(1) 2/9/19

(I)

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10866-10867 OF 2010

IN THE MATTER OF: -

M. Siddiq (D) Thr. Lrs. ... Appellant

VERSUS

Mahant Suresh Das & Ors. etc. etc. ... Respondents

AND
OTHER CONNECTED CIVIL APPEALS

SUBMISSION NO.1
BY
DR. RAJEEV DHAVAN, SENIOR ADVOCATE

COMPILATION ON ENGLISH LAW IN INDIA AND JUSTICE EQUITY AND GOOD CONSCIENCE IN MODERN INDIAN LAW

(PLEASE SEE INDEX INSIDE)

ADVOCATE-ON-RECORD: EJAZ MAQBOOL

INDEX

JUSTICE, EQUITY AND GOOD CONSCIENCE IN INDIAN LAW

- Inheritance of Justice, Equity and Good Conscience from English Common law
- Inheritance of Justice, Equity and Good Conscience from ancient personal (Hindu and Muslim) law.

Development of Justice, Equity and Good Conscience in Indian Law

Sr No.	Date	Particular
1.	1772	Warren Hastings presiding over the Committee of circuits held that in all suits regarding inheritance, marriage, caste and other religious usages or institutions, the laws of the Quran with respect to the Mohamaddans and those of the shastras with respect to the Hindus shall be invariably adhered to. This application of largely uncodified principles of Justice, Equity and Good Conscience in Hindu and Muslim Laws left the British judges confused and often at the mercy of native pundits who they appointed to help with translation or contextualization of the law to a particular fact scenario.
2.	1781	Impey's Regulation of 1781 introduced the English law concept of equity in India by stating that in the absence of statutory or personal law, the courts would decide the case on the basis of 'Justice, Equity and Good Conscience'.
3.	1781	Regulations for the Administration of Justice in the Courts of Dewannee Adaulut (Divani Adalat or Civil Court) of the provinces of Bengal, Bihar and Orissa passed by the Governor-General and Council of Fort William in Bengal. The regulations contained Section 60, which said, "That in all cases, within the jurisdiction of the Mofussil Dewannee Adaulut for which no specific directions are hereby given, the respective Judges thereof do act according to Justice, Equity and Good Conscience.

4.	1793	Regulation III was introduced in Bengal first, laying down that the Justice Equity Good Conscience formula is only residual in nature and should be applied only where the fund of local law was exhausted.
5.	1802	Regulation II introduced in the Madras Presidency, laying down that the Justice Equity Good Conscience formula is only residual in nature and should be applied only where the fund of local law was exhausted.
6.	1810	In the Bengal Presidency, the British Government had assumed control of all the public endowments and benefactions, both Hindu and Mahommedan, and placed them under the charge of the respective Board of Revenue.
7.	1817	In Madras Presidency, the British Government had assumed control of all the public endowments and benefactions, both Hindu and Mahommedan, and placed them under the charge of the respective Board of Revenue.
8.	1827	Regulation of 1827 laid down a provision which required the East India Company Courts to act according to the principles of Justice, Equity and Good Conscience in the absence of any specific law or usage.
9.	1827	Regulation IV was finally introduced in Bombay, laying down that the Justice Equity Good Conscience formula is only residual in nature and should be applied only where the fund of local law was exhausted. The Elphinstone Code came into existence. This code was an attempt at codifying and recording ancient and native laws initially left out on grounds of complexity etc. It considered old laws, customs, practices, orders of courts to create a comprehensive set of regulations that addressed the native society as well.
10.	1833	Justice Equity and Good Conscience began to assume the face of its interpretation under English Law as Privy Council became the ultimate court of appeal from India.

		The Privy Council acted as a channel through which English legal concepts came to be assimilated with the body and fabric of Indian Law.
11.	1850-1925	Judges consulted not merely English law but also Roman and foreign continental laws.
12.	1858	The **Government of India Act 1858** was an Act of the Parliament of the United Kingdom (21 & 22 Vict. c. 106) passed on August 2, 1858. Its provisions called for the liquidation of the British East India Company (who had up to this point been ruling British India under the auspices of Parliament) and the transfer of its functions to the British Crown
13.	1860	In Collector of Masulipatnam v. Cavaly Vencata (8 M.I.A 529), the principles of English law were applied in preference to the Hindu Law by the Privy Council.
14.	1862	When High Courts were set up across India, 'Justice, Equity and Good Conscience began to mean English law so far as applicable to the Indian situation.' Whenever English barristers and judges came across a situation which they had to decide according to justice, equity and good conscience, to which no custom was applicable, they invariably began to base their decisions on the rules of English law with which they were acquainted.
15.	1862	In Varden Seth Sam v. Luckpathy (9 M.I.A. 303), the Privy Council pointed out that the Company's Courts did not have any prescribed general law to which their decisions must conform; that they were obligated to proceed generally according to Justice, Equity and Good Conscience.
16.	1862	In Culliandoss Kirparam v. Cleveland [(1862 2 I.J. O.S 15)] a problem in easements was solved by reference to English Law because it was derived from the Civil (Roman) law and had no

		peculiarities debarring its application to British subjects in India.
17.	1863	The Government considered it expedient to divest itself of the charge and control of Hindu and Muslim religious institutions and endowments, and to place them under the charge of their respective Boards of Revenue.
18.	1864	In Mayna Bai v. Uttaram [(1864) 2 M.H.C.R 196, 203-204,] the Madras High Court, not knowing what rule of Hindu law to apply to the heritable relationship between the descendants of a Hindu woman who had been living as mistress of a non Hindu, considered the English law, rejected it and applied the Roman law as it was more consonant with the general analogies of the Hindu law, and Justice, Equity and Good Conscience.
19.	1865	In Daba v Babaji [2 Bom. H.C.R 36(1865)] the Bombay High Court upheld Varden Seth Sam as good law and justified the need to apply Justice, Equity and Good Conscience in such situations.
20.	1870	In Ibrahim Saib v Muni Mir Udin Saib [(1870) 6 M.H.C.R 26] the Islamic law of preemption was unsuccessfully sought to be enforced in the mufassil of the then Madras Presidency. Justice Holloway held that 'it cannot be equity and good conscience to introduce propositions which the history of similar laws shows by experience to be most mischievous'.
21.	1871	In Braja Kishore Surma v. Kirti Chandra Surma [(1871) 7 Beng L.R 19,25] there appeared to be a gap in Islamic law. It was held not consistent with Justice Equity and Good Conscience that a plaintiff who refused to purchase when the property was offered to him, and who induced another person to purchase it should be allowed to undo his renunciation and demand to preempt.
22.	1872	Sir James Stephen (law member) stated that "though Justice, Equity and Good Conscience are the law which Indian judges are bound to administer, they do in point of fact resort to English law books for their guidance on questions of this sort, and it is impossible that they should do otherwise, unless they are furnished with some

		specific rules as the Indian Contract Act will supply them with."
23.	1873	In Gokuldass v Kriparam [(1873) 13 Ben. L.R 205, 213] the Court used the equity of redemption but not a result or reference to English law direct, but by applying the Bengal Regulation XVII of 1806, which was eventually not applicable as such in the provinces in question. Here, it was Indian law that was the source.
24.	1882	In Raj Bahadur v. Bishen Dayal [(1882) I.L.R 4 All 343.] The family was neither Hindu nor Mohammedan and therefore Justice, Equity and Good Conscience were to apply to the suit.
25.	1887	The Privy Council in Waghela Rajsanji v. Shekh Malsudin [14 I.A. 89,96 (1887)] remarked that "equity and good conscience" had been "generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances"
26.	1890	In Pattabhiramier v. Vencatarow Naicken (13 M.I.A.560), the Pricy Council refused to apply the English rule of equity of redemption in Madras on the ground that it was never applied by the courts and the ancient Hindu law did not recognize any such rule
27.	1894	In Lalla Sheo Churn Lal v. Ramnandan Dobey, [(1894) I.L.R 22 Cal 8, 12] the question was whether gross negligence on the part of a next friend in conducting a suit would be a ground for allowing the minor to institute a fresh suit. It was settled by reference to the rule of English equity under Justice, Equity and Good Conscience.
28.	1894	In a ruling in **Abu Fateh v Russomoy** (LR 22 I.A 76), the Privy Council declared family waqfs as invalid. The council in consultation with maulvis opined that the objective of a waqf should be for a religious or a charitable purpose. Private or family waqfs were a veiled attempt at frustrating such a purpose in this case. A dedication must not depend upon an uncertain contingency, such as the possible extinction of the family. The ruling in Abu Fateh was not received well by

		the Muslim community who enacted the Mussalman Waqf Validating Act, 1913 and subsequently the Mussalman Waqf Validating Act, 1930.
29.	1896	In Norendra Nath Sircar v Kamala Basini Dasi (23 I.A 18), the Privy Council gave a warning against the use of English cases to interpret wills of people of India.
30.	1908	In Akshay Chandra Bhattacharya v Hari Das Goswami (I.L.R 35 Cal 721) , Mitra J was anxious to fill a gap in Dayabhaga law by reference to law which did not have the spirit of Dayabhaga behind it. He alleged that spiritual benefit was not always the guiding principle; propinquity also had some place. Then he referred to principles of natural justice. In the absence of texts under the Dayabhaga law recourse should be had to the Mitakshara law, a doctrine which was not in those days regarded as accurate. However, it was an instance where a gap was filled by reference, under Justice, Equity and God Conscience, not to English law or any foreign law, but to the next nearest indigenous system.
31.	1920	In Satish Chandra Chakravarti v. Ram Doyal De, [(1920) I.L.R 48 Cal 388] Acting Chief Justice Mookerjee held that there was no absolute privilege for defamation in India. In practice, he admitted the law of torts under Justice, Equity and Good Conscience was substantially common law.
32.	1921	In Gokul Chand v. Hukum Chand [(1921) ILR 2 Lah 40], joint family properties were utilized to send a coparcener to England and educate him there so that he became a member of the Indian Civil Service (I.C.S.). It was held that the salary of the officer becomes a joint family asset in such a case. Accordingly it was held to be attachable in execution of decree debt binding upon the family. The decision in Gokul Chand's case led to the passing of the Hindu Gains of Learning Act of 1930. By this Act (known as the Jayakar Act) this decision was statutorily superseded. Under this Act gains of learning are only self-acquired property,

		whether the education imparted happens to be ordinary education or specialized education. Gains of learning are thus always self-acquired property as a result of this Act. However, in tax cases from 1900s to 1970s not connected to gains of learning, law of the Dharmashastra was applied to income of a director owing to his appointment in joint family.
33.	1921	The Privy Council in Vidya Varuthi Thirtha v. Balusami Ayyar &ors (1921 48 I.A 302) observed that there are two systems of law in force in India, both self contained and both wholly independent of each other, and wholly independent of foreign and outside legal conceptions. Also, in this matter, Mr Ameer Ali, now a judge of the Privy Council, took occasion to doubt the interpretation or adjustment of personal laws to meet the requirements of any other system.
34.	1930	In Maharban Khan v. Makhana (57 I.A 168) the Privy Council applied to an Indian case the English rule against the clog on redemption.
35.	1939	In Krishna Mudaliar v. Marimuthu Mudaliar [(1939) AIR Bom 59], Patanjali Sastri J, as he then was, considered the claim that according to Justice, Equity and Good Conscience, persons resembling gotrajasapindas should dislodge atmabandhus as if they were indeed true gotrajas.
36.	1940	In The Mosque Known as Masjid Shahid Ganj & Ors v. Shiromani Gurudwara Parbandhak Committee, Amritsar, and Anr [(1940) 67 I.A 251), the Court Authority held that on the change of sovereignty in 1857-58, it was the English law and not law of the previous regimes that would apply.
37.	1953	The Supreme Court in Namdeo Lokman Lodhi v. Narmadabai and Ors (1953 AIR 228) discussed equity formula in which the question was whether the formula could be used to introduce the principle in Section III (g) of the Transfer of

		Property Act, 1882 to a lease executed before the passing of the Act. Justice Mahajan refused to apply the principle in this case, stating that in India there existed a substantial body of authority for the proposition that in respect of leases made before the Transfer of Property Act, 1882.
38.	1955	In Chinnaswami Chettiar v. Sundarammal [(1955) 1 M.L.J 312, 315] a fire had spread to a neighbour's property and done damage, the Indian Court sought under Justice Equity and Good Conscience law from abroad.
39.	1959	In Kahandas v. Narrandas (1881 I.L.R 5 Bom. 154) the court reiterated that in all matters of trust the Hindus in India must resort to English law. Note: If American equity differed and both came before the Judge there would be a choice, that being preferred which was nearest, in the Judge's view to Justice, Equity and Good Conscience (Derrett)
40.	1965	In Murari Lal v. Devkaran (AIR 1965 SC 225) the Privy Council went out of its way not to enforce the English law. Gajendragadkar J suggested that laws other than English law, especially Indian law should be looked into but the formula itself must be based on a common sense rule, the object of which must be to prevent injustice.
41.	1970	In the tort case of Khusru v. Guzdur (AIR 1970 SC 1468) the Court upheld that the old English law, prior to Brown v. Mooton (80 HR 47), must be applied as it was closer to the principles of Justice, Equity and Good Conscience.

Sr. No.	Date	Particular
1.	450 BC (approx.)	The Treatise XII Table was drawn up in Roman Law which was the legislation that stood at the foundation of Roman law. The Tables consolidated earlier traditions into an enduring set of laws.
2.		The Roman legal system was constructed by the practical minds of jurists, without too much dependence on philosophy. Their word was aequitas, closer to evenhandedness, than the Greek's yielding to reasonableness. Their concern was good faith, which was not something they associated with contemporary Greeks. Legal rights could not be enforced in bad faith.
3.	11th Century	Norman conquest of England. Post the conquest, royal justice came to be administered in three central courts: the Court of King's Bench, the Court of Common Pleas, and the Exchequer The common law developed in these royal courts.
4.	1272-1377	Judges went on circuit and received petitions of all kinds which they dealt with not by applying the emerging rules of common law but according to what they perceived to be justice and equity and sound administrative sense.
5.	14th Century	Chancery was operating as a court, affording remedies for which the strict procedures of the common law worked injustice or provided no remedy to a deserving plaintiff. Chancellors often had theological and clerical training and were well versed in Roman law and canon law
6.	15th Century	The judicial power of Chancery was clearly recognized. Equity, as a body of rules, varied from Chancellor to Chancellor, until the end of the 16th century
7.	1557	Records of proceedings in the Courts of Chancery were kept and several equitable doctrines developed.
8.	1615	In The Earl of Oxford's case (1615) 21 ER 485, Common law court gave a verdict in favour of one party and Court

		of Equity gave an injunction from preventing that party from enforcing the judgment. Dispute was referred to the King who asked the Attorney General to make a decision. It was decided that in case of conflict between common law and equity, equity is to prevail.
9.	**1781**	**Impey's Regulation of 1781 introduced the English law concept of equity in India by stating that in the absence of statutory or personal law, the courts would decide the case on the basis of 'Justice, Equity and Good Conscience'.**
10.	**1827**	**Regulation of 1827 laid down a provision which required the East India Company Courts toact according to the principles of Justice, Equity and Good Conscience in the absence of anyspecific law or usage.**
11.	1854	Common Law Procedure Act, 1854 was enacted in England where under Common Law, courts were given the power to award equitable remedies.
12.	1858	Chancery Amendment Act gave the chancellor the power to grant damages in addition to, or in substitution for an injunction or a decree of specific performance.
13.	1873	The Judicature Act of 1873 in England abolished the competitive and separate common law and equity courts in England and their attendant delays, expenses and injustice was done away with.

11

CHANGING LAW IN DEVELOPING COUNTRIES

EDITED BY

J. N. D. ANDERSON

Professor of Oriental Laws, Head of the Department of Law at the School of Oriental and African Studies and Director of the Institute of Advanced Legal Studies in the University of London.

LONDON

GEORGE ALLEN & UNWIN LTD

RUSKIN HOUSE MUSEUM STREET

www.vadaprativada.in

12

7

JUSTICE, EQUITY AND GOOD CONSCIENCE

DR J. DUNCAN M. DERRETT
Reader in Oriental Laws in the University of London

The formula which provides the title of this essay deserves investigation particularly because its meaning is obscure and its function is open to debate. In India, Pakistan and Burma (with the exception of the Original Sides of the former Presidency High Courts of Bombay, Calcutta, and Madras and corresponding jurisdictions of High Courts which have evolved, as it were, from them) the court must decide the case in the absence of a rule from statute, the written sources of the personal laws, custom, or case-law, according to 'justice, equity and good conscience'.[1] This provision can, and occasionally does, produce contradictory results.[2] For example, a claim by, or through, an illegitimate child, in circumstances where the relevant system of law is silent, could be upheld on the ground that natural justice favours claims by natural relations, as opposed, for example, to the claim of the State by escheat[3]; or it could equally be rejected on the ground that to encourage heritable claims that deny the need for legitimacy and valid marriages between parents would be against public policy.[4] In Africa numerous Ordinances provide that a native custom shall be applied provided that it is not repugnant to natural justice, equity and good conscience. It may well be debated whether a particular custom is to be applied, and what criteria must be satisfied if this test is to work. Similarly it is provided that in the absence of distinct provision in the customary law the court must apply 'justice, equity and good conscience'. The Northern Nigeria Sharī'a Court of Appeal Law, 1960 (M. 16 of 1960), s. 15, directs the court to apply 'natural justice, equity and good

[1] Government of India Act, 1915, s. 112. F. B. Tyabji, *Muhammadan Law*, 3rd edn., Bombay, 1949, 28-9.
[2] Bijay K. Acharyya, *Codification in British India*, Calcutta, 1914, 319-20.
[3] *Jagarnath Gir* v *Sher* (1934) 57 All. 85, 100-1.
[4] *Meenakshi* v *Muniandi* A.I.R. 1915 Mad. 63, 67 col. i.

conscience' as a residual category of law. It is therefore a residual source of law, but apparently enacted in embarrassingly vague terms. There is even an instance where, when the method of ascertainment of a personal law is to be determined, the court is directed in case of doubt to ascertain it, or to determine, according to justice, equity and good conscience.[1] Here it serves a more limited purpose, but not necessarily without important effects. In particular both South Asia and Africa are put in a dilemma whether or not to import English or other foreign laws under the cover of this formula. In some quarters there is doubt whether a provision apparently authorizing reference to foreign laws will have the same meaning when judges of foreign nationality eventually leave. And if justice, equity and good conscience may mean something very different after a number of years, why should it bear its present meaning now? In short is there any, and if any what, authority for supposing that a foreign system of law, or foreign systems of law generally, is or are incorporated into the legal system of a country which possesses this obligation (or facility) of reference to that source.

It may be argued at the outset that 'justice, equity and good conscience' is a nice, comfortable formula meaning as much or as little as the judges for the time being care to make it mean. One might confine one's activity to considering how judges have in fact construed the direction to consult it. The results would not be of permanent value, since just as the concept of public policy varies with the years and the venue, so precedents may be of little help where this phrase is called into play. Let us agree at once that study of the judicial applications of the 'residual' or 'repugnancy' references has limitations. Very few cases show a real curiosity as to what the phrase means, many expressions fall *per incuriam*, and consequently are of no authority. But a survey of some representative applications of the formula, and a review of its extraordinary history, may help to place the matter in perspective, showing that it still has a lively part to play in the development of the legal systems of developing countries.

This essay will deal first with the concept as present in the minds of jurists of England in the sixteenth century. For this purpose it will be necessary to enter upon a preface explaining it against the background of Romano-canonical juridical thought of the time. We shall then pass to the problem of sources of law for the administration of justice in Bombay Island, the movement to apply Roman Law there,

[1] Laws of Kenya 1948, p. 1927, cap. 149, s. 11.

and authoritative recognition of the applicability of 'justice, equity and good conscience' in the Island (and shortly afterwards in Madras). The next link in the chain is the re-birth of the principle from the confused antipathies of English legal methods personified in the procedure of the Supreme Court of Calcutta, on the one hand, and the oriental happy-go-lucky judicial administration personified by the courts of the East India Company in Bengal, Bihar and Orissa, on the other. The further story of our formula in South Asia naturally follows. The adoption of the formula in Africa, and its subsequent history in West Africa, in the Sudan, and (to a minute extent) in East Africa forms the last chapter of the story. The part which the Civil Law has played in bringing the formula to India, and the roles it played in the laws of India and Pakistan, deserve treatment at length, and they are sketched somewhat lightly in this article.

THE ROMANO-CANONICAL ORIGINS OF THE FORMULA

It will be news to Indians, Pakistanis, and Africans that 'justice, equity and good conscience' has, in origin and tradition, little to do with English law, still less the Common Law of England. Yet if this had been explained to judges in India between about 1790 and 1870, the great formative period of all branches of Indian law except its modern constitution, it would have received ready acceptance. About 1870–80 the doctrine developed that it was a provision which not only let in English law, and in particular Common Law, but was intended to have that effect. It will be shown in this essay that the views of, for example, Sir James FitzJames Stephen and Sir Frederick Pollock, the most vocal representatives of contemporary juridical reflection,[1] took far too narrow a view of its history and function—a defect particularly regretable in the latter, for he was ranked as a legal historian as well as a jurist. Sir George Rankin was much nearer the truth when he pointed out, as recently as 1941,[2] the fact that 'justice, equity and good conscience' did *not* point to English law, and hinted that the

[1] G. C. Rankin, *Background to Indian Law* (Cambridge, 1946), 119. F. Pollock, *Law of Fraud . . . in British India*, Calcutta 1894, 6-8, 10. The same, *Essays in the Law* (London, 1922), 61. U. C. Sarkar, *Epochs in Hindu Legal History* (Hoshiarpur, 1958), 376-8. A. S. Nataraja Ayyar, *Mīmāmsā Jurisprudence* (Allahabad, 1952). *Morley's Digest*. W. Stokes, *Anglo-Indian Codes*, I, xvi, xxi, 55. See now Derrett at (1962) 64 Bom. L.R. (J.), 129 ff, 145 ff.

[2] 'The personal law in British India', J.R.S.A., 89, May 1941, 427-441, at 433.

behaviour of judges in India ought not to be explained by facile and unhistorical generalizations. But he was himself quite ignorant of the origin of the phrase, and the function which it was then intended, and fitted, to perform.

It would be a mistake to suggest that the law of Rome supplied the concept. It is not found as a ready-made formula anywhere in Roman, or for that matter Romano-canonical, texts. It arose out of Romano-canonical learning common to the whole continent of Europe as it appeared to English minds of the sixteenth century. All the materials lay ready to hand, and all the parts of the formula still lie scattered profusely in the literature which was the common reading for constitutional lawyers of that period.

