1963 *Present :* **Basnayake, C.J., Abeyesundere, J., and G. P. A. Silva, J.**

LEBBE, Appellant, *and* SANDANAM, Respondent

S. C. 127/59—D. C. Kandy, 7457/MR

Pleadings—Amendment of plaint—Scope of the power of Court to amend plaint—Distinction between amendment and alteration—Civi iProcedure Code, ss. 21, 38, 46 (2), 93.

Sections 21, 28, 46 (2) and 93 of the Civil Procedure Code provide for amendment of the plaint in each of the cases specified in those sections. Except in section 93 the burden of making the amendment is imposed on the plaintiff. In section 93 the power to amend is conferred on the Court. The Court may not exercise that power before the hearing of the action or after final judgment.

The power conferred on the Court by section 93 of the Civil Procedure Code is the limited power of amendment. The word " amend " means, in legal procedure, the correction of an error. The Court's power is therefore limited to the correction of errors (of both commission and omission) in pleadings. As the power is limited to the correction of errors, it follows that the Court has no power to make alterations—

(*a*) which set up a new case,

(*b*) which have the effect of converting an action of one character into an action of another character,

(*c*) which have the effect of taking the action out of the provisions governing the limitation of actions in the Prescription Ordinance or any other enactment of law,

(*d*) which have the effect of the addition of a new cause of action,

(*e*) which have the effect of prejudicing the rights of the other side existing at the date of the proposed amendment, and

(*f*) which have the effect of changing the substance or essence of the action.

When seeking the aid of English decisions for the solution of questions under section 93 of our Code, it is well to examine the specific rule or provision of law which the particular decision whose aid is invoked seeks to interpret or give effect to. There are material differences between section 93 and the corresponding English Orders and Rules.

Plaintiff was a businessman who was engaged in several kinds of business such as dealing in estate lands, running cinemas, and lending money. On 26th August 1958 he instituted the present action in which he sought to recover from the defendant a sum of Rs. 15,000 which he alleged he had loaned to the defendant. The trial commenced on 28th July 1959, and on that day the chief issue framed was whether the defendant borrowed from the plaintiff and the plaintiff lent and advanced to the defendant the sum ? The defendant, while admitting the receipt of the sum, denied that the money was a loan and claimed that it was an advance given by the plaintiff towards the purchase from the defendant of an estate called Hyndford Estate, in respect of which transaction, an action filed by the plaintiff against the defendant was already pending. On 20th August 1959 the plaintiff, while he was still under cross-examination, moved that the plaint be amended so that he might take up the alternative position that, in the event of it being established that there was no money lending transaction, the sum of Rs. 15,000 was due to him as an advance paid by him to the defendant towards the purchase of Hyndford Estate.

Held, that the plaintiff was not entitled to amend his plaint in terms of the motion of 20th August 1959. The amendment that was sought was not for the purpose of correcting any mistake, defect, slip or omission but to bring into the pleadings a case which the plaintiff himself had repudiated in his evidence. The amendment was designed to meet a situation which might arise if the defendant succeeded in establishing the version of the facts outlined by his Counsel.

APPEAL from an order of the District Court, Kandy.

H. V. Perera, Q.C., with *E. A. G. de Silva* and *Miss Maureen Seneviratne*, for Defendant-Appellant.

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatte*, for Plaintiff-Respondent.

Cur. adv. vult.

January 24, 1963. BASNAYAKE, C.J.—

The only question that arises for decision on this appeal is whether the learned District Judge was wrong in allowing the application of the plaintiff's counsel to amend the plaint in terms of the motion dated 20th August 1959.

Briefly the facts are as follows :—The plaintiff was clerk of Gondennawa Estate and a businessman who was engaged in several kinds of business such as dealing in estate lands, running cinemas, buying green tea leaf, and lending money on cheques, chits, promissory notes and bonds. He also owned a tea factory which manufactured bought tea leaf. He had known the defendant for a long time and had lent money to him since 1947. On 25th January 1958 the plaintiff entered into a notarial

agreement with the defedant to buy an estate called Hyndford Estate, 377 acres in extent, for a sum of Rs. 538,000 of which a sum of Rs. 52,500 was paid by the vendee by way of deposit before the execution of the agreement. The deposit was to be retained by the vendor as liquidated damages if the vendee failed to observe the terms of the agreement or complete the purchase.

