Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeals of Baboo Puhlwan Singh and others v. *Maharajah Moheshur Buksh Singh, and Maharajah Moheshur Buksh Singh* v. *Megburn Singh and others from the High Court of Judicature at Fort William, in Bengal; delivered June 22nd*, 1871.

Present:

SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.
LORD JUSTICE JAMES.
LORD JUSTICE MELLISH.

SIR LAWRENCE PEEL.

THIS was a suit in the nature of an action of ejectment, brought to recover a considerable quantity of land which was alleged to belong to the Plaintiff, on account of its having been gained by accretion to four mouzahs which had been previously his property. Besides certain defences in point of law which have all been abandoned before us, there were two substantial defences in point of fact on the merits which were raised by the Defendant. First, he said, in substance, that the land was not gained gradually by accretion, as alleged by the Plaintiff, but was what is called a chukkee, and after stating the facts as he alleged them to be, he summed up by saying, "In consequence of the route thus described by the river, "the Cuckee in suit stood firm, retaining all the "traces of numbers and boundaries, and continued "without opposition on part of any one in the "occupancy of your petitioners." Then he raised a second defence on the merits, by which he said, "The land in the south and north of the

"disputed land is in the possession of your petitioner, "hence, were it even admitted according to the "Plaintiff's false plea that the diluvion was by "Dhooee, still considering the land in suit to be a "part and parcel of the land Nos. 447 and 912 in "the occupancy of your petitioners, none but your "petitioners, under the provisions of the very law "quoted by the Plaintiff could be entitled to its "possession." Issues were formed on those pleadings. Both parties were allowed to present their issues, and then the Judge, out of the issues presented formed those which were to be tried. The material issue was this—"Whether the disputed "lands have been gradually washed away, and have "accreted on the estate of the Plaintiff by oblitera- "tion of its former marks, or whether by the "sudden change of the Ganges they have accreted "with a continuance of the former marks." This issue a little confuses the matter, by bringing in the marks as if they were necessarily conclusive of the question—"Whether the disputed lands "have been gradually washed away, and have "accreted on the estate of the Plaintiff;" as if it followed that because the marks were obliterated, therefore the land had gradually accreted. The other alternative is put in the same way—"Whe- "ther, by the sudden change of the Ganges they "have accreted with a continuance of the former "marks." Then there are further issues—"Even "if gradually washed away, whether on the ground "of the same being intermixed up with other lands "in the possession of the Defendants on the south "and north of the disputed lands, the Defendants "are entitled to the same or not?"—"Whether the "Plaintiff, after being in possession of the dis- "puted lands has been ousted by the Defendants "or not, and whether any land adjacent to the "disputed land amongst the accreted lands, is still "in the possession of the Plaintiff, or whether the "Plaintiff was never in possession of the contested "lands?" A great mass of evidence was given. The Judge in the Court below, the Sudder Ameen himself, inspected the ground on several occasions, and most careful inquiries were made on the spot as to whether the land had gradually accreted or whether it had been a chukkee suddenly formed? It was then ordered that an Ameen should draw a

plan, and survey the land and present a report to the Court. That accordingly was done. He framed the plan in the suit which is before their Lordships, which shows by distinctive colours—yellow, pink and green—the land sought to be recovered in the action, the Chukkee which is admitted still to belong to the Defendants, and land which is in the possession of the Plaintiffs but is claimed by the Defendants.

Now, the questions which really arise are two, first, whether the land has gradually accreted, and how that issue ought properly to be determined, and secondly, whether the Defendants, by reason of their chukkee, are entitled to any portion of the land, even assuming that it has been accreted?

As respects the first question it is necessary to consider, have the Courts below been wrong in point of law, or have they committed any error in fact? Now, no doubt their Lordships at one period of the argument had considerable doubt whether there might not have been a mistake in point of law, because, looking at the nature of the report of the Ameen and of the judgment of the first Judge, and even at the form of the issues, there appeared reason to doubt whether it had not been supposed that if the surface of the land had all been changed, and the marks had all been obliterated, so that no houses or trees or mounds or vestiges of boundary could be found, and that all the surface of the land was fresh land which had been brought down by the river,—that was conclusive of the question. Now, if the Court below had meant to say that was conclusive in point of law, so that the land was to be considered as land gradually accreted, even although the channel of the river had changed, and had gone from one bed and course to another; if the Court below had meant to say that, if the marks of the old channel were obliterated, and if the marks of the land between the old channel and the new channel had also been obliterated, by reason of the water having flowed over the surface and washed off the old land, and brought new sand and mud down upon it; notwithstanding there was land left between the two channels which had not, in fact, fallen into the river, and been entirely