It must be recollected that in discussing the nature of justice and the judicial process, the 'office of the judge', and the sources of law to which the judge must apply himself, the contemporary jurists did not rely exclusively upon Roman materials. These served as a useful quarry, and were repeatedly referred to, but the scheme into which they were fitted was one which had been evolved out of the practice of mediaeval Italian cities and states, and the experience of France and Germany, and the great fund of humanistic learning that had been drawn upon with increasing vigour and effect by the jurists of the 'Alciatic' as opposed to the (old-fashioned) 'Bartolist' school. A discussion of the full meaning of the first title of the Digest, *De Iustitia et Iure*, would then start with references to Aristotle,[1] sometimes to his original Greek text, but more often to the translations which were then commonly read all over Europe.[2] We are thus not concerned with what Justinian meant, or what Aristotle himself meant, but with what such sources were believed to imply in practice by the leading authorities of the legal world about 1500. Specialist studies of the concept of *aequum et bonum* or of *ius naturale* as known to Cicero or Ulpian or Tribonian cannot help us.[3] We are concerned with what was said by Giasone da Maino, *alias* Jason, by Budaeus, Tiraquellus, Connanus, Boerius; the views of Grotius, Heineccius, Hunnius and other later writers, not excluding Domat (of whom we shall hear later), are only of value in so far as they evidence

[1] *Rhet.* I, 13; *Ethic.* V, 10.

[2] Joachim Perionius (*Aristotelis Stagiritae Tripartitae Philosophiae Opera Omnia*, Basileae, 1563, I, col. 467B; II, col. 89A, 102 A-B).

[3] Moritz Voigt, *Die Lehre vom Jus Naturale, aequum et bonum und ius gentium der Römer*, 4 vols. Leipzig, 1856-76. F. Pringsheim, 'Bonum et aequum', *Z.S.R.*, 52, Rom. Abt., 1932, 78-155.

the continuation into their times of views expressed by their predecessors.

It emerges from the studies of these authors that all law is founded upon the law of nature. Upon that rests the divine law, which is binding upon all Christians. Non-Christian countries and peoples may have the law of nature administered to them so far as it is not abrogated by other sources of law. The natural and divine laws are not relevant, nor need we refer to them, where custom or positive law or the terms of a valid grant or contract provide the rule of decision. Naturally, no such source can be incompatible with natural or divine law—if it were, it would be void. When we come to these applicable sources there are varying, though equally valid, methods of categorizing and cross-classifying them. We are at once in a difficulty in that our vocabulary is not adequate and a few words have to do duty in several different senses. We are by no means bound by the vocabulary of the Romans; but they had like difficulties, and quite distinct sources of law are found both in the writings of classical authors and in the Corpus Iuris passing under a shared name. It is necessary to explain, from time to time, what is meant by a common term, such as *aequitas*, and what connotation is intended in the context.

Aristotle took great pains to explain that *τὸ δίκαιον*, which is habitually translated *iustitia*, 'justice', needs and presupposes (if it does not comprehend) *τὸ ἐπιεικές*, which is translated *aequitas*.[1] The function of *τὸ ἐπιεικές* is to adjust the written statute (of which the Greeks had plenty) to the particular circumstances of the case, and to point out the truly just solution to a problem, for which formal general rules are offered. It may not be just, in short, to apply statute or custom, or maxim or principle, without taking into account factors which place the affair in a special light—factors, such as 'public policy', which make it inexpedient, and so improper, to follow out logically what an over-particular, and necessarily generally expressed, law seems to imply. This fitted admirably into the Romanic propositions that *aequitas* had two functions, (i) to correct, modify, and if necessary amend statute law—in fact to serve as a comrade and interpreter for an otherwise inefficient and unintelligible element

[1] J. Oldendorpius, *Tractatus locorum communium actionum iuris civilis ad usum forensem secundum aequissimas legislatorum sententias . . .* (*Volumen V Tractatuum ex Variis Iuris Interpretibus Collectorum*, Lugduni, 1549) fo. 101 v, nos. 18, 20. Budaeus (cited below) translates *τὸ ἐπιεικές aequum et bonum* (p. 2), *ἐπιείκεια aequitas*.

of law;[1] and (ii) to supplement, make good, and otherwise remove the deficiencies of the written, or otherwise ascertainable, source of law.[2] When we get down to practical details the picture emerges somewhat as follows.

Since *ius est ars boni et aequi*[3] it follows that *all* persons exercising judicial responsibility, whether originally or as delegates, must act so as to produce a result which is both *bonum* and *aequum*.[4] That is to say, an Ordinary, a judge delegate, a court of merchants, an arbiter, or an arbitrator, must give a decision which possesses *benignitas* and *aequitas*. It is only in marginal situations, where all other valid sources of law fail, that *naturalis aequitas*, 'natural equity', the ultimate source, is called upon. But, as we shall see, even in that context the judge must apply his mind to *law* and not to non-legal considerations or rules of his own invention.[5] Contrasted with the office of the judge is the so-called *arbitrium rusticorum*,[6] which seems to have been the Romanic counterpart of 'palm-tree justice', whereby the 'arbitrator' divides the disputed property equally between the two parties: here no juridical activity can be seen—he splits it between them, like the Monkey in Aesop's fable, as the simplest way of quieting the noisier party. It is not even 'rough justice', or 'substantial justice', for no judicial discretion whatever has been used, and where there is no judicial

[1] H. Grotius, *De Aequitate, Indulgentia et Facilitate*, at end of *De Iure Belli et Pacis* (Amstelaedami, 1735) ch. 1; G. Durandus, *Speculum Iudiciale* (Basle, 1563), p. 140; J. Cuiacius, *Recitationes . . . De Iustitia* in I.C., *Operum, Tomus Secundus*, (Lugduni, 1606), 135; B-C. R. Zouch, *Quaestionum Juris Civilis Centuria*, 3rd edn. (Oxford, 1683), 8.

[2] F. Connanus, *Commentariorum Iuris Civilis* I (Paris, 1553), fos. 44a-45b; Cuiacius, *op. cit.*, coll. 129A, 135C. J. Story, *Commentaries on Equity Jurisprudence* (Boston, 1836) I, 5; 1st Eng. edn. Grigsby (London, 1884), 4.

[3] Celsus, reported by Ulpian, Dig. I, 1, 1, pr.

[4] *Aequum et bonum est lex legum:* T. Hobbes and the author of *Principia Legis* (1753). Oldendorpius, *ubi cit.*, no. 30: *qui rationem atque exercitationem boni et aequi ignorat, is sane . . . maximam iuris partem ignorat.* Connanus, *ubi cit.*, fo. 48a; H. U. Hunnius, *Encycl. Iurius Universi* (Cologne, 1675), p. 3; H. Treutler, *Selectarum Disputationum ad Ius Civile*, ed. Hunnius (Frankfurt, 1624), I, 18, 19f. G. Budaei, Parisiensis, *Annotationes in Libros Pandectarum* (Paris, 1542), pp. 1-5; Cuiacius, *Recitationes . . . De Iustitia* (1606 edn.), col. 94D, 129D.

[5] Bartolus, *Sec. Bart. super Dig. Vet.* (1547) (ff. mandati vel contra, § quaedam), fo. 114 f; Jason, *de Actionibus* (Lugduni, 1540), fo. 24 v, no. 138; Cuiacius (*ubi cit.*, 93C); Oldendorpius, *op. cit.*, fo. 102 r, no. 29. Story (1836 edn., p. 15, 1884 edn., pp. 9-10) cites *Cowper* v *Cowper* (*Earl*) (1734) 2 P. Will. 720, 753.

[6] *Prima Bartoli super Digesto Veteri* (Lugduni, 1547) fo. 135 v; *Prima Baldi super Dig. Vet.* (Lugduni, 1547), fo. 195 r.

discretion there is no *ius*, no *iustitia*. In the *arbitrium rusticorum* there is no harm in the 'arbitrator' walking about and waving his arms: a judge, by contrast, must give judgment sitting. Not that mistakes cannot be made sitting, or that if he sits he is exempt from supervision and perhaps punishment: but the first requirement of any judgment is that it shall be delivered with attention to essential and indispensable forms, and this is one of them.

Positive law, which equity modifies or supplements, is made up of *ius scriptum*, the written law, i.e. statutes, constitutions, rescripts, *responsa*, and *ius non scriptum*, the unwritten law which is found out by reference to witnesses or other appropriate sources that tell us what has been taken for law in practice so long as the memory of the people, or class, has run.[1] Custom, *consuetudo*, is the best example of this category, and it is to be applied where there is no repugnancy to natural or divine law, or to the *ius scriptum*. If we see *iustitia* as the correlative of *aequitas*, then *iustitia* consists of positive law, made up of written and unwritten sources, statutes and custom, the applicability of these being determined either by positive law itself, or by the natural equity, that is to say, the natural reason of the case. But in another sense *aequitas* comes *into* this picture of *iustitia*. There can be no *ius* in practice without its twin, the *aequitas* in sense (i) which modifies or amends it to suit circumstances.[2] *Ius strictum*, or *summum ius*, the 'letter of the law', can very seldom, if ever, move without the aid of *aequitas*, 'equity'. Thus, in sense (i) *aequitas* is bound up with *iustitia*, and yet seems to be by definition an addition to it *ab extra*. In the second sense of the term, *aequitas* fills the gaps left by the positive law. It supplements the *ius scriptum sive non scriptum* for cases not covered by statute, for example, or contemplated by custom in so many words. In sense (ii) *aequitas* is a most important source of law, particularly for developing countries. *Aequitas* in this sense is both *scripta* and *non scripta*. A good example of the latter is the rule prohibiting unjust enrichment.[3] Where *ius scriptum* and *aequitas scripta* happen to conflict the latter prevails; where *ius non scriptum* and *aequitas scripta* conflict the latter may prevail; against *ius scriptum* or

[1] Hunnius, *op. cit.*, pp. 27-30.

[2] Bartolus, *Prim. Bartoli super Codicem* (*Bartoli Commentaria in Primam Codicis Partem*, Lugduni, 1547), fo. 33 v, no. 4; Iacobi Cuiacii, *op. cit.*, col. 91B, 1832E.

[3] Baldus on Cod. III, 1, 8; Angelus de Perusio *ad loc.* (*In Codicem Comm.*, Venetiis, 1579, fo. 40 v); Jason de Mayno, *In Primam Codicis Partem Comm.*, Venetiis, 1568, fos. 121 v—122 v. Baldus, *in Sec. Dig. Vet. Partem Comm.* (Venetiis, 1577) fo. 22 v—23 r.

aequitas scripta, *aequitas non scripta* cannot prevail. The prince alone, or his deputy, can solve difficulties raised where the second-mentioned conflict arises.[1] 'Written' equity lies in the praetorian law embodied and amalgamated with the Civil Law in the Corpus Iuris of Justinian; it is also created by the joint efforts of judges, councils, and jurists in the development of the Romano-canonical system through the ages. 'Unwritten' equity is a complex source, always on the point of turning into 'written' equity.[2] The judge knows that the case is not provided for in the books, he views the law that has a bearing upon the topic and would supply the answer were this not a *casus omissus*, and investigates the 'equitable' rights of the parties.[3] Bartolus, in a short but penetrating analysis of this predicament, shows that the party with a 'natural equity' is at a disadvantage against the party with an equity founded on the civil law; that a party with a general equity is likely to lose the case against the party with a special equity. On the one hand the judge considers the conduct and relationship of the parties, on the other the capacity of the law having a general bearing on the situation to produce an answer suitable to the case. By analogy, and similar well recognized methods of reasoning, he may draw forth, as it were, by unwritten equity, the rule applicable to the case.[4]

So much for *ius strictum*, *aequitas* (i), and *aequitas* (ii). Throughout we have assumed that traditional forms of law, and traditional courts, have been pursuing the course laid down for ages. The judge is answerable to an established superior, the sources of law are not in doubt, and all the time the judge has written and/or traditional sources upon which he must rely. But there are two classes of cases where, without departing for a moment from his judicial function, he cannot rely upon those sources because they do not help him. In a case where the established political authority is taken away, or is itself in doubt, and in a case which none of his formal sources contemplate, he must fall back upon his duty, his 'office', to give a decision *ex bono et aequo*.[5] This brings us to *aequitas* in a further sense, sense (iii). The ultimate source of law is, of necessity, the most difficult to explain and predict. Often referred to in the Corpus Iuris, little or no help is given us as to how it would work. Moreover, its importance is enhanced by the fact

[1] Bartolus, *ubi cit.*, n. 20 above, no. 5; *Prima Bart. sup. Dig. Nov.* (1547) fo. 97 r; *Sec. Bart. sup. Dig. Vet.* fo. 51 r.

[2] Bartolus, *ubi cit.*, no. 20 above, no. 4; Oldendorpius, *ubi cit.*, fo. 102 r, nos. 27ff.

[3] *Sec. Bartoli sup. Dig. Vet.* (1547), fo. 109 r.

[4] Bartolus, *ubi cit.*, no. 20 above, no. 5.

[5] See above, p. 119, n. 4.

that, by the time of our jurists, the formal method of judicial administration had been abandoned in favour of decisions *ex bono et aequo* in at least two well-marked contexts. Even in cases where there was little or no doubt as to the nature and identity of the political superior, and the judge's position in the constitution—even in cases where justice and equity provided ample and notorious rules—the law itself provided, by explicit enactment or by long sufferance and tradition, that *aequitas* (iii) was the *primary* source of decision. In cases of widows[1] and orphans, in disputes regarding dowries and certain problems raised by testaments[2], it was as a matter of fact provided that the technical *exceptiones*, 'formal defences', should not be available. In these and certain other contexts the judge was authorized and required to concern himself with the substantial rights of the parties[3] and to be put off by no defences or procedural steps which obscured the truth.[4] The further possibility, that the judge should accept fictions in order to give a just decision, does not seem to have been contemplated by our jurists. Moreover, amongst merchants transactions regularly proceeded upon the faith that disputes would be resolved by experts traditionally invested with judicial authority to act without regard to procedural regulations operative in other *fora*, and to apply laws of international origin, consonant with natural law, and fundamentally expressive of *aequum et bonum*.[5] Moreover, even where the case was not before a court of merchants the civil judge had the duty of deciding *ex aequo et bono*, if statute and equity (i) were silent, equity (ii) were inapplicable, and the equities of the parties were obscure in view of a *lacuna* in their solemn written agreement.[6]

It is evident that decisions *ex bono et aequo* were of the utmost importance in many branches of judicial activity, certainly in western

[1] *Consilia D. Ludovici de Roma* (*Pontani*) (Venice, 1493), cons. CCCCXXX.

[2] *Iasonis Mayni . . . in Primam Infortiati Partem Comm.* (Venetiis, 1568) fo. 39 v, no. 201.

[3] *Ludovici Pontani . . . in Primam atque Secundam Dig. Nov. Partem Comm.* (Venetiis, 1580), fo. 48, no. 11; *Andreae Alciati . . . Operum*, Tom. III (Frankfurt, 1617), col. 525.

[4] *Sec. Bart. sup. Dig. Vet.* (1547), fo. 114 r.

[5] *Sec. Bart. sup. Dig. Vet.* (1547), fo. 114 r; fo. 115 r. Baldus (*Baldi Ubald. Perusini . . . in Quartum et Quintum Codicis Lib.*, Venetiis, 1572), fo. 117 r. Jason (*in Primam Infortiati Partem Comm.*, 1580), fo. 39 v, no. 204. F. Pollock, *Essays* (cited above), p. 55f.

[6] Inst. III, 25, 5, cited in the gloss on Decretal. Greg. IX, I, 32, 2: *et ubi deficit lex et contractus, iudex facit quod ex bono et aequo sibi videtur.* G. Durandus, *Speculum* (see n. 1, p. 119 above), p. 133, col. i. (*Argumentum Institutionum Imperialium*, Paris, 1519, fo. 189 v).

countries, and in cases where no actual conflict of laws was in question. What did this jurisdiction amount to? Did it mean that the judge followed his nose, and gave judgment according to his fancy? No, these were cases for Judgments of Solomon. It is emphasized again and again that the judge consults analogous provisions of law; juridical maxims, in particular those contained in the Corpus Iuris, even though they have not in fact been applied to such a case in the written sources of law or equity; and the writings of jurists steeped in legal thinking.[1] Let us take three typical cases.

Merchants must decide *ex bono et aequo*. Is it lawful for goods belonging to merchants of country *X* to be seized at the application of a merchant of country *Y* as security for payment of a debt owed by another merchant of country *X* who is outside the jurisdiction of the *forum* and whose own goods cannot be attached for some reason (e.g. they are not available)? This is, practically, a case of reprisal. If reprisals are consistent with the law of nature they are available and the court of merchants can be authorized by the local monarch to grant reprisals in such cases. But reprisals in fact are condemned by Papal rescript and by a well-known royal constitution; theologians moreover are disposed to doubt whether they are consistent with divine law. Yet, since reprisals are a method of enforcing an equity which the defendant ignored or frustrated, and are a means of securing that justice is done, when all simpler methods have been tried in vain, it is proper to hold that reprisals may validly be granted by a properly authorized mercantile court, or at its application.[2]

Widows are, as we have seen, in some places entitled to have their cases tried *ex aequo et bono*. Technical 'exceptions' are thus excluded. Can the exception of prescription, i.e. that the disputed property has been in the *bona fide* possession of the defendant for, say, thirty years, be admitted?[3] Is it consistent with *aequitas* (iii) that a rule of limitation of actions, which is essentially a rule of procedure applicable in the *forum*, should keep the widow from property which she could prove to be hers by right? The answer seems to be that the rule of prescription, which is part and parcel of the civil law of the Romans, whose laws contain so high a proportion of natural equity, is a rule founded

[1] *Prima Pars Consiliorum Acutissimi . . . Pauli de Castro* (1522), Cons. VI, fo. 4 v; Hunnius, *op. cit.*, p. 50.

[2] Jacobus a Canibus, *Tractatus Represaliarum* (*Volumen XVII Tractatuum ex Var. Iuris Interp. Coll.*, Lugduni, 1549), fo. 18, no. 19.

[3] See n. 1, p. 122 above. Bartolus, *Sec. Bart. sup. Dig. Vet.*, f. 1141, glosses. *Consilia D. Ludovici*, fo. 43 v (cons. CXLIX).

upon considerations of much wider import than the defeating of claims by widows. If the defendant was indeed a *bona fide* possessor it is conclusively presumed that the plaintiff has been negligent or incompetent to the degree stigmatized by the law—*dormientibus lex non subvenit*. This represents a maxim of universal application, and is fitted to a court which procedes *ex bono et aequo*.

Finally, in any court a time may come in which the case presented and proved on *either* side is sound. No amount of *iustitia* or *aequitas* (i) or (ii) can help out the judge in such a predicament. A plaintiff sues for restitution and proves that he is entitled and has constructive possession of the property; the defendant proves title and actual possession grounded upon it. What is the judge to do? There are several possibilities. He could sequestrate, to force a concord. Or he could divide the property between them. This would not be a case of *arbitrium rusticorum*, for since the dispute is about possession, and therefore profits pending decision of the main action, no manifest harm will ensue by a division in this fashion since neither party has proved his title to the whole.[1] Or he could decide by the use of the dice, with which all courts should be supplied! Problems of law may often properly be settled by dice.[2] Perhaps this is not one of them, since the problem is essentially not of law but of fact, and doubts regarding fact are not to be settled by recourse to the judicial dice. Perhaps the judge should postpone a decision indefinitely, or say to the parties *Ite cum Deo*, 'Go with God', i.e. 'Good morning'. He can add if he likes, 'One of you is lying but I do not know which of you it is.'[3] Alternatively he can say *Uti possidetis, ita possideatis*, a puzzling decision[4] which, it has rightly been noticed, amounts to *Ite in nomine diaboli*, 'Clear off, the pair of you, and go to the devil!'[5] On balance both the last suggestions are more negations of the judicial office than exercise of judicial discretion, and since equality is equity the equal division between the parties seems most in accordance with *aequum et bonum*, or the basic rule that unless the plaintiff proves his case the defendant wins.

[1] Rebuffius, *Commentaria in Constitutiones . . .*, 1613, p. 742; *Decisiones Burdegalenses Nicol. Boerii . . . Collectae* (Lugduni, 1566) Quaestio XLII (p. 86f at pp. 93-4, no. 39 (1520)); Quaest. CCXXXIX (pp. 446-7 (1531)). Baldus, *ad Lib. XXVIII Dig.* (Venetiis, 1577), fo. 84 r (on Dig. XXVIII, 5, 40).

[2] Boerius, Quaest. CCXXXIX, p. 446, col. ii.

[3] Baldus, *ad Lib. VII Cod.*, fo. 49 r.

[4] Boerius, Quaest. CCXXXIX, p. 446, col. ii. G. Durandus, *Speculum* (Basle, 1563), p. 524, no. 32.

[5] Boerius, *ubi cit.*, pp. 93, 447.

We have seen enough to realise that the structure of the jurisdiction of any judge to administer any law was built up, in the minds of the jurists of the period in which we are interested, in this fashion:

iustitia —ius strictum, summum ius { ius scriptum / ius non scriptum }

aequitas— { aequitas scripta / aequitas non scripta } { aequitas moderans (i) / aequitas supplens (ii) }

bonum et aequum—aequitas (iii), (conscientia)

One point remains. What was the nature of *conscientia*, 'conscience'? Here is another of these words doing duty for a group of terms which our vocabulary lacks. In one sense *conscientia* is Aristotle's ἐπιεικές. In another it is the judge's juridical knowledge in general, his 'conscience' as a judge.[1] In yet another it is the judge's realization of the true facts of the case, drawn from personal acquaintance with them independently of the pleadings and evidence. The first sense is an embarrassment to us, and must be disregarded. The last must be brushed aside: the judge's conscience as to facts is nowhere proper to the judicial process.[2] The second is relevant. It is to the 'conscience' of the judge that all litigants, not merely those who litigate *ex bono et aequo*, appeal. Now 'conscience' has no meaning where law is clear. But where the law is unclear, or non-existent, or its applicability is challenged, appeals to the judge's conscience are likely, and indeed inevitable.[3] Judged from the judge's seat one party will then have acted consistently with conscience, the other will not. The judge's conscience will decree or reject the suit accordingly. What is done *ex aequo et bono* in an appropriate case (where there is jurisdiction *ex bono et aequo*) is bound to be consistent with the judge's conscience and with the 'good conscience' of the parties. Thus the English translation of *bonum et aequum* was 'conscience', and of *ex bono et aequo* 'according to good conscience'.[4] A Court of Conscience is therefore one which acts *ex bono et aequo*,[5] and it will be evident at once that although

[1] *Clarissimi Iuris Utriusque . . . Baldi Commentaria super Decretalibus* (Lugduni, 1521), fo. 56 r. *Summae Sylvestrinae* (Antwerp, 1581), II, 70 f.

[2] *Secunda Pars Consiliorum . . . Pauli de Castro* (1522), Cons. CCXCIX, no. 4.

[3] Jason *de Actionibus* (1540), fos. 23 v—24 v, no. 138; *Iasonis Mayni in Primam Infortiati Partem Comm.* (1568), fo. 51 v.

[4] Beaver's trans. of Duck, at pp. xxviii, xxix. *iudicandi ex aequo et bono demandata est* = 'judging and determining according to Equity and Good Conscience'.

[5] Sir Thomas Smith, *De Republica Anglorum*, II, 12; trans. J. de Laet (Lug. Bat., 1641), 198-9.

fifteenth-century petitioners of the Chancellor used to affirm that their adversaries had acted *encountre ley et reson et bone conscience*,[1] 'against law and right and good conscience', or words to that effect,[2] the Chancellors gave justice *ex aequo et bono* like all other judges, that is to say where positive law and written law failed, and not otherwise. Thus to call a Chancery court a Court of Conscience is only approximately correct, and may lead to misunderstandings.

