Magistrate, having a B report before him, to take evidence before assuming jurisdiction under Section 152 (3). As a matter of construction there is nothing in Section 152 (3) which compels one to read into it a requirement to take evidence. I am not aware of any principle of law which makes it necessary that the assumption of any jurisdiction conferred on a Judge must be preceded by the taking of evidence on oath. I think that a Magistrate may act on any material properly before him as a Magistrate before assuming jurisdiction, provided the conditions laid down in *Silva v. Silva*[1] are satisfied.

The case of *Abanchi Hamy v. Peter*[2] was cited in the course of the argument by learned Crown Counsel. A bench of two Judges decided that the failure to take the complainant's evidence before assumption of jurisdiction was not a fatal irregularity but one curable under Section 425 of the Code. In the view I take that the failure to record evidence in the case under consideration is not even an irregularity, the application of this decision does not arise.

I would answer the question whether the opinion referred to in Section 152 (3) may be based on the B report in the affirmative.

Appeal to be listed in due course.

1949 *Present :* **Nagalingam J. and Windham J.**

THANGAMMAH *et al.*, Appellants, *and*
KANAGASABAI *et al.*, Respondents

S.C. 471—D. C. Jaffna, 1,105

Misjoinder—Parties and causes of action—Right of pre-emption—Separate sales by co-owners—Right to purchase—One cause of action—Joinder of plaintiffs—Civil Procedure Code—Section 11.

Plaintiffs who were each entitled to ½ share of a land brought an action for pre-emption of the other half which belonged to two sets of defendants, viz., the first and second defendants who by 8D1 transferred to the eighth defendant and the third to the sixth defendant who by 8D2 also transferred to the eighth defendant. On an objection that there was a misjoinder of parties and causes of action,

Held, that the plaintiffs' cause of action was not the execution of deeds 8D1 and 8D2 but the violation of the plaintiffs' right to purchase the outstanding half-share and that there was no misjoinder.

Held further, that the right of pre-emption is based on an implied contract whereby co-owners are jointly bound to one another. The plaintiffs were therefore joint contractors and entitled to join in one action under section 11 of the Civil Procedure Code.

[1] *(1904) 7 N. L. R. 182.* [2] *(1918) 24 N. L. R. 15.*

APPEAL from a judgment of the District Court, Jaffna.

F. A. Hayley, K.C., with *H. W. Tambiah*, for plaintiffs appellants.

C. Chellappah, for 2nd defendant respondent.

H. V. Perera, K.C., with *C. Vanniasingham*, for 7th and 8th defendants respondents.

Cur. adv. vult.

April 12, 1949. NAGALINGAM J.—

This appeal raises a question with regard to joinder of parties and causes of action. The plaintiffs claiming to be the owners of an undivided ½ share of the lands described in the schedule to the plaint instituted this action against eight defendants for a declaration that they are entitled to pre-empt the remaining ½ share which they allege has been purchased by the 8th defendant in violation of the right conferred on them by the Thesawalamai. The title to the remaining half-share, according to the plaintiffs, is claimed by two sets of defendants : the 1st and 2nd defendants on the one hand and the 3rd, 4th, 5th and 6th defendants on the other.

It is unnecessary for the purpose of this appeal to notice the title of these two sets of defendants. It is sufficient, however, to say that by deed 8D2 of November 21, 1943, the 3rd, 4th, 5th and 6th defendants transferred to the 8th defendant, the wife of the 7th defendant, the half-share claimed by them. On the following day, namely, November 22, 1943, by deed 8D1 the 1st and 2nd defendants purported to convey their half-share also to the 8th defendant. The plaintiffs allege that both the deeds 8D2 and 8D1 were executed without notice to them and without their being given an opportunity of exercising their right of pre-emption as co-owners of the lands. On a plea taken on behalf of the defendants that there was a misjoinder of parties and of causes of action, the action has been dismissed. The argument has been advanced, and that argument apparently found favour with the learned District Judge, that the cause of action against the 3rd, 4th, 5th, 6th and 8th defendants was one that arose from the execution of the deed 8D2 and that it was distinct from the cause of action against the 1st, 2nd and 8th defendants, which arose as a result of the execution of the deed 8D1.

