*Present:* Mr. Justice Middleton and Mr. Justice Grenier. *Feb. 25, 1910*

PERERA *v.* SILVA *et al.*

*D. C., Kalutara, 4,034.*

*Sale by defendant before service of summons* — Lis pendens — Litis contestatio.

A conveyance by a defendant of the land in dispute in an action is valid as against the plaintiff, if it was made before the defendant knew of the existence of the suit.

If it could be shown that the defendant knew of the institution of the action against him and evaded service of summons, and in the meantime sold the land, the doctrine of *lis pendens* would apply, and the sale would be a nullity as against the plaintiff.

APPEAL from a judgment of the District Judge of Kalutara. In this action (partition) title to a one third share was in dispute between the plaintiff (respondent) and the added defendants (appellants). Admittedly the land belonged originally to one Christian Silva, who mortgaged it to the added defendants, who put the bond, which was unregistered, in suit on May 17, 1906. Summons was served on Christian Silva on June 26, 1906. Judgment was entered against Silva, and the mortgaged property was bought by the added defendants, who registered their Fiscal's transfer on June 22, 1909. Prior to the service of summons, on June 7, 1906, Christian Silva sold the mortgaged land to plaintiff, and the transfer was registered on June 8, 1906.

The learned Acting District Judge (A. C. G. Wijekoon, Esq.) held that as summons had not been served on Christian Silva at the date of his transfer to the plaintiff, the conveyance was not made *pendente lite*, and that it was valid as against the added defendants.

The added defendants appealed.

*Feb. 25, 1910*

*Perera v. Silva*

*H. A. Jayewardene* (with him *Cooray*), for the appellants.—The transfer to the plaintiff was made after the institution of the mortgage action. It is therefore bad as against the added defendants. It does not matter whether summons was served or not at the date of the transfer. Counsel cited *Krishnappa v. Shivappu*,[1] *Faiyaz Husan Khan v. Munshi Prag Narain*,[2] *Lency v. Peries*,[3] *Samy Appu v. Dissanayake*,[4] *Bellamy v. Sabine*.[5]

*A. St. V. Jayewardene*, for the respondent.—Until service of summons there will be no *lis pendens*. The transfer here was made before the service of summons. There is nothing to show that Silva was evading service of summons, or was aware of the institution of the mortgage suit. Counsel cited *Sande 130*; *Anders' Cession of Action 81*; *4 Nathan 216, sections 2173 and 2174*; *Swaris v. Pieris*;[6] *Hakum Chand 694*; *Kotze's Van Leeuwen, vol. II., 460*; *Abraham Fernando v. Silvester Perera*.[7]

*Cur. adv. vult.*

February 25, 1910. MIDDLETON J.—

This was a partition action in which the plaintiff sought to partition a certain land called Meegahawatta, allotting to himself an undivided one-third share and to the first defendant an undivided two-thirds share.

The second, third, and fourth added defendants intervened, and it was admitted Christian Silva possessed one-third of the said land, but mortgaged it on May 29, 1900, unregistered; that the bond was put in suit and summons issued on May 21, 1906, but was not served till June 26, 1906, defendant Christian being twice reported as not to be found.

On June 7, 1906, by P. 3, registered June 8, 1906, Christian sold his share to the plaintiff pending action on the mortgage bond. Judgment was entered on the mortgage bond on June 8, 1906, and the land, presumably as bound and executable, was seized and sold on August 29, 1906, and added defendants obtained a Fiscal's transfer, which was registered on June 22, 1906.

The question therefore is, in whom is the title to this one-third? The question has been argued before us at considerable length on the footing that the case was one of *lis pendens*, and it has been decided in the Court below, on the authority of *Radhosyam Mohapattra v. Sibu Panda and another* [8] that the principle applicable to

[1] *(1907) 31 Bom. 393.*
[2] *(1907) 5 Cal. L. J. 563.*
[3] *(1887) 8 S. C. C. 94.*
[4] *(1902) 3 Browne 82.*
[5] *(1857) 1 G. & J. 566.*
[6] *(1908) 4 A. C. R. 155.*
[7] *(1880) 3 S. C. C. 158.*
[8] *(1888) I. L. R., 15 Cal. 647.*

cases of *lis pendens* did not apply if the sale took place before the suit became contentious, and inasmuch as the summons was not served on the defendant when he sold the land, the title of the plaintiff was upheld as against that of the added defendants, who now appeal to this Court. Counsel for the appellant cited *John de Lency v. Adrian Peries*,[1] *Samy Appu v. Dissanayake and another*,[2] *Hakum Chand 688 and 694*, *Krishnappa v. Shivappu*,[3] *Faiyaz Husan Khan v. Munshi Prag Narain*.[4]

