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,

but did not contain a warrant to charge the tenants.

"The question was raised before me, whether under a warrant to charge the tenants to give obedience to the decree it would be possible to proceed to eviction. But it is not necessary that I should consider this point, because the extract which is in process contains no warrant for execution. The defender, however, proceeded to charge the pursuers, and on the expiry of the days of charge evicted them. For these proceedings damages are claimed.

"The defence is that the pursuers had no title of possession, their title having been negatived by the decree of a competent Court. Reliance is placed on the case of *Macdonald* v. *Duchess of Leeds*, where the Court refused to grant an issue for trial on the ground that while the tenant alleged eviction without a warrant he did not set out a title of possession. I do not doubt that there are cases in which an owner is entitled to turn out a wrongdoer *brevi manu* without legal process. If in my absence a stranger takes possession of my house, he may be ejected by force. He cannot be allowed to say "Your house is my castle, and I will remain in it until you establish your right to dispossess me by an action of removing."

"But in the present case I must take for granted that the pursuers were lawfully in possession. The defender had proceeded against them in the Sheriff Court, and they had appealed to the Court of Session. The pursuers were therefore in possession, although it appears that their objections to remove are not well-founded, and such possession could only be terminated by the voluntary act of the pursuers, or by putting in force the machinery of the law. This was not done. A charge given without a warrant is no better than eviction without a charge, and I cannot entertain the supposition that the owner of the cottage after obtaining his decree was entitled to execute that decree at his own hand. The pursuers might have wished to appeal to the House of Lords, in which case the defender must have moved for execution pending appeal. This consideration in my opinion sufficiently distinguishes the case from *Macdonald* v. *Duchess of Leeds*, the reports of which in the Court of Session Reports and the Jurist do not support the view maintained by the present defender." . . .

The defender reclaimed, and argued — The pursuers had no title to sue, as they had set forth no title to possess the subjects from which they had been removed — *Macdonald* v. *Duchess of Leeds*, May 16, 1860, 22 D. 1075, 32 Jur. 494.

At advising—

Lord President—This is an action of damages brought on the allegation that the pursuers were illegally removed from certain subjects known as Eden Cottage. The defender, who is in one sense the proprietor of the subjects, but really the holder of a long lease—the distinction, however, not being material—raised an action in the Sheriff Court of Aberdeen, Kincardine, and Banff in 1881 to have the present pursuers removed from these subjects, and he certainly came into Court then mistaking both their and his position. He then dealt with them as if they were holding under a tenancy which would expire at Whitsunday 1881. In that case it was proved that the defenders (now pursuers) had no title, and therefore the Sheriff sustained the pursuer's title to sue, repelled the defences, and remitted to the Sheriff-Substitute to pronounce decree of removing on reasonable notice. Thereafter the Sheriff-Substitute decerned against the defenders, and ordained them to remove on seven days' notice. That interlocutor was affirmed by this Division of the Court on appeal.

The pursuer of that removing then proceeded to eject the defenders, and for that purpose he obtained an extract of the decree of this Court affirming the interlocutor of the Sheriff-Substitute. That extract, however, had no warrant for execution, and therefore the present pursuers maintain that the proceedings following thereon were illegal, since they were taken without any warrant. They also contend that the ejectment was illegal because they were entitled to be in possession of the subjects, but certainly there is no averment on record of any title of possession. The question therefore is, Are the pursuers entitled to maintain an action of damages?

The execution of the charge was on 16th February 1883, and the summons in this action of damages was signeted on 24th March following. There has been no suspension of the execution of ejectment, although that would have been quite competent on the ground maintained by the pursuers here, and I do not think that the course followed here is to be encouraged, or that parties are entitled to come here with an action of damages, founding on a technical error, when they have taken no steps to suspend the charge. I do not, however, put my judgment on that ground. I merely refer to it in passing, for I consider that it was not necessary to have all that apparatus of execution put in motion. The effect of the judgment was to find that the occupants had no title, and that the pursuer had a title, and that therefore it was in the power of the pursuer to eject them without any warrant or charge. The Sheriff, however, very properly required that reasonable notice should be given them, and fixed the period at seven days. It is not said that this notice was not given; on the contrary, it is conceded that such notice was given. And so it appears that their ejectment by the owner or long lessee—they having no title of possession—was perfectly legal without any legal warrant.

How then can there be an action of damages on the ground that there was an illegal interference when they were not legally there? No doubt the ejectment of parties without a title may form the ground of a complaint if the manner in which the ejectment is carried out is so violent as to constitute an assault, but that is not said here. It is merely alleged by the pursuers they were entitled to be there, and that the proceedings were carried through without legal warrant. I think this case is very like that of *Macdonald* v. *Duchess of Leeds*—indeed in point of principle the two are almost identical, for in both there is wanting an averment that the pursuer of the action has a title to the subjects. I am therefore for recalling the interlocutor of the Lord Ordinary and dismissing the action.

