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

company a book was issued called 'How to Operate,' a copy of which is produced. That book was very largely circulated. In October 1887 defender wrote to the company for a copy of the book 'How to Operate,' and to the best of my belief a copy was sent to him. In accordance with our custom his name was entered in the books, and market reports were sent to him regularly every week afterwards. The first time I saw defender was when he called for me at the office of the company. The first transaction was subsequent to that interview. He came in like an ordinary customer, and wanted to see me about stocks. The next thing that happened was that he sent an order, and an account was subsequently opened. The company are stockjobbers—just as one man deals in gloves and another in boots, we deal in stocks. We are buyers and sellers. We are not agents or brokers; we are principals in the matter. (Q) And only deal as principals?—(A) Only. We have a document called 'Terms under which the Universal Exchange Company carries on its business.' We make that known to all who deal with us. . . . These terms are printed on the back of every bought and sold note and every order sent to customers, to prevent possible misunderstanding. From the time of his first order we had a number of transactions with defender, purchases and sales, as the account discloses. On the occasion of each transaction we sent him a bought and sold note in the ordinary way when he purchased, and when we bought from him the appropriate note was also sent. In the case of every sale to defender we undertook to deliver to him, and in like manner in every case of purchase from him we undertook to accept delivery from him. We were quite ready to carry out our undertakings in these respects. . . . The statement on record on his behalf, that with the exception of the dealings in Brighton A and Dover A, the 'other pretended sales and purchases were mere gambling transactions for differences, and represented no real purchases or sales,' is wholly incorrect. With regard to the further statement in the same answer, that '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 pocket the proceeds of successful gambling.' With regard to that I say, we never represented anything to him, we gave him our terms of business, and said these were the terms we were prepared to deal on. We did not deal on any other terms than those expressed in the document to which I have referred. We were quite ready to fulfil the contracts we entered into, either by accepting or taking delivery of the stocks; it was always at defender's request that delivery was not taken or given. The £1450 Brighton A and £3100 Dover A stocks are, I believe, the stocks he referred to at his first interview with me; I think that was in the spring of 1889. He told me he had bought them for speculation, but found it would not pay him as the commission was so high, and that was the reason why he wanted to deal with us. He said he was not satisfied with them, and should prefer to buy something else instead. At that time we were interested in a very large investment in American railway stock—Missouri, Kansas, and Texas railway stock; we had half a million nominal value of it ourselves; and I told him if he liked to buy some of that, I thought it might turn out satisfactorily. To the best of my belief he then said, 'I will sell the stock and think the other matter over.' An order in writing was taken from him to sell the stock, but no other order was taken that day to the best of my knowledge. He rather wanted to leave it to my discretion what to buy with the proceeds of the Brighton and Dover stock. We never do business on that footing, but as we had actually taken delivery of the stock and had it in hand, I did not mind in that instance, with the idea that if it turned out all right we should let him have the profit which might be on it, as we had his cash in hand, and in that way it was left. No definite order was passed. . . . If the defender's account had been closed at an earlier period there would have been a considerable profit to him. In the result there was a debit-balance of £4709, the sum sued for. After the account was rendered, defender came to see us—this was the second interview that I remember—and we went carefully through the account. He admitted that it was correct, and gave us a receipt admitting the indebtedness, dated 25th June 1889. . . . *Cross.*—The nominal capital of the company is £100,000 in 10,000 shares of £10 each. The number of shares taken up was 2953. All the capital was called up on these shares. . . . In 1887 the working capital was about £18,000, and when the company went into liquidation it was about £90,000 in addition to the goodwill; that was the actual amount of the surplus assets in addition to the goodwill. The company went into liquidation in 1889. In 1888 the amount of the company's investments in stocks and shares was £91,000; cash at bankers, £16,000; owing on current accounts, £24,000; roughly speaking, about £130,000 of available assets. . . . All the transactions appearing in the account sued on began with purchases except the Brighton A and Dover A stock. The stocks were purchased from the company by the defender. When he wanted to resell he would give his orders in the ordinary way I suppose. (Q) What did you understand by closing?—(A) I understand he wanted to buy off us so much stock, and so soon as it showed him a profit of ½ per cent. he wanted to re-sell it to us, to take his profit instead of keeping it as an investment. We should not be losers by that transaction; the transaction one enters into one day has nothing to do with the transaction one has on the second day. . . . It was when it dawned upon me that the

