(1868) 03 CAL CK 0003

Calcutta High Court

Case No: None

The Secretary of State		APPELLANT
	Vs	
The Administrator-General of Bengal		RESPONDENT

Date of Decision: March 16, 1868

Judgement

Markby, J.

In this suit the Secretary of State for India in Council prayed to have it declared that the whole estate and effects of one Henry Thompson Dodsworth, deceased, had escheated, on his death, for want of heirs; and that the plaintiff was entitled'' to the same, and that an account might be taken against the defendant, Charles Swinton Hogg, as Administrator-General of the said estate and effects come to his hands; and that he might be decreed to make over to the plaintiff what might be found due, and for such other relief as the case might require. Eight other persons were made defendants in the suit, namely: Oomda Khanum, Sona Bibi, Henry Thompson Dodsworth junior, Mary Dodsworth, Caroline Dodsworth, Ellen Dodsworth, Edward Dodsworth, and Alice ''Dodsworth.

2. The deceased Henry Thompson Dodsworth, in his lifetime was an indigo planter, residing at Azimghur, in the North-Western Provinces. He was at the time of his death possessed of several Indigo Factories and villages, or parts of villages, in the districts of Azimghur and Futtehpore, a bungalow in the cantonment of Allahabad, and various monies, securities, and other moveable property, all of which are now in the possession of the Administrator-General.

3. Henry Thompson Dodsworth, whom I shall hereafter call the deceased, died on the 24th day of March 1863. He was the son of Ralph Dodsworth, by a Mahomedan woman, the defendant Oomda Khanum. Ralph Dodsworth and Oomda Khanum were never married according to the Christian rite, or any Mahomedan usages. The deceased was never married, but for many years prior to Mb death, he cohabited with two women, the defendant Sona Bibi, and Jan Bibi, who predeceased him. Both

these women were originally Hindus, but became Mahomedans upon or after coming to live with the deceased. No marriage ceremony of any kind took place between the deceased and either of these two women. By Sona Bibi, the deceased had three children, the defendants Ellen, Edward, and Alice. By Jan Bibi, he had four children, the defendants Henry Thompson, Mary, Caroline, and Eliza.

4. It is quite certain that neither Ralph Dodsworth nor the deceased ever professed either the Hindu or the Mahomedan religion; and there is no doubt, in my mind, that they did, in a general way, profess the Christian religion, though whether they did so or not, is, in my opinion, unimportant for any question which will have to be decided in this case.

5. The following issues were settled by agreement between the parties:--

1. Who are the heirs, if any, of the deceased, and by what law is their sub-cession determined?

2. Whether the deceased made any and what disposition of his property, or any and what part thereof?

3. Whether if the deceased died without heirs, his estate escheated to the Crown?

6. These issues do not raise in terms, but it appears to me necessary as a preliminary inquiry to investigate the question--what was the legal status of the deceased?

7. I occupy myself very unwillingly in making this enquiry, knowing that so many persons, whose knowledge and experience are far greater than mine have already pursued it without any satisfactory result; and I regret that my time, which could be far more usefully employed, should be consumed in a matter which it is rather the province of the Legislature to settle, and for whom the (sic) would be one of comparative simplicity. If I could hope that the labour I (sic)d lead to, or assist in leading to, a settlement of this important question, there would be less cause of regret, but that I do not anticipate. The origin of the difficulty in ascertaining the legal status of a large number of persons in this country, as well as its only possible solution, is to be found in the history of the relations between the former rulers of it and the British Crown.

8. The district of Azimghur, in which is situate the town of Azimghur, where the deceased was domiciled, and the other districts in which the deceased had property, formed portions of the province of Oudh under the Moghul Empire. Of this province the family of Sujah Dowla became the sovereign, and one of his successors, Seadut Ali, ceded those portions of it in which Azimghur, Allahabad, and Futtehpore are situate, to the East India Company, on the 10th of November 1801, in perpetual sovereignty, in commutation of certain payments due from him, as Nawab, to the Company under previous treaties (2 Aitchison''s Treaties, 122). There can be no doubt that immediately upon this treaty being concluded, this portion of Oudh

became British territory; and the inhabitants of this district became British subjects. The East India Company held the territory and the sovereignty in their own name; but the supreme sovereignty of the British Crown is expressly reserved in the Charter of 1698, and recognized in the most distinct terms by the 53 Geo. III, c. 155, s 95, and numerous other Acts of the British Legislature, as well as by Sir William Scott in the case of the Indian Chief (3 Rob. Adm. Rep., 12).

9. The history of our relations with this district are, therefore, simple enough. But it appears to me impossible to investigate the question now under consideration without also inquiring into the history of the acquisition by the British Grown of the sovereignty of Bengal, Behar, and Orissa. Notwithstanding the enormous difference between the modes in which these respective territories came under our rule, the one by express cession of territory in perpetual sovereignty, and the other by developing into independent sovereignty a subordinate, though important, office granted in perpetuity, there never has been, as far as I can discover, the least shadow of doubt that the same considerations determine the legal status of the inhabitants of Bengal, Behar, and Orissa, and of the inhabitants of the provinces ceded by Saadut Ali. It is, therefore, to the more complicated history of the relations of the Company to the Moghul Empire that we have to direct our enquiry.

