ORIGINAL CIVIL.

Before Mr. Justice Wallis.

IN THE MATTER OF C. L. CANTHOM & Co., INSOLVENT.* 1909. March 1.

Indian Insolvency Act, 11 and 12 Vic., c. 21, s. 39—Right of set off exists against Official Assignee in respect of bills discounted before and dishonoured after insolvency.

Under sections 39 and 40 of the Indian Insolvency Act, anything can be set off in India which can be set off in England under the Bankruptcy law in force for the time being. Mutual credits which may be set off include credits which have a natural tendency to terminate in debt and not merely credits which must terminate in debts. Claims in respect of bills discounted for the insolvent before insolvency and dishonoured by the makers after insolvency, can be set off under section 39 of the Indian Insolvency Act.

Miller v. *National Bank of India*, [(1892) I.L.R., 19 Calc., 149], dissented from.

Young v. *Bank of Bengal*, [(1836) 1 Moo. I.A., 87], referred to and explained.

Alsager v. *Currie*, (2 M. & W., 751), followed.

THE facts for the purpose of this case are fully set out in the judgment.

C. F. Napier for the Official Assignee.

Nugent Grant for the Chartered Bank.

JUDGMENT.—In this case, the Official Assignee has taken out a garnishee summons calling on the Chartered Bank to show cause why they should not deliver to him Rs.1,330-9-3, being the balance of the insolvents' current account and four trade bills dated the 11th August 1908. According to the agreed statement of facts, these four bills had been sent to the Bank to be discounted on the 11th August, but the Bank had not discounted them on 13th August, the date of the vesting order. As regards these bills it seems clear that no credit or debt had arisen in respect of them on the date of the insolvency and that the Bank can have no claim to set them off. Nor can the Bank claim to retain them by virtue of their lien as Bankers. Such lien under section 170 of the Indian Contract Act is only for the general balance of account, and the balance at the date of insolvency was in the insolvents' favour. The Official Assignee is therefore entitled to succeed as regards these four notes. As regards the sum of Rs. 1,330-9-3, the Bank claim a set off in respect of certain promissory notes payable to the insolvents which the insolvents indorsed to the Bank and the

* Insolvent Petition No. 167 of 1908.

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Bank discounted prior to the insolvency and which have since been dishonoured by the makers. According to the decision of Mr. Justice Trevelyan in *Miller* v. *National Bank of India*(1) there is no right of set off under section 39 of the Indian Insolvency Act in respect of a bill or note which has been discounted for the insolvent but has not been dishonoured until after the date of the insolvency, as if the bill is honoured by the acceptor or the note by the maker, there will be no debt due from the insolvent; and according to the view taken by the learned Judge, it is only claims which of their nature terminate in debts that can be set off under section 39 of the Indian Insolvency Act. As this case had not been cited before me on the first argument, I directed the case to be re-argued. Mr. Napier for the Official Assignee now contends that this decision is in accordance not only with the leading case of *Rose.* v. *Hart*(2), but also with *Young* v. *Bank of Bengal*(3) a decision of the Privy Council on the earlier Indian Act and he invites me to follow these decisions rather than late English cases such as *Alsager* v. *Currie*(4) which go to show that mutual credits which may be set off include credits which have a natural tendency to terminate in debts, and not merely credits which must necessarily terminate in debts. After such consideration as I have been able to give to the authorities I am unable to follow the decision in *Miller* v. *National Bank of India*(1). In the course of his judgment the learned Judge observed that there is nothing in the Indian Act to permit everything proveable being set off and I was at first much influenced by this as rendering the late English cases inapplicable to section 39 of the Indian Insolvency Act. This ruling, however, is opposed to the decision of the Privy Council in *Young* v. *Bank of Bengal*(3) already cited in which it was held that under section 36 of 9 Geo. 4, c. 73, the law of set off under the Indian Act was entirely assimilated to the English Act then in force 6 Geo. 4, c. 16. S. 36 of 9 Geo. 4 has, in the present Act, been split up into two sections 39 and 40, but these sections substantially reproduce the language of section 36 of the previous Act. Construing the

(1) (1892) I.L.R., 19 Calc., 146.
(2) 2 Sem. L.C. (9th Ed.) 324; 8 Taunt, 499.
(3) (1836) 1 Moo. I.A., 87.
(4) 12 M. & W., 751.

present sections in the way in which that section was construed by the Privy Council in *Young* v. *The Bank of Bengal*(1) I hold that anything may be set off in India which can be set off in England under the Bankruptcy Law for the time being. In this case the Bank is undoubtedly entitled to prove in respect of the bills discounted by it and dishonoured after insolvency and this being so, it is entitled to set them off, and the present case is on all fours with *Alsager* v. *Currie*(2).

Further, even if we confine ourselves to the language of section 39 of the present Act, I do not think Lord Brougham's judgment in *Young* v. *Bank of Bengal*(1) can be relied as showing that a credit does not arise within the meaning of the section when a bill has been discounted and is outstanding at the date of the insolvency. On the contrary at the bottom of page 149 he observes "supposing the notes discounted then due *or supposing them not due* it would have been a case of credit given to Palmer & Co. by them (the Bank) and of debt due by them to Palmer & Co. and so clearly within the statute." The specific statement that discounting bills is a case of giving credit within the meaning of the section appears to show that some of the general observations in the judgment were not intended to apply to a case such as this; and besides Parke, B., who was one of the members of the committee who heard *Young* v. *Bank of Bengal*(1) explained that decision in *Alsager* v. *Currie*(2) as proceeding upon the ground that no credit of any kind had been given by Palmer & Co. to the Bank before the date of the insolvency and this was the ground taken in Sir William Follett's argument for the appellant which contains one of the fullest and clearest statements of the statute and case law as to mutual credits to be found anywhere.

In the result I hold on this part of the case that the Bank is entitled to set off its claim in respect of the notes discounted before insolvency and since dishonoured.

Official Assignee's costs out of the estate.

David & Brightwell, Solicitors for Chartered Bank.

Short & Bewes, Official Assignee.

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(1) (1836) 1 Moo. I.A., 87. (2) 12 M. & W., 751.