Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Thakur Raghbir Singh v. *Raja Norindur Bahadur Singh, from the Court of the Judicial Commissioner of Oude; delivered Thursday, November 17th*, 1881.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THE shape in which this Appeal comes before their Lordships is this: The Plaintiff in the suit, who is the talookdar of Harha and the Respondent in this Appeal, claims against the Defendant, who is the talookdar of Dhanawan and the Appellant, certain lands as accrued or accreted to his estate by the action of the River Gogra. The first Court before which the question came, that of the Deputy Commissioner Colonel Chamier, decided in the Plaintiff's favour as to a certain portion of the claim, namely 380 pukka beeghas, and that is no longer in dispute; but as to the rest of the land claimed, which was after measurement found to embrace 2,500 pukka beeghas, that is to say as to 2,120 beeghas, he decided against the Plaintiff upon the ground that in a previous suit, which commenced in the year 1867 and was decided by Colonel MacAndrew in the year 1870, the Court had established, as between the same parties who are now litigants, that a definite line,—a hard and fast line, as it is called in some of the judgments,

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—was to be laid down between the estates of the Plaintiff and Defendant, and that whatever the action of the river might be, that line was still to divide the estates. The commissioner Colonel Reid upon appeal differed from Colonel Chamier in his view of the decree of 1870. He considered that the meaning of Colonel MacAndrew's decree was that the boundary between the two estates was the river itself,—the northernmost stream of the river,—and that each estate ran to the water's edge, wherever that might be. He considered that the line was a variable line according to the action of the river, instead of being a hard and fast line fixed by the decree of 1870. And upon that view Colonel Reid gave the Plaintiff a decree for the whole area claimed. Their Lordships do not know whether it was the whole area mentioned in the plaint. There seems to be some uncertainty about measurement, but the Ameen who was deputed to make an inquiry on the subject specified the land on the map marked Z. at 2,500 pukka beeghas altogether.

Upon appeal to the Judicial Commissioner Mr. Capper, he affirmed Colonel Reid's decree; and from that decision of Mr. Capper the present Appeal is brought. It is clear that the principal subject of dispute in the Courts below has been the bearing of Colonel MacAndrew's decree of the year 1870; and it is necessary to refer to the suit in some detail to show what that decree was; for whatever it was, it now binds the parties.

The suit, which was commenced in the year 1867, was one brought by the present Appellant and two other Plaintiffs against the present Respondent, for the recovery of a large tract of land which had, by the action—in this suit usually called the sudden action—of the River Gogra, been thrown from the south bank to the north

bank of the main stream; and the ground of the Plaintiff's claim was, that the custom of Dhardhura, or the custom that the boundary of estates should vary with the main stream of the river, prevailed in the locality. That seems to have been the principal point in dispute, and it certainly was the point that affected the great bulk of the land then claimed by the Plaintiffs. The case came before Mr. McMinn, he being a settlement officer at the time, in the month of August 1869; and he decided that the custom of Dhardhura, if it existed before, had been displaced by the revenue survey in the year 1859, and by the sunnud which was consequent upon that survey; but he held that the construction of the sunnud was to give to the Appellant and Respondent respectively all the soil up to the centre of the then main stream of the Gogra; that the boundary so ascertained was a fixed line, the Respondent being entitled to the land to the south of that line, and the Appellant being entitled to the land to the north.

