1931

Present : **Lyall Grant and Drieberg JJ.**

FERNANDO *et al.* *v.* ARNOLIS.

346—*D. C. Kalutara*, 14,495.

Servitude—Right of way—All co-owners of servient tenement necessary parties—Owner of intervening land—Civil Procedure Code, ss. 18 *and* 33.

In an action for a declaration of a right of way all the co-owners of the servient tenement are necessary parties.

When the owner of an intervening land denies the existence of the right of way over his land, he should be made a party to the action.

APPEAL from a judgment of the District Judge of Kalutara.

N. E. Weerasooria, for the defendants, appellant.

M. T. de S. Amarasekera, for the plaintiffs, respondent.

April 30, 1931. DRIEBERG J.—

This is an action by the respondents to obtain a declaration of a right of way 10 feet wide for carts over the appellants' land Delgahawatta to the high road. The respondents claim this as the owners of Ambalanduwalanda, to which they are entitled on a partition decree in D. C. Kalutara, No. 4,409, and a deed No. 2,849 of June 13, 1917. Between their land and Delgahawatta is Ambalanduwakurundewatta owned by Hendrick. The appellants denied the right to a cart way but admitted that the respondents were entitled to a footpath over their land.

In their answer, the appellants took the objection that there were several other co-owners of Delagahawatta and that the action could not be maintained unless they were made parties ; an issue was framed on this point ; the trial Judge did not treat it as a preliminary issue and rule on it as he should have done, but tried the case on all the issues framed and gave judgment for the respondents.—He held that it was not necessary for the respondents to join the other co-owners of Delgahawatta.

It is admitted that there are other owners of Delgahawatta. The first respondent said that the first appellant and his brothers possess the whole of Delgahawatta. The respondents called one other co-owner who said he owned 1/32 of the land and he admitted the right of way claimed. The first respondent said that the first appellant was the only one who denied his right.

The first appellant stated, and this has not been challenged, that the members of his family own a half share of Delgahawatta, he himself being entitled to $\frac{1}{8}$,

and that the other half share is owned by 10 or 15 people. The appellants' objection should have been upheld and the respondents should have been ordered to make the other co-owners parties before proceeding to trial. A judgment declaring a land subject to such a servitude as this is a judgment against the land and it is therefore necessary that all the owners of it should be parties to the action. If this judgment stands, it is possible that in a subsequent action brought against other co-owners the respondents may fail to obtain a declaration of a right of way ; this will be an impossible condition and it could not be said of the first judgment that it binds the land, which it must do if it declares the existence of the servitude. Referring to the action to obtain a declaration of a servitude, the *actio confessoria*, Maasdorp says.

> The action will in any case lie against the latter (*i.e.*, the owner of the servient tenement) and if there are several joint-owners, all will have to be joined. In fact, the declaratory action 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. (*Institutes of Cape Law, 2nd ed., vol. II., p.* 229.)

Nathan says that—

> Generally this action lies against the owner of the servient tenement ; and, if there are two or more owners against each of them for the whole servitude (in solidum). (*Common Law of South Africa, 2nd ed., vol. I., p.* 543.)

Voet VIII., 5, 2 states that the reason for this is that the action is not divisible.

The respondents' action therefore must fail as all the co-owners of the alleged servient tenements have not been made parties to it.

At the argument before us Mr. Weerasooria contended that Galabodage Hendrick, the owner of the intervening land, Ambalanduwakurundewatta, was a necessary party. This objection was not taken in the lower Court.

I am not sure that the owner of an intervening land must in all cases be made a party to the action ; but where the right of way over an intervening land is denied by the owner of it his presence before the Court becomes necessary in order to enable the Court effectually and completely to adjudicate and settle all questions involved in the action and to avoid further litigation. (*Civil Procedure Code, ss.* 18 *and* 33.)

In November, 1896, Hendrick sued the first appellant in C.R. Panadure, No.2,291, for a declaration of a right of cart way over Delgahawatta, and on February 5, 1897, his action was dismissed ; on the same day Romanis Fernando, the father of the first respondent, presented a petition (P 5) to the Court complaining that the action was brought collusively with the object of depriving him of his right of cart way over Delgahawatta. He asked that his petition be filed in the record ; the Judge noted on it that he should intervene in proper form if so advised. Hendrick was called by the appellants at the trial. The effect of his evidence is that he had brought the action on information given by others who however refused to give evidence at the trial ; he said he had no personal knowledge of the right of cart way but admitted that he removed one row of cinnamon bushes ; this was done apparently to make the footpath, which was admitted, appear wide enough for a cart way. The trial Judge believed that the previous action was brought in collusion with the object of obtaining a judgment negativing a right of cart way. He may be

right, but this finding does not bind Hendrick, and there remains a possible, and in my opinion a certain, cause of further litigation over what is really the subject of this action, viz., the respondents' claims to a right of way over Ambalanduwakurundewatta and Delgahawatta to the Talpitiya high road. It is necessary that both these matters should be decided in one action.

I have already held that in any case the action cannot be maintained unless all the co-owners of Delgahawatta are made parties.

The action is dismissed, and the respondents will pay to the appellants their costs in the lower Court and the costs of this appeal. The respondents are granted permission to bring a fresh action for the subject of this action, making parties to it all the co-owners of Delgahawatta and the owner or owners of Ambalanduwakurundewatta.

LYALL GRANT J.—I agree.

Appeal allowed.