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-reccipts 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 Pouparæ,

near Gisborne, which was worked under the personal superintendence of both for their joint behoof. In February 1885, George, being in bad health, determined to visit Scotland, and Melville resolved to accompany him. Before starting both brothers employed a solicitor at Gisborne to make their wills, and they then set out, leaving the farm in charge of a manager. They arrived in Scotland, where George died on 22nd January 1886. He left a widow, Mrs Elizabeth Wright or Smith, and two pupil children, Walter and Mary Smith. By his above-mentioned will he appointed his widow to be the guardian of his children. She was also his sole executrix accepting and acting under his will.

In consequence of his brother's death it became necessary to realise the farm of Pouparæ, and Melville tried, but in vain, to dispose of it through a London agency. He accordingly went to New Zealand himself, and the farm and stock were realised in November 1886, and accounts between the brothers afterwards adjusted by a New Zealand accountant. Melville had the share of the estate falling to him invested in stock issued by the Union Bank of Australia in London. Having settled these matters, he started to return to Scotland, but was taken ill at New York, and died there upon 9th July 1887. He was never married. In his portmanteau was found the will of 6th February 1885.

By this his last will and testament he revoked all previous wills. He appointed two gentlemen in New Zealand to be the "trustees and executors of this my will;" he bequeathed certain legacies; and lastly—"And I give, devise, and bequeath all the rest, residue, and remainder of my real and personal estate, of whatsoever nature and kind soever, unto my said trustees upon trust, to sell and convert the same into money, and out of the proceeds of such sale and conversion, in the first, to pay all my just debts, funeral and testamentary expenses, and then to pay the residue thereof in manner following, namely, one-third of such nett proceeds to my brother George Greig Smith and his heirs absolutely; one other third to my brother James Smith of Park End, Lochmaben, Scotland; and the remaining one-third equally between my sisters, Jane Smith and Mary Smith, as tenants in common: And I devise unto my said trustees all estates vested in me as trustee or mortgagee, according to the equities thereof.—In witness whereof, I have to this, my last will and testament, set my hand this 6th day of February 1885. —MELVILLE BABINGTON SMITH. — Signed by the said testator Melville Babington Smith as and for his last will and testament, in the presence of us, both present at the same time, who, in his presence, at his request, and in the presence of each other, have hereto subscribed our names as witnesses—Edward Chas. Ward jr., solicitor, Gisborne; Charles C. Lucas, solicitor's clerk, Gisborne."

After all the purposes of the will had been satisfied except the bequest to "George Greig Smith and his heirs absolutely," questions arose between the parties, and this special case was presented for the opinion of the Court by (1) Mrs Mary Smith, the surviving sister and executrix-dative of Melville Babington Smith; (2) the surviving brothers and sisters of Melville Smith or their representatives; (3) the children of George Greig Smith and their mother as their guardian, nominated and appointed by him in his will of 6th February 1885, being all the known next-of-kin and heirs *in mobilibus* of George Greig Smith.

The second parties maintained that Melville Babington Smith died domiciled in New Zealand, and that the law of that country fell to be applied in construing his will. They further maintained that even if the testator died domiciled in Scotland the law of New Zealand should be applied. It was admitted by all parties that by the law of New Zealand the bequest to George Smith lapsed by his predecease, and that the parties entitled to share in the residue would be the next-of-kin of Melville Babington Smith. The third parties maintained that the testator died domiciled in Scotland, that the law of Scotland fell to be applied in construing his will, and that by it the bequest to George Greig Smith and his heirs absolutely, did not lapse by his predeceasing the testator, and fell now to be paid to his children as his heirs.

These questions were submitted—"(1) Was Melville Babington Smith domiciled in Scotland at the date of his death? (2) Assuming that the first question is answered in the affirmative, does the law of Scotland or the law of New Zealand regulate his testamentary succession?"

At the bar it was admitted and a minute was lodged by the second parties to the effect that Melville Babington Smith was a domiciled Scotsman when he died.

The second party argued—It was admitted that Mr Smith was domiciled in Scotland, and it was no doubt true that the usual course was to construe the will by the law of the testator's domicile—M'Laren on Wills, i. 39. The Act of 1861 (24 and 25 Vict. cap. 114) provided that a will should be held good if made according to the law of the place where the testator was residing at the time. But the presumption that the law of the domicile was to rule could be redargued, and in this case the law of New Zealand ought to rule. The intention of the testator must rule, and the testator intended New Zealand and not Scottish law to rule. At the time the settlement was made the testator was possessed of heritable property in New Zealand, and had no property elsewhere—*Mitchell & Baxter* v. *Davies*, December, 3, 1875, 3 R. 208; *Rainsford* v. *Maxwell*, February 6, 1852, 14 D. 450. The persons who were appointed as trustees were resident in that country—*Ferguson* v. *Majoribanks*, April 1, 1853, 15 D. 637. The testator had gone to a New Zealand solicitor to prepare the deed, who had used the professional language to which he was accustomed in drawing up the deed, supposing it was to be construed by the law

which was applicable to the words he used. There were various technical phrases which could only be explained by the law of New Zealand, and it was therefore proper to have the whole will construed by that law —*Thomson's Trustees* v. *Alexander*, December 18, 1851, 14 D. 217; *Trotter* v. *Trotter*, June 10, 1829, 3 W. & S. 407.

