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*March 20, 21.

*June 22.

GEORGE CRAIN (DEFENDANT).....APPELLANT;

AND

OSCAR WADE, LIQUIDATOR OF THE EXCELSIOR BRICK COMPANY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Contract—Sale of brickyard—Default—Repossession—Ownership of bricks—Set-off—Mutual debts—"Ontario Judicature Act," R.S.O. [1914] c. 50, s. 126—"Winding-up Act," R.S.C. [1906] c. 144, s. 71.

B., owner of a brickyard, gave an option of purchase to V. part of the price to be paid in debentures and stocks of a company formed at the time. The option was assigned to and exercised by said company, which made default in the payments and afterwards went into liquidation under the Dominion Winding-up Act. B., under the terms of the option agreement, re-entered into possession of the brickyard and of the bricks manufactured and in process of manufacture. W., liquidator of the company, brought action against B. for the value of said bricks.

Held, affirming the judgment of the Appellate Division (35 Ont. L.R. 402,) that the manufactured bricks were the property of the Company and B. was liable to account for their value.

Held, also, that B. was not entitled to set-off against the liquidator's claim the amount of the debentures of the company transferred to him as part of the price of the property.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), varying the judgment at the trial in favour of the plaintiff.

The facts are sufficiently stated in the above headnote.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 35 Ont. L.R. 402.

Chrysler K.C. and *McClemont* for the appellant.

A. C. McMaster for the respondent.

THE CHIEF JUSTICE.—I take no part in this judgment having been absent from court during a great portion of the argument.

DAVIES J.—I concur in the reasons of Mr. Justice Anglin for dismissing this appeal.

IDINGTON J.—The correct construction of the agreement in question, whether considered as an option or actual purchase, seems to me to fail to give the appellant, on its termination, any title to the bricks manufactured by the respondent company.

The appellant in taking possession of the lands upon which these bricks were situated was doing what he was rightly entitled to do, and his merely doing so did not assert, and I am by no means certain that in anything else he did relevant thereto he asserted, such dominion over the bricks in question as to be liable in trover.

His acts in completing the burning of such bricks as were being burnt in the kilns may have been of such a character as consistent with another view than that arising from such an assertion of dominion over them as to render him liable in trover.

Even if he might be found so liable it would not render the property his until the respondent liquidator had assented thereto as the correct interpretation of what had transpired.

The liquidator served a demand for the possession of property which as such he was entitled to, and failed to receive a delivery pursuant thereto by appellant.

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At least such I take to be the facts, though strangely enough counsel for the appellant has alleged in his factum that there was no evidence of service of the demand, yet inconsistently in a previous part of the same factum, at page 6 thereof, the statement of events appears in which I find the following:—

> On or about the 25th day of April, the plaintiff Wade, hereinafter referred to as the liquidator, served upon the defendant a demand of possession of all the assets belonging to the estate of the Excelsior Brick Company.

I have no doubt that at the trial when counsel for respondent stated the fact of service and filed notice everyone concerned proceeded upon the assumption that it had been served as stated. It is now rather late to start the inquiry anew for express proof.

I am of the opinion that an action so founded and established, resulting in an assessment of damages and judgment therefor in favour of a liquidator, under the "Winding-Up Act," does not in its result constitute a debt which may, under section 71 of said Act, be held one for the recovery of that which was "due at the commencement of the winding-up."

The claim to set off in respect thereof seems therefore, as does also that in respect of the notes for machinery, to be clearly untenable under said section.

The fact that under the "Judicature Act" a counterclaim, when established, may be set off against something allowed a plaintiff in same action, does not help appellant herein when the liquidator as trustee is limited to, and bound by, the express provision of the said section 71 to observe only such rules of set off as usually understood arising from the mutual relations of the company and its creditors or debtors as existent at the commencement of the winding-up proceedings.

It might, at the option of the company before that

event, have been quite competent for it to have waived the tort if committed as urged in March, and sued for goods sold and delivered, but it was not compellable to adopt that course, and could have sued in tort when set off, as usually understood, would have been as to damages recovered in such a suit, out of the question.

In any way I can look at the matter there is no room for the application "of the law of set off as administered by the courts" of Ontario within the meaning of the said section 71.

As to the other clauses incidentally, as it were, set up in regard to a number of items, I see no reason for interfering therewith as finally disposed of by the courts below.

The appeal should be dismissed with costs.

