1941 *Present :* **de Kretser J.**

MARIMUTTUPILLAI *v.* SUPPIAHPULLE.

219—C. R. Badulla-Haldummulla, 1,202.

Estoppel—Action in Court of Requests—Defendant's failure to counter-claim—Like cause of action—Civil Procedure Code, s. 817.

The bar placed by section 817 of the Civil Procedure Code upon a defendant who fails to interpose in the action a claim in his favour against the plaintiff does not operate when the Court has no jurisdiction to entertain the claim.

The meaning of the words "for a like cause" in the section considered.

[1] *10 T. C. 155, at p. 192.* [2] *(1933) A. C. 368.*

APPEAL from a judgment of the Commissioner of Requests, Badulla-Haldummulla.

W. E. Abeykoon, for plaintiff, appellant.

No appearance for defendant, respondent.

Cur. adv. vult.

March 7, 1941. DE KRETSER J.—

In C. R. Nuwara Eliya, No 14,682, Suppiahpillai of Boragasketiya, the defendant in the present case, sued Marimuttupillai of Hakgala, the plaintiff in the present case. It would appear that the plaintiff's residence is at Boragas and that he has a branch establishment at Hakgala. In the Nuwara Eliya case Suppiah sued Marimuttupillai for moneys lent to him on three occasions and for the value of some cabbages sold to him. Marimuttupillai filed answer on February 14, denying both claims.

On February 19 Marimuttupillai instituted the present action in the Court of Requests, Badulla, against Suppiahpillai for goods sold and delivered. Suppiahpillai denied the plaintiff's claim and pleaded that the same was prescribed. No bar was pleaded to the maintenance of the claim.

When the case came up for trial, among the issues framed were these two:—(*a*) Can plaintiff have and maintain his action as the plaintiff failed to interpose his claim as a claim in reconvention in C. R. Nuwara Eliya, No. 14,682, in which defendant sued plaintiff? (*b*) Was the claim in this case due at that time?

The learned Commissioner held in favour of plaintiff on his claim for goods sold and delivered but dismissed his action on the ground that he had failed to make this claim in reconvention in the Nuwara Eliya case. He held that the claim was barred by section 817 of the Civil Procedure Code. The appeal is from that order.

This section was the subject of interpretation in two cases, viz.—*Perera v. Silva*[1] and *Perera v. Pesomahami*[2]. In the former case the plaintiff sued for advances made on an undertaking by defendant to lease certain property and the defendant failed to claim in reconvention the amount due to him on a promissory note. Grenier J. held that the words of section 817 were comprehensive enough to include a claim on a promissory note and that the claim of the defendant made in the subsequent action was therefore barred.

In the latter case the earlier case does not appear to have been cited and de Sampayo J. held that the action was not barred because the previous action for the cancellation of a mortgage bond on the ground that the debt had been paid could hardly be regarded as an action for a breach of contract.

I have not been able to ascertain how section 817 came to be enacted. In such copies of the earlier Ordinances as I have been able to refer to there was no similar provision and in fact there was no provision at all for a claim in reconvention.

It will be noted that the bar applied only to actions for breach of contract, and that the claim in reconvention must consist of a cause of action in defendant's favour for *a like cause*; and thirdly, it must be a

[1] *13 N. L. R. 339.* [2] *15 N. L. R. 438.*

claim that might have been allowed him at the trial of the action. What is the significance of words " for a like cause "? It is not the case that defendant is required to make a claim in reconvention consisting of *any* cause of action in his favour but only for a *like* cause. Does that mean that his cause of action must arise from a breach of contract ? and might it be further restricted to mean a breach of the particular contract on which he is being sued ? It is not easy to answer this question but I should incline to the view that it was intended that once a contract came before the Courts then all questions arising from that particular contract should be settled in the one case ; for I fail to see why plaintiff should be allowed to plead the breach of a single contract and defendant be required to go beyond that contract and why, if a defendant were required to interpose a claim he had on any other contract, he should not also be required to interpose any kind of claim he had against the plaintiff on any cause of action, irrespective of whether it arose from breach of contract or not.