On 26th August 1958 the plaintiff instituted the present action in which he sought to recover from the defendant a sum of Rs. 15,000 which the plaintiff alleged he had loaned to the defendant. Apart from the plea of jurisdiction the plaint consisted of the prayer and the following two paragraphs :—

"2. The Defendant on the days and dates appearing in the account particulars appended herewith borrowed moneys from the Plaintiff and the Plaintiff lent and advanced to the Defendant monies at his request and for his use.

3. No part of the said sum has been paid by the Defendant and there is now due and owing to Plaintiff upon the said transactions from the Defendant a sum of Rs. 15,000 on account of principal and Rs. 309·72 on account of legal interest together making the sum of Rs. 15,309·72 which sum the Defendant has failed and neglected to pay Plaintiff though thereto demanded.

Wherefore the Plaintiff prays for judgment against the Defendant in the said sum of Rs. 15,309/72 together with further legal interest on Rs. 15,000 from 10th day of August 1958 till date of Decree and thereafter legal interest on the aggregate amount till payment in full and costs of suit and for such other and further relief as to this Court shall seem meet."

The " account particulars " referred to read—

	Principal	*Legal Interest*	*Total*
	Rs.	*Rs. c.*	*Rs. c.*
1958 February 27th by Cheque	5,000 ..	114 59 ..	5,114 59
1958 March 7th by Cheque ..	5,000 ..	109 03 ..	5,109 03
1958 April 9th by Cheque ..	5,000 ..	56 10 ..	5,056 10
	15,000	309 72	15,309 72

In the defendant's answer delivered on 20th January 1959 he stated :

"2. The defendant denies the averments contained in paragraphs 2 and 3 of the plaint and puts the plaintiff to the strict proof thereof.

Wherefore the defendant prays for dismissal of the plaintiff's action with costs and for such other and further relief as to this Court shall seem meet."

The trial commenced on 28th July 1959. On that day the plaintiff's counsel suggested the following issues :—

" (1) Did the plaintiff lend and advance to the defendant the several sums of money referred to in the account particulars filed with the plaint ?

(2) Has the defendant repaid to the plaintiff the said sum of money or any part thereof ?

(3) If not, what sum of money is the defendant liable to pay to the plaintiff ? "

Learned counsel for the defendant objected to issue (1). In doing so he submitted that the issue should be recast in terms of paragraph 2 of the plaint. The learned District Judge's minute of the further submissions made by counsel is as follows :—

". . . he does not deny the receiving of the money, what is denied is the borrowing, and that the money was lent and advanced. Making further submissions Mr. Thiagalingam states that in the other case dealt with by the Court this morning, M.R. 7430, there was an agreement to purchase a particular estate, and these monies, which form the subject matter of this action, were given by the plaintiff to the defendant towards the payment of the consideration ; he suggests instead of issue (1) the following :—

(1) Did the defendant borrow from the plaintiff and the plaintiff lend and advance to the defendant the sums of money referred to in the account particulars in the schedule to the plaint ?

Mr. Thiagalingam moves that it be recorded that if the plaintiff claims to recover this money on some other ground, he has several other defences to it."

Plaintiff's counsel agreed to the issue suggested by the defendant's counsel and the trial proceeded.

The defendant while admitting the receipt of Rs. 15,000 in three equal instalments denied that it was a loan but claimed that it was an advance towards the purchase of Hyndford Estate.

The plaintiff denied this claim categorically and maintained over and over again in the course of his examination-in-chief and cross-examination that the sum he claimed was a loan. The cross-examination was directed to show that the plaintiff's claim that the transaction was a loan was untrue and that in fact it was a case of money given as an advance towards the purchase of Hyndford Estate. These are some of the questions and answers in the cross-examination—

Q. So all the three sums of Rs. 5,000 were made on the same basis ?

A. As a loan basis.

Q. And you know as far as the defendant was concerned, he received it not as a loan but as an advance ?

A. No, I still say it was a loan ; I understand that it was to be deducted from the consideration payable on Hyndford Estate.