Our jurists notice that in matrimonial causes *aequitas* is most particularly to be observed. It is evident in this and in other fields of canon law that the office of the judge is exercised according to equity, and that *ex bono et aequo* he may vary the sentence or determine the issue largely and at his discretion in the interests of peace, the benefit of religion and the church, and the welfare of the parties.[3] Yet even when equitable decisions, based upon the *plenitudo potestatis* of the Pope, most notoriously varied with the importance of the parties and the subject-matter of the dispute, no one suggested that in applying 'public policy'[4] and similar criteria the judge departed from a truly judicial path, or that he gave a judgment in anything but a professional manner upon the basis of legal arguments. The great role played by the Roman civil law in the administration and development of canon law proves that the authorities looked to law, and not to expediency, as the ultimate criterion.

The role of *ex bono et aequo* jurisdiction in modern canon law[5] and international law,[6] as also in modern continental (and Turkish) judicial administration,[7] is beyond the scope of our present study.

JUSTICE, EQUITY AND GOOD CONSCIENCE IN ENGLAND

The common law in its earlier centuries no doubt knew the fundamental bases of judicial decision-making, within which this customary

[1] W. P. Baildon, *Select Cases in Chancery* (London, 1896), p. 119, case 121 (1420/2). C. K. Allen, *Law in the Making*, 6th edn. (Oxford, 1958), 390.

[2] W. T. Barbour, *Oxford Studies in Social and Legal History*, ed. Vinogradoff, iv (Oxford, 1914), 182, 212.

[3] Joan. Staphil. Arch. Tragurini, *Super Gratiis . . .* (*Volumen XIIII Tractatuum*, Lugduni, 1549), fo. 29 r, no. 9.

[4] Jason, *de Actionibus* (1540), fo. 24 v; Claudius Cantiuncula, *De Officio Judicis* (1543) (in *Vol. II Tractatuum*, as above), fo. 293 r, no. 6.

[5] C.J.C., c. 144; c. 1500; c. 1929.

[6] L. Oppenheim, *International Law*, ed. H. Lauterpacht (London, etc., 1952) II, p. 68-9. K. Strupp, *Ac. Dr. Int., Receuil des Cours, 1930* (III), (Paris, 1931), pp. 357f, 376, 399.

[7] Z.G.B. §4; B. K. Acharyya, *Codification* (cited above), 35f.

system, this *ius commune*, fitted. But the scope of common law judges was naturally confined to issues that could be solved, grievances that could be remedied, according to that *ius commune* or the statutes, the *ius strictum* (modified, interpreted, and applied according to judicial equity) which supplemented or abrogated the *ius commune*. We have seen that the equitable jurisdiction of the Chancellor completed the picture of *iustitia* and *aequitas*, particularly *aequitas* in sense (ii). Courts of Conscience and Requests came into existence to supplement and rival courts of merchants, and other courts of a civil law origin, such as the Court of the Admiral, which were not bound by common law remedies or common law procedure.

The formal recognition that all law must be based either upon strict law, equity, or good conscience is evidenced during the activity which effected the reformation of the English Church and its separation from Rome. At that time it was necessary to appeal not to the English constitution as such, but to the fundamental sources of law upon which the English constitution itself stood. The Acts of the English Parliament were addressed directly to the English people, but with more than a glance at continental opinion, which would inevitably be guided by continental jurists. The man who took a leading part in putting the ideas of the time into words was Thomas Cromwell, Secretary to King Henry VIII. Cromwell is known to have spent some time studying civil law in Italy,[1] and he put his knowledge to good use. The Supplication of the Commons, which he drafted (1532), reveals a reliance on the Romano-canonical division of sources of law. The Commons were petitioning for relief against taxation and against other alleged inconveniences in the ecclesiastical jurisdiction in England,[2] and the whole was directed to the undoing of papal authority in this country. We note that the word *ius* can as well be translated 'right' as 'law', and that *ius* in this context will tend to mean *ius scriptum*, in particular statute and the common law as administered in the King's courts. We note, too, that reason and in particular natural reason was viewed as synonymous with *ius naturale*: what is reasonable must be *ex bono et aequo*, but reason may be called upon at an earlier stage to supply the rule of equity in sense (ii).

[1] Dict. Nat. Biog; R. B. Merriman, *Life and Letters of Thomas Cromwell* (Oxford, 1902); J. A. Muller, ed., *Letters of Stephen Gardiner* (Cambridge, 1933), 399.

[2] H. Gee and W. J. Hardy, *Documents Illustrative of English Church History* (London, 1896), XLVI, pp. 145f. Merriman, II, 105, 109, 110.

The Commons are made to declare that the rules against which they complain are 'ayenst all equytee right and good conscience'; 'against all justice lawe equite and good conscience'; and 'against all lawes right and good conscience'.[1] What was against conscience was not binding even morally, since granted that what could not be established in a court of law might be established in a court of conscience, what could be established in neither was not binding in any way whatever. Later we are told[2] that a practice 'standeth not with the right order of justice nor good equity (*bona aequitate=ex bono et aequo*)'; 'contrary to right and conscience'. Again, a claim is made, 'it standeth therefore with natural equity and good reason . . .'[3] In the Act of Succession we are told that, notwithstanding positive law on the subject (which is about to be repealed), the succession of the bastard Elizabeth would be against 'all honour, equite, reason, and good conscience'.[4] A statute of Mary declares that Cranmer, as Archbishop, pursued a course 'against all laws, equity and conscience'.[5]

It is evident from these, as from other examples, that the appeal to 'justice, equity and good conscience' is an appeal to sources of law other than English common and statute law. It is an appeal to fundamental laws, recognized universally, though the actual application of any of them might give rise to debate.

The phrase therefore embodied a concept of the Romano-canonical system that was very much alive in the high constitutional thinking of the founders of the Reformation in England, and with the continuation of the controversies into the next two centuries it could hardly slip out of sight. Nor was this likely while the jurisdiction of the courts administering Civil Law, and the character of the law they administered and its advantages over the Common Law, were constantly brought into question. A series of publications intended to enlighten the public, and in particular the Stuart kings, as to the truth of these matters, appeared from the beginning of the seventeenth century,[6] and these went in many cases into a number of editions, so that we can be sure that the subject enjoyed continuous attention.

[1] H. Gee and W. J. Hardy, *Documents Illustrative of English Church History* (London, 1896), XLVI, pp. 145f. Merriman, II, 105, 109, 110.

[2] (1533-4) 25 H. VIII c. 14 (St. of R. 454); (1534) 25 H. VIII c. 21 (Gee and Hardy, LIII, pp. 8, 209f).

[3] Last cited statute (G. and H., p. 211).

[4] (1536) 28 H. VIII c. 7, preamble.

[5] (1553) 1 M. c. 1, st. 2; *H.C.Jo.* 26-28 Oct. 1553.

[6] T. Ridley, *A View of the Civile and Ecclesiastical Law* (London, 1607), 2d. edn. Gregory (Oxford, 1634), repr. 1662, 1664, 1675, 1676; R. Zouch, *Jurisdiction of the Admiralty of England Asserted* (London, 1663, 1686); A. Duck, *De*

The result is that when the East India Company acquired the Island of Bombay, and inherited judicial responsibilities there, a climate of opinion at home favoured the continuance of the Civil Law there (it remained from 1665 to 1672),[1] and was in no doubt but that if there were any deficiency in the laws to be applied it was to be made up by reference to our formula. This position was arrived at along two independent paths. Firstly the convenience of continuing the Portuguese set-up gave considerable weight to the claims of Civil Law, and the theory was current that Civil Law was the only law suitable to be administered to Christians and non-Christians in countries ruled by Christian monarchs.[2] The Civil Law was the best and most suitable source of 'natural equity', and hardly any country, Christian or non-Christian, was envisaged as likely to be ruled so well as by laws derived from that source.[3] It was believed on good authority that even the Ottoman conqueror of Constantinople had called for a Turkish translation of the Greek version of Justinian's *Corpus* in order to guide himself in governing his new empire,[4] and if the Turk respected Justinian it was hard to see how the Mogul and his subordinates and former subjects could object to a similar course being followed. The desire to apply Roman law to India starts with the commencement of English rule in Bombay and ends, after a period of decline (as we shall see), only with the nineteenth century. The second path which let in justice, equity and good conscience was the demands of the East India Company itself for a system of law which could be applied conveniently to the foreigners who traded along the coast, a system of mercantile law which would satisfy the requirements of trade and avoid the notorious inadequacies of the common law, and the frustrating limitations of the English Admiralty court.[5] Bombay was to become a commercial centre; courts might safely administer common law with reference to some crimes (we

Usu et Authoritate Juris Civilis Romanorum in Dominiis Principum Christianorum (Lug. Bat., 1654, repr., 1679, 1689); J. Beaver, *History of the Roman or Civil Law* (London, 1724) includes a trans. of C. J. Ferriere's work and a partial translation of Duck. D. O. Shilton and R. Holworthy, *High Court of Admiralty Examinations 1637–1638* (N.Y., London, 1932).

[1] Sir Charles Fawcett, *First Century of British Justice in India* (Oxford, 1934), 3, 6, 34, 44, 46.

[2] Duck, *op. cit.*, passim. [3] Wiseman, cited below.

[4] Wiseman (cited below, p. 131), pp. 272-3; Duck I, ii, 6, cited in turn by Wood (1704), p. iii.

[5] H. J. Crump, *Colonial Admiralty Jurisdiction in the Seventeenth Century* (London, 1931), pp. 5, 20f, 165f, 177f.

exclude piracy and the peculiar offence of 'interloping') and matters of real property and contract between merchants and non-merchants; but there was the problem of testaments, and much judicial business of importance would be of a maritime character or derived from customary transactions usual between international merchants.

Hence in 1669 the judges appointed under the Company's Laws were 'in all things' to behave themselves 'according to good conscience',[1] and the oath undertakes that the judge will behave himself 'duly and truly towards all according to justice and good conscience . . .'. The demand for a Judge Advocate qualified in Civil Law made in 1670 was refused,[2] but factors who had studied Civil Law and Common Law were sent out to India. Eventually Wilcox, a former clerk in the Prerogative Office, and so acquainted with ecclesiastical procedure, was appointed Judge to administer the law of England in Bombay in 1672.[3] The Judge was expected to act according to law, reason, and equity.[4] How this worked is well shown by the provisions made by the Governor for the apprehension of persons found forestalling, regrating, and engrossing produce.[5] It was known that these crimes were punishable by the laws of England, some said even by the common law, but there was no pretence that English statute law applied to Hindus and Muslims domiciled on Bombay Island, for that had never been applied to them. However it was an offence at natural law, and perhaps, as Coke would have it, at divine law;[6] and therefore the natives were as amenable to it as their colleagues under Portuguese rule were amenable to the natural law in the matter of certain offences over which the Portuguese courts claimed exclusive jurisdiction.

Royal Charters of August 9, 1683, setting up a mercantile and admiralty court at Bombay,[7] and December 30, 1687,[8] setting up a Municipality and Mayor's Court at Madras, reveal awareness of this theory. The Court of Judicature at Bombay is to consist of one person learned in the Civil Law, and two merchants. They are to handle all mercantile and maritime cases whatsoever 'according to the rules of equity and good conscience, and according to the laws and customs of merchants'. The Mayor's Court at Madras is to try and

[1] Fawcett, p. 23.
[2] *Ibid.*, 34. Aungier again asked in 1671.
[3] Fawcett, pp. 46, 49, 81, 83.
[4] Fawcett, p. 54.
[5] Fawcett, p. 82.
[6] S. Browne, *Laws against Ingrossing, Forestalling, Regrating and Monopolising*, 2d. edn. (London, 1767), 83-4.
[7] Fawcett, p. 133. J. Shaw, *Charters Relating to the East India Company from 1600 to 1761* (Madras, 1887), 72, 81.
[8] Shaw, cited above, pp. 88, 89.

adjudge 'in a summary way according to equity and good conscience and according to such laws orders and constitutions that we have already made'. This policy carries out with perfect faithfulness the policy advocated with vehemence by Sir Josiah Child, a businessman of great repute and for long the Chairman of the East India Company. In his view, repeatedly published,[1] the English were hampered in their competition with the Dutch by three disadvantages, namely, (i) the high legal rate of interest, (ii) the absence of a law of negotiable instruments, and (iii) the absence of a proper mercantile court to which all merchants, whatever their nationality, could resort in expectation of speedy and inexpensive justice. All the limitations of the English courts, including the Admiralty court, could be avoided by a jurisdiction set out in the Charters mentioned above. Child's fancy for the Roman Law itself, of which there is ample evidence (for he himself said that the judge should proceed discreetly according to common equity and good conscience, which is the general rule of the Civil Law . . .),[2] was evidently due to the learned and partisan clamour of Robert Wiseman, D.C.L.,[3] who repeatedly urged that Roman Law was the only residual law to which any court anywhere need look, and to the famous, but now neglected, *Symboleography* of William West. The former says *inter alia* '. . . the civil law is of such large extent, and so vast a comprehension, that nothing can fall out, whereon the ministration of law, equity, or any part of justice may be necessary, which either the words of that law, or the reason thereof will not decide . . .'[4] The spirit of the Roman Law was incorrupt: '. . . as in publick matters, *salus populi* was *suprema lex*, so in private, *quod aequum bonumque fuit*, was that which made up the Law with them; the dispensation of true right and pure equity was thought the most effectual means to preserve the whole.'[5] Again, 'the Roman Civil Law has not the preeminence of other laws in title and denomination onely, but it is thought also, that in the books there are laid up such treasure of human Wisedom, Policy, Justice, Equity, and natural Reason, that

[1] J.C., *Brief Observations concerning Trade and Interest of Money* (London, 1668; B.M. 1029.b.1(2)), p. 6, pts. 12, 13; J. Child, *A New Discourse of Trade . . .* (London, 1693), pp. 106-113; 'Philopatris', *A Treatise wherein is Demonstrated I That the East India Trade is the most National of all Foreign Trades . . .* (London, 1681; B.M. 1029.i.30) at p. 35.

[2] Fawcett, pp. 133-4.

[3] *Law of Laws or the Excellency of the Civil Law above all other Humane Laws whatsoever . . .* (London, 1657, 1686).

[4] *Ibid.*, edn. 1686, p. 261.

[5] *Ibid.*, p. 264.

the art of doing equal justice, and the doctrines of true and uncorrupted right, is taught by them onely. *Jus*, said Celsus, *est ars aequi et boni*'.[1] Meanwhile West, who supplies in his *Second Part* numerous forms of documents needed for international commerce and known to the Civil Law, adds a long chapter on the nature of Equity derived exclusively from Romanic sources and intelligible rather to persons trained in that system than in the common law.[2] He has a good section on *conscientia*, relying on Oldendorpius' definition of the function of the judge's conscience in detecting fallacies and administering equity;[3] and yet he shows clearly that though equity works to supply the gaps in law, 'to maintain *aequum et bonum*', conscience has no scope without law, for they 'join hands in the moderation of extremitie' (where any law is to be found on the point).[4]

The history of Dr St. John's period of office as Judge-Advocate and *de facto* judge of the court of judicature in Bombay (1684-7) goes beyond our present enquiry, but it is of interest to see that this protégé of Sir Leoline Jenkins, the well-known English civilian, made the Civil Law unpopular even with the Company, and that the Royal Charters of 1726 and 1753 which regulated the Mayors' Courts in the Presidency Towns, courts which were essentially English courts administering English law, avoid the phrase 'justice, equity and good conscience' or 'equity and good conscience', with its Civil Law flavour and substitute 'justice and right'. The fact that it has been held judicially that the latter formula does not differ in meaning from our own[5] does not obscure the evident fact that the draftsmen of the Charters were perfectly aware of the difference when they drew them.

In our story there appears to be no further reference to the formula from the English side, for the mention of the administration of justice in accordance with equity and good conscience which we find in Ordinance of Gambia No. 13, March 28, 1844, s. 5 may not be purely English in origin, but may well have come to Africa from India.

JUSTICE, EQUITY AND GOOD CONSCIENCE IN BENGAL

From Bombay and Madras in 1687 to Calcutta in 1781 is a long step in space as well as in time. When the formula was re-born in

[1] *Law of Laws or the Excellency of the Civil Law* . . . (cited above), p. 280.
[2] *The Second Part of Symboleography . . . whereunto is annexed another Treatise of Equitie* . . . (London, 1611) fo. 173 v; 174 v.
[3] *Ibid.*, fo. 176 v, sect. 13. [4] *Ibid.*, sect. 12.
[5] *A. D. Narayan* v *Kannamma* (1931) 55 Mad. 727, 746. Shaw, p. 235, 261.

Calcutta the two Charters of the 1680's were almost forgotten, and it is only with difficulty that we can imagine how the phrase can have been revived. Regulations for the Administration of Justice in the Courts of Dewannee Adaulut (i.e. Dīvāni 'Adālat, or civil court) of the provinces of Bengal, Bihar and Orissa passed by the Governor-General (Warren Hastings) and Council of Fort William in Bengal on July 5, 1781[1] included sec. 60, 'That in all cases, within the jurisdiction of the Mofussil Dewannee Adaulut, for which no specific Directions are hereby given, the respective Judges thereof do act according to Justice, Equity and good Conscience', and sec. 93 which makes the same provision for the Judge of the Sudder (i.e. Sadr, or chief, appellate) Dewannee Adaulut. The provisions are obviously procedural, as are most of the provisions in these 'Regulations', and they are intended to set out the law by which the exercise of the judges' office should be judged in all matters (and they were at first very many) wherein the positive law of the Company was silent. This somewhat peculiar way of introducing justice, equity and good conscience gives us a clue to explain the meaning and purpose of its introduction.

The Regulations were nothing more nor less than a draft compiled by Sir Elijah Impey and forwarded to the Council on July 5, 1781. In his letter[2] he explains what were his sources. The Rules, Orders and Regulations of the Sadr and Mufassil Dīvāni 'Adālats, some of which were very recent (in particular those of April 17, 1780 and April 6, 1781), were revised, rearranged and pruned so that repealed elements might be excluded, and he added thereto 'some few new Rules, which I hope may prove conducive to the due Administration of Justice . . .' Our rule is one of these, evidently. The Council had on April 6th previously resolved[3] that Impey be requested to carry out this work of revision and compilation but nothing was said about making additions. The request reached him on April 18th and his work was finished by July 5th. This did not leave time for communication with anyone at Bombay or Madras. Impey for his own part acknowledges considerable indebtedness to Mr [Edward] Otto Ives, judge since 1780 of the 'Adālat at the important city of Murshidabad, who favoured him with a 'very laborious and able work'.[4] That it was laborious and able is also certified to us by the Council themselves.

[1] India Office Mss. (Records), Beng. Rev. Cons. 50/33 (1 June–13 July 1781), pp. 397, 424; *Regulations in the Revenue and Judicial Departments enacted by the Governor General in Council . . . of Bengal A.D. 1780-1792* (London, 1834), pp. 176, 185.

[2] Beng. Rev. Cons. 50/32, p. 451.

[3] Beng. Rev. Cons. 50/33, p. 312.

[4] Beng. Rev. Cons. 50/33, p. 313.

They saw his work and ordered that their approbation should go to Mr Ives.[1] That both Impey and the Council should express acknowledgement to Ives, when no part of his 'laborious and able work' needed to be referred to where it coincided with existing regulations from which Impey was expected to provide a short digest or code, suggests forcibly that Ives was chiefly responsible for the relevant addition, as for the other elements which were not present in the former regulations and orders.

Before considering why Ives should have made this suggestion and how he came to make it, and with what object Ives, Impey and the Council came to agree in this respect, it is necessary to eliminate one competitor for the honour of inventing the phrase in Bengal, and to examine more closely Impey's own right to that title. Sir John Day, a barrister in no great practice in the Middle Temple,[2] was sent out to India by the East India Company as their Advocate-General in 1777. He had been appointed in the previous year when it was realized that a barrister ought to represent the Company in its cases before the Supreme Court at Calcutta, since conflict between the Court and the Council had very soon emerged, and indeed had not been unexpected ever since the Supreme Court had been set up with the intention of protecting Indians from the 'oppressions' of the Company's servants. William Hickey, whose opinions have always to be taken with a pinch of salt, but whose memory was exceptional, gives us a very poor impression of Day,[3] and indeed Day's account subsequently of his refusal to appear in court to plead the Company's causes agrees much less with the contemporary correspondence than with Hickey's account,[4] though both can be made to agree. In Hickey's view Day was incompetent and lazy, and no great lawyer as well as vain. Day's own Opinions, several of which are extant, as well as his letters, have more than the usual eighteenth-century flavour of pomposity, indirectness, and hypocrisy.[5] Yet Day, as Company's Advocate-

[1] Beng. Rev. Cons. 50/33, p. 432.

[2] Admitted 20 Sep. 1759; called 8 Feb. 1765. He appears to have died in 1795 or 1796.

[3] *Memoirs*, ed. A. Spencer, 4 vols. (London, 1913-25), II, 151; III, 299-301.

[4] I.O. Mss (Rec.) *Home Misc. Ser.* 421, pp. 605-19. Correspondence between Day and Impey at B.M. ADD. MSS. 16, 267 fo. 23 r—26 r = 16, 263, fos. 20-35 (12-13 July 1779).

[5] *Report from the Committee to whom the Petition of John Touchet and John Irving, Agents . . . were severally Referred* ([London] 1781), Gen. App. no. 4, and Cossijurah App. nos. 5, 9, 18, 20. The unpaginated volume is cited below from the inked pagination of the B.M. copy.

General, certainly studied the Company's Charters. The greater part of his work, as he subsequently boasted, was directed to upholding the Company's jurisdiction, such as it was, against the 'pretensions' of the Supreme Court.[1] He even boasted that he went in fear of his freedom, and, prisons being what they were, his life, because of his steady opposition to the Supreme Court's policies;[2] and it was because of his advice that the Council dared, by a stroke that has never ceased to elicit surprise and even indignation, to oppose the execution of the Supreme Court's process in respect of *zamīndārs* by force of arms in the celebrated Cossijurah Case.[3] He could not have done this without knowing the exact footing upon which the Company's courts and other authoritative bodies acted, and this would mean searching through the old Charters. If the Charters of Bombay and Madras would have been of little direct help to him in this work relative to Bengal, it is certain that before he took up his appointment he would have looked into the history of Dr St. John. Not all the papers would have been available to him, but he must have known that even with the royal appointment procured for the learned doctor through Sir Leoline Jenkins he suffered much embarrassment in Bombay and was later repudiated by Child and his employers in London, claiming, at one stage, not to have been paid for his work. Letters Patent were procured for Day giving him precedence over all advocates in Calcutta,[4] but his appointment, properly, lay and remained with the Company itself, with whom he later entered into acrimonious and fruitless controversy regarding a salary Warren Hastings rather idiotically promised him in addition to his regular salary. A desire not to fall into the trap that awaited St. John, and caught many another King's Judge in India, would have urged him to consult the terms on which St. John went out, and to determine the nature of the controversies in which he was embroiled in reliance

[1] *State of Sir J. Day's Claim* (cited above), p. 29.

[2] *Ibid.*, pp. 29-33.

