Wednesday, July 4.

FIRST DIVISION.

[Sheriff of Caithness.

SPENCE *v.* SINCLAIR.

Ship—Salvage—Appeal from Sheriff—Merchant Shipping Act 1854 (17 *and* 18 *Vict. c.* 104), *secs.* 464, 536.

An appeal was lodged under sec. 464 of the Merchant Shipping Act 1854 against an award by the Sheriff upon a claim for salvage, without any record of the evidence taken in the Sheriff Court. Section 464 is contained in Part VIII. of the Act, which deals with wrecks, casualties, and salvage. Appeal *refused*, on the ground that the appellant should have moved the Sheriff to keep a record of the evidence; and *held* that section 536, which occurs in Part X. of the Act (being that part relating to legal procedure), and contains a prohibition against taking evidence down in writing, does not apply to Part VIII.

The Merchant Shipping Act 1854 (17 and 18 Vict. c. 104) provides by section 460 that disputes with regard to salvage shall be referred, if the sum claimed does not exceed £200, to the arbitration of two Justices of the Peace. The Merchant Shipping Acts, &c., Amendment Act 1862 (25 and 26 Vict. c. 63) by section 49 amends the above provision to the effect of giving the Sheriff or Sheriff-Substitute of any county the same jurisdiction in salvage cases as was given to two Justices.

Part VIII. of the Merchant Shipping Act of 1854 is headed, Wrecks, Casualties, and Salvage, and provides by section 464—"If any person is aggrieved by the award made by such Justices or such umpire as aforesaid, he may in England appeal to the High Court of Admiralty of England, in Ireland to the High Court of Admiralty of Ireland, and in Scotland to the Court of Session; but no such appeal shall be allowed unless the sum in dispute exceeds fifty pounds, nor unless within ten days after the date of the award the appellant gives notice to the Justices to whom the matter was referred of his intention to appeal, nor unless the appellant proceeds to take out a monition, or to take such other proceeding as according to the practice of the Court of Appeal is necessary for the institution of an appeal within twenty days from the date of the award."

Part X. of the Act is headed Legal Procedure, and in that portion which is applicable to Scotland it is provided by section 536—"The whole procedure in cases brought in a summary form before the Sheriff or Justices of the Peace in Scotland shall be conducted *viva voce*, without written pleadings, and without taking down the evidence in writing, and no record shall be kept of the proceedings, other than the complaint, and the sentence or decree pronounced thereon."

By section 542 of the Act, which is also contained in Part X., it is provided—"No order, decree, or sentence pronounced by any Sheriff or Justice of the Peace in Scotland under the authority of this Act shall be granted or vacated for any misnomer, informality, or defect of form; and all orders, decrees, and sentences so pronounced shall be final and conclusive, and not subject to suspension, advocation, reduction, or to any form of review or stay of execution, except on the ground of corruption or malice on the part of the Sheriff or Justices." . . .

This was an application presented by William Sinclair and others, fishermen, residing in the Island of Stroma, Caithness, to the Sheriff-Substitute of Caithness, Orkney and Shetland, at Wick, under sec. 460 of the Merchant Shipping Act 1854, as amended by sec. 19 of the Merchant Shipping, &c., Amendment Act 1862, to arbitrate between them and John Spence, Lloyds' Agent, Dunnet, and agent for the owners of the s.s. "Gladiolus," as to the amount of salvage to be paid to them for services rendered by them to the cargo of this ship jettisoned in February 1883 while she was stranded in the Pentland Firth.

After a proof the Sheriff-Substitute (SPITTAL) pronounced this interlocutor—"Decerns against the defender in favour of the pursuers for the sum of £94 sterling of salvage, in respect of salvage services rendered by the pursuers, and for the sum of £10 sterling of expenses."

The defender appealed to the Court of Session under section 464 of the Merchant Shipping Act 1854.

A note of appeal was lodged along with certain productions, but without any record of the evidence taken in the Sheriff Court.

The appellant argued—A right of appeal being given by section 464 of the Act of 1854, that implies a right to the inquiry necessary to make the appeal effectual. Therefore, if necessary, the evidence must be re-heard. The evidence could not have been recorded in the Sheriff Court because of the prohibition in section 536.

Argued for the respondents—The existence of a right of appeal in any summary proceeding implies a right to have the evidence recorded if a motion were made at the proof. As no such motion was made, the appeal on the merits was lost—*Gardner* v. *Dymock*, January 9, 1865, 5 Irv. 13; *Halliday* v. *Bathgate*, June 1, 1867, 5 Irv. 382. Part X. either did not apply to salvage cases under Part VIII., which contained the section giving the right of appeal, or it applies only partially, and not to the effect of preventing notes of evidence from being recorded; or if it applied *in toto*, then under section 542 there was no appeal except on grounds of corruption or malice.

At advising—

LORD PRESIDENT—This appeal is brought under section 464 of the Merchant Shipping Act of 1854 against an award pronounced by the Sheriff-Substitute on a claim for salvage by which the Sheriff awarded the sum of £94 to the salvors in respect of their services. The appeal has been brought here without any record of the evidence taken in the Sheriff Court being before the Court to enable us to say whether the judgment brought under review is well founded or not, and the appellant's contention is that he could not have had any record of the evidence kept, because of the prohibition against recording evidence contained in the statute. That prohibition he maintains is contained in section 536. But if section 536, which is in Part X. of the Act, is to be read as applying to the provisions of Part VIII., which has reference to wrecks, casualties, and salvage, then the result is that the same statute, in two different sections, gives a right of appeal and then

takes it away—an anomaly which, I need hardly say, is not to be admitted in construing any statute.