defender could not take up the stocks which were standing in his name as at 26th April, amounting to £600,000, that I closed the account. It had not dawned upon me until then, but it occurred to me at that time that he was going in too heavily. . . . My letter of 25th April 1889 to defender means that we were beginning to get very much afraid of the account. It does not mean that he should re-sell the stocks to us at once; he might have sold them wherever he chose. By saying he had a great deal of stock open, I meant stock which had not been actually taken up—bought but not paid for. As it happened in this case, it had been bought from us; if you substitute the word 'unsettled' for 'open' that would give the exact meaning. The bargain has been closed certainly, but the stock is open in the slang of the market because it has not been paid for. The defender would have closed his stock if he had re-sold it or taken it up; you can close in both ways. He could have closed the stock referred to in the letter of 25th April by writing, 'I will pay for these £100,000 Brighton A's; please deliver them to Herries, Farquhar,' or anybody else; or by saying, 'I will re-sell them to you at the best market price.' We did not mind which way he did it, so long as he either took them up or sold. We suggested that he should close with the view of purchasing them at a cheaper rate later on. On 25th April he had £600,000 of stock open which he had purchased from us. That made £6000 of difference on each one per cent. of rise or fall. No doubt things did look rather black and not satisfactory on that date, and our letter would be the ordinary letter any stockbroker or jobber would write to a customer when he thinks he is incurring a liability he does not care to incur. When we received defender's telegram to close, as he did not give any instructions to take up, we understood the word 'close' in Stock Exchange slang to mean that he was to re-sell to us. We accordingly closed, and sent him the appropriate note. On 25th April 1889 I cannot say that we had purchases current covering the £600,000 of stocks which we had undertaken to deliver to defender on the 26th, but we had purchases current in the various stocks mentioned to a very large amount, and we may have had such purchases current for the full amount. . . . (Q) Was the usual course of dealing that he should purchase from and sell to you alone?—(A) Yes. . . . (Q) You had transactions with him to the amount of £1,287,683; did you expect he was going into these transactions with the view of taking up the stocks?—(A) I never analyse my customers' intentions. I did not know that he was speculating for the differences; it did not concern me what he wanted; I knew what I wanted. (Q) Did you seriously contemplate that he was to ask you for delivery of any of those stocks which he bought from you? — (A) We have been asked in cases like that. (Question repeated—(A) I did not consider it; I thought it was quite possible that he might; but I should have been surprised if he had."

Mr Howat deponed—"It was quite understood that the transactions were to be for speculation only, not for delivery. That was distinctly said by both of us in Mr Lowenfeld's private office when I saw him. He spoke about speculating in £5000 or £10,000 worth of stock, and I asked, 'Are you obliged to pay for that?' and he said no, it was merely a speculation. He said they never paid for stock at all, it was never delivered, the transaction was only for the difference in the price. They never called on clients, he said, to pay for stock. The book 'How to Operate' explains that a transaction for the purchase of stock is closed by re-selling. The whole correspondence, including the orders and transactions, were entered into and proceeded on the footing I have stated, that there was to be no delivery given on either side, and nothing paid but differences. The only exception was the transaction in Dover A's and Brighton A's stocks which I had formerly bought through Herries, Farquhar, & Company. The whole of the orders I gave to pursuer's company were in writing, either in the correspondence or on orders. When I gave the orders which are referred to in this action, I never intended to take delivery of the stocks. It would not have been possible for me to do so. . . . I was in London on 13th April 1887, the date when the Brighton A's and Dover A's are entered in the account as sold. I had an interview on that date with Mr Lowenfeld about these stocks. I told him they had risen considerably since I had bought them, and asked whether he thought it would be wise to sell out. He said he did not think they would go any higher, and that he knew of something very good to invest in, namely, the Missouri, Kansas, and Texas railway stock. He showed me a map of the railway, and said the company held a large quantity of that stock, and he advised me to invest in it, which I agreed to do. I agreed to carry out the investment by selling the Brighton A's and Dover A's at the price of the day, and the proceeds were to be invested by the pursuer's company in Missouri, Kansas, and Texas railway stock. I did not intend to sell that stock again unless it went up considerably; it was an investment, and I was to take delivery. I was to give delivery of the Dover A's and Brighton A's, and I did so. It was a rule of pursuer's company that everything must be in writing, and I wrote on 22nd April in accordance with the arrangement we had come to. They replied on the 23rd, 'As arranged when you called upon us last, the proceeds have already been invested in Missouri, Kansas, and Texas,' and I believed that was the case. I first learned that that had not been done when they sent me the account in June. I had an interview after that, when pursuer said he had not invested the money, but had applied it to the reduction of the debt due by me on the other transactions. I did not know what to say, the account was there, and I believed I was legally bound to pay. I granted the acknowledgment which is in

