also, and she is therefore subject to the jurisdiction of this Court in the present case.

It is said, however, by the defender that in respect of a judicial separation between her and the pursuer, she (the defender) no longer follows the domicile of her husband, but may and has acquired in Malta a separate domicile of her own. I am not satisfied that the separation of the parties was a judicial separation as we understand these terms. The separation did not proceed on any judicial inquiry as to the alleged cause therefor; indeed, the deed of separation produced, and which was sanctioned by judicial authority, bears in terms that the parties had entered into it "by mutual consent." It rather appears to me that the separation of the parties was the result of an extrajudicial agreement into which they had entered, but which required by the law administered in Malta the consent or interposition of the Judge to allow of them acting upon it by living apart from each other. All that the Judge seems to have done being—all that his duty required him to do—was to endeavour to bring about a reconciliation between the spouses, failing in which he authorised the separation.

But even taking the separation to have been judicial, it is certainly not clear that it so separates the parties to the effect of enabling the defender to acquire a domicile different from the pursuer. It may have the effect of enabling her to carry on business for herself, to sue and defend questions arising out of such a business without the consent or intervention of her husband, may give the courts at Malta a jurisdiction over her which, apart from the separation, they would not have had, and even give her a domicile to found such jurisdiction. But it does not, so far as I see, affect her *status* as the pursuer's wife, or the rights and privileges which that *status* confers except in so far as by the agreement she had renounced them.

Assuming, however, that the separation was judicial, the terms of the agreement —that is, the conditions on which separation was decreed—bar the defender from pleading it as she now does. For one of those conditions was, to state it shortly, that in the event of the defender committing adultery, the separation should not prevent the pursuer seeking the remedy of divorce "before the competent tribunals in England," by which I understand the competent tribunals of the United Kingdom. The defender cannot now, therefore, in respect of the separation, object to the pursuer seeking here that remedy which by a rather remarkable provision was reserved to him by the conditions of that separation. On the whole matter I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

The Court adhered, and found the wife entitled to the expenses of the reclaiming-note.

Counsel for the Reclaimer—Younger—Shennan. Agent—Walter C. B. Christie, W.S.

Counsel for the Respondent—Shaw—C. N. Johnston. Agents—Curror, Cowper, & Curror, W.S.

Friday, November 20.

SECOND DIVISION.

[Sheriff of Forfarshire.

THE GRANITE CITY STEAMSHIP COMPANY, LIMITED *v.* IRELAND & SON.

Ship — Discharge — Charter-Party — Excepted Causes—Demurrage.

A charter-party allowed forty-eight running hours for discharging cargo "except in cases of . . . strikes . . . detention by railway . . . or any other cause beyond the control of the charterers which may impede the ordinary loading and discharging of the vessel," and stipulated for demurrage at the rate of 10s. per hour for any time expended over and above the forty-eight hours. The charterers failed to discharge within the stipulated time, and were sued by the shipowners for demurrage. The defenders alleged that the delay was due to the impossibility of getting railway waggons owing to a strike of railway servants.

Held that the delay was not due to any of the causes specified in the charter-party, and that the defenders were liable in demurrage.

David Ireland & Son, coal exporters and steamship brokers, Dundee, chartered the steamship "Linn o' Dee," belonging to the Granite City Steamship Company, Limited, Aberdeen, to carry coals from a port on the Tyne to Leith Docks.

The charter-party provided that after loading her cargo the vessel should proceed "to Leith Docks and deliver the same agreeably to bills of lading to the said affreighters or their assignees, alongside any safe wharves, crafts, or depôts, as ordered by receivers, on being paid freight at the rate of three shillings and ninepence per ton of 20 cwt. . . . The freight to be paid on unloading and right delivery of the whole cargo, in cash, at current rate of exchange.

running hours to be allowed the said freighters for loading, as per colliery guarantee, and forty-eight running hours for discharging the said cargo, except in case of holidays, Sundays, colliery pay-days, idle days, riots, strikes, lock-outs, idle time, or restriction of out-put at the colliery or collieries with which the steamer is booked to load, frosts, storms, floods, detention by railway or cranes, accidents to machinery, or any other cause beyond the control of the charterers which may impede the ordinary loading and discharging of the vessel.

. . . Demurrage at the rate of ten shillings and pence per hour, to be paid by the freighters for any time expended over and above the said hours allowed for loading and delivery. . . . Time for discharging to commence when steamer is ready to deliver, reported at Custom House, and according to usual custom at port of discharge."