The case then came by way of appeal before Colonel MacAndrew, and he agreed with the Court below in holding that the custom of Dhardhura was displaced, that being the principal question in the suit; but with regard to the fixed boundary he disagreed, and the principle he laid down was this: "If the river, before it took "its new course in 1272 F. (A.D. 1864–5) "to the south, had encroached on the northern "bank by degrees and thrown up land to the "south, such land would belong to Defendant "now, even though not in his estate when the "summary settlement was made." That judgment lays down the principle on which the boundary line between the talooks of Dhanawan and Harha is to be ascertained. And the importance of the case is this: The original rights of the Plaintiff and Defendant must depend upon

the sunnuds, and upon the operation of the rules of law with reference to those sunnuds. Their Lordships have not got the sunnuds before them; but they find that in the suit ending in 1870, when they were before the Court, the Court held two things: one, that the sunnuds displaced the custom of Dhardura; and the other, that, notwithstanding the sunnuds, if land were thrown up by degrees on the south bank of the river, the then Defendant, the present Plaintiff, would be entitled to it. Thereupon Colonel MacAndrew referred the matter to the Commissioner to ascertain whether any such land had been thrown up; and it is upon the report of the Commissioner that the principal difficulty appears to arise with regard to the construction of Colonel MacAndrew's final decree.

It should be here mentioned that the river was found to have been encroaching towards the north, and to have been throwing up land to the south, for at least five years; that is, from 1859, when the revenue survey was made, to the year 1864. Some time in the year 1864 the main stream shifted its course; not by gradually overflowing the land, but by striking off at an angle to the south, leaving only a comparatively small quantity of water running down the old main bed, and enclosing a space of land between the old main bed, called bed No. V., and the new main bed, called bed No. II. That was the land which was claimed in the suit of 1867.

Now Mr. Harington, the Commissioner to whom the matter was referred by Colonel MacAndrew, seems to have thought that if Colonel MacAndrew had had a map before him he never would have remanded the case. Mr. Harington reports that from the year 1859 down to the year 1864 the river encroached gradually to the north; and then he finds, "that of the land claimed none "has been gradually thrown up, the change of the

" river from north to south having been sudden, " and the places where accretion did take place " between 1859 and 1864, when the river was " encroaching to the north, not being in suit." That is inaccurate language on Mr. Haring-ton's part. It is quite clear that whatever accre-tions were made between 1859 and 1864—and they must have been substantial—were claimed in the suit of 1867 by the present Appellant; for Mr. McMinn, in stating the plaint, says :—" Ghur-" koiyan "—that is the owner of Ghurkoiyan, the present Appellant—" claims all the land opposite it " down to the new main stream in which the river " was then flowing." Indeed it is impossible that the Appellant, who was contending that the large tract of land down to the new main stream, *i.e.*, all between bed V. and bed II., was his, should do otherwise than claim the comparatively small strip which had formed by accretion on the south bank of bed V. Therefore it is per-fectly clear that whatever had accreted to the south bank of the old main stream must have been in suit in the year 1867. Mr. Harington's meaning, however, seems to be pretty clear. He was thinking of the great mass of the land which was claimed by the then Plaintiff between the old main stream and the new main stream; and the reason he assigned for finding that of the land claimed none had been gradually thrown up, was that the change of the river from north to south was sudden. Therefore he was thinking of the bulk of the land cut off by the sudden change, and thrown from the south to the north of the main stream, and not of that comparatively small portion which had accreted to the south bank and been taken from the north bank of bed V. by the action of the river. If he had said that the questions raised related either to the custom of Dhardhura or to the existence of a fixed

boundary line, and not to accretion, he would have been right.

Upon Mr. Harington's report Colonel MacAndrew decided as follows: "That at annexation the stream was very nearly in the bed No. V."—which is the old main bed of the river; "that between annexation and 1272 F.,"—that is 1864,—"the river was slightly cutting to the north and throwing up land to the south." Therefore he held that part of the land in dispute was accreted land. Then he said: "It is clear that "the river was the boundary. Its actual edge "at the time of the summary settlement is not "ascertainable; and consequently, now that it "has forsaken its bed, the boundary of the "Harha estate must be held to go up to the "southern edge of bed No. V."