Counsel for the respondent relied on *Sande 130; Anders, on the Law of Cession of Actions, 81, 1901 edition; 4 Nathan 216, sections 2173 and 2174; Swaris v. Pieris*;[5] *Kotze's Van Leeuwen, vol. II., 460; Abraham Fernando v. Silvester Perera*;[6] *R. V. Adriana, &c. v. Prolishami*;[7] *and Hakum Chand 694*. Both sides referred to *Bellamy v. Sabine*.[8]

I have carefully gone through all the authorities quoted, and in my opinion the Roman-Dutch Law, like the English, founds the doctrine of *lis pendens* common to both systems, not on any principle of constructive notice, but on the ground that it will be impossible for any suit or action to be brought to a successful termination if alienations, *pendente lite*, of the property in litigation were permitted to prevail (*Bellamy v. Sabine, ubi supra*), and the judgment will be a mockery (*Sande, ubi supra*). Under the Roman-Dutch Law the phrase *res litigiosa* is in use, and the alienation of a *res litigiosa* is interdicted after *litis contestatio* has given it the character of *res litigiosa*. It would seem that the Roman-Dutch jurists considered that *litis contestatio* occurs in different forms of action at different periods, but at the Cape it has been held to occur on the closing of the pleadings by Villiers C.J. (*Nathan, ubi supra*).

In India the Privy Council has held that in terms of section 52 of the Transfer of Property Act IV of 1882, which prohibits the transfer of immovabe property, the subject of a contentious suit or proceeding during the active prosecution in any Court of such suit, the doctrine of *lis pendens* applies to a transfer made after the transfer of immovable property, the subject of a contentious suit or *Husan Khan v. Munshi Prag Narain, ubi supra*), and this was held also by Jenkins C.J. and Beaman J. in a case decided by them just nine days before the Privy Council judgment was delivered (*Krishnappa v. Shivappu, ubi supra*). It was further held that a contentious suit meant every real suit as distinguished from a collusive one, and that a suit might be contentious before a summons was served on the other party. In both these cases the question of evasion of service of summons was alluded to and considered. The

[1] *(1887) 8 S. C. C. 94.*
[2] *(1902) 3 Browne 82.*
[3] *(1907) 31 Bom. 393.*
[4] *(1907) 5 Cal. L. J. 563.*
[5] *(1908) 4 A. C. R. 155.*
[6] *(1880) 3 S. C. C. 158.*
[7] *(1884) 6 S. C. C. 93.*
[8] *(1857) 1 G. & J. 566.*

*Feb. 25, 1910*

MIDDLETON J.

*Perera v. Silva*

case relied on by the District Judge appears, therefore, to be over-ruled.

Under the English Law there is a statutable provision for the registration of a *lis pendens*, with a view no doubt to the protection of a *bona fide* purchase for value without notice from an alienating litigant (*2 and 3 Vict., chapter II., section 7*). But I take it that the rule before this was that a purchaser, *pendente lite*, from a defendant in a real action was bound by the judgment (*Metcalfe v. Pulvertoft*[1]), and generally that purchasers, *pendente lite*, were bound by the decree (*Yeavely v. Yeavely*[2]), and that an interest acquired in the subject-matter of the suit, *pendente lite*, was a nullity as against the plaintiff (*Gaskell v. Durdin*[3]).

By our system of procedure in Ceylon an action is instituted by the filing of a plaint (section 39, Civil Procedure Code), which is done in the Court itself. The next step is a summons to the defendant, who until service of it may well be deemed ignorant that there is a *res litigiosa* between himself and the plaintiff. In both the Indian cases the Courts considered the possibility of the successful evasion of service of summons by the defendant until he had divested himself by sale of all the property on which the plaintiff's claim attached, which is just as likely in Ceylon as in India. There is no proof, however, that defendant was evading service here.

In England *Bellamy v. Sabine*, *ubi supra*, would seem to show that the service of a subpœna or writ of summons constitutes a *lis pendens* between the plaintiff and defendant. This indicates the necessity that knowledge of the existence of the suit must be brought home to the defendant under the English Law, as indeed it appears to me to be necessary under the Roman-Dutch Law (*Sande 130*). I think, therefore, that if it could be shown that Christian knew of the institution of the action against him and evaded service, in the meantime selling to the plaintiff, the doctrine of *lis pendens* would apply, and the sale should be deemed a nullity, even if it were without notice to a *bona fide* purchaser or without service of summons. As Jenkins C.J. said in *Krishnappa v. Shivappu*, *ubi supra*, page 40, "the hardship to the purchaser cannot affect the decision of the case," and there is no statute law in Ceylon with reference to the registration of a *lis pendens*. As, however, there is no proof that the summons was served on the mortgagor in the action on the mortgage and before the sale to the plaintiff, or that he evaded service, I would hold that at the date of the sale there was no *lis pendens* proved, and the appeal must be dismissed with costs.

GRENIER J.—I am of the same opinion.

*Appeal dismissed.*

[1] (*1813*) *2 Vesey & Beames' Reports 205.* [2] (*1813*) *3 Chancery Reports 84.*
[3] (*1812*) *2 Ball & Beaty, Ireland, 170.*