

1937

*Present: Maartensz and Moseley JJ.*TOCHINA *v.* DANIEL188—D. C. (*Inty.*) Galle, 34,347.

*Registration—Partition action—Registration of lis pendens in wrong folio—Rectification of error after issue of summons—Registration of Documents Ordinance, No. 23 of 1927, s. 12 (1).*

Where a partition action was registered as a *lis pendens* in the wrong folio and summons was issued in terms of section 12 (1) of the Registration of Documents Ordinance,—

*Held*, that the plaintiff should be allowed to rectify the mistake and obtain fresh summons.

There is no provision in the Registration of Documents Ordinance that the action should be dismissed if the requirements of section 12 (1) are not complied with.

**A** PPEAL from an order of the District Judge of Galle.

H. V. Perera, K.C. (with him Colvin R. de Silva), for first defendant, appellant.

No appearance for plaintiff, respondent.

*Cur adv. vult.*

July 2, 1937. MAARTENSZ J.—

The question for decision in this appeal is whether a partition action should be dismissed because the precept or order for the service of summons was issued before the action was duly registered as a *lis pendens* as required by section 12 (1) of the Registration of Documents Ordinance, No. 23 of 1927. This sub-section enacts that “a precept or order for the service of a summons in a partition action shall not be issued unless and until the action has been duly registered as a *lis pendens*”. By section 15 of the Ordinance an instrument is not duly registered unless it is registered in the book allotted to the division in which the land affected by the instrument is situated and in, or in continuation of, the folio in which the first registered instrument affecting the same land is registered.

It appears from the proceedings in this action that the action was registered as a *lis pendens*, but not in the proper folio.

When the plaintiff discovered the mistake he registered the action in the proper folio and moved for the issue of fresh summons on the defendants. The first defendant objected to the motion; he contended that the action should be dismissed. His objection was overruled and this appeal is from that order.

The objection is in my opinion unsustainable. There is no provision in the Ordinance which declares that the action should be dismissed if the provisions of section 12 (1) are not complied with. In the absence of such provision I see no reason why a plaintiff should not be allowed to rectify his error and proceed with the action.

We have not in this case to deal with a question of competing actions which might give rise to other considerations.

I would dismiss the appeal with costs.

MOSELEY J.—I agree.

*Appeal dismissed.*