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ABSTRACT OF THE PROCEEDINGS

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ABSTRACT OF THE PROCEEDINGS

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ASSEMBLED FOR THE PURPOSE OF MAKING

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WITH INDEX.

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Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vic., cap. 67.

The Council met at Government House on Wednesday, the 2nd October, 1878.

PRESENT:

His Excellency the Viceroy and Governor General of India, G.M.S.I., *presiding.*
His Honour the Lieutenant-Governor of the Panjab, C.S.I.
His Excellency the Commander-in-Chief, G.C.B.
The Hon'ble Sir A. J. Arbuthnot, K.C.S.I.
Colonel the Hon'ble Sir Andrew Clarke, R.E., K.C.M.G., C.B.
The Hon'ble Whitley Stokes, C.S.I.
The Hon'ble A. R. Thompson, C.S.I.
Lieutenant-General the Hon'ble R. Strachey, R.E., C.S.I., F.R.S.
Lieutenant-General the Hon'ble Sir S. J. Browne, K.C.S.I., C.B., V.C.
The Hon'ble B. W. Colvin.
The Hon'ble T. H. Thornton, D.C.L., C.S.I.
The Hon'ble F. R. Cockerell.

ALLUVION BILL.

The Hon'ble MR. STOKES introduced the Bill to define and amend the law relating to alluvion, islands and abandoned river-beds, and moved that it be referred to a Select Committee composed of the Hon'ble Sir Andrew Clarke and the Hon'ble Messrs. Thompson, Colvin, Thornton, Cockerell, Evans and himself. He said that, about a month ago, when he obtained leave to introduce this short, but important, Bill, he had described its objects and mentioned its principal provisions. Since then, the Bill had been circulated to Hon'ble Members, and he proposed now to explain briefly a few of the details of the measure which might, perhaps, be thought to require justification.

First of all, the definition of an alluvial island, or, as it was called in Bengal, a *char*, was made to include land arising in a river or lake, submerged in the wet season and visible only in the dry. At first sight this, so far at least as regarded islands formed in public navigable rivers, seemed at variance with a ruling of the Calcutta High Court (in the case of *Maharani Narayan Kumari* v. *the Nawab Nazim*, 4 Suth. W. R. 41), which was thus given by

Mr. Markby—whose recent loss to India was, indeed, a gain to England—in his Lectures on Indian Law, page 63 :

"As to when a *char* or island can be said to have been formed, it has been considered that an adjoining" [an obvious misprint for "arising in"] "a public navigable river cannot be considered as an accession to the adjoining estate, which is regularly submerged in the wet season and is visible only in the dry."

MR. STOKES had carefully considered that decision and, although the report of the case was extremely imperfect, he thought that what the judges (Steer and Campbell JJ.) really decided, or meant to decide, was that an alluvial deposit, which had not risen high enough to become cultivable in the dry season, remained part of the river-bed and was not a *char* within the meaning of Bengal Regulation XI of 1825; but that, if the deposit had risen to that height, the fact of its being submerged in the rains would not prevent its being a *char*. Alhough this was perhaps a piece of judicial legislation (for, as he read it, the Regulation applied to islands which were not, as well as to those which were, cultivable), it seemed to him, if he might say so, a reasonable ruling and in accordance not only with the decision of a great American judge, but also with the facts and requirements of such cases.

For instance, Sir Ashley Eden, after expressing his opinion that the mere fact of an island being submerged in the wet season should not prevent its being an island for the purposes of the Act, said : "There are many islands yielding crops, and therefore of value to the possessor, which are for years only visible during the dry season." Half the *chars* in the Brahmaputra, which were valuable enough and a source of considerable revenue, became submerged in such floods as those of this season, but they did not on that account cease to be islands. This was the opinion of the Chief Commissioner of Assam. To the same effect wrote the Lieutenant-Governor of the North-Western Provinces, where there were many islands which, though submerged in the rains, were ploughed up early in the cold weather, and yielded a harvest in the spring. So in the Madras Presidency the lankas in the Godavari and Kistna were, MR. STOKES believed, nearly always covered by high floods, and yet were both extensive and valuable during the greater part of the year. Whether for the purposes of the Act the term "island" should not be restricted to cultivable land was a point he would submit to the consideration of the Committee, to which he hoped the Bill would be referred.

The definition of "island" went on to exclude land in tidal rivers and the sea, submerged by the flow of ordinary tides. This was in accordance both with judicial decision (14 W. R. 352) and the opinions of the Local Governments. Sir Ashley Eden, for instance, said that "land which is only visible

for six hours at a time need hardly be treated as an island for the purposes of this Act. It might, however, be well to declare that no right of property in such lands vests in any other than the Crown (6 Bengal 347-8)." The Bill, section 10, might easily be enlarged so as to make that declaration, if the Committee thought it desirable: it certainly was not necessary.

