

1900.

June 27 and
July 4.

WHITHAM v. PITCHA MUTTU.

D. C., Kandy, 13,172.

Action on promissory note—Counter claim for unliquidated damages—Civil Procedure Code, chapter LIII., ss. 704, 706.

Under chapter LIII. of the Civil Procedure Code a claim for unliquidated damages is a defence to an action on a promissory note.

Mohamadu v. Lewis (8 S. C. C. 148) considered and held inapplicable to existing procedure.

ACTION on a promissory note under Chapter LIII. of the Civil Procedure Code.

The defendant applied for leave to appear and defend the action. He did not offer to pay into Court the sum mentioned in the summons, but in his affidavit, tendered in support of his prayer for leave to appear and defend the action, he showed that he had a counter claim, which when deducted from the amount sued for would leave a large balance in his favour. He averred, "I am advised that, instead of bringing a separate suit for the recovery of these sums of money, my proper course is to claim them in this case."

The substance of the affidavit was as follows:—that he made the note; that at the time of making it he was employed as head kankani of Kadawela estate, and had under him a gang of 148 coolies and 13 sub-kankanis; that in October, 1897, his sub-kankanis were indebted to the estate on account of advances in the sum of Rs. 4,641; that he made the note sued upon for that amount by way of security for their debt in favour of the plaintiff, who was the superintendent of Kadawela estate; that the superintendent withdrew from the deponent's command 8 sub-kankanis and 123 coolies and placed them under Murugen, head kankani, though the debt of such coolies and sub-kankanis due to the deponent amounted to Rs. 7,108, which from plaintiff's wrongful conduct were now lost to him; that in addition to the specific debts thus lost, other damages amounting to Rs. 2,500 had accrued to the defendants; and that such being the nature of the transactions between the plaintiff and the deponent in respect of the promissory note sued upon he was advised that his proper course was to claim the aggregate sum of Rs. 9,608 in reconvention in the present case.

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The District Judge refused the application for leave to appear and defend the action in these terms:—

“ Assume to be true all that defendant says in his affidavit, I do
 “ not think he has any defence to the claim on the promissory note.
 “ He has his remedy against the sub-kankanis on the promissory
 “ notes he holds from them. If the defendant applying for leave
 “ to appear and defend pays into Court the sum mentioned in the
 “ summons, he is of right entitled under section 706 to the relief
 “ he asks for. A bare claim in reconvention may sometimes afford
 “ a satisfactory defence within the meaning of chapter LIII., as, for
 “ instance, a liquid claim due to the defendant by plaintiff upon a
 “ promissory note, cheque, or guarantee. Such a claim being of a
 “ liquid and definite character falls within the purview and
 “ meaning of the term ‘ defence ’ as used in chapter LIII. It was
 “ held by the Supreme Court in D. C., Kandy, 97,222 (*S. C. C. 148*)
 “ that, in an action of regular procedure, a partial failure of con-
 “ sideration does not constitute a defence to a claim on a promis-
 “ sory note, if the *quantum* to be deducted on that account is matter
 “ not of definite computation, but of unliquidated damages. Biles
 “ says, at page 150 (15th edition): ‘ Formerly the money as to
 “ ‘ which the consideration fails must have been a specific ascer-
 “ ‘ tained amount, for the jury could not in an action on a bill or
 “ ‘ note assess by way of set-off the damages arising from a breach
 “ ‘ of contract, and the defendant was left to his cross action; but
 “ ‘ now unliquidated damages may be set up in a counter claim:

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“ ‘ as such a claim can be made, is a defendant entitled to make it
“ ‘ under chapter LIII.’? It seems to me that he is, under section
“ 706. Are then the facts sufficient to support the application?
“ I must confess I fail to see in the affidavit any facts entitling
“ defendant to damages. The claim is not even a plausible one.
“ Let a decree be entered in favour of plaintiff.”

The Defendant appealed.

Browne, for appellant.

Morgan, for respondent.

BONSER, C.J.—

In my opinion the District Judge was quite right in holding the claim for unliquidated damages was a defence to an action under chapter LIII. of the Code. The case in *8 S. C. C. 148* was decided before the new Code came into operation, and is therefore no authority as to the present procedure. At the same time I think that the judge ought to have allowed the defendant to defend the action. The affidavit discloses facts which render it reasonable that the defendant should be allowed to come in and defend.

MONCREIFF, J.—I agree.
