1933 *Present :* **Dalton A.C.J. and Maartensz A.J.**

THE BANK OF CHETTINAD, LTD. *v.* THAMBIAH *et al.*

1—D. C. (Inty.) Colombo, 44,660.

Jurisdiction—Corporation resident in India—Having Office in Colombo—Right to sue through attorney—Recognized agent—Misjoinder of causes of action—Waiver—Civil Procedure Code, s. 22 (b).

A corporation registered in India, having its registered office and principal place of business there, with a branch establishment in Colombo, is not a party resident within the jurisdiction of the District Court of Colombo for purposes of section 25 (b) of the Civil Procedure Code.

Where the plaintiffs lent the defendants on one mortgage bond two sums of money, due to each separately, and it was provided by the bond that the plaintiffs were entitled to recover the moneys payable to them by suing jointly or separately,—

Held, that the defendants had waived the right to raise an objection to the action on the ground of misjoinder of persons and causes of action.

THIS was an action on a mortgage bond executed by the first and second defendants, husband and wife, by which they borrowed from the first plaintiff the sum of Rs. 216,000 with interest and from the second plaintiff the sum of Rs. 95,600 with interest.

The plaintiffs prayed that the defendants jointly and severally be ordered to pay the first plaintiff Rs. 238,392 and the second plaintiff Rs. 105,584.

The first plaintiff, the Bank of Chettinad, Ltd., is a corporation registered in India with its registered office and principal place of business there, but carrying on its banking business in Ceylon as well, with a branch establishment at Colombo. The second plaintiff is an individual Chetty, not connected with the bank, residing and carrying on business in Colombo.

The following, among other issues, were raised at the trial:—

(*a*) Is the proxy granted by the attorney of the first plaintiff valid?

(*b*) Was Somasunderam Chetty the recognized agent of the first plaintiff Company?

(*c*) Is there a misjoinder of parties and causes of action?

The learned District Judge answered the issues in favour of the plaintiffs and the defendants appealed.

H. V. Perera (with him *D. W. Fernando*), for defendants, appellants.— Somasunderam Chetty is a person holding a general power of attorney from the first plaintiff. He is not a recognized agent of the first plaintiff within the meaning of the Code. Section 25 does not apply because the first plaintiff is resident within the jurisdiction of the Court. It only applies where the party resides outside the jurisdiction. The company carries on its business here. (*Michelin & Co. v. Leo*[1].) A corporation may have more than one place of residence[2]. (*The New York Life Insurance Co. v. The Public Trustee*[3].) In the case of a corporation which carries on business the conception of home is absent. It resides where it carries on business. A distinction must be drawn between foreign companies which carry on business here themselves through a branch and those which do so through an agent, *e.g.*, another company (*The Lalandia*)[4]. The meaning of the word "residence" is indicated in sub-section (c).

There is another objection to this action. The two bonds are distinct and mutually exclusive. In *Sokalingam Chettiar v. Ramanayake*[5] the plaintiffs were joint-creditors. The fact of hypothecation would not make it one cause of action. A hypothecary action is a combination of two actions, a personal action for the money due and an action to declare the land executable. The claims for money due are here distinct. For plaintiffs to join in an action they must be interested in the same cause of action, not the same transaction. (*Servante v. James*[6].)

N. Nadarajah (with him *E. B. Wikramanayake* and *J. L. M. Fernando*), for plaintiff, respondent.— The term "reside" has various meanings in various enactments. (*6 Bom. 100.*) In section 25 (*b*) the term is used in the sense of a person's real home. A corporation resides where it is domiciled. (*De Beer's Consolidated Mines v. Howe*[7]; *Dicey's Conflict of Laws, 3rd ed., 163; Foote's Private International Law 5th ed., 176.*) What is contemplated in section 25 (*b*) is not an inferential residence but a real residence. The question of the residence of individuals has been decided in *Kanappa Chetty v. Saibo & Co.*[8] It is not the place where he carries on business but the place where he lives. In the case of a company the test is the residence of the directors.[9] Suppose for example the company is sued. The attorney, on appellant's argument, cannot appear. Section 111 of the Joint Stock Companies Act requires the name to be given of the person who is authorized to accept process on behalf of the company.

