1944 *Present:* **de Kretser J.**

ODIRISHAMY, Appellant, *and* ELARIS, Respondent.

220 C. R. Gampaha 1,672

Res Judicata—Action on lease—Allegation of ouster and claim for damages—Case settled—Subsequent action for restoration of possession—Civil Procedure Code, s. 34.

In C. R. Gampaha, 1,684, the plaintiff, alleging that he was entitled to possess certain rubber trees on a lease, complained of an ouster by the defendant and asked for damages sustained by him and continuing damages till date of judgment.

The defendant denied plaintiff's right to the lease, which he said was void, but at the trial admitted the plaintiff's claim and consented to pay damages.

In the present action the plaintiff alleged that the defendant had refused to give up possession of the land and claimed that he be placed and quieted in possession and that the defendant be ejected,—

Held, that the present action was not barred by section 34 of the Civil Procedure Code.

APPEAL from a judgment of the Commissioner of Requests, Gampaha.

H. V. Perera, K.C. (with him *R. C. Fonseka*), for the defendant, appellant.

L. A. Rajapakse, K.C. (with him *S. R. Wijayatilake*), for the plaintiff, respondent.

Cur. adv. vult.

December 18, 1944. DE KRETSER J.—

The only question debated at the hearing of this appeal was whether the palintiff was barred by section 34 of the Civil Procedure Code from making his present claim by reason of the claim he successfully made in C. R. Gampaha, case No. 1,684.

In that case the plaintiff set out in his plaint the manner in which he became entitled on a lease to possess certain rubber trees during his lease and, complaining of an ouster by the defendant a few days after the plaintiff had entered into possession, he asked for damage already sustained and continuing damages until the date of judgment. He did not ask for a declaration of his right to possess on his lease and consequently not for damages until he was placed in possession.

The defendant filed answer admitting the title of the lessors and the lease to plaintiff but pleaded that the lease was void as it was executed during the pendency of a partition action. He also denied that the plaintiff entered into possession or that he had suffered any damages or had a cause of action or that he (the defendant) was in unlawfull possession.

At the trial issues were raised on these lines and immediately afterwards the record reads " case settled at this stage. Of consent judgment for plaintiff as prayed fo fixing damages at Rs. 19.25 per mensem as a matter of settlement. Plaintiff to have costs of this class. Enter decree accordingly ".

The plaintiff believing that his right was admitted went to take possession on the very next day, when the defendant refused to give possession. The plaintiff then brought the present action setting out title and the decision in the previous case and claimed damages and that he be placed and quieted in possession and that the defendant be ejected. The defendant filed an answer making the same pleas as in the previous case and in addition pleaded the earlier action as a bar and also that the Court had no jurisdiction as the subject matter of the action was worth Rs. 1,500. The same issues as before were raised and in addition the following:—

(1) Is the plaintiff's action barred by the decree in C. R. Gampaha, No. 1,684 ?

(2) If so, can he claim (*a*) ejectment ? (*b*) damages ?

(3) Under any circumstances is the plaintiff estopped by the decree in C. R. Gampaha, No. 1,684, from claiming damages, if any, in excess of Rs. 19.25 per mensem ?

The learned Commissioner held in the plaintiff's favour but reduced the damages claimed. The defendant appeals.

It is clear that the defendant is taking advantage of a legal defence and would have no defence on the merits, and none was attempted. No case exactly in point was cited to me. The learned Commissioner decided the case on the footing that a new cause of action had accrued to the plaintiff after the decision of the earlier case. It was conceded that if this view be correct the judgment was unimpeachable. The argument for the defendant was based on the assumption that the position between the parties was the same as it had been before the previous action, viz., the defendant was in possession denying the plaintiff's right to possession and, therefore, there was no new cause of action. I do not think this view is correct or possible, for clearly the position was not the same.

In the earlier case the plaintiff alleged an ouster and the defendant denied the plaintiff's right on the lease, which he alleged was void, but at the trial he conceded the plaintiff's claim and consented to pay him damages. The cause of action in the earlier case had not been merely the refusal to give possession but a refusal on a certain footing. There was no express decree declaring the plaintiff entitled to possess on his lease or placing him in possession but his claim to damages could only have been admitted and costs fixed on the implied admission that the plaintiff was entitled to possess on the lease. The plaintiff was entitled to assume that the defendant would, thereafter, yield him possession and when he refused to yield a fresh cause of action arose. The position is only slightly different from the case of *Wimalasekere v. Dingirimahatmaya* [1]. There the plaintiff was declared entitled to a land after a contest but no decree of ejectment had been prayed for or granted. The plaintiff brought a fresh action and the previous case was held not to be a bar under section 34. So, in this case the plaintiff on the date of the trial of the first case had his claim conceded. He was entitled to possession whether the decree says so or not, and he was entitled to take possession on the admission impliedly made. Both parties claim from the same

[1] *39 N. L. R. 25.*

source and both were aware that the plaintiff's rights on his lease could not be contested. The defendant was probably trying to wear the plaintiff down into surrendering his lease. Section 34 is based on the maxim that no one should be vexed twice regarding the same matter. It is a provision for the defendant's benefit and he cannot plead his own wrong and claim a benefit therefrom. He alone is to blame if he is being sued a second time. The provision is a salutary one but it must be so used and its scope so confined within certain recognized limits and principles, as not to take suitors unfairly by surprise and so as to do as little injustice as possible. The onus is on the defendant to show that the causes of action were identical and any doubt ought to go against him. In my opinion the present action is not barred. The appeal is, therefore, dismissed with costs.

Appeal dismissed.