1934 *Present :* **Macdonell C.J., Garvin S.P.J., Drieberg and Akbar JJ.**

KAILASAN PILLAI *v.* PALANIAPPA CHETTIAR.

153—D. C. (Inty.) Matara, 6,364.

Decree—Assignment in writing—Seizure of decree by creditor after assignment —Priority—Sanction of Court for assignment unnecessary—Civil Procedure Code, ss. 234 and 339.

Where, after a decree has been assigned in writing, it is seized by a creditor of the assignor, the credtior is not entitled to priority merely because the assignee has made no application for execution under section 339 of the Civil Procedure Code.

The holder of the earlier assignment has preference.

It is not necessary for the validity of an assignment of a decree that it should be sanctioned by Court.

CASE referred by Akbar J. and de Silva A.J. for determination by a Bench of four Judges.

The material facts as stated by Akbar J. are as follows:—Plaintiff obtained a mortgage decree against the defendant on March 11, 1931, but he assigned this decree to the appellant by bond No. 309 of September 2, 1931, which was duly registered by the appellant. The respondent to

this appeal who was a judgment-creditor of the original plaintiff in the case now in appeal having got judgment in D. C. Galle, No. 28,986 issued a notice under section 234 of the Civil Procedure Code seizing the mortgage decree on October 8, 1931. On March 1, 1932, the appellant moved to be substituted as plaintiff, which motion was allowed on May 2, 1932. On June 24, 1932, the respondent moved under sections 234 and 339 of the Civil Procedure Code for writ to sell the land.

The question for decision was whether the seizure effected by the respondent on October 8, 1931, prevailed over the assignment of September 2, 1931.

Kurukulasuriya (with him *T. S. Fernando*), for substituted plaintiff, appellant.

Navaratnam (with him *D. W. Fernando* and *S. Alles*), for creditor, respondent.

Cur. adv. vult.

March 12, 1934. MACDONELL C.J.—

This matter raised a contest between the assignee of a mortgage decree and a judgment-creditor who had seized that decree under section 234 of the Civil Procedure Code. It was argued before Akbar and de Silva JJ. and was by them sent before a Full Bench.

The facts were these. On March 11, 1931, the original plaintiff obtained a mortgage decree against the defendant in this case. On September 2, 1931, he assigned that decree to the appellant in this matter who registered it on September 11, 1931. Thereafter on February 1, 1932, the appellant filed his assignment in Court and moved under Civil Procedure Code, section 339, for notice on the defendant to show cause why he the appellant should not be substituted as plaintiff of record and be allowed to take the necessary steps to execute the judgment. The defendant was duly served with this notice but did not appear, and on May 2, 1932, the appellant was substituted as plaintiff of record in place of the original plaintiff.

It is now necessary to give the facts affecting the respondent to this appeal. He, on October 23, 1930, had got judgment against the original plaintiff in this action for Rs. 515.40 in a case D. C. Galle, No. 28,986. About a year afterwards, on October 8, 1931, he issued a notice under section 234 of the Civil Procedure Code seizing the mortgage decree of March 2, 1931, pronounced in favour of the original plaintiff in this action. It will be observed that this notice was later than the assignment of the decree to the appellant but was earlier than the appellant's application under section 339 of February 1, 1932. The respondent, having issued this notice of seizure, did nothing till June 24, 1932, when he applied in this action under sections 254 and 339 of the Civil Procedure Code for a writ to have the land, the subject of the mortgage, sold. It will be remembered that the appellant had been substituted as plaintiff of record in this action some six weeks earlier. These facts raised a clear issue between the two parties, the appellant who was by now substituted plaintiff of record and the respondent who had seized the mortgage decree. The contest between them was argued on September 19, 1932, at which

the case *Walpola v. Cooke*[1] was cited and it was argued that the transfer by assignment of the decree could not be complete until sanctioned by the Court, which sanction was not obtained until after the respondent had seized the decree on October 8, 1931. The order appealed from was as follows:— "The seizure of the decree which was notified on October 3, 1931, must prevail over the assignment of it which was not notified to Court till February 1, 1932".