The charter-party was for two voyages, and the vessel performed both voyages, and carried two cargoes of coal to Leith for the charterers. Thereafter the shipowners raised an action against them for demurrage upon alleged delay at Leith owing to the failure of the defenders to take delivery of the cargo within the time allowed by the charter-party. The pursuers alleged that upon the occasion of the first voyage their vessel arrived and was berthed in the Old Dock, Leith, and that she was ready to deliver her cargo by 4 p.m. of 27th January 1891, but discharge was not completed until 31st January, being forty-eight hours longer than was stipulated. On the occasion of the second voyage she was berthed in the Edinburgh Dock, and ready to deliver cargo at ten a.m. of 5th February 1891, but the defenders did not take delivery until two o'clock of 10th February, seventy-six hours beyond the time mentioned in the charter-party.

The defenders averred—"On the occasion of both voyages delay took place in discharging the cargo owing to a strike of the servants of the railway companies, which rendered it impossible for these companies and for the defenders to get waggons forward to receive the cargo. The delays thus occurred from causes beyond the control of the defenders. It was impossible to take delivery of the cargo by carts or otherwise than by railway waggons."

"The pursuers pleaded—"(1) The pursuers' vessel having been in demurrage for the time specified through the fault of the defenders, they are liable in payment to the pursuers of the stipulated sum payable in respect thereof."

The defenders pleaded—"(2) The delays upon which demurrage arose having occurred through causes beyond the control of the defenders, and falling under the exceptions specified in the charter-party, the action should be dismissed."

A proof was allowed, which established that the vessel arrived at the Albert Basin, Leith at 4·10 on 27th January 1891; that at 10 o'clock the captain went ashore and landed the ship's papers, and the *transire* bearing the quantity of cargo shipped in Shields Tyne Dock to the agents of the charterers; it was not necessary to report the vessel, as that was only done in the case of foreign trading vessels, while the "Linn o' Dee" was a coaster; the agent did not lodge these papers with the authorities until the next day; the coal was to be taken by the affreighters to the Edinburgh Gas Company, to whom they had contracted to deliver 2000 tons of coal; the North British Railway Company only had a railway from Leith Docks to the Gas Commissioners' sidings; a strike was in progress among the North British Railway Company's servants which rendered it difficult for the company to supply waggons; the continuance of this strike was well-known to the parties in the case; when waggons were forwarded it was at irregular intervals, and not in large number, so that unloading was frequently stopped from the want of waggons; the agent for the defenders when he found on the arrival of the vessel that waggons could not be got from the railway company, asked one carting contractor to cart the coals from the ship to the gasworks, but owing to the great pressure put upon all means of portage by the railway strike the contractor was unable to do so; a comparatively small amount of coal came into Leith, and most of that was carried away in carts. One carting contractor, who had, at the time the "Linn o' Dee" was lying in the dock, carted a cargo of 800 tons of coal from another ship, deponed—"I could not have carted 500 tons from the 'Linn o' Dee' to the gasworks at Edinburgh, but we could have carted them to the spare ground round the north side of the Albert Dock or Edinburgh Dock, which is kept by the Dock Commissioners. I do not think the Dock Commissioners would have charged for the storage in the circumstances; they allow vessels to do so in special circumstances. When vessels have sprung a leak they allow them to put coals down there. . . . I would not undertake carting but for special customers. The defenders are not special customers, but if they had given me exceptional terms I might have done the carting for them; I mean if they had given me a premium. *By the Court*—(Q) What premium would you have expected? (A) If they had given from 1s. 3d. to 1s. 6d. a ton we would have managed it—that is, to have laid the coals down on the spare ground, and then they would have been carted away at their convenience."

Upon 10th June 1891 the Sheriff-Substitute (CAMPBELL SMITH) pronounced this interlocutor:—[*After stating the facts as above*]—"Finds that on the first voyage in question the ship was reported at the Custom House by 11 a.m. of the 28th January 1891, and that the discharge was finished by 4·30 p.m. of the 31st January, having occupied twenty-nine and a-half hours more than the stipulated forty-eight hour after report at the Custom House, and that on the second voyage the point of time for discharge commencing was 11 a.m. of 5th February, and that it ended at 2 p.m. on 10th February (the second previous day being Sunday), and the excess over the stipulated time, deducting Sunday, being fifty-one hours: Finds that on the two voyages more than twice forty-eight hours was occupied, to the extent of eighty hours, but finds that the charge for demurrage was not incurred in respect that the cause of delay was the failure of the North British Railway to supply waggons to receive the coals carried by the ship owing to a 'strike' of their ser-

vants, and that said 'strike' or 'detention by railway,' which impeded the discharging of the vessel, fell within the aforesaid exception, expressly, or as a cause not within the defenders' control: Therefore assoilzies the defenders from the conclusions of the prayer of the petition," &c.

