[St. John's Law Review](https://scholarship.law.stjohns.edu/lawreview)

Volume 31
Number 1 *Volume 31, December 1956, Number 1*

Article 12

May 2013

Lis Pendens--Cancellation for Failure to Commence Action Ends Privilege (Israelson v. Bradley, 308 N.Y. 511 (1955))

St. John's Law Review

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation

St. John's Law Review (1956) "Lis Pendens--Cancellation for Failure to Commence Action Ends Privilege (Israelson v. Bradley, 308 N.Y. 511 (1955))," *St. John's Law Review*: Vol. 31 : No. 1 , Article 12.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol31/iss1/12

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

In *Estin v. Estin*[22] the wife had obtained a support order in New York prior to her husband's Nevada *ex parte* divorce. In a later suit by the wife for arrears in alimony in New York, the court said ". . . the fact that marital capacity was changed does not mean that every other legal incidence of the marriage was necessarily affected."[23] In *Armstrong v. Armstrong*,[24] an Ohio court awarding the wife alimony was held to have afforded full faith and credit to a Florida *ex parte* divorce decree which recited " 'that no award of alimony be made.' "[25] The Court held that ". . . the Florida court did not purport to adjudicate the absent wife's right to alimony."[26] The concurring opinion of Justice Black refused to side-step the constitutional question. The decree " '. . . *specifically decreed* that no award of alimony be made to the defendant. . . .' "[27] Relying on the *Estin* case Justice Black continued that because ". . . Mrs. Estin's claim to support had been reduced to judgment . . . is not a meaningful distinction. Mrs. Armstrong's right to support before judgment, like Mrs. Estin's after judgment, is the kind of personal right which cannot be adjudicated without personal service."[28]

Relying on the dicta in the *Estin* and *Armstrong* cases, the majority in the instant case found that there was no conflict between their decision and the full faith and credit clause. In effect, the Court says that marriage as well as divorce could be called "divisible." Marriage is thus two separate things—marital status and its legal incidents.[29] It presents an interesting picture. A wife can be deprived of marital status by mere constructive service; but she cannot be deprived of support by a foreign court lacking in personam jurisdiction.

LIS PENDENS — CANCELLATION FOR FAILURE TO COMMENCE ACTION ENDS PRIVILEGE.—Plaintiff filed in *County Court* a summons, complaint and a notice of pendency of action involving an alleged contract to sell real property, but failed to serve the defendant. Before cancellation of this notice became effective, plaintiff filed a second lis pendens in *Supreme Court* in the same cause and served the defendant. The defendant moved to cancel the new lis pendens. The

---

22 334 U.S. 541 (1948).
23 Estin v. Estin, 334 U.S. 541, 545 (1948).
24 350 U.S. 568 (1956).
25 Armstrong v. Armstrong, 350 U.S. 568, 571 (1956).
26 *Id.* at 569.
27 *Id.* at 575.
28 *Id.* at 577.
29 See Bingham, *The American Law Institute vs. the Supreme Court: In the Matter of Haddock v. Haddock*, 21 CORNELL L.Q. 393, 401 (1936).

Court of Appeals *held* that where a party seeking the privilege of lis pendens fails to comply strictly with its requirements, he forfeits the privilege for that cause of action. *Israelson v. Bradley*, 308 N.Y. 511, 127 N.E.2d 313 (1955).

The doctrine of lis pendens is founded on the theory of public policy rather than notice.[1] It developed from the early Roman law principle,[2] *pendente lite nihil innovetur:* during the pendency of an action nothing should be changed.[3] The English courts adopted the doctrine both at common law and equity,[4] declaring that one who purchased real property during the pendency of a suit was bound by the decree.[5] Later it became statutory.[6]

New York courts early approved of and adopted the doctrine.[7] In 1823 the state legislature modified the case law by passing a statute requiring that, if notice is to be given to third parties, a lis pendens be filed in various real property actions.[8] Today, Sections 120 to 125 of the New York Civil Practice Act provide for the filing, cancellation, recording and effect of a lis pendens. Section 120 allows a plaintiff to file a notice before service of the summons "but . . . personal or substituted service . . . must be made . . . within sixty days after the filing . . . or publication . . . be commenced, or service . . . be made without the state, as prescribed by law." [9] Section 123 states that ". . . if a plaintiff filing the notice unreasonably neglects to proceed in the action, the court, in its discretion . . . may direct that a notice . . . be cancelled. . . ." [10] In applying these statutes the courts have held the provisions of Section 120 to be mandatory and peremptory,[11] and have cancelled the notice where the plaintiff failed to serve the defendant within sixty days.[12] The courts first acted under the

---

[1] See Lamont v. Cheshire, 65 N.Y. 30, 36 (1875); Bellamy v. Sabine, 1 DeG. & J. 566, 578, 44 Eng. Rep. 842, 847 (Ch. 1857).