sunk into the channel itself,—if they meant to say that was conclusive, their Lordships would have thought they would clearly have been wrong in point of law. But upon the whole of the case it does not, in fact, appear that the Defendants ever substantially raised that question before the Court below at all. In their arguments they appear to have assented to the framing of the issues in the way in which they were framed, and they appear to have assented to resting their case on the question whether the land which is sought to be recovered did or did not on its surface appear to be entirely new and fresh-formed, with no marks of the old cultivation and habitation upon it, or whether it had, as they seem to have alleged it had, houses and trees, and boundaries and marks of the old cultivation upon it. Certainly, when parties before their Lordships allege that a mistake has been made in point of law, if they have not raised that question in the Court below, although it is certainly open to them to raise it here, yet their Lordships ought to be very certain indeed that the Judge really has made the mistake imputed to him, and that the decision in fact is attributable to such mistake. It may well be that the Judges made no such mistake at all, that they perfectly understood what gradual accretion is, and what the true rule of law on that subject is, and that they meant merely to say, that as a matter of fact, which no doubt was a material fact to ascertain, there were none of the marks of the old cultivation upon it which the Defendants had alleged. If any marks of the old channels, or of the old houses, and of the trees, and of the old mounds, could have been found, that would have been conclusive against the Plaintiff, and therefore it was a matter very material to be inquired into. It did not necessarily follow, nevertheless, that because no marks were found, therefore the Plaintiff had proved his case, but it does not appear that that objection was ever taken. The parties were content to rest upon the issues as framed, and it may be that they all thought, and possibly thought rightly, that under the circumstances, the condition of the land would be the best evidence which could be given as to whether the land really had gradually accreted, or whether there had been a sudden change in the course of

the river. Therefore their Lordships think that it is impossible to say that either of the Courts below came to any wrong conclusion in point of law on the question of accretion.

Did they then make any mistake in point of fact? And certainly, looking at the great extent of the changes, and particularly at the maps, and some portion of the evidence, there might be some reason to doubt whether the whole of it had really accrued by gradual accretion as alleged. But their Lordships are of opinion that the case clearly comes within the rule which they have so often laid down, where the dispute turns upon matters of fact, and where the Courts below have agreed on the conclusion which they have come to respecting that fact. This was a case where a careful examination on the spot was most material towards coming to a proper conclusion on the fact. That examination was held, and apparently very carefully held, and it was after that examination that the first Court came to a conclusion in favour of the Plaintiff on that part of the case. The High Court came to the same conclusion, and their Lordships are of opinion that there is certainly no such errror shown in that conclusion as would enable them, or make it right and proper, to reverse or alter that decision. It may be added that the map of 1851 appears to their Lordships to show that as respects one great change that took place in the course of the river, the effect of it was that the Plaintiff got a large acquisition to his mouzahs, and that what he so got, which contains a large part of that coloured green, and probably a small part of that coloured yellow, was gained by gradual accretion. Therefore, on the whole, their Lordships think that they ought to come to the conclusion that the first material issue was properly proved and decided in favour of the Plaintiff.

Lopes's case was very strongly urged upon their Lordships; but their Lordships do not think that this case is at all governed by the decision in Lopes's case. That was a case where the river first went forward, and then, after a certain number of years, came back again, and brought to the surface the ground which had been sunk. It was held that that went back to the old owner. Here the sole question is, has the land, by gradual

accretion, been accreted to the estate of the Plaintiff, the Defendants not having at all raised the issue that it was their old ascertainable land, swallowed up and then restored? As their Lordships are not convinced that the Courts below have erred in point of law, and as they have taken very careful means to go right, and there is nothing to satisfy their Lordships that they went wrong in point of fact, their Lordships are of opinion that their Judgment on that part of the case ought to be confirmed.