The pursuers appealed, and upon 18th August 1891 the Sheriff (COMRIE THOMSON) pronounced the following judgment:—"Finds that the delays upon which demurrage arose occurred through a cause beyond the control of the defenders, which impeded the ordinary discharging of the vessel: Finds that by the terms of the charter-party this exempts the defenders from the liability now sought to be imposed upon them; to that extent and effect adheres to the interlocutor appealed from, assoilzies the defenders, and decerns, &c.

"*Note.*—I arrive at the same result as the Sheriff-Substitute, but I do not agree with him in some of the views which he has expressed. For example, I am disposed to think that the expression 'detention by railway' in the exemption clause applies to loading and not to discharging time. I also seriously doubt if 'strikes' can be held to apply in the present case, as there was no strike among the dock labourers or stevedores which prevented the cargo being put out of the vessel within the stipulated time. But the want of waggons, however occasioned, was the proximate cause of the delay; it was beyond the control of the defenders, and I think it is unreasonable to say that they should have taken delivery upon the quay although there were no means available for removing the cargo."

The pursuers appealed to the Court of Session, and argued—The defender, it was admitted, had not discharged the cargo from the vessel as he was bound to do by the charter-party in forty-eight running hours after she was ready to begin discharging; his failure to do so could only be excused if he could show that it was due to anyone of the excepted causes in the charter-party. The Sheriff-Substitute cited three cases in which the defenders could be exempted:—(1) Strikes—it was plain that this referred to any delay in loading on account of a strike at a colliery from which the coals were to come, but had nothing to do with a strike of railway employees at the port to which the cargo was consigned. It might be conceivable that a strike of stevedores or of dock labourers might come under this head, because that might impede the "ordinary discharge of the cargo." (2) Detention by rail—that also implied a delay in loading, but it did not provide for the present case. (3) This delay was not occasioned by any cause "beyond the control of the charterers." They knew of the strike, and if they had acted properly they would have taken measures to have had a supply of carts down at the docks so as to enable them to get out the cargo. The mistake made by the charterers was in confusing the delivery of the cargo to them and their delivery of the cargo to their own customers. The shippers had no concern with the latter; they were willing and ready to discharge the cargo on to the quay for the charterers to take delivery, but if they did not wish to take it until they could get it away from the quay, they were not entitled to use the pursuers' vessel as a warehouse without paying for it. The difficulties which the defenders put forward as bringing them within the excepted causes in no wise interfered with the "ordinary discharging of the vessel"—*Kruuse and Others* v. *Drynan & Co.*, July 9, 1891, 28 S.L.R. 958; *Grant* v. *Coverdale & Co.*, March 24, 1884, L.R., 9 App. Cas. 470; *Budgett & Co.* v. *Binnington & Co.*, October 31, 1890, L.R., 1 Q.B.D. 1891, 235; *Hansen* v. *Donaldson*, June 20, 1874, 1 R. 1066; *The* "*Carisbrooke*," March 13, 1890, L.R., 15 P.D. 98; *Wyllie* v. *Harrison & Co.*, October 29, 1885, 13 R. 92. The Sheriff-Substitute was also wrong in the two points he made in the number of hours; the defenders were admittedly beyond the forty-eight running hours. The ship was a coaster, and therefore reporting was not necessary, but the captain had lodged the ship's papers and the *transire* with the agents of the charterers by 10 a.m. on 27th January; the time of unloading therefore ran from then, and not from the date when the agent actually lodged them with the authorities, as that was owing to his delay. According to a well-known rule, Sunday should be counted in reckoning demurrage.

The respondents argued—It was admitted that some delay took place in discharging the vessel, but the defenders were exempted from responsibility for that delay by the excepted causes in the charter-party. The charterers had agreed that the coal should be loaded into trucks on the quay, and then taken by the railway company to the gas works. When the ship arrived the company could not give them waggons on account of a strike on their railway system, and therefore there was detention by railway on account of a strike. They did endeavour to get carts to carry the coal to the gas works, but owing to the strike and consequent disorder of the railway service, there was such a pressure upon the carting contractors that no one would take the contract. There was no place for storing coal on Leith Docks. All these circumstances happened from causes beyond their control, and therefore the excepting clause applied. This was the same case as *Wyllie* v. *Harrison & Co.*, cited *supra*; *Postlethwaite* v. *Freeland*, June 7, 1880, L.R., 5 App. Cas. 599. The clause applied to discharging as well as to loading cargoes.