The definition of "thread of the stream," with reference to which rights of riparian owners to *chars* were to be determined, had caused him much thought and trouble. One thing seemed certain, that the Indian rivers, and even different parts of the same river, were so various in their natures—some with permanent banks, others with one or both banks constantly shifting, others with one or more streams, each of which was fairly entitled to be called the main stream, others magnificent in the rains, but in the dry season dwindling down to thin streaks of shallow water—that no single definition would answer. He had therefore ventured on what was, so far as he knew, a novelty in drafting, and given three definitions of this expression:—

(*a*) the middle line of the main stream during the dry season;

(*b*) the middle line between what were the shores on each side when the water was at its average height;

(*c*) the middle line of the particular channel in which the island referred to arose.

The first definition was said to be appropriate to all the Panjab rivers, and was, therefore, recommended by the Panjab Government. It seemed to suit all the rivers in the Bombay Presidency, large rivers like the Ganges and the Ghaghra in the North-Western Provinces, and rivers in the Berars that ran throughout the year. It was also recommended by the Chief Commissioner of Assam.

The second was the definition adopted in Europe and America, where the river-banks were, as a rule, well-defined and permanent. It would suit such rivers in India as the Lower Jumna, the Sarju and the Gomati, so far at least as the Ghazipur district was concerned. This definition would also apparently apply to most of the rivers of the Madras Presidency. At least the local Board of Revenue thought that "the centre of the stream in ordinary floods will be a better and fairer guide for determining the rights of landowners to islands forming in a river."

The third definition was suggested by Sir Ashley Eden.

"The question," he said, "is one of extreme difficulty, looking to the character of the rivers of Lower Bengal. But on the whole the Lieutenant-Governor is disposed to think that it would be best to take the centre of the stream as ascertained by survey in

each case of doubt, the stream being understood to mean the particular channel in which the island formed and the measurements being taken from the nearest permanent land on either side, whether itself island or mainland."

The Local Governments were empowered to declare by notification in the Gazette which of those three definitions should be deemed to be in force with regard to any river or any part of any river; in the absence of such declaration the first would apply. The Local Governments might also declare what should be deemed, for the purposes of the Act, in the case of each river, the " main stream " and the " dry season."

So much for the definitions. As to the operative part of the Bill, provision was made for alluvial land formed on the shores of lakes, as to which the present Regulation was strangely silent. The Bill in this respect embodied the local custom, at all events, in the case of the great Suraha Tal in the Balliya tahsil, North-West Provinces, which had, as he was informed by the Collector of Gazipur, diminished by half its area since the revenue survey in 1837. So in America, where a navigable lake receded gradually and insensibly, it had been held that the derelict land belonged to the adjacent riparian owners.

He had drawn section 6 of the Bill so as, he hoped, to make it clear that when the channel between the bank or shore and a newly-formed island was fordable *at any point*, it should become the property of the owners of the bank or shore in proportion to their frontage, whether the actual channel opposite the frontage of any particular owner were fordable or not. This, no doubt, was opposed to the doctrine of what was called " the nucleus of accretion " as laid down by the High Court at Fort William in *Ghulam Ali Chaudhri* v. *Gopal Lal Thakur*, 9 W. R. 401; but it seemed the fairest way of treating the matter. The owner to whose estate a large *char* became first attached had, as Sir Ashley Eden observed, no equitable right merely on that account to extend his estate along the face of his neighbours' lands; the effect of such extension often being, when the channel on their frontage silted up, to cut them off from the river altogether. MR. STOKES was sorry to deviate from any ruling of the High Court, but it seemed to him that Sir Ashley Eden's reasoning was unanswerable.

To the section declaring that riparian owners were entitled to an alluvial island in proportion to the frontage which they respectively had opposite the island, he had lately added an explanation of the word " opposite." He confessed he had thought that " opposite " was as clear and simple a word as existed in the English language. But it seemed he was wrong. The Madras Board of Revenue observed that the word in question " is not defined," and asserted that " it would be impossible to settle conflicting claims without a

more precise expression of the intention." One of our ablest English Judges (Mr. Justice Brett) had recently declared that it was not right for judges to profess not to know phrases in the English language which were well known in English society. But this doctrine was constantly disregarded in India. In the very last number of the Indian Law Reports he found the learned Chief Justice, who presided with such dignity over the High Court at Allahabad, asking the meaning of the expression " where a decree is appealed against," and calling it not only " obscure and doubtful," but " rather unfortunate and ambiguous." The sad necessity of precluding, if possible, such criticism would account for much in our Indian laws that would otherwise be rightly regarded as superfluous and childish.