10. From the point of view in which I have now to consider the matter, the events which passed the sovereignty of Bengal, Behar; and Orissa, from the hands of the Moghul Emperors to those of the British Crown, may be shortly described thus: In the year 1765, the Moghul Emperor, Shah Alum, conferred upon the East India Company the office of Dewan of these provinces, from generation to generation, for ever and ever (1 Aitchison''s Treaties, 61). The Company became thereby at once (looking to the extent and nature of the duties of this office) subordinate sovereigns of the country under the Moghul Emperor, who still retained, nominally at least, the supreme sovereignty. In the course of a very short time from being sovereigns of the country subordinate to the Moghul Emperor, the East India Company became sovereigns of the country subordinate to the King of England; and with this difference, that whereas the supreme sovereignty of the Moghul Emperor was nominal and dormant, the supreme sovereignty of the King of England was real and active. This transfer of sovereignty was made tacitly, that is to say, there was not, as in the case of the Oudh provinces, a formal cession by one party to the other; nor is there any one act or any one point of time which marks the change. It is, however, not the less clear that as soon as the transfer of the sovereignty was complete, Bengal, Behar, and Orissa became British territories (see the authorities quoted above), and the inhabitants of those countries became subjects of the British Crown.

11. We have on this state of facts, to consider what is the law applicable to these subjects of Her Majesty. I have not succeeded in finding anywhere laid down in express terms, or in any explicit manner, any answer whatsoever to this inquiry But various suggestions have been made, intended more or less completely to satisfy

the enquiry. I have had some difficulty in putting them into a form sufficiently tangible for the purposes of discussion; but I think the following five theories, though they might be differently expressed, include in them all the notions which have been put forward on this subject:--

1. That, except where any other law is expressly or impliedly enacted by the British Government, the law which governs is the Mahomedan Law as nearly as the circumstances of the case will admit; in other words, that the territorial law of this country is a modified form of Mahomedan Law.

2. That, except where any other law is expressly or impliedly enacted by the British Government, the law which governs is the English Law as nearly as the circumstances of the case will admit; in other words, that the territorial law here is a modified form of English Law.

3. That, except where any other law is expressly or impliedly enacted by the British Government, the law which governs is the law of justice, equity, and good conscience.

4. That, except where any other law is expressly or impliedly enacted by the British Government, there is no law except for European British Subjects, who by privilege enjoy the English Law.

5. That, with the exception of such Regulations and Statutes as are territorial, all law in India is personal, and that the law of persons not Hindus or Mahomedans, is to be determined by their national descent, if Christians; and by their religion, if not so.

12. Of these I will first consider the third and fourth; and they are almost identical. If there be no law applicable, then, of necessity, a Judge must be guided by his notions of morality. If the case is to be governed by justice, equity, and good conscience, there is no law. Because I do not suppose that any one would contend that by the word "equity" in this juxtaposition is meant the body of law administered by the English Court of Chancery.

13. For the third theory, I do not think any better argument is capable of being produced than that the Mahomedan Law, as a territorial law, has been revoked, and nothing else substituted in its place. That the Mahomedan Law has been reduced from being a territorial law to being a personal law I shall presently show. But no one would resort to the other branch of this argument, except under the strongest necessity; and I think it will appear that no such necessity exists, but, on the contrary, that when the Mahomedan Law was reduced to a personal law, a territorial law was introduced to supply the deficiency thereby created.

14. In support of the fourth theory, strange to say, express provision of the Legislature is quoted. But putting aside together the utter improbability of any sovereign power making such a provision, or rather declaring its intention to make no provision (for I maintain it is the same thing), for the general government of its

people, I think the enactments referred to quite incapable of supporting the opinion which I am now combating. This opinion, however, if not supported by direct authority, has, at least, obtained some currency; I think it right, therefore, to discuss the provisions of the Legislature in question at some length.

15. These words first make their appearance (as far as I am able to discover) in reference to this country, in a Charter of Charles II, of the year 1683, by which the Company were empowered to establish Courts of Judicature at such places as they might appoint, to consist of one person learned in the civil laws, and two merchants; and to decide according to equity and good conscience, and according to the laws and customs of merchants. It is difficult to assign any precise meaning to such loose phraseology as this, but it is of no importance to our present inquiry, as it has long since been superseded, and was only addressed to the very limited number of persons then living under British protection at the Company''s settlements.

16. I have not been able to find these words in any of the Regulations prior to 1793. They are first used with reference to the general administration of justice in Bengal, Behar, and Orissa, in that year, when we had exercised virtual sovereignty for twenty eight years, and had passed several general schemes for the regulation of the provincial Courts. The two principal Regulations passed in that year for the administration of justice were the third and fourth. The first is for extending and defining the jurisdiction of the Zillah and city Courts; the other is for regulating the proceedings in those Courts. The last provisions of the third Regulation (Section 21) is that "in cases coming within the jurisdiction of the Zillah and City Courts for which no specific rule may exist, the Judges are to act according to justice, equity, and good conscience." Then in the fourth Regulation (Section 15) follows the provision declaring (so far as it is expressly declaring at all) what is to be the law administered in the Zillah and City Courts, that is to say, "in cases of succession, inheritance, marriage, caste and religious usages, and institutions, the Mahomedan Law for the Mahomedans, and the Hindu for the Hindus." Now the argument, or rather the proposition, is, as I understand it, that the rule laid down in Section 15 of Regulation IV, and the rule laid down in Section 21 of Regulation III, were intended together to make up the general law to be administered in India. But inasmuch as we know that these Regulations were drawn together and formed part of a code, I cannot believe that, if this had been the meaning, an arrangement so utterly illogical would have been adopted. I look on Section 21 of Regulation III as supplementary to the provisions contained in that Regulation, and as intended to lay down no more than this, that the rules contained in that Regulation are to be equitably construed, so as to govern any case coming within the jurisdiction of those Courts, though the case be not within their express terms.

