[FULL BENCH.] 1923.

Present: Bertram C.J., Ennis, Porter, and Schneider JJ., and Garvin A.J.

ANOHAMY *et al. v.* HANIFFA.

57—D. C. (Inty.) Matara, 199 H.

Lis pendens—*Gift by husband to wife—Liability for debts of husband—Mortgage action not registered—Relation back of decree to mortgage.*

On August 31, 1918, Senaratne transferred four lands to his wife. Both husband and wife mortgaged the lands to Bastian on October 7, 1918. The deed was registered on October 16, 1918. Seyanis instituted an ordinary money action against Senaratne on October 10, 1918, and obtained judgment on February 3, 1919. Bastian put his bond in suit and obtained decree on December 1, 1920. The sale under the mortgage decree was held on February 6, 1921, and the lands were purchased by defendant, who obtained a Fiscal's transfer on April 7, 1921 (registered on the same day). Bastian did not register the *lis pendens*. Meanwhile Seyanis seized the lands in execution of his decree. Bastian caused notice to be given of his mortgage and that the bond had been put in suit. The lands were purchased by the plaintiffs, who obtained Fiscal's transfer on February 4, 1921 (registered on February 7). The plaintiffs instituted the present action for declaration of title.

Held, that the plaintiffs were not bound by the mortgage decree, but that the defendant, who purchased under the mortgage decree, had certain rights in equity.

The rights of the parties were not affected by any supposed doctrine of relation back of the title of the purchaser under the mortgage decree to the date of the mortgage.

(*Per* Full Court, GARVIN A.J. *dissentiente*).—Where a husband makes a gift in favour of his wife, and the wife has thereafter made a *bona fide* alienation of the property (along with the husband), it cannot be seized and sold to satisfy a debt of the husband.

ENNIS J.—A creditor can proceed against the property of the wife (acquired from the husband) to satisfy the husband's debt to the same extent and in the same manner as he could have proceeded against the property had it remained his. The extent to which a man's property is subject to his debt is so long as it is in his hands or can be followed; the moment he has made a *bona fide* alienation of the property, it cannot be seized and sold to satisfy a debt.

BERTRAM C.J.—These words ("to the same extent" in section 13 of the Matrimonial Rights Ordinance, 1876) are words of limitation, and I would construe them as intimating that the charge in favour of the creditors, created by the section, is subject always to the right of the person in whom the property is vested to alienate it or charge it.

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GARVIN A.J.—It is clear from the language employed, that notwithstanding that a husband has made a gift to his wife, the property remains subject to his debts and engagements in the same manner and to the same extent as if the gift had not been made. It gives a creditor the right to take the property in execution as if the title to the property were still in the husband. By creditor is meant a person who was a creditor at the time of the gift.

THIS case was reserved for argument before a bench of five Judges by the following judgment by Ennis J. :—

The facts in this case are as follows. Four lands were conveyed by one Charles Edward Senaratne by deed No. 1,161 on August 31, 1918, to his wife, Johanna Francina Goonewardene. On October 7, 1918, the husband and wife acknowledged their joint indebtedness to one Don Bastian, and executed a mortgage of the properties in favour of Don Bastian. This mortgage was registered on October 16, 1918. Don Bastian put the bond in suit in D. C. No. 9,300 and obtained a decree on December 1, 1920. At the sale in execution, the defendant purchased and obtained a Fiscal's transfer of the three lands on April 7, 1921. This was registered the same day. It appears that one Seyanis was a creditor of Charles Edward Senaratne, and in D. C. No. 8,446 he obtained judgment against him and seized the lands in question. In D. C. 8,777 he brought an action to have it declared that the lands were liable in execution in No. 8,446. He obtained a decree in his favour, which was registered on July 14, 1920. Thereafter the lands were sold in execution of the decree in No. 8,446, and purchased by plaintiffs, who obtained Fiscal's transfers on February 4, 1921, which were registered on the 7th of that month. The learned Judge found in favour of the plaintiffs on the ground that the plaintiffs purchased the land subject to a liability to pay the debts of Charles Edward Senaratne. An issue had been raised in the case as to whether the *lis pendens* of the mortgage action on which the defendant purchased was registered. It seems to have been admitted in the Court below, and also appears to have been admitted in the petition of appeal, that the *lis pendens* was not registered. The learned Judge did not decide the case on the question of *lis pendens*, and did not in fact decide the issue as to whether the *lis pendens* was registered. His decision turned on the fact, as found by him, that the lands were liable for the debts of Charles Edward Senaratne. He appears to have overlooked the fact that Charles Edward Senaratne joined in the mortgage to Don Bastian, and acknowledged a debt to Don Bastian in the deed itself ; so that the defendant also, in a sense, may be regarded as a creditor of Charles Edward Senaratne. The Judge's finding, therefore, does not help the judgment in the case. On appeal it was urged by the plaintiffs-respondents that the absence of any registration of *lis pendens* gave the plaintiffs title which was good as against the defendant. On this point we have

been referred to a number of cases which it is difficult to reconcile with one another. The first of these cases was one decided by my brother Porter and myself in 1922—*Davit v. Davith*.[1] We were told by Mr. Hayley, who appears for the respondent in this case, that in that case also the mortgage bond was registered, although the fact is not mentioned in the report. It was there held that the non-registration of a *lis pendens* gave the purchaser title, and in that case his title was upheld in the absence of any contention as to the rights of the purchasers under the mortgage sale. This case was followed in 1923 by the case *Mohamadu Buhari v. Silva*[2] where it was held by two Judges that the question of registration of *lis pendens* did not affect a title, under the mortgage, by any other means, and it was suggested that the title of the purchaser at the mortgage sale related back to the date of the mortgage, although the two cases referred to appear to relate to a question of priority of registration. Following this case was the case of *Fernando v. Peris*,[3] where it was held that a purchaser has superior title if the *lis pendens* has not been registered. It would seem that the mortgage action No. 9,300 was properly constituted, inasmuch as every one that could be made a party at the date of that action was included; and any title under the action is not void by the provisions of section 3 of Ordinance No. 29 of 1917. That provision says that no *lis pendens* shall bind a purchaser, a mortgagee, or a lessee unless and until registered. If, therefore, the plaintiffs claim the benefit of this, it is difficult to see how they can claim an absolute title, seeing that they purchased subject to the mortgage which had been duly registered, and the purchaser at the mortgage sale undoubtedly obtained some rights in these proceedings.

I would accordingly refer the case to a bench of five Judges for fuller consideration of the legal points involved.

The cost will abide the event.

PORTER J.—I agree.

Keuneman (with him *Croos DaBrera*), for defendant, appellant.—A mortgage action has been held to be a *lis* within the meaning of the Ordinance. *Muheeth v. Nadarajapilla*.[4] The only effect of Ordinance No. 29 of 1917 as amended by No. 21 of 1918 is that a *lis pendens* does not bind a purchaser, mortgagee, or lessee unless registered. The result is that the mortgage decree (when the action has not been registered) does not operate as *res judicata* against any purchaser from the judgment-debtor pending the mortgage action, and such purchaser may accordingly re-agitate any matter which was in issue in the mortgage action. The Ordinance does not vest in such purchaser a title free of the mortgage and the mortgage action.

