for he was found to be colluding with the claimant, the present defendant No. 2. We think it is not shown that plaintiff is barred by article 11 of schedule II of the Limitation Act. The District Judge finds on the evidence that the house is the property of plaintiff and not of his mother, defendant No. 2. That he says that his conclusion is the same as that of his predecessor in the Court does not make the finding on the evidence less binding in second appeal and upon that finding his decision is correct.

The fifth ground of second appeal appears to be founded on a mistake. We understand the case of the two brothers, the plaintiff in this suit, and the plaintiff in original suit No. 119 of 1888, to have been not that they divided the houses, but that they built the houses and that each took one as his share. But whether this be so or not, no question was raised by defendant No. 1 as to the plaintiff being only entitled to half of the house and we cannot allow that plea to be set up for the first time in second appeal.

The second appeal fails and is dismissed with costs.

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## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.*

SECRETARY OF STATE FOR INDIA (DEFENDANT No. 14), APPELLANT,

*v.*

KADIRIKUTTI AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 4 AND 5), RESPONDENTS.*

1889. October 14. November 11. 1890. March 18.

*Accretion—Alluvion—Tidal navigable river—Cause and nature of variation in high water line.*

The rules of English law, according to which the rights of the Crown or of riparian owners to accretions caused by alluvion are determined with reference to the character of the river and the manner in which the accretion is occasioned, are applicable in British India unless excluded by enactment or local usage.

Accordingly, where a rapid variation in the natural high water line of a tidal navigable river in Malabar had been caused by acts unlawfully done by the tenants of the riparian owner:

*Held*, that the Crown was entitled as against the riparian owner to the accretion caused by such variation.†

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* Second Appeal No. 7 of 1889.

† Compare *North Shore Railway Company* v. *Pion*, L.R. 14, App. Cas., 612, [Reporter's note.]

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SECOND APPEAL against the decree of A. F. Cox, Acting District Judge of North Malabar, in appeal suit No. 522 of 1887, affirming the decree of J. A. deRozario, District Munsif of Pynad, in original suit No. 81 of 1886.

Suit to recover possession of certain land, of which part was in the possession of defendants Nos. 1—13, under an expired demise from the plaintiffs' karnavan, and part (consisting of accretions to the land, the subject of the above demise, resulting from recession of a river) was in the possession of Government.

The District Munsif passed a decree as prayed, and his decree was affirmed on appeal by the District Judge.

The Secretary of State (defendant No. 14) preferred this second appeal.

The *Government Pleader* (Mr. *Powell*) for appellant.

As far as this Presidency is concerned, this case is one of first impression. Many cases have arisen in Bengal both as to new formation by the process of alluvion and as to reformation after diluviation; they were all, however, governed by the Bengal Regulation XI of 1825, which proceeds on the assumption that the beds of navigable rivers are the property of the Crown. See *Felix Lopez* v. *Maddan Thakoor*(1), *Pahalwan Singh* v. *Maharajah Muhessur Bukhsh Singh Bahadoor*(2), and compare *Baban Mayacha* v. *Nagu Shravucha*(3). In *Doe d. Seebkristo* v. *The East India Company*(4), however, the Privy Council lay down in general terms the proposition that the East India Company, as representing the Indian Government, had a freehold estate in the beds of navigable rivers in India, apparently regarding it as a proposition applicable to the whole country unlimited by any question of custom and independent of any evidence as to the assertion of the right. In deciding that appeal, the Privy Council referred to, and were guided by, the common law as to the right of the Crown in such property in England; and that is the course which the Lower Courts should have adopted here. The judgment of the District Court in the present case, however, would imply that the Crown has no such right in Malabar, because it has been held that the Government has no right to waste there: whether or not the decision referred to goes further than to establish that the Government has not the same right to waste lands there as elsewhere

(1) 5 B.L.R., 521. (2) 9 B.L.R., 150.
(3) I.L.R., 2 Bom., 40. (4) 6 M.I.A., 267.

in India, it cannot affect its rights as regards rivers or the foreshore. And the District Munsif has suggested the Hindu common law as a guide to a decision, but a rule which recognized as owner the first person who made a beneficial use of the soil would be impracticable and would be the cause of endless confusion.