17. The next time these Words appear are when the judicial system of Bengal was applied to the Ceded Provinces of Ondh, in 1803. The general frame of Regulations II and III of that year is very like that of Regulations III and IV of 1793. Section 17 of

Regulation II of 1803 provides, that "in cases coming within the jurisdiction of the Zillah and City Courts for which no specific rule shall exist, the Judges shall act according to justice, equity, and good conscience." But it is again in the subsequent Regulation (Section 16 of Regulation III) that the rule is placed reserving to Hindus and Mahomedans their own laws in certain cases. From the Legislature having persevered in this arrangement, I think it is quite clear, even if it was not so before, that these provisions cannot be considered supplementary to each other; and I think Section 17 of Regulation II of 1803 must receive a construction analogous to that which I have already assigned to Section 21 of Regulation III of 1793.

18. These words appear again in Regulation V of 1831, which relates only to Moonsiffs, in the following manner. By the Regulation XXIII of 1814, the laws of Hindus and Mahomedans, in matters of inheritance, succession, and caste (not marriage or religious usages) are to be preserved to members of those religions, not generally, however, in all Moonsiffs'' Courts, but only in such of those Courts as should be established within the zillah of Chittagong. I have toot met with any explanation of these very peculiar provisions, which continued to exist until the year 1831. By Regulation V of that year (Section 6), it was provided that the local rules for Moonsiffs in zillah Chittagong, contained in the Regulation of 1814, should be rescinded; and then follows what professes to be a re-enactment of certain of those rules for the observance of Moonsiffs generally: There is, however, very little which is re-enactment, and much of what is new. By the first rule, Moonsiffs generally are directed to administer the Hindu Law in respect of Hindus, and Mahomedan Laws with respect to Mahomedans, in matters of inheritance and succession and caste (marriages and religious institutions are again omitted), in the same words as were used in the Chittagong rule; and a clause is added that in cases in which the plaintiff is of a different religious persuasion from the defendant, the decision is to be regulated by the law of the hitter, provided that this rule is limited to oases in which the defendant is either a Mahomedan or Hindu. The second rule lays down that "in all cases in which the above rules cannot be applied, the Moonsiffs are to act according to justice, equity, and good conscience;" and then follows one more of the Chittagong rules. Now here, no doubt, the provision comes in just at the place where it ought to be, if it was meant by the Legislature to cover all cases in which the Mahomedan and Hindu Laws were not expressly preserved. But then it is applicable to Moonsiffs'' Courts only; and even in those Courts it would be very difficult to treat these two rules as laying down --the first, by particular enactment, and the second, by way of general supplement--a complete system of law for those Courts, because then the Hindu and Mahomedan Laws of marriages and religious usages would stand entirely abrogated in those Courts, which I do not suppose was intended. Moreover, I am inclined to think that all these provisions are rescinded by the Regulation of the following year, which I am about to consider.

19. The last place in which these words appear are in Section 9, Regulation VII of 1832. But though there are very great difficulties in understanding some of the

provisions of that section and the section which precedes it, there is, as it appears to me, no difficulty at all in showing that it does not, in any way, support the theory now under discussion. This Regulation professes to have been passed in modification of the Regulation of 1831 respecting Moonsiffs, though it contains provisions of an undoubtedly general character. By Section 8 that "part of Clause 2, Section 3, Regulation VIII of 1795, enacted for the province of Benares, which declares that, in causes in which the plaintiff shall be of a different religious persuasion from the defendant, the decision is to be regulated by the law of the religion of the latter, excepting when Europeans or other persons not being either Mahomedan or Hindu shall be defendants, in which case the law of the plaintiff is to be made the rule of decision in all plaints or actions of a civil nature, is hereby rescinded, and the rule contained in Section 15 of Regulation IV, 1793, and the corresponding enactment, contained in Clause 1, Section 16, Regulation III of 1803, shall be the rule of guidance in all suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions that may arise between persons professing the Hindu and Mahomedan persuasions respectively." Section 9 is in these words:--" It is hereby declared, however, that the above rules are intended, and shall be held to apply to such persons only as shall be bona fide professors of those religions at the time of the application of the law of the case, and were designed for the protection of the rights of such persons, not for the deprivation of the rights of others. Whenever, therefore, in any civil suit, the parties to such suit may be of different persuasions, where one party shall be of the Hindu and the other of the Mahometan persuasion, or when one or more of the parties to the suit shall not be either of the Mahomedan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of soon laws, they should have been entitled. In all such cases, the decision shall be governed by the principles of justice, equity, and good conscience, it being clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign law, or the application to such cases of any rules not sanctioned by these principles."

20. Before proceeding to examine minutely the words of this section, it is important to observe that though we have here a reference to the old law, as well as new provisions, no mention whatever is made of Section 21 of Regulation III of 1793, or Section 16 of Regulation II of 1803, which would hardly have been the case, if they had been as general as has been supposed. And if the rule of justice, equity, and good conscience were already in force in all oases where the Mahomedan and Hindu Laws had not been preserved, or express Regulations passed, where was the use of the elaborate and careful details of the oases in which that rule was to apply contained in Section 9?

