Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rae Manick Chund v. *Madhoram and others from the late Sudder Dewanny Adawlut at Agra, North-Western Provinces, Bengal; delivered* 10*th March*, 1869.

Present:

LORD CHELMSFORD.
SIR JAMES W. COLVILE.
JUDGE OF THE ADMIRALTY COURT.
LORD JUSTICE SELWYN.
LORD JUSTICE GIFFARD.

SIR LAWRENCE PEEL.

THEIR Lordships are of opinion that the only arguable question upon this Appeal is, whether it has been established, within the meaning of the 2nd Section of Regulation 11 of 1825, that there is an immemorial custom by virtue of which the River Ganges at the point in question is taken to be the boundary between the estates on either bank, so that alluvial land, like that in question, belongs to one or other of those estates according to the actual course of the river?

If that custom is not established, their Lordships are perfectly satisfied that the Appellant had succeeded in the Court below in establishing every circumstance which was necessary to bring his case within the 2nd Clause of the 4th Section of the same Regulation;—that he had shown that the land was separated from his estate by a sudden change in the course of the river, and had clearly identified it as cultivated land which had formed a portion of his estate.

Upon the question of immemorial custom, he had the Judgment of the Zillah Court in his favour. The learned Judges of the Sudder Court have reversed that Judgment, on the ground that they thought there was sufficient evidence of the cus-

tom to warrant them in so doing. That is not their Lordships' opinion.

The reasons assigned by the learned Judges do not support their conclusion.

They rely principally on the letter of the collector, Mr. Morris, which was written in an early stage of the proceedings mentioned in the record to the Sudder Board of Revenue; but it seems to their Lordships that they have put an entirely erroneous interpretation upon that letter. That letter, as their Lordships read it, amounted to this,—that the main stream of the Ganges had hitherto been held to constitute the boundary of the two Pergunnahs for police and fiscal purposes; and that if that rule were to determine the proprietary right to alluvial land, it would no doubt follow that the land in question belonged to the Zemindary on the southern side of the river. But the Collector went on to state his opinion, and to give reasons for that opinion, that the question of proprietary right was not to be determined upon that principle. Therefore, the Judges of the Sudder Court seem to have been in error in treating the opinion of the Revenue Officer so given as an argument for coming to the conclusion to which they did come. And it may be further observed that the Sudder Board of Revenue, the authority to which the Collector's letter was addressed, does not appear to have taken that view.

Then as to the other evidence upon which the Judges of the Sudder Court rely, it seems to their Lordships to be far from sufficient to justify the conclusion that an immemorial custom had been proved. The Canongoe's evidence, which has been chiefly relied upon, is clearly too slight for that purpose. The proceeding with reference to the Gogra, which is set forth in the record, if it amounts to a decision that such a custom as that which is now set up obtains on the banks of that river, affords no evidence that a similar custom exists on the banks of the Ganges where it forms the boundary between the Pergunnahs Jhosee and Chail. The language of the Regulation implies that the custom to be proved is a local custom.

Upon the whole, then, their Lordships are of opinion that in holding that the custom was established the Court below was wrong.

The only further question for their Lordships to consider is, whether they should reverse the decree under appeal, and affirm the decree of the Court of first instance, or whether they should remit the case, as the Judges of the Sudder Court seem at one time to have thought of remitting it, for a new trial? It appears that the parties were fully informed what issue they had to prove; they should have come prepared with evidence to prove, if it was capable of proof; and they have failed to do so.

Their Lordships think therefore they ought to take the first of the before-mentioned courses, viz. reverse the Judgment of the Court of Appeal, and affirm the Judgment of the Zillah Court.

Considering, however, that the case of the Respondents may have failed from mere defect of proof, and that similar cases may arise between other parties in the neighbourhood of this locality, their Lordships are desirous to state by way of caution that this Judgment should not be quoted in any future case between other parties as a conclusive decision of this Court of Appeal, to the effect that no such custom as that which has been here alleged exists. All they intend to decide is, that it lay on the Respondents to prove the custom which it was essential to their title to prove, and that, as they have failed to do so, the title of the Appellant must prevail.

Their Lordships therefore will humbly recommend Her Majesty to reverse the decree of the late Sudder Dewanny Adawlut at Agra; to order that, in lieu thereof, a decree be made dismissing the appeal to that Court from the decree of the Zillah Court of the 27th of July, 1864, with costs. And the Respondents must also pay the costs of this appeal.