

Their Lordships reversed the interlocutors appealed from.

Counsel for the Appellant—Rigby, Q.C.—M'Laren. Agent—A. Beveridge, for Carment, Wedderburn, & Watson, W.S.

Counsel for the Respondent—The Lord Advocate—Strachan—Moore. Agent—Charles Turner, for John Elder, S.S.C.

## COURT OF SESSION.

Thursday, March 19.

### OUTER HOUSE.

[Lord Low.  
MILLAR (LIQUIDATOR OF THE PROPERTY INVESTMENT COMPANY OF SCOTLAND, LIMITED) v. AIKMAN AND OTHERS.

*Company—Winding-up—Compensation of Debts.*

A shareholder in a property investment company having received from the manager of the company a letter in which he stated that he was willing to hold whatever money might be deposited in his name as paying, so far as its amount might suffice, any calls that might be made upon his shares, deposited certain sums with the company. The deposits could only be uplifted on giving a month's notice. The company having been ordered to be wound up by the Court, he refused to pay a call made prior to but not payable till after the commencement of the winding-up, and a call made by the Court in the winding-up, and claimed to compensate his liability under these calls by the sums at his credit on deposit with the company.

*Held* that he had no such right of compensation, and was liable in payment of the calls.

Andrew Aikman, leather merchant, Edinburgh, was the holder of ninety-eight shares of £10 each in the Property Investment Company of Scotland, Limited, incorporated under the Companies Acts 1862 and 1867. Upon these shares prior to 1888 £5 had been paid up. On 18th February 1888, after some correspondence between Mr Aikman's firm of A. & D. Aikman and Peter Couper, the manager of the company, as to the terms on which the company would receive deposits from Mr Aikman, Mr Couper wrote to A. & D. Aikman the following letter—"As requested in your letter of yesterday, I beg to state that the rate of interest allowed on a deposit from your firm will be 4½ per cent. on one month's notice, and that I am willing to hold whatever money may be deposited in the name of your firm, or in your Mr Andrew Aikman's name, as paying (so far as its amount may suffice to that end) any

calls that may be made upon Mr Andrew Aikman's shares." On 27th February 1888 Andrew Aikman lodged with the company on deposit-receipt, at 4½ per cent. interest, the sum of £500, and received in exchange therefor a deposit-receipt endorsed as follows—"The within deposit to bear interest at 4½ per cent. When the deposit is to be uplifted, one month's previous notice is required to be given." On 11th November 1889 £300 were repaid to account thereof, and on 16th December 1889 £98 were repaid to account thereof, leaving a balance of principal of £102 due thereon. On 13th March 1888 A. & D. Aikman lodged with the company on deposit-receipt, at 4½ per cent. interest, the sum of £200, and received in exchange therefor a deposit-receipt endorsed as follows—"The within deposit to bear interest at 4½ per cent. When the deposit is to be uplifted, one month's previous notice is required to be given. If the deposit, however, is not then to be uplifted, no notice requires to be given, and the deposit will be held to be renewed for a like period." The said sums deposited were treated as ordinary deposits in the books and balance-sheets of the company, and interest at the said rate was paid from time to time on the sums due at Whitsunday and Martinmas half-yearly up to and including the interest due at the term of Whitsunday 1890. In December 1889 another call of £1 per share was paid by Mr Aikman.

On 30th July 1890 a petition was presented by certain shareholders of said company praying that it should be wound up by the Court, and on 13th August 1890 the company was appointed to be wound up by the Court, and Robert Cockburn Millar, C.A., Edinburgh, was appointed liquidator.

At 30th July 1890, the date of the commencement of the winding-up, £6 had been paid up by Mr Aikman on his shares as before mentioned. On 14th July 1890 a call of £1 per share had been made, but this call was not payable till 13th August 1890. On the 27th January 1891 a further call of the £3 remaining uncalled was made by the Court. Mr Aikman having intimated to the liquidator that he intended to withhold payment of these two calls of £1 and £3 in respect that he was entitled to set off against these calls the sums due by the company to him and his firm in respect of their deposits, and he and his firm of A. & D. Aikman having lodged affidavits and claims in the liquidation in which they claimed this right of compensation, the liquidator presented this note in which he prayed the Court "to find and determine that there was no valid agreement between the company and Mr Aikman or A. & D. Aikman (who were called as respondents) such as was alleged in the said affidavits and claims, and that the calls made upon the 98 shares in the said company, belonging to the said Andrew Aikman, and in respect of which he was a contributory, so far as said calls were unpaid, were payable by him to the official liquidator, free from any right of

retention, set-off, or otherwise in respect of the sums due under said two deposit-receipts, and also that the sums due under said deposit-receipts were not prepayment to that extent of the said calls."