[3] The group of opinions is dated October 17, 1779 to February 23, 1780. He notes at p. 477 the want of positive provisions of law and the defective character of the constitution. Coss. App. no. 26, pp. 507, 508, 510. J. F. Stephen, *Nuncomar* (cited above); B. B. Misra, *Judicial Administration of the East India Company in Bengal, 1765-82* (Patna, 1953); the same, *Central Administration of the East India Company, 1773-1834* (Manchester, 1959), 233f. B. N. Pandey, *Sir Elijah Impey in India, 1774-1783*. Ph.D. Thesis (unpublished), London (1958).

[4] B.M. ADD. MSS. 16263, fo. 18 is a copy. The date: December 5th, 18 Geo. III (1778).

upon his Charter. Moreover, Day was educated at the Bar at a period noted for two phenomena of importance, namely the popularization of Civil Law and, more strongly, Natural Law doctrines amongst barristers, both at the common law and Chancery Bars; and the development of the law merchant as a branch of common law under the influence of Lord Mansfield. In a liberal age, when most barristers (and Day was no exception) were well-read in the humanities, our formula would not fail to have a meaning in theory if not, at any rate on English soil, in practice.

Yet, when Day discusses the Patna case and other problems involving a consideration of the juridical bases of the judicial process as known in the *mufassil* of Bengal, the terms he uses show awareness of our *concept* without any awareness of its terms.[1] The formula is not there. He does not seem ever to have been on good terms with Impey, and though it is unlikely they failed to meet, Impey and Day were opposed in interpretation of the Regulating Act, and probably thought little of each other as professional men. On his return to England in 1785, about three years after Impey had done the like, Day boasted of his opposition to Impey during the quarrels between the Supreme Court and the Council, and this he was unlikely to do when Impey's own danger was past (and long after Impey and Hastings had seen eye-to-eye over the question of the Company's civil courts) unless in fact Impey and Day had been from the first unreconciled. Thus when the Council, who were quick enough to acknowledge Day's help in 1780 in another connexion,[2] ignored him and showed their obligation to Ives, we are entitled to assume that Ives, and not Day, was the source of the additions made by Impey to the old regulations, amongst which our phrase is to be found.

As for Impey's claim to be the author, this is feeble enough. In a collection of charters, rules, orders, and instructions which Impey compiled for his own use and which still survives,[3] the Charters of 1683 and later containing the phrase 'equity and good conscience' do not figure. In the Bill he and all his fellow judges compiled in collaboration with Hastings and his Council in 1776[4] no such conception appears: on the contrary Impey and the rest saw themselves acting as legislators and judges by turns, so that every gap could be filled by reference to the native laws or English law as the case might

[1] *Report from the Committee* . . . Gen. App., no. 4, p. 112.
[2] *State of Sir J. Day's Claim*, pp. 17-18—testimonial dated February 29, 1780.
[3] B.M. ADD. MSS. 16, 268-70.
[4] I.O. Mss. (Rec.) *Home Misc. Ser.* 124, fos. 160-177.

be. In his interesting and long judgment in the Patna case, which was concerned with professional misconduct in persons exercising a *de facto* judicial office, he makes it clear that the validity of their acts is not to be judged by English legal standards, but by standards of universal application. This is a reference to the same standards to which justice, equity and good conscience, or strictly good conscience alone, would refer us, but the phrase does not appear. 'Though the observations already made are not narrow or confined to the rules of evidence of any particular system of municipal laws, but what would naturally arise to men of common sense [i.e. natural reason]; yet for the purpose of determining *quo animo* these defendants acted, it will be necessary to examine these proceedings still more liberally than we did when we were enquiring whether their acts were strictly justifiable'.[1] While entering upon the latter question Impey, C.J., said, 'I have no hesitation to say, that I think the whole and every part of Mr Tilghman's argument [*delegatus non potest delegare*] is founded in law, natural justice, and common sense . . . .'.[2] The last phrase, which represents our phrase, shows how far he was from any formulation of the concept in those very terms, only a little over a year before the request to frame the regulations came to him.

We are left, then, with the conclusion that Ives was the author of the notion. Why he should have been so concerned on the subject of the jurisdiction of the country judges is no mystery once we realize that in between the Patna case and the case of *Gour Chund Dutt* v *Hosea*[3] Ives himself had been involved in the very difficulties of which the Company had been complaining at large, and on which Day had been advising them that acts normally done in the *mufassil* could not possibly be defended or 'justified' in the Supreme Court. Ives was a quite exceptionally well-qualified man. From the post of Persian Translator to the Murshidabad Board he had been appointed, in addition to his duties as translator, to the incredibly onerous post of Superintendent (note, not judge) of the Inferior Dīvānī 'Adālat in that city.[4] Here numerous *munsiffs* actually decided the cases, and Ives confirmed their decrees. He showed concern for incorrectly-decided cases,[5] and urged the government repeatedly to improve the establish-

[1] *Report from the Committee . . .*, Patna App. no. 17, pp. 291f (January 17, 1780), p. 305.
[2] *Ibid.*, Patna App., no. 16, p. 289.
[3] See n. 5, p. 138 below. *Home Misc. Ser.* 421, pp. 124-41, 437-40, 511-46. *Report from the Comm. . . .*, Gen. App., no. 4 (pp. 112-5, 116).
[4] I.O. MSS. (Rec.), Fac. Rec. Murshid. 13 (unfoliated), March 27, 1777.
[5] Fac. Rec. Murshid. 16 (unfol.), March 11, 1779.

ment and to make provision for more effective judicial administration.[1] He was a very different type of man from his colleagues who were involved in the unfortunate Patna affair. But on March 23, 1779, a certain Bolanaut Shoam, father of a party to a case that had been pending since 1777, intervened in the hearing before one of Ives' *munsiffs*, saying, 'I plead after the Calcutta manner', relying on all sorts of technicalities unheard of in the *mufassil*, and abusing the *munsiff* for an ignoramus.[2] Summoned to the Cutcherry (Board's office) by Ives he refused to come and claimed that 'Hastings-Fastings' himself could not attach him (in view of the apparent supremacy of the Supreme Court over the Company). Force was applied to him, and he summoned Ives, his *munshi* and a *munsiff* before the Supreme Court to answer to a plea of trespass, assault, and imprisonment. On June 11, 1779, the Council authorized North Naylor, the Company's Attorney, to enter an appearance for Ives and to defend him.[3] About this time the Supreme Court heard the case of Hosea, Ives' colleague in Murshidabad, whose irregularities, in dealing with a suit for an amount above the limit of jurisdiction of Ives' court, gave much pain to Sir John Day when he came to examine the facts.[4] Despite his advice that nothing could be said to justify the conduct of Hosea and his assistants, the Council thought that it would be advantageous to have a decision as to whether a man could be sued as an individual for acts done in his judicial capacity. Rightly, as it turned out, for Impey, C.J., held that in suits instituted before the provincial councils, except in cases of manifest corruption, the court would not enter into the regularity of the proceedings.[5] The Dīvānī 'Adālats, therefore, were courts in the true sense of the word, and though they were not courts known to English law they had, by reference to the residual sources of law, perhaps *iure naturali*, a jurisdiction which the Supreme Court would recognize. Thus undoubtedly Ives had jurisdiction to attach for contempt of court; and we can be sure that in *Bolanaut* v *Ives* judgment was entered for the defendant. But the necessity of investing the *mufassil* courts with their residual jurisdiction, of making them subject to a system of law which, while *not* being English law, provided a fair standard which the Supreme Court could

[1] Fac. Rec. Murshid. 14 (unfol.), December 3, 1777; *ibid.* 14, June 1, 1778; *ibid.* 16, August 9, 1779, September 27, 1779.
[2] Fac. Rec. Murshid. 16, May 3, 1779.
[3] *Home Misc. Ser.* 421, pp. 547–86 (June 11, 1779).
[4] Stephen, *Nuncomar*, II, 157-9.
[5] *Ibid.*, 159.

apply to them, giving them at once protection, security, and a measure of subjection to control, as for example for 'manifest corruption', must have been plain to Ives, who was so much involved. His suggestion will have won ready acceptance from Impey, that justice, equity and good conscience was the law by which the judges were bound in the absence of positive regulation.

From whence would a man like Ives obtain the phrase? We may never know. He went to India as a youth with no training in law. If he saw an English law-book while at Murshidabad it is most unlikely that it contained anything that could have led him in this direction. He made a good judicial officer but he was not firmly wedded to law, and was posted to political duties about six years after the event we are discussing. Possibly the phrase was born from a suggestion of North Naylor. He was only an attorney, but he was steeped in the Company's constitutional affairs, was actually imprisoned for contempt in the course of his duties, and died as a result of being so imprisoned.[1] Naylor's views on all this must have been heart-felt: and that he communicated with Ives, whom he had to defend, is more than likely. And there the quest for the author of our formula will have to rest until new evidence appears.

JUSTICE, EQUITY AND GOOD CONSCIENCE IN INDIA AND PAKISTAN

The provisions of the Regulations of 1781 for the judge to apply justice, equity and good conscience were copied from Regulation to Regulation, and from Regulation to Statute, and this residual source of law is now firmly fixed in South Asia. The area in which it can operate is progressively narrowed, but gaps in the personal laws (especially Hindu and Islamic)[2] and gaps left in the interstices between them, where a conflict of personal laws can occur,[3]—gaps, too, in the judge-made, uncodified, topics of private and public law[4]—may still

[1] Coss. App. nos. 21, 23, 26, pp. 480-1: January-March, 1780.

[2] *Radha* v *Raj Kuar* (1891) 13 All. 573, 575; *Lalla Sheo* v *Ram* (1894) 22 Cal. 8; *Mancharsha* v *Kamrunissa* (1868) 5 B.H.C.R. A.C.J. 109, 114; *Vithal* v *Balu* (1936) 60 Bom. 671, 678-9.

[3] *Raj Bahadur* (see below, p. 145); *Sheikh Kudratulla* v *Mahini* (1869) 4 B.L.R. FBR, 134; *Budansa* v *Fatima* (1914) 26 M.L.J. 260=22 I.C. 697, 699; *Pavitri* v *Katheesumma* AIR 1959 Ker. 319; *Robasa* v *Khodadad* [1948] Bom. 223.

[4] *Ram* v *Chunder* (1876) 4 I.A. 23, 50-1; *Gokuldoaa* v *Kriparam* (1873) 13 Ben. L.R. 205, 213 PC; *Akshoy* v *Bhajagobinda* (1929) 57 Cal. 92; *Chinnaswami Chettiar* v *P. Sundarammal* (1955) 2 M.L.J. 312; *Satish* v *Ram* (1920) 48 Cal. 388 SB; *Kotah Transport* v *Jhalawar Transport* A.I.R. 1960 Raj. 224, 231.

be filled by reference to this source. We realize at once that since 'justice' represents *iustitia*, *ius scriptum* and *ius non scriptum*, there is little occasion for it to be applied where, by definition, *ius* of either sort exists. If a statute or valid custom were available there would be no recourse, under the Regulations, to the principle. But though this seems like an error, in fact it was correctly devised. In, for example, an instance where a code is silent it is proper to fill the gap with equity, namely *aequitas* in sense (ii). The first step will be to see whether the other provisions of the code throw any general light on the problem. This implies an interpretation of *ius scriptum*. But whenever we apply our minds to *ius scriptum* we remember that what we are interpreting is not *summum ius* (for *summum ius summa iniuria*), but *ius* modified and controlled by *aequitas* in sense (i). Thus equity in very many cases involves consultation of law, and so, although that instinct is not false which leads judges constantly to let drop the word 'justice' in the formula or to refer to the formula in the apparently illiterate form 'equity, justice and good conscience',[1] it is proper to have the full phrase even in those cases where we refer to a wide range of legal sources as *residual* sources of law.

We must concern ourselves with the questions, to what law or laws did the judges turn; and with what effects? The story must be viewed period by period. Up to about 1850 reference was made to the written laws of the Hindus and Muslims; particularly in matters of contract and transfer of property—for the laws were rich enough to admit of such reference, jurists were available to interpret them, and though the Regulations did not *oblige* the judges to apply the personal law in such contexts it was only just to apply a system that might, or indeed must, have been within the contemplation of the parties to the dispute.[2] Where the exact provisions of the native laws were not clear, or even where they were clear but their universality and justice were not evident, and the judges needed to be reassured that what they were administering was consistent with justice, equity and good conscience in the broad sense of what was naturally just, 'natural justice' in the wider sense of that term, aid was taken of Roman Law, the laws of continental countries, English law, both common law and statute law,

[1] *Azīz Bano* v *Muhammad* (1925) 47 All. 823; *Chinna* v *Padmanabha* (1920) 44 Mad. 121; *Ramchandra* v *Ramkrishna* (1951) 54 Bom. L.R. 637, 641.

[2] *Sibnarain* v *R. Chunder* (1842) Fulton 36, 66=1 I.D. (O.S.) 683 per Grant, J; *Zohorooddeen* v *Baharoollah* (1864) Gap No. W.R. 185, 186; Baillie, *Digest of Moohummuden Law on the Subjects to which it is usually Applied by the British Courts of Justice in India* (London, 1865), pp. xxi-xxiii.

and finally Natural Law. In the characteristic Slavery Case,[1] to which the writer has referred elsewhere, the judges, after consulting pandits, cite Pufendorf. The early decades of the nineteenth century saw relatively less use of technical English books than books of a decidedly Romanic complexion, such as Colebrooke's work on the law of contract,[2] and books on 'civil law in its natural order'. In this way Domat and Pothier in English translations, side by side with Pufendorf, began to train as well as aid the amateur jurist who sat in the country courts. Nor were the Privy Council, when established as an effective court of appeal from 1833 onwards, differently minded. Reference to the formula by name was rare in those early days. But their Lordships protest that they apply a rule which is naturally just, and more or less universal in civilized countries,[3] and we see again and again that the English rule is allowed to be followed only when it satisfies this fundamental requirement. Consultation of Roman, French, Dutch, German and other laws was fashionable in the Privy Council, in the Sadr Dīvānī 'Adālats, and even in the Supreme Courts where the suitability of application of English law was in doubt, or there was reason to believe that the law in force in the country courts ought to be followed even in the Supreme Court. Almost at the end of the period G. Bowyer, D.C.L., Barrister-at-law, published his *Commentaries on Modern Civil Law*,[4] the last of a long line of works on Civil Law (in fact expurgated Roman Law), with the intention that it should be used in the *mufassil* of India. He dedicated it to the Marquis of Lansdowne, Lord President of the Council, and it was undoubtedly used in India.[5]

But gradually better-trained lawyers found their way into the judicial service of the East India Company. In 1831 the celebrated Raja Rammohun Roy had recommended in an influential book that European judges sent to India should be at least twenty-four years of age, and should have a certificate of proficiency in *English* law.[6] His

[1] W. H. Macnaghten, *Principles and Precedents of Hindu Law* (Calcutta, 1828), II, 272-3; 4th edn. of Kennett's trans., 1729.

[2] *Treatise on Obligations and Contracts* (London, 1818). See 24 RabelsZ. 662-3.

[3] (1835) 5 W.R. 98, 99 P.C.=4 I.R. 743; 8 M.I. 69, 73-4=4 I.R. 910, 917-8; 6 M.I.A. 145, 159; 8 M.I.A. 500, 524-5; 10 M.I.A. 123, 145; 13 M.I.A. 467, 473.

[4] London, 1848. See Dict. Nat. Biog. His *Commentaries on Universal Public Law* was used in India: e.g. 14 S.D.A.R., 862 (1858).

[5] *R. A. Roy* v *R. K. Debea* (1856) 12 S.D.A.R. 643=15 I.D. (O.S.) 114.

[6] *Exposition of the Practical Operation of the Judicial and Revenue Systems of India* (London, 1832), 47.

notion, which was eminently sound, was that a judicial outlook and ability were essential in the judges, and that it was more practical to expect those in someone who had been trained in his own native system of law through materials in his own language than in those who picked up the methods of the existing courts by a hotchpotch casual experience of the medley of laws administered there. This was a bold recommendation, but was obviously attractive notwithstanding the unsuitability of the English law of that time for export to foreign countries. The East India College at Haileybury in fact taught English law and the principles of 'universal jurisprudence'. The best legal learning that could be obtained from Germany was made available to the cadets.[1] One result was undoubtedly the increase in consultation of continental laws in India. The celebrated case of Holloway, J., in Madras will be called to mind.[2] Holloway used to cite Latin maxims, passages from the *Digest* of Justinian and the opinions of German jurists from the bench almost as often as he cited English authorities, and he must have been the despair of the Bar. English law was to be administered under this source only if it was right;[3] and the same test was applied to all other candidates for consultation. If Islamic law was offered, as in the case of preemption amongst Hindus, it might be rejected on the ground that preemption was not consistent with the formula, having been abandoned and disapproved in Germany.[4] But apart from this additional stimulus to continental laws, the overall effect of the better training of judges was the more regular application of English rules so far as they were suited to the circumstances. Indeed, almost as a counterblast to Raja Rammohun Roy's recommendation the Bengal Legislature enacted that by 'justice, equity and good conscience' it should not be understood that English or any foreign law was to be introduced into India.[5] The intention in 1832 evidently was that if an English rule was applied this was to be because it happened to be an expression of justice, equity and good conscience.[6] Yet in the

[1] 24 *RabelsZ.* 671 and n. 36.

[2] 24 *Zeits. f. ausl. und intern. Privatr.* (*RabelsZ.*), 1959, 657f at 670f.

[3] *Madras Railway* v *Zemindar of Carvatenagaram* (1874) 1 I.A. 364, 372; 24 RabelsZ. 673.

[4] *Ibrahim* v *Muni* (1870) 6 M.H.C.R. 26; cf. *Sheikh Kudratulla* v *Mahini* (1869) 4 B.L.R. 134.

[5] Reg. VII of 1832, s.9. Different personal laws. *Morley's Digest*, pp. clxxiii-iv. *Sec. of State* v *Adm. Gen. of Bengal* (1868) 1 B.L.R.OC. 87, 97.

[6] (1857) 13 S.D.A.R. (Cal.) 1140=16 I.D. (O.S.), 139. Cf. *Gopeekrist* v *Gungapersaud* (1854) 6 M.I.A. 53, 75-6 (English law not applied). *Shapurji* v *Dossabhoy* (1905) 30 Bom. 359, 362.

realms of guardianship, wills and trusts the English chancery rules soon occupied the field,[1] and to this day the formula means nothing but English rules. Between 1850 and 1880 the struggle between English and continental and American rules went on, with English law gradually gaining an ascendancy. An unfortunate decision gave the impression that English law was invariably to be referred to.[2] This emanated from a judge who, working in Bombay, was unduly influenced by the fact that on the Original Side of that High Court English common law, pure and simple, had long been held to be the residual law. His successors were more cautious, but by 1870 the view had gained ground that in practice the phrase meant English law unless there were some element in the case which made the English rule inappropriate.[3] English jurists summing up at that time were impressed by the infiltration of English rules into contract and tort, and overgeneralized from the resulting picture. They were preoccupied with the question of codification, and utilized the undoubted habit of consultation of English law in those fields as an excuse to hasten the codification of Indian law upon English lines subject to local modifications. Where codification took place the further reference to continental laws was sharply cut off, and judicial equity constantly refers to English precedents.

From 1880, or thereabouts, to the present day the formula has meant consultation of various systems of law according to the context. The dictum in the Privy Council which is so often cited,[4] and which leads to the view that English law will first be consulted wherever the formula applies, is just not true. In trusts, guardianship, tort and contract, English law is indeed looked to first. So also in conflict of laws questions (on topics like domicile), and constitutional matters, though American rules frequently compete for attention, if not as frequently as might be desirable. In those contexts where English law is consulted

[1] *Waghela* v *Sheikh* (1887) 14 I.A. 89, 96; *In the matter of the petition of Kahandas* (1881) 5 Bom. 154, 158; *In the matter of Saithri* (1891) 16 Bom. 307; *V. J. Walter* v *M. J. Walter* (1927) 55 Cal. 730, 741; *Mollwo* v *Court of Wards* (1872) I.A. Sup. Vol. 86.

[2] *Dada Honaji* v *Babaji* (1865) 2 B.H.C.R. 36, 38; *Webbe* v *Lester* (1865) 2 B.H.C.R. 52, 56.

[3] Cf. *Mehrban* (1930) 57 I.A. 168, 170=11 Lah. 251 with *Muhammad* v *Abbas* (1932) 59 I.A. 236=7 Luck. 257.

[4] *Waghela* v *Sheikh* (1887) 14 I.A. 89, 96 (a guardianship case): 'In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances'. A different tone was taken in *Guthrie* v *Abool* (1871) 14 M.I.A. 53, 65 cf. *Muhammad* v *Abbas* (cited at n. 3 above).

as a matter of course, there is no reason to suppose that English common law, as distinct from English law as a whole, ought to be regarded. The suggestion that we have to consider particularly the common law, to the exclusion of statutory amendments,[1] is incorrect: it is to a developed system of law that we must refer, and we cannot ignore the developments which have occurred in the system we choose for first reference. The correct position is explained in the frequently-cited passage from the judgment of Barnes Peacock, C.J., in *Degumbaree Dabee* v *Eshan Chunder Sein*:[2]

'Now, having to administer equity, justice and good conscience, where are we to look for the principles which are to guide us? We must go to other countries where equity and justice are administered upon principles which have been the growth of ages, and see how the courts act under similar circumstances; and if we find that the rules which they have laid down are in accordance with the true principles of equity, we cannot do wrong in following them.'

As Stone, C.J., said in *Sec. of State* v *Rukhminibai*:[3]

'. . . one shall regard the law as it is in England today, and not the law that was part of the law of England yesterday. One cannot take the common law of England divorced from the statute law of England and argue that the former is in accordance with justice, equity and good conscience and that the latter which has modified it is to be ignored.'

In the former case English cases were cited as the latest exponents; in the latter the doctrine of 'common employment' was rejected because it had been abolished in England.

In other fields of law the priority of English rules is by no means admitted. Where the systems of personal law are silent, or where they are inapplicable because the religions of the parties differ, the English law, and indeed other systems of foreign law, seem hardly the obvious choice. In practice analogies are sometimes drawn from the nearest personal law. The effects can be incongruous, but perhaps less harm is done than by the application of a system utterly unconnected with the

[1] *Philomena* v *Dara Nussarwanji* [1943] Bom. 428; *Cheriya Varkey* v *Ouseph* A.I.R. 1955 T.C. 255, 257 FB; *Pavitri* v *Katheesumma* A.I.R. 1959 Ker. 319; *Manni* v *Paru* A.I.R. 1960 Ker. 195, 196.

[2] (1868) 9 W.R. 230, 232.