The third party argued—Assuming that Mr Smith's domicile was Scotland, there was no reason why the ordinary rule that the law of the domicile governs the construction of the will should be put aside—Storey's Conflict of Law, 661; Bar's International Law, 476. The will was validly drawn up by the New Zealand solicitor, the only person to whom Smith could go in order to have his wishes put into shape by a professional man; it was therefore valid to convey moveable property in Scotland, and must be construed by the law of Scotland—*Purvis' Trustees* v. *Purvis' Executors*, March 23, 1861, 23 D. 812. The same rule obtained in England—*Anstruther* v. *Chalmer*, February 6, 1826, 2 Simon's Rep. 1; *Enohin* v. *Wylies*, April 3, 1862, 10 Clark's Rep. (H.L.) 1. Although there were some technical words in the will that did not afford sufficient indication of the intention of the testator to induce the Court to hold that it must be construed according to New Zealand law—*Bradford* v. *Young*, April 30, 1885, 29 L.R., C.D. 617. All the facts were against the idea that the testator wished any other law than that of Scotland to govern the construction of his settlement.

At advising—

LORD YOUNG—The first question submitted by the parties for the determination of the Court involves a question of fact, and is therefore a question we cannot determine under a special case. But the parties agreed at the bar that it should be held as admitted that Melville Babington Smith was domiciled in Scotland at the date of his death. With that admission I have no hesitation in answering the second question. I am of opinion that Mr Smith's will must be construed and his testamentary succession regulated by the law of Scotland, that being the law of his domicile, and there being nothing in Mr Smith's will, or in the circumstances attending its execution, to indicate any intention on his part that his testamentary succession should be regulated by any other law.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred.

The Court pronounced this interlocutor:—

"The Lords having considered the special case, and heard counsel for the parties thereon, in respect the parties by their counsel admit that Melville Babington Smith was domiciled in Scotland at the date of his death, Answer in the affirmative the first of the questions stated in the case; and with regard to the second question are of opinion that his testamentary succession is regulated by the law of Scotland: Find and declare accordingly, and decern."

Counsel for the First and Second Parties —Goudy—Cullen. Agent—James Forsyth, S.S.C.

Counsel for the Third Party—C. K. Mackenzie — Hunter. Agents — J. C. & A Stewart, W.S.

Thursday, July 9.

SECOND DIVISION.

[Sheriff of the Lothians.

KRUUSE AND OTHERS *v.* DRYNAN & COMPANY.

Ship—Charter-Party—Demurrage.

A charter-party provided, "the cargo . . . to be discharged as quick as the vessel can discharge," and prescribed £8 per day as the rate of demurrage. The vessel arrived in port early on the morning of Wednesday. The cargo was not discharged until the afternoon of the following Monday, although the time actually occupied in discharging was twenty-six hours.

In an action against the shippers they contended that the delay was owing to the failure of a railway company to supply them with waggons.

Held that the defenders must accept responsibility for the delay, and that they were liable in demurrage for four days.

The steamship "Aage" of Nyburg, owned by Wilhelm Kruuse and others in Denmark, arrived in Bo'ness Roads with a cargo of pit-props upon the evening of Tuesday, 2nd September 1890, and on the morning of 3rd September, at four o'clock, entered the dock, when the harbour-master appointed her a discharging berth on the south side of the harbour. She was ready to begin discharging at six o'clock that morning. After some delay it was found that A. B. Drynan & Company, shipbrokers and pit-wood importers, Bo'ness, were the parties to whom the cargo was consigned, and they began discharging upon Wednesday at two o'clock in the afternoon. The discharging was not completed until 6 p.m. on Monday 8th September, although the time actually occupied in the work was twenty-six hours.

The owners of the vessel raised an action against the consignees for £32 sterling, being the amount of demurrage for four days at £8 per day.

The charter-party—which was in the Danish language, and the translation of which was admitted by both parties to be correct—was in these terms—"4. The cargo to be loaded as quick as vessel can receive, and to be discharged in Bo'ness as quick as the vessel can discharge. ready to discharge, and should the vessel over this time be detained, then is payable for every lay-day £8, besides freight, &c. 5.