1932 *Present:* **Macdonell C.J., Garvin S.P.J., Dalton J. and Jayewardene A.J.**

DE SILVA *v.* NONOHAMY *et al.*

356—D. C. Galle, 27,260.

Right of way—Claimed over several lands—Obstruction by owner of one land—Joinder of owners of intervening lands—Roman-Dutch law—Civil Procedure Code, s. 18.

Per MACDONELL C.J., GARVIN S.P.J., and JAYEWARDENE A.J. (DALTON J. dissenting):—

Where a person who claims to be entitled to a right of way which traverses a number of contiguous lands is obstructed and disturbed in the enjoyment of his rights by the owner of one of these lands, an action brought by him against the wrong-doer for a declaration of his right and damages, is not badly constituted because the owners of all the intervening servient tenements are not joined as parties.

Where, it appears that the owner of an intervening land denies the right of way the Court may, in exercise of the powers vested in it by section 18 of the Civil Procedure Code, add the said owner as a party to the action.

THIS was an action in which the plaintiffs claimed a right of way for carts from their land to the Gansabhawa road. They stated that the defendant obstructed the cart-way when it passed over his land. Between the plaintiffs land and that of the defendant's the cart-way passed over several lands. Three questions were submitted for the opinion of the Court by Drieberg and Akbar JJ.:—

(1) It is necessary that a plaintiff should in all cases join as parties to the action the owners of all the intervening lands.

(2) Or is the action properly constituted without their being made parties, it being left to the Court of its own motion or on the application of the plaintiff or the defendant to make the owners of the intervening lands parties to secure the objects stated in sections 18 and 33 of the Civil Procedure Code.

(3) Or is a plaintiff entitled to proceed against the defendant alone even when it appears in the course of the proceedings that the owner of the intervening land denies the right of way.

Gratiaen (with him *Ameresekere*), for defendant, appellant.—Where a servitude is claimed over a servient tenement not adjacent to the dominant tenement it must be shown that the intervening tenements are subject to the same servitude (*Voet VIII., 4, 19*). Once a servitude has been acquired, there really results one servitude over several servient tenements. That servitude is one and indivisible (*Gunasekera v. Rodrigo*[1], *Fernando v. Fernando*[2]). Where the servitude is extinguished with regard to one of the intervening tenements the whole servitude is extinguished. The right of the dominant owner is an indivisible right to pass

[1] *30 N. L. R. 468.* [2] *31 N. L. R. 107.*

over the lands of all the intervening owners and not piecemeal over the lands of each one. Correspondingly there is an indivisible obligation on the part of the owners to allow his rights. An indivisisible obligation can be discharged only by all the co-obligees. *Pothier Vol. I., 172,* illustrates this by the case of a servitude. In this case plaintiff must show that he has a right to go up to defendant's land and, when he has crossed it, to the road. He cannot establish his right to part of a servitude. Suppose the plaintiff gets a declaration of his servitude against the defendant and subsequently the servitude is declared non-existent as against another of the intervening owners?

Rajapakse (with him *Abeysekera* and *Rajakaruna*), for plaintiff, respondent.—The question for decision is not one of substantive law but of procedure. Section 5 of the Civil Procedure Code defines a cause of action. Section 14 refers to persons who must be made defendants. Plaintiff has no cause of action against the intervening owners. He can claim no relief against them. The question must be decided solely with reference to section 14. Why should plaintiff be unnecessarily cast in cost against intervening owners who do not resist his claim? Section 18 makes it only discretionary on the Court to join parties. A distinction must be made between parties who are necessary for the proper constitution of the action and parties the joinder of whom is merely discretionary. If parties necessary under section 14 are not joined the action fails. Not so under section 18. Under section 18 plaintiff will not have to pay costs. The obstruction caused by each separate owner gives rise to a separate cause of action (*2 Menzies 295 ; 3 Bal. 295*). The case would be different if there was one servient tenement with several co-owners. It is in such a case that Drieberg J. has held that all co-owners must be joined. Even in the case of a right of way of necessity the joinder of all the co-owners was not considered necessary (*1 Nathan, s. 701 ; 2 Maasdorp 220 ; 4 Bisset and Smiths' Digest 846*).