[1] *(1922) 4 C. L. R. 43.*
[2] *(1923) 24 N. L. R. 477.*
[3] *(1922) 24 N. L. R. 121.*
[4] *(1917) 19 N. L. R. 461.*

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As regards title different considerations apply. The purchaser under mortgage decree is entitled to regard the mortgage action and the decree culminating in the mortgage sale as valid links in his chain. In this case the mortgage purchaser's title relates back to, and has its source in, a mortgage which is prior both in date of execution and registration to the deed given by the judgment-debtor pending the mortgage action. He has accordingly the better title. This was so held in *Mohamadu Buhari v. Silva* (*supra*) where the earlier case of *Davit v. Davith* (*supra*) was considered. The principle is derived from the two Full Bench cases—*Mutturamen v. Massilamany*,[1] and *Silva v. Gunawardena*.[2]

The purchaser from the judgment-debtor pending the mortgage action in any event does not get a title free from the mortgage bond. His title is burdened with the mortgage. It has been held in India that at a sale in execution of a mortgage decree the purchaser acquires not only the interest of the mortgagor, but also that of the mortgagee. *Khevraj Jusrup v. Lingaya*,[3] *Sheshgiri Shanbhog v. Salvador Vas*,[4] *Maganlal Shakra v. Girdhr*.[5] It cannot be said that the purchaser obtains no rights whatever. Even assuming that the mortgagor was free to alienate his interest the interest of the mortgagee remains, and that has been vested in the mortgage purchaser, who is entitled to enforce this right.

Alternatively it may be argued that the mortgage purchaser is entitled to claim compensation in view of the fact that he has cleared the land of the mortgage. It has been held that discharge of a mortgage by a co-heir may be regarded as an *utilis impensa* entitling the co-heir to a *jus retentionis* until it is discharged. *De Silva v. Shaik Ali*[6] and *Ukku v. Banda*.[7] On equitable grounds too compensation is payable to the mortgage purchaser.

The purchaser from the judgment-debtor had notice of the mortgage action before he purchased, and is bound by the mortgage decree. *Rowel v. Jayawardene*.[8]

Counsel also cited *Suppramaniam Chetty v. Weerasekera*,[9] *Moraes v. Nallan Chetty*,[10] and *Kristnappa Chetty v. Horatala*.[11]

Samarawickreme (with him *H. V. Perera*), for the plaintiffs, respondents.—The plaintiffs did not buy the property subject to the mortgage and are not bound by the mortgage decree. Where a person buys a mortgaged property after a mortgage, he should be either made a party or given notice of the mortgage action, if the mortgage decree is to bind him. If a person buys a mortgaged property after the mortgage action, the mortgage decree would not

[1] *(1913) 16 N. L. R. 289.*
[2] *(1915) 18 N. L. R. 241.*
[3] *(1873) 5 Bom. 2.*
[4] *(1873) 5 Bom. 5.*
[5] *(1897) 22 Bom. 945.*
[6] *(1895) 1 N. L. R. 228.*
[7] *(1902) 6 N. L. R. 45.*
[8] *(1900) 14 N. L. R. 47.*
[9] *(1918) 20 N. L. R. 170.*
[10] *(1923) 24 N. L. R. 297.*
[11] *(1923) 25 N. L. R. 39.*

bind him unless the *lis* was registered. The registration of the *lis* is notice to the purchaser. In either case the party would have notice of the action, and he would be in a position to put forward a defence if he had one. If he had no defence he would be in a position to redeem the property if the *lis* had been registered. If the *lis* was not registered the plaintiffs' title must prevail. The mortgage decree is not admissible in this case. The plaintiffs are not even prepared to admit that there was a mortgage. Counsel cited *Weerappa Chetty v. Arunaselam Chetty.*[1]

The case of *Mohamadu Buhari v. Silva* (*supra*) was wrongly decided on the supposed authority of *Mutturamen v. Massilamany* (*supra*) and *Silva v. Gunawardana* (*supra*). The points for decision in those cases were different ; the cases are not in any event binding on this Court.

It is not possible to regard the purchaser at the mortgage sale as an improver of land entitled to compensation (see *Muttiah Chetty v. Latchimanan Chetty,*[2] *Jayasinghe v. Menike* [3]). The purchaser at the mortgage sale cannot be said to have acquired the rights of the mortgagee. Counsel cited *Mulla's Code of Civil Procedure, p. 666.*

Plaintiffs' title is derived from Senaratna, but is not bound by the mortgage. By section 13 of the Matrimonial Rights Ordinance the creditor of Senaratna can ignore the gift to his wife by Senaratna. Senaratna joined in the execution of the mortgage bond, not in his right as owner, but only as husband, to give validity to the act of his wife. As against creditors of Senaratna the gift must be considered " as not having been made." See section 13.

Keuneman, in reply.—Section 13 of the Matrimonial Rights Ordinance only enables creditors to proceed against a property gifted to a spouse so long as the property has not been alienated to an outsider. If any further burden on the property was intended, clear language would have been used. Otherwise the result would be curious. A husband may alienate to a stranger who would obtain a good title. But if a husband gifted his property to his wife who alienated to a stranger, the stranger's title would be burdened to meet the debts of the husband's creditors.

December 21, 1923. BERTRAM C.J.—

In this case I have had the advantage of reading my brother Ennis's judgment. I entirely agree with his conclusions on all points, but I should like to express myself somewhat more fully than he has done upon the issues of law involved. I need not recapitulate the facts, as they are so completely and precisely set out in his judgment.

[1] *(1909) 12 N. L. R. 139, at page 143.* [2] *(1913) 6 Bal. N. C. 3.*
[3] *(1911) 4 Bal. N. C. 21.*

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The questions of law which we found it necessary to discuss are the following:—(A) The interpretation of section 13 of the Matrimonial Rights Ordinance, No. 15 of 1876 (recently repealed); (B) the effect of the non-registration of a *lis pendens*; (C) the supposed relation back of the title of a purchaser under a mortgage decree to the date of the mortgage; and (D) the equitable rights of the purchaser under a mortgage decree as against a purchaser under an ordinary execution who bought subject to the mortgage but is not bound by the decree.