The first thing to observe is that the assignment in this case was admittedly complete. It has been notarially executed and in terms is a full cession, showing an intention by the assignor the original plaintiff to pass all the rights he has to the appellant assignee. It had also been registered. For the assignee it had to be conceded that he had done nothing to inform the Court from which the decree issued of the fact of this assignment until February 1, 1932. The section applicable to this contest is section 339 of the Civil Procedure Code—

"339. If a decree is transferred by assignment in writing or by operation of law from the decree-holder to any other person, the transferee may apply for its execution by petition, to which all the parties to the action or their representatives shall be made respondents to the Court which passed it, and if on that application that Court thinks fit, the transferee's name may be substituted for that of the transferor in the record of the decree, and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder.

Provided that where the decree has been transferred by operation of law, the transferor need not be made respondent to the petition.

Provided also that where a decree against several persons has been transferred to one of them, it shall not be executed against the others.

In the case where one decree of court is seized in execution of another decree, the judgment-creditor of this second decree is in the situation of assignee of the judgment-creditor of the decree which is seized, provided the letter person is identical with the judgment-debtor of the decree in execution of which the seizure is made."

The opening words of this section are important, "if a decree is transferred by assignment in writing or by operation of law from the decree-holder to any other person." Clearly it is not from this section that any right to make an assignment is derived; that right must be due to some other law, for the words of the section contemplate an assignment which is already made. The section then goes on to say what are the powers of the Court with regard to the claim of the assignee and says that, if the Court thinks fit, it may substitute the assignee's name for that of his assignor in the record of the decree and give him the right of execution previously possessed by the assignor. But the section, it will be observed, is purely procedural. The assignment must have been made before the section is invoked and the effect of the assignment, as transferring the original rights of the decree-holder to his assignee, must depend not upon this section 339 but upon the validity in form and substance of the assignment itself. Now the effect of an assignment if otherwise complete, as the present assignment is admitted to be, is to transfer the

[1] *(1929) 31 N. L. R. at p. 378.*

rights named in that assignment to the assignee. In the common phrase, he steps into the shoes of the assignor and is henceforward clothed with all the rights of the assignor in the matter assigned. If the assignment is complete, as the present assignment is admitted to be, then from the moment of that completion there is nothing left to the assignor of his original rights, the subject of that assignment, for they have passed *in toto* to the assignee. This consideration really disposes of the question put before us. The assignment being complete there was nothing for the respondent to seize when he issued his notice on October 8, 1931, under section 234, seizing the mortgage decree in this action. The point is quite clearly put by Schneider J. in *Wimalasuriya v. Purolis*[1], which was a case where money seized in execution of the plaintiff's writ had been deposited in Court but where the plaintiff had in the meantime duly assigned the decree, and the gist of the matter is contained in the words at page 122, "Till the assignment is set aside the substituted plaintiff is the owner of the money and was its owner at the time of the seizure by the judgment-creditor. It follows therefore that at the date of seizure the property seized was not that of the judgment-debtor".

For the respondent reliance was placed in section 254 of the Civil Procedure Code. The judgment-creditor who has seized the decree is to be deemed the assignee thereof, the section says, but it then proceeds to lay down the limits within which he is to be deemed such assignee. He is to be such "as of the date of seizure" and so far as the "interest" of the person against whom he is executing the writ of execution extends. Applying section 254 to the facts of the present matter, the respondent will be assignee of the decree he has seized only from October 8, 1931, whereas the appellant became assignee on September 2, 1931, and even from that October 8 the respondent will be assignee only as far as the interest of the person against whom he is executing extends. But that person, the original plaintiff, had parted with all his "interest" some six weeks earlier. There was no "interest" then remaining for the respondent to become assignee of.

It was necessary to reserve to a Full Bench the point before us because of certain *dicta* in *Walpola v. Cooke* (*supra*). That was a case where the plaintiff had obtained judgment on a mortgage bond and had then mortgaged the decree with a third party, who will be called B. Subsequently C, who was himself the holder of a decree against the plaintiff, seized the mortgage decree which had been mortgaged to B, got himself substituted as plaintiff in the action and had the security realized, and it was held that C had a preferent right to the proceeds of the sale overriding that of B the mortgagee of the decree. In that judgment the following passage occurs at page 383:—"The only way so far as I can see in which the mortgagee can complete his security is by taking proceedings under section 339. Until he does so he is not secured. In other words, possession of the decree remains in the mortgagor. Possession is transferred not by the deed but by the Court and at the Court's discretion. It is no doubt true that the Registration Ordinance does not declare mortgages of choses in action void unless there is either delivery or registration, but it remains to be ascertained

[1] 2 *C. L. Rec.* 121.

what security is created in such a case, and to ascertain this we are thrown back upon the Common law. As indicated above, I do not think that any right in *rem* was acquired by B. The document merely gave him an opportunity to acquire such a right by going to the Court and by being substituted as plaintiff, but he did not avail himself of his right".