Gratiaen, in reply.—Section 16 of the Code gives the plaintiff power to get one defendant to represent a number. That disposes of the question of convenience. There is a cause of action against each separate owner because the obligation is indivisible.

September 13, 1932. MACDONELL C.J.—

I have seen the judgments of Garvin and Jayewardene JJ. with which I respectfully concur and I do not think that there is much that I can profitably add.

Unquestionably the proper, and originally the only, remedy in Roman-Dutch law was by *actio confessoria,* a real action "against the possessor of, and all persons claiming any real right to, the alleged servient tenement, to have the servitude declared in favour of the dominant tenement and to have the possessors and occupiers of the servient tenement interdicted from interrupting the enjoyment of the servitude" (*Maasdorp, Vol. II., p. 221*), and no doubt, it would have been matter of exception to the pledgings of the plaintiff claiming the dominant tenement had he omitted any one of the perhaps numerous owners of the servient

tenement or of portions thereof. The servitude, here a right of way, is one and indivisible, in the sense that it must be shown legally to exist at each and every point on the strip of land over which it is claimed and if the claimant fail to prove its existence at any one of such points, the servitude disappears not at that point only but at every other point; it is wholly at an end; *aut tota amittitur aut tota retinetur.* Consequently it could well be argued that unless the claimant of the servitude joined every owner of the servient tenement, it would be a logical impossibility for him to prove his action. It must then be frankly admitted that a personal action of trespass, with claim for damages, to try indirectly the right to a servitude was an innovation which the earlier authorities on Roman-Dutch law would have rejected probably as something unintelligible, certainly as a remedy quite unknown to their system of law. Possibly it was an innovation at the time of *Saunders v. Executrix of Hunt,*[1] but this method of indirectly establishing a right is convenient, and has been adopted in South Africa where it has received the approval of so great an authority as de Villiers C.J. (*Hofmeyr v. Hofmeyr*[2]). The principle is clear; why must the owner of the dominant tenement who claims the servitude be compelled to sue owners of parts of the servient tenement who do not dispute his right to the servitude, why may he not be allowed to sue that owner only who does dispute his right? The same idea, though not of course the same remedy, was perhaps present to the minds of the Roman lawyers themselves (*Dig. VIII., 3, 11*); *Per fundum, qui plurium est, ius mihi esse eundi agendi potest separatim cedi. Ergo suptili ratione non aliter meum fiet jus, quam si omnes cedant et novissima demum cessione superiores omnes confirmabuntur: benignius tamen dicetur et antequam novissimus cesserit, eos, qui antea cesserunt, vetare uti cesso jure non posse.* A remedy was given against those who had already granted the servitude restraining them from derogating from their grant, even though the other owners had not yet made grant at all and so were not liable to action, and from this to giving a remedy against those who infringe the right granted by them or their predecessors without having to join others who have not infringed that right, the step is surely both short and reasonable. See also *Dig. VIII., 3, 23* cited in *Ebden v. Anderson*[3]; *Si tamen fundus, cui servitus debetur, certis regionibus inter pluros dominos divisus est, quamvis omnibus partibus servitus debeatur, tamen opus est, ut hi, qui non proximas partes servienti fundo habebunt, transitum per reliquas partes fundi divisi iure habeant aut, si proximi patiantur, transeant.* This is the same idea from another point of view. The dominant tenement is divided into several lots—*certis regionibus*—among several owners. As the servitude is a whole each of these owners must be allowed to use it, even though this involves his passing through the portions of the dominant tenement belonging to others; and if one of those owners obstruct another of them, it would be against the owner so obstructing that action would lie, not against the others who had not been guilty of obstruction.

The owner of the dominant tenement certainly runs a risk if he sues in trespass one owner of part of the servient tenement without joining the other owners of the same. He may in proving trespass establish his right

[1] *2 Menz. 295.* [2] *(1875) 5 Buch. 141.* [3] *2 Searle, 64.*

as against that one owner who, let us suppose, acquiesces in the judgment against him and does not appeal. The owner of the dominant tenement then sues another owner of part of the servient tenement who, however, successfully appeals against the judgment against him. Then the servitude, being an indivisible whole, is at an end, and the owner of the dominant tenement cannot enforce it, for having gone in part it has gone in whole, *tota amittitur*, even against the other owner of part of the servient tenement against whom he possesses a judgment which is final since it was not appealed against. It may also be argued that to allow the right to be tried by this personal action of trespass against one owner only of the servient tenement, has worked hardship on him, since for a time he has had to submit to a servitude which another conclusive judgment has now declared not to exist. But to this it can be answered that this inconvenience is not likely often to arise, that in a great majority of cases it will be prevented by the use of section 18 of the Civil Procedure Code, either the other owners of the servient tenement will join or the Court will require their joinder, and that in any event it is a lesser inconvenience than would be a compulsion on the owner of the dominant tenement to join every one of the owners of the servient tenement whenever one only of them obstructed his enjoyment of the servitude.

