1940 *Present :* **Soertsz and Keuneman JJ.**

THILAKAVATHYPILLAI *v.* SIVAPALAM *et al.*

174—D. C. (Inty.) Trincomalee, 2,559.

Misjoinder of parties—Joint promissory note—Application to amend plaint by deletion of heirs of deceased maker.

Where the plaintiffs, who sued on a joint promissory note the heirs of a deceased maker and the surviving maker of the note, moved on the date of trial to amend the plaint by deleting the claim against the heirs of the deceased maker,—

***Held,* that the amendment should be allowed subject to an appropriate order for costs.**

APPEAL from an order of the District Judge of Trincomalee.

N. E. Weerasooria, K.C. (with him *E. B. Wikremanayake*), for plaintiffs, appellants.

L. A. Rajapakse (with him *M. M. I. Kariapper*), for defendants, respondents.

Cur. adv. vult.

March 19, 1940. KEUNEMAN J.—

A short point arises in this appeal. Plaintiffs sued on a joint promissory note the first defendant and the second to the sixth defendants, who were, with the first defendant, the heirs of Subramaniam, deceased. The first defendant and Subramaniam were the makers of the note. On November 16, 1939, the trial date, proctor for the plaintiffs appears to have appreciated the fact that his plaint was bad, because of the misjoinder of the heirs of the deceased maker with the surviving maker of the note. This had been decided in *Annamalai Chetty v. Menika*[1]. Proctor for plaintiffs moved to amend his plaint by deleting the claim against the second to the sixth defendants. The learned District Judge refused to allow this amendment, on the ground that the amendment would alter the whole scope of the action, and that the plaintiffs had enough time to make the application earlier. Thereafter the action was dismissed in view of the judgment of the Supreme Court already referred to.

[1] *(1860) 32 L. J. 210 (Prob.).*

[2] *20 N. L. R. 407.*

On appeal, Counsel for the appellants argues that the amendment should have been allowed. I think the first ground mentioned by the District Judge has been stated far too widely. It is in the very nature of amendments that they alter the scope of the action. I understand the position taken up by respondents' Counsel to be that by this amendment he will be deprived of a defence to the action which he would otherwise have. I think this is correct, but I do not see why a plaintiff who has misconceived a portion of his claim should not abandon such portion, and so preserve to himself the legal rights which he actually has.

As regards the point that this claim for amendment is made too late, I think, in this case, that any prejudice to the defendants can be adequately compensated by an appropriate order as to costs.

I accordingly set aside the order refusing the amendment and the order dismissing the plaintiff's action as against the first defendant, and allow the amendment proposed by the plaintiff. As regards costs, the plaintiffs will pay to the first defendant the costs of the trial date and any costs which may be incurred by the first defendant in amending his answer in consequence of the amendment of the plaint.

The plaintiff's action against the second to the sixth defendants will remain dismissed with costs. There will be no costs of appeal. The case will go back for further proceedings in due course.

SOERTSZ J.—I agree.

Appeal allowed.