[2] Jones v. Williams, 155 N.C. 179, 71 S.E. 222, 224 (1911) (dictum); Note, 12 ORE. L. REV. 68 (1932).

[3] BALLENTINE, LAW DICTIONARY 948 (2d ed. 1948).

[4] See Bishop of Winchester v. Paine, 11 Ves. Jun. 196, 197, 32 Eng. Rep. 1062, 1063 (Ch. 1805); 3 WARREN'S WEED, NEW YORK REAL PROPERTY 304 (4th ed. 1950); 8 CARMODY, NEW YORK PRACTICE 23 (2d ed. 1933).

[5] Bishop of Winchester v. Paine, *supra* note 4; Bellamy v. Sabine, *supra* note 1, at 584, 44 Eng. Rep. at 849 (dictum).

[6] 2 & 3 VICT., c. 11, § 7 (1839).

[7] See Murray v. Ballou, 1 Johns. Ch. *566 (1815); 3 WARREN, *op. cit. supra* note 4.

[8] Laws of N.Y. 1823, c. 182.

[9] N.Y. CIV. PRAC. ACT § 120.

[10] N.Y. CIV. PRAC. ACT § 123.

[11] See Brown v. Mando, 125 App. Div. 380, 109 N.Y. Supp. 726 (1st Dep't 1908); Singer v. Regal Shoulder Pad Co., 81 N.Y.S.2d 734 (N.Y. City Ct. 1948); PRASHKER, NEW YORK PRACTICE 603 n.13 (3d ed. 1954).

[12] See Napoli v. Frank, 202 App. Div. 482, 195 N.Y. Supp. 108 (1st Dep't 1922); Brown v. Mando, *supra* note 11; Cohen v. Biber, 123 App. Div. 528, 108 N.Y. Supp. 249 (2d Dep't 1908); Lipschitz v. Watson, 113 App. Div. 408, 99 N.Y. Supp. 418 (2d Dep't 1906) (per curiam); Cohen v. Ratkowsky, 43

"unreasonable neglect to proceed" provision of Section 123 [13] but one court later denied its applicability.[14] The courts have also cancelled the lis pendens where one of several defendants was not served within sixty days although his co-defendants were.[15] However, where the defendant has evaded service for the sixty days, the court has refused to cancel the lis pendens.[16] Until the sixty-day period has expired, the court cannot cancel the lis pendens.[17]

The Court of Appeals in the instant case considered for the first time the question of cancellation of notice for failure to commence an action.[18] After examining Sections 120 and 123 the Court determined that neither apply to the facts of the case. Both sections deal with actions only and the Court pointed out that an action, as defined in Section 218 of the New York Civil Practice Act, was not involved.[19] Hence the Court concludes that the legislature has left to the courts the power to decide the question.

In deciding the case the Court followed the decisional law established by lower courts in cases such as *Cohen v. Ratkowsky* [20] and *Cohen v. Biber*.[21] Plaintiffs in both cases filed lis pendens, but did not serve the defendants within sixty days. In the *Ratkowsky* case, after the first notice was cancelled, the court cancelled a second lis pendens filed in the same action, holding that the cancellation of the first notice had decided the issue.[22] In the *Biber* case the court cancelled a lis pendens on the grounds that the plaintiff, accepting a privilege, had violated its terms and thus lost the privilege. The Court, in the instant case, directly adopts the reasoning of the *Biber* case. It declares the filing of a lis pendens to be "an extraordinary

---

App. Div. 196, 59 N.Y. Supp. 344 (1st Dep't 1899); Singer v. Regal Shoulder Pad Co., *supra* note 11; Lipschutz v. Horton, 55 Misc. 44, 104 N.Y. Supp. 850 (Sup. Ct. 1907). *But see* Bruno v. Bruno, 81 N.Y.S.2d 810 (Sup. Ct. 1948).

[13] See Napoli v. Frank, *supra* note 12; Brown v. Mando, *supra* note 11; Cohen v. Ratkowsky, *supra* note 12, at 198, 59 N.Y. Supp. at 345.