The point is pretty clearly raised in *Perera v. Fernando*,[1] a decision of Wood Renton C.J. and de Sampayo J. The relevant parts of the judgment are as follows :—

> "The plaintiff in this action claims a right of way over two distinct lands. The one belongs to the first defendant, the other to the second and third defendants. It is the first defendant alone who is alleged to have interfered by any overt act with the right of way which the plaintiff claims. He had no cause of action against the second and third at the date of action brought . . . . The District Judge has held that an objection taken on behalf of the defendants to the constitution of the action on the ground that there had been a misjoinder of parties and causes of action, was bad, since it would be useless for the plaintiff to obtain judgment for a section of the right of way he claims, without having it declared as a whole, and since, if he had to bring another action against the second and third defendants, he might not be successful even if the present action succeeded. That does not seem to me to be a very convincing reason in support of the order under appeal. The causes of action are distinct, even assuming that the plaintiff has any cause of action at present against the second and third defendants, and they might well be prejudiced were their case to be tried along with that of the first defendant, who is alleged in the plaint to have created a positive obstruction to the exercise of the right of way in suit. The action should, I think, be dismissed against the second and third defendants. But the plaintiff should have liberty to proceed with his action against the first defendant."

[1] *4 C. W. R. 148.*

There is therefore on practically the same point as that now before us a decision of this Court with which I would respectfully concur.

I answer the question put to us in the same terms as Garvin J.

GARVIN S.P.J.—

This is a reference at the instance of Drieberg and Akbar JJ. before whom this appeal came up for argument. The principal question for decision is whether when a person who claims to be entitled to a right of way which traverses a number of contiguous lands is obstructed and disturbed in his enjoyment of his rights by the owner of one of these lands an action brought by him against the wrong-doer for a declaration of his right and damages is not properly constituted unless the owners of all the servient tenements over which the right of way is claimed are joined as parties.

The question is of great practical importance. Lands in this country, especially in the villages, are frequently the subject of ownership in common. They are traversed by paths, many of them not public paths, which give access to different parts of the village and to the public road in the vicinity. Manifestly, it would be extremely burdensome not only to a plaintiff but to the owners of the several lands traversed by such a path, should it be held that an action to vindicate his right by one owner, who happens to be obstructed in his enjoyment of such right of way by a disaffected neighbour, is not properly constituted unless every person having a proprietary interest in every one of the contiguous allotments of land traversed by the path is made a party.

Under the Roman-Dutch law a person obstructed in the enjoyment of a servitude was entitled to seek his remedy by the *actio confessoria*. "But in most cases the action lies against the owner of the servient tenement; and if there be more than one, against each one of them in solidum, because the action is not divisible in this case" (*Voet VIII., 5, 2*). In the next section Voet goes on to say "The object of this action is that the free use of the servitude which has been created may be left unaltered, and security given against disturbing the rights for the future; . . . . That the defendant may also be compelled to pay the fruits; by which term is meant the advantage the plaintiff would have enjoyed supposing the servitude not to have been interfered with (. . . .) and so the loss which he has suffered by reason of the obstruction to the servitude."

In the Roman-Dutch law as administered in South Africa, the *actio confessoria* is referred to as a declaratory action "which should properly be brought in the form of a real action against the possessor of, and all persons claiming any real right to, the alleged servient tenement, to have the servitude declared in favour of the dominant tenement and to have the possessors and occupiers of the servient tenement interdicted from interrupting the enjoyment of the servitude; but there is no legal objection to having a disputed right of servitude tried indirectly by a personal action of damages or in an action of trespass" (*Maasdorp, Vol. II., p. 221*).