According to the English law, the soil of the sea estuaries and of navigable rivers is *primâ facie* the property of the Crown (see *Hale de jure Maris*, pp. 12, 25) and *Malcomson* v. *O'Dea*(1). See also *Gann* v. *Free Fishers of Whitstable*(2), *Lyon* v. *Fishmongers' Company*(3), in which it was laid down as an axiom that the soil of tidal navigable rivers was *primâ facie* the property of the Crown. To determine the line of demarcation between the property of the Crown in such rivers and the property of the riparian owners, the rule is that up to the line of medium high tides throughout the year the soil vests in the Crown. See *Attorney-General* v. *Chambers*(4).

The principle according to which the results of alluvion or imperceptible accretion are given to the owner of the lands adjoining the sea estuaries and tidal rivers appears to be inapplicable to cases where the original boundary line between the shore and the land can be made out clearly by marks or otherwise. In such cases no reason can be assigned why the Crown should be deprived of its property, see per *Lord Chelmsford* in *Doe d. Seebkristo* v. *The East India Company*(5). The case should probably be remanded for completer findings as to the character of the river, but in any case the plaintiff here cannot be said to have established the title set up by him.

*Sankara Menon* (*Bashyam Ayyangar* with him) for respondents Nos. 1 and 2.

The plaintiff is entitled under the common law of England as a riparian owner to the property in the soil of the river bed up to the middle line. Angel on Water-courses, p. 16. He can also rely on the rules stated in 2 Blackstone, 262, that where alluvion is so gradual as not to be perceived as it progresses, the proprietor, whose bank on the river, is increased, is entitled to the addition—see *Scratton* v. *Brown*(6), *Hull and Selby Ry. Co.*(7), *The King*

(1) 10 H.L.C., 593. (2) 11 H.L.C., 192.
(3) L.R.I., App. Ca., 662. (4) 4 De Gex. M. & G., 206.
(5) 6 M.I.A., 267. (6) 4 B. & C., 485. (7) 5 M. & W., 327.

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v. *Lord Yarborough*(1). But in Malabar all the soil belongs to private owners, *Secretary of State* v. *Vira Rayan*(2), and see Sir C. Turner's Minute, p. 23; so the Crown has not the right claimed, and the plaintiff should succeed as owner of the land to which the land in question has become annexed.

Even, if it is conceded that the case must be governed by the English law, and that the first of the above rules does not apply where the river is a public tidal navigable river, still the appellant cannot succeed, for he has not proved its navigability, &c. As to navigability, it is a question of fact, see *Chunder Jaleah* v. *Ram Churn Mookerjee*(3). A public navigable river is a river which is actually navigable, and in which the tide ebbs and flows; all other rivers on which navigation is carried on are private rivers over which the public have acquired a right or easement of navigation, see per *Denman*, C.J., in *Mayor of Colchester* v. *Brooke*(4), *Horne* v. *Mackenzie*(5), Coulson and Forbes on the Law of Water, p. 58. Moreover a river may be public and tidal in part only, see *Bickett* v. *Morris*(6), *Hargreaves* v. *Diddams*(7), *Bristow* v. *Cormican*(8).

Though the flux and reflux of the tide is *primâ facie* evidence that a river is navigable, it does not necessarily follow that because the tide flows and reflows in a particular place that the river is therefore a public navigable river although of sufficient size. The importance to be attached to that circumstance must depend on the nature and situation of the channel. The best evidence is the actual user of a tidal river for navigation by the public, but even such evidence will not suffice if the user is only temporary and by small boats. *The King* v. *Mountague*(9), *Chunder Jaleah* v. *Ram Churn Mookerjee*(3).

Assuming the navigability, &c., of the river, still land gained from it by alluvion or gradual accretion goes to the owner of the adjoining land. *Attorney-General* v. *Chambers*(10), 2 Blackstones' Commentaries, 262, Hunt's Law of Boundaries and Fences, p. 30. Moreover, the rules that hold good as to accretions arising from natural causes seem equally applicable to cases of accretions resulting from artificial causes or from causes partly natural and

(1) 3 B. & C., 91; 2 Bligh N.S., 147.
(2) I.L.R., 9 Mad., 175.
(3) 15 W.R., 212.
(4) L.R., 7 Q.B., 339.
(5) 6 Cl. & F., 628.
(6) L.R., 1 Sc. & D. App., 47.
(7) L.R., 10 Q.B., 582.
(8) L.R., 3 App. Ca., 641.
(9) 4 B. & C., 598.
(10) 4 De Gex. M. & G., 206.

partly artificial, so long, at any rate, as the person causing them has merely exercised the lawful rights of property, and has not abused them with the sole or express view of encroachment—see per *Lord Chelmsford* in *Attorney-General* v. *Chambers*(1), *Doe d. Seebkristo* v. *The East India Company*(2). Compare also *Foster* v. *Wright*(3).