At advising—

LORD JUSTICE-CLERK—Both the Sheriffs have in this case pronounced practically the same judgment, but I am sorry to say I cannot agree with them.

The charter-party under which this vessel was engaged stipulated that a certain number of hours should be allowed for her discharge, and then followed a list of circumstances which were to be held as exceptions to the general rule, and any of which would be a good excuse to the shipper if he was not able to take delivery

from the ship within that time. In this case we are concerned with only two of three exceptions, viz., "strikes" and "detention by railway."

Now, as regards the "detention by railway," I do not think that that clause refers at all to detention in the sense that the railway company failed to put trucks alongside the vessel so that she might discharge her cargo into them within the time specified in the charter-party. I think that that exception is solely applicable to the case of trucks with coal being brought from the colliery to the quay for the purpose of loading the vessel.

In regard to the other exception, it is difficult to hold that the word "strike" as it occurs in the charter-party refers to a strike on the railway, which can have nothing to do with the obligations of the ship, although one can imagine that a strike of the stevedores or dock labourers or of the sailors on board the ship might be covered by the clause.

Even supposing that the strike on the railway did affect the discharge of the cargo, all that can be said is that the railway company in consequence of the existing strike failed to bring the trucks alongside the vessel so that her cargo could be discharged into them.

There is nothing particular said in the charter-party about the discharge of the ship—she is to discharge in the ordinary way, there is no mention of any custom of the port, and no rule is mentioned that the discharge must be into railway trucks. The charterers are therefore in this position—they must either pay demurrage on the time the ship is kept waiting until she can discharge her cargo into trucks, or they must find, and if necessary pay for, some other mode of discharging the cargo.

On the question of whether the defenders could not have got some other mode of discharging the vessel, I must say I do not think they were very active in the matter. The railway strike was existing at the time that the defenders entered into this charter-party, and it might quite well have been in their contemplation that difficulties might arise in getting this cargo discharged. I think, however, it has been proved that the charterers could have got this vessel discharged in reasonable time if they had been active in the matter. The owners of the vessel had stipulated that she should be discharged within a certain time subject to certain exceptions, and I do not think that the defenders have proved that the vessel was not discharged within that time owing to any cause beyond their control.

I am further of opinion that the view of the Sheriff-Substitute is wrong in holding that if demurrage is payable the Sunday must be excepted. The lay-days expired before Sunday, and demurrage had begun to run. The delay over the Sunday is therefore not to be excepted in calculating the demurrage.

LORD YOUNG—I am of the same opinion. I think it is not proved that the delay in discharging this vessel was owing to the railway strike then existing, or to any other cause mentioned in the clause of exceptions in the charter-party. That, I think, is conclusive of the case. I think, however, that it is not proved that the vessel could not have discharged her cargo upon the quay.

I do not think it very material to notice that it is said that if that had been done the cargo would have had to lie upon the quay until the consignees took it away, but even that is not proved. I am therefore not disposed to concur in the views of the Sheriff expressed in the last sentence of his note—"But the want of waggons, however occasioned, was the proximate cause of the delay; it was beyond the control of the defenders, and I think it is unreasonable to say that they should have taken delivery upon the quay although there were no means available for disposing of the cargo."

I think it unreasonable to say that the shipowner is bound to let his ship be treated as a warehouse, and keep the cargo on board until the owners found a way of removing it and handing it over to their customers. I do not think that the delay in discharging was attributed to any of the exceptions mentioned in the charter-party.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—I think the interlocutors of both the Sheriffs are wrong. I agree with what has been said by your Lordship in the chair and by Lord Young upon the clause of exception in the charter-party, and have no difficulty in the matter. The charterers, the defenders, undertook to discharge this cargo in "forty-eight running hours." It is quite certain that they did not do that; they are therefore responsible according to a well-fixed rule of law for the detention of the vessel beyond these forty-eight hours.

The only answer they have to this charge is that the case is taken out of the ordinary rule of law by a clause in the charter-party which exempts them from that responsibility. They appeal to the clause of exemption, but it must be observed that all the exceptions which exempt them are limited by this, that they must be such as "impede the ordinary loading and discharging of the vessel."

Now, the defenders have failed to show that any of the excepted causes existed which prevented the cargo in question being discharged in the ordinary way over the ship's side. It was no concern of the shipowner whether the charterers of the cargo had any difficulty in removing the cargo from the quay on which it had been discharged.