On the question of misjoinder, the definition in section 5 does not exhaust causes of action. (*Samichi v. Peris*[10].) The terms of the bond

[1] *27 N. L. R. 459, at 460.*
[2] *(1924) 2 Ch. 101.*
[3] *(1911) 2 K. B. 516.*
[4] *(1933) 1 Prob. 56.*
[5] *33 N. L. R. 319.*
[6] *10 Barnwall & Cresswell 410.*
[7] *(1906) A. C. 455.*
[8] *2 C. L. R. 37.*
[9] *13 N. L. R. 41; 1 Times 214.*
[10] *16 N. L. R. 057.*

must be considered to see whether the interest is joint. There is only one hypothecation. The cause of action is the default in the payment of interest. ' The Roman-Dutch law recognizes concurrent mortgages [1]. Both plaintiffs are interested in the sale of the mortgaged property. The right to sell the property is a joint right. If the actions are separate the rights in the land of the mortgagee who is struck out will be extinguished. If this is to be considered as two bonds, one will be prior to the other according to the time of registration. There is a term in the bond giving the plaintiffs the right to sue jointly. The rules of section 22 of the Code are made for the convenience and the benefit of the parties and may be waived. They may therefore be contracted out of. (*Rauther v. Kandasamy* [2]; *Griffiths v. Dudley* [3]; *Corporation of Toronto v. Russel* [4].) Section 839 gives the Court the power to consolidate suits for the sake of convenience. So it has been held in India under the corresponding section. (*Hukum Chand Boid v. Singh* [5].)

H. V. Perera, in reply.—The cases cited with regard to residence are Income Tax cases. The same considerations do not apply. It may be necessary in such cases on the ground of convenience to find out one residence for a corporation. The test of carrying on business does not apply in the case of a corporation. The only function of a trading corporation is to carry on business. It may have more than one place of residence. The test is " Is it here?".

There can be no waiver unless a person is aware of the rights he is waiving. Parties cannot contract themselves out of the provisions of the law. If the law says the plaintiffs cannot join in an action the defendant cannot by consent give them the right to join. The clause in the bond, moreover, is conclusive proof that the parties realized that the claim were distinct.

September 21, 1933. DALTON A.C.J.—

This is an action brought by the two plaintiffs, against the defendants for the recovery of capital and interest alleged to be due on a mortgage bond. The first plaintiff, the Bank of Chettinad, Ltd., on the facts stated to us which (although they differ from some of the statements made in the plaint) are not now denied, is a corporation registered in India, with its registered office and principal place of business there but carrying on its banking business elsewhere, as well as in Ceylon, at Colombo with a branch office here. It is admitted also that it has complied with the provisions of section 111 of the Joint Stock Companies Ordinance, No. 4 of 1861, applicable to Companies established outside the Island. The second plaintiff is an individual, a Chetty, not connected so far as appears in this case with the bank, residing and carrying on business in Colombo. The defendants are wife and husband, and they executed the bond now sued on in favour of the plaintiffs in Colombo on August 6, 1930. Various issues were framed on the pleadings, of

[1] *2 Nathan 1089.*
[2] *8 C. W. R. 16.*
[3] *(1882) 9 Q. B. 357, at 364.*
[4] *(1908) A. C. 493, at 500.*
[5] *33 Cal. 927.*

which it was decided three should be decided first. These three were as follows:—

(1) Is there a misjoinder of parties and causes of action?

(2) Is the proxy granted by Somasunderam Chetty, the attorney of the first plaintiff, valid?

(4) Was Somasunderam Chetty the recognized agent of the first plaintiff Company?

In the lower Court the first issue has been answered in the negative, and the second and fourth in the affirmative. The defendants now appeal from this decision.