process under that belief. It was given when I was in London; it was already written when I went there. (Shown No. 10)—That is the acknowledgment; it is signed by me, but the body of it is not in my handwriting. I did not sign any document before commencing to transact with the company stating the terms on which the business was to be done. I knew that the terms of settlement were on all the purchase and sale orders, but I did not read them through. . . . On 26th April 1889 I received a letter from them advising me to close all my stocks, and I at once followed their advice, with the result that is shown in the account sued on. After crediting me with the price of the Dover A's and Brighton A's, which I sold to the company for investment, the account brings out a balance of £4812, 2s. 10d. against me. . . . The account sued on is a correct statement of the transactions which took place. I do not think I have been fairly dealt with by the company. The whole of the transactions took place in the period from 2nd to 26th April 1889. They amounted to £1,287,683, 16s. 7d."

The "terms" referred to by the pursuer provided, *inter alia*, as follows:—"1. In all transactions the company acts as a stock and share jobber, buying from clients and selling to them direct on the company's sole responsibility, and in no case does the company act as broker or agent for a client. . . . 2. Every purchase or sale of stocks or shares contracted by the company is a *bona fide* transaction for delivery, the company always being prepared to deliver or take up on the settling-day specified in the contract any and every stock or share which it may have bought or sold. Clients may, if it suits their convenience, re-purchase or re-sell to the company, or any other stock dealers, any stocks or shares which they may have previously bought or sold; the company shall, however, have no power to compel them to do so, the company's intention on entering into any and every transaction being to deliver or take up the stocks bought or sold by them. . . . 4. Every transaction entered into by the company is to be completed on the settling-day specified on the contract. Should, however, clients find it inconvenient to deliver or take up any stocks or shares which they have bought or sold on such settling-day, they can, upon terms to be mutually agreed upon, arrange with the company to postpone the delivery until the next settling-day; but as it is the company's intention, on entering into the bargain, to deliver or take up all stocks or shares which they may have previously bought or sold, the company cannot be compelled by clients to thus postpone the delivery of stocks. . . . 6. . . . Written contracts will be issued by the company to clients in respect of every transaction, and proper statements of account will be rendered by the company to clients, prior to settling-days, giving full particulars of every purchase or sale of stocks, contango or interest charges, cash payments, and any other transactions which may have taken place between the company and its clients since the date of the last statement of account. . . . 10. The company is frequently applied to for advice as to the probable fluctuations in the prices of stocks, and is willing to advise its clients, but any suggestions or advice so given are to be accepted by the clients on their own responsibility, and the clients are not in any case to hold the company liable or in any way responsible in respect of such advice or suggestions, or anything done in consequence thereof. Clients should always remember before accepting any advice or suggestion that the company acts as principal or jobber, and is therefore an interested party."

On 23rd April 1889 the Exchange Company wrote to Mr Howat—"We beg to acknowledge with thanks the receipt of your letter enclosing certificates for £1440 Brighton A, and £3190 Dover A, which was bought of you. As arranged when you called upon us last, the proceeds have already been invested in Missouri, Kansas, and Texas. According to your instructions we have sold to you £100,000 each Dover A at 117¼, Brighton A @ 157¼, Midlands 147, and Great Westerns @ 158½, contract for which we beg to enclose, and we note you wish to sell same at ½ % profit."

On 25th April they wrote—"We have just heard that Home Rails are likely to still further recede in price, and seeing you are a large bull of them we wish to communicate the fact to you that it might be advisable to forthwith close all bulls with a view of purchasing them at a cheaper rate later on, and should you wish to do this no time should be lost. Considering that you have a very large quantity of stock open great caution should be exercised in dealing in same."

Mr Howat telegraphed on 26th April—"Thanks for letter received. Please close stocks as suggested." The company replied—"We buy of you 100 each Great Northern A at 113½, Dover A at 115½, Brighton A at 155½, Midlands at 144¾, Great Westerns at 157, and 50 each Metropolitan Consolidated at 89½, North Westerns at 183."

No. 10 of process was in the following terms—"I beg to acknowledge receipt of your account, which I find correct, and I hereby acknowledge that I am indebted to you to the extent of four thousand seven hundred and nine pounds seventeen shillings and sevenpence (£4709, 17s. 7d.), on which amount I agree to pay you interest at the rate of four per cent. per annum from the 29th inst. until the date of payment."

