Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Baboo Bissessurnath and others v. *Maharajah Mohessur Bux Singh Bahadoor and others, from the High Court of Judicature at Fort William in Bengal; delivered 25th May* 1872.

Present:

Sir James W. Colvile.
Sir Montague E. Smith.
Sir Robert P. Collier.

Sir Lawrence Peel.

This was a suit to recover possession of a large tract of land which had at one time been alluvial, but which for a great number of years had been regularly cultivated and inhabited, lying between two streams described by the Plaintiffs (who are now the Appellants,) as branches of the Ganges, but which might perhaps be more correctly described, the one as being the river Dewha, and the other as being the river Ganges.

The Plaintiffs were the owners of a zemindary, of the name of Manjhee, on the north side of the north channel; the Defendants were the owners of a zemindary, of the name of Arrah, on the south side of the south channel, both streams flowing from the west and joining each other to the east of the property in dispute.

It appears that the tract of land between these two channels was, as early as the year 1790, in the possession of one Noorool Hossein, with whom, as occupier and proprietor, a settlement was made by the Government in the year 1790, and that in the year 1800 a permanent settlement was made with his son.

The Defendants claim the land in question by purchase from a descendant of Noorool Hossein,

and it appears to be undisputed that Noorool Hossein and his heirs and those who succeeded him in title down to the present Defendants have held uninterrupted possession of this land from 1790 to the present day.

The Plaintiffs seek to eject the present possessors, the Defendants, upon these grounds; it appears that in the year 1849 or 1850 the great volume of water left the northern channel and took the southern channel, whereby the northern channel which before had been deep became fordable, and the southern channel which before had been fordable became deep, and they allege that upon that state of facts they are entitled to obtain possession of the whole of the land lying between these two channels, by virtue, first, of an alleged custom, secondly, of an ekrarnamah executed in 1780 between the then proprietor of the zemindary Manjhee and the then proprietor of the zemindary Arrah.

It is necessary to examine separately these two grounds on which the Plaintiffs rely. First, as to the custom. The custom on which the Plaintiffs rely is nowhere to be be found clearly stated in their pleadings, and their Counsel found some difficulty in quite accurately defining it. It appears to their Lordships that in order to succeed in disturbing a possession of such long duration, under the circumstances of this case, it is necessary for the Plaintiffs to establish a custom existing in the district in which these properties are situated to the effect that where land which had once been alluvial lies between two branches of a river, (or it would appear between two rivers), and from time to time the volume of water shifts so that alternately one of those channels is deep and the other is fordable, then the whole of such intermediate land belongs to the landowner on the side of the channel which at any given time is fordable; in short, that the ownership and right of possession of the whole intermediate tract of land shift with the volume of the water, always attaching to the riparian proprietor on the side of the channel

which happens for the time being to be fordable.

It should be observed that this custom appears to be based on the hypothesis that at all times one channel is deep and the other fordable, because it could not apply if both were deep, or both were fordable; it would also appear that this custom is wholly independent of any question of accretion or arrosion of banks; that it attaches merely upon the water becoming deeper or shallower in one channel or the other without necessarily any alteration in the beds or banks of the channels.

This being the custom which it appears to their Lordships that the Plaintiff is bound to make out in order to establish his case, their Lordships would require to be satisfied by very clear and distinct evidence of its existence, since the operation of such a custom must be to render the rights of property fluctuating and precarious.

A question has indeed been suggested, whether a custom of this description falls within the terms of Regulation XI., section 2. Their Lordships, however, do not think it necessary to decide this question, inasmuch as they have come to the conclusion that no "clear and definite usage" such as would be necessary to support the Plaintiffs' case has been in point of fact established by the Plaintiffs.

Reference has been made very frequently in the record, and in the course of the argument, to certain proceedings on the part of the Government which took place in 1780, and the ekrarnamahs executed by the proprietors of the respective estates at that time in pursuance of those proceedings, but their Lordships are of opinion that the effect of those proceedings and ekrarnamahs amounts to no more than this: that there being a dispute, indeed a violent quarrel, as it would appear, between two zemindars whose properties were contiguous the one to the other, the Government adopted a settlement at the time between them which appeared to be equitable and expedient, and to be in conformity with what had

been done on previous occasions by previous owners of the same properties, and that this arrangement made with these two landowners by the Government was acquiesced in, adopted, and ratified by the ekrarnamahs which have been referred to, which it will be necessary subsequently to state more in detail. This by no means amounts to that clear proof which would be required to support a district custom of this description, and to sustain the claim of the Plaintiff to transfer to themselves this property from those who have been in possession of it for 80 years or more.

