

right of the depositor when sued on the note to claim set-off would be indisputable under English law: *Anderson's Case*, L. R. 3 Eq. 337. The statute in terms preserves that right in cases to which it applies. . . . [Reference to *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q. B. at p. 579; *Ontario Bank v. Routhier*, 32 O. R. 67; *Berry v. Brett*, 6 Bosworth (N.Y.) 627.

But it may be argued that the liability of the indorser, because conditional upon non-payment by the maker at maturity and the giving of due notice of dishonour, was not, at the time of the commencement of the winding-up, a debt due or accruing due to the bank within the meaning of sec. 57 of the Winding-up Act, and that, therefore, the indorser when sued has no right of set-off. In *Vanier v. Kent*, Mr. Justice Wurtelle says of this section: "What this clause means, and what appears to have been intended, is that any right which any party having dealings with the bank may have had to claim compensation (set-off) is not taken away by the effect of the winding-up under the Act; but the right to be enforced must be one which would have existed if the bank had not been placed under the operation of the Act. The section maintains an existing right, but it does not create a new one." Such being its object and purview, neither should this section be held to deprive a defendant of any right of set-off, which under the *lex fori* he would have had against the bank, if solvent and itself the plaintiff in this action. Though perhaps the inchoate liability of an indorser before maturity is not within the language of sec. 57, I decline to construe that section as so exhaustive and so prohibitive of all claims of set-off, which it does not in terms declare to exist, as to prevent this Court giving effect to a claim of set-off so eminently just and equitable as that which I propose to allow the defendant *McDiarmid* to set up in regard to the balance to the credit of his deposit account. His liability existed potentially at the time of the commencement of the winding-up; it does not arise out of any subsequent transaction, and the many authorities denying the right of set-off in such cases may on that ground be distinguished.

Upon the defendants exercising the privilege accorded to them of amending their defence, judgment may be entered allowing them the set-off which I have permitted them to plead, declaring the claim of plaintiffs satisfied thereby, and the right of defendant *McDiarmid* to rank upon the estate of the bank in the hands of the liquidators in respect of the balance of his claim upon his deposit account, and dismissing this action.