The case of *Saunders v. Executrix of Hunt,*[1] referred to by Maasdorp, is a clear recognition of the right to maintain an action for damages against a person who obstructs another in the enjoyment of a servitude notwithstanding that a question as to the existence of the right of servitude is in issue and may have to be decided.

It would seem, therefore, if the owner of land desired to have another land declared by judgment to be servient to the right of servitude he claims, he had to bring what is referred to as a real action making the owner or owners and all persons claiming any real right in the land parties. But it was also competent for him to bring an action for damages against the person who caused the obstruction or impeded him in the enjoyment of his right notwithstanding that his right to the servitude is denied and may have to be established.

Unless a decree in such a "real action" had some special effect, such, for instance, as the effect of a judgment *in rem,* and if on the contrary such a decree had no greater effect than any other judgment *inter partes,* the difference between the two actions, the one for a declaration of the rights of servitude the other for damages, involving when the right is denied an adjudication that the plaintiff is entitled to the servitude claimed, resolves itself into a mere matter of form.

The Roman-Dutch law remains our common law and the rights and liabilities of parties are in many matters regulated by its principles but the forms of action and the procedure of the Roman-Dutch law has long been obsolete and the Civil Procedure Code now regulates the bringing of action, the joinder of causes of actions and the joinder of parties. Judgments entered in actions, even judgments declaring title to land or to servitudes over land, are only binding on parties and their privies except in the case of those which are declared to be judgments *in rem, e.g.,* final judgments under the Partition Ordinance.

It is difficult to see why a person, obstructed in the enjoyment of a right of servitude, who may sue the person who obstructs him for damages and can invite the Court to hold in such an action that he is entitled to the right of servitude he claims, may not be declared entitled to that right in the judgment which can only bind the parties and their privies. It is obviously in the interests of such a person to make all the owners of the servient tenement parties so that by binding all owners of the servient tenement he may obtain a judgment of real value to himself and his successors in title to the dominant tenement. If he does not do so, the Court is entitled under the provisions of section 18 of the Civil Procedure Code to order the co-owners to be made parties, and it will no doubt do so when there is a serious denial of the right of servitude asserted.

There is no special reference in the commentaries on the Roman-Dutch law or in the judgments, to the case of an action in respect of a right of servitude, such as a right of way over a number of contiguous lands where the obstruction complained of or the denial of the right is the act of the owner or owners of one of the servient tenements. In such a case the servitude is one and indivisible in the sense that if it be legally determined at any one point the servitude as a whole is at an end (*vide Samsan*

[1] *2 Menzies 295.*

Dias v. Amarasinghe[1], *Gunasekere v. Rodrigo*[2], and *Fernando v. Fernando*[3]). But each of the contiguous lands is a servient tenement and the law lays the owner or owners of each of such tenements under a duty to permit the free exercise by the owner of the dominant tenement of his right of way. If the obstruction be caused by the owner or owners of one of such servient tenements all that the owner of the dominant tenement needs at most to secure his enjoyment of the servitude is a judgment which establishes his right of servitude over that particular servient tenement against the owner or owners.

Under the strict rules of the Roman-Dutch law, it may be necessary even as it is, in many cases, desirable, that all the co-owners should be made parties to the action. But there is evidently nothing to support the contention that to establish by judgment a right of servitude over one servient tenement in the case of a right of way over a number of contiguous servient tenements every person is a necessary party who has a real interest in any one of the servient tenements.

If a right of servitude over a single servient tenement may be tried and established in a personal action for damages against a single co-owner who causes an obstruction, a right of servitude over a number of contiguous lands may surely be tried in an action to establish a servitude over one servient tenement against the owner or owners of that tenement without joining the owners of the other servient tenements. This is in accordance with what has been the practice—*vide Samsan Dias v. Amarasinghe (supra), Gunasekere v. Rodrigo (supra), Fernando v. Fernando (supra) and S. C. No. 67, C. R. Matara, No. 15,914, S. C. Min. October 20, 1931.* The only judgment in which a different view is expressed is that of *Fernando v. Dona Maria*[4]. In that case the third issue was as follows:—"Are the plaintiffs entitled to the right of way over the intervening lands marked 1 and 4?" Dalton J. dealing with this issue said "On the action as brought under the issues framed, it seems to me that the trial Judge could only answer issue 3 in the negative. If plaintiffs wish to establish that they are entitled to the declaration of right they claim, they must establish their contention that all four lots are subject to the right of way. For that purpose it seems to me the owners of the intervening properties must necessarily be heard and plaintiffs must bring them before the Court".