[3] A.I.R. 1937 Nag. 354—followed in *Sm. Mukul* v *Indian Airlines Corp.* A.I.R. 1962 Cal. 311, 320.

parties' contemplation when they entered into the transaction which gave rise to the action. Where there is no possibility of reference to a personal law, reference to no specific law, to a statute, or to the English law as a last resort is found. Instances where the English law has been repudiated as not in accordance with the law usual in civilized countries,[1] as unsuited to India, or to the case,[2] and so not applied there, are not infrequent. In *Raj Bahadur* v *Bishen Dayal*[3] the family were neither Hindus nor Muslims, but the family had followed the Hindu law of inheritance by custom and the Hindu law was applied to them. One of many instances of silent reference to the formula is found in *Chathunni* v *Sankaran*,[4] where a patrilineal man married a matrilineal woman and it was held that natural justice required that the child should inherit patrilineally through his father and matrilineally through his mother, a situation not contemplated by any system of personal law. *Radha* v *Raj Kuar*[5] is perhaps an example of reference to a concept of justice in the judge's mind which has a distinctly liberal tinge, not referable to any particular system of law, and not apparently due to English law. A man lived with a woman of lower caste whom he could not marry and was outcasted. He died, and the woman held property which was acquired by him and died leaving it to her children by him. His brothers, who had remained in caste, sued for this property, claiming that the woman and her illegitimate issue had no right to it. The court held that as the property was not ancestral and the brothers had contributed nothing to its acquisition they were not entitled to it, but that justice, equity and good conscience gave it to the children. In *Jagarnath Gir* v *Sher Bahadur Singh*[6] the formula allowed a mother to succeed to her illegitimate child. In that case analogies from the Anglo-Hindu law were drawn upon. In *Viswanatha Mudali* v *Doraiswami*[7] it was held that dancing-girls, whose customs in many respects differed from the personal law, were to be governed by Hindu law or by analogies drawn from the Hindu law. In *T. Saraswathi Ammal* v *Jagadambal*[8] it was held that propinquity, being a fundamental principle of Hindu law, could be relied on under our principle to enable the dancing-girl daughter and the married daughter of a woman to succeed together to her property in the absence of a customary rule

[1] *Gatha Ram* v *Moohita* (1875) 23 W.R. 179.
[2] *Ramratan Kapali* v *Aswini* (1910) 37 Cal. 559.
[3] (1882) 4 All. 343, 349-51.
[4] (1884) 8 Mad. 238.
[5] (1891) 13 All. 573, 575.
[6] (1934) 57 All. 85.
[7] (1925) 48 Mad. 944; *Venkata* v *Cheekati* (1953) 1 M.L.J. 358.
[8] A.I.R. 1953 S.C. 201, 204 col. i.

to the contrary. In *Sudarshan Singh* v *Suresh Singh*[1] it was held that the illegitimate son and illegitimate daughter of a Hindu woman share her estate equally, though if Hindu law had been applied by analogy the daughter would have been preferred to the son. In *Iravi Pillai* v *Mathevan*[2] a problem in the residual law to be applied to matrilineal families was solved by the application of Hindu law, i.e. patrilineal law, a system which had been applied previously to fill gaps in the customary matrilineal systems. In *Pavitri* v *Katheesumma*[3] a Muslim male had had an illegitimate daughter by a Hindu female. The daughter sued for maintenance out of his estate. This was refused to her on the ground that justice, equity and good conscience, whether one searched the Hindu law or the English common law, was hostile to such claims. In *Robasa* v *Khodadad*,[4] a case recently followed in Pakistan,[5] a spouse was converted from Zoroastrianism to Islam. It was held that under our principle, which by no means required reference to English law (which in any case provided no helpful analogies), a party to a solemn pact could not bring it to an end by unilateral act, and the marriage did not stand dissolved. It was not possible to apply the Islamic law, which was applicable only where *both* parties were Muslims.

A further use for the formula arises where the doctrines of the personal laws are obscure because of differences of opinion between the native jurists. In *Aziz Bano* v *Muhammad Ibrahim*[6] it was held that a choice most consistent with justice, equity and good conscience could be made between the conflicting opinions in Islamic law; and a similar view was evinced with reference to Hindu law in *Rakhalraj* v *Debendra*.[7]

It remains to discuss a peculiar feature of 'justice, equity and good conscience' as known in South Asia. Repeatedly advocates attempt to argue that a provision of the personal law, or indeed of some statute, is not to be applied in the circumstances because it would be contrary to equity and good conscience so to do. In no case have they succeeded. It is very curious that this argument should be raised, since in *Moonshee Buzloor Ruheem* v *Shumsoonnissa Begum*[8] the Privy Council indignantly and with great emphasis repelled the notion that a definite rule of the personal law could be nullified because it did not

[1] A.I.R. 1960 Pat. 45.
[2] A.I.R. 1955 T.C. 55 FB.
[3] A.I.R. 1959 Ker. 319.
[4] [1948] Bom. 223.
[5] *Farooq Leivers* v *Adelaide* P.L.R. (1958) 2 W.P. 1116.
[6] (1925) 47 All. 823.
[7] A.I.R. 1948 Cal. 356.
[8] (1867) 11 M.I.A. 551.

square with the court's notion of justice, equity and good conscience. Sir James W. Colvile said:[1]

'The passages just quoted, if understood in their literal sense, imply that cases of this kind are to be decided without reference to the Mahomedan law, but according to what is termed, "equity and good conscience", i.e. according to that which the judge may think the principles of natural justice require to be done in the particular case. Their Lordships most emphatically dissent from that conclusion. It is, in their opinion, opposed to the whole policy of the law in British India, and particularly to the enactment (Reg. IV of 1793, s.15) . . . which directs, that in suits regarding marriage . . . the Mahomedan laws with respect to Mahomedans . . . are to be considered as the general rules by which Judges are to form their decisions; and they can conceive nothing more likely to give just alarm to the Mahomedan community than to learn by a judicial decision that their law, the application of which has been thus secured to them, is to be overridden upon a question which so materially concerns their domestic relations. The Judges were not dealing with a case in which the Mahomedan law was in plain conflict with the general municipal law, or with the requirements of a more advanced and civilized society—as, for instance, if a Mussulman had insisted on the right to slay his wife taken in adultery. In the reports of our Ecclesiastical Courts there is no lack of cases in which a humane man, judging according to his own sense of what is just and fair, without reference to positive law, would let the wife go free; and yet, the proof falling short of legal cruelty, the Judge has felt constrained to order her to return to her husband.'

This left it open to be supposed that the personal laws could be overridden if they were inconsistent with the requirements of a more advanced and civilized society, and indeed in *Mahomed Kadar* v *Ludden*[2] it was contended that the Islamic institution of *mut'a* (the temporary marriage amongst Shias) was subject to modification disallowing the husband's right to divorce unilaterally. It was however held that what the Privy Council had in mind was inhumanity or barbarity, and that short of these the personal laws could not be impugned. Yet similar attempts are regularly made even in these days. Again and again we find the judges saying that the provision of law is

[1] At p. 614.

[2] (1886) 14 Cal. 276, 286-7.

not repugnant to those principles[1]—and rightly so, for, as we have seen, there is no ground for supposing that in South Asia the formula operates as a *repugnancy* rule. Where we are concerned with *custom*, no doubt a custom is to be followed if not contrary to *natural justice:* but that is another question entirely. The equity which ancient Roman advocates used to urge upon the court, *aequitas* in sense (i), and the 'equity of the statute' which flourished in England until the eighteenth century, have no place in modern South Asia.

JUSTICE, EQUITY AND GOOD CONSCIENCE IN AFRICA

A complete survey of the scope of the phrase in Africa would be impossible in this already lengthy paper. Moreover, it seems that many valuable decisions are not published. It is clear that reference to some Indian cases has taken place,[2] but that on the whole judges prefer to treat the formula as if it meant 'public policy', 'natural justice', and the like. But an instinct to refer to a developed system of law, and in particular one which is accessible to the practitioners as well as to the court, is well evidenced[3] and is, as we have seen, perfectly sound in principle.

It is no mystery how the formula came to Africa. As soon as it was determined that the administration of African customary law should be integrated with the judicial administration of the Supreme Court of the Gold Coast, a reorganization of the jurisdiction and practice of that court required a definition, in s. 19 of the Supreme Court Ordinance of the Gold Coast, 1876, of the scope within which native laws or customs should be judicially applied. We have already seen that customs were to be enforced if not repugnant to natural justice, equity and good conscience (or ordinances for the time being in force), and that 'in cases where no express rule is applicable to any matter in controversy, the court shall be governed by the principles of justice, equity and good conscience'. Similar provisions are to be found in the laws of Gambia, Sierra Leone, Nigeria and Northern Rhodesia.

Instructions for drawing up the Ordinance were communicated by the Colonial Secretary, Lord Carnarvon, on 16th April 1875.[4] It was then the custom to supply the Queen's Advocate, Mr Chalmers, with

[1] *Km. N. Sp. N. Valliammal* v *J. A. Ramachandra* A.I.R. 1959 Mad. 433; *Revappa* v *Balu* A.I.R. 1939 Bom. 59, 61 Col. i.

[2] H. W. Hayes Redwar, *Comments on some Ordinances of the Gold Coast Colony* (London, 1909), 59, 65.

[3] Views cited by E. Guttman (1957) 6 I.C.L.Q. 401f, at 412.

[4] Despatch no. 55 of that date. P.R.O., C.O. 96/116. Sept. G.C. No. 10, 867, sent September 6, 1875, received October 1, 1875.

copies of Indian statutes on subjects under consideration for legislation.[1] Here was no exception: various 'Laws' were sent out, and Mr Chalmers says, 'I have adopted very numerous provisions from these laws; but not without carefully considering the questions of local suitability which presented themselves in each instance.'[2] Although he did not refer to the [Indian] Punjab Laws Act, Act IV of 1872, it is quite clear that he consulted it.[3] The relevant provisions of that Act are contained in ss. 5-7.

s.5. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastards, family relations, wills, legacies, gifts, partition, or any religious usage or institution, the rule of decision shall be—

(*a*) Any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been declared to be void by any competent authority;

(*b*) the Muhammadan law . . . and the Hindu law . . .

s.6. In cases not otherwise specially provided for, the Judges shall decide according to justice, equity and good conscience.

s.7. All local customs and mercantile usages shall be regarded as valid, unless they are contrary to justice, equity or good conscience, or have . . . been declared to be void by any competent authority.

Punjab is somewhat peculiar, in that, in the matters where the personal law normally reigns supreme, local customs for the most part take the place of those laws, and cut across religious denomination. The provision in s. 5 (a) is not at once intelligible. If the formula meant English or any other foreign law it must make nonsense of the basic provision that customary law must be the primary source, for naturally very few of the customs of the Punjab would be likely to agree with foreign laws. It is evidently a piece of incompetent draftsmanship, and what the legislature meant to say was that customs should be binding if they were not repugnant to natural justice, *ius naturale;* and the same comment must be made about s. 7.[4] This is eloquent proof that by the 1870's influential and well-informed men,

[1] Same volume, October. Reference to a despatch of March 5, 1876. See also G.C. No. 12, 303, *ibid.*

[2] Covering letter submitted to Governor Strahan, September 4, 1875, ref. as n. 4, p. 148 at para. 3.

[3] J. M. Sarbah, *Fanti Customary Laws* (London, 1897), 18, 30; Hayes Redwar, *op. cit.*, 59.

[4] I.O. MSS. (Rec.) *Home Misc. Ser.* 124, fo. 171.

such as the Law Member of the Viceroy's Council, had totally forgotten what our phrase really meant. Mr Chalmers, faced by this anomaly, tried to improve on its evident solecism by turning 'justice' into 'natural justice'. This did not render it a satisfactory provision, and we must read the repugnancy provision as if it were 'repugnant to natural justice', and treat the following words, 'equity and good conscience' as superfluous.

Very good sense has been shown in the Sudan in dealing with the relevant residual provision there. The Civil Justice Ordinance, 1929, s. 9 provides, for a land singularly short of statutory or case law, that, 'In cases not provided for by this or any other enactment for the time being in force the courts shall act according to justice, equity and good conscience'. Here the borrowing is likely to have been direct from India rather than indirectly from the Gold Coast. There is ample evidence[1] that under our principle the courts of the Sudan apply English law (including English statutory law), Egyptian law, Indian law, or indeed the law of any country the written sources of which are readily available to them, that there is a distinct preference for English law, and that this preference rests upon principles fully recognized. It has been pointed out that the public needs as residual systems of law systems with which the Bar as well as the Bench may be familiar,[2] and that the system with which members of the Bar, law teachers and law students alike are best acquainted, questions of religion apart, is the English law, and that therefore English cases and statutes are most readily to be cited.

The predominance of English law in African territories ruled or once ruled by the British is not therefore surprising. But one may wonder whether, or for how long, it will continue.

CONCLUSION

The effects of the formula in India have been to smooth out discrepancies between systems of law, and to introduce conceptions which strongly resemble the general character of English law. Actual rules of English law are regularly relied upon in some fields.[3] In so far as this has established lines of authority the importation of American

[1] E. Guttman (cited p. 148, n. 3 above) at pp. 407, 410, 411. It appears that now the rule laid down in 1920 that English law should guide but not govern the courts in the Sudan has been modified in favour of the doctrine that any system of law may be consulted, English law having no preference.

[2] N. 3 at p. 148. [3] But see *Namdeo* v *Narmadabai* [1953] S.C.R. 1099.

or other foreign laws is unlikely, if not impossible, as long as the residual sources remain unaffected by legislation. Yet we have seen that there are fields and chapters where English law by no means claims prominence or predominance. The influence exerted by India's long connexion with England, nowhere more subtle or pervasive than in her legal system, seems, none the less, to ensure frequent consultation of English decisions wherever India lacks an authority. The same should apply to relevant parts of Africa.

But in both parts of the globe a proviso exists, which goes back to the origins of the formula. If English law had been meant to be indicated it would indeed have been indicated in so many words. The formula was a device to escape from English law, not to call it in. Because precedent does not govern what the judge may in his discretion regard as consistent with justice, equity and good conscience to anything like the same degree as in other fields it is open to any judge to review other systems of law offered by counsel for his information. It is clear that this source does not mean uncontrolled speculation or personal preference. Reference to another system of law there must be, and provided it is a developed system of law it cannot be said to be against justice, etc., unless it is plainly inconsistent with the needs of the case or markedly incongruent with the rest of the system. So long as the system of customary law applied is one which can provide a valid analogy, the scope for introducing foreign laws does not exist. It is only where positive law, custom, and equitable analogies based upon proved custom cannot be traced that our formula comes into its own. In such cases if the Bar and the Bench are sufficiently learned they may review the whole field of law: customs of neighbouring and similar tribes; written laws of generally similar peoples; the opinions of textbook writers and anthropologists; considerations of peace and public policy; the laws of developed countries starting, naturally, with English law, and reviewing the position in the other colonies or ex-colonies, the Dominions, the United States, and finally the Civil Law world. There is, it is submitted, a case for the employment of a trained comparative lawyer as a legal adviser, from whose opinions, perhaps as *amicus curiae*, it will be possible to determine what would be the *best* law for the circumstances. A rule cannot be consistent with justice, etc., if it relies upon a rule in a particular foreign law, however familiar, when the reverse is normally used amongst a great part of mankind—so long as that latter rule would not be incompatible with the whole chapter of law under consideration.

Finally it is perhaps necessary to point out that some *other* formulae may or may not amount to the same thing as our formula. We have seen that the 'justice and right' of the Original Sides of the Presidency High Courts and their successors has been held to amount to the same thing as 'justice, equity and good conscience', though there are still doubts whether after all the English common law is not the residual source of law there. The repugnancy provisions of various African statutes admitting native law and custom are beyond our concern, for we have seen that 'natural justice, equity and good conscience' was really a mistake, and the question whether 'natural justice' is or is not the same as 'morality', 'humanity', and the like is beyond the scope of this essay.

ADDENDUM

The provision in the law of Ghana for reference to our formula in repugnancy and residual contexts (Courts Ordinance, cap. 4, s. 87 (1)) has been repealed with the rest of that Ordinance by the [Ghana] Courts Act, 1960, s. 156. The savings in s. 154 do not include s. 87 of the earlier law. The new code provides by s. 66 (3) (b) that—

> the rules of estoppel and such other of the rules generally known as the doctrines of equity as have heretofore been treated as applicable in all proceedings in Ghana shall continue to be so treated.

Since 'justice, equity and good conscience' is not a rule of common law or equity, and, as we have seen, does not even refer of necessity to common law or equity (though to establish what is consistent with equity and good conscience it would be advisable to inform oneself of what the common law, equity and statute law of England have to say on the topic at issue), it seems to follow that reference to it is abolished in Ghana. It may be asked whether a fundamental rule can be abolished by statute; in other words whether Parliament is bound by fundamental laws which the courts will apply in interpreting the intention of Parliament. Technically the answer in this day and age must be yes to the first question, and no to the second. The result

would be that where residual law is needed, or a custom is impugned on the ground of being repugnant to 'natural justice, equity and good conscience' (as distinct from the common law rules of 'reason' and 'public policy'), the plaintiff must fail, or the custom must be admitted, because where the formula is missing, the case must proceed as if no alternative were available. But the function of the judge being what it is (see p. 119 above), decisions (perhaps in contexts other than these last) founded on the principles of justice and natural equity, reason, and good conscience will continue to be given, pending a distinct prohibition from the legislature. As a result the way is still open for the consultation of comparative legal material. Customs will, in any case, be admitted if they are not 'repugnant' in the legally trained opinions of the Ghana judges (see pp. 114, 148 above), and, where necessary, material from foreign systems of law will still be imported at those same judges' discretion to fill gaps left by the positive law.

S2

ESSAYS IN CLASSICAL AND MODERN HINDU LAW

BY

J. DUNCAN M. DERRETT

D.C.L. (Oxon.), LL.D., Ph.D. (Lond.), of Gray's Inn, Barrister;
Professor of Oriental Laws in the University of London;
sometime Tagore Professor of Law, University of Calcutta;
Medallist of the Asiatic Society, Calcutta, 1977

VOLUME FOUR

CURRENT PROBLEMS AND THE LEGACY OF THE PAST

LEIDEN
E. J. BRILL
1978

53

JUSTICE, EQUITY AND GOOD CONSCIENCE IN INDIA.

It is not the intention of this paper to enter into the history of the formula.[1] Briefly, it is a group of references to the sources of law recognised by civil lawyers of the European world, trained in Roman and Canon laws, which act as residual sources of law in default of written law and custom. It was introduced into India by the East India Company under the influence of the theory that Civil law was suitable to the Company's Courts in the presidency-towns, since the Common law was not suited to the conditions in the settlements there. Much later Sir Elijah Impey introduced it into the Administration of Justice Regulation (Bengal), 1781, ss. 60 and 93, as a result of the discovery that the Company's Courts could not function in proximity with the King's Court at Calcutta without protection from the process of the latter. Under the influence of an apt suggestion, apparently, from Mr. E. O. Ives, who had had experience of this process, he set out as the residual law of the Company's Courts the basic, fundamental sources of western jurisprudence, *in order to avoid the application* to them, or by them, *of the common law.*

In course of time the function of J.E.G.C. (as I shall for convenience abbreviate the formula) came to be misunderstood. Throughout the centuries, however, repeated glimpses have been provided of the true meaning and purpose of that residual source. If we refer back to them we realise that, though numerous Judges have not always been aware of it, its function has not been lost sight of. J.E.G.C. is as much a part of the law of India as it was in 1781, though naturally the scope for its employment is very restricted. The vast development of statute law and case law, and the progressive diminution of the realm of custom due to the Shariat Act, 1937, and the Hindu Code have restricted the need to call upon Justice, Equity and Good Conscience. But when it must be called upon, as not infrequently happens from time to time, it is essential to know what it means. The function of this paper is to supply references, sorted out according to a somewhat rough and ready plan, to enable the advocate to find authorities which may help him. A complete list of all references to J.E.G.C. in the Indian cases could be compiled, but it would be a lifetime's work. In those circumstances it would be useless to ask for a list of the *silent* references to J.E.G.C. which occur every day. The Courts are habituated to refer to principles of equity and justice, and to consult English and American cases, and gradually and imperceptibly supplementation and enrichment of Indian law goes on without any overt appeal to J.E.G.C. Yet it is by virtue of that formula that such growth can occur. It is important to watch how the process got under way, and to attempt to correct movement in an unsound direction.

At the outset I should state plainly what I aim to show. There will be no conclusion to this paper, and it is convenient to summarise the intended conclusions at this stage:—

1. The history of the formula, traced from the canonists of the 16th century to modern Africa, appeared in J.N.D. Anderson, ed., *Changing Law in Developing Countries, 1962*, under the title "Justice, Equity and Good Conscience."

1. There is no scope for J.E.G.C. when the case-law is clear, when the point is covered by statute,[2] or where the principles of the system of personal law in question can be found out by the personal law's own system of interpretation,[3] or by the normal methods of construing statutes.

2. There is no such thing, outside the Punjab, as repugnancy on the ground of contravention of J.E.G.C. Even in the Punjab, the reference to the formula is an error of draftsmanship.[4] What was meant was that customs should not be contrary to 'natural justice', which is a somewhat different matter. No rule of the personal laws, still less any statutory rule, can be set aside by an appeal to J.E.G.C. The doctrine that rules, for example, of Hindu law would not be enforced if contrary to J.E.G.C., which seems to have emanated from a misunderstanding by J. D. Mayne, is totally false. Cases on the point merely deny that the impugned rule is contrary to J.E.G.C., and no genuine example of setting aside a rule of personal law for repugnancy with J.E.G.C. can be found.[5] Such examples as *appear* to be in that direction deal with another problem.

3. Where the rights of parties are not clearly governed by a particular personal law, where the personal law is silent, where a Code has a lacuna, and where the source fails, or requires to be supplemented, J.E.G.C. may properly be referred to. It may also be referred to where the sources are irreconcilably conflicting, or some choice must be made between authorities which are equally applicable, but inconsistent. Thus where the doctors of the Islamic law differ, or the *smritis* are in conflict, as not infrequently happens, J.E.G.C. may indicate which should be followed.[6]

4. Once reference to J.E.G.C. is indicated, the Court must apply itself to the source. It is about the identification of this source that the great problem arises. J.E.G.C. is any developed system of law suitable to the circumstances of the case.[7] If the case is in the realm of commercial law, wills,[8] trusts, charities, or guardianship the English law will normally be looked to.

5. If J.E.G.C. must be applied and the problem is in none of the chapters of law referred to in the previous paragraph, there is no rule that English law must be consulted. The Court, which naturally must do the best it can with the material at its disposal, is obliged to consider all developed systems of law which could be helpful in providing a rule consistent with J.E. and G.C. Between about 1850 and 1925 Judges consulted not merely English law but also American and continental laws. Judges such as Holloway of Madras[9] and

2 See *Ram Coomar Coondoo* v. *Chunder Canto Mukerjee*, (1876) 4 I.A. 23, 50-1. *Bai Dahi* v. *Bai Sada*, [1961] A.I.R. Guj. 105, 109, col. a.

3 See the angry words of Chandavarkar, J., in *Kalgavda Tavanappa* v. *Somappa Tamangavada*, (1909) 33 Bom. 669, s.c. 11 Bom. L.R. 797. He objected to attempts to *Romanise* Hindu law, when general Hindu principles were available. The Hindu law texts contain their own appeals to, and provisions for, equity: *Peramanayakom* v. *Sivaraman*, [1952] A.I.R. Mad. 419, 472-3, F.B.

4 Punjab Laws Act, Act IV of 1872, ss. 5, 6.

5 This is not to say that between 1772 and 1840 numerous rules of the personal law were not refused application on the ground that they were unenforceable for various reasons, including natural justice: but this process is very poorly documented, and the personal laws became virtually settled by the middle of the century.

6 See *Aziz Bano* v. *Muhammad Ibrahim, Husain*, (1925) I.L.R. 47 All. 823, 837, 848 (Muhammadan law); *Rakhalraj Mondal* v. *Debendra Nath*, [1948] A.I.R. Cal. 356, 358 col. a (Hindu law).