The Court pronounced this interlocutor:—

"Find that by the charter-party, No. 8 of process, the defenders chartered from the pursuers the steamship "Linn o' Dee" for two voyages from Tyne Dock to Leith Dock, forty-eight running hours being allowed for discharging a cargo

except in certain special cases specified in the charter-party, and demurrage at the rate of 10s. per hour being payable by the charterers for any time expended over and above the said hours allowed for delivery: Find that after the first voyage the defenders detained the said ship for forty-eight hours after the expiry of the forty-eight hours allowed for discharging the cargo, and that after the second voyage for seventy-six hours after the expiry of the said forty-eight hours: Find that the detention of the ship on said two occasions was not due to any of the causes specified in the charter-party as exceptions to the defenders' obligation to pay demurrage if the cargo was not taken within forty-eight hours: Find in law that the defenders are liable to the pursuers for demurrage at the rate of 10s. per hour for said two periods of forty-eight hours and seventy-six hours, amounting to £62: Therefore recal the interlocutor of the Sheriff-Substitute of date 10th June 1891, and the interlocutor of the Sheriff of date 18th August 1891, and decern against the defenders for payment to the pursuers of the sum of £62 sterling," &c.

Counsel for Appellants—W. Campbell—Salvesen. Agent—John Rhind, S.S.C.

Counsel for Respondents—Ure—Lyon Mackenzie. Agents—Henderson & Clark, W.S.

Friday, November 20.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

LOWENFELD (LIQUIDATOR OF THE UNIVERSAL STOCK EXCHANGE COMPANY, LIMITED) *v.* HOWAT, *et e contra.*

Contract—Stock Exchange Transaction—Gaming—Whether Contract Real, or for Payment of Differences.

In an action for a balance alleged to be due upon certain transactions in stocks and shares, the defender alleged that these were gambling transactions for differences. It appeared that the capital of the parties was entirely disproportionate to the amount of the transactions, and that the parties contemplated that these might be fulfilled in the way of a re-sale, but the pursuer denied that the transactions were for differences, the defender could not prove such an agreement, and on the face of the documents the transactions appeared to be carried out in the ordinary course of Stock Exchange business, and might have been enforced at law by either party.

The Court *held* that the transactions were real, and decerned in terms of the conclusions of the summons.

Process—Proof—Title to Sue—Liquidator of Public Company — Opening of Closed Proof to Receive Document of Title—Discretion of Court.

The liquidator of a limited company produced as his title to sue in an action a copy of the minutes of the company which had not been certified by the proper officer, and he did not produce a certified copy till the proof was closed. *Held* that it was within the discretion of the Court to open up the proof and admit the document of title.

This was an action by Henry Lowenfeld, liquidator of the Universal Stock Exchange Company, Limited, 49 Queen Victoria Street, London, against Richard Howat, Mabie, Dumfriesshire, for payment of £4812, 2s. 10d., the balance alleged to be due upon certain stock and share transactions as per account from 2nd April to 10th May 1889. The whole transactions amounted to £1,287,683, 16s. 7d. Mr Howat also sued the company for payment of £5834, 3s. 9d., being the price of Brighton A and Dover A stocks sold by him to the company, and of which price the company refused payment, on the ground that after crediting Howat with its full amount he was still due them on their total transactions the sum concluded for in their action.

In the first action the defender alleged—"No purchases or sales of stock as are referred to by the pursuer were ever made except the sales of £1450 Brighton A and £3100 Dover A, which were made by the pursuer or his pretended company on behalf of the defender. The pursuer or said company have never accounted for the proceeds of said sales, and the defender has raised an action therefor. The whole other pretended sales and purchases were mere gambling transactions for differences, and represented no real purchases or sales. The pursuer or said company never had the said stocks or shares in their possession or under their order, neither they nor the defender had funds to purchase or pay for the same, and the pursuer and his company represented to the defender throughout that he would never require to pay any money, but simply to pocket the proceeds of successful gambling."

He pleaded—"(1) The pursuer has produced no title to sue, and he has none. (4) The transactions upon which the alleged debt by the defender to the pursuer arose, not being real transactions, but gambling transactions for differences, the defender is entitled to absolvitor."

In the proof allowed by the Lord Ordinary the pursuer deponed—"The business of the company was carried on under the memorandum and articles. I was managing director of the company. . . It went into voluntary liquidation in the summer of last year with the object of increasing the capital and getting additional powers under new articles of association as a step to putting the company on a new and enlarged basis. In the course of the liquidation all the creditors were paid 20s. in the pound and the business re-started. In the course of carrying on the business of the