Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Lopez v. Muddun Mohun Thakoor and others, from the High Court of Judicature at Fort William in Bengal: delivered 11th July, 1870.

Present:—

Sir James W. Colvile.
Sir Joseph Napier.
Lord Justice James.

Sir Lawrence Peel.

THE Plaintiff in this case, Felix Lopez, was the proprietor of a very considerable estate, a mouzah, on the banks of the Ganges. By the year 1840, by reason of the continued encroachment of that river, it was wholly submerged, and it was, to adopt an expression used in this class of cases in India, "diluviated;" that is, the surface soil, the culturable soil, was wholly washed away. After the lapse of some years, and after one temporary recession and re-encroachment which has occurred in the interval, the water has ultimately retired, and the land, having been for some time in a state described as admitting of only temporary cultivation by hand sowing, has become hard and firm soil, capable of being cultivated in the usual manner. The Plaintiff says, "This was my pro-"perty. The Ganges, which swallowed it, has "again yielded it up, and I claim my property, "which, having been buried and lost to sight, has "again reappeared."

The rule of the English law applicable to this case, is thus expressed in a work of great authority (Hale, 'De Jure Maris,' p. 15): "If a subject "hath land adjoining the sea, and the violence of "the sea swallow it up, but so yet that there be "reasonable marks to continue the notice of it, or "though the marks be defaced, yet if by situation "and extent of quantity and boundary on the firm

"land, the same can be known, or it be by art or in-
"dustry regained, the subject doth not lose his pro-
"perty. If the marks remain or continue, or the ex-
"tent can reasonably be certain, the case is clear."
And in another place, p. 17, he writes thus: "But if
"it be freely left again by the reflux and recess of
"the sea, the owner may have his land as before, for
"he cannot lose his property of the soil, although
"it for a time becomes part of the sea, and within
"the admiral's jurisdiction while it so continues."

This principle is a principle not merely of English law, not a principle peculiar to any system of municipal law, but it is a principle founded in universal law and justice; that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property, remains in the original owner.

There is, however, another principle recognized in the English law (derived from the civil law), which is this,—that where there is an acquisition of land from the sea or a river by *gradual, slow, and imperceptible means*, there, from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land (Lord Yarborough's case, 2 Bligh, N.S. 147). And the converse of that rule was, in the year 1839, held by the English Courts to apply to the case of a similar wearing away of the banks of a navigable river, so that there the owner of the river gained from the land in the same way as the owner of the land had in the former case gained from the sea (the Hull and Selby Railway case, 5 Meeson and Welsby, 327). To what extent that rule would be carried in this country, if there were existing certain means of identifying the original bounds of the property, by landmarks, by maps, or by a mine under the sea, or other means of that kind, has never been judicially determined.

This principle of law, so far as relates to accretion, has, to some extent, been made part of the positive written law of India, and it is on the operation of such positive written law that the

Defendants' case is based. This law is to be found in the Regulation No. 11 of 1825, a Regulation for carrying out the rules to be observed on the determining of claims to lands gained by alluvion, or by the dereliction of a river or the sea. There is a recital in that regulation as to disputes which had arisen with regard to such claims, and the necessity of having some definite rule laid down with regard to several matters, only one of which is material or relevant to the present case; and that is the case provided for by the 4th section of the Regulation. By that section it is provided that, "when land may be gained by gradual accession, "whether from the recess of a river or of the sea, "it shall be considered an increment to the tenure "of the person to whose land or estate it is thus "annexed, whether the land be held immediately "from the Government, or from any intermediate "landowner." And the Defendants' contention is, that the Plaintiff's land having been wholly submerged, so as to make their (the Defendants') land the river boundary, the subsequent recession of the river has caused a gradual accession to their land, and an increment by annexation to their estate, notwithstanding that the land has been re-formed on the ascertainable and ascertained site of the Plaintiff's mouzah.

It is to be observed, however, that that clause refers simply to cases of gain, of acquisition by means of gradual accession. There are no words which imply the confiscation or destruction of any private person's property whatever. If a Regulation is to be construed as taking away anybody's property that intention to take away ought to be expressed in very plain words, or be made out by very plain and necessary implication. The Plaintiff here says,—"I had the property. It was my property "before it was covered by the Ganges. It re-"mained my property after it was submerged by "the Ganges. There was nothing in that state of "things that took it from me and gave it to the "Government. When it emerged there was no-"thing that took it from me and gave it to any "other person." And in answer to such a claim it would certainly seem that something more than mere reference to the acquisition of land by increment, by alluvion, or by what other term may be

used, would be required in order to enable the owner of one property to take property which had been legally vested in another.