The existance or non-existance of a right of way is a question of fact and I am aware of no reason why like any other fact the existence of a right of way which traverses a number of contiguous lands may not be established without hearing the owners of the intervening lands. The existance of such a right may be proved in a personal action for damages even under the Roman-Dutch law without hearing even the other co-owners of the servient tenement in respect of which the right is claimed—*vide Saunders v. Executrix of Hunt (supra).* *A fortiori*, it may be established in an action to which the owner or owners of the servient tenement over which the right is claimed are parties without bringing in the owners of the other servient tenements in a case where the right of way passes over several contiguous lands.

[1] *(1917) 4 C. W. R. 269.*
[2] *(1929) 30 N. L. R. 468.*
[3] *(1929) 31 N. L. R. 107.*
[4] *(1930) 32 N. L. R. 166.*

It is evident that Dalton J. has adopted the distinction between the real and the personal action which obtains in South Africa, and has extended the requirement that all the owners of a servient tenement must be made parties to an action to establish by judgment a right of servitude claimed over that tenement to the case of a servitude of a right of way over several contiguous tenements. It is sometimes desirable, often it is in the interest of the plaintiff himself, and in South Africa it seems to be necessary, to make all the owners of a servient tenement parties to an action to have that servient tenement declared to be under the servitude claimed by the owner of the dominant tenement. But I am aware of no provision of the Roman-Dutch law which compels a person who seeks to have a right of servitude claimed by him established in respect of one servient tenement to bring in the owners of all the other tenements which may be servient in respect of the same servitude—nor is there anything in the law as it obtains in Ceylon which compels him to do so. Indeed a plaintiff who joins the owners of servient tenements who have neither caused him obstruction nor denied his right to the servitude he claims incurs the risk of having to pay them their costs since they have given him no cause of action—*vide Tornhill v. Weeks*[1], where it was doubted "whether the mere assertion that there is a public right of way and the mere provision of legal assistance for the defence of private individuals, who prior to the assertion and without any reference to the district council have exercised the alleged right on their own behalf and been sued in trespass accordingly, would without more give rise to any cause of action against the district council."

In the case of *Harris v. Jenkins* which was a proceeding to have a statement of claim to a right of way struck out as embarrassing for want of particulars as to the title by which the right was claimed and as to the course of the right of way, Fry J. observed "I think the defendant is entitled to a short statement by the plaintiff of the title by which he claims . . . . I think also that the plaintiff ought to show with reasonable precision and exactitude the termini of the right of way and the course which it takes. It may be sufficient to state the names of the closes of land through which it passes, or to refer to their numbers in the tithe commutation map of the parish". It was never suggested that the owners of all the closes of land traversed should be made parties.

I am, therefore, of opinion that an action brought to vindicate a right of way over several contiguous lands is not badly constituted because the owners of all the other servient tenements intervening between the two termini have not been made parties.

The questions submitted for decision by Drieberg and Akbar JJ. are—

(1) Is it necessary that a plaintiff should in all cases join as parties to the action the owners of the intermediate land or lands as was held by Dalton J. in *Fernando v. Dona Maria*[3].

(2) Or is the action properly constituted without their being made parties, it being left to the Court of its own motion or on the application of the plaintiff or defendant to make the owners of

[1] *(1913) L. R. 1 Ch. D. 438.* [2] *(1882-3) L. R. 22 Ch. D. 481.*

[3] *32 N. L. R. 166.*

the intervening lands parties to secure the objects stated in sections 18 and 33 of the Civil Procedure Code as was held in *Fernando v. Arnolis Hamy*[1] ?

(3) Or is a plaintiff entitled to proceed against the defendant alone even where it appears in the course of the proceedings that the owner of an intervening land denies the right of way ?

For the reasons given I would answer the first question in the negative and the second question in the affirmative. The answer to the third question will also be in the affirmative but subject to the qualification that the Court may, in exercise of the powers vested in it by section 18, order that any person or persons be joined whose presence it may deem necessary to enable it effectually and completely to adjudicate upon and settle all the questions involved in the action.

