TAGORE LAW LECTURES—1889.

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THE LAW OF RIPARIAN RIGHTS, ALLUVION AND FISHERY:

WITH INTRODUCTORY LECTURES

ON

THE RIGHTS OF LITTORAL STATES OVER THE OPEN SEA, TERRITORIAL WATERS, BAYS, &c., AND THE RIGHTS OF THE CROWN AND THE LITTORAL PROPRIETORS RESPECTIVELY OVER THE FORESHORE OF THE SEA.

BY

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Division of the subject—Essential nature of right of fishery—Enumeration and definition of the different kinds of right of fishery recognised by English law—Distinction between each of these kinds—A I. Fishery in the high sea—II. Fishery in the territorial waters—III (*a*). Fishery over the foreshore of the sea, and in tidal waters—Right of fishery in such waters primâ facie vested in the public—Extent of the right—Mode in which this right may lawfully be exercised—Foundation of the right—Discussion of authorities—Effect of alteration of the channel of a tidal navigable river upon the public right of fishery—Prerogative of the Crown to appropriate or grant several fisheries in tidal waters anterior to Magna Charta—Effect of Magna Charta on such prerogative—In what cases may a claim by a private individual to a several fishery in tidal waters, be valid?—Reversion to the Crown of a several fishery in tidal waters by forfeiture or otherwise—Modes in which a right to a several fishery in tidal waters may be claimed by a subject—Nature of proof requisite in each case—Kinds of several fishery in tidal waters—Nature of each kind of several fishery—Does the right to a several fishery in tidal waters raise any presumption as to the ownership of the subjacent soil?—Effect of shifting of the channel of a tidal navigable river upon the ownership of a several fishery—*Mayor of Carlisle* v. *Graham*—Free fishery in tidal waters—Restrictions upon the enjoyment of a several fishery or a public right of fishery in tidal waters—Fishery in non-tidal rivers and streams—Right of fishery in such waters primâ facie vested in the riparian owners—Foundation and nature of the right—Enumeration of the different kinds of right of fishery in such waters—Ambiguity of the term 'several fishery,' when applied to non-tidal waters—Modes in which a several fishery in such waters may be created—Does the right to a several fishery in non-tidal waters raise any presumption as to the ownership of the subjacent soil?—Several fishery in one, subject to a limited right in another—Free fishery in non-tidal waters—Franchise fishery in non-tidal waters—Effect of shifting of the channel of a non-tidal river upon the right of fishery—*Foster* v. *Wright*—Restrictions upon the exercise of the right of fishery in those non-tidal rivers that are navigable—Obstruction to the passage of fish. 345

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LECTURE XIV.

FISHERY.—(*Continued.*)

III (b). Fishery in navigable rivers—Under Roman law, right to fish in perennial rivers common to the public,—Appropriation by the sovereigns in feudal times of the right to fish in navigable rivers—Right of the public to fish in navigable rivers rehabilitated in France by the Code Napoleon—Right also recognised in some of the states in America—In India, right of fishing in navigable rivers primâ facie belongs to the public—Mode of enjoyment of such right—Exclusive fishery claimable by private individuals by grant from Government or by prescription—Nature of evidence requisite to prove acquisition of such exclusive right—Whether exclusive right of fishery in a navigable river imports a right to the subjacent soil—Effect of shifting of, or of any other change in, the channel of a navigable river upon the exclusive or the public right of fishery in the river—Course of decisions upon this topic in Bengal—Remarks —Fishery in non-navigable rivers or streams—Right of fishing in such rivers or streams primâ facie vested in the owner of the subjacent soil—Distinction between territorial and incorporeal fishery in non-navigable streams—Modes of acquisition of incorporeal fishery—To whom does the right of fishery in non-navigable streams flowing between two estates, primâ facie belong?—Whether exclusive right of fishery in a non-navigable stream imports a right to the subjacent soil—Modes of determining the right to the soil under different circumstances—Right of the grantee of the entire julkur of a pergunnah—Obstruction to the passage of fish—Fishery in lakes and ponds—Right of fishing in small lakes, ponds, &c. primâ facie belongs to him in whose lands they are situated—Right of fishing in large non-tidal navigable lakes, under English law—Under American law—Right of fishing in lakes, ponds, &c. generally, according to Anglo-Indian law—Sums annually payable under a lease of a fishery, whether rent or not—Right of occupancy in respect of the julkur of a stream, &c.

B. Topics relating to rights of fishery in general—Whether a right to compensation exists for loss of right of fishery, when subjacent soil is acquired for public purposes—Whether the English Prescription Act applies to right of fishery in gross—Provisions of the Indian Limitation Act and the Easements Act respectively regarding right of fishery in gross—A fluctuating body of inhabitants of a vill, parish, or a borough cannot by custom claim a right—First reason for the rule—Second reason—Comments on the second reason—*Goodman* v. *Mayor of Saltash*—*Lutchmiput Singh* v. *Sadaulla Nashayo*.

C. Remedies for disturbance of rights of fishery—(i) Civil actions—(ii) Criminal proceedings—Roman law regarding ferae naturae—General principles of law regarding the same topic—Provisions of the English Common law—*Blades* v. *Higgs*—Liability of a trespasser for capture of ferae naturae—24 & 25 Vict. c. 96, s. 24—Summary of the decisions upon the section—Anglo-Indian law regarding ferae naturae—Cases in which capture of fish does not constitute any offence under the Indian Penal Code—Act II of 1889 (B. C.)—Section 145 of the Criminal Procedure Code, how far applicable to rights of fishery. 368

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LECTURE I.

THE SEA, TERRITORIAL WATERS, BAYS, GULFS AND ESTUARIES.

Introduction—Rights of littoral states over bays, gulfs, estuaries, territorial waters and the main ocean—Respective provinces of municipal and international law as regards rights over waters—Under Roman law, sea common to all—In ancient times, sea open to universal depredation—In later ages exclusive sovereignty over several portions of the high seas claimed by different states—Reason assigned by Grotius for the doctrine of freedom of the seas—By Puffendorf—By Bynkershoek—By Vattel—Main ocean common to all nations for navigation and fishery—Exclusive rights of navigation and fishery acquirable by treaty—Doctrine of exterritoriality of ships—Distinction between the immunities of private and public vessels in ports and territorial waters of foreign states—Bed of the sea common to all—Portions of bed of the sea prescriptible—I. Extent of 'territorial water'—Reasons for appropriation of adjoining seas—Bynkershoek first to suggest range of cannon-shot from shore as limit—Three miles from shore, the limit of 'territorial water' according to modern international law—Ambiguity of the expression 'territorial water'—II. Sovereignty and dominion of a littoral state over its territorial water—Summary of the purposes for which such sovereignty and dominion may be exercised—Sovereignty and dominion of England over the narrow seas—Selden's opinion—Lord Hale's doctrine—(*a*) Nature of sovereignty over territorial water—Jurisdiction over foreign ships in such water now regulated by various treaties between England and other states—Nature of these treaties—17 and 18 Vict. c. 104—*Rolet* v. *The Queen*—*The Leda*—*General Iron Screw Colliery Co.* v. *Schurmanns*—Jurisdiction of British Courts over foreigners in foreign ships in territorial water of Great Britain—Discussion of cognate topics by Courts in India—*Reg.* v. *Irvine*—*Reg.* v. *Elmstone*—*Reg.* v. *Kastya Rama*—37 and 38 Vict. c. 27, Courts' (Colonial) Jurisdiction Act—Effect of that statute on some of the Indian cases—*The 'Franconia' case*—41 and 42 Vict. c. 73, Territorial Waters Jurisdiction Act—Jurisdiction over offences committed by one foreigner upon another on board foreign ships passing through territorial water—(*b*) Nature of dominion over territorial water—Open to peaceful navigation by all nations, but adjoining littoral state exclusive owner of fishery—Reasons generally adduced for asserting ownership over the bed of territorial water—Reasons assigned by Lord Hale—Dicta in *Blundell* v. *Catterall*, *King* v. *Lord Yarborough*, and *Benest* v. *Pipon* influenced by the old doctrine of the narrow seas—*Gammell* v. *Commissioners of Woods and Forests*—*Whitstable Free Fishers* v. *Gann*—Award of Sir John Patteson and the Cornwall Submarine Mines Act (21 and 22 Vict. c. 109) as to ownership of mines beyond low-water mark of Duchy of Cornwall—Law in India as to ownership of bed of territorial water—Observations in *Reg.* v. *Kastya Rama*—*Babun Mayacha* v. *Nagu Shravucha*—These observations need reconsideration—Littoral states entitled,

for maintaining lighthouses &c., to levy tolls on vessels passing through or casting anchor in territorial water—Such tolls not leviable without quid pro quo—III. Bays, gulfs and estuaries—Test for determining their territorial character—King's Chambers, what—*Reg.* v. *Cunningham*—Observations by the Privy Council with regard to *Conception Bay* on the east of Newfoundland—Test deducible from the cases—Territorial bays, &c. subject to the municipal law of adjoining state—Ownership of the soil of their bed—In England bed of districtus maris alienable by Crown before 1 Anne, c. 7 subject to ius publicum—In India alienable by Government, probably, without any such restriction.

Before I proceed to deal with the immediate subject of the present course of lectures, namely, the principles and the rules of law which regulate the rights of riparian and littoral proprietors in streams, rivers and arms of the sea, I shall endeavour to give you a short sketch of that interesting, though somewhat difficult, branch of law which relates to the rights of littoral states over bays, gulfs, estuaries, territorial waters and the main ocean.

Some acquaintance with this subject, if not indispensable to the student or the practical lawyer in this country, may yet perhaps be of occasional utility to both. Questions, though no doubt in some rare instances only, have been raised and discussed in the Courts in India, which, however, ultimately depend for their solution upon the nature of the rights of littoral states over their adjoining seaboard.

It is at the present day a fundamental postulate of international jurisprudence,—whatever the history of the past stages of the doctrine may be,[1]—that the sovereignty of a state is territorial, that a nation cannot by its laws directly bind property which is beyond the limits of its territory, nor directly control persons who are not resident therein.[2] It follows as a necessary consequence from this that, the municipal law of a state is competent to deal with the riparian and littoral rights of its subjects over such waters alone as are encompassed by its own territorial bounds; while an investigation of the rights of the various maritime states over those waters that are outside their respective territorial limits falls within the domain of international law. But though the respective provinces of municipal and international law with regard to rights over waters may thus seem to be sharply defined and exclusive of one another,

[1] Maine's Ancient Law (4th ed.), 101—112.

[2] Rodenburg, De Statutis, t. 1. c. 3. § 1; Wheaton's Int. Law (Boyd's 2nd ed.), 105—106; 1 Phillimore's Int. Law (3rd ed.), 216; § 145; 1 Kent's Comm., § 457; 1 Twiss's Law of Nations (2nd ed.), 258; § 158; Story's Conflict of Laws, § 539; Hall's Int. Law (3rd ed.), 50—55; § 10; Maine's Lect. on Int. Law, 56.

the consensus of civilized nations, which forms the main basis of modern international law, has appropriated to every littoral state a zone of the high sea, known as its 'territorial water,' where the municipal law of that state as well as international law have concurrent operation.

The Main Ocean.—Before I enter into the subject of territorial water, which, on account of its ever-increasing practical importance, demands a much larger share of your attention, I propose to make a few remarks with regard to the rights of states, whether littoral or not, over such parts of the open sea as fall within the exclusive operation of international law.

The Roman Institutional writers laid down that, by the law of nature, the sea was common to all: Et quidem naturali iure communia sunt omnium haec, aer et aqua profluens et mare et per hoc littora maris.[1] Differences of opinion prevailed among the ancient commentators as to the precise signification to be attached to the expression 'res communes'; some maintained, not perhaps without considerable plausibility, that the community denoted by it was intended to be confined to the Roman people, but the more approved and generally accepted view was that it extended to mankind in general.[2]

This doctrine of community of the sea, enunciated in the writings of the jurisconsults, is undeniably the source to which its counterpart in modern international law may ultimately be traced, but it may perhaps be given to doubt, whether that doctrine, in its inception, was not a mere speculative tenet of the Roman lawyers, deduced from the vague principles of a supposed law of nature, rather than a description of the actual condition of the sea in those primitive ages. Indeed, Sir Henry Maine has hazarded the opinion that, the sea at first was common only in the sense of being universally open to depredation.[3]

In later times, however, nations and states, tempted by the supremacy of their power, and the magnitude of their maritime resources, but actuated principally by a beneficent desire to rid the seas of pirates and filibusterers, advanced unbounded claims to the sovereignty and dominion of several portions of the high seas. Spain and Portugal, at different epochs, claimed exclusive right, founded upon the titles of

[1] Inst. i 1. 1; Dig. i. 8. 2. 1.

[2] Noodt, Probabilia Iuris, t. 1. cc. 7, 8; Grotius, de Iur. Bell. et Pac. lib. ii. c. 3. § 9, 1 (cf. Barbeyrac's note 5). Cf. Dig. xliii. 8. 3. 1; J. Voet. Comm. ad Pand. lib. i. t. 8. § 2.

[3] Maine's Lect. on Int. Law, 76.

previous discovery, and Papal grants, to the navigation, commerce and fisheries of the Atlantic and Pacific Oceans.[1] England asserted the right of sovereignty over the so-called British Seas.[2] Venice laid claim to the Adriatic, Genoa to the Ligurian sea, and Denmark to a portion of the North sea.[3] But these extravagant pretensions, always unfounded, long since gave way to the influence of reason and common sense. Grotius, Puffendorf, Bynkershoek and Vattel, and the succeeding publicists all uniformly asserted the absolute freedom of the high seas. Grotius, the most authoritative of the founders of international law, and probably the most reverenced of all the writers on the subject, maintained the doctrine on the ground that the sea like the air is so immense, that it is sufficient for the purposes of all mankind.[4] Puffendorf, his disciple, rested his opinion on the ground that the exclusive dominion of

[1] 1 Phillimore's Int. Law (3rd ed.), 247; Wheaton's Int. Law (Boyd's 2nd ed.), 221; § 166; Hall's Int. Law (3rd ed.), 141; § 40.

[2] Selden in his Mare Clausum asserted the sovereignty of the King of England as far as the shores of Norway. See Hargrave's notes to Co. Litt. 107 *b*., which is a summary of the 1 ch. 2nd Book of Selden's Mare Clausum Lord Hale supports Selden in his treatise De Iure Maris. p. 1, c. 4; Hargrave's Law Tracts, 10, where he says:—"The narrow sea, adjoining to the coast of England is part of the waste and demesnes and dominions of the King of England, whether it be within the body of any county or not. This is abundantly proved by that learned treatise of Master Selden called Mare Clausum; and therefore I shall say nothing thereon, but refer the reader there. In this sea the King of England hath a double right, *viz*., a right of jurisdiction which he ordinarily exerciseth by his admiral, and a right of propriety or ownership."

The British seas, sometimes called the Four Seas are those which encompass the coasts of England, Scotland and Ireland. They are—1, The Atlantic, which washes the western shore of Ireland, and which comprises, as it were, by way of subdivision, the Irish Sea or St. George's Channel, and the Scottish Sea to the north-west; 2, The North Sea on the coast of Scotland; 3, The German Ocean on the east; and 4, The British Channel on the south. Co. Litt., 107*a*, note 7. The jurisdiction of the King as lord and sovereign of the sea, has been defined, with respect to the Channel, to extend between England and France, and to the middle of the sea between England and Spain. Sir John Constable's case, 3 Leon. 73; 5 Com. Dig. 102. With respect to the Western and Northern Oceans, there was said to be more uncertainty as to the limits of British dominion. Selden contended for the fullest exercise of dominion over the British Seas, both as to the passage through and fishing in them; while Sir Philip Medows suggested more confined rights, as to exclude all foreign ships of war from passing upon any of the seas of England without special license, to have the sole marine jurisdiction within those seas, and also an appropriate fishery. Woolrych on Waters, (2nd ed.), 5.

[3] Bynkershoek, Dissertatio de Dominio Maris, cc. 4, 5, 6, & 7; Craig's Ius Feudale lib. i. t. 15. § 10; Hall's Int. Law (3rd ed.), 139-140; § 40; *Reg.* v. *Keyn*, 2 Ex. D. 174, 175.

[4] De Iur. Bell. et Pac. lib. ii. c. 2. § 3, 1.

the sea by any single nation is not only unprofitable, but also manifestly unjust.[1] Bynkershoek, however, placed the doctrine upon a firmer and a more practical basis. He affirmed it upon the ground that the sea is incapable of continuous occupation and insusceptible of permanent appropriation.[2] But Vattel supported the doctrine upon all these three grounds, and also upon a fourth, namely, that the use of the sea is innocuous, that he who navigates or fishes in the open sea, does injury to no one.[3]

Whatever be the reasons upon which the rule ought really to rest, it is perhaps immaterial for us at the present day to enquire. It may be safely laid down as an unquestionable proposition of modern international jurisprudence that the main ocean for the purposes of navigation and fishery—probably the only uses which the main ocean admits of—is common to all the nations.[4] The subjects of all nations meet there, in time of peace, on a footing of entire equality and independence.

It is possible, however, that a state may acquire exclusive rights of navigation and fishing over portions of the open sea as against another state, by virtue of the specific provisions of a treaty.[5]

A ship navigating the main ocean remains subject to the jurisdiction of the state whose flag it carries. This is called the exterritoriality of ships, a doctrine by which the dominion of a state is artificially extended over its ships in the high sea in order that it may exercise jurisdiction over them.[6] By some writers on international law a ship

[1] De Iur. Nat. et Gent. lib. iv. c. 5. § 9.

[2] Dissertatio de Dominio Maris, c. 3. Totum, qua patet, mare non minus iure naturali cedebat occupanti, quam terra quævis, aut terræ mare proximum. Sed difficilior occupatio, difficilima possessio; utraque tamen necessaria ad asserendum dominium, iure videlicet gentium.

[3] Law of Nations, Bk. i. c. 23. § 281.

[4] Wheaton's Int. Law (Boyd's 2nd ed.), 251; § 187 ad fin; 1 Phillimore's Int. Law (3rd ed.), 247-248; § 172; 1 Twiss' Law of Nations (2nd ed.), 284; § 172; Kent's Int. Law (Abdy's ed.), 97; Maine's Lect. on Int. Law, 78.

[5] Grotius, de Iur. Bell. et Pac. lib. ii. c. 3. § 15, 1 & 2; Vattel's Law of Nations, Bk. i. c. 23. § 284; Wheaton's Int. Law (Boyd's 2nd ed.), 250-251; § 186 ad fin.

[6] Grotius, de Iur. Bell. et Pac. lib. ii. c. 3. § 13; Vattel's Law of Nations, Bk. i. c. 19. § 216; Wheaton's Int. Law (Lawrence's 2nd ed.), 208, Pt. ii. c. 2. § 10; Kent's Int. Law (Abdy's ed.), 97-98. Hall's Int. Law (3rd ed.) 245; § 76. This right of jurisdiction of a state is really founded upon its ownership of the ship as property in a place where no local jurisdiction exists, Hall's Int. Law (3rd ed.), 250; § 77.

on the ocean is regarded as a floating portion of the territority of the state to which it belongs. But this, after all, is a mere metaphor, and too much care cannot be taken when it is made the starting point for new inferences. If the figure represented accurately the international status of the ship, one consequence of it would be that she ought to be inviolable at all times and under all circumstances, but we know it to be an admitted principle of international law that in time of war she can be seized and condemned by belligerent states for carriage of contraband or breach of blockade.[1] However that may be, it is certain that all persons on board a vessel in the main occean, whether subjects or foreigners, are bound to obey the law of the state whose flag it sails under, as though they were actually on its territory on land.[2] When a private ship enters the port or (what I shall presently define) the territorial water of another independent state, it becomes subject, in the one case absolutely, and in the other for some purposes only, to the jurisdiction, and consequently to the municipal law, of that state.[3] But ships of war or other public vessels enjoy absolute immunity from the jurisdiction of foreign states even when they lie in the harbours or territorial waters of such states.[4]

If, as I stated just now, the high sea is common to all nations for navigation and fishery, it is evident that the soil of its bed cannot be the exclusive property of any single state, except, however, in those rare cases where a portion of it has been beneficially occupied for a sufficient

[1] Hall's Int. Law (3rd ed.), 244-249; § 76; Maine's Lect. on Int. Law, 86.

[2] 1 Twiss' Law of Nations (2nd ed.), 285-286; § 173. Cf. Judgment of Sir Robert Phillimore in *Reg.* v. *Keyn*, 2 Ex. D. 63.

[3] Wheaton's Int. Law (Boyd's 2nd ed.), 132 § 101; 1 Twiss' Law of Nations (2nd ed.), 272-273; § 166.; Hall's Int. Law, (3rd ed.), 199-200; § 58.

[4] Wheaton's Int. Law (Boyd's 2nd ed.), 132—133, § 101; 1 Twiss' Law of Nations (2nd ed.), 272; § 165; Kent's Int. Law (Abdy's 2nd ed.), 370; Hall's Int. Law (3rd ed.), 191—195; § 55; Maine's Lect. on Int. Law, 91.

The Charkieh, L. R. 4 Adm. & Eccl. 59.

The Constitution, 4 P. D., 39.

The Parlement Belge, 4 P. D., 129; 5 P. D., 197.

With regard to acts committed on board a public vessel, a distinction is drawn between those that begin and end on board the vessel, the consequences thereof taking no effect externally to her, and those that being done on board the vessel result in consequences external to her. In the one case, the jurisdiction of the state to which the vessel belongs, is exclusive. In the other, the state whese territorial laws are infringed must as a rule apply for redress to the government of the country to which the vessel belongs, the latter being alone competent to punish the offender, except in very extreme cases.

length of time by any one state to give it a prescriptive right to that portion by the acquiescence of other states.[1]

I. Extent of territorial water:—Let us next consider the extent of the territorial water of a state and the nature of the sovereignty and dominion which that state is entitled to exercise over it.

First, then, as to the *extent* of this territorial water. The chief reasons which have influenced the publicists from the earliest times in denying to any state exclusive dominion and sovereignty over the main ocean, cease to be applicable when we come to consider the nature of those parts of it which adjoin the coasts of any maritime state. In the vicinity of the coasts of some maritime states are to be found coral, amber, pearl, sea-weed, shell-fish, &c. in the open sea. However bounteous the gifts of nature might be, these sea-products would soon be exhausted, if all the nations of the earth were permitted to appropriate them indiscriminately,[2] while it would be neither unjust nor unprofitable to allow the exclusive appropriation of such products by those states on whose borders they are found.[3] Indeed to allow other nations to participate in them would result in manifest injustice. Besides, every state in the interests of its own safety and self-preservation, is entitled to guard its maritime frontier as against other nations, like any other frontier on land. "It is of considerable importance" says Vattel, "to the safety and welfare of the state that a general liberty be not allowed to all comers to approach so near their possessions, especially with ships of war, as to hinder the approach of trading nations, and molest their navigation."[4] However impracticable it may be for a state to preserve continuous physical possession over its adjoining water, it is doubtless always possible to assert such a domination over them as effectually to exclude every other nation from their use. It is this physical capacity of exclusion which jurists and publicists have almost invariably regarded as the essential constituent of possession.[5] Hence it follows that, every maritime state is

[1] Wheaton's Int. Law (Boyd's 2nd ed.), 220; § 164; *The Twee Gebroeders*, 3 C. Rob. 339; 1 Twiss' Law of Nations (2nd ed.), 295; § 182.

[2] Vattel's Law of Nations, Bk. i. c. 23. § 287.

[3] Puffendorf, de Iur. Nat. et Gent., lib. iv. c. 5. § 9.

[4] Bk. i. c. 23. § 288.

[5] Savigny on Possession, Bk. ii. § 16; Holland's Jurisprudence (4th ed.), 160; 1 Twiss' Law of Nations (2nd ed.), 234—235.

Existimem itaque, eo usque possessionem maris proximi videri porrigendam, quousque

entitled to exercise sovereignty and dominion over a portion of the high seas, within a certain distance from its coasts so far as its safety renders it necessary, and its power is able to assert itself. But as that distance cannot, with convenience to other states, be a variable distance, depending on the presence or absence of an armed fleet, it was necessary that some fixed and determinate limit should be agreed to by the common assent of all states. Bynkershoek in his famous essay, De Dominio Maris, was the first to suggest that the portion of the open sea over which a state could command obedience to its sovereignty by the fire of its cannon from its coast should be considered as a part of its territory: "Quousque è terra imperari potest,—Quousque tormenta exploduntur,—Terrae dominium finitur, ubi finitur armorum vis,[1]"—is his language. Succeeding publicists have one and all accepted this suggestion, and fixed the distance at a marine league from the shore at low tide. It may now be taken as fairly established by the consensus of civilized nations that each maritime state is entitled to the extension of its frontier over the sea which washes its shores to the distance of a league or three sea miles from low-water mark. The great improvements recently effected in the range of artillery, may, perhaps, render it desirable, consistently with the requirements of the principle upon which a state appropriates this marine belt, that its measure of distance should be increased, but this can only be done by the general consent of nations or by specific treaty with particular states.[2] It should be borne in mind, that the

continenti potest haberi subditum; eo quippe modo, quamvis non perpetuo navigetur, recte tamen defenditur et servatur possessio iure quaesita: neque enim ambigendum est *eum possidere continuo, qui ita rem tenet, ut alius eo invito tenere non possit.* Bynkershoek, Dissertatio de Dominio Maris, c. 2.

1 Dissertatio de Dominio Maris c. 2.

The writers who preceded Bynkershoek, entertained vague and widely divergent views as to the distance to which the dominion might be extended. "Albericus Gentilis extended it to one hundred miles; Baldus and Bodinus to sixty; Loccenius (de Iure Maritimo c. iv. § 6) puts it at two days' sail; another writer (Rayneval) makes it extend as far as could be seen from the shore. Valin in his commentary on the French Ordonnances of 1681, (ch. v.), would have it reach as far as the bottom could be found with the lead-line." *Reg.* v. *Keyn*, 2 Ex. D. (63), 176, *per* Cockburn, C. J. See also Wheaton's Int. Law (Lawrence's 2nd ed.), 320; § 6 (note 103).

2 1 Phillimore's Int. Law (3rd ed.), 276; § 198. The Crown of England, under a treaty with the Emperor of China has jurisdiction over British subjects "being within the dominions of the Emperor of China, or being within any ship or vessel at a distance of not more than one hundred miles from the coast of China." 1 Phillimore's Int. Law (3rd ed.), 283; § 199.

three-mile zone around the coasts of a maritime state is termed its 'territorial water,' in a metaphorical sense only, because a certain portion of the high seas can be properly described as territorial, only on the assumption that the sovereignty and dominion of the adjoining state over it is absolute and exclusive, which, however, in the case of the territorial water they are not. To obviate any chance of confusion that may possibly arise from the use of this expression, Sir Travers Twiss prefers to designate this portion of the high seas adjacent to a state as its 'jurisdictional waters.'

II. Sovereignty and dominion over territorial water.—The next and most important branch of our enquiry is, what is the precise nature of the sovereignty and dominion which a state is entitled to exercise over its territorial water? There has been some difference of opinion amongst internationalists upon this matter, but they are clearly agreed so far that, this sovereignty and dominion of the state are not so absolute and paramount over its territorial water as they are over its territory by land and its ports. "This right of dominion or property," says Sir Travers Twiss, "gives to a nation a right to exclude all other nations from the enjoyment of the territory of which it has taken possession, and its right of empire (sovereignty) warrants a nation to enforce its own sanctions against all who would intrude upon its territory."[1] Every state, therefore, in the exercise of its right of dominion, has an absolute right to refuse a passage to foreigners over its territory by land, whether in time of peace or war. But with regard to the passage of foreign ships over its territorial water, internationalists are agreed that a state possesses no such right of interdiction, if such passage be with an innocent or harmless intent or purpose.[2]

Mr. Manning, in his Law of Nations, thus limits the purposes as to which this right of sovereignty and dominion may be exercised :—"For some limited purposes" says he "a special right of jurisdiction, and even (for a few definite purposes) of dominion, is conceded to a state in respect of the part of the ocean immediately adjoining its own coast line. The purposes for which this jurisdiction and dominion have been recognized are— (1) the regulation of fisheries; (2) the prevention of frauds on custom laws; (3) the exaction of harbour and lighthouse dues; and (4) the protection of the territory from violation in time of war between

[1] 1 Twiss' Law of Nations (2nd ed.), 231; § 143.

[2] Hall's Int. Law (3rd ed.), 201-203; § 59; 1 Twiss's Law of Nations (2nd ed.), 302; § 186 *Reg.* v. *Keyn*, 2 Ex. D. (63), 82.

other parties. The distance from the coast line to which this qualified privilege extends has been variously measured,—the most prevalent distances being that of a cannon-shot or of a marine league from the shore."[1] This may be accepted as a fair summary of the purposes for which a state, according to modern international law, may exercise sovereignty and dominion over its territorial water.

But, according to the ancient municipal law of England, the Crown is said to have possessed absolute sovereignty and dominion over the British Seas as against foreign nations, including the right to prohibit foreign vessels from passing over them; and in the controversy regarding the freedom of the seas in the seventeenth century, the English writers and lawyers under the lead of Selden[2] strenuously maintained the right of the Crown of England to these waters, insisting that the title to the sea and to the fundus maris, or bed of the sea—tam aquae quam soli—was in the King. Lord Hale says, "The King of England hath the propriety as well as the jurisdiction of the narrow seas; for he is in a capacity of acquiring the narrow and adjacent sea to his dominion by a kind of possession which is not compatible to a subject; and accordingly regularly the King hath that propriety in the sea."[3] "The narrow sea, adjoining to the coast of England, is part of the waste and demesnes and dominions of the King of England, whether it lie within the body of any county or not."[4] Coke, Bacon, Blackstone and Callis have at different periods re-asserted the same doctrine,[5] and so have the more modern writers.[6] But, in *Reg.* v. *Keyn* the Judges unanimously declared that, such a doctrine had long since been abandoned, though, no doubt, some of them held that it applied to the three-mile zone.

(a.) Sovereignty over territorial water.—The right of sovereignty involves the right of civil and criminal legislation, and if a state had as complete dominion and sovereignty over its littoral sea, as it possesses over its land territory, it would follow that the laws of a state, whether civil or criminal ought, proprio vigore, to apply to its subjects as well as to foreigners within its littoral sea, and no special legislation

1 Manning's Law of Nations (Amos' ed.), 119.

2 1 Bacon's Abr. 640; Co. Litt. 107; Hale, de Iure Maris, cc. 4, 6.

3 Hale, de Iure Maris, c. 6; Hargrave's Law Tracts, 31.

4 Hale, de Iure Maris, c. 4; Hargrave's Law Tracts, 10.

5 Co. Litt. 107, 260*b*; Bacon's Abr. tit. Court of Admiralty; 1 Black. Comm, 110; Callis on Sewers, 39-41.

6 Schultes' Aquatic Rights, 1-5; Chitty on Prerogative, 143, 173, 206; Woolrych on Waters (2nd ed.), 41; Hall on the Seashore (2nd ed.), 2, 3; Morris' Foreshore, 663.

ought to be necessary. But with regard to foreigners in foreign ships navigating this part of the sea, various treaties have been entered into between England and some of the foreign states, and various statutes have been passed by Parliament, for the maintenance of neutral rights and obligations,[1] the prevention of breaches of the revenue[2] and fishery laws, and for relief in certain cases of collision. The treaties and legislation for the first two purposes have been altogether irrespective of the three-mile distance, being founded on a recognized principle of international law, namely, that a state has a right to take all necessary measures for the protection of its territory and its subjects, and the prevention of any infraction of its revenue laws. In the *Twee Gebroeders*[3] Lord Stowell distinctly affirmed the principle that, within a limit of three miles from the coast of a state, all direct hostile operations are by the law of nations forbidden to be exercised. In *Church* v. *Hubbard*,[4] decided in the United States in America, Marshall, C. J., fully explained the principles upon which the right of a state to legislate within this limit for the protection of its revenue is founded. The English legislature has asserted a certain jurisdiction over foreign ships by the 527th section of the Merchant Shipping Act, 17 and 18 Vict. c. 104, which provides that "whenever any injury has in any part of the world been caused to any property belonging to Her Majesty, or to any of Her Majesty's subjects, by any foreign ship, if at any time thereafter such ship is found in any port or river of the United Kingdom, or within three miles of the coast, if it be shown that such injury was probably caused by misconduct, or want of skill of the master or mariners, it may be detained until satisfaction be made for the injury, or security be given to abide the event of any action or suit." The Privy Council in *Rolet* v. *The Queen*,[5] on appeal from a

[1] Cf. The Foreign Enlistment Act (33 & 34 Vict. c. 90), which imposes penalties for various acts done in violation of neutral obligations. It applies to all the dominions of Her Majesty, 'including the adjacent territorial waters.' This statute therefore applies to India and the Colonies.

[2] Cf. 39 and 40 Vict. c. 36, An Act for the consolidation of Acts relating to Customs. S. 179 of this Act embodying the provisions of s. 212 of the previous Act, 16 & 17 Vict. c. 137, enacts that if a foreign vessel is found within three miles of the coast, conveying spirits, tea or tobacco, otherwise than in vessels or packages of certain specified dimensions, the articles in question as well as the vessel itself shall be liable to forfeiture.

[3] 3. C. Rob. 162.

[4] 2 Cranch, (U. S.), 234, cited in *Reg.* v. *Keyn*, 2 Ex. D. 63.

[5] L. R. 1 P. C. 198.

sentence of the Vice-Admiralty Court of Sierra Leone, which had condemned goods and boats seized for breach of the customs ordinances of the Colony, held, that although the Colonial legislature had power to make laws for the protection of its revenue, within a distance of three miles from the shore, yet it being proved in the case that the vessel from which the goods had been unshipped was not within three miles from the shore at the time of the unloading, it was not liable to the harbour dues payable under the customs ordinances. *The Leda*,[1] a salvage case, and *General Iron Screw Colliery Co.* v. *Schurmanns*,[2] a collision case, arose with regard to the construction of certain sections of the Merchant Shipping Act. In the former Dr. Lushington held that s. 330 of the Statute 17 & 18 Vict. c. 104, which is limited in terms to 'the United Kingdom,' included the three miles of open sea round England. In giving judgment, he says:—"Then arises another question—what are the limits of the United Kingdom, according to the intention and true construction of the statute? Now, the only answer I can conceive to that question is, the land of the United Kingdom and three miles from the shore." It might be said that this case had no reference to foreign ships at all; but this objection does not apply to the other case because the circumstances of that one went a good deal further. There the collision had occurred within three miles of the English coast, and the damage was done by a British to a foreign vessel. The owners of the British vessel filed a bill in Chancery to declare a limitation of her liability according to the provisions of s. 504 of the Merchant Shipping Act, 17 & 18 Vict. c. 104. It was admitted that unless there was reciprocity, that is to say, unless the statute might in the like case, have been relied on by the foreign ship, it could not be relied on against her. The question therefore argued was, whether the statute applied to the locality of the collision, and therefore would have applied to the foreign ship. Upon this, Wood, V. C., (afterwards Lord Hatherley), in delivering judgment, said:—"With respect to foreign ships, I shall adhere to the opinion which I expressed in *Cope* v. *Doherty*,[3] that a foreign ship meeting a British ship on the open ocean cannot properly be abridged of her rights by an Act of the British legislature. Then comes the question how far our legislature could properly affect the rights of foreign ships, within the limits of three miles from the coast of this country. There can be no possible doubt that the water below low-water mark is part of the high sea. But it is equally beyond

[1] Swa. Adm. 40. [2] 1 J. & H. 180. [3] 4 K. & J. 367; 2 D. & J. 614.

question that for certain purposes every country, may, by the common law of nations, legitimately exercise jurisdiction over that portion of the high seas which lies within the distance of three miles from its shore. Whether this limit was determined with reference to the supposed range of cannon, on the principle that the jurisdiction is measured by the power of enforcing it, is not material, for it is clear, at any rate, that it extends to the distance of three miles; and many instances may be given of the exercise of such jurisdiction by various nations. This being so, one would certainly expect that that recognized limit would be the extent of the jurisdiction over foreign ships which the Merchant Shipping Act would purport to exercise. In dealing with so large a subject, the natural desire of the legislature would be to exert all the jurisdiction which it could assert with a due regard to the rights of other nations." Further on, he observes:—"Authorities have been cited to the effect that every nation has the right to use the high seas, even within the distance of three miles from the shore of another country; and it was contended that it was not legitimate to interfere with foreigners so using this portion of the common highway, except for the bonâ fide purposes of defence, protection of the revenue, and the like. It is not questioned that there is a right of interference for defence and revenue purposes; and it is difficult to understand why a country having this kind of territorial jurisdiction over a certain portion of the high road of nations, should not exercise the right of settling the rules of the road in the interests of commerce. An exercise of jurisdiction for such a purpose would be, at least, as beneficial as for purposes of defence and revenue."

It follows from the doctrine of exterritoriality of ships, to which I have already adverted, that the criminal law of England applies to British subjects as well as to foreigners[1] on board British ships on the high seas, and that it does not apply to foreigners in foreign ships on the high seas. But the question, whether it applies to foreigners in foreign ships within the territorial water of England, seems never to have arisen before the case of *Reg.* v. *Keyn*,[2] decided in 1876. Before I come to that case I shall call your attention to the course of decisions in this country prior to that date. The qualified power of legislation which the Indian legislature possesses by delegation from the British Parlia-

[1] *Reg.* v. *Sattler*, Dears & B. Cr. C. 526; *Reg.* v. *Anderson*, L. R. 1 Cr. C. 161; *Reg.* v. *Lesley*, Bell, Cr. C. 220, 234.

[2] 2 Ex. D. 63.

ment in consequence of its peculiar position as a dependency of England has served to raise before the Courts in this country some important questions with reference to the territorial water of India, for instance, (1) as to the power of the Indian legislature to make laws affecting British subjects, native or European, navigating such waters in British ships, and (2) as to the extent of the operation of the Indian Penal Code within such limits. The cases, in which these questions have been raised, contain a judicial discussion of some of the points, upon which the solution of the question I have just proposed to consider ultimately depends.

In *Reg.* v. *Irvine*,[1] a certain offence was committed by a European British subject within three miles of the coast of India, and the question arose whether the accused was to be charged according to English law or under the Indian Penal Code. Mr. Justice Holloway suggested that the locality was within the territories of British India, as defined in ss. 1 and 2 of the Indian Penal Code, and that the offence ought to be charged under that Code.

In *Reg.* v. *Elmstone, Whitwell, et al.*[2] one of the prisoners, named Marks, a European British subject, and a seaman on board a British ship, the 'Aurora,' was charged with maliciously destroying the ship by fire on the high seas, at a distance of more than three miles from the shore of British India, and within the Admiralty jurisdiction of the High Court of Bombay. The trial, of course, took place according to the High Court's Criminal Procedure Amendment Act, XIII of 1865, which was the lex fori at the time, but the question arose whether the nature and extent of the punishment to be awarded to the prisoner was to be regulated by the English law, or by the Indian Penal Code. This involved the consideration of several important points, namely:—(*a*) Whether the Governor-General of India in Council had the power to legislate over European British subjects on the high seas beyond three miles from the coast of India, either in British or in foreign vessels, or over foreigners in such parts of the high seas in British vessels? (*b*) Whether there had been in fact such legislation? (*c*) Whether the Governor-General of India in Council had the power to legislate over British subjects within the territorial water of India, or over foreigners

[1] 1 Madras Sessions, 1867, cited in Mayne's Penal Code in the commentary on s. 4.

[2] 7 Bomb. H. C. (Cr. C.) 89. Cf. *Reg.* v. *Thompson*, 1 B. L. R. (O. Cr. J.) 1, (as to the law under which the sentence is to be inflicted under similar circumstances); *The Queen* v. *Mount*, L. R. 6 P. C. 283.

within that limit, and (*d*) Whether the operation of the Indian Penal Code extended over such territorial water? With regard to (*a*), Sir Michael Westropp held that the statute 32 & 33 Vict. c. 98, as well as the statute 28 & 29 Vict. c. 17, left it an open question. With regard to (*b*), he held that Act XXXI of 1838 having been repealed by the Indian Penal Code (Act XLV of 1860) and Act II of 1869, it was unnecessary to determine it, as it depended on the construction of the repealed Act. As to (*c*), he held that having regard to the established rule of international law, and the case of *Rolet* v. *The Queen*,[1] the Indian legislature probably did possess the power of legislating with regard to the high seas within a distance of three miles from the shores of British India. And lastly, as to (*d*), which was the most important of all the points involved in the case, as it is the one with which we are now more directly concerned, the Chief Justice was of opinion that, the words "the whole of the territories which are or may become vested in Her Majesty by the statute 21 & 22 Vict. c. 106",—(by which statute all the territories in the possession or under the government of the East India Company were transferred to the Crown and over which the Indian Penal Code was to have operation), included the maritime territory of British India, or its territorial water. In the result he held that, the offence in question having been committed beyond this maritime territory of British India, the substantive law under which the sentence was to be passed was the English law and not the Indian Penal Code. It might be said that the decision of the Court upon the last point was a mere obiter dictum, because no one ever suggested that the criminal law of a country could have so wide an operation as to extend to persons on the high seas at a distance, as in this case, of more than fifty miles from its shores, yet it shows at any rate that the Chief Justice of Bombay, before whom *Reg.* v. *Irvine*[2] does not appear to have been cited, was disposed to lay down the same doctrine which Mr. Justice Holloway had previously expressed in that case.

This last point, however, arose directly, in the case of *Reg.* v. *Kastya Rama et al.*[3] where the prisoners, native Indian subjects, were charged with having committed certain offences on the high seas, but within three miles from the coast of British India. The case was tried

[1] L. R. 1 P. C. 198.

[2] 1 Madras Sessions, 1867, cited in Mayne's Penal Code in the commentary on s. 4.

[3] 8 Bomb. H. C. (Cr. C. 63). Cf. *Bapu Daldi* v. *The Queen*, I. L. R. 5 Mad. 23.

originally by the Magistrate of the Thana District. The statute 23 & 24 Vict. c. 88, coupled with the statute 12 & 13 Vict. c. 96 had conferred jurisdiction on the Mofussil Courts over persons brought before them charged with offences committed in places where the Admiral had jurisdiction; so that the question of jurisdiction was scarcely mooted in argument. But one of the principal questions discussed was under what law, the English or the Indian, the sentence was to be passed. Kemball & West, JJ., before whom the case had been brought under their revisional jurisdiction, approved of the decision of Holloway, J., in *Reg.* v. *Irvine*,[1] and distinctly declared that the territorial jurisdiction of British India extended into the sea as far as one marine league from its coast, that the Indian Penal Code was applicable to offences committed within this limit, and that therefore the prisoners were rightly punished under the Indian Penal Code. Mr. Justice West, in the course of his judgment, says :— "Writers on international law have recognized the principle that so far as its own subjects are concerned, every state may properly define the limits of its own territories beyond the line of coast. The necessities of orderly government on which this principle rests are as great and obvious in a dependency as in the ruling country. A limit of three miles from shore has thus come to be recognized as undoubtedly within the general powers of legislation conceded to Colonial governments (*Rolet* v. *The Queen*, L. R., 1 P. C. 198); on the same ground of public convenience and necessity it might not unreasonably be argued that these powers extend, except where otherwise expressly restricted, to the making of laws for sea-going vessels engaged in fishing or on voyages from one port in India to another, and the persons on board such vessels."

It is necessary to consider in this connection the effect of the statute 37 & 38 Vict. c. 27, cited as The Courts (Colonial) Jurisdiction Act, 1874, upon the foregoing decisions. It is an Act passed for the purpose of regulating the sentences imposed by Colonial Courts where jurisdiction to try offences is conferred by Imperial Acts. Section 3, among other things, enacts that, when by virtue of any Act of Parliament, a person is tried in a Court of any Colony for any crime or offence committed upon the high seas out of the territorial limits of such Colony, such person shall, upon conviction, be liable to such punishment as might have been inflicted

[1] 1 Madras Sessions, 1867, cited in Mayne's Penal Code in the commentary on s. 4.

upon him, if the crime or offence had been committed within the limits of such Colony. The term 'Colony' in the above section includes British India by virtue of sec. 2 of the Act. It is therefore evident that this statute certainly abrogates the law laid down in *Reg.* v. *Thompson*,[1] *Reg.* v. *Elmstone, Whitwell, et al.*[2] and *The Queen* v. *Mount*,[3] (the last being a decision of the Privy Council), because it is only under Acts of Parliament and not under Acts of the local legislatures that the Indian and the Colonial Courts are empowered to try offences committed on the high seas. But the statute leaves untouched *Reg.* v. *Irvine*,[4] and *Reg.* v. *Kastya Rama et al.*[5] if the high seas within the distance of a marine league from the shores of British India be considered to be within its territorial limits, (as to which, however, the statute is silent), because in that case the local Courts derive their jurisdiction from the Acts of the local legislatures.

You will have observed that in none of the above cases were the Courts called upon to consider, the question whether they had jurisdiction to try and punish foreigners on board foreign ships for offences committed by them within the limits of the territorial waters. That question arose for the first time in England in *Reg.* v. *Keyn*, more popularly called the 'Franconia' case, which, for the profundity of learning, research and legal reasoning displayed in the judgments of some of the most eminent judges who took part on that occasion, will endure as a conspicuous landmark in the legal literature of England. The 'Franconia' a German ship, commanded by Keyn, a German subject, was on her voyage from Hamburg to the West Indies. When within two and a half miles from the beach at Dover and less than two miles from the head of the Admiralty pier, she, through the negligence, as the jury found, of Keyn, ran into the British ship 'Strathclyde,' sank her and caused the death of one of her passengers. The accused Keyn was tried at the Central Criminal Court and convicted of manslaughter under the English law. The learned judge at the trial, Pollock, B., reserved the question of jurisdiction for the opinion of the Court for Crown Cases Reserved. The case was twice argued; the second time before fourteen judges, and the conviction was quashed by a majority of seven to six, one judge Archibald, J., having died before the judgment was given, but whose opinion was known to have been the same as that of the majority. The

[1] 1 B. L. R., (O. Cr. J.,) 1. [2] 7 Bomb., H. C., (Cr. C.), 89. [3] L. R., 6 P. C. 283.
[4] 1 Madras Sessions, 1867, cited in Mayne's Penal Code in the commentary on s. 4.
[5] 8 Bomb., H. C., (Cr. C.), 63.

minority of the Court, Lord Coleridge, C. J., Brett and Amphlett, JJ. A., Grove, Denman and Lindley, JJ., held that by the law of nations, the open sea within three miles of the coast of England is a part of the territory of England as much and as completely as, if it were land, it would be part of its territory, subject, however, to the right of free navigation on the part of other nations, if such navigation be with an innocent or harmless purpose; that this right of navigation is merely a liberty or easement which all the world enjoys in common, and does not by any means derogate from the sovereign authority of the state over all its territory; that consequently every provision of English law, Common or statute law, applies to the whole of this territory; that the Central Criminal Court, which succeeded to the criminal jurisdiction of the Admiral over the seas without the body of a county, had jurisdiction to try the case. Lord Coleridge, C. J., and Denman, J., relied on the further ground that the offence was in contemplation of law wholly committed on board a British ship and therefore within the territorial jurisdiction of England. The majority of the Court, Cockburn, C. J., Kelly, C. B., Bramwell, J. A., Lush and Field, JJ., Sir R. Phillimore and Pollock, B., held that the Central Criminal Court had no jurisdiction, and quashed the conviction. The elaborate judgment of Lord Cockburn, C. J., in which the majority of the Court substantially agreed, proceeded upon the ground that the sovereignty of a state over the seas adjoining its shores exists only for certain definite purposes, for which such sovereignty has been conceded to it by other nations, *i. e.*, the protection of its coasts from the effects of hostilities between other nations when they are at war, the protection of its revenue and of its fisheries, and the preservation of order by its police; that granting that, usage and the common assent of nations have appropriated the sea within three miles of the shore to the adjacent state, to deal with it as such state might think fit and expedient for its own interests, yet such concurrent assent of nations cannot of itself, without express and specific legislation by Parliament, convert that, which before was in the eye of the law high sea, into British territory so as to render the whole of the Common law, and the statutes which have no special reference to such waters, proprio vigore, applicable to it, or invest the municipal Courts with a jurisdiction over foreigners on board foreign ships, a jurisdiction which they did not possess before. Lord Chief Baron Kelly and Sir Robert Phillimore, seemed rather to throw a doubt as to the competency

of Parliament consistently with a due regard to the rights of other nations and the principles of international law, to make the English criminal law applicable within the limits of the territorial water.[1]

In consequence of the decision in this case, which, it may be observed in passing, cannot be considered as altogether satisfactory, the British Parliament shortly after, in the session of 1878, passed a statute, 41 & 42 Vict. c. 73, called the Territorial Waters Jurisdiction Act,[2] which, by virtue of the interpretation clause contained in sec. 6, expressly extends to India and the Colonies. The preamble recites that "the rightful jurisdiction of Her Majesty, her heirs and successors extends, and has always extended over the open seas adjacent to the coasts of the United Kingdom, and of all other parts of Her Majesty's dominions to to such a distance as is necessary for the defence and security of such dominions."

The statute, therefore, is not merely enactive but also declaratory of the existing jurisdiction over the territorial waters. The Act, among other things, provides that, "An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried and punished accordingly;" and it then declares that "The territorial waters of Her Majesty's dominions, in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by the Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

A doubt seems to have been entertained by some of the Judges who were in the minority in the case of *Reg.* v. *Keyn*, whether when an

[1] Sir Henry Maine and Mr. Hall have criticized the opinion of the majority, as being based rather on grounds of municipal than of international law. Maine's Lect. on Int. Law, 38—44; Hall's Int. Law (3rd ed.), 202; § 59 (note).

[2] See Lord Chancellor's (Lord Cairn's) speech introducing the Bill in Parliament. Reprinted in Halleck's Int. Law (Baker's ed.), 559.

offence is committed on board a foreign ship traversing the territorial water of a state, and no one, save its passengers or crew, is concerned in, or suffers from, what is done on board, such state can assume jurisdiction over the offence and punish it. But if a foreign ship lying in, or entering, the port of a state be, as doubtless it is, according to the rules of international law, subject to the jurisdiction of that state, so fully and completely that every offence committed by one foreigner upon another on board that ship becomes cognizable by the criminal Courts of that state concurrently with the Court of the state on which it depends, it seems somewhat difficult to conceive why a different rule should be applied to that ship when she is passing through its territorial water. The difficulty of drawing the line between a vessel which, from stress of weather, casts anchor for a few hours in a bay within the legal limits of a port, though perhaps twenty miles from the actual harbour, and a vessel entering a port, would seem to indicate that the same rule ought to be equally applicable in both the cases. It may also be remarked that the terms of section 2 of the statute 41 & 42 Vict. c. 73, to which I have already referred, are apparently comprehensive enough to include the case in question. The Criminal Courts in France, however,[1] refuse to exercise jurisdiction over offences committed by one foreigner upon another on board a foreign ship, or over acts concerning the interior discipline of that ship, either when it is passing through her territorial water or lying in any of her ports, provided the peace of that port is not affected. The reasonableness and expediency of this practice have been so amply demonstrated by Mr. Hall, that it seems somewhat strange that it should not have yet been adopted by every other state as an international rule.[2]

(b.) Dominion over territorial water.—We have hitherto confined our attention to the nature of the sovereignty or jurisdiction which a maritime state, and particularly England, is entitled to exercise over its territorial sea. We shall now examine the nature of the dominion or right of property which it may exercise over it. Primâ facie, sovereignty and dominion are correlative and co-extensive. When a nation takes possession, for instance, of a vacant tract of land, it acquires, under ordinary circumstances, the dominion or fullest right of property concurrently with the right of sovereignty. But this general rule is liable to modification according to the nature and circumstances of the place of which a nation takes possession. The case of the territorial

[1] Hall's Int. Law, (3rd ed.) 198-199; § 58. [2] Ibid., 201-202; § 59.

waters is one where some modification of the rule is necessary. The nature of both sovereignty and dominion over these waters is somewhat peculiar.

Testing the nature of dominion over these waters by the possible physical uses of which they alone seem to be capable, namely, navigation and fishery, it is undoubted that, unlike the waters encompassed by the territorial limits of a state, these waters are open to the peaceful navigation of the whole world, while at the same time international law has uniformly conceded to every independent littoral state the exclusive right of fishery over its territorial water, to be exercised subject, though it might be, to the overriding and paramount exigencies of navigation.[1] By treaties with France and the United States as well as by the implied assent of nations, the right of fishing within three miles of the coast of the United Kingdom is vested exclusively in the subjects of Her Majesty.[2]

If a state had as complete dominion over this belt of sea, as it possesses over its territory on land, it would follow that its ownership of the subjacent soil would be equally absolute. The fact of encroachments on the sea, by the construction of harbours, piers, forts, breakwaters and the like, generally made by states, is sometimes adduced as evidencing their right of property in the soil of their adjacent waters; but such evidence must, indeed, be regarded as very feeble proof of such proprietary right, as the acquiescence of other states in such encroachments is capable of being explained on the ground that, being made for the benefit of navigation, as they generally are done, they are made for the common benefit of all states, or that, being constructed for the purposes of defence, they are made within the strict limits of the right of self-preservation inherent in all states. Lord Hale, who, as I have already observed, was an implicit adherent of the now exploded doctrine of the sovereignty and dominion of the King of England over the adjacent narrow seas, maintained that the King's right of property or ownership in the sea and the soil thereof was evidenced principally (1) by his right of fishing in the sea, and (2) by his right of property to the shore and the maritime increments.[3]

In England the question regarding the right of the Crown to the

[1] Puffendorf, de Iur. Nat. et Gent., lib. iv. c. 5. § 9; Vattel's Law of Nations, Bk. i. c. 23. § 287. "Who can doubt" says Vattel, "that the pearl fisheries of Bahrem and Ceylon may lawfully become property." 1 Twiss' Law of Nations, (3rd. ed.) 311—313; § 191; Wheaton's Int. Law (Boyd's 2nd ed.), 237; § 177.

[2] Wheaton's Int. Law (Boyd's 2nd ed.), 241.

[3] De Iure Maris, p. 1, c. 4; Hargrave's Law Tracts, 10-17.

bottom of the sea has been incidentally raised in several cases. Passing over *Blundell* v. *Catterall*,[1] *King* v. *Lord Yarborough*[2] and *Benest* v. *Pipon*,[3] in which the proprietary right of the Crown to the land beneath the sea is asserted in general terms, founded, apparently, upon the old doctrine of the narrow seas, which still seemed to linger in the minds of the judges, we come to comparatively more recent decisions, influenced, no doubt by the modern international doctrine of the three-mile zone, in which the ownership of the Crown in the soil of this limited portion of the sea is expressly acknowledged. In *Gammell* v. *Commissioners of Woods and Forests*,[4] in the House of Lords, in which the exclusive right of the Crown to the salmon fishery on the coast of Scotland was in question, Lord Wensleydale in delivering his opinion, said:—"That it would be hardly possible to extend fishing seaward beyond the distance of three miles, which by the acknowledged law of nations belongs to the coast of the country—that which is under the dominion of the country by being within cannon range—and so capable of being kept in perpetual possession." And Lord Cranworth, too, apparently entertained the same opinion. In *Whitstable Free Fishers* v. *Gann*,[5] which involved the right to collect tolls for anchorage beyond low-water mark, Erle, C. J., laid down broadly that "the soil of the sea-shore, to the extent of three miles from the beach, is vested in the Crown." When this case came before the House of Lords on appeal,[6] Lord Wensleydale assented to that rule, but Lord Chelmsford adverting more directly to the above statement of Erle, C. J., observed:—"The three-mile limit depends upon a rule of international law, by which every independent state is considered to have territorial property and jurisdiction in the seas which wash their coasts within the assumed distance of a cannon-shot from the shore. Whatever power this may impart with respect to foreigners, it may well be questioned whether the Crown's ownership in the soil of the sea to this large extent, is of such a character as of itself to be the foundation of a right to compel the subjects of this country to pay a toll for the use of it in the ordinary course of navigation."

The observations in the above cases are no doubt open to the remark that they are mere obiter dicta, and not judicial decisions on the point we are now discussing, but still, as expressing the deliberate opinions of

[1] 5 B. & Ald., 268.
[2] 3 B. & C. 9; 1 Dow's App. Ca. (N. S.) 178.
[3] 1 Knapp, 60.
[4] 3 Macq. 465.
[5] 11 C. B. (N. S.) 387, 413.
[6] 11 H. L. C., 192; see the same case before Exchequer Chamber, 13 C. B., (N. S.) 853.

some of the most eminent judges in England, they are deserving of much considerable weight.

The decision of Sir John Patteson and the statute 21 & 22 Vict. c. 109, The Cornwall Submarine Mines Act of 1858, passed soon after by Parliament to give practical effect to that decision, is sometimes relied upon (and indeed was strongly relied upon by Lord Coleridge, C J., in *Reg.* v. *Keyn*,)[1] as showing conclusively the existence of the right of the Crown to the soil of the open sea below low-water mark. The Duchy of Cornwall, which is vested in His Royal Highness the Prince of Wales, by the Charter of 11 Edw. 3,[2] (having the force of an Act of Parliament), extends into the sea down to low-water mark. Mines in the Duchy existing under the bed of the sea within the low-water mark having been carried out beyond it, a question was raised on the part of the Crown as to (1) whether the minerals beyond the low-water mark, and not within the county of Cornwall, as also (2) those lying under the sea-shore between the high and low-water mark within the county of Cornwall, and under the estuaries and tidal rivers within the county belonged to the Crown or to the Duchy of Cornwall. The matter was referred to the arbitration of Sir John Patteson. The argument on the part of the Crown was that the bed of the sea below low-water mark, and therefore beyond the limits of the county of Cornwall, belonged in property to the Crown. The argument on behalf of the Duchy was two-fold: first, that all which adjoined and was connected with the county of Cornwall passed to the Dukes of Cornwall under the terms of the original grant to them, at the time of the creation of the Duchy; and therefore, that even if the bed of the sea elsewhere belonged to the Crown, it had passed from the Crown to the Dukes in the seas adjacent to Cornwall; secondly, that the bed of the sea did not belong to the Crown, and that the Prince was entitled, as first occupant, to the mines thereunder. As to the property in the mines and minerals lying under the seashore between high and low-water mark within the county of Cornwall, and under the estuaries and tidal rivers within the county, Sir John Patteson's decision was that, they were vested in His Royal Highness as part of the soil and territorial possessions of the Duchy of Cornwall. But on the first point, namely, as

[1] 2 Ex. D., 63.

