1919.

Present: Ennis A.C.J. and Schneider A.J.

FERNANDO *v.* PERERA.

127—D. C. Negombo, 12,842.

Surety—Right to sue for the debt—Misjoinder—Section 22, Civil Procedure Code.

A surety who discharges the principal obligation is entitled to stand in the shoes of that creditor, and to enforce all the rights available to that creditor. An objection to the misjoinder of parties and causes of action taken after the case is closed is too late.

THE facts appear from the judgment.

Samarawickreme, for the appellant.

July 10, 1919. ENNIS A.C.J.—

It appears that the original first, second, and third defendants in this action executed a mortgage bond in favour of one A. J. Fernando. The money was raised for the benefit of the first and third defendants, and the second defendant joined as surety. The second defendant paid, and at his request the creditor assigned the bond to one Sebastian Silva. The second defendant having some doubts as to the integrity of Sebastian Silva got him to endorse on the original bond "cancelled and discharged," and subsequently got Sebastian Silva to assign the bond to the first plaintiff. The first plaintiff then filed this action against the three defendants. But on the facts being disclosed, the second defendant was made the second plaintiff in the case. Before trial the plaintiffs filed a replication, in which they sought to recover, in the alternative, the money paid by the second plaintiff as surety. After judgment had

[1] *(1892) 1 Matara Cases 203.*

been reserved, an issue was raised as to misjoinder of parties and causes of action. The learned Judge finally dismissed the plaintiff's claim on the bond because of the endorsement and the claim; in the alternative, for misjoinder of parties and causes of action. In my opinion the objections to the misjoinder of parties and causes of action came too late, and that the provisions of section 22 of the Civil Procedure Code should have been applied. But, however, I am unable to see that there was any misjoinder of parties or causes of action. It is clear from *2 Nathan 1035* that the Roman-Dutch law is that a surety who discharges the principal obligation is entitled to stand in the shoes of the original creditor, and to enforce all the rights available to that creditor, and, inasmuch as the first plaintiff admitted all the facts stated by the second plaintiff, and was merely a nominee of the second plaintiff, the plaintiffs were regarded as one for the purposes of the action. In the circumstances, and on the facts found by the learned Judge, the second plaintiff is entitled to a mortgage decree. I would accordingly set aside the decree appealed from, and enter a mortgage decree for the second plaintiff, with costs both in the Court below and on appeal in terms of the prayer in the plaint.

Schneider A.J.—I agree.

Set aside.