The respondents having lodged answers, the Lord Ordinary (LOW) pronounced the following interlocutor:—The Lord Ordinary having heard counsel for the liquidator, and for Andrew Aikman, and A. & D. Aikman, on the note and answers for them respectively, "Finds and determines that there was no valid agreement between the company and the respondents such as is alleged in the affidavits and claims mentioned in the said note for the liquidator, and that the calls made upon the 98 shares in the said company belonging to the said Andrew Aikman, and in respect of which he is a contributory, so far as said calls are unpaid, are payable by him to the official liquidator free from any right of retention, set-off or otherwise, in respect of the sums due under the two deposit-receipts mentioned in the said note and answers, and also that the sums due under said deposit-receipts are not prepayment to that extent of the said calls, and decerns: Reserving to the respondents their right to claim a preference on the surplus assets of the company, if any, after the claims of the creditors of the company are satisfied for repayment of said calls, and reserving to the liquidator his answer thereto: Finds the respondents conjunctly and severally liable to the official liquidator in expenses," &c.

"*Opinion.*—It is admitted that Mr Aikman has no good answer to the call made in the liquidation, but he maintains that he is entitled to retain the amount of the call made prior to the liquidation (although the winding-up commenced before the call became payable) in consequence of an alleged agreement entered into between him and Mr Couper, the manager of the company, by the letters printed in the appendix to the note.

"By these letters Mr Couper agreed that the company should hold any money which Mr Aikman should deposit with them as paying any calls which might be made upon him, and that although the receipts for the sums deposited might bear no reference to the agreement.

"I do not think it necessary to consider what would have been the effect of the agreement if the question had arisen while the company was still carrying on business. In that case much might depend upon whether Mr Couper had authority to enter into such an agreement, and it might be doubted whether Mr Couper had authority to enter into such an agreement, and it might be doubted whether the agreement was consistent with the provisions of the 25th section of the Act of 1867. However that may be, I think that the liquidation of the company made a material difference in the position of matters. The calls then became payable to the liquidator as a statutory trustee for the equal and rateable payment of all the creditors, and it is settled that a shareholder who is also a creditor cannot set the debts due by the

company to him against the calls due by him to the company—*Cowan v. Gowans*, 5 R. 581; *Black & Company's* case, 8 Ch. 254. But that is just what Mr Aikman maintains that he is entitled to do. The agreement was made before any money had been deposited, and when it was deposited it was lent to the company in the ordinary course and for the purposes of their business, and one month's notice was required before the money could be uplifted. It was therefore not a case of an agreement to set-off a present liability of the company to pay cash against future calls such as there was in the case of *Jones, Lloyd & Company*, 41 Ch. Div. 159. In the present case the agreement was, that if and when calls were made, any money upon deposit with the company, although it could only be called up upon a month's notice, should be returned on paying the calls. I think that such an agreement was similar in its nature to that in *Black & Company's* case, to which I have referred, where the company agreed to set the price of engines supplied by the shareholder against calls, and to that in *Cowan v. Gowans*, where Gowans had taken shares upon the condition that calls thereon should be deducted from the price of the theatre which he had contracted to build. In both of these cases it was held that after the liquidation the debts could not be set off against each other, and I am of opinion that the same rule falls to be applied in the present case."

Counsel for the Liquidator—H. Johnston.  
Agents—Morton, Smart, & Macdonald,  
W.S.

Counsel for the Respondents—John  
Wilson. Agents—Watt & Anderson, S.S.C.

Saturday, June 6.

## SECOND DIVISION.

### SMITH v. SMITH AND OTHERS.

*Will and Succession—Foreign—Construction—Domicile.*

A domiciled Scotsman who possessed heritable property in New Zealand, where he often lived, executed there a last will and testament, which was drawn by a solicitor according to the law of New Zealand. *Held* that this will must be construed and his testamentary succession regulated by Scots law, as the law of the testator's domicile.

Melville Babington Smith was born on 24th September 1838, of Scottish parents, in the parish of Tinwald and county of Dumfries. In 1862 he and his elder brother, George Greig Smith, went to New Zealand, where George occupied himself in sheep farming, while Melville engaged in various occupations. In the course of his business he travelled a great deal, and made various visits to Scotland. In 1881 the two brothers purchased jointly the sheep farm of Pouparé,