Present: Bertram C.J. and Ennis J.

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RAMEN CHETTY *v.* MACKWOOD, LTD.

77—D. C. Kegalla, 5,781.

Action against agents of an estate for money advanced to superintendent—Motion to add proprietors as added defendants—Civil Procedure Code, ss. 14 and 18—Numerous proprietors out of the Island—Service of summons—Application by plaintiff to appoint some one proprietor to defend the action on behalf of all—Names of several proprietors unknown—Civil Procedure Code, ss. 16, 25, and 65.

Plaintiff sued the defendant company, who were agents of Cottangala estate, for the recovery of money advanced to the superintendent for the benefit of the estate. The defendant company denied responsibility. Plaintiff thereupon moved to add the proprietors as defendants.

Held, that the cause of action against the defendant company and the proprietors were the same, and that the proprietors might be added as defendants.

Both the defendant company and the proprietors could have been joined originally under section 14 of the Civil Procedure Code. Section 18 must be construed as enabling an addition to be made of any party who might, for the purpose of determining the cause of action, have been originally joined under section 14.

The co-proprietors of the estate were numerous, and the defendant company did not know who most of them were. The Supreme Court gave permission to the plaintiff to make an application for the joinder of such of the proprietors as he may nominate, and for leave to sue them as representing themselves and the other co-proprietors under section 18. Notice was also directed to be given to all the proprietors by advertisement in the papers.

The application for the appointment of certain persons to sue or to be sued in a representative capacity, under section 16 of the Civil Procedure Code, need not proceed from those persons themselves. It may be made by persons seeking to sue them, and even in the face of the opposition of a person sought to be made

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representative. It is not necessary in an application for this purpose to specify by name all the persons to be represented. It is sufficient to describe them generally, and leave them, if necessary, to be subsequently ascertained.

THE facts appear from the judgment.

Samarawickreme (with him *Canakaratne*), for the appellant.

Hayley, for the respondent.

October 6, 1922. BERTRAM C.J.—

This is an appeal against an order of the District Court of Kegalla refusing an application by the plaintiff for the joinder of certain parties as defendants. The plaintiff is a Chetty, who made certain advances to one Lloyd Perera, who was at the time the superintendent of Cottangala estate. He claims that those advances were made in pursuance of an authority granted to the said Lloyd Perera by the defendant company who are the agents of the estate, and that the defendant company acquiesced in those advances, and that they were so advanced for the benefit of the estate. On those grounds he sues the defendant company. The defendant company by their answer plead that the plaint discloses no cause of action against them. They admit that they are the agents of Cottangala estate, but deny that they are in any way responsible for any liabilities incurred on behalf of the estate. They also traverse generally the allegations of the plaintiff. On this answer being filed, the plaintiff sought to add as defendants the proprietors of the estate, to whose existence the answer had drawn fuller attention, and it was for this purpose that an application was made to the Court below. The plaint in the action, which seeks to fix the defendant company with liability, is certainly open to criticism, and if it means to charge them with liability on the ground that they are the local agents of a principal outside the jurisdiction, it clearly ought to have been made more explicit. But this is a point with which it is not necessary to concern ourselves. The only question that we have to determine, in the first instance, is whether the proprietors should be joined as parties.

Mr Hayley appears on behalf of the defendant company and objects to this proposed joinder. His objection is that, while no doubt the Code authorizes the joinder of defendants, it only authorizes such a joinder in respect of the same cause of action. He says that his own liability, if any, with respect to this money arises on a different cause of action from any supposed liability that may exist in the proprietors. He urges incidentally that the liability of the proprietors, if any such liability exists, is for the return of the money lent, whereas the liability against him, if any, is a liability for breach of a warranty of authority.

I think this is too narrow a view to take of section 14 of the Civil Procedure Code. The cause of action here is the same, both against the defendant company and against the proprietors. It arises on a loan, and the cause of action is the breach of the obligation to return the money said to be advanced. It may be held that the party liable is the defendant company. It may be held that the proprietors alone are liable. But the cause of action is the same. It is undoubted that both the company and the proprietors could have been joined originally under section 14. I think that section 18 must be construed as enabling an addition to be made of any party who might, for the purpose of determining the cause of action, have been originally joined under section 14. See the judgment of Grantham J. in *Massey v. Heynes*.[1] That, however, does not dispose of all the difficulties in the case.

It appears that the co-proprietors in this case are extremely numerous. The defendant company, indeed, do not know who they are. They know the proprietors entitled to one-third of the estate, but they are unable to state the proprietors entitled to the remaining two-thirds. With regard to those proprietors, they correspond in the case of one-third with a firm of solicitors in London, and with regard to the other one-third, they correspond with a lady named Mrs. Corner.

