

J. M. MANTE *v.* J. P. JENKINS.

## SERVITUDE—RIGHT OF ACCESS—OBSTRUCTION.

*Coram :*  
 AMES-  
 HOFF, J.  
 JORIS-  
 SEN, J.  
 ESSER, J.

*The plaintiff was the registered owner of a certain remaining portion (of the width of 24 feet) of erf No. 660, at Pretoria, which portion, according to the plaintiff's deed of transfer, was subject to a right of access or way in favour of the owners of the other portions of the erf. This right of way was not further described in the plaintiff's title deed.*

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29 September.  
 4 December.

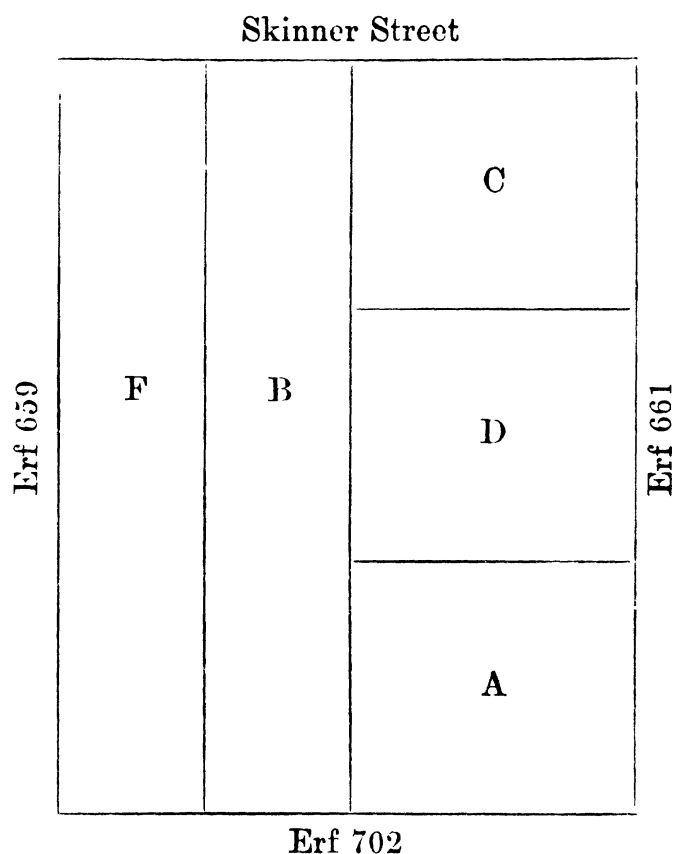
*The defendant was the registered owner of another portion of the erf, which, according to his title deed, had a right of way over the adjoining portion belonging to the plaintiff, extending from the public street, with a width of 24 feet, to the southern boundary of the erf. This right of way was also exercised by the owners of the other portions of the erf.*

*Held, that, under the circumstances, the plaintiff was not entitled to erect a gate on his portion of the erf, or of obstructing in any manner the defendant's right of way over the whole of such portion.*

THIS was an action for a declaration of rights with regard to a certain portion of erf No. 660, situated in Skinner Street, Pretoria. The summons set out that the plaintiff was the registered owner of certain two portions, marked A and B on the diagram annexed, of erf No. 660, Pretoria: That the portion marked B was subject to a right of approach or way in favour of the owners of the other portions, marked C, D, and F of the said erf: That the plaintiff had placed a gate across the portion B for the whole width thereof, which gate could be opened and closed, and which gave a full, free and sufficient access to the owners of the other portions of the erf, and that the defendant had purposely and unlawfully removed and destroyed the gate, alleging that the plaintiff was not entitled to place a gate across his said portion of the erf. The plaintiff accordingly prayed for a declaration of rights; that he, as owner of the portion B, was entitled to place a gate thereon, and that the defendant was not entitled in any manner whatever to meddle with this gate, or obstruct the plaintiff in the exercise of his rights as owner.

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The sketch diagram of erf 660 was as follows:—



The diagram of surveyor Walker, to which reference was also made, agreed with this sketch diagram, except that portion

A was marked G H M L.  
 B „ „ B K C M.  
 C „ „ I K E F.  
 D „ „ E F G H.  
 F „ „ A B C D.

The defendant, in his plea, admitted that he had broken down the gate, and alleged that the ground over which the right of approach existed was a street, subject to the fullest rights of access. He also pleaded specially that he was the registered owner, according to his deed of transfer, dated 22nd March, 1896, of that portion of the erf No. 660 marked F on the plan annexed to the summons, with a right of way of 24 feet, and which servitude was registered on the remaining portion of erf 660, and that the plaintiff's predecessor in title subsequently, on 15th July, 1896, obtained transfer of a portion of the said remaining portion of erf No. 660, subject to the said servitude of free access.

The endorsements on the various deeds of transfer are given in the judgment of Esser, J.

It appeared from the evidence that the portion B was 24 feet wide and that the plaintiff had bought it, together with portion A, in May, 1897, from a Mrs. Sinclair. The plaintiff stated that he was not aware that portion B was regarded as a street, otherwise he would not have bought it. Mrs. Sinclair, on the other hand, testified that the plaintiff was well aware of what he bought, and that she had informed him, prior to the sale, that the portion B was a street. She had bought the other portion of the erf, marked A in June, 1896, from the mortgage company, and portion B was also, at the same time, transferred to her, subject to the right of approach in favour of the owners of the other portions of the erf. In her diagram of portion A the portion marked B was indicated as a street.

