1958 *Present :* **H. N. G. Fernando, J.**

K. SINGARAM *et al.*, Appellants, *and* M. SHANMUGAM *et al.*, Respondents

S. C. 128—C. R. Point Pedro, 1400

Servitudes—Well—Right to draw water—Right of aquae ductus*—Prescription.*

In an action instituted by the plaintiffs for a declaration that they were entitled to a share of the well situated in the defendants' land and to a right of way and watercourse from the well to the land of the plaintiffs—

Held, that, although a right to draw water from a well and to a right of way for the purposes of such user can be acquired by prescription, the law does not contemplate that a share in a well can be acquired by prescription.

Held further, that a right to take water along a watercourse on the servient land can be established only upon a special grant or by clear evidence of prescriptive user.

APPEAL from a judgment of the Court of Requests, Point Pedro.

C. Ranganathan, with *S. Rajaratnam*, for the defendants-appellants.

S. T. K. Mahadevan, for the plaintiffs-respondents.

Cur. adv. vult.

October 28, 1958. H. N. G. FERNANDO, J.—

Decree has been entered in this case declaring the plaintiffs to be entitled to a share of the well situated in the defendants' land and to a right of way and watercourse from the well to the land of the plaintiffs.

The learned Commissioner found that the plaintiffs had established *title* to the share of the well and to the right of way and watercourse, i.e. presumably documentary title. There is no deed establishing that any of these rights had been acquired by the plaintiffs or their predecessors either by purchase or grant from the owner of the servient tenement. But there has been one deed which has been misconstrued as an acknowledgment of such a title. The dominant tenement was sold to one Sinnapillai by P1 of 1916, which purported to convey to her a share of the well, and by P2 of 11th September 1925 Sinnapillai in turn conveyed the land to one of the plaintiffs' predecessors, purporting also to transfer therewith " the proportionate share of the well . . . . and right of way and watercourse ". This same Sinnapillai had become in 1915 the owner of the servient tenement, and, if she had been its owner at the time of the execution of P2, then the latter conveyance would have operated as a grant of the aforesaid rights by the owner of the servient tenement. But in fact Sinnapillai had ceased to be the owner two days before the execution of P2, for she had on 9th September 1925 sold the servient tenement by the document D10. The finding for the plaintiffs on the question of title cannot therefore be supported.

The substantial question was therefore one of prescription, on which also the learned Commissioner found for the plaintiffs. I do not think the law contemplates that *a share in a well* can be acquired by prescription, and it would be more appropriate to hold that the plaintiffs have by user acquired a servitude to the use of the well, i.e. to draw water therefrom, and to a right of way for the purposes of such user. There is ample evidence to support such a finding. But the position is different with regard to the watercourse. The learned Commissioner erred in assuming that " for the purposes of drawing water from a well, a watercourse is essential ". Such an assumption might be correct in the case of a conveyance of a share in a well, but, short of that, a right to take water along a watercourse on the servient land can be established only upon a special grant or by evidence of prescriptive user. But for the assumption to which I have referred the learned Commissioner could not, on the scanty evidence of user and of the existence of an alleged channel, have found that the plaintiffs had acquired a prescriptive right of *aquae ductus*. The claim to this servitude should therefore have been rejected.

In the result the decree will be amended so as to declare the plaintiffs, as owners of Lots 1, 2, 3 and 4 in Plan No. 442 of 3rd March 1955, entitled only to the right to draw water from the well and to a right of way for that purpose. As the appellants have succeeded only on a minor point, I would make no order as to the costs of appeal. The decree for damages and costs in the lower Court will stand.

Decree amended.