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observed, it would in my opinion be too severe a penalty to attach to the omission to direct the reclaiming-note to be withdrawn or to refuse it on that account.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,

stated, contrary to the fact and apparently for fun, that there was none ready, and the fireman went away. As the fireman did not return, and when sent for could not be found, A, who did not know the mechanism of the detonator, went to the hole which was charged and attempted to pull out the wires. This occasioned sufficient friction in the detonator to explode the charge and A was killed.

Held (1) that the facts as stated did not show that A pulled the wires in an attempt to remove the charge, and that therefore his action did not amount to a breach of rule 12 (*e*); (2) that he was not guilty of "serious and wilful misconduct in the sense of the Workmen's Compensation Act 1897; and (3) that the accident arose "out of and in course of" his employment within the meaning of that Act.

Mrs Mary Jane Queen or Lynch, widow of Daniel Lynch, Bellshill, for herself and on behalf of her pupil children, claimed compensation under the Workmen's Compensation Act 1897, from William Baird & Company, Limited, coalmasters, Bothwell, in respect of the death of her husband Daniel Lynch, who was killed while in their employment by the explosion of a shot in one of their pits.

The matter was referred to the arbitration of the Sheriff-Substitute of Lanarkshire (THOMSON) who awarded compensation. The defenders appealed and obtained a case.

The case stated—"The following facts were admitted or proved—(1) That the deceased Daniel Lynch was a brusher in the employment of Morrison Bryce, who had a contract for the brushing work of the Bothwell Park Colliery belonging to the respondents. (2) On the night of 27th May 1902 Bryce was unable to be at his work, and in his absence deceased took charge of the shift. (3) The work consisted in the making of manholes, in the course of which blasting is necessary, and the brushing squad prepare the necessary shots by boring holes and filling the holes with charges of an explosive called saxonite; the charges are then fired by the fireman, who uses a pocket electric battery for the purpose. (4) A shot had been fired in the ordinary way in No. 3 manhole, and some time afterwards a hole about 2 feet 6 inches deep was bored and a charge rammed in and stemmed, and made ready to be fired in No. 4 manhole. (5) About midnight the fireman appeared and asked whether they had a shot ready, and the deceased then stated, contrary as he well knew to the fact, and apparently in fun, that there was none ready, whereupon the fireman went away. (6) As the fireman did not return, and when sent for could not be found, the deceased left No. 3 manhole, where the squad then was, and proceeded to No. 4 manhole, distant about 20 yards. (7) Almost immediately after his arrival there the shot went off, and the deceased was found lying dead close to the shot; one of his hands had been blown off, and the other was nearly severed; his head was cut and bruised and he was otherwise injured by the explosion. (8) Saxonite does not explode spontaneously, but requires either ignition or pressure or heat to set it off. On this occasion it had not been fired by electricity, nor exploded by heat, or any natural 'crush' occurring in the mine. No one else was near the spot, and no tools were found lying anywhere near it. (9) The only way in which the accident can be accounted for is, and I accordingly found in fact, that the deceased had attempted to pull out the wires which pass through the charge and are connected at the bottom of the charge with the detonator containing fulminate of mercury and chlorate of potash. These wires are designed to be connected outside the charge with the wires of the pocket electric battery before referred to. The ends of the wires within the detonator are connected by a platinum bridge, whereby a circuit for the electricity is formed. (10) The pulling out of the wires had occasioned sufficient friction in the detonator to cause the explosion, which was thus brought about by the act of deceased. (11) The general rule 12 (*e*) referred to in the defences is well known to the miners, and was well known to deceased, and it is carefully enforced. (12) It is not proved that the deceased knew the mechanism of the detonator or that the pulling of the wires was in itself dangerous. (13) The parties are agreed that if compensation be due the amount is £253, 10s.

"In these circumstances I found that the pulling of the wires did not amount to a breach of the general rule No. 12 (*e*) of the Coal Mines Act, which provides that 'No explosive shall be forcibly pressed into a hole of insufficient size, and when a hole has been charged the explosion shall not be unrammed, and no hole shall be bored for a charge at a distance of less than six inches from any hole where the charge has missed fire,' that the deceased was not guilty of serious and wilful misconduct within the meaning of said Act, and that the said accident arose out of and in the course of the deceased's employment.

"The questions of law for the opinion of Court are—(1) Did the action of the deceased in pulling the wires of said shot amount to a breach of said general rule No. 12 (*e*) of the Coal Mines Regulation Act 1887 to 1896? (2) Was the deceased guilty of serious and wilful misconduct within the meaning of section 1 sub-section 2 (*c*) of said Act? (3) Did said accident arise out of and in the course of the deceased's employment within the meaning of section 1 of said Act?"