7 In the article cited at n. 1 above will be found references to remarks by Sir Frederick Pollock, Sir James Fitz James Stephen, Morley, Stokes, Sir George Rankin and others as to the meaning of J. E. G. C. I do not find myself entirely satisfied with their efforts at definition, though much of their statements as to the usage of Courts in the earlier days must be correct. Mr. Justice Asutosh Mookerjee, on the other hand, I find entirely reliable. There are useful references to J. E. G. C. in A. S. Nataraja Ayyar's *Mimamsa Jurisprudence* (1952), pp. 71f, and in U. C. Sircar's *Epochs in Hindu Legal History* (1958), at p. 376 and elsewhere.

8 Sir Ernest Trevelyan in his book on Hindu wills frequently makes use of the formula, to allow English rules, or the rules of the Indian Succession Act which are not specifically applicable to the Hindu will, to be relied upon in appropriate cases.

9 Mr. Justice Holloway's extraordinary career as a judge is detailed in my "Role of Roman Law and Continental Laws in India", (1959) 24 Zeitschrift fuer auslaendisches und internationales Privatrecht (RabelsZ), 657-685.

Sir Ashutosh Mookherjee in Calcutta[10] did not hesitate to consult Roman law wherever it might throw light on a disputed and unclear passage of Indian law. Since 1925 such learning has been called upon less and less frequently, and the skill and familiarity with the books required have vanished together.[10a] But it is not too late to recreate this skill. Familiarity with American and Commonwealth statutes and case-law has revived with the development of constitutional law, industrial law, and fiscal law. Comparative law, an academic study hardly upon its feet before 1925, is now equipped with experts and handy research materials in English. There are journals devoted entirely to it. Within a short space of time bibliographies upon the treatment of a particular problem or chapter of law can be supplied from almost any English-speaking country. The natural inclination to look first to English law, because Judges and advocates were trained in England or in English legal ways, and know how to handle English books easily, should not cut out the possibility of consultation of other systems of law.

6. Where the Court consults English law to determine whether the English rule would be consistent with J.E.G.C. there is no obligation whatever to consult only the Common law. Numerous cases have in fact done this. On the other hand others correctly consult the English law as it stands, modified by statute, and apply, if they think it consistent with J.E.G.C., the combined effect of Common law and statute. Naturally this must be preferable. The common law may be the residual system for some purposes on the Original Sides of the presidency High Courts, but where the charters refer to 'justice and right', which is identical with J.E.G.C., reference may be made first to any developed system, and this may well require reference to the complete English law. This cannot be the *undeveloped* Common law, with many of whose features the Courts have repeatedly disagreed, as unsuited to Indian conditions.

Before passing to an analysis of the cases we should pause to pay tribute to the role played by J.E.G.C. in the past in the formation of the Anglo-Hindu law. It has been recognised repeatedly that the case-law contains numerous silent additions and modifications due entirely to the application of English equitable principles.[11] The law relating to alienation of undivided interests, the law permitting the attachment of an undivided interest, the law relating to the protection of the alienee from a limited owner, much of the law relating to the 'pious obligation': in all these cases the contribution of J.E.G.C. has been subtle and profound, and it is not open at this hour of the day to refer to original Hindu authorities in the hope of undoing this work.

I

The 'Repugnancy' Mare's Nest

In *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*[12] it had been suggested that rules of the Muhammadan law relative to a Muslim husband's right to restitution of conjugal rights should be abandoned in deference to J.E.G.C. The Privy Council objected:—

"The passages just quoted (from the Calcutta High Court's judgment of 1862), if understood in their literal sense, imply that cases of this kind are to be decided without reference to the Mahomedan law, but according to what is terms, 'equity and good conscience', i.e. according to that which the Judge may think the principles of natural justice

10 To the examples given in the article mentioned in the previous note I ought to have added Mookerjee, J.'s, amazingly thorough survey of Roman and continental legal thinking with reference to the posthumous son in *Kusum Kumari Dasi* v. *Dasarathi Sinha*, [1921] A.I.R. Cal. 487, s.c. 67 I.C. 210.

10a Though, to be fair, one must note that awareness of continental-type law is sometimes indicated in the Supreme Court and that Japanese banking law was cited there, as we see from *Kuruvilla* v. *Reserve Bank*, [1962] K.L.T. (S.C.) 69, 92, along with American law.

11 *Ramchandra Shrinivas* v. *Ramkrishna*, (1951) 54 Bom. L.R. 636, 641; *Sheonandan Prasad* v. *Ugrah Sao*, [1960] A.I.R. Pat. 66, 74; *Amrit Lal* v. *Jayantilal*, [1960] A.I.R. S.C. 964, 970, col. b, s.c. [1960] 3 S.C.R. 842.

12 (1867) 11 M.I.A. 551, 614-5.

require to be done in the particular case. Their Lordship most emphatically dissent from that conclusion. It is in their opinion opposed to the whole policy of the law in British India, and particularly to the enactment (Reg. IV of 1793, s. 15)... The judges were not dealing with a case in which the Mahomedan law was in plain conflict with the general municipal law, or with the requirements of a more advanced and civilized society—as for instance if a Mussulman had insisted on the right to slay his wife taken in adultery."

The dictum suggesting that there *might* be cases where the personal law might be departed from was taken up in *Mahomed Abid Ali Kumar Kadar* v. *Luddon Sahiba,*[13] a case of a *muta* marriage. Ameer Ali, who appeared for the wife, contended that under J.E.G.C. consent was required before the wife could be divorced. The Calcutta High Court pointed out that what the Privy Council had in mind in *Buzloor Ruheem's* case was inhumanity or barbarity. In *Vidya Varuthi Tirtha* v. *Balusami Ayyar,*[14] Mr. Ameer Ali, now a Judge of the Privy Council, took occasion to doubt the interpretation or adjustment of personal laws to meet the requirements of any other system. He said, "It would...be a serious inroad into their rights if the rules of the Hindu and Mahommedan laws were to be construed with the light of legal conceptions borrowed from abroad, unless perhaps where they are absolutely, so to speak, *in pari materia.*"

In *Guru Gobind Shaha Manlal* v. *Anand Lal Ghose Mazumdar*[15] Hobhouse J., made the curious remark that the practice of adoption had justice, equity and the fitness of things to support it. He evidently thought that the institution was under fire, or that an attempt was being made to narrow down its force under a claim to some overriding considerations of J.E.G.C., but he repudiated this.

Mayne, at p. 153 of the 10th edn., says that where archaic rules of Hindu law very plainly transgress the rules of J.E.G.C. they cannot be enforced. He had in mind the marriages of impotent persons and lunatics. This is cited by Collister, J., in *Bhagwati Saran Singh* v. *Parmeshwari Nandan Singh.*[16] Reference to Mayne 7th edition shows that this was a genuine notion of Mayne's and not an importation from his editors.[17] From Mayne the notion has spread elsewhere; but it is totally unfounded.[18] If lunatics may marry (which was always doubtful) no rule of J.E.G.C. could set aside the rule. In *Chandulal* v. *Bai Kashi*[19] it was alleged that where a woman died without blood relations it would be contrary to 'natural justice' that her husband's heirs should succeed. Much stranger things have happened, and the allegation was repudiated. In *Krishna Mudaliar* v. *Marimuthu Mudaliar*[20] Patanjali Sastri, J. (as he then was), considered the claim that according to J.E.G.C. persons resembling *gotraja sapindas* should dislodge *atmabandhus* as if they were indeed true *gotrajas.* In his view the text (Yajn. II, 136) could not be outweighed by analogical reasoning. In *Valliammal Achi* v. *Ramachandra*[21] it seems to have been urged that under the Madras Agriculturists' Relief Act, 1938, it was inconsistent with J.E.G.C. that an assignee from a puisne mortgagee should be liable if he purchased the mortgagor's interest in the property to pay a decree lying against both. The contention was repudiated.

The position in the Punjab is indicated in the rather old edition of W. H. Rattigan's *Digest of Civil Law for the Punjab* (11th edn., 1929) by K. J. Rustomji, pp. 41-5. Two instances are given of a custom being held not contrary to J.E.G.C., and one instance only of a custom being held bad as repugnant to J.E.G.C. Instances of customs being bad as contrary to natural

13 (1886) I.L.R. 14 Cal. 276, 286-7.
14 (1921) 48 I.A. 302, 310, s.c. 24 Bom. L. R. 629.
15 (1870) 5 Beng. L.R. 15, 21.
16 [1942] All. 518, 581.
17 This seems to be the effect of a statement at p. 281 of that edition.
18 Since the law in Africa is modelled on that of the Punjab and not that of India generally in this small respect the citation of *Eshugbayi* v. *Govt. of Nigeria* (a Nigerian case), [1931] A.I.R. P.C. 248, s.c. 61 M.L.J. 975, is not quite apposite. The reference to J.E.G.C. at p. 10 of Raghavachariar's current edition of *Hindu Law Principles and Precedents* seems to be sound.
19 [1939] A.I.R. Bom. 59, 61 col. a, s.c. [1939] Bom. 97, s.c. 40 Bom. L.R. 1262.
20 [1939] 2 M.L.J. 423, 434.
21 [1959] A.I.R. Mad. 433, 436.

justice, as being inclined to foster bad morals, and the like are indistinguishable. Such cases have no bearing on the general Indian law.

We may now consider *Ibrahim Saib* v. *Muni Mir Udin Saib*.[22] This was the rather celebrated case where the Islamic law of preemption was unsuccessfully sought to be enforced in the mufassil of the then Madras Presidency. Holloway J. held, after a review of continental law of preemption, particularly German law and its history, that preemption was not a good thing, and he refused to apply the Islamic law of preemption in the mufassil. "It cannot be equity and good conscience," he said "to introduce propositions which the history of similar laws shows by experience to be most mischievous." This is *not* an instance of a chapter of the personal laws being held void as repugnant to J.E.G.C. The position was this, that in the mufassil the topic of preemption was not one of the listed topics, upon which the personal laws were to be applied. Hence if it was to be applied it would be (as was normal then) under the heading of the residual source, J.E.G.C. But the law of preemption tendered did not seem to be consistent with the best law then available for consultation, hence it was not 'introduced' there.

II

J. E. & G. C. AS A SOURCE OF LAW

A. The Scope for English Law

J.E.G.C. comes to the Judge's aid (i) where there is no specific source of law indicated; or (ii) where the indicated source fails. These two contexts are closely similar, and often overlap, but we shall find it convenient to divide the cases where it was used as a *source* from those where it merely *supplemented* a known and established source. In the former cases the Judges were more free to look around them and consider what system or systems were applicable, than in the latter case where the principal system was already before them and revealed distressing gaps or uncertainties. We consider first those instances where English law was turned to, and the doubts as to the status of Common law, pure and simple, for our purpose. Chronological order may not be unsuitable.

In *B. Churn Mitr* v. *Jykishen Mitr, & C.*[23] the Sudder Diwani Adalat of Calcutta expressed the opinion that the law of England was most conformable with justice and right reason, and this was applicable in the mufassil; ten years later the same opinion was expressed. It is known that during that period (the mid-19th century) books on Civil law and natural law as well as English law were studied and utilised, and it is evident that the advantage of English law lay only in the case of contact which the Judges in India might have with its development, and the certainty with which they could acquaint themselves with its rulings. In *Culliandoss Kirparam* v. *Cleveland*[24] a problem in easements was solved by reference to English law because it was derived from the Civil (Roman) law and had no peculiarities debarring its application to British subjects in India. In *Varden Seth Sam* v. *Luckpathy Royjee Lallah*[25] an appeal to the Privy Council was solved by the application of English law, not because the parties were English, for they were not, but because the contract was made in Madras, the general law of which was English law. English law respecting equitable mortgages applied, and therefore an equitable mortgage by deposit of title-deeds gave rise to a lien over the land. This was an application of the rule under Madras Reg. II of 1802, s. 17, which made J.E.G.C. the residual law. In *Dada Honaji* v. *Babaji Jagusket*[26] there was a dispute about the effect of oral additions or alterations of a written contract. The English rule of equity was administered because although English law was not binding on the

22 (1870) 6 M.H.C.R. 26. See *Bhim Rao* v. *Patilbua.* (1959) 62 Bom. L.R. 574, 580.
23 (1847) 8 I.D. 226, at p. 233. See (1847) 7 Sel. Rep. 431; and (1857) 13 S.D.A.R. (Cal.) 1140; 10 I.D. (O.S.) 130.
24 (1862) 2 I.J., O.S., 15.
25 (1862) 9 M.I.A. 303.
26 (1865) 2 B.H.C.R. 36, 38.

Courts in the mufassil they ought in proceeding according to J.E.G.C. to be governed by the principles of English law applicable to a similar state of circumstances. Here Couch J. went a little too far, and he repeated this overwide proposition in *Webbe* v. *Lester*[27] where, after all, the problem was joint speculation in improving land, a topic well within the scope of equity, though perhaps rules of Roman law might have been consulted with profit. Problems in estoppel arose in *Mussamut Edun* v. *Mussamut Bechun*[28] and later in *Byro Dutt* v. *Mussamut Lekhranee Kooer*.[29] In both cases the English law was applied. This is not surprising as in matters of evidence English law was on the point of ousting the mixed English and Islamic law of India on that subject, and the Hindu law of evidence had long since disappeared. In *Degumburee Dabee* v. *Eshan Chunder Sein*[30] Sir Barnes Peacock, C.J., a very eminent Judge in Calcutta and at the Privy Council Board, dealt with the problem of a co-debtor who purchased the decree under which he was a debtor and wanted to levy the whole amount against his co-debtors. He said,

"Now, having to administer equity, justice, and good conscience, where are we to look for the principles which are to guide us? We must go to other countries where equity and justice are administered upon principles which have been the growth of ages, and see how the Courts act under similar circumstances; and, if we find that the rules which they have laid down are in accordance with the true principles of equity, we cannot do wrong in following them."

And he proceeded to cite English cases. We have noticed the much less cautious approach of Couch J. in Bombay. When Chief Justice there he held in *Mancharsha Ashpandiarji* v. *Kamrunissa Begam*[31] that Parsis in the mufassil having no specific law J.E.G.C. must be applied to them, which, with certain necessary modifications, amounted to the practice of the Courts of equity in England. We note that the problem was as to the rights of a mortgagee in possession to the cost of necessary repairs to the property.

In *Vaman Janardhan Joshi* v. *The Collector of Thana and the Conservator of Forests*,[32] J.E.G.C. was referred to, correctly, as embracing a consideration of the public good. The rule of English law relative to the construction of grants to the subject was the proper rule to be applied in construing grants from native governments. Melville J. said:

"The British government, having bound itself to respect all grants made by former governments, the application of this rule would be oppressive if it involved a harsher mode of construction than would have been applied under the native governments, by whom the grants were made. And if this be not the case, it is still not such a rule as should be applied if it be in any way opposed to justice, equity and good conscience."

The English rule turned out to be just. In *Mollwo, March & Co.* v. *Court of Wards*[33] it was asserted by the Privy Council that, though the usages of business people in India ought to be borne in mind,

"In the absence of any law or well-established custom existing in India on the subject, English law may properly be resorted to in mercantile affairs for principles and rules to guide the Courts in that country to a right decision."

In *Rajah Kishendatt Ram* v. *Rajah Mumtaz Ali Khan*[34] the Privy Council proposed to apply a rule of English equity to the rights of redemption of a mortgagor whose property had received accretions through certain mergers by the mortgagee in possession. Their Lordships opined:—

"...If the principle invoked depended upon any technical rule of English law, it would of course be inapplicable to a case determinable, like this, on the broad principles of equity and good conscience. It is only applicable because it is agreeable to general equity and good conscience. And, again, if it possesses that character, the limits of its applicability are not to be taken as rigidly defined by the course of English decisions,

27 (1865) 2 B.H.C.R. 52, 56.
28 (1867) 8 W.R. 175, at p. 179.
29 (1871) 16 W.R. 123.
30 (1868) 9 W.R. 230, 232.
31 (1868) 5 B.H.C.R., A.C.J. 109, 114.
32 (1869) 6 B.H.C.R., A.C.J. 191, 193-4.
33 (1872) I.A. Supp. Vol. 86, 100.
34 (1879) 6 I.A. 145, 159.

although those decisions are undoubtedly valuable, in so far as they recognise the general equity of the principle, and shew how it has been applied by the Courts of this country."

In all matters of trusts the Hindu in India must resort to English law: In re *Kahandas Narrandas*,[35] a principle now well-established and recognised recently in, for example, *Fulchand* v. *Hukumchand*.[36] Where statute and case-law fail, the rules of English equity are applicable. If American equity differed and both came before the Judge there would be a choice, that being preferred which was nearest, in the Judge's view, to J.E.G.C.

The general applicability of English law to Parsis in the mufassil was re-asserted by Bayley, J., in *Mithibai* v. *Limji Nowroji Banaji*[37] but he emphasised that there must be a similar state of circumstances before it can be applied. In *Moothora Kant Shaw* v. *The India General Steam Navigation Co.*[38] the English common law was applied with reference to the liability of common carriers because the Indian Carriers Act, 1865, did not affect it. The case of *Mollwo* was cited. In *Abdool Hye* v. *Mir Mahomed Mozaffer Hossein*,[39] the Privy Council applied the common law as J.E.G.C. when transactions were in question which were intended to defraud creditors. In *Waghela Rajsanji* v. *Shekh Masludin*[40] the Privy Council uttered the famous dictum about J.E.G.C. which has caused much misunderstanding, and has rightly been doubted. We should note first that the matter was a guardianship matter, and the question the right of the guardian to impose liabilities upon his ward.

"...In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances."

Not long afterwards in In the matter of *Saithri*,[41] the rules of a Court of equity were applied in a guardianship case under 'justice and right' (cl. 33 of the Charter of the Supreme Court, Bombay, December 8, 1823). In *Chunilal Vithaldas* v. *Fulchand*,[42] Bayley C. J. applied the English doctrine of marshalling of securities in reference to mufassil mortgages. Once again the applicability of English equitable rules under J.E.G.C. seemed inevitable. English law was meanwhile applied as the source of law on easements of necessity. It was just, equitable, and free from local peculiarities, and therefore appropriate to Indian needs: *Chunilal Mancharam* v. *Manishankar Atmaram*,[43] a principle later followed in *Wutzler* v. *Sharpe*,[44] where an English statute was actually applied. When a limited company was being wound up there was a question whether secured creditors were entitled to a general preference over others: the English rule, applicable since 1875, was applied in *The Mussoorie Bank, Limited.* v. *The Himalaya Bank, Limited*.[45]

To return to a guardianship topic, in *Lalla Sheo Churn Lal* v. *Ramnandan Dobey*,[46] the question was whether gross negligence on the part of a next friend in conducting a suit would be a ground for allowing the minor to institute a fresh suit. It was settled by reference to the rule of English equity under J.E.G.C. In reference to the English practice the Transfer of Property Act was relied upon in *Kader Moideen* v. *Nepean*,[47] (a case on mortgages), even in a situation where the Act was not literally applicable. The same principle is widely used even in more recent times (but compare the exceptional *Namdeo*

35 (1881) I.L.R. 5 Bom. 154, 163, 172-4.
36 (1959) 62 Bom. L.R. 308, 313 (and cases there cited). The same case is reported sub nom. *Phulchand* v. *Hukumchand* at [1960] A.I.R. Bom. 438.
37 (1881) I.L.R. 5 Bom. 506 527-8. See *Pardunji M. Banaji* v. *Mithibai*, (1897) I.L.R. 22 Bom. 355.
38 (1883) I.L.R. 10 Cal. 166, 189.
39 (1883) 11 I.A. 10, 17-8.
40 (1887) 14 I.A. 89, 96.
41 (1891) I.L.R. 16 Bom. 307. On 'Justice and right' see also *Mool Chand* v. *Alwar Chetty*, (1915) I.L.R. 39 Mad. 548, 552, 553.
42 (1893) I.L.R. 18 Bom. 160, 168, 170-1, 172.
43 (1893) I.L.R. 18 Bom. 616, 623, 627, 629-30. Compare *Charu Surnokar* v. *Dokouri Chunder Thakoor*, (1882) I.L.R. 8 Cal. 956 (discussed by Peacock on Easements (1899) 361-2, 383-4).
44 (1893) I.L.R. 15 All. 270, 299.
45 (1893) I.L.R. 16 All. 53.
46 (1894) I.L.R. 22 Cal. 8, 12.
47 (1898) 25 I.A. 241, s.c. 26 Cal. 1, 6. Also in *Singamma* v. *Sri Kantiah* (1945) 27 Mys. L. J. 85.

Lokman v. *Narmadabai*,[48] where the Supreme Court reviewed cases which attributed to the Transfer of Property Act a character consistent with J.E.G.C.). And in *Alabi Koya* v. *Mussa Koya*,[49] the provisions of s. 123 of that Act were held more suited to J.E.G.C. than the Muhammadan law on *musha*, which was in any case not *prima facie* applicable in the mufassil.

A necessary corrective of the unduly wide *dicta* in Bombay is provided by Batchelor J. in *Shapurji* v. *Dossabhoy*[50] which was concerned with the question whether the Parsi husband had any rights over his wife's personalty. He said (p. 362),

"...It is true that in such cases the practice of English Equity Courts would also be followed with necessary modifications (see *Mancharsha* v. *Kamrunisa Begum*[50a]), but I take it that the reference to those Courts would be not for the purpose of introducing special or peculiar doctrines of English law, but rather with the purpose of elucidating the principles of equity and good conscience."

The English law as to forfeiture of a tenancy were held applicable to India in *Nizamuddin* v. *Mamtazuddin*,[51] and the Privy Council expressly approved this in *Maharaja, Jeypore* v. *Rukmani*.[52]

Perhaps the most learned judgment dealing with J.E.G.C. is that of Mookerjee, A.C.J. in *Satish Chandra Chakravarti* v. *Ram Doyal De*,[53] in which he held that there was no absolute privilege for defamation in India. He threw some doubt as to whether the Privy Council meant the very comprehensive rule attributed to them in *Waghela's* case. In practice, he admitted, the law of torts under J.E.G.C. was substantially common law.

"...the only justice, equity and good conscience which judges steeped in the principles of English jurisprudence could and did administer in default of any other was so much of English law and usage as seemed reasonably applicable in this country."

The grave limitations of English law even in the realm of guardianship was adverted to in *Victor Justin Walter* v. *Marie Josephina Walter*,[54] but no reference was made to any other system, probably because counsel had no other information available. Clogs on the equity of redemption were considered in *Mehrban Khan* v. *Makhna*,[55] where Lord Tomlin incautiously said that J.E.G.C. was English law, under the dictum in *Waghela's* case: however, in view of the subject-matter the slip was venial.

A good example of a lacuna filled by J.E.G.C. which amounted to English common law adjusted to Indian conditions (there being no statute law to consider) is the rule that an advocate has a lien for his costs over property recovered: *S. Kuttikrishna Menon* v. *Cochin Mercantiles Ltd.*[56] When English law came to be consulted in reference to a claim for slander, in fact imputing unchastity to a woman, without proof of special damage, in *Narayana Sah* v. *Kannamma Bai*,[57] it is to be noted that the pre-1891 English law was not applicable, but the contemporary English law was applied. English law was utilised somewhat more modestly in *Muhammad Raza* v. *Abbas Bandi Bibi*,[58] where the Privy Council considered the effect of an agreement not to alienate property out of the family: partial restriction of alienation was held to be binding under J.E.G.C., upon which English law threw some light. This was almost a "common sense" case (see below).