The case will now be listed before Drieberg and Akbar JJ. for further hearing and disposal.

DALTON J.—

Three questions have been referred for the opinion of this Court. In the reference it is set out that the plaintiffs claim a right of way for carts from their land to the Gansabhawa road. They state that the defendant obstructed the cart-way where it passed over his land. Between the plaintiffs' land and that of the defendant the cart-way claimed passes over the land of Siyadoris and Girigoris, and, beyond defendant's land goes over the land of Ovinis, and then joins the Gansabhawa road.

Plaintiffs claimed the right of way by long user, but defendant allowed the plaintiffs a right of footway only over his land. Of the owners of the intervening lands, only Girigoris was called, and he supported the defendant's case.

The question submitted for the opinion of this Court are as follows :—

(1) Is it necessary that a plaintiff should in all cases join as parties to the action the owners of the intervening land or lands as was held in *Fernando v. Dona Maria*[2].

(2) Or is the action properly constituted without their being made parties, it being left to the Court of its own motion or on the application of the plaintiff or defendant to make the owners of the intervening lands parties to secure the objects stated in sections 18 and 33 of the Civil Procedure Code as was held in *Fernando v. Arnolis Hamy*[3] ?

(3) Or is a plaintiff entitled to proceed against the defendant alone, even where it appears in the course of the proceedings that the owner of the intervening land denies the right of way ?

The case referred to in the first question was decided by me, and nothing I have heard in the course of the argument before us has satisfied me that the case was wrongly decided. I would therefore answer the first question in the affirmative. As the rest of the Court, however, are of the opinion that the answer to the first question should be in the negative, I propose here to add but little to what I there stated. I would wish

[1] *8 Times of Ceylon L. R. 132.* [2] *32 N. L. R. 166.*
[3] *32 N. L. R. 328.*

first of all to stress the distinction between an action for damages for obstruction, and an action for a declaration that plaintiff is entitled to a right of way over certain land. In such an action as the former, the action would be properly constituted by making the person from whom damages are claimed the defendant. The case before us now is one of the latter class. It is conceded that a right of way over defendant's land to the Gansabhawa road will be useless to plaintiff without the necessary intervening connections, and the right is claimed, as set out in the reference, over all the lands intervening between the plaintiffs' land and the road. I am unable to agree that the joining of the other intervening owners, against whom the plaintiff is in effect seeking to establish a right, is in such a case as this merely a matter of procedure. It has been suggested that in practice this might mean a very large number of defendants, but in such an improbable case the difficulty is one for which section 16 of the Code applies.

The nature of the right sought to be vindicated has been referred to. It is a real right, and a *jus in rem,* which is to be enforced by a vindicatory action. I do not wish to add anything further to what I have already stated, except to point out that the indivisibility of the right claimed is clearly stressed in the partition cases mentioned in the reference. It has been held that where the right of way over an intervening land has been lost, the whole right of way has been necessarily determined, and a plaintiff cannot claim a right of way over a land beyond it. I am unable to draw any practical distinction between such a case and a case as here where plaintiff, by bringing an action against the owner of one land, seeks to establish a right of way over intervening lands without so much as showing that the right over those lands, so far from being lost, has ever existed.

I would answer the first question in the affirmative, whence it follows that the two remaining questions must be answered in the negative.

JAYEWARDENE A.J.—

The plaintiffs brought this action complaining that the defendant had dug a drain along a path leading from their land to the Gansabhawa road, and disputed their right of way. They sought a declaration that they were entitled to the right of way, and that the defendant be ordered to remove the drain. They also claimed damages and costs. They obtained judgment in the Court of Requests and the defendant appealed. The main question is whether it is necessary that the plaintiff should in cases of this nature join as parties the owners of all the intermediate lands.

Actions in connection with servitudes were of two kinds in the Roman law, being declaratory (*actio confessoria*) or negatory (*actio negatoria*). Those who are liable to be sued by the *actio confessoria* are described in the *Digest VIII. 10, 1. Agi autem hac actione poterit non tantum cum eo, in cujus agro aqua oritur, vel per cujus fundum ducitur : verumetiam cum omnibus agi poterit, quicunque aquam (non) ducere impediunt, exemplo cœterarum servitutium. Et generaliter, quicunque aquam ducere impediat, hac actione cum eo experiri potero :* The plaintiff may sue the owner of the source of supply, the person through whose estate the water flows but

most assuredly he may bring suit against one who impedes the flow of the water, just the same as in other servitudes. In general, one is able to put to the trial of this action anyone whomsoever that meddles with the flow.