I will take these questions in order:—

(A) *The interpretation of section 13 of the Matrimonial Rights Ordinance, No. 15 of 1876.*

The question here is whether when a husband, under section 13 of the Ordinance, makes a voluntary grant to his wife, the property so granted is thereupon immobilized in her hands, and cannot be either alienated or charged as against her husband's creditors. This result is said to follow from the words, "shall . . . . be subject to the debts and engagements of each spouse in the same manner and to the same extent as if such grant . . . . had not been made . . . . I cannot myself so interpret the section. To do so would go beyond any possible intention that can be imputed to the Legislature. It would be to put the spouses in a worse position than they would have been before the alteration of the law. The effect of the section has already been considered in a Full Court case (see *Louis v. Dingiri*[1]). It was there held that the provision we are now considering must be limited (in the absence of fraud) to debts and engagements existing at the time of the alienation, and does not apply to future debts. Much of the reasoning of the judgments of that case applies to the present. It was there pointed out that the object of the Legislature was to relax the common law in favour of the spouses, and it could not have been supposed to place them in a worse position than under the old law of community. The same reasoning applies here. Some effect must be given to the words "to the same extent." These words are words of limitation, and I would construe them as intimating that the charge in favour of the creditors, created by the section, is subject always to the right of the person in whom the property is vested, to alienate it or charge it. The husband always had that right, notwithstanding the fact that his property was always liable to be made subject to the debts of his creditors, and, in my opinion, a wife has still a corresponding right.

The mortgage, therefore, was a valid mortgage, and any subsequent sale of the property, at the suit of an execution-creditor of the husband, was subject to that mortgage.

[1] *(1915) 18 N. L. R. 161.*

(B) *The effect of the non-registration of a* lis pendens.

Mr. Keuneman argued that the only effect of this default was to allow a person who pleaded it to re-open any of the issues which were decided, or which might be deemed to have been decided, in the action. He sought to throw upon this person the onus of invalidating the judgment by showing that it was given in ignorance or misapprehension of some consideration of fact or law. He urged that the judgment under which he claims must have its full legal effect, subject to the right of the plaintiffs so to invalidate it. But, in my opinion, this is unarguable. The Ordinance expressly declares that "no *lis pendens* unless duly registered shall bind the purchaser." This applies equally to a purchaser under a private sale and to a purchaser at a sale by a Fiscal. Such a person is not bound, in any way at all, either by the suit or by any decree or sale pronounced or held in pursuance of it. He is entitled to ignore the suit, and all consequences proceeding from it, as though they had never occurred. Whatever legal rights he had are unaffected by the suit or its results, and the material right in this case was the right of the execution-creditor to have the property of his execution-debtor sold in satisfaction of his own decree.

(C) *The supposed relation back of the title of a purchaser under a mortgage decree to the date of the mortgage.*

Mr. Keuneman sought to escape from the situation just explained by pleading the supposed doctrine of the relation back of the title of a purchaser under a mortgage decree. In my own opinion, no such doctrine, even though it existed, could avail him. It is a matter of the utmost indifference to a purchaser not bound by the *lis pendens* to what date a title resulting from that *lis* is said to date back. He is not affected by that title, at whatever date it is deemed to originate. He may treat the title as though it never existed at all.

But, in my own opinion, there is no such doctrine. De Sampayo J., in *Mohamadu Buhari v. Silva* (*supra*), only gave effect to that doctrine, because he supposed himself to be bound by two previous decisions, and Schneider J. concurred in the same view. I venture to think, with the greatest respect, that no such doctrine was established by the decisions referred to. Indeed, it has been more than once expressly held by this Court that there was no such relation back. (*Abeyagoonewardene v. Andris Appoo*,[1] *Unge Appu v. Babuwe*.[2]) If the facts in the cases referred to by my brother De Sampayo are examined, it will be seen that there could be nothing in a decision on those facts which would invalidate the authority of those two earlier decisions.

[1] (*1894*) *3 C. L. R. 71.*

[2] (*1894*) *3 C. L. R. 76.*

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The first of these two decisions (both of them are decisions by Courts of three Judges) was *Mutturamen v. Massilamany* (*supra*). That was a case in which a mortgage had acquired priority against a lease, antecedent in date to itself, by virtue of prior registration. It was held that the priority so acquired applied to all steps necessary for the effective enforcement of the mortgage, and that that priority was not lost simply because the date of the registration of the Fiscal's transfer was (as it almost necessarily must have been) subsequent to the date of the registration of the lease. As it was forcibly expressed by Wood Renton J., "An instrument which acquires priority by registration pushes out of its way every competing unregistered instrument of prior date *for all purposes*." In the circumstances of the case, the words " for all purposes " must be considered as referring to all purposes connected with the enforcement of the document entitled to priority. There is nothing of that sort in the present case, nor was there anything of the kind in the case of *Mohamadu Buhari v. Silva* (*supra*). In spite of some general remarks of Lascelles C.J., which may seem to imply the idea, no general doctrine of relation back of the title of the purchaser under a mortgage decree was formulated in *Mutturamen v. Massilamany* (*supra*). Nor could such a doctrine legitimately have been formulated upon the facts of that case. The other case above referred to was *Silva v. Gunawardene* (*supra*). Here, again, a registered mortgage bond " pushed out of the way " a deed prior in date but subsequent in registration, that is to say, a deed by which the mortgagor had gifted his land prior to the mortgage. In this case the Judges carried the doctrine " of pushing out of the way " to very great lengths. They appear to have considered that the prior registered deed not only pushed the other out of the way, but absolutely obliterated it, so much so, that the party claiming under that deed was bound by the judgment in an action to which he was not made a party and could not claim to hold the land gifted to him even subject to the subsequent mortgage. De Sampayo J. adopted this view with reluctance, understanding himself to be bound by *Mutturamen v. Massilamany* (*supra*). I would venture to express the hope that the view suggested by De Sampayo J. in this case may some day receive further consideration.

I agree with my brother Garvin that the decisions in these cases do present very great difficulty. The difficulty does not lie in what I understand to be their main principle. This I take to be that a mortgage, which by diligence in registration acquires priority over a deed prior in date to its registration, retains this priority for the purpose of its enforcement. This seems to me reasonable and just. The difficulty is that these decisions lay down that persons claiming under the postponed deed are not entitled to be made parties to the mortgage action. One can understand that the mortgagee should

retain his priority, but surely he ought to assert that priority in the normal way by joining in the action the person against whom he asserts it, more particularly when he has notice of that person's claim and when the person is in actual possession of the property mortgaged.

I do not think, however, that this is an appropriate occasion for entering into these questions.

In the present case there is no "pushing out of the way" of any deed prior in date. We have no occasion, therefore, to consider what are the consequential results of such a process. In my opinion, therefore, the rights of the parties are not affected by any supposed doctrine of relation back.

(D) *The equitable rights of the parties.*

On this question one thing is clear. The execution-creditor, whether he was bound by the *lis pendens* or not, could only sell the land subject to the mortgage, and the purchaser at the Fiscal's sale held for the purpose could only take a title subject to the mortgage. He cannot, therefore, claim a clean title to the property. His title is subject to an equity. But the question is, who can enforce that equity? The mortgage no longer exists, having been extinguished by the sale. How can the purchaser who merely bought the mortgagor's interests set up an equity derived from a mortgage to which he was a stranger?