With all respect the passage in *Walpola v. Cooke* quoted above is a misapprehension of section 339, particularly where it says that possession of the decree is transferred not by the deed but by the Court, for the analysis of the question should have begun a stage further back asking what did the deed itself—a mortgage—transfer, and then it would have been perceived that the mortgage deed had transferred, not the decree itself, that certainly could only be done by the Court, but that it had transferred the substance of the decree, the beneficial interest in its subject-matter if the phrase be permitted, and this analysis would then have shown that C when he did seize the decree was seizing something empty of content because its substance had previously passed to another. I would also respectfully dissent from the statement that the document "merely gave him an opportunity to acquire such a right by going to the Court and by being substituted as plaintiff". I think it is clear, as I have said, that it is the document itself which gives him the right independently of his going to Court and asking to be substituted as plaintiff.

The point before us seems to be clearly ruled by the general law as to assignments as also by the words of section 339 itself properly apprehended. If further authority be needed I would respectfully adopt the words of Schneider J. in the case in *2 Ceylon Law Recorder, p. 121,* cited above.

My answer to the questions before us would be then that the assignment to the appellant of September 2, 1931, should be held to prevail over the respondent's seizure of the mortgage decree of October 8, 1931, and that the order in this case of September 19, 1932, should be reversed with costs here and below.

GARVIN S.P.J.—

A point of law which arose in the course of the argument which took place before Akbar J. and de Silva A. J. has been reserved for determination by this Bench of four Judges. The material facts are set out as follows by Akbar J:—

"Plaintiff obtained a mortgage decree against the defendant on March 11, 1931, but he assigned this decree to the appellant by bond No. 309 of September 2, 1931, which was duly registered by the appellant. The respondent to this appeal, who was a judgment-creditor of the original plaintiff in the case now in appeal having got judgment in D. C. Galle, No. 28,986 issued a notice under section 234 of the Civil Procedure Code seizing the mortgage decree on October 8, 1931. On March 1, 1932, the appellant moved to be substituted as plaintiff which motion was allowed on May 2, 1932. On June 24, 1932, the respondent moved under sections 254 and 339 of the Civil Procedure Code for writ to sell the land."

The question for determination is whether the seizure effected by the respondent on October 8, 1931, prevails over the assignment of September 2, 1931.

The assignment in favour of the appellant is unexceptionable. There was a right to assign, namely, the plaintiff's right in the decree entered in this case. The intention to part with that right to the appellant has been clearly manifested and there has also been a cession of the right. This is evidenced by a document in writing in the most solemn form known to our law, which is a writing attested by a notary and two witnesses. Further, the appellant moved the Court under the provisions of section 339 of the Code and, by virtue of the assignment in his favour, had been substituted on the record in the place of the original plaintiff. It was urged however, that the seizure effected by the judgment-creditor in D. C. Galle, No. 28,986, who is the respondent to this appeal operates as an assignment to him of the decree as at and from October 8, 1931, being the date on which that seizure was effected. Section 254 of the Civil Procedure Code which is relied on as authority for this proposition does undoubtedly support it to the extent that it is declared that "when the property seized is a decree of court the judgment-creditor at whose instance the seizure is made shall be deemed to be the assignee thereof under assignment as of the date of the seizure made by the person against whom he is executing the writ of execution, so far as that person's interest extends and he may realize the decree in the manner hereinafter provided for the execution of a decree by an assignee thereof". The respondent at whose instance this decree was seized must be deemed to be the assignee thereof under assignment as of the date October 8, 1931. But the appellant is an assignee under assignment dated September 2, 1931, and his assignment, being prior in date, would presumably take priority over the respondent's assignment. Indeed section 254 seems to say so almost in terms for the seizing creditor is only to be deemed the assignee by assignment (*a*) "as of the date of the seizure", and (*b*) "so far as that person's interest (*i.e.*, the interest of the holder of the decree under seizure) extends". At the date of the seizure the interest of the original plaintiff in this decree had ceased for he had assigned it by assignment No. 309 of September 2, 1931. In *Cader v. Saibu*[1] Schneider J. when dealing with one of the arguments adduced by Counsel for the appellant said with reference to a creditor who had seized a decree that he "was never an assignee of the decree, because at the date of his seizure his debtor had no interest in the decree" having divested himself by an assignment of earlier date.