At the close of the defender's proof his counsel called upon the pursuer, in terms of his undertaking, to produce the minute-book of the company, that excerpts might be made of the minutes relating to the liquidation.

The pursuer stated that careful search had been made in the company's office in London, but the minute-book had not been found, and that the pursuers were satisfied that it was either lost or destroyed along with other documents belonging to the old company.

The defender put in documents per inventory and closed his proof.

The pursuer had before closing his proof put in as his title a copy of the minute appointing him liquidator, which he had obtained from Somerset House, but which was not certified. He now craved leave to put in evidence in substitution for that document a copy certified by the Registrar at Somerset House.

The defender objected to the reception of the evidence, on the ground that the pursuer had closed his proof. The Lord Ordinary sustained the objection and refused to allow the production.

In Howat's action against the company the Lord Ordinary (KYLLACHY) on 2nd July 1891 assoilzied the defenders from the conclusions of the action, and of the same date, in the action by Lowenfeld against Howat, the Lord Ordinary found that the pursuer had not produced any title to sue, and he therefore sustained the defender's first plea-in-law and dismissed the action.

"*Opinion.*—[*After narrating the two actions*]—Both actions therefore substantially involve the same question, viz., whether the debt entries in the company's account form a good charge against Mr Howat? and that again depends (for there is no question of the correctness of the account) upon the further question, whether the transactions between the parties were proper purchases and sales, or were, as Mr Howat alleges, mere gambling transactions, of which the only obligation on either side was for payment of differences.

"On this question, having considered the proof and the various writings produced, I have come to the conclusion that my judgment must be in favour of the company. I think the documents sufficiently instruct that whatever facilities this company may give for speculation in shares and stocks, and whatever temptations in that direction it may put in the way of inexperienced persons, its transactions are real transactions, under which delivery of stock sold and acceptance of stock bought is made matter of obligation and may be enforced. That is certainly the effect of the documents, and in particular of the pamphlet, 'How to Operate,' which the company circulated, and of the printed terms and conditions which are brought under the notice of every customer, and are endorsed upon every bought or sold note which the company issues, and although the defender alleges that it was understood between him and the company that there should be no delivery on either side, but merely payment of differences, the officials of the company are emphatic the other way; and altogether I am bound to say that I think it is the effect of the evidence that whatever may have been contemplated as the probable mode of working out the transactions, it was distinctly made matter of contract that if it suited (as in certain states of the market it might suit) the interest of either party to demand delivery or acceptance, such delivery or acceptance might be enforced. In short, the business carried on by the company appears to be substantially the same as that of a jobber on the Stock Exchange. They appear to buy and sell indifferently, being ready to buy or to sell any stock quoted on the Stock Exchange at the market price of the day, and their profit as a rule arises not upon the rise or fall of a particular stock, but upon what is called the turn of the market, which is really a sort of commission. It is not alleged that in the transactions in question the prices charged were not fair prices, or that Mr Howat was unfairly dealt with. He would apparently have suffered exactly the same loss if he had bought and sold the particular stocks through a broker on the Stock Exchange, and although the transactions were certainly of sufficient magnitude to have suggested doubts as to Mr Howat's ability to carry them out except by payment of differences, I cannot say that I think it is proved that he could not have made arrangements to do so if necessary, or that there is anything in the amount of the transactions which is necessarily inconsistent with the company's view of the contract.

"On the whole, therefore, I must, in Mr Howat's action, grant absolvitor to the company, and a corresponding result would have followed in the company's action but for the difficulty as to the liquidator's title to sue, which, so far as concerns his action, seems to me to be insuperable.

"The title of the liquidator depends of course upon the minutes of the company, and the proper evidence of the winding-up and of the liquidator's appointment is of course the minute-book of the company, kept and signed in terms of section 67 of the Companies Act of 1862. That being so, and Mr Howat having denied on record the pursuer's title, and tabled a plea of want of title, and called for production of the minutes, it was, I think, incumbent on the liquidator to have produced the minutes or to have produced some statutory equivalent. It appears, however, that the minutes have either been destroyed or lost, and the only document produced before the close of the liquidator's proof in support of the liquidator's title was a copy from Somerset House. That document was produced as a certified copy, said to be admissible under section 6 of the Companies Act 1877, but apparently by some oversight it is not certified or signed by the proper officer, and is accordingly in my opinion of no value. After his proof was closed the liquidator sought to remedy this defect by producing a second copy properly certified, but Mr Howat's counsel, while willing to allow production of the minutes, declined, in the absence of the minutes, to allow this new copy to be put in evidence. He objected that the pursuer's proof was closed, and I confess I see no answer to this objection.