The other evidence which has been relied upon in support of the custom consists mainly of supposed admissions on the part of the Defendants in the course of various legal proceedings; but upon examination those admissions do not appear to amount to more than this, that the Defendants or their predecessors appear in certain proceedings to have insisted upon a rule somewhat similar to that which the Plaintiffs now allege, but by no means identical with it, as applicable to these zemindaries, and do not point to " a clear and definite usage " binding all property within the district.

Reference has been made also to various proceedings with respect to other properties, in which the Government authorities have treated the main channel of the Dewha as the boundary between certain zillahs; and to one case in which they appear to have intimated that that boundary should be applied also to certain private properties; but the circumstances of these cases are not so distinctly before their Lordships that they are enabled to treat them as proof of such a custom as that which has been before described, and upon which it is necessary for the Plaintiff to rely. It may be observed, that it by no means follows that if a certain fluctuating boundary, viz., the course of a river, is adopted between two zillahs, that its adoption for that purpose, affects the rights of landed proprietors in those zillahs. The case of Rae Manick Chund *v.* Madhoram, in 13th Moore's

Indian Appeals, p. 1, which has been referred to, is to the effect that there may be a fluctuating boundary between zillahs, which by no means affects the rights of landed proprietors.

Their Lordships are of opinion that sufficient evidence has not been given to prove this custom, which is necessary in order to make out the Plaintiff's case. They agree, indeed, with Mr. Justice Raikes, who says in his judgment, "I think it is fully made out, that when claims "were preferred to island, a new formation in "the Ganges, by rival riparian proprietors, the "custom was to award possession to the pro-"prietor on the side on which the alluvial lands "were fordable, and if the question before us "was for the possession of newly formed lands, "and we were asked to apply the custom to such "lands, I should have no hesitation in doing "so;" but their Lordships also agree with what Mr. Justice Raikes further says, "But this is not the nature of the present suit."

Their Lordships are, therefore, of opinion that the Plaintiff has failed to make out the first ground upon which he relies.

The second ground is the ekrarnamah that was entered into between the then owner of the pergunnah Arrah, Rajah Bickromajeet Singh, who is the grandfather of the Defendant, and Tegh Ali Khan, who was then the owner of pergunnah Manjhee, under whom the Plaintiffs claim title; and it is to this effect: The Rajah recites that there had been a suit with respect to Diara lands of certain villages which he describes; then that Mr. Matthew Leslie and Mr. Gream had been sent to survey the land in dispute, and taken the statements of both parties. Then he goes on to say, "The gentlemen of the Council of Azee-"mabad and Mr. Gream forwarded to the "Council at Calcutta a report of the dispute "between the parties, and a map of the Diara "lands," which, unfortunately, is not now forthcoming. Then he recites that orders were received from the Council at Calcutta, that on

whichever side the Ganges was fordable, the Diara lands will appertain to that side; and then that Mr. Leslie and Mr. Gream came again to the Diara lands, "and finding that the river Ganges "on the side of pergunnah Arrah, sircar Sha- "habad, had dried up and was fordable, and on "the side of pergunnah Manjhee it was a flowing "current with deep water, gave possession to me "the declarant, from 1187 Fuslee, of the Diara "lands aforesaid, with all the crops thereon;" and that he therefore took possession. Then he says, "Therefore I declare and give this writing, that "the boundary of the Diara between pergunnah "Arrah, sircar Shahabad, and pergunnah Man- "jhee, sircar Sarun, has been fixed in this "manner, that if the river Ganges becomes "fordable on the side of pergunnah Arrah, the "Diara lands will belong to the zemindars of "Arrah, and if it becomes fordable on the side "of pergunnah Manjhee, sircar Sarun, then will "belong to pergunnah Manjhee. If any or "either of us act contrary to this agreement, our "act shall be false and void, and we will be "liable to punishment by the Government." A duplicate of this agreement was executed by Tegh Ali Khan the then zemindar of Manjhee.

It has been contended, on the one hand, that this agreement relates only to newly formed lands or alluvial lands which may be formed after its date; on the other, that it distinctly refers to the lands in question, at all events in their then state, and that it is applicable to them now. But, be that as it may, assuming the meaning given to this document by the Appellants to be correct, their Lordships are of opinion that whatever may have been its effect as a contract between the two zemindars who executed it, it clearly cannot be binding upon the Defendants, who derive their title from Noorool Hossein, who was a stranger to it.

Their Lordships are of opinion that it was not in the power of the then zemindar to impress upon the land a *quasi* servitude, or to burden it

with a covenant which would run with it into the hands of any possessor of it by any title.

Their Lordships are therefore of opinion that the Plaintiffs fail also on the second ground of claim.

That being so, it is unnecessary to go into a question which has been raised of the identity of the lands.

For these reasons their Lordships are of opinion that the Plaintiffs fail to make out their case; and they will humbly advise Her Majesty that the decree of the High Court in India be affirmed, and that this Appeal be dismissed, with costs.