*Govinda Menon* for respondents Nos. 3 and 4.

Mr. *Powell* in reply.

JUDGMENT.—The question to be decided is whether the strip of land designated as item No. 1 in the plaint is the jenm property of the plaintiff or whether it belongs to the Government.

This question is raised in a written statement filed on behalf of the Government, in which it is alleged that this strip of land belongs to Government by reason of its having been artificially reclaimed from the bed of a navigable river, and that even if it were a natural accretion (which it is not) the property in it nevertheless vests by local usage in the State. The District Munsif without recording any opinion as to the character of the river, finds that the land was an accretion gradually formed from the river bed and brought about by artificial means which he explains. He rules, as a matter of law, that such accretions belong to the riparian owner, and not to Government, and he further holds that no local usage was proved whereby such accretions became vested in the State. The District Judge treats the claim of Government as one founded solely on custom, and agrees with the District Munsif in holding that the custom was not proved. He considers that the fact that Government has no claim to waste lands in Malabar renders the claim of Government most questionable. With regard to the character of the river, and the means by which and manner in which the accretion came to be made, he records no opinion. Before dealing with the facts of the case, as to which it was complained in the argument that there were no sufficient findings, it may be well to state the principles on which the rights to soil gained from a river by accretion are determined.

According to English law the general rule has always been that laid down by Justinian:—"That ground which a river has "added to your estate by alluvion becomes your own, by the law

(1) 4 De Gex, M. & G., 206. (2) 6 M.I.A., 267. (3) L.R., 4 C.P.D., 438.

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"of nations. And that is said to be alluvion which is added so "gradually that no one can judge how much is added in each "moment of time." Justinian's Institutes, lib. II, tit. I, 20. Speaking of "lands gained from the sea, either by alluvion, by "the washing up of sand and earth, so as in time to make *terra* "*firma*; or by dereliction, as when the sea shrinks back below the "usual low water mark." Blackstone says, "in these cases the "law is held to be, that if this gain be by little and little, by "small and imperceptible degrees, it shall go to the owner of the "land adjoining. For *de minimis non curat lex*: and, besides, "these owners being often losers by the breaking in of the sea, or "at charges to keep it out, this possible gain is therefore a reci-"procal consideration for such possible charge or loss. But if the "alluvion or dereliction be sudden and considerable, in this case "it belongs to the King; for, as the King is lord of the sea, and "so owner of the soil while it is covered with water, it is but "reasonable he should have the soil, when the water has left "it dry." (Blackstone's Commentaries, Volume II, p. 262; Stephen's Commentaries, Volume I, edition of 1863, p. 457.) The principle on which this rule as to gradual accretion rests is founded as well "on the necessity which exists for some such "rule of law for the permanent protection and adjustment of "property" as "on the impossibility of identifying from time "to time small addition to or subtraction from land caused by "the constant action of running water." In re *Hull and Selby Ry. Co.*(1), *Foster* v. *Wright*(2).

From the passage cited from Blackstone it further appears that the Crown is regarded as owner of the land covered by the sea, and that to the Crown therefore belongs land which is gained from the sea by sudden dereliction or alluvion. What is true with regard to the sea is equally true with regard to tidal navigable rivers. The ownership in the land between the ordinary high and low water marks is vested in the Crown and subject to the user of the public for purposes of navigation and otherwise. *Gann* v. *Free Fishers of Whitstable*(3).

The theory is that such lands are not capable of ordinary cultivation and occupation, and so in the nature of unappropriated soil; whereas lands that are only covered by extraordinary tides

(1) 5 M. & W., 327. (2) L.R., 4 C.P.D., 38. (3) 11 H.L.C., 192.

being for the most part dry are or may be capable of cultivation. See *Attorney-General* v. *Chambers*(1). The rule laid down in that case was that the extent of the Crown's right to the sea-shore landward is *primâ facie* in the absence of particular usage limited by the line of the medium high tide between the springs and the neaps. The rule referred to by the District Munsif according to which the riparian proprietors are entitled to the bed of the river, *ad medium filum*, is not applicable in the case of navigable rivers in which the tide flows and reflows. It is a question of fact whether any particular river is a tidal navigable river. A river may be tidal and yet not navigable, but the fact that it is tidal has been said to be *primâ facie* evidence that it is navigable. Regard must, however, be had also to the nature and situation of the channel, its depth at different periods of the tide and the use that has been actually made of it in order to determine whether it is a navigable river. See *The King* v. *Montague*(2).