[2] The charter is set out at length in the *Prince's case* (8 Co. Rep. 1) in which it was decided that this charter had all the effects of an Act of Parliament.

to the property in the mines and minerals lying beyond low-water mark, and not within the county of Cornwall, he expressed himself thus:— "I am of opinion and so decide, that the right to the minerals below low-water mark remains and is vested in the Crown, although those minerals may be won by workings commenced above low-water mark and extended below it." The statute 21 & 22 Vict. c. 109, which gave effect to this decision, went a little beyond the precise terms of this award, and declared and enacted that such mines and minerals were as between Her Majesty the Queen, in right of her Crown, and His Royal Highness the Prince of Wales, in right of his Duchy of Cornwall, "vested in Her Majesty the Queen in right of her Crown *as part of the soil and territorial possessions of the Crown.*"[1]

In India, the Bombay High Court, relying upon the English authorities above adverted to and a few more, have similarly held in two cases, (though the point did not directly arise in them) that the Government is the owner of the soil of the sea within a distance of three miles around the coasts of British India. In *Reg.* v. *Kastya Rama et al*,[2] where one of the points raised, namely, whether the removal of a number of fishing-stakes lawfully fixed in the sea within three miles from the shore by persons other than those who had planted them, constituted an offence under the Penal Code, depended upon a determination of the further question whether the bed of this portion of the sea as well as the fishery therein was or was not a part of the prerogative right of the Crown, West, J., in the course of his judgment, after citing the usual authorities,[3] observed, "These authorities support both the ownership by the Crown of the soil under the sea, and the proposition that the subjects of the Crown 'have also by common right a liberty of fishing in the sea, and in its creeks or arms as a public common of piscary,' 'yet in some cases the King may enjoy a property exclusive of their common of piscary. He also may grant it to a subject; and consequently a subject may be entitled to it by prescription.'[4] The sovereign's rights are as great under the Hindu and Mahomedan systems as under the

1 See the judgment of Lord Coleridge, C. J., in *Reg.* v. *Keyn*, 2 Ex. D. (63) 155-158, and the criticism upon this arbitration by Cockburn, C. J., in the same case. 2 Ex. D. 199-202.

2 8 Bomb. H. C. (Cr. C.) 63.

3 *Blundell* v. *Catterall*, 5 B. & Ald. 268; *Benest* v. *Pipon*, 1 Knapp, 60; *Malcolmson* v. *O'Dea*, 10 H. L. C. 593; *Sir H. Constable's case*, 5 Rep. 1056, and Butler's note to Co. Litt. §. 440.

4 Hale, de Iure Maris, p. 1, c. 4; Hargrave's Law Tracts, 11.

English; but without a minute examination of these, it is sufficient to say that by the acquisition of India as a dependency, the Crown of Great Britain necessarily became empowered to exercise its prerogatives and enjoy its jura regalia in this country and on its coasts, subject always to the legislative control of Parliament."

The position thus laid down by Mr. Justice West was adopted by Sir Michael Westropp in *Baban Mayacha* v. *Nagu Shravucha and others*,[1] and supported in an elaborate, exhaustive and extremely learned judgment by independent reasoning and original research; though, no doubt, the actual circumstances of the case before his Lordship were not such as to necessitate an expression of judicial opinion. It was a civil action for damages and for an injunction to restrain an alleged illegal disturbance of the plaintiff's right to fish and use fishing stakes and nets fixed in the sea below low-water mark and within three miles from the coast. It having been conceded that, in the absence of any appropriation by the Crown of the soil of the territorial water of British India or of the right of fishing therein to any particular individuals, such right was common to all the subjects of Her Majesty, and the Court being of opinion that an interference with the reasonable exercise of that right was actionable, the question we are now considering, namely, as to the right of the Crown to the soil of the territorial water of British India, could not directly arise. The learned Chief Justice, however, fully reviewed almost all the authorities bearing upon the point, and said:—"Howsoever great or small may be the value of the analogy, it may perhaps be well to observe that as in Great Britain the sovereign, as Lord of the Waste, is said to be Lord also of the British territorial waters and the soil beneath them, so in India we find that, as a general rule, its waste lands are vested in the Ruling Power." And then again, after discussing the various authorities which tend to establish the proposition that, the ownership of the beds of tidal rivers in British India is generally vested in the Crown, he puts forth an additional argument thus:—"Assuming, as I think we may, that the proposition—that the beds of tidal rivers in British India are, like those of such rivers in Great Britain, primâ facie, to be regarded as vested in the Crown—is established, the transition thence to the proposition—that the subjacent soil of the British Indian seas, within the territorial limit of three geographical miles from low-water mark, is also vested in the Crown—is (if the like proposition as to

[1] I. L. R., 2 Bomb., 19.

the territorial waters of Great Britain be true) not difficult, for a navigable river, in such part of it as the tide flows and ebbs is an arm of the sea."

The statute 41 and 42 Vict. c. 73, which, as I have already observed, extends also to India, throws no light whatever upon this question. It does not at all declare the law as to the ownership of the bed of the sea below low-water mark. According to the decision of the majority in *Reg.* v. *Keyn*,[1] which is binding on all the Courts in England,[2] it seems now to be finally settled that, no statute having been passed by Parliament appropriating the bed of the territorial water round the British coasts, the Crown has not, except in the case of an uninterrupted occupation for a sufficient time to gain a title by prescription, any right to this bed as against other nations. Notwithstanding the dicta of the learned Judges in *Reg.* v. *Kastya Rama et al*[3] and *Baban Mayacha* v. *Naga Shravucha and others*[4] noticed above, the judgment of the Court of Common Pleas in *Blackpool Pier Co.* v. *Fylde Union*,[5] declaring the effect of *Reg.* v. *Keyn* upon the point under discussion, would seem to render a further consideration of it necessary in India.

According to international law, every maritime state, which takes upon itself the burden and charge of securing and assisting navigation, either by erecting or maintaining lighthouses, or by affixing sea-marks to give notice of rocks and shoals, is entitled to impose a reasonable toll on all who navigate through its territorial water. The right of passage over all portions of the open sea is one of the natural rights of nations, but "every vessel" says Travers Twiss, citing Azuni, "which casts anchor within the jurisdictional waters of a nation, becomes liable to the jurisdiction of that nation in regard to all reasonable dues levied for the maintenance of the general safety of navigation along its coasts. If a vessel merely passes along the coasts of a nation without casting anchor within the limits of a marine league, or without entering any port or harbour, it is not subject to the payment of any territorial dues."[6]

[1] 2 Ex. D., 63.

[2] *The Franconia*, 2 P. D. 163; *Harris* v. *Owners of Franconia*, 2 C. P. D. 173.

[3] 8 Bomb. H. C. (Cr. C.,) 63. [4] I. L. R. 2 Bomb. 19.

[5] 46 L. J. (N. S.) M. C. 189, where the Court of Common Pleas held that the part of a pier below low-water mark was out of the realm, and therefore not rateable to the poor under 31 & 32 Vict. c. 122, s. 27.

[6] 1 Twiss' Law of Nations (2nd Ed.), 305; § 187; Grotius, de Jur. Bell. et Pac., lib. ii. c. 3. § 4.

If then, the law of nations permits every maritime state under the above circumstances to levy such a toll from a foreigner, it is manifest that the municipal law of that state would a fortiori allow such toll to be taken from its own subjects. But the foundation of this right being, in the one case as in the other, the construction and maintenance of some works of public utility calculated to aid and promote the safety of navigation, which may be said to form as it were the quid pro quo for the imposition of such a toll, it is manifest that no state can, without rendering any such corresponding benefit or service, compel its subjects to pay a toll for the use of its territorial water in the ordinary course of navigation; nor can a private individual merely by reason of his ownership of a districtus maris or a portion of the bed of the sea, either under a charter or grant from the sovereign, or by prescription which presupposes such a grant, claim to levy such a toll from persons navigating such waters. "If," says Hale, C. J., "any man will prescribe for a toll upon the sea, he must allege good consideration; because by Magna Charta and other statutes, every man has a right to go and come upon the sea without impediment." And so it has been decided in England, in *Gann* v. *The Free Fishers of Whitstable*,[1] that, the Crown cannot compel its subjects to pay a toll for casting anchor in the ordinary course of navigation in the bed of the territorial water round the British coasts, because the right to cast anchor is merely an incident of the right of free navigation to which every subject is entitled. The Crown may, however, levy such toll, if authorized by an Act of Parliament to do so.

Bays, gulfs and estuaries.—Besides the territorial water, the maritime dominion of every state also extends, according to the law of nations, over arms of the sea, bays, gulfs and estuaries, which are enclosed by headlands belonging to one and the same state, and wherever the sea coast is indented by small bays and gulfs, the territorial water which is superadded to them stretches seaward from an imaginary line drawn from one headland to another.[2] But as there are bays and gulfs of such large dimensions that they could not possibly be said to form a part of the territorial rights of a state, a qualification has been engrafted by the law of nations to the effect that, they must be of such configuration

[1] 11 H. L. C. 193.

[2] 1 Twiss' Law of Nations (2nd Ed.), 293—295; § 181; Wheaton's Int. Law (Boyd's 2nd Ed.), 237; § 177; 1 Phillimore's Int. Law (3rd Ed.), § 188; Hall's Int. Law (3rd Ed.), 153 - 516; § 41.

and extent, that it would be within the physical competence of the state, possessing the circumjacent lands, to exclude other nations from every portion of such seas; or as Martens puts it, "Partes maris territorio ita natura vel arte inclusæ, ut exteri aditu impediri possint, gentis eius sunt, cuius est territorium circumiacens." Upon this principle, the Bay of Bengal, the Bay of Biscay, the Gulf of St. Lawrence, the Gulf of Mexico, the Gulf of Gascony, the Gulf of Lyons, and many similar portions of the high sea have always been regarded as international waters and excluded from the territories of the adjacent states.

Great Britain has immemorially claimed and exercised exclusive property and jurisdiction over the bays or portions of the sea cut off by lines drawn from one promontory to another, and called the King's Chambers. They are considered as included within the bodies of the adjacent counties of the realm, and therefore subject to the operation of the Common law. But the real, and in some cases, perhaps, almost insuperable, difficulty is in determining what bay or gulf should be regarded as included within the territorial dominion of a state. Referring to the Common law of England, we find Lord Hale in his De Iure Maris, laying it down that an arm or branch of the sea which lies within the fauces terrae, so that a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county.[1] This test is indeed extremely vague and indefinite, inasmuch as the distance will clearly vary according to the nature and size of the object to be discerned, although, no doubt, it indicates somewhat Lord Hale's opinion that usage and the mode in which a portion of the sea has been treated as being part of a particular county are material.

In *Reg.* v. *Cunningham*,[2] the question to be determined was whether certain foreigners who had committed a crime in a foreign vessel lying in the Bristol Channel, were subject to the jurisdiction of the Common law Courts in the county of Glamorgan. Although the place where the offence was committed was below low-water mark, beyond any river and at a point where the sea was more than ten miles wide, it was held to be within the county of Glamorgan, and consequently, in every sense of the words, within the territory of Great Britain. Lord Chief Justice Cockburn rested his judgment upon the local situation of that portion of the sea as well as upon the fact that it had always been treated as part

[1] Pt. 1. c. 4; Hargrave's Law Tracts, 10; see also 4 Inst., 140.

[2] Bell, Cr. C. 86.

of the parish of Cardiff, and as part of the county of Glamorgan. This question again arose in a late case[1] before the Privy Council, on appeal from the Supreme Court of the Colony of Newfoundland, with regard to the jurisdiction of that Court over Conception Bay, which lies on the east of that Colony. It is situated between two promontories at a distance of rather more than twenty miles from one another. Its average width is fifteen miles, and the distance of the head of the bay from the two promontories being respectively forty and fifty miles. Lord Blackburn, who delivered the judgment of the Board, said:—"Passing from the Common Law of England to the general law of nations, as indicated by the text-writers on international jurisprudence, we find an universal agreement that harbours, estuaries and bays landlocked, belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is 'bay' for this purpose." "It seems generally agreed that when the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay, it is part of the territory; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting therefore a width of one cannon-shot from shore to shore, or three miles; some a cannon-shot from each shore, or six miles; some an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the Bristol Channel which in *Reg.* v. *Cunningham*,[2] was decided to be in the county of Glamorgan. On the other hand, the diplomatists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays,[3] and Chancellor Kent in his commentaries, though by no means giving the weight of his authority to this claim, gives some reasons for not considering it altogether unreasonable."

"It does not appear to their Lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination. If it were necessary in this case to lay down

[1] *Direct U. S. Cable Co.* v. *Anglo-American Telegraph Co.*, 2 App. Ca. (394), 419.

[2] *Supra.*

[3] His Lordship was here referring to Delaware Bay.

a rule, the difficulty of the task would not deter their Lordships from attempting to fulfil it. But in their opinion it is not necessary so to do. It seems to them that, in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to shew that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclusive) the British Legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland."

It would seem, therefore, to follow from the above two cases that where the configuration and dimension of any bay are of such a nature as to render it extremely difficult, independently of other considerations, to pronounce an opinion as to whether it belongs to the territory of the adjacent state or not, the habitual assertion by such state of sovereignty and dominion over it, by legislation or otherwise, or by the exercise of jurisdiction over it by its tribunals, if followed by the undoubted acquiescence of other nations in such assertion, may be a sufficient and conclusive guide in determining its territorial character.

These landlocked bays, gulfs and estuaries, unlike the territorial waters on the external coast, are subject to the sovereignty and dominion of the circumjacent state, and consequently to the governance of its municipal law, as fully and completely as are its intra-territorial waters.[1]

The soil of the bed of such bays, gulfs and estuaries primâ facie belongs, in England, to the Crown,[2] and in this country to Government.[3] Before the passing of the statute prohibiting the alienation of Crown lands[4] in England, the soil of such bays, gulfs &c., in any portion of the districtus maris could have been communicated to a subject by charter or grant, provided it did not derogate from, or interfere with, the public

1 Grotius, de Iur. Bell. et Pac. lib. ii. c. 3. § 10; Vattel's Law of Nations, Bk. i. ch. 23. § 119; Bynkershoek, Quest. Iur. Pub. lib. i. c. 8; Dissertatio de Dominio Maris, c. 2; Wheaton's Int. Law (Boyd's 2nd ed.), 237; § 177; Hall's Int. Law (3rd ed.), 153-156; § 41; 1 Twiss' Law of Nations (2nd ed.), 293-294; § 181.

2 Hale, de Iure Maris, c. 4; Hargrave's Law Tracts, 10-11. Cf. *The Free Fishers of Whitstable* v. *Gann*, 11 C. B. N. S. 387; see *infra*, Lect. II.

3 Cf. *Baban Mayacha* v. *Nagu Shravucha*, I. L. R., 2 Bomb. (19) 43.

4 1 Anne, c. 7, s. 5.

rights of navigation and fishery over such waters. In the absence of any such statute in this country, it would seem that Government is at liberty to make similar grants to private individuals, unrestrained by any right on the part of the public to fish in such waters[1]—for the Magna Charta does not apply to India—but subject, presumably, to the public right of navigation.

[1] Cf. *Baban Mayacha* v. *Nagu Shravacha*, I. L. R., 2 Bomb. (19) 44.

LECTURE II.

THE FORESHORE OF THE SEA.

The term 'foreshore' a generic expression—Extent of foreshore of the sea—Law takes notice of only three kinds of tides, the high spring tides, the spring tides, and the neap tides—Landward limit of foreshore of the sea according to Roman law—According to French law—According to English law as defined by Lord Hale—As ultimately determined in *Attorney-General* v. *Chambers*—The seaward limit of foreshore—Ownership of the soil of the foreshore of the sea, according to the Roman law—Discrepancies between the texts relating to this subject—How reconciled by Grotius, J. Voet, Vattel, Schultes and Austin—Ownership of the soil of the foreshore of the sea according to English law—According to the law of France—According to the law in this country—Soil of the foreshore claimable by subject, by grant or prescription—Burden of proof upon the subject, both in England and Scotland—Theories as to the foundation of the primâ facie title of the Crown to the soil of the foreshore—Crown's ownership of the foreshore subject to the public rights of navigation, access and fishery—Crown prevented from making foreshore grants by a statute of Queen Anne—The several acts exerciseable over the foreshore—The value of each of these several acts taken singly as well as jointly—*Attorney-General* v. *James*—*Lord Advocate* v. *Blantyre*—*Lord Advocate* v. *Young*—Nature of the restrictions upon the proprietary title of the Crown or of its grantee to the soil of the foreshore—Right of access to the sea—Right of navigation—*Attorney-General* v. *Richards*—*Mayor of Colchester* v. *Brooke*—*Blundell* v. *Catterall*—Right of the public to fish over the foreshore—Right of the public to take sand, shells, seaweed &c.—No such right claimable by custom, either by the general public, or by any portion thereof without incorporation—The Roman Civil law with regard to wreck—Under English law, wreck primâ facie belongs to the Crown—Different species of wrecks—Right of wreck does not imply right to the foreshore, nor vice versâ—Procedure for custody of wrecks and for making claims thereto—Flotsam, jetsam and ligan, called *droits* of the Admiralty—They belong to the Crown unless the owner can be ascertained—*The Pauline*—The provisions of the English Merchant Shipping Act, 17 & 18 Vict., c. 104 with regard to wrecks—The provisions of the Indian Merchant Shipping Act, VII of 1880, on the same subject.

Under this head I propose to discuss the extent and limits of the foreshore of the sea, of estuaries and arms of the sea;[1] the ownership of the soil of such foreshore; as well as some minor topics connected with this subdivision of law.

1 The word "foreshore," as defined by the legislature in 29 & 30 Vict. c. 62, s. 7. embraces "the shore and bed of the sea, and of every channel, creek, bay, estuary, and of every navigable river of the United Kingdom as far up the same as the tide flows." Cf. *Mayor of Penryn* v. *Holm*, 2 Ex. D. 328; 46. L. J. Ex. 506; 37 L. J. Ex. 103. *Trustees* v. *Booth*, 2 Q. B. 4.

The expression 'foreshore,' as a term of art, has been introduced into legal language in comparatively recent years, and is not to be met with in the earlier English text-books or reports of decisions on the subject. In its technical import it is more comprehensive than sea-shore,[1] and includes the shore of every bay, estuary and tidal river, channel or creek between high and low-water mark. Though the nature and some of the legal incidents of the foreshore of the sea are, in many respects, similar to those of the foreshore of tidal navigable rivers, yet on the whole it will be deemed far more convenient to deal with them separately.

Extent of foreshore determined by tides.—The waters of the sea are liable to constant fluctuations and subject to ever-recurring changes; sometimes rising above and overflowing the land; sometimes retiring from and leaving the land dry. When examined, these fluctuations and changes are found to present two widely different characteristics. Some of them observe a fixed periodicity and regularity, in consequence of which they may be described as being ordinary; others observe no such periodicity at all; they occur seldom and at irregular intervals, and for this reason may be regarded as being extraordinary. To the former class belong the physical phenomena known by the denomination of tides; under the latter class may be grouped all inundations and floods as well as all sudden and unusual recessions or derelictions of the sea. The manner, extent and permanency of these changes will be found, as we proceed, to govern and determine the ownership of the soil affected by them.

The seashore separates the sea-bottom on one side from what may be called the terra firma or dry land on the other. In common parlance, the sea-bottom refers to the soil which never becomes dry, notwithstanding changes on the surface of the sea; the terra firma imports land wholly exempt from the action of any of the tides; and the seashore denotes such portion of the intervening land as is alternately covered and left dry by the flux and reflux of the tides, comprising within it all that extensive belt of waste ground or strand of sand, shingles and rock liable to the action of every kind of tide. But definitions or rather descriptions of this kind do not convey anything more than a mere general idea of the subject-matter, and can scarcely be said to be adequate for any scientific purpose. We have all observed that the boundary lines which divide the seashore

1 "That is called an arm of the sea where the sea flows and reflows, and so far only as the sea so flows and reflows," Hale, de Iure Maris, p. 1, c. 4; Hargrave's Law Tracts, 12.

from sea-bottom on one side and from terra firma on the other shift and vary with the nature of the tide. It may, therefore, be expected that a strict legal definition of these boundary lines, will be obtained by a consideration of the nature and effect of the several kinds of tides.

Different kinds of tides.—The law in England ignores those tides, or more properly, floods and inundations which are the result of storm or other temporary or accidental circumstances co-operating with the action of the sun and moon upon the ocean, and takes notice of only three kinds of tides :[1]—

1*st.* The high spring tides, which are the fluxes of the sea at those tides which happen at the two equinoctials.

2*nd.* The spring tides, which happen twice every month at the full and change of the moon.

3*rd.* The neap tides, which happen between the full and change of the moon, twice in twenty-four hours.

From these three kinds of tides would seem to result three distinct shores, each differing from, though overlapping, the other. Indeed, the actual tides are far more numerous than these, because we know that, as a matter of fact, the tides of each day differ from one another, in the limits which they reach. But the variations are too small for the law to take notice of them.

Landward limit of foreshore, (a) according to Roman Law.—The Roman law appears to have had adopted the limit of the highest tide in time of storm or winter as the landward boundary of the litus maris or the seashore. Est autem litus maris quatenus hibernus fluctus maximus excurrit.[2]

1 Hale, de Iure Maris, p. i, c. 6; Hargrave's Law Tracts, 25, 26; *Smith* v. *Earl of Stair*, 6 Bell's App. Cas. 487; Hall on the Seashore (2nd ed.), 10; Morris' Hist. of the Foreshore, 676.

2 Inst. ii. 1. 2. Litus is defined by Celsus thus :—Litus est, quousque maximus fluctus a mari pervenit. Dig. l. 16. 96 pr. According to Cassius :—Litus publicum est eatenus, qua maxime fluctus exaestuat. Dig. l. 16. 112. There seems to be some slight divergence of opinion among some of the English authorities on the Civil law as to the proper interpretation to be put upon the passage quoted in the text from the Institutes of Justinian. According to Lord Stair's exposition, which was adopted by Alderson, B., and Maule, J., as well as by Lord Cranworth, L. C., in *Attorney-General* v. *Chambers* (4 De G. M. & G., 206), the definition contained in that passage refers to the highest *natural* tide as distinguished from the highest *actual* tide, for these, it is said, may be produced by peculiarities of wind or other temporary or accidental circumstances concurring with the flow produced by the action of the sun and moon upon the ocean. Cf. Hall on the Seashore, (2nd ed.) 8; Morris' Hist. of the Foreshore, 674. Sandars apparently adopts the same view, for he translates the passage thus :—

(b) **According to French law**.—The law of France, regulated in this respect by the Ordonnances of 1681, declares that the landward limit of the seashore coincides with the line reached by the highest flood of March (*i. e.* when the sun is near the vernal equinox), though on the sides of the Mediterranean, the limit of the seashore still continues to be determined by the rule of the ancient Roman law.[1]

(c) **According to English law**.—Of the three species of tides I have just mentioned, the Common law of England has selected the third, that is, the neap tides for the purpose of fixing the limit of the seashore. That law gives the shore to the Crown, as a part of its royal prerogative, (a topic on which I shall have occasion to dwell later on at some length,) on the principle that it is land so barren and unprofitable as to be incapable of ordinary cultivation or occupation, and therefore to be regarded in the nature of unappropriated soil. If we apply this test to the high spring tides, it is manifest that they can by no means be taken to determine the extent of the seashore, as a part of the royal demesnes, because they frequently overflow ancient meadows and salt marshes which unquestionably belong to the subject. Nor do the spring tides fulfil this test either. In the marshy districts along the coasts of the sea, the lands which are subject to the action of the spring tides are of considerable extent and value, and by no means so barren and unprofitable as the ordinary seashore or strand. These marshes, indeed, are in many places 'manoriable,' to quote Lord Hale's expression,—and the right to embank and enclose them against the fluxes of the spring tides for the purpose of reducing them to a cultivable condition, is of no small importance to

"The seashore extends as far as the greatest winter flood runs up;" (Sandars' Institutes of Justinian, 2nd ed., 168). But Hunter seems to differ from him, for his rendering, *viz.*,—"The seashore extends to the highest point reached by the waves in winter storms," includes the combined effect of the storm and the winter tide. (Hunter's Roman Law, 1st ed., 164). The latter view seems to accord with the interpretation which the modern Continental civilians have put upon the passage, because Moyle, who professedly bases his commentary and the notes on the authority of the Institutional and other treatises of Puchta, Schrader, Baron, and Vangerow, paraphrases "hibernus" to mean 'per hiemem vel ventis excitatus," *i. e.*, in winter or in time of storm. 1 Moyle's Imp. Iust. Inst., 183. Lord Cranworth, L. C., in *Attorney-General* v. *Chambers*, remarked that, speaking with physical accuracy, the winter tide was not in general the highest.

[1] Sirey, Les Codes Annotes, v. i, § 538, note (n. 34.) The limit of the seashore is defined by art. 1, tit. 7, Bk. iv of the Ordonnances of 1681. Cf. Ibid., note (n. 38). Lands covered at periodical intervals by the waters of the sea forcing themselves through a fissure in a cliff or breach in an embankment occurring unexpectedly are not reputed seashore. Ibid. note (n. 37.)

the lords of adjacent manors and the owners of adjacent lands. The neap tides, primâ facie, seem to indicate the limits which would satisfy the requirements of the test stated above; and, indeed, Mr. Hall in his Essay on the seashore, written so far back as 1830, following the authority of Lord Hale, states it as good law in his day that, the terra firma and the right of the subject in respect of title and ownership extends down to the edge of the high-water mark of the ordinary or neap tides.

Besides, the older authorities on the Common law uniformly describe the "shore," as that which lies within the "ordinary flux and reflux of the tides."[1] In recent times this definition appears to have been judicially recognized in *Lowe* v. *Govett*[2], in England, and in *Smith* v. *Earl of Stair*,[3] in Scotland. But the final precision was given to it in the subsequent case of *Attorney-General* v. *Chambers*,[4] where, after much doubt and discussion, it was finally settled that the seashore landwards, in the absence of particular usage, is primâ facie limited by the line reached by the average of the medium high tides between the spring and the neap, in each quarter of a lunar revolution during the whole year. There the learned Judges, who assisted Lord Chancellor Cranworth in the determination of this somewhat difficult point, accepting as a sound governing principle, Lord Hale's reason for excluding the spring tides, namely, that the lands overflowed by them are, for the most part of the year, dry and 'manoriable,' that is to say, free from the action of the tides during a greater portion of the year, proposed to themselves for answer the question, 'What are the lands which, for the most part of the year, are reached and covered by the tides? For lands which are

[1] Dyer, 326; 2 Roll. Abr. 2, p. 170, l. 43; *Blundell* v. *Catterall*, 5 B. & Ald., 304; Hale, De Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 12, 14.

[2] 3 B. & Ad., 863. Cf. Hale, de Iure Maris, p 1, c. 6; Hargrave's Law Tracts, 12, 26; Hall on the Seashore (2nd ed.), 8; Morris' Hist. of the Foreshore, 674; *Harvey* v. *Mayor of Lyme Regis*, L. R. 4 Ex., 260.

[3] 6 Bell, App. Cas. 487; 13 Jur., 713.

[4] 4 De G. M. & G., 206; 23 L. J. Eq., 662; 18 Jur., 779. Prior to this case, this very point had been raised in Scotland in *Smith* v. *The Officers of State for Scotland*, which came before the House of Lords on appeal and is reported in 13 Jur., 713. Sir Fitzroy Kelly argued that the medium line between the springs and the neaps should be taken as the boundary of the property of the Crown. But the House of Lords expressly abstained from intimating any decisive opinion upon it. It is to be noted that in this case Lord Brougham in extremely emphatic and reverent language defended the high authority of Lord Hale's work, De Iure Maris, the authenticity of which, notwithstanding doubts suggested by Serjeant Mereweather, Mr. Hall and Sir J. Phear, has at last been conclusively established by Mr. Morris. See his Hist. of the Foreshore, 318.

subject to the action of the tides for the most part of the year, being on that account incapable of cultivation and appropriation in the ordinary modes, must evidently constitute the seashore. Now, strictly speaking, the lowest high tides (those at the neaps) are also as much periodical, and happen as often as the spring tides; consequently, lands covered by them cannot be said to be lands which, for the most part of the year, are reached and covered by the tides. But not so are the medium high tides of each quarter of a lunar revolution during the year. They seem clearly to fulfil this condition. "It is true" said the learned Judges "of the limit of the shore reached by these tides, that it is more frequently reached and covered by the tide than left uncovered by it; for about three days it is exceeded, and for about three days it is left short in each week, and in one day it is reached. This point of the shore, therefore, is about four days in every week, that is for the most part of the year reached and covered by the tides."

Lord Cranworth, L. C., thus stated the principle and the rule:— "The principle which gives the shore to the Crown is that, it is land not capable of ordinary cultivation or occupation, and so is in the nature of unappropriated soil. Lord Hale gives as his reason for thinking that lands only covered by the high spring tides do not belong to the Crown, that such lands are, for the most part, dry and manoriable; and, taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is, that the Crown's right is limited to land which is, for the most part, not dry or manoriable. The learned Judges whose assistance I have had in this very obscure question, point out that the limit indicating such land is the line of the medium high tide between the springs and the neaps. All land below that line is more often than not covered at high water, and so may justly be said, in the language of Lord Hale, to be covered by the ordinary flux of the sea. This cannot be said of any land above that line; and I therefore concur with the able opinion of the Judges, whose valuable assistance I have had, in thinking that that medium line must be treated as bounding the right of the Crown."

Seaward limit of foreshore.—For similar reasons, the seaward boundary of the seashore, or in other words, the boundary line which separates the seashore from the sea-bottom, primâ facie, in the absence of particular usage, corresponds to the line reached by the average of the medium low tides between the spring and the neap, in each quarter

of a lunar revolution during the whole year. When, therefore, in charters, grants, or other deeds, land is granted either up to the high-water mark or down to the low-water mark, such grants &c. must be understood to convey land in the one case, up to the line reached by the average of the medium high tides, and in the other, down to the line reached by the average of the medium low tides, between the spring and the neap tides, in each quarter of a lunar revolution during the whole year.

The boundary corresponding to the line of the medium low tide between the spring and the neap tides is also of some, though not of quite as much, practical importance as the other boundary line, because the foreshore may be granted by the Crown to one individual and the soil of the bed of any portion of the sea, districtus maris, in what are called the King's Chambers, or the soil of the bed of an arm of the sea, may be granted to another, in which case the boundary line between the two properties would evidently be this line of medium low tide. The importance of this boundary has been further enhanced in consequence of the recent decision in *Reg.* v. *Keyn*,[1] in which, in the absence of statute, the low-water mark has been held to be the limit of the British territory on the external coast, and the limit of the Common law jurisdiction of counties on the sea-coast.

As these lines vary as the sea encroaches on the land or recedes from it, so the boundaries of the foreshore vary with such encroachment or recession of the sea.[2] But the right of the Crown or its grantees to

[1] 2 Ex. D. 63. Cf. *Blackpool Pier* v. *Fylde Union*, 46 L. J. M. C., 189, in which the necessity for ascertaining the low-water mark arose, for the purpose of determining whether a pier was out of the realm so as to be exempt from the liability of being rated to the poor as an extra-parochial place under 31 & 32 Vict. c. 122, s. 27.

[2] *Scratton* v. *Brown*, 4 B. & C. 485, where Bayley, J., observes "The Crown by a grant of the seashore would convey, not that which at the time of the grant is between high and low-water marks, but that which from time to time shall be between these two termini." It is described as a "moveable freehold" and its validity supported by a reference to 1 Inst., 486.

The rule of Scotch law is similar to this, for with regard to a charter 'with pertinents' and bounded by the sea (which, according to Scotch law, includes the foreshore down to low-water mark), Lord Glenlee thus observed in *Campbell* v. *Brown*, (17 Fac. Coll. on p. 447), "When a landholder is bounded by the sea, it is true he has a bounding charter. But it is a boundary moveable and fluctuating suâ naturâ; and when the sea recedes, he must be entitled still to preserve it as his boundary. The shore is indeed still publici iuris; but when the sea goes back, the shore advances, and the proprietor is entitled to follow the water to the point to

the foreshore, in those systems of law where the Crown does possess this right, is not affected, unless the alteration in the position of those boundaries takes place by slow and imperceptible degrees.[1]

Ownership of the foreshore of the sea (a) according to Roman law.—Having thus ascertained the limits of the seashore according to the Roman law, the French law and the English Common law respectively, let us now proceed to consider in whom the ownership thereof, according to those systems of law, is vested, as well as what the nature of such ownership is.

Having drawn the distinction between 'res in patrimonio,' *i. e.*, things which admit of private ownership, and 'res extra patrimonium,' *i. e.*, things which do not admit of private ownership, Justinian in his Institutes proceeds to classify 'res extra patrimonium' under four heads, *viz.*,—(i) 'res communes.' *i. e.*, things common to all, (ii) 'res publicae,' *i. e.*, things which are public, (iii) 'res universitatis,' *i. e.*, things belonging to a society or corporation, and (iv) 'res nullius,' *i. e.*, things belonging to no one. With regard to the first, *i. e*, the 'res communes,' he says:—The following things are by natural law common to all,—the air, running water, the sea, and consequently the seashore. No one therefore is forbidden access to the seashore, provided he abstains from injury to houses, monuments, and buildings generally; for these are not, like the sea itself, subject to the law of nations.[2]

Marcian from whom the above passage in the Institutes is taken, enumerated the 'res communes' thus:—The following things are by natural law common to all—the air, running water, the sea, and consequently the seashore. No one therefore is forbidden access to the seashore for the purpose of fishing, provided he abstains from injury to houses, buildings and monuments; for these are not like the sea itself, subject to the law of nations.[3]

which it may naturally retire, or be artificially embanked." See opinion of Lord Watson in *Lord Advocate* v. *Young*, 12 App. Ca. (544), 552.

[1] *Rex* v. *Lord Yarborough*, 3 B. & C. 91; s. c. in error, 2 Bligh (N. S.) 147; *Re Hull & Selby Railway*, 5 M. & W., 327. The law appears to be the same in France, because there if the sea encroaches upon the lands of private owners, such lands become part of the sea shore, and subject to the ownership of the state; Sirey, Les Codes Annotes, v. i. § 538, note (n. 38).

[2] Et quidem naturali iure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris. nemo igitur ad litus maris accedere prohibetur, dum tamen villis et monumentis et aedificiis abstineat, quia non sunt iuris gentium, sicut et mare. Inst. ii. 1. 1.

[3] Marcianus:—Et quidem naturali iure omnium communia sunt illa: aer, et aqua profluens, et mare, et per hoc litora maris. Dig. i. 8. 2. 1.

With regard to the use of the seashore and its ownership, the law is thus stated in the Institutes:—

Again the public use of the seashore, as of the sea itself, is part of the law of nations; consequently every one is free to build a cottage upon it for purposes of retreat, as well as to dry his nets and haul them up from the sea. But they cannot be said to belong to any one as private property, but rather are subject to the same law as the sea itself, with the soil or sand which lies beneath it.[1]

There is another passage in the Institutes taken with slight alteration from the Digest, which has some bearing on this matter. It is as follows:—

Precious stones too, and gems, and all other things found on the seashore, become immediately by natural law the property of the finder.[2]

It is also laid down in the Digest that: If by driving piles one erected a structure upon any part of the seashore, he became owner of the soil (soli dominus), but his ownership lasted so long as the structure stood there.[3]

It is quite evident from the words 'and consequently' (et per hoc), in the context, "the sea, and consequently the seashore" (mare et per hoc litora maris) that, according to Roman law, the seashore was considered as a part of the sea, and not of the adjoining land. It would, therefore, seem to follow that the legal incidents of the seashore would presumably be the same as those of the sea itself. But then, if the sea and the seashore are 'res communes,' *i. e.*, common to all, what is the meaning of the passage last cited, namely, "the *public* use of the seashore, (litorum quoque usus publicus) as of the sea itself, is part of the law of nations"? Are the expressions 'communis' and 'publicus' in the

Marcianus:—Nemo igitur ad litus maris accedere prohibetur piscandi causa, dum tamen villis et aedificiis et monumentis abstineatur, quia non sunt iuris gentium sicut et mare Dig. i. 8. 4. To 'piscandi causâ' Gothofred, on the authority of Theophilus, adds in a note "sed et ambulandi et navis religandae causa."

1 Litorum quoque usus publicus iuris gentium est, sicut ipsius maris: et ob id quibuslibet liberum est casam ibi imponere, in qua se recipiant, sicut retia siccare et ex mare deducere. proprietas autem eorum potest intellegi nullius esse, sed eiusdem iuris esse, cuius et mare et quae subiacent mari, terra vel harena. Inst. ii. 1. 5. Cf. Dig. i. 8. 4; i. 8. 5. 1.

2 Item lapilli gemmae et cetera, quae in litore inveniuntur, iure naturali statim inventoris fiunt. Inst. ii. 1. 18.

Florentinus:—Item lapilli, gemmae, caeteraque, quae in litore invenimus, iure naturali nostra statim fiunt. Dig. i. 8. 3.

3 Dig. i. 8. 6 pr.; xli. 1. 14 pr. et 1.

above passages used synonymously ?[1] The classification of 'res extra patrimonium' by Justinian, to which I have already adverted, shows that 'res publicae' form as distinct a co-ordinate species thereof as 'res communes.' They ought, therefore, to be exclusive of one another. Strictly speaking, 'res communes' refer to things which are common to all mankind, and 'res publicae' denote things which belong to, and are used by, the state as a private person, as well as things which are publico usui destinatae, *i. e.*, things, the use whereof belongs to the cives, *i. e.*, all the members of the state, and not to 'communes,' *i. e.*, mankind in general. This verbal discrepancy may possibly be reconciled by the suggestion that the less is included in the greater; that 'usus publicus' is included in 'usus communis,' that although the use of the seashore is common to all mankind, it is not incorrect to say that the use of it is common to all the members of the state, (*i. e.*, the Roman Empire) who form a part of mankind in general.

This community of the seashore is rendered more explicit by Neratius, who says that they are not public in the same sense as those things which are the property of the people at large, (that is to say, as belonging exclusively to a particular state), but in the sense of things provided originally by nature, and not yet brought under any man's ownership.[2]

But if the seashores are 'res communes,' *i. e.*, belonging to all mankind, they must necessarily be beyond the jurisdiction and dominion of the Roman Empire. This, however, seems to be contrary to what Celsus declares:—"It is my opinion that through the whole extent of the Roman Empire, the seashores belong to the Romans; the use of the sea, like that of air, is common to all mankind."[3] It is also inconsistent with what Pomponius says:—"Although what is built by us on the public seashore or in the sea is our own, yet the Prætor's leave must be obtained, in order that such act may be lawful."[4]

1 Barbeyrac in a note to Grotius, de Iur. Bell. et Pac., lib. ii, c. 3. § 9, states that Noodt, in his Probabilia Iuris, lib. i. cc. 7, 8, has proved at large that, according to the language of the ancients on this subject, the terms public and common meant the same thing. And he apparently shares the same opinion.

2 ——————— nam litora publica non ita sunt, ut ea, quae in patrimonio sunt populi, sed ut ea, quae primum a natura prodita sunt et in nullius adhuc dominium pervenerunt, Dig. xli. 1. 14 pr.

3 Litora, in quae populus Romanus imperium habet, populi Romani esse arbitror. § 1. Maris communem usum omnibus hominibus, ut aeris. Dig. xliii. 8. 3.

4 Quamvis quod in litore publico vel in mari extruxerimus nostrum fiat, tamen decretum praetoris adhibendum est, ut id facere liceat. Dig. xli. 1. 50.

Reconciliation of conflicting texts.—Grotius reconciles this conflict of texts by holding that Neratius meant the shore only so far as it is serviceable to those who sail or pass by, but that Celsus spoke of the shore in so far as it is appropriated to some use, as when one builds a structure upon it.[1]

Thus Grotius' view of the Roman law on this subject was, that according to it, the dominion of the Roman Empire over the seashore extended as far as it was actually appropriated by the Roman people.

J. Voet thought that, according to Roman law, the seashore belonged to the people of Rome in this sense, that they could prevent the approach of persons to it, who came there to infest or molest the dwellers on the coasts; that the jurisdiction, which Celsus declared the Roman people possessed over the seashore, was of the same kind as that which Antoninus claimed for himself over the world; that it was merely expressive of the idea of supremacy, and did not include the notion of property.[2]

Vattel thinks that, according to the Roman jurists, the shores of the sea were common to all mankind only in regard to their use; that they were not to be considered as being independent of the Empire.[3]

Schultes states that the gloss upon the Pandects of Justinian[4] (in the Bibliotheca Bodleiana) shows that the ancient civilians considered the seashore and the adjoining sea as being in the protection and under the jurisdiction of the king; and that they have described the sea in regard to its property, use and jurisdiction thus:—'Mare est commune quoad usum, sed proprietas est nullius, sicut aer est communis usu, proprietas tamen est nullius, sed jurisdictio est Caesaris.'

The expression 'res publicae,' according to Austin, has a larger as well as a narrower signification. In the larger sense, all things within the territory of the state are 'res publicae', or belong to the state, in the sense that, it is not restrained by positive law from using or dealing with

[1] Grotius, de Iur. Bell. et Pac., lib. ii, c. 3. § 9, 2.

[2] Ita quoque populi Romani fuit, ad littora sua appulsum denegare nocituris et turbaturis accolarum quietem. Nec alio sensu Celsum in l. littora, 3 ff ne quid in loc. publ. fiat. Scripsisse arbitror littora, in quae populus Romanus imperium habet, populi Romani esse, quam quod in littora illa, quibus aeque ac Oceano Romana terminabatur potestas, et á gentium aliarum terris separabatur, hanc jurisdictionis speciem populus exercuerit; sicut dominium, quod aiunt, superioritatis, non proprietatis, ei Celsus tribuerit; eo modo, quo sibi Antoninus mundi adrogavit dominium in l. 9, ff de lege Rhod. de jactu. J. Voet, Comm. ad Pand, lib. i, t. 8, § 3.

[3] Vattel's Law of Nations, Bk. i, c. 23, § 290.

[4] Dig. i. 8. 3; Vinnius, Comm. ad Instit., lib. ii, t. 1, § 18.

them as it may please. In the narrower sense, it refers to those things which the state reserves to itself. Of the latter, there are some which it nevertheless permits its subjects generally to use or deal with in certain limited and temporary modes. The shores of the sea (in so far as they are not appropriated by private persons,) come within this class of things. He says that 'res publicae', in this latter sense are commonly styled 'res communes,' and that the opinion of the Roman lawyers, that the title of the subjects to the use of 'res communes' was anterior to any that the state could impart, is erroneous.

It has been thought by some writers that the modern doctrine, that the seashore belongs to the state, has been derived from Celsus. But whether this is so or not, it is clear that Austin's view as to the nature of the ownership of the seashore is the inevitable corollary of his system of positive jurisprudence.

(*b*) **According to English law.**—However difficult it may be, amid this conflict of texts and discordance of opinions among the modern civilians to spell out with accuracy the doctrine of the Roman law, the Common law of England on this topic has, from the earliest times, been uniformly clear and consistent. Even Bracton, the earliest writer on the Common law, who is considered to have laid down very nearly the same doctrine on this matter as the ancient civilians did,—indeed, he has been accused by Sir Henry Maine[1] of having directly borrowed from the Corpus Iuris 'the entire form and a third of the contents' of his treatise on English law—said only as follows: Indeed by natural law the following things are common to all:—running water, the air, the sea and the shores of the sea which are, as it were, accessories of the sea. No one is forbidden access to the shores of the sea provided he abstains from injury to houses and buildings generally, because the shores of the sea, like the sea itself are by the law of nations common to all.[2] He did

[1] Ancient Law (4th ed.) 82. In *Benest* v. *Pipon*, 1 Knapp, 60, Lord Wynford, on p. 70, observed "whoever indeed will take the trouble to read Bracton, and our other early writers on the Common law, will be surprised to find the number of doctrines they have adopted, and even whole passages that they have transcribed from the Civil law." See 1 Law, Q. R., 425 (where Mr. Scrutton, after a careful comparison of a large portion of the text of Bracton with that of the Institutes, remarks that Sir Henry Maine's estimate of Bracton's indebtedness to Roman law is excessive); Scrutton, Roman Law in England, 79-121; Bracton's Note Book (Ed. Maitland), Introd., 10.

[2] Naturali vero iure communia sunt omnia haec,—aqua profluens, aer, et mare, et litora maris, quasi maris accessoria. Nemo enim ad litora maris accedere prohibetur, dum tamen a

not add the remainder of the passage from the Civil law, *viz.*,—'but they cannot be said to belong to any one as private property',[1] thereby suggesting the inference that even he did not mean to deny that the ownership of the shores of the sea rested with the king; the use merely, according to him, being common to all.[2]

The soil of the foreshore of the sea, of estuaries and arms of the sea as well as of tidal navigable rivers, is, according to the law of England, primâ facie vested in the Crown[3] by virtue of its prerogative.[4] "Rex in ea

villis et aedificiis abstineat, quia litora sunt de iure gentium communia, sicut et mare. Bracton, lib. ii. f. 7, § 5.

[1] Proprietas autem eorum potest intellegi nullius esse. Inst. ii. 1. 5.

[2] Hall on Seashore (2nd ed.), 105. Mr. Morris controverts Mr. Hall's argument by remarking that Bracton omitted the passage in the Institutes because he must have been well aware that, throughout the kingdom the foreshore, in point of property, was in very numerous places vested in the lords of manors, although subject to the right of the public to use it for certain purposes. Hist. of the Foreshore, 31-33.

[3] *Mayor of Penryn* v. *Holme*, 2 Ex. D., 38; *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C., 192; *Attorney-General* v. *Parmeter*, 10 Price, 378; *Blundell* v. *Catterall*, 5 B & Ald., 268; *Attorney-General* v. *Chambers*, 4 De G., M. & G., 206; *Bagot* v. *Orr*, 2 Bos. & Pull., 472; *Mayor of Colchester* v. *Brooke*, 7 Q. B., 339; *Williams* v. *Wilcox*, 8 Ad. & El., 314; *Mayor of Carlisle* v. *Graham*, L. R., 4 Ex., 361; *Sir Henry Constable's case*, 5 Rep. 106a; Dyer, 326; *Attorney-General* v. *Burridge*, 10 Price, 350; *Lopez* v. *Andrew*, 3 Man. & Ryl., 329; *Lowe* v. *Govett*, 3 B. & Ad., 863; *Scratton* v. *Brown*, 4 B. & C., 485; *Somerset* v. *Fogwell*, 5 B. & C., 883; *Attorney-General* v. *London*, 1 H. L. C., 440; *In re Hull & Selby Railway Co.*, 5 M. & W., 327; *Benest* v. *Pipon*, 1 Knapp., 60; *Attorney-General* v. *Tomline*, 12 Ch. D., 214; 14 Ch. D., 58; *Dickens* v. *Shaw*, Hall on the Seashore (2nd ed.), Apdx.; Hale, de Iure Maris, p. 1, c. 4; Hargrave's Law Tracts, 11, 12; 1 Bla. Com., 110, 264; 8 Bacon's Abr. tit. Prerogative, B. 3; 5 Com. Dig., Navigation, A. B; 1 Kent, Com. 367; 3 Kent, Com., 427, 431; Chitty on Prerogative, 207. Cf. *Malcolmson* v. *O'Dea*, 10 H. L. C., 593; *Bristow* v. *Cormican*, 3 App. Ca., 641; *Neill* v. *Duke of Devonshire*, 8 App. Ca., 135. Mr. Morris has by an elaborate historical examination of all the cases and old records relating to foreshore, endeavoured to prove that the theory of the primâ facie title of the Crown thereto was unknown in England down to the time of Queen Elizabeth, that it was invented for the first time by Mr. Digges in the year 1568, and that it is directly opposed to the actual state of things, because, as he afterwards proceeds to shew, the Crown has to a very large extent granted away the foreshore, and that very little, if any, of it in fact remains vested in the Crown. History of the Foreshore, Introd. i—liv, 638-644. He has also shewn by a review of some of the Scotch cases, that the primâ facie theory was equally unknown in Scotland, until 1849, when it was introduced by a dictum of Lord Campbell in *Smith* v. *Earl of Stair* (6 Bell's App. Cas., 487). Ibid., 573-591.

[4] "By the word 'prerogative' we usually understand," states Sir William Blackstone, "that special pre-eminence which the king hath over and above all other persons and out of the ordinary course of the Common law, in right of his royal dignity. It signifies, in its etymology, (from prae and rogo) something that is required or demanded before, or in pre-

habet proprietatem, sed populus habet usum ibidem necessarium,"[1] is the aphorism of Callis. It is so vested not for any beneficial interest to the Crown itself, but for the purpose of securing to its subjects collectively all the advantages and privileges which can accrue from such property. "All prerogatives," says Bacon,[2] "must be for the advantage and good of the people; otherwise they ought not to be allowed by law." "This prerogative power" says Mr. Chitty "is vested in the king as the protector of his people, and guardian of their rights. It is subservient, however, to those jura communia, which nature and the principles of the constitution reserve for His Majesty's subjects. It can neither prevent them from trading or fishing."[3]

Consequently, this prerogative cannot be exercised so as in any way to derogate from, or interfere with, these privileges of the public, consisting chiefly of the right of navigation, access and fishing.

(*c*) **According to French law.**—Under the law of France too, the right to the foreshore of the sea is vested in the state[4] and may be communicated to a subject by means of a grant (concession).[5]

(*d*) **According to the law in this country.**—In this country the primâ facie title of the Crown to the foreshore of the sea and its arms has not yet been expressly affirmed in any judicial decision. But it is conceived that, whenever the question arises, the rule of English law will be followed, as the primâ facie title of the Crown to the foreshore of tidal navigable rivers, which is a branch of the same rule and dependent upon the same principles as those on which the title to the foreshore of the sea rests, has, as will be shown later, clearly been adopted by the Courts in India.

Foreshore claimable by subject by grant or prescription.—To return to English law: Although the Crown has, primâ facie, this right to the foreshore, yet a subject may have it either by ancient grant or charter or by prescription.[6]

"The sea," said Lord Wynford, in delivering the judgment of the Privy Council in *Benest* v. *Pipon*,[7] is the property of the king, and so is

ference to all others. And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others." 1 Bla. Com., 250.

[1] Callis on Sewers, 55. [2] Bac. Abr. tit. Prerogative, p. 1. [3] On Prerogative, 173.

[4] Code Napoleon, § 538. [5] Sirey, Les Codes Annotes, v. i. § 558, note (nos. 40, 42).

[6] Hale, de Iure Maris, p. i, c. 5; Hargrave's Law Tracts, 17, 18; *Sir Henry Constable's case*, 5 Rep., 107; *Duke of Beaufort* v. *Swansea*, 3 Ex. 413; *Calmady* v. *Rowe*, 6 C. B. 861.

[7] 1 Knapp, 60.

the land beneath it, except such part of that land as is capable of being usefully occupied without prejudice to navigation, and of which a subject has either had a grant from the king, or has exclusively occupied for so long a time as to confer on him a title by prescription: in the latter case a presumption is raised that the king has either granted him an exclusive right to it, or has permitted him to have possession of it, and to employ his money and labour upon it, so as to confer upon him a title by occupation, the foundation of most of the rights of property in land. This is the law of England, and the cases referred to, prove that it is the law of Jersey."

The law of Scotland,[1] upon this point, is the same as that of England; and in both countries, at all events since 1849, the presumption is the same, namely, that the foreshore still belongs to the Crown; and in every case where the subject claims the ownership thereof, the burden is thrown upon him to prove that by charter, grant or prescription it has passed to him.[2]

Theories as to the foundation of prima facie title of the Crown.—Various reasons have from time to time been assigned by judges as well as by text writers for the existence of this right of the Crown to the foreshore. Under the fiction of the feudal law by which all lands in the kingdom are, immediately or ultimately, derived from the king, as lord paramount, the shores and bed of tide waters having no other acknowledged owner are said to have remained vested in him in all cases where he is not shown to have granted them away. The aphorism of Lord Wynford, 'what never has had an individual owner belongs to the sovereign within whose territory it is situated,' evidently borrowed from the writings of Grotius and Puffendorf, the famous expounders of the law of nature, and applied by him to support the prerogative right of the Crown to the land beneath the sea, is merely a logical

[1] Bell's Principles, § 642; Craig's Ius Feudale, lib. i. t. 15. § 12; *Gammel* v. *Commissioners of Woods and Forests*, 3 Macq., 419; *Smith* v. *Officers of State*, 13 Jur., 713; 6 Bell, App. Cas., 487; *Lord Advocate* v. *Blantyre*, 4 App. Ca., 770; *Lord Advocate* v. *Young*, 12 App. Ca., 544.

[2] *Attorney-General* v. *Richards*, 2 Anst., 606; *Scratton* v. *Brown*, 4 B. & C., 485; *Somerset* v. *Fogwell*, 5 B. & C. 875; *Dickens* v. *Shaw*, Hall on the Seashore, Apdx. lxvii; *Blundell* v. *Catterall*, 5 B. & Ald., 268; *Attorney-General* v. *Parmeter*, 10 Price, 378; *Lopez* v. *Andrew*, 3 Man. & Ryl., 329. As to the presumption in Scotland, see *Smith* v. *Officers of State*, *supra*; *Lord Advocate* v. *Young*, *supra*. Until the year 1849, the presumption of law in Scotland was that the seashore had been granted to the subject as 'part and pertinent of the adjacent land, subject to the Crown's right as trustee for public uses'. Bell's Principles, §§ 642, 647. See also cases cited in Morris' Hist. of the Foreshore, 575—576.

deduction from the doctrine of territorial sovereignty, shown by Sir Henry Maine to be distinctly an offshoot, though a tardy one, of feudalism.

Serjeant Woolrych thinks that the king was once in reality the master, as well in right of territory as in right of prerogative, of all the lands within his dominion; that the needy condition of the monarchs and the constant demand for money, in early days, tempted them to dissever their possessions, and that thus in process of time there remained but a small territory which is now known by the terms of Crown or demesne lands, which include the seashore and the soil of tidal waters[1]. Somewhat different, however, is the theory propounded by Mr. Chitty as to the origin of the Crown lands[2].

Mr. Jerwood suggests that at the time of the Norman conquest, William I, having acquired by confiscation all the estates in England, retained in his own possession those lands, including the foreshore, which were not distributed among his followers[3].

The doctrine of the Crown's title as universal occupant, postulated in the formula 'what never has had an individual owner belongs to the sovereign within whose territory it is situated', has been expressly dissented from by Lord Blackburn in a recent case[4] before the House of Lords. In the opinion which his Lordship gave, after quoting Mr. Justice Lawson's remark,—"What ground is there for suggesting that the title" (in that case, the title to the soil of a lake) "was not in the Crown? It is not shown or even suggested to be in any other, and it could not be in the public"—he observed:—"This would be a strong remark if there was any authority for saying that by the prerogative, the Crown was entitled to all lands to which no one else can show a title. But this is so far from being the case, that in the only instance in which no one could show a title, I mean that of an estate granted to one for the life of another, where the grantee died leaving the cestui que vie, the law cast the freehold on the first occupant of the land.[5] It was never thought that the Crown was entitled in such a case."

Nature of the right of the Crown.—If the ownership of the Crown over the foreshore is merely that of a trustee, and the public at large are its cestuis que trustent,[6] it follows that the Crown can make no grant, nor can a subject assert a claim by prescription, (which, indeed, presupposes such a grant), of any portion of the foreshore freed from the

[1] Woolrych on Waters (2nd. ed.), 434.
[2] Chitty on Prerogative, 202-203.
[3] Jerwood on the Seashore, 20-29.
[4] *Bristow* v. *Cormican*, 3 App. Ca., (641), 667.
[5] See Co. Litt., 40.
[6] Phear on Rights of Water, 52.

rights or privileges of the public in respect of navigation, access and fishery.[1]

But such was not the view which the English monarchs in the early days took of their prerogative rights. Unrestrained by the constitutional fetters which popular movement afterwards succeeded in imposing on the royal prerogatives, the English monarchs made grants of foreshores to their subjects, with exclusive rights of fishing over them by means of appliances which were calculated to obstruct or impede the public right of navigation.[2] These were forbidden by the Great Charter, which declared that "all weirs[3] from henceforth shall be utterly put down, by Thames and Medway, and through all England, but only by the sea-coast."[4] But these grants had been so long enjoyed without interruption, that the legislature, though restraining by a statute passed in the reign of Edward III, the erection in future of any kind of obstruction to the enjoyment of the public right of navigation, thought fit to legalize all weirs, gorges &c. which had been erected and exercised before the commencement of the reign of Edward I.

Claim to foreshore by grant.—As I have already said, a subject may claim any portion of the foreshore of the sea under an express grant from the Crown, either (i) as parcel of a manor,[5] or of an adjoining freehold, or (ii) in gross. Claims to the foreshore, however, are as a matter of fact invariably made by lords of manors, in right of their manor.[6]

It would not serve much useful purpose at this day, if I were to take you through the various English cases on the construction of technical expressions used in ancient foreshore grants in gross and grants of manors on the coast. It is, however, important to bear in mind the general

[1] See *Free Fishers of Whitstable* v. *Gann*, 11 H. L. C., 192; *Free Fishers of Whitstable* v. *Foreman*, L. R., 2 C. P., 688; L. R., 3 C. P., 578.

[2] Phear on Rights of Water, 50.

[3] Fixed apparatus for exclusive fishing. Structures projecting into the sea or stream from which the fishermen launched their boats and cast their nets or conducted other fishing operations. See *Malcolmson* v. *O'Dea*, 10 H. L. C., 619, 620; *Neill* v. *Duke of Devonshire*, 8 App. Ca., 135.

[4] 2 Co. Inst. 37. This statute was followed by others which were more effectual, *viz.*, 25 Ed. 3, c. 3; 1 H. 4, c. 12; 12 Ed. 4, c. 7.

[5] The two most prevailing divisions of landed property in England are, (1) manors, which are tracts of freehold land, accompanied by peculiar rights and privileges, and (2) naked freeholds, or freehold lands unaccompanied by any such manorial rights and privileges. Copyholders are mere tenants of the lords of a manor.

[6] Hall on the Seashore (2nd ed.), 17; Morris' Hist. of the Foreshore, 683.

canon of construction, which, after considerable vacillation of opinion, has at last been judicially settled. Until a comparatively recent period the rule established by the general current of authorities was that, grants from the Crown are to be construed strictly and in favour of the Crown; more specially, when they are in derogation of the prerogative of the Crown and in defeasance of the right of the public.[1] But the Privy Council[2] has laid down that the same rules of common sense and justice must apply in the construction of a deed, whether the subject-matter of construction be a grant from the Crown or from a subject—it being always a question of intention to be collected from the language used with reference to the surrounding circumstances. In England, one established rule of construction applicable to grants of sea-coast manors is, that if the boundary be expressed to be down to the sea, it is presumed that the ordinary high-water mark (or, to be more precise, the medium line of high tides between the springs and the neaps) is intended as the boundary line; but if it be expressed to be down to low-water mark, it will include the foreshore.[3]

For a long time the sovereigns of England enjoyed absolute and uncontrolled freedom in making whatever grants they chose of the royal demesnes including the foreshore; but after William III had greatly impoverished the Crown by such grants, Parliament was obliged to interfere and pass a statute,[4] in the reign of Queen Anne, prohibiting the alienation of Crown lands with certain specified exceptions. So much, therefore, of the foreshore as had not been actually aliened by grant and bestowed on lords of manors and other subjects before that period, still remains vested in the Crown,[5] incapable of alienation by it. But it is clear that with

[1] *Royal Fishery of the Banne*, Sir John Davies, 149; *Somerset* v. *Fogwell*, 5 B. & C., 875; *Attorney-General* v. *Farmen*, 2 Lev., 171; Hall on the Seashore (2nd Ed.), 20; Morris' Hist. of the Foreshore, 686—687; Jerwood on Seashore, 60; Forsyth's Constitutional Law, 175; *R.* v. *Mayor of London*, 1 Cr. M. & R., 12; *R.* v. 49 *Casks of Brandy*, 3 Hagg. Adm. R., 271; Feather v. *R.*, 6 B. & S. 283; 35 L. J. Q. B., 204.

[2] *Lord* v. *Commissioners of Sydney*, 12 Moo., P. C. C., 496. In the construction of statutes, however, the recognised rule has been that the prerogative of the Crown cannot be taken away except by express words or necessary implication. *Woolley* v. *Attorney-General of Victoria*, 2 App. Ca., 163.

