Present: Lascelles C.J. and Pereira J.

1912.

APPUHAMY *et al.* *v.* BANDA.

245—D. C. Kandy, 21,544.

Res judicata—*Action for declaration of title—Failure of defendants to claim in reconvention—Compensation for improvements—Defendants not barred from bringing separate action for compensation.*

A defendant in a District Court action who had neglected to set up a claim in reconvention is not barred from bringing a separate action to enforce the claim.

In an action in the District Court between the same parties the present defendant was declared entitled to certain lands. The plaintiffs, who were defendants in the former action, thereupon brought this action for compensation for improvements effected by them to the lands when they were in occupation.

Held, that plaintiffs' failure to claim the compensation in the former action by way of reconvention was no bar to the present action.

THE facts appear from the judgment.

Bawa, K.C. (with him *Wadsworth*), for the plaintiffs, appellants.—The failure of the plaintiffs to claim compensation for improvements in the former action, in which they were defendants, is no bar to the present action. They were not bound in that action to set up any claim in reconvention at all. The Civil Procedure Code only requires a defendant to set up claims in reconvention in Courts of Requests (see section 817), and that too only in certain cases—in actions on contract. A claim in reconvention is practically a new cause of action, and a separate action can always be brought. Section 207 does not apply to cases where defendant can bring a separate action. If the Legislature wanted to limit the rights of defendants to bring separate actions on any claim which they might have set up in reconvention, it would have specially enacted to that effect in clear terms.

No appearance for the respondant.

Cur. adv. vult.

November 15, 1912. LASCELLES C.J.—

The defendant in this action was declared in action No. 19,423 (in which the plaintiffs in this action were the defendants) to be entitled to certain lands, and he obtained an order placing him in possession of the property.

1912.

LASCELLES C.J.

Appuhamy v. Banda.

The plaintiffs now sue the defendant for compensation for improvements effected by them to the lands when they were in occupation, and the learned District Judge has ruled that their claim is *res adjudicata* under section 207 of the Civil Procedure Code. The question is whether the decision of the learned District Judge is sound.

In considering this question it is to be noticed that no question of *jus retentionis* arises. The plaintiffs have been ejected from the land, and their present claim is in no way dependent on their occupation of the land. The learned District Judge has construed section 207 of the Civil Procedure Code to mean that if the defendant in an action fails to claim in reconvention any relief which he might have claimed in this way, he cannot afterwards claim such relief by means of a separate action.

It is clear to me that it was not the intention of the Legislature to lay down any such rule with regard to the procedure of the District Courts; for in Part X. of the Code, relating to the special procedure for Courts of Requests, we find a section (section 817) providing that if a defendant in an action for breach of contract neglects to interpose a claim in reconvention consisting of a cause of action in his favour for a like cause which might have been allowed to him at the trial, he is precluded from afterwards maintaining an action on the claim.

If the general rule were that a defendant who had neglected to set up a claim in reconvention in an action could not afterwards bring an action to enforce the claim, it is inconceivable that the Legislature should have enacted section 817, applying this rule specially to Courts of Requests, and even then limiting the application of the rule to actions for breach of contract.

The learned District Judge bases his decision on the use of the words " set up " in the explanation to section 207, and he considers that this expression is intended to apply to the case of a defendant in contradistinction to the word " claimed," which applies to the case of a plaintiff.

But this, I think, is making too much of the expression. The words " set up," after all, are equally applicable to a plaintiff's claim and a defendant's counter-claim. If it had been the intention of the Legislature to lay down a rule so far-reaching in its effect, it is reasonable to suppose that the intention would have been distinctly expressed, and that at least there should have been a specific reference to claims in reconvention.

For the foregoing reasons, I am of opinion that the judgment must be reversed and the case remitted to the District Judge for trial in due course, the appellant having his costs of the appeal.

PEREIRA J.—I agree.

Appeal allowed.