The section restricts the ordinary right of a litigant to decide for himself whether he should make a claim in reconvention or not and should therefore, in my opinion, be given a restrictive interpretation. The plaintiff 's cause of action is the breach of contract and if all that was intended was that defendant 's claim should be based on breach of contract it would have been sufficient to say " on a similar cause of action ". The words used may possibly amount to the same thing but I feel that a distinction was intended. It was intended that the cause of action should arise from like facts and the facts of the same contract may be alike, but it is not likely that the facts of any two contracts would be similar.

It is not necessary, however, to deal further with this aspect of the matter, and I pass on to the third requirement, viz :—that the claim must be one that might have been allowed him at the trial of the action, *i.e.*, not one which by chance might have been allowed but which the Court had power to allow.

Section 75 (*e*) of the Code states that a claim in reconvention shall have the same effect as a plaint in a cross action. Now, a plaint can be presented only in the Court in which a party defendant resides or the cause of action arises or the contract sought to be enforced was made or where the land in respect of which the action is brought is situate. The learned Commissioner has found that the present plaintiff's claim might properly be brought in the Badulla Court but could not properly have been brought in the Nuwara Eliya Court. That being so, it was one which, if it had been made by way of reconvention, could not have been allowed at the trial of the action in the Nuwara Eliya Court.

Section 75 of the Courts Ordinance (Chapter 6, Vol. 1., of the Legislative Enactments) confers jurisdiction on Courts of Requests and requires that parties defendant shall be resident within the jurisdiction of the Court or the cause of action shall have arisen within such jurisdiction. Neither of these conditions would have been complied with had the defendant made his claim in reconvention in the Nuwara Eliya Court.

Section 817 does not confer jurisdiction; and I do not think therefore that the present plaintiff acted wrongly in deciding to bring a separate action in the Court which did have jurisdiction. I do not forget that section 818 makes express provision for a case in which the claim in

reconvention exceeds Rs. 300 or in which the amount is uncertain. But that may be due to the fact that it was contemplated that the counter-claim would arise from a breach of the same contract regarding which the parties were already before the Court when no question of local jurisdiction could arise, or it may have been due to its being considered necessary to protect both the plaintiff and the Court from claims which might protract the trial of the original claim. There is nothing to prevent a claim in reconvention exceeding Rs. 300 being made in a Court of Requests and, if made, it must be tried, but the Court can give relief only up to the extent of its monetary jurisdiction : *vide* section 79 of the Courts Ordinance, which corresponds with similar provisions in the English law with regard to Courts of inferior jurisdiction.

Section 818 probably furnishes another reason for the opinion that section 817 contemplates counter-claim on the same contract for section 76 of the Courts Ordinance gives the Court of Requests jurisdiction to decide certain claims irrespective of value. It would be odd if plaintiff could claim beyond Rs. 300 but defendant could not claim on a similar cause of action beyond Rs. 300 when section 76 gives him such a right.

For the reasons given by me I allow the appeal and set aside the decree entered in the Court below and enter judgment for the plaintiff as prayed for with costs in both Courts.

Being of opinion that this matter required closer investigation, I decided to postpone delivery of this judgment and to call in the assistance of the Legal Draftsman, while I made further inquiry myself. Through his courtesy I have had placed before me by Mr. Wendt, his Assistant, the draft of the proposed Civil Procedure Code prepared by Chief Justice Wood Renton and District Judge Maartensz, published in the *Government Gazette* of April 27, 1917. They redraft section 817 to read as follows :—

" Where the defendant in an action in the Court of Requests for breach of a contract neglects to set up a claim in reconvention *arising out of the same contract,* which might have been allowed to him at the trial of the action, he and every person deriving title through or from him shall be precluded from maintaining an action to recover the same at any time thereafter."

The marginal note is as follows :—

Note.—" The object of sub-section (1) of this section " (quoted above) " is to put in a more intelligent form what is understood to be the intention of the old section, viz., section 817 . . . ."

Appeal allowed.