As in *A. D. Narayana* (above) a sensible view was taken of the residual

48 (1953) 55 Bom. L.R. 517, 522, 523-4. The case is of great academic interest on the question how far English law is utilised in current Indian cases. Cf. the now overruled *Krishna Shetti* v. *Gilbert Pinto* (1918) I.L.R. 42 Mad 654.

49 (1901) I.L.R. 24 Mad. 513. 519, 521.

50 (1905) I.L.R. 30 Bom. 359, s.c. 7 Bom. L.R. 988.

50a (1868) 5 B.H.C.R. (A.C.J.) 109.

51 (1900) I.L.R. 28 Cal. 135, s.c. 5 C.W.N. 263.

52 [1919] A.I.R. P.C. 1,4, s.c. 21 Bom. L.R. 655. But see the discussion in *Namdeo* (cited at n. 48 above).

53 (1920) I.L.R. 48 Cal. 388, s.b., at pp. 407-9. This case is noticed and discussed by Sri K. D. Bhate at (1960) 62 Bom. L.R. (Jour.) *84f, 87*.

54 (1927) I.L.R. 55 Cal. 730, 741.

55 (1930) 57 I.A. 168, 170-1, s.c. I.L.R. 11 Lah. 251, s.c. 32 Bom. LR. 882.

56 [1961] K.L.T. 968.

57 (1931) I.L.R. 55 Mad. 727, 740, 746.

58 (1932) 59 I.A. 236, s.c. I.L.R. 7 Luck. 257, 267-8, s.c. 34 Bom. L.R. 1048.

source in *Secretary of State* v. *Rukhminibai*.[59] There Stone, C.J., said (p. 367),

"...in considering what is to-day consonant to justice, equity and good conscience one should regard the law as it is in England to-day, and not the law that was part of the law of England yesterday. One cannot take the common law of England divorced from the statute law of England and argue that the former is in accordance with justice, equity and good conscience and that the latter which has modified it is to be ignored...."

Accordingly the doctrine of "common employment", which was at length ejected from the English law of torts by statute, was held no part of the law of India. It is a pity that such a sensible view has not been taken in more recent cases. Meanwhile the tort of seduction was introduced into India as another piece of English common law in *Baboo* v. *Subanshi*[60] (if not much earlier). In the absence of legislative enactment on the subject it was necessary to consult English cases and the opinions of English jurists on the question of the duty of the assured in a fire-insurance to disclose material facts of which he is 'deemed' to have knowledge: this is a good example of the silent use of J.E.G.C. which might be exemplified from almost any volume of Indian law reports: *Vijayakumar* v. *New Zealand Ins. Co.*[61] Similarly where, in *Chinnaswami Chettiar* v. *Sundarammal*,[62] a fire had spread to a neighbour's property and done damage the Indian Court sought, under J.E.G.C. (explicitly referred to), law from abroad. What was eventually applied was the common law as modified by the Fire Prevention (Metropolis) Act, 1774. It is notable that the English law relied upon was not mere common law, which would not have been a developed system of law.

Most unfortunately, in *Philomena Mendoza* v. *Dara Nussarwanji*,[63] where the problem was whether a Parsi father was liable in a civil action to maintain his illegitimate child, reference to the common law was made as the residual law for Parsis, and again as the source under J.E.G.C. Chagla J., as he then was, had the following misleading remarks to make, which have had an unfortunate effect on subsequent jurisprudence in India, which has on the whole taken an incorrect and damaging view of the rule of J.E.G.C. on the rights of illegitimates to maintenance (see *Pavitri* v. *Katheesumma*[64] and compare *Sadu Ganaji* v. *Shankerrao*)[65]:—

"The principles of equity and good conscience which our courts administer are those principles which have been embodied in the common law of England and to which the English Courts have given effect. I am not aware of any principles of justice, equity, and good conscience which are contrary to or not recognised by the common law of England. If according to the common law of England an illegitimate son is not entitled to claim maintenance from his putative father, it is very difficult for me to hold that, apart from the common law which applies to the respondent in this case, on general principles of justice, equity and good conscience he is liable to pay maintenance to his illegitimate child".

One need scarcely add that the proposition that an illegitimate child has no right to maintenance is as shocking to an Englishman as to an Indian,[66] and the artificiality of this judgment would have been avoided if J.E.G.C. had been properly explained to the learned Judge.

Equally strange, but not equally alarming is the instance in *Ameer-un-Nissa Begum* v. *Mahboob Begum*[67] where common law was applied in preference to English statute law on the subject of the repeal of statutes. The assertion that J.E.G.C. meant the common law of England turns up again, without any explanation or justification, in *Varkey* v. *Thresia*,[68] where the problem was the

59 [1937] A.I.R. Nag. 354, 367-8.
60 [1942] A.I.R. Nag. 99, s.c. [1942] Nag. 650.
61 (1953) 56 Bom. L.R. 341.
62 [1955] 1 M.L.J. 312, 315.
63 [1943] I.L.R. Bom. 428, [1943] A.I.R. Bom. 338, 45 Bom. L.R. 687.
64 [1959] A.I.R. Ker. 319, where the history of vaccilations as to the effect of J.E.G.C. in this connexion is clearly shown.
65 [1955] A.I.R. Nag. 34, discussed at (1955) 57 Bom. L.R. (Jour.) 80f.
66 See *Ghana Kanta Mohanta* v. *Goreli*, (1904) I.L.R. 32 Cal. 479, disapproved in *Chakko* v. *Daniel*, [1953] A.I.R.T.C. 61; cf. *Lingappa Goundan* v. *Esudasan*, (1903) I.L.R. 27 Mad. 13.
67 [1955] A.I.R. S.C. 352, 362.
68 [1955] A.I.R. T.C. 255, 257, col. a. F.B.

husband's duty to maintain his wife. Fortunately this did not have the sad results of *Philomena's* case. References to English and (happily to relate) American law also appear in the instructive judgment in *Pudota Chinnamma* v. *Sanapareddi Subbareddi*[69] where the rights of a Christian wife to maintain a suit for maintenance were established.

In *Manni* v. *Paru*,[70] the Kerala High Court had the advantage of comparing the common law of England and the statute law which we have followed for a quarter of a century. Their Lordships came to the conclusion that the common law was better, and more consonant with J.E.G.C. It is very difficult to say whether this was correct. One is, perhaps, entitled to choose a rule of common law which is obsolete in England if it is in fact followed in some other part of the world. There are very few places where the common law rule (on the presumption of survivorship when two persons die in a common disaster, etc.) is in force. It is possible that the Court might take the view that the common law rule was in force in India prior to 1925 (when it was abandoned in England), and that therefore it could not be changed except by statute,[71] but that was not the drift of the judgment. In a case from Rajasthan a question arose of the right of dependants to obtain damages for the death of a person killed in a collision between buses. Unable to apply a statute of local application the common law was referred to, but it was the common law, naturally, as modified by English statutes enabling this right of action to survive for the benefit of dependants: *Kotah Transport Ltd.* v. *Jhalawar T. Service*.[72] A similarly awkward problem arose in Orissa, where the Indian Easements Act had not been extended. In *Keshab Sahu* v. *Dasaratha Sahu*,[73] the question was whether the plaintiff had an easement of privacy. The common law was looked to for information and also the Indian statute under J.E.G.C. A long series of cases has determined that in cases not within the Contract Act, 1872, the English common law as modified by the Carriers Act, 1865, is applicable to determine the liability of common carriers in India: *National Tobacco Co.* v. *Indian Airlines Corp.*[74]

Apart from this vexed question of the applicability of common law where it has been modified in England by statute, we cannot end this section without examples of the regular application of English law even in these days in matters of contract and quasi-contract. In *Nellie Wapshare* v. *Pierce Leslie & Co.*[75] the English law was incorporated in a matter of "unjust enrichment" by an effort of creative judicial interpretation. In *Joti Parshad* v. *Kartar Singh*,[76] the principles of English law, applied formerly by the Privy Council, were consulted to determine the starting point of limitation in an indemnity question.

69 [1958] An. W.R. 197.
70 [1960] A.I.R. Ker. 195, 196.
71 *Agha Mir Ahmad* v. *Mudassir Shah*, [1944] A.I.R. P.C. 100, s.c. 71 I.A. 171, [1944] 2 M.L.J. 354, 47 Bom. L.R. 591. Compare *Manorama Bai* v. *Rama Bai*, [1957] A.I.R. Mad. 269, 278.
72 [1960] A.I.R. Raj. 224, 231 col. a.
73 [1961] A.I.R. Orissa 154, 155.
74 [1961] A.I.R. Cal. 383.
75 [1960] A.I.R. Mad. 410.
76 [1960] A.I.R. Pun. 425, 427.

III

J. E. G. C. AS A SOURCE OF LAW

B. The Scope For Laws Other Than English Law

Naturally, the search for J.E.G.C. was not always confined to English law, and decisions are still given where the rule is taken from some other quarter. Those decisions, which may be called "common sense" decisions in that the Judge applies what seems to him to be just and proper, without relying upon any particular authority are properly within the scope of this section, but we may keep them separate as it is rather convenient to emphasise how often this rather lazy method of discovering the residual law is employed. Occasionally the two categories overlap. We shall find a similarity of pattern between cases in the present category, where J.E.G.C. serves as a source of law, and those in the next, where it serves to supplement an existing source, though it is not as striking a similarity as one might expect.

Even from the first quarter of the nineteenth century it was evident that J.E.G.C. would mean in many cases reference to the personal laws where they were not actually laid down by the Regulations as the *prima facie* source of law. Baillie's *Digest of Muhammadan Law* (introd., p. xxi) was written precisely on this understanding. Where Hindus and Muslims had for long entered into transactions upon the mutual understanding that particular institutions would apply, it would not be in accordance with J. E. G. C. to apply any foreign system to them. Indeed this is exactly why s. 9 of Reg. VII of 1832 was passed:—

> "Where parties are of different persuasions the laws of the religions shall not deprive a party of property to which, but for the operation of such laws, he would 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."

Instances of the application of J.E.G.C. in this early period show the principle at work. In *Zohorooddeen Sirdar* v. *Baharoollah Sircar*,[77] the Court were considering a problem in the law of gifts. This was not a listed subject for the mufassil. It was an invariable practice in such contexts to apply the Muhammadan law of gifts between Muslims, so that the gift was invalid where the donor has agreed to remain in possession for his lifetime. In *Meenakshi Ammal* v. *Rama Aiyar*,[78] a case from the mufassil of Madras, a Hindu was sought to be made liable to maintain his daughter-in-law out of his separate property. The claim (now valid) then failed. If it had been a claim out of the estate of a deceased Hindu it would have come under succession, which was a listed subject. As it was, the appeal to Hindu law would have been valid

77 (1864) Gap No. W.R. 185, 186.

78 (1912) I.L.R. 37 Mad. 396, 399, s.c. [1914] A.I.R. Mad. 587.

if, in consulting J.E.G.C., Hindu law could have been the source. Precepts of Hindu law might be entitled to great respect in deciding the rule of justice in such cases, but Benson and Sundara Ayyar, JJ., felt that conditions of modern society and conceptions of equity and justice would weigh heavily. One may have doubts "about the desirability of fettering the inducement to acquire property by burdening the acquirer with the maintenance of persons who take no part in the labour of acquiring."[79] A somewhat curious case was that of *Sibnarain Ghose* v. *R. Chunder Neoghy*,[80] in which it was held that a Bengali mortgage, even though unaccompanied with possession, gave a lien upon the lands. Grant J. studied the Hindu law, though it was not applicable in the mufassil as a source of law, and declared that it was derived from the laws of nature and nations. He cited Grotius, French law, and the laws of Holland and Germany. When applying "equity, justice and good conscience" in the non-listed cases,

"...They (the Courts) act not arbitrarily nor under the unsafe guide of the uncontrolled discretion and private judgment of each presiding judge, but under the rules which confine the otherwise uncertain direction of proceeding according to the dictates of equity and good conscience within definite limits of the like nature, tho' perhaps not equally certain with those which now bind the decisions of English Courts of Equity, and to act consistently with good conscience, it must frequently be necessary for these Courts to ascertain by what Law or what usage the contracting parties meant their contract to be interpreted and under what Law to operate: incidentally then they must decide on that law: and if the parties have contracted with reference to usage, and not the written Law, it must in like manner be necessary to ascertain and act upon that usage. Thus both the written Law and the practice and usages of the Hindoos may and frequently do require to be ascertained in such cases as foundations on which the decisions of these Courts are to rest, and in such cases by *their very constitution and by the very terms of the Regulation* they are bound to their adoption. In such cases as well as in the cases wherein they are expressly directed to adopt the Hindoo Law by the Regulation before referred to, they consult their Law Officers, and their decisions...are in my judgment as much judicial expositions, and therefore, evidence of that Law and of those usages in the former class of cases as in the latter."

Hence, when seeking for J.E.G.C. one might be obliged to consider native laws as well as foreign laws.

In *Raj Bahadur* v. *Bishen Dayal*[81] the family were neither Hindus nor Muhammadans, and therefore J.E.G.C. must be applied. In accordance with the doctrine stated above (and perhaps that of the *Abraham* case to which we shall refer below) the Court discovered that the Hindu law of inheritance had always been followed in the family, and determined that it would be in accordance with J.E.G.C. to apply that law to the suit.

In *Gopeekrist Gosain* v. *Gungapersaud Gosain*,[82] the Privy Council arrived at a momentous decision. When a father buys property in the name of his son the presumption in English law is that he is making a gift: it is called the presumption of advancement. Seeing that the personal law had nothing to say on the subject and it was a matter of evidence which should be decided by the law of the forum, it would have been natural to import the English law in default of evidence of the father's intention. However, it was fortunately determined that in India the presumption is of *benami*. The English law, not being a rule of natural justice, was not applied. Whence the Indian rule comes, for it does not appear to be peculiar to Hindu law or Muhammadan law, is not known: but it is certainly a rule of Indian custom and usage.

In *Ramratan Kapali* v. *Aswini Kumar Dutt*,[83] the question was whether the release of one joint tortfeasor released the others. Mookerjee and Teunon JJ., examined the English law on the point, but rejected it. It had not been ap-

79 *Meenakshi Ammal* v. *Rama Aiyar*,(1912) I.L.R 37 Mad. 396, at 402.
80 (1842) 1 I.D. (O.S.) 666, at p. 683;(1842) Fulton 36, 66.
81 (1882) I.L.R. 4 All. 343, 349-51.
82 (1854) 6 M.I.A. 53. 75, 76.
83 (1910) I.L.R. 37 Cal. 559, 572.

proved in America, and was not consistent with the principles of J.E.G.C. The American rule was then applied.

The maxim *quicquid plantatur solo, solo cedit* had been held not to apply to India as far back as 1866. It was sought to be applied in *Narayan Das Khettry* v. *Jatindra Nath Roy Chowdhury*,[84] where the Privy Council rejected the idea. It is not a rule of universal jurisprudence, as one might suppose: *Mammunki* v. *Kunhibi*.[85] The equity of redemption is imported into many Indian arrangements which are in the nature of a mortgage, but in *Gokuldoss* v. *Kriparam*,[86] a conditional sale received this construction not as a result of reference to English law direct, but by applying the Bengal Regulation XVII of 1806, which was actually not applicable as such in the provinces in question. Here it was an Indian law which was the source. The perverse *dicta* which disfigure Markby J's. judgment in *Secretary of State* v. *Administrator General of Bengal*,[87] do not altogether destroy it as an authority of value on J.E.G.C. The historical portion of the judgment is useful. The decision itself would not be repeated, we hope, today. An Englishman had an illegitimate son by a Muslim woman. He died intestate. The mother and her illegitimate issue were claiming his estate against the Crown. The learned Judge held that the territorial law of the land, which he believed was English law, gave the estate to the Crown; this appears to have been because he preferred to evade the requirement to apply J.E.G.C., which might have brought in foreign laws, with their more favourable attitude to the claims of illegitimate children at any rate in competition with the State.

In *Chinnaswamy Koundan* v. *Anthonyswamy*[88] the question was whether Tamil Vaniya Christians were governed by Hindu law in matters of the joint family. They were, as a matter of fact, governed by the Hindu law of succession by custom—the Indian Succession Act never having been applied to them. It was held that the pious obligation applied to them, and that there was nothing in the pious obligation which was contrary to the conceptions of equity and good conscience. Thus the nearest source of law, the Hindu law, was chosen as applicable under J.E.G.C.

A curious problem arose in *Kuppammal* v. *Rukmani Ammal*.[89] A passenger had been killed in a railway disaster, and the company had paid voluntarily Rs. 2,500 to his widow. At that time she had a daughter and a son. After providing for the daughter's marriage and increasing the value of the property she died in 1937. There was later a dispute between the son and the daughter as to the division of the mother's estate. The daughter claimed all of it as *stridhan*. The son claimed that in view of the source of the property all the family had an interest in it. No rule of Hindu law as such governed the distribution of the Rs. 2,500. The statute (Fatal Accidents Act) provided for the distribution amongst dependants in the Court's discretion. Accordingly the Court held that it belonged at the time of payment (twenty-six years before) to the mother, son and daughter in the following proportions:—mother and son in equal shares by analogy from the Hindu Women's Rights to Property Act, 1937; to the son and daughter in such proportions that the son should have twice as much as the daughter, following the Muhammadan law, "which is supposed to be the most equitable system of distribution amongst the relations." Thus the mother was deemed to have taken two-fifths, the son two-fifths, and the daughter one-fifth. The daughter's share was adeemed by her marriage-expenses, and the son was entitled to mesne profits on this share, namely one-half, of the residue in his sister's hands. Here J.E.G.C. did not require any reference to English law.

84 (1927) 54 I.A. 218, pp. 223-4, s.c. [1927] A.I.R. P.C. 135, s.c. 29 Bom. L.R. 1143.
85 [1961] A.I.R. Ker. 147.
86 (1873) 13 Ben. L.R. 205, 213 P.C.
87 (1868) 1 Beng. L.R., OC, 87, 93, 97-8, 100.
88 [1961] A.I.R. Ker. 161, 165.
89 [1946] A.I.R. Mad. 164.

IV

J. E. G. C. TO SUPPLEMENT THE LAW

In *Mayna Bai* v. *Uttaram*,[90] the Madras High Court, not knowing what rule of Hindu law to apply to the heritable relationship between the descendants of a Hindu woman who had been living as mistress of a non-Hindu, considered the English law, rejected it and applied the Roman law as more consonant with the general analogies of the Hindu law and J.E.G.C. In *Gatha Ram Mistree* v. *Moohita Kochin Atteah Domoonee*,[91] the question was whether decrees for restitution could be enforced by compulsory process. At English law they could. Markby, J., considered the laws of Germany, Austria and France, and also America. He and Mitter, JJ., held that such enforcement was not possible in India. They commented that if the law of the parties does not provide the rule, Courts need not necessarily resort to the English law for guidance when that law is opposed to the general trend of the law in civilised countries.

Akshay Chandra Bhattacharya v. *Hari Das Goswami*,[92] is a probably incorrect case in Dayabhaga law, which has not yet been overruled. Mitra J. was anxious to fill a gap in Dayabhaga law by reference to law which had not the spirit of the Dayabhaga behind it. He alleged that spiritual benefit was not always the guiding principle; propinquity also had some place. Then he referred to principles of natural justice. Then he asserted that in the absence of texts under Dayabhaga law recourse should be had to the Mitakshara law, a doctrine which is not nowadays regarded as accurate. However, it was an instance where a gap was filled by reference, under J.E.G.C., not to English law or any foreign law, but to the next nearest indigenous system. Exactly the same is constantly happening in Kerala. It is not convenient to refer to the numerous times in which the Kerala High Court has succeeded in applying the patrilineal Mitakshara law to matrilineal marumakkattayam people. The best citation is *Parameswaran* v. *Ramkrishna*,[93] when Sankaran J., vigorously, but ineffectually, protests against this strange (but inevitable?) process.

The case of the *devadasis* is perhaps not so peculiar. Given that they are bound by the Hindu law so far as they cannot prove customs to the contrary, the customs that can be proved are so startlingly at variance with Hindu law that the introduction of Hindu law rules to fill gaps in proved custom must produce a queer patchwork effect. Nevertheless that is what has happened in the name of J.E.G.C. in *Viswanatha Mudali* v. *Doraiswami Mudali*,[94] and *Venkata Challamma* v. *Cheekati*.[94] There was never any question of applying English law, or any further analogy than from the Mitakshara system. The attraction of the personal law in all cases of defective customs is undeniably strong, and it can be expected to increase, and that of the Hindu Code (in the reserved contexts, where custom can still be proved) not less so.

V

"COMMON SENSE" AS J. E. G. C.

The only excuse for having this separate section is that the Judges did not bestir themselves to look for authorities. This was not entirely satisfactory. As we have seen J.E.G.C. does not mean uncontrolled judicial discretion. It means law, but law that the Judge can seek from a suitable source. It is better, therefore, if the advocate who demands resort to J.E.G.C. should come ready armed with examples from systems which he feels are readily suited to the case.

In *Charotte Abraham* v. *Francis Abraham*,[96] the Privy Council were content to leave the usages of the family as the chief guide, when J.E.G.C. was applicable. In *Isaac Pandah* v. *Surbomongola Dossee*,[97] a Hindu and his wife were

90 (1864) 2 M.H.C.R. 196, 203-4.
91 (1875) 23 W.R. 179, 181, 182.
92 (1908) I.L.R. 35 Cal. 721, 726-7.
93 [1955] A.I.R. T.C. 55, F.B. See Mayne, 11th edn. App. III p. 972.
94 (1925) I.L.R. 48 Mad. 944, 962.
95 [1953] 1 M.L.J. 358.
96 (1863) 9 M.I.A. 195, 239.
97 (1864) 1 W.R. 22.

converted to Christianity. What were the husband's rights in the wife's property? It was held most consonant with equity and good conscience to refer to the usages of the class to which the convert attached himself, and of the family to which he may have belonged. In *Sheikh Kudratulla* v. *Mahimi Mohan Shah*,[98] an effort was made to allow Muslims to enforce preemption upon Hindu purchasers from a Muslim. The learned judges examined the Islamic law, found it to be weak and technical, and rejected it on the ground that it had nothing to recommend it upon the bare abstract ground of J.E.G.C., whence it followed that it could not be applied to non-Muslims. So in *Braja Kishor Surma* v. *Kirti Chandra Surma*,[99] there appeared to be a gap in the Islamic law. It was held not consistent with J.E.G.C. that a plaintiff who refused to purchase when the property was offered to him, and who induced another to purchase it, should be allowed to undo his renunciation and demand to preempt. Where a plaintiff claimed that the contract was entered into by him under duress, but he did not offer to return the purchase money the Court, in *Charles Seton Guthrie* v. *Abool Mozuffer*,[100] considered English law, Muhammadan law, and "the general rule of equity and good conscience, which was the law of the forum", and held that this position was impossible. This case is perhaps the best of the present series, for although no citation was offered under J.E.G.C., which was treated as distinct from the other two sytems mentioned, citations were offered for the position under each of them. In *Venkamma* v. *Savitramma*,[101] the Court, under J.E.G.C. refused to give an infant to the custody of a natural guardian living an immoral life. In *Mussumat Fanny Barlow* v. *Sophia Eveline Orde*,[102] the law applicable to succession to the propositus was the personal law, or if no religion could be determined, then J.E.G.C. Under the latter it would not be inequitable to interpret the word 'children' as including illegitimate children, when it appeared in the will. The appeals to natural justice in this judgment should have served as a source of inspiration for the many instances when the Court had to consider the plight of illegitimate children.

