1956 *Present :* L. W. de Silva, A.J.

E. DE LA HARPE *et al.*, Appellants, *and* G. WICKREMARATNE, Respondent

S. C. 189—C. R. Colombo, 50,953

Servitude—Private right of way—Reasonable user—Obstruction by gates—How far actionable.

An obstruction of a private right of way is not actionable unless it is substantial.

Plaintiff had a right of way from her residential property along lot C which was a portion and boundary of the defendants' residential property and leading to a public roadway. At the entrance to lot C from the roadway there were two gates which were maintained by the defendants and had been in existence even before the servitude had been acquired by the plaintiff.

Held, that the plaintiff was not entitled to have the gates removed. The defendants were, however, bound to keep the gates open at all times except at night-time when they might remain closed but never locked.

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

H. V. Perera, Q.C., with *Ivor Misso* and *A. Nagendra*, for the defendants-appellants.

E. B. Wikramanayake, Q.C., with *T. P. P. Goonetilleke*, for the plaintiff-respondent.

Cur. adv. vult.

December 11, 1956. L. W. DE SILVA, A.J.—

The dispute between the parties to this action, instituted in 1954, is concerned with a private right of way which is depicted as Lot C in D1, the plan No. 51 of 1941. The plaintiff-respondent as the owner of Lot A is entitled to a right of way over Lot C, leading to Lot A from the 43rd Lane which is now known as Vivekananda Road at Wellawatte. The defendants-appellants, who own Lot C subject to this right of way, also own Lot B which adjoins Lot A on the southern side. Lot C runs along the western boundary of Lot B and touches the southern boundary of Lot A. Lots A and B are respectively the residential properties of the respondent and the appellants.

It is common cause that the grant in favour of the respondent gave her and her agents a full and free right of way over Lot C at all times for the purpose of passing and repassing, with or without animals and vehicles, to Lot A. The respondent alleged in her plaint that the appellants had in 1946 erected a gate at the entrance to Lot C but did not make use of it so as to affect the roadway. Since July 1953, however, they had begun to keep the gate always closed, thereby obstructing the

right of way and denying to the respondent the free use thereof. At the trial it was found that a gate had existed at the same spot from about 1929, and it had been replaced by another gate about the year 1946. The learned Commissioner of Requests found that there were in fact, at all material times, two gates at the entrance to Lot C from Vivekananda Road. What the appellants had done since 1946 was to close the gates and place a latch across the two projections on the gates. The appellants contended that, since the gates were not locked, freedom of passing along the roadway to and from the respondent's premises was not hindered. They took up the position that the servitude in issue had been acquired by the respondent subject to the existence of the gates.

There was no evidence at the trial whether the gates were kept closed at all times of the day and night before 1946. The learned Commissioner, after recounting the hardships caused to the respondent and her family by their having to alight from their car, raise the latch, open the gates, and again close them, came to the conclusion that, though these gates had existed since 1929, the right of way created in 1941 gave a free and full passage over Lot C at all times of the day and night to the occupants of Lot A, and the appellants themselves became the owners of Lot C in 1951 subject to the same right in the owners of Lot A. He accordingly entered a decree in favour of the respondent, declaring her entitled to the free and unobstructed use of the right of way over Lot C and also ordered the appellants to remove the gates at the entrance to Lot C as prayed for by the respondent.

Under the Roman-Dutch Law, an obstruction of a private right of way is not actionable unless it is substantial. There is no difference between the Roman-Dutch Law and the English Law on this question : vide *ex parte Letord : in re Marcus, N.O. & others* [1], which follows the ruling in *Pettey v. Parsons* [2] cited by learned counsel for the appellants. The following statement of the law in Halsbury's Laws of England (Hailsham's ed.) is quoted and followed in Letord's case [1] :

> "No action will lie unless there is a substantial interference with the easement granted . . . The question whether any particular interruption amounts to an unlawful interference depends upon the nature of the right of way and of the *locus in quo*, and upon the general circumstances of the case."

The fact cannot be overlooked that, in the case of a private right of way, the ownership of the way is in the owner of the soil, though such ownership does not entitle him to obstruct the way to any substantial degree. At the same time, the owner of the right is entitled only to reasonable user. The learned Commissioner has upheld the literal terms of the grant and has not considered this legal aspect of the matter. The order to remove the gates cannot be justified since they have been in existence even before the servitude. There is no doubt that the keeping of the gates closed, held together by a latch at all times of the day, is a substantial interference with the enjoyment of the respondent's

[1] *(1953) 4 S. A. L. R. 359.* [2] *(1914) 2 Ch. 653.*

right. Two main questions arise in the case of an obstruction to a private right of way—firstly, whether the interference is substantial and not merely appreciable, and, secondly, reasonable user of the way by the owner of the right. There are in this case, established by evidence, circumstances which make it necessary to secure to the appellants some degree of privacy and protection which they need against trespassers on their residential property consistent with the legal right of the respondent to reasonable user. In *Pettey v. Parsons* [1], where the grant was in substantially the same terms, Pickford L.J. said : " The claim to erect and maintain a gate which is to be open during business hours is not in my opinion a derogation from the grant of the right of way." Taking all the facts and circumstances into account, I direct a variation of the decree that the gates at the entrance to Lot C be kept open at all times except at night-time between the hours of 9 p.m. and 6 a.m. when they may remain closed but never locked. The appellants must pay the respondent half the costs of this appeal.

Decree varied.

[1] *(1914) 2 Ch. 653.*