There seems no reason to doubt that the principles above indicated are the principles according to which the law must be administered in British India in the absence of local usage or statutory enactment to the contrary. The rule that the Government is the owner of the soil in the bed of a navigable river up to high water mark is recognized in the Regulation XI of 1825, see *Felix Lopez* v. *Maddan Thakoor*(3), and it was further recognized by the Judicial Committee in the case of *Doe d. Seebkristo* v. *The East India Company*(4). Nor is there any ground for the contention that this rule is inconsistent with the law prevailing in Malabar with regard to ownership in land. It is true that there is no presumption in Malabar that waste lands are the property of Government: but land covered by the water of the sea or of a tidal river is not within the category of waste land, for as land it is incapable of occupation and, whoever may be the owner, it is subject to rights of user by the public. If this is so, and if the neighbouring jenmi is not the owner of the land as long as it remains covered with water, on what principle should it be held to belong to him when by some sudden recession of the water it becomes dry land? Any principle on which the jenmi's title to such land so gained from a river can be supported would be equally applicable to land similarly gained from the sea and even

(1) 4 De Gex. M. & G., 206, 218.
(2) 4 B. & C., 598.
(3) 5 Beng. L.R., 527.
(4) 6 M.I.A., 267.

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to an island formed in the sea. It is difficult to believe that any private rights to such land can have grown up among a people like the inhabitants of Malabar given to agricultural habits and possessed of a strong feeling of horror and aversion towards the sea and the navigation of it. Otherwise it might be conceivable that such new and unoccupied land should belong to the first occupant or to the sovereign by a title similar to title by escheat—*Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*(1); but on what principle the neighbouring owner should be entitled to it has not been explained. In our opinion there is nothing in the system of property as recognized in Malabar to displace the rights of the Crown as they are ordinarily understood. On the contrary the evidence indicates a recognition of those rights in recent times; and in the grant traditionally recorded to have been made by the Brahmans to Keralan are enumerated among other sovereign rights "the regulation of the beds of streams and accretions from the seas," Malabar Manual, Volume I, p. 226.

On the assumption then that we have to apply the principles which we find in the English books there are two matters to which regard has to be had in order to ascertain whether in the case of a given accretion from a river the property in it vests in the Crown. There is the character of the river to be considered, and the manner in which the accretion is occasioned. On the former of these matters we have already made some observations, and concerning the latter we have noted the distinction between an accretion which is gradually and imperceptibly produced, and one which is sudden and considerable. The right of the owner, and therefore, in the case of a tidal navigable river, of the Crown is not lost where the alluvion or dereliction is of the last-mentioned character. It was argued on the respondent's behalf that provided the accretion in this case was gradually made, as appears to have been the opinion of the District Munsif, it was immaterial whether it was produced or accelerated by artificial means adopted by or on behalf of the respondent. Subject to a proviso which will be hereafter mentioned this position is correct and is well supported by authority. So long as the accretion has been slow and imperceptible in its progress so that it could not be marked from day to day, but only at the end of some considerable period of time, the rule

(1) 8 M.I.A., 525.

in favor of the riparian owner is applicable notwithstanding that the accretion may have been brought about by operations conducted by him lawfully on his own lands or by neighbours on their lands—*Attorney-General* v. *Chambers*(1), *Doe d. Seebkristo* v. *The East India Company*(2). In the latter case the Judicial Committee observes "a question of law was raised whether supposing the "accretion (granting it to be gradual) was one which had been "contributed or even purposely contributed to, by the act of the "defendants, that would not take the matter out of the ordinary "law with respect to the accretion. The Court below thought, and "we think rightly, that that made no difference. If there were a "gradual accretion which was not denied, it was one which would "be dependent on ordinary law." This passage might at first sight seem to justify the contention that a riparian proprietor was at liberty to employ any means to promote the formation of soil on his own bank and thus to transfer to himself part of the bed of the river. But an examination of the facts of the case will show that no such point was decided. It was found as a fact that the defendants in the case, the East India Company, were the owners of the land adjoining the high water mark, and that in constructing a road and works protecting it along the bank of the river the Company were acting within their rights. Being the owners of the land to which a gradual accretion was made, they were necessarily owners of that accretion, which moreover was gained from the bed of the river which itself was vested in the East India Company. This case therefore is no authority even for the proposition that a deliberate intention on the part of a riparian owner to produce an accretion and adoption of means to that end are immaterial in considering whether the accretion so gained belongs to him or not. In the later case of *Attorney-General* v. *Chambers*(1), the Lord Chancellor did not entertain that opinion, for after saying that the rule with regard to accretion is not affected by the nature and character of the operation employed to produce it, he observes that, "of course an exception must always be "made of cases where the operations upon the party's own land "are not only calculated, but can be shown to have been intended, "to produce this gradual acquisition of the sea-shore, however "difficult such proof of intention may be." If there is not only