21. When we consider the particular words of Section 9, it will be seen at once that it is a qualification of Section 8, and not supplementary to it. It is divided into three

clauses. The first declares what was the intention of the Legislature in laying down the rule contained in Section 8, namely, that it was intended to protect the bond fide professor of the Hindu and Mahomedan religions, but not to extend that protection so far as to allow it to infringe on the rights of other persons. This part of the section is clearly concerned with cases in which there is a conflict of rights; and it is concerned not with every species of conflicts of rights, but only those in which the rule of Section 8 might operate, that is to say, conflicts of rights between Hindus and Mahomedans, or between Hindus and persons not Mahomedans, or between Mahomedans and persons not Hindus. To a case where the parties were none of them either Hindus or Mohammedans, e. g., to a case between two Armenians, or between an Armenian and a Parsee, this clause would have no application. The first three sentences of the second clause are perhaps capable of being read in three ways. The words "whenever, therefore, in a civil suit the parties to such suit may be of different persuasion" may be read as a general definition of the cases concerning which the framers of the Regulation are about to legislate; of which cases, the suits in which "one party shall be of the Hindu and the other of the Mahomedan persuasion are one kind, and the suits in which "one or more of the parties to the suit shall not be either of the Mahomedan or Hindu persuasion "are another; or, secondly, these sentences may be read distributively, and each as giving a different definition of cases which the framers of the Statute intended to include; or the first sentence may be a definition, the second an example, and the third a definition. I think the first the more grammatical construction. But even if either of the other two be adopted, I think there are conclusive reasons why there must always be implied this restriction of Hindu or Mahomedan rights in conflict either with each other, or with the rights of persons of neither of those persuasions. I think this is shown both by what precedes and what follows. The declaration which precedes, as has already been shown, applies only to this restricted class of conflicts of rights, and the words which introduce the second class, "whenever, therefore," clearly show that it is to effectuate the intention declared in the first clause that the second clause is introduced. There would, of course, he nothing absurd or contradictory in effecting that object by a provision much wider than the case it is intended to meet; but it would be contrary to all canons of interpretation so to construe the provision, if it were capable of any other meaning. But the words which follow these three sentences make the matter quite clear. What is to happen in the cases under contemplation in the second clause? The laws of Hindus or Mahomedans are not to operate to deprive the parties just described of any property to which, but for the operation of such laws, they would have been entitled. Now, in a case in which no one of the parties was either a Hindu or Mahomedan, the Hindu and Mahomedan Laws would have no operation at all; to say as to these, therefore, that the laws of Hindus and Mahomedans were not to have a certain operation, would be mere nonsense. Shut in, therefore, as these definitions are between two provisions of a clearly restricted nature, I cannot think it possible to give to them any other than the same restricted interpretation.

22. Though the next clause is that which is more expressly now under consideration, I am fortunately not under the necessity of considering it closely. It will be sufficient for our present purpose to show that whatever be its meaning, it is of the same restricted application as the two previous clauses. For this purpose, I need not go beyond the first four words. "In all such cases" must of necessity mean the cases described in the second clause.

23. On the whole, I come to the conclusion that Section 9 of Regulation VII of 1832 applies only to that limited class of oases of conflicts of rights in which one of the parties at least is a Hindu or Mahomedan; and that it has no application to any cases whatever in which none of the parties are of either of those persuasions.

24. I have gone through the process of considering this section at this tedious length, because, as far as I am able to discover, it was subsequent to, and in consequence of, this provision that the notion became current that all deficiencies in express legislation were to be filled up by the rule of justice, equity, and good conscience.

25. It was not till about this time, I dare say, that these deficiencies became prominent. It appears to me, however, that the argument in favour of that notion from Section 21 of Regulation III of 1793 and Section 17 of Regulation II of 1803 would have been at least more plausible than that under the Regulation of 1832; but the fact that the latter Regulation was relied on, and not the former, affords a proof that the earlier Regulations did not, at that time, in general estimation, bear the more general construction which has since been attempted to be placed upon them; and in questions of this kind, contemporaneous construction is of the greatest importance.

26. But even if these arguments should be unsatisfactory, and any one should consider that the Regulations of 1793 and 1803 and 1832 have a more general construction than that which I have placed upon them, yet it cannot be contended that these provisions abrogate any law then existing. If, therefore, I should succeed in showing that there was at that time a territorial law in existence, these provisions will, in no way, affect it.

27. I have not overlooked Section 21 of the Letters Patent of 1865, but that provision appears to me to be studiously worded by a person in doubt as to what the law really was, so as not to produce any alterations in the existing law. Section 20 of the obsolete Charter of 1862 is in similar words.

28. The fifth theory seems to have found some favour, but I think little with lawyers at all conversant with the law of this country. Though it provides a law far a larger number of persons than the third and fourth theories, it is manifestly deficient in making no provision for the large class who are unable to trace their claim by descent to any personal law; and the provision in favour of non-Christians, who are not Hindus or Mahomedans, is altogether illusory, the hypothesis that the religion

supplies a law, which is true of Hindus and Mahomedans, being utterly inapplicable to Jews, Chinese, Armenians, and apparently also to Parsees. Moreover, according to this theory, a Scotchman ought to be governed by the Scotch Law and not the English.