It is convenient to deal with the question raised in the second and fourth issues first. They may be considered together and they only concern the first plaintiff, whom I will call the bank.

The action was instituted, so far as the bank is concerned by Messrs. Wilson & Kadirgamar filing a proxy and plaint with the bond. The proxy is signed "The Bank of Chettinad, Ltd., by attorney A. R Somasunderam Chetty" and is in the usual form. A certified copy of a general power of attorney by the bank in favour of Somasunderam Chetty to manage the branch of the bank established at Colombo was produced. This power is very wide and in paragraphs 32 to 34 authorizes the attorney to commence and prosecute and defend all suits, actions, and proceedings arising out of the various transactions of the bank and to sue for and recover all sums of money and debts due to the bank. There can be no doubt that Somasunderam was the authorized agent of the bank to commence these proceedings, but it is urged he was not the bank's "recognized agent", within the meaning of sections 24 and 25 of the Civil Procedure Code.

Section 24 provides that acts may be done or appearances may be made in any Court by a party in person, by his recognized agent, or by a proctor appointed by the party or recognized agent. The persons who come within the term "recognized agent" are set out in section 25, and include in sub-section (*b*) persons holding general powers of attorney from parties not resident within the local limits of the jurisdiction of the Court concerned. The question to be answered is whether the bank was resident or not within the jurisdiction. If it was not so resident, then Somasunderam was the recognized agent of the bank under section 25 (*b*) ; but if the bank was resident within the jurisdiction section 25 (*b*) did not apply and Somasunderam Chetty was not a recognized agent of the bank under the provisions of the Code, and was not authorized to institute this action or to do any other act on behalf of the bank as a party thereto.

We have had a very full argument on the question of the residence of a corporation with many authorities cited, and I think it is generally conceded that the answer to the question must vary according to the wording of the particular statute or rule under consideration. Dicey in his *Conflict of Laws* (*5th ed. p. 137*) states "in each case the particular question is not whether a corporation has in reality a permanent residence in a particular country, but whether for certain purposes (*e.g.*, submission

to the jurisdiction of the Courts or the situs of its shares, or liability to taxation) a corporation is to be considered as resident in England or in some other country".

The class of case principally relied upon in the argument for the appellant before us was that class dealing with foreign corporations, the corporation in question having its centre in a foreign country but which is held to reside or be present in England so as to be liable to be served with a writ under Order IX., rule 8, if it does business in England through an agent. *Compagnie General Trans-atlantique v. Law & Co.*[1] and *Saccharin Corporation, Ltd. v. Chemische Fabrik von Heyden Aktiengesellschaft*[2] are two of several such cases cited to us. Rule 8 is applicable to foreign corporations carrying on business and having an office in England in such a mannar as to constitute residence there for the purpose of founding jurisdiction, and the question whether the corporation is carrying on business and has such an office is a question of fact. The same question, residence for the purpose of being sued, arose in *New York Life Insurance Co. v. Public Trustee*[3], a case of a simple contract debt. Stress was laid by Mr. Perera upon some words used by Atkin L.J. in his judgment at p. 120 as if they were of general application. The words "purposes of suit" used there, as appears from the words that follow, clearly have reference to the right to sue the corporation and nothing more. Taken together, all these authorities go to show that for purposes of subjection to jurisdiction a corporation may have as many residences as it has places of business. (Dicey, *ubi supra* p. 140.)