But there is a second very material portion of the case, namely, whether the whole of the lands have really accreted on to the Plaintiffs' land; and certainly the map itself, to the eyes of everybody who looks at it, appears to show that it is a very extraordinary conclusion that these lands have wholly accreted to the Plaintiffs. Here we have on the south the Chuckee, admitted to belong still to the Defendants; the land on the other side of the river belongs to the Defendants: and yet it is supposed that many hundred acres of land in fact directly situated between the Defendants' land and the river, and their land on the other side of the river, somehow or other have accreted to somebody else's estate, and not to theirs!

The Judge in the Court below, dealing with this question, deals with it very shortly, and says they cannot claim any portion of disputed land as having accreted or belonging to their land, because the river Ganges flows between them. That is in itself unquestionably an inaccurate statement. The river Ganges does not flow, at least did not flow at the commencement of the suit, or for some time previously, between them. What had happened was this. The river Ganges had originally flowed, as is admitted on all hands, at the bottom of the undisputed Chuckee. Then, by what is admitted to have been a sudden change, a portion of the Ganges began to run above the Chuckee, and between what is now the Chuckee and the disputed land which is coloured yellow. Now it seems quite clear from the description of the premises, that the whole of that portion of the stream which so flowed between the Chuckee and the land coloured yellow, and in fact much of the land coloured yellow itself, was then the property of the Defendants. Therefore, the whole that

was there before the Ganges came was the property of the Defendants. Well, then the Ganges comes there. It is not necessary, perhaps, to say what exactly the effect of that might have been on the soil covered with water. Their Lordships must not be supposed to say that that was taken away from the Defendants. But, at any rate, the moment that the Ganges left that stream which it had so formed—and it certainly does not appear to have remained there above a year or two, as far as their Lordships can discover—the moment that course became a nullah, dry in the dry season, it appears to their Lordships quite clear (and indeed Lopes's case would be for that a direct authority) that that land which had been covered with water, when it ceased to be covered with water, became the property of the Defendants. The consequence is, that the Defendants were themselves the owners of the land to which the greater part of the new land accreted. It appears to their Lordships quite clear that that portion of the yellow which is *ex adverso* the Chuckee must be taken as accreted to the Chuckee.

As to the other portion, their Lordships think that the Plaintiffs have shown that the land coloured green was in their possession, and that that portion which is *ex adverso* the land coloured green, has accreted to that land. The High Court on this part of the case took a view which certainly appears rather surprising, that because the Defendants had mainly no doubt, and principally denied that the land had accreted at all, and had said that it had been caused by a sudden change in the river, and had not been caused by gradual accretion; that because they said that and failed, they were not entitled to rely on their second defence, which is most clearly stated in their pleadings, is most clearly stated in the issue, and is also stated in the Judgment of the first Judge in the Court below. It is to their Lordships perfectly clear that the mere fact of their having relied on their first defence could not possibly prevent them also relying on their second defence if the first defence failed. The final result is that there must be a division of the disputed land, each estate taking that which is *ex adverso* its own frontage. The carefully prepared map of the Ameen shows with

sufficient accuracy how this division is to be made. Their Lordships think that taking the point where the extreme left of the yellow at the bottom of the nullah intersects with the land coloured white in the map directly below the green, a line must be drawn from that point, as nearly as may be perpendicular, to the course of the Ganges until it meets the river, and that the land which lies to the right of that, that is to say, to the south-east of it, will belong to the Defendants, and that the land which lies to the north-west of it will be the only land which the Plaintiff is entitled to recover in this suit.

With reference to the second suit, their Lordships think that the point on which the High Court decided that suit does not arise, because they say that the Plaintiff has not recovered the whole of the lands which he might have recovered in the first suit. Now, they arrived at that conclusion from this consideration: the Plaintiff, in his plaint in the first suit, specified the boundaries of the lands which he sought to recover, and he most clearly specified the boundaries towards the Ganges as being the river Ganges itself; and there can be no doubt that he sought to recover the whole of the land which he said he was entitled to up to the Ganges, but he stated also the number of beegahs that there were in his plaint, according to his measurement, as 2967. When the Ameen of the Court came to measure it, he found that there were more beegahs than the Plaintiff had estimated, and therefore the High Court came to the conclusion that he had only recovered the 2967 beegahs. They did not alter the Judgment of the Lower Court at all, but simply affirmed the Judgment with costs. The High Court then comes to the conclusion that, having recovered only that quantity, he had failed to recover the excess, which is therefore not his, and that the subsequent accretion is to that excess. It is not easy to see, if he was not to recover the whole of the land between the boundaries which he had stated in his plaint, what portion of the land stated within those boundaries he was not to recover; and it is not very easy to see why that portion has been taken from the land next the river rather than from any other portion. But their Lordships are of opinion that that is really a misconception of the