[3] *Corporation of Hastings* v. *Ivall*, L. R., 19 Eq., 558.

[4] 1 Anne, c., 7. s. 5; see *Doe, d. R.* v. *Archbishop of York*, 14 Q. B., 81; Hall on the Seashore (2nd Ed.), 106; Morris' Hist. of the Foreshore, 781-782; Chitty on Prerogative, 203.

[5] The management of the rights and interests belonging to the Crown, in the shores and bed of the sea and the rivers of the United Kingdom as far as the tide flows, was by 29 & 30

the sanction of Parliament, the Crown can still aliene any portion of the foreshore; for though the Crown may not of its own authority part with any of its prerogatives, yet when the Crown has acted under the authority of Parliament, such alienation is valid.[1]

Claim to foreshore by prescription.—As I have already observed, a subject may also claim a portion of the foreshore by user and prescription, and that again either (i) as parcel of a manor or of an adjoining freehold, or (ii) in gross. It should be borne in mind that although in English law, the term 'prescription' is generally used in a technical sense, as referring to the mode of proof employed to establish what are called incorporeal rights, *e. g.*, easements, profits a prendre &c., yet it is sometimes also used in a general and a wider sense to express merely that the right in question could not be assailed after immemorial enjoyment or enjoyment for a defined statutory period.[2]

The several acts of user or of ownership for the exercise of which the foreshore of the sea appears to afford scope are chiefly these:—(*a*) taking wreck; (*b*) taking royal fish; (*c*) the various incidents of a port; (*d*) fishing; (*e*) mining, digging and taking sand, gravel, sea-weed, &c.; (*f*) egress and regress, and right of way for the purpose of navigation, fishing, bathing and other uses of the sea; (*g*) taking of anchorage and groundage of vessels upon the foreshore; (*h*) embanking and enclosing; and (*i*) punishing purprestures or intrusions, *i. e.*, trespasses.[3]

Lord Hale says: "It"—that is, the shore—"may not only belong to a subject, in gross, which possibly may suppose a grant before time of memory, but it may be parcel of a manor." "And the evidences to prove this fact are commonly these; constant and usual fetching gravel,

Vict. c. 62, s. 7, transferred from the Commissioners of the Woods and Forests to the Board of Trade, who are thereby directed to protect the Crown's rights, to ascertain in what parts of the coast the Crown has parted with its rights, in what parts the rights of the Crown are undoubted, and in what part the title is doubtful; to prevent encroachments on the foreshore, to protect navigation and other public interests, and to sell or lease in certain cases with certain specified restrictions. Cf. 48 & 49 Vict. c. 79.

[1] *Cavilier* v. *Aylwin*, 2 Knapp, 72; *Reg.* v. *Eduljee Byramjee*, 3 Moo. Ind. App., 468; 5 Moo., P. C. C., 294; *Reg.* v. *Aloo Paroo*, 3 Moo. Ind. App., 488; 5 Moo., P. C. C., 296. The following cases show that the prerogative of the Crown to hear appeals cannot be taken away except by express words in a statute. *Cushing* v. *Dupuy*, 5 App. Ca., 409; *Johnston* v. *The Minister & Trustees of St. Andrew's Church*, 3 App. Ca. 159; *Theberge* v. *Laudry*, 2 App. Ca., 102; *In re Louis Marois*, 15 Moo., P. C. C., 189.

[2] Phear on Rights of Water, 68.

[3] Ibid., 89; Morris' Hist. of the Foreshore, 657—661.

and sea-weed, and sea-sand between the high-water and low-water mark, and the licensing others so to do; enclosing and embanking against the sea, and enjoyment of what is so inned; enjoyment of wrecks happening upon the sands; presentment and punishment of purprestures there, in the court of a manor, and such like;" and he adds, "it not only may be parcel of a manor, but de facto, it many times is so; and perchance it is parcel of almost all such manors as, by prescription, have royal fish, or wrecks within their manors. For, for the most part, wrecks and royal fish are not and indeed cannot be well left above the high-water mark, unless it be at such extraordinary tides as overflow the land: but these are perquisites which happen between the high-water and low-water mark; for the sea, withdrawing at the ebb, leaves the wrecks upon the shore, and also those greater fish which come under the denomination of royal fish. He, therefore, that hath wrecks[1] of the sea or royal fish by prescription infra manerium, it is a great presumption that the shore is part of the manor, or otherwise he could not have them."[2]

A few explanatory remarks upon some of the technical expressions I have just used in enumerating the several acts of user or of ownership, may perhaps be thought desirable before I proceed to discuss the question of prescription. The subject of wrecks in general requires a fuller treatment and I propose to deal with it at a later stage of this lecture but for our present purpose, wreck in its specific sense, may be taken to refer to unclaimed ships, and cargo cast on the shore. It belongs to the Crown, as a part of its royal prerogative.

Whale, sturgeon, and porpoise are called royal fishes, and whenever and by whomsoever they are caught in the British seas, they become the property of the Crown by royal prerogative too.[3] They constitute a part of the ordinary revenue of the Crown, and do not belong to it by virtue of, or as incident to, the ownership of the soil of the foreshore. The Crown may grant the foreshore as well as the wreck and the royal fish to the same person, or it may grant them separately to different persons; or it may reserve the foreshore and grant the wreck and the royal fish

[1] *Sir H. Constable's case*, 5 Rep. 107; *Calmady* v. *Rowe*, 6 C. B., 891; *Rex* v. *Ellis*, 1 M. & S. 662; see Round on Riparian Rights, 14.

[2] Hale, de Iure Maris, p. 1. c. 6; Hargrave's Law Tracts, 26, 27.

[3] The prerogatives of royal mines, treasure-trove, and royal fish are not enjoyed by the sovereign in all or even in most countries, and they have not been extended to the East Indian possessions of the British Crown. See *Mayor of Lyons* v. *The East India Company*, 1 Moo., Ind. App., (175) 280, 281; 1 Moo. P. C. C. 175.

only, or vice versâ. When a prerogative right is granted to a subject it is called a franchise.

The privilege of erecting ports at which customable goods may be landed, and of taking dues and tolls as incident thereto, is also a part of the royal prerogative and may be communicated to a subject, as a franchise, without granting any right to the soil, or both may be granted to the same person, or separately to different persons.

Purprestures are encroachments (by the making of enclosures, wharfs, piers, or other similar structures) on the proprietary rights of the Crown in the demesne lands, or in the public rivers, harbours, or highways.[1] They differ from public nuisances, which are violations of, or encroachments on, the rights of the public. The distinction may be thus illustrated. When the owner of the adjoining terra firma, without grant or licence from the Crown, extends a wharf or building into the water in front of his land, it is a purpresture, though the public rights of navigation and fishery may not be impaired.[2] When such a structure interferes with the exercise of the public rights of navigation and fishery or causes injury to any other public rights, it is called a public nuisance. Thus an encroachment may be both a purpresture and a public nuisance. Lords of manors, which include the foreshore, possess the jurisdiction, in their manor courts, of presenting, punishing and putting down inclosures made, or obstructions placed, on the foreshore. Presentment and punishment of purprestures by the lord of a manor, is very good evidence to show that the foreshore on which these trespasses are committed, is a part of the manorial waste.

It is thus evident that neither the taking of wreck, nor royal fish, nor the erecting of ports and taking tolls and dues therein can be adduced as unequivocal evidence of the ownership of the soil of the foreshore. Sir John Phear says, that they cannot be adduced as any evidence of title to the shore, but this statement would perhaps require some qualification,

[1] 2 Co. Inst. 38, 272; Co. Litt. 277*b*; 4 Bla. Com., 167; Hall on the Seashore (2nd ed.), Apdx. I. (note). "Purprestura cometh of the French word *purprise*, or pourpris, which signifieth an enclosure or building, and in legal understanding signifieth an encroachment upon the king, either upon part of the king's demesne lands of his Crown which are accounted in law as *res publicae*; or in the high-wayes, or in common rivers, or in the common streets of a city, or generally when any common nusans is done to the king, and his people, endeavouring to make that private, which ought to be publique." 2 Co. Inst. 272.

[2] Hale, de Portibus Maris, p. 2 c. 7; Hargrave's Law Tracts, 84; Callis on Sewers, 174-175; Woolrych on Waters (2nd ed.), 193-196.

inasmuch as in the case of *Dickens* v. *Shaw*[1] the Court was clearly of opinion that, the taking of wreck by the lord of a manor was evidence of the ownership of the soil of the shore, particularly if it was coupled with other acts of enjoyment, though, no doubt, it also held that taken alone it was not sufficient to confer a title by prescription.

In the same manner, the ownership of a several or exclusive fishery whether in tidal or in non-tidal waters, does not necessarily import the ownership of the subjacent soil.[2] The right to the exclusive fishery and the right to the soil are sometimes found associated in the same person, in which case it is aptly styled "a territorial fishery," but there are, on the other hand, many instances in which they are found disunited, in which case the right to the fishery is regarded as a profit à prendre in alieno solo. The evidence of the ownership of the soil of the foreshore furnished by exclusive fishing cannot therefore be said to be unambiguous in its character. It is otherwise, however, if this exclusive right of fishing is exercised by means of weirs and fixed engines. In that case a very strong inference as to the ownership of the soil arises.[3] According to the latest decisions in England, there is ordinarily a presumption that the several or exclusive fishery carries with it a right to the soil.[4] But the Privy Council has on appeal from Indian cases held that no such presumption exists.[5]

Mining, digging and taking sand, gravel and sea-weed &c. for building, ballast, manure, and so forth are all acts, which are as much likely to be done by the owners of the soil, as by persons possessing the limited rights of profit à prendre; they may also be usurpations or intrusions on the ownership of the Crown, and oftentimes they are so. A custom to dig and take coal or minerals, or sand or gravel or sea-weed, &c. from the foreshore is analogous to the customary right of digging coal or minerals or turf or brick-earth or sand in the waste lands of a manor by the customary tenants. These acts, therefore,

[1] Hall on the Seashore (2nd ed.), Apdx. xlv.

[2] Ibid.

[3] Morris' Hist. of the Foreshore, 658.

[4] *Holford* v. *Bailey*, 8 Q. B. 1000; 13 Q. B. 427; *Marshall* v. *Ulleswater Navigation Co.*, 3 B. & S., 732, 748; 6 B. & S., 570, (in this case Cockburn, C. J. differed from the rest of the Court); Hall on Seashore (2nd ed.), 45-81; *The Duke of Somerset* v. *Fogwell*, 5 B. & C., 875; *Scratton* v. *Brown*, 4 B. & C., 485; *R.* v. *Ellis*, 1 M. & S., 662.

[5] *Forbes* v. *Meer Mahomed Hossein*, 12 B. L. R., 210; 20 Suth. W. R., 45; *Rajah Burda Kant Roy* v. *Baboo Chunder Kumar Roy*, 12 Moo. Ind. App., (145) 155; 2 B. L. R., (P. C.) 1; 11 Suth. W. R., (P. C.) 1.

do not necessarily indicate absolute ownership of the soil in the person who exercises them, but are compatible with the existence of such absolute ownership in some other person. As to egress and regress and right of way for the purposes of navigation and fishing, bathing and other uses of the sea, these acts, like those I have just mentioned, are likely to be done by the owners of the soil, but it is also possible that they may be done by persons who are entitled to mere easements.

Taking salvage for the grounding of ships may possibly be a mere liberty or license, but it is more in the nature of a proprietary act.

Lastly, as to embanking and enclosing and punishing purprestures or intrusions. These are undoubtedly acts of appropriation and do not in any way partake of the nature of liberties, licenses, profits or easements. It is impossible to construe them otherwise than as pure proprietary acts, done either by the actual owner of the soil or by intruders, who must be presumed to have done them with the intention of acquiring actual ownership therein.

Nature of evidence required to establish title by prescription.—Mr. Hall in his learned essay on the seashore has elaborately discussed the question whether a subject may by prescription and user acquire a right to the seashore as against the Crown. He thinks that the various acts, which I have mentioned above, with the exception of the last one, are separable from the ownership of the soil and do not necessarily imply a title to it; and strongly maintains the position that the seashore being in its nature land, nothing short of evidence of adverse occupation and actual possession of the soil continued for a period of sixty years ought to be permitted to prevail against the primâ facie title of the Crown.[1]

Sir John Phear, however, is not quite so hostile to the claims of subjects to the seashore as against the Crown. In a very clear and concise passage he observes: "Almost all beneficial enjoyment of land is necessarily so exclusive in its character as to leave but little opening for question as to the possession; it is only with regard to waste lands, waters and the seashore, that any real doubt can arise. On the other hand, of these latter, the seashore especially is by its very nature so little capable of exclusive possession, that the most undoubted owner of it finds it very difficult to support his title by user. In some sense, ownership may be said to be the aggregate of exclusive

[1] Hall on the Seashore (2nd ed.), 17—108; Morris' Hist. of the Foreshore, 683-784.

easements; the greater the number of them which are openly exercised, the stronger is the probability of the greater right being the true foundation of that exercise; where, as in the case of the seashore, the incidents of enjoyment are very few, it is not easy to say whether the user of one or two of them is to be referred to ownership or to the lesser right. No general rules of guidance can be laid down, but perhaps it may be assumed that to make acts evidence of ownership, they must appear under the circumstances which surround them, to have been done animo habendi, possidendi, et appropriandi."[1]

In deciding claims to the foreshore by prescription and user, it is necessary to bear in mind a distinction generally recognised, and one founded on obvious reasons, that where the foreshore is claimed by a landowner as forming parcel of his land, the question is, so to speak, one of *boundary*; but that where it is claimed in gross, *i. e.*, not as forming parcel of any adjoining land, it is one of *title*. Acts of enjoyment exercised on the foreshore, which are more or less in the nature of mere franchises or liberties or profits à prendre or easements, are less readily construed as evidence of actual ownership of the soil, where the claim to the foreshore is in gross, than where the foreshore is claimed as forming parcel of the adjoining land. Of course, the presumption of ownership of the foreshore arising from the aggregate of these several acts, is in both cases in proportion as they are numerous, extensive and unequivocal. But in the latter case a lesser number of acts would suffice to raise a certain degree of presumption of ownership, than would be necessary to raise the same degree of presumption in the former; because, in that case, these acts, except such as are purely in the nature of franchises, liberties or privileges, are sooner regarded as having been done animo habendi, possidendi et appropriandi, than they are done in this.[2]

Claims to the foreshore by a subject are in England almost invari-

[1] Rights of Water, 88. Mr. Morris practically agrees with Sir John Phear, and dissents from the view put forward by Mr. Hall. He justly remarks that because the Crown only grants a limited and qualified ownership to the subject in the foreshore, the latter cannot from the necessity of the case be expected to shew more than a limited and qualified user of the subject-matter of his grant. Moreover, he adds that the Crown itself could not have had exclusive physical possession of the foreshore by embankment and enclosure thereof. How can it, therefore, require such impossible occupation from its grantee? Hist. of the Foreshore, 702 note (o).

[2] Messrs. Coulson and Forbes remark that there is no reported case in England where a claim to the foreshore in gross has been advanced merely on the basis of prescription and user. Law of Waters, 17.

ably made by lords of seaside manors, and as forming parcel of their manors.[1]

Discussion of English and Scotch cases.—In England in *Attorney-General* v. *James*,[2] *Calmady* v. *Rowe*,[3] *The Duke of Beaufort* v. *Swansea*,[4] and *Chad* v. *Tilsed*,[5] where claims to the foreshore were made by lords of adjacent manors, the evidentiary value of the several acts of enjoyment I have enumerated above, in raising a presumption whether the foreshore formed parcel of the manor or not, was discussed. It is needless to go into them in detail.

In *Attorney-General* v. *James*,[6] the defendant gave in evidence a grant of a manor, with fishery, wrecks of the sea, &c., and also gave in evidence various acts of ownership, such as taking sand and gravel, and preventing others from doing so. The learned Judge told the jury that the grant of the manor did not pass the shore, and left it to them to say whether they were satisfied by the evidence of user that the defendant had acquired a title as against the Crown; but the Court of Exchequer held that this was a misdirection, and that the proper question for the jury was, whether the evidence of user coupled with the grant satisfied them that the defendant had such title.

In Scotland, however, it would seem from the remarks of Lord Fitzgerald,[7] that less amount of proof than what would be necessary in England, would suffice to sustain a claim to the foreshore by an adjacent landowner on the ground of prescription. *Lord Advocate* v. *Lord Blantyre*,[8] and *Lord Advocate* v. *Young*,[9] decided by the House of Lords contain the latest exposition of the law of Scotland on this topic.

In *Lord Advocate* v. *Lord Blantyre*, the claim to the foreshore of a tidal navigable river (and the foreshore of the sea stands on precisely the same footing as the foreshore of a tidal navigable river, so far as regards the question we are now discussing) ex adverso the lands of the pursuers

[1] Hall on the Seashore (2nd ed.), 17; Morris' Hist of the Foreshore, 683; Coulson and Forbes' Law of Waters, 18.

[2] 2 H. & C., 347; 33 L. J. Ex., 249.

[3] 6 C. B., 861.

[4] 3 Ex., 413; see also *Le Strange*, v. *Rowe*, 4 F. & F., 1048.

[5] 5 Moore, 185; 2 Brod. & Bing., 403.

[6] *Supra.*

[7] *Lord Advocate* v. *Young*, 12 App. Cas., 544.

[8] 4 App. Cas., 770.

[9] 12 App. Ca., 544.

(*i. e*, plaintiffs) held on barony titles, was rested on the grounds, first, that the barony titles, (which contained neither any express grant of the foreshore nor any specific boundaries which could be held to include the foreshore) alone gave them a title to it; and secondly, that at any rate the acts of possession enjoyed from time immemorial, coupled with the barony titles, conferred such a title. The acts of possession, proved to have been exercised during a period of forty years, were the pasturing of cattle regularly on the seagreens, cutting reeds and seaweeds, carrying off drift seaweed, carrying away large quantities of sand and stones, and depositing upon the foreshore great quantities of sand and soil dredged from the bed of the river and thereby elevating the surface above the level of high water. The House of Lords held that such acts of possession following on barony titles were sufficient to constitute a right of property in the foreshore, and that it was not necessary to decide the other ground.

Lord Blackburn, in delivering his opinion to the House in that case, thus observed with regard to the weight of each act of possession as evidence:—"Every act shown to have been done on any part of that tract by the barons or their agents which was not lawful unless the barons were owners of that spot on which it was done, is evidence that they were in possession as owners of that spot on which it was done. No one such act is conclusive, and the weight of each act as evidence depends on the circumstances; one very important circumstance as to the weight being, whether the act was such and so done that those who were interested in disputing the ownership would be aware of it. And all that tends to prove possession as owners of parts of the tract, tends to prove ownership of the whole tract; provided there is such a common character of locality as would raise a reasonable inference that if the barons possessed one part as owners they possessed the whole,[1] the weight depending on the nature of the tract, what kind of possession could be had of it, and what the kind of possession was. This is what is very clearly explained by Lord Wensleydale (then Baron Parke) in *Jones* v. *Williams*.[2] And as the weight of evidence depends on rules of common sense, I apprehend, that this is as much the law in a Scotch as in an English Court. And the weight of the aggregate of many such pieces of evidence taken together is very much greater than the sum of the weight of each such piece of evidence taken separately."[3]

[1] See upon this point Mr. Justice Bayley's observations in *Stanley* v. *White*, 14 East, 332.

[2] 2 M. & W., 326, at p. 331.

[3] 4 App. Ca., (770), 791.

Lord Advocate v. *Young*[1] is a stronger case. By sec. 34 (37 & 38 Vict. c. 94) of the Conveyancing (Scotland) Act, 1874, the period of prescription having been reduced from forty years to twenty years, the various acts of possession proved to have been exercised during a period of twenty years, were that the pursuer's (*i. e.*, plaintiff's) predecessors had built a retaining wall upon a portion of the foreshore, that he and his predecessors had taken stone and sand from the foreshore, and that they and their tenants had exclusively carted away the drift sea-ware. The Crown, on the other hand, adduced evidence to show that stones and sand had been taken from the shore to build a harbour, and that the villagers had carried away in creels drift sea-ware. The House of Lords held that the pursuer had given sufficient prescriptive evidence following on his title to confer on him a valid right of property to the solum of the foreshore as against the Crown.

Restrictions upon the proprietary title of the Crown or of its grantee.—Having discussed so far the nature of evidence required to establish the proprietary right of the subject to the foreshore as against the Crown, I next propose to consider the nature of some of the restrictions with which this proprietary right is burdened, whether it still remains in the Crown or has been granted to a subject.

1. **Right of access.**—First: The Crown's ownership of the soil of the foreshore is subject to the right of access to sea, possessed by the owner of the land adjoining the foreshore. The Crown cannot grant the foreshore to a subject free from this burden. It has been held in a very recent case[2] decided by the Privy Council that as against the Crown or its grantee such owner has a private right of access to and egress from the sea, distinct from his public right to the fishery and navigation thereover; and where there is an invasion of such right by means of reclamation and other works (*e. g.*, the erection of a quay or a pier) executed on the foreshore in front of his land by the Crown or its grantee, such owner is entitled to recover damages.[3] Besides the owner of the land adjoining the foreshore, every member of the public has a right of

[1] 12 App. Cas., 544.

[2] *Attorney-General of the Straits Settlement* v. *Wemyss*, 13 App. Cas., 192. Cf. *Lyon* v. *Fishmongers' Company*, 1 App. Cas., 662; *North Shore Railway Co.* v. *Pion*, 14 App. Cas., 612.

[3] In England the dignity and prerogative of the Crown does not allow a petition of right for a tort committed by itself, but according to the law of the Straits Settlement (whence this appeal was brought before the Privy Council), the Crown can be sued in tort. *Attorney-General of the Straits Settlements* v. *Wemyss*, 13 App. Cas. 192.

access to the sea, for the purposes of navigation and fishing, though he may only get to the foreshore by means of a public highway.[1]

2. **Right of navigation.**—Secondly: This ownership of the Crown is also, as I mentioned before, subservient to the public right of navigation, and cannot be used in any way so as to derogate from, or interfere with, such right. The grantees of the Crown, consequently, take subject to this right, and any grant to a subject which interferes with the exercise of this public right is void as to such parts as are open to such objections, if acted upon so as to work an injury to the public right.[2] Any such interference with the public right will be abated as a nuisance. In the case of *Attorney-General* v. *Richards*,[3] it appeared that the defendants had built certain permanent structures in the Portsmouth harbour between high and low water-marks, which prevented vessels from passing over the spot or mooring there, and also endangered the navigation of the harbour by preventing the current of water from carrying off the mud. The structures were held to be nuisances, and defendants were restrained from making further erections, and were ordered to abate those already built. Every structure erected on the foreshore, however, is not necessarily a public nuisance. It becomes a public nuisance only when it interferes with the exercise of this public right. What is a public nuisance is therefore a question of fact to be decided according to the circumstances of each case.[4]

If an act be done for a public purpose and be productive of a counterbalancing advantage to the public in the exercise of that very right, the invasion of which constitutes the supposed nuisance, it is really within the trust, so to speak, of the Crown, and not wrongful.[5]

Although, neither the Crown nor its grantee is competent to obstruct the navigation, there can be no doubt that an obstruction authorized by Parliament would be lawful.[6]

The public right of navigation carries with it certain incidental pri-

[1] Hall on the Seashore (2nd ed.,) 172; Morris' Hist. of the Foreshore, 847-848.

[2] *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C., 192; *Attorney-General* v. *Burridge*, 10 Price, 350; *Attorney-General* v. *Parmeter*, 10 Price (378), 412.

[3] 2 Anst., 603.

[4] *Attorney-General* v. *Richards*, 2 Anst., (603), 615; *Attorney-General* v. *Burridge*, 10 Price, 350; *Reg.* v. *Betts*, 16 Q. B., 1022; *Reg.* v. *Randall*, 2 Car. & M., 496; *Attorney-General* v. *Terry*, L. R., 9 Ch., App., 423.

[5] *Rogers* v. *Brenton*, 10 Q. B., 26.

[6] *Rex* v. *Montague*, 6 D. & R., 616; 4 B. & C., 598.

vileges, such as the right to anchor, which involves the use of the soil beneath the water as well as of the water itself. The right of anchorage is essential to the full enjoyment of the right of navigation, and if reasonably and properly exercised, is protected like the principal right, even though it may cause a temporary disturbance of the soil, or an unavoidable injury to an oyster bed there planted.[1] Although this right of passage over water may be unlimited as regards locality,[2] yet it would seem that the right to anchor is confined to such places alone as are usual and reasonable having regard to the condition of the particular place.[3]

In *Mayor of Colchester* v. *Brooke*,[4] it was held that the right of passage in a river, and a fortiori in the sea,[5] exists at all times and states of the tide, and that it is no excess of this right if a vessel which cannot reach its destination in a single tide, remains aground till the tide serves again.

This right of passage was held in *Blundell* v. *Catterall*,[6] (a somewhat old case), not to extend, in the absence of necessity or of prescription, to the right of crossing the foreshore when it is dry at low-water for the purpose of bathing, fishing, landing goods, or of navigation, where the foreshore is vested in a private individual. In a supplemental chapter[7] of his essay on the seashore, Mr. Hall has elaborately and very forcibly combated the reasons for the judgment pronounced in that case and has adduced most excellent arguments to shew that the grounds, upon which the general right of the public to cross the seashore for the purpose of bathing was denied in that case, cannot reasonably be sustained. It may, perhaps, be worth while to observe, in further support of Mr. Hall's position, that as the owner of the foreshore in that case had the exclusive right of fishing thereover with stake nets under a valid grant created by the Crown before Magna Charta, the ultimate determination at which the Court arrived might well perhaps be upheld without acknowledging the necessity of affirming the very broad proposition, that the public has no right to cross the shore at low-water mark at any place; because the

1 *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C., 192; *Mayor of Colchester* v. *Brooke*, 7 Q. B., 339.

2 *Rex* v. *Ward*, 4 A. & E., 384.

3 *Williams* v. *Wilcox*, 8 A. & E., 314.

4 7 Q. B., 373.

5 *Blundell* v. *Catteral*, 5 B. & Ald., 268.

6 *Ibid.*

7 (2nd ed.), 155—186; Morris' Hist. of the Foreshore, 833—860.

unrestrained liberty of the general public to pass and repass over the foreshore is really incompatible with the exclusive right of a private owner to fish over any particular spot with what are called stake nets planted in the soil. Moreover, the grounds of decision in that case seem to be inconsistent with the judgment in *Bagot* v. *Orr*[1] where it was held that, the public has a right by Common law to take shell-fish from the shore, such as lobsters, crabs, prawns, shrimps, oysters &c. even though the proprietary right to the particular spot may be in a private individual. If a man is not a trespasser when he is up to his knees or neck in water in search of a lobster, a crab or a shrimp, it would indeed be a strange anomaly, if he were to be treated as such when he goes there for bathing. In fact, later decisions[2] seem virtually to have overruled the dicta in *Blundell* v. *Catterall*,[3] and it is doubtful whether they would be supported at the present day. If the proprietary right of the Crown or of its grantee were, subject to the public rights of navigation and fishing, so exclusive and absolute in its character, as it was declared to be by the learned Judges (except Best, J.,[4]) in that case, it would follow that even the owner of the land adjoining the foreshore would have no right of access to, and egress from, the sea over the foreshore where it happened to be vested in a subject (other than himself) by a grant from the Crown; but this, however, would, as I have already pointed out, be contrary to the rule of law established by the highest authority.[5]

With regard to the public right of way along the coast at high water for the purpose of navigation or fishing, Mr. Hall thus argues:— "The law, for instance, will compel him" *i. e.*, the fisherman or the navigator "to take the usual and public road down to the sea-side, if there be one within reasonable and convenient distance; but when there, how is he to reach his boat which may be a mile off along the shore, at the time of high water, unless he can go along the edge of the coast on the terrâ firma to his boat? It would be a serious obstruction to the fishery if he must bring his boat where the old road runs into the sea, and nowhere else. So, when in the sea, if he desire to land his fish, his mer-

[1] 2 Bos. & Pul., 472.

[2] *Marshall* v. *Ulleswater* Co. L. R., 7 Q. B., 166; *Mayor of Colchester* v. *Brooke*, 7 Q. B., 339.

[3] 5 B. & Ald. 268.

[4] Afterwards, Lord Wynford.

[5] *Attorney-General of the Straits Settlement* v. *Wemyss*, 13 App. Cas., 192. Cf. *Lyon* v. *Fishmongers' Company*, 1 App. Cas., 662; *North Shore Railway Co.* v. *Pion*, 14 App. Cas., 612.

chandise (not customable) or himself, at the time of high water, unless he is allowed a way along the terrâ firma to the next public road, he cannot land at all; wherefore in all such cases, at the time of high water, there must be a Common law right of way, along the dry land to the nearest inland road."[1]

3. **Right of fishery.**—Thirdly: The ownership of the foreshore by the Crown is also burdened with the public right of fishing thereover.[2] The Crown cannot since Magna Charta grant to a subject an exclusive right of fishery over the foreshore, nor grant any portion of the foreshore itself freed from this public right. An exclusive right of fishery in the sea or over the foreshore can now be claimed by a subject only under express grant from the Crown made prior to Magna Charta or by prescription, or ancient enjoyment presupposing such a grant.[3] This right of the public to fish has been held to include the taking of shell-fish, but not perhaps of shells.[4] This public right is, however, subservient to the paramount right of navigation.[5] Whether the fishermen and others have a right to drag up their vessels above the reach of the tides, upon the banks, for security and for repairs, as is the general practice, does not seem ever to have been decided; but this seems essential to the exercise of the right of fishing, and would therefore be supported. It is incontestable that immemorial custom will entitle the fishermen of a sea village to beach their boats in winter on ground adjoining the foreshore.[6]

There is no general right in the public to enter the foreshore and take sand, shells and sea-weed.[7] These being either part or natural products of the soil of the foreshore, belong primâ facie to the Crown or its grantees. When the soil of the foreshore still remains vested in the Crown, the removal of these things by the public is attributable rather to forbearance or non-intervention on the part of the Crown, than to the existence of any right in them.[8] A lord of a manor cannot claim a

[1] Hall on the Seashore (2nd ed.,) 176-177; Morris' Hist. of the Foreshore, 851-852.

[2] *Fitzwalter's case*, 1 Mod, 105; *Warren* v. *Mathews*, 1 Salk., 357; *Smith* v. *Kemp*, 2 Salk., 637; *Ward* v. *Cresswell*, Willes, 265; *Bagot* v. *Orr*, 2 Bos. & Pul., 472; *Carter* v. *Murcot*, 4 Burr., 2163; *Neill* v. *Duke of Devonshire*, 8 App. Cas., 135.

[3] *Malcolmson* v. *O'Dea*, 10 H. L. C., 593; *Neill* v. *Duke of Devonshire*, 8 App. Cas., 135.

[4] *Bagot* v. *Orr*, 2 Bos. & Pul., 472.

[5] *Attorney-General* v. *Parmeter*, 10 Price., 378; *Attorney-General* v. *Johnson*, 2 Wils., 87.

[6] *Aiton* v. *Stephen*, 1 App. Cas., 456.

[7] *Howe* v. *Stowell*, 1 Al. & Nap., 356; *Bagot* v. *Orr*, 2 Bos. & Pul., 472.

[8] Per Best, J., in *Dickens* v. *Shaw*, Hall on the Seashore, (2nd ed.,) Apdx., lxviii.

right to cut sea-weed below low-water mark except by grant from the Crown or by prescription.[1] When, however, the sea-weed is thrown over the land of the adjacent owner by extraordinary tides,[2] or when the sand is drifted by wind over his land, it becomes the property of such owner.[3]

Neither the inhabitants of a town, which is not incorporated, nor the general public can claim a right by custom or prescription to take sand, shingle, or cut sea-weed from the foreshore, because such an unlimited enjoyment as the claim imports, might not only soon exhaust but be altogether destructive of the subject-matter of the claim.[4] The reasons for the opinions delivered in *Goodman* v. *The Mayor of Saltash*[5] decided lately by the House of Lords, would, however, go to to shew that a limited claim by the inhabitants of a borough, even though not incorporated, to take such sea-ware would be valid according to law.

The Roman law regarding wreck.—The Civil law with regard to wrecks is thus laid down by Justinian. "It is otherwise with things which are thrown overboard during a storm, in order to lighten the ship; in the ownership of these things there is no change, because the reason for which they are thrown overboard is obviously not that the owner does not care to own them any longer, but that he and the ship besides may be more likely to escape the perils of the sea. Consequently any one who carries them off after they are washed on shore or who picks them up at sea and keeps them, intending to make a profit thereby, commits a theft; for such things seem to be in much the same position as those which fall out of a carriage in motion unknown to their owners."[6]

[1] *Benest* v. *Pipon*, 1 Knapp., 60.

[2] *Lowe* v. *Govett*, 3 B. & Ad., 863; *Baird* v. *Fortune*, 7 Jur. N. S., 926, per Lord Campbell, C. J.

[3] *Blewitt* v. *Tregonning*, 3 A. & E., 554.

[4] *Race* v. *Ward*, 4 E. & B., 702; *Constable* v. *Nicholson*, 14 C. B. N. S., 230; 32 L. J. C. P., 240; *Blewitt* v. *Tregonning*, 3 A. & E., 554; *Padwick* v. *Knight*, 7 Ex., 854; *Attorney-General* v. *Mathias*, 4 K. & J., 579; *Lord Rivers* v. *Adams*, 3 Ex. D., 361.

[5] 5 C. P. D., 431; 7 Q. B. D., 106; 7 App. Cas, 633.

[6] 2 Moyle, Imp. Iust. Inst. 46. Alia causa est earum rerum, quae in tempestate maris levandae navis causa eiciuntur. hae enim dominorum permanent, quia palam est eas non eo animo eici, quo quis eas habere non vult, sed quo magis cum ipsa nave periculum maris effugiat: qua de causa si quis eas fluctibus expulsas vel etiam in ipso mari nactus lucrandi animo abstulerit, furtum committit. nec longe discedere videntur ab his, quae de rheda currente non intellegentibus dominis cadunt. Inst. ii. 1. 48. Cf. Dig. xli. 1. 9. 8. See J. Voet, Comm. ad Pand. lib. xli. t. 1. § 9.

Thus, according to the Civil law, wreck in general, whether taken while floating on the sea, or when cast on the shore, belonged to the first finder, unless the real owner claimed them, in which case they had to be restored to him, but no time apparently was specified within which the real owner was to assert his claim.

English law regarding wreck.—But such is not the law of England or of this country either. According to English law, all wrecks primâ facie belong to the Crown by virtue of the royal prerogative.[1] The reason for this, as stated by Lord Coke, is founded upon the two main maxims of the Common law: first, that the property in all goods whatsoever must be in some person; secondly, that such goods, as no subject can claim any property in, belong to the king by his prerogative as treasure trove, strays and others.[2]

The origin of this branch of the prerogative is now somewhat obscure. It has been said by some that the king, in ancient times was obliged at heavy expenses to occasionally scour the seas of robbers and pirates who committed depredations on the ships, and that all wrecks were assigned to him to meet these expenses.[3]

Different species of wrecks.—Wreck, in its generic sense, may be defined as goods floating on the sea or stranded below high-water mark, which have ceased, either actually or constructively to be in the possession of their owner.[4] It consists of four species:—(1) wreck property so called, flotsam, jetsam and ligan.

1. *Wreck,* property so called, refers to those goods which are cast or left on the shore. Wreccum maris significat illa bona quae naufragio ad terram appelluntur.[5]

2. *Flotsam* refers to goods floating on the sea, after a ship or vessel has sunk or otherwise perished.[6]

Si quis merces ex nave jactatas invenisset, num ideo usu capere non possit, quia non viderentur derelictae, quaeritur? Sed verius est eum pro derelicto usucapere non posse. Dig. xli. 7. 7. (Marcian).

1 2 Inst., 167; *Sir Henry Constable's case,* 5 Rep., 106; 6 Mod., 149. Anon.; Hall on Seashore (2nd ed.,) 44; *Sutton* v. *Buck,* 2 Taunt., 355; Woolrych on Waters, (2nd ed.) 14; Hale, de Iure Maris, p. 1. c. 7; Hargrave's Law Tracts, 37-39.

2 2 Inst., 167; Schultes' Aquatic Rights, 130; Woolrych on Waters (2nd ed.), 14.

3 2 Inst., 168; *Sir H. Constable's case,* 5 Rep. 106; Hale, de Iure Maris, p. 1. c. 7; Hargrave's Law Tracts, 41—42; Woolrych on Waters, (2nd ed.), 14.

4 Phear on Rights of Water, 99 (note).

5 *Sir Henry Constable's case,* 6 Rep., 106; 2 Inst., 166.

6 *Sir Henry Constable's case,* 5 Rep., 106. "Flotsam is when the ship is split and the

3. *Jetsam* refers to goods cast into the sea and abandoned for the purpose of lightening the ship when it is in danger of being sunk, and afterwards the ship perishes.[1]

4. *Lagan* or *Ligan* (from ligo to tie) refers to heavy goods cast into the sea for the purpose of lightening the ship (which, nevertheless, afterwards perishes) with a buoy or float attached to them for the purpose of assisting in their future recovery.[2]

The first is denominated wreccum maris, and the rest adventurae maris.

Thus when flotsam, jetsam, or ligan are cast on the shore by the sea they are all called wreck.

The right of the Crown to wreck is distinct from, and independent of, the ownership of the shore, and the right to wreck on the shore may be granted to a subject apart from the shore itself.[3]

Wreck property so-called, frequently exists as a franchise attached to sea-coast manors. It may be claimed by a subject not only by grant but also by prescription.[4]

Right of wreck does not imply right to foreshore, nor vice versa.—A grant of the shore alone does not pass the right of wreck, nor does the grant of wreck alone pass the right to the shore, though it may be called in as evidence in support of a claim to the shore.[5] Lord Hale laid down that the perception of wreck furnishes a very strong proof of the existence of a right to the shore, but this rule has not been adopted in modern cases. Where the right to wreck is granted to a subject apart from the shore itself, which remains either in the Crown, or is granted to another subject, the grantee of the wreck has the right to cross the shore for the purpose of taking it.[6]

Conditions which wrecks must fulfil.—But all goods cast on the shore are not deemed wrecks so as to become the property of the Crown or of its grantee. They must fulfil these conditions :[7]—

goods float upon the water between high and low-water marks." Schultes' Aquatic Rights, 131. This seems, however, to be at variance with the description given in *Sir H. Constable's case*

[1] *Ibid.* [2] *Ibid.*

[3] 2 Inst., 168 ; *Sir H. Constable's case*, 5 Rep., 106 ; Hale, de Iure Maris, p. 1. c. 7 ; Hargrave's Law Tracts, 41-42 ; Woolrych on Waters (2nd ed.), 14.

[4] Hale, de Iure Maris, p. 1. c. 7 ; Hargrave's Law Tracts, 41 ; see *Talbot* v. *Lewis*, 6 C. & P. 603.

[5] *Dickens* v. *Shaw*; Hall on the Seashore (2nd ed.), Apdx., 45.

[6] *Alcock* v. *Cooke*, 2 M. & P., 625.

[7] Hale, de Iure Maris, p. 1. c. 7 ; Hargrave's Law Tracts, 34.

(1) The ship which carried these goods, or the goods themselves, must have wrecked or perished at sea. For, if the goods were taken by pirates and by some means or other they were brought ashore, they had to be restored to their true owner.

(2) That, even where the ship or goods had been wrecked and cast on the shore, no living thing should have escaped alive to land out of the ship, or any vestige remained by which the property might be identified, for otherwise such ship or goods, according to statute of Westminster, 1. c. 4, would not be deemed wreck.[1]

(3) That these goods had been cast on the shore or land and not brought thither in a ship or vessel.[2]

Procedure for seizure, custody and disposal of wrecks in England before 17 and 18 Vict. c. 104.—But all goods cast on the shore, whether they fulfilled these conditions or not, had to be saved and kept by the coroner, sheriff or king's bailiff, or by the Crown's grantee, and to be detained until the rightful owner claimed them and proved them to be his, in which case it had to be restored to him. The statute of Westminster 1. c. 4, following the Common law, allowed the rightful owner the period of a year and a day to make his claim, failing which the goods became the property of the Crown. The day and the year used to be reckoned from the time the goods were taken possession of.[3] Until the owner claimed them they remaind vested in the king for protection.

Flotsam, jetsam and ligan.—Flotsam, jetsam and ligan are within the jurisdiction of the Admiral and are called droits of the Admiralty.[4] If they are taken in the wide ocean, they belong to the taker of them, if the owner cannot be known.[5] But if they are taken within, what are called, the narrow seas, or in any haven, port or creek or arm of the sea, they primâ facie belong to the Crown, if the ship perishes and the owner cannot be known. But if the owner can be known, he gets them back.[6]

1 *Sir H. Constable's case*, 5 Rep. 106, resol. 4.

2 Woolrych on Waters, (2nd Ed.,) 13; 2 Inst., 167; *Sir H. Constable's case*, 5 Rep. 106. resol. 1.

3 Hale, de Iure Maris, p. 1. c., 7; Hargrave's Law Tracts, 39; 2 Inst., 168; Woolrych on Waters (2nd ed.), 12; *Sir H. Constable's case*, 5 Rep. 106, resol. 4.

4 *Sir H. Constable's case*, 5 Rep. 106, resol. 1, 2; 2 Inst. 167; Woolrych on Waters (2nd ed), 17; Hale, de Iure Maris p 1. c., 7; Hargrave's Law Tracts 41.

5 *Sir H. Constable's case*, 5 Rep. 106, 108 (note); Hale, de Iure Maris, p. 1. c. 7; Hargrave's Law Tracts, 41; Woolrych on Waters (2nd ed.), 17. According to Bracton and Britton, they belonged to the finder, 5 Rep. 108 (note).

6 Hale, de Iure Maris, p. 1. c. 7; Hargrave's Law Tracts, 41.

Lord Hale says that, a subject may also be entitled to these, as he may be to wreck, either by charter or by prescription.[1] A grantee of wreck alone cannot claim flotsam, jetsam or ligan. Even as to the right to the wreck, properly so called, a distinction is taken in the books. It may be seized on the shore between high and low-water marks either when the tide is in and the shore is covered with water, or when the tide is out and the shore actually dry. When the tide is in, the shore is within the jurisdiction of the Admiralty, and the wreck, a droit of the Admiralty; when the tide is out, the shore is within the jurisdiction of the Common law Courts, and the wreck is a wreccum maris and belongs to the lord of the manor, who has the franchise of wreck at the place.[2] The space between high and low-water mark is therefore regarded as divisum imperium, unless it be within the body of a county. This distinction is well illustrated by the case of *The Pauline*.[3] The vessel in that case was wrecked on the Pole sands, near the mouth of the Exe, and not within the body of any county. She was taken possession of while lying aground within low-water mark, but the tide had not then so far ebbed as to leave the place dry. In fact, the boat by means of which she was boarded, floated alongside her. The question raised was whether she was to be treated as wreccum maris, or as a droit of the Admiralty? If the former, she belonged to the lord of the manor; if the latter, to the Crown. Dr. Lushington held that it was a droit of the Admiralty and belonged to the Crown. In the course of his judgment, he said:—"I apprehend that the distinction, taken in all books, and not only with respect to civil rights, but also with respect to criminal jurisdiction, as the law stood before the statute, (4 and 5 Will. 4, c. 36, s. 22) immediately attaches, namely, that the jurisdiction of the Admiralty subsists at the time when the shore is covered with water; the jurisdiction of the Common law, and consequently, the rights of lords of manors, at the period when the land is left dry. The doctrine is thus laid down in East's Pleas of the Crown, under the title 'Piracy:'—'Upon the open seashore, it is past dispute, that the Common law and the Admiralty have alternate jurisdiction between high and low-water mark. But, in harbours or below the bridges in great rivers near the sea, which are

[1] Hale, de Iure Maris, p. 1. c. 7; Hargrave's Law Tracts, 42.

[2] *R.* v. *Two Casks of Tallow*, 2 Hagg. 294; *R.* v. *Forty-nine casks of Brandy*, 3 Hagg. 257; *The Pauline*, 2 Rob. Ad., 358; 9 Jur. 286.

[3] 2 Rob. Ad., 358; 9 Jur. 286.

partly enclosed by the land, the question is often, more a matter of fact than of law, and determinable by local evidence. There are, however, some general rules laid down upon this point, which it would be improper altogether to omit. It is plain, that the Admiralty can have no jurisdiction in any river, or arms or creeks of the sea within the bodies of counties, though within the flux and reflux of the tide.' "

Procedure for seizure, custody and disposal of wrecks in England under 17 and 18 Vict. 104.—The rule founded upon this distinction naturally led to frequent scrambles between the officers of the Crown and the bailiffs or agents of lords of manors in the seizure of wrecks. To remedy this and various other inconveniences which arose therefrom, an improved procedure for the seizure, custody and disposal of wrecks has been laid down in the Merchant Shipping Act, 17 and 18 Vict. c. 104. Section 439 of the Act has, since 1st May 1855, vested the superintendence of all wrecks in the Board of Trade, who are thereby authorised to appoint persons, called receivers of wreck, to take charge of all wrecks in any district, the term wreck, by s. 2 of the statute, being made to include jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water.

The Admiral, Vice-Admiral, lords of manors and all other persons claiming the ownership of, or any other interest in, the wrecks are prohibited by s. 440 from interfering with them in any way. But the receiver is directed to deliver the wreck to the Admiral, Vice-Admiral, lord of manor or any other person, provided the latter prefers a claim within one year from the date when such wreck comes into his (*i. e.* the receiver's) possession, and pays all salvage expenses. By sec. 474 the Board of Trade has been authorised to purchase on behalf of the Crown the right to wreck belonging to any private individual. Unclaimed wrecks are, by s. 475, directed to be sold, and the proceeds to be made part of the Consolidated Fund of the United Kingdom.[1]

Procedure for seizure, custody and disposal of wrecks in India.—In India the law regarding wrecks is now regulated by ss. 71-79 of the Indian Merchant Shipping Act 1880, (VII of 1889), which sections are to some extent drawn on the lines of sections 459-475 of the English Merchant Shipping Act. By s. 71 wreck includes the following when found in the sea or any tidal water or on the shores thereof, that is to say—

[1] In England the law regarding wrecks is to some extent regulated by the following statutes:—17 and 18 Vict. c. 104, ss. 2, 418, 439-457, 471-475; 18 and 19 Vict. c. 91; ss. 19, 20; 25 and 26 Vict. c. 63, ss. 49-53; 43 and 44 Vict. c. 22 ss. 2, 7.

(*a*) goods which have been cast into the sea and then sink and remain under water.

(*b*) goods which have been cast or fall into the sea and remain floating on the surface.

(*c*) goods which are sunk in the sea, but are attached to a floating object in order that they may be found again.

(*d*) goods which are thrown away or abandoned, and a vessel abandoned without hope or intention of recovery,

In this country the right of the Government to wreck (in the senses above defined) in any particular area has not been parted with in favour of any private individual, either as appurtenant to any estate in land, or as an independent franchise[1]; it was not therefore at all necessary here to distinguish between goods cast on the shore and goods cast in the sea, or to classify the latter into flotsam, jetsam and ligan, a division which in England is called for by the Crown's grants of franchise of wreck and sometimes of flotsam, jetsam and ligan separately, to lords of manors or other persons. This Act therefore gives the denomination of wreck to all goods which have been cast or which fall into the sea or any tidal water, or on the shores of the sea or of any tidal water.

By s. 73, the local Government is authorised, with the previous sanction of the Governor-General in Council, to appoint persons to receive and take possession of wreck within certain prescribed local limits, such persons to be called receivers of wreck.

By s. 74, any person finding and taking possession of any wreck within any local limits for which a receiver of wreck has been appointed, is directed, if he be the owner thereof, to give the receiver notice in writing, of the finding of the wreck and of the marks by which it may be distinguished; and, if he be not the owner of it, to deliver it to the receiver.

The receiver on taking possession of any wreck is by s. 76 bound to publish a notification in such manner and at such place as may be prescribed by the Local Government, containing a description of it and the time at which, and the place where, it was found. If, after the publication of such notification, the wreck is either unclaimed, or the person claiming the same fails to pay the amount due for salvage, and for the charges in-

[1] But it has been held that the owner of a riparian estate may lay a claim as against Government to goods of an unknown person washed away by a river and floated on to his estate, as a right appurtenant thereto by grant from Government or by prescription. *Chuttur Lal Singh* v. *The Government*, 9 Suth., W. R. 97.

curred by the receiver, the latter is by s. 77 authorised to sell such wreck by public auction; if, of a perishable nature, forthwith; and if not of a perishable nature, at any period not less than six months after such notification.

The proceeds of the sale, after deduction of the amount due for salvage and for charges incurred by the receiver, together with the expenses of the sale, are to be paid to the owner of the wreck or if no such person appear, to be held in deposit for payment without any interest, to any person who may thereafter establish his right to it, provided he makes his claim within one year from the date of the sale. Sec. 79 provides certain penalties for failure to give notice of, or deliver, wreck to the receiver of wreck.

LECTURE III.

RIVERS GENERALLY: TIDAL AND NON-TIDAL RIVERS.

Popular definition of a river too vague for legal purposes—Defects of such a definition—Constituents of a river according to Roman law—Definition of alveus and ripa according to Roman law—Legal definition of a river—The component elements involved in this definition of a river—Bed and banks of a river, what—Landward and riverward boundaries of banks defined—Foreshore of a river, what—Current, a material ingredient of a river—Difficulties of ascertaining the point from which a river, in a legal sense, begins—Point from which a river begins in contemplation of law—Point at which a river terminates—Continual flow not essential to a river or stream—A tidal river, what—Its foreshore defined—The boundary line between the tidal and non-tidal portions of a river—Distinction between tidal and non-tidal rivers peculiar to the Common law of England—Ownership of the beds of tidal rivers—Ownership of the beds and banks of perennial rivers according to Bracton—Ownership of the beds of tidal rivers, according to Lord Hale—Reconciliation by Mr. Houck of the conflict between the respective doctrines of Bracton and Lord Hale—*The Royal Fishery of the Banne*—Opinions of text writers as to the true character of the Common law doctrine—How far this doctrine has been followed in America—Crown's primâ facie ownership of the beds of tidal rivers extends only as far as they are navigable—Dicta in *Malcolmson* v. *O' Dea*, *Gann* v. *Free Fishers of Whitstable*, *Lyon* v. *Fishmongers' Company*, *Neill* v. *Duke of Devonshire*, (as to the English law), and *Lord Advocate* v. *Hamilton*, and *Orr Ewing* v. *Colquhoun* (as to the Scotch law)—*Murphy* v. *Ryan*—*Hargreaves* v. *Diddams*—*Pearce* v. *Scotcher*—Public right of fishing co-extensive with the right of the Crown to the soil of a river—Tidality, merely primâ facie test of navigability—Foundation of the Crown's ownership of the beds of tidal navigable rivers—Foreshore and the beds of tidal navigable rivers primâ facie vested in the Crown—Alienation of the foreshore and the beds of tidal navigable rivers by the Crown forbidden by 1 Anne c. 7. s. 5.—Ownership of the beds and banks of non-tidal rivers—Extracts from Hale, de Iure Maris—Rules deducible from these passages—Rule of construction applicable to grants of land bounded by a non-tidal river—The principle upon which this rule is founded—Right of towage on the banks of navigable rivers, according to English law—Fishermen not entitled to use the bank for drying their nets.

Defects of the popular definition of a river.—A river has been defined by lexicographers as "a large stream of water flowing through a certain portion of the earth's surface and discharging itself into the sea, a lake, marsh, or other river."[1] A definition, such as this, is indeed too vague to be of any value in legal investigation. While, on the one hand, it mentions particulars which from a legal standpoint may be regarded as wholly immaterial, it omits on the other to set forth the most essential ingredients which are involved in the legal conception of a river. The law

[1] Ogilvie's Imp. Dict. "River."

regarding a stream of water issuing from an artificial fountain or a spring is fundamentally distinct from the law regarding a stream of water issuing from a natural source, and yet one may, without straining language, include the former kind of stream within this definition. A stream or a watercourse flowing through an artificial channel is regulated by entirely different legal principles from those which govern a stream flowing through a natural channel, and yet the definition is so vaguely worded as possibly to embrace even an artificial watercourse. Nor is the definition perhaps so precise in its terms as positively to exclude the case of water flowing not within certain defined banks or walls, but straggling or diffusing itself over a portion of the earth's surface, and finally escaping into a lake, marsh or a river, though even with regard to this, as we shall see hereafter, the legal rules are not the same as those which govern water flowing within defined banks or walls.

Constituents of a river according to Roman law.—Neither the Digest nor the Institutes of Justinian contain any definition of a river (flumen);[1] but a note in the Digest, probably by Gothofred, on the expression 'flumine publico' in the Interdict 'Ne quid in flumine publico &c,'[2] states that a river is constituted by three things, namely, alveus, aqua, and ripa,[3] that is, bed, water, and bank. The more correct expression, it is conceived, would be aqua profluens, instead of aqua simply, because as I shall shew presently, current is also an indispensable ingredient in the constitution of a river. Thus in the Roman Civil law the channel or hollow containing a river was distinguished as the bed and the bank, the river itself being water.[4]

Ripa or bank is defined by Ulpian as that (elevation of land) which contains the river, controlling the natural direction of its course.[5]

[1] Voet in his commentary on title 12 of the 43rd book of the Digest, taking the definitions of the component elements of a river from the texts, defines it thus:—Flumen est collectio aquae intra certas ripas, flumen plenissimum continentes, cum naturalem cursus sui rigorem tenet, et incipientes ex quo primum terra à plano vergere incipit usque ad aquam.

[2] Dig. xliii. 12. 1.

[3] Tribus constant flumina, alveo, aqua et ripis.

[4] Grotius, de Iur. Bell. et Pac. lib. ii. c. 8. § 9. Barbeyrac in a note (no. 2) upon this section states that, according to the received notions of the Roman lawyers the bed of a public river, considered in itself, is reckoned part of the banks; so that as soon as the river leaves its bed which thus ceases to be necessary for public use, the owners of the adjacent lands to whom the banks belong enter into possession of their own.

[5] & [6] Ripa autem ita recte definietur id, quod flumen continet naturalem rigorem cursus sui tenens: ceterum si quando vel imbribus vel mari vel qua alia ratione ad tempus excrevit,

The reason for this last qualification, namely, that the bank merely controls the natural directions of the course of a river, is thus explained by him in the next passage:—But if at any time, either from rains, the sea, or any other cause, it (*i. e.*, the river) has overflowed for a time that (elevation of land), it does not (on account of such overflow) change its banks. Nobody has said that the Nile which by its overflow covers Egypt, changes or enlarges its banks; for when it has returned to its usual heights, the banks of its bed are to be secured.[6]

Paulus, however, gives a more precise definition of the bank of a river in the latter portion of the following placitum:—That is considered to be bank which contains the river when fullest. All the spaces next to the banks of rivers are not public, because to the bank is assigned the space from the line whence the slope from the plain (*i. e.*, the declivity) first commences down to the water.[1]

Vinnius, in commenting upon the first portion of this passage, says that, it follows from this that that space next to the bank which is sometimes not occupied by the river when diminished by heat in the summer season is not a part of the bank. But it is evident from the subsequent context (he continues) that the bank must not be taken to be that narrow space (of which there may be several) which corresponds either to the margin or brim of a river, or simply to the extremity of the bed and of the soil which contains the river, (and) of which extremity there can scarcely be any user; but that it is to be taken (to denote) that somewhat broader space which intervenes between the river and the adjacent land, so that the bank is considered to begin from that (line) where it slopes from the plain (and to extend) down to the river.[2]

ripas non mutat: nemo denique dixit Nilum, qui incremento suo Ægyptum operit, ripas suas mutare vel ampliare. nam cum ad perpetuam sui mensuram redierit, ripae alvei eius muniendae sunt. Dig. xliii. 12. 1. 5, (Ulpian).

Ne quis putet, si quando flumen imbribus vel nivibus auctum excreverit, ripas idcirco mutare. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De usu et proprietate riparum.

Bank is defined by Grotius thus:—Ripa est pars extima alvei, quod naturaliter flumen excurrit. De Iur. Bell. et Pac. lib. ii. c. 8. § 9.

[1] Ripa ea putatur esse, quae plenissimum flumen continet. Secundum ripas fluminum loca non omnia publica sunt, cum ripae cedant, ex quo primum a plano vergere incipit usque ad aquam. Dig. xliii. 12. 3. 1, 2.

[2] Ut significet, partem ripae non esse spatium illud ripae proximum, quod aliquando flumine caloribus minuto aestivo tempore non occupatur. Apparet autem ex sequentibus, ripam non tam anguste, ut nonnulli faciunt, accipiendam esse pro crepidine, aut labro amnis, sive pro sola extremitate alvei et terrae, quae flumen continet, cuius extremitatis vix

An obvious inference from this is that, according to Roman law the beach or foreshore of a river, that is, the space between high and low-water mark, is a part of the alveus or bed, and is generally subjacent to the river, being subject to the daily flow of the tide; whereas ripa or bank, which is also a part of the alveus, is generally not subjacent to the river, and it lies above the beach or foreshore,[1] where the river is tidal.

Legal definition of a river.—Lord Tenterden, in *Rex* v. *Inhabitants of Oxfordshire*,[2] interpreted the expression 'flumen vel cursus aquae', which occurs in the indictment upon the statute of Bridges 22 H. 8. c. 5.,[3] to mean water flowing in a channel between banks more or less defined.

"A stream of water," says Sir George Jessel, "is water which runs in a defined course, so as to be capable of diversion; and it has been held that the term does not include the percolation of water underground."[4]

Woolrych defines a river as a running stream pent in on either side with walls and banks, and it bears that name as well where the waters flow and reflow as where they have their current one way.[5]

A river, for legal purposes, may more fully be defined as a running stream of water arising at its source by the operation of natural law,[6] and by the same law pursuing over the earth's surface a certain direction in a defined channel, being bounded on either side by banks, shores or walls until it discharges itself into the sea, a lake, or a marsh.[7]

This definition therefore includes all natural streams, however small, flowing over the surface of the earth through a natural channel, and having a definite or permanent course, and excludes artificial watercourses, however large, supplied from a natural or an artificial source, (*e. g.*,

est ut ullus fit usus: sed aliquanto laxius pro spatio inter flumen et vicina praedia interjecto, ut ripa incipere intelligatur, ex quo a plano ad flumen vergit. Vinnius, Comm. ad Inst., lib. ii. t. 1. text. De usu et proprietate riparum.

[1] 'Litus' applies to the shore of the sea, and ripa to the bank of a river; there does not appear to be any word in Latin which corresponds exactly to the foreshore of a river. Houck on Navigable Rivers, 4 (note).

[2] 1 B. & Ad., 302.

[3] 2 Co. Inst., 701.

[4] *Taylor* v. *St. Helens Co.*, 6 Ch. D., 264.

[5] Woolrych on Waters (2nd ed.), 40; Callis on Sewers, 77; Houck on Navigable rivers, 1.

[6] *I. e.*, after having been collected from rains or issuing out of the veins of the earth. Vel ab imbribus collecta, vel e venis terrae scaturiens. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De aere &c.

