1935

Present: **Koch J.**

RODRIGO *v.* ABDUL RAHMAN.

241—C. R. Colombo, 3,767.

Res judicata—*Dismissal of action for cartway—Subsequent action for foot-path—Civil Procedure Code, s. 207.*

The dismissal of an action for a roadway is a bar to a subsequent action for a right of way on foot in respect of the same land.

APPEAL from a judgment of the Commissioner of Requests, Colombo.

H. V. Perera (with him *N. E. Weerasooria* and *Peter de Silva*), for defendant, appellant.

R. L. Pereira, K.C. (with him *L. A. Rajapakse* and *Mackenzie Pereira*), for plaintiff, respondent.

August 1, 1935. KOCH J.—

This appeal is from the judgment of the Commissioner of Requests declaring the respondent entitled to a right of way 4 feet wide, as set out in issue 1.

Issue 1 is as follows:—

> " Is the plaintiff entitled to a right of way leading from premises 178B to the Station Approach road, Dehiwala, as shown in plan Z filed of record ? "

Plan Z filed of record is a plan made by a special licensed surveyor, dated July 13, 1934, depicting a path within dotted lines leading from the respondent's land on the north to Station road on the south through a garden bearing assessment No. 178 belonging to the appellant. This plan is on the scale of 1 chain to an inch. I have scaled this carefully with a foot rule and I find that the width of the path depicted is one-sixth of an inch which works out to a width of 10 feet. I had to ascertain this fact for myself as the surveyor has not been called. I read the learned Commissioner's finding therefore to be that he allows the respondent a passage within these lines from north to south but limits it to a width of 4 feet.

The respondent in his plaint claimed a pathway of 5 feet for the free ingress and egress of his tenants, the transport and conveyance of their furniture, &c. (*sic.*). He does not specifically state that the transport was to be by cart. In his evidence, however, it becomes clear that this was to be by cart. He speaks of rickshaws and handcarts. A rickshaw though called such is a vehicle and a handcart is a cart.

Now, the servitude he claims is in the nature of a right of way. Servitudes of this nature are divided into (1) *Iter, i.e.,* passing on foot, (2) *Actus, i.e.,* drawing vehicles across, (3) *Via, i.e.,* using the path as a road in a reasonable way. Both the Roman law and the Roman-Dutch law lay down that the larger of these rights includes the smaller. (Vide *Justinian, bk. II., tit. 3, p. 2,* and *Voet, VIII., 3, 2.*)

If this is so, as no doubt it is, a claim made for a road 10 feet wide (*via*) would include the right of footway (*iter*) and the right for the passage of vehicles (*actus*).

If then the respondent had previously brought an action for a declaration of title to the use of such a road against this defendant and his action was dismissed without any reservation, the dismissal of his action would operate to prevent a subsequent action against the same defendant being brought for a declaration to the same right and all interests which that right may include.

The previous action was for a " *via* ". The present action is against the same defendant for an " *actus* ". The greater right includes the less and the original claim will include the subsequent one, if the passage is the same.

At the argument there was difficulty experienced by the learned counsel who appeared for the appellant and respondent to declare positively whether the 4-foot passage for carts which was allowed by the learned Commissioner fell within the path depicted within the dotted lines on plan Z.

With the approval of counsel I drew the attention of the learned Commissioner to this difficulty and desired him to report on this point. I received a reply after some delay owing to the absence of the Commissioner on leave from his station, which is to the effect that the plan filed in the earlier case was taken out of the record on a motion by the respondent's proctor of July 9, 1934. It can now be appreciated how the confusion has arisen. He has, however, given his reasons for concluding that the 5-foot passage claimed in this case fell within the boundaries of the 10-foot passage claimed in the earlier case. He has also manifested that the obstruction complained of in both cases was the same act.

The issue framed in the earlier case was :—

" Is the plaintiff entitled to a right of cartway 10 feet wide leading from the premises No. 178B to the Station Approach road, Dehiwala, as shown in the sketch by the plaintiff ? ".

This action was dismissed without any reservation, the learned Commissioner who decided the case holding that he rejected the evidence that the path was used as a cartway. He stated, however, that he was satisfied that the evidence established that there was user of a footpath only but did not decree the plaintiff entitled to it. Here clearly the Commissioner was wrong. As the larger right of roadway claimed included the smaller right of footway, he should have decreed the plaintiff entitled to the latter and set out its width (generally the width allowed in such a case is 3 feet). This he failed to do, but the plaintiff is to blame in not having urged at the earlier trial that if the smaller right was proved, he should be declared entitled to it. He was further to blame in not appealing and having the error rectified in a higher Court.

The result is that that decree now stands in the way of his succeeding in his present claim, because apart from the learned Commisioner's opinion I am convinced on the material before me that the present path (*actus*) is included in the earlier roadway (*via*) that the respondent previously claimed.

Apart from this consideration of actual inclusion of one right in the other, the law requires that on the obstruction complained of, every right of property or to relief of any kind which can be claimed, set up or put in issue between the parties upon the cause of action for which the action is brought, whether actually so claimed or not, cannot be made the subject of a subsequent action against the same party, and the decree passed on the first action becomes *res adjudicata*.—Section 207 of the Civil Procedure Code.

The obstruction complained of in this case is the same act as that complained of in the earlier action, so that the cause of action in both

cases is the same, and if appropriate relief was not claimed in the earlier case, the law will not allow that relief to be made the subject of a separate claim in a later action.

I am therefore of opinion that the Commissioner's finding on issue 5 is incorrect. His finding should have been against the respondent. I set aside his judgment and dismiss the respondent's action with costs. The appellant will have his costs of appeal.

In view, however, of the Commissioner's finding in favour of the respondent in the earlier case in regard to a footway, and the finding of fact of the Commissioner in this case, I shall expressly reserve to the respondent the right to claim a way of necessity over the appellant's land, if so advised, but this right must be limited to a claim for a footway only, and I also desire to state that this judgment should in no way prejudice the rights of either party in the proceedings in which such a claim may be investigated.

Appeal allowed.