1962 *Present :* Herat, J., and G. P. A. Silva, J.

B. K. E. PERERA and another, *and* M. WIJEKOON, Respondent

S. C. 65 (Inty.)/1962—D. C. Colombo, 9120/L

Co-owners—Deed of partition—Portion of corpus retained in common to serve as a road—Obstruction by one co-owner—Action instituted by the other co-owners claiming their use to the common road—Maintainability—Joinder of parties and causes of action—Servitudes.

A, B and C executed a deed of partition in respect of a land owned by them in common. A portion of the land was, however, left undivided to serve as a common road for the use of the various allottees. Subsequently C obstructed the use of the road by A and B.

Held, that it was open to A and B to maintain an action against C to have their use to the common road vindicated and the obstruction removed. In such a case, there is no misjoinder of parties and causes of action, for the action is really one for declaration as to the rights of co-owners and not for a declaration for a servitude.

APPEAL from an order of the District Court, Colombo.

D. R. P. Goonetilleke, with *D. C. W. Wickramasekera*, for Plaintiffs-Appellants.

M. M. Kumarakulasingham, for Defendant-Respondent.

December 3, 1962. HERAT, J.—

The two plaintiffs-appellants and their sister owned a land called Koskumbura Estate in common. At a certain stage by a deed of partition they divided up this land into several lots as shown in plan, copy of which is marked P 1, allotting to themselves in several deeds and separate ownership various lots. A portion of the land owned in common was, however, left undivided to serve as a common road for the use of various allottees. That common road is depicted in the plan P 1 towards the south between dotted lines.

The case for the plaintiffs-appellants was that their sister, the defendant-respondent, had obstructed the use of the road by the two plaintiffs by obstructing that use at the points X and Y in P 1. They therefore brought this action to have their use to the common road vindicated and the obstruction removed. A preliminary point was taken that the action could not be maintained on the ground of misjoinder of parties and causes of action. The learned District Judge, purporting to follow

the judgment of the late Mr. Justice Drieberg in the case of *Fernando v. De Silva*[1], upheld this point and dismissed the plaintiffs' action. From that order the plaintiffs have appealed to this Court. We are of opinion that the appeal should be allowed. In the case decided by Mr. Justice Drieberg a land had been owned in common and had been subsequently partitioned by deed into several lots. These several lots, as a result of the partition, were owned in separate ownership. A number of these separate owners of these separate lots brought one action for a declaration of a right of way of necessity over another land owned by a third party. Clearly, in that instance there was a mis-joinder of parties and causes of action. Each owner of each separate lot was entitled to a *via necessitatis* over the servient tenement owned by the third party. There was nothing joint in that right of servitude between one owner of a separate lot and any one or other of the other owners of the other separate lots, and, if we may say so with respect, Mr. Justice Drieberg was clearly right when he came to the conclusion that there was a mis-joinder of parties and causes of action. On the other hand, the present action is really one for the declaration as to the rights of co-owners and not a declaration for a servitude. It is an action brought by two out of the three co-owners against the third co-owner for a declaration that the two plaintiffs co-owners are entitled to the normal and common use to which a land owned in common by the plaintiffs co-owners and the defendant co-owner was meant to be used. The portion of land retained in common is owned by the plaintiffs and their sister in common, and the purpose of retaining it in common was for all three to use it as a road to serve the various lands which they owned in separate ownership and which received access through this common lot. If one co-owner, namely the defendant sister, took upon herself the task of obstructing her two co-owner brothers from exercising their rights as co-owners of the reasonable use of the common land, these two co-owners had a joint cause of action against the erring co-owner, and they certainly could maintain one action to vindicate their rights. We think that the preliminary point raised against the plaintiffs-appellants should have been decided in their favour. We, therefore, set aside the order of the learned District Judge dismissing the plaintiffs' action on this preliminary point and remit the case to proceed to trial before another District Judge.

The plaintiffs-appellants will be entitled to their costs of appeal.

G. P. A. SILVA, J.—I agree.

Appeal allowed.

[1] *(1928) 30 N. L. R. 56.*