Now upon those words it is contended that Colonel MacAndrew intended to decide with regard to a tracing of a survey map that was before him (called Map A.) that the southern edge of bed No. V. was a fixed point—a hard and fast line ascertained at the time of the revenue survey, and that the Harha estate was never to go beyond that edge. Of course that is consistent with the literal interpretation of the words; but it is equally consistent with the literal interpretation of the words to hold that by bed No. V. he meant the bed which was actually holding the reduced stream of the northern branch of the river, and that he intended the boundary of the Harha estate to go up to the edge of the water, wherever it might be. Both these interpretations are equally consistent with the words of Colonel MacAndrew just read; but it is only the latter interpretation which is consistent with the passage read from his previous judgment, that, "If the "river had thrown up land to the south such "land would belong to the Defendant now, even

" though not in his estate when the summary " settlement was made." And it is very clear, in their Lordships' opinion, that the Judicial Commissioner and the Commissioner were right in so interpreting Colonel MacAndrew's judgment.

It will be convenient here to refer to the report of the Ameen which has been before mentioned as having been made in this suit. Colonel MacAndrew's judgment finds that for five years the river was cutting to the north and throwing up land to the south. The Ameen finds "that when the revenue survey of the pargana of Dariabad was made in 1863–64,"—that was the map the tracing of which (Map A.) was before Colonel MacAndrew.—" the southern " bank of channel No. IV. was at the point marked " A., which the revenue surveyor indicated by a " dotted line in his map. The main stream was " then at this very place." That then was the boundary of the stream when the survey was made. Then he points out that in the suit of 1867 no separate map was prepared; " but by looking at the map "—another map—" of the Gonda district,"—which lies to the north of the river altogether,—" as well as by a local in- " spection, it appears that the southern bank of " channel No. 5 at the time of Commissioner's " decision was at the point marked C."

Turning to the Ameen's map (Map Z.), and looking at points A. and C., we find that there has been a considerable retrocession of the river towards the north and a corresponding gain of the land upon the southern bank between the time of the survey and the time of the Commissioner's decision. But then there is another map which is in evidence, and that is the revenue survey of the Gonda district. The date of that is not certain; but the surveyor of the Gonda district fixed the southern bank of the stream at a point still further north—at a point which

on Map Z. is marked B., so that either the river must have advanced still further north between C. and B., or, having advanced from C. to B., it had gone back again from B. to C. at some time previous to the Commissioner's decision. One of those conclusions must be true. Which is true would depend on the date of the Gonda map.

The object of referring to all those shiftings and changings of the river from time to time is to show that there was evidence before the Court on which it might find that there had been a gradual accretion of land to the south of bed V. It appears that both Colonel Reid the Commissioner, and Mr. Capper the Judicial Commissioner, were clear that there was such an accretion. Colonel Reid says, "As the land in suit is a "gradual accretion to the estate of Plaintiff it "follows that it belongs to him." Mr. Capper says, "The land has been left as the river in "stream No. V. receded from its southern bank, "and has gradually accrued to the southern "land, and cannot be recognised or named by "its old name when on the northern bank."

Those are two concurrent findings of fact. To impugn them it has been suggested at the bar that there is no evidence on which those findings can rest. But when we look at the judgment of Colonel MacAndrew, his findings in the year 1870, the subsequent findings of the Ameen in this suit, and the three maps, it seems clear that there has been a gradual working of the river to the north, certainly from time to time there has been some shifting to the north, and it was very well open to the Court to say that that was such a gradual shifting as to make the exposed land accreted land. Moreover the paucity of evidence is accounted for by the absence of dispute. The Defendant never took issue on the point whether or no there had been gradual accretion. When the vakeels went

before Colonel Chamier to settle the issues there was no such dispute; it was not raised upon appeal; when Colonel Reid delivered his decision there was a distinct finding on the point, and the adverse decision against the Defendant rested upon that finding; yet when the Defendant appeals to Mr. Capper and takes four or five objections, no one of them is the objection that there was no evidence on which to find the fact of accretion.

Their Lordships consider that this matter is completely concluded by the judgments of the two Appellate Courts below; and they will therefore humbly advise Her Majesty that the Appeal be dismissed. The costs to follow the event.