The question that meets one at the very threshold of this case is whether there are two causes of action against the two sets of defendants. The plaintiffs contend that there is only one cause of action against all the defendants. The learned Judge, although he himself referred to the definition of the term cause of action, has in the course of the discussion of the case fallen into the error of regarding the cause of action asserted by the plaintiffs as a wrong in the sense of a tort.

The term cause of action is defined in section 5 of the Civil Procedure Code as the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the negligence to perform a duty and the infliction of an affirmative injury. I may say at once that the word " wrong " used in

this definition is not used in the narrow sense of a tort but in a much wider sense as embracing the infringement or violation of every and all manner of right to which a person would be entitled as a member of human society.

Now, what is the cause of action in respect of an action for pre-emption ? Is it the execution of a deed by a co-owner conveying his rights to a stranger, that is to say, one not entitled to the right of pre-emption ? Or does it consist in the non-affording to the co-owner entitled to the right of pre-emption of an opportunity of purchasing the interest sold to the stranger ? It is true, however, to say that the fact of sale by the co-owner to a stranger must be alleged and proved as one of the media before relief can be claimed. But I do not think that the execution of the deed is the cause of action or the " wrong " to redress which the pre-emptor brings the action. Take the case of a person who has no vestige of title to any interests in the land assuming the role of a co-owner and selling his alleged interests to a stranger. The execution of that deed cannot be said to give rise to a cause of action to any of the admitted co-owners of the land, for their rights are in no way violated. It therefore cannot be said that the bare execution of the deed by itself constitutes the cause of action. It is easy to fall into the error, at least in this class of cases, of thinking that the cause of action results from the objective act of the execution of the deed rather than from the violation of the subjective right of the co-owner entitled to pre-empt. The cause of action must have reference to the individual whose rights are violated and have no reference to acts objectively as such.

The case of *London and Lancashire Fire Insurance Co. v. The P. & O. Co. and the Ceylon Wharfage Co.* [1] is a useful one to look at in this connection. There were two causes of action set out in the case, one in tort, the other based on contract, the former of which alone is of interest for the purpose of the point under discussion. There, certain bags of sugar were lost as a result of a collision between the barge belonging to the 2nd defendant company and a steamer belonging to the 1st defendant company. The District Judge took the view that there were distinct causes of action, one against the steamship company and the other against the lighterage company on the footing that the negligence of the servants of the 1st defendant company was the cause of action against it and the negligence of the servants of the 2nd defendant company was another distinct cause of action against the 2nd defendant company ; the District Judge further specifically held that the loss sustained by the consignee whom the plaintiff represented was not the cause of action. On appeal, however, there was unanimity of view that the District Judge's reasoning was fallacious in this regard and de Sampayo J. expressly held that the cause of action was the *loss of the goods*. It will thus be seen that the cause of action was not objectively looked at from the point of view of the acts of the defendants but rather from that of the loss or injury sustained by the plaintiff.

If one bears this reasoning in mind, it will be plain to see that it is not the execution of the deeds that constituted the cause of action but the

[1] *(1914) 18 N. L. R. 15.*

violation of rights suffered by the plaintiffs resulting, no doubt, from the execution of the deeds. Now, what are the plaintiff's rights which have been violated ? The plaintiff's case is that there is only one half-share that is outstanding and not that there are two half-shares, and their cause of action is that they have been deprived of their right to purchase the outstanding half-share. If that half-share is treated as an entity by itself, it is clear that the sales by rival claimants of that half-share by two separate deeds on separate dates do not give rise to two separate causes of action, for their acts do not result in the deprivation of the plaintiffs' right to acquire two separate half-shares but only of the one half-share. The cause of action, therefore, against both sets of defendants is one. The case certainly would have been different had, for instance, the co-owners purported to deal with separate and distinct shares in the lands, as for instance, if one set of co-owners dealt with a ¼ share which was distinct from another ¼ share owned by the other set of owners. Nor does the fact that the plaintiffs claim the relief in the alternative against the two sets of defendants mean that they have separate causes of action against the two sets of defendants ; their cause of action against both sets of defendants is, however, one. In truth, there cannot be causes of action in the alternative, it is only the relief or the remedy that can be claimed in the alternative. See the case of *Fernando v. Fernando* [1].