To extricate himself from this difficulty, Mr. Keuneman had recourse to a doctrine which appears to have been developed in the Indian Courts. That doctrine is that at a sale in execution of a mortgage decree the purchaser acquires, not only the interest of the mortgagor, but also that of the mortgagees. See *Khevraj Jusrup v. Lingaya* (*supra*), *Sheshgiri Shanbhog v. Salvador Vas* (*supra*), and *Maganlal Shakra v. Girdhr* (*supra*). It appears to be the practice in Bombay for the mortgagee actually to convey his interest, because it is stated that, though this practice does not prevail in the Mofussil, yet the interest of the mortgagee passes by estoppel. In the researches I have been so far able to make I have not been able to trace the principle of this doctrine. It may perhaps ultimately be derived from the English practice, under which the mortgagee, in whom the fee simple is necessarily vested, himself conveys the property upon its sale. The working out of the doctrine in India has resulted in obscurity. It is there agreed that where a puisne incumbrancer, not bound by a mortgage decree, seeks to disturb a purchaser under that decree, he must redeem the land by paying the amount of the mortgage debt, but it is not agreed whether the whole of this sum is to go to the mortgage purchaser, or whether it is to be apportioned between him and the still unsatisfied mortgagee. See *Mulla's Code of Civil Procedure, 6th ed., p. 666.* This doctrine has so far not been

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introduced into Ceylon, and until I can be shown some logical basis for its introduction, I prefer not to introduce it. Whatever may be the case where the mortgagee is himself the purchaser (and on this I express no opinion), I cannot at present see that a stranger purchaser can in any way invoke the rights of the mortgagee.

The purchaser, nevertheless, is clearly a person entitled to equitable considerations. By his purchase he has freed the land from the mortgage. It is not just that the purchaser at the execution should thus acquire the land freed from the mortgage at the expense of a purchaser under the mortgage decree without making him some satisfaction. The question is, On what principle can we direct this to be done? There are cases in which it has been held that the discharge of a mortgage by a co-heir may be regarded as an *utilis impensa* entitling the co-heir to a *jus retentionis* until it is discharged. See *De Silva v. Saik Ali* (*supra*) and *Ukku v. Banda* (*supra*). This doctrine, however, on its application to cases like the present, has been criticised in *Muttiah Chetty v. Latchimanan Chetty* (*supra*) and *Jayasinghe v. Menike* (*supra*), and was repudiated by Lascelles C.J. and Wood Renton J. in *Elyatamby v. Valliamma*.[1] Indeed, it is clear that so far as this doctrine goes it cannot apply. *Utiles impensæ* are expenses incurred by a person while in the possession of land which he in good faith believes to belong to himself. The expenses in this case are incurred before the purchaser enters into possession, and in order to enable himself to get into possession.

Nevertheless, though this particular doctrine does not apply, I should be very sorry to hold that in cases of this kind we are not free to give effect to equitable principles. We are administering, not a dead, but a living system of law. In Muhammadan law there is a point known as "the closing of the door of effort," at which constructive jurisprudence is understood to have ceased, and from which the Courts confine themselves in all matters to doctrine already settled by authority. I should be sorry to hold that this stage has been reached in our own law. In a recent case, *Kristnappa Chetty v. Horatala* (*supra*) my brothers Ennis and Jayewardene intimated that a purchaser, in somewhat analogous circumstances, might claim equitable satisfaction, though they did not feel able to grant such satisfaction in the case as then before them. In this case the facts are clear, and I see no reason why we should not ourselves direct that the plaintiffs' rights should be subject to the defendant's right of equitable relief. As to the nature of that relief, I was fully prepared to concur in the order proposed by my brother Ennis. Inasmuch, however, as the Court is divided, and there is no other means of giving an effective judgment, I am prepared to adopt the intermediate course proposed by my brother Schneider.

[1] *(1913) 16 N. L. R. 210.*

ENNIS J.—

Certain lands belonged to Charles Edward Senaratne, and on August 31, 1918, he transferred four of them to his wife. On October 7, 1918, by the document D 4 , Senaratne and his wife acknowledged that they were jointly and severally indebted to one Don Bastian in the sum of Rs. 500, as security for which they mortgaged the four lands to Don Bastian and gave him possession in lieu of interest. The attestation clause in this document states that the money was paid in the presence of the notary, and the learned Judge in his judgment under appeal has held that Don Bastian must be regarded as " an honest man who lent good money on his bond." The bond was duly registered on October 16, 1918.

On October 10, 1918, one Seyanis instituted an ordinary money action, No. 8,446, against Senaratne, and got judgment in his favour on February 3, 1919. On July 1, 1919, Seyanis instituted an action, No. 8,777, against Senaratne and his wife to have it declared that the deed of August 31, 1918, was null and void, as it was executed in fraud of creditors, and for a further declaration that the lands dealt with by that deed were subject to be seized and sold to satisfy the debts of the husband, Senaratne. Seyanis lost his case, for it was held that the wife had paid for the lands with her own money. On appeal, however, it was held that the money used by the wife came from a fund which belonged to the husband, and, that under section 13 of the Matrimonial Rights Ordinance, 1876, the property in question was liable to be taken in execution for the husband's debts. It is to be observed that Seyanis did not make Don Bastian a party to this action, notwithstanding that Bastian's mortgage had been registered before he instituted the action ; it is also to be observed that there was no finding that the deed of August 31, 1918, had been executed in fraud of creditors.

At this stage Don Bastian put his bond in suit in action No. 9,300 and obtained a decree on December 1, 1920. The record does not show when the action was instituted. The sale under the mortgage decree was held on February 5, 1921, and three of the lands were purchased by the defendant, who obtained Fiscal's transfers on April 7, 1921, which were registered the same day. Don Bastian did not register a *lis pendens*.

Meanwhile Seyanis seized the lands in execution of his decree in case No. 8,446. Don Bastian then caused notice, D 5, to be given of his mortgage and that the bond had been put in suit in action No. 9,300. The lands were then sold under Seyanis's writ and purchased by the plaintiffs, who obtained Fiscal's transfers on February 4, 1921, which were registered on February 7.

The plaintiffs then instituted the present action, praying for a declaration of title and for the ejectment of the defendant. The learned Judge found in favour of the plaintiffs, and the defendant appeals. On appeal the case was referred to the Full Court.

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Mr. Keuneman, for the appellant, submitted (1) that the conveyance by Senaratne to his wife was valid; (2) that Bastian's action on his bond was perfectly constituted, and that the plaintiffs are estopped from denying the defendant's title as they had notice of the mortgage action; and (3) if not estopped, that they cannot claim more than they bought, viz., the land subject to the mortgage.

