1934 *Present :* **Drieberg and Akbar JJ.**

SOCKALINGAM CHETTIAR *et al. v.* WIJEYGUNAWARDENE.

325—D. C. Colombo, 40,805.

Mortgage action—Agreement to assign rights—Must be notarially executed—Ordinance No. 7 of 1840, s. 2.

An agreement to take an assignment of the rights in a mortgage action is not valid unless it is notarially executed.

APPEAL from a judgment of the District Judge of Colombo.

F. A. Hayley, K.C. (with him *Van Geyzel*), for plaintiff, appellant.

H. V. Perera (with him *Athulathmudali* and *Kariapper*), for defendant, respondent.

Cur. adv. vult

January 29, 1934. AKBAR J.—

This appeal is from a judgment of the District Court dismissing the plaintiff's action with costs as the agreement by the defendant to take an assignment of the plaintiff's rights in a mortgage action (D. C Colombo, No. 34,919) was a verbal agreement and not executed in terms of section 2 of Ordinance No. 7 of 1840. One Don Martin owed plaintiff Rs. 6,000 on a mortgage bond executed by Don Martin and hypothecating a rubber land. Plaintiff sued Don Martin on this bond in case No. 34,919 on October 8, 1929. On October 26, 1929, during the pendency of this action defendant agreed to take an assignment of the plaintiff's rights in the action and to pay Rs. 6,000 and interest to the plaintiff. In pursuance of this agreement the defendant gave the plaintiff two promissory notes

for Rs. 6,000. The agreement, however, was not notarially executed, and it was on the ground that such an agreement was invalid under section 2 of Ordinance No. 7 of 1840 that the action was dismissed.

Appellant's counsel argued that under the Roman-Dutch law a mortgage of immovable property was movable property. That seems to be so according to *Voet (bk. I., tit. 8, s. 27—Buchanan's translation, p. 145 and p. 141; 2 Maasdorp p. 6; 1 Van L. Kotze's translation, p. 146).* But this does not conclude the question, and it will be necessary to examine section 2 of Ordinance No. 7 of 1840 to see whether the agreement here was an agreement which came within that section. Mr. Hayley argued that section 2 of Ordinance No. 7 of 1840 did not cover the agreement in this case, and he even went so far as to contend that a transfer of a mortgage bond of immovable property need not be notarially executed. In this latter connection I may refer to the *obiter dicta* of Wood Renton J., and de Sampayo J. in *Muttiah v. Marcanden*[1], where the first named Judge referred to the English case of *Driver v. Broad*[2], in which it was held that a contract for the sale of debentures charging a company's properties movable and immovable was a contract for an interest in land within the meaning of the fourth section of the Statute of Frauds. The second named Judge stated as follows:—"It is a serious question whether any interest in the bond, containing as it does a mortgage of immovable property can be validly transferred except by means of a notarial instrument so far as the security at all events is concerned, I should say it could not. But it is unnecessary to decide this point, because I think the plaintiff must fail on the evidence".

In my opinion a transfer of a mortgage bond hypothecating immovable property or an agreement to transfer such a bond comes within the terms of section 2 and is of no force or avail in law unless it is notarially executed. Such a transfer or agreement will fall within the words "No promise . . . . contract or agreement . . . . for establishing any . . . . interest or incumbrance affecting land or other immovable property . . . ." in section 2 of Ordinance No. 7 of 1840.

It is significant that in section 16 of Ordinance No. 14 of 1891 and section 8 of Ordinance No. 23 of 1927 the words "or transferring have been added after the words "for establishing". These words were really unnecessary because the word "establish" in my opinion clearly indicates that what were required under section 2 were (*a*) an interest affecting land and (*b*) a nexus connecting a person with that interest. A mortgage of immovable property by A in favour of B is in my opinion an "interest or incumbrance affecting land or other immovable property", and if a third party C wishes to "establish" an interest in that mortgage bond whether under a transfer by B of his rights or by an agreement to transfer by B his interest in that bond, he can only do so by producing a notarial transfer or agreement to transfer.

In Sande's *Cession of Actions, s. 11,* I find the following: "Meanwhile we must note particularly that though cessions are effected by mere intention, even by persons absent from each other, yet the formalities

[1] *4 Ceylon Weekly Reports 301.* [2] *(1893) 1 Q. B. 744.*

prescribed by the common law or by Statute for the transfer or alienation of any property must be observed in regard to the cession of action available in respect of the same kind of thing".

Sections 12-16 give instances where the special formalities had to be observed. Section 16 is as follows:—"In the same way where according to the rules of the Saxon Court and certain Belgian provinces the alienation of immovable property is ineffectual without a formal cession in the presence of the Judge of the place where the property is situated, it seems that also the transfer of actions relating to immovables requires the same ceremony and judicial cession".

In the South African case *Le Roux v. de Villiers,* reference was made to a Dutch Placaat requiring a cession of a bond to be made in the same way as the mortgage was made, *coram lege loci,* but it was held in that case that cession may be made "underhand" as "by the uniform practice of the Colony during the last fifty years cessions had been underhand and the matter had never been called in question till now".

The practice here has been to insist on transfers and agreements to transfer mortgage bonds affecting land being executed by notarial documents. A mortgage action on a bond hypothecating immovable property is in my opinion in the same position as the mortgage bond itself, and a plaintiff's right in such an action is an interest affecting immovable property. This being my opinion, I think the order of the District Judge was right and I would dismiss the appeal with costs.

DRIEBERG J.—I agree.

Appeal dismissed.

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1 (1869) *Buchanan's Reports 90.*