(1) 4 De Gex. & J; 55, 69. (2) 6 M.I.A., 267.

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proof of that intention but it also appears that the party has by unlawful acts done upon the land below the high water mark contrived to raise the bed of the river adjoining his own land, and thus endeavoured to appropriate to himself soil which is vested in the Crown, there can be no doubt that he cannot claim the benefit of the ordinary rule with regard to accretions. To allow him to do so would be to allow him to take advantage of his own wrong. The proposition therefore that the means whereby an accretion is occasioned are immaterial must be taken subject to the proviso expressed in the judgment of the Lord Chancellor, viz., that it is by a lawful use of the party's own land that the accretion is caused. Acts not coming within that category done with the intention and result of annexing the soil of a public river are nothing else than acts of encroachment.

It is apparent from what has been already said with regard to the findings in this case that in neither of the Courts have the facts requisite for a determination of the rights of the parties been considered and adjudicated upon. There were no proper issues raised with regard to the matters upon which the claim made on behalf of Government would rest. We must therefore ask the District Judge having regard to the observations above made to record findings on the following issues :—

(1) Whether as far as the point near which the land No. 1 in the plaint lies the river Kottapuya is a tidal navigable river.

(2) Whether the variation if any in the natural line of high water has at the same point been slow, gradual and imperceptible or otherwise.

(3) Whether such variation has been caused by acts unlawfully done by the plaintiffs and persons claiming under them or otherwise.

The parties are at liberty to adduce further evidence.

The findings will be returned within three months from the date of the receipt of this order, when seven days after the posting of the findings in this Court will be allowed for filing objections.

In compliance with the above order the District Judge submitted the following finding :—

"I find the first issue in the affirmative, and the second in "the negative, and on the third issue I find that the variation "in the high water line has been caused by acts unlawfully done

"by persons alleged by the contending respondents (plaintiffs) to "be their lessees or tenants under their lessees."

This second appeal coming on for final hearing upon receipt of the above finding the Court delivered judgment as follows :—

JUDGMENT :—The findings are against the plaintiffs. It is objected that the District Judge declined to issue a commission for the purpose of ascertaining whether there was any tree 50 years old on the spot in dispute. This application was not made until the re-hearing was closed, and the Judge observes that the Sheristadar and the Amshom. Menon, who inspected the locality, denied the existence of such a tree, and that none of the respondents' witnesses, except one, who is discredited, referred to its existence.

We accept the finding, and must accordingly reverse the decrees of the Courts below and direct that the suit be dismissed. The plaintiffs (respondents Nos. 1 and 2) must pay the costs of appellant throughout. The other respondents, who need not have appeared but have benefited by the appeal, will bear their own costs.

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## ORIGINAL CIVIL.

*Before Mr. Justice Handley.*

ADMINISTRATOR-GENERAL OF MADRAS (PLAINTIFF),

1889. Dec. 19.

*v.*

WHITE AND OTHERS (DEFENDANTS).*

*Will, construction of—Absolute gift—Repugnant gift over indefiniteness of gift—Reputed wife.*

On the construction of a will which was as follows :—

"I hereby declare all former wills cancelled. I desire that my wife should "obtain possession of all my property and enjoy the benefit of all monies that "may accrue until her death, when I wish that whatever may remain shall be used "for the education of the children of the Eurasian and Anglo-Indian community. "I desire that this will be administered by the Official Trustee of Madras : "

*Held*,

(1) that the reputed wife should take under the will without strict proof of the marriage, no fraud being imputed to her in the matter of the marriage ;

(2) that the gift to the wife was absolute and the gift over bad for repugnancy.

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* Civil Suit No. 263 of 1889.