29. And not only is the theory in itself defective, but it has, I believe, been almost uniformly rejected by the Supreme Court. The subject was investigated at great length in Jebb v. Lefevre, [(Clarke''s Ad. Ca., 56 (prefixed to his edition of the Rules of 1829)], and Musliah v. Musliah, (Boulnois'' Reports, 234), and it is unnecessary for me to do more than to refer to those cases to show that no person, except he be a Hindu or Mahomedan, is entitled in this country to a personal law, as such, whether he claim it by descent or religion. This view was also confirmed in Hogg v. Greenway, (Cor., 97). It is true that the notion of Europeans at least being governed by the personal law of their race, was at one time current in the Mofussil Courts. But I agree with Sir Arthur Buller in thinking that that was the mode adopted by these Courts of taking refuge from the rule of "justice, equity, and good conscience," which it was considered the Legislature had imposed upon them.

30. A theory has been broached differing from this in some important points, but connected with it, and which deserves careful notice, because it has been supposed to receive some colour from a decision of the Privy Council.

31. It has been suggested that all law in India is personal, and that if any one fails to establish his claim to any personal law, or chooses to give up his personal law, he is then at liberty to choose his own law. This is no doubt an idea taken from the celebrated ''"free choice "'' of the middle ages; and that there is much analogy between the condition of things in this country and that of the Roman Empire after the barbarian invasion, no one would deny; and the solution of many questions which arise here might, I think, be assisted by an attentive study of that period. But I think that this suggestion proceeds rather upon the popular notion of the right of "free choice" than upon historical facts. The opinion which once prevailed as to the unrestricted nature of the choice, and its prevalence throughout Europe, upon which Gibbon threw doubts, has been entirely exploded by further enquiry. The references will be found in Milman''s edition of Gibbon, Vol. III., page 403. I believe it to be now accepted that the law of the conquering nation was universally a territorial law, but the conquered nation retained its own as a personal law. Successive invasions after which the same concession was made, produced several co-existent systems of personal law with territorial law, the particular law of the person being always determined by his national descent. Thus, when Germans conquered Gauls, they retained the Roman as a personal law of the Gauls, establishing their own territorial law. When Franks in their turn conquered Germans, they retained both the German Law and Roman Law, as the personal law of the Germans and Gauls respectively, but they again established their own as a territorial law, so that there never ceased to be a territorial law, it being successively

the Roman, the German, and the Frankish. There was no room, therefore, for the universal free choice which some have supposed to have existed; and for the vast majority of persons it did not exist, though there were a few persons, such as widows, priests, freedmen, and bastards who, from peculiar circumstances, had a limited choice, as to Which of two or three systems they would live under. The instance in which "free choice" was carried to the greatest extent, and which no doubt led to the idea, which at one time existed, that it was the role and not the exception, is that which was exercised by the subjects of the Pope Eugene under the special permission of the Emperor, known as the constitution of Lothaire, volumus ut cunctus populus Romanus interrogetur quali lege vult, ut tali lege, quali vivere professi sunt, vivant, but that was a choice specially conferred to meet a special difficulty; nor was it even then an unlimited choice; it was a choice between certain well-known and defined systems, and it was made once and for ever, and was binding on the posterity of the makers. It resulted, as is well known, in an almost unanimous choice of the Roman Law.

32. It will be seen from this that the early history of modern Europe does not afford any precedent for allowing any large proportion of the inhabitants of a country to choose their own laws, still less for a condition of things in which there was no territorial law. But if a precedent, taken from this period is to be considered of any value in the present discussion, it will be plain from what follows, that it does afford a precedent, and a remarkably exact one for the theory which I adopt with respect to the law of this country.

33. Nor do I believe that the Privy Council intended in Charlotte Abraham and Daniel Vincent Abraham vs. , to lay down any such rule as that "free choice," limited or unlimited, existed in India. They are discussing there the relations, inter se, of a joint Hindu family, and in the language of the period to which I have just been alluding, this is a matter quod ad voluntatem special; and, the maxim in pactianibus et conventiontbus unus quisque se sud lege defendere potest is one of universal application. All that I understand the Privy Council to have done in Abraham v. Abraham is to affirm this maxim.

34. We are left, therefore, to the first and second theories.

35. The first which recognizes the Mahomedan as a still existing territorial law, has in its favour the immense advantages that it accords most early with the humane doctrines which would govern an analogous case in Europe. The laws of different European countries are so much alike that a change of rulers involves by implication, and it is an understood and acknowledged doctrine that it should involve by implication, no change in the general law of the country, whether the change be a consequence of conquest or peaceful acquisition.

36. Nor could any one nowadays deny that the same motives of humanity ought to guide us in dealing with an Eastern as with Western power. The extreme doctrine of

Lord Coke in Calvin''s case, (7 Co., 176), even if it would now be recognized, has no application whatever to our position in this country, inasmuch as it was intended only to refer to cases of pure military conquest; prima facie, therefore, the first theory is that which ought to be adopted, and it stands on such strong grounds that it can only be displaced by very strong arguments.

37. Nor, with great deference, can I see the force of the observation made by the Indian Law Commissioners, in the Report to which I shall allude again ''Presently, that the Mahomedans would not, in a conquest of their own, apply these humane principles. Whether they would, or would not, is, I think, beside the enquiry; for the principles of the modern European law of conquest or peaceful acquisition are founded not on reciprocity but humanity. Indeed, I may go so far as to say that I accept fully the principle of law contained in this theory, for that principle goes no further than to assert that no alteration in the law can be implied from the mere fact of conquest or peaceful acquisition. This is in no way inconsistent with the universally recognised power of the new sovereign to sweep away the whole fabric of law previously existing in his newly-acquired territories, that power being based on precisely the same grounds as the power to alter the law in particular matters. Nor could any one deny the power of the ceding or conquered sovereign, by the act of cession, to alter to any extent the existing law. And as at the time the East India Company were appointed Dewan, the Moghul was an absolute sovereign, so that if that appointment ex (sic)tate rei involved a wide and general change in the law as hitherto administered, that change was according to Mahomedan ideas (though it may (sic) odd) perfectly constitutional.