Lastly, he had to remark that the Bill contained no provisions as to the rights of mortgagees and lessees to alluvial accretions to land comprised in their mortgages and leases. This omission was not an oversight, for alluvian was only one form of accession to immoveable property, and therefore he had thought, and thought still, that this matter might more fitly be provided for by the chapters of the Transfer of Property Bill, which dealt respectively with mortgages and leases of land. Those provisions might run as follows. First as to mortgages :—

" If, after the date of the mortgage, any accession is made to the mortgaged property, the mortgagor upon redemption shall, in the absence of a contract to the contrary, and subject to the law relating to alluvion for the time being in force, be entitled to such accession.

" If, after the date of the mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession."

Then as to leases :—

" If, during the term any accession is made to the property leased, such accession shall, in the absence of a contract to the contrary, and subject to the law relating to alluvion for the time being in force, be deemed to be comprised in the lease."

In conclusion, he wished to express his grateful acknowledgments of the counsel received from his honourable friend Mr. Thornton during the preparation of this difficult Bill. Mr. Thornton possessed a practical acquaintance with the fluvial phenomena of the Panjab, and, in the absence of such an adviser, a mere lawyer like himself would never have been justified in attempting to draft so peculiar a measure.

The Hon'ble MR. THORNTON said that there was probably no portion of the territories under His Excellency's government which suffered so constantly

and so extensively from the caprices of its rivers as the province of the Panjab. Having been for some years connected with the administration of that province, and having had some practical experience in dealing with cases of alluvion and diluvion, he deemed it right to trouble the Council with a few remarks on the subject of the Bill just introduced. And the particular point he proposed to take up on the present occasion was the consideration of the two following questions,—*first*, whether the circumstances of the Panjab and the state of the river-law of that province were such as to call for legislation; and, *secondly*, assuming that legislation was called for, whether the general principles of this Bill were sound and suited to its requirements. He felt especially called upon to consider these two questions, because he found, from perusal of the official correspondence on the subject, that an attempt had been made on the part of one or two conscientious officers in the Panjab to denounce the present Bill as a mischievous and unnecessary piece of legislation.

That the subject of the present Bill was, in the Panjab, an exceedingly important one, would be evident to anyone who glanced at the map and was at all acquainted with the character of the country. Its plains were traversed by seven large rivers. Each of these rivers, as it emerged from the sub-Himalayan ranges, flowed no longer in a well-defined and permanent channel, but wandered, almost at will, through broad alluvial tracts; while the stream, which in the cold season shrinks into insignificance, winding, in one or more small channels, through an expanse of sand, becomes in the hot weather and rains a wide, rapid and resistless flood, cutting into its banks in most eccentric fashion, and sometimes altering its course for miles. It followed that on the banks of all the Panjab rivers important changes were annually occurring. Whole villages would be swept away on one side the stream, while long stretches of alluvial soil would be thrown up on the other, or large islands would be formed in the bed of the river. These newly-formed lands were often very fertile, and the islands, though liable to be submerged in the flood season, were often valuable as producing excellent winter crops, and were not unfrequently the objects of keen contention between rival cultivators. Besides the great rivers there was a multitude of smaller streams and nullahs —such as the *Markanda*, the *Gaggar*, the *Chakki*, the *Bhimbar*, the *Sohan*, the *Harroh*, the *Kuram*, the *Gumal*, and others, flowing from the Himalayan or Sulimani ranges—all of which were subject to great increase of volume from the melting of the snows or accumulation of the rainfall, the result being that they too caused annually considerable alteration of area in the villages adjacent to them. But, perhaps, a better idea would be formed of the situation and its effects when he mentioned that the aggregate length of non-permanent river-bank liable to erosion by the Panjab rivers was believed to

exceed 4,000 miles, and that the aggregate amount of culturable land thrown up on the banks or in the beds of the same rivers for the four years ending in 1876-77 was estimated to amount to 480,000 acres; even this statement, however, gave a very inadequate idea of the extent of alluvial formations resulting from the annual floods, because, under the rules in force for assessing alluvial lands, no notice was taken by the Revenue authorities of an increment unless it exceeded 10 per cent. of the area of the estate affected.

It would be admitted, he thought, to be a matter of extreme importance, that the law regulating the ownership of these extensive tracts of newly-formed culturable land, or of lands cut-off or abandoned by changes in the course of rivers—whether that law was based on custom, or was the result of statutory enactment—should be clear and complete and suited to the circumstances of the time and the locality. Let us see, then, whether the present state of the law regulating these matters in the Panjab answers to the above description.