[7] Angell on Watercourses (7th ed.), § 2; Woolrych on Waters (2nd ed.), 40; Coulson and Forbes' Law of Waters, 51; Gould on Waters, § 41.

water constantly pumped out of a mine and flowing in a stream), all bodies of water either percolating through the strata of the earth in an uncertain course or flowing underground in a defined channel, as well as all stagnant collections of water, as lakes or ponds, and all surface drainage, even though it may ultimately find its way to, and feed, a stream. A subterranean stream flowing in a known and defined channel may indeed, in some respects, give rise to rights similar to those which exist in respect of streams flowing above ground,[1] but mere percolating water[2] or surface drainage, being incapable of diversion, can never form the subject of riparian rights.[3]

Definitions of the constituents of a river.—The definition, I have just stated, assumes that every river involves the following constituent elements: (1) the bed; (2) the water; (3) the banks or shores; and (4) current.

The bed is the space subjacent to the water which flows over it, and includes that which contains the water at its fullest when it does not overflow its banks. The bank is the side or border of the bed within which the river flows when in its fullest state naturally, that is to say, when not temporarily overflowed by extraordinary floods or rains. "The bank and the water," observes Cowen, J., "are correlative, you cannot own one without touching the other."[4] The banks form a part of the bed of the river, and does not include either lands beyond the banks which are covered in times of freshets or extraordinary floods, or swamps or low grounds which are liable to overflow but are reclaimable for agriculture or for pasture.

The landward boundary of the bank is the line from which its declivity first commences. In those systems of law in which the bank is subjected to certain rights or servitudes in favour of the public, the position of this boundary is of no small importance to the owners of adjoining lands. They have a right to see that the exercise of these privileges by the public is confined within the limits of the bank, and, except in certain cases, to sue as trespasses any transgressions of those limits.

[1] *Dickenson* v. *Grand Junction Canal Co.*, 7 Ex. (282), 300; 21 L. J. Ex., 241; *Chasemore* v. *Richards*, 7 H. L. C., (349), 374; 29 L. J. Ex. 81; 5 Jur. (N. S.) 873. Cf. Lect. XI, *infra*.

[2] Ibid; *Reg.* v. *Metropolitan Board of Works*, 3 B. & S. 710; 32 L. J. Q. B., 105; *Ballucorkish Silver Lead and Copper Mining Co.* v. *Harrison*, L. R., 5 P. C., 49; 43 L. J., P. C., 19. Cf. Lect. XI, *infra*.

[3] *Acton* v. *Blundell*, 12 M. & W., 324; 13 L. J. Ex., 289; *Rawstron* v. *Taylor*, 11 Ex., 369; 25 L. J. Ex., 33; *Broadbent* v. *Ramsbotham*, 11 Ex., 603; 25 L. J. Ex., 115. Cf. Lect. XI, *infra*.

[4] *Starr* v. *Child*, 20 Wend., (149), 152, cited in Gould on Waters, § 41, (note).

The position of the riverward boundary of the bank is also material under those systems where the bed of tideless navigable rivers is vested in the state, and their banks in the subject. Questions often do arise as to whether any structure erected on the bank is also an encroachment on the public domain.

The nature of the test which ought to be applied in determining this boundary line is so clearly discussed by Justice Curtis in a case in the Supreme Court of the United States that I cannot do better than quote a portion of his judgment:—"The banks of a river" says the learned Judge "are those elevations of land which confine the waters, when they rise out of the bed; and the bed is that soil so usually covered by water, as to be distinguishable from the banks by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor the middle stage of the water, can be assumed as the line dividing the bed from the bank. The line is to be found by examining the bed and banks, and ascertaining where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation as well as in respect to the nature of the soil itself. Whether this line, between the bed and the banks, will be found above or below, or at a middle stage of water, must depend on the character of the stream. The height of a stream, during much the larger part of the year, may be above or below a middle point between the highest and lowest flow. Something must depend also upon the rapidity of the stream, and other circumstances. But, in all cases, the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearance they present; the banks being fast land, on which vegetation, appropriate to such land in the particular locality, grows, wherever the bank is not too steep to permit such growth, and the bed being soil of a different character, and having no vegetation, or only such as exist when commonly submerged in water."[1]

The foreshore[2] or beach of a river is ordinarily defined as that band

[1] *Howard* v. *Ingersoll*, 13 Howard, 426, cited in Houck on Navigable Rivers, 6-7; and in Angell on Watercourses, (7th ed.) §§ 2-3 (notes).

[2] The term 'shore' is strictly applicable with reference to the sea or a tidal river, but

or margin of the bed of a river which lies between the high and low-water marks. Like the foreshore of the sea, this band or margin also fluctuates, but it does so generally between the outermost limit of the bed and its lowest extremity when the water reaches its lowest level at neap tide.

Current is also a material ingredient of a river. Indeed, a stream necessarily involves the idea of a current. It is the presence of the current which gives rise to questions relating to the acceleration or retardation or obstruction of water, which do not arise in the case of still waters, like lakes or ponds. Current induced by artificial means, for example, by means of locks in a canal for the purposes of navigation, does not bring such canal within the category of a river, so as to make the doctrines relating to natural or artificial streams applicable to it. This is illustrated by the case of *Staffordshire Canal* v. *Birmingham Canal*,[1] where Lord Cranworth, in delivering his opinion to the House of Lords, said:—"The water passing from the Wolverhampton Level to the Atherley Junction, is not a natural, nor even an artificial, stream in the sense in which these words are understood in the many cases in which the law relating to flowing water has been considered. The water in this canal is not flowing water. It is water accumulated under the authority of the legislature in what is in fact only a tank or reservoir, which the respondents are bound to economise and use in a particular manner for the convenience of the public. It never flows. It is let down artificially, for the convenience of persons wishing to pass with boats, by what may be called steps, till it reaches the Atherley Level, and so enables the boats to pass into appellant's canal. To such waters none of the doctrines, either as to natural or artificial streams, is applicable."

It is necessary, however, to add that the existence of current alone does not distinguish a river from a lake. There are natural lakes in which there is current in the surface water flowing from a higher to a lower level, and discharging itself through a small outlet into a river or a marsh. But the presence of such current merely does not make that a river which would otherwise be a lake, nor does the fact that a river broadens like a pond-like sheet between any two points give it the legal incidents of a lake.[2]

it is sometimes also used with respect to a fresh river or a lake, either as synonymous with bank or as denoting that portion of the bank which touches the margin of the stream at low water.

[1] L. R., 1 H. L., 254. Cf. *Rochdale Canal* v. *Radcliffe*, 18 Q. B., 287.

[2] Cf. *Mackenzie* v. *Bankes*, 3 App. Cas., 1324.

Point from which a river begins.—The definition of a river for legal purposes is not complete unless we know exactly the point from which it commences, and the point where it terminates. The determination of these points, essential as it is sometimes to the adjustment of the rights and liabilities of riparian proprietors, is generally, from the very nature of the thing attended with no small difficulty. Water issuing from the veins of the earth through a spring or falling from heaven on the surface of a hill, descends by the force of gravity into a rivulet or stream, which uniting oftentimes with similar streams in their onward course, ultimately feeds a river. Does the river or stream begin, and consequently do riparian rights come into existence, from the spring-head, from the top of the hill, from its foot, or from any other intermediate point on its surface? The spring may be situated wholly within the land of one person, or the hill may belong exclusively to a single individual. Has the owner of the land within which the spring is situated, a right to appropriate, or otherwise prevent flowing into the brook, all the waters issuing out of the spring, or has the owner of the hill a right to divert the water so as to prevent its falling into a particular stream at its foot? These are for the most part questions of some nicety, and their solution really depends upon a determination in each particular case of the point from which the river or stream may, in legal intendment, be said to begin.

"A river or stream," says Mr. Angell, borrowing the language used by Baron Martin, in the case of *Dudden* v. *The Guardians of Clutton Union*,[1] "begins at its source, when it comes to the surface." This statement of the law is true only when the channel of the stream commences, as in fact it did in that case, at the very source or spring-head;[2] for as Pollock, C. B., said on that occasion, "if there is a natural spring the waters of which flow in a natural channel, it cannot be lawfully diverted by any one to the injury of the riparian proprietors. The law of the case is clear and undoubted. This was a natural spring, the waters of which *had acquired a natural channel from its source to the river.* It is absurd to say that a man might take the water of such a stream, four feet from the surface." But the proposition as stated by Mr. Angell is not true where the water, after rising to the surface through a spring, diffuses itself or trickles away without any defined course over, and within the limits of, the land

[1] 11 Ex., 627; 23 L. J. Ex., 146. Cf. *Ennor* v. *Barwell*, 2 Giff., 410; 6 Jur., N. S. 1233; 7 Jur., N. S. 788; *Gaved* v. *Martyn*, 15 C. B., N. S., 732.

of the person in which the spring is situated, even though such water, if suffered to remain, may afterwards flow into a natural and defined stream either within or without the bounds of his property. For, in such a case, the law appears to be that the lower riparian proprietors have no right to the flow of water, and that the landowner is entitled to treat such water as a nuisance, as being prejudicial to cultivation, and to drain his land or get rid of the nuisance in any way he finds most convenient.[1]

This view of the law was recognised in a very recent case[2] which came before the Privy Council on appeal from the Supreme Court of the Cape of Good Hope, where one of the questions argued was, whether by the Roman-Dutch law which obtains in that Colony, the owner of the land in which a fountain arises and flows in a known and defined channel has the absolute right to dispose of the water in what way he pleases. Lord Blackburn in delivering the judgment of the Board, after quoting the following observation from the judgment of Sir James Colville in the case of *Van Breda* v. *Silberbauer*[3] :—"Again their Lordships have not before them the particular texts in Voet upon which all the judges seem to concur in holding that, if the streams do rise in the appellant's land, he is, by the law of the Colony, entitled to do what he pleases with their waters. Their Lordships are not satisfied that this proposition is true without qualification; or that by the Dutch-Roman law, *as by the law of England*, the rights of the lower proprietor would not attach upon water which had once flowed beyond the appellant's land in a known or definite channel, even though it had its source within that land"—said:—"This does not, as was truly said, amount to a decision, for the case was decided upon other grounds, but it does amount to an expression of a very grave doubt, whether that which was alleged to be the Dutch-Roman law could be so, the English law as laid down by Lord Kingsdown being so much more convenient. In this doubt, their Lordships in the present case participate." It was in *Miner* v. *Gilmour*,[4] that

[1] *Rawstron* v. *Taylor*, 11 Ex., 369; 25 L. J. Ex., 33; *Broadbent* v. *Ramsbotham*, 11 Ex., 603; 25 L. J., Ex. 115. In *Ennor* v. *Barwell*, 2 Giff., 410; 6 Jur., N. S., 1233, where in consequence of the close proximity of the spring to the boundary of the adjoining neighbour's property, the water rising from it could not deeply furrow, or make clear and defined, a channel before it reached such boundary, it was held that the owner of the land in which the spring was situated was not entitled to divert its water.

[2] *Commissioners of French Hoek* v. *Hugo*, 10 App. Cas., 336.

[3] L. R., 3 P. C., (88), 99.

[4] 12 Moo. P. C. C., 131.

Lord Kingsdown laid down the English law referred to here, and it was thus expressed:—"But he" (*i. e.*, the riparian proprietor) "has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury."

Again, the proposition is not true where rain-water collecting in a basin formed on a hill, overflows its brim and squanders itself on the adjoining surface, though it ultimately finds its way into a brook running at its foot; for in such case too the owner of the land in which the basin is formed has a right to drain the water from it. "No doubt," observed Baron Alderson, in *Broadbent* v. *Ramsbotham*,[1] "all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls, from dealing with it as he may please and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such a channel."

It is by an examination of such 'frontier' instances, that the real foundation of most of the legal rights in this as in any other department of law, can be successfully discovered, and the true principle deducible from the examples I have cited, indeed seems to be that a river or a stream commences and riparian rights accrue from the point where the water begins to flow in a well-defined natural channel.[2] The correctness of this conclusion appears further to be corroborated by the analysis of the basis of riparian rights, for if such basis, as I shall hereafter shew, be the ownership of the banks of a stream, and if bank and channel are correlative and interdependent, no riparian rights can arise unless there exists a natural channel.

Point at which a river terminates.—A river terminates where it mingles with the sea, an arm of the sea, a lake or a marsh. It is not very material to determine for legal purposes, the precise point at which a river terminates, for the transition from a river to a sea, a lake or a marsh does not in general cause any difference in the nature of riparian or other rights. Wherever any such difference exists, it is the

[1] 11 Ex., 602; 25 L. J. Ex. 115.

[2] *The Grand Junction Canal Co.* v. *Shugar*, L. R., 6 Ch. App., 483.

creature of some special statute, and in such case, the statute itself fixes, for its own purposes, the boundary line between a river and the sea or a lake.

Intermittent stream.—It is not necessary, however, to constitute a river or a stream in a legal sense, so as to annex riparian rights thereto, that water should flow in it continually. A stream may be 'intermittent,' that is, be dried up at certain seasons of the year, and yet riparian rights will attach to its water as though the stream were continual. But the cause of the flow of water in the stream, whether it be at regular or even at irregular periods, must be of a permanent character, such as natural floods or rainfalls, which in the ordinary course of nature must from time to time recur, and not of a temporary nature, as the pumping of water from a mine.[1]

Ownership of the beds of rivers.—Having thus arrived at a somewhat accurate notion of the legal signification of a river, I shall now proceed to consider the ownership of its bed under different systems of law. A stream rising from a hill or a mountain, gradually expanding into a river as it flows down its course, and ultimately debouching itself into the sea, (to take that as a typical instance of rivers generally), is up to a certain point tidal, that is, affected by the flux and reflux of the sea, and beyond it, is non-tidal. The tidal portion is generally navigable; but the non-tidal portion may or may not be navigable. It may be navigable up to a certain point and beyond it, may be wholly non-navigable. There are, no doubt, rivers or rather small streams besides, which throughout their whole course are both non-tidal and non-navigable, or again, small creeks which are tidal and yet non-navigable.

For the purpose, therefore, of presenting to you in a clear and intelligent shape the discussion relating to the ownership of the beds of rivers, I shall consider such ownership:—

First, with reference to the tidal or non-tidal character of a river; and

Secondly, with reference to its navigable or non-navigable character.

Tidal rivers.—Before we proceed to discuss the main question, let us know exactly what is meant by a tidal river, the extent of its foreshore, and the boundary line between the tidal and non-tidal portions of a river.

A tidal river may generally be defined as a river, the waters of which daily rise and fall with the flux and reflux of the sea caused by the

[1] *Drewett* v. *Sheard*, 7 C. & P., 465; *Trafford* v. *Rex*, 8 Bing. 204.

phenomenon known as the tides. It follows from this definition that a river which discharges its waters into a lake or a marsh, unconnected with the sea, cannot be tidal.

The foreshore of a tidal river is a part of its bed, and its limits are ascertained upon the same principle and defined in the same way as those of the foreshore of the sea. Its high-water mark corresponds to the line reached by the average of the medium high tides between the springs and the neaps in each quarter of a lunar revolution throughout the year; and the low-water mark, to the line reached by the average of the medium low tides between the springs and the neaps in each quarter of a lunar revolution throughout the year.[1] It is important to know the precise extent of both the limits, because, although generally, as I shall shew later, the Crown in England, and the Government in India, is the owner of the foreshore of a tidal river up to high-water mark, yet a subject may claim a right to it by charter, grant or prescription, and in that case a determination of the low-water mark which defines the boundary line between the property of the Crown and its subject becomes most material.

Boundary line between the tidal and the non-tidal portions of a river.—The boundary line between the tidal and non-tidal portions of a river

[1] *Attorney-General* v. *Chambers*, 4 De G., M. & G. 206; 23 L. J. Eq. 662; 18 Jur. 779.

In India, the question regarding the precise line of high-water mark as separating the property of Government from that of a private landowner, has arisen in two cases with regard to some lands on the foreshore of the river Hooghly. In *Govindo Lall Seal and another* v. *The Secretary of State*, A. O. D. No. 32 of 1882 in the High Court of Calcutta, (the judgment whereof is unreported) the Lower Court had held that the boundary line corresponded with the level of average high water during the year, and that the height of the average tide level in the river Hooghly at Calcutta was 15·09 feet above the datum of Kidderpur Dock Sill. The High Court on appeal simply affirmed this judgment.

In *Joy Krishna Mookerjee and others* v. *The Secretary of State*, A. O. D. No. 445 of 1885, decided on the 6th July 1886, (also unreported), it was found that during four months in the year, when the river was in freshwater flood (as all tidal rivers in India are) the water on the foreshore at the spot in suit below the line indicating the average of the highest spring tides during that period marked against a vertical bank was breast-high and that during that period it was navigable not only for small boats carrying passengers or for fishing boats, but navigable for native boats of very considerable size, and that this line was only from eighteen inches to two feet above the 15·09 feet line laid down in the previous case. Norris and Macpherson, JJ., concurring with the lower Court, held that the boundary line was properly determined. Cf. *Secretary of State for India* v. *Kadirikutti*, I. L. R., 13 Mad. (369), 375, where the Court was of opinion that in the absence of local usage or statutory enactment, the rule laid down in *Attorney-General* v. *Chambers* ought to be followed in India.

has been held in the recent case of *Reece* v. *Miller*,[1] to depend not upon the presence or absence of salt water, but upon the fact whether there is fluctuation of water, as shown by its regular rise and fall, under the influence of the tide. Lord Hale says, "that is called an arm of the sea where the sea flows and reflows, and so far only as the sea so flows and reflows; so that the river Thames above Kingston and the river Severn above Tewksbury, &c., though there they are public rivers, yet are not arms of the sea. But it seems, that although the water be fresh at high water, yet the denomination of an arm of the sea continues, if it flow and reflow as in the Thames above the bridge."[2]

The question arose for judicial decision in England for the first time apparently in *Rex* v. *Smith*.[3] It was attempted to be argued there, that the right of the Crown to the soil of the Thames extended no further than London Bridge and that the sea did not properly flow beyond the bridge, although there was a regular rise and fall of the river caused by the accumulation and pressure backwards of the fresh water. Lord Mansfield held that the distinction between rivers navigable and not navigable, and those where the sea does or does not ebb and flow, was very ancient and that there were no new facts in the case, which let in the distinction contended for, between the case of the tide occasioned by the flux of the sea water and the pressure backwards of the fresh water.

The point up to which a tidal navigable river, and consequently the public right of fishery therein, extends, directly arose, however, in *Reece* v. *Miller*,[4] where it appeared that the water of the river Wye at the spot in question was not salt, and that in ordinary tides it was unaffected by any tidal influence, but that upon the occasion of very high tides, the rising of the salt water in the lower parts of the river dammed back the fresh water, and caused it upon those occasions to rise and fall with the flow and ebb of the tide. It was held that the right of the Crown and the public right of fishery did not extend to this part of the river. Grove, J.,

[1] 8 Q. B. D. 626. The Supreme Court of the United States referring to the case of *Rex* v. *Smith*, 2 Doug. 441, have decided, that although the current in the river Mississippi at New Orleans, may be so strong as not to be turned backwards by the tide, yet, if the effect of the tide upon the current is so great as to occasion a regular rise and fall of the water, it might properly be said to be within the ebb and flow of the tide. *Peyroux* v. *Howard*, 7 Pet. 324; *Attorney-General* v. *Woods*, 108 Mass. 439; *Lapish* v. *Bangor Bank*, 8 Maine, 85; cited in Angell on Watercourses (7th Ed.) § 544, note.

[2] Hale, de Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 12.

[3] 2 Doug., 441.

[4] 8 Q. B. D. 626.

said:—"The question what constitutes a tidal navigable river has been discussed in various cases, and in my judgment a river is not rendered tidal, for this purpose, at the place in question by the fact that it may be affected by the tide as described in this case on the occasion of unusually high tides, when the action of the tide is reinforced by a strong wind, or some such exceptional circumstance causes the tide to rise unusually high. In order that the river may be tidal at the spot in question, it may not be necessary that the water should be salt, but it seems to me that the spot must be one where the tide in the ordinary and regular course of things flows and reflows. There is no case which shews that because at exceptionally high tides some portion of the river is dammed up and prevented from flowing down and so rises and falls with the tide, that portion of the river can be called tidal."

Ownership of the beds of tidal navigable rivers under English law.—Now to proceed to the determination of the ownership of the bed of a tidal navigable river. It is necessary to premise that the division of the bed of a river according as its waters are within or beyond the influence of the ebb and flow of the tide is wholly peculiar to the Common law of England. It is unknown to most of the continental systems of law deriving their jurisprudence from the Civil law. Unlike the small rivers in England with their short courses[1] which in former times were, with trifling exceptions, only navigable in their natural condition as far as the ebb and flow of the tide for any purpose useful to commerce,[2] the streams on the continent are many of them large and long and navigable to a great extent above tide-water, and accordingly we find, as I shall have occasion to point out later, that the Civil law which regulates and governs those countries has adopted a very different rule.

Bracton, the earliest English authority on this question, borrowed the phraseology of the Institutes[3] in laying down the law. He said thus: "All rivers and ports are public, and accordingly the right of fishing

[1] "In England, or in Great Britian, the chief rivers are the Severn, Thames, Kent, Humber, and Mersey, the latter of which is about fifty and the first about three hundred miles in length; and of this (the Severn) about one hundred miles consists of the Bristol Channel. The world-renowed Thames has the diminutive proportions of two hundred miles and of even these lengths, not the whole is navigable," *per* Judge Woodward in *McManus* v. *Carmichael*, 3 Iowa, 1, cited in Houck on Navigable Rivers, 37.

[2] Woolrych says:—"Few of our rivers, besides the Thames and the Severn, were naturally navigable, but have been made so under different Acts of Parliament." 3 T. R., 255, by counsel, arg. Woolrych on Waters (2nd. ed.), 40 (note (d)).

[3] Inst. ii. 1. 1, 2, 5.

in a port and in rivers is common to all persons. The use of the banks is also public by the law of nations, as of the river itself. It is free to every person to moor ships there to the banks, to fasten ropes to the trees growing upon them, to land cargoes and other things upon them, just as to navigate the river itself; but the property of the banks is in those whose lands they adjoin; and for the same cause the trees growing upon them belong to the same persons; and this is to be understood of perennial rivers, because streams which are temporary may be property."[1] The close similarity of this language to the language of the Roman Civil law has induced some writers to affirm that Bracton simply stated the rule of the Roman Civil law upon the subject, and that he did not intend to lay down the rule according to the Common law. It has led others to theorize that in the thirteenth century the law upon this subject was in an undefined state, and that Bracton supplied the deficiency by borrowing from the Roman law. An intermediate position maintained is that at that early period the rules of the Civil law and the Common law upon this point were identical.[2] This last view, however, has ultimately prevailed in recent times,[3] and it may therefore be taken that anciently under the Common law, rivers and harbours were public, without reference to the tide.

But Lord Hale laid down that fresh rivers, of what kind soever, belonged to the owners of the soil adjacent, with the right of fishing therein, usque filum aquae, and that the king's right by prerogative was limited to such rivers as were arms of the sea, and that that was to be called an arm of the sea, where the sea flowed and reflowed, and so far only as the sea so flowed and reflowed.[4]

This conflict between the doctrines laid down by Bracton and Lord Hale respectively, is regarded by Mr. Houck as only apparent, and he has, in his excellent treatise on the Law of Navigable Rivers, attempt-

[1] Sir Travers Twiss' edition of Bracton, v. i. p. 57. "Publica vero sunt omnia flumina et portus. Ideoque ius piscandi omnibus commune est in portu et in fluminibus. Riparum etiam usus publicus est de iure gentium, sicut ipsius fluminis. Itaque naves ad eas applicare, funes arboribus ibi natis religare, onus aliquod in iis reponere, cuivis liberum est, sicut per ipsum fluvium navigare. Sed proprietas earum est illorum quorum praediis adhaerent, et eadem de causâ arbores in eisdem natae eorundem sunt. Sed hoc intelligendum est de fluminibus perennibus, quia temporalia possunt esse privata." Bracton, lib. i. c. 12. fol. 7, 8; also quoted in Hale, de Portibus Maris, p. ii. c. 7; Hargrave's Law Tracts, 83-84.

[2] *Per* Best, J., in *Blundell* v. *Catterall*, 5 B & Ald., 268.

[3] 2 Reeve's Hist. of English Law (3rd ed.) 88, 282; Güterbock's Bracton, preface.

[4] Hale, de Iure Maris, p. 1, c. 4; Hargrave's Law Tracts, 12.

ed to reconcile it, by showing, as a historical fact that in Bracton's days transportation of goods on the fresh water by barges and lighters was unknown in England, that none other than salt-water rivers were navigable, or rather used for navigation, and that therefore when Bracton spoke of rivers and ports being public, he meant navigable rivers only, and their ports, though as a matter of fact, navigation was in those days confined to salt-water rivers only; that this accidental coincidence led Lord Hale, who deduced the law from the cases actually adjudicated and reported in the Year Books,—the facts of every one of which had occurred on salt-water,—to narrow down the doctrine of the Common law by restricting public navigable rivers to such rivers only as were subject to the ebb and flow of the tide.[1]

Turning to reported cases, after those in the Year Books and which are mentioned in the De Iure Maris, the earliest one we find is that of *The Royal Fishery of the River Banne*,[2] in Ireland, in which it was held that "there are two kinds of rivers, navigable and not navigable; *that every navigable river, so high as the sea ebbs and flows in it*, is a *royal* river, and belongs to the king by virtue of his prerogative; but in every other river, and in the fishery of such other river, the terre-tenants on each side have an interest of common right; the reason for which is, that so high as the sea ebbs and flows, it participates of the nature of the sea, and is said to be a branch of the sea so far as it flows."

The rule thus laid down was followed in a long, though perhaps not uniformly consistent, course of decisions, in England, notably amongst them being *Bulstrode* v. *Hall*,[3] *Fitzwalter's case*,[4] *Warren* v. *Mathews*,[5] *Rex* v. *Montague*,[6] *Carter* v. *Murcot*,[7] *Mayor of Lynn* v. *Turner*,[8] *Rex* v. *Smith*,[9] *Miles* v. *Rose*,[10] *Bagot* v. *Orr*,[11] *Ball* v. *Herbert*,[12] *Mayor of Colchester* v. *Brooke*[13] *and Williams* v. *Wilcox*.[14]

Some discussion has taken place in England, especially amongst text writers, as to the true doctrine of the Common law upon this topic as deducible from these cases. Serjeant Woolrych and Sir John

1 Houck on Navigable Rivers, §§ 24-44.
2 Sir John Davies, 149.
3 1 Sid., 149; see also Com. Dig. Navigation (A), (B).
4 1 Mod. 105; 3 Keb. 242.
5 6 Mod. 73; Salk. 357, approved by Willes, C. J., in Willes, R. 265-268.
6 4 B. & C., 598.
7 4 Burr. 2163.
8 Cowp. 86.
9 2 Doug. 441.
10 Taunt. 705.
11 2 Bos. & Pul. 472.
12 3 T. R. 253.
13 7 Q. B. 330.
14 8 Ad. & El. 314.

Phear have contended that navigability in fact is the real and unfailing test to apply to ascertain whether a river is public, the flow and reflow of the tide being merely prima facie, though strong, evidence that a river is navigable. After discussing *The Mayor of Lynn* v. *Turner*, *Rex* v. *Montague* and *Miles* v. *Rose*, Serjeant Woolrych thus concludes :—"Public user for the purposes of commerce is, consequently, the most convincing evidence of the existence of a navigable river, and that fact being established, the accompanying rights of fishery, and of ownership of soil, &c., are easily defined".[1] And Sir John Phear observes "it is too perhaps not free from doubt whether the land covered by non-tidal rivers, which are navigable, and by large fresh-water lakes, does not by Common law belong to the Crown."[2]

But the controversy in America, both among judges and text-writers, as to what is the true doctrine of the Common law has been of a more serious and practical character. While some states have implicitly adopted the strict Common law rule as laid down in the De Iure Maris, and others have accepted a modified view of it, namely, as furnishing a primâ facie test, a third class of states, has openly repudiated the Common law doctrine, and has followed the guidance of the Civil law upon this matter. I shall endeavour in the next lecture to give you a short account of the details of this controversy.

Whatever the views of text writers in England, and the course of decisions in the different states in America, a series of modern cases has at last finally settled the rule of law in England. The ownership of the soil of all navigable rivers, as far as the tide flows and reflows, and of all estuaries and arms of the sea, is according to that rule, vested primâ facie in the Crown. As in the case of the foreshore of the sea, it is so vested not for any beneficial interest in the Crown itself, but as a trustee for its subjects, collectively, and cannot be used in any way so as to derogate from, or interfere with, their rights of navigation and fishery, which are primâ facie common to all.

It is clear from the proposition thus stated, that the ownership of the Crown in England extends not to the soil of every navigable river, whether it be tidal or non-tidal, but is confined only to such rivers or such parts of rivers as are both navigable and tidal. Navigability and tidality must both concur in order that the right of the Crown and with it, the right of the public may attach to the soil of the bed of a river.

[1] Woolrych on Waters, (2nd ed.) 42.

[2] Phear on Rights of Water, 13.

Willes, J., in submitting the opinion of the Judges to the House of Lords in *Malcolmson* v. *O'Dea*,[1] said:—"The soil of all navigable rivers, like the Shannon, so far as the tide flows and reflows, is primâ facie in the Crown, and the right of fishing primâ facie in the public."

Lord Westbury addressing the House of Lords, in *Gann* v. *The Free Fishers of Whitstable*,[2] said:—"The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is by law vested in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from, or interfere with, the right of navigation, which belongs by law to the subjects of the realm."

In *Lyon* v. *Fishmongers' Company*,[3] where the question was as to whether a riparian owner on the banks of a tidal navigable river had a right of access to the water, as a private right, distinct from his right, as a member of the public, Lord Selborne thus expressed himself:—"Upon principle, as well as upon those authorities, I am of opinion that private riparian rights may, and do, exist in a tidal navigable river. The most material differences between the stream above and the stream below the limit of the tides are, that in an estuary or arm of the sea there exist, by the Common law public rights in respect of navigation and otherwise, which do not generally (in this country) exist in the non-tidal parts of the stream; and that the *fundus* or bed of the non-tidal parts of the stream belongs, generally to the riparian proprietors, while in the estuary it belongs generally to the Crown."

Similarly in *Neill* v. *Duke of Devonshire*,[4] Lord O'Hagan, observed:—"The right of the sovereign exists in every navigable river where the sea ebbs and flows. Every such river is a royal river, and the fishing of it is a royal fishery, and belongs to the Queen by her prerogative.[5]

This is also the law of Scotland, for in *Lord Advocate* v. *Hamilton*,[6] which came before the House of Lords on appeal from the Court of Session in Scotland, Lord St. Leonards, L. C., in delivering his opinion, stated:—"With reference to the question which has been mooted as to the right of the Crown to the *alveus* or bed of a river, it really admits of no

[1] 10 H. L. C. (593), 619. See also *R.* v. *Stimpson*, 32 L. J. M. C. 208; *Attorney-General* v. *Chambers*, *per* Alderson, B., 4 DeG. M. & G. 206; 23 L. J. Ch. 665; *Blundell* v. *Catterall*, *per* Bayley, J., 5 B & Ald. 304.

[2] 11 H. L. C. 192.

[3] 1 App. Cas. (662), 682.

[4] 8 App. Cas. (135), 157.

[5] Sir J. Davies, 56.

[6] 1 Macq. (H. L) 46.

dispute. Beyond all doubt the soil and bed of a river (we are speaking of navigable rivers only) belongs to the Crown."

And in the late case of *Orr Ewing* v. *Colquhoun*,[1] (which was a Scotch case too), Lord Blackburn quotes with approbation the following observation from the judgment of Lord Deas:—"The Crown holds the *solum* of the tidal part of the river as trustee for the whole public; but in the remaining portion of the river the proprietors of the banks are the proprietors of the *solum* of the river, and the right of navigation on the part of others requires use to found and support it;" and later on he himself observes:—"My Lords, where the property on the banks of a natural stream, above the flow of the tide, is in different persons, primâ facie, and until the contrary is shown, the boundary between their properties is the medium filum aquae. In this respect, there is no difference between the law of England and Scotland."

It might, perhaps, be said that the cases in which the above observations were made, did not directly raise for discussion the question, whether the ownership of the bed of a navigable river above the flow and reflow of the tide belongs to the Crown or not; still it must be admitted that these observations of the learned Lords as well as the dictum of Willes, J., represent such an overwhelming consensus of judicial opinion of the highest order that they far outweigh in point of authority any direct adjudication of the point.

The question, however, has been directly raised and decided in several cases in recent times, and the rule of law laid down in them may therefore be taken as perfectly established.

In the case of *Murphy* v. *Ryan*,[2] in which an action was brought for trespass to a fishery in the non-tidal part of a navigable river, and the defendant pleaded that the river was a royal river, and the right of fishery in the public, on demurrer to this plea, O'Hagan, J., delivering the judgment of the Court, held that above the flux and reflux of the tide, the soil and fishing of rivers were vested primâ facie in the riparian owners, and not in the Crown and the public, and this notwithstanding that the river was navigable, and had been immemorially navigated for commercial and other purposes.

This judgment of the Court of Common Pleas in Ireland has, as Lord O'Hagan observes in *Neill* v. *Duke of Devonshire*,[3] been followed in

[1] 2 App. Cas. (839), 854. *Cf. Bickett* v. *Morris*, L. R. 1 H. L., Sc. 47

[2] Ir. R. 4 C. L. 143.

[3] 8 App. Cas. (135), 157.

several cases[1] decided in that country and has been constantly approved of and acted upon in England.[2]

In *Hargreaves* v. *Diddams*[3] and *Mussett* v. *Burch*,[4] the Court of Queen's Bench in England have held that where a river above the flux and reflux of the tide is made navigable by an Act of Parliament, and the public is allowed to navigate, but the soil and the rights of the riparian owners remain untouched by the Act, a claim by one of the public to fish in such waters cannot exist in law.

The point was directly raised and decided in the somewhat recent case of *Pearce* v. *Scotcher*,[5] in the Queen's Bench Division, where a complaint was lodged against the defendant under s. 24 of 24 and 25, Vict. c. 96 for having unlawfully and wilfully fished in the navigable portion of the river Dee, but above the flow and reflow of the tides, where there was a private fishery. The Court held that there could be no public right of fishery in non-tidal waters, even where they were to some extent navigable. Huddleston, B., observed:—"The distinction is clear upon the whole current of authorities in this country and in Ireland, that, where a river is navigable and tidal, the public have a right to fish therein as well as to navigate it; but that, where it is navigable but not tidal, no such right exists."

These authorities, therefore, fully establish the proposition that in England, Scotland, and Ireland the soil of a navigable river, up to the point where the tide of the sea flows and reflows, primâ facie belongs to the Crown, and that above that point, whether the river be navigable or not, the soil is presumed to belong to the riparian owners, usque medium filum aquae, *i. e.*, as far as the middle thread of the stream.

These decisions, it may be observed in passing, also involve a collateral proposition, to which I shall have occasion to advert again in a subsequent lecture,[6] that the public right of fishery is co-extensive with the right of the Crown to the soil of the river, and that it ceases to exist in law beyond the point where such right of the Crown ceases: and that the private right of fishery, (except where such fishery is claimed under a

[1] *Bloomfield* v. *Johnson*, Ir. R. 8 C. L. 68; *Bristow* v. *Cormican*, Ir. R., 10 Ch. 434; *per* Whiteside, C. J., *Neill* v. *Duke of Devonshire*, Ir. R., 2 Q. B., C. P. and Ex. D. 172.

[2] *Mussett* v. *Burch*, 35 L. T. (N. S.) 486, *per* Cleasby, B.; *Mayor &c. of Carlisle* v. *Graham*, L. R. 4 Ex. 361; *Reece* v. *Miller*, 8 Q. B. D. 626; *Neill* v. *Duke of Devonshire*, (135), 157, *per* Lord O'Hagan.

[3] L. R. 10 Q. B. 582. *Cf. Hudson* v. *Macrae*, 4 B. & S. 1585; 33 L. J. M. C. 65.

[4] 35 L. T. (N. S.) 486. [5] 9 Q. B. D. 162. [6] Lect. XII; *infra*.

grant from the Crown before Magna Charta) is co-extensive with the right of the riparian proprietors to the soil of the river, and that it ceases to exist below the point where the right of the Crown to the soil commences.

Tidality, only prima facie test of navigability.—At Common law, the flux and reflux of the tide affords a strong primâ facie presumption that the river is navigable, but it does not necessarily follow, because the tide flows and reflows in any particular place, that there is a public navigation, although the river may be of sufficient size. The strength of this presumption depends upon the situation and nature of the channel. If it is a broad and deep channel, calculated to serve for the purposes of commerce, it would be natural to conclude that there has been public navigation; but if it is a petty stream navigable only at certain periods of the tide and then only for a short time, and by very small boats, it is not a public navigable channel at all.[1] There are many small tidal creeks running into the estates of private owners on which a fishing skiff or other very small boats may be made to float at high water, but they are not deemed navigable rivers. The actual user of a tidal river for the purposes of navigation, is the strongest evidence of its navigability.[2]

Foundation of the ownership of the beds of tidal navigable rivers.—The real foundation of this ownership of the Crown in the soil of the bed of an estuary or of a tidal river, is, as has been declared in the case of the *Royal Fishery of the Banne*, the fact that up to the point reached by the flux and reflux of the tide, a river partakes of the nature of the sea, or, as Lord Hale describes it, is 'an arm of the sea.' This ownership, like that of the seashore, therefore, rested originally upon the old doctrine of the narrow seas, which, since the decision in *Reg.* v. *Keyn*,[3] may be regarded as wholly exploded. It must therefore now rest upon prescription or immemorial enjoyment by the Crown.

Ownership of the foreshore of tidal navigable rivers.—The foreshore of tidal navigable rivers, like the foreshore of the sea, is also vested primâ facie in the Crown, subject to the same restrictions and qualifications as those which attach to the Crown's ownership of the bed of such rivers, namely, the public rights of navigation and fishery.[4] Indeed, as

[1] *Rex* v. *Montague*, 4 B. & C. 598; *Mayor of Lynn* v. *Turner*, 1 Cowp. 86; *Miles* v. *Rose*, 5 Taunt. 705.

[2] *Miles* v. *Rose*, 5 Taunt. 705; *Vooght* v. *Winch*, 2 B. & Ald. 662.

[3] 2 Ex. D., 63.

[4] Hale, de Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 12, 13; *Attorney-General* v.

has been already stated, the foreshore is a part of the bed of the river, and its ownership must consequently be governed by the same rule which regulates the ownership of the bed. As in the case of the foreshore of the sea, this ownership is also subject to a right of access by the public to the river.[1]

Alienability of the bed and foreshore of tidal navigable rivers.—The Crown could grant to a subject any portion of the bed and foreshore of a tidal navigable river, subject, of course, to the public right of fishery and navigation,[2] but since the passing of the statute[3] in the reign of Queen Anne, forbidding the alienation of Crown lands, no such grants can be made. It is scarcely necessary to repeat what I have already mentioned in the analogous case of the foreshore of the sea that, the Crown is still competent to make such alienations with the sanction of Parliament.[4]

Ownership of the beds of non-tidal rivers.—I have already to some extent anticipated the rule of law which governs the ownership of the bed of a fresh-water river or stream, or of that portion of a river which, though it mediately discharges its waters into the sea, is yet above the flux and reflux of the tide; but I recur to it here for the purpose of elucidating briefly the precise nature and limits of the rule.

Lord Hale says:—"Fresh rivers of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing, usque filum aquae; and the owners of the other side the right of soil or ownership and fishing unto the filum aquae on their side. And if a man be owner of the land of both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees the common experience." "But special usage may alter that common presumption; for one man may have the river, and others the soil ad-

Chambers, 4 De G., M., & G. 206; *Lowe* v. *Govett*, 3 B. & Ad. 863; *Doe* dem. *Seeb Kristo Banerjee* v. *The East India Co.*, 6 Moo. Ind. App. 267; 10 Moo. P. C. C. 140; *Lord Advocate* v. *Lord Blantyre*, 4 App. Cas. 770.

1 *Supra*, 58; *Lyon* v. *Fishmonger's Company*, 1 App. Cas. 662; *North Shore Railway Co.* v. *Pion*, 14 App. Cas. 612. *Cf. Attorney-General of the Straits Settlement* v. *Wemyss*, 13 App. Cas. 192.

2 *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C. 192; *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135; *Lord Advocate* v. *Lord Blantyre*, 4 App. Cas. 770.

3 1 Anne c. 7. s. 5.

4 *Supra*, 49—50.

jacent; or one man may have the river and soil thereof, and another the free or several fishing in that river."[1]

In *Bickett* v. *Morris*,[2] Lord Cranworth speaking with reference to a non-tidal stream, observes :—"By the law of Scotland, as by the law of England, when the lands of the two conterminous proprietors are separated from each other by a running non-tidal stream of water, each proprietor is primâ facie owner of the soil of the alveus or bed of the river, ad medium filum aquae. The soil of the alveus is not the common property of the two proprietors, but the share of each belongs to him in severalty, so that if from any cause, the course of the stream should be permanently diverted, the proprietors on either side of the old channel would have a right to use the soil of the alveus, each of them up to what was the medium filum aquae, in the same way as they were entitled to the adjoining land."[3]

The rules deducible from the law laid down in the above passages may be shortly formulated thus :—

(*a*) The ownership of the soil of the alveus or bed of a non-tidal stream, whether it be navigable or not, primâ facie belongs to the riparian proprietors on both sides, not in common, but in severalty, the medium filum aquae or the middle thread of the stream, being the dividing line between the shares of the two proprietors respectively.

(*b*) As a corollary of this rule, if the course of such a stream be permanently diverted, and the old alveus or bed be left dry, each riparian proprietor becomes entitled to it up to the line which coincides with what was the middle thread of the stream.

(*c*) When the lands on both banks of such a stream belong to the same person, the presumption of law (though rebuttable) is, that the ownership of the whole alveus or bed belongs to him.

(*d*) The ownership of the alveus or bed of such a stream may be claimed by a person who does not own land on either bank of it, though this is generally not the case.

Foundation of such ownership.—The right of a riparian proprietor to the soil of the bed of a non-tidal river depends not upon nature, but

[1] De Iure Maris, p. 1. c. 1 ; Hargrave's Law Tracts, 1.

[2] L. R. 1 H. L. Sc. (47) 57.

[3] *Wishart* v. *Wyllie*, 1 Macq. H. L. C. 389 ; *Carter* v. *Murcot*, 4 Burr. 2162 ; *Reg.* v *Inhabitants of Landulph*, 1 Moo. & R. 393 ; *Middleton* v. *Prichard*, 3 Scam. (Ill.) R. 520 ; *Wright* v. *Howard*, 1 Sim. & St. 203 ; Schultes' Aquatic Rights, 136 ; 3 Kent's Comm. 428.

on grant or presumption of law.[1] Consequently, such presumption of ownership is capable of being repelled by showing the express terms of a counter grant or by evidence of exclusive exercise of acts of user of the whole bed whether by the proprietor of the land on either side of the stream,[2] or by a stranger. In that case, the boundary line between the estates of the proprietors of the bed of the river and of the adjacent land respectively would seem to be the bank, as already defined.

Construction of grants bounded by a non-tidal river.—A grant of land expressed to be bounded by a non-tidal river is construed in general to carry the title of the grantee to the middle thread of the stream, unless the language of the instrument, taken in connection with the surrounding circumstances,[3] indicate a clear intention to the contrary.[4] "In my opinion," says Cotton, L. J., in *Micklethwait* v. *Newlay Bridge Company*,[5] "the rule of construction is now well-settled, that where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances or enough in the expressions of the instrument to shew that that is not the intention of the parties." This rule does not owe its origin to any peculiar doctrine of the English Common law, but is founded upon a principle universally applicable, namely, that it would be absurd to suppose that the grantor reserved to himself the right to the soil ad medium filum, which in the great majority of cases is useless and wholly unprofitable.[6]

1 *Per* Lord Selborne, *Lyon* v. *Fishmongers Co.*, 1 App. Cas. 662.

2 *Jones* v. *Williams*, 2 M. & W. 326. *Cf. Bristow* v. *Cormican*, 3 App. Cas. 641.

3 *Duke of Devonshire* v. *Pattinson*, 20 Q. B. D. 263.

4 *Lord* v. *The Commissioners of Sydney*, 12 Moo. P. C. C. 473; *Plumstead Board of Works* v. *British Land Co.*, L. R. 10 Q. B. 24, *per* Blackburn, J.; 3 Kent's Comm. (10th Ed.) 560, 564; Elphinstone and Clerk's Interpretation of Deeds, 180-182; Hunt on Boundaries (3rd Ed.) 3; 25; *The City of Boston* v. *Richardson*, 113 Allen, 144, 154.

5 33 Ch. D. 133; *Duke of Devonshire* v. *Pattinson*, 20 Q. B. D. 263; *Becket* v. *Corporation of Leeds*, L. R. 7 Ch. App. 461; *Marquis of Salisbury* v. *Great Northern Ry. Co.*, 5 C. B. (N. S.) 174. *Cf. Berridge* v. *Ward*, 10 C. B. (N. S.) 400, (as to highway). *Dist. Leigh* v. *Jack*, 5 Ex. D. 264, (where the presumption was rebutted).

6 *Lord* v. *The Commissioners of Sydney*, 12 Moo. P. C. C. 473. The soil of the bed is sometimes, (though indeed very seldom) appropriated by the construction of pillars or piers for the support of bridges.

The reason upon which this rule is founded is very lucidly and forcibly stated by Redfield,

Although at Common law all rivers and streams above the flow and reflow of the tide, are primâ facie deemed to be private, yet in England, many have become subject to the public right of navigation by immemorial user[1] or by Act of Parliament. When an Act of Parliament, conferring the public right of navigation in a river, does not expressly touch or affect the rights of the riparian proprietors to the soil of the alveus or bed, neither any right of property in the soil nor any right of fishing can be acquired on the part of the public merely by reason of such navigation.[2]

A grant by the Crown of land bounded by a non-navigable creek was held to pass the soil of the creek ad medium filum aquae, as the description of the boundaries in the grant did not exclude from it that portion of the creek which by the general presumption of law would go along with the ownership of the land on its banks.[3]

Right of towage.—The banks of all tidal navigable rivers above high-water mark, and the banks of all non-tidal navigable rivers up to the edge of water, being the property of private individuals, it has been held in England overruling some earlier decisions and dicta to the contrary,[4] that the public have no Common law right to pass over them

J., in the opinion delivered by him in *Buck* v. *Squires*, 22 Vt. (484), 494, partially quoted in Gould on Waters, § 46, (note) 3:—

"The rule itself is mainly one of policy, and one which to the unprofessional might not seem of the first importance; but it is at the same time one which the American Courts, especially, have regarded as attended with very serious consequences, when not rigidly adhered to; and its chief object is, to prevent the existence of innumerable strips and gores of land, along the margins of streams and highways, to which the title, for generations, shall remain in abeyance, and then, upon the happening of some unexpected event, and one, consequently, not in express terms provided for in the title deeds, a bootless, almost objectless litigation shall spring up to vex and harrass those, who in good faith had supposed themselves secure from such embarrassment. It is, as I understand the law, to prevent the occurrence of just such contingencies as these, that in the leading, best reasoned, and best considered cases upon this subject it is laid down and fully established that Courts will always extend the boundaries of land deeded as extending to and along the sides of highways and fresh-water streams, not navigable, to the middle of such streams and highways, if it can be done without manifest violence to the words used in the conveyance."

[1] *Orr Ewing* v. *Colquhoun*, 2 App. Cas. 838.

[2] *Hargreaves* v. *Diddams*, L. R. 10 Q. B. 582; *Mussett* v. *Burch*, 35 L. T. (N. S.) 486.

[3] *Lord* v. *Commissioners of Sydney*, 12 Moo. P. C. C. 473; *Crossley* v. *Lightowler*, L. R. 3 Eq. 279.

[4] *Young* v. ——— 1 Ld. Raym. 725; *Queen* v. *Cluworth*, 6 Mod. 163; *Pierse* v. *Fauconberg*, 1 Burr. 292; Hale, de Portibus Maris, p. 2. c. 7; Hargrave's Law Tracts, 85—87.

for the towage[1] of boats, or to use them, except in cases of peril or emergency, for landing and embarkation, or for the mooring of vessels.[2] Any navigator who does any of these acts is liable in trespass to the riparian owner, who may, in the alternative, demand from him such charge as he likes for the use of the bank, provided he gives notice of it before the bank is so used.[3]

The right to tow on the banks of navigable rivers, being in the nature of a right of way,[4] may be acquired by the public by grant, dedication, custom or prescription,[5] and Lord Kenyon suggested that small evidence of user would be sufficient before a jury to establish the right by custom upon grounds of public convenience.[6] The right may also be conferred on the public by statute.[7]

In all these cases, the right of the riparian owner to the soil of the bank remains intact unless, where the right to tow is conferred by statute, it is taken away thereby in express terms.[8]

Drying nets on the bank.—Fishermen, as such, have no right to dry their nets on the bank either of a tidal or of a non-tidal river, or to use it for any purpose accessory to fishing, but they may acquire such right by prescription.[9]

1 *Ball* v. *Herbert*, 3 T. R. 253. In America, the rule varies in different states; some have adopted the doctrine of the Civil law and recognize the right of the public to tow on the banks of navigable rivers; others, however, have implicitly followed the Common law rule. Angell on Watercourses (7th Ed.) §§ 552—553; Angell & Durfee on Highways (3rd Ed.), §§ 74—75.

2 *Cf. Ibid*; *Williams* v. *Wilcox*, 8 Ad. & El. 314; *Blundell* v. *Catterall*, 5 B. & Ald. 268; *Gray* v. *Bond*, 2 Brod. & Bing. 667; Gould on Waters, § 99, and the American authorities cited in notes 1 and 2 to that section.

3 *Steamer Magnolia* v. *Marshall*, 39 Miss. 109; *Morgan* v. *Reading*, 3 S. & M. 366; *Commissioners* v. *Withers*, 29 Miss. 21, cited in Gould on Waters, § 99, note 5.

4 *Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 838.

5 *Supra*, note 3. *Cf. Winch* v. *Conservators of Thames*, L. R. 7 C. P. 458; 41 L. J. C. P. 241; *Badger* v. *S. Y. R. Co.*, 1 E. & E. 347; *Monmouth Canal Co.* v. *Hill*, 4 H. & N. 427; *Kinlock* v. *Neville*, 6 M. & W. 795; *Hollis* v. *Goldfinch*, 1 B. & C. 205; Angell on Tide Waters, 176; Angell on Watercourses (7th Ed.) § 551; Woolrych on Waters (2nd Ed.) 164; Gould on Waters, §§ 101, 104.

6 *Ball* v. *Herbert*, 3 T. R. 253.

7 *Winch* v. *Conservators of the River Thames*, L. R. 7 C. P. 471; *Lee Conservancy Board* v. *Button*, 12 Ch. D. 383.

8 *Ibid.*

9 *Gray* v. *Bond*, 2 Brod. & Bing. 667; 5 J. B. Moore, 527.

LECTURE IV.

NAVIGABLE AND NON-NAVIGABLE RIVERS.

Remarks on the use of the expression 'non-navigable river'—Rules of the Roman Civil law with regard to navigable rivers, a more valuable guide than the doctrines of the English law concerning tidal rivers, in solving legal questions with respect to rivers in India—I. Classification of rivers and streams according to the Roman law into perennia and torrentia—Public rivers—Test of navigability—Navigability not an essential ingredient of a public river—Agri limitati and agri arcifinii—Ownership of the beds of rivers and streams—Conflicting theories with regard to such ownership—Ownership of the banks of rivers—Public uses to which they are subject—II. Doctrine of tidality not recognized by the law of France—Under that law, rivers classified into such as are navigable, 'flottables,' or such as are not—A navigable or a 'flottable' river, what—Ownership of the beds of navigable or 'flottables' rivers—Ownership of their banks—Divergent opinions as to the ownership of the beds of streams which are neither navigable nor 'flottables.'—III. Question as to the ownership of the beds of rivers more fully investigated in America than in any other country—Different doctrines adopted by different states—Reasons stated by Judge Turley of Tennesse for rejecting the doctrine of tidality—Test of navigability—Whether rights of riparian proprietors in the United States are limited by the survey lines run on the top of the bank, or whether they extend down to water's edge—Conflicting decisions as to the ownership of the foreshore—Divergent opinions as to the ownership of the banks of navigable rivers—IV. In India, classification of rivers into navigable rivers and non-navigable streams alone recognised—Test of navigability—Ownership of the beds of navigable rivers—*Doe* d. *Seeb Kristo Banerjea* v. *The East India Company*—Discussion of other cases bearing upon the same question—Ownership of the beds of 'small and shallow' rivers or non-navigable streams—Discussion of authorities—*Khagendra Narain Chowdhry* v. *Matangini Debi*—Investigation of the foundation of the rule regarding ownership of small streams unnecessary in India—Ownership of the foreshore of a tidal navigable river—Ownership of the banks of navigable rivers.

Right of towage—Right of towage according to Roman law and the law of France.

Having in the preceding lecture discussed at length the law relating to the ownership of the beds and banks of tidal and non-tidal rivers, it remains for me now to call your attention to the law regarding the ownership of the beds and banks of navigable and non-navigable rivers. The expression 'non-navigable river' by reason of a narrower meaning having been assigned to the second term in popular language, as excluding small streams, may seem somewhat incongruous, but the larger signification which it has acquired in law and to which I have already so fully adverted, renders the use of it, at least in legal phraseology, less open to any such objection.

The division or classification of rivers, according as they do or do not possess the character of navigability, for the purpose of determining the ownership of their beds, and the rights of the public as well as of private individuals over their waters, obtains in the jurisprudence of most of the states in the continents of Europe and America. The large rivers that traverse the countries which at one time composed the vast territory of the Roman Empire have a greater resemblance to the rivers of India than those which course through the island of Great Britain. Consequently rules propounded in the most matured, if ancient, legal system of that Empire for the solution of the manifold questions which arise with regard to rivers cannot fail to furnish a far more infallible guide in the determination of similar questions with respect to rivers in India than the technical and perhaps narrow doctrines of this branch of the Common law of England, forced in a great measure, as they undoubtedly were, by the smallness of her rivers, which are navigable above the tide by small crafts only. I shall therefore first of all turn to the Roman law.

I. **Classification of rivers according to Roman law.**—A river (flumen) according to that law is distinguished from a stream (rivus) by its greater magnitude or by the reputation it bears among the surrounding inhabitants.[1] Rivers (flumina) are then classified into *perennia* (permanent) *i. e.*, rivers which flow all the year round, and *torrentia*, *i. e.*, winter torrents that leave their beds dry in the summer. If a perennial or permanent river, which generally flows all the year round, dries up in any summer, it does not thereby forfeit its distinctive character.[2]

Public rivers.—"Of rivers" says Ulpian, "some are public, some are not. A public river is defined by Cassius to be one that is perennial. This opinion of Cassius which Celsus also corroborates, seems to be reasonable."[3]

Therefore, according to this text, all perennial rivers are public rivers

1 Flumen a rivo magnitudine discernendum est aut existimatione circumcolentium. Dig. xliii. 12. 1. 1, (Ulpian.)

2 Item fluminum quaedam sunt perennia, quaedam torrentia. perenne est quod semper fluat, torrens, id est, hyme fluens. Si tamen aliqua aestate exaruerit, quod alioquin perenne fluebat, non ideo minus perenne est. Dig. xliii. 12. 1. 2, (Ulpian).

3 Fluminum quaedam publica sunt, quaedam non. publicum flumen esse Cassius definit, quod perenne sit: haec sententia Cassii quam et Celsus probat, videtur esse probabilis. Dig. xliii. 12. 1. 3, (Ulpian). The passage in the Institutes: 'flumina autem *omnia* et portus publica sunt' (Inst. ii. 1. 1,) is opposed to the above text of Ulpian as well as to the following excerpt from Marcian; 'sed flumina *paene* omnia et portus publica sunt' Dig. i. 8. 4. 1.

and the rest are private. They are said to be public, not in the sense that the ownership of the soil of their bed belongs to the public, but in the sense that they are intended for the use of the public, or in other words, that they are subjected by the law to a kind of servitude in favour of all members of the state.

Test of navigability.—Public rivers are then divided into such as are navigable and such as are not navigable.[1] A river, according to that law, is said to be navigable if it is navigable either by boats or by rafts:

"Under the appellation navigium" (a vessel or a boat),—says Ulpian, "rafts also are included, because the use of rafts is very often necessary."[2]

Navigability not essential to constitute a public river.—This division of public rivers into navigable and non-navigable rivers, is made not for the purpose of discriminating the nature of the ownership of their alveus or bed, but for the purpose of determining the particular Interdict which would be applicable to one kind of public river or the other, the Interdict applicable to navigable rivers or to the navigable portion of a river, being different from the Interdict applicable to non-navigable rivers or to the non-navigable portion of the same river;[3] though doubtless for some purposes, the same Interdict was applicable to both kinds of rivers.[4]

Navigability has been regarded by some learned text-writers as forming an essential element in the constitution of a public river under the Roman law. But this, if I may venture to state, is probably not so. The passages in the Digest, bearing upon this point, warrant the inference that non-navigable rivers[5] were as much public as navigable rivers, if

[1] The following texts bear out the position that not only navigable rivers, but also non-navigable rivers were public under the Roman law, if they were perennial:—'Ergo hoc interdictum ad ea tantum flumina publica pertinet, quae sunt navigabilia, ad cetera non pertinet'. Dig. xliii. 12. 1. 12, (Ulpian). 'Sed et si in flumine publico, non tamen navigabili fiat, idem putat'. Dig. xliii. 12. 1. 18, (Ulpian). 'Quominus ex publico flumine ducatur aqua, nihil impedit (nisi imperator aut senatus vetet), si modo ea aqua in usu publico non erit: sed si aut navigabile est aut ex eo aliud navigabile fit, non permittitur id facere'. Dig. xliii. 12. 2, (Pomponius). 'Pertinet autem ad flumina publica, sive navigabilia sunt sive non sunt. Dig. xliii. 13. 1. 2, (Ulpian). *Cf.* J. Voet, Comm. ad Pand. lib. xliii. t. 12. §§ 12, 13; Pothier, Pandectae, lib. xliii. t. 12. art. 1. § 3.

[2] Navigii appellatione etiam rates continentur, quia plerumque et ratum usus necessarium est. Dig. xliii. 12. 1. 14, (Ulpian).

[3] Dig. xliii. 12. 1. 12, 17, 18.

[4] Dig. xliii. 13. 1. 2.

[5] The use of the banks of all perennial rivers being public under the Roman law there could be no difficulty in their making use of non-navigable rivers also, *e. g.*, by taking water. Dig.

they were only perennial. Gothofred in a note upon the passage, 'pertinet ad flumina publica, sive navigabilia sunt, sive non sunt'[1], (*i. e.*, this (Interdict) applies to all public rivers, whether they be navigable or not), says, 'flumen non fit publicum sola navigandi utilitati. Nam flumen publicum esse potest, et tamen non navigabile', (*i. e.*, rivers do not become public merely by reason of their suitability for navigation. Because, a river may be public even though it be not navigable). Of course, such Interdicts as are intended for the protection of the public right of navigation, can apply only to such public rivers as are, in fact, navigable, and as far as they are so navigable.[2] Interdicts which are intended for the preservation of the banks of rivers, for the maintenance of the flow of their water without diminution or diversion, or for the removal of obstructions from their channel, apply to all rivers whether they are navigable or not.[3] There were some Interdicts which were specially applicable to non-navigable public rivers.[4]

It is also evident from what I have already said, that under the Roman law the flux and reflux of the tides of the sea formed no factor whatever in determining the rights of the public or of the riparian owners with regard to rivers generally.