In his commentary on the Codex of Justinian Perezius says,—

> "*Denique observandum, pro servitutibus vindicandis duplicem esse proditam actionem in rem. Confessoriam nempe et negatoriam. Confessoria datur illi, qui servitutem aliquam in re alterius sibi competere contendit adversus impedientem, hoc modo: Dico me jus habere eundi, agendi, aquam ducendi ex fundo vicini in fundum meum . . . . Perezius Praelectiones in—Codicem III. 34, 31.*

H. J. Roby, Professor of Jurisprudence in University College, London, in his introduction to the study of Justinian's Digest says, "The regular action for the fructuary was the *vindicatio usufructus* (commonly called the *confessoria Digest VIII., 5, 1*), and this he could use against the proprietor of the estate in usufruct or against any possessor whatever who disputed him in his usufruct, *e.g.*, against the possessor of a neighbouring estate who disturbed him (*Roby p. 174*).

If trees are blown down by the wind and the proprietor does not remove them so that the usufruct or way is obstructed, according to the *Digest VII., 1, 19,* the usufractuary must try the matter with *him* (that is, sue *him*) by his proper actions (*suis actionibus usufructuario cum eo experiundum*).

The Roman-Dutch law adopted the two actions called *confessoria* and *negatoria* and their use in the Roman-Dutch law is examined in *Van Leeuwen's Commentaries 11, 22, 6, Decker's Notes.* The *actio confessoria,* so called because the adversary is compelled by it to confess that his property is servient, is a civil action *in rem.* It lies against any possessor of the usufructuary property, or against anyone disturbing another in the possession of the established usufruct, and especially against the owner himself of the servient tenement (*Voet VII., 6, 2*). The *actio confessoria* lies against any person who obstructs a servitude. In most cases the action lies against the owner of the servient tenement, and if there be more than one against each one *in solidum;* because the action is not divisible in this case. So that the defendant is held liable to satisfy the entire demand, because it is the interest of the plaintiff who brings his action *in solidum,* that on no event should he be obstructed (*Voet VIII., 5, 2*). A riparian proprietor may have a servitude as against a dozen estates higher up on the same stream than the dominant tenement, and he may have his damages and an interdict for an interference by a proprietor between whose estate and the plaintiff's there are several other estates, provided the stream in question flows through such estates (*Nathan p. 503, 2nd Ed.*).

According to Maasdorp the declaratory action (*actio confessoria*) should be brought in the form of a real action against the possessor of and all persons claiming any real rights to, the alleged servient tenement, to have the servitude declared in favour of the dominant tenement, but there is no legal objection to have a disputed right of servitude tried directly by a personal action of damages or in an action of trespass.

The action will lie against whoever interferes with the exercise of a right of servitude. The action will lie in any case against the owner of the servient property, and if there are several joint owners, all will have to be joined (*2 Maasdorp p. 229, 2nd Ed.*). A real action is an action concerning a thing (*res*)—actions being divided in Roman-Dutch law into personal or real; "those which arise from an ordinary debt or obligation only or where some property or thing is bound or secured for the same or which serves for the purpose of claiming or following up any property" (*Van Leeuwen's Comm. V., 10, 2*).

In *Saunders v. Executrix of Hunt*[1] the Court expressed an opinion that although a question as to a disputed right of servitude might indirectly be tried by a personal action, the plaintiff's proper remedy was by a *real* action against the possessor of, and all claiming right in the servient tenement. In *Hofmeyr v. Hofmeyr*[2] it was held that a question of infringement of a right of way can be properly tried in the form of an action of trespass. De Villiers C.J. said that in England nothing is more common than for such right to be tested in actions for trespass and that there were several cases in *Gale on Easements* to the same effect regarding injury to a right of way.

