

an older machine of the same sort, which machine was annexed by the company to the freehold as a permanent fixture, with the result that, when the defendant took possession of the land, upon the forfeiture by the company, he also took possession of the machine so annexed. In another action, the surety contended that he had been discharged because the defendant did not, under the Conditional Sales Act, proceed to sell the machine, but used it as part of the brick-making plant. The circumstance could not afford a legal defence to the claim against the maker of the notes, the Excelsior company.

Reference to *Canadian Westinghouse Co. v. Murray Shoe Co.* (1914), 31 O.L.R. 11; *Utterson Lumber Co. v. H. W. Petrie Limited* (1908), 17 O.L.R. 570.

The defendant was entitled to recover against the Excelsior company the full amount due and owing upon the notes, and was, in the circumstances, under no compulsion to sell the machine for which they were given.

The Court was unable to agree with the defendant's further contention that he was entitled to set off the amount of the notes against the plaintiff's claim. The defendant should be declared entitled to rank upon the assets in the liquidation, but not to the set-off asserted.

The claims in both cases were pleaded as counterclaims. That in itself would not be fatal if the correct conclusion should be that the claims, although called counterclaims, are really set-offs: *Gates v. Seagram* (1909), 19 O.L.R. 216; *Judicature Act*, R.S.O. 1914 ch. 56, sec. 126; *Winding-up Act*, R.S.C. 1906 ch. 144, sec. 71. The defendant's difficulty, however, is, that the plaintiff's claim is not a debt, but a claim really, in form at least, of detinue, or for damages. It is not, therefore, a case of mutual debts, and hence not the proper subject of set-off: *Eberle's Hotels and Restaurant Co. v. Jonas* (1887), 18 Q.B.D. 459; *Moody v. Canadian Bank of Commerce* (1891), 14 P.R. 258.

The appeal should be allowed to the extent indicated, but without costs. The plaintiff, as liquidator, to have his costs of the appeal out of the estate.