Q. I am telling you now that the defendant's position is that this is not a loan but an advance against the purchase price of Hyndford Estate ; do you accept that or not ?

A. I don't accept it.

Q. You say what the defendant says is false ?

A. Yes.

Q. When the defendant says that it was an advance on Hyndford Estate, it is false ?

A. Yes.

Q. According to you, what was in fact the transaction ?

A. All three were loan transactions.

On 28th July 1959 while the plaintiff was still under cross-examination the trial was adjourned to 21st September. On that date, more than a year after the plaint was filed, plaintiff's counsel moved that the plaint be amended in terms of the motion filed on 20th August 1959—

"By the deletion of the following words from paragraph 3 :— 'on account of the principal and Rs. 309·72 on account of legal interest together making the sum of Rs. 15,309·72.'

2. By adding after paragraph 3 the following new paragraph :—

'4. In the alternative the plaintiff states that on or about the 25th January 1958 the plaintiff and the defendant entered into an agreement No. 593 attested by M. A. Van Rooyen, Notary Public, whereby the defendant agreed to sell and the plaintiff agreed to purchase certain allotment of land comprising Hyndford Estate for the sum of Rs. 538,000 of which on the said date the plaintiff paid to the defendant and the defendant acknowledged receipt of a sum of Rs. 52,500 as an advance and deposit.

5. Thereafter the defendant, who had been sued in case No. 1617 of this Court, sitting at Gampola, for ejectment from a property of the United Planters Company on which he had trespassed, appealed to the plaintiff on several occasions to advance him moneys to enable him to meet his commitments in connection with the said case, the protracted trial of which was continued for over thirty days before the defendant was ultimately ejected.

6. The plaintiff accordingly advanced to the defendant the sums of money referred to in the account particulars filed herewith on the understanding that the plaintiff would be given credit for the said amounts in the event of the sale of Hyndford Estate taking place or in the event of it not taking place the defendant would repay the said amount to the plaintiff on demand.

7. The plaintiff states that the said sale of Hyndford Estate did not take place and he accordingly demanded the return of the said sum of Rs. 15,000 and the sum of Rs. 52,500 referred to above which the defendant refused to pay. The plaintiff has sued the defendant in case No. M.R. 7430 of this Court for the repayment of the said sum of Rs. 52,500.

8. The plaintiff states that he has paid the said sum of Rs. 15,000 to the defendant, who has received the same for his own use and benefit and is now under on obligation to refund the same to the plaintiff but though thereto often demanded the defendant has failed and neglected to pay the said sum or any part thereof.

9. A cause of action has therefore accrued to the plaintiff to sue the defendant for the recovery of the said sum of Rs. 15,000 together with legal interest thereon from date of decree till date of payment in full.'

3. By amending the prayer by the substitution for Rs. 15,309·72 ' Rs. 15,000 '.

4. By deleting the last column re interest, and 'Total Rs. 15,309·72' in the account particulars."

The plaintiff's counsel maintained that the transaction was a money lending transaction and that the loan had to be repaid if the purchase of Hyndford Estate which the defendant had on 5th January agreed to sell to the plaintiff for a sum of Rs. 538,000 was not completed. If it was completed on or before 30th April 1958 the defendant was entitled to retain the money and the amount to be paid in cash as the purchase price was to be reduced by that amount. He asked that he be given an opportunity of amending his plaint so that he may take up the alternative position that the sum of Rs. 15,000 having been received by the defendant, the plaintiff is entitled in any event to recover it regardless of whether it was a loan or an advance against the purchase of Hyndford Estate. He wanted, he said, to plead an alternative position in the event of it being established that there was no loan. The application was opposed on the following grounds :—

(*a*) That the application to amend was *mala fide*.

(*b*) That it sought to introduce two new causes of action by way of alternative grounds.

(*c*) That the amendments which were asked for were not in accord with the principles enunciated in the case of *Wijewardene v. Lenora*.[1]

[1] *(1958) 60 N. L. R. 457.*

After hearing counsel the learned District Judge made order granting the plaintiff's prayer that the plaint be amended on the lines set out in the application. This appeal is from that order.