DUFF J.—I see no reason to doubt that the substance of the brick, whether manufactured, or in the course of manufacture, had become so completely separated from the soil, and had been dealt with in such a manner as to give them the character of personal property, and the consequence follows, I think, that they were the property of the Excelsior Brick Co. The agreement of sale imposed upon the company the duty of carrying on the business which comprised, not only the manufacture, but the selling of brick; and it must have been contemplated that the purchasers should be entitled to deal with the brick once they had assumed that character as their own. Indeed, putting out of view any question as to other rights, and without attempting precisely to characterize the right of the company in the land derived from the agreement, it is perfectly clear that the company at least was entitled to possession, and to take clay for the purpose of making brick, and to manufacture it into

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brick. Putting this right at the lowest, treating it as mere *profit à prendre*, it would confer upon the company a title to what was taken as soon, at least, as that was devoted to the purpose to which the company was entitled to apply it after actual separation from the soil. It would not follow that an amorphous heap of clay lying on the surface would become the property of the company, but to clay shaped into the form of bricks, and actually in process of manufacture, as such, the company would have a title. That being so, Mr. McMaster's argument convinces me that there was no error in Mr. Justice Middleton's estimate of the amount of damages to which the liquidator is entitled for conversion.

The important question in controversy is whether section 71 of the "Winding-Up Act" entitled the appellant to set off as against the liquidator's claim for conversion moneys due to him in respect of his debentures. Section 71 is in the following words:—

> The law of set-off, as administered by the courts, whether of law or equity, shall apply to all claims upon the estate of the company, and to all proceedings for the recovery of debts due or accruing due to the company at the commencement of the winding-up, in the same manner and to the same extent as if the business of the company was not being wound up under this Act. R.S., ch. 129, sec. 57.

The first condition which the appellant's claim must satisfy is that the claim the liquidator seeks to enforce was a claim due or accruing due at the commencement of the winding-up proceedings. I have come to the conclusion that this condition is fulfilled. The decision of the point turns on the question whether the evidence establishes wrongful conversion of the company's chattels before the commencement of the winding-up by the appellant. The appellant, acting within his rights under the agreement, by virtue of which the Excelsior Brick Co. occupied the premises on which

the bricks were made, and from which the material was taken for making them, rightfully took possession of those premises, and was in possession of them when the winding-up proceedings began. It is an undisputed fact that when the appellant assumed possession of the premises, the chattel property in respect of the conversion of which the liquidator has recovered judgment for damages against him, passed into his physical control, indeed in a qualified sense passed into his possession.

That, I say, is indubitable. But here the critical point is, did he take possession of the chattels in this sense that the control he exercised over them was a control excluding recognition of the true owner's rights? It is obvious enough that complete possession of the premises might very well involve control over the chattels as against persons having no rightful authority to interfere with them without creating any impediment in the way of the owner in exercising his rights or involving any denial of those rights because the right of Crain to assume possession of the premises on default of payment of the purchase money would in the ordinary course lead, in the exercise of it, to such control over the chattels as would exclude trespassers from interfering with them until the company (the owner) should remove them. Repossessing himself therefore of the premises on which the chattels were, and thereby acquiring *detentio* in respect of the chattels is in itself, for our present purpose, a neutral circumstance.

If, however, with this circumstance there are coupled circumstances shewing an intention on Crain's part to reduce the chattels into his possession and to exclude the true owner therefrom existing at the time he repossessed himself of the land on which they

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were, then all the elements of the wrong of conversion are present; because every person is guilty of a conversion who, without lawful justification, takes a chattel out of the possession of any one else, and the act of assuming physical control, if done with the object of assuming possession as against persons rightfully entitled to possession and having possession in fact, is a taking within the meaning of the rule: *Wilbraham* v. *Snow*(1); and it makes no difference, I think, whether the conduct of the taker relied upon to establish the existence at the critical moment of the *animus possidendi* is contemporaneous or subsequent conduct.

The conduct of the appellant disclosed by the evidence in the present case manifests very clearly an intention on his part to take possession, not merely of the land, but of the chattels as well, under a belief and a claim that they belonged to him and a cause of action for conversion thereupon immediately accrued to the company, although at the moment, the available evidence in support of it may have been scanty or insufficient.

It is, moreover, I think, immaterial that the claim is made and properly enough made by the liquidator in his own name. The liquidator sues in a fiduciary capacity. As Mr. Chrysler pointed out in his very able and most valuable argument, the *persona* of the company does not disappear upon the granting of the winding-up order or on the appointment of a liquidator (sec. 20 "Winding-Up Act"), and the liquidator sues as trustee for the company.

I have been forced to the conclusion, however, that under a proper application of the provisions of the

(1) 2 Saun. 47*a*.

