a mandatary is subjected to the jurisdiction of the Court by being sisted."

The pursuer reclaimed.

Argued for the pursuer and reclaimer—The Judgments Extension Act 1868 had made an essential difference in respect that under that Act a Scotch decree can be at once enforced in England as effectually as in Scotland. Accordingly there was now no reason why a person resident in England should not be received as a mandatary in a Scotch Court. On this principle it was decided in *Lawson's Trustees* v. *British Linen Company*, June 20, 1874, 1 R. 1065, 11 S.L.R. 592, that the pursuer of an action in a Scotch Court who was resident in England did not require to sist a mandatary. The present case came directly within the principle of that decision, as well as of the decision in the later case—*Dessau* v. *Daish*, June 26, 1897, 24 R. 976, 34 S.L.R. 739.

Argued for the respondents—The pursuer was not entitled to have a person resident in England sisted as a mandatary. The practice was that a mandatary sisted in a Scotch Court must be resident in Scotland. It was essential that the mandatary should be a person who could be made answerable not only for the expenses of the cause but also for the proper conduct of the cause. Even in the view that a mandatary resident in England was, in virtue of the Judgments Extension Act 1868, as good in the matter of expenses as a mandatary resident in Scotland, yet, not being subject to the jurisdiction of the Scotch Courts, he could not be made as effectually responsible for the conduct of the case. The matter of security for costs was the interest of the other party to the case, but the matter of having within its jurisdiction a party responsible for the proper conduct of the case was the interest of the Court itself. The right of a foreigner to sue in a Scotch Court, arising from his being creditor in an obligation, was much broader than his rights with regard to sisting a mandatary.

At advising—

LORD PRESIDENT — The question is whether we should comply with the request of the pursuer that a person resident in England should be sisted as mandatary in this case. No personal objection is stated to the individual proposed. The only objection stated is that, as he is resident in England, the defender will have less security for expenses than if a mandatary was sisted who was directly subject to the jurisdiction of this Court.

It was laid down by Lord President Inglis in the case of *Lawson's Trustees* v. *British Linen Company*, that the sisting of a mandatary is entirely within the discretion of the Court. The question in the case of *Lawson's Trustees* was whether a mandatary should be sisted where the principal is resident in England. The Court held that the Judgments Extension Act 1868 had made a material difference, in respect that a Scotch decree on being registered could at once be enforced in England, and that therefore it was unnecessary to require that a mandatary should be sisted.

The question here is whether a mandatary resident in England should be accepted as sufficient. I think the considerations which led to the decision in the case of *Lawson's Trustees* apply, viz., that as a Scotch decree can now be inexpensively and quickly enforced in England, the other party to the action will be in no worse a position in consequence of the mandatary being resident in England than if he were resident in Scotland. If there were any allegations against the solvency, sufficiency, or character of the proposed mandatary, this might require to be considered by the Court. But there is no suggestion of this kind here. Accordingly, with the fullest reservation of the power and the duty to consider each case on its merits, I can see no reason why we should not apply the principle which received effect in the case of *Lawson's Trustees*, and sist the mandatary proposed by the pursuer.

LORD M'LAREN—I agree with your Lordship. In the practice which existed before the Judgments Extension Act 1868 the chief benefit derived from the appointment of a mandatary for a litigant resident abroad was that there was someone against whom the party could enforce a money decree either for expenses or in pursuance of a judgment on the merits. I doubt whether the sisting of a mandatary would be of much use if the decree was a decree *ad factum præstandum*, as, for instance, if the decree was upon an order to execute a conveyance. Such a decree could not be implemented by a mandatary, as he would not have the titles or be in the position of the owner of the subjects to be conveyed, although he might be liable to imprisonment for failure to implement the order. The main consideration therefore was to give the litigant resident in Scotland security for decrees against a litigant resident abroad resulting in money payments. Since the passing of the Judgments Extension Act it has been held that security for implement of decrees ordering payment of money is unnecessary where the litigant is resident in England, because the decrees of Scotch Courts were by that Act made effectual in any other part of the United Kingdom. In the present case the mandatary who is proposed could himself sue or be sued in our Courts without a mandatary, unless in circumstances so exceptional that no case of the kind has arisen since the case of *Lawson's Trustees* v. *British Linen Company* in 1874. The suggested mandatary is resident in England, and a decree for a money payment could be as effectually enforced against him under the Judgments Extension Act

as if he were himself the principal. Now if a party to a case gets, as mandatary for his opponent, a person who could himself be sued in our Courts and against whom a decree can be executed by registration, he has got all that he can legitimately ask for. It is satisfactory that in so deciding we do not differ from the Lord Ordinary, because in his Lordship's opinion he says that, as the acceptance of a person resident in England as a mandatary would alter the existing practice the alteration should be made by a judgment of the Inner House. For these reasons I think we ought to hold that the mandatary proposed is sufficient; no personal objection is taken to him—only that he is resident in England—and that objection does not appear to me to be well founded.