"I must therefore in this action find that the pursuer has not instructed any title to sue, and shall therefore dismiss the action. And with respect to expenses, I think the only course I can follow is to find no expenses due to or by either party in either action."

Both parties reclaimed.

Argued for Lowenfeld—(1) *On the question of title*—The objection taken to title by Howat, and sustained by the Lord Ordinary, was very unreal. Owing to inadvertence the document produced before the Lord Ordinary lacked authentication, but that had now been remedied, and any defect that then existed had now been cured. When the document was first tendered no objection was taken to it, and the time for objecting was past—*Robertson* v. *Thom*, December 29, 1848, 11 D. 353; *Christie* v. *Thompson*, January 28, 1859, 21 D. 337; Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 72. (2) *On the merits*—It was too late for Howat, after the transactions had turned out unfavourably for him, to seek to escape liability on the ground that they were gambling transactions. The documents showed that the transactions were real. The regulations of the company corroborated this, and the Lord Ordinary after hearing the evidence was satisfied that they were so. Howat in his own evidence did not stand well. He knew that if he had wished it he could have got delivery of any of the stocks which he purchased, and it was by his own desire that they were re-sold at a loss. He was aware of the terms upon which the company did business, and they were incorporated into every transaction. The transactions were not so enormous, looking to the character of the shares, as they were all good marketable stock. Besides, Howat, both in his evidence and by his writ, had acknowledged the correctness of the account sued for, and his repudiation of it afterwards was an afterthought, and under professional advice — *Newton* v. *Cribbes*, February 9, 1884, 11 R. 554; *Shaw* v. *Caledonian Railway Company*, February 20, 1890, 17 R. 466.

Argued for Howat—The correspondence and documents passing between the parties showed that the transactions were not real, but only for differences. The orders to buy were accompanied by directions to sell when the prices would show a profit of ½ per cent.; this showed that the transactions were merely for differences. The terms printed by the company on the back of the bought and sold notes were framed for the purpose of evading the law, but the Court would look behind these at the real transactions between the parties. The evidence and the documents, looked at fairly, showed that this was a series of gambling transactions to which the Court would not give effect. The company had not the means of handing over to the purchaser so large a quantity of stock. The transactions were quite beyond the scope of their business — *Heiman* v. *Hardie*, January 7, 1885, 12 R. 406; Bell's Prin., secs. 364-5.

At advising—

LORD PRESIDENT — The first question which has to be determined in order to enable us to reach the general question that has been argued is that as to the title of the pursuer of the action at the instance of the liquidator of the Stock Exchange Company. This of course is a purely technical question of practice, and it is now admitted by Mr Dickson that there is no statutory incompetency in the Court allowing a document of title to be put in after the party who founds upon it has closed his proof. That being so, the question necessarily is one of the discretion of the Court, and I cannot say that the present case seems to present a very difficult question of discretion.

No doubt after a party's case is closed on the evidence after a long proof the Court ought to be very careful in allowing it to be re-opened and re-developed. But in this case the matter is one of the merest formality in regard to the measure and extent of the proof proposed to be offered. A most exact estimate can be formed by the party opposing its admission, because it consists merely in this, that the document in question differed from another document already produced by containing a docquet of two lines. Accordingly I cannot help thinking that, sitting as we are now as a court of review, it is our duty to permit the reception of this document. I therefore propose to your Lordships that we should allow the reclaimer to open up the proof for the reception of this document, and that after it has been put in, that we should deal with the title accordingly. So standing this title, there is no further objection made to it, because the pursuer is then the authentic and authorised liquidator of the company, and he is the creditor in the obligation sued on.

Accordingly that brings us to the question upon which truly both actions turn. It is raised by the fourth plea of the defender in the action at the instance of the liquidator against Mr Howat. He pleads that "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." I think that plea very fairly raises the legal question in the case. As the transactions stand on the writings which evidence them, there is no doubt that they are transactions of sale of stocks. It appears that in some of the documents—in the contracts for the purchase—there is an order that in a certain event, viz., if there shall be a profit there shall be a re-sale, but that does not seem to me really to alter the complexion of the case. Therefore, on the face of the documents there is no doubt that these are sales enforceable by law, and can found the claim which is now made by the liquidator.