Sections 21, 38, 46 (2) and 93 of the Civil Procedure Code provide for amendment of the plaint in each of the cases specified in those sections. Except in section 93 the burden of making the amendment is imposed on the plaintiff. In that section the power to amend is conferred on the Court. It reads :

> " At any hearing of the action, or any time in the presence of, or after reasonable notice to, all the parties to the action before final judgment, the court shall have full power of amending in its discretion, and upon such terms as to costs and postponement of day for filing answer or replication, or for hearing of cause, or otherwise, as it may think fit, all pleadings and processes in the action, by way of addition, or of alteration, or of omission. And the amendments or additions shall be clearly written on the face of the pleading or process affected by the order ; or if this cannot conveniently be done, a fair draft of the document as altered shall be appended to the document intended to be amended, and every such amendment or alteration shall be initialled by the Judge."

The Court may not exercise that power before the hearing or after final judgment. The words " at any time " in the context mean at any time after the hearing and not at any time before the hearing. That power is conferred on the Court for the reason that it is only at the hearing or at any time thereafter that the Court would be in a position to decide whether having regard to the evidence there should be an amendment of the pleadings. The power conferred on the Court is the limited power of amendment. The word " amend " means in legal procedure—

> " An amelioration of the thing without involving the idea of any change in the substance or essence."
>
> " The alteration of a pleading, writ, petition or the like, to make it accord with the facts of the case or with the rules of practice." (Sweet's Law Dictionary)
>
> " The correction of an error committed in any process, pleading, or proceeding at law or in equity." (Black's Law Dictionary)
>
> " A correction of any errors in the writ or pleadings in actions, suits, or prosecutions." (Wharton's Law Lexicon)
>
> " The correction of some error or omission, or the curing of some defect, in Judicial proceedings." (Byrne's Law Dictionary)

The concept that an amendment is the correction of an error runs through all the definitions cited above and the definitions in the recognised English dictionaries, such as the Oxford English Dictionary, Standard Dictionary, and Webster's New International Dictionary. The

Court's power is therefore limited to the correction of errors in pleadings. If there is no error, then the Court cannot act under section 93. The words " by way of addition, or of alteration, or of omission " suggest that errors of both commission and omission are contemplated. As the power is limited to the correction of errors, it follows then that the Court has no power to make alterations—

(*a*) which set up a new case,

(*b*) which have the effect of converting an action of one character into an action of another character,

(*c*) which have the effect of taking the action out of the provisions governing the limitation of actions in the Prescription Ordinance or any other enactment or law,

(*d*) which have the effect of the addition of a new cause of action,

(*e*) which have the effect of prejudicing the rights of the other side existing at the date of the proposed amendment, and

(*f*) which have the effect of changing the substance or essence of the action.

In England elaborate rules provide not only for the amendment but also for the alteration of pleadings. They also provide for a variety of cases for which no provision is made in our Code. They are to be found at pages 621 to 650 of the 1963 White Book and are as follows :—

" 1. The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

2. The plaintiff may, without any leave, amend his statement of claim, whether indorsed on the writ or not, once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared.

3. A defendant who has set up any counterclaim or set-off may, without any leave, amend such counterclaim or set off at any time before the expiration of the time allowed him for answering the reply, and before such answer, or in case there be no reply, then at any time before the expiration of twenty-eight days from defence.

4. Where any party has amended his pleading under either of the last two preceding Rules, the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the Court or a Judge to disallow the amendment, or any part thereof, and the Court or Judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may be just.

5. Where any party has amended his pleading under Rule 2 or 3, the opposite party shall plead to the amended pleading, or amend his pleading, within the time he then has to plead or within eight days from the delivery of the amendment whichever shall last expire; and in case the opposite party has pleaded before the delivery of the amendment, and does not plead again or amend within the time above mentioned, he shall be deemed to rely on his original pleading in answer to such amendment.

6. In all cases not provided for by the preceding Rules of this Order, application for leave to amend may be made by either party to the Court or a Judge, or to the Judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may be just.

7. If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such fourteen days, as the case may be, become *ipso facto* void, unless the time is extended by the Court or a Judge.

8. An indorsement or pleading may be amended by written alterations in the copy which has been delivered, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any one place, or are so numerous or of such a nature that the making them in writing would render the document difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the document as amended.