Agri limitati and agri arcifinii.—Under the Roman law, lands were divided into two principal[5] classes, agri limitati, *i. e.*, limited lands, and agri arcifinii, *i. e.*, 'arcifinious' lands. Lands obtained generally by conquest and distributed amongst the soldiery, or granted to private individuals by the state, as comprised within certain defined limits or boundaries, such as roads or paths, were called agri limitati, an appellation given to them because they were enclosed by certain artificial limits; whereas all lands bounded by natural limits such as rivers, woods or mountains, were called agri arcifinii,[6] because, according to Varro, these natural objects

xliii. 12. 2), or by fishing, ('ius piscandi omnibus commune est in portubus fluminibusque'. Inst. ii. 1. 1.)

[1] Dig. xliii. 13. 1. 2.

[2] Dig. xliii. 14.

[3] Dig. xliii. 13.

[4] Dig. xliii. 12. 1. 12, 18.

[5] Ager assignatus or assigned land was merely a species of ager limitatus. Land given by a certain measure only, as by so many acres, was known by the special term ager assignatus. Grotius, de Iur. Bell. et. Pac. lib. ii. c. 3. § 16; Vinnius, Comm. ad Inst., lib. ii. t. 1. text. De alluvione.

[6] Dig. xli. 1. 16; Grotius, de Iur. Bell. et Pac. lib. ii. c. 3. § 16, and Barbeyrac's notes thereto. Arcifinius, scilicet, qui non alium finem ea parte habet quam naturalem, id est, ipsum flumen. Ager limitatus dictus fuit ager ex hostibus captus, et deinde â populo vel Principe privatis ita possidendus datus, ut certis limitibus sive finibus ius possessoris circumscriberetur.

also served as 'fines arcendis hostibus idoneos,' *i. e.*, boundaries fit to keep the enemies out.[1]

Ownership of the beds of rivers and streams.—The ownership of the alvei or beds of private rivers belonged to them through whose land they flowed. The ownership of the alvei or beds of public rivers which flowed through agri limitati or limited lands, belonged not to the proprietors of such lands but to the state,[2] because the very nature of the grants under which they held forbade any presumption of ownership in their favour. But if such a river ran between agri arcifinii or 'arcifinious' lands, then, whether the river was navigable or not, the ownership of its alveus or bed, after it became dry, belonged to the proprietors of lands on its adjacent banks. "If," says Pomponius quoting Celsus the younger "on the bank of a river which is adjacent to my land, a tree grows, it is mine, because the soil itself is my private (property), although the use of it is considered to belong to the public. So too the bed, when it becomes dry, becomes the property of those nearest to it, because the public no longer use it."[3]

But with regard to the ownership of the alveus or bed of a public river running through 'arcifinious' lands, when such alveus or bed remains covered by water, rival theories have been in existence. The earlier commentators and interpreters of the Roman law maintained that, in legal contemplation the bed was always the property of the riparian owners, whether water flowed over it or not, subject, of course, in the former case to the right of the public to use the river or its water for certain purposes.[4] The modern expositors, however, affirm that the

Limitatis agris similes sunt, qui certa mensura comprehenduntur. Vinnius, Comm. ad Inst., lib. ii. t. 1. text. De alluvione.

Heineccius apparently uses the term ager adsignatus with regard to that description of land to which Grotius and Vinnius apply the term ager limitatus.

Veteres Romani agros dividebant in arcifinios, limitatos et adsignatos. Arcifinii sunt, qui non alios habent fines, quam naturales, veluti montes, flumina &c.: limitati, qui ad certam mensuram possidentur: adsignati, qui per extremitatem mensurae comprehenduntur. Heineccius, Recit. Iur. § 358.

[1] Grotius, de Iur. Bell. et Pac., lib. ii. c. 3. § 16.

[2] Ut sciretur, quod extra hosce fines esset, id publicum manere. Vinnius, Comm. ad Inst., lib. ii. t. 1 text. De alluvione.

[3] Celsus filius, si in ripa fluminis, quae secundum agrum meum sit, arbor nata sit, meam esse ait, quia solum ipsum meum privatum est, usus autem eius, publicus intelligitur. et ideo cum exsiccatus esset alveus, proximorum fit, quia iam populus eo non utitur. Dig. xli. 1. 30. 1.

[4] Grotius, de Iur. Bell. et Pac., lib. ii. c. 8. § 8; J. Voet. lib. i. t. 8, § 9; Vinnius, Comm.

bed of a public river, so long as it remains covered by water, was by that law, considered as res nullius, or no man's property.[1] The sources do not furnish us with any direct or positive text decisive of the question, nor is it at all possible from the materials contained in them to deduce any coherent theory, such as will harmonise with the somewhat peculiar, unsymmetrical and, in some respects, even illogical, doctrines of the Roman law with respect to alluvion, islands springing up in a river, and dereliction of a river-bed. If, on the one hand, as the adherents of the former opinion chiefly argue, the bed of a public river is res nullius, then islands and derelict beds should, reasoning in accordance with the theory of the Roman jurists with regard to occupancy, be held to belong to the first occupant, and not to the riparian proprietors. But this would, doubtless be opposed to the acknowledged doctrines of the Roman law, which, as I shall show hereafter, assigned the ownership of islands and derelict beds to the owners of lands on the adjacent banks. If, on the other hand, as the supporters of the latter theory contend, the bed is the property of the riparian owners, then it ought always to remain as such, whether it be covered by water or not, and it is wholly superfluous to resort to the peculiar doctrine of alluvion,—the acquisition of ownership in lands added by gradual and imperceptible accession,—to account for the ownership of a portion of the bed of a river adjacent to the bank when the water retires from it in consequence of a deposit of soil thereon. Nor, on that assumption, does there seem to be any foundation in justice for the doctrine of avulsion; for why should soil, violently severed from one's land and deposited over a site belonging to another, belong to the former, by reason of such violent severance alone, and the latter be thus deprived, not on account of any fault of his own, of the ownership of the site which ex hypothesi belongs to him?[2] I may add that the advocates of the first theory also

ad Inst., lib. ii. t. 1. text. De usu et proprietate riparum; De insula, ('ego non aliam huius acquisitionis rationam esse arbitror, quam quod insula alvei pars fit, alveus pars censeatur vicinorum praediorum').

[1] 1 Moyle, Imp. Iust. Inst. 190 (note to § 19), which professedly embodies the result of the latest German researches in Roman law. Markby's Elements of Law (3rd ed.), 238. § 493, which also is apparently based upon the German authorities.

[2] It is this incongruence in the doctrines of the Roman law with regard to alluvion that called forth from Grotius and Puffendorf the remark that they are founded not so much on natural law, which they profess to be, as on the positive usages or ordinances of particular nations. Grotius, de Iur. Bell. et Pac. lib. ii. c. 8. § 8; Puffendorf, de Iur. Nat. et Gent. lib. iv. c. 7. § 11.

rely, in proof of their position, upon the further fact that, under the Roman law riparian proprietors were competent to erect works even in the bed of a public river for the protection of the banks or of the adjoining lands, provided they did not thereby interfere with the navigation of the river by the public, deflect the course of the stream, or otherwise cause any injury to the rights of the upper and the lower riparian proprietors.[1]

Ownership of the banks of rivers.—The ownership of the banks of rivers according to the Roman law belonged to the proprietors of the adjoining lands, subject however to the use of the public for navigation and other purposes. The rule is thus laid down in the Institutes :—

"Again the public use of the banks of a river, as of the river itself, is part of the law of nations; consequently, every one is entitled to bring his vessel to the bank, and fasten cables to the trees growing there, and use it as a resting place for the cargo, as freely as he may navigate the river itself. But the ownership of the bank is in the owner of the adjoining land, and consequently so too is the ownership of the trees which grow upon it."[2]

A comparison of the above passage with that relating to the public use of the seashore[3] under Roman law shows, that according to that law, the public had no right to use the banks of a river for the purpose of drying their nets and hauling them up from the river.[4]

II. **Doctrine of tidality not recognised by French law.**—Turning next to the law of France, one seeks in vain to discover in it any trace of that doctrine which presumes the ownership of the bed of the river to be vested in the Crown or in the subject, according as it is or is not within the flux and reflux of the tide. The legal system of that country built upon the substructure of the Roman jurisprudence, supplemented and slightly modified by the customary laws of the provinces and ultimately consolidated, re-modelled and partially reconstructed by the Code Napoleon, could hardly receive into its edifice a doctrine so utterly repugnant to its framework and style.

Classification of rivers according to French law.—The Code Civil

[1] 'Quominus illi in flumine publico ripave eius opus facere ripae agrive qui circa ripam est tuendi causa liceat, dum ne ob id navigatio deterior fiat'. Dig. xliii. 15. 1, (Ulpian). *Cf.* J. Voet, Comm. ad Pand. lib. i. t. 8. § 9.

[2] 2 Moyle, Imp. Inst. 36; Inst. ii. 1. 3, 4; Dig. i. 8. 5.

[3] Inst. ii. 1. 5; *supra*, 40. *Cf.* Dig. i. 8. 5. 'retia siccare et ex *mare* reducere' (Gaius).

[4] Nor does the law of France allow such a liberty to fishermen. Sirey, Les Codes Annotes, v. 1, § 650, note (no. 17.)

contains no separate article classifying rivers and streams according as they are navigable, 'flottables' or not, but various provisions are laid down therein by which the rights of the state, the public and of the riparian proprietors respectively with regard to rivers and streams are discriminated and regulated according as such rivers and streams are navigable, 'flottables' or not.[1] It may therefore be safely stated that all rivers and streams according to that law are distinguished into such as are navigable or 'flottables' and such as are not. The Code contains no definition of a navigable or 'flottable' river, but there have been judicial decisions in France by which the precise significations of those words have been to some extent determined.

Test of navigability.—A river is said to be navigable or 'flottable' when it is navigable for boats, flats and rafts. A river which floats logs only, and is incapable of floating boats or rafts laden with articles of merchandise, does not come under the denomination of a 'flottable' river;[2] nor does a river fall within the category of a navigable or 'flottable' river, merely because the dwellers on its banks employ some means of navigation for the purpose of crossing it.[3] In short, it is the possibility of the use of the river for transport in some practical and profitable way, which forms the real test of navigability under that law.[4] The navigability of a river, is, in France, determined by the administrative authority.

Ownership of the beds of navigable or 'flottables' rivers.—The beds of rivers and streams which are navigable or 'flottables' in the above sense, are under that law considered as dependencies on the public domain, that is to say, as the property of the state.[5]

Ownership of the banks of rivers.—The ownership of the banks of rivers whether navigable or 'flottables' or not, belongs to the owners of the adjacent lands and the limit which separates the bed from the bank, that is to say, the public domain from the property of the riparian

1 *Cf.* Code Civil, §§ 538, 556, 559, 560, 561, 562, 563.

2 Sirey, Les Codes Annotes, v. 1. § 538, note (nos. 15, 16).

3 *Ibid.* note (no. 15).

4 It was so held by the Judicial Committee of the Privy Council in *Bell* v. *Corporation of Quebec*, 5 App. Cas. 84, on appeal from a judgment of the Court of Queen's Bench for the province of Quebec, in Canada, where the old French law prevails. The opinion was based solely on the French authorities. It is worthy of note that at the locus in quo the river was tidal, and yet the Courts deemed it necessary to decide whether it was navigable or 'flottable' or not.

5 Sirey, Les Codes Annotes, v. 1. § 538.

owners, is fixed at the point which the highest water in the normal condition of the river or stream reaches, and above which the water commences to overflow.[1] It is the administrative authority alone, to the exclusion of the judicial, to which appertains the province of determining the extent and the limits of the beds of navigable rivers or streams.[2]

Ownership of the beds of streams neither navigable nor 'flottables'. —The question relating to the ownership of the beds of streams which are neither navigable nor 'flottables,' has been the subject of much controversy and of no less conflicting opinions in France. There appear to be three systems in competition. According to one, the small streams or watercourses neither navigable nor 'flottables,' are like the navigable or 'flottables' rivers, the property of the state. This opinion is advocated by Merlin, Proudhon, Royer-Collard, and a few others, and also countenanced by some judicial decisions.[3] A second system is supported by other text-writers in much greater number, who on the contrary maintain that, the small streams and watercourses, neither navigable nor 'flottables,' are the property of the riparian owners. Of these, it is sufficient to mention the names of Vaudore, Toullier, Pardessus, Daviel and Troplong, though there are several others besides, who equally entertain the same opinion. This too is sustained by various judicial decisions.[4] Between these two systems is interposed a third, which assigns the ownership of the beds of non-navigable streams to the riparian owners, (the flowing water not being the property of any one), subject, so long as they are covered with water, to certain servitudes in favour of the public. This is maintained by Devilleneuve, Carrette, Comte, Tardif, Cohen, and Dufour.[5]

Under the system which asserts the right of the riparian proprietors to the beds of non-navigable streams and watercourses, the bed is declared to belong to them in common, pro indiviso, and not in severalty, each up to the central line of the stream. But this community of interest does not prevent rules being made for the distribution of the water among the riparian proprietors.[6]

[1] Sirey, Les Codes Annotes, v. 1. § 538 note (no. 22.) It has, however, been laid down in Rouen that this limit is determind by the line reached by the water when it is at its mean level. *Ibid.*, note (no. 21).

[2] *Ibid.*, § 538 note (no. 23.)

[3] *Ibid.*, § 538 note (nos. 26, 29.)

[4] *Ibid.*, § 538 note (nos. 27, 30.)

[5] *Ibid.*, § 538 note (no. 28.)

[6] *Ibid.*, § 538 note (no. 32.)

Under the feudal system as it prevailed in France, the property in small streams belonged to the ancient seigneurs. The laws by which that system has been abolished, have not at all interfered with the grants made before such abolition, nor have they invalidated the onerous titles created by the ancient seigneurs in water-courses situated in their seigneuries.[1] It is evident from this that, in France a subject cannot claim the ownership of the bed or of the soil between high and low-water mark of a navigable or 'flottable' river under a grant from the state, unless it had been obtained before the abolition of the feudal system.

III. **Ownership of the beds of rivers under the American law.**—The subject has undergone a far more thorough, comprehensive and searching investigation in America than in any other country. The abundance of rivers of every description from the grand and magnificent Mississippi to the comparatively unimportant streams in the New England States, the birth of opulent cities, the rapid growth of inter-state commerce, the daily increasing development of agricultural and manufacturing industries, and the vast accumulation of wealth generally, have all contributed to raise up before the courts of that country a variety of questions relating to the rights of the public and of private individuals in rivers both below and above the tide, which however depend, more or less, for their ultimate solution upon the determination of the ownership of the soil of the bed of such rivers as well as of their banks. Originally borrowing their jurisprudence from the doctrines of the Common law of England, the various states in America were primâ facie bound to adhere to the Common law definition of rivers, and accordingly such states as New Jersey, Delaware, Maryland, Georgia, Massachusetts, New Hampshire, Connecticut, Maine, Virginia, Ohio, Udiana, Vermont, Kentucky[2] and Illinois, where the rivers are com-

[1] Sirey, Les Codes Annotes, v. 1. § 538, note (no. 33).

[2] In *Berry* v. *Smyder*, 3 Bush, 266, (decided in Kentucky and cited in a note to § 62 of Gould on Waters), Williams, J., suggested new reasons for the distinction drawn between the titles to the beds of fresh and salt-water rivers respectively. He said:—"So long as the ocean keeps its bed, and nature's present frame shall continue to exist, there will always be water up to the ocean's level in all those channels where the tide ebbs and flows, and this not dependent upon the water falling in rain; therefore, these channels are filled to ocean's level twice every twenty-four hours, and are constantly and uniformly navigable. Their navigability does not depend upon a season more or less rainy, but on the constant, unvarying laws of nature and will remain as surely navigable as the sea itself. Though not so deep, their surface level is the same; hence, without violence of expression or idea, they are called arms

paratively small and unimportant, have laid down the rule of tidality as determining the ownership of the bed of a river and the right of fishing in its waters; on the other hand, Pennsylvania, North Carolina, Iowa, Missouri, Tennesse, Alabama and one or two other states, where the rivers are navigable for several hundreds of miles above the reach of the tides and upon whose broad expanse an almost oceanic commerce is carried on, have liberated themselves from the trammels of the Common law, and laid down navigability in fact as the only rational test of navigability in law, and as determining their amenability to the Admiralty jurisdiction, and the proprietorship of the beds and banks of such rivers.[1]

Judge Turley of Tennesse has adduced most excellent reasons for rejecting the doctrine of tidality in countries where the rivers are large and navigable far above the tide. "All laws," he observes, "are, or ought to be, an adaptation of principles of action to the state and condition of a country, and to its moral and social position. There are many rules of action recognised in England as suitable, which it would be folly in the extreme, in countries differently located, to recognise as law; and, in our opinion, this distinction between rivers 'navigable' and not 'navigable,' causing it to depend upon the ebbing and flowing of the tide, is one of them. The insular position of Great Britain, the short courses of her rivers and the well known fact that there are none of them navigable above tide water but for very small crafts, well warrants the distinction there drawn by the Common law. But very different is the situation of the continental powers of Europe in this particular. Their streams are many of them large and long and navigable to a great extent above tide water; and accordingly we find that the Civil law which regulates and governs these countries, has adopted a very different rule."[2]

of the sea. But it is different with all the great rivers of the earth above tide water. These are dependent for their supply from the clouds."

[1] Gould on Waters, §§ 56-75; Angell on Watercourses (7th ed.), §§ 546-549; Houck on Navigable Rivers, §§ 50-120; Angell on Tide Waters, 38, 76; Hall on the Seashore (2nd ed.), 3 (note f).

[2] *Elder* v. *Burrus*, 6 Humph. (Tenn.) 366, cited in Angell on Watercourses (7th ed.), § 549. Cf. *Barney* v. *The City of Keokuk*. Sup. Ct. U. S. Oct. T. 1876, 4 Centr. Law Journ. 491, 494; 94 U. S. 324, (cited in a note to the same section) where Bradley, J., said:—"The confusion of navigable with tide water, found in the monuments of the Common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British Island, and that of the American Continent. It had the influence for two generations of excluding the Admiralty jurisdiction from our great rivers and inland seas.

Test of navigability.—In America, rivers are said to be navigable in fact (in so far as that quality is regarded as a criterion for determining the ownership of their bed), when they are used or are susceptible of being used in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[1]

Mr. Houck's opinion as to the survey lines run on the top of the banks being the limits of estates.—Closely allied to the main topic under discussion is the point arising out of the system of surveys and grants of public lands under the laws of the United States, which it will be convenient to notice now. It has an important bearing upon certain theories advanced by the learned author of "The Law of Navigable Rivers" with regard to the law of alluvion, which I shall have occasion to notice and comment upon in a subsequent lecture.[2] In an argument certainly remarkable for much plausibility and research, he has contended[3] that the lines run by the United States surveyors along the top of the river banks are lines of boundary, that the properties of the adjoining landowners are limited by such mathematical lines, and, when these cannot be found, by the top of the bank, that being the great landmark. But more recent decisions[4] in America have, however, settled that such lines are not lines of boundary at all; that, notwithstanding such lines, the properties of the adjacent landowners extend as far as the edge of the water, thus giving them the benefit of river frontage and with it the right of access to the river, and the other incidents of riparian proprietorship as to accretion and the use of the water.

A system of survey and thak measurements and the so-called Dearah surveys, which have been held by Government in this country, and which in their method, though not in their object, are probably analogous to the surveys of the United States, may possibly give rise to a similar question here; and if it does occur, it will, I apprehend, have to be decided in the same way in which it has been done in America. The question was raised before the Privy Council in *Nogendra Chandra Ghose* v. *Mahomed Esoff*,[5] but their Lordships expressed no opinion upon it.

And under the like influence it laid the foundation in many states of doctrines with regard to ownership of the soil in navigable waters above tide-water, at variance with sound principles of public policy."

1 *The Daniel Ball*, 10 Wall. 557, cited in Angell on Watercourses (7th ed.), § 543.

2 *Infra*, Lect. VI.

3 Houck on Navigable Rivers, §§ 250-260.

4 *Railroad Co.* v. *Schurmeir*, 7 Wall. 272; *Barney* v. *Keokuk*, 94 U. S. 324, cited in § 76 of Gould on Waters.

5 10 B. L. R., 406; 18 Suth. W. R., 113.

To return: It follows, of course, from what has been already stated that, in those states which have adopted the Common law doctrine in its entirety, the soil of the beds of rivers beyond the influence of the tide, belongs to the adjacent proprietors usque medium filum aquae; and that in those states where navigability in fact has been adopted as the test of navigability in law, the soil of the beds of rivers above the point where navigability ceases, likewise belongs to the adjacent proprietors usque medium filum aquae.

Ownership of the foreshore and banks—But the question to whom belongs the soil between high and low-water mark, is one upon which there has not been a concurrence of opinion in the courts of the different states. In those states where the Common law doctrine has been accepted, the soil of the foreshore has, of course, been held to belong to the state, and the lands of riparian proprietors, to terminate with the line of ordinary high-water mark. But of those states which have repudiated the Common law doctrine, some have adopted the rule that the rights of the adjacent proprietors extend up to the ordinary high-water mark; while others have laid down that such rights extend down to the ordinary low-water mark; the result being, that some states have reserved to themselves the right to the soil of the foreshore, while others have conceded that right to the adjacent landowners.[1]

Similar diversity of opinion has prevailed with regard to the ownership of the banks of navigable rivers above the flow and reflow of the tides. In some of the states, the right of the adjacent owners to the banks has been regarded as being so absolute and capable of such exclusive appropriation by them as to be entirely free from those servitudes in favour of the public that are incidental for the purposes of navigation; while in others, and these are apparently more numerous than the former, the banks, though regarded as being the private property of the adjacent owners, have yet been held to be subject to such servitudes.[2]

IV. **Classification of rivers according to Anglo-Indian law.**—Lastly, I shall discuss the law of India regarding the topics I have just touched upon. Bengal Regulation, XI of 1825, which has force almost throughout India except the Presidencies of Madras and Bombay, was passed for the purpose of declaring the rules to be observed in determining claims to lands gained by alluvion or by dereliction of a river or the sea. Section 4, clause 3, enacts:—

"When a chur or island may be thrown up in a *large navigable* river

[1] *Supra*, 107, note 1.

[2] *Ibid.*

(the bed of which is not the property of an individual), or in the sea, and the channel of the river, or sea, between such island and the shore may not be fordable, it shall, according to established usage, be at the disposal of Government &c."

And clause 4 of the same section provides:—

"In *small and shallow* rivers, the beds of which, with the julkur (or)[1] right of fishery, may have been heretofore recognised as the property of individuals, any sandbank, or chur, that may be thrown up, shall, as hitherto, belong to the proprietor of the bed of the river, &c."

It is evident from the language of these two clauses that, the Indian legislature, in declaring the rules for the determination of the ownership of churs or islands or sandbanks that might be formed or thrown up in rivers, classified or divided rivers according as they are 'large navigable rivers' or 'small and shallow rivers.' None of the several provisions of the Regulation make any mention of the presence or absence of the tide of the sea as in any way determining or affecting the rights of the Government or of private individuals to the beds of rivers or to alluvial or insular formations in them. Indeed, the expression 'tide' does not even occur in the Regulation.

It is to be observed also that, the expression 'small' in clause 4 has manifestly been used in contradistinction to the expression 'large' in clause 3; and that the expression 'shallow' in clause 4 has been used in contradistinction to the expression 'navigable' in clause 3. A river may be small and yet may be navigable; consequently, 'small' refers to the breadth of a river, and 'shallow' to its depth and presumably to its non-navigability.

Test of navigability.—A river has been held to be navigable when it allows of the passage of boats at all seasons of the year, although in the hot and cold seasons the water may not be very deep.[2]

Clause 3 of section 4, points to the further, though perhaps not conclusive, inference that the bed of a large and navigable river is primâ facie the property of Government, and that possibly it may also become the property of a private individual.[3] By parity of reasoning, the in-

[1] The word 'or' is evidently omitted by mistake. It is in Mr. J. H. Harrington's draft of Beng. Reg. XI of 1825: Markby's Lect. on Indian Law, 53.

[2] *Chunder Jaleah* v. *Ram Chunder Mookerjea*, 15 Suth. W. R., 212; *Mohiny Mohun Dass* v. *Khaja Ahsanoollah*, 17 Suth. W. R., 73, (a river cannot be considered as a "large navigable river" within the terms of the section, merely because it is unfordable).

[3] *Jugdish Chunder Biswas* v. *Chowdhry Zuhoorul Huq*, 24 Suth. W. R., 317; *Mohiny Mohun Dass* v. *Khajah Ahsanoollah*, 17 Suth. W. R., 73.

ference deducible from clause 4 of the same section, is that the ownership of the bed of a small and shallow river generally belongs to private individuals.

The language of section 5 of the Regulation also suggests the same conclusion by implication. It says :—

"Nothing in this Regulation shall be construed to justify any encroachments by individuals, on the beds or channels of navigable rivers &c."

If the beds of navigable rivers had been the property of private individuals, encroachments made by them upon such beds would not have been declared as unjustifiable.

Accordingly, the Privy Council, in *Doe* dem. *Seeb Kristo Banerjee and others* v. *The East India Co.*,[1] held that the East India Company, as representing the Indian Government, had a freehold in the beds of navigable rivers in India.[2] It may be noted, that though the river, in point of fact, was also tidal in the locality in question, yet that circumstance did in no way affect their Lordship's judgment.

Although, therefore, one should have expected that the rule was fully established, yet we find that in *Gureeb Hussein Chowdry* v. *Lamb*,[3] the Judges of the Calcutta Sudder Dewani Adawlat used expressions

[1] 6 Moo. Ind. App., 267 ; 10 Moo. P. C. C. 140.

[2] In *Nobin Kishore Roy* v. *Jogesh Pershad Gangooly*, (6 B. L. R. 343 ; 14 Suth. W. R., 352), Norman, J., states the proposition in a slightly different form : "So long as it,"—*i. e.*, the bed of a navigable river,—"is washed by the ordinary flow of the tide at a season when the river is not flooded, I think that it remains publici iuris, or, if vested in any one, that it is vested in the Crown ; not under Regulation XI of 1825, and for mere fiscal purposes, but as representing, and as it were a 'trustee for the public.' That land in this condition is not subject to private rights of ownership is universally recognised, and it might be most detrimental to the interests of navigation if it were otherwise." The question raised in that case was as to the ownership of certain alluvial formations (in the bed of a tidal navigable river), which had not attained sufficient height so as to be above the level of the ordinary high-water mark.

But in *Lopez* v. *Muddun Mohun Thakoor*, (13 Moo. Ind. App., 467 ; 5 B. L. R., 521 ; 14 Suth. W R., (P. C.) 11,) the bed of a navigable river, where it is not the property of any private individual, has been described by the Privy Council as being 'public territory' or 'public domain.' In *Eckowrie Sing* v. *Hiralal Seal*, (12 Moo. Ind. App., 136 ; 2 B. L. R., (P. C.) 4 ; 11 Suth. W. R., (P. C.) 2) the Privy Council at the commencement of their judgment, in stating the nature of the case before them said :—"This is a case of a claim to land washed away and reformed in the bed of *a navigable river, the ownership of which is not commonly in the riparian proprietors of its banks* and which is not proved in this case to have belonged to the predecessor in title of either disputant." The italics do not occur in the report.

[3] Calc. S. D. A. Rep. 1859, p. 1357.

in their judgment which seem to indicate that they intended to limit the right of the Government to the beds of navigable rivers as far as the tide ebbs and flows. The plaintiff in that case claimed an exclusive right of fishery in a portion of a navigable river (though that portion happened also to be tidal), as appurtenant to his permanently settled riparian estate, and the Court substantially held that the bed of a navigable river where the tide ebbs and flows, is primâ facie vested in the state and that the right of fishery therein belongs to the public. That this is the right interpretation of that decision, is borne out by the remarks of Glover, J., in *Chunder Jaleah and others* v. *Ram Churn Mokerjee and others*,[1] in which a claim was preferred by the plaintiffs as members of the public for the enforcement of their rights of fishery in a non-tidal navigable river, in which the defendants claimed to have an exclusive right of fishery as forming part and parcel of a permanently settled estate which they had purchased from Government. His Lordship dismissed the claim distinguishing the case from that of *Gureeb Hussein Chowdry and others* v. *Lamb*,[2] upon the ground that the latter related to a tidal river. He said:—"But in the first place, this case is not on all fours with the present. It had reference to the Megna, a large river in which the tide ebbs and flows regularly, and which fact had everything to do with the decision arrived at." The High Court in that case held that the ownership of the bed of the river which was navigable for boats, though situated far above the ebb and flow of the tide, primâ facie, belonged to Government and that it could grant an exclusive right of fishery in such waters to a private individual. Therefore, as regards the ownership of the bed of a river, this case goes further than *Gureeb Hussein Chowdry* v. *Lamb*,[3] because it extends the right of the Government to the beds of navigable rivers above the flux and reflux of the tide. Sir Michael Westropp in *Baban Mayacha* v. *Nagu Shravucha*,[4] after reviewing the above two cases as well as *Doe* d. *Seeb Kristo Banerjee* v. *The East India Co.*,[5] and *Bagram* v. *The Collector of Bhullooa*,[6] expressed himself in a way such as would raise the inference that, in his opinion, the

1 15 Suth. W. R., 212. Cf. *Bagram* v. *Collector of Bhullooa*, Suth. W. R., 1864, p. 243, (in which the right of Government to the beds of all navigable rivers, whether tidal or non-tidal was clearly acknowledged); *Collector of Rungpore* v. *Ramjadub Sen*, 2 Sev. 373; 1 R. C. & Cr. R. 174.

2 Calc. S. D. A. Rep. 1859, p. 1357.

3 *Ibid.*

4 I. L. R., 2 Bom., 19.

5 6 Moo. Ind. App., 267.

6 Suth. W. R., 1864, p. 243.

right of the Government to the beds of navigable rivers extends as far only as the tide ebbs and flows, and no further. However that may be, the question seems now to be concluded by the following observation of the Privy Council in the case of *Nogendro Chandra Ghose* v. *Mahomed Esoff*[1]—"The learned counsel did not contend for a distinction between a tidal river and a navigable river which has ceased to be tidal. Their Lordships have no reason to suppose that in India there is any such distinction as regards the proprietorship of the bed of the river."[2]

Ownership of the beds of non-navigable streams.—The beds of 'small and shallow' rivers or streams or of those portions of rivers which are above the point where navigability ceases, primâ facie belong to the riparian proprietors, ad medium filum aquae, *i. e.*, as far as the middle thread of the stream. But if the lands on both banks of such a stream belong to one and the same person, the presumption of law is, that he is the owner of the entire bed.

In *Bhageeruthee Debea and others* v. *Greesh Chunder Chowdhry*,[3] Norman, J., in delivering the judgment of the Court, after citing a previous case decided by the Sudder Dewany Adawlut of Calcutta in 1862,[4] said: "By the Common law of this country, the right to the soil of a river when flowing within the estates of different proprietors belongs to the riparian owners, ad medium filum aquae".[5] That this is the correct view of the law in this country upon the point in question seems to be corroborated by the observations of the Privy Council in *Kali Kissen Tagore* v. *Jodoo Lal Mullick*,[6] in which the plaintiff, respondent, who was the owner of some land on the bank of a tidal but non-navigable creek, complained that the erection by the defendant (whose land lay on the opposite bank) of a wall was an encroachment on the bed of the

[1] 10 B. L. R. 406; 18 Suth. W. R., 113.

[2] In *Lopez* v. *Madan Mohun Thakoor*, (13 Moo. Ind. App. 467; 5 B. L. R. 521; 14 Suth. W. R., (P. C.) 11), the bed of the river Ganges at Bhaugulpore, and in *Mussamat Imam Bandi* v. *Hargobind Ghose*, (4 Moo. Ind. App. 403) the bed of the same river at Patna, was regarded by the Privy Council, as well as by all the Courts below, as 'public domain' or 'public territory,' though, as a matter of fact, the river is *not tidal* but only navigable at those places.

[3] 2 Hay, 541. It would appear from the statement of the facts of the case that the accretions formed in a navigable river, where the middle thread rule certainly does not apply.

[4] *Rajah Neelanund Sing and others* v. *Rajah Teknarain Singh*, Cal. S. D. A. Rep., 1862, p. 160.

[5] Cf. *Hunooman Dass* v. *Shama Churn Bhutta*, 1 Hay, 426. Contra, *Prosunno Coomar Tagore* v. *Kishen Choytunno Roy*, 5 Suth. W. R., 286.

[6] 5 Cal. L. R., 97.

stream and constituted an injury, for which he was entitled to have the wall demolished. It was found that the bed of the stream belonged to Government in right of its zemindari of 24-Pergannahs. Upon this state of facts the Privy Council observed :—"It appears that the plaintiff at all events has not all the rights of a riparian proprietor, or he would have been entitled to the bed of the stream ad medium filum." That is to say, that even according to the law in India, one of the rights of a riparian proprietor on a non-navigable stream is that, ordinarily, he is also the owner of its bed ad medium filum. The case further shows that, although this is the primâ facie presumption, yet it is capable of being rebutted, and that the bed may belong to neither ripariam proprietors but to a third person. Be that as it may, the rule above stated may be taken to be conclusively settled by the recent decision of the Privy Council in *Khagendra Narain Chowdhry* v. *Matangini Debi*,[1] in which the proprietors of estates situated on opposite banks of a watercourse (described in the judgment of the Court below as a 'sota' or an 'elbow or offset' of a river) brought cross-suits, each claiming against the other to be exclusively entitled to, and to be put into possession of, the whole of the watercourse flowing through their boundary. It was under attachment by Government under the provisions of the Criminal Procedure Code for the prevention of disputes occasioning a breach of the peace, and both parties had failed in their respective suits to make out exclusive title and possession in themselves. Under those circumstances the High Court of Calcutta was of opinion that both suits should be dismissed. But the Privy Council on appeal held that, as the evidence was sufficient to prove possession of the 'sota' between the two riparian owners, and that as Government was merely in the position of a stakeholder, advancing no proprietary claim thereto for itself, each of such owners was entitled to an equal moiety of the 'sota' opposite to and adjoining their respective estates.

It is perhaps needless to investigate at this day the foundation of the rule, which assigns to the riparian proprietors on each side the bed of a 'small and shallow' stream as far as the middle thread, because the elaborate system of survey and thak measurements held by Government in this country from time to time, have demarcated with almost scientific accuracy the boundary lines of estates belonging to private proprietors; and that although the beds of navigable rivers flowing between such

[1] L. R., 17 Ind. App. 62; I. L. R., 17 Cal. 814.

estates have generally been excluded from such measurements and reserved as public domain, the beds of 'small and shallow' streams have in some cases been wholly included within the ambit of one or other of the riparian estates; and in others, bisected by lines corresponding to the middle thread of the stream, so as to indicate the actual common boundary between them. It is possible, however, that the question may still in some (though indeed in very few) cases arise, as for instance where the evidence afforded by the records of such survey and thak measurements may not be forthcoming, or where the bed of such 'small and shallow' rivers may not have undergone such survey and thak measurements. In such cases, I apprehend, Courts of justice in this country will be inclined to adopt the sound rule laid down in the above cases, the more specially, as it is in unison with the law which prevails in most other countries.

It is also clear that if a 'small and shallow' river widens, in course of time, into a large navigable river by the irruption of the waters, the bed of such a river will still continue to be the property of the riparian proprietors, unless by their conduct they indicate an intention to abandon their right to it, in which case, of course, it will become a part of the public domain, and its ownership vest in Government. But if by alluvion on its banks or by gradual dereliction of a portion of its bed, a large navigable river contracts into a small and shallow stream, the right of the Government, will, as I shall explain more fully hereafter, continue to attach only to the diminished bed, and its right to the soil, which previously formed a part of the original bed of the river, will cease.

Ownership of the foreshore.—The law may be taken as perfectly settled in this country that the foreshore of a tidal navigable river belongs to Government.[1] Above the point where navigability ceases, its right to the bed of the river, and consequently its right to the foreshore (if the river happens to be tidal even above such point) ceases, such foreshore being thenceforward regarded as the property of the riparian proprietors.

Ownership of the banks of navigable rivers and the right of the public to tow thereupon.—In India, the banks of public navigable rivers are generally the property of the adjoining landowners, although they are

[1] *Doe* d. *Seeb Kristo Banerjee* v. *The East India Co.*, 6 Moo. Ind. App. 267; *Gangadhar Sirkar* v. *Kasi Nath Biswas*, 9 B. L. R., 128; *Gobindlall Seal* v. *The Secretary of State*, A. O. D. No. 32 of 1882; *Joy Krishna Mookerjee* v. *The Secretary of State*, A. O. D. No. 445 of 1885.

subject to a right of passage over by the public for the purposes of navigation.[1] Section 5 of Regulation XI of 1825, recognizes the existence of this public right, because it declares that "nothing in this Regulation shall prevent zillah and city magistrates or any other officers of Government who may be duly empowered for that purpose from removing obstacles which shall in any respect obstruct the passage of boats *by tracking on the banks of* such rivers or otherwise."[2] This does not, however, preclude riparian owners from imposing on boatmen a charge, called 'kuntagara,' for driving stanchions or pegs into the bank for the purpose of attaching their boats thereto.[3] It is an incident of the ownership of the bank, and it is not illegal or contrary to public policy to demand such a charge which is not of a compulsory character, because no boatman need make use of the bank in this manner save at his own option. But it seems yet reasonable, as has been ruled in America,[4] that notice of such a demand should be given before the bank is made use of in this manner.

Right of towage under Roman and French law.—The right of the public to use the banks of navigable rivers for the purpose of towing vessels was recognized by the Roman law. Any obstruction placed on a towpath was treated as an impediment to navigation, and a special Interdict was provided to prevent any interference with the free exercise of that right.[5]

The law of France follows the Roman law in this respect and declares that heritages abutting on navigable and 'flottables' rivers are subject to the servitude of a way along the bank in favour of the public for the towage of boats, rafts, and logs;[6] and it contains minute and detailed provisions for the setting out, use, and conservancy of different kinds of towpaths. Owners of heritages on the banks of a navigable or 'flottable' river are bound by the Ordonnance of 1669 (art. 7. tit. 28) to set apart a space of ten feet in breadth on each bank so long as towing is conducted by men;[7]

1 *Roop Lall Dass* v. *The Chairman of the Municipal Committee of Dacca*, 22 Suth. W. R., 276. *Cf.* Reg. XI of 1825, s. 5, which recognises the right of 'tracking on the banks' of navigable rivers for the towage of boats.

2 This power is now exercised under s. 133 of Act X of 1882.

3 *Dhunput Singh* v. *Denabundhu Shaha*, 9 Cal. L. R., 279.

4 *Supra*, 96.

5 Dig. xliii. 12. 1. 14. "Ait praetor: 'iterque navigii deterius fiat' . . . . . si pedestre iter impediatur, non ideo minus iter navigio deterius fit."

6 Code Civil, § 650.

7 Sirey, Les Codes Annotes, v. 1. § 650, note (nos. 1, 10.)

but where towing by horses is established, they are bound to leave a space of twenty-four feet in breadth, though on that bank only on which the practice of towing by such means actually exists.[1] Owners of heritages on the banks of a river 'flottable' for rafts only are bound by the Ordonnance of 1672 (art. 7. tit. 17) to set apart a space of four feet in breadth on the banks for the benefit of raftsmen.[2] The towpath, being a servitude merely for the benefit of navigation, may be used by navigators and fishermen alone,[3] who may stop anywhere along such way that the needs of navigation may require.[4] But they are not entitled to have any fixed place for landing along the towpath.[5] There are various other provisions besides, but they are too numerous to be stated at the close of a lecture.

[1] Sirey, Les Codes Annotes, v. 1, § 650, note (nos. 1, 10.)
[2] *Ibid.*, note (no. 8.)
[3] *Ibid.*, note (no. 15.)
[4] *Ibid.*, note (no. 15 (2)).
[5] *Ibid.*

LECTURE V.

ALLUVION AND DILUVION.

(*Roman and French law.*)

Preliminary remarks—I. Under Roman law, alluvio &c. a branch of Accessio—Accessions caused by a river divisible into four kinds, *viz.*, (i) alluvio, (ii) avulsio, (iii) Insula nata, and (iv) alveus relictus—Alluvio—Reason for the accrual of ownership in alluvions—Right of alluvion restricted to ager arcifinius—Alluvion in ager limitatus belongs to first occupant or to the state—Right of alluvion not applicable to lakes and pools—Avulsio—Distinction between alluvio and avulsio—Insula in mari nata—Insula in flumine nata—Modes in which islands may be formed in a river—Ownership of islands formed in each of those several modes—Nature of such ownership—Apportionment of islands among competing frontagers—Ownership of accessions to an island by alluvion—Right by which ownership in an island is acquired—Ownership of the bed of a river, according to Vinnius—Ownership of islands formed in a public river, according to Grotius and Puffendorf—Ownership of a ford (vadum), according to them—Alveus relictus—Law laid down by Justinian—Opinion of Gaius as to the ownership of the bed abandoned by a river, when such bed had previously occupied the whole of a man's land—Reason for the accrual of right to the soil of the bed abandoned by a river, as stated by Vinnius—Vinnius' explanation of the reason for the distinction between the rule as stated by Gaius, and that laid down by Justinian—Rule deducible from the discussions by the commentators—Opinion of J. Voet with regard to the rule stated by Gaius—Inundatio—Law laid down by Justinian—Vinnius' comments on the same—Grotius' opinion as to the distinction drawn by the Roman jurists between an inundation withdrawing suddenly, and an inundation subsiding gradually—Right of a pledge-creditor, hypothecary-creditor, and usufructuary to alluvion—Imposition of additional tax or abatement thereof in respect of lands gained by alluvion or lost by diluvion respectively—II. Alluvion and diluvion according to French law—Alluvion and ownership thereof according to the Code Civil—Old French law with regard to such ownership—Ownership of lands gained by alluvion from the sea, or by dereliction thereof—Alluvion under different circumstances and their essential requisities—Ownership of alluvions formed along a public road—Right of alluvion not applicable to increments annexed to the banks of torrents—State canalizing a stream cannot remove alluvions without offering indemnnity to riparian owners—Right of usufructuaries, legatees, secured creditors &c., to alluvions—Right of a vendee to alluvion—Right of a farmer and an emphyteuta to alluvion—Dereliction of the bed of a river and the ownership of such bed—Legal effect of inundation on ownership—Right of alluvion not applicable to lakes and ponds—Avulsion—Ownership of islands formed in the beds of rivers or streams, navigable or 'flottables'—Ownership of islands formed in the beds of streams neither navigable nor 'flottables'—Ownership of abandoned river-beds—Anomaly resulting from a difference in the provisions with regard to partial and total dereliction.

The rules of law, which regulate the ownership of the bed and foreshore of the sea, and the beds and banks of rivers, form an indispensable preliminary to the law of alluvion and diluvion. Having in the three preceding lectures ascertained, among other things, who are to be deemed proprietors in each of these several cases, and what the nature of such ownership is, we are now in a position to enquire and determine how such ownership is affected, altered or modified by reason of changes taking place, by the action of water, in the bed and foreshore of the sea as well as in the channels and banks of rivers. These changes generally lead to, or are concomitant with, the deposition and annexation of soil and sand on and to the foreshore of the sea, or the banks of rivers; the disruption and disseverance of soil from such foreshore or banks; the dereliction of the bed of the sea or of rivers; or the formation of islands in the bed of the sea or rivers. The consideration of the various rules of law which regulate the ownership of such alluvial and insular formations, or of the bed abandoned by the sea or a river shall form the subject of the present as well as of some of the succeeding lectures.

The earliest trace of a perception of these rules is indeed discoverable in the deliverances of a Brahminical sage[1] of vast antiquity, but compared with the product of a highly matured and nearly finished legal system of a comparatively later, yet remote, age, the conception, such as it was, appears to be so rudimentary and indistinct as to be undeserving of interest to any one except to the legal antiquarian. The jurisprudence of the Roman Empire has furnished to the world the type and pattern of a body of rules upon the various branches of the law of alluvion, so singularly perfect in its general feature, and so decidedly complete in all its important details, that the collective wisdom of succeeding centuries, in reproducing these rules, with one notable exception, in the legal systems of modern states, has failed to suggest any positive improvement in their form or substance.

Classification under Roman law of accessions caused by a river.— In the Institutes of Justinian, remarkable for the excellence of its method, if not for the strict logicality of its classifications, these rules are treated under the head of Accessio, which is one of the modes of acquisition of ownership. It is a generic name given by the Roman jurists to that natural mode of acquisition of ownership, by which the owner of the principal object becomes, by virtue of such ownership alone, owner

[1] Vrihaspati.

also of the accessory. Accessio est modus adquirendi iure gentium quo vi et potestate rei nostrae aliam adquirimus.[1] It embraces not merely the rules for the acquisition of ownership in land added by the natural action of a river, but also those for the acquisition of ownership in accessions or additions made to one's property, whether moveable or immoveable, by human agency or skill. The accessions made to one's land by changes in the bed of the sea being of extremely rare occurrence are slightly touched upon by the Roman lawyers. Accessions caused by the natural action of a river are divided by them into four distinct heads[2]:—

(i) That which is imperceptibly added to land by a river by Alluvio, *i. e.*, alluvion. (The term also sometimes denotes the increment so added.)

(ii) That which being detached from the land of one person by the open violence of a river, becomes afterwards united with the land of another. This process is called Avulsio, or avulsion, (which sometimes is also applied to the increment added in this mode).

(iii) Island springing up in a river, called Insula nata.

(iv) Bed abandoned by a river, called Alveus relictus.

I. **Alluvio.**—With regard to Alluvio, the first of these four modes, the law is thus laid down in the Institutes of Justinian:—

"Moreover, soil which a river has added to your land by alluvion becomes yours by the law of nations. Alluvion is an imperceptible addition (est autem alluvio incrementum latens), and that which is added so gradually that you cannot perceive the exact increase from one moment of time to another, is added by alluvion."[3]

This passage has, with slight verbal alterations, been taken from an excerpt from Gaius[4] contained in the Digest.

1 Heineccius, Recit. Iur., §

2 Atque hoc modo quatuor rerum genera nobis acquiruntur; quae latenter per alluvionem a flumine agris nostris adiiuntur; quae aperta vi fluminis de alieno avulsa cum praedio nostro unita sunt; insula in flumine nata; alveus a flumine relictus. Vinnius. Comm. ad Inst. lib. ii. t. 1. text. De alluvione.

3 2 Moyle, Imp. Iust. Inst., 39. Praeterea quod per alluvionem agro tuo flumen adiecit, iure gentium tibi adquiritur. est autem alluvio incrementum latens. per alluvionem autem id videtur adici, quod ita paulatim adicitur, ut intellegere non possis, quantum quoquo momento temporis adiciatur. Inst. ii. 1. 20. *Cf.* Gaius, Inst. ii. 70 ('quod ita paulatim adicitur ut oculos nostros fallat.'). *Cf.* Cod. vii. 41. 1; J. Voet, Comm. ad Pand. lib. xli. t. 1. § 15.

4 Dig. xli. 1. 7. 1.

Foundation of the right of alluvion.—"Alluvion is said to be incrementum latens, *i. e.*, an imperceptible addition, when any thing is so gradually and secretly added to our land that one cannot perceive by his senses the quantity which at each moment of time is detached from the land of another person and added to ours. It is out of this (circumstance) that the equity of this acquisition arises; assuredly, because what is added by alluvion is so slowly and secretly detached from (another's land), that if perchance its restitution were thought of, one would be unable to make out whose it was before or from what it had been detached."[1]

Right of alluvion, where applicable and where not.—The right of alluvion exists in respect of ager arcifinius, that is, 'arcifinious' lands, alone. It does not exist in respect of ager limitatus or limited lands, for, "it is well-established," says Florentinus, "that in limited lands the right of alluvion does not exist."[2] The distinction between 'arcifinious' and limited lands, as it obtained in the Roman law, has been already pointed out.[3] The increments added to limited lands by a river belong to the state, because the grants of such lands being comprised within certain fixed and determinate limits, the grantees thereof are not entitled to claim any land beyond such limits.[4] It may be observed, however, that there is a passage in the Digest which lays down, that such accessions are to be deemed as res nullius to which the first occupant may acquire a title.[5]

The right of alluvion does not also exist in respect of lakes (lacûs) and pools (stagna). "Lakes and pools," says Callistratus, "although they sometimes increase and sometimes dry up, yet retain their boundaries and

[1] Alluvionem dicit esse incrementum latens, cum quid ita paulatim et obscure praedio nostro adicitur, ut sensu percipi non possit, quantum quoque temporis momento alterius praedio detrahatur, et adiciatur nostro, ... Ex quo crescit huius acquisitionis aequitas: nimirum quod quae alluvione accedunt, ita lente et obscure detrahantur, ut intellegi non possit, si forte de his restituendis quaeratur, quorum prius fuerit, aut quibus detracta. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De alluvione. *Cf.* Grotius, de Iur. Bell. et Pac. lib. ii. c. 8, § 11.; Frontinus, de Controv. Agr. 50.

[2] In agris limitatis ius alluvionis locum non habere constat. Dig. xli. 1. 16. *Cf.* Dig. xliii. 12. 1. 6.; Vinnius, Comm. ad. Inst. lib. ii. t. 1. text. De alluvione; Heineccius, Recit. Iur. § 358.

[3] *Supra*, 100.

[4] Grotius, de Iur. Bell. et Pac. lib. ii. c. 8. § 12; J. Voet, Comm. ad Pand. lib. xli. t. 1. § 15.

[5] Dig. xliii. 12. 1. 6.

therefore in them the right of alluvion is not recognized."[1] Vinnius states that the expression 'river' (flumen) is used in the passage relating to alluvio which I last cited from the Institutes, "to contradistinguish it from lakes and pools, with regard to which the right of alluvion is not recognized; for rivers alone have natural flow and motion, in consequence of which they frequently change their banks and limits; so that they and they alone admit of alluvion."[2]

II. **Avulsio.**—With regard to Avulsio, or Appulsio, which is the second mode of accession already mentioned, Justinian in his Institutes thus states the law:—

"If, however, the violence of the stream sweeps away a parcel of your land and carries it down to the land of your neighbour, it clearly remains yours; though, of course, if, in process of time, it becomes firmly attached to your neighbour's land, and the trees which it carried with it strike root in the latter, they are deemed from that time to have become part and parcel thereof."[3]

This passage too has been taken from Gaius.[4] J. Voet in his commentary on the Pandects, describes this kind of accession as 'incrementum patens et conspicuum.'[5]

This mode of accession differs not a little from the foregoing, *i. e.*, alluvion, because in the case of avulsion, our right to the parcel of land detached from the land of another person by the violence of a river and added to our land does not accrue, as it does in the case of land imper-

1 Lacus et stagna licet interdum crescant, interdum exarescant, suos tamen terminos retinent ideoque in his ius alluvionis non adgnoscitur. Dig. xli. 1. 12 pr. *Cf.* Dig. xxxix. 3. 24. 3, ('Lacus cum aut crescerent aut decrescerent, numquam neque accessionem neque decessionem in eos vicinis facere licet').

2 Ad differentiam lacuum et stagnorum, in quibus ius alluvionis non agnoscitur. Etenim ut sola flumina fluxum et motum naturalem habent, quo fit, ut ripas suas et terminos saepe mutent; ita et sola alluvionem admittunt. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De alluvione.

3 2 Moyle, Imp. Just. Inst., 39-40. Quodsi vis fluminis partem aliquam ex tuo praedio detraxerit et vicini praedio appulerit, palam est eam tuam permanere. plane si longiore tempore fundo vicini haeserit arboresque, quas secum traxerit, in eum fundum radices egerint, ex eo tempore videntur vicini fundo adquisitae esse. Inst. ii. 1. 21.

Avulsion is a phenomenon of rare occurrence. It is related, however, that such violent mountain torrents, as the Nile and the rivers of North Italy, especially the Po, sometimes produce such a change. Roby, Introd. to the Study of Justinian's Digest, 72, s. v. alluvionis.

4 Dig. xli. 1. 7. 2; xii. 1. 4. 2, (Ulpian). *Cf.* Gaius, Inst. ii. 71.

5 Voet, Comm. ad Pand. lib. xli. t. 1. § 16.

ceptibly added by alluvion, the moment such adherence takes place, but only after it has coalesced with, and become firmly rivetted to, our land; for until such coalescence takes place, the portion detached retains its original form and entity, and therefore the right to that parcel of land continues in him to whom it formerly belonged. As Vinnius expresses it, 'the river is only a partial and remote cause of this mode of acquisition, the proximate and most potent cause is coalescence.'[1]

Vinnius thinks that it is not essential to this mode of acquisition that the parcel detached should have brought trees with it, and that they should strike root in the land to which it is carried; for the right in such a case, according to him, accrues from the mere fact of coalescence, and the circumstance that the trees have struck root in the land to which the portion so carried adheres, in the particular case where such detached parcel may have carried trees with it, merely furnishes the most conclusive proof of such coalescence.[2]

III. **Insula nata.**—As regards Insula nata, the third species of accession, the law is thus stated by Justinian:—

(*a*) As to an island rising in the sea, insula in mari nata, it is said that:—

"When an island rises in the sea, though this rarely happens, it belongs to the first occupant, for until occupied, it is held to belong to no one."[3]

(*b*) With regard to an island arising in a river, insula in flumine nata, the law is thus enunciated:—

"If, however, (as often occurs) an island rises in a river, and it lies in the middle of the stream, it belongs in common to the landowners on either bank, in proportion to the extent of their lands as measured along the bank; but if it lies nearer to one bank than to the other, it belongs

[1] Haec a superiore illa multum differt. Nam si pars terrae integra a vicino agro vi fluminis avulsa sit, et nostro praedio adiecta; ea non statim nobis acquiritur, ut aquiruntur, quae latenter flumen adicit per alluvionem, sed quamdiu nondum coaluit, et unitatem cum terra mea fecit, manet eius, cuius ante fuit: quia manet eadem species seu idem individuum, ut loquuntur, aut ut clarius loquar et nostro more, quia cum nondum coaluit, partem praedii mei non facit, ut ei cedere debeat. Ubi verò coaluit, et tamquam trabali clavo agro meo affixa est; iam ut pars fundo meo cedat necesse est, et mihi iure accessionis acquiritur. Huius igitur acquisitionis flumen ex parte tantum causa est, et remotior: proxima et potissima coalitio. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De vi fluminis.

[2] Vinnius, Comm. ad Inst. lib ii. t. 1. text. De vi fluminis.

[3] 2 Moyle, Imp. Just. Inst. 40. Insula, quae in mari nata est, quod raro accidit, occupantis fit: nullius enim esse creditur. Inst. ii 1. 22.; Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De Insula; Heineccius, Recit. Iur. § 357.

to the landowners on that bank only. If a river divides into two channels, and by uniting again, these channels transform a man's land into an island, the ownership of that land is in no way altered."[1]

This passage also has been taken from Gaius.[2]

Modes in which islands may be formed.—"There are three modes," says Pomponius, "in which an island is formed in a river:—

First,—When the river flows round land which used not to be part of its bed;

Second,—When it leaves dry a place which used to be a part of its bed and begins to flow on either side of it;

Third,—When by the gradual deposit it has made, a spot emerges above its bed, and has increased it by alluvion.

In the last two modes, an island is formed which becomes the private property of him, who at the time of its first appearance was owner of the nearest land: for the nature of a river is such that when its course is changed, it changes also the character of its bed. Nor does it matter whether our enquiry is about a mere change of the soil of the bed, or about something deposited on that soil and ground; for both are of the same kind. But in the mode first mentioned the character of the ownership is not changed."[3]

"Let us consider," says Paulus, "whether this is not incorrect with regard to an island which does not adhere to the bed itself of the stream, but by rushes or some other light material is supported in the stream, so that it does not touch its bottom, and is moveable; for such an island is almost public and part of the river itself."[4]

1 At in flumine nata, quod frequenter accidit, si quidem mediam partem fluminis teneat, communis est eorum, qui ab utraque parte fluminis prope ripam praedia possident, pro modo latitudinis cuiusque fundi, quae latitudo prope ripam sit. quodsi alteri parti proximior sit, eorum est tantum, quia ab ea parte prope ripam praedia possident. quodsi aliqua parte divisum flumen, deinde infra unitum agrum alicuius in forman insulae redegerit, eiusdem permanet is ager, cuius et fuerat. Inst. ii. 1. 22. *Cf.* Gaius, Inst. ii. 72.

2 See excerpt from Gaius, Dig. xli. 1. 7. 3.

3 Tribus modis insula in flumine fit, uno, cum agrum, qui alvei non fuit, amnis circumfluit, altero, cum locum, qui alvei esset, siccum relinquit et circumfluere coepit, tertio, cum paulatim colluendo locum eminentem supra alveum fecit et eum alluendo auxit. duobus posterioribus modis privata insula fit eius, cuius ager proprior fuerit, cum primum extitit: nam et natura fluminis haec est, ut cursu suo mutato alvei causam mutet. nec quicquam intersit, utrum de alvei dumtaxat solo mutato an de eo, quod superfusum solo et terrae sit, quaeratur, utrumque enim eiusdem generis est. primo autem illo modo causa proprietatis non mutatur. Dig. xli. 1, 30. 2.

4 Paulus: videamus ne hoc falsum sit de ea insula, quae non ipsi alveo fluminis cohaeret

It is therefore clear from the above texts that, if the island is a floating island, or if it is formed by the river encircling the land of a private individual, its proprietorship is in no way altered. In the latter case, it remains the property of the person whose land is thus transformed into an island; in the former, it is considered as a part of the river itself and its proprietorship therefore remains in the public.

Topics concerning islands discussed by Vinnius.—With respect to an island formed in the other two modes mentioned by Pomponius in the text I have just quoted, three questions, according to Vinnius, usually arise, *viz.* :—[1]

1. By whom is it acquired?

2. To what extent is it acquired, that is to say, what is the nature of the interest which is acquired in it?

3. By what right or according to what legal principle is ownership acquired in it?

(1) As regards the first question, it is clear from the text of Justinian[2] that the island does not belong to the public but to the owners of lands on either bank opposite to such island. This is also the opinion of Pomponius as I have just pointed out, as well as of Ulpian as appears from the following text:—

"If an island rises in a public river, it is asked, what shall become of it? It does not appear to belong to the public; for it belongs to the first occupant, if the lands be limited lands, or to him whose bank it touches, or, if it rises in the middle of the river, to both the riparian proprietors."[3]

This position is further confirmed by the reasoning of Paulus and Proculus contained in the texts[4] to which I shall presently refer.

It is also evident from this text of Ulpian that when an island rises in a river flowing through ager limitatus or limited land, it belongs to the first occupant.

sed virgultis aut alia qualibet levi materia ita sustinetur in flumine, ut solum eius non tangat, atque ipsa movetur: haec enim propemodum publica atque ipsius fluminis est insula. Dig. xli. 1. 65. 2.

[1] Tria fere sunt, quae de acquisitione insulae in flumine nascentis quaeri possunt; cui, quatenus, et quo iure, seu qua iuris ratione acquiratur. Vinnius, Comm. ad Inst. lib. ii. t. 1., text. De Insula.

[2] *Supra*, 123.