But it is pleaded that these are not real transactions. It is unnecessary to say that the fact that the transactions are evidenced by writing would not at all preclude the possibility of establishing even by parole that the documents do not give the substance of them; that the writings are merely simulate, and represent another and totally different transaction from that which was really entered into. Our law knows cases of that

kind where writings are used merely as a cloak and for collateral purposes, and even where the substance of the transaction is entirely contrary to what is set out in the writings. But at the same time, where writings evidencing a contract are to be so dealt with, and to be shown not to set forth the full truth of the transaction, but to be merely a device, it is necessary that some very definite and plain evidence should be brought for that purpose.

In this case the first thing which strikes one is that there is in the testimony of the two witnesses examined a direct conflict as to whether at the inception of these transactions there was or was not an agreement that they were to be merely transactions for differences as distinguished from what they purported to be from the documents which passed on each occasion. Mr Howat asserts that that agreement was expressed in words at his meeting with the liquidator. The liquidator pointedly asserts the contrary. If the evidence stood alone on that bare conflict of the two witnesses there could be no doubt that we should not be entitled to set aside the documents as being veils or cloaks and not realities. But Mr Dickson has founded upon a number of circumstances of real or admitted evidence which he says bears irresistibly in the direction of his contention. I cannot say that I am at all convinced by them, even when they are taken collectively. It is necessary to see what is the proposition which Mr Dickson requires to make out by the aid of these circumstances. It is not enough for him to show that both parties contemplated that these transactions might be fulfilled in the way of a re-sale taking place at the expiry of the natural period. I think, for my part, that looking to the various circumstances he has arraigned in support of his argument, that it is highly probable—nay, one may go the length of saying it is certain—that both parties contemplated that, at all events in the ordinary case, there not being delivery there could be a re-sale. And in some cases to which I have already adverted that expectation is expressed in words. But does that in itself, any more than in the words of his plea, prevent the sales which are set out from being real transactions? On the contrary, it merely shows that the real transactions were expected to be financed in one way instead of in another. He has said, for instance, pointedly, that the very inadequate capital, as he describes it, which is known to be possessed by this company is totally disproportionate to the gigantic figures which even this account produces. But whether it is prudent to enter into engagements in which there might be a meaning if they were enforced specifically is one question. It is quite another matter when you know the way in which those transactions are meant, and then say that the smallness of the capital shows that the transactions are not real, but on the contrary are simulate.

The other points which the reclaimer has taken seem all to be susceptible of the same explanation, and that brings us back to the question raised by his plea, whether he has made out that gambling transactions for differences is the proper description of what was done between this gentleman and the manager of the company. I take it that, as was pointed out by Lord M'Laren in a previous case, it is extremely unlikely as a matter of human probability that a case will readily occur in which there is evidence producible that there was an agreement that there should be no transaction, and that matters should not be in the ordinary course of business. I think so long as financiers have their wits about them it is not very likely that that case will arise.

But while I am confident that this was a case of real transaction, it appears to me not merely a case of failure on the part of Mr Howat to show that there was this antecedent or concurrent agreement that there should be no transaction or sale of stocks but merely a gambling transaction for differences, but that the probability is really the other way. I think, if one comes to form a conclusion on the state of the facts formulated, it is much more likely that the arrangement was that the transactions should be as was expressed in the writings, but that the energies of both parties should be directed towards escaping from any unpleasant consequences which might be brought about if there turned out to be a loss in buying and selling.

The parties were not in dispute as to the law, and the decision which I propose that your Lordships should pronounce will be entirely conform to the principles which are laid down in the previous cases, both English and Scottish. I cannot say that I think this case is one of peculiar difficulty as regards the principle which has guided the English and Scottish Courts in previous cases. Therefore I am of opinion that in the action at the instance of the liquidator he is entitled to decree, and for the same reason the action at the instance of Mr Howat falls to be dismissed.

LORD ADAM—I agree with your Lordships about the propriety of allowing the liquidator now to produce his title to sue—that is, to produce a document which had been produced before. The only difficulty was that there was an inadvertence to notice that what he had produced was not a certified copy. I think that is a mere inadvertence and that it is quite within our power to allow a certified copy to be produced now. If that is so, then there is no further objection to the pursuer's title as liquidator of the company.