9. Whenever any indorsement or pleading is amended, the same when amended shall be marked with the date of the order, if any, under which the same is so amended and of the day on which such amendment is made, in manner following, viz.: 'Amended ..... day of ....., pursuant to order of ..... dated the.....'

10. Whenever any indorsement or pleading is amended, such amended document shall be delivered to the opposite party within the time allowed for amending the same.

11. Clerical mistakes in judgments or orders, or errors, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a Judge on motion or summons without an appeal.

12. The Court or a Judge may at any time, and on such terms as to costs or otherwise as the Court or Judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings "

I have reproduced above all the rules in the White Book in order to show how elaborate they are and to show that they provide for a number of cases not provided for in our section 93. The rule nearest to that section is rule 12 ; but it is wider in—

(*a*) that it permits the Judge to amend at any time and not only at the hearing or at any time thereafter ;

(*b*) that it expressly empowers the Judge to make all amendments necessary for the purpose of determining the real question or issue raised by or depending on the proceedings.

When seeking the aid of English decisions for the solution of questions arising under section 93 of the Code, it is well to examine the specific rule or provision of law which the particular decision whose aid is invoked seeks to interpret or give effect to. A decision given under one rule should not be taken as applying to all cases or to cases which do not fall within the ambit of the particular rule considered in the case. With great respect to the eminent Judges of this Court, who adopted the pronouncements of English Judges on the English Orders and Rules as applying to section 93 of our Code, it seems to me that in doing so they have overlooked the fact that there are material differences between that section and the English Orders and Rules. The learned District Judge has also been guided by English decisions which he has regarded as binding on him without a careful examination of the particular rule considered in each of those cases. The cases referred to in the judgment are *Tildesley v. Harper*[1], *Clara Pede & Co. v. Commercial Union Association*[2], and *Bakers Ltd. v. Midway Building and Supplies Ltd.*[3] All these are cases discussed under Order 28 *r.* 1 in the White Book. Of these I have not been able to refer to the volume of the report (32 W. R. 263) in which *Clara Pede & Co's* case is reported as it is not available in any of the libraries to which I have access. The case of *Tildesley v. Harper* (*supra*) a case decided in 1878 deals with Order XIX *rr.* 17 and 22. They are not reproduced in the report, but the observations of the Lords Justices seem to indicate that what was being permitted is the correction of an error in the pleadings. Bramwell, L.J. said—

> " . . . I confess that if the present case had come before me I should have had some doubt whether the Defendant had made a *bona fide* mistake, as the mistake is so very obvious. I should probably have required some affidavit or statement by the solicitor to shew that the slip in the pleading was a *bona fide* one, and if satisfied on the point, I should not have refused leave to amend."

The words of Thesiger L.J. are to the same effect. They are—

> " . . . The object of these rules is to obtain a correct issue between the parties, and when an error has been made it is not intended that the party making the mistake should be mulcted in the loss of the trial."

[1] *(1878) 10 Ch. D. 393 at 396.*
[2] *32 W. R. 263.*
[3] *(1958) 3 All E. R. 540.*

It would appear from the words I have quoted above that the words of Bramwell L.J. quoted by the learned District Judge, "My practice has always been to give leave to amend"; refer to correction of *bona fide* mistakes or slips. The case of *Bakers Ltd. v. Midway Building and Supplies Ltd.* (*supra*) is a decision in 1958 under Order 28 *r.* 1 and Order 58 *r.* 3 (2). The trial Judge refused the defendant leave to amend, and in appeal leave was granted on the ground that the statement of claim did not show that the plaintiff's claim was to be put on the ground of personal liability in equity as distinct from tracing trust money, and the refusal of leave to the defendants to amend by pleading that they were purchasers for value without notice would deprive them of what would possibly be their only effective defence to a claim so put. The following words of Jenkins L.J. indicate the basis on which leave was granted :—

> "It is no doubt true that the function of a statement of claim is to plead the facts on which the plaintiff relies and that he is not strictly obliged to plead law, but here it does seem to me that any person of ordinary experience reading the statement of claim would consider that the matters in issue were confined to those which I have described and would not appreciate that on this pleading it was intended not merely to make out a claim of tracing in the old and restricted form, but also to rely on the personal liability in equity which was held to exist in *Ministry of Health v. Simpson* [1] . . ."