The remedy the plaintiffs seek is the enforcement of their right to purchase the outstanding half-share either against the 1st, 2nd and 8th defendants or alternatively against the 3rd, 4th, 5th, 6th and 8th defendants, according as the Court should find which group of defendants has the title to the outstanding half-share. It has been contended that the plaintiffs must decide which group of defendants they would sue but not throw the responsibility on the Court. This is an argument which, it will be obvious, is one which can be urged in every case a claim is preferred in the alternative against two or more defendants.

It is to meet the difficulty which a plaintiff may experience in deciding which of two or more defendants is liable that provision has been made permitting a suit to be instituted in the alternative. The plaintiffs aver that the title to the remaining half-share is vested either in the 1st and 2nd defendants or alternatively in the 3rd, 4th, 5th and 6th defendants, but that they are unable to say which set of defendants has the legal title. They claim the relief not against both sets of defendants but against one set only, against the set of defendants in whom the Court should find the title is truly vested.

A separate action against each group of defendants would not only not lie but would be disastrous to the plaintiffs. The action against one set of defendants can only be instituted on the footing that that group not only has, but that the plaintiffs themselves admit that that group has the legal title to the outstanding half-share and that the plaintiff is prepared to make purchase of that half-share. Similar averments must form the basis of the action against the other set of defendants. If the defendants in each case consent to judgment, the plaintiffs would as a result of their having filed two actions find themselves in the inevitable

[1] *(1937) 39 N. L. R. 145.*

predicament of having to buy the remaining half share of the land by paying the value of the half-share twice over to each set of defendants. Furthermore, any one set of defendants, where two actions have been filed, may be able to contend not unsuccessfully that inasmuch as the plaintiffs themselves recognise and admit the existence of the title of the two half-shares in the two sets of defendants in the two cases, thereby accounting for the whole of the title to the entirety of the land in third parties, the plaintiffs must necessarily therefore be deemed to be no co-owners and consequently disentitled to assert any claim to pre-empt.

It seems to me therefore that there can be no objection in law to the joinder of all the defendants in one action.

The next point for consideration is whether the action is bad by reason of the joinder of the two plaintiffs. It is said that as each of the plaintiffs is entitled to a $\frac{1}{4}$ share, each has a separate cause of action. Section 11 of the Civil Procedure Code expressly permits all persons to be joined as plaintiffs in whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative in respect of the same cause of action. Several plaintiffs, therefore, in whom the right to relief exists jointly or severally can unite in the same action, so that it is immaterial to consider whether the plaintiffs are entitled to the relief they seek jointly or severally, for in either case a joinder is permissible. The point to be ascertained, however, is whether the relief claimed by the several plaintiffs is in respect of the same cause of action. This leads one to a consideration of the nature of the rights of co-owners *inter se* in regard to the right of pre-emption.

The right of pre-emption is one that is conferred by law upon co-owners and must be deemed to be based upon an implied contract whereby the co-owners are jointly bound one to another, and the co-owners in this view of the matter become joint contractors in regard to the enforcement of this obligation. If the contract is joint, then there can be no objection to several joint contractors instituting a single action to enforce their rights. See *Sopia v. Navaratnam* [1].

For these reasons I am of opinion that the action is properly constituted. The order of the learned District Judge is therefore set aside and the case remitted to the lower Court for trial of the issues other than the 10th, 12th, 13th and 14th issues. The plaintiffs will be entitled to the costs of appeal and of the argument in the lower Court.

WINDHAM J.—I agree.

Appeal allowed.

[1] *(1919) 1 C. L. Rec. 36.*