[3] Si insula in publico flumine fuerit nata inque ea aliquid fiat, non videtur in publico fieri. illa enim insula aut occupantis est, si limitati agri fuerunt, aut eius cuius ripam contingit, aut, si in medio alveo nata est, eorum est qui prope utrasque ripas possident. Dig. xliii. 12. 1. 6.

[4] Dig. xli. 1. 29, 56; *infra*, 127, 128.

(2) The second question subdivides itself into two branches :—

(*a*) Whether such riparian owners are entitled to the bare ownership of the island or also to every use of it of which it may be capable?

(*b*) Whether the island belongs to each of the adjacent riparian proprietors in severalty, or whether it belongs to all of them pro indiviso or in common?

As to (*a*), Vinnius comes to the conclusion that if an island rises in a public river, the proprietors of adjacent lands, when such lands admit of the right of alluvion,[1] are entitled not merely to the bare ownership but also to every use of it; and that therefore they are entitled to sow corn and plant trees in its soil and enjoy their fruits; if they do anything on it (*i. e.*, the island) or drive anything into it, that is not considered as done in a public place or on the bank.[2]

As to (*b*), Vinnius in his commentary observes that, if the island rises in the middle of the river, it belongs in common to those who possess lands on either bank: if, however, it rises wholly on either side of the middle line of the river, and lies in front of the land of a single person, such land being nearer to it than any other, it belongs exclusively to the owner of that land; but if it lies in front of the lands of several persons, it belongs in common to those who possess the adjacent bank, as far as such island extends. He then goes on to say that, by this community of interest it is not to be understood that it belongs to them pro indiviso, in which sense the expression is more aptly used; but that it belongs to them in distinct parcels according to the extent of frontage of each riparian proprietor, so that each riparian proprietor shall have that parcel opposite to his frontage which is contained within lines drawn at right angles across the island from the extremities of his frontage.[3] He then refers to the following text of Paulus in support of his position :—

[1] *i. e.* when the land is 'arcifinious' and not limited.

[2] Ad primam quod attinet, sic omnino habendum, insulam in flumine publico natam, si vicina praedia alluvionis ius habent, non proprietate tantum, verum usu etiam dominis vicinorum praediorum acquiri, ideoque eos solos sementem in ea facere, arbores plantare, fructus ibi natos percipere posse: nec si quid aliud in ea faciant, aut quid in eam immittant, id in publico aut in ripa fieri intellegi. Vinnius, Comm. ad Inst. lib. ii. t. 1, text. De Insula.

[3] Et siquidem in medio fluminis alveo enata sit, communis fit eorum, qui prope utramque ripam possident: sin cis, aut ultra medium amnem, siquidem contra frontem unius praedii, cui proprior est, tota acquiritur huius praedii domino; sin ita ut fronti plurium agrorum sit opposita, communis fit omnium, qui secundum eam ripam, in quantum insula porrigitur, habent, *hoc* § et *d. l.* 7. § 3. *eod.* Communem autem fieri insulam cùm dicimus, non intellegimus, eam communem fieri pro indiviso uti solemus, cùm propriè loquimur *l.* 5. *de stip. ser.*

Apportionment of islands amongst competing frontagers.—"An island which has risen in a river is not the undivided common property of those who have lands on one of the banks, but is theirs in separate shares; for each of them will hold of it in severalty so much as lies in front of his bank, a line being, as it were, drawn across the island at right angles."[1]

It follows as a corollary from the rule laid down by Paulus that,—"If an island has formed and become an accession to (a portion of) my land, and I sell the lower portion in front of which the island does not lie, no part of that island will belong to the purchaser, for the same reason for which it would not have been his originally, if he had been owner of that same portion at the time when the island rose."[2]

The rule as stated by Justinian in the text which I have already quoted,[3] *viz.*—"but if it" (*i. e.*, the island) "lies nearer to one bank than to the other, it belongs to the landowners on that bank only," is apparently defective, inasmuch as the island may rise in the middle of the river and may yet be nearer to one bank than to the other, in which case, of course, the island will belong to the landowners on both banks, and not merely to the landowners on the bank nearer to the island, the central line of the river being the dividing boundary between the portions of the island to which the owners of lands on the two banks will be respectively entitled.[4]

Apportionment of a second island rising between the first and the opposite mainland.—If an island rises in a river so that it belongs wholly to the owner on one side of the bank and then another island rises between that island and the opposite bank, how is the ownership of this new island

l. 5. § *ult. de reb. eor. qui sub tut.* sed regionibus divisis pro fronte, hoc est, latitudine cuiusque fundi, quae prope ripam sit; ut tantum quisque in ea habeat certis regionibus, quantum ante cuiusque eorum ripam esse linea in directum per insulam transducta apparebit. Vinnius, Comm. ad Inst. lib ii. t. 1. text. De insula.

[1] Inter eos, qui secundum unam ripam praedia habent, insula in flumine nata non pro indiviso communis fit, sed regionibus quoque divisis: quantum enim ante cuiusque eorum ripam est, tantum, veluti linea in directum per insulam transducta, quisque eorum in ea habebit certis regionibus. Dig. xli. 1. 29.

[2] [Ergo] si insula nata adcreverit fundo meo et inferiorem partem fundi vendidero, ad cuius frontem insula non respicit, nihil ex ea insula pertinebit ad emptorem eadem ex causa, qua nec ab initio quidem eius fierit, si iam tunc, cum insula nasceretur, eiusdem partis dominus fuisset. Dig. xli. 1. 30 pr.

[3] *Supra*, 123.

[4] 1 Moyle, Imp. Iust. Inst. 191, § 22 (note).

to be determined? Paulus declares that it should be determined by an imaginary line drawn through the middle of the channel between the old island and the opposite bank, and not by a line drawn through the middle of the channel as it stood between the old banks before any island rose in the river.[1] "For what does it matter," says Paulus, "what the character of the land is by reason of proximity to which the question as to the ownership of the second island is settled?"

Ownership of increments annexed to islands.—An important rule with regard to the ownership of increments added to an island is the following laid down by Proculus:—

"An island rose in a stream in front of my land, in such wise that its length did not extend beyond the limit of my land; afterwards it gradually increased and stretched in front of the lands of my upper and lower (riparian) neighbours: I ask whether the increment is mine on account of its being an adjunct to what is mine, or whether it is his to whom it would have belonged, if originally when the island rose it had been of that length. Proculus replied: if the law of alluvion applies to that river[2] in which you have stated that an island rose in front of your land in such wise that it did not exceed the length (frontage) of your land, and if the island was originally nearer to your land than to that of the proprietor on the opposite side of the river; then the whole of it became yours, and that which was subsequently added to the island by alluvion is yours, even though the addition took place in such a manner that the island extended opposite to the frontages of (your) upper and lower (riparian) neighbours, or that it (the island) approached nearer to the land of the proprietor across the river."[3]

[1] Si insula in flumine nata tua fuerit, deinde inter eam insulam et contrariam ripam alia insula nata fuerit, mensura eo nomine erit instruenda a tua insula, non ab agro tuo, propter quem ea insula tua facta fuerit: nam quid interest, qualis ager sit, cuius propter propinquitatem posterior insula cuius sit quaeratur? Dig. xli. 1. 65. 3, (Paulus).

[2] *i. e.*, if the river runs through agri arcifinii, and not through agri limitati.

[3] Insula est enata in flumine contra frontem agri mei, ita ut nihil excederet longitudo regionem praedii mei: postea aucta est paulatim et processit contra frontes et superioris vicini et inferioris: quaero, quod adcrevit utrum meum sit, quoniam meo adiunctum est, an eius iuris sit, cuius esset, si initio ea nata eius longitudinis fuisset. Proculus respondit: flumen istud, in quo insulam contra frontem agri tui enatam esse scripsisti ita, ut non excederet longitudinem agri tui, si alluvionis ius habet et insula initio propior fundo tuo fuit quam eius, qui trans flumen habebat, tota tua facta est, et quod postea ei insulae alluvione accessit, id tuum est, etiamsi ita accessit, ut procederet insula contra frontes vicinorum superioris atque inferioris, vel etiam ut propior esset fundo eius, qui trans flumen habet. Dig. xli. 1. 56 pr.

Ownership of an island not affected by the main channel subsequently flowing between it and the nearer bank.—A further question discussed by Proculus regarding the ownership of islands is as follows:—"I also ask, if the island has risen nearer to my bank and afterwards the whole river forsaking the larger channel begins to flow between my land and the island, have you any doubt that the island still continues to be mine, and a portion of the soil of the bed relinquished by the river is also mine? I beg you, write to me what you think. Proculus replied: if the island was originally nearer to your land, and the river forsaking its larger channel, which lay between that island and the land of your neighbour on the opposite side of the river, began to flow between the island and your land, the island still remains yours. And the bed, which used to be between that island and your neighbour's land, ought to be divided in the middle, so that the part nearer to your island is to be considered yours and the part nearer to the land of your (opposite) neighbour his. I understand that when the bed of the river on either side of the island dried up, it ceased to be an island, but in order that the case may be more intelligible, they call the land an island which used to be an island."[1]

(3). With regard to the third question, namely, by what right or according to what principle of law, ownership of the island is acquired, Vinnius holds that it is acquired by right of accession, and not by right of occupancy (occupatio). He observes: "I think there is no other ground for this acquisition than that the island is a part of the bed, and that the bed is considered as a part of the adjoining land; as in the case, where the whole bed is discovered (by water), it is acquired by the adjoining landowners, so too when a portion of it is discovered, that is to say, when an island rises in it, it is also acquired by them, clearly by right of accession. That the island is a

[1] Item quaero, si, cum propior ripae meae enata est insula et postea totum flumen fluere inter me et insulam coepit relicto suo alveo, quo maior amnis fluerat, numquid dubites, quin etiam insula mea maneat et nihilo minus eius soli, quod flumen reliquit, pars fiat mea? rogo, quid sentias scribas mihi. Proculus respondit: si, cum propior fundo tuo initio fuisset insula, flumen relicto alveo maiore, qui inter eam insulam fuerat et eum fundum vicini, qui trans flumen erat, fluere coepit inter eam insulam et fundum tuum, nihilo minus insula tua manet. et alveus, qui fuit inter eam insulam et fundum vicini, medius dividi debet, ita ut pars propior insulae tuae tua, pars autem propior agro vicini eius esse intellegatur. intellego, ut et cum ex altera parte insulae alveus fluminis exaruerit, desisse insulam esse, sed quo facilius res intellegeretur, agrum, qui insula fuerat, insulam appellant. Dig. xli. 1. 56. 1.

part of the bed is unquestionable. It may be objected however that, what we have said as to the bed being a part of the adjoining land, is not quite consistent, since the bed is declared public by the same law according to which the river itself is public, (Dig. xliii. 12. 1. 7); that, therefore, it should rather be held on the contrary, that the island, which is a part of the bed, ought also to be public. But it is clear that the bed is not public absolutely, but only so long as it is covered by the river; the public make use of it by means of the river, and when it is discovered by the river, it becomes the private property of the adjoining landowners. It makes no difference,—as Pomponius, anticipating that such an objection might be raised, replied,—whether our enquiry is about a change of the soil of the bed, or about something deposited over that soil and ground, that is, whether our enquiry relates to a change of the whole bed and desertion by the river, or to an island rising in it, for it is enough (for our purpose) that the portion of the bed in which the island rose is no longer covered by the river. Nor indeed does the fact that the river flows between prevent the island from being united with and annexed to the adjoining lands on the bank by means of the bed, any more than the public road, which lies between the bed and the adjacent lands, prevents the bed, when dry, from being acquired by those who possess property along the road, (Dig. xli. 1. 38). For, as the public road is considered a part of the adjoining land (Dig. xli. 1. 38, in fin.), so also is the intervening bed subjacent to the river.[1]

[1] Ego non aliam huius acquisitionis rationem esse arbitror, quam quod insula alvei pars sit, alveus pars censeatur vicinorum praediorum; ac proinde ut alveus totus nudatus vicinus acquiritur, ita et partem eius nudatam, id est, insulam in eo natam iisdem acquiri, iure scilicet accessionis. Et insulam quidem partem alvei esse constat. At absonum videri potest, quod alveum partem esse dicimus vicinorum praediorum, cum alveus publicus sit eodem iure, quo ipsum flumen, l. 1. § *simile* 7. *de flum.* § *seq. inf. hoc tit.* ut contra potius dicendum videatur, insulam quoque, quae alvei pars est, publicam fieri oportere. Sed sciendum est, alveum non simpliciter publicum esse, sed quatenus a flumine tenetur, eoque per flumen populus utitur, nudatum flumine privatum fieri vicinorum: nihil autem interesse, ut Pomponius huic objectioni occurens respondet, utrum de alvei solo mutato, an de eo, quod superfusum solo et terrae sit, quaeratur, hoc est, utrum quaeratur de toto alveo mutato et a flumine relicto, an de insula in alveo nata; quippe sufficere, ea parte, qua insula extitit, alveum a flumine non teneri, *d. l. ergo* 30 § 1 *et* 2. Neque vero flumen interfluens impedit, quominus insula vicinis ripae agris per alveum jungatur atque accedat, non magis quam via publica inter alveum et vicina praedia interjecta impedit, quominus alveus siccatus acquiratur his, qui secundum eam viam possident, *l. Attius* 38. *eod.* Etenim ut via publica pars praedii vicini existimatur, *d. l. Attius* 38. *in fin.* ita et alveus intermedius flumini subjectus. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De Insula.

Grotius' theory as to ownership of islands formed in a public river.—With regard to the ownership of islands formed in a public river, Grotius and Puffendorf maintain that if an island rises in a river which, when the body of the people took possession of the whole extent of a country, was not included in the lands that were parcelled out among private individuals, it should belong to the public in the same manner in which an island, formed in a river belonging to a private person, or the channel of such a river when it is left dry, belongs to him.[1]

But, then, if an island formed in a public river belongs to the public, and the alluvion annexed to the banks, to private individuals, the question arises who should be deemed owner of that narrow elevated space of ground (vadum) between the island and the adjacent bank, which has not attained sufficient height so as to emerge above the surface of the water? Grotius thinks that if the passage over such space generally be by boat, it should be considered as part of the island.[2]

IV.—**Alveus relictus.**—The fourth mode of acquisition by right of accession takes place when the river abandons its bed and begins to flow through another channel.

With regard to this, Justinian declares the law thus :—

"But if a river entirely leaves its old bed, and begins to run in a new one, the old bed belongs to the landowners on either side of it in proportion to the extent of each owner's lands as measured along the bank, while the new one acquires the same legal character as the river itself, and becomes public. But if after a while the river returns to its old bed, the new bed again becomes the property of those who possess the land along its banks."[3]

[1] Grotius, de Iur. Bell. et Pac. lib. ii. c. 8. § 9 (1). Puffendorf, de Iur. Nat. et Gent. lib. iv. c. 7. § 12.

[2] Grotius, de Iur. Bell. et Pac. lib. ii. c. 8. § 14. Grotius mentions that with regard to this, there are different customs in the different provinces of Holland; in Gelderland, if a loaded cart can pass over the submerged space between the bank and the island it belongs to the owner of the adjacent estate, provided he takes possession of it; and in the district of Putte it belongs to the adjacent owner if a man on foot can with his sword's point touch such submerged space.

[3] 2 Moyle, Imp. Iust. Inst. 40. Quodsi naturali alveo in universum derelicto alia parte fluere coeperit, prior quidem alveus eorum est, qui prope ripam eius praedia possident, pro modo scilicet latitudinis cuiusque agri, quae latitudo prope ripam sit, novus autem alveus eius iuris esse incipit, cuius et ipsum flumen, id est publicus. quodsi post aliquod tempus ad priorem alveum reversum fuerit flumen, rursus novus alveus eorum esse incipit, qui prope ripam eius praedia possident. Inst. ii. 1. 23.

This also is taken from Gaius with slight verbal alterations, but as a portion of the text of Gaius has been left out by Justinian, it may be worth while to refer to it now. It runs thus:—

"When, however, the new bed has occupied the whole of a man's land, though the river shall have returned to its former bed, yet he to whom the land belonged cannot in strictness of law, have any right to that (deserted) bed, because the land which was (before) his, has ceased to be his, through its having lost its proper form, and also because not having any neighbouring land, he cannot take any portion of that bed by reason of vicinage, but it is scarcely possible that (in equity) this rule should prevail. 'sed vix est, ut id optineat.'"[1]

Vinnius, after citing the text of Pomponius[2] to which I referred in my last lecture, and after discussing several grounds of objection, comes to the conclusion that the reason upon which this right is founded is that, the bed of a river is part of the adjacent land, just as if it had on some former occasion been detached from the latter, though subject to the use of the public, and that therefore when the river dries up it is restored to the adjacent landowner.

Vinnius states his conclusion thus: "Besides, to explain to you briefly the principle upon which this right, and this acquisition is based, (and) which I have to some extent already pointed out, the bed of a river, beyond the use of the public, was considered by the ancients as a part of the adjacent lands, as though it had been at some former time detached from the latter; the argument being, which seems reasonable, that such island springing up in a river as coheres to the bed, belongs to the adjacent landowners: which (argument) would not hold, unless the bed to which the island adhered were considered a part of the adjacent lands; for the bed takes priority over the island, which follows the character of the bed as its part."[3]

[1] Cuius tamen totum agrum novus alveus occupaverit, licet ad priorem alveum reversum fuerit flumen, non tamen is, cuius is ager fuerit, stricta ratione quicquam in eo alveo habere potest, quia et ille ager qui fuerat desiit esse amissa propria forma, et, quia vicinum praedium nullum habet, non potest ratione vicinitatis ullam partem in eo alveo habere: sed vix est, ut id optineat. Dig. xli. 1. 7. 5. Vinnius thus explains the meaning of the latter portion of the above passage: Postulat hoc stricta ratio; sed aequitas saepe aliud suggerit. Comm. ad Inst. lib. ii. t. 1. text. De Alveo.

[2] Dig. xli. 1. 30. 1; *supra*, 10.

[3] Atque ut hic quoque paucis rationem huius iuris et acquisitionis tibi explicem, dixi paulo ante, alveum fluminis extra usum publicum a veteribus existimatum fuisse partem praediorum vicinorum, quasi olim iis detractum; argumento esse, quod placet, insulam manente adhuc alveo in flumine natam vicinorum esse: quod profecto non fieret, nisi alveus, cui

The position laid down by Gaius is also confirmed by Pomponius, who says as follows :—

"The recession of a flood restores that land which the violence of a river has wholly taken away from us. Therefore, if a field, which lies between a public road and a river has been overflowed by an inundation (inundatio), whether it has been overflowed gradually or not gradually, if it has been restored by the river receding with the same violence (with which it came), it belongs to its former owner; for rivers discharge the functions of *censitores*, so as to convert private property into public, and public into private: therefore, in the same way, as this land, when it became the bed of a river, would become public, so now it ought to be the private property of him, whose it was originally."[1]

To the same effect is the law laid down by Ulpian :—

"Similarly, if the river forsakes its own bed and begins to flow through another (channel), anything done in the old bed does not fall within the scope of this Interdict; in fact it shall not then have been done in a public river at all, because it (the old bed) is the property of both the adjoining neighbours, or, if the land be limited land (ager limitatus), may become the property of the first occupant: it certainly ceases to be public. And that channel which the river made for itself, if it was private, nevertheless becomes public: because it is impossible that the bed of a public river should not be public."[2]

With reference to the passage, namely, 'sed vix est, ut id optineat,' —that is, (equity) would hardly allow this (strictness) always to prevail,— which occurs at the end of the text of Gaius I quoted a few moments ago, Vinnius in his commentary thus observes :—

"The principle of equity and justice again and again suggests that

insula cohaeret, et ipse vicinorum praediorum pars intelligeretur: nam prior est alvei ratio quam Insulae, quae conditionem alvei ut pars eius sequitur. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De Alveo.

[1] Alluvio agrum restituit eum, quem impetus fluminis totum abstulit. itaque si ager, qui inter viam publicam et flumen fuit, inundatione fluminis occupatus esset, sive paulatim occupatus est sive non paulatim, sed eodem impetu recessu fluminis restitutus, ad pristinum dominum pertinet: flumina enim censitorum vice funguntur, ut ex privato in publicum addicant et ex publico in privatum: itaque sicuti hic fundus, cum alveus fluminis factus esset, fuisset publicus, ita nunc privatus eius esse debet, cuius antea fuit. Dig. xli. 1. 30. 3.

[2] Simili modo et si flumen alveum suum reliquit et alia fluere coeperit, quidquid in veteri alveo factum est, ad hoc interdictum non pertinet: non enim in flumine publico factum erit, quod est utriusque vicini aut, si limitatus est ager, occupantis alveus fiet: certe desinit esse publicus. ille etiam alveus, quem sibi flumen fecit, etsi privatus ante fuit, incipit tamen esse publicus, quia impossibile est, ut alveus fluminis publici non fit publicus. Dig. xliii. 12. 1. 7.

the bed should rather be restored to its former owner than that it should be adjudged to the possessors of adjacent lands. With regard to this, it is not easy to define the (rule) positively, but each case ought to be determined according to its own circumstances. Suppose the river leaving its natural bed occupies the land of any person (whether gradually or not gradually, makes no difference), as if with the object apparently of acquiring in it a new bed; not a long while after, it suddenly returns to its old place with the same violence with which it had quitted it; it is most equitable that on this retrocession of the river the land should be restored to its former owner, though the violence of the river should have deprived it of its form; Dig. xli. 1. 7. 5. *in fin;* xli. 1. 30. 3; vii. 4. 23), inasmuch as this kind of occupation does not differ very much from inundation. But if the river quits (the new bed), not with the same violence with which it came, but by means of slow and gradual retrocession comes back to its former place by the process of alluvion, then that portion of the bed which it gradually leaves dry behind itself, ought not, it seems, to be restored to its former owner, but ought to be considered as an accession by alluvion to the possessors of the adjacent lands; (Dig. xli. 1. 38; Cod. vii. 41. 1). It was for this very reason, I think, that Pomponius advisedly used the words 'with the same violence,' (eodem impetu) in Dig. xli. 1. 30. 3."[1]

In support of this opinion, he refers to a law in the Code[2] and

[1] Saepe enim aequi et boni ratio suadet, ut priori potius domino alveus restituatur, quam adiudicetur vicinis possessoribus. De quo haud facile quid certi definiri potest, sed ex circumstantiis judicandum est. Finge, flumen relicto naturali alveo agrum alicuius occupasse (sive paulatim, sive non paulatim, nihil interest) ita ut novum hic sibi alveum quaesisse videatur; deinde nec ita multo post tempore in veterem locum subito atque eodem impetu, quo perruperat, se recepisse; aequissimum est, agrum recessu fluminis restitutum ad pristinum dominum reverti, licet formam agri impetus fluminis abstulerit, *d. l.* 7. § *quod si* 5. *in fin. d. l. ergo* 30. § 3. *hoc t. l. si ager* 2. *quibus mod. usufruct. am.* quia huiusmodi occupatio non longe abest ab iuundatione. At si flumen non eodem impetu, quo venit, discedat, sed lente et minutatim recedendo, alluvione in pristinum locum redeat, spatium illud alvei, quod siccum post se sensim reliquit, non videtur priori domino restituendum, sed alluvione accrescere proximorum praediorum possessoribus, leg. *Attius,* 38. *hoc. tit.* fac. *l.* 1. *C. de alluv.* Atque ob hanc causam arbitror Pomponium in *d. l. ergo* 30. § 3. *et d. l. si ager* 23. consulto expressisse haec verba, *eodem impetu.* Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De Alveo. Sed quemadmodum, si eodem impetu discesserit aqua, quo venit, restituatur proprietas, ita et usum fructum restituendum dicendum est. Dig. vii. 4. 23, (Pomponius).

[2] Et cum fluvius priore alveo derelicto, alium sibi facit: ager, quem circumit, prioris domini manet. quodsi paulatim ita ferat, ut alteri parti applicet: id alluvionis iure ei quaeritur, cuius fundo accrescit. Cod. vii. 41. 1.

to the following case considered by Alfenus Varus to be found in the Digest:—

"Attius had a field adjoining a public road: beyond the road there was a river and land belonging to Lucius Titius: the river moving on by slow degrees first of all washed away a plot of land which lay between the road and the river and then carried away the road. Afterwards it gradually receded, and came back to its former place by (the process of) alluvion. It was held that when the river carried away the field and the public road, that field became his who had land on the opposite side of the river: afterwards when (the river) by slow degrees went back again, it took away the land from him to whom it had been assigned, and gave it to the owner of the land across the road, because his land was nearest to the river; that property, however, which had been public could not be acquired by any one; but still the road, it is said, in no way prevented the land cast by alluvion on the other side of the road becoming the property of Attius; because the road itself would be a part of the land (of Attius)."[1]

Therefore, the general rule, which may be gathered from this discussion by Vinnius, is shortly this that, when the river leaving its natural bed occupies the land of any person, and afterwards suddenly and violently, and not by the process of slow and gradual alluvion, reverts to its old bed, then the land in which the river had made its second bed ought to remain the property of its former owner.

J. Voet, however, in his commentary on the Digest, expresses a view

[1] Attius fundum habebat secundum viam publicam: ultra viam flumen erat et ager Lucii Titii: fluit flumen paulatim, primum omnium agrum, qui inter viam et flumen esset, ambedit et viam sustulit, postea rursus minutatim recessit et alluvione in antiquum locum rediit. respondit, cum flumen agrum et viam publicam sustulisset, eum agrum eius factum esse, qui trans flumen fundum habuisset: postea cum paulatim retro redisset, ademisse ei, cuius factus esset, et addidisse ei, cuius trans viam esset, quoniam eius fundus proximus flumini esset; id autem, quod publicum fuisset, nemini accessisset. nec tamen impedimento viam esse ait, quo minus ager, qui trans viam alluvione relictus est, Attii fieret: nam ipsa quoque via fundi esset. Dig. xli. 1. 38.

The relative positions of the fields, the public road and the river respectively seem to be as follows:

Field of Attius——————————

PUBLIC ROAD .....

Field of an anonymous person——————

River~~~~~~~~~~~~~~~~~~~~~~~~~~~~

Field of Lucius Titius——————

Vide Pothier, Pandectae, lib. xli. t. 1. § 28 (notis).

of the law regarding the ownership of abandoned beds different from that entertained by Vinnius. He thinks that Justinian advisedly rejected the qualification which Gaius had engrafted upon the general rule, and holds that the rule as laid down by Justinian, namely, that in all cases where the river deserting its second bed either reverts to its original bed or makes a third bed for itself, the second bed should be divided among the adjacent landowners in proportion to their respective riparian interests, is far more equitable than the one suggested by Gaius, namely, that in some cases the second bed should be restored to its previous owner.[1]

Inundatio.—As regards Inundatio, or flood, the Roman lawyers are unanimous in declaring that it produces no jural change whatever. Justinian using the words of Gaius[2] says:—

"It is otherwise if one's land is wholly inundated, for an inundation does not permanently alter the nature of the land, and consequently if the water goes back, the soil clearly belongs to its previous owner."[3]

What inundatio signifies, is thus explained by Vinnius in his commentary on the Institutes:—"It is properly speaking an inundation, when a river augmented by showers or by the melting of snow or by any other cause, outspreads its waters over the adjacent fields in such manner that it does not change its banks or its bed;[4] (Dig. xliii. 12. 1. 5). When this happens, Justinian following Gaius (Dig. xli. 1. 7. 6) declares, that the proprietorship of the land is not lost: and that, consequently, when the water subsides, the land, which was thus covered, is not added to the lands of the adjoining owners, but continues to be his whose it was before the inundation. And then he adds this reason, (namely), that inundation does not permanently alter the character (species) of the land, implying thereby that in the case of inundation, the land does not lose its proper form as it does when the river changes its bed; because the bed is supposed to be formed by the river flowing over the land for a considerable time, and slowly excavating it, whereby its surface stratum disappears; whereas by inun-

1 J. Voet, Comm. ad Pand. lib. xli. t. 1. § 18.

2 Dig. xli. 1. 7. 6.

3 2 Moyle, Imp. Just. Inst. 40. Alia sane causa est, si cuius totus ager inundatus fuerit. neque enim inundatio speciem fundi commutat et ob id, si recesserit aqua, palam est eum fundum eius manere, cuius et fuit. Inst. ii. 1. 24.

4 Inundatio propriè est, cum flumen imbribus, vel nivibus, vel qua alia ratione auctum in vicinos campos ita se effundit, ut nec ripas alveum suum mutet, *l.* 1. § *ripa* 5 *de flum.* Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De Inundatione.

dation the lands are all at once with a sudden violence invaded and are simply covered by water; it cannot be said that by such violence they, (*i. e.*, the lands) are comminuted, dissolved or excavated, or that they are deprived of their proper form. Although, at best the higher parts of the ground are washed down, yet the solid parts of the interior of the ground (*i. e.*, the substratum) remain intact; and though there be a change in any of its qualities, yet there is no more change in its substance than there is when a portion of a field is encroached on by a lake, in which case it is certain that the rights are not at all altered."[1]

Grotius is of opinion that the distinction thus drawn by Roman lawyers between an inundation retiring all of a sudden and an inundation receding slowly and gradually,—preserving the right of the previous owner to the overflowed land in the one case and assigning the abandoned bed to the adjacent landowners in the other,—may well be introduced by positive law as tending to make people more careful in securing their banks, but it does not at all follow from natural law[2] or natural reason; and he holds that in both cases the right of the previous owner ought to subsist,[3] though in some cases a presumption of abandonment of such land by him may arise if the inundation is excessive and continues for a long length of time and no indications of his intention to retain his property therein are apparent. But such presumption being naturally variable and uncertain, the positive laws of some countries have, he states, fixed definite periods after the lapse of which the owner's right to the submerged land is lost, unless he preserves his title to it by the exercise of some acts of ownership, *e. g.*, by fishing,—a proviso which the Roman lawyers, however, rejected.

[1] Hoc cum fit, ait Justinianus post Gaium, *l.* 7. § *aliud sanè* 6. *hoc tit.* fundi proprietatem non amitti: et ideo recedente aqua, fundum, qui occupatus fuerat, non adici vicinis possessoribus, sed eius manere, cuius ante inundationem fuerat. Et addit hanc rationem, quia inundatio fundi speciem non commutat, quasi dicat, non ut alveo facto propriam formam ager amittit, ita et inundatione: quippe alveum fieri diuturno lapsu fluminis et lenta excavatione agri, ut iam plana eius facies amplius non appareat: inundatione autem uno subitaneo impetu praedia invadi, atque aqua cooperiri dumtaxat, non comminui, dissolvi aut excavari, aut formam amisisse dici possunt, *d. l.* 1. §. *aliter* 9 *de flum.* Atque ut maximè summa pars agri in arenam dissolvatur, manet tamen solida pars fundi interior: et ut de qualitate aliquid mutet, substantiam non mutat non magis quam pars agri, quae a lacu hauritur, cuius ius non mutari certum est . . . . . Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De Inundatione. *Cf.* J. Voet Comm. ad Pand. lib. xli. t. 1. § 19.

[2] Grotius, de Iur. Bell. et Pac. lib. ii. c. 8. § 8

[3] *Ibid.*, § 10.

Owners of qualified interests in land who may claim alluvions.—Under the Roman law, a pledge-creditor and a hypothecary-creditor, that is to say, persons who acquired an interest in land under a pledge (pignus) or a hypothec (hypotheca) were entitled to have the same interest extended over increments annexed thereto by alluvion subsequent to the pledge or the hypothec.[1] According to Ulpian, a usufructuary (fructuarius) also had a right to accessions by alluvion to land over which he had a right of usufruct (usufructus), but he had no right to islands which might rise in front of such land.[2]

Alluvions liable to additional tax.—In the time of the Emperors, lands gained by alluvion were subjected to the payment of an additional tribute or tax to the treasury, and lands lost by diluvion were exempted from such payment.[3]

Alluvion and diluvion under French law.—Let us next proceed to see how the principles of law which we have just discussed, have been developed and elaborated in the legal system of France. In pursuing this enquiry, it will be convenient to adhere to the original classification of the subject-matter, namely, (i) alluvion, (ii) avulsion, (iii) islands, and (iv) abandoned beds of rivers.

I. **Alluvion.**—The Code Civil, article 556, thus defines alluvion and declares to whom its ownership is to belong:—

A deposit and increase of earth formed gradually and imperceptibly on soil bordering on a river or other stream, is denominated 'alluvion,' and it is for the benefit of the riparian proprietor, whether in respect of a river or stream navigable, 'flottable,' or not; on condition, in the first two cases of leaving a landing-place or towing-path conformably to regulations.[4]

Under the old French law, alluvions formed on the banks of navi-

1 Si nuda proprietas pignori data sit, usus fructus, qui postea adcreverit, pignori erit: eadem causa est alluvionis. Dig. xiii. 7. 18. 1. (Paulus). Si fundus hypothecae datus sit, deinde alluvione maior factus est, totus obligabitur. Dig. xx. 1. 16 pr. (Marcian).

2 Huic vicinus tractatus est, qui solet in eo quod accessit tractari: et placuit alluvionis quoque usum fructum ad fructuarium pertinere. sed si insula iuxta fundum in flumine nata sit, eius usum fructum ad fructuariam non pertinere Pegasus scribit, licet proprietati accedat: esse enim veluti proprium fundum, cuius usus fructus ad te non pertineat. Dig. vii. 1. 9. 4, (Ulpian). But the right to alluvion was denied by Paulus, who held that it went to the dominus. Paulus, Sent. iii. 6. 22.

3 Cod. vii. 41. 2, 3.

4 Code Civil. § 556.

gable rivers belonged to the king, and the riparian proprietors could claim no right to them otherwise than under grants from him.[1]

Lands gained by alluvion from the sea, or by dereliction thereof, belong under the Code Civil to the state, and they do not acquire the character of alluvion or dereliction until they have been completely abandoned by the withdrawal of the waters of the sea.[2]

The state may grant, subject to such conditions as it may choose to impose, alluvions and derelictions of the sea to private individuals, who may, therefore, also claim them by prescription.[3]

A deposit of earth has the character of alluvion, if it be formed under the surface of the water gradually and imperceptibly; it matters little that its appearance above water has been sudden and the result of subsidence of an inundation; the gradual and imperceptible growth which is necessary in order to constitute alluvion, relates to the mode of formation of the alluvial deposit and not to its emergence above the surface of water.[4]

If a sandbank forms in the bed of a navigable river, so that it remains covered with water during several months of the year, it cannot be considered as an alluvion belonging, by right of accession to the adjacent riparian owner; but is regarded as still forming a portion of the bed of the river and therefore belonging to the state.[5] Nor does a deposit of earth formed on the banks of a navigable river acquire the character of alluvion, if it remains covered with water when such water is at the mean height necessary for navigation.[6]

Lands temporarily discovered by water at ebb tide cannot be considered as an alluvion, more specially at that period when, by reason of the proximity of the sea, they happen to be entirely submerged by the spring tides.[7]

An essential pre-requisite of alluvion is the physical adherence of the increment to the riparian soil. Therefore, a deposit of earth formed in a river, so that it is separated from the adjacent riparian soil by an arm of the river or by a streamlet (fil d'eau) cannot be considered

[1] Pothier, Droit Civil, tom. iv. p. 1. c. 2. s. 3. art. 2. n. 157.
[2] Sirey, Les Codes Annotes, v. 1. § 538, note (nos. 38, 39).
[3] *Ibid.*, § 538, note (nos. 42-44).
[4] *Ibid.*, § 556 note (no. 2).
[5] *Ibid.*, § 556, note (no. 3).
[6] *Ibid.*, note (no. 4).
[7] *Ibid.*, note (no. 5). But upon this point opinions seem to differ.

as an alluvion.[1] It has, however, been adjudged subsequently, that it is sufficient if the adherence of deposits to the riparian estate is habitual, though only at certain periods of the year it may be separated from the latter by a streamlet.[2]

A deposit of earth formed insensibly in the bed of a river and adhering under the water to the subsoil of a riparian estate, has the character of alluvion, and belongs to the owner of such subsoil even though at the surface of the water it may be separated from such soil by a streamlet or a canal.[3]

A deposit of earth gradually and imperceptibly added to riparian land, has the character of alluvion and belongs to the owner of such land, even though it should have been occasioned by the labour of the human hand executed in the river or stream or even by works of art executed by the state in a navigable or 'flottable' river.[4] But it is otherwise, if the deposit of soil resulting from works of art takes place suddenly and perceptibly.[5]

There appears to be a conflict of authority in France upon the point whether alluvions formed in a river or stream along a public road or highway belong to the state or to the commune, or whether they belong to the owners of estates situated on the other side of the road or way.[6] But it is settled that if they form along a towpath, they enure to the benefit of the riparian owners.[7]

The alluvion which takes place in a canalised stream or a canal, does not accrue to the riparian owners, the banks thereof being the property of the state or of him who has excavated the canal.[8]

The right of alluvion does not apply to increments annexed to the banks of torrents (*i. e.* intermittent streams); the owners of the soil of the bed become the owners of the increments which the waters have added thereto by superposition.[9]

As alluvions formed on the banks of a stream, whether navigable or

1 Sirey, Les Codes Annotes, v. 1. § 556, note (nos. 6, 7).
2 *Ibid.*, note (no. 8).
3 *Ibid.*, note (no. 9).
4 *Ibid.*, note (nos. 14, 15).
5 *Ibid.*, note (no. 16).
6 *Ibid.*, note (nos. 17, 18).
7 *Ibid.*, note (no. 20).
8 *Ibid.*, note (no. 23).
9 *Ibid.*, note (no. 24 (2)).

not, belong to the riparian proprietors from the time that the deposit takes place, it follows that if the state desires to canalise the stream, it cannot remove the alluvions without indemnifying the riparian owners for the loss which they suffer on account of it, even though the riparian owners may not have previously taken possession of such alluvions.[1]

Right of usufructuaries, legatees and secured creditors to alluvion.—Usufructuaries,[2] legatees, secured creditors, and in general, all third persons who acquire an interest in, or a right to follow, the land, are entitled to alluvions, according to the nature of the contract in each case.[3]

Right of a vendee to alluvion.—In the case of a sale, the buyer is entitled to accretions formed after his purchase, even though the extent of the area sold may have been expressly stated[4]; but as to alluvions formed previous to his purchase, his right to them depends on the terms of the contract of sale, or on the intentions of the parties, and does not necessarily pass under the conveyance.[5] Where the sale is subject to a power of re-purchase, the vendor is entitled, when he exercises the option so reserved to him, to all accretions formed subsequent to the sale.[6]

If a person without title sells riparian land to another, the true owner may recover from the buyer not only such land, but also all increments that may have been added to it, though the buyer may be entitled to claim compensation in respect of such increment.[7]

Whenever any act of alienation is dissolved or rescinded, and the subject-matter of such alienation is ordered to be restored to the alienor, the latter is entitled to have it together with all alluvial increments which may have accrued thereto.[8]

Right of a farmer and an emphyteuta to alluvion.—A farmer is entitled to alluvions formed after the date of his lease, though there is some difference of opinion amongst the authorities as to whether he is liable to pay any additional rent for them.[9] But the emphyteuta acquires the

[1] Sirey, Les Codes Annotes, v. 1. § 556, note (no. 25).
[2] Code Civil, § 596.
[3] Sirey, Les Codes Annotes, v. 1. § 556, note (no. 26).
[4] *Ibid.*
[5] *Ibid.*, note (no. 27).
[6] *Ibid.*, note (no. 27 (2)).
[7] *Ibid.*, note (no. 28).
[8] *Ibid.*, note (no. 29).
[9] *Ibid.*, note (no. 30).

alluvion free from the obligation of paying any increased rent, even though the exact area may have been specified in the lease.[1]

A stranger, who is not a riparian proprietor, may by prescription acquire a right to an alluvion, either directly or by prescribing for the riparian estate to which the alluvion adheres.[2]

Dereliction.—The Code Civil draws no jural distinction between deposits of earth formed by the process of alluvion and lands gained by the dereliction of a portion of the bed of a river, because article 557 goes on to provide that in the case of derelictions occasioned by a river receding insensibly from one of its banks, and encroaching on the other, the proprietor of the bank discovered profits by the alluvion (or, more properly speaking, by the abandoned portion of the bed), and the proprietor on the opposite side loses his right to reclaim the land encroached upon by the river.[3]

Derelictions of the sea, however, belong to the state and not to the littoral proprietor.[4]

Inundation.—Inundations, even for long periods, do not affect the proprietorship of the submerged soil, under the law of France, as they do not even under the Roman law. Land, which during several years, has been covered by the overflow of a stream, is not, when the waters happen to retire, assimilated to the bed of the stream, and considered thenceforward as an acquisition for the benefit of the adjoining riparian proprietors, but is deemed to continue as the property of its previous owner, although it might have been denuded of all soil susceptible of culture and vegetation.[5] It is the same with regard to lands which might have remained submerged under water for more than thirty years, provided, however, the river has not abandoned its ancient bed.[6]

Alluvion in lakes and ponds.—Article 558 of the Code Civil declares that:—

Alluvion does not take place with respect to lakes and ponds, the proprietor of which preserves always the land which the water covers when it is at the pond's full height, even though the volume of water should diminish.

1 Sirey, Les Codes Annotes, v. § 556, note (no. 31).
2 *Ibid.*, note (no. 32).
3 Code Civil, § 557.
4 Sirey, Les Codes Annotes, v. 1. § 538, note (nos. 38, 39).
5 *Ibid.*, § 556, note (no. 10).
6 *Ibid.*, note (no. 10 (2)).

In like manner, the proprietor of a pond acquires no right over land bordering on his pond which may happen to be covered by an extraordinary flood.

II. **Avulsion.**—Article 559 of the Code thus lays down the law with regard to avulsion:—

If a river or a stream, navigable or not, carries away by sudden violence a considerable and identifiable part of a field on its banks, and bears it to a lower field, or on its opposite bank, the owner of the part carried away may reclaim his property; but he is required to make his demand within a year: after this interval it becomes inadmissible, unless the proprietor of the field to which the part carried away has been united, has not yet taken possession thereof.

It has been held that article 559 applies also to a case where a new branch of the stream suddenly cutting off a portion of a field has transformed it into an island.[1]

III. **Islands.**—I stated in a previous lecture[2] that, according to the law of France, the beds of all rivers which are navigable or 'flottable,' are not susceptible of private ownership, but are vested in the state as a part of the public domain; the proprietorship of islands being a necessary consequence of the proprietorship of the bed, it follows that the proprietorship of islands formed in such rivers should, according to that law, be also regarded as vested in the state, and accordingly we find article 560 of the Code Civil laying down that:—

Islands, islets, and deposits of earth formed in the bed of rivers or streams, navigable or 'flottables,' belong to the state, if there be no title or prescription to the contrary.

An island thus formed belongs to the state, even though it occupies submerged sites belonging to private proprietors, provided it has formed gradually and not in a sudden manner. To such a case as this, articles 562 and 563 of the Code Civil do not apply.[3]

But the beds of streams which are neither navigable nor 'flottables' being, as we have already seen, the property of the riparian proprietors, the Code Civil in article 561 lays down that:—

Islands and deposits of earth formed in rivers and streams neither navigable nor 'flottables,' belong to the riparian proprietor on that side on which the island is formed; if the island be not formed on one side

[1] Sirey, Les Codes Annotes, v. 1. § 559, note (no. 1).
[2] *Supra*, 104.
[3] *Ibid.*, § 560, note (no. 2).

only, it belongs to the riparian proprietors on both sides, divided by an imaginary line drawn through the middle of the river.[1]

This article applies even though the stream may be 'flottable' for logs only.[2]

The law of France both prior to[3] and since the Code Civil follows the rule of Roman law with regard to the ownership of islands formed by a branch of a river intersecting a field, and separating it from the mainland. Article 562 of the Code Civil lays down that:—

If a river or stream in forming for itself a new arm, divide and surround a field belonging to a riparian proprietor, and thereby form an island, such proprietor shall retain the ownership of his land, although the island be formed in a river or in a stream navigable or 'flottable.'

IV. **Abandoned beds of rivers.**—The old law of France, prior to the Code Civil, following in this respect the provisions of the Roman law, declared that the bed abandoned by a river or stream belongs to the riparian proprietors by right of alluvion, the proprietors of the soil in which the river or stream makes a new bed having no right whatever to the soil of the deserted bed.[4] But article 563 of the Code Civil abrogates this rule and provides that:—

If a river or a stream, whether navigable, or 'flottable' or not, forms a new channel abandoning its ancient bed, the proprietors of the soil newly occupied by the river take, by title of indemnity, the ancient abandoned bed, each in proportion to the land of which he has been deprived.

This seems to be in accordance with the view of Puffendorf, who condemning the rule of the Roman law upon this matter, maintained that the deserted bed ought, in equity, to be adjudged to the proprietor of the land occupied by the new bed to console him for his loss, and that if the river again forsook this new bed, it should be restored to its previous owner and should not be divided among the riparian owners.[5]

Although under article 563, the proprietors of the soil newly occupied

1 As to the old law, which is the same as the present, see Pothier, Droit Civil, tom. iv. p. 1. ch. 2. s. 3. art. 2, no. 164.

2 Sirey, Les Codes Annotes, v. 1. § 560. note (no. 5).

3 Pothier, Droit Civil, tom. iv. p. 1. ch. 2, s. 3. art. 2. no. 162.

4 *Ibid.*, no. 160; Sirey, Les Codes Annotes, v. 1. § 563, note (no. 4). But in the jurisdiction of the Parliament of Toulouse the rule of the Roman law is followed. *Ibid.*, note (no. 5.)

5 Puffendorf, de Iur. Nat. et Gent. lib. iv. c. 7. § 12.

by the river are entitled to the soil of the abandoned bed, yet they are not entitled to islands or islets which may have previously formed in such bed and become vested in the state or in the riparian owners.[1] It is worthy of note that a comparison of this article with article 557, leads to a somewhat curious result, namely, that if a river abandons a *portion* of its bed, and encroaches upon the land of the opposite riparian proprietor, the portion of the bed thus abandoned belongs to the adjoining and not to the opposite riparian proprietor, but that if it happens to abandon the *whole* of its bed and occupy the land of the riparian proprietor on the opposite side, the bed thus wholly abandoned belongs to the latter.

[1] Sirey, Les Codes Annotes, v. 1. § 563, note (no. 2).

LECTURE VI.

ALLUVION AND DILUVION,—*(Continued)*.

(*English and American Law*).

Value and importance in this country of rules of English and American law relating to alluvion—Bracton—A. Maritima incrementa—Divisible into three kinds, alluvio maris, recessus maris, and insula maris—(i) Alluvion, according to Lord Hale—According to Blackstone—Result of the authorities—*Rex* v. *Lord Yarborough*—Meaning of the expression 'imperceptible accretion'—*Attorney-General* v. *Chambers*—Definition of alluvion—Right to alluvion resulting from artificial causes—Applicability of the principle of alluvion to the converse case of encroachment of water upon land—Applicability or otherwise of the rule of alluvion, where the original limits of littoral or riparian estates towards the sea or river are ascertainable or ascertained—Discussion of authorities—*Foster* v. *Wright*—Mr. Houck's argument that rule of alluvion ought not to apply to grants made in the United States of lands bounded by 'sectional lines'—Rule of alluvion not applicable to estates which have no water frontage—Nature of right acquired in increments added by alluvion—Apportionment of alluvion amongst competing frontagers—*Thornton* v. *Grant*—(ii) Dereliction—Ownership of lands abandoned by the sea or a tidal navigable river—Effect of inundation on the ownership of lands—Effect of sudden change of the channel of a river upon the ownership of the bed newly occupied—*Mayor of Carlisle* v. *Graham*—Custom as to the medium filum of the Severn (for a portion of its course) being the constant boundary between the manors on opposite banks—Criterion for determining the legal character of such formations in the sea or in a river as lie on the border-land between alluvion and dereliction—(iii) Islands—Ownership of an island under different circumstances—(iv) Avulsion—B. Fluvialia incrementa—(i) Alluvion—(ii) Dereliction—Ownership of lands derelicted—Effect of sudden or gradual change of the bed of a stream on the position of the boundary line between conterminous proprietors—(iii) Islands—Apportionment of islands among riparian proprietors—Rule of the Civil Code of Louisiana—Mode of division of a second island formed between the first and the opposite mainland—*Earl of Zetland* v. *The Glover Incorporation of Perth*—*Trustees of Hopkins Academy* v. *Dickinson*.

Value and importance of the English and American law of alluvion.—Besides the doctrines of the Roman Civil law with regard to alluvion and diluvion, the principles expounded by eminent judges and renowned text-writers in England upon that subject, and developed and elaborated by like authorities in America,[1] by reason of the fluvial pheno-

1 The American lawyers are considered high authorities on the law of alluvion, the Courts of the United States having had to consider questions relating to it to a far greater degree than the Courts of other countries. See speech of the Hon'ble Mr. W. Stokes on the Alluvion Bill. Gazette of India, Supplement, Oct. 12, 1878, p. 1599.

mena in that great continent affording more frequent and far greater practical opportunities for their discussion and application, are often resorted to as rules of 'equity and good conscience' for the determination of similar questions arising in this country, whenever the statute-law here fails to furnish a satisfactory solution. It may be useful therefore to consider in detail, so far as the limits of this lecture will permit, the provisions of the law of England and America upon this matter.

Whether Bracton, the earliest writer on the Common law of England, formulated the rules of the Common law upon this subject,[1] or whether he simply interpolated the rules of the Civil law,[2] we need not stop to enquire. It is sufficient for the present purpose to mention that he has stated the law in almost the same terms as those in which Justinian had laid it down, and to which I have already called your attention.

Lord Hale, however, has proceeded on a firmer and surer basis. He has deduced the various rules of law upon this subject from the materials with which the Year Books furnished him.

In discussing, therefore, these rules, I shall frequently have occasion, in the course of the present lecture, to refer to the De Jure Maris.

Classification of increments of lands caused by the action of running water.—

Increments of lands caused by the action of running water may for purposes of convenience be divided into two classes :—

First.—Maritima incrementa, that is, accessions of land caused by the action of the sea, or by the action of the waters of an arm of the sea, or of a tidal navigable river.

Secondly.—Fluvialia incrementa, that is, accessions of land caused by the action of the waters of a non-tidal or private stream.

Lord Hale classifies maritime increments under three heads, *viz.*,— Increase—

1. per projectionem vel alluvionem.
2. per relictionem vel desertionem.
3. per insulae productionem.[3]

[1] *Per* Best, C. J., in *Reg* v. *Lord Yarborough*, 2 Bligh. (N. S.) 147; see Fortescue, 408, for opinion of Parker, C. B. to the same effect; *Ball* v. *Herbert*, 3 T. R. 253, *per* Best. J.

[2] *Per* Buller, J., in *Ball* v. *Herbert*, 3 T. R. 253; see also Sir Mathew Hale's First Treatise, printed in Morris' Hist. of the Foreshore, p. 360, ('Civil Law, from whom Bracton borrows much of his learning in this particular').

[3] Hale, de Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 14; Morris' Hist. of the Foreshore, 380.

or, as he says in another place—

1. Alluvio maris.
2. Recessus maris.
3. Insula maris.[1]

A. *Maritima incrementa*—Let us now proceed to see what the rules of the English and American law are with regard to these three kinds of maritime increments, in the order in which I have just enumerated them.

1. Alluvion.—According to Lord Hale.—As to alluvion, Lord Hale says:—

"The increase, per alluvionem, is, when the sea by casting up sand and earth doth by degrees increase the land, and shut itself out further than the ancient bounds; and this is usual. The reason why this belongs to the Crown is, because in truth the soil, where there is now dry land, was formerly part of the very fundus maris, and consequently belongs to the king. But indeed if such alluvion be so insensible that it cannot be by any means found that the sea was there, idem est non esse et non apparere, the land thus increased belongs as a perquisite to the owner of the land adjacent."[2]

He says in another place:—

"For the ius alluvionis which is an increase of the land adjoining by the projection of the sea casting up and adding sand and slubb to the adjoining land, whereby it is increased, and for the most part by insensible degrees, Bracton, lib. 2. cap. 2. writes thus:" (he quotes here a passage from Bracton in which he lays down the law regarding alluvion).—"But Bracton follows the Civil law in this and some other following places. And yet even according to this, the Common law doth regularly hold at this day between party and party. But it is doubted in case of an arm of the sea, 22. Ass. 93.

"This ius alluvionis, as I have before said, is de iure communi by the law of England the king's, *viz.*, if by any marks or measures it can be known what is so gained; for if the gain be so insensible and indiscernible by any limits or marks that it cannot be known, idem est non esse et non apparere, as well in maritime increases as in increases by inland rivers.

1 Hale, de Iure Maris, p. 1. c. 6; Hargrave's Law Tracts, 28; Morris' Hist. of the Foreshore, 395.

2 Hale, de Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 14; Morris' Hist. of the Foreshore, 380.

"But yet custom may in this case give this ius alluvionis to the land whereunto it accrues."[1]

According to Blackstone.—Blackstone lays down the law in these words:—

"As to lands gained from the sea either by *alluvion*, *i. e.*, by the washing up of sand or earth, so as in time to make terra firma, or by *dereliction*, as when the sea shrinks back below the usual water-mark, 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 reciprocal 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."[2]

Result of the authorities.—It is necessary to remark before we proceed that though Bracton and Lord Hale laid down the doctrine with regard to 'alluvion', yet Blackstone applies it also to gradual and imperceptible derelictions of the waters, and, if I might venture to say, he is right in so doing,[3] for the gradual and insensible retreat of the sea or of a river is generally the effect of its own action by the heaping up of alluvial soil, beach or sand. As Lord Hale himself observes, 'there is no alluvion without some kind of reliction, for the sea shuts out itself.'[4]

It is also evident from the passages I have just now read that, according to Lord Hale and Blackstone, the general rule is, that lands gained from the sea and from tidal navigable rivers belong to the Crown,[5] but that a subject, that is to say, the adjacent littoral proprietor

1 Hale, de Iure Maris, p. 1. c. 6; Hargrave's Law Tracts, 28; Morris' Hist. of the Foreshore, 395-396.

2 2 Black. Com. 261.

3 Hall on the Seashore, (2nd ed.), 111; Morris' Hist. of the Foreshore, 787; Gould on Waters, § 155.

4 Hale, de Iure Maris, p. 1. c. 8; Hargrave's Law Tracts, 29; Morris' Hist. of the Foreshore, 397, 399, ('And though there is no alluvion without some kind of reliction, for the sea shuts out itself).'

5 Dyer, 326, b. n. 5; 1 Keb. 301; where it is said that the right is as ancient as the King's Crown. *Whitaker* v. *Wise*, 2 Keb. 759; *Rex* v. *Lord Yarborough*, 2 Bligh (N. S.) 147; Woolrych on Waters (2nd ed.) 29; "It is not to be understood," says Woolrych, referring to the case of the Abbot of Ramsay, cited in Lord Hale's de Iure Maris, p. 1. c. 6, "that the Crown is not

may claim them, if (i) the aggregate increment or total 'acquest' is small in quantity, and (ii) the accretion is slowly, gradually and imperceptibly added.

That the increment should be small in quantity[1] is clear from the reasons respectively assigned by Lord Hale and Blackstone for this species of acquisition, *viz.*,—'Idem est non esse et non *apparere*,' and, 'De *minimis* non curat lex.' Yet in England instances are not wanting in which littoral proprietors have taken possession of not very inconsiderable quantities of alluvial increments; though Woolrych attributes it rather to forbearance, or neglect to interfere, on the part of the Crown on account of the smallness of the usurpation, than to the absence of any prerogative right to such increments.

Meaning of the expression 'imperceptible accretion'.—But this doctrine was controverted and disapproved in the well-known case of *Rex* v. *Lord Yarborough*,[2] where the Court held that the lord of the adjacent manor was entitled to a quantity of nearly 453 acres of marshy land on the ground of alluvion.[3] So that at the present day it may be taken as a settled rule in England that, any quantity of land, however large,[4] may be claimed by a subject as an accretion by alluvion, provided the accretion satisfies the essential condition that it has been slow, gradual and imperceptible in its progress. The passages in which Lord Hale says that land increased by alluvion belongs to the subject, when it is "so insensible that it cannot be by any means found that the sea was there," or "so insensible and indiscernible by any limits or

entitled by its prerogative to all this increment, to alluvion as well as avulsion, but as Sir William Blackstone observes, '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 possibly a reciprocal consideration for such possible loss or charge." Woolrych on Waters (2nd ed.), 445; Houck on Navigable Rivers, § 232.

1 Dav. Rep. 59; 2 Ventr. 188. "If the salt water leave a great quantity of land on the shore, the king shall have the land by his prerogative, and the owner of the adjoining land shall not have it as a prerogative." 2 Roll. Abr. Prerog. B. pl. 11; Houck on Navigable Rivers, § 230; Woolrych on Waters (2nd ed.), 445.

2 3 B. & C. 91.

3 Schultes thinks that when the question arises between the Crown and a subject, the decision ought to depend on the extent of the 'acquest', and the duration of time elapsed in its accumulation or reliction; but that when it arises between a subject and a subject, the decision ought not to rest upon the duration of time only. On Aquatic Rights 137. This opinion, however, militates against the actual circumstances of the case of *Rex* v. *Lord Yarborough*, *supra*.

4 Hunt on Boundaries, (3rd ed.), 31.

marks that it cannot be known", are doubtless liable to the construction which in *Rex* v. *Lord Yarborough*[1] the counsel for the Crown sought to place upon them, namely, that a subject is entitled to a maritime increment by alluvion only where such increment is so inconsiderable as to be almost 'imperceptible.' But the Court of King's Bench declined to accede to that argument, and held in that case that an imperceptible accretion means one which is imperceptible in its progress, and not one which is imperceptible after a lapse of time. Abbott, C. J., delivering the judgment of the Court in that case said as follows:—

"In these passages, however, Sir Mathew Hale is speaking of the legal consequence of such an accretion, and does not explain what ought to be considered as accretion insensible or imperceptible in itself, but considers that as being insensible, of which it cannot be said with certainty that the sea ever was there. An accretion extremely minute, so minute as to be imperceptible even by known antecedent marks or limits at the end of four or five years, may become, by gradual increase, perceptible by such marks or limits at the end of a century, or even of forty or fifty years. For it is to be remembered that if the limit on one side be land, or something growing or placed thereon, as a tree, a house, or a bank, the limit on the other side will be the sea, which rises to a height varying almost at every tide, and of which the variations do not depend merely upon the ordinary course of nature at fixed and ascertained periods, but in part also, upon the strength and direction of the wind, which are different almost from day to day. And, therefore, these passages from the work of Sir Matthew Hale are not properly applicable to this question. And, considering the word 'imperceptible' in this issue, as connected with the words 'slow and gradual,' we think it must be understood as expressive only of the manner of the accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time. And taking this to be the meaning of the word 'imperceptible,' the only remaining point is, whether the accretion of this land might properly, upon the evidence, be considered by the jury as imperceptible. No one witness has said that it could be perceived, either in its progress, or at the end of a week or a month."