I am unable to see how the validity of the conveyance can be challenged. Section 13 of the Matrimonial Rights Ordinance expressly legalized grants and gifts between husband and wife. The deed was not declared void in Seyanis's action, No. 8,777, and the decree in that action declaring the lands liable for Senaratne's debts was not binding on Don Bastian, as he was not a party to it. There is no prayer to set the deed aside in the present action, and the evidence does not seem to justify setting it aside, for Seyanis's evidence in this case seems to indicate that Senaratne had other property which might have been available to meet his debt to Seyanis. Seyanis says that at the end of 1916 Senaratne sold one-half only of a land belonging to him for Rs. 6,000. It was argued, however, that section 13 of the Matrimonial Rights Ordinance enable a creditor of a husband to disregard his gifts to his wife and deal with the property as if the grants or gifts had never been made. The section is somewhat obscurely worded, for, after making it lawful for a husband to gift property to his wife, it proceeds: "but all property so granted, gifted, or settled, and all acquisitions made by a husband or wife out of or by means of the moneys or property of the other shall, except as otherwise provided by section 11, be subject to the debts and engagements of each spouse in the same manner and the same extent as if such grant, gift, settlement, or acquisition had not been made or occurred."

Mr. Samarawickreme contends that the words of this section, "the property . . . . shall be subject to the debts of the husband . . . . as if such . . . . gift . . . . had not been made," support his construction, and that something in the nature of a permanent lien on the property in favour of the creditors is created the moment such a gift takes place, and he went to the extent of suggesting that it operated in favour, not only of creditors at the time of the gift, but of all subsequent creditors, and that all the creditors might be entitled to concurrence. This argument is obviously very much beyond the scope of an Ordinance dealing with matrimonial rights. In my opinion the words "the property so granted, gifted, or settled" must be read as defining the property in the hands of the wife, and that the words "shall be subject to the debts" must be read as "shall be liable to be seized and sold in execution of a decree," which is the only manner and extent to which the property of any person can be said to be "subject to debts." The section will then mean, that a creditor can proceed against the property of the wife (which she has acquired

from the husband) to satisfy the husband's debt to the same extent and in the same manner as he could have proceeded against the property had it remained his. The extent to which a man's property is subject to his debts is so long as it is in his hands or can be followed; the moment he has made a *bona fide* alienation of the property it cannot be seized and sold to satisfy a debt. The mortgage by Senaratne and his wife to Don Bastian appears to have been a *bona fide* transaction. I would hold therefore that, if the plaintiffs are not bound by Bastian's mortgage decree, they purchased the property subject to the mortgage.

It was contended for the defendant-appellant that the plaintiffs were bound by Bastian's mortgage decree. In support of this contention the case of *Rowel v. Jayawardene* (*supra*) was cited. That case, however, was decided in 1910, and since then there is the express legislative enactment No. 29 of 1917, as amended by No. 21 of 1918, that no *lis pendens* shall bind a purchaser, mortgagee, or lessee unless it is registered.

In my opinion the doctrine of estoppel by notice cannot over-ride the express provisions of the Ordinance requiring registration. Don Bastian's failure to register his *lis pendens* gave the plaintiffs an opportunity to purchase the mortgagor's interest in the land without being bound by the mortgage decree, but here we were referred to the case of *Mohamado Buhari v. Silva* (*supra*), where it was held that a mortgagee could go behind the effect of the non-registration of his *lis* and carry his title back to the date of the mortgage. In that case the cases of *Mutturamen v. Massilamany* (*supra*) and *Silva v. Gunawardene* (*supra*) were regarded as decisive upon the point.

In my opinion those cases do not apply, for they turned on the question of priority of registration to push aside all subsequent deeds creating adverse interests. In *Mutturamen v. Massilamany* (*supra*) a lease, executed in 1905 and registered in 1910, was in conflict with a mortgage executed and registered in 1907, and, for the purpose of priority under section 17 of the Land Registration Ordinance, 1891, the prior registration of the mortgage was held to give priority to a subsequent purchaser under the mortgage decree as against the lessee. Similarly in *Silva v. Gunawardene* (*supra*) there was a direct conflict between a deed of gift and a mortgage. In the present case there are no adverse deeds competing for priority, the interests of the mortgagor and the interests of the mortgagee were separate and distinct interests at the date of the mortgage and of its registration—there was no conflict. I am of opinion, therefore, that *Mohamadu Buhari v. Silva* (*supra*) does not afford reliable support to the appellant's contention in this respect.

There remains the question as to whether anything survives to the defendant, who purchased under the mortgage decree. The mortgagor's title to the land is with the plaintiffs, the mortgage

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had been extinguished in the mortgage action, and it is questionable whether any further action can be taken under the mortgage. (*Suppramaniam Chetty v. Weeresekere* (*supra*) and *Moraes v. Nallan Chetty* (*supra*).) In a recent case *Kristnappa Chetty v. Horatala* (*supra*) my brother Jayewardene and I suggested that, in equity, a purchaser who had contributed to the extinguishment of the mortgage was entitled to recompense at the hands of the party who benefitted thereby. Such a course is consistent with the Roman-Dutch principle, that a man should not benefit himself at the expense of others, and with the broad principle of equity applied by the Privy Council in a Ceylon appeal generally referred to as the *Dicklanda Estate Case*.[1] In my opinion the defendant is entitled to stand in the shoes of the mortgagee to the extent of his purchase. In the present case there is no difficulty in the ascertainment of his position, the mortgage was a usufructuary one, the defendant is in possession, and the amount paid to extinguish the mortgage is known, viz., Rs. 375. I would accordingly vary the decree appealed from, and, while granting the plaintiffs a declaration of title to the lands, declare that the defendant is entitled to remain in possession till the sum of Rs. 375 is paid.

The appellant will be entitled to the costs of the appeal.

For the purpose of concurrence I am prepared to adopt the order proposed by my brother Schneider.

PORTER J.—

I have had the advantage of reading the judgment of my brothers Schneider and Garvin in this case, with which judgments I entirely agree and for the same reasons.

I further agree with my brother Schneider that in a case such as the present the purchaser under the mortgage decree would appear to be entitled to some equitable relief if it be the fact that he had cleared an encumbrance which had existed and the party claiming title against him successfully has derived the benefit of that act.

No equitable claim was put forward or even referred to either in the lower Court or on appeal. The first plaintiff has had no opportunity of meeting such a claim. The facts of the case as they now stand justify the inference that she was probably aware of the existence of the mortgage and that it was put in suit, but she does not admit the genuineness or that any money is due under it or that she purchased subject to it.

Her counsel claimed an absolute title.

It is difficult without a further consideration of the law to say upon what principles, relief, if any, should be granted to the defendant. I would remit his action to the District Court in order that the defendant may formulate his claim, and that the first plaintiff may be afforded an opportunity of meeting it. In the

[1] *1 C. L. R. 32.*

circumstances I would affirm the decree, except as to the order regarding the costs of the action, and remit the case for trial of any claim which the defendant, if so advised, would prefer against the first plaintiff within a time to be fixed by the District Judge. In the event of his failing to comply with that order, his appeal is deemed to have been dismissed, with costs, as from the date of the judgment of this Court, and the decree of the lower Court affirmed in its entirety.

