1920.

Present: De Sampayo J. and Loos A.J.

PUNCHI MAHATMAYA *v.* WALOOPILLAI.

350—D. C. Ratnapura, 3,257.

Lis pendens—*Application for sale of property subject to* fidei commissum.

An application to Court under the Entail and Settlement Ordinance, 1876, for sale of a property subject to a *fidei commissum* is not a *lis* in the sense required for the purposes of the doctrine of *lis pendens*.

THE facts appear from the judgment.

H. J. C. Pereira (with him *Canakeratne*), for defendant, appellant.

A. St. V. Jayawardene (with him *Weeraratne*), for plaintiff, respondent.

Cur. adv. vult.

March 25, 1920. DE SAMPAYO J.—

This is a somewhat peculiar case, and the proceedings are equally peculiar, inasmuch as the District Judge has decided serious questions of fact without any evidence whatever. The case arose in the following circumstances. Mrs. Caroline Julia de Zilva, being the owner of a certain house in the town of Ratnapura, by deed dated July 10, 1906, gifted the premises to her son Victor de Zilva for life, and after his death to his wife Florence Hazel for life, and after her death to Caroline Hazel Vivian, the daughter of Victor and Florence Hazel, who was, and still is, a minor. The gift was subject to a life interest in the donor, and also subject to a *fidei commissum* in favour of the heirs of the minor Caroline Hazel Vivian. The donor died on January 21, 1919. She and her son Victor gave certain leases, with regard to which it need only be stated that they would expire in April, 1922. The premises were used as a proctor's office, and the leases were either in favour of the defendant's partner, P. C. F. Goonewardene, or in favour of himself. On March 18, 1919, Victor de Zilva made an application to Court, under the provisions of the Entails and Settlements Ordinance, 1876, for authority to sell the premises for Rs. 10,000, and to invest the money in the purchase of some other property, subject to the same conditions. After due inquiry the Court on April 16, 1919, allowed the application, and the property was sold to the plaintiff by deed dated April 17, 1919. In the meantime, on March 19, 1919, Victor de Zilva gave a lease to the defendant for a period of five years commencing from the expiration of the subsisting leases.

1920.

DE SAMPAYO J.

Punchi Mahatmaya v. Waloo-pillai

The plaintiff brought this action to have this deed of lease cancelled, on the ground that the lease was obnoxious to the provisions of the original deed of gift, which had prohibited a lease for more than two years or during the pendency of another lease. It was obvious that this was a wholly untenable ground, but at the trial the nature of the action was enlarged, and it was made to rest on the ground (1) that the lease being granted during the pendency of the application to Court for sale of the property, the doctrine of *lis pendens* applied, and the lease was invalid; and (2) that the defendant obtained the lease fraudulently and in collusion with Victor de Zilva. As regards the first branch of this cause of action, I am unable to regard the application to Court under the Entail and Settlements Ordinance, 1876, as a *lis* in the sense required for the purposes of the doctrine of *lis pendens*. But it is only necessary to say that this so-called *lis pendens* was not registered under the provisions of the amending Land Registration Ordinance, and therefore the plaintiff is not able to maintain his case on that ground. As regards the second branch, the District Judge negatived the existence of fraud, as in the circumstances he must necessarily do. But he has found that the defendant entered into the lease of March 19, 1919, collusively with Victor de Zilva for the purpose of defeating the application to Court, and he accordingly set aside the lease and entered a decree in favour of the plaintiff for possession and damages. The only fact which the learned District Judge had before him in connection with this point is the admission in the answer that the defendant knew of the application to Court. But mere knowledge of this kind does not amount to collusion, which implies co-operation or acting in concert, but of this there is not the slightest trace, nor is there anything to show that the defendant's intention was to defeat the Court's exercise of its power in respect of the application for sale of the property. The District Judge's finding on this point is a gratuitous assumption. He also found by mere comparison of the rent secured by the various leases that the consideration for the lease in question was inadequate, and utilized that opinion as proof of the existence of collusion. This is an instance of one assumption being taken as proof of another assumption. The question of inadequacy of consideration could only have been determined by due inquiry into all the circumstances. But, as I stated before, there was no evidence whatever taken in this case. Moreover, the lease caused no prejudice to the minor, since the full value of the property was realized by the sale. The plaintiff, as purchaser, may be said to be prejudiced, but he purchased with his eyes open. The most remarkable circumstance in the whole case is that the plaintiff knew about the lease before the purchase, and even entered a *caveat* against registration of any deed relating to the land, and yet for some extraordinary reason he abstained from informing the Court of the lease, and purchased the property

notwithstanding that fact. I do not think he can complain now. It was contended in appeal on the authority of *Andrishamy v. Silva* [1] that in any case Victor de Zilva had no power to make the lease and so defeat the exercise of the Court's authority. But that decision is inapplicable, for it was based on the fact that the Court had already made an order and had itself undertaken the sale and carried it through a Commissioner appointed by Court, though out the formal transfer had not yet been executed.

In my opinion the judgment appealed from is erroneous. I would set it aside, with costs in both Courts.

Loos J.—I agree.

Set aside.