These authorities in my opinion do not assist and cannot be used by way of analogy in interpreting section 25 (*b*). First of all one is not dealing with a case of residence to found jurisdiction for the purpose of suing the bank. There can, I suppose, be no doubt that under the provisions of section 111 (2) of the Joint Stock Companies Ordinance, 1861, the bank is here for the purpose of being served with process. Secondly, such decisions as *Michelin & Co. v. Don & Co.*[4] on the disability of "absence beyond the seas" under section 14 of the Prescription Ordinance, 1871, and *The Keynsham Blue Lias Lime Co., Ltd., v. Baker*[5] on the meaning of the word "dwells", in section 128 of *9 & 10 Vict. c. 95* (Small Debts Recovery Act) show that each case must be answered according to the wording of the particular enactment under consideration. Then, if one turn to section 25 (*c*), where the words "parties not resident" are also used, it is clear that the parties referred to are parties whose trade or business is being carried on within the jurisdiction, the parties themselves being not resident within the jurisdiction. "Resident" there cannot therefore mean, or include the idea of, having an office and carrying on business in a place, in addition to being actually resident. Sub-sections (*b*) and (*c*) must be read together, for they provide for two classes of cases that may arise in turn, and the word "resident" has the same meaning in both sub-sections. The argument raised in the lower Court that section 25 did not apply to corporations was not pursued before us, and it is conceded that the decision in *The Singer Manufacturing Company v. The Sewing Machine Company*[6] on this point has

[1] *(1899) A. C. 431.*
[2] *(1911) 2 K. B. 516.*
[3] *(1924) 2 Ch. 101.*
[4] *2 N. L. R. 459.*
[5] *2 H. & C. 730.*
[6] *(1893) 2 S. C. Rep. 27.*

never been followed, the consistent practice being, as pointed out by the trial Judge, that foreign persons whether individuals or corporations appear through attorneys appointed by powers of attorney duly executed by the individual or the corporation. It is apparent that very considerable practical difficulties would arise if Mr. Perera's contention is adopted, although that fact cannot affect the interpretation of the section, if one were satisfied it is correct.

As I have stated, the question to be answered depends upon the wording of each particular act or enactment and I have come to the conclusion that the bank is not resident within the jurisdiction within the meaning of section 25 (*b*). The residence there referred to in my opinion is its residence and domicile, the place where its principal place of business is situated, in this case at Chettinad in India. The bank is, therefore, for the purposes of section 25, a party that is not resident within the local limits of the jurisdiction of the Court, and the issues (2) and (4) were therefore in my opinion correctly answered by the learned trial Judge.

On the first issue, whether there was misjoinder of parties and causes of action, I am unable to agree that the facts in *Sokalingam Chettiar v. Ramanayake*[1], so far as they concern this point, are exactly similar, as the learned Judge has found. Each of the plaintiffs here, although they joined in one bond, has a cause of action against the defendants. It is clear however from the conditions in the bond that the defendants agreed that the obligees on the bond should be entitled to sue for and recover the moneys payable to them respectively under the bond either by suing jointly with the other of them or separately. I see no good reason here why the defendants should be freed from the terms to which they have agreed. They have taken objection to this misjoinder under section 22 of the Code, which is applicable, but I see no reason why a person should not previous to action, in such a bond as this, contract out of his right to take objection. There is no suggestion that the defendants did not fully understand what this condition meant, and it is quite possible if they had objected to its mention in the bond the transaction might not have been carried through. There seems to be no reason to think that the two causes of action cannot be conveniently tried together and in all these circumstances the objection raised by the defendants on the ground of misjoinder should be dismissed. The result on this issue then is that the defendants must fail.

For these reasons I would dismiss this appeal with costs.

MAARTENSZ A.J.—

This was an action on a mortgage bond No. 1,596 executed by the first and second defendants on August 8, 1930, by which they became held and bound to the first plaintiff in the penal sum of Rs. 432,000 for the payment to the first plaintiff of the sum of Rs. 216,000 with interest at the rate of 12 per cent. per annum from the date of the bond, and to the second plaintiff in the penal sum of Rs. 191,000 for the payment to the second plaintiff of the sum of Rs. 95,000 with interest at the same rate.

[1] *33 N. L. R. 319.*

The plaint averred that there was due and owing to the first plaintiff on the said bond a sum of Rs. 238,392, to wit: Rs. 216,000 as principal and Rs. 23,392 as interest from August 8, 1930, to the date of action, and to the second plaintiff Rs. 105,584.89, to wit: Rs. 95,600 as principal and Rs. 9,984.89 as interest for the same period.