Foundation of the rule of alluvion and the precise nature thereof.— If then the true and the only sensible meaning of the rule is that, where

[1] 3 B. & C. 91.

the increase is imperceptible in its progress the increment becomes the property of the subject, it follows that it becomes vested in him de die in diem as its growth extends, and what is once vested in him cannot be devested by the circumstance of a still further increase taking place afterwards. It is also clear that after this decision of the Court of King's Bench, which was afterwards affirmed by the House of Lords,[1] the true foundation for the law of alluvion must be sought elsewhere than in the maxim 'de minimis non curat lex' upon which Blackstone, as we have seen, rested it. Thus, in *Attorney-General* v. *Chambers*,[2] Lord Chelmsford, after quoting the passage I have already cited from Blackstone, said:—

"I am not quite satisfied that the principle de minimis non curat lex is the correct explanation of the rule on this subject: because, although the additions may be small and insignificant in their progress, yet, after a lapse of time, by little and little, a very large increase may have taken place which it would not be beneath the law to notice, and of which, the party who has the right to it can clearly show that it formerly belonged to him, he ought not to be deprived. I am rather disposed to adopt the reason assigned for the rule by Baron Alderson in the case of *The Hull and Selby Railway Company*,[3] *viz.*, 'That which cannot be perceived in its progress is taken to be as if it never had existed at all.' And as Lord Abinger said in the same case, 'The principle, as to gradual accretion, is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property.' It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the seashore."

And Lindley, J., in *Foster* v. *Wright*[4] stated that "the law on this subject is based upon the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water."

1 2 Bligh. N. S. 147; 5 Bing. 163; 1 Dow. N. S. 178.

2 4 De G. & J. 55; 5 Jur. (N. S.) 745.

3 5 M. & W. 327.

4 4 C. P. D. 438. In *Lopez* v. *Muddun Mohan Thakur*, Lord Justice James said that the accretion by alluvion is held to belong to the adjoining owner on account of "the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs." 13 Moo. Ind. App. 467.

In the light of these authorities, alluvion may therefore be defined as an addition made by the action of running water to adjoining land, littoral or riparian, in such slow, gradual and imperceptible manner[1], that it cannot be shown at what time it occurred, the extent of the total increment being wholly immaterial; and the law of alluvion which confers such increment on the adjacent landowner may be taken to rest upon the principle of compensation embodied in the maxim, qui sentit onus debet sentire commodum—the equity of awarding the gradual gain to him who is exposed to the chance of suffering a possible gradual loss, as well as upon the impracticability of identifying from day to day the minute increments and decrements caused by the constant action of running water.[2]

Alluvion resulting from artificial causes.—Such then being the foundation of the law of alluvion, there does not seem to be any reason why it should not be equally applicable, whether the gradual accretion be the result of purely natural or of purely artificial causes or partly of natural and partly of artificial causes; provided, in the case where the gradual accretion is produced by the sole or partial operation of artificial causes, it arises from acts of such a nature as may be done in the lawful exercise of rights of property and are not intended for the sole or express purpose of gaining such an acquisition.[3] Therefore, if manufacturing or mining operations upon lands bordering on the sea or upon a public river cause a gradual silting up of rubbish, slate or other matter, either upon lands where the manufactories or mines are situated, or upon neighbouring property, the materials thus accumulated would be subject to the ordinary rule relating to alluvion, just as if they had been deposited by natural causes.[4]

But the law of alluvion does not apply where the artificial causes do not produce a slow and gradual but a sudden and manifest 'acquest' of land from the sea or from a river; in such case the law

1 Dist. *Att.-General* v. *Reeves*, (1885) 1 Times, L. R. 675; where the gradual growth of the accretion was proved to have been clearly perceptible by marks and measures as they took place, and the accretion was therefore adjudged to the Crown.

2 Angell on Watercourses, § 53, note 2; Gould on Waters, § 155.

3 *Att.-General* v. *Chambers*, 4 De G. & J. 55; 5 Jur. N. S. 745; *Doe* d. *Sheeb Kristo Banerjee* v. *The East India Co.*, 10 Moo. P. C. C. 140; 6 Moo Ind. App 267; *Smart* v. *Magistrate of Dundee*, 8 Bro. P. C. 119; *Proprietors of Waterloo Bridge* v. *Cull*, 5 Jur. N. S. 1288; *Blackpool Pier* v. *Fylde Union*, 46 L. J. M. C. 189.

4 Hunt on Boundaries (3rd ed.), 33.

relating to dereliction, which I shall presently explain, applies, and the acquisition belongs to the owner of the bed.[1]

In America, it has been held that, if it clearly appears that a wharf or pier built out into navigable water is an encroachment upon the public domain, and in consequence thereof an accretion is formed against the adjoining land, the owner of such land does not acquire a title to the accretion, unless there has been long continued and exclusive adverse possession. But if the state excavates the soil of navigable waters for the purpose of deepening a channel, and deposits the earth in front of land which it has previously conveyed by grant, the grantee becomes entitled to such accretion.[2]

Whether principle of alluvion applicable to converse case of encroachment by water upon land.—The principle which underlies the law of alluvion applies as much to the converse case of encroachment by water upon the land as it does to the case of encroachment by land upon the water. Therefore, where the sea or a tidal navigable river, by gradual and imperceptible progress encroaches on the land of a subject, the land thereby occupied belongs to the Crown.[3]

Whether rule of alluvion applies where original limits of littoral or riparian estates towards the sea or river are fixed or ascertainable.—The next point which I shall discuss is, whether according to English law the rule of alluvion is applicable where the original bounds or limits of the littoral or riparian property to which the accretion adheres are capable of being ascertained by landmarks, maps, evidence of witnesses, or by any other means. Upon this question there appears to have been no slight conflict of authority; but the latest exposition[4] of the law, however, is in favour of the affirmative position. I shall briefly go through the history of the discussion upon the subject, as the point seems to me to be one of some importance, having regard to the fact that a contrary conclusion[5] has been arrived at by the Privy Council upon a similar question arising in India.

"The law of alluvion has no place in limited lands," say both Bracton and Fleta.[6]

Lord Hale lays down the law thus:—"If a fresh river between the

1 *Todd* v. *Dunlop*, 2 Rob. App. Cas. 333.

2 Gould on Waters, § 155.

3 *In re Hull & Selby Ry. Co.*, 5 M. & W., 327.

4 *Foster* v. *Wright*, 4 C. P. D., 438.

5 *Lopez* v. *Muddun Mohan Thakur*, 13 Moo. Ind. App. 467; 5 B. L. R. 521; 14 Suth. W. R. (P. C.) 11.

6 In agris limitatis ius alluvionis locum non habere constat. Bract. lib. ii. c. 2.; Flet. lib. iii. c. 2.; Britton, lib. ii. c. 2. *Cf.* Dig. xli. 1. 16.

lands of two lords or owners do insensibly gain on one or the other side it is held, 22 Ass. 93, that the propriety continues as before in the river. But if it be done sensibly and suddenly, then the ownership of the soil remains according to the former bounds. As if the river running between the lands of A and B, leaves his course, and sensibly makes his channel entirely in the lands of A, the whole river belongs to A; aqua cedit solo: and so it is, though if the alteration be by insensible degrees but there be other known boundaries as stakes or extent of land. 22 Ass. pl. 93. And though the book make a question, whether it hold the same law in the case of the sea or the arms of it, yet certainly the law will be all one, as we shall have occasion to shew in the ensuing discourse."[1]

Thus, according to Lord Hale, the law of alluvion does not apply where the riverward boundary or the extent of the riparian land is known or is capable of being ascertained. In the above passage, no doubt, his Lordship deals with the case of gradual encroachment and not of gradual accretion. But the one is merely the converse of the other, and the legal effect of both is ascertained upon the same principle.

The language used by Abbot, C. J., in the passage I have quoted before[2] from his judgment in *Rex* v. *Lord Yarborough*, clearly shows, that in his Lordship's opinion too the rule of alluvion, which awards the gradual accretion to the owner of the adjoining land, would be applicable even where the bounds or limits of such land towards the sea or river were known.

In *In re Hull and Selby Ry. Co.*,[3] the Court expressly held that in the case of gradual encroachment of the banks by a tidal navigable river, the owner of the bed, that is to say, the Crown acquired the ownership of the land encroached upon, and the owner of the bank lost his right to it, even though the exact extent of the encroachment was clearly ascertainable by known limits.

But in *Attorney-General* v. *Chambers*,[4] Lord Chelmsford, L. C., dissented from the rule laid down by Lord Hale, and after quoting from the judgment of Abbot, C. J., the passage I have already cited, observed as follows:—"This, however, is not in accordance with the great authority upon this subject, Lord Hale. He says, in page 28 of his book De Iure

[1] Hale, de Iure Maris, p. 1 c. 1; Hargrave's Law Tracts, 5, 6; Morris' Hist. of the Foreshore, 371.

[2] *Supra*, 151.

[3] 5 M. & W. 327.

[4] 4 De G. & J. (55), 71; 5 Jur. N. S. 745.

Maris, 'This ius alluvionis, as I have before said, is, de iure communi by the law of England the King's, *viz*, if by any marks or measures it can be known what is so gained, for if the gain be so insensible and indiscernible by any limits or marks that it cannot be known, idem est non esse et non apparere as well in maritime increases as in increases by inland rivers.' Lord Hale here clearly limits the law of gradual accretions to cases where the boundaries of the seashore and adjoining land are so indiscernible, that it is impossible to discover the slow and gradual changes which are from time to time occurring, and when at the end of a long period it is evident that there has been a considerable gain from the shore, yet the exact amount of it, from the want of some mark of the original boundary line, cannot be determined. But when the limits are clear and defined, and the exact space between these limits and the new high-water line can be clearly shown, although from day to day, or even from week to week, the progress of the accretion is not discernible, why should a rule be applied which is founded upon a reason which has no existence in the particular case?"[1]

The case of *Ford* v. *Lacey*[2] is the next in order of time. There the entire bed of the river at the locus in quo belonged to the owner of the land on its eastern bank, and three plots of land immediately contiguous to the western bank, and forming a portion of the bed, were left bare by the gradual recession of the river. Evidence was also given of continuous acts of ownership on the part of the landowner on the eastern bank since the alteration of the bed of the river. The Court of Exchequer held that he was entitled to those plots.

Thus stood the law until the year 1878, when the Court of Common Pleas Division, in *Foster* v. *Wright*[3], disagreed with the view expressed by Lord Chelmsford in *Attorney-General* v. *Chambers*,[4] and came to a different conclusion. That was a case of gradual encroachment of land on the

[1] It is curious to remark that although Lord Chelmsford delivered this judgment in 1859, yet Lord Justice James, in pronouncing the judgment of the Privy Council in 1870 in *Lopez* v. *Muddan Mohan Thakur*, (13 Moo. Ind. App. 467) after stating the rule of gradual accretion as laid down in the two cases, *Rex* v. *Lord Yarborough*, (2 Bligh. N. S. 147) and *In re Hull & Selby Ry. Co.* (5 M. & W. 327) said:—"To what extent that rule 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 by mine under the sea, or other means of that kind, has never been judicially determined." The report of the arguments of counsel in Moore shews that the case of *Attorney-General* v. *Chambers* (4 De G. & J. 55; 5 Jur. N. S. 745) was not at all cited before the Judicial Committee.

[2] 7 H. & N. 151; 7 Jur. N. S. 684.

[3] 4 C. P. D., 438.

[4] *Supra.*

bank of a non-tidal and non-navigable river, the riverward boundary of such land as it existed before the encroachment being clearly ascertainable. So far as the point now under consideration is concerned, all the authorities are agreed that there is no difference between tidal and non-tidal or navigable and non-navigable rivers. Indeed Lord Hale himself observes that there is no difference in this respect between the sea and its arms and other waters.[1] The Court there was of opinion that the distinction relied upon by Lord Chelmsford between the case where the old boundaries are clear and defined, and the case where such boundaries are obliterated or otherwise unascertainable; was inconsistent with the principle on which the law of accretion is founded, and following the decision in *In re Hull & Selby Ry. Co.*,[2] held that if land is gradually encroached upon by water, it ceases to belong to the former owner, even though such land may be identified and its boundary ascertained. The law is thus stated in the very learned and valuable judgment of Lindley, J. :—

"Gradual accretions of land from water belong to the owner of the land gradually added to: *Rex* v. *Yarborough*[3] and, conversely, land gradually encroached upon by water, ceases to belong to the former owner: *In re Hull & Selby Ry. Co.*[4] The law on this subject is based upon the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water. The history of the law shews this to be the case. Our own law may be traced back through Blackstone,[5] Hale,[6] Britton,[7] Fleta,[8] and Bracton,[9] to the Institutes of Justinian,[10] from which Bracton evidently took his exposition of the subject. Indeed, the general doctrine, and its application to non-tidal and non-navigable rivers in cases where the old boundaries are not known, was scarcely contested by the counsel for the defendant, and is well settled: see the authorities above cited. But it was contended that the doctrine does not apply to such rivers where the boundaries are not lost: and passages in Britton,[11] in the Year Books,[12] and in Hale, De Iure Maris[13], were referred to in support of this view: *Ford* v. *Lacey*,[14] was also relied upon in support of this distinction. Brit-

[1] De Iure Maris, p. 1, c. 1, Hargrave's Law Tracts, 6.
[2] 5 M. & W., 327.
[3] 3 B. & C. 91; 5 Bing. 163.
[4] 5 M. & W. 327.
[5] Vol. ii. c. 16, pp. 261, 262.
[6] De Iure Maris, cc. 1, 6.
[7] Bk. ii. c. 2.
[8] Bk. iii. c. 2, §§ 6, &c.
[9] Bk. ii. c. 2.
[10] Inst. ii. 1. 20.
[11] *Supra.*
[12] 22 Ass. p. 106, pl. 93.
[13] Bk. i. c. 1, citing 22 Ass. pl. 93.
[14] 7 H. & N. 151.

ton lays down as a general rule that gradual encroachments of a river enure to the benefit of the owner of the bed of the river: but he qualifies this doctrine by adding, 'if certain boundaries are not found.' The same qualification is found in 22 Ass. pl. 93, which case is referred to in Hale, ubi supra. But, curiously enough, this qualification is omitted by Callis in his statement of the same case: see Callis, p. 51, and on its being brought to the attention of the Court in *In re Hull and Selby Ry. Co.*,[1] the Court declined to recognise it, and treated it as inconsistent with the principle on which the law of accretion rests. Lord Tenterden's observations in *Rex* v. *Yarborough*[2] are also in accordance with this view; and, although Lord Chelmsford in *Attorney-General* v. *Chambers*[3] doubted whether when the old boundaries could be ascertained, the doctrine of accretion could be applied, he did not overrule the decision of *In re Hull and Selby Ry. Co.*,[4] which decided the point so far as encroachments by the sea are concerned.

"Upon such a question as this I am wholly unable to see any difference between tidal and non-tidal or navigable and non navigable rivers: and Lord Hale himself says there is no difference in this respect between the sea and its arms and other waters: De Iure Maris, p. 6. The question does not depend on any doctrine peculiar to the royal prerogative, but on the more general reasons to which I have alluded above. In *Ford* v. *Lacey*,[5] the ownership of the land in dispute was determined rather by the evidence of continuous acts of ownership since the bed of the river had changed, than by reference to the doctrine of gradual accretion, and I do not regard that case as throwing any real light on the question I am considering."[6]

Whether rule of alluvion applies to grants of land in the United States bounded by 'sectional lines.'—Not altogether dissimilar to the point I have just noticed is the question propounded, and discussed with remarkable ability and thorough-going research, by Mr. Houck in his treatise on the Law of Navigable Rivers, where he maintains that in America grants of land bounded by 'sectional lines,' measured and

1 5 M. & W. 327.
2 3 B. & C. 106.
3 4 De G. & J. 69-71.
4 5 M. & W. 327.
5 7 H. & N. 151.

6 The qualification *viz.*, 'and the old margin of the river or stream cannot be distinctly traced,' contained in draft sections 22 and 23 drawn by Mr. Monahan is inconsistent with the rule laid down in *Foster* v. *Wright*, *supra*, and is apparently based upon the observation of Lord Chelmsford in *Attorney-General* v. *Chambers*, *supra*. Monahan's Method of Law, 196, sections 22, 23.

sold by the acre should, in all respects, be placed upon the same footing as the agri limitati of the Roman law, that they are limited towards the river by mathematical lines of survey run on the top of the bank and do not extend to the edge of the water; that if, under the Roman law, owners of agri limitati are not entitled to accretion by alluvion, there is no reason why the grantees of such 'fractional sections'—by which term these grants are known in America—should be entitled to the same right. "The right of alluvion," says the learned author, "is dependent upon the contiguity of the estate to the water. The water cannot add anything to property which it does not touch. If the lines bounding a fractional section, therefore, mean anything, they limit the rights of the purchaser; and no alluvion can attach to such fractions because not bounded by the water, but by mathematical lines. The objection that the space between the lines and the river is small, and of no benefit to the Government, and that, therefore, it ought to go to the grantee, is of no force. If the Government sells nine hundred and ninety-nine acres out of a thousand, the remaining one acre still remains the property of the Government."[1] But this argument has not met with the approval of the Supreme Court of the United States, which in *Railroad Co.* v. *Schurmeir*,[2] followed subsequently in a long series of cases,[3] has held that these mathematical lines or 'meander lines', as they are called, are employed not as boundaries of the 'fraction,' but as a means of defining the sinuosities of the river banks and of ascertaining the quantity of land comprised in the fraction; that in these cases the right of the grantee extends up to the edge of the water, and that therefore they are entitled to all accretions by alluvion.

It seems to follow as a corollary from the principle of accretion, that if a riparian proprietor sells a portion of his estate reserving to himself a strip along the whole length of the river frontage, such purchaser is not entitled to any increment by alluvion, because his estate is not in contact with the water.[4]

Nature of right acquired in increments by alluvion.—Accretions by alluvion acquire the legal character of the land to which they adhere. If the lord of a manor is entitled to land bordering on the sea or a river as part of his demesne, that is to say, as a freehold land

[1] Houck on Navigable Rivers, § 251.
[2] 7 Wall. 272, cited in Gould on Waters §§ 76-78.
[3] Cited in Gould on Waters, § 76 (notes.)
[4] Houck on Navigable Rivers, § 257.

in his own occupation, the accretions annexed thereto will become his absolutely; if such land be a copyhold tenement, and its boundary is not otherwise limited than by the sea or by the river, then the copyholder acquires the same copyhold interest in the accretion as he has in the adjoining tenement, and the lord of the manor acquires a bare freehold interest in it, subject to the right of the copyholder; and if such land is part of the waste of the manor, the right of the lord to the accretions will be subject to the rights of the tenants for commonage, and in the waste.[1]

It is also an obvious deduction from the same principle that, if a public highway extends across the shore to navigable water, it would continue to be prolonged up to the edge of the water according as the shore receded in consequence of accretions.[2]

It has been held in America that, if a city is the owner of a quay or river bank, it is entitled like any private littoral or riparian owner, to alluvial increments annexed thereto; and similarly, if an embankment is lawfully constructed by a city along the margin of waters which are the property of the state up to high-water mark, it becomes the artificial boundary of the adjoining private properties, and the city acquires a title to accretions which are subsequently added.[3]

Apportionment of alluvion amongst competing frontagers.—Accretions by alluvion sometimes form in front of the lands of two or more littoral or riparian proprietors. In such cases a somewhat difficult problem sometimes occurs as to what is the proper method of apportioning them amongst such proprietors. The question does not appear to have arisen in England,[4]

1 Hall on the Seashore, (2nd ed.), 112-114; Morris' Hist. of the Foreshore, 788-790; Phear on Rights of Water, 43; Hunt on Boundaries (3rd ed.), 34.

2 Gould on Waters, § 157.

3 *Ibid.*

4 Although the exact question has not yet arisen in England, yet the decision of the Court of Appeal in *Crook* v. *Corporation of Seaford* (L. R. 6 Ch. App.) 551 indicates somewhat the rule which the Courts there would be inclined to adopt if such question arose before them. In that case the plaintiff claimed against the defendant Municipal Corporation, specific performance of an agreement to let out to him the flat part of the beach opposite to his field, and it was contended on his behalf that he was entitled to a lease of the whole of the beach comprised between lines drawn in prolongation of the sides of his field, but the Court held that the boundaries of the piece of land agreed to be demised were lines drawn from the extremities of the plaintiff's field perpendicular to the coast line.

The method of apportionment of what are called the 'superfluous lands' (such portions of lands acquired by Railway Companies under their statutory powers as are more than what is

but it has arisen in America, and has been very carefully discussed in numerous cases by the Courts in that country, chiefly in connection with the apportionment of flats-ground or the beach, that is, the shore between high and low-water mark, amongst the adjoining littoral proprietors in the states of Massachusetts and Maine.[1] Alluvial formations obviously stand on precisely the same footing as flats-ground, as regards the mode of their apportionment. The question resolves itself into a problem of geometry in each case, depending for its solution mainly upon two general considerations which must always be kept in view, namely, to give to each proprietor a fair share of the land, and to secure to him convenient access to the water from all parts of his land by giving him a share of the new frontage in proportion to the extent of his old frontage.[2] What the extent of the property of each frontager back from the shore or bank is, whether it consists of a deep parcel or a mere strip, is wholly immaterial. It is also manifest that the rule of apportionment must be the same whether the accretion is gained from the sea, a tidal navigable river or a private stream.

If the configuration of the shore or river bank approximates to a straight line, the problem is easy enough; because then the apportionment can be made by drawing straight lines from the terminals of the boundaries of the several riparian or littoral estates at right angles to the

wanted for the construction of their line and other works, and which, unless sold by them within a certain time, vest in and become the property of the owners of the adjoining lands, in proportion to the extent of their lands respectively bordering on the same, under s. 127 of the Lands Clauses Consolidation Act, 1845) amongst the adjoining owners adopted in England may be regarded as the nearest approximation to what, according to the law of that country, would be a fair mode of division of alluvial land amongst competing frontagers.

In *Moody* v. *Corbett*, (5 B. & S. 859; L. R. 1 Q. B. 510; see also *Smith* v. *Smith*, L. R. 3 Ex. 282) the Court of Queen's Bench held that superfluous lands should be apportioned among the owners of the adjoining lands, not according to the depth of their land or the limits of the frontage of such land, but by drawing a straight line from the point where the boundaries of two adjoining owners meet to the nearest point on the farthest limit of such superfluous land; but on appeal the Exchequer Chamber was of opinion that where there are several adjoining properties in contact with the superfluous land, it should be divided among the owners of such adjoining properties *in proportion to the frontages of each*, meaning by frontage what would be the length of the line of contact of each property, if such line was made straight from the point of intersection of the boundaries on one side to the point of intersection of the boundaries on the other. This is precisely the method of division of alluvions followed in America.

[1] Angell on Watercourses (7th ed.), § 56.

[2] Gould on Waters, § 163.

general course of the original bank or of the original high-water mark of the shore.

But, if the general course of the shore or river bank curves or bends, the problem assumes a more difficult aspect. The general rule of apportionment which has been adopted in America in such cases is to measure the whole extent of the old shore or river line to which the accretion attaches; then to divide the new shore or river line into equal parts corresponding in number to the feet or rods of which the old shore or river line is found to consist by such measurement; and after allotting to each proprietor as many of these parts as he owned feet or rods on the old line, to draw lines from the original terminals of the boundaries of each littoral or riparian property to the points of division on the new line. If, for example, the shore or river line of two conterminous properties owned by A and B before the formation of alluvion, was 200 rods in length, A's share being 150 rods and B's 50, and the newly formed line is but 100 rods in length, then A would take 75 rods, and B 25 rods of that line, and the division of the accretion would be made by drawing a line from the extremity of the boundary line between the two properties to the point thus determined on the new line.[1] The dividing lines will diverge or converge and each proprietor will consequently have a greater or a less frontage on the new water line than he had on the old, according as the new shore or river line forms a convex or a concave curve against the water.[2]

This rule is to be modified under certain circumstances, namely, where the shore or river line is elongated by deep indentations or sharp projections, its length should be reduced by equitable and judicious estimate, and the general available line ought to be taken before it is employed in making the apportionment.[3]

The rule for the apportionment of accretions by alluvion is, as I have said, practically the same as that which governs the apportionment of beach, flats-ground or flats; and in America when flats lie in a cove or re-

[1] Angell on Watercourses (7th ed.), § 55; Gould on Waters, § 163. This rule is taken from Denisart. See note A at the end of the lecture, p. 176, *infra*.

[2] Gould on Waters, § 163, *in fin.* It is perhaps more correct to say, 'according as the new shore or river line is greater or less than the old shore or river line in length,' for the dividing lines will be equally divergent, whether the new shore or river line forms a convex or a concave curve against the water, if only the *length* of such curves happen to be greater than the length of the old shore or river line.

[3] Angell on Watercourses (7th ed.) § 55; Gould on Waters, § 164.

cess, the mouth of which is wide enough, they are apportioned by drawing parallel lines from the extremities of the divisional lines of the littoral properties perpendicular to an imaginary base line run across the mouth of the cove from headland to headland ; but where the mouth of the cove is so narrow that it is impossible to make the apportionment by drawing such parallel lines, the apportionment is made by drawing converging lines from the extremities of the divisional lines of the littoral properties to points upon an imaginary base line run as above, such points being determined by giving to each proprietor a width upon the base line proportional to the width of his shore line. If a cove or inlet is so irregular in outline and so traversed by crooked channels, that none of the rules that have been stated are applicable, the only course is to apportion the flats in such manner as to give to each proprietor a fair and equal proportion by as near an approximation to these rules as is practicable.[1]

A rule somewhat different from any of those that I have already mentioned, was adopted in the case of *Thornton* v. *Grant*,[2] in Rhode Island, where the question arose with reference to the extent of the water frontage of two conterminous littoral proprietors, it being alleged that the defendant was so constructing a wharf in front of his premises as to encroach upon the plaintiff's water frontage, although the wharf did not actully project beyond the divisional line prolonged to the edge of the water at low-water mark. Durfee, J., in delivering the opinion of the Court, after referring to the above rules, said :—

"In the case before us we are not called upon to partition alluvion or flats, but to determine the extent of the plaintiff's water front. The principle involved, however, is very much the same in the one case as in the other; and we are therefore not insensible to the guidance to be derived from the decisions cited. But these decisions do not establish any one invariable rule, and it is quite evident that no one of the several rules which they do suggest could be applied in all cases without sometimes working serious injustice. In the case at bar a solid rock projecting out to the main channel has preserved the shore of the plaintiffs from detrition at that point, but has allowed quite a deep inward curve beyond that point, while the shore of the defendants, having no such protection, has conformed more to the course of the river. The consequence is, that

[1] Gould on Waters, § 164 ; Angell on Watercourses (7th ed.), § 56.

[2] 10 R. J. (477), 489, cited in Gould on Waters, § 165.

if we draw a front line from headland to headland, and then draw the division line so as to give to each set of proprietors a length of front line proportionate to the length of their original shore, the division line will pass diagonally across what would ordinarily be regarded as the water front of the defendant's land. This is a result which does not commend itself to us as either reasonable or just. We have decided upon another rule, which to us seems equitable, and which, for our present purposes, in the circumstances of this case, leads to a pretty satisfactory result. The rule is this: Draw a line along the main channel in the direction of the general course of the current in front of the two estates, and from the line so drawn, and at right angles with it, draw a line to meet the original division line on the shore. This rule is not unlike the rule adopted in *Gray* v. *Deluce*.[1] It will give the plaintiffs as large an extent of water front as we are disposed to allow them; and upon the front so defined we will grant them an injunction to prevent the defendant from encroachments."

II. Dereliction.—In the phraseology of English law the expression dereliction is generally used in modern times[2], in preference to the term reliction used by the American lawyers[3] (borrowed apparently from the relictio of the Civil law), to denote a sudden and perceptible shrinking or retreat of the sea, or of a river, and derelict land is used to denote land suddenly, and by evident marks and bounds, left uncovered by water.[4]

Ownership of lands abandoned by the sea or a tidal navigable river.—Lord Hale says:—"Now as touching the accession of land per recessum maris, or a sudden retreat of the sea, such there have been in many ages &c.

"This accession of land, in this eminent and sudden manner by the recess of the sea, doth not come under the former title of alluvio, or increase per projectionem; and therefore, if an information of intrusion be laid for so much land relict per mare, it is no good defence against the king to make title per consuetudinem patriae to the marettum, or sabulonem per mare projectum; for it is an acquest of another nature &c.

"And yet the true reason of it is, because the soil under the water must needs be of the same propriety as it is when it is covered with

[1] 5 Cush. 9.

[2] "Reliction" is used by Lord Hale and Mr. Schultes.

[3] Angell on Watercourses (7th ed.), § 57.

[4] Hall on the Seashore (2nd ed.), 115, 129; Morris' Hist. of the Foreshore, 791, 803; Angell on Watercourses (7th ed.), § 57; Hunt on Boundaries (3rd ed.), 30.

water. If the soil of the sea, while it is covered with water, be the king's, it cannot become the subject's because the water hath left it."[1]

Then after citing some authorities, he continues:—

"But a subject may possess a navigable river, or creek or arm of the sea; because these may lie within the extent of his possession and acquest.

"The consequence of this is; that the soil relinquished by such arms of the sea, ports or creeks; nay, though they should be wholly dried or stopped up; yet such soil would belong to the owner or proprietor of that arm of the sea, or river, or creek: for here is not any new acquest by the reliction; but the soil covered with water was the subject's before, and also the water itself that covered it; and it is so now that it is dried up, or hath relinquished his channel or part of it."[2]

From this it is clear that in the case of dereliction, the ownership of the derelict land follows the ownership of the bed while it was covered with water. Accordingly, if the derelict land is a portion of the bed of the sea or of a tidal navigable river, in England it primâ facie belongs to the Crown;[3] but if a districtus maris or a portion of the bed of a tidal navigable river within certain boundaries belongs to a subject, whether under a charter, or grant, or by prescription, it continues to be his property if the water retires from it suddenly.[4]

This is also the rule in those states in America which have adopted the Common law distinction between tidal and non-tidal rivers. But in those states where the ownership of the bed of a river is determined by its navigability or non-navigability in fact, derelict land forming part of the bed of a navigable river primâ facie belongs to the state, and where it is a part of the bed of a non-navigable stream, it belongs to the adjacent riparian owner.[5] The ownership of land relicted by the sea is of course the same in all the states.

[1] Hale, de Iure Maris, p. 1. c. 6; Hargrave's Law Tracts, 30, 31; Morris' Hist. of the Foreshore, 397-399.

[2] Hale, de Iure Maris, p. 1. c. 6; Hargrave's Law Tracts, 32; Morris' Hist. of the Foreshore, 399. Cf. *Ibid.* 381.

[3] Hale, de Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 14; Hale, de Iure Maris, p. 1. c. 6; Hargrave's Law Tracts, 30, 31; Schultes on Aquatic Rights, 121; Woolrych on Waters, (2nd ed.), 46.

[4] Hunt on Boundaries (3rd ed.), 34. See Hall's remarks in his Essay on the Seashore (2nd ed.), 142, 143.

[5] Gould on Waters, § 158.

Effect of inundation on the ownership of lands.—For similar reasons, if the sea, or a tidal navigable river owned by the Crown suddenly overflows the lands of private individuals, and landmarks, maps, mines under the sea, or even the evidence of witnesses, afford certain means of identifying such lands, they remain the property of the former owners as well during submergence as afterwards; and the right of the Crown does not attach thereto when the sea or the river retires and leaves them dry, although the overflow may have continued for such length of time as not only to deface all marks or signs of the lands, but also to render them completely a part of the sea or of the river.[1]

In America, the rule is precisely the same.[2]

"If a subject," says Lord Hale, "hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced; yet if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject doth not lose his propriety: and accordingly it was held by Cooke and Foster, M. 7 Jac. C. B. though the inundation continue forty years,"

"If the marks remain or continue, or extent can reasonably be certain, the case is clear.—Vide Dy. 326.—22 Ass. 93."[3]

The same view is thus expressed by him in another passage in the same treatise:—

"It is true, here were the old bounds or marks continuing, *viz.*, the Hedgewood. But suppose the inundation of the sea deface the marks and boundaries, yet if the certain extent or contents from the land not overflown can be evidenced, though the bounds be defaced, yet it shall be returned to the owner, according to those quantities and extents that it formerly had. Only if any man be at the charge of inning of it, it seems by a decree of Sewers he may hold it till he be reimbursed his charges, as was done in the case of Burnell before alledged. But if it be

[1] Hale, de Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 15; Black. Comm. 262; Viner's Abr. Prerog. B. a 2; Comyns' Dig. Prerog. D. 62; Schultes on Aquatic Rights, 122, (Schultes observes that, according to Herodotus, this was the law among the Egyptians too); Hall on the Seashore (2nd ed.), 129-130; Hunt on Boundaries (3rd ed.), 35; Coulson & Forbes' Law of Waters, 23, 62.

[2] Gould on Waters, § 158.

[3] Hale, de Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 15; Morris' Hist. of the Foreshore, 381.

freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make it out where and what it was; for he cannot lose his propriety of the soil, though it be for a time become part of the sea, and within the admiral's jurisdiction while it so continues."[1]

Callis puts this case—"The sea overflows a field where divers men's grounds lie promiscuously, and there continueth so long, that the same is accounted parcel of the sea; and then after many years the sea goes back and leaves the same, but the grounds are so defaced as the bounds thereof be clean extinct, and grown out of knowledge, it may be that the king shall have those grounds; yet in histories I find that Nilus every year so overflows the grounds adjoining, that their bounds are defaced thereby, yet they are able to set them out by the art of geometry."[2]

Effect of sudden change of the bed of a river on ownership of lands newly occupied.—If a river, whether tidal or non-tidal, navigable or non-navigable, instead of shifting its natural channel laterally by the gradual and insensible erosion of any of its shores or banks, suddenly forsakes it altogether, and by the incursion of its waters forms an entirely new bed, in the lands of a private individual, the right to the soil of the new bed remains in him as before, and he acquires an exclusive right of fishery in the new channel, subject, though it may be, in some cases, to the right of navigation on the part of the public.[3]

The point was raised in the case of the *Mayor* of *Carlisle* v. *Graham*,[4] which was an action for trespass to plaintiff's several fishery in the navigable tidal river Eden, such fishery having been derived under a grant from the Crown. It appeared that about the year 1693 the river began to leave its former bed where plaintiff's fishery was situate, and to flow down a channel which was formerly a ditch on the land of the Earl of Lonsdale, under whom defendants claimed. The plaintiffs claimed to have the several fishery in the new channel, but the Court held, that the right of the Crown to grant a several fishery in a tidal river depends on its proprietorship of the bed, and that the bed in this case remained, as before, the property of the former owner. Kelly, C. B., delivering the

[1] Hale, de Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 16; Morris' Hist. of the Foreshore, 383.

[2] Callis on Sewers, 51.

[3] Schultes on Aquatic Rights, 122; Woolrych on Waters (2nd ed.), 47; Gould on Waters, § 159; *Miller* v. *Little*, L. R. 2 Ir. 304; *Mayor of Carlisle* v. *Graham*, L. R., 4 Ex. 361.

[4] L. R. 4 Ex. 361

judgment of the Court, said:—"All the authorities ancient and modern are uniform to the effect that, if by the irruption of the waters of a tidal river, an entirely new channel is formed in the land of a subject, although the rights of the Crown and of the public may come into existence, and be exercised in what has thus become a portion of a tidal river, the right to the soil remains in the owner, so that if at any time thereafter the waters should recede and the river again change its course, leaving the new channel dry, the soil becomes again the exclusive property of the owner free from all rights whatsoever in the Crown or in the public."[1]

Custom as to medium filum of Severn being the common boundary between opposite littoral manors.—A custom, apparently founded upon the principle which we have just now considered, is recorded by Lord Hale in his De Iure Maris,[2] according to which the filum aquae or the middle thread of the river Severn, a tidal navigable river, forms in that portion of its course which lies between Gloucester and Bristol, the common though fluctuating boundary between the manors on either side, according as the river shifts its channel from time to time. It is important to bear this instance in mind, as being the English counterpart of a custom more generally prevalent in India, chiefly on the banks of rivers in the Punjab.

In England, derelict land cannot, as a general rule, be claimed by a subject or the lord of a manor by custom;[3] but it may be claimed under a grant from the Crown or by prescription; and if a creek, arm of the sea or other districtus maris has been acquired by such grant or by prescription, the land derelicted within the known boundaries of such districtus maris belongs to the owner of the districtus maris, provided, however, in the case where the title is claimed by prescription, it is shewn that the prescription extends to a right of property in the soil, and not merely to an incorporeal franchise.[4]

Border instances between alluvion and dereliction.—On the borderland between alluvion and dereliction, a question of some nicety, and sometimes of practical difficulty too, may arise where, for instance, the

1 *Cf.* Hale, de Iure Maris, in Hargrave's Law Tracts, 5, 6, 13, 16, 37, *Reg.* v. *Betts.* 16 Q. B. 1022.

2 Hale, de Iure Maris, p. 1. cc. 1, 5, 6; Hargrave's Law Tracts, 6, 16, 34; see also Lord Hale's First Treatise, printed in Morris' Hist. of the Foreshore, 353-354.

3 1 Keb. 301. For an instance of a local custom entitling lords of manors to derelict lands, cf. *Attorney-General* v. *Turner*, 2 Mod. 107.

4 6 Bacon's Abr. t. Prerog. 400; Hale, de Iure Maris, cc. 4, 6; Hunt on Boundaries, (3rd ed.), 34.

sea gradually heaps up a bar to itself across a marshy arm or inlet of the sea, the communication between the sea and the inlet gradually decreasing until at last the entrance is quite blocked up, and the inlet becomes a lake or pond, which afterwards by evaporation and drainage, natural or artificial, becomes dry land; or where, for instance, a navigable river suddenly shifts its main channel leaving on a portion of its old bed an arm or branch of its own, more or less stagnant, and separated from the main channel by a long stretch of sandbank, and such branch or arm gradually becomes closed at both ends until it becomes a lake, which at last silts up in the same way as it does in the case of an arm or inlet of the sea. Does such an 'acquest' belong to the Crown or to the owner of the adjacent land? Is it to be regarded as derelict land or as an alluvial accretion?

There can be no doubt that so long as the communication between the arm or inlet and the sea or the main channel of the river is not actually shut out, the soil of such arm or inlet continues to be part of the public domain, and as such belongs to the Crown. It is equally clear that the owner of the adjacent land becomes entitled iure alluvionis at least to so much of the uncovered or dry soil as is gradually added thereto by the slow and insensible decrease of the water of the arm or inlet, between the time that the closure of its communication with the sea or the main channel of the river first commences until such communication finally ceases. At this period of final exclusion of the sea or of the river what was an arm or inlet before, becomes transformed into a lake or pond. Such period, therefore, must be regarded as the punctum temporis with reference to which the right of the Crown or of the adjacent owner to the 'acquest' must be determined. If the formation of the bed of the arm or inlet be such, that as its communication with the sea or the main channel of the river gradually diminishes, the bed of such arm or inlet also gradually silts up, and that to such an extent that at the moment when the communication finally ceases, the whole bed is uncovered or becomes dry, it ought to be deemed an accretion annexed to the adjacent soil by *alluvion* and therefore belonging to the owner of it. But if, on the other hand, the formation of the bed of the arm or inlet be such, that at the time when its communication with the sea or the main channel of the river finally stops, such arm or inlet becomes a lake or pond; then, as the right to the lake or pond at the time of such final cessation of communication must vest in somebody, and as such lake or pond cannot

be regarded as an accretion by alluvion to the adjacent soil, it must vest in the Crown. The right of the Crown to such lake or pond may also be supported on the ground that the final exclusion of the sea or the river and the consequent transformation of the arm or inlet into a lake or pond was not a gradual but a sudden event.

Such peculiar cases, however, as these, must depend upon circumstances disclosed in the evidence, the general criterion for determining the ownership of the 'acquest' in each case being, whether the fluvial change which caused it was gradual and insensible or sudden and manifest.

III. Islands.—Ownership of islands.—An island rising up in the sea or in a tidal navigable river, primâ facie belongs by Common law to the Crown,[1] and in America, to the respective states, which have adopted the rule of the Common law with respect to the ownership of the bed of such river. The same rule is equally applicable to an island rising in a non-tidal but navigable river, in those states in America where the bed of such river belongs to the state.[2] In short, the ownership of islands thrown up in the sea or in a river depends on the ownership of the soil on which they rest[3], and is governed by the same rule as that which regulates acquisitions by dereliction. An island is generally formed either by the recession or sinking of the water or by the accumulation or agglomeration of sand and earth on the bed, which becomes in process of time solid land environed with water. In either case the island is part of the soil of the bed of the sea or river, and its proprietorship must therefore necessarily follow the proprietorship of the bed. There is a third mode in which an island may be formed, namely, when an arm of the sea divides itself and encompasses the land of a private owner; in such case, the ownership of the land, though now transformed into an island, remains in him as before.[4]

It follows from the reason I have just indicated that, where a dis-

1 Bracton, lib. ii. c. 2. § 2; Fleta, lib. iii. c. 2. § 9; Hale, de Iure Maris, p. 1. cc. 5, 6; Hargrave's Law Tracts, 17, 36; Callis on Sewers, 45, 47; Schultes on Aquatic Rights 117; Hall on the Seashore (2nd ed.), 140-142; Phear on Rights of Water, 11, 44; Jerwood on Seashore, 189; Woolrych on Waters (2nd ed.) 36, 37.

2 Angell on Tide Waters, 267; Houck on Navigable Rivers, § 264-269; Gould on Waters, § 166.

3 Monahan's Method of Law, 197, sec. 25.

4 Hale, de Iure Maris, p. 1. c. 6; Hargrave's Law Tracts, 37; Schultes on Aquatic Rights, 120; Woolrych on Waters (2nd ed.), 37.

trictus maris, or a portion of the bed of a tidal navigable river belongs to a subject, either by charter or prescription, an island which rises within the known metes and bounds of such private property will also belong to him.

Lord Hale thus lays down the law with regard to islands in the De Iure Maris:—

"As touching islands arising in the sea, or in the arms or creeks or havens thereof, the same rule holds, which is before observed touching acquests by the reliction or recess of the sea, or such arms or creeks thereof. Of common right and primâ facie, it is true, they belong to the Crown, but where the interest of such districtus maris, or arm of the sea or creek or haven, doth in point of propriety belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private propriety of a subject, will belong to the subject according to the limits and extents of such propriety. And therefore if the west side of such an arm of the sea belong to a manor of the west side, and an island happen to arise on the west side of the filum aquae environed with the water, the propriety of such island will entirely belong to the lord of that manor of the west side; and if the east side of such an arm of the sea belong to a manor of the east side usque filum aquae, and an island happen between the east side of the river and the filum aquae, it will belong to the lord on the east side; and if the filum aquae divide itself, and one part take the east and the other the west, and leave an island in the middle between both the fila, the one half will belong to the one lord, and the other to the other. But this is to be understood of islands that are newly made; for if a part of an arm of the sea by a new recess from his ancient channel encompass the land of another man, his propriety continues unaltered. And with these diversities agrees the law at this day, and Bracton, lib. 2. cap. 2. and the very texts of the civil law. For the propriety of such a new accrued island follows the propriety of the soil, before it came to be produced."[1]

IV. Avulsion.—Where the impetuosity of a river dissevers a portion of the land of a private individual and transports it to the land of another, it remains the property of the former owner, unless he abstains from taking possession of it for so long that it cements and coalesces

[1] Hale, de Iure Maris, p. 1. c. 6; Hargrave's Law Tracts, 36, 37; Morris' Hist. of the Foreshore, 405. *Cf.* Hale, de Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 17; Morris Hist. of the Foreshore, 383.

with the land of the other person. This is called title by avulsion,[1]—a species of acquisition dealt with by Bracton, Fleta, Blackstone, and other subsequent text writers, but never judicially discussed, probably because no case of the kind has ever arisen.

B. Incrementa Fluvialia.

I. Alluvion.—The principles which govern the ownership of accretions gained by alluvion from private streams, and the modes of their application to varying circumstances, are obviously the same as those which I have already discussed in my observations concerning the sea and public navigable rivers.[2]

II. Dereliction.—Ownership of derelict beds.—Land left dry by the sudden dereliction of a portion of the bed of a private river or stream belongs to the owners of the adjacent soil and not to the Crown, because the ownership of such bed was in the adjacent riparian owners while it was covered with water. Where the whole bed of such private river or stream dries up by sudden dereliction, then, inasmuch as the bed of such river or stream, as explained in a previous lecture,[3] belongs to the riparian proprietor on each side up to the middle thread of the stream, such derelict land is divided between them equally; and where there are several riparian proprietors on each side of the stream, the derelict land on each side of the middle thread is divided amongst the riparian proprietors on that side only, according to the extent of their respective riparian frontages, the middle thread in each case being the middle line between the banks of the river or stream when the water is in its natural and ordinary stage, without regard to the channel or deepest part of the stream.[4]

Effect of sudden or gradual change of the bed of a stream on the position of the boundary line between conterminous proprietors.—For similar reasons, land suddenly overflowed by the waters of a private river or stream remains after subsidence or recession of the waters, as it did before, the property of its former owner, and the original medium filum continues to mark the common boundary between opposite riparian estates.[5]

1 Bracton. lib. ii. c. 2. § 1; Fleta, lib. iii. 2. c. 2. § 6; Schultes on Aquatic Rights 116; Houck on Navigable Rivers, § 270; 2 Black. Com. 262; Angell on Watercourses (7th ed.), § 67; Woolrych on Waters (2nd ed.), 36, 47.

2 *Cf.* Angell on Watercourses (7th ed.), § 53.

3 *Supra*, 92.

4 Schultes on Aquatic Rights, 121; Angell on Watercourses (7th ed.), §§ 57, 58.

5 Schultes on Aquatic Rights, 122; Hunt on Boundaries (3rd ed.), 37; *Ford* v. *Lacey*, 7 H. & N. 151; 7 Jur. N. S. 684.

If a private river or stream slowly and imperceptibly changes its course, the medium filum of the new channel becomes the boundary line between opposite riparian properties; but if the change is sudden and manifest, as for instance, when it arises from a freshet, the original medium filum continues to mark the boundary between them.[1]

III. Islands.—The right to the ownership of islands formed in a private river or stream depends, as in the case of land left dry by sudden dereliction, upon the ownership of the bed[2]; consequently, the ownership of an island varies according to the situation of it with reference to the middle thread of the river or stream. If it lies wholly on one side of the middle thread, it belongs exclusively to the riparian proprietor on that side; if it rises exactly in the middle of the river or stream, it is divided between opposite riparian proprietors by the middle thread; but if it so forms that it lies nearer to one side of the river or stream than to the other, the apportionment amongst opposite riparian proprietors is still made by the middle thread, with the result, however, that a greater portion of the island is given to the nearer riparian proprietor than to the riparian proprietor on the opposite side. If the island lies in front of the lands of several riparian proprietors on each side, the division is made according to the extent of their respective riparian frontages.[3]

These rules, therefore, are substantially the same as those which have been laid down by the Roman Civil law on this topic, and which we have already discussed in the last lecture.[4]

The rules on this subject, however, are more definitely laid down in the code of Louisiana. They are as follows:—"Islands and sand-bars, which are formed in streams not navigable, belong to the riparian proprietors and are divided among them according to the rules prescribed in the following articles: If the island be formed in the middle of the stream, it belongs to the riparian proprietors whose lands are situated opposite the island. If they wish to divide it, it must be divided by a line supposed to be drawn along the middle of the river. The riparian

[1] Hale, de Iure Maris, p. 1. c. 1; Hargrave's Law Tracts, 5, 6; *Ford* v. *Lacey*, 7 H. & N. 151; 7 Jur. N. S. 684; *Foster* v. *Wright*, 4 C. P. D. 438; Gould on Waters, § 159; Hunt on Boundaries (3rd ed.), 37; Angell on Watercourses, (7th ed.), § 53; Monahan's Method of Law, 196, secs. 24, 25, (the second part of the section is opposed to *Foster* v. *Wright*).

[2] Monahan's Method of Law, 197, sec. 26.

[3] Angell on Watercourses (7th ed.), § 44; Gould on Waters, § 166; Hunt on Boundaries, (3rd ed.), 29.

[4] *Supra*, 123, 126.

proprietors then severally take the portion of the island which is opposite their land, in proportion to the front they respectively have on the stream, opposite the island. If, on the contrary, the island lie on one of the sides of the line thus supposed to be drawn, it belongs to the riparian proprietors on the side on which the island is, and must be divided among them, in proportion to the front they respectively have on the stream, opposite the island."[1]

Mode of division of a second island formed between the first and the opposite mainland.—An interesting question sometimes occurs where, after the formation of an island, a second island appears between the first and the opposite mainland; or where the extent of the right of fishery of opposite riparian proprietors, which in a private river generally does, and in a public navigable river may by special local usage, extend up to the middle thread, has to be determined after the formation of an island.

The latter point arose in *Earl of Zetland* v. *The Glover Incorporation of Perth*,[2] with regard to the extent of the right of fishing in the river Tay in Scotland, in which, although it was a public navigable river, the right of fishing belonged by special local usage to the riparian proprietors usque medium filum. There a drifting island had sprung up in the channel so as to impede or embarrass the exercise of the right of fishing by the Earl of Zetland, one of the riparian proprietors; and it was contended on his behalf that, as it was nearer his side of the river, his right of fishery extended up to the middle thread of that branch of the river, which lay between the further side of the island and the opposite mainland. But the House of Lords held that the island was to be reckoned as part of the bed of the river and that the middle thread was the middle line between the original banks. Lord Westbury said that, if the island had become annexed to the bank so as to form a permanent accretion, there would have been a new medium filum.

The former point arose in Massachusetts in America, in *Trustees of Hopkins Academy* v. *Dickinson*,[3] where Chief Justice Shaw laid down that the filum aquae, which should determine the ownership of the second island rising in a private stream, is not the original middle thread but the new middle thread of the channel between the first island and the river bank on the side on which the second island rises. He thus discussed the point in his judgment:—

[1] Angell on Watercourses, (7th ed.), § 45. [2] L. R. 2 H. L. Sc. 70.

[3] 9 Cush. 544, 547-550, cited in Angell on Watercourses, (7th ed.), § 48 a. *Cf.* Gould on Waters § 166.

"Assuming the thread of the stream as it was immediately before such land made its appearance, this rule assigns the whole island, or bare ground formed in the bed of the river, if it be wholly on one side of the thread of the river, to the owner on that side; but if it be so situated that it is partly on one side and partly on the other of the thread of the river, it shall be divided by such line,—*i. e.*, that line which was the thread of the river immediately before the rise of the island,—and held in severalty by the adjacent proprietors. But that line must thenceforth cease to be the thread of the river, or filum aquae, because the space it occupied has ceased to be covered with water. But, by the fact of an island being formed in the middle of the river, two streams are necessarily formed by the original river, dividing it into two branches. The island itself, having become solid land, forms itself a bank of the new stream on the one side, and the old bank on the main shore forms the other. And the same rule applies on the other side of the island. There must, then, be a filum aquae to each of these streams, whilst the old filum aquae is obliterated to the extent to which land has taken the place of water. But this island, having all the characteristics of land, may soon be divided and subdivided, by conveyances and descents, and all the modes of transmission of property known to the law, and thus become the property of different owners. Now suppose another island formed in one of these branches, between the first island and the original main shore. It seems to us that it must be divided upon the same principle as the first; but, in doing it, it will be necessary to assume as the filum aquae the middle line between the first island and the original river bank on that side. If this is a correct view of the practical consequences flowing from the adoption of the principle stated,—and it appears to us that it is,—an obvious difficulty presents itself, in making that line a fixed standard for the demarcation of the boundaries of real estates between conterminous proprietors, which is itself fluctuating and changeable. Perhaps a satisfactory answer to this may be found in the suggestion, that the rule is equitable, and as certain as the proverbially reliable nature of the subject-matter will admit; and, in adapting it to the varying circumstances of different cases, a steady regard must be had to the great principle of equity,—that of equality. This changing of the filum aquae seems not to be distinctly treated in any case; but it seems that it must necessarily occur in many cases. In addition to those already mentioned, suppose a river, by slow accretions or washing away,

widens or narrows on both sides as it may, but unequally, the filum aquae must change its actual line. Supposing an island dividing a river for some distance shall be wholly washed away, the filum aquae must shift and pass along a line which was formerly solid land."

Note A (*referred to in note* 1 *on p.* 162.)

Il faut, 1° mesurer toute l'étendue de l'ancien rivage et compter combien chaque riverain y possede de perches, de toises, ou de pieds de face. On doit compter par perches, toises ou pieds, selon que cela est nécessaire, pour éviter les fractions dans la mesure de chaque terrein en particulier.

2° On additione ces différentes quantités de toises, par exemple, que l'on a trouvées par l'opération précédente; et en supposant que le total se monte à deux cens toises, on divise en deux cens parties égales le nouveau rivage de la riviere, et l'on destine à chaque co-partageant autant de portions de cette derniere rive qu'il possede de toises sur l'ancienne.

Alors, pour faire le partage, il ne reste plus que de tirer des lignes, qui partent des anciennes limites des héritages, et aboutissent aux points, qui, d'après ce que l'on vient de dire doivent servir de bornes aux différens domaines sur le bord de la riviere.

Les lignes tirées ainsi, du rivage ancien au rivage nouveau, seront tantôt paralleles, tantôt divergentes, tantôt convergentes, selon que la rive actuelle de la riviere aura une étendue pareille à celle de l'ancien rivage, ou moindre, ou plus grande. Il est facile de concevoir comment le cours d'une riviere peut s'allonger ou se raccourcir en changeant de direction.—Collection de Décisions Nouvelles par M. Denisart, tit. Attérissement.

In the Draft Civil Code of New York the rule of alluvion (including dereliction) is thus stated:—

§. 443. Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material, or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.

N. B.—If the formation is sudden, it belongs to the state.

The rules contained in this Draft Code (§§ 444—448) with regard to the ownership of islands formed in navigable rivers and non-navigable streams, of islands formed by the division of streams, and of abandoned river-beds, as well as the rule relating to avulsion are similar to those laid down by the Code Napolean.

LECTURE VII.

ALLUVION AND DILUVION.—(*Continued*).

(*Anglo-Indian Law*).

The early Hindu law concerning alluvion—Text of Vrihaspati—Opinion submitted by the Hindu law officers to the Calcutta Sudder Dewanny Adawlut in 1814—Opinion of Mr. J. H. Harrington—Reported decisions prior to 1825—Enumeration of topics—I. Alluvion—Incrementum latens—Effect of the use of the expression 'gradual accession,' in Regulation XI of 1825, and of the omission therefrom of the expression 'imperceptible'—Rule of alluvion, in what cases applicable?—Precise nature of the rule of alluvion—Qualification upon that rule—What evidence insufficient to prove 'gradual accession'—The height which an alluvial formation must attain before it can form the subject of private right—Accretions resulting from artificial causes—Alluvion in beels or lakes—Apportionment of alluvial formations amongst competing frontagers—Provisions of the Indian Alluvion Bills of 1879 and 1881 respectively—Objections to which these provisions are open—Who are entitled to accretions by alluvion—Nature of interest acquirable in them—II. Dereliction—Real nature of dereliction—Gradual dereliction correlative to alluvion—Sudden dereliction of a portion of the bed of the sea or of a navigable river—Sudden dereliction of the bed of a non-navigable stream—Whether abandoned bed must be 'usable' before private right can accrue to it—Apportionment of abandoned river-bed—III. Islands—Ownership of islands formed by an arm of a river encircling a portion of the mainland—Provisions of Reg. XI of 1825 thereupon—Ownership of other kinds of islands—Provisions of Reg. XI of 1825 with respect thereto—'Fordable channel,' what—Origin of the doctrine of a fordable channel—Requisites of a strict definition of a fordable channel—Point of time to which the fordability or otherwise of the channel ought to refer—Examination of cases bearing upon this topic—*Wise* v. *Amirunnissa*—Act IV of 1868 (B. C.)—Provisions of the Alluvion Bills of 1879 and 1881 respectively with regard to a 'fordable channel'—Meaning of the expression 'shall be at the disposal of Government' in cl. 3, sec. 4 of Reg. XI of 1825—Ownership of accretions annexed to an island separated from the mainland by a fordable channel—Ownership of such accretions when they extend in front of the lands of several riparian proprietors—Ownership of sandbanks or churs thrown up in 'small and shallow' rivers—Ownership of the dried-up beds of such rivers—IV. Avulsion—Provisions of Reg. XI of 1825 in respect thereof.

I shall now proceed to deal with the law of India with regard to alluvion and diluvion.

Early Hindu law concerning alluvion.—Whatever the degree of historical interest which might attach to them, the provisions of the early Hindu law concerning this topic are evidently so meagre, vague and archaic that they do not deserve anything beyond a cursory notice.

A text of Vrihaspati alone, quoted in some of the commentaries[1] on Hindu law, though not to be found in the extant treatise with which his name is associated, is generally cited as embodying the whole law upon the subject. It runs thus:—

"If a large river or a king taking land from one village gives it to another, how is the adjudication to be made?

Land yielded by a river or given by the king is acquired by him on whom it is bestowed. If this be not admitted, then men cannot make any acquisition through royal favour or acts of God. Ruin, prosperity and even human life are dependent on acts of God and royal pleasure. Therefore, what is done by them shall not be disturbed.

Where a river forms the boundary between two villages, it gives or takes away land according to the good or bad luck of persons. When there is diluvion of the bank on one side of a river, and deposit of soil on the other, then his[2] possession of it[3] shall not be disturbed.[4]

If a field, with a growing crop on it, is overrun by a river, and dissevered (from the bank) by the force of its current, then the former owner shall have it."[5]

The above text is cited by the author of the Viramitradaya in the chapter on Boundary Disputes, as furnishing the rule of adjudication in the case 'where a river forming the boundary of several villages, &c., intersects one of them in such wise that land which was situated on its right side is thereby transposed to its left;' as also 'when the king assigns to one village land which had belonged to another.'

It is obvious from the text just quoted, viewed in the light afforded by the nature of the use which the author of the Viramitradaya makes of it, that what in the modern Anglo-Indian jurisprudence is treated

[1] Vivada Chintamani, (*tr.* by Prosunno Coomar Tagore ed. 1863) p. 123; Viramitrodaya, (*ed.* by Jibananda Bhattacharjea) pp. 461-462; Vyavahara Adhya, *title:* Boundary Disputes. The substance of the text is also to be found in Halhed's Gentoo Laws, 185. *Cf.* Colebrooke's Digest, v. ii. p. 284.

[2] *i. e.* 'The person who gains land by the action of the rivers'. Viramitrodaya.

[3] *i. e.* 'The land gained.' *Ibid.*

[4] *i. e.* 'Shall not be altered, *i. e.*, the former owner shall not wrest it from him.' *Ibid.* The author of the Viramitrodaya, after citing this passage, interposes the remark, that it relates to banks on which there is *no* growing crop, and that the next succeeding passage refers to banks on which there *is* a growing crop.

[5] *i. e.* 'The former owner shall have it till he reaps the crop grown thereon; but after the crops have been reaped, the case will be governed by the preceding rule.' Viramitrodaya.

as an exceptional rule, obtaining in particular localities only, was in ancient times the law almost universally prevalent in India. The deep channel of a river flowing between two villages, whatever changes took place in it, how much soever it might rob one village and enrich another, perpetually marked, under the ordinances of Vrihaspati, the indisputable, though fluctuating, boundary line between them. The extreme hardship which too strict an adherence to such a provision was likely to entail in some cases, was perceived even in those primitive ages, and it was therefore declared that, where land torn away from the bank had had a growing crop on it, the former owner was to remain in possession of it until he should have reaped the same.