38. I am prepared to show that both these events have happened; that the appointment of the East India Company to the office of Dewan did involve a very great change, and an undefined change, in the law of the country; and that the words of the Legislature do show, not perhaps exactly, the extent to which Mahomedan Law is now applicable, but at least that it is no longer a territorial law.

39. The appointment of the East India Company to the office of Dewan vested in persons not professing the Mahomedan faith the supreme administration of justice. But it is, I think, conclusively shown by the Indian Law Commissioners in their Special Report on the petition of East Indians and Armenians (See p. 422, s. 99 of the volume printed by the House of Commons in 1842) that according to the fundamental principles of Mahomedan Law, that system is incapable of being administered by persons who are not of the Mahomedan faith; that, moreover, the Mahomedan Law being of divine origin is entire and immutable; though, therefore, it is by its nature a territorial and not a personal law, it is one from which all persons not of the Mahomedan faith are excluded. These principles have been partially accepted by us. We appointed Mahomedan officers to administer the Mahomedan Law. We have assented to the principle that the Mahomedan Law is one exclusively applicable to the members of that religion. We have, however, denied its divine

origin, and its immutability. And we have further recognized the social equality of persons of other religions.

40. The result of this seems to me to reduce the law of the Koran, from its high position of a law universal and necessary, to the condition of a mere personal law of Mahomedans.

41. The language of the Legislature leads to the same conclusion. I think it desirable to examine it at some length, and to bring together at this place all the provisions which I am able to find, in which any declaration has been made relating to the subject now under consideration. So early as the year 1772, Warren Hastings, with admirable energy and clearness of purpose, drew up a plan for the administration of justice, in Bengal, Behar, and Orissa, which will be found in the "Proceedings of the Governor in Council at Fort William in Bengal, respecting the administration of justice amongst the natives in Bengal, printed in the year 1774," and in "Colebrooke''s Supplement, p. 1."

42. It is expressly laid down in Section 23 of that plan, that in all suits regarding "inheritance, marriage, caste, and other religious usages or institutions, the laws of the Koran with respect to Mahomedans, and those of the Shasters with respect to Gentus, shall be invariably adhered to. On all such occasions, the Moulvies or Brahmins shall, respectively, attend to expound the law, and they shall sign the report and assist in passing the decree."

43. This clear and intelligible plan was followed by a very confused plan intended as a temporary arrangement for the management of the revenue, but which materially affected the existing plan for the administration of civil justice (Colebrooke''a Supplement, 200). By the new plan, a Dewan or Ammil was appointed to superintend in each Collectorship, but what his duties were, or whether he was a distinct officer from the Naib, who, u/s 16, is appointed to manage the Collectorship, I am not able clearly to discover. But however this may be, it is these Naibs who, u/s 20, are directed to hold Courts of Dewanny Adawlut" according to the present Regulations. But these proceedings were to be transmitted to the Provincial Councils, and the Naib seems to have acted rather as their dependant officer than as an independent Judge, and the provision which I am next about to notice treats the Provincial Council and not the Naib as the Court for the determination of causes. This plan was superseded so far as the administration of justice was concerned, by the Regulation of 1780, (Colebrook''s Supplement, 14), which, by section 3, restricted" the Provincial Councils" (no mention is made of Naibs) to the trial of causes in matters relating to the revenue, and conferred the general administration of civil justice on the newly established Courts of Dewany Adawlut, of which there were to be six, each presided over by a Company''s covenanted servant under the title of Superintendent. By Section 27 of this Regulation, the provisions of Section 23 of Warren Hastings'' plan above quoted are repeated verbatim.

44. By a Regulation of 1781, the number of Courts of Dewanny Adawlut was largely increased, the name of Judge was substituted for that of Superintendent, and much more elaborate rules of procedure were drawn up, but not differing greatly from those contained in the first plan of Warren Hastings in 1772. By Section 37, the same provision, as was contained in Section 23 of the plan of 1772, was re-enacted with the addition of the word "succession."

45. This change of phraseology is not unimportant, as it shows that these words received some special attention, and are not a mere phrase copied from the previous Regulations. It is also worth while to observe that the provisions of the 21 Geo. III., c 70, section 17, with respect to inhabitants of Calcutta, are somewhat different. By that Statute it is provided for those persons" that their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party shall be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentus by the laws and usages of Gentus, and where one of the parties shall be a Mahomedan or Gentu by the laws and usages of the defendant."

46. The Regulation VIII of 1787 again united the office of Judge of the Mofussil Courts of Dewanny Adawlut and that of Collector of the Revenue, and re-enacted the provisions of Section 37 of the Regulation of 1781 above quoted, with an additional provision that, in cases of succession to land, the usages of the district or family were also to be considered (Colebrooke''s Supplement, 103).

47. Regulation III of 1793 is the first of a series of Regulations for the establishment of Civil Courts of Judicature in Bengal It recites the intention of the British Government to preserve to the inhabitants the "laws of the Shasters and the Koran, not generally, but in matters to which they have been invariably applied." This Regulation extends and defines the jurisdiction of the Courts of Dewanny Adawlut.