The laws which governed cases of alluvion in the Panjab were, *first*, certain well-established and recognised customs prevailing in the villages subject to river-action; and, *secondly*, in cases not governed by custom, the Bengal Regulation XI of 1825, and the often conflicting decisions of High Courts of Judicature with which that Regulation was encrusted.

With regard to the customary law, the customs which prevailed, so far as they had been ascertained, were three in number. There was, *first*, the "deep-stream rule"—a custom known by various local names, *e.g.*, *had sekandari*, *kishtibanna*, or the euphonic appellation *kach-mach*. Where this usage prevailed in its extreme form lands which, from a change in the course of the deep-stream, became transferred from one side of the stream to the other changed owners—even though the land so transferred was intact or identifiable—and islands or alluvial lands belonged to the owner of the nearest bank on the same side of the deep-stream, without reference to former ownership of site. The *second* custom was a modification of the first, and was perhaps the most common. Under its provisions the deep-stream was *ordinarily* regarded as the boundary of the village, but an exception was made to the general rule of transfer of ownership, when the land transferred was identifiable—that is, recognizable by physical features or visible land-marks. The *third* custom was known as *warpar*. Under its operation the boundaries of opposite riverain estates were assumed to be permanently fixed in the river-bed,—so that, whatever changes might take place in the course of the deep-stream, the ownership of the soil remained the same.

With regard to the local extent of the abovementioned customs, the first two prevailed, he believed, more or less on the banks of all the Panjab rivers except the Indus. The third was, he believed, in force in all villages on the banks of the Indus, and was to be found also, though less frequently than the two forms of the deep-stream rule, on the banks of the other rivers.

These customs were not only practically in force among the people, their existence was, under certain circumstances, legally presumed. For, under section 16 of the Panjab Land-Revenue Act, 1871, a river-custom duly entered in the settlement record of a village was presumed to be in force, unless the contrary was proved.

Of the three customs, the first—that is the deep-stream rule, pure and simple—was obviously most inequitable. It did not appear to be a custom of remote antiquity. It would seem to have grown up during that period of anarchy which intervened between the decay of the Moghal Empire and the advent of British rule. During that period the dominant principle of ownership was—"let him keep who can," and under such circumstances land which became separated from its proprietor by the intervention of the deep-stream was as good as lost to him. The deep-stream rule was thus the recognition of an unpleasant fact rather than the prescription of a convenient arrangement. The custom is denounced by one of the Panjab Commissioners as "monstrously unjust and irrational," and its evil effects are pointed out by Mr. J. B. Lyall, Commissioner of Settlements in the Panjab, in the following terms:—

"It is generally admitted that the deep-stream rule is a very bad one. I have myself seen how very unfairly the pure form of it works in the Gurdáspur district: it gives to one village for a few years more land than they can make use of, and leaves the zamíndárs of opposite villages sitting idle on the bank waiting for the river to turn. Government loses revenue, and the value of property in river villages is depreciated."

But not only was this custom inequitable on the face of it; it was, he believed, heartily disliked, and would be gladly abandoned by the great majority of those affected by it, in fact by all except the few who happened, for the time being, to be gainers by its operation. In the present state of the law, however, to effect a change in the custom would be difficult, if not impossible, because, by the operation of section 16 of the Panjab Land-Revenue Act above quoted, the custom was, practically, stereotyped, as its abandonment might be successfully resisted by every individual interested in its preservation. A very interesting account of the vain efforts of a riparian community to shake itself free of the deep-stream rule was given by Colonel McMahon. It was a case which occurred a few years ago in the Hoshiarpur district. In that district was a river tract comprising 158 villages. In those villages the deep-

stream rule was in force, and was duly recorded in the village-papers. But the bulk of the inhabitants were anxious to abandon the deep-stream custom and adopt a more equitable system of dealing with alluvial lands—similar in principle to the rules contained in the present Bill. Accordingly the village notables assembled and a document was drawn up declaring that the deep-stream custom should no longer be in force. This document was signed by the representatives of all the 158 villages, except three. It happened shortly after that an alluvion case occurred in which one of the three "opposition" villages was concerned. The Court of first instance treated the deep-stream rule as abandoned and decided accordingly. But the case was appealed to the Chief Court. The Chief Court was obliged to reverse the decision, holding (very properly) that the declaration of the 155 villages was not binding on the minority; but when recording a decision in their favour, the Court remarked as follows:—

"We regret that the custom of *kishtibanna* has not been lawfully abrogated, as we are fully sensible of its evil effects; but it is the duty of the Court to apply the law as it stands, and not to usurp the functions of the Legislature."

