fish it with the rod. The defender's author therefore may very probably have been unwilling to challenge the operations of a neighbour with whom he was on friendly terms, and prevent him taking fish out of a pool which he did not himself desire to fish, so long at least as the unauthorised fishing was not injurious. A very different question would arise when it was found to be so destructive as it is shown to have been of recent years. It may be said, further, that the owner of an undoubted estate of salmon-fishing was not called upon to challenge the pursuer's practice as soon as it began, because he was not bound to assume that it implied the assertion of an adverse right. A practice which is not commonly known to be rightful can hardly be said to import of necessity the assertion of a right. But I do not think the question depends upon reasoning of this kind. If I am right in my understanding of the law laid down in the last case in the House of Lords, it is concluded by authority. But apart from what was expressly laid down as law, there is a great body of authority, which was certainly not called in question on that occasion, to show that possession to establish a prescriptive right of fishing with nets must be possession by net and coble. We should be going against a *series rerum judicatarum* extending over more than a century if we were to hold the pursuer's practice of fishing sufficient to create a valid and effectual right. For these reasons I think we must adhere to the Lord Ordinary's interlocutor.

LORD ADAM and LORD M'LAREN concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—H. Johnston, K.C. — Hunter. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Defender — Dean of Faculty (Asher, K.C.)—Dundas, K.C.—Constable. Agents—Blair & Cadell, W.S.

Tuesday, January 12, 1904.

FIRST DIVISION.

M'LACHLAN *v.* NELSON & COMPANY, LIMITED.

Process—Reclaiming Note—Principal Copy without Record Appended—Competency—Court of Session Act 1825 (*Judicature Act*) (6 *Geo. IV. c.* 120), *sec.* 18—*A.S. 11th July* 1828, *sec.* 77.

A Lord Ordinary having dismissed an action after hearing parties, the pursuer reclaimed, but failed to append to the principal copy of the reclaiming-note a copy of the record. The printed copies containing reclaiming-note and record were properly boxed. In the Single Bills the respondents moved the Court to refuse the reclaiming-note as incompetent, the principal copy received by the Clerk of Court having no copy of the record attached to it.

Held that as the conditions of appeal, under section 18 of the Judicature Act, had been satisfied, the reclaiming-note was competent, although the rule of Court, in terms of section 77 of the A.S. directing that a copy of the record should be attached to the reclaiming-note, had not been observed.

The Court of Session Act 1825 (Judicature Act) enacts (section 18) "that such party (the reclaimer) shall, within twenty-one days from the date of the interlocutor, print and put into the boxes appointed for receiving the papers to be perused by the judges, a note reciting the Lord Ordinary's interlocutor . . . and if the interlocutor has been pronounced without cases, the party so applying shall, along with his note as above directed, put into the boxes printed copies of the record authenticated as before . . ." By A.S. 11th July 1828 it is provided (section 77)—". . . Provided always that such notes, if reclaiming against an Outer House interlocutor, shall not be received unless there be appended thereto copies of the mutual cases, if any, and of the papers authenticated as the record, in terms of the statute, if the record has been closed."

Mrs Agnes Baxter or M'Lachlan, widow, residing at Kirkintilloch, raised an action against Nelson & Company, Limited, tea merchants, Edinburgh. On 10th December 1903 the Lord Ordinary (Low) issued an interlocutor sustaining the first plea-in-law for the defender and dismissing the action.

The pursuer printed and boxed a reclaiming-note against this interlocutor, to the printed copies of which a copy of the record was appended, but failed to attach a copy of the record to the principal copy, which was however received by the Clerk of Court together with a printed copy.

In the Single Bills the defenders objected to the competency of the reclaiming-note on the ground that a copy of the record was not appended to the principal copy, viz., the one signed by counsel. and argued—The provisions of the Judicature Act and of the relative A.S. were imperative, and rendered this reclaiming-note incompetent. The record was an indispensable appendage of the reclaiming note, without which it could not be received. The fact that it has been received by the Clerk could not be held to displace the statutory provisions, failure to comply with which was fatal to the note.—Judicature Act 1825 (6 Geo. IV., c. 120), sec. 18; A.S., 11th July 1828, sec. 77; *M'Evoy* v. *Braes' Trustees*, 16th January 1891, 18 R. 417, 28 S.L.R. 276; *Wallace* v. *Braid*, 16th February 1899, 1 F. 575, 36 S.L.R. 419.

