

Present : Bertram C.J.

1920.

MUTTUNAYAGAM v. BRITO et al.

380—D. C. Colombo, 52,818.

*Civil Procedure Code, ss. 35 and 75—Plaintiff suing in one capacity—  
Claim by defendant in reconvention against plaintiff in another  
capacity.*

Where a plaintiff brings an action in one capacity, it is not competent for the defendant to put in a claim against him in reconvention in another capacity.

THE facts appear from the judgment.

*E. W. Jayawardene* (with him *Tisseverasinghe*), for appellants.

*A. St. V. Jayawardene* (with him *Bartholomeusz*), for respondents.

June 21, 1920. BERTRAM C.J.—

This is an action to enforce a mortgage bond. The substantial plaintiff is really the second defendant. The plaintiff is nominally an assignee of the bond, and was made plaintiff for the purpose of the action in order to secure compliance with the provisions of the Civil Procedure Code, which require that in all mortgage actions the mortgagor or the person who is in the position of the mortgagor shall be made a defendant. The third and fourth defendants put in an answer of a somewhat voluminous character, and in that answer there is only the most exiguous trace of the contention they ultimately raised. In the settling of the issues, for the first time there emerged their real plea that they were entitled to an account against the second defendant in another capacity, that is to say, as executor of his father-in-law, the original mortgagor. The District Judge, having framed this issue, was invited to make alterations in the pleadings, to adapt the pleadings to that issue. He declined to do so, and ultimately gave judgment in favour of the plaintiff on the mortgage bond, but intimated that the Court would on proper material consider an application to withhold issue of the writ pending the settlement of the claim raised by the third and fourth defendants in a separate action.

Against that judgment the present appeal is brought, and the substantial question which we have to decide on the appeal is this : Where a plaintiff brings an action in one capacity, is it competent for the defendant to put in a claim against him in reconvention in a different capacity ? I quite agree with Mr. E. W. Jayawardene that it might be very convenient if all matters of account between the parties to this action could be decided in the present proceedings. But we have to determine this simple question of principle.

1920.

BERTRAM  
C.J.*Muttunaya-  
gam v. Brito*

The case was argued for some time upon the basis of sub-section (2) of section 35 of the Civil Procedure Code, which declares that no claim by or against an executor shall be joined with claims by or against him personally, except in certain specified cases. In my opinion, however, this case does not come within that sub-section. I think this is quite clear from a consideration of the case of *Macdonald v. Carington*.<sup>1</sup> In that case both Denman J. and Lindley J. expressed the opinion that the corresponding English rule, namely, order 17, rule 5, does not apply to the case of a counter claim. On the same reasoning our section ought not be held to apply to a claim in reconvention. The principle of section 35 (2) is, I think, a simple one. It is that, as a general rule, an action cannot be brought against a man in his personal capacity and in his capacity as executor at the same time. To that there are certain obvious exceptions which the course of practice has developed. One is the case in which the claim against the executor personally arises with reference to the estate in respect of which he is sued as executor. The reason for that exception is clearly explained in the English case of *Padwick v. Scot*.<sup>2</sup> The final sentence of the section mentions another obvious exception, namely, the case of two persons jointly liable, one of whom becomes the executor of the other. The section, as I have said, does not appear to apply to claims in reconvention, though in an appropriate case we might no doubt apply its principles by analogy.

The case under consideration is not a case of joinder of claims at all. It is the case of a person who sues in one capacity and is called upon to meet a claim in reconvention made against him in another. In deciding this question we are not governed by any specific section of the Civil Procedure Code. We have to apply the general principles of the Common law with regard to reconvention which are discussed in the case of *Silva v. Perera*.<sup>3</sup>

We may conveniently inquire for this purpose what is the English principle in a similar case. This is explained by the judgment of Lindley J. in the case of *Macdonald v. Carington*<sup>1</sup> previously cited. Under the English rules of procedure, by order 19, rule 3, it is laid down that a defendant may set off or set up by way of counter claim any right or claim, whether such set off or counter claim sound in damages or not, and such set off or counter claim shall have the same effect as a statement of claim in a cross action. That rule is the foundation of our section 75 (e), though our own enactment is not framed in precisely the same terms. Lindley J. speaking of that provision said that he understood the principle to be that the defendant in any action might set off or set up by way of counter claim any claim against the plaintiff in the same character in which he sues himself. I think myself that this is a

<sup>1</sup> 4 C. P. D. 28.<sup>2</sup> 2 Ch. D. 736, at page 743.<sup>3</sup> (1914) 17 N. L. R. 206.

principle which we ought to apply in regard to reconvention in our own system of law. I am, therefore, of opinion that this appeal must be dismissed, with costs. I have no doubt that the District Court, on proper application being made to it, will give effect to the intimation made by the District Judge in his judgment.

It appears to be necessary that a formal amendment should be made in the decree, as no date has been fixed for the payment. In the circumstances, it will be convenient that a date, three months from this date, should be fixed for this purpose. The costs of the appeal should be calculated upon the basis of 25 per cent. of the amount claimed.

SHAW J.—I agree.

*Appeal dismissed.*

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gam v. Brito*