The second custom—that of the modified deep-stream rule—was more equitable in theory, but in practice was almost as unsatisfactory as the first. Mr. Lyall said of it:—

"The question whether a plot of land is recognizable or not, that is whether it is an old bank or island rather damaged by flood water, or a newly-formed bank or island, is often a fine one, and not easy to decide; yet the whole existence of an estate into which the river is cutting may depend upon its stopping the advance of the opposite estate by proving a title to some such plot in the river. The most unscrupulous claims and counter-claims are advanced every year and are supported by the rankest perjury. Petty officials are bribed and the facts are so obscured that a long trial often ends in a wrong decision, or a right one is set aside in appeal."

The third custom—that of fixed boundaries unaffected by changes in the position of the deep-stream—was generally admitted to be the most equitable, and the best in every way, provided the boundaries in question were properly surveyed and mapped. It was, in fact, almost identical in principle with the provisions of the Bill.

Now, assuming for argument's sake that all cases of river-law coming before the Courts of the Panjab were governed by the above-mentioned customs, he would still be decidedly of opinion that legislation was called for. And why? To enable riparian communities who wished to abandon the deep-stream custom and adopt a more equitable rule to do so.

But, in point of fact, custom did not regulate all such cases coming before the Courts. He did not wish to trouble the Council by minute references to judicial decisions; but cases could be quoted in which the parties admitted

that there was no established custom in force in their lacality. Then, again, there were cases in which it was proved that the deep-stream custom—though it had prevailed formerly—had fallen into desuetude. In the decision of all such cases, that is in cases coming from localities where no custom had been established, or in which formerly-existing custom had fallen into desuetude, the Courts were bound by the Statute-law, that is by Regulation XI of 1825. But how obscure and incomplete that enactment was had been amply shown by the hon'ble the Mover. It would be sufficient here to mention that the exact meaning of one important word in section 4 of the Regulation—the word " identified "—was finally settled by the Privy Council only three years ago.

But it had been urged on him by the opponents of legislation that it would be better instead of tinkering Regulation XI of 1825 or replacing it by a new enactment derived more or less from Western Codes to let its obscurities be cleared up gradually by judicial interpretation, and its defects be remedied by decisions of Courts of law based upon principles of " justice, equity and good conscience." Now, with regard to the first of these recommendations, he need only remind the Council of the fact that the judicial settlement of the meaning of *one* doubtful phrase in this Regulation had taken precisely half a century, and that at the same rate of progression the authoritative interpretation of this important enactment would not be completely ascertained until the year A.D. 2150, or thereabouts. As for the other suggestion—namely, that our river-laws should be evolved from the moral consciousness of judicial officers—he need only refer to the correspondence which had taken place in reference to the present Bill, from which it would be evident that the ideas of the most experienced and conscientious officers as to what was equitable in alluvion cases were almost as capricious as the action of a Panjab river. For instance, with reference to section 5 of the Bill, one experienced officer expressed the opinion that for the Government to assert a right to an island in the bed of a Panjab river would be a proceeding at once unjust and inexpedient. Another experienced officer regards this section as a most excellent law—one that was much required and entirely in accordance with the practice of previous Governments. One Commissioner, as he had already mentioned, denounced the deep-stream rule as a " monstrous and irrational " custom, and his opinion was shared by many others; but another Commissioner, he found, spoke of the rule as " safe, just and popular, and better than any that would be substituted for it."

Having regard then to all the circumstances of the case,—the unsatisfactory condition and transitional character of the customary law of the province; the obscurity and incompleteness of the Statute-law; the conflicting decisions of the High Courts, and the difference of opinion amongst experi-

enced officers as to what was equitable—he had arrived at the opinion that legislation in the matter of alluvion and diluvion was greatly needed in the Punjab.

He would now proceed to consider very briefly the second question—namely, whether, on the assumption that legislation was required, the general principles of the proposed enactment were applicable to the Panjab?

To that question he was prepared, unhesitatingly, to give a reply in the affirmative and for the following reasons: In the first place, he found that by its provisions the customs of the Punjab were duly recognized and presumed, under certain conditions, to be in force. In the second place, the existing Statute-law, which was greatly in need of revision and improvement, had been materially amended and improved. In the third place, the rules for regulating the ownership of alluvial increments appeared to be not only in accordance with general principles of equity, but in accordance with that one amongst the Panjab customs which was generally admitted to be the best.