SCHNEIDER J.—

The day after the conclusion of the argument of this appeal I left Colombo on circuit. On circuit it is not convenient to have access to the several authorities cited at the argument. I have had the advantage of studying the judgment of His Lordship the Chief Justice. I agree, if I may say so with all respect, with his judgment as regards the questions of law discussed by him under the heads (A), (B), and (C).

In regard to *Mohamadu Buhari v. Silva* (*supra*), in which I concurred in the judgment of my brother De Sampayo, I confess that if the reason given for the decision had been stated differently it would have been better. It should have been stated that the plaintiff's title was to prevail, in that it was derived under a sale subsequent in date to the sale to the defendant, but anterior in date in respect of registration, inasmuch as the sale under which the defendant claimed was on May 4, 1921, and that under which the plaintiff claimed was on May 11, 1921, and the plaintiff's deed was registered in August, and the defendant's deed in September, 1921. It was a simple case of a subsequent deed obtaining priority by registration. But where no question of such a competition by reason of registration arises, the principle which should govern a case such as the present was followed by me in deciding *Fernando v. Peris* (*supra*).

As regards the questions discussed under head (D), I am of opinion that there is nothing either in our law of mortgage or in the procedure by which a mortgage is realized which supports the argument that the purchaser at a sale in execution under a mortgage decree acquires the rights of the mortgagee.

I agree that in a case such as the present, the purchaser under the mortgage decree would appear to be entitled to some equitable relief if it be the fact that he has cleared an encumbrance which had existed, and the party claiming title against him successfully has derived the benefit of that act. The only question raised and tried in this case was that of the title of the parties. No equitable claim was put forward or even referred to in the lower Court. The first plaintiff has had no opportunity of meeting such a claim. The facts of the case as they now stand justify the inference that she was probably aware of the existence of the mortgage and that it was put in suit, but she does not admit its genuineness or that any

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money is due under it or that she purchased subject to it. Her counsel, Mr. Samarawickreme, on the contrary, claimed an absolute title.

I am very diffident without a further consideration of the law to say upon what principles, relief, if any, should be granted to the defendant. It would appear to be upon the footing of compensation for some benefit derived by the owner of the land. I am of opinion that before any relief can be granted to the defendant he should formulate his claim, and the first plaintiff should be afforded an opportunity of meeting it.

In the circumstances I would affirm the decree, except as to the order regarding the costs of the action, and remit the case for the trial of any claim which the defendant, if so advised, would prefer against the first plaintiff within a time to be fixed by the District Judge. In the event of his failing to comply with that order, his appeal is to be deemed to have been dismissed, with costs, as from the date of the judgment of this Court, and the decree of the lower Court affirmed in its entirety.

GARVIN A.J.—

The facts of this case are so fully set out in the judgment of my brother Ennis that they need not be recapitulated. It is not challenged that the conveyance made by the husband to the wife was in effect a gift. The plaintiff seized, sold, and purchased this property as property which by reasons of the provisions of section 12 of the Matrimonial Rights Ordinance, No. 15 of 1876, was subject to the debts and engagements of the husband " in the same manner and to the same extent as if such . . . . gift . . . . had not been made . . . ." He does not claim to have seized, sold, or purchased the interests of the wife. What he does claim is to have acquired a title to this property superior to, independent of, and despite such title as passed to the wife by the gift.

The defendant is the purchaser in execution of a hypothecary decree obtained by the holders of a mortgage created by the wife. Such title as he acquired by this purchase is and can only be the title of the wife. That was the title she obtained by and under her husband's gift. The respective titles now under consideration are therefore wholly independent of each other. The defendant claims under the wife; the plaintiff claims despite such title as the wife may have taken by the gift, and as if the gift had never been made.

It is clear from the language employed that notwithstanding that a husband has made a gift to his wife the property remains subject to his debts and engagements " in the same manner and to the same extent as if the gift had not been made." It gives to a creditor the right to take the property in execution as if the title to the property were still in the husband. By creditor is meant a person who was a creditor at the time of the gifts (*vide Louis v. Dingiri*) (*supra*).

The section confers upon spouses the right to make gifts to each other. This is a privilege which they had not hitherto enjoyed, for the law forbade such gifts. When conferring this privilege, the law does so upon a condition that the property is to be always available to the creditors of the spouse who makes the gift. This brief notice of the historical development of the law on the point helps to emphasize the plain meaning and intention of the section, which is, that so far as the rights of creditors were concerned, the property was to be as if it had not been made the subject of a gift.

It was conceded in the course of argument that so long as the property remained in the wife this section gave a creditor the right to take it in execution for the purpose of recovering his debt. What is that but an admission that the words of section 13 created a charge in favour of the creditor of the husband. It is said, however, that the rights of a creditor, which the law has been at such pains to conserve, can be defeated directly by the simple expedient of a conveyance, or indirectly by placing the property under a mortgage which by some process is said to become preferent to the charge created by law. That a wife to whom property has been gifted may transfer or mortgage such title as she took by the gift no one is concerned to deny. But it is denied that by so dealing with her interests she can defeat either wholly or even partially the rights which the law has secured to the creditors of her husband.

An owner of property who has himself hypothecated the same in favour of a creditor does not destroy that hypothec or defeat the rights of a creditor so secured by subsequently transferring or dealing with the property. Upon what principle can it be contended that a statutory charge such as this is can be defeated in the manner suggested by a person who takes it subject to the charge ? The section does not say that the charge placed on the property is to remain effective only so long as the wife remains vested with title, and it is to be subordinate to any charge created by the wife in favour of her creditors. To the argument that it does not say that the charge is to continue to adhere to the property after it is transferred by the wife or is charged by her, it is sufficient to answer that the Legislature had apparently no reason to anticipate that it would be contended that a person who takes a title subject to a charge can by the act of making a conveyance pass on a title free of the charge. No one can give a better title than he himself has. In the absence of express words in the Ordinance to restrict the charge in the manner suggested, there can be no reason for regarding or treating it differently from any other hypothec or charge on property.

This is an instance of a statutory charge. It is not the only instance of such a charge. By section 4 of the Crown Debts Ordinance, No. 14 of 1843, the property of the Treasurer of the Colony and certain other officers employed in the collection, receipt, and expenditure of the revenue, public moneys, stores, and other

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property of Government is made liable for the payment, arrearages, or debts, fines, penalties, &c., due by such officer or officers. As regards the lands and tenements present and future of such officers, the liability to be taken in execution is expressed as follows :—

> " In like and as large and beneficial a manner and to all intents and purposes as if the said officer . . . . had the day he became first an officer . . . . specially mortgaged the said lands and tenements to Her Majesty for the full payment of such arrearages . . . . "

It cannot well be contended that this is not a legal hypothec, nor can it be suggested that such a hypothec does not attach to the property when it is transferred by such an officer.