*Wessels* (with him *De Waal*), for the defendant: A right of approach is very extensive. It may be exercised with a cart, on horseback, or in any other manner. If the defendant possesses this right, then no gate can be put up. The defendant is entitled to the right of approach according to his title-deed. The servitude stands registered on the title-deed of the original owner of the remaining portion of the erf, viz., of the Mortgage Company. Mrs. Sinclair, and consequently the plaintiff, could acquire no greater rights. For a width of 24 feet the plaintiff cannot erect any obstruction. The plaintiff, moreover, had notice of the servitude. The street was pointed out to him by Mrs. Sinclair. He is therefore bound, even although the servitude may not be clearly described in his title-deed. (*Richards v. Nash*, 1 Juta, 312; *Judd v. Fourie*, 2 E. D. C. 41; *De Villiers v. Erasmus*, Kotzé, Rep. 1881-84, 138; *Weilbach v. Diedriksen and Breurer*, 3 Off. Rep. p. 80.)

*Coster* (with him *Lohman*), for the plaintiff: It has not been proved that there is a public street. Only a right of access is mentioned; the width of 24 feet is not stated. The plaintiff is only bound by what his title-deed says, and no proper description of the servitude is given therein. (*Parkin v. Titterton*, 2 Menz. 296; Law No. 3, 1886, s. 2; and the authorities cited in *Lissack v. The Sigma Building Co.*, ante, p. 213.) We must interpret as

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strictly as possible here—*civilliter interpretatio* (Grotius, 2, 35. 6); therefore only 18 feet, even if the width be 24 feet.

*Wessels*, in reply: We cannot ignore the Registrar of Deeds, and maintain that the plaintiff has only to go by his own title-deed. The defendant's right of access is wider than an ordinary right of way.

*Cur. ad. vult.*

*Postea.* 4th December, 1897.

ESSER, J.: In this case I am of opinion that the defendant ought to succeed. The plaintiff's title-deed No. 3,872/1897, dated 27th April, 1897, describes the portions purchased by him as follows:—

1. "Certain south-eastern portion, 44 roods and 39 square feet in extent, according to diagram of December, 1895, framed by the surveyor, W. H. Gilfillan"; and
2. "The remaining portion, 36 roods and 96 square feet in extent, according to diagram of March, 1895, framed by surveyor, H. H. Walker, of the piece of land, being erf No. 660, situate on Skinner Street, Pretoria; the last-mentioned remaining portion is subject to the right of access over it, granted to the owners of the other portions of the erf, and which portion was acquired by the appearer's principal by deed of transfer No. 3013/1896, dated 15th June, 1896, and which property shall be subject to such conditions as are mentioned therein."

The diagram of surveyor Gilfillan describes the western boundary as being a street, which street corresponds very clearly with the portion represented by the letters B K C M on the diagram of surveyor Walker, being the remaining portion of 36 square roods and 96 square feet, constituting the remaining portion of erf No. 660, transferred to the plaintiff under No. 2, above. From this, then, it appears that what the plaintiff bought under No. 2 stood described on the diagram as a street. The reference to title-deed 3013 shows that portion No. 2 is subject to "the right of access over this portion granted to the owners of the other portions of the erf," in accordance with the conditions mentioned in title-deed of 3rd December, 1889, No. 3,764/1889.

The duty, therefore, rested on the plaintiff to inspect the registers in regard to the deed of transfer No. 3764/1889, and the

deeds of transfers of the owners of the remaining portions of the erf. Had he done so he would have seen—

1st. That on title-deed No. 3764 1889, to which the diagram of Walker belongs, it is stated that the western, north eastern, and eastern portions shall have “a right of access over the adjoining portion extending from Skinner Street, with a width of 24 feet to the southern boundary of this erf.”

2nd. That on title-deed No. 2373, 1896 (that of Millar, marked I K E F on the diagram) it is stated that this portion shall have “the right of access along the western boundary of this portion extending from Skinner Street, with a width of 24 feet, to the southern boundary of the erf, in common with the owners of the other portions of this erf.” These words are repeated in the annexed declarations of purchaser and seller, while the power of attorney of S. Meintjes, *q.q.*, the vendor, granted to R. J. L. Tindall, adds thereto the words “as a small street.”

3rd. That on title-deed No. 1445, 1896 (transfer in favour of the defendant for the portion marked A B C D on the diagram) precisely the same is stated.

It is therefore indisputable that the portion B K C M, which has a width of 24 feet, is subject to a right of access over its whole extent in favour of all the owners of the other portions of the erf. The plaintiff, by placing a gate there, necessarily withdraws a part of the surface from the servitude which exists over it. Even if, instead of a gate, he were to place a pole there of a few inches in circumference, something will be taken away from the 24 feet and the servitude impeded. For this reason I am of opinion that there must be judgment in favour of the defendant, with costs.

AMESHOFF, J., concurred.

JORISSEN, J. : I am of opinion that this claim must be dismissed. The right claimed of closing—well, not a public, but at any rate a way common to the adjoining occupants, is in conflict with the rights of such occupants, and the evidence produced in support of the plaintiff's contention that he bought this right is refuted by that produced on behalf of the defendant.

Attorney for the plaintiff : *S. K. H. Lingbeek.*

Attorney for the defendant : *J. H. L. Findlay.*

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