While, however, he welcomed the legislation now proposed, and believed it to be generally suitable, he ventured with deference to express the opinion that it was defective in what appeared to him a very important particular,—in that it did not make any suitable provision for getting rid of the difficulty to which he had adverted. It made no provision to enable riparian communities suffering under the curse of the deep-stream rule to abandon that rule and adopt the provisions of this Bill. It seemed to him that this defect would be remedied if a provision were inserted enabling the Local Government—when satisfied that there was a general wish among the riparian communities of a locality to abandon the deep-stream rule—to give effect to their wishes,—that is to say, by making a scientific survey of the river-bed, effecting an equitable adjustment of the rights of riparian owners *inter se*, and of State rights, and placing the results on record—thus changing the shifting and unsatisfactory boundary of the deep-stream into a permanent and satisfactory one. That this plan was a feasible one he was in a position to assert with some confidence, because it had been actually carried out in respect to the riparian villages of the river Indus, and, he believed, also in some localities on the river Ravi.

He would not trouble the Council at the present time by going into all the provisions of the Bill, as such details could be more conveniently considered in Committee; but he would take leave to notice the provisions of one section, namely, section 6, clause (*c*), which provided that—"When an island is formed in a river, and is partly on one side and partly on the other of what was the thread of the stream immediately before the formation, the island is supposed

to be divided by such thread." This clause prescribed a rule of decision which he believed would be found, so far as the Panjab rivers were concerned, to be absolutely impracticable.

The Hon'ble MR. STOKES had only to make a few remarks with reference to what had fallen from his hon'ble friend Mr. Thornton. First, with regard to making provision for a Government survey of river-beds and the marking out of what should be deemed the thread of the stream. The Revenue and Agricultural Department had put the question to all Local Governments as to whether those surveys should be carried out, and he believed that most of these Governments were of opinion that the expense would be so great as to render such surveys practically impossible, and that, even if they were made, they would be of little or no use. To the same effect was the opinion of Mr. Justice Innes of the Madras High Court, to whom the Legislative Department was under so many obligations. That learned Judge said :—

"The expensive process of causing surveys to be made of river-beds and marking out, by pillars, bearings or otherwise, what should be deemed to be the thread of the stream would, I think, be throwing a great burden upon the public, not in accordance with the Indian system of making the suitor pay for justice. It would also, I conceive, be infinitely more expensive and not in any respect more effectual than making measurements of the river-beds as occasion requires in spots where disputes arise."

The Calcutta Board of Revenue said that—

"The changes in rivers in some parts of the country are so considerable and frequent that the Board do not think surveys and pillars would be of any use. A pillar put up to mark the positon of the thread of the stream, as defined in the letter from the Government of India, might be found to be a long way from it in the following year."

The Lieutenant-Governor agreed with the Board that pillars would be of little use in Lower Bengal. To the same effect was the opinion of the Panjab Government.

With regard to clause (*c*) of section 6 of the Bill, which provided that—

"Where the island is formed in a river and is partly on one side and partly on the other of what was the thread of the stream immediately before the information, the island is supposed to be divided by such thread, and the owners of the banks are severally entitled to the division opposite their banks in proportion to the frontage which they respectively have on the river opposite the island,—"

in the first place he must point out that the case for which this clause provided seldom occurred, for this obvious reason, that the thread of the stream was the part of the stream which ran with the greatest rapidity; consequently, alluvial deposits as a rule took place only on one side of the thread, where the current was retarded by the friction of the banks. The provision, however, had been

inserted in order to make the Bill complete. But he had further to observe that the clause in question followed the rule laid down by one of the greatest authorities on alluvion law—Chief Justice Shaw of Massachusetts—and he would read to the Council what that learned Judge had said on the matter. Referring to a case of *Ingraham* v. *Wilson*, the Chief Justice observed :—

"It recognizes the rule of the Common Law that the property in the soil of rivers not navigable, subject to public easements, belongs to those whose lands border upon them; and from this right of property in the soil in the bed of the river the Court deduce the right of property in an island which gradually rises above the surface and becomes valuable for use as land. 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" (*Trustees of Hopkins Academy* v. *Dickinson*, cited in Angell on the Law of Watercourses, 6th edition, p. 49).

Chancellor Kent had also laid down the same law in his *Commentaries*, 11th edition, vol. III, page 542, where he says that islands situated so as to cover the middle of a river " would belong in severalty to the owners on each side, according to the original dividing line or *filum aquæ* continued on from the place where the waters begin to divide." MR. STOKES might here remark that American lawyers were considered high authorities on this subject, the Courts of the United States having had to consider questions relating to the law of alluvion to a far greater degree than the Courts of other countries.