The language in which property gifted by a husband is charged is of even wider import. In each of the two instances under consideration the charge is created by a few simple words, such as " shall be subject to the debts " or " shall be liable to the payment of debts " ; the nature and extent of the charge in the case of gifts between spouses is expressed to be even wider than in the case of special mortgage—it is to be as comprehensive " as if the gift had not been made."

To my mind it is apparent that it was the intention of the Legislature that such gifts were to be void as against the claims of creditors.

As between husband and wife title passes by the gift, but as between the wife and the creditors of the husband the conveyance is of no avail. If the title of the wife is of no avail against her husband's creditors, how can any alienee or other person claiming under the wife be heard to say that his title prevails over the rights of such creditors ?

Section 14 of the Ordinance contemplates an inquiry upon a question between a creditor of the husband and the wife or *a person claiming under her* " as to the mode and time of the acquisition of any property claimed by such woman " and places the burden of proof as to the mode and time of acquisition " on such woman or person claiming under her."

Suppose that as between a husband's creditors and a person claiming under the wife it is found that the mode of acquisition of the property by the wife was by gift from her husband during the subsistence of a vaild marriage, what is to happen. Surely it must be followed by a declaration that the property is " subject to the debts and engagements " of the husband. If not, the inquiry and finding is purposeless. The circumstances that section 14 contemplates such an inquiry, and inferentially such a declaration, not only between the husband's creditor and the woman, but also between such a creditor

and any person claiming under the woman, is a clear indication that the charge created by section 13 is to be effective, not only against the wife, but against all persons claiming under the wife.

Under the Roman-Dutch law a transfer of immovable property which was not passed before the tribunal of the place was valid *inter partes*, but void as against the claims of the creditors of the transferor. *Maasdorp, vol. 2, p. 71.* The position created by section 13 in regard to the respective rights of donor, donees, and the creditors of the donor in the case of a gift from husband to wife is an exact parallel.

It is then argued, that inasmuch as the husband is a party to the bond of mortgage with his wife, this is a mortgage by the husband. Having parted with his title to his wife by a conveyance which was valid *inter partes* the husband had nothing to mortgage. From the circumstances that the husband joined in the bond, it may fairly be said that he has consented to his wife's mortgage, and that there is, therefore, a sufficient compliance with the requirements of section 9 as to a wife's dealings with her property. But the wife mortgages her right, title, and interest, not those of her husband.

In my opinion, the plaintiff, who was a creditor of the husband at a time prior to the making of this gift, had the right to seize and sell the property " as if the gift had not been made, " and when he purchased the property he took a title superior to, and independent of, that of the wife and those claiming under her. This is decisive of the matter, and the appeal fails.

If, on the other hand, it be held that any dealing with the property by the wife defeats the charge—a view to which I cannot assent—that is also decisive, for the plaintiff has neither seized, sold, nor purchased the wife's interests. The contention that the plaintiff takes the property subject to the mortgage created by the wife is one which I cannot follow or appreciate. A wife may create a hypothec over her property or, in other words, hypothecate her title. She cannot create a valid hypothecation over her husband's property. If the mortgage created by the wife in this case is superior to the statutory charge in favour of creditors, it can only be because she has by the act of mortgaging her title to the property enlarged her rights, and in fact mortgaged a title superior to the defeasible title she took under and at the date of the gift. That is to say, that by this act she has converted her title which was defeasible into a title which is not defeasible at the instance of her creditors, and it is such an indefeasible title which was mortgaged by her.

If such a conversion is possible, the defendant who purchased at the sale in execution of the hypothecary decree takes a title against which the charge in favour of creditors is of no avail, though as to the balance proceeds of the sale, if any, after satisfying the mortgage debt it may be possible to contend that this should go to the husband's creditors and not to the wife.

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If, on the other hand, she mortgaged only that which in my opinion she had the right to mortgage, that is, her title, then the defendant by his purchase took a title to the property which is of no avail against the claims of creditors.

Whether section 13 is construed in favour of the plaintiff, as I think it should be, or whether it be held that the charge ceases to be operative against persons who claim under the wife, it is decisive of the question of title. The respective title upon which we have to pronounce are wholly independent, and do not proceed from a common source. The plaintiff does not claim under the wife, whereas the defendant does. If the wife's mortgage leaves the charge in favour of the husband's creditors unaffected, the plaintiff's title is superior ; if, on the other hand, it be held that by dealing with the property the wife frees her title from the charge in favour of creditors, the defendant's is the better title.

But since this case has been referred to a Collective Court for the decision of the question whether or not the case of *Mohamadu Buhari v. Silva* (*supra*) has been rightly decided, and the majority of the Court takes the view that the facts of this case do raise that question, it is perhaps as well that I should state what I deem to be the correct answer to that question.

In that case it was held that in a contest between the title of a purchaser under a mortgage decree and the title of a person who obtain a Fiscal's transfer at a sale in execution of an ordinary money decree during the pendency of the action on the mortgage, the purchaser under the mortgage decree was entitled to refer his title back to the mortgage, and thus acquire priority over the Fiscal's transfer, which was prior both in respect of date and in registration to the transfer obtained by the purchaser under the mortgage decree.

Is it a sound proposition of law that a purchaser under a mortgage decree is entitled to refer his title back to the mortgage and thereby obtain priority over transfers of title made by the mortgagor subsequent to the mortgage but prior to the transfer obtained by the purchaser under the mortgage decree ?

The case of *Mohamadu Buhari v. Silva* (*supra*) is an instance of the application of this proposition, which the Judges who decided that case thought had been authoritatively laid down by the Full Bench of this Court. The cases referred to are those of *Mutturamen v. Massilamany* (*supra*) and *Silva v. Gunawardene* (*supra*). In each case the decision was that of a bench of three Judges. This Court has on more than one occasion held it was bound by a previous decision of a Collective Court, which is only another term for a Full Bench. It has never decided, nor can I well see how it can decide, that at every period in the history of the Supreme Court three Judges constituted a Full Bench or Collective Court. At a certain period in the history of the Supreme Court three Judges were a Full Bench.

Thereafter the constitution was changed, provision having been made for four Judges. Last year the constitution was again changed, and there are now five Judges on the bench of the Supreme Court. During the period within which the two cases referred to were decided there were four Judges provided for by the constitution of the Court, and four Judges had been appointed in accordance with that constitution. The Full Bench, therefore, was only complete when all four Judges sat together. Three Judges were not, and cannot be considered, the Collective Court.

Five Judges, who together constitute the Collective Court, are therefore free to examine, and if need be over rule, the propositions of law laid down in the cases to which reference has been made.

