Friday, November 5.

OUTER HOUSE.

[Lord Stormonth Darling.

STRUIJS AND OTHERS *v.* HUGHES.

Process — Exchequer — Revenue — Appeal — Competency — Certificate under sec. 267 *of Customs Consolidation Act* 1876 (39 *and* 40 *Vict. cap.* 36) *— Court of Exchequer (Scotland) Act* 1856 (19 *and* 20 *Vict. cap.* 56), *sec.* 17.

The cargo of a ship was seized by the Revenue officials and the master was tried before the Justice of Peace Court on a charge of having contraband goods on board. He was acquitted, and in his absence the Revenue officials obtained from the Justices who had tried the case a certificate that there was reaasonable or probable cause for the seizure of the cargo. Such a certificate is, by section 267 of the Customs Consolidation Act 1876, pleadable in bar of an action of damages brought against any person on account of the seizure. The master of the ship appealed to the Court of Exchequer against the granting of this certificate. *Held* (*per* Lord Stormonth Darling) that as no action of damages had been raised, the appeal was not warranted by section 17 of the Court of Exchequer (Scotland) Act 1856, and was incompetent.

This was an appeal at the instance of R. Struijs, master of the ship "Cosmopoliet," to the Court of Exchequer, under the provisions of sec. 17 of the Court of Exchequer (Scotland) Act 1856. That section provides —"In all cases when at the date of the passing of the Act a writ of *habeas* or a writ of *certiorari* might have competently issued fram the Court of Exchequer, to the effect of removing any proceedings before, or warrant granted or issued by any inferior court or magistrate or public officer, to the said Court of Exchequer, in order to examination, it shall be competent to the party against whom such warrant is directed, or to either of the parties to such proceedings, to bring up such warrant or proceedings to the Court of Session, sitting as the Court of Exchequer, to the like effect as by such writ of *habeas* or writ of *certiorari* before the passing of the Act"— "and that by lodging a note of appeal in terms of Schedule F."

Struijs had been tried before the Justice of Peace Court at Wick on a charge at the instance of Ellis Hughes, collector of customs, of a contravention of section 179 of the Customs Act 1876. On this charge he was acquitted.

Hughes obtained a certificate from the Justice to the effect that there was reasonable or probable cause of seizure.

Against this certificate Struijs appealed to the Court of Exchequer.

On 5th November 1897 the Lord Ordinary (STORMONTH DARLING) dismissed the appeal.

Opinion.—"The appellants were brought up before the Caithness Justices on a summary complaint charging them with a contravention of sec. 179 of the Customs Act of 1876, and on 10th August last, after a protracted trial, they were acquitted. On 31st August in the appellants' absence, and indeed (as they say) after they had left the country, the Justices granted the certificate which appears on the print, bearing to be granted under sec. 267 of the Act. It is against this certificate that the present appeal is brought.

"Of the appellants' argument against the validity of the certificate I shall only say that it is a very formidable one. It is to the effect that sec. 267 permits the granting of such a certificate only where there is an information or suit relating to a seizure, and that the complaint in this case had nothing to do with a seizure, but was purely a proceeding *in personam* for recovery of penalties.

"But the appellants' interest to attack the certificate has plainly and admittedly no relation to the particular proceeding in which it was granted, for that resulted in their acquittal. Their interest will arise only in the event of their raising an action of damages against the Crown, and the Crown pleading the certificate in bar of the action. That is declared by sec. 267 to be the sole use of such a certificate.

"Now *prima facie* the proper Court to determine whether there is a good bar to an action is the Court before which the action is brought. It is contrary to one of the best established rules of judicial procedure to decide such a question before the action is brought and before the plea is stated.

"Accordingly, the first question is whether this appeal is competent under sec. 17 of the Exchequer Act. I am of opinion that it is not. The section substituted for the old writs of *habeas* and *certiorari* a note of appeal to the Lord Ordinary in Exchequer Causes, and makes the circumstances in which either of these writs could have been granted in 1856 the test of the competency of the new proceedings. The writ of *habeas* has plainly nothing to do with the case, but both sides of the bar favoured me with an argument of research into the old practice in Scotland and the present practice of England governing the writ of *certiorari*. I think it may be conceded to the appellants that this writ was in 1856 the appropriate mode of removing into the Court of Exchequer any proceedings before an inferior court with a view to their examination on points of competency and regularity. The Latin form of writ used in Scotland before 1729, which was unknown to Lord Fraser when he decided *Dodsworth's* case (14 R. 23, and see p. 241), but which Mr Kennedy's industry has discovered, seems to have been confined to cases where an officer of Customs was prosecuted in an inferior court and craved the Court of Exchequer itself to assume the future conduct of the proceedings. But I do not doubt that a *certiorari* must have been equally competent at the suit of the