The decisions referred to above, which interpret the scope and meaning of Order 28 *r.* 1, afford no authority for interpreting and determining in the same way the scope of section 93 which is quite a different provision meant to serve a different purpose.

In *Wijewardene's* case [2] I myself referred to *Tildesley v. Harper* (*supra*) and certain other English decisions (*Re Trufort : Trafford v. Blanc* [3]; *Clear v. Clear* [4]; *Sharp v. Wakefield* [5]; *Wickins v. Wickins* [6]; and *Blunt v. Blunt* [7]). But they were all cited in connexion with the discussion of the meaning and effect of the words "as it may think fit" in section 93 and "it thinks fit" in section 211, and the principles governing the exercise of the discretionary power vested in the Court by those words and not in connexion with the scope of the power to amend ; because in that case the plaintiff sought to supply an omission in his pleading by specifying the names of the persons to whom the alleged defamatory words were spoken. The power to amend was not disputed, but the question was whether the discretion had been properly exercised. The following observations in that case bring out the aspect of the section considered therein—

> "It would be unsafe to lay down any rules as to the limits of the exercise of the discretion vested in the Judge by that section. Nevertheless pronouncements of this Court and of the Superior Courts in England afford some guidance in its exercise. It has been stated by this

[1] *(1950) 2 All E. R. 1137.*
[2] *(1958) 60 N. L. R. 457.*
[3] *53 L. T. (N. S.) 498.*
[4] *(1958) 1 W. L. R. 467.*
[5] *(1891) A. C. 173 at 179.*
[6] *(1918) P. 265 at 272.*
[7] *(1943) A. C. 517 at 525.*

Court (*Seneviratne v. Candappa*[1]), quoting with approval the observations of Brett M.R. in *Clarapede v. Commercial Union Association*[2], that amendment should be allowed if it can be made without injustice to the other side, however negligent or careless may have been the first omission, and however late the proposed amendment. "

My words seek to underline the fact that even where there is a negligent or careless omission, mistake, slip or defect, the discretion cannot be exercised if its exercise will cause injustice to the other side; but where its exercise does not cause injustice to the other side the fact that the omission or error is due to negligence or carelessness however gross does not prevent the Judge from exercising it even though the occasion for its exercise arises at a very late stage of the proceedings. It is important to remember that a condition precedent to the exercise of the Judge's discretion is the existence or disclosure of a mistake, defect, slip or omission in the pleadings.

In recent times there appears to have grown a practice of the respective parties repeatedly altering their pleadings under the guise of amendment as if they have an unlimited right to alter their pleadings as and when they think fit to do so. Judges of first instance appear to ignore the provisions of the Code and act as if Order 28 of the English Rules and Orders and all the rules under it were in force here and the parties themselves had the right to *alter* pleadings and not as if the power was one of *amendment* only and not *alteration* conferred on the Judge alone. This tendency must be arrested and Judges both of appellate and original jurisdiction have to be on their guard against the adoption of the pronouncements of the English Courts without a close scrutiny of the provisions of law and the facts and circumstances in regard to which they are made.

The amendment that was sought in the instant case is not for the purpose of correcting any mistake, defect, slip or omission, because the plaintiff has repeatedly asserted both in examination-in-chief and cross-examination that the money he claimed was a loan which is the very assertion he makes in his plaint. The plaintiff's counsel seeks to bring into the pleadings a case which the plaintiff himself has repeatedly and emphatically repudiated in his evidence. The amendment is designed to meet a situation which may arise if the defendant succeeds in establishing the version of the facts outlined by his counsel. The Court was wrong in allowing the plaintiff's application.

We therefore allow the appeal with costs, both of appeal and the contest in regard to the amendment, set aside the order of the District Judge allowing the amendment, and direct that the record be sent back in order that the trial of the action may proceed.

ABEYESUNDERE, J.—I agree.

G. P. A. SILVA, J.—I agree.

Appeal allowed.

[1] *(1917) 20 N. L. R. 60 at 61.*

[2] *32 W. R. 263.*