It is, of course, possible to go round the difficulty which confronts us by saying that in each of these two cases there was competition between an instrument of earlier date and a mortgage of later date which acquired priority by reason of earlier registration, whereas in this case the mortgage was prior both in date and in registration. But the Judges who decided the case of *Mohamadu Buhari v. Silva (supra)* did not take so restricted a view of the applicability of those decisions. They appear to have taken the view that if the title of the purchaser under a mortgage which obtained priority by registration was entitled to refer his title back to the mortgage, a purchaser under a mortgage prior both in date and registration was entitled to the same privilege. To affirm the decisions in the two Three-Judge cases as sound law where the purchase is under a mortgage which acquires priority by registration, and to deny this privilege to purchasers under mortgages which have the double advantage of priority in date and in registration would be to create a somewhat anomalous situation. Why should the purchaser under a mortgage which is prior both in date and in registration be placed in a position of disadvantage as compared with a purchaser under a mortgage which only takes priority by registration ?

Is it correct to say that this is the logical result of the application of section 17 of the Land Registration Ordinance, 1891 ?

The section runs as follows :—

> " Every deed, judgment, order, or other instrument as aforesaid, unless so registered, shall be deemed void as against all parties claiming an adverse interest thereto on valuable consideration, by virtue of any subsequent deed, judgment, order, or other instrument, which shall have been duly registered as aforesaid. Provided, however, that fraud or collusion in obtaining such last-mentioned deed, judgment, order, or other instrument, or in securing such prior registration, shall defeat the priority of the person claiming thereunder ; and that nothing herein contained

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shall be deemed to give any greater effect or different construction to any deed, judgment, order, or other instrument registered in pursuance hereof, save the priority hereby conferred on it."

There can be no doubt that the effect of this section is to give to a registered mortgage bond priority over an unregistered instrument of earlier date. Is anything more than this implied by the statement that an unregistered deed is to be deemed to be " void, as against parties claiming an adverse interest thereto on valuable consideration " by virtue of any subsequent deed or instrument ? In the case of *Silva v. Gunawardene* (*supra*) De Sampayo J. said " it is to my mind impossible to say that registration of the mortgage bond rendered the deed of gift (which was the earlier unregistered instrument) ' void ' for all purposes or in any other sense than that the mortgage becomes prior in right though subsequent in date." This, if I may respectfully say so, is the correct meaning to be attached to the word " void " in section 17. The sentence which follows immediately after the one in which the word " void " occurs refers to the advantage gained by the unregistered instrument as " the priority of the person claiming thereunder," while the concluding words of the section on which De Sampayo J. specially relies appear to me amount to an explanation of the sense in which the word " void " is to be understood. Moreover, the person who claims an adverse interest by virtue of the mortgage bond is the mortgagee. The purchaser, who is often a stranger to the mortgage bond, takes his interests by virtue of the transfer in his favour. Section 17 does not expressly or by necessary implication confer any advantage on persons claiming by virtue of such transfers. The advantage conferred on a subsequent registered mortgage over an earlier unregistered mortgage is that it receives the status of a mortgage which is earlier in date and prior in the matter of registration to a subsequent instrument. What reason can there be for penalizing an earlier unregistered instrument beyond this or for conferring any greater advantage on those claiming an adverse interest thereto on a subsequent registered mortgage bond ?

But the fruits of the advantage thus conferred on a subsequent registered mortgage must, as in the case of a mortgage which has the double advantage of priority in date as well as in registration, be harvested by due process of law. If the interest created by the earlier deed is such, that the person claiming under it has a right to be made a party to the action on the mortgage bond he should be joined. If that is done, the mortgagee obtains a judgment under which he receives the full benefit of the priority. If he omits to take a necessary step in the procedure which the law prescribes, he and those who claim under him have only themselves to thank for the position in which they find themselves. I can assign no reason why such a mortgagee or a purchaser under such

a mortgage should be in a better position than that which will be the position of the mortgagee under a mortgage prior both in date and registration, or of the purchaser under such a mortgage when there has been an omission to join as a party to the hypothecary action a person claiming under a later instrument who was entitled in law to be joined as a party defendant.

For these reasons I must repectfully dissent from the decisions in *Mutturamen v. Massilamany* (*supra*) and *Silva v. Gunawardene* (*supra*) in so far as they hold that a purchaser under a mortgage is entitled to refer his title back to the date of the mortgage, and by that process claim priority and preference as against the rights of a person claiming under an instrument which is prior both as regards date of execution and in the matter of registration to the transfer in favour of the purchaser under the mortgage, in any case in which such person was entitled in law to be made but was not made a party defendant.

The case of *Mohamadu Buhari v. Silva* (*supra*) is, as I have said, only an instance of the application of the principle of these two cases to the case of a purchaser under a mortgage which has the advantage of the double priority. It is expressly based on the decision of *Silva v. Gunawardene* (*supra*), and must stand or fall with that case.

I know of no principle which enables a purchaser under a mortgage who claims on a conveyance made on a date specified therein to claim that his conveyance shall be deemed to date as from the date of the mortgage bond referred to in the hypothecary decree under which he purchased.

But in this case the mortgage was admittedly earlier in date and duly registered. The competing transfer was obtained *pendente lite*. Section 27A (1) of the Registration Ordinance as amended by Ordinance No. 29 of 1917 compels the registration of such a *lis pendens*, and penalizes the omission to register by leaving a transferee *pendente lite* unaffected by the *lis pendens*. The *lis pendens* of the mortgage action was not registered, and as a result of this omission the title of the purchaser is unfettered by the decree in the action (*vide Don Davith v. Don Davith* [1] (*supra*)).

But if the principle of *Mohamadu Buhari v. Silva* (*supra*) and the earlier case on which it is based is to be applied, the purchaser under the mortgage is entitled to claim that his title dates back to the mortgage, and in the process " pushes out " the transfer made *pendente lite*.

Before the passing of Ordinance No. 29 of 1917, there was no need to have recourse to this doctrine of dating back, because by reason of the doctrine of *lis pendens* all transfers made by the parties to an action *pendente lite* were void as against the rights declared by or arising from the *lis*.

[1] *(1922) 24 N. L. R. 193.*

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It was felt, however, that this doctrine caused great hardship and prejudices to innocent purchasers who took transfers in ignorance of the pendency of a *lis*. The Legislature stepped in and passed Ordinance No. 29 of 1917, declaring that a *lis pendens* should be registered, and that unless it was registered no *lis pendens* was to bind purchasers *pendente lite*. It is clear, therefore, that the Legislature has decided that the " weapon " of *lis pendens*, to use the language of De Sampayo J., was to be available only upon condition that the *lis pendens* is registered. This was the only weapon by which transfers *pendente lite* could be defeated, until a new one was forged to meet the situation created by Ordinance No. 29 of 1917 by adopting and extending the principle of *Mutturamen v. Massilamany* (*supra*) and *Silva v. Gunawardene* (*supra*).

The benefits which it is the policy of the Legislature to secure to purchasers who bought during the pendency of an unregistered *lis* should not be defeated by the adoption and extension of a principle for which no proper legal foundation exists.

For reasons which I have already stated, I think that in this case the plaintiff has established a title superior to and wholly independent of that of the defendant, and in this view I would dismiss the appeal, with costs.