The plaintiffs prayed that the defendants jointly and severally "be ordered to pay the first plaintiff Rs. 238,392" and the second plaintiff Rs. 105,584.89 with further interest as set out in the prayer of the plaint.

That the property described in the schedule to the plaint be declared specially bound and executable for the said sum of Rs. 343,976.89 and interest on the footing of the said bond and for plaintiff's costs of suit.

That in default of payment of the said sum of Rs. 343,976.89 and interest, and costs of suit within the said period (which does not appear to be mentioned in the prayer), the said premises declared specially bound and executable be sold, &c.

The third defendant is joined in the action as a puisne incumbrancer.

The first plaintiff is a bank duly incorporated and having its registered office at Colombo within the local limits of the jurisdiction of the District Court of Colombo.

A number of issues were framed at the trial of which three were dealt with by the District Judge as preliminary issues of law. They are as follows:—

(*a*) Is there a misjoinder of parties and causes of action? (Issue No. 1.)

(*b*) Is the proxy granted by Somasunderam Chetty, the attorney of the first plaintiff, valid? (Issue 2.)

(*c*) Was Somasunderam Chetty the recognized agent of the first plaintiff? (Issue 4.)

No evidence was recorded on any of these issues nor is there any note on the record of the facts on which the judgment is based. The facts must therefore be gathered from the judgment.

According to the judgment:—"With regard to issues 2 and 4 the position taken up by the defendants is that the first plaintiff bank, having a branch and registered office in Colombo must be considered as residing in Colombo and that section 25 of the Civil Procedure Code had no application as sub-section (*b*) of that section provides that appearance on behalf of a party may be made by persons only in cases where the party giving the power of attorney is not resident within its jurisdiction".

The learned District Judge after discussing the arguments addressed to him said "I am inclined to the opinion that section 25 does apply, that the first plaintiff company has its head office in South India and has only a branch office here and that it must be regarded for the purposes of section 25 as resident outside the local jurisdiction in spite of the fact there is a branch in Colombo. Being thus outside a person holding a general power of attorney for the company is a recognized agent of the first plaintiff bank within the meaning of section 25".

The proctor appearing for the first plaintiff has been appointed under the provisions of section 24 of the Civil Procedure Code by Somasunderam Chetty, who holds a general power of attorney from the bank.

He would have the authority to appoint the proctor if he is a recognized agent of the first plaintiff company within the meaning of section 25 (*b*) of the Civil Procedure Code.

Section 24 of the Civil Procedure Code enacts that—

> "any appearance, application, or act in or to any court, required or authorized by law to be made or done by a party to an action or appeal in such court, except only such appearances, applications, or acts as by any law for the time being in force only advocates or proctors are authorized to make or do, and except when by any such law otherwise expressly provided, may be made or done by the party in person, or by his recognized agent or by a proctor duly appointed by the party or such agent to act on behalf of such party . . . . ."

Section 25 provides that—

"The recognized agents of parties by whom such appearances and applications may be made or acts may be done are—

> (*b*) Persons holding general powers of attorney from parties not resident within the local limits of the jurisdiction of the court within which limits the appearance or application is made or act done, authorizing them to make such appearances and applications, and do such acts on behalf of such parties; which power, or a copy thereof certified by a proctor or notary, shall in each case be filed in the court".

The question for decision on issues 2 and 4 is whether the first plaintiff company is or is not a party resident within the local limits of the jurisdiction of the District Court of Colombo. The answer to the question depends on the meaning to be given to the word "resident" in the section cited, 25 (*b*).

In support of the appellant's contention that the first plaintiff company is a party resident within the local limits of the jurisdiction of the District Court of Colombo we were referred to various cases under the Income Tax Act (16 & 17 Vict. c. 34, s. 2, Sch. D), and Rule 8 of Order IX., of the Rules of the Supreme Court (England) regarding service of a writ of summons on a corporation.