"Ontario Judicature Act," and Rules relating to set off and counterclaim, this case is not within section 71. I agree that there is much to be said in favour of the view that the substantial difference between the right of set off and the right of counterclaim has been greatly reduced by the Ontario rules. Where the object of both the action and the counterclaim is to enforce a pecuniary demand, and both are tried at the same time or proceedings either in the action or on the counteraction, there being no defence, are stayed until after the trial of the other, judgment is eventually given in favour of the plaintiff or defendant, as the case may be, for the difference between the sums severally recovered. On the other hand, claims which might be the subject matter of counterclaim cannot be set up by way of defence, unless they fall also within the scope of the classes of claims which may be the subject of set off by force of the provisions of the "Judicature Act" (secs. 126-128). Still an undefended action where a counterclaim is set up may in the discretion of the court be stayed until the trial of the counterclaim. The authority of the court to stay is, of course, like every judicial authority to be exercised on principle, and it may therefore be said that in such cases the defendant has a right if in the circumstances it is, in the judgment of the court, just and convenient to have the undefended action stayed until the counterclaim is disposed of; and that being done he is entitled as of right to have the amount recovered on the counterclaim deducted, if it be the lesser sum, from the amount to which the plaintiff is entitled in the action.

It is nevertheless true that under the Ontario rules a defendant is not entitled *ex debito justitiæ* to set up either in form or in substance by way of defence claims

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which, though proper subjects for counterclaim, are not permitted to be made subjects of set off. The right as regards the latter, on the other hand, does not rest in discretion of the court, but is *ex debito justitiæ*. It is no answer, I think, to this to say that the court has inherently and by express enactment in the "Judicature Act" and Rules power to strike out and otherwise deal with pleadings and issues as justice and convenience dictate. Set off in this regard seems to be upon the same footing as any other defence; and under the Ontario procedure the court would have no authority to strike out a defence set up by the pleadings or to postpone the consideration of such a defence until after judgment, except on the ground that the defence had no foundation in law or that the defendant was by the operation of some legal rule or principle precluded from relying upon it or on the ground that it was frivolous or vexatious. I think that cannot be affirmed of counterclaim without qualification.

Turning now to section 71, I think the use of the word "debts" is not without significance. It rather points, I think, to the strict sense of the word "set off" as fixing the scope of the section.

I agree that the appeal should be dismissed with costs.

ANGLIN J.—The defendant appeals from the judgment of the Appellate Division (unanimously affirming the judgment of Middleton J.) on two chief grounds: (1) that he is not liable for the sum of $6,300 awarded as damages for wrongful conversion of a quantity of brick, wrongfully held, he contends, to have been the property of the plaintiff company; and (2) that, if he is, he is entitled to set off against such liability the indebtedness to him of the plaintiff company in respect of

$24,000 worth of debentures held by him and for a sum of $546.05 for which that company has been held liable to him in respect of certain other claims.

In view of the position taken throughout the trial by counsel representing him, viz., that he was liable to account to the plaintiffs or to pay damages for the bricks as having been admittedly wrongfully taken by him, I think the first ground of appeal is not open to the appellant. If it were, on the true construction of the agreement between him and Major Vane, I incline to the view that the manufactured brick on the premises belonged to the plaintiff company, and was not subject to the right of repossession which the defendant had in respect of the realty and other property.

For the appellant it was contended subsidiarily that he had been charged with damages for taking brick in course of manufacture whereas, according to his pretension, only brick of which the manufacture had been completed belonged to the plaintiff company, and brick in process of manufacture, at whatever stage, remained the property of the defendant and liable to seizure and re-possession by him under the terms of the Vane agreement. But it is abundantly clear that no allowance was in fact made to the plaintiffs for brick in process of manufacture because, although the total quantity of brick manufactured, and in course of manufacture, at the time of the seizure was shewn to be 691,000, the plaintiffs recovered only for 600,000 brick which was less than the quantity fully manufactured.

The right of set off asserted by the defendant in my opinion does not exist, both because the claim for damages for the conversion arose after the liquidation began, and therefore accrued to the liquidator, and also because, if it should be regarded as having arisen earlier in favour of the company, it and the defendant's

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claims against the company did not constitute "mutual debts" within the right of set off under secs. 126 and 127 of the "Judicature Act," R.S.O. 1914, ch. 56. Notwithstanding the freedom allowed by the Ontario Rules of Practice in regard to matters of set-off and counterclaim, they remain in their essential nature different in that province, as is pointed out by Mr. Justice Osler in a very valuable judgment in *Gates* v. *Seagram*(1), In Ontario, as elsewhere, only "mutual debts" which are properly the subject of set-off as distinguished from counterclaim fall within sec. 71 of the Dominion "Winding-Up Act."

I am, for these reasons, of the opinion that the appeal fails on both grounds and should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. M. McClemont.*

Solicitors for the respondent: *McMaster, Montgomery, Fleury & Co.*

(1) 19 Ont. L.R. 216 at page 223.