[14] See 17th Ave. & 73rd Street Corp. v. Ocean Operating Corp., 215 App. Div. 106, 213 N.Y. Supp. 608 (2d Dep't 1926).

[15] See Steinmetz v. Kindred, 121 App. Div. 260, 105 N.Y. Supp. 676 (2d Dep't 1907); Nassau Suffolk Lumber and Supply Corp. v. Peterson, 133 N.Y.S.2d 590 (Sup. Ct. 1954). *But see* Hudson River Yards Corp. v. Morano Construction Corp., 284 App. Div. 894 (2d Dep't 1954) (without opinion).

[16] See Levy v. Kon, 114 App. Div. 795, 100 N.Y. Supp. 205 (2d Dep't 1906); Shostack v. Haskell, 116 Misc. 475, 190 N.Y. Supp. 174 (Sup. Ct. 1921), *aff'd without opinion,* 200 App. Div. 919, 192 N.Y. Supp. 950 (2d Dep't 1922).

[17] 17th Ave. & 73rd Street Corp. v. Ocean Operating Corp., *supra* note 14.

[18] See Israelson v. Bradley, 308 N.Y. 511, 516, 127 N.E.2d 313, 315 (1955).

[19] Section 218 reads in part, "A civil action is commenced by the service of a summons, which is a mandate of the court." N.Y. CIV. PRAC. ACT § 218.

[20] 43 App. Div. 196, 59 N.Y. Supp. 344 (1st Dep't 1899).

[21] 123 App. Div. 528, 108 N.Y. Supp. 249 (2d Dep't 1908).

[22] "The order was the law of the case, and so long as it remained in force the plaintiff could not file another notice. If the plaintiff was not satisfied he should have appealed from the order." Cohen v. Ratkowsky, 43 App. Div. 196, 198, 59 N.Y. Supp. 344, 345 (1st Dep't 1899).

privilege"[23] granted by the legislature. To reap the benefits of this privilege, the plaintiff must comply strictly with its requirements. "If the terms imposed are not met, the privilege is at an end."[24] The Court also, on the facts, extends the decision of the *Ratkowsky* case. Where, in that case, the court cancelled a second notice in the same action, here the Court has said that a second notice may not be filed where the plaintiff abandons all prior proceedings and begins anew in a different court.

This result, however, would seem to be necessary, since, without it, the law as expressed in the *Ratkowsky* case could be easily circumvented. Although the plaintiff in this case apparently failed to make service solely through his own neglect, the penalty seems harsh. Justice might better be served by amending the lis pendens statutes to require filing of a bond, similar in purpose and effect to the bond necessary for issuance of warrants of attachment.[25] Then the plaintiff would be penalized for his neglect by forfeiture of the bond, but would not lose the privilege of filing a lis pendens.

SPECIAL LEGISLATION — OPTIONAL AMENDMENT TO UNIFORM UP-STATE JURY LAW UPHELD.—Plaintiff brought a tax-payer's suit to restrain defendant-officers of Albany County from applying the provisions of the so-called 1954 "Uniform Up-State Jury Law," as amended in 1955.[1] The amendment made the uniform regulations of the 1954 statute optional with counties of less than 100,000 population. The plaintiff contended that the statute, as amended, violates New York constitutional provisions which (1) forbid local or private laws in establishing juries[2] and (2) restrict them when related to county

[23] Israelson v. Bradley, 308 N.Y. 511, 516, 127 N.E.2d 313, 315 (1955).
[24] *Ibid.*
[25] Section 819 of the New York Civil Practice Act provides in part that "Except where security is expressly dispensed with by statute, such an order or warrant shall not be granted unless the party applying therefor gives security for the protection of the party against whom or whose property the order or warrant is to be directed." N.Y. CIV. PRAC. ACT § 819.

Section 907 provides in part that "The undertaking to be given on the part of the plaintiff, before the granting of the warrant [of attachment], shall be to the effect that if the defendant recovers judgment, or if the warrant is vacated, the plaintiff will pay all costs which may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking." *Id.* § 907.

[1] N.Y. JUD. LAW §§ 650-85 (Supp. 1955), as amended, N.Y. JUD. LAW §§ 500-31 (Supp. 1956).

[2] "The legislature shall not pass a private or local bill in any of the following cases:

"Selecting, drawing, summoning or empaneling grand or petit jurors." N.Y. CONST. art. III, § 17.