party arraigned in the inferior court to bring up the judgment convicting him. At all events, it is plain from the 17th section and its relative Schedule F that the new form of appeal was intended to bring up at the instance of either party any steps of procedure from the original warrant of commitment to the final judgment. But in my opinion it is equally plain that the removal of the proceedings, at whatever stage it might take place, was intended solely to prevent miscarriage in that particular case and no other.

"Now, in this particular case the appellants cannot plead miscarriage, because they have got a judgment of absolvitor. When that was pronounced they had no further interest in the proceedings, and took no further part in them. If the Justices had afterwards done anything so flagrant as to attempt to recal their judgment of absolvitor, I daresay an appeal would have been competent, because that would have been an unwarrantable attempt to prejudice the appellants in that particular case. But the granting of a certificate, however irregular in itself, which did not profess to affect the final decision, seems to me to stand in a different position. Let its validity be determined when, if ever, it is attempted to be put in force. I conceive that a statutory right of appeal ought not to be stretched beyond the obvious purpose for which it is designed."

Counsel for the Appellants — Ure, Q.C. — M'Lennan. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Respondent — Sol.-Gen. Dickson, Q.C. — Kennedy. Agent — R. Pringle, W.S.

Saturday, December 18.

OUTER HOUSE.

[Lord Stormonth Darling.

LIQUIDATORS OF EMPLOYERS' ASSURANCE COMPANY OF GREAT BRITAIN.

Process — Expenses — Company — Liquidation—Expenses of Double Agency.

The liquidator of a company is not entitled to allow the expenses of the attendance of both Edinburgh and local agents at a discussion in the Court of Session unless there are special reasons for double attendance.

This was a note by the liquidators of the Employers' Assurance Company of Great Britain, objecting to a report by the Auditor of the Court of Session under the following circumstances:—In the course of the liquidation the Glasgow agents of the liquidators had on their instructions attended a discussion in the Court of Session. It was also attended by the Edinburgh agents. In their accounts the liquidators charged the expenses of the attendance both of the Edinburgh and of the Glasgow agents. The Auditor disallowed the charge for the Glasgow agents, and the present note was presented for authority to make that charge.

LORD STORMONTH DARLING—I have disallowed what is practically an appeal from the Auditor as regards a fee to the Glasgow agents of the liquidators for attending a debate in this Court, because I think the Auditor's rule, which (he tells me) has prevailed in his office for many years, is a salutary one. Liquidators are really in the position of trustees, and though it may be a satisfaction to them to have their local agents in attendance on judicial proceedings in Edinburgh, and though they may give instructions accordingly, it does not follow that the trust-estate should bear the cost of double agency. In the present case I agree with the Auditor that there were no special reasons for allowing such a charge.

Counsel for the Liquidators — Lorimer. Agents—Melville & Lindesay, W.S.

Tuesday, January 4, 1898.

OUTER HOUSE.

[Lord Stormonth Darling.

COLLINS *v.* COLLINS' TRUSTEES.

Parent and Child—Legitim—Collatio inter liberos.

The plea of collation *inter liberos* in answer to a claim for legitim can only be maintained by a party entitled to share in the legitim, and not by trustees representing the interest of the residuary legatee—*Nisbet's Trustees* v. *Nisbet*, March 10, 1868, 6 Macph. 567, *not followed.*

The facts of the case appear sufficiently from the opinion of the Lord Ordinary.

On 4th January 1898 the Lord Ordinary (STORMONTH DARLING) decerned in terms of the conclusions of the summons.

Opinion.—"The pursuer, as one of the eight surviving children of the late Sir William Collins, here sues his father's trustees for legitim. He does not claim more than one-eighth of the legitim fund, which (Sir William having died without leaving a widow) consists of one-half of his free moveable estate as it stood at his death. It is not maintained by the trustees that the pursuer's claim has been discharged or renounced, but they say that he is bound to collate certain payments made to him by his father during his life amounting to £8000, with interest from the date of payment, the effect of which would be to wipe out the claim altogether. And the question is, whether this contention of the trustees is well founded.

"Sir William Collins was very successful in business as a publisher and stationer in Glasgow, and in 1880, when his firm of