Privy Council Appeal No. 60 of 1932.

The Secretary of State for India in Council - - - - *Appellant*

v.

Foucar and Company, Limited - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH DECEMBER, 1933.

Present at the Hearing:
LORD MACMILLAN.
SIR JOHN WALLIS.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

The question in this appeal is as to the respondents' title to certain partly-submerged lands in the Pegu river, which is tidal and navigable, and the *alveus* of which is admitted to be in the Crown.

Somewhere about 1892 an island began to form in the bed of the river, and parts of it having become from time to time fit for the cultivation of *dhani* palms, which, it is said, grow best below the high-water mark, were granted out by the Government to different persons for that purpose.

In the year 1922 the whole of the island as it then existed was acquired by the respondents. In the subsequent years further accretions occurred at the south-east end of the island, and a portion which had been lost some years before by erosion reappeared. These lands were taken possession of by squatters, one of them apparently having the permission of the Collector, who claimed both the accretions and the re-formed land for

Government. The respondents thereupon instituted a suit against the appellant in the District Court of Insein, claiming a declaration of their rights, possession and other relief. The squatters were joined as co-defendants, but took no part in the proceedings, the only contesting defendant being the appellant as representing the Government.

The Trial Judge dismissed the suit, holding that the Court had no jurisdiction to entertain it. He was also of opinion that the respondents had no title to either the accretions or the re-formed land.

On appeal to the High Court at Rangoon the question of jurisdiction was decided against the appellant, and the correctness of this decision has not been contested before the Board.

The learned Judges of the High Court also differed from the Trial Judge as to the re-formed land, which they held to belong to the respondents. This finding also has not been seriously disputed before their Lordships. It is, they think, clear that there was no abandonment by the predecessors in title of the respondents, and the ordinary rule would apply under which the title of the grantees attaches upon the reformation. It was suggested that the respondents' conveyance did not cover the re-formed land, but there is no trace of any such contention having been raised in the Burma Courts, where Counsel for the appellant formally admitted the respondents' title to all the land the subject of the original grants. Under these circumstances their Lordships must hold that this point is not open on the present appeal.

It was also contended in the lower Courts that the respondents by their user of the island for purposes other than *dhani* cultivation had forfeited their rights. This contention had commended itself to the Trial Judge, but found no favour with the High Court, and it has been abandoned before their Lordships.

The question to which the main argument on the appeal has been addressed is as to the accretions. The appellant contends that the well-recognized doctrine as to gradual accretions owing to the action of tidal waters, has no application in Burma, and, alternatively, that it is excluded by the terms of the particular grants under which the respondents hold.

On this aspect of the case the two learned Judges before whom the appeal came in the High Court, differed, Brown J., while not prepared to accept the first branch of the appellant's argument, thought that what was granted in each case was a specific area between high and low-water limits, demarcated by posts, which were, he thought, clearly intended to be a rigid boundary. In his opinion, therefore, no claim to additional land by accretion was open to the grantees or to persons claiming through them. He was confirmed in this view by the fact (upon which much reliance has been placed by the appellant) that no

claim on the ground of accretion had been made by the predecessors in title of the respondents, who, when additions to their original grants emerged, acquiesced in several cases in these being granted by Government to other persons.

Otter J. took the opposite view. He had no doubt that the doctrine of accretion was applicable in Burma, and he did not think that it was excluded by the terms of the grants, or by the possible existence of the posts upon which his learned colleague relied. He summed up the position in the following words :—

> " If the grants can be described as well defined at any time, they were not so well defined as to exclude the doctrine. If, on the other hand, they were not defined at all (and there is no real evidence as to the construction or maintenance of the posts) and the boundary on the water fronts was the river, then the doctrine would apply."

The result of this difference of opinion between the learned Judges was that the case was referred under Clause 34 of the Letters Patent to a third Judge, J. R. Das J., who agreed with the opinion of Otter J. The appeal was accordingly allowed, and a decree passed in the High Court in favour of the respondents on their principal claims.

The judgments of both Brown J. and Otter J. contained careful expositions of the case law as to accretions and the application of the doctrine in India, and their Lordships will have little to add on this part of the case. Das J. contented himself with a mere adherence to the opinion of Otter J.

Before discussing the questions which fall to be decided by the Board, their Lordships will make a further reference to the facts upon which the decision must be based.