The pursuer argued—The Judicature Act specially refers to complete printed copies being boxed to the Judges. Here these prints have been properly boxed. With the copy of the reclaiming note signed by counsel there was also lodged as usual a printed copy, here complete. The pro-

visions of the A.S. are merely directory and not imperative; and as the Court has the whole reclaiming-note before it the essential conditions of appeal have been fulfilled—*Glen* v. *Thomson*, 21st November 1901, 4 F. 154, 39 S.L.R. 129; *Allan's Trustee* v. *Allan & Sons*, 23rd October 1891, 19 R. 15, 29 S.L.R. 28.

LORD PRESIDENT—The objection taken to the reclaiming-note is that no copy of the closed record was attached to it. It was, however, received by the Clerk, and the question is whether the reclaiming note is invalidated by the absence of a copy of the closed record.

The answer to this question depends upon a consideration of the Judicature Act of 1825, and the Act of Sederunt of 11th July 1828, section 77.

By the Act of 1825, section 18, it is provided that such party (the reclaimer) shall, within twenty-one days from the date of the interlocutor, print and put into the boxes appointed for receiving the papers to be perused by the Judges, a note reciting the Lord Ordinary's interlocutor . . . and if the interlocutor has been pronounced without cases, the party so applying shall, along with his note as above directed, put into the boxes printed copies of the record authenticated as before." . . . The Act prescribes the conditions of boxing, and these conditions have been complied with in the present case. It seems to be clear that it was the intention of the Legislature to make boxing to the Judges the important thing. The Act therefore does not make this reclaiming-note incompetent.

But it is said that, according to the Act of Sederunt 1828, section 77, a reclaiming-note without a record appended shall not be received. This reclaiming note, however, has been received, and the question is whether by the Act of Sederunt the sanction of nullity is attached to the absence of the record. The Act of Sederunt does not say so, and as the record was boxed to the Judges and is before the Court, no harm has been done, and no prejudice has been created by the omission to append the record to the copy of the reclaiming-note lodged with the Clerk. Although the directory provision of the Act of Sederunt has not been observed, it would in my opinion be too severe a penalty to attach to the omission to direct the reclaiming-note to be withdrawn or to refuse it on that account.

LORD ADAM—I am of the same opinion. There is no doubt as to the facts here. The reclaiming-note was properly boxed in due time, and there is here no analogy with cases of incorrect copy of the record. What the Act of Parliament deals with is boxing, and that has been done. Something more is necessary to bring the reclaiming-note before the Court, and this has been regulated by the Act of Sederunt, which contains a direction to the Clerk of Court not to receive a reclaiming-note without a copy of the record appended to it.

The provisions in the Act of Sederunt are merely directory, and if and when passed by the Clerk—*i.e.*, received—it would be too great a penalty now to throw out the reclaiming-note.

LORD M'LAREN—In my opinion the provisions of the Act of Parliament as to reclaiming days, &c., are quite clear, and have been enforced by decisions. Compliance with them is a condition of the right of appeal. But here the conditions of appeal have been satisfied.

Appending a copy of the record to the reclaiming-note is a rule of Court which should be enforced if necessary by a penalty or award of expenses. But it is too severe a penalty to throw out the reclaimer's case because someone has omitted to lodge a copy of the record with the Clerk of Court.

LORD KINNEAR concurred.

The case was sent to the roll.

Counsel for the Pursuer and Reclaimer—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Defenders and Respondents—T. Trotter. Agents—Pringle, Taylor, & Lamond Lowson, W.S.

Saturday, January 16.

SECOND DIVISION.

[Sheriff-Substitute at Hamilton.

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

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (1) *and* (2) (*c*)—*Accident Arising "out of and in the course of" Employment*—*"Serious and Wilful Misconduct"*—*Coal Mines Regulation Act* 1887 (50 *and* 51 *Vict. c.* 58), *General Rule* 12 (*e*)—*Unramming of Charged Explosive.*

General Rule No 12 (*e*) of the Coal Mines Regulation Act 1887 provides—"No explosive shall be forcibly pressed into a hole of insufficient size, and when a hole has been charged the explosive shall not be unrammed."

A case for appeal under the Workmen's Compensation Act 1897 set forth—While making manholes in a mine by means of blasting, a brushing squad was preparing the necessary shots by boring holes and charging them with explosives. A detonator was at the bottom of the charge, and two wires passed through the charge and were connected with the detonator for the purpose of exploding the charge by electricity from a pocket electric battery carried by the fireman. After a hole had been bored and a charge made ready to be fired, the fireman appeared and asked whether the shot was ready. A, the brusher in charge of the squad,