1913.

Present: Pereira J. and Ennis J.

PERERA *v.* APPUHAMY.

398—D. C. Negombo, 9,400.

Res judicata—*Claim in reconvention—No replication—Dismissal of action—Is claim in reconvention* res judicata ?

Where a defendant in an action claimed in reconvention from the plaintiff the value of certain nuts plucked by the latter from certain particular trees, and there was no replication in the case,—

Held, that the mere dismissal, without evidence, of the claim in reconvention is not necessarily *res judicata* on the question as to the plaintiff's right to the produce of the trees.

THE facts appear from the judgment.

Bawa, K.C., for plaintiff, appellant.

A. St. V. Jayewardene, for defendant, respondent.

Cur. adv. vult.

December 16, 1913. PEREIRA J.—

The question for decision in this case is whether the judgment in case No. 19,714 of the Court of Requests of Negombo is *res judicata*, and is a bar to the maintenance by the plaintiff of his claim in this case. The plaintiff is the usufructuary mortgagee of the parcel of land described in the second paragraph of the plaint. The defendant has a valid lease, from the owner, of fifty coconut trees growing on the land. Where these fifty trees are to be located, that is to say, whether they are on the north-east of the land, or whether they are certain trees marked as the defendant states in his plaint in case No. 19,714 (which the present plaintiff contends are on the north-west of the land), is a matter in dispute between the defendant on the one side and the plaintiff and the owner of the land (the mortgagor) on the other. The present action is brought by the plantiff on the footing that the defendant, not being entitled to any trees on the north-west of the land, has picked nuts from trees on that side. The question is whether it is to be deemed to have been decided in case No. 19,714 that the trees on the north-western side of the land were the trees in which the defendant had a leasehold interest. In that case the present plaintiff was the defendant, and he claimed in reconvention a certain sum of money alleged to be the value of nuts picked by the present defendant, who was the plaintiff in that case, from trees on the north-western side of the land. The case was laid over to abide the result of another case, and on the termination of

that case, without any evidence or admission, judgment was entered in the case (19,714) dismissing the present plaintiff's claim in reconvention. Now, the claim in reconvention involved two questions: (1) Whether the defendant was entitled to pick nuts from the trees on the north-western side; and (2) whether he in fact picked nuts from those trees. There was no reply to the claim in reconvention, and, therefore, all the averments in support of it were to be regarded as denied by the present defendant. In that state of things, had the plaintiff succeeded in his claim, the decision in the case would have been *res judicata* with reference to the question as to the defendant's right to pick nuts from the trees referred to, because, in order to succeed in his claim, it was necessary that the plaintiff should prove, not only that the defendant was not entitled to pick nuts from the trees, but that the defendant did in fact pick nuts. The converse proposition, however, does not hold good, that is to say, the success of the defendant did not necessarily mean that he was entitled to pick nuts from the trees in question. In his case it was enough for him to establish either of the alternatives, namely, that he was entitled to pick nuts from the trees in question, or that he in fact did not pick nuts at all. That being so, the decision in the case did not necessarily involve the decision of the issue as to the defendant's right to pick nuts from the trees in question. There was no pleading delivered by the present defendant in reply to the claim in reconvention, and it is impossible to say to which of the two defences open to the defendant the decision in the case can be attributed. I can find no case quite in point, but the principles underlying the decision in the case of *Modusudham Shaha Mundul v. Brae* [1] apply. There it was held that an *ex parte* decree, when final, is *res judicata* only so far as the decision necessarily decided an issue.

I would set aside the judgment appealed from and remit the case to the Court below to be proceeded with. I think that the appellant is entitled to his costs in both Courts.

ENNIS J.—I agree.

Set aside.

[1] *I. L. R. 16 Cal. 300*