1946 *Present :* **Cannon and Jayetileke JJ.**

SINNATHAMBY *et al.*, Appellants, *and* KATHIRGAMU, Respondent.

34—D. C. Point Pedro, 1,710.

Servitude—Right to discharge surplus rain water along defined channel—Substitution of new channel by agreement—Validity of the agreement—Prescription.

When a right to discharge surplus rain water along a defined channel across another's land has been acquired by prescription and a new channel has been substituted for the old one by agreement, the benefit of possession of the old channel would attach to the new one.

APPEAL from a judgment of the District Judge of Point Pedro.

[1] *(1826) 3 Bing. 589.*

H. V. Perera, K.C. (with him *P. Navaratnarajah*), for the first and second defendants, appellants.

N. Nadarajah, K.C. (with him *H. W. Thambiah*), for the plaintiff, respondent.

Cur. adv. vult.

May 24, 1946. JAYETILEKE J.—

One Muttupillai and three others instituted action No. 24,539 of the Court of Requests of Point Pedro against the first, third, fourth, fifth and sixth defendants and another, to be declared entitled to discharge the surplus rain water from lot 6 in plan Z along the channel marked RST by me in red. They alleged that the surplus rain water had been discharged along the channel "from time immemorial" and that the first defendant obstructed the said channel by erecting a stone wall at U on the Southern boundary of his field (lot 2). The other defendants were made parties to the action as they were the owners of lots 3, 4 and 5. The first defendant alone contested the plaintiff's claim. The case was settled on October 17, 1935, on the following terms :—

> "We the above-named plaintiffs and defendants do hereby agree to settle the case, that the new water channel which is marked on the eastern side of the wall in plan No. 1,030 of December 8, 1930, prepared by Surveyor Mr. K. ValeMuruku will be cut and used by us in future".

The parties are agreed that the settlement was that the channel RST should be deviated and that the plaintiff should have the right to discharge the surplus rain water along the channel shaded blue in the plan Z. It must be noted that a section of the channel is on the property of Kathiran Alvan, who was not a party to the action. At the same time it must be noted that the plaintiffs alleged in their plaint that the surplus rain water used to flow through Kathiran Alvan's field along the channel RST. In settling the case the first defendant has accepted the position that the plaintiffs have acquired by prescription the right to discharge their surplus rain water from lot 6 along the channel RST. The evidence shows that lot 6 is higher than lots 2, 3, 4, and 5. It is well settled law that lower grounds must serve upper grounds by receiving the water which comes naturally from them. The first defendant did not in his answer allege that Kathiran Alvan raised any objection to the water running down his field to the pond on the north. The plaintiff in this action, who is the successor in title of Muttupillai, alleged that in the years 1940 and 1941 the first defendant and his son, the second defendant, obstructed the new channel by erecting a dam along the eastern boundary of lot 2. He claimed the right to discharge the surplus rain water from lot 6 to the pond along the channel shaded blue in the plan Z.

The main point taken by the first and second defendants was that a new channel was not, in fact, constructed in terms of that settlement. At the trial the following issues were framed :—

(1) Was the water channel marked BCE in the plan used as an outlet by the plaintiff to lead surplus rain water from his field lot 6 after the settlement in case No. 24,539 C. R., Point Pedro ;

(2) Did the defendants, first and second, in or about October, 1940, obstruct the flow of surplus rain water from lot 6 along the portion of the channel within lot 2 shown in plan 1,030 ;
(3) If so, what damages is the plaintiff entitled to ;
(4) Did the defendant or his predecessor in title construct the entire water channel BCE as depicted in plan 1,030 ;
(5) If not, are the defendants liable in damages to the plaintiff for any obstruction ;
(6) Is there, in fact, a water channel leading from lot 6 to the pond known as Kavodikirai tank shown in the plan ;
(7) If not, can the plaintiff maintain this action ;
(11) Did the plaintiff cut and remove a portion of the eastern dam in lot 2 wrongfully, in November, 1940 ;
(12) If so, what damages are the defendants first and second entitled to from the plaintiff.

After a careful consideration of the evidence the trial Judge found against the first and second defendants on issues 1, 2, 4, 6, 11 and 12. On the materials before us, we are unable to say that the findings are wrong.

Mr. Perera urged that the consent decree did not become effective as Kathiran Alvan, who was not bound by it, objected to a channel being cut on his land. The evidence of Mr. Sivagnanasunderam, which has been accepted by the trial Judge, shows that the channel shaded in blue in plan Z has been in existence from the year 1936. The inference to be drawn from that evidence is that Kathiran Alvan consented to the channel being deviated from its old course. The following passage in the second defendant's evidence shows indubitably that the old course existed—

"*To Court.*—From 1927 till now the surplus rain water from plaintiff's land did not discharge itself into my land.

Q. Did the surplus rain water from plaintiff's land empty itself into the pond without going over your land ?

A. It flowed through my land as well as the adjoining land and emptied itself into the pond."

It has been held in the case of *Costa v. Livera* [1] that when a right of way has been acquired by prescription and a new route has been substituted by agreement for the old route the benefit of the old possession would attach to the new route. This decision has the support of the judgment of the Privy Council in *Young v. Kinloch* [2].

The substitution of the new channel for the old one seems to have been made under such circumstances that it is reasonable to infer that there was an intention to abandon the old channel. Moreover, the new channel has been in use for a period of over five years.

The judgment of the trial Judge is, in our opinion, correct, and we would, accordingly, dismiss the appeal with costs.

CANNON J.—I agree.

Appeal dismissed.

[1] *(1912) 16 N.L.R. 26 ; 2 C.A.C. 28.*

[2] *(1910) A.C. 169.*