The original grants by Government, made in 1893, were of land the greater part of which was then, at all events, submerged at high tide in the river. The grants were all, apparently, made on printed forms divided into columns, one of which contained a statement of the area granted, and another its boundaries. Each form was accompanied by a rough plan, on which the plot, the subject of the grant, was delineated by more or less straight lines with small circles at each corner, which are said to represent posts. The scale on which the plans are drawn seems to vary in each case. The boundaries set out in the column above referred to and those shown on the plans do not correspond, but, speaking generally with regard to such of the grants as are available in the record, the south boundary, upon which the greater part of the accretions throughout the period since 1893 has been formed, appears consistently as the river. The only evidence as to the growth of the island is a series of 22 survey maps produced from the district records, which both parties admitted to " represent accurately the accretions and submergencies from time to time." These plans, which correspond only approximately with those referred to above, also show the river as the southern boundary of the grants. They also undoubtedly suggest that as additional

lands emerged after 1893, they were granted by Government to different persons without regard to any question of accretion. But, apart from the plotting on these plans, there is no evidence as to what happened when the new grants were made, or what were the conditions then prevailing.

The record also contains, in the case of some of the grants, the application of the grantee and the proceedings in the Revenue Department leading up to the grants. These purport to show that the applicant in each case had demarcated the plot for which he was applying by wooden boundary posts, but there is nothing to indicate that these were of a permanent nature or that they were maintained or renewed from time to time.

The conclusions which their Lordships draw from these facts are that in each case the grant was of land forming part of the foreshore of tidal water, of which the south boundary and, in the material cases, the east boundary also, was the river. They accept the suggestion that the plots were originally marked out by posts or stakes, but they are not prepared to assume that these were of anything but a temporary character.

With regard to the nature of the interest passed under the grants, it is now admitted that it was in each case such as would support a claim to accretion if the doctrine applied, and it is to this question that their Lordships must now address themselves under the two alternative contentions put forward by the appellant.

The principle that gradual accretion enures to the land which attracts it is one that has been recognized from very early times. Thus, Lord Stair, writing in 1681, says :—

> "Appropriation by alluvion is admitted in all nations, for thereby the adjection of another's ground insensibly and imperceivably, by the running of a river, becomes a part of the ground to which it is adjected ; because it is uncertain from whose ground such small and imperceivable particles are carried by the water, and thereby also the frequent questions that would arise betwixt the proprietors upon the opposite banks of rivers are prevented ; and though the adjection may be perceivable and considerable in a tract of time it maketh no difference if at no particular instant the adjection be considerable ; as the motion of the palm of a horologe is insensible at any instant, though it be very perceivable when put together in less than a quarter of an hour." ("Stair's Institutes of the Law of Scotland," II, 1, 35.)

The basis of the rule has been differently stated at different times, but their Lordships think it must be regarded as a rule of "general convenience and security" (*per* Lord Shaw in *A.G. of S. Nigeria* v. *John Holt & Co.* [1915], A.C. 599 at 612) and as necessary for the "mutual adjustment and protection of property" (*per* Lord Abinger in *Hull and Selby Railway Co.*, 5 M. & W. 327 at 332).

In India the doctrine has been embodied in the law of Bengal by Reg. XI of 1825, and of Oudh by Act XVIII of 1876, and it is equally well established in Madras, where there is no statutory

enactment on the subject (*per* Lord Hobhouse, *Shri Balsu Ramalaksmamma* v. *The Collector of Godaveri*, 26 I.A. 107, at 111). In Bombay the right is recognized, but is restricted by the Land Revenue Code of 1879, Section 4, to accretions not exceeding an acre in extent.

Under these circumstances it would, their Lordships think, be difficult to hold, as the appellant contends, that the doctrine is wholly inapplicable to Burma, where under Act XIII of 1898 the ultimate test is to be "justice, equity and good conscience" (Section 13 (3)). There is no direct statutory provision on the subject, and, so far as their Lordships are informed, no authority in the Courts of that country. The appellant rests his argument mainly upon Section 6 of the Burma Land and Revenue Act, 1876, which is in the following terms:—

> "S. 6. No right of any description shall be deemed to have been or shall be acquired by any person over any land to which this part applies except the following:—
>
> (*a*) Rights created by any grant or lease made by or on behalf of the British Government;
>
> (*b*) Rights acquired under Sections 27 and 28 of the Indian Limitation Act, 1871;
>
> (*c*) Rights created or originating in any of the modes hereinafter in that behalf specified;
>
> (*d*) Rights legally derived from any right mentioned in Clauses (*a*), (*b*) and (*c*) of this section."

