

1907.
April 24.

Present: Sir J. T. Hutchinson, Chief Justice, and
 Mr. Justice Grenier.

PLESS POL v. DE SOYSA.

Ex parte SHATTOCK.

D. C., Kandy, 17,549.

Assignment of interest in pending action—Validity—Roman-Dutch Law
 —*Litis contestatio—Civil Procedure Code, s. 404.*

Under the Roman-Dutch Law the assignment of the rights of a party in a pending action after *litis contestatio* is not illegal and void.

Even if, as a matter of procedure, such an assignment was prohibited by the Roman-Dutch Law after *litis contestatio*, such prohibition is removed by the provisions of section 404 of the Civil Procedure Code.

THE plaintiff sued the defendant for the recovery of a sum of Rs. 32,400 as damages and also further damages of Rs. 150 a day arising out of the breach of an agreement entered into between them on 17th February, 1905. Issues for trial were settled on 31st May, 1906. On 3rd July, 1906, the plaintiff sold and assigned all his interest in the agreement as well as his interest in the action to one Perianen Chetty. On 18th October, 1906, the defendants filed an amended answer averring that in consequence of the assignment to Perianen Chetty the plaintiff could not maintain the action. By deed dated the 19th December, 1906, Perianen Chetty sold and assigned to Shattock all his interest in the deed of 3rd July, 1906, and in the agreement of 17th February, 1905, and in the action. Shattock thereupon made an application under section 404 of the Civil Procedure Code to be added or substituted as plaintiff on the record. The District Judge (J. H. Templer, Esq.) dismissed the application, holding that under the Roman-Dutch Law an action cannot be sold after *litis contestatio*.

Shattock appealed.

Van Langenberg, for the appellant.

Walter Pereira, K.C., S.-G. (with him *H. J. C. Pereira*), for the defendant-respondent.

Cur. adv. vult.

24th April, 1907. HUTCHINSON, C.J.—

This is an appeal by E. M. Shattock from an order of the District Court of Kandy, dismissing his application to be added as a plaintiff in the action. The action is brought by S. de Pless Pol for damages in pursuance of an agreement made between the plaintiff and the defendant dated 17th February, 1905. By this agreement the

defendant undertook to complete certain buildings in Kandy and to grant a lease of them to plaintiff for ten years from the 15th June, 1905; and it was stipulated that, if the defendants should not complete the works on or before that date, they should pay to the plaintiff Rs. 150 a day for each day beyond that date that the works should remain unfinished by way of liquidated damages. The plaintiff alleges that the defendant failed to complete the works in terms of the agreement, and he claims Rs. 32,400 and a further sum of Rs. 150 a day from the date of the plaint till the works are complete. The plaint was filed on the 9th December, 1905; the answer on the 7th February, 1906. On the 3rd July, 1906, the plaintiff by deed sold and assigned to M. P. L. Perianen Chetty all his interest in the agreement of 17th February, 1905, and also his interest in this action. By their amended answer under an order of the District Court made on the 18th October, 1906, the defendants submitted that the plaintiff in consequence of the assignment to Perianen Chetty, cannot maintain the action. By deed dated the 19th December, 1906, Perianen Chetty sold and assigned to Shattock all his interest in the deed of the 3rd July, 1906, and in the agreement of the 17th February, 1905, and in the action. The District Judge dismissed Shattock's application on the ground that after *litis contestatio* an action cannot be sold, relying on a statement of the Roman-Dutch Law to that effect contained in *Nathan's Common Law of South Africa, vol. II., p. 735. litis contestatio* in Ceylon means the settlement of issues in the action, it took place before the sale by the plaintiff, issues having been settled on the 31st May, 1906. Shattock's application was made under section 404 of the Civil Procedure Code. The sections immediately preceding deal with assignments by operation of law in consequence of the death or bankruptcy of a party, and section 404 enacts that in other cases of assignment of any interest pending an action the action may with the leave of Court, be continued by or against the person to whom such interest has come either in addition to, or in substitution for, the person from whom it has passed.

The Solicitor-General, for the respondents, contends that under the Roman-Dutch Law a right of action cannot be assigned after *litis contestatio*, and that therefore there was no assignment to which section 404 can apply. Reference was made to *Voet (Berwick, v. 97)*; *Herbert's Grotius, p. 336*; *Lorenz's Select Theses, p. 225*; *Nathan's Common Law of South Africa, vol II., p. 735*, based on *Voet, bk. 18, chap. 4, sections 9 to 11, and Grotius' Introduction 3, 14, sections 10, 12*. On these authorities it does not seem to me quite clear that the Roman-Dutch Law forbids such an assignment. But if it did, I think it cannot have been intended to make the transaction altogether illegal and void as between the parties to it, but that the rule was only a rule of procedure, and that section 404 over-rides

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it. That section gives the Court power to allow the assignee to be added as a party when the assignment was made at any time pending the action; and the Court ought to do so in a proper case when it appears convenient and possible without prejudice to the other party. This applicant is the assignee of the plaintiff's right under the contract upon which the action is brought. So far as appears the assignment was made for value and in good faith. The Court can easily take care that no additional costs are thrown on the defendants; and if that is done, I do not see how the defendants can be prejudiced. I propose that this Court should give leave that the action be continued by the plaintiff and the applicant Ernest M. Shattock, and that the defendants pay the applicant's costs of his appeal; and that the costs of this application in the District Court be costs in the cause.

GRENIER A.J.—I agree, and have nothing to add.

Appeal allowed; case remanded.
