ON PETITION FOR REHEARING.

December 13, 1889.

BREWER, J. This case was submitted to me last winter on demurrer to the bill. On examination of the questions, it seemed to me that the demurrer was well taken, and I accordingly prepared an opinion sustaining, it. An application for a rehearing was filed, and the case is before me now on such application. For the facts of the case, I refer to the former opinion.

The first question is whether the doctrine of accretion applies. In my former opinion, I assumed that it did but that assumption is strongly, challenged by counsel for defendant. While the allegation in the bill is of an imperceptible increase, one of the characteristics and tests of accretions, yet counsel urge that I am bound to take judicial notice of the character of the Missouri river, and the soil through which it flows, and of the rapid changes in the banks which are constantly going on, and also that the extent of the total increase, as disclosed by the bill, is so great as to forbid the idea of that necessary imperceptible increase. I cannot assent to this. While it is true the increase is great, many acres having been added, yet the time during which this increase was made was nearly 20 years, and, obviously, during that time an increase might be going on, imperceptible from day to day and from week to week, which during the lapse of these many years would result in the addition of all the land, as alleged. Hence, notwithstanding what is known of the character of the river, and the soil through which it flows, no conclusions flowing therefrom can overthrow the plain averments of the bill.

Passing now to the question which I ruled in favor of the defendant, I am constrained to believe that I erred therein. It was held that a deed to lot 4 conveyed lot 4 only, as it existed at the time of the survey, and that all accretions remained the property of the prior owner, unless expressly named in the deed. The ruling was based principally upon the case of *Jones* v. *Johnston,* 18 How. 150, and singularly it is that case which, after re argument and re-examination, leads me to change my opinion. Section 2396 of the Revised Statutes provides how the boundaries and contents of the several sections, half sections, and quarter sections of the public lands may be ascertained:

"Sec. 2396. The boundaries and contents of the several sections, half sections, and quarter sections of the public lands shall be ascertained in conformity with the following principles: *First.* All the corners marked in the surveys returned by the surveyor general shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate; and the corners of half and quarter sections not marked on the surveys shall be placed as nearly as possible equidistant from those two corners which stand on the same line. *Second.* The boundary lines actually run and marked in the surveys returned by the surveyor general shall be established as the proper boundary lines of the sections or subdivisions for which they were intended, and the length

of such lines, as returned, shall be held and considered as the true length thereof. And the boundary lines which have not been actually run and marked shall be ascertained by running straight

lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water-course, Indian boundary line, or other external boundary of such fractional township. Each section or subdivision of section, the contents whereof have been returned by the surveyor general, shall be held and considered as containing the exact quantity expressed in such return; and the half sections and quarter sections, the contents whereof shall not have been thus returned, shall be held and considered as containing the one-half or the one-fourth part, respectively, of the returned contents of the section of which they may make a part."

Obviously, then, in surveying land bordering upon a river the opposite corners of the quarter sections are fixed, and the side lines are extended from these corners, parallel with each other, until they meet the water-course; and that water-course, and not any line that is run along it, becomes the boundary. This was settled by the case of *Railway Co.* v. *Schurmeir,* 7 Wall.,272. Now in the case in 18 How., *supra,* the court held that land outside of fixed lines, boundaries of a tract, could not be appurtenant to it, quoting Lord Coke to the effect that a thing corporeal cannot properly be appurtenant to a thing corporeal. The lots in that case, as shown by the plat, were bounded on the north by North Water street, and were included within lines dropped from fixed corners on that street, at right angles with the same, and extended until they intersected the lake shore. Now, it was with reference to accretions formed at these side lines that the court used the language referred to. The said lines, being definite and fixed, run at right angles to North Water street, were and continued to be the boundaries of the lots named, no matter what accretions formed outside those lines. And in further illustration of this was the language used which I quoted in the former opinion. But, while this was laid down as the rule for accretions formed outside of the fixed side lines, a different rule was stated in reference to land formed by accretions at the end of the lot, where the water-front was the boundary. It affirmed that where the water-line was the boundary it remained the boundary, no matter where that line, might be. Thus this language is used:

"Now, in order to determine what land was conveyed to the plaintiff by his deed of 22d October, 1885, all that was necessary was to locate the lot upon the ground in conformity to the description at that date. The calls in the deed, having reference to the plat, furnished the necessary data for the location. There was the fixed line north, on the ground; the lake, a natural object, south; and the lot in closed between two lines extending at right angles from the corners on Water street to the lake. If the call for the southern boundary, instead of being a lake, which is a shifting line, had been a permanent object, such as a street or wall, there could not be two opinions as to the location. And yet the Water-line,

though it may gradually and imperceptibly change, is just as fixed a boundary, in the eye of the law, as the former. I speak not now of sudden and considerable changes, which are governed by different principles."

And again:

"But the true answer to the position assumed, and which governed the trial below, is that the water boundary on the lake is to be deemed the true southern boundary of the lot at the date of the conveyance; as much so as North Water street was its northern boundary. And the plaintiff is carried by his deed to it, not because of the alluvial deposit, if any, between the water-line at the time of the survey and plat and the line at the date of the deed having passed as appurtenant to the lot, but because one of the calls given in the deed requires that the side lines should be thus extended."

In other words, the supreme court seems to have laid down this proposition, that where a water-line is the boundary of a named lot that line remains the boundary, no matter how it shifts, and a deed describing the lot by number or name conveys the land up to that shifting line, exactly as it does up to the fixed side line. Supporting this doctrine are the cases of *Lamb* v. *Rickets,* 11 Ohio, 311; *Giraud's Lessee* v. *Hughes,* 1 Grill & J, 249; *Kraut* v. *Crawford,* 18 Iowa, 549; *Glover* v. *Shields,* 32 Barb. 374. And, independent of authority, any other rule would be attended with great, if not insurmountable, practical difficulties. Supposing a chain of title to this very lot, (lot 4) in which, during a succession of years, there appears every two or three weeks a conveyance. The boundary on the river is gradually extending, but extending so slowly that during the time of possession of any grantor the increase would be imperceptible. How, then, can the portion thus reserved be distinguished from the portion conveyed? It is true that between the time of possession of the patentee and the last grantee the change becomes evident; but is there any reason why all this increase should belong to the patentee, and not be distributed among the various holders in the chain of title? And how can it be distributed? This practical difficulty in the application of the rule announced in the former opinion has led to a careful re-examination of the question in the light of the authorities, and especially of the case in 18 How., and I am compelled to hold that there was error in the former opinion. The true rule is that, so long as the doctrine of accretion applies, the water-line, if named as the boundary, continues the boundary, no matter how much it may Shift, and the deed of the lot carries all to such line. The petition for a rehearing must be sustained, and the demurrer to the bill will be overruled.