In truth, when the whole words are looked at, not merely of that clause, but of the whole Regulation, it is quite obvious that what the then Legislative authority was dealing with, was the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain not usable in the ordinary sense, that is to say, the sea belonging to the State, a public river belonging to the State; this was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which, by accretion, became valuable and usable out of that which was in a state of nature neither valuable nor usable.

And on the very words of the section itself, if the ownership of the submerged site remained as it was (and there seems nothing to take it away), it is difficult to see why a deposit of alluvion directly upon it is not at least as much an accretion and annexation vertically to the site as it would be an accretion and annexation longitudinally to the river frontage of the adjoining property.

If we had then to consider the question for the first time, we should have come to the conclusion that the 4th Section did not govern the case, and that the question would have to be determined by the general principles of Equity, to which all cases not in terms provided for are referred by the 11th Section. Those principles would not give the Plaintiff's property to the Defendant. But the question is not raised for the first time. The very point came for consideration in India before a Court comprising Sir Barnes Peacock, Mr. Justice Bailey, and Mr. Justice Kempe; and after full consideration, it was decided that lands washed away and afterwards re-formed on an old site, which could be clearly recognized, are not lands gained within the meaning of Section 4, Regulation XI. of 1825, viz. they do not become the property of the adjoining owner, but remain the property of the original owner.

And the same point arose in a case in this Court of Mussumat Imam Bandi and Wajid Ali Khan, Appellants, and Thurgovind Ghose, Respondent,

reported in 4 Moore's Indian Appeals. It is there said,—"The whole of the district adjoining the land in dispute, as well as that land "itself, is flat, and very liable to be covered or "washed away by the waters of the Ganges, which "river frequently changes its channel. The land "in dispute was inundated about the year 1787; "it remained covered with water till about 1801, "and then became partly dry, until in the year "1814 it was again inundated. After this period "it once again reappeared above the surface of "the water, and by the year 1820 it "became very "valuable land." That is a state of things very singularly like what has occurred in this case.

In that case it was held as follows:—"The "question then is, to whom did this land belong "before the inundation? Whoever was the owner "then remained the owner while it was covered "with water and after it became dry."

This authority appears to their Lordships conclusive in the present case.

In a subsequent case, however, (*Kattemonee Dossee* v. *Rance Mounohinee Dubee*, 'Weekly Reporter,' 26th May, 1865,) it was held by a Court comprising Justices Trevor, Loch, Bayley, and Morgan that all gradual accessions from the recess of a river or the sea are an increment to the estate to which they are annexed without regard to the site of the increment, and a distinction was taken between the two cases; and it seems to have been considered that the former case did not apply to any case where the property was to be considered as wholly lost and absorbed, and no part of the surface remained capable of identification; where there was a complete diluviation of the usable land, and nothing but a useless site left at the bottom of the river. Their Lordships, however, are unable to assent to any such distinction between surface and site. The site is the property, and the law knows no difference between a site covered by water and a site covered by crops, provided the ownership of the site be ascertained.

Their Lordships, however, desire it to be understood that they do not hold that property absorbed by a sea or a river is, under all circumstances, and after any lapse of time, to be recovered by the old

owner. It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain, as part of the sea or river of the State, and so liable to the written law as to accretion and annexation.

But in this case not only did the parties themselves take the proper, prudent, and honest means of preventing the necessity of any dispute arising by interchanging the Tanabundee which has been put in evidence, but the Plaintiff, as between him and the State, did also take the most effectual means in his power (having the description and measurement of the submerged mouzah recorded, and continuing to pay rent for it) to prevent the possibility of any question of dereliction or abandonment being raised against him. Their Lordships are, therefore, of opinion that the property now being capable of identification by means of that Tanabundee and otherwise, the property having been the property of the Plaintiff when it was submerged, never having been abandoned or derelict, having now emerged from the Ganges, is still his property; and they will therefore recommend to Her Majesty to reverse the decision of the Court from which the appeal has come, to affirm the decision of the Principal Sudder Ameen, and that the costs of the litigation both below and here should be given to the Appellant, the Plaintiff.