Argued for the appellants—(1) On the facts the deceased had been guilty of serious and wilful misconduct. He had made a false statement to the fireman, and that statement had led to the accident. Further, the pulling out of the wires was an act of gross carelessness. The wires must have been pulled in an attempt to haul out the charge, and it was therefore an act of unramming, and an infringement of special rule 12 (*e*) of the Coal Mines Regulation Act 1887. (2) The accident did not arise out of and in the

course of his employment. The deceased was a brusher in the mine, and it was no part of his duty to touch the detonator.

Argued for the pursuer and respondent—(1) In this case there had been no serious or wilful misconduct. The deceased had acted neither in breach of special rule No. 12 nor in breach of an order given by a superior. All the cases in which there had been held to be serious or wilful misconduct on the part of the workman fell within one of these two categories. The deceased had not been attempting to pull out the wires in order to take out or unram the explosive. His intention was to render the explosive harmless by removing the wires. The false statement was too remote to be taken into account as a cause of the accident. (2) The accident arose out of and in the course of the employment. The deceased was performing what he considered his duty in the service of his employers when the accident happened.

LORD YOUNG—I have carefully considered the Sheriff's findings of fact, and I think that upon these findings he has come to a correct conclusion in law. The most serious question presented for his consideration was whether or not the deceased workman committed a contravention of rule 12 (*e*) of the Coal Mines Act, for if so we should certainly have characterised such contravention as "serious and wilful misconduct." I agree with the Sheriff that the behaviour of the workman did not amount to a violation of the rule, for assuming the facts to be as found by the Sheriff, I agree with him that they do not show that at the time of the accident the workman was attempting to "unram" the charge. I have also no doubt that the accident arose out of and in the course of the man's employment, and I therefore see no reason for interfering with the Sheriff's judgment, and think it should be affirmed.

LORD TRAYNER—I have come to the same conclusion. I have no doubt that the accident arose out of and in the course of the deceased's employment. But the serious question is whether the deceased violated rule 12 (*e*) of the Coal Mines Regulation Act, which provides (1) that no explosive is to be pressed into a hole of insufficient size, and (2) that after the hole has been charged the explosive shall not be unrammed. Now, on the facts as stated by the Sheriff-Substitute (and we are bound to take these facts as correct) there is no evidence that the deceased attempted to remove the charge. He attempted to pull out the wires. For what purpose? The impression produced on my mind from the Sheriff's statement of the facts is that being ignorant of the mechanism of the detonator he thought that the charge might go off if anything came in violent contact with the wires, and he therefore attempted to take out the wires and render the detonator harmless. The mishap in my opinion was caused by the ignorance of the deceased and not by his serious and wilful misconduct.

LORD JUSTICE-CLERK—I confess that while hearing the debate I have had from time to time some misgivings as to whether the conclusion arrived at by the Sheriff-Substitute is right. But when these misgivings are analysed I find that they all turn on the question whether the findings in fact of the Sheriff-Substitute are correct. Thus on finding (9) my impression would rather have been that the deceased was attempting to remove the charge by pulling at the wires, and if that had been the case he would of course have been breaking rule 12 (*e*) of the Coal Mines Act.

But I am bound to take as correct the findings of fact of the Sheriff-Substitute on these points, and that being so I do not see my way to differ from your Lordships.

LORD MONCREIFF was absent.

The Court answered the first and second questions of law in the negative and the third question of law in the affirmative, and therefore dismissed the appeal.

Counsel for the Pursuer and Respondent—Salvesen, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

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

Saturday, January 16.

SECOND DIVISION.

[Sheriff Court at Glasgow.

WILSON *v.* BENNETT.

Res Judicata—Conviction for Assault on Policeman not Bar to Action of Damages against Policeman for Assault Prior to Offence.

A person who had been convicted in the police court of assault upon a policeman brought an action of damages against the policeman in respect of an assault which he alleged the defender had made on him on the occasion of, but prior to, the assault of which he had been convicted.

Held that the conviction did not bar the pursuer proceeding with his action.

Gilchrist v. *Anderson*, November 17, 1838, 1 D. 37, *commented on.*

Process—Issue—Form of Issue—Action of Damages Against Policeman for Assault—"Wrongously."

Where an action of damages for assault against a policeman was sent to jury trial the Court *refused* the motion of the defender that the word "wrongously" should be inserted in the issue.

George Albert Wilson, engineer, Glasgow, raised an action in the Sheriff Court at Glasgow against Alexander Bennett, constable in the Eastern Divison of the Glasgow Police Force, for £100 in name of damages for assault.