Their Lordships do not think that the words of this section can be stretched to exclude rights of accretion or alluvion. Apart from the contention that such rights would be within clause (*d*), upon which it is not necessary for them to come to any conclusion, they are unable to hold that gradual additions to land of a grantee by the action of a river are within the prohibition of the section. It is not that their Lordships are asked to presume that additional lands were granted by the Crown, but only that the Crown made grants which might be either added to or diminished by the water. The chance was inherent in the grant. The river gives, just as it may take away, and if the gift is gradual, little by little, from day to day, or from week to week, the law for the reasons explained above deems what is added to have been part of what was granted: in the words of Baron Alderson (*Hull and Selby Railway's* case *supra*), "that which cannot be perceived in its progress is taken to be as if it never had existed at all." It would, in their Lordships' opinion, require much more precise words than those appearing in the section above quoted to exclude the application of a doctrine so well established and founded upon such broad considerations.

Their Lordships now turn to the second branch of the appellant's argument, upon which the learned Judges of the High Court differed. They have already indicated that in their view little reliance can be placed upon the original staking out of the plots as indicating rigid and discernible boundary lines, but they

will assume in the appellant's favour, for the purpose of this part of the argument, that the grant in each case was what has sometimes been called a " bounding grant," that is, one confined by specific boundaries represented by the lines drawn on the attached plans. On this assumption the question is whether the existence of such boundaries is sufficient of itself, as the appellant contends, to exclude the doctrine of accretion.

Reference has been made to the dictum of James L.J. in *Lopez* v. *Muddun Mohun Thakoor*, 13 Moo I.A. 467 at 474, that it had not been judicially determined to what extent the rule as to accretions 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 other means of that kind," and to a similar doubt suggested by Lindley L.J. in *Hindson* v. *Ashby* [1896] 2 Ch. 1 at 13. But these dicta can hardly be regarded as authorities in the appellant's favour. Reliance is also placed upon the opinion expressed by Lord Chelmsford in *A.G.* v. *Chambers*, 4 D.G. and J. 55 at 71, but this again is little more than *obiter dictum*, as the case was remitted for the trial of further issues and does not appear to have come up again for decision.

The question was, however, considered at length by Palles C.B. in *A.G.* v. *McCarthy* [1911] 2 Ir. Rep. 260, who held that it was concluded by the well-known decision in *Rex* v. *Yarborough*, 3 B. and C. 91, which, as he points out, was affirmed by the House of Lords, *Gifford* v. *Lord Yarborough*, 5 Bing 163. In that case there was the clearest possible boundary to the land for which the accretion was claimed in the existence of a sea wall, and yet the doctrine was held to be applicable. The headnote to the report of the Irish case, which expresses concisely the conclusion there come to, is as follows :—

> " The decision of the House of Lords in *Gifford* v. *Yarborough* conclusively determines that where land is added to the seashore by the gradual and imperceptible action of natural causes, the owner of the lands adjoining the accretions acquires in them a good title against the Crown, notwithstanding the existence of marks or bounds or other evidence by which the former, or a former, line of ordinary high water can be ascertained.
>
> " The real question in every such case of accretion is whether during the process of accretion the progress of the accretion can be ascertained."

The question was again considered by Romer J. in *Brighton and Hove General Gas Co.* v. *Hove Bungalows, Ltd.* [1924], 1 Ch. 372, where a similar conclusion was reached.

In their Lordships' opinion, these cases were rightly decided, and they think that the general principle of accretion applies even where the former boundaries of the land on the water front were known or capable of ascertainment. On the assumption, therefore, that this was the position by reference to the plans in evidence in the present case, they are unable to hold that this excludes the application of the doctrine.

It only remains to deal with the suggestion of estoppel based on the fact that some of the earlier grantees acquiesced in fresh grants being made by the Government of lands which they might, on the basis of this judgment, have claimed for themselves as accretions. Their Lordships fail to understand how any case of estoppel can be sustained against the respondents. Nothing is known as to the circumstances under which these fresh grants were made. The grantees may not have desired the additional lands : they may even have regarded a new holder, settled between them and the chances of the river, as an additional security to their own holdings : they may have been, and probably were, altogether ignorant of their rights, or unwilling to spend money in litigating with Government if they did know of them. But in any case the accretions were totally different from those now claimed by the respondents, and the non-claimer by them cannot, in their Lordships' opinion, have any adverse effect upon the rights now claimed by the respondents.

For the reasons given their Lordships think that the decree passed by the High Court, against which this appeal has been brought, was right, that the appeal fails, and that it should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL

v.

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DELIVERED BY SIR GEORGE LOWNDES.

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