By section 2, Schedule D, duties are imposed for and in respect of the annual profits or gain arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation whether the same shall be respectively carried on in the United Kingdom or elsewhere.

The rule laid down for determining whether a foreign company resides in the United Kingdom is as follows:—

> "The test of residence is not where it is registered, but where it really keeps house and does its real business. The real business is carried on where the central management and control actually abides".

Whether any particular case falls within that rule was held to be a pure question of fact, to be determined not according to the construction of this or that regulation or by law, but upon a scrutiny of the course of business and trading. (*De Beer's Consolidated Mines, Ltd. v. Howe (Surveyor of Taxes*[1].)

The facts were that the business of diamond merchants was carried on by the De Beers Company in England. The principal office was in England, the majority of the directors met in England and although the diamonds sold came from Kimberley the profits were realized within the United Kingdom, and it was held that the Company resided in England.

The case of *The Attorney-General v. Alexander & others*[2] is an example of a case where on the facts it was held that the foreign corporation did not reside in the United Kingdom although the corporation—a bank—had a branch and agency in London where the ordinary business of bankers was carried on under the management of a committee of persons who resided in England and were elected by the shareholders.

Rule 8 of Order IX. says that in the absence of any statutory provision regulating service of process every writ of summons issued against a corporation aggregate may be served on the Mayor or other head officer, or on the town clerk, treasurer, or secretary of such corporation.

In the cases cited the question was whether a foreign corporation was amenable to the jurisdiction of the English Courts and could be served with writ of summons under the rule and it was held that where a foreign corporation does business in England in such a way as to be resident in England it may be sued and the writ served on the office in England.

I need only refer to the case of *La Compagnie Generale Trans-Atlantique v. Thomas Law & Co.*[3] This rule was applied to a banking corporation in the case of *A. de Lhonous Linon et Cie v. The Hongkong & Shanghai Banking Corporation.*[4]

The bank had a head office and directorate abroad with an agency in India where it carried on business, and it was held that the service of a writ in an action against the corporation, the cause of which action arose out of the jurisdiction, could properly be effected upon the manager of the London Agency. Bacon V.C. said in the course of his judgment, "They hire a house, they write up their name and send out cheques and other documents in which their London address also appear and beyond all question they stamped upon themselves and upon their place of business the assumption that they were carrying on business at that place".

I understand that the activities of the first plaintiff company in this case are very similar.

In the case of *New York Life Insurance Co. vs. Public Trustee,*[5] the question was whether the company was a debtor resident in England, and it was held that a corporation might have a dual residence and that

[1] (*1906*) *A. C. 455.*
[2] (*1874*) *44 L. J. Exchequer, p. 3.*
[3] (*1899*) *A. C. 431.*
[4] (*1886*) *54 Law Times 863.*
[5] (*1924*) *L. R. 2 Chancery 101.*

the plaintiffs were resident both in New York and England. Lord Atkin there said at page 120 :—

> "It appears to me that the true view is that the corporation resides for the purposes of suit in as many places as it carries on business, and it is to be noted that in ordinary cases where an obligation is entered into by the corporation without any particular limits of the place where it is payable, inasmuch as that obligation is an ordinary personal obligation which follows the person, you have in each jurisdiction a right to sue the corporation there; the corporation is resident there, and the obligation is enforceable there. Under ordinary circumstances the debt would be situate in each place where the corporation can be found".

I am of opinion however that the rules to which I have referred do not apply to the question which falls for decision in this case.

The word "Resident" has a variety of meanings just as much as the word "residence" which Erle C.J. said has a variety of meanings according to the statute in which it is used. See *Neaf & another v. Mutter,*[1] see also the dictum of Cotton L.J. in the case of *In re Bowie.*[2]

In the case of *Ramachandra Sakharam v. Koslav Durgaji by his Agent Hakma Depaji*[3], the term 'non resident' in section 37 (*a*) of the Indian Code of Civil Procedure (which corresponds to section 25 (*b*) of our Code) was held to cover every absence which may reasonably be supposed to have been within the contemplation of the legislature.