true legal effect of the Decree of the Court below. That Decree is this:—"That a Decree be given to "the Plaintiff, that the Plaintiff obtain possession "of 2967 beegahs 10 cottahs of disputed land men- "tioned in the plaint, and in the map of the Court "Ameen, according to the boundaries given in the "plaint." Well, now, the Judgment is, that he is to recover it according to the boundaries given in the plaint. It is true it goes on to specify the quantities, but it turns out that those quantities are not strictly accurate. Then the question is, which is he to recover, the quantities or according to the boundaries given in the plaint? Their Lordships think that it must be interpreted as if it were a conveyance of land stating the boundaries, and then saying that it contains so many acres; of course the real conveyance would be of the land within the boundaries, and it would be a mere false description that there was some slight mistake in the quantities. Their Lordships think that that principle ought to be applied to this case, because they find among the rules which prevail in the Courts in India, it is stated:—"Where the boundaries of the property "in suit are required by the code to be specified, "they ought to be stated with as much precision "as possible, a map being, if necessary, annexed to "the plaint, or some map which has the character "of a public document being referred to; but if "the boundaries be set forth, the land may be de- "creed to the Plaintiff, even though the quantity "be somewhat more than they stated in the plaint." Now, that is the very thing that happened here. The quantity was somewhat more than they stated in the plaint; but their Lordships think that the true construction of the Decree in the first suit was, that it was a Judgment for all the land contained within the boundaries stated in the plaint. That being so, the ground on which the Supreme Court relied in the second suit, namely, that there was a splitting of the suit, did not arise at all, because he has recovered in the first suit all the land which he could recover. In the result as arrived at by their Lordships, he has not in fact recovered anything like what he has claimed. At any rate that point does not arise, because it was not correct to say that it was not necessary to bring

a second suit. There was a continual fresh accretion going on during the two years which elapsed between the time when the first suit was commenced and when the second was brought. It appears to their Lordships that the second suit is substantially brought for that newly accreted land, and the decision in the second suit ought simply to follow the decision of the first. To avoid any possible misconception, their Lordships have had the line drawn on one of the copies of the Ameen's map which is to be annexed to their Report, and so much of the land claimed in the second suit as lies to the north-west of the line which has been already specified. Their Lordships think the Plaintiff is entitled to recover in the second suit.

There will, of course, be some further question about the mesne profits; and it appears that the cases must go back to the Court below, for the purpose, first of all, of fixing the boundaries as described in the line which has been specified; and next, of finding out what are the real mesne profits according to these boundaries. There is no information before their Lordships by which it is possible that they could specify what those mesne profits should be.

As to the costs, their Lordships are of opinion that, as respects the costs in the first Court, they should be given according to what is the ordinary practice of the Courts in India as to giving costs in cases where a Plaintiff recovers a portion only of the land which he claims, and there is a successful defence as respects the other portion. Their Lordships are further of opinion that, under all the circumstances, there should be no costs at all to either party, either of the Appeals to the High Court or of the Appeals that have been brought to the Queen.

Their Lordships will, therefore, recommend to Her Majesty that an Order be drawn up in accordance with these terms.

Their Lordships' recommendation to Her Majesty on these Appeals will be that she would allow both Appeals, and declare that the Plaintiff in the suits (the Maharajah) is entitled to so much of the accreted land as lies on the north-west of the line drawn on the map annexed to this Report, and that the Defendants are entitled to so much of the ac-

creted land as lies on the south-east of that line; and that she should remit the causes to the High Court, with a direction to put the parties in possession, and to settle the amount of wasilut payable and receivable by either, in conformity with the above declaration. And declare further, that the costs of both the suits in the Zillah Court should be paid and received by the parties according to the practice of the High Court, in the proportion which the amount recovered by the Plaintiff bears to the amount claimed by him, and that each party should bear his own costs in the High Court; credit to be given for any costs which have been already paid; and that there should be no costs of either Appeal.