The appellant seeks to join both this firm of solicitors in London and Mrs. Corner. But this cannot be allowed. Neither Mrs. Corner nor this firm of solicitors are proprietors. Some of the proprietors are thus unknown, and the question is how is justice to be done in the matter. I express no sort of opinion as to whether there is any substance whatever in the claim. It would, however, be a most unfortunate result if it were not possible to try claims arising against estates in this country because some of the persons entitled to shares in the estates could not be identified. It would also be most unfortunate if it were necessary in such a case to serve all these proprietors personally outside the jurisdiction. Section 25 of the Civil Procedure Code was considered in this connection when the question arose whether it may not be possiblbe to serve the defendant company on behalf of at least the known proprietors, under paragraph (c) of that section, but Mr. Hayley points out that that section only applies to persons carrying on trade or business for and in the name of the parties not resident. Although the company whom he represents carries on business for the proprietors, it does not do so in their name. There is, however, another section which might, to some extent, meet the difficulty, and that is section 65, which declares that where there is an action relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court, service on any manager

[1] *(1888) 21 Q. B. D. on p. 336.*

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or agent who at the time of service personally carries on business or work for such person within such limits shall be deemed good service.

It is not necessary for us to decide in this matter whether under that section a superintendent might be served with notice of any process against the known proprietors of his estate, because it appears to us that there is another solution of the matter which I will proceed to explain.

The difficulty in the case is that there is a very numerous body of proprietors, some of whom are altogether unknown. Now, section 16 of our Code provides that where there are numerous parties having a common interest in defending an action, one or more of such parties may, with the permission, of the Court, be sued on behalf of all the parties so interested. That section is taken from the English Rules of Court, the corresponding rule there being Order XVI., Rule 9. Now it is quite clear under the English rule that the application for the appointment of certain persons to sue or to be sued in a representative capacity need not proceed from those persons themselves. It may be made by persons seeking to sue them, and even in the face of the opposition of a person sought to be made representative. See *Wood v. McCarthy* [1]. Similarly, it does not appear to be necessary in an application under that rule to specify by name all the persons to be represented. It would appear to be sufficient to describe them generally, and leave them if necessary, to be subsequently ascertained. I see no difficulty under that section in an action being launched against certain persons as representing a numerous body of other persons who are not at the time ascertained, but who are ascertainable. A difficulty arises, however, in the fact that certain words have been added to our own section which do not appear in the English rule. These additional words seem to contemplate only cases in which persons themselves apply to sue or defend in a representative capacity. Are we to construe these additional words in which only these cases are provided for as limiting the first part of the section to these cases? I do not think so. I think that all that the situation shows is that the draftsman of the section had not fully thought out all the cases to which it applies. In the cases he mentions it is provided that notice of the action shall be given to all the parties interested either by personal service, or if from the number of parties or any other cause such service is not reasonably practicable, then by advertisement. I think, in the first place, we should authorize such of the resident proprietors as the plaintiff nominates to be sued as representing themselves and the other co-proprietors, and that, although the second part of the section does not apply in the present case, we should take the same equitable course as is there

[1] *(1893) 1 Q. B. D. 775.*

indicated, and should direct that notice should be given to all the proprietors by public advertisement in the "Times of Ceylon" and the "Observer." The result is, therefore, that the appeal must be allowed.

In my opinion, we should set aside the order, and we should send the case back to allow the plaintiff to make application for the joinder of such of the proprietors as he may nominate, and for leave to sue them as representing themselves and the other co-proprietors under section 18, without prejudice, of course, to any opposition which these gentlemen may choose to make in the Court below; and at the same time an opportunity should be given to allow the plaintiff to make any application he may think fit for the amendment of his plaint. As I have before observed, there is no occasion for us to give any decision on the question as to whether Mr. Champion Jones, the present superintendent of the estate, can be served with notice on behalf of the proprietors.

I may add that, even if we were not satisfied that the provisions of the Code cited authorize the solution we have adopted, we should have had no hesitation in taking the same course under our inherent power to make such orders as may be necessary for the ends of justice referred to in section 839 of the Code. See Ordinance No. 42 of 1891, section 4.

In view of the terms of the order I have proposed, and in view of the fact that the appellant was aware of existence of the proprietors, and ought to have considered the question of an alternative suit at the beginning, I think that the proper order for costs is that costs both here and below should be costs in the cause.

ENNIS J.—I agree.

Set aside.