In *Ebden v. Anderson*[3] the owner of a farm granted to the owner of another farm and his heirs and successors a right of way over the first farm, and the farms were divided into lots, the purchaser of one of the lots of the dominant tenement was held entitled to claim such right of way from the purchaser of a lot on the servient tenement, although the defendant was not the owner of the whole of the servient farm or even of the homestead situated thereon. In *Dreyer v. Letterstead's Executors*[4] it was pointed out that the result of the passages in the *Digest VIII., 1, 17, "Viae, itineris, actus, aquaeductus pars in obligationem deduci non potest: quia usus eorum indivisus est":* and in *VIII, 3, 18, "Una est via etsi per plures fundos imponitur; cumuna servitus sit: denique quaeritur, an si per unum fundum iero, per alium non, per tantum tempus quanto servitus amittitur: an retineam servitutem? et magis est, ut aut tota amittatur: aut tota retineatur. Ideoque si nullo usus sum, tota amittitur: si vel uno, tota servatur,"* is that a praedial servitude being indivisible cannot be partially acquired or lost (*Voet VIII., 1, 5*) is to the same effect.

As a rule in the case of rural servitudes, a servitude is prevented by an intervening tenement not being subject to a servitude and a tenement not bordering on the dominant tenement can be subject to a servitude to it, if only the intervenient tenement owes the same servitude (*Voet VIII., 4, 19*). But it has not been laid down, as far as I can discover, that the owners of all the lands subject to the same servitude should necessarily be made parties to the declaratory action (*confessoria*) because of an obstruction to the servitude by one servient owner.

In *Simpson v. Lewthwaite*[5] Lord Tenterden C.J. said, "The termini in this case are correctly described: and I am of opinion that, as a general

[1] *2 Menzies 295.*
[2] *(1875) 5 Buch. 141.*
[3] *2 Searle (1853-6) 64.*
[4] *5 Searle (1864-7) 88.*
[5] *3 B. & Ad. 226.*

proposition where a private way is claimed by prescription, if both the termini be correctly stated, it is not necessary to take notice of all the intervening land". Littledale J. remrked, "It would be very inconvenient to require a party to set out all the intermediate closes". This view is supported by *Jackson v. Shillitoe* [1] and *Rouse v. Bendin* [2].

In an action to restrain the obstruction of an alleged private right of way, the plaintiff, it has been held, ought to show with reasonable precision and exactitude the *termini* of the right of way and the course which it takes, and it would be sufficient to state the names of the closes of land through which it passes and to refer to their numbers in the map of the parish.

In *Thornhill v. Weeks* [3] it was held that if the defendant claims and insists on the right to do a thing, although he has not already done it *modo et forma* he would be a proper party to the suit.

As regards the pleadings, *Gale* (*Easements p. 522, 9th Ed.*) states that in action for the disturbance of a way, the plaintiff should state the terminus *a quo* and *ad quem,* and the kind of way he claims, and it is not necessary although it is convenient to give the intervening closes.

In India the same principles are followed as in England and the same action lies, three distinct classes of rights of way being recognized in the one country as well as in the other, *Chunilal v. Ram Kishen Sahu* [4]. A person who obstructs a right of way is looked upon as committing a wrong or tort and an action lies against him (*Ratanlal on Torts p. 361*). I have examined the *Empire Digest,* Bose's *Indian Digest,* and Bisset and Smith's *South African Digest,* but I have not found any case which required all owners of intervening farms and tenements or closes to be joined as parties.

As regards local cases the weight of judicial authority is in favour of the view that the owners of all the intervening lands need not be joined. In *Fernando v. Arnolis* [5] Drieberg J. thought so, Lyall Grant J. agreeing. Garvin J. was of that opinion in *Gimarah v. Davith* [6]. In *Perera v. Fernando* [7]. Wood Renton C. J. and de Sampayo J. went so far as to hold that the owners of two lands over which the road ran cannot be sued in the same action and that the party who created the positive obstruction to the right of way should alone be sued.

I would answer the first question in the negative and the second in the affirmative, as to the third, following the principle enunciated in *Thornhill v. Weeks* (*supra*) it will be in the discretion of the Court to add any party.

[1] *1 East 381.*
[2] *1 H. Bl. 351.*
[3] *(1913) 1 Ch. 438.*
[4] *15 Cal. 460.*
[5] *32 N. L. R. 326.*
[6] *11 C. L. R. 171.*
[7] *4 C. W. R. 148.*