48. By Regulation IV of 1793 which regulates the practice of the Courts, it is provided (Section 15) that "in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Mahomedan Laws with respect to the Mahomedans, and the Hindu Laws with regard to the Hindus, are to be considered as the general rules by which the Judges are to form their decisions. In the respective cases, the Mahomedan and the Hindu law officers of the Court are to attend to expound the law."

49. By Regulation VII of 1795, the system of Civil Judicature already in force in Bengal, Behar, and Orissa was extended to the city of Benares and the Zillah of Mirzapore, Ghazipore, and Juanpore. By that Regulation (Section 3) it is provided that the following rule is substituted in lieu of Section 15 (i.e. of Regulation IV of 1793) : "In suits regarding succession, inheritance, marriage, and caste, or other religious usages or institutions, the Mahomedan Law with respect to Mahomedans, and the Hindu Law with regard to Hindus, are to be considered as the general rules

by which the Judges are to form their decisions." And then follows a provision which first discloses that conflict of laws which has since caused so much trouble.

50. "In causes in which the plaintiff shall be of a different religious persuasion from the defendant, the decision is to be regulated by the law of the religion of the latter, excepting where Europeans or other persons not being Mahomedans or Hindus shall be defendants, in which cases the law of the plaintiff is to be made the rule of decision in all plaints and actions of a civil nature. The Mahomedan and Hindu law officers of the Courts are to attend to expound the law of their respective persuasions in cases in which recourse may be required to be had to it" The partial repeal of this provision by the Regulation of 1831 has been already noticed.

51. In the year 1803, a Code of Regulations, founded on those in use in Bengal, Behar, and Orissa, was drawn up for the provinces ceded by the Nawab, including those where the deceased was.

52. By Regulation II of that year, Zillah Courts of Adawlut were established and all natives and other persons not British subjects (i.e. European British Subjects) were declared to be amenable to the jurisdiction of these Courts, which were especially empowered to take cognizance of all suits and complaints respecting the succession or right to real or personal property, land, rents, revenues, debts, accounts, contracts, partnerships, marriage, caste, claims to damages for injuries, and generally of all suits and complaints of a civil nature. By Section 16 "in suite regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Mahomedan Laws with respect to Mahomedans, and the Hindu Laws with regard to Hindus, shall be considered to be the general rules by which the Judges are to form their decisions. The "Mahomedan and Hindu law officers shall attend to expound the law of their respective persuasions, in oases in which recourse may be required to be had to it."

53. The Regulation of 1814 constituting Courts of Moonsiffs contained no general provision for the preservation of any portion of the Hindu or Mahomedan Laws. But (as before pointed out) amongst some local rules, which it lays down for the guidance of Moonsiffs in Zillah Chittagong, there is one which prescribes that "in all cases of inheritance or succession to landed property (not marriage, caste, or religious usages and institutions), the Mahomedan Laws with respect to Mahomedans, and the Hindu Laws with regard to Hindus, are to regulate the decision." I have already pointed out, and will not again repeat how this modified provision was subsequently extended to all Moonsiffs'' Courts by Regulation V of 1831, Section 6.

54. I have also noticed already, and discussed the provisions relating to the application of the rules of justice, equity, and good conscience, contained in Section 21 of Regulation III of 1793, Section 19 of Regulation II of 1803, Section 6 of Regulation V of 1831, and Sections 8 and 9 of Regulation VII of 1832. The words of

Section 8 are very important; they establish generally, and without distinction, the reservation of laws to Hindus and Mahomedans on the basis of the Regulations of 1793 and 1803, in all suits regarding succession, inheritance, marriage and caste, and all religious usages and institutions.

55. In Act XXI of 1850, the ninth section of Regulation VII of 1832 is recited as far as the word "entitled." and it is farther recited that "it would be beneficial to extend the principle of that enactment throughout the territories subject to the Government of the East India Company;" and it is then enacted that so much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts, on any person, forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company and in the Courts established by Royal Charter within the said territories."

56. These are all the passages which I have been able to collect in which, in any general manner, the Government of this country have signified their intention as to what is to be the law applicable to its inhabitants.

57. These provisions would at first seem to imply that only so much of the Hindu and Mahomedan Law was retained as is there specially mentioned, that is the law of inheritance, succession, marriage, and caste, and religious institutions We know, however, that the fact is otherwise, and that the whole of the Mahomedan criminal law, and such rights as that of the pre-emption and property in a slave, were from the first universally recognized. One is, therefore, driven to the conclusion that the provisions for the preservation of certain portions of Mahomedan Law are not exhaustive. Perhaps it may be true, or nearly so, that with regard to both the Hindu and the Mahomedan Law a larger principle was recognized, namely, that, after our acquisition of the sovereignty of this country, the general Mahomedan Law, as the personal law of Mahomedans, and the general Hindu Law as the personal law of Hindus, was still in existence. But that neither was considered as in existence as a territorial law is, as it appears to me, abundantly clear.

58. We arrive, therefore, at this position : we have the Mahomedans with a general or nearly general personal law of their own, and the Hindus with a general or nearly general personal law of their own. The question remains how the gap was filled up, what was the law applicable to persons who were neither Hindus nor Mahomedans, or to Hindus and Mahomedans in the cases (if any) to which their personal law did not apply.