Opinion submitted by the Hindu law officers to the Calcutta Sudder Dewanny Adawlut in 1814.—It was probably this text of Vrihaspati to which the Hindu law officers[1] referred (but which unfortunately they did not quote), in support of the opinion they submitted to the Court of Sudder Dewanny Adawlut at Calcutta in 1814, as to the provisions of the Hindu law upon the subject. But the actual opinion, which they stated, clearly went very much beyond its literal tenor. For they said, "the proprietary right in alluvial lands of the Ganges and such like rivers, the same being connected with one of the banks, vests in the proprietor of such bank. In alluvial lands unconnected with one of the banks, the right is that of those who are entitled to the julkur. In land left by the recession of the sea, the same being connected with the shore, the right vests in the owner of that shore. In land appearing above the sea not being connected with the shore, the right of the sovereign exists."[2]

Opinion of Mr. J. H. Harrington.—However that may be, it was stated by Mr. J. H. Harrington, (a judge of the Sudder Court, at whose instance this opinion was obtained), in a minute recorded by him in the year 1825, that the exposition of the law delivered by the Hindu law officers was substantially in accordance with his notions of the law and usage of the country upon the matter, subject, however, to one exception, namely, as to the rule of ownership of islands thrown up in large rivers with unfordable channels on all sides.[3]

In a note to his Analysis of the Regulations,[4] after citing a passage

[1] There is scarcely any provision in the Mahomedan law relating to alluvion. Markby, Lect. on Indian Law, 48.

[2] Markby, Lect. on Indian Law, 48-49. [3] *Ibid.* [4] Vol. ii. pp. 251-253.

from Vattel (Law of Nations, Bk. i. ch. 22) as containing the provisions of the Civil law upon the point, he more fully states the opinion which he had previously suggested in his minute. He says:—"This statement of the Civil law corresponds exactly with the established usage of Bengal. The most difficult question is, when churs, or islands, are thrown up in the middle of a river, or on the sea coast, to whom does the property of them appertain? In the latter case, indeed, when the chur is not immediately annexed to the contiguous estate, so as to come within the rule of gradual accession, there seems to be no doubt that the island belongs to the state. In the large rivers also, such as the Ganges, Megna and Burrumpooter, if a chur be thrown up in the middle of the river, or in any part where there is no fordable channel on either side, it is, I believe, according to established usage, considered to belong to Government. But if there be a ford on either side, it is deemed an accession to the estate connected with it by the ford. In smaller rivers, belonging to individuals, the right to a chur newly thrown up would of course vest in the proprietor of the bed of the river where the chur is formed."

Reported decisions prior to 1825.—The reports of the earlier decisions of the Calcutta Sudder Dewanny Adawlut prior to 1825 do not furnish us with more than half a dozen cases on the subject of alluvion. Almost all of them relate to claims by the owners of riparian estates to alluvial lands annexed thereto by gradual accession in consequence of the retrocession of the river and its encroachment upon estates on the opposite bank. Such claims were all decreed without exception.[1] In one of these cases, certain alluvial lands after having become annexed to a riparian estate by the gradual recession of the river, was afterwards severed from it by the river suddenly returning to its old course, whereby those lands became re-annexed to the estate on the opposite bank. It having been admitted on both sides that according to local usage the river always formed the mutual boundary between the two estates, the Court held that such alluvial lands became the property of the riparian owner to whose estate it became last united, and that the sudden character of the change in the channel did not affect the application of the rule.[2] There is one case in which an island thrown up in a *navigable* river was

[1] *Ishur Chunder Rai* v. *Ram Chand Mookerjee*, 1 Sel. R. 221; *Radha Mohun Rai* v. *Sooruj Narain Banerjee*, Ibid., 319; *Ziboonnissa* v. *Pursun Rai*, 3 Sel. R. 316; *Ram Kishen Rai* v. *Gopee Mohun Baboo*, Ibid., 340.

[2] *Raja Grees Chunder* v. *Raja Tejchunder*, 1 Sel. R. 274.

apportioned among the riparian proprietors opposite to whose estates it had appeared.[1]

Enumeration of topics.—Such was the state of the law until the year 1825, when the Indian legislature by Regulation XI[2] of that year declared and enacted the rules for the determination of claims to land gained by alluvion, or by dereliction of a river or the sea. It will be convenient to consider the law of alluvion and diluvion as it has been in force in India since this enactment, under the following (*a*) principal, and (*b*) subsidiary heads :—

(*a.*) *Principal.*

1. Alluvion.
2. Dereliction. } in the sea, and in rivers navigable and
3. Islands. } non-navigable.
4. Avulsion.
5. Re-formation on original site.
6. Custom.

(*b.*) *Subsidiary.*

7. Assessment of revenue or rent on alluvial increments, including islands separated from the mainland by fordable channels.
8. Possession of accretions, islands or submergent lands, and the rules of limitation applicable to them.

1. **Alluvion**.—Clause 1, section 4, of Regulation XI of 1825 enacts that "when land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zemindar or other superior landholder, or as a subordinate tenure, by any description of under-tenant whatever."

Incrementum latens.—This rule therefore clearly recognises the distinction between the mere physical adhesion of land which may be sudden and manifest, and the incrementum latens of the Civil law, which means an accretion formed by a process so slow and gradual as to be latent

[1] *Koowur Hari Nath Rai* v. *Musst. Joye Durga Burwain*, 2 Sel. R. 269.

[2] This Regulation was extended to Panjab by Act IV of 1872; to the Central Provinces by Act XX of 1875; and to Oude, by Act XVIII of 1876. In Sindh, the law of alluvion is regulated by certain executive Rules, dated 22nd May, 1852. The Regulation does not apply to the Presidencies of Madras and Bombay.

and imperceptible in its progress;[1] and it lays down that it is only in the latter case that the accretion or increment belongs to the person to whose land it is so annexed. Lord Justice James in delivering the judgment of the Privy Council in *Lopez* v. *Muddun Mohun Thakoor*[2] observed that this clause embodies the principle recognised in the English law (derived from the Civil law), and which is this:—"that where, there is an acquisition of land from the sea or a river by gradual, slow, and imperceptible means, there, from the supposed necessity of the case and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land."

Effect of omission of the expression 'imperceptible' from the Regulation.—The Regulation by using the expression 'gradual accession' only and omitting the qualification 'imperceptible,'[3] which a literal translation of the passage in Bracton, borrowed from Justinian, required in English law, has greatly obviated the doubt and difficulty which was raised and discussed in the case of *Rex* v. *Lord Yarborough*,[4] as to whether a subject is entitled to claim against the Crown any accretion by alluvion, unless the extent of the acquisition be so inconsiderable as to be almost imperceptible even after the lapse of many years. That case was decided by the Court of King's Bench in 1824, and it may not perhaps be quite unreasonable to suppose, that when this Regulation was passed in India in the following year, the qualification 'imperceptible' was advisedly omitted by the Legislature from the clause in question, to prevent the introduction into this country of a doctrine which had been so recently rejected in England. However plausible such a doctrine may have seemed at one time, (and whatever signs of its vitality may as yet be seen to linger in some of the text-books on the subject), in a country where the rivers are generally small, and their erosive powers insignificant, it is wholly unsuited to a region of tropical rain like India, where the huge torrents that descend from the Himalayas, expanding into mighty

[1] *Nogendra Chunder Ghose* v. *Mahomed Esoff*, 10 B. L. R. 406; 18 Suth. W. R. 113. Dist. *Secretary of State for India* v. *Kadiri Kutti*, I. L. R. 13 Mad. 369, (where the accretion was proved to have formed *suddenly*).

[2] 13 Moo. Ind. App. 467; 5 B. L. R. 521; 14 W. R. (P. C.) 11.

[3] The German law, like the law of India, uses only the word 'gradual;' the French and Italian law speak of land gained 'gradually and imperceptibly.' Markby, Lect. on Indian Law, 62. The New York Draft Civil Code refers to land forming 'by imperceptible degrees.' *Supra*, 176.

[4] 3 B. & C. 91.

proportions as they roll over the soft clay of Bengal and the bright sands of the Panjab, possess such enormous powers of disintegration and deposition, that large tracts of land are seen to be washed away from one place and to be thrown up in another in the course of a single freshet. Indeed, so far as it is possible to judge from the reports of decided cases, there is not to be found a single instance in which Government in this country has resisted the claim of a private individual to an alluvial increment, on the ground that such increment was distinct, manifest and large, and not latent, imperceptible and small. Besides, accession of land by imperceptible degrees is so unusual in India that it led Sir Charles Turner, one of the members of the Indian Law Commission of 1879, to suggest that acquisition of land by alluvion should not be made to hinge upon the slow, gradual, and imperceptible character of its formation, but should be left to be dealt with by the Courts on a general principle sufficiently understood.

Rule of alluvion, in what cases applicable?—The rule which awards the alluvial accretion to the owner of the adjoining land, is the same whether the accretion takes place in the sea, a public navigable river, or in a private non-navigable stream.[1] I have already explained to you in a previous lecture[2] that the law of India makes no distinction between a tidal and a non-tidal river, for the purpose of defining the ownership of their respective beds. Under that law, a navigable river is contradistinguished from a non-navigable stream, the ownership of the bed of the one being regarded as vested primâ facie in the Government, as 'trustee for the public,' and the ownership of the bed of the other, as vested primâ facie in the riparian proprietors.[3] I have also shown that the banks of rivers, whether navigable or non-navigable, belong to the proprietors of adjacent lands.[4] If then the right to an alluvial accretion be a riparian right, which doubtless it is,[5]—dependent for its accrual on the ownership of the bank,—it follows necessarily that it must be the same whether such accretion takes place on the bank of a navigable or a non-navigable river. And indeed the Regulation itself, though it fully recognises and gives effect to the distinction between 'large and navigable rivers' and 'small and shallow rivers', when laying down the rule for the ownership of newly-formed islands, draws no such distinction

[1] *Dataram Nath* v. *Eshan Chunder Law*, 11 Suth. W. R. 116. But see *Moulvi Wahed Alee* v. *Syed Mozuffer Alee*, S. D. 1858, p. 1774, where the Court held that cl. 1, s. 4, Regulation XI of 1825 applies to navigable rivers only

[2] *Supra*, 110, *et seq.* [3] *Supra*, 110—113. [4] *Supra*, 115—116. [5] See Lect. X, *infra*.

when providing for the case of gradual accessions; because it says simply that, "when land may be gained by gradual accession, whether from the recess of a *river* or of the sea, it shall be considered an increment to the tenure of the person, &c."

Precise nature of the rule of alluvion—Qualification upon that rule.—But this rule, however manifest and universal at first sight it might seem to be, is indeed subject to one very important qualification, namely, that the site over which the accretion forms is not proved to belong to another private individual, for in that case the accession, though a lateral prolongation of the land of the riparian proprietor, is at the same time a vertical addition to the submerged site, and in determining the right of competing claimants to such accretions, the law prefers the owner of the submerged but identifiable site to the owner of the bank.[1] It might be urged that, if this qualification were pushed to its legitimate consequences, no riparian proprietor could claim a title by accretion to land gained from the bed of a navigable river, because the bed of such river belongs generally to Government, and in a very few instances only, to private individuals, the landward limits of such bed or the precincts of such submergent site being, as a matter of fact, always known and accurately defined in this country, by reason of the survey measurements which estates generally and riparian estates in particular have undergone. The possibility of such an objection as this being raised shows that the qualification is too broadly stated, and it enables us at the same time to arrive at a correct determination of the exact nature of the rule of alluvion, and the precise limits of the qualification. So long as the bed of a navigable river remains covered with water and is not vested in any private individual, it is regarded as 'public domain' or 'public territory,' and the law permits a riparian proprietor to gain lands from such 'public domain' or 'public territory' by means of alluvion. It is only where a portion of such 'public domain' adjoining the bank is vested in any private individual, that the title of the riparian proprietor by accretion yields to the title of the owner of the submerged site by what is called 'reformation.' It is obvious that no such objection can be taken to the qualification thus stated, when the accretion takes place on the bank of a non-navigable river; in such case, the ownership of the bank, and the ownership of the adjoining bed as far as the middle thread of the stream, being generally united in the same person, the title by accretion and the title by reformation mutually coincide, and it is perfectly immaterial whether

[1] *Infra*, 210—213.

the increment by alluvion be given to the riparian proprietor quà riparian proprietor or be given to him quà owner of the submergent site.

What evidence insufficient to prove 'gradual accession.'—It is difficult to define exactly the nature of the evidence which will suffice to show that a particular formation on the bank of a river is a 'gradual accession' within the meaning of the law. The two following cases show what evidence will be deemed insufficient to prove gradual accession.

In *Ranee Surnomoyee* v. *Jardine Skinner and Co.*,[1] an island thrown up in a large navigable river was resumed by Government and afterwards sold to a private individual. On the south of the island flowed an unfordable arm which gradually dried up in consequence of its having become closed at its east and west ends. The purchaser of the island claimed this dried-up bed as an accretion to the island by alluvion, relying merely on this peculiar mode of formation as conclusive evidence of gradual accession. The Privy Council held that such evidence taken alone was insufficient to show that the land had appeared as an accretion to the island by means of 'gradual accession.'

In *Pahalwan Singh* v. *Maharaja Mohessur Buksh Singh Bahadur*,[2] the Privy Council held that the mere fact that the surface of the land in question had all been changed, and the marks had all been obliterated, so that no houses, or trees, or mounds, or vestiges of boundary could be found, and that such surface was fresh land which had been brought down by the river, was not conclusive of the question of accretion, if the river had gone from one bed to another, and the water flowed over the intervening space and washed off the surface soil only.

The height which an alluvial formation must attain before it can form the subject of private right.—A point of great practical importance with regard to an alluvial formation, whether contiguous to the bank or insular, is, what is the height which it must attain before it can be said to cease to form a part of the public domain, so that private proprietary right might attach to it? In *Maharani Odhirani Narain Kumari* v. *Nawab Nazim of Bengal*,[3] the Court held that an alluvial formation in a public navigable river cannot be considered an accession to the adjoining estate, if it is regularly submerged in the wet season

[1] 20 Suth. W. R. 276; see also *Buddun Chunder Shaha* v. *Bipin Behary Roy*, 23 Suth. W. R. 110.

[2] 9 B. L. R. (150) 165; 16 Suth. W. R. (P. C.) 5.

[3] 4 Suth. W. R. (C. R.), 41.

and visible only in the dry; and that until the land rises beyond the ordinary high-water mark in such a way as to become fit for cultivation, it is part of the river-bed, and, as such, public property[1].

The judgment in this case is somewhat ambiguously expressed, inasmuch as the two propositions just stated are not necessarily co-extensive with one another. The latter proposition undoubtedly embodies what is perfectly sound law, as was subsequently judicially affirmed in *Nobin Krishna Rai* v. *Jogesh Pershad Gangopadhya*,[2] with regard to an insular formation in a tidal navigable river. So long as any alluvium, whether it is deposited contiguous to the bank or emerges from the bed as an island, is washed by the flow of the ordinary tides at a season when the river is not flooded, it can scarcely be used for cultivation or for any other useful purpose. But the former proposition, it is humbly conceived, is rather too broadly stated, because there are many alluvial formations which yield crops, and consequently are of value to the possessor, but which for years are visible during the dry season only.[3]

The key to the true criterion for determining the point at which an alluvial formation, either contiguous to the bank or insular, ceases to form a part of the 'public waste' or 'public domain,' and becomes susceptible of private proprietary right, may be obtained from the following observations of the Privy Council in *Lopez* v. *Muddun Mohan Thakoor*[4]:—

"In truth when the words are looked at, not merely of that clause, but of the whole Regulation, it is quite obvious that what the then legislative authority was dealing with was the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain not usable in the ordinary sense, that is to say, the sea belonging to the state, a public river belonging to the state; this was a gift to an individual whose estate lay upon the sea, a gift to him of that which by accretion became valuable and usable out of that which was in a state of nature neither valuable nor usable." Interpreting the Regulation by the light reflected upon it by this passage, the inference is clear, that the legislature intended to confer on the adja-

[1] It is to be remarked that in that case the alluvion formed in the river Bhagirathi (a branch of the Ganges), at Moorshedabad, a place which is far above the reach of the tide.

[2] 6 B. L. R. 343; 14 Suth. W. R. 352.

[3] See speech of the Hon'ble Mr. W. Stokes on the Alluvion Bill, Gazette of India, Supplement, dated 12th Octr. 1878. pp. 1591, 1592.

[4] 13 Moo. Ind. App. 467; 5 B. L. R. 521; 14 Suth. W. R. (P. C.) 11.

cent riparian proprietor the alluvial formation as a gift only when it attained such height as to become, to use the language of the Privy Council, 'valuable and usable' to him. By parity of reasoning, the same intention may be attributed to the legislature when the alluvial formation appears as an island.

An alluvial formation may appear either in a tidal navigable river or in a non-tidal navigable river. If it appears in a tidal navigable river and rises so high as to be wholly free from submergence even during the annual floods, there can be but little doubt that it becomes in the generality of cases 'valuable and usable.' It might also be 'valuable and usable,' though perhaps not to the same extent, even if it were liable to submergence during the annual floods or only on the occasion of extraordinary spring tides in the dry season. But, if it happens to be washed by the flow of ordinary tides throughout the year, its fitness for cultivation or its capability of appropriation for any useful purpose is almost out of the question. It seems to me, that it would be more logical, although the result might practically be the same, to adopt the boundary line between the foreshore and the adjacent property—the boundary line between the public domain and private property—as the limit of the level which the alluvial formation must exceed before it could become the subject of private property; the foundation of the reasoning by which the limit is arrived at in either case being precisely the same, namely, that the soil of the bed of the sea or of a river continues to be part of the public domain so long as it is not capable of ordinary cultivation or occupation, or as Lord Hale expresses it, 'not dry or manoriable'. That boundary, as I have said in a previous lecture,[1] is the line corresponding to the average of the medium high tides between the springs and the neaps in each quarter of a lunar revolution throughout the year.

If, on the other hand, the alluvial formation appears in a non-tidal navigable river, although such formation may be liable to submergence during the annual floods, it may still be 'valuable and usable,' if it periodically appears above the surface of the water in the dry season only. These distinctions have been adopted in the following definition of an island contained in the Alluvion Bill of 1881:—"In this Act 'island' means land surrounded by water and capable of being employed for cultivation, pasture or other useful purpose. It includes such land arising in a river

[1] *Supra*, 36.

or lake, submerged in the wet season and visible only in the dry season; but it excludes land arising in tidal rivers, tidal lakes or the sea, submerged by the flow of ordinary tides throughout the year."[1]

Alluvion resulting from artificial causes.—According to the English and the American law, a riparian proprietor, as I have already said,[2] is entitled to alluvion by gradual accretion, even though such alluvion is the result of artificial causes, provided, however, such artificial causes are the result of the lawful exercise of rights of property, and have not been put into operation with a view to the acquisition of such alluvion. And, in fact, this rule was also adopted by the Privy Council in an Indian case with regard to some lands on the bank of the river Hooghly.[3] Such cases as these are, however, extremely rare, and hence the Alluvion Bill of 1881 restricts the right of riparian proprietors to such alluvial lands as are the results of natural causes only, and recognises the right of Government in all other cases.[4]

Alluvion in beels or lakes.—As the first clause of s. 4 of Regulation XI of 1825 refers only to lands gained "from the recess of a river or of the sea," it has been held that the Regulation does not apply to accretions formed in a beel or lake.[5] But the new Alluvion Bill proposes to extend the law of accretion to lakes, except where the bed of such lake may be proved to belong to a private individual.

Apportionment of alluvions amongst competing frontagers.—Intricate questions relating to the apportionment of alluvial lands or abandoned river-beds amongst several competing frontagers have not as yet presented themselves for determination before Courts of Justice in this country. In the few instances in which the question has been raised, it has been simply for the partition of alluvial land between two riparian proprietors. In *Pahalwan Singh* v. *Maharaja Mohessur Buksh Singh Bahadur*,[6] the Privy Council divided certain alluvial accretions

[1] The Indian Alluvion Bill of 1881, § 3; Gazette of India, March 19th, 1881, p. 689.

[2] *Supra*, 133.

[3] *Doe* d. *Seeb Kristo Banerjee* v. *The East India Co.*, 6 Moo. Ind. App., 269; 10 Moo. P. C. C. 140. Dist. *Secretary of State for India* v. *Kadiri Kutti*, I. L. R. 13 Mad. 369, (where an accretion in a tidal navigable river, being proved to have *suddenly* formed, in consequence of acts unlawfully done by the riparian owner, was held to belong to Government.)

[4] The India Alluvion Bill of 1881. ss. 4, 5, 6 & 10. *Cf.* N. Y. Draft Civil Code, § 443, *supra*, 176 (note).

[5] *Suroop Chunder Mozumdar* v. *Jardine Skinner & Co.*, Marsh. 334.

[6] 9 B. L. R. 150; 16 Suth. W. R. (P. C.) 5.

which had formed at the junction of two riparian estates, by a line drawn from the point of such junction perpendicular to the course of the river. This principle has been followed by the High Court in a number of cases, but the judgments in those cases have not been reported.

The Indian Alluvion Bill of 1879 provided that, where an alluvial land or an island separated from the mainland by a fordable channel, formed in the sea or a lake in front of the lands of several persons, its partition should be effected on the principle that, the owners of the shore were severally entitled to such land or island in proportion to the frontage which they respectively had on the sea or lake immediately before the formation; and left the modus operandi of such partition to an executive officer, who was to effect the same in accordance with such rules, consistent with this principle, as the local Government might from time to time prescribe.[1] I suppose one of the reasons which influenced the framers of this rule in leaving the method of working it out in practice in this indefinite form, was the impossibility of getting the middle thread with regard to the sea or a lake.

When alluvial land or an island is formed on the bank of or in a river in front of several frontagers, then, inasmuch as the river and consequently its middle thread may be, and generally is, a curve, the Bill provided that each owner having a frontage on the river is entitled to so much of the land or of the island as is included by his frontage, the thread of the stream during the dry season next after the formation, and lines drawn riverwards from the ends of such frontage to meet the thread of the stream in a direction normal to such thread; and it further provided that where more than one such normal could be drawn from one and the same end of any frontage and each of such normals was of different length, the shortest of such normals should be deemed to be the including line, and where more than one such normal could be so drawn and each of such normals was of the same length, the line bisecting[2] the angle between the two extreme positions of the shortest normal should be deemed to be the including line.[3]

A similar rule was provided by the Bill for the apportionment of abandoned river-beds.[4]

[1] Indian Alluvion Bill of 1879, ss. 4, 6.

[2] It is possible to conceive cases in which the bisectors might intersect one another before they reached the new frontage.

[3] Indian Alluvion Bill of 1879, s. 7.

[4] *Ibid.*, s. 9.

The rules thus framed did not, however, commend themselves as perfect or easily workable to the Select Committee which revised the Bill in 1881. Apart from the obvious objection to which they were open, namely, that they merely postponed the evil day by leaving important difficulties to be disposed of by rules to be made thereafter by the local Governments, the Select Committee thought that the rules as framed greatly complicated the question by making its solution depend on the 'thread of the stream,' a line or combination of lines which it would often be hard to determine, and which might, when determined, turn out to be of a very irregular shape. The necessity of drawing normals required by the rules provided by sections 7 and 9, was not always feasible, because it appeared to them that cases would sometimes present themselves in practice in which no such normals could be drawn.

They therefore rejected these rules in toto, and substituted for them an entirely new set of rules. Of these, the first is intended to apply to all cases in which new land is formed on a shore or bank of the sea, a river, or a lake by imperceptible accretion, and the second to all other formations to which riparian owners may have a right.

1. The first rule lays down that when the alluvial formation takes place either on the bank or shore of a river, the sea or a lake, and springs from a nucleus at the junction of two holdings, each owner shall be entitled to so much of the formation as lies on his side of a line drawn through the point of junction and bisecting the angle between the frontages at that point; and

2. The second rule provides that in the case of islands separated from the bank or banks by a fordable channel or channels, of land formed otherwise than by imperceptible degrees, and of abandoned river-beds, "each particle of the island or land so formed, or the river-bed so abandoned, shall belong to that one of the riparian owners who can show a point on the frontage of his holding nearest to such particle;" and it goes on to provide further that "when the line dividing the formation to which one owner is entitled under this section from the formation to which another owner is entitled under this section is an arc of a curve, the chord of such arc shall be substituted therefor."[1]

[1] With regard to the second rule, the Select Committee in their report said as follows:—

"The cases to be dealt with by the second rule, on the contrary, may present every variety of complication, but we think they may be provided for by a rule which is capable of being simply expressed, which would generally be easy to apply, and about the application of which

As the shore or bank may sometimes be a curve of a very irregular shape, the Bill by its second schedule provides elaborate rules for determining the frontage of a holding in order that the rules just stated may be easily applied.

The first rule is merely an application to a concrete instance of the principle laid down in the second, which, in fact, is its more generalized form and is based evidently upon the notion of proximity. Apart from the simplicity of the proposition which embodies this general rule, the chief merit of that rule consists in eliminating the middle thread and making the solution of every question relating to the apportionment of alluvial lands, whether formed in the sea, in a river or a lake, as well as of abandoned river-beds, depend solely upon the relative situations of the original riparian frontages. They possess the additional advantage of being workable in practice without the aid of accurate scientific instruments. But

there would never be any serious difficulty, and which, moreover, would make as fair a division of the new land as can be hoped for in a class of cases for which, in the absence of anything in the way of a definite principle to guide us, we must be content with a somewhat rough-and-ready rule.

The rule we propose (section 6) is, each particle of a new formation shall belong to that one of the riparian owners who can show a point in his frontage nearest to it; provided that, when the line dividing the portion of the land to which one owner is entitled from the portion to which another is entitled is an arc of a curve, the chord of such arc shall be substituted for the arc. The dividing line given by this rule will be different according to the relative positions of the two competing frontagers, but it will be one which it will be always easy to draw.

In ordinary case it will be the bisector of the angle between the frontages, or, in the case of holdings on opposite sides of a river with parallel frontages, a line parallel to the frontages and equidistant from both; in others it will be the perpendicular erected at the middle point of the line connecting the extremities of the frontages; and in others, again, it will be the chord of a parabola. As this last line might at first sight be supposed to present some difficulty, we think it well to explain that chord can be drawn without describing the parabola, and by a person altogether ignorant of the nature and properties of that curve. It is, in fact, simply, the right line connecting two points which could be fixed by any patwari or amin without the slightest difficulty. We may add as regards the substitution of the chord for the arc in this case, that it not only simplifies the problem, but also makes what we believe, would, by most persons, be considered a fairer division of the land."

N. B.—The only instance in which the dividing line will describe a parabola is, when one of the frontages is a straight line, corresponding to the directrix, and the other a point, corresponding to the focus. But it is difficult to imagine a case in which the frontage is merely a point. It is equally difficult to see how the chord of a parabola can be drawn without tracing the curve itself, and thereby determining the point on the new frontage to which the chord has to be drawn.

the theoretical excellence of this rule has been attained, it is conceived, at the sacrifice somewhat of those equitable considerations, which require not only that there should be a fair division of the new formation, but also that the division should be such, and so made, that each littoral or riparian owner may have a frontage on the new shore or river line. It appears to me that the latter condition, which is as much essential to a just partition as the former, has been overlooked. The effect of these rules is to make the apportionment wholly independent of the shape and configuration of the new formation. It is possible to conceive cases in which the conformation of the shore or bank, (as, for instance, in a cove), and the configuration of the alluvial formation may be such that, one or more of the littoral or riparian owners will be so completely hemmed in by the partition lines (drawn according to the above rules) intersecting one another, before they reach the new shore or river line, that they will thenceforward cease to be littoral or riparian frontagers; and be thereby deprived of the right to future alluvial formations and various other important riparian rights which the law annexes to such a situation, and upon which so much of the value of riparian properties in most countries depend.[1]

In view of these objections it seems to me that, it is almost impossible to frame any general rule such as will cover all possible cases, and that the set of rules adopted by the American lawyers[2] commend themselves to ordinary minds as being simple and most practicable, and at the same time fair and equitable.

Who are entitled to accretions by alluvion?—I have now to ascertain who are riparian owners, that is, to determine the classes of persons who are entitled to accretions by alluvion; and this, first of all, under clause 1, section 4, of Regulation XI of 1825. It is clear from the terms of that clause that every person from the zemindar or other superior holders, *i. e.*, independent talukdars or other actual proprietors of the soil, enumerated in and defined by Regulation VIII of 1793, down to every description of under-tenant, is entitled to increments by gradual accession. Government holding a resumed mehal on its rent-roll as its khas property, is in the same position as a private zemindar

[1] The method of apportionment adopted in the Alluvion Bill, 1881, is the same as that laid down by Barthole in his treatise, 'De Fluminibus,' (ed. 1512), vol. v. bk. 1. pp. 630 *et seq.* but the latter has been criticized and rejected by Denisart for nearly the same reasons as those stated in the text. Collection de Decisions Nouvelles *tit.* Attérissement.

[2] *Supra*, 160—164.

and is entitled to the benefit of this clause, whether such resumed mehal be a riparian estate[1] or an island in a navigable river.[2] It has been held that a lakherajdar,[3] ex-mafidar,[4] mokurraridar,[5] a jotedar (maurusi-mokurrari,[6] or otherwise,[7]) and an occupancy-ryot[8] come within the denomination of 'under-tenants' used in that clause, and are therefore entitled to such increments. An ijaradar is also primâ facie entitled to future accretions, but he is certainly not entitled to accretions of an older date than that of his own lease.[9] There has been some conflict of opinion as to whether a tenant-at-will (a tenant from year to year would seem to be a better description of his status in this country) is entitled to accretions.[10] According to the latest view it appears that he is not.[11]

Under the Transfer of Property Act (IV of 1882)[12] a mortgagee, in the absence of a contract to the contrary, is entitled, for the purposes of the security, to all accretions by alluvion, annexed to the mortgaged property after the date of the mortgage. Under the same Act, a lessee[13], in the absence of a contract to the contrary, is entitled, so long as the lease subsists, to all such accretions, if added during the continuance of the lease.

Under the Bombay Revenue Code, section 104, clause 3, the owner of any holding granted by Government, the area of which has been fixed by any sanad or other document executed under the authority of Govern-

1 *Collector of Pubna* v. *Ranee Surnomoyee*, 17 Suth. W. R, 163.

2 *Kally Nath Roy Chowdhry* v. *J. Lawrie*, 3 Suth. W. R. (C. R.) 122.

3 *Mussamat Rammonee Goopta* v. *Omesh Chandra Nag*, S. D. 1859, p. 1836; *Putheeram Chowdhry* v. *Kuthee Narain Chowdhry*, 1 Suth. W. R. (C. R.) 124.

4 *Fazl-ud-din* v. *Mussamat Imtiyarunnissa*, 4. N. W. P. (C. Ap.) 152.

5 *Chooramoni Dey* v. *Howrah Mills* Co. I. L. R. 11 Cal. 696.

6 *Attimoollah* v. *Shaikh Saheboollah*, 15 Suth. W. R. 149; *Shorussoti Dasi* v. *Parbuti Dasi*, 6 Cal. L. R. 362.

7 *Gobind Monee Debia* v. *Dina Bundhoo Shaha*, 15 Suth. W. R. 87; *Juggut Chandra Dutt* v. *Panioty*, 6 Suth. W. R. (Act X), 48.

8 *Oodit Rai* v. *Ram Gobind Singh*, 3 N. W. P. (C. Ap.) 406.

9 *Jaur Ali Chowdhry* v. *Pran Kristo Roy*, 4 Suth. W. R. (C. R.) 65; *Muthura Kanto Shaha Chowdhry* v. *Meajan Mandal*, 5 Cal. L. R. 192.

10 The earlier rulings in favour of the right of a tenant-at-will to hold accretions, so long as he holds the parent holding, are:—*Narain Dass Bepary* v. *Soobul Bepary*, 1 Suth. W. R. (C. R.) 113; *Bhuggobut Pershad Singh* v. *Doorg Bijoy Sing*, 8 B. L. R. 73; 16 Suth. W. R. 95. Contra, *Zuheeroodeen Paikar* v. *J. D. Campbell*, 4 Suth. W. R. 57, (as to a tenant from year to year).

11 *Finlay Muir & Co.* v. *Goopee Kristo Gossami*, 24 Suth. W. R. 404

12 S. 70, and *illust.* (a).

13 S. 108, cl. (d).

ment, is not entitled to any increment added by alluvion. This rule is analogous to the provision of the Roman law, according to which the owner of an ager limitatus was not entitled to the ius alluvionis or right of alluvion.[1]

It is important to bear in mind, what no doubt is quite obvious that, the appellation 'riparian proprietor' does not belong to one whose estate is not in contact with the flow of water. Hence, if any one who is a riparian proprietor sells a strip of land stretching along the river frontage, he thereby ceases to be a riparian proprietor, and consequently the purchaser, and not he, is entitled to subsequent accretions.[2]

Nature of interest acquirable in accretions.—The last point which remains to be considered under the head of alluvion, is the nature of the interest which a littoral or riparian owner is entitled to have in the accretion. The right to the accretion is regarded in contemplation of law as a right of an accessorial character incident to the parent holding. Presumably, therefore, the right to the accretion, where such right exists, must be of the same nature as that which exists in the parent holding. "The land gained," observes Lord Chelmsford, in *Eckowrie Sing* v. *Heeraloll Seal*, "will then follow the title to that parcel to which it adheres."[3] The same clause of the first section of the Regulation, to which I have already referred, goes on to enact in the form of a proviso: "that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed, to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed, &c." The cases to which reference has just been made, for the purpose of determining who are entitled to accretions, in fact also exemplify this principle.[4]

Consequently, if the owner of a permanently-settled estate accepts from Government temporary settlements in respect of accretions annexed to his estate by alluvion, such settlements do not curtail his permanent interest in the accretions, inasmuch as this is the only kind of settlement which Government does, in practice, grant in respect of alluvial

1 *Supra*, 121.

2 *Mussumat Idan* v. *Nund Kishore*, 25 Suth. W. R. 390.

3 12 Moo. Ind. App. 136; 2 B. L. R. (P. C.) 4; 11 Suth. W. R. (P. C.) 2. The passage occurs on page 140 *in fin.* of Moore.

4 See notes nos. 3—9 on p. 193, *supra*. See also *Mahomed Wasil* v. *Zulekha Khatoon*, 2 Hay, 515; *Ram Prasad Rai* v. *Radha Prasad Sing*. I. L. R. 7 All. 402 (where it was held that if the parent holding is "ancestral property" the increment will acquire the same character.)

formations during a considerable number of years, until the capabilities of the soil have been fairly ascertained.[1]

If a public road leads down to the bank of a river, and an alluvial accretion is afterwards formed on the bank, the public has the same right of access to the water across the new formation as they had before such alluvion formed.[2]

II. Dereliction.—Real nature of dereliction.—Dereliction may be either gradual or sudden. If it is gradual, the result, in the generality of cases, is the same as that which is produced by alluvion. The physical processes implied in them respectively, in fact correlate to one another. The deposit of soil on the bank, by the 'projection of extraneous matter' on it, cannot take place without a simultaneous withdrawal pro tanto of the water from the site which such 'projected' matter occupies. But if the dereliction is sudden, it is regarded as an altogether distinct mode of acquisition of property. Properly speaking, it is not a mode of acquisition of property at all; it merely denotes a particular mode of transition of land (in which there is already an existing right) from one state to another, from the state of being covered by water to the state of being dry land; and when there is this transition, the law uniformly declares that there shall be no change of ownership.

Ownership of the bed of the sea or of a river suddenly abandoned by it.—The Regulation provides no express rule with regard to the ownership of the bed of an arm of the sea, or of a river suddenly derelicted or abandoned by it; but by the fifth clause of its fourth section, it leaves the determination of such a question, in the absence of any established usage, to be made 'on general principles of equity and justice.'

Dereliction of the bed of an arm of the sea is an event of somewhat rare occurrence, and so is the total dereliction of the bed of a navigable river. Instances of partial dereliction, however, of the bed of a navigable river may be observed when sandbanks are thrown up or islands form in a navigable river, in such a way as to be separated at first from either mainland by fordable channels; one of which gradually closes up at one or both ends, and afterwards dries up suddenly. Whether the dereliction be partial or total, Government in this country being primâ

[1] *Raghoobar Dyal Sahoo* v. *Kishen Pertab Sahee*, L. R. 6 Ind. App. 211; 5 Cal. L. R. 418.

[2] *Maharanee Odhiranee Narain Koomari* v. *The Nawab Nazim of Bengal*, 4 Suth. W. R. (C. R.) 41.

facie the owner of the soil of the beds of all navigable rivers, its proprietary right therein continues even when the water retires from it.[1] If, however, a private individual has already acquired a right to the whole or any portion of the bed of any such river under an express or implied grant from Government, or if his proprietary right thereto has been recognised at the time of the Permanent Settlement of his estate (the survey maps of riparian estates being evidence of the boundaries of such estates as they existed at the time of the Permanent Settlement), the soil discovered by water remains in him as before.[2]

When the dereliction takes place in the channel of a non-navigable stream, the soil of the bed continues to be the exclusive property of one or other of the riparian proprietors, or even of a stranger, if he had an exclusive right to the soil when it was covered with water.[3] But, if there was no exclusive right to the soil in any one, then the presumption of law being, that it belonged to both the riparian proprietors in severalty, usque medium filum aquae, when it was covered with water, it would continue to be the property of each of them respectively to the same extent as before.[4]

Whether abandoned bed can form the subject of private ownership before it becomes 'usable.'—It is unnecessary to discuss again with regard to dereliction the question, which I have already considered with

[1] Cf. *Ranee Surnomoyee* v. *Jardine Skinner & Co.*, 20 Suth. W. R. 276; *Budun Chunder Shaha* v. *Bepin Behary Roy*, 23 Suth. W. R. 110; *Secretary of State for India* v. *Kadiri Kutti*, I. L. R., 13 Mad., 369.

[2] *Radha Proshad Singh* v. *Ram Coomar Singh*, I. L. R. 3. Cal. 796; 1 Cal. L. R. 259; *Grey* v. *Anund Mohun Moitra*, Suth. W. R. 1864 p. 108; *Isser Chunder Rai* v. *Ram Chunder Mookerjea*, 1 Sel. R. 221.

The Indian Alluvion Bill, 1881, by section 8, subsection (h) makes, as regards this point, the same provision as that which has been stated in the text. It runs thus:—"Nothing herein contained shall affect the right of the Government or a private owner to the adjacent bed of a river, which is proved to belong to the Government or such owner immediately before its abandonment."

[3] *Grey* v. *Anund Mohun Moitro*, Suth. W. R. 1864. p. 108; *Isser Chunder Rai* v. *Ram Chunder Mookerjea*, 1 Sel. R. 221.

[4] Section 6 and section 8, subsection (h) of the Indian Alluvion Bill, 1881 taken together, lead substantially to the same result as that stated in the text, though in the Bill the rule has been laid down in a more comprehensive and generalized form. Section 6 (inter alia) provides:—"And where a river suddenly abandons its bed, each particle of the new bed so abandoned shall belong to that one of the riparian owners who can show a point on the frontage of his holding nearest to such particle."

"When the dividing line is an arc of a curve, its chord shall be substituted for it."

respect to alluvion, namely, whether land left by dereliction should be 'usable,'—should be fit for cultivation, pasture or for any other useful purpose, before private proprietary right might attach thereto; for, as I have already stated, there is no accrual of a new right in such a case, but merely the revival of a pre-existent right which had lain dormant for a while, and it is immaterial what the state of the land be (whether covered with water or dry), over which this right exists.

Apportionment of abandoned river-bed.—When the bed of a river is not the exclusive property of Government or of any private individual, the rules for the apportionment of such bed amongst the riparian proprietors, when it is derelicted or suddenly abandoned by the river, are the same as those for the apportionment of alluvial formations.

The Indian Alluvion Bill of 1879 provided the same rule for the apportionment of abandoned river-beds as it did for the apportionment of alluvial formations. The Alluvion Bill of 1881 proposed the following rule, namely, that the abandoned river-bed should be so divided that "each particle of it shall belong to that one of the riparian owners who can show a point in the frontage of his holding nearest to such particle." The same objections might be urged against the application of this rule to the apportionment of abandoned river beds, as those which I have pointed out while I was discussing the matter in connection with the apportionment of alluvial formations.[1] If the provision of law be that the bed of a river, when it is not the exclusive property of Government or of a private owner, belongs to the riparian proprietors in severalty up to the middle thread, in proportion to the extent of their respective frontages, then it follows that the partition lines, however drawn, must not, in order that they may conform to this provision, intersect one another before they reach the middle thread; but, as I have said before, there may be cases in which the rule of apportionment proposed by the Indian Alluvion Bill of 1881 may lead to this consequence.

III. Islands.—Ownership of islands formed by a river encircling a portion of the mainland.—Like the other systems of law we have already discussed, this Regulation deals also with two kinds of islands, and enacts rules for determining their ownership in each case.

With regard to the first kind of island, the Regulation by the second clause of its fourth section thus provides:—

"The above rule shall not be considered applicable to cases in which a river by a sudden change of its course may break through and intersect

[1] *Supra*, 191—192.

an estate without any gradual encroachment, ... In such cases the land on being clearly recognised shall remain the property of its original owner."

It seems to me that this clause, though not very artistically framed, is intended to refer to the case where an island[1] is formed by a river encircling a portion of the land of a private owner. It lays down the same rule with regard to the ownership of such an island as that which is recognised in the other systems of law, namely, that the ownership of the soil remains unaffected by the change.

In *Thomas Kenney* v. *Beebee Sumeeroonissa*,[2] the Calcutta High Court in their judgment thus observed with regard to the meaning of this clause:—"A claim to hold the land under clause 2 can only be maintained by the old proprietors when the land used by man has not been diluviated, but is cut off by a change of the stream—fields, trees, houses, or other surface objects remaining as before."

But the observations of the Privy Council in *Pahalwan Sing* v. *Maharajah Mohessur Buksh Sing Bahadoor*[3], to which I have already referred[4], would seem to show that the continuance of the fields, trees, houses, or other surface objects in position is not essential to the operation of this clause.

This clause does not lay down any mode of acquisition of property. It is merely a qualification of the first clause, and declares that the latter shall not be applicable where there is a sudden change in the course of the river. If a person has acquired a right to property under the first clause by gradual accession, any subsequent change in the course of the river, such as is contemplated by the second clause, will not deprive him of his right.[5]

Ownership of islands formed in other modes.—With regard to the second kind of island, the Regulation enacts the following provisions:—

"*Third.* When a chur, or island, may be thrown up in a large and navigable river (the bed of which is not the property of an individual) or in the sea, and the channel of the river or sea between such island

1 These small islands are known by the name of *chuckees* in Behar. Cf. *Pahalwan Sing* v. *Maharajah Mohessur Buksh Sing Bahadoor*, 9 B. L. R. 150; 16 Suth. W. R. (P. C.) 5.

2 3 Suth. W. R. (C. R.) 68.

3 9 B. L. R. 150; 16 Suth. W. R. (P. C.) 5.

4 *Supra*, 185.

5 *The Court of Wards* v. *Radha Pershad Sing*. 22 Suth. W. R. 238; affirmed by the Privy Council, on appeal, I. L. R. 3 Cal. 796; 1 Cal. L. R. 259.

and the shore may not be fordable, it shall according to established usage be at the disposal of Government. But if the channel between such island and the shore be fordable at any season of the year, it shall be considered an accession to the land, tenure or tenures of the person or persons whose estate or estates may be most contiguous to it, subject to the several provisions specified in the first clause of this section with respect to increment of land by gradual accession.

"*Fourth.* In small and shallow rivers, the bed of which with the julkur (or)[1] right of fishery may have been heretofore recognised as the property of individuals, any sand-bank or chur that may be thrown up shall, as hitherto, belong to the proprietor of the bed of the river, subject to the provisions stated in the first clause of the present section."

Enumeration of topics concerning islands.—As regards the third clause, the following matters require elucidation:—

(*a.*) The meaning of the expression 'fordable channel.'

(*b.*) The point of time at which the fordability or otherwise of the intervening channel should be ascertained for the purposes of this clause.

(*c.*) The meaning of the words, 'shall be at the disposal of Government.'

Probable origin of the doctrine of a fordable channel.—Now as regards (*a*), you will have observed that the doctrine of a fordable channel formed no part of the Roman law of alluvion. It could scarcely find a place in a system in which the theory with regard to the ownership of the bed of a river was that it was vested in the riparian proprietors; so that whether the island was separated from the banks by fordable or unfordable channels, in either case it was deemed to be the property of the riparian owners and not of the state. The necessity for the doctrine probably arose for the first time, when under the jurisprudence of the feudal system the theory regarding the ownership of the beds of rivers underwent a change, and the beds of all navigable rivers came to be regarded amongst the iura regalia of the Crown.

Fordable channel, what?—The Regulation itself contains no interpretation clause, nor does it anywhere define the meaning of the expression 'fordable channel.' But it has been held under that clause that, a channel which can be crossed only in a zigzag direction by taking

[1] The word 'or' does not occur in the Regulation, but it is evidently omitted by mistake. It is in Mr. Harrington's draft. Markby, Lect. on Indian Law, 53 (note).

advantage of the higher portions of the bed in the dry season, and that even only with the water breast-high cannot be said to be fordable.[1] It has been also held that a channel cannot be said to be fordable, if it can be crossed on foot at the extreme ebb of the tide only, and probably for some short time before and after; or, if under ordinary circumstances and at the most favourable season, it cannot be crossed at least for sixteen hours out of twenty-four.[2]

Requisites of a strict definition of a fordable channel.—The depth of a river in the dry season is not the same as it is in the wet, nor is it the same during all the months of the dry season. In fact, its depth varies from day to day, and in a tidal river, it varies almost every moment. For legal purposes, therefore, it is essential that there should be a precise definition of the word 'fordable', and such a definition requires that the following elements should be fixed, namely, (i) the exact depth of the water over the ford, (ii) the duration of time for which that depth must continue, and (iii) the point of time at which that depth is to be measured. The first two elements, regard being had to the nature of them, must necessarily be somewhat arbitrary, and can only be defined by the legislature. The third element is, perhaps, capable of being ascertained from the language of the clause itself, and this leads us to the consideration of point (*b*) mentioned before.

Point of time to which the fordability or otherwise of the channel ought to refer.—As regards (*b*), a reasonable construction of the context of the first part of the clause suggests the inference that, the period when the fordability or otherwise of the intervening channel is to be ascertained, is the time when the chur or island is thrown up; and therefore the meaning of this part of the clause is, that if the island is not fordable when it is thrown up, it is to be 'at the disposal of Government.'

But it frequently happens that at the commencement of the dry season, a very small portion of the chur or island emerges from the water, separated from either bank by unfordable channels, and as the water sinks down gradually, the visible surface of the island enlarges, and before the end of the same dry season it is found to be connected with one or other of the riparian estates by one or more fords, sometimes extending along the whole length of the frontage. It would indeed be extremely inequitable, nay almost illogical, to lay down that such chur or island should not belong to the riparian owner, but should be at the

[1] *Juggobundhoo Bose* v *Gyasoodeen*, 3 Suth. W. R. (C. R.) 94.

[2] *Nobin Kishore Roy* v. *Jogesh Pershad Gangooly*, 6 B. L. R. 343; 14 Suth. W. R. 352.

disposal of Government, and at the same time to declare that he should be the owner of an alluvial increment which formed in contiguity with the bank, though it might have been wholly under water during a greater portion of the dry season, and only appeared above the surface just towards the latter end of that season; the only difference between the nature of the two formations being that, in the former case the soil between the chur or island and the adjacent land happens to be covered with a few inches of water, say, knee-deep or ankle-deep only; while in the latter, such soil is totally dry about the same period of time. It seems to me that it was to meet such a hardship as this, that the second part of the clause provided that, if the channel was fordable 'at any season of the year' it was to be considered as an accession to the land of the person whose estate might be most contiguous to it. The second part of the clause cuts down the apparent generality of the first, and the result, therefore, is that if the island is fordable 'at any season of the year,' that is to say, in any part of the dry season in which the formation appears above the surface of the water, and when the water has sunk to its lowest level, it should be considered to belong to the adjoining riparian proprietor; otherwise, it should be at the disposal of Government.

Examination of cases bearing upon the topic.—But then when one comes to examine the series of decisions that have been passed upon this clause, he finds not a little divergence and fluctuation of opinion with regard to the construction that ought to be put upon it. This is due in some measure to the ambiguity of the expression 'shall be at the disposal of Government,' and to the somewhat inartificial character of the provisions of Act IX of 1847, with which I shall have occasion to deal more fully hereafter.[1] That Act relates to the assessment of lands gained from the sea or from rivers by alluvion or dereliction; and by its third section provides for the making of a new survey of lands on the banks of rivers and on the shores of the sea, whenever ten years shall have elasped from the approval of any prior survey by the Government, and for the preparation of new maps according to such new survey. The seventh section enacts that whenever, on inspection of any such new map, it appears to the local revenue authorities that an island has been thrown up in a large and navigable river liable to be taken possession of by Government under clause 3, section 4, Regulation XI of 1825 of the Bengal Code, the said revenue authorities shall

[1] Lect IX, *infra*.

take immediate possession of the same for Government, and shall assess and settle the land, &c.

In *Wise* v. *Ameerunnissa Khatoon*,[1] and *Wise* v. *Moulvi Abdool Ali*,[2] decided within a few days of each other, the alluvial formation to which the plaintiffs Ameerunnissa Khatoon and Moulvi Abdool Ali laid claim under clause 1, section 4 of Regulation XI of 1825, appeared originally as an island with unfordable water on all sides, and subsequently became annexed to their respective estates before the time appointed for a re-survey under Act IX of 1847 arrived. Bayley and Campbell, J.J., held that Act IX of 1847 had the effect of modifying the provisions of the Regulation and of making the assertion of the rights of Government "to cease to be continuous but only at intervals of years;" and that it was clear from the language of the Act that the 'status' of the land at the time of the original formation thereof was not to be looked to, but that its 'status' at the time of re-survey alone was to be regarded. Being of that opinion, they decreed the land to the plaintiffs, although, as I have said, the island, when it was first thrown up, was surrounded with unfordable water on all sides. This was expressly dissented from by Norman, J., in *Kalee Pershad Moozoomdar* v. *The Collector of Mymensing and others*,[3] where he held that the true rule was that, the right to the possession of land either gained by gradual accession, or reformation, or thrown up in a river or the sea, must be determined by an enquiry into the condition of the land, when it was originally gained by alluvion or thrown up, and became the subject of property and capable of cultivation or occupation as such. In delivering judgment his Lordship said:—"It is difficult to see how a right which has once accrued can be divested by any change in the condition of land adjacent to that in which such right exists, and therefore one would think that if land comes into existence and becomes the subject of property as an island in a navigable river, the fact that the channel between it and the mainland dries up subsequently cannot destroy rights of property or possession, which any person may have acquired in it while it continued to be an island. As an island, it must be presumed to be at the disposal of Government. If it

[1] 2 Suth. W. R. 34; *Koer Poreshnarain Roy* v. *R. Watson & Co.*, 5 Suth. W. R. (C. R.) 283; 2 R. C. & Cr. (C. R.) 10; *Nogendra Chunder Ghose* v. *Mahomed Esoff*, 3 R. C. & Cr. (C. R.) 225. Cf. *Wise* v. *Ameerunnissa*, 3 Suth. W. R. (C. R.) 219.

[2] 2 Suth. W. R. (C. R.) 127.

[3] 13 Suth. W. R. 366.

is taken possession of and cultivated by any person, the Government may have rights against him. But his possession is good and constitutes a right as against all persons except the Government. The subsequent drying up of a channel between the island and the shore cannot affect his right to insist on his possession as a good title as against everybody except the Government, or one who can show a better title than himself. There is nothing in the 3rd clause of section 4, Regulation XI of 1825 which militates against this view. The clause in question does not, in fact, provide for the case of an island thrown up in a river, which at the time when it becomes capable of being occupied or cultivated, in other words, a subject of property, is separated from the lands most nearly adjacent to it by an unfordable channel, further than to declare that such island shall be at the disposal of Government. But if the Government does not think fit to lay claim to it, the case will fall within the 5th clause of section 4." His Lordship then read the clause in question, and continued—

"By Act IX of 1847, the right of the Government to come in and claim possession is postponed till the time of re-survey. But it is difficult to see how that Act can affect any question between the person in possession and any person other than the Government.

"I confess myself unable to assent to the rule supposed to be laid down in *Wise* v. *Ameerunnissa Khatoon*, 3 Weekly Reporter, 34, that the status of the land at the time of the re-survey is to be looked at in determining questions between rival claimants when the Government is not one of such claimants."

Next arose the case of *Mohini Mohun Doss* v. *Juggobundoo Bose*,[1] which came before Sir Barnes Peacock, C. J., and Jackson and Macpherson, J.J., upon a difference of opinion between Trevor and Glover, J.J., in which, strangely enough, the pendulum of opinion swung back to its former position. The Chief Justice, who delivered the judgment of the Court, observed as follows:—"If, when the island first formed, the river Bawor was not fordable from the plaintiff's estate which formed that part of the shore which was nearest to the island, the island might, according to clause 3, have been disposed of by the Government. If, before the Government disposed of it, the river between the plaintiff's estate Kootubpore and the island became fordable, then according to clause 5 it would belong to the plaintiff as the owner of Kootubpore."

This was followed by Phear and E. Jackson, J.J., in *Golamally Chowdhry* v. *Gopal Lall Tagore*.[2]

[1] 9 Suth. W. R. 312.

[2] 9 Suth. W. R. 401; 5 R. C. & Cr. R. 25.

The question, however, ultimately came for decision before a Full Bench in the case of *Budroonissa Chowdhrain* v. *Prosunno Coomar Bose*,[1] where the learned Judges reviewed the previous authorities on the subject, and upon a consideration of the 3rd clause of section 4 of the Regulation as well as of Act IX of 1847 came to the conclusion that, the state of things existing at the time when the chur or island is thrown up or forms, is the criterion by which the right, either of the Government or of the owner of the contiguous land, is to be determined, and that the subsequent creation of a fordable channel between the island and the mainland does not affect the right acquired at the period of its first formation. With regard to Act IX of 1847, Couch, C. J,, after adverting to some of its provisions in his judgment, observed:—"What the Act seems to me to have intended to do was to prevent the great inconvenience which might arise from surveys being made at different times, probably of small portions of land, at a great expense, perhaps much greater, than the property would be worth, and adopt a system of having the surveys at stated periods, so that whatever rights might be found to have accrued to Government with regard to lands of this description, those rights might be enforced. It did not, I think, alter the period which had been fixed by Regulation XI of 1825 for determining whether the right existed or not, namely, the period of the formation of the chur or island, and lay down the time of survey or the preparation of the map as the period when those rights actually accrued."

This last view has been recognised and adopted by the Privy Council in *Wise* v. *Ameerunnisa Khatoon* and *Wise* v. *Collector of Backergunge*[2] where their Lordships say in their judgment that:—"Even if the Government was not entitled to assess the lands in consequence of Act IX of 1847,"—because a re-survey of the lands under that Act had not taken place—"they were entitled to take possession of them as lands which originally formed as an island, and were at their first formation surrounded by water which was not fordable, &c."

It is always a question of fact in each case as to what is that precise period of time when the chur or island may properly be said to have been thrown up or to have formed.[3]

1 14 Suth. W. R. (F. B.) 25.

2 L. R. 7 Ind. App. 73; 6 Cal. L. R. 249; affirming on appeal, *Ameerunnissa Khatoon* v. *Wise*, 24 Suth. W. R. 435. See *Cannon* v. *Bissonath Adhicari*, 5 Cal. L. R. 154.

3 *Budroonnissa Chowdhrain* v. *Prosunno Coomar Bose*, 14 Suth. W. R. (F. B.) 25, *per* Couch, C. J.

Provisions of Act IV of 1868 (B. C.)—The Full Bench case of *Budroonnissa Chowdhrain* v. *Prosunno Coomar Bose*,[1] was decided irrespective of the provisions of Act IV of 1868 (B. C.), although it had been passed two years before, because the suit in that case had been instituted before the passing of that Act. I shall therefore now proceed to call your attention to some of the provisions of that enactment. Section 1 repeals section 7 of Act IX of 1847.[2] Section 2 declares that when any island shall under the provisions of clause 3, section 4 of Regulation XI of 1825, be at the disposal of Government, all lands gained by gradual accession to such island, shall be considered an increment thereto and shall be equally at the disposal of Government.[3] Section 3 is substituted for section 7 of Act IX of 1847, and it provides that whenever it shall appear to the local revenue authorities that an island has been thrown up in a large and navigable river liable to be taken possession of by Government under clause 3, section 4 of Regulation XI of 1825 of the Bengal Code, the local revenue authorities shall take immediate possession of the same for Government, and shall settle and assess the land, &c. This section therefore makes the assumption of possession—or 'resumption,' as it is sometimes called,—of an island by the revenue authorities independent of the inspection, and consequently irrespective of the previous existence, of any revenue survey map made under section 3 of Act IX of 1847, such as was required by section 7 of Act IX of 1847. Section 4 enacts that any island of which possession may have been taken by the local revenue authorities on behalf of the Government under section 3 of this Act, shall not be deemed to have become an accession to the property of any person by reason of such channel becoming fordable after possession of such island shall have been so taken.

The Act does not expressly provide for the case where an island is thrown up, surrounded on all sides by unfordable water, which afterwards becomes fordable from the adjacent bank, but before such island has been taken possession of by Government. There can be no doubt, that it would still be governed by the Privy Council judgment to which I have just referred.

Fordable channel, what, according to the Alluvion Bills—The Alluvion Bill of 1879 as well as that of 1881, after defining, by an

[1] 14 Suth. W. R. (F. B.) 25. [2] *Supra*, 201.

[3] This was the law even before the passing of the Act. *Kally Nath Roy Chowdhry* v. *J. Lawrie*, 3 Suth. W. R. (C. R.) 122.

interpretation-clause, an 'island' as 'land surrounded by water and capable of being employed for cultivation, pasture or other useful purpose,' and pointing out, as I have already stated, what formations are included in such definition and what are not, goes on to lay down in the same clause that "a channel is said to be fordable when it does not exceed five feet in depth in the dry season next after the formation referred to and throughout the twenty-four hours."

The Bills then provide that when an island is formed in a river, the sea, or a lake and is separated from each bank or shore by a channel not fordable at any point, the Government is entitled to such island; but if it is separated from the bank or banks by a fordable channel or channels, the owner of such bank or banks is entitled to it. Now it may be observed that, although there are some islands which at their first formation are covered with fertilizing silts, which render the soil culturable by hand-sowing, yet in the large majority of cases, these islands at their first formation are mere tracts of sand (more or less extensive), scarcely fit for cultivation, pasture or other useful purpose, and it is not until after the lapse of a year or two that they grow fit for such purposes. The effect of the foregoing definition of an island, therefore, is that, the fordability or otherwise of the channel separating an island from the mainland is to be determined, and the competing claims of Government and of private individuals to the proprietorship of such island are to be adjudged, not by a reference to the state of things existing at the time when such island is first thrown up, but to those happening next after the period when the island becomes fit to be employed for cultivation, pasture or other useful purpose. Until an island becomes fit for any of these purposes, it continues by reason of this definition to be a part of the 'public domain,' incapable of being lawfully possessed by any private person, but liable, nevertheless, to be taken possession of meanwhile by Government, (for possession may be taken of it as soon as it is formed), as trustee for him who may thereafter acquire ownership in it, whether he be a private individual or the Government itself.

If Government lays claim to an island on the ground that it is fordable from a riparian estate belonging to itself, it is bound to show, like any other private individual,[1] that the intervening channel is fordable at any season of the year, and was fordable when the island was thrown up.

[1] *Mussamat Tahira* v. *The Government*, 6 Suth. W. R. (C. R.) 123; on review, 7 Suth. W. R. (C. R.) 513.