Lord Deas concurred.

Lord Mure—I concur with your Lordships.

On the 24th of June 1882, as it appears from the process, a decree of removing was pronounced against the pursuers, ordaining them to remove from the premises on seven days' notice to that effect. That order of the Sheriff-Substitute was on 21st December 1882 affirmed in this Division. Therefore from the 24th of June 1882 the pursuers were under orders to remove as having no legal right to be there. On the 8th of February 1883 the pursuers were charged to remove within seven days, the days of charge being the same as the time fixed by the Sheriff, and on 16th February, not having obeyed the order, they were ejected.

They have now raised an action of damages on a technical ground, not on the ground that they had a right to be there, but on the ground that they were charged in the Court of Session decree instead of in the decree of the Sheriff Court, and it is said that their ejection was illegal because of the mistake of the officer in narrating the judgment. I cannot hold that to be an illegal act on the part of the defender in this action, because I agree with your Lordships that in order to give a party the right to bring an action of damages he must be legally on the premises. The pursuers had no legal right to be there, and I do not think that they are entitled to bring an action of damages on this technical ground.

Lord Shand—I agree with your Lordships that there has been here no legal wrong which can be the ground of a claim of damages. The ground of the action in the Sheriff Court was that the pursuers here were without any title to possess; the Sheriff took that view, and accordingly granted decree, subject however to this qualification, that reasonable notice should be given by the proprietor, and fixed the period of such notice at seven days. In these circumstances, while it may be maintained that the pursuers had a right to remain in undisturbed possession for seven days, they could not possibly remain longer. Now, however, they raise an action of damages founding on an alleged informality in the proceedings which were subsequently taken for the purpose of ejecting them. I do not think that service by a messenger or execution was necessary at all; I think that if the notice had been given by letter that would have been quite sufficient. But it certainly does not make it worse that a more formal notice was given, and therefore the pursuers' claim of damages on technical grounds cannot be sustained.

I may further add that I concur with your Lordship in thinking that the case of *Macdonald* v. *The Duchess of Leeds* applies to the present, for there was in that case just as little title as there is here.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for Pursuers — Brand — Salvesen. Agent—D. Barclay, Solicitor.

Counsel for Defender—G. Wardlaw Burnet. Agent—George Andrew, S.S.C.

Thursday, July 5.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

BEATTIE *v.* MACGREGOR.

Arbitration—Contract—Clause of Reference.

The clause of reference in a contract for plumber-work was in these terms—"Should any difference arise between the proprietor and any of the contractors in regard to the true meaning of the plans, drawings, or specifications, or the manner in which the work is to be executed, or any matter arising thereout or connected therewith, the same is hereby submitted to B, whom failing to C, whose decision shall be final." After the completion of the contract the employer disputed the accuracy of the measurement which the contractor had obtained, and denied that any proper measurement had ever been made. The contractor then raised an action to have it declared that the dispute fell within the clause of reference. *Held* (following *Kirkwood* v. *Morrison*, 5 R. 791) that such a clause of reference included and was intended to apply only to disputes arising during the execution of the contract, and requiring to be immediately disposed of, and that therefore the present dispute, which related to the completed work, did not fall within it.

This was an action at the instance of Robert Purves Beattie, plumber and gasfitter, 19 Castle Street, Edinburgh, against Donald Macgregor, Royal Hotel, Edinburgh, to have it declared that a difference arising between them in regard to the labour and material supplied and work done by the pursuer under a contract for making additions and alterations on the defender's hotel, was included in the reference clause of the contract, and that the defender should be ordained to enter into a valid deed of submission, or otherwise for decree against the defender for £46, 9s. 8d., the balance of the contract price.

The contract was one for the plumber-work of alterations which the defender was executing upon the Royal Hotel, and was entered into on 25th February 1876 between the pursuer and George Beattie & Son, as architects for the defender. The clause of reference was in these terms—"Should any difference arise between the proprietor and any of the contractors in regard to the true meaning of the plans, drawings, or specifications, or the manner in which the work is to be executed, or any matter arising thereout or connected therewith, the same is hereby submitted to the determination of William Beattie, Esquire, whom failing John Lessels, Esquire, both architects in Edinburgh."

The present dispute arose after the completion of the contract, the pursuer maintaining that his work had been measured up by William Hamilton Beattie, that according to his measurement the amount due was £2119, 13s. 10d., and that after crediting payments to account there remained a balance of £46, 9s. 8d. The defender, on the other hand, denied that Mr Hamilton Beattie had in point of fact ever measured the work, and maintained that the amount so brought