The tenth part of the Act, which deals with legal procedure in Scotland, contains a prohibition against the recording of evidence, but it further prohibits all appeals except on the ground of corruption or malice on the part of the Sheriff or Justices, and therefore I think the true construction of the statute is, that the tenth part is intended to regulate procedure in criminal cases and others of a like nature, and does not touch claims for salvage which are given in the eighth part.

The question therefore is, How are such claims to be dealt with? I think it is quite competent to record the evidence, either by having it taken down in shorthand, or else the Sheriff might take it down with his own hand. The procedure in England under the eighth part is in all respects similar, for I find that in two cases decided by Dr Lushington—the case of the "*Cuba*," reported in 6 Jurist (N.S.) 152, and the "*Andrew Wilson*," in 32 L.J., Pro. Ad. and Div. 104—both cases being appeals brought under section 464 of this Act—Dr Lushington went into the evidence, and came to the conclusion that if the appellant did not make out a case of gross miscarriage of justice the Court could not listen to the appeal. That doctrine is, in my opinion, a very sound one, and one which we should apply in the present case, even if we had the evidence before us. But the appellant here brings this appeal without laying before the Court the possibility of considering the merits of the case. I think that it was entirely the fault of the appellant that the evidence in this case was not recorded, for the Sheriff would have been bound to keep a record if he had been asked. I am therefore for refusing this appeal.

LORDS DEAS, MURE, and SHAND concurred.

The Court refused the appeal.

Counsel for Appellant — Trayner — Dickson. Agents—Irons, Roberts, & Lewis, S.S.C.

Counsel for Respondents—J. P. B. Robertson —M'Lennan. Agent—John K. Lindsay, S.S.C.

Wednesday, July 4.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

MACDONALD AND ANOTHER *v.* WATSON.

Landlord and Tenant—Ejection—Title of Possession—Relevancy.

Held that in an action of damages for ejection without a warrant, a title of possession must be averred.

This was an action at the instance of Mrs Ann Smith or Macdonald and Mrs Elizabeth Macdonald or Gowan, residing in Tomintoul, Banffshire, against Peter Watson, tenementer, Tomintoul, to recover damages for illegal removal from certain subjects known as Eden Cottage, Tomintoul, of which the pursuers had been occupants.

On 24th June 1882 the defender obtained a decree of removing against the pursuers in the Sheriff Court of Aberdeen, Kincardine, and Banff, at Banff, ordaining them to remove from Eden Cottage on seven days' notice to that effect. On appeal the First Division of the Court of Session affirmed this judgment on 21st December 1882, and on 8th February following the defender gave the pursuers a charge to remove, proceeding on the extract of the interlocutor of the Court of Session. The pursuers were removed on 16th February. With regard to this proceeding the pursuers averred—"The said pretended charge bore to proceed upon an alleged warrant contained in an interlocutor, dated 21st December 1882, in an action in the Court of Session at the instance of the defender against the present pursuers. The interlocutor referred to contained no warrant whatever to remove, but notwithstanding the pursuers were charged by the defender, or those for whom he is responsible, to remove from said subjects within seven days under the pain of ejection, and which charge bears to be executed in virtue of said interlocutor. The action in which the said interlocutor was pronounced contained no declaratory conclusions, and actions of removing being competent in the Sheriff Court only, the Court of Session could not have pronounced any decree of removing, and did not do so." The pursuers did not aver any title to the premises of any kind, their averment on this point being "that for many years they were occupants of Eden Cottage and other subjects thereto attached, and continued to live in the said cottage, and remained undisturbed in the peaceable possession of it and other subjects connected with it until recently, when the defender illegally removed them therefrom."

They pleaded—"(1) The pretended charge to remove having set forth and borne to proceed upon an interlocutor of the Court of Session, which could not and did not contain any decree or warrant of removal, and the pretended charge being disconform to its alleged warrant the same was inept, and the subsequent ejection illegal and unwarrantable. (2) The ejection, assuming it to have been on a Sheriff Court decree, not having been preceded by a regular warrant and charge of forty-eight hours, was illegal and unwarrantable."

The defender pleaded — "(1) The pursuers have, or at least set forth, no title to sue, and their averments are irrelevant and insufficient to support the conclusions of the summons."

The Lord Ordinary (M'LAREN) adjusted an issue for the trial of the cause.

"*Opinion.*—This is an action of damages by two tenants or occupiers of a cottage in Tomintoul against the owner, claiming reparation for alleged illegal ejection. The defender on 24th June 1882 obtained decree of removal against the pursuers, and on an appeal to the Court of Session the Sheriff's judgment was affirmed by interlocutor dated 21st December 1882, with a variation as regards expenses.

"The defender proceeded to enforce his decree, and with that view obtained an extract of the interlocutor of the Court of Session, and put it into the hands of an officer for execution.

"But the extract was not an extract for execution. It set forth the terms of the decree,