The assignment in favour of the appellant has not been challenged on the ground that it is in fraud of creditors or on any ground upon which it might legally be impeached. It is therefore unexceptionable and being an assignment in writing of a decree prior to the seizure is entitled to preference.

It was argued however that an assignment in writing of a decree is not complete until it has been notified to the Court which passed the decree. Certain passages in the judgment of Lyall Grant J. in *Walpola v. Cooke*,[2] have been referred to us supporting this proposition and in particular the

[1] *(1923) 25 N. L. R. 36.*

[2] *(1929) 31 N. L. R. 378.*

following:—"It seems to me that the effect of this section (339) is that the transfer of a decree is not complete until the Court after consideration has sanctioned it". Nowhere in the Code is there any provision for the notification to the Court of the assignment of decrees. But provision has been made for the execution of a decree by the assignee thereof whether the assignment be in writing or by operation of law. Indeed, even in the case of a person at whose instance a decree is seized what is provided is that "he may realize the decree in the manner hereinafter provided for the execution of a decree by an assignee thereof"—section 254. In effect this section places a person who procures the seizure of a decree in the situation of an assignee thereof who may if he desires to realize the decree do so in the manner provided for the realization of a decree by an assignee thereof. The procedure for the realization of a decree by an assignee is laid down in section 339 as follows:—

> "If a decree is transferred by assignment in writing or by operation of law from the decree-holder to any other person, the transferee may apply for its execution by petition, to which all the parties to the action or their representatives shall be made respondents to the court which passed it, and if on that application that court thinks fit, the transferee's name may be substituted for that of the transferor in the record of the decree, and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree holder."

The opening words of the section indicate that the only persons to whom its provisions are available are those to whom a decree had been transferred by assignment in writing or by operation of law. Indeed, it is required of a person who seeks to avail himself of its provisions that the decree shall have been transferred to him by assignment in writing or operation of law. I am unable to agree with Lyall Grant J. that there is anything in section 339 which suggests that a transfer of a decree by assignment in writing or by operation of law is not complete "until the Court after consideration has sanctioned it". It does not say so. What appears to be implicit in the section is that a transfer of a decree if made by assignment in writing or by operation of law is complete and gives the transferee a right to avail himself of the provisions of the section. The requirement of the section that all parties to the action or their representatives shall be made respondents to the application is intended to furnish them with an opportunity to object to the application. They or any of them may for instance desire to impeach the assignment; they may object that the decree has been duly paid or satisfied or raise any other valid objection to the substitution of the applicant as plaintiff on the record. But in the absence of any valid objection the applicant as the transferee of the decree would clearly be entitled to realization of the decree in the manner provided by the section.

A transferee of a decree whether by assignment in writing or by operation of law is only bound to proceed under section 339, if and when he desires to obtain execution of that decree. An assignee who does not promptly proceed under section 339 imperils his interests in that the decree may be executed by the original plaintiff or by the application of a subsequent assignee.

But so long as the decree remains unexecuted and unsatisfied as in the case before us the respective claims of competing assignees to be permitted to execute the decree and take the benefit thereof must be determined in accordance with the principles of the general law.

There are here two persons claiming to be transferees of the decree—the one by an assignment in writing, to which no exception has been or can be taken, dated September 2, 1931; the other deemed to be assignee as of the date of a seizure effected at his instance on October 8, 1931.

The holder of the earlier assignment clearly has the preferent right.

The order of the District Judge will be set aside and this appeal allowed with costs in both Courts.

DRIEBERG J.—I agree with the judgment of my Lord the Chief Justice.

AKBAR J.—I agree with the judgment of my Lord the Chief Justice.

Appeal allowed.