LORD KINNEAR—I agree. There is no question as to the general rule that foreigners suing in the Courts of this country must sist a mandatary, who shall be not only responsible for costs but also for the proper conduct of the case. I assent to the proposition of the defenders that the mandatary must be a person against whom the decrees of the Court shall be enforceable as readily and easily as if the litigant were resident in Scotland. Before the Judgments Extension Act 1868 that rule excluded an Englishman, because the judgments of this Court were not enforceable directly in England. The Judgments Extension Act, however, put a person resident in England in the same position as a person resident in Scotland, in this respect, that the decrees of this Court are enforceable against him as effectually as if he resided in Scotland. In the case of *Lawson's Trustees* it was held that it was unnecessary for a party resident in England to sist a mandatary in suing an action in this Court. It is argued that it is undesirable to permit a foreigner suing to sist as mandatary a person resident in England, because the effect would be to give the other party to the litigation an inferior security for his costs in the action. That was also the argument in *Lawson's Trustees*; and it was precisely because the Court held that the security was not inferior, and that the residence of the pursuer in England made no difference to the defender, that they refused to order a mandatary to be sisted. I assent to the view that, whatever the general rule may be, sisting of a mandatary remains a question for the discretion of the Court in every case. There are, however, no circumstances suggested in the present case for treating it as exceptional.

LORD ADAM was absent.

The Court pronounced this interlocutor:—

"Recal the interlocutor and decern: Find the defenders liable to the pursuer in expenses since the date of the interlocutor reclaimed against; and remit the account thereof to the Auditor to tax, and to report to the Lord Ordinary; and remit to his Lordship to sist the mandatary proposed for the pursuer, and to proceed, with power to decern for the taxed amount of said expenses."

Counsel for the Pursuer and Reclaimer — Wilson, K.C. — Sanderson. Agents — Wishart & Sanderson, W.S.

Counsel for the Defenders and Respondents — Clyde, K.C. — Lyon Mackenzie. Agents — Bonar, Hunter, & Johnstone, W.S.

Tuesday, February 17.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

DUNLOP PNEUMATIC TYRE COMPANY, LIMITED *v.* NEW LAMB TYRE COMPANY, LIMITED.

Expenses—Patent—Infringement of Patent—Certificate as to Validity—Expenses as Between Agent and Client—Patents, Designs, and Trade-Marks Act 1883 (46 *and* 47 *Vict. c.* 57), *sec.* 31.

Held that the pursuers in an action for infringement of their patent, who had previously in the High Court of Justice in England obtained a final judgment and a certificate under section 31 of the Patents, Designs, and Trade-Marks Act 1883, were entitled to expenses as between agent and client in terms of that section, although the validity of their patent had not been disputed by the defenders.

By section 31 of the Patents, Designs, and Trade Marks Act 1883 (46 and 47 Vict. cap. 57) it is provided that "In an action for infringement of a patent the Court or a judge may certify that the validity of the patent came in question; and if the Court or judge so certifies, then in any subsequent action for infringement the plaintiff in that action on obtaining a final order or judgment in his favour shall have his full costs, charges, and expenses as between solicitor and client, unless the Court or judge trying the action certifies that he ought not to have the same."

In an action brought in the High Court of Justice in England at the instance of the Dunlop Pneumatic Tyre Company, Limited, against Henry Casswell, a certificate of the validity of certain letters patent was granted by Mr Justice Kekewich on 19th February 1886 under and in terms of sec. 31 of the Patents, Designs, and Trade Marks Act 1883. In 1901 the Dunlop Pneumatic Tyre Company, Limited, brought an action in the Court of Session against the New Lamb Tyre Company, Limited, in which they craved interdict against that company infringing the same letters patent.

The defenders did not dispute the validity of the pursuers' patent, but maintained that there had been no infringement.