The company is no doubt 'here', to use the expression applied in the case of *La Compagnie Generale Trans-Atlantique v. Thomas Law & Co.,* for certain purposes. It carries on business and is registered in Ceylon under the provisions of section 111 (*c*) of the Joint Stock Companies Ordinance, No. 4 of 1861, as amended by Ordinance No. 7 of 1918, and has, I take it, furnished as required by the Ordinance the names and addresses of some one or more persons resident in Ceylon authorized to accept on behalf of the company service of process and any notices required to be served on the company.

But is it here for the purpose of appointing proctor? I am of opinion that it is not. There is nothing on the record to show that there is in Ceylon any person who could sign the proxy except the attorney and the object of section 25 (*b*) would be defeated if we were to hold that the proxy must be sent to India to be signed by a member of the company.

Again section 25 (*c*) which enacts that—

> "Persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance or application is made or act done, in matters connected with such trade or business only, where no other agent is expressly authorized to make such appearances and applications and do such acts."—

makes it quite clear that the mere carrying on of a trade or business through an agent does not render the principal a resident within the jurisdiction of the Court, and I am of opinion that the word 'resident' in section 25 (*b*) must be interpreted in the same sense.

The first plaintiff company is therefore not a resident within the jurisdiction of the District Court of Colombo.

[1] *(1862) 31 L. J. C. P. 357.* [2] *(1880) 50 L. J. Chancery 384.*

[3] *3 I. L. R. Bombay 100.*

I am of opinion that the finding of the District Judge regarding issues 2 and 4 is right and must be affirmed.

On issue No. 1 whether there was a misjoinder of parties and causes of action, the District Judge held on the authority of the case of *Sockalingam Chettiar v. Ramanayake* [1] that there was no misjoinder of parties and causes of action.

I am of opinion that the learned District Judge has misdirected himself with regard to the case on which he relied.

The bonds in both cases are what are called concurrent bonds but the terms of the bond in the reported case on which it was held that there was no misjoinder of parties and causes of action are not reproduced in the bond now sued on. A detailed comparison is unnecessary.

Respondent's counsel drew our attention to certain passages in the bond sued on, which he contended showed that the obligation was joint and several. I am unable to agree with him. It is to my mind perfectly clear that one obligee has no interest in the amount lent by the other and that each obligee is only entitled to recover the amount he has lent.

The respondent's counsel further argued that the learned District Judge's order could be supported by the following proviso in the bond :—

> " Provided also that it shall be lawful for the said respective obligees to sue for and recover the moneys payable to them respectively under and by virtue or in respect of these presents either by suing jointly with the other of them or by suing separately for the amounts due to each of them separately. "

by which he contended the first and second defendants had contracted themselves out of the provisions of the Code relating to misjoinder of parties and causes of action.

Two objections were urged against this contention. The first objection was based on section 46 of the Code which provides that the Court may refuse to entertain a plaint and return it for amendment if it is wrongly framed by reason of non-joinder or misjoinder of parties or because the plaintiff joined causes of action which ought not to be joined.

This section vests a discretion in the Court which has not been exercised, and that such objections could be waived is clear from section 22 of the Code which enacts that—

> " all objections for want of parties, or for joinder of parties who have no interest in the action, or for misjoinder as co-plaintiffs or co-defendants, shall be taken at the earliest possible opportunity, and in all cases before the hearing. And any such objection not so taken shall be deemed to have been waived by the defendant ".

The second objection was that there was nothing to show that the defendants were aware of the rights which they were surrendering. This objection might have been a good one if the waiver was only implied or expressed in general terms. But the provision in question expressly gives the obligee the right to sue on the bond together—it is more than a waiver and the defendants must have known that it was inserted to remove any objection which could be raised to such a course of action.

I would dismiss the appeal with costs.

Appeal dismissed.

[1] *33 N. L. R. 319 & 9 Times Law Reports (Cey.) 88.*