That being so, the only question that remains is the question on the merits, whether the transactions in buying and selling between this liquidator and Mr Howat, in shares and stocks, were real transactions? What I understand by a real transaction is a transaction in which the pursuer was to be seller or buyer as the case might be, and which could by law be enforced against the other party. If that be so, I think, on the authorities, that the transactions in the present case are real

transactions. If Mr Howat could enforce delivery of any of the stocks he bought from Mr Lowenfeld, that was a real transaction. That is my view of the law applicable to such a case.

Now, it is not disputed that the documentary evidence shows upon the face of it—unless we can get behind it—that that was the nature of the transactions here. There are bought and sold notes in every case, and so far as appears from the documents everything bought and sold was a real transaction. I do not think anyone can dispute that it is competent to get behind the note, and to show that the contract apparently expressed upon the document was not a real contract between the parties; that although that contract so far as appears could be enforced, nevertheless it was by some other contract or some other agreement provable by writing or parole not a real transaction, and that that was the state of the fact. I do not in the least doubt that such a contract—a contract between the parties carrying on these transactions, with a right to demand delivery on the one hand, but without an obligation to deliver on the other—could be proved. I can quite understand that the contract might have included that, but I agree with your Lordship that there is no evidence of that here. I do not find in the state of the evidence that there was any such agreement or any necessity for such. I have no doubt at all that Mr Lowenfeld, the dealer in these stocks, knew his position quite well, and that any contract or agreement he made with Mr Howat for dealing in differences would render all his transactions with him illegal. If he made a contract for dealing in differences, he would conclude that there was no necessity whatever for him to enter into such an understanding with the purchaser. I have no doubt, on the other hand, that Mr Howat understood in his own mind perfectly well that Mr Lowenfeld would deal with him practically only for differences, and that the parties expected that that would be the course of dealing. But that to my mind is not enough. That is a great deal short of what I think is necessary. I think the party who says that the contract which is disclosed by the documents does not show any real transaction is bound to show some other contract or some other agreement which could be enforced by the one against the other, which will prevent either of them founding upon the contract produced. I find no such contract produced, and that being so, I think it is a real transaction, and that Mr Lowenfeld is entitled to recover the whole sum.

LORD M'LAREN—The Lord Ordinary has decided the case on the question of Mr Lowenfeld's title. As I understand, the Lord Ordinary's judgment is maintained because it is suggested that we have no power to allow additional evidence which the Lord Ordinary in his discretion has not seen fit to allow. We were referred to the provisions of the Court of Session Act, 1868, giving power to the Inner House on hearing an appeal from the Sheriff or inferior courts to allow additional evidence to be taken before themselves. Now, it was represented that the giving of that power in reference to cases coming before us on appeal was exclusive of the existence of a similar power in reference to actions which originate in this Court. But the condition of the two cases is entirely different. It may have been very right to give a power of allowing additional evidence where the cases coming from the inferior court are defective in the matter of proof, in order to remove any doubt that might be understood to have existed as to whether the Supreme Court could deal with a Sheriff Court case otherwise than as an appellate court. But when a case comes before us from the Lord Ordinary we are not reviewing the Lord Ordinary's judgment as a court of appeal. It is not a process of appeal at all; it is a reclamation, or, in other words, a re-hearing of the case by the same Court differently constituted, charged with a greater number of judges, and everything that might have been done by a single judge may be done by the Court upon the re-hearing. Therefore it appears to me that it was quite unnecessary that the Act of 1868, which was not an exhaustive mode of procedure, should deal with this subject, the power of this Court having existed all along, and being unquestionable. I am sure all your Lordships have known instances where this Court has ordered evidence to be taken on questions which have not been dealt with by the Lord Ordinary, because perhaps, in the view he has taken, evidence on those particular points was unnecessary. I am of opinion that we ought to allow production to be made, as your Lordship has suggested, of Mr Lowenfeld's title.

On the merits of the case, I may say, as I said in the case of *Shaw*, that it will always be extremely difficult to reduce a Stock Exchange transaction, or one carried on in a similar manner to a Stock Exchange transaction, to the level of a gambling debt. I think one difficulty is this, that the dealer generally has no interest as to the particular mode in which the settlement should be effected. It is a matter of perfect indifference to him whether the account is to be closed by a re-sale or by a re-delivery of stock, because if his customer likes to take delivery of the stock, the broker has only to go into the market and supply himself at the market price of the day. Therefore it is antecedently very unlikely that he should enter into a subsidiary engagement that would be of no benefit to himself in the matter of settlement, and which would at the same time expose the original transaction to be set aside on the ground of illegality if it turned out to be favourable to himself. The unsupported evidence of either party would never in ordinary circumstances be sufficient to displace the inference arising from the documents, when the evidence of the dealer, in accordance with his own interest, is that the transaction was a real transaction and

in accordance with the documents. Therefore I must say that as regards Stock Exchange transactions carried out in the ordinary course of business, the distinction between contracts for differences and real transactions is of purely theoretical interest and really does not afford mere speculators any available means of being released from their obligations. I concur with your Lordship that this case should be disposed of as your Lordship has suggested.