It might, no doubt, be sometimes difficult to obtain satisfactory evidence as to what was the thread of the stream immediately before the appearance of a *char;* but the Courts would do their best : no other plan was possible; and he inferred from the absence of objection on the part of the Lieutenant-Governor of Bengal and the Chief Commissioner of Assam, that this clause expressed the rule by which they would ascertain the rights of riparian owners in the rare cases to which it had reference. As to the alleged impracticability of applying this rule to the Panjab rivers. MR. STOKES would set-off against the opinion of his hon'ble friend Mr. Thornton that of the Deputy Commissioner of Montgomery (Mr. Macauliffe), who said that the system described in section 8 (now section 6) was " quite correct, and not opposed to the ancient custom of India."

His Honour THE LIEUTENANT-GOVERNOR wished to say a few words in addition to the remarks which had fallen from Mr. Thornton. He differed from him to some extent in thinking that the present was the time to discuss

the respective merits of the different customs which prevailed regarding the disposal of alluvial land on the banks of the Punjab rivers. It was quite true that, theoretically, various opinions might be held; but he believed that the people who were closely affected by the customs in question were the best judges as to whether they desired to have them altered or not, and he should deprecate any authoritative interference in the present enactment with any existing and well-established custom. The chief merit of the Bill, in his opinion, was that it maintained local usages, and also respected the provisions of the Panjab Land-Revenue Act of 1871, under which the record in the papers of a regular settlement of any custom was presumed to be true. As he understood section 10 of the Bill, the customs which had been recorded at settlement in all the districts of the Panjab which were affected by the rivers would be presumed to be true, and no further proof would be required of the persons who alleged that the custom existed than the production of the record prepared at the settlement.

The Hon'ble MR. THORNTON said that he believed his hon'ble friend the Lieutenant-Governor had somewhat misunderstood him. He did not for a moment intend to say that we should by legislation or otherwise interfere with existing custom so long as it was approved by the majority of those affected by it. But when a custom besides being in itself inequitable was repugnant to the views and wishes of almost all of those to whom it applied, then he ventured to submit that we should not stereotype that custom for ever, but make an arrangement by which the general wish of the community concerned might be given effect to.

The Hon'ble MR. STOKES ventured to doubt whether the love of the Natives for their local usages had not been slightly exaggerated, and whether it was altogether expedient to legislate so as practically to petrify all those usages, and thus to prevent the natural modification which they would otherwise have received. The Commissioner of Hissar (Colonel McMahon), in an able paper sent in by the Panjab Government, proposed to omit from the Bill the clause saving usage. Colonel McMahon thought we had gone quite far enough in our laudable desire to give free scope to local customs, and that there was now some fear "lest we should go too much in the other extreme and stereotype customs which are unjust in themselves and which the people, were they consulted, would wish to modify or abrogate." For instance, on the Beas, there was that local custom (called *kishtibanna*), according to which, when the river suddenly changed its course, the proprietary and cultivating rights to all the land transferred from one bank of the deep-stream to the other were, by this accident, transferred from the former proprietors and cultivators to new proprietors and cultivators on the other side of the river,

even though the change in the course did not carry away the surface of the ground or destroy its identity. Nothing could be more unjust, or irrational, or injurious both to the riparian owners and the land-revenue. Nevertheless in the Hoshiarpur case (reported in the *Panjab Record*, No. 56 of 1869), the Chief Court of the Panjab, fettered by our Act XXXIII of 1871, section 16, upheld this usage, though saying, as Mr. Thornton had told us: "We regret that the custom of *kishtibanna* has not been lawfully abrogated, as we are fully sensible of its evil effects."

In the Presidency of Madras, where he had lived for two years, and with the local laws of which he had, as Reporter to the High Court, become tolerably familiar, he could say positively that the Natives would have discarded some of their most peculiar usages had they not been foiled in their attempts to do so by the conservatism of the late Court of Sadr Adalat. In Malabar, for example, where property was held by those indissoluble family unions called *tarawads*, where land acquired by the individual exertions of any member, which he did not dispose of in his lifetime, belonged to the union, there had been constant, but unsuccessful, efforts to change the local usage for the less strictly corporate system of the Mitakshara. In the rest of the Presidency of Madras (excluding South Canara), the Hindus were, speaking roughly, under the law of the Mitakshara, according to which, in the case of ancestral immoveable property, not only a man's sons, but his grandsons and great-grandsons, were co-proprietors with him and had vested interests during his life. But in Lower Bengal, where the Hindus followed the Dayabhaga, a man's sons were not joint owners with him, and he might alienate even ancestral land without their assent. It was obvious that, of the two, the Bengal system was far the more favourable to individual energy, social progress and commercial activity; and when he was in Madras in 1862-64, he had learned on the best authority that the Natives under the Mitakshara were constantly striving but, owing to the higher Courts, striving in vain, to deal with their property as if they were under the Bengal law. So much for the law of Property. In the case of Personal Relations similar phenomena had occurred: for instance, he found from Mr. J. D. Mayne's masterly and interesting book on *Hindu Law and Usage*, page 51, that among the Tottiyars, a caste of Madura, it was still the custom of brothers, uncles, nephews and other relations to hold their wives in common, and their priests compelled them to keep up the custom if they were, as was sometimes the case, unwilling to do so. What with legislatures, Courts and priests, all acting, no doubt, from the most benevolent and conscientious motives, the struggles of the many Indian representatives of the Primeval Man to raise themselves in the scale of civilization were not as successful as might be desired. Sir John Lubbock, Mr. Tylor and