59. The general criminal law of the land was, undoubtedly, Mahomedan, from which, however, European British Subjects and their descendants were exempted. But this was a privilege which no other persons could claim. It was involved in the provisions which made them amenable exclusively to Courts which with respect to

them had no power to administer any other than English Law. This general extension of the Mahomedan criminal law was perfectly Bound in theory; the only difficulty in its way being removed by the provision contained in the 4th Section of Warren Hastings'' plan, and in substance repeated in subsequent Regulations, that" in the Foujdaree Adawlut, the Cazee and Muftee of the district and two Moulvies shall sit and expound the law."

60. It is with regard to civil law that the gap remains. Having excluded the Mahomedan Law, the solutions of the question are no longer manifold. It is either the English Law or none. But if none, what then becomes of the English, Scotch, and Irish; the natives of Australia, the Cape, West Indies, and other colonies of the British Empire resident out of Calcutta; of the domiciled emigrants from the continent of Europe, from China, Persia, and other parts of the Globe; of the whole body of Mahomedans and Hindus who changed their religion; and the vast number of persons in this country of illegitimate descent? They are all equally excluded from the pale of law, unless they are able to show that they are European British Subjects and are also able to enforce their rights in this Court.

61. No one has, I believe, ever asserted such a proposition as this, but many persons have avoided the immediate acceptance of the alternative, that the English Law is the territorial law, by the adoption of one or other of what Appears to me perfectly untenable theories.

62. One has been that all English Law at present in force in this Court owes its introduction to the Charters which established the Supreme Court, and that the right of a certain portion of Her Majesty''s subjects to live under English Law depends on their right to have recourse to that Court exclusively. There is no doubt high authority for saying that the English Law, as administered in that Court, owes its introduction to this source, though from an observation in his judgment in the case of Advocate-General of Bengal v. Rani Swarnamayi Dasi (9 Moore, I. A., 387), I gather that the present learned Chief Justice accepts even this limited proposition with some reserve; and I should wish to do the same. It is certainly not difficult to show that without those Charters, the English Law was the law of all Oriental factory settlements (see the opinion of Lord Stowell to that effect in the case of the Indian Chief (3 Roh. Adm. Rep., 12). But however this may be, it is obvious that this suggestion, though it might be sufficient to decide a particular case, does not meet the general difficulty. I cannot suppose that Sir Edward Hyde East, or any other Judge of the late Supreme Court, ever intended to go to the extent of saying, that all English Law in India depended on the Charters of the Supreme Court, If so, the right of an Englishman or Scotchman or any other person to live under the English Law would have depended entirely on the exclusive jurisdiction of the Supreme Court in matters in which they were concerned, so that when that exclusive jurisdiction was taken away as it was by Act XI of 1836, the right was also gone. An Englishman or Scotchman living in the Mofussil would be now as much without law as any other

person.

63. That at least an Englishman or Scotchman living in the Mofussil is generally governed by a modified form of English Law, is, I believe, undoubted; and if so, it must be by a right not depending on the exclusive jurisdiction of the late Supreme Court, or present High Court; and the portion of English Law enjoyed by those persons must owe its introduction to some other source than the Charters by which these Courts were created.

64. Another suggestion has been that the English Law is administered here as the personal law of Englishmen,--I have already disposed of that suggestion.

65. The result seems to me inevitable, and this is really the strength of the whole argument, that there exists in this country English Law, which is not due to the Charters creating the Supreme Court, and which is not personal law. Nor is it possible to suggest, as far as I am aware, any ground for the existence of that law, except that when this country was brought under English rule, the English Law became the territorial law of the country, applicable, it is true, in very few instances, because of the very large number of persons who had a personal law of their own, and only in the same modified form in which it is applicable within the city of Calcutta, but still a territorial law.

66. Some of the reluctance which has been shown to accept this result has, no doubt, arisen from the idea that to do so were to apply to our relations here principles less humane than those which would be applied in Europe. That it is in accordance with the doctrines of humanity to treat the law of a newly-acquired country as nearly as may be as unaltered by the change of sovereignty, I freely admit. But that it is humane, after having restricted the operation of the ancient laws to the members of a particular class, to leave the rest of the inhabitants without any law at all, I most emphatically deny.

67. I answer then the question proposed by saying that, in my opinion, the law which governs this case is that modified form of English Law which is usually applied in this Court, coupled with the Regulations; and which, I think, Mr. Justice Phear in Hogg v. Greenway (Coryton, 97) has aptly described as "Indo-English Law."

68. No Regulation has been referred to, nor am I aware of any, which is applicable to this case. We are, therefore, left to the English Law.

69. This really disposes of the whole case. It was not contended that according to English Law there were any heirs of the deceased, so that the first issue must be found in favour of the plaintiff.

70. The only disposition of this property by the deceased which has been relied on is a verbal one. But according to the law which I consider applicable to this case, such a disposition could be of no avail; and the second issue must be found in favour of the plaintiff.

71. The only issue which remains is the third. Whether or not the estate escheated to the Crown for want of heirs depends on whether the right of the Crown as ultimus hoeres is part of the Indo-English Law. I think it is. The Privy Council certainly so consider it in the case of the Collector of Masulipatam v. Cavaly Venkata Narianapah (8 Moore, I. A., 524); and though the Succession Act of 1865 is not directly applicable to this ease, it can hardly be contended that this part of the English Law is by its very nature inapplicable to this country, since Section 28 of that Act provides that if a person has left none who are of kindred to him, his estate shall go to the Crown.

72. I, therefore, find this issue also in favour of the plaintiff.

73. The result is that the plaintiff is entitled to decree in the terms of the prayer. The costs of all parties will be paid as between attorney and client out of the estate.