LORD KINNEAR—I have no doubt at all that the pursuer should be allowed an opportunity of producing his title, which certainly ought to have been produced before the close of the proof, but which from inadvertence he had failed to get certified.

Upon the merits I also agree with your Lordship. There is no question at all as to the law that the Court may refuse to enforce bargains which are not real transactions between the various parties, but are mere wagers for differences on the prices either of stocks or any other commodity between one man and another. I agree that the test which must be applied in order to determine whether any particular transaction is of that kind or not—whether it is a real transaction of purchase and sale, or a mere wager for differences—is to inquire whether or not by the contract as proved the purchaser would have an action to compel delivery of the subject sold, and the seller to have the price paid. Upon the contract as it appears from the face of the documents, I do not think there can be any question that in that sense the transactions between the pursuer and defender were real transactions. The only difficulty appears to me to arise from the evidence of Mr Howat, because if we were to accept that evidence, I should be very much disposed for myself to come to the conclusion that there was no contract at all, but a mere gambling transaction which neither party intended should have any effect otherwise than by paying the differences. But then the evidence of Mr Howat is directly contradicted by the evidence of Mr Lowenfeld, and the Lord Ordinary, who saw the witnesses, has come to an entirely different conclusion, that we must accept Mr Lowenfeld's testimony of the transaction and reject Mr Howat's. Reading the evidence and the documents before us, I come to the same conclusion, and I certainly am not prepared to differ from him. I think it is quite sufficient that upon the question of credibility the Lord Ordinary, who saw the witnesses, has indicated which side he ought to believe. I therefore agree in the judgment which your Lordship proposes.

In Lowenfeld's case the Court recalled the interlocutor reclaimed against, allowed the document now tendered to be produced, and decerned against the defender for the sum sued for with interest as concluded for.

In the case of Howat against Lowenfeld the Court adhered.

Counsel for Lowenfeld—Sol.-Gen. Graham Murray—Dundas—Deas. Agents—Simpson & Marwick, W.S.

Counsel for Howat — Jameson — C. S. Dickson. Agents—J. & A. Hastie, S.S.C.

Friday, November 20.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

MACRAE (BUCHANAN'S JUDICIAL FACTOR) *v.* MACKENZIE.

Superior and Vassal—Feu-Contract—Obligation to Build—Personal or Transmissible—Damages.

A superior feued ground to three parties, and the survivors or survivor, and the heir of the last survivor, on condition, *inter alia*, that the vassals should build within two years and maintain dwelling-houses of a certain value, failing which the feu-contract and all following thereon should, in the option of the superior, become null and void. After the lapse of the two years the last surviving vassal died in possession of the subjects without having implemented the obligation to build. His widow, his sole trustee, announced that she did not claim the subjects. The superior sought to have her ordained, as personal representative of her late husband, to erect the stipulated buildings or to pay damages.

The Court *assoilzied* the defender, *holding* (1) that although there was a personal obligation on the last vassal to fulfil the conditions of the feu, this obligation existed as a condition of holding the subjects, and did not attach to his personal representative, who was not vassal therein; and (2) that as there was no obligation affecting the defender which could been forced, she was not liable in damages.

Observed (*per* Lord Kinnear and Lord Adam) that the claim of irritancy merely conferred an additional remedy by the use of which the superior might enforce the conditions of the contract.

Horatio Ross Macrae, W.S., judicial factor on the trust-estate of the late Neil Griffiths Buchanan of Knockshinnock, Ayrshire, sued Mrs Mackenzie, the widow and sole surviving trustee of the late Kenneth Mackenzie, coalmaster, New Cumnock, for implement of certain obligations undertaken by the defender's husband under a feu-contract granted by Buchanan's trustees in May 1875.

By this contract the superior feued to the late Kenneth Mackenzie and three other persons carrying on business under the firm of the "Bank Coal Company," and the survivors and survivor of them, and the heir of the last survivor, as trustees for behoof of the company, two pieces of ground in the parish of New Cumnock and county of Ayr—"To