other students of primitive culture would perhaps be gratified by the artificial preservation of interesting specimens of archaic usage; but MR. STOKES hardly thought that this was the function either of the legislatures or the Courts of British India. Colonel McMahon was not alone in questioning the expediency of saving, in all cases, local usage as to alluvion. Thus Sir George Couper informed us that Colonel MacAndrew and the late Judicial Commissioner of Oudh, Mr. Charles Currie, two most experienced officers, would omit the clause intended to have that effect: the former on the ground that it was a mere peg on which to hang lawyers' arguments and was unnecessary; the latter on the ground that the interpretation of local usage caused uncertainty and confusion, and that the proof of it required was so stringent that it was practically impossible to substantiate it. On the whole, MR. STOKES would be inclined to confine the operation of the clause to the Panjab, which was so pre-eminently a *pays de coutumes*, and where the Local Government was still so strongly in favour of maintaining local usage intact.

The Motion was put and agreed to.

The Hon'ble MR. STOKES moved that the Bill be published in the local official Gazettes in English and in such other languages as the Local Governments should think fit.

The Motion was put and agreed to.

CENTRAL PROVINCES EVIDENCE BILL.

The Hon'ble MR. STOKES moved for leave to introduce a Bill to make better provision for recording evidence in the Central Provinces. He said that the new Civil Procedure Code (Act X of 1877) prescribed (section 182) that in appealable cases the evidence of witnesses should be taken down in a narrative form in the language of the Court by or in the presence and under the personal direction of the judge. Act VIII of 1859, the old Civil Procedure Code, had been extended to the Central Provinces by an executive notification with certain exceptions and provisos. One of those was that for so much of the Act as required that the whole of the evidence should be taken down in the language in ordinary use, there should substituted a rule in force in Oudh, to the effect that an intelligible note of the essential points of the evidence of each witness should be taken at the time and in the course of oral examination by the officer who tried the case, in his own language. The old Code being repealed by the present Code, that notification fell with it. The Chief Commissioner had now applied to the Government of India to take the necessary steps towards legalizing the recording of evidence in English or in the vernacular of the Judge, according to the practice which had hitherto prevailed in the Central Provinces under the executive notification. The

condition of the Central Provinces was somewhat peculiar as regarded the languages used in the different local Courts. Hindi, Hindustani, Marathi, Uriya and Telugu—the last a non-Aryan tongue, the rest widely differing from one another—were all in use in different tribunals, and the Native judges of the subordinate Courts were often unable to write fluently the language of the district in which they were employed. The Government of India, in consideration of this and of the fact that the present system had now been in operation in the Central Provinces for about sixteen years and was believed to have worked well, had decided that it was not expedient to compel a change in the procedure hitherto followed in this respect in the Central Provinces, and the present Bill had accordingly been prepared to legalize the existing practice.

The Motion was put and agreed to.

DESTRUCTION OF RECORDS BILL.

The Hon'ble MR. STOKES moved for leave to introduce a Bill to authorize the destruction of useless records in Courts in British India. He said that the object of this Bill (which owed its origin to a difficulty felt in the High Court at Bombay) was to give the various High Courts power to dispose of the masses of useless records, books and papers which, from day to day, were accumulating in those Courts and in the Courts subordinate to them. Legislation was necessary to give this power, as the documents proposed to be destroyed were in some cases private property. The three local legislatures might, no doubt, provide for the Courts within their territories respectively; but as there would still remain certain Provinces for which none of those legislatures could provide, and as it seemed desirable to have one general law applicable to the whole of India, the Government of India had taken the subject into their own hands.

The Motion was put and agreed to.

The Council adjourned to Wednesday, the 16th October, 1878.

D. FITZPATRICK,

Secretary to the Government of India,
Legislative Department

SIMLA;
The 2nd October, 1878.

NOTE.—The meeting which was originally fixed for Thursday, the 26th September, 1878, was adjourned to Wednesday, the 2nd October, 1878.

S. G. P. I.—77 L. D.—6 7 11.