In *Mussumat Thukrain Sookraj* v. *Government*,[103] J. E. G. C. was held to protect an equitable owner from an order of confiscation made against her trustee. In *Moung Hmoon Htaw* v. *Mah Hpwah*,[104] there appeared to be a gap in Burmese Buddhist law, and reference was made to J. E. G. C. The rough-and-ready solution that a wife maintaining herself had no right to sue for maintenance emerged, apparently upon *a priori* reasoning. Not dissimilarly in *Maung Po Nyun* v *Ma Saw Tin*,[105] the gap in the Buddhist texts and case-law was filled by a suggestion in the nature of J.E.G.C. which fitted the circumstances of the particular case. Vague impressions derived from the general character of the Burmese Buddhist law inspired the Court in arriving at that conclusion.

A stalwart refusal to apply English law occurred in *Gokuldoss Gopaldoss* v. *Rambux Seochand*.[106] The purchaser of an equity of redemption in reference to immovable property in Hyderabad paid off the first mortgage thereon with notice of the second mortgage. It was held that he must be assumed, according to J. E. G. C., to have intended to keep the first mortgage alive, and that therefore he was entitled to stand in the place of the first mortgagee and to retain possession against the second mortgagee until repayment. In *Chathanni* v. *Sankaran*,[107] there arose a question of rights of succession where the married couple belonged to different systems of law. English customs were, it is true, cited as parallels, but they barely support the 'practice and natural justice' solution, namely that the children could inherit according to both systems. In

98 (1869) 4 Beng. L.R., FBR, 134, 145-6, 152, 173.
99 (1871) 7 Beng. L.R. 19, 25. On the whole subject of preemption see *Bhim Rao* v. *Patilbua*, (1939) 62 Bom. L.R. 574.
100 (1871) 14 M.I.A. 53, 65.
101 (1838) 12 Mad. 67, 69.
102 (1870) 13 M.I.A. 277, 309, 312.
103 (1871) 14 M.I.A. 112, 127.
104 (1884) 11 I.A. 109, 119.
105 (1937) 54 I.A. 403, 412.
106 (1884) 11 I.A. 126, 133-4.
107 (1884) I.L.R. 8 Mad. 238.

Bai Narmada v. *Bhagwantrai*,[108] no authority was given for the proposition that it would be contrary to equity and good conscience to allow the heir to recover property from possessors of his inheritance without permitting them to recoup themselves out of it for their expenses on the funeral and in paying the debts of the deceased. J.E.G.C. is a rule of common sense in *Robert Watson & Co.* v. *Ram Chand Dutt*,[109] and in *Raghubans Narain Singh* v. *Khub Lal Singh*,[110] where one of several shareholders was protected against the interference and greed of the other shareholders.

In *Radha Kishen* v. *Raj Kuar*,[111] a Brahmin had lived with a Bania widow and was outcasted. The widow and her illegitimate sons by the Brahmin wanted to remain in possession of the father's property, which he had acquired by his own exertions. The deceased's brothers who remained in caste wanted to oust them. Manu and other Hindu sources appeared to be silent. It was held that J.E.G.C. protected the widow and her sons against the cupidity of the brothers, whose claim was entirely without merit. Should one who holds an estate and pays the revenue in respect of it and takes such other steps as are necessary to prevent its being sold be entitled to recover those expenses when the land is recovered from him by the actual owner by judicial process? It is in accord with J.E.G.C. that he should be: *Dakhina Mohan Roy* v. *Saroda Mohan Roy*.[112] Not altogether dissimilar from *Radha's* case was *Musammat Maharana* v. *Thakur Pershad*,[113] where an unchaste widow acquired for her maintenance property from the brother of her paramour. It was not *stridhana* as that is usually understood. She had an illegitimate child, who claimed the property against members of the husband's family. After she began to live with the paramour the widow naturally lost all her own claims upon her husband's family, and it was believed to be contrary to J.E.G.C. that the illegitimate child should be deprived of the property by these relations. In *Budansa Rowther* v. *Fatima Bai*,[114] once again, there was a conflict of personal laws. A Hindu woman had married a Hindu, became a convert to Islam and married a Muslim. A daughter of the second marriage claimed a share in the estate of her father's father. It was held that she was illegitimate. J.E.G.C. was not helpful to her. J.E.G.C., without citation, is used as the last reason why a Sudra should succeed to his *dasiputra* in the (probably incorrectly decided) *Subramania Ayyar* v. *Rathnavelu Chetty*.[115] A plea for illegitimate children was turned down in *Meenakshi* v. *Muniandi*,[116] where Seshagiri Aiyar J. refused to admit that J.E.G.C. would allow the illegitimate daughter of an adultress to share with her legitimate son.

In *Chinna Pichu Iyengar* v. *Padmanabha Iyengar*,[117] (a case no longer good law), Sadasiva Ayyar J. held that in those days there was no claim in justice or equity to inherit from remote relations, and the law appearing to admit the great-grandson of the paternal aunt could not be authentic. This attitude is not commonly met. On the other hand we accept as accurate the decision in *Kenchava* v. *Girimallappa Channappa*,[118] that even if the Hindu law was not precisely against the inheritance of a man's estate by his murderer, J.E.G.C. excluded him. In *Aziz Bano* v. *Muhammad Ibrahim Husain*,[119] where J.E.G.C. was let in by a divergence of opinion amongst the authorities, it was held that it would be contrary to all rules of equity or justice to force an abhorrent marriage on a girl: the minor has, according to J.E.G.C. an option whether the marriage was performed by her father or grandfather. The liberal view was in accordance with J.E.G.C. and the requirements of the times. 'Justice

108 (1888) I.L.R. 12 Bom. 505. See also equity applied in *Ramanathan* v. *Palaniappa*, [1939] A.I.R. Mad. 531.
109 (1890) 17 I.A. 110, 121, s.c. I.L.R. 18 Cal. 10. *Akshay Kumar Shaha* v. *Bhajagobinda Shaha*, (1929) I.L.R. 57 Cal. 92.
110 (1931) 58 I.A. 299, 304-5.
111 (1891) I.L.R. 13 All. 573, 575.
112 (1893) I.L.R. 21 Cal. 142, 149, P.C.
113 (1911) 14 Oudh Cases 234, 238.
114 (1913) 26 M.L.J. 260, s.c. 22 I. C. 697, 699.
115 (1918) I.L.R. 41 Mad. 44, 75, F.B.
116 [1915] A.I.R. Mad. 63, 67, col. a.
117 (1920) I.L.R. 44 Mad. 121.
118 (1924) 51 I.A. 368, 373.
119 (1925) I.L.R. 47 All. 823, 839, 848.

and right' in *Hirabai Jehangir* v. *Dinshaw Edulji*,[120] gave the plaintiff damages for slander without proof of special damage. In *Jagarnath Gir* v. *Sher Bahadur Singh*,[121] the mother was allowed to succeed to her illegitimate son, in competition with the Crown, because J.E.G.C. would require that she should. In *Vithal Tukaram* v. *Balu Bapu*,[122] the widow died leaving *stridhana* but no heirs in her husband's family. Brothers and sisters were allowed to share equally. J.E.G.C. could find no distinction between them. So in *Sudarshan* v. *Suresh*,[123] the learned Judge recently allowed an illegitimate son and illegitimate daughter to share their mother's property equally,, for 'equality is equity', and that must be test of J.E.G.C. Much along the same lines the Supreme Court had, in *Saraswathi Ammal* v. *Jagadambal*[124] allowed daughters to succeed together to their mother's property on the ground of their equal propinquity, which was a consideration of J.E.G.C. in succession cases, though some were *dasis* (and thus of their mother's community) and some were not, having married respectably. Naturally in these days when an illegitimate son of a predeceased daughter of a woman competes with her husband, so that a questionable relation competes with an undoubted heir, J.E.G.C. cannot be stretched in his favour, and the husband will take: *Sadu Ganaji* v. *Shankerrao*.[125]

J.E.G.C. supports the notion that when a power of adoption comes to an end it cannot be revived. Here perhaps 'logic' would be as powerful a weapon as the heavy guns of J.E.G.C.. but that was how the Supreme Court put the matter in *Gurunath* v. *Kamalabai*.[126]

In *Robasa Khanum* v. *Khodadad Bomanji*[127] a Zoroastrian wife was converted to Islam. She sued for dissolution from her Zoroastrian husband shortly after her conversion. Because of the conflict of personal laws J.E.G.C. must be consulted, or rather 'justice and right', which we have seen is the same thing in practice. The English law was out of the question since it deals only with Christian marriages. The Shariat Act applies only to Muslims.

> "...Therefore we must decide according to justice and right, or equity and good conscience independently of any provisions of the English law. We must do substantial justice between the parties and in doing so hope that we have indicated the principles of justice and right or equity and good conscience.
>
> ...It would be patently contrary to justice and right that one party to a solemn pact should be allowed to repudiate it by a unilateral act."

Accordingly it was held that the Muslim wife's attempt to dissolve the marriage at Islamic law was invalid. In *Ayesha Bibi* v. *Subodh Ch. Chakravarty*[128] Ormond J. applied Muslim law in a similar situation as in conformity with J.E.G.C., to enable a Hindu wife who had embraced Islam to be divorced from her Hindu husband. Other authorities were against this. In *Farooq Leivers* v. *Adelaide B. M.*,[129] a Pakistani case, it was held that a Muslim husband who pronounces *talak* and sues for a declaration that his former wife, a Christian, is no longer his wife cannot take advantage of Islamic law. J.E.G.C. was against the decree, and the *talak* was invalid. A quotation was made from the Prophet that "divorce is most hated by Allah".

Finally we may note *Malkan Rani* v. *Krishan Kumar*,[130] a case under the Hindu Marriage Act. It was held under J.E.G.C. that the Court has inherent power to stay proceedings till the husband pays the maintenance *pendente lite*.

It is evident that, whether the Courts enter upon elaborate research or not, J.E.G.C still has a considerable function in a country where codification of the

120 (1926) I.L.R. 51 Bom. 167, s.c. 28 Bom. L.R. 1334.
121 (1934) I.L.R. 57 All. 85, 100-1.
122 (1936) I.L.R. 60 Bom. 671, 678-9, s.c. 38 Bom. L.R. 520.
123 [1960] A.I.R. Pat. 45.
124 [1953] A.I.R. S.C. 201, 204, col. a.
125 [1955] A.I.R. Nag. 84, 90, 96.
126 [1955] A.I.R. S.C. 206, 212, col. a.
127 [1947] A.I.R. Bom. 272, 274, 276, s.c. [1948] Bom. 223, s.c. 48 Bom. L.R. 804.
128 [1940] A.I.R. Cal. 436.
129 [1958] P.L.R. 2 W.P. 1116, 1142.
130 [1961] A.I.R. Pun. 42, 44 citing *Sunder Mal* v. *Budh Ram*, [1955] 4 Patiala 481.

personal laws is still incomplete, where there are lacunae in statutes, where the recourse to foreign law is admitted in certain important chapters, and where interpersonal law problems arise. The growth of the study of comparative law should on this ground alone be of service to India, not to speak of its obvious usefulness when the Indian Civil Code comes to be drafted.

ADDITIONAL ANNOTATIONS

Tit. ref. *Walker & Sons* v. *F. C. W. Fry* [1966] N.L.R. (Sri Lanka), 73, 78, 120.

p. [8], n. 1. In that article the development of the formula in the Chancery court from the concept at Aristotle, *Ethics* V. 3-4, to the Tudor period in England is set out. The contrast between *law* and *equity* cannot be better illustrated by the remarks of the wronged Cardinal Wolsey at G. Cavendish, *Life and Death of Cardinal Wolsey* (ed. R.S. Sylvester, London, 1959), 117. F. d'Agostino, *La Tradizione dell'Epieikeia nel medioevo Latino* (Milan, 1976). The concept in England: *Hussey* v. *Palmer* [1972] 1 W.L.R. 1286, 1289.

p. [9], n. 9. Sup., 179ff.

p. [9], l. 20. Where statute is precise J.E.G.C. can have no scope: *Tushkar* v. *Bhowani* (1968) 73 C.W.N. 143, 152. Where the personal law is negative there is no gap to be filled: *Premchand* v. *Hulashchand* (1869) 4 B.L.R., App. 23 (also 63 Cal. 1098, 1111).

p. [10], n. 12. Foll. *Abdul Kadir* v. *Salima* (1886) 8 All. 149, 153-4 F.B.

p. [11], l. 7. Repugnancy arises in relation to *musha*. According to the Islamic doctrine of *musha* numerous limitations are engrafted onto it in India so that its operation may be consistent with J.E.G.C.: *Nazir Din* v. *Mohammad* A.I.R. 1936 Lah. 92. Note doubts obiter at *Alabi* v. *Mussa* (1901) 24 Mad. 513. Musha is a rule to avoid confusion of ownership: a gift of an undivided share is irregular and will fall unless perfected by partition and possession. The more extreme view is that *musha* is irrational and ought to be abolished: *Khader* v. *Kunhamina* [1970] K.L.T. 237.

p. [11], n. 15. Note how E.G.C. construed customary adoption in *Jagat Singh* v. *Ishar* (1930) 11 Lah. 615, 620. A custom whereby a divided brother excluded a widow would be against equity and justice: *Mokka* v. *Ammakutti* (1927) 51 Mad. 1, 17 F.B.

p. [12], §2. In *K. Venkata Krishnayya* v. *Lakshmi* (1908) 32 Mad. 185, 187 F.B. the Order of Reference opined that Asura marriage was against J.E.G.C. and such contracts must be void.

p. [12], §3. On judicial law-making s. V. S. Deshpande, *Judicial Review of Legislation* (Lucknow, 1975), 101. Private International Law in India is based on non-statutory English law under J.E.G.C.: *I. & G. Investment Trust* v. *Raja of Khalikote* A.I.R. 1952 Cal. 508, 516; *Raman Chettiar* v. *Raman* A.I.R. 1954 Mad. 97. Torts are based on J.E.G.C. (*Khushro* v. *Guzder* A.I.R. 1970 S.C. 1468, 1474) and the common law is a valuable residual source of law in India: *A.D.M. Jabalpur* v. *Shivakant Shukla* (1976) 2 S.C.C. 521, 579 §71, 608 §199. *Kantilal* v. *Balkrishna* [1950] Nag. 239 F.B. (J.E.G.C. not available in Berar to introduce new torts).

p. [13], l. 12. English law *was* J.E.G.C. in *Gogun* v. *Dhurnidhur* (1881) 7 Cal. 616, 619 (falsification of documents); taken up with emphasis in *Nathu Lal* v. *Mt. Gomti* A.I.R. 1940 P.C. 160, 165 = 67 I.A. 318, 331. *Binda* v. *Kaunsilia* (1890) 13 All. 126, 158 (desertion and restitution).

p. [14], l. 24. S. the difference of opinion as to third parties' rights on a contract: *Kshirodebihari* v. *Mangobinda* (1933) 61 Cal. 841 (positive); cf. *Tarachand* v. *Syed Abdul Razak* A.I.R. 1939 Sind. 125 (negative); inf., p. 284, ad p. [258].

p. [14], l. 35. Implied grant of easement under J.E.G.C.: *Charu Surnokar* v. *Dokouri Chunder* (1882) 8 Cal. 936; *Kadambini* v. *Kali Kumar* (1898) 26 Cal. 516.

p. [14], n. 36. *Devlakshmi* v. *Vishwakant* (1970) 73 Bom.L.R. 594. But cf. *S. Darshan* v. *Dalliwall* A.I.R. 1952 All. 825 (not all trusts).

p. [16], l. 6. Ref. with app. *Brocklebank* v. *Noor Ahmode* (1940) 45 C.W.N. 197, 204 P.C.

p. [16], n. 64. S. inf., 309.

p. [16], n. 66. *Chakko* [1952] K.L.T. 595 foll. *Commr. I.T.* v. *Paily* [1972] K.L.T. 24 F.B., disc. Derrett, [1972] K.L.T., J., 39-41.

p. [17], l. 6. *Dharni Dhar* v. *Chandra* A.I.R. 1951 All. 774 F.B. (Act of 1935 foll.); *K. Gopalakrishna* v. *Sankara* A.I.R. 1968 Mad. 436 (Act of 1935 rejected). On joint tortfeasors *s. Khushro* (sup.).

p. [18], l. 7. *Seyed Mohiuddin* v. *Sofia* (1940) 44 C.W.N. 974, 980. *Bikani* v. *Shuk* (1892) 20 Cal. 116, 179 F.B.

p. [18], l. 30. The P.C. repudiated the suitability for Bengal of the common law in relation to suspension of rent by a tenant evicted from part: *Ram Lal Dutt* v. *Dhirendra* (1942) 70 I.A. 18, 26. Laws other than English law were applied in *J.C. Mehta* v. *P.C. Mody* A.I.R. 1959 Bom. 289 (insolvency); *Keshab Sahu* v. *Dasrath* A.I.R. 1961 Or. 154 (R. Dhavan, *Supreme Court of India*. Bombay, 1977, 101-102). (1932) 7 Trav. L.T. 354 (interest allowable on damages). For old examples between Christians including Armenians: *Aratoon* v. *Catherina* (1848) 7 S.D.A. Rep. 528; *Agabeg* v. *Jones* (1849) 4 Dec. N.W.P. 295 (W.H. Morley, *Analytical Digest*, N.S., I, 1852, 182-3). The Hindu law was applied to Syrian Christians in *Thoma* v. *Rahel* (1934) 24 Trav. L.J. 281. Where the Transfer of Property Act, 1882, is not applicable it is said Hindu law applied as to gift: *State* v. *Sant Singh* (1976) 78 Punj. L.R. 87, but in [1977] 2 M.L.J., J., 7-8 we find reference to application of the principles of the T.P. Act to Travancore under J.E.G.C. A conflict between J.E.G.C. and Hindu law was observed in *Meenakshi* v. *P. Rama Aiyar* A.I.R. 1914 Mad. 587. On the role of Hindu law as J.E.G.C. cf. *Iravi Pillai* v. *Mathevan* A.I.R. 1955 T.C. 55 F.B. with *Bhavani* v. *Madhava* [1963] K.L.T. 859 F.B. and *Mary* v. *Bhaswra* [1967] K.L.T. 430 (s. sup., III, 344). The Mussalman Wakf Validating Acts 1913, 1930 were thought suitable in Cochin as 'more in conformity with modern concepts' with regard to a wakf created in 1936: *Off. Rec.* v. *Kassim* [1966] K.L.T. 985, 990. The want of proof of custom led to J.E.G.C. in *Kali Pennamma* [1972] K.L.T. 12 (this was Hindu law in *Kamalakshy* v. *Narayani* [1967] K.L.T. 1051) but the abolition of customary succession in the Punjab (for Hindus) let in, not any other law, but the Mitakshara joint family: *Pritam Singh* v. *Ass. Control. Est. Duty* (1976) 78 Punj. L.R. 342 F.B. (correct?).

p. [19], l. 35. In *Phan Tiyok* v. *Lim Kyin* (1930) 8 Rang. L.R. 57 F.B. it was held that the Indian Succession Act, not Burmese Buddhist Law, applied to Chinese Buddhists.

p. [19], l. 3 from bott. As to tortfeasors the English statute law was rejected in *Khushro* (sup.) and *K. Gopalakrishnan* v. *Sankara* A.I.R. 1968 Mad. 436.

p. [20], l. 30. But Hindu law is not always a source where custom fails: *Kali Pennamma* v. *St. Paul's Convent* [1972] K.L.T. 12 (difference between judges).

p. [20], n. 88. Inf., 172 ad p. [150], n. 20; *Albuthammal* v. *Taluk* [1977] K.L.T. 333.

p. [21], l. 2. In *Maung Pathan* v. *Ma San* A.I.R. 1939 Rang. 207 the Buddhist irregular wife of a Muslim was held to be his wife for purposes of sec. 488 of the Criminal Procedure Code (inf., 62) under J.E.G.C. J.E.G.C., rather than English law, enabled a Christian wife to obtain separate maintenance: *P. Chinnamma* v. *Sanapareddi* [1958] 1 An.W.R. 197; cf. *Stella* v. *Rajiah* [1965] 1 Mad. 614; J.E.G.C. requires a mother to be guardian of her Christian illegitimate child: *Pamela* v. *Patrick* [1970] 3 Mad. 82. In *Kunhi* v. *Palayan* [1975] K.L.T. 652 J.E.G.C. denied an alleged right raised by a dissident faction amongst Muslims.

p. [21], l. 5. Roman law was applied as J.E.G.C. in (1872) 7 Madras Jurist 354.

p. [21], l. 37. In *Kali Pennamma* (sup.) it was decided widow and son must share equally, as a rule of J.E.G.C. J.E.G.C. has figured in connection with inheritance (*Chatunni* v. *Sankaran* 1884 8 Mad. 238) and particularly in connection with illegitimates (sup., III, 203-ff.), e.g. *Sadu Ganaji* v. *Shankerrao*, A.I.R. 1951 Nag. 401, A.I.R. 1955 Nag. 84 (sup., III, 218, 220). For a good modern example s. *Sudarshan Singh* v. *Suresh* A.I.R. 1960 Pat. 45 (sup., III, 218 ad p. [206], l. 7). In *Kochan Kani* v. *Mathevan* A.I.R. 1971 S.C. 1398 the S.C. held no custom was proved, and neglected to apply J.E.G.C.

p. [21], §4. *Ali Hasan* v. *Dhirja* (1882) 4 All. 518, 524. A most imortant example: *Murari Lal* v. *Devakaran* A.I.R. 1965 S.C. 225, clogs on equity of redemption are void even where Transfer of Property Act, 1882, sec. 60, does not apply (Hindu law of contract considered). R. Dhavan, op. cit., 98-9. In *Biyyata* v. *Muthukoya* [1977] K.L.T. 50 it was held against J.E.G.C. to hold that a suit was time-barred before the plaintiff came to know of

the document. In *Ramdayal* v. *Gulabia* (1908) 4 Nag. L.R. 120, 124 delay defeated equities.

p. [21], n. 92. App. *Rabindra* v. *Narayan* P.L.D. 1967 Dacca 745.

p. [22], l. 41. English *dicta* were repudiated as a binding authority in *Manjhoori Bibi* v. *Akal* (1913) 17 C.W.N. 886, 916. A vigorous and eloquent refusal of English law occurred in *Rattan Lal* v. *Vardesh Chander* (1976) 2 S.C.C. 103 (Free India has to find its conscience in our rugged realities—and no more in alien legal thought: *per* V. R. Krishna Iyer, J., pp. 114-15, §21). Cf. the similar attitude in *Namdeo* v. *Narmada* A.I.R. 1953 S.C. 148 (undeserving tenant cannot insist on written notice where Transfer of Property Act, 1882, cannot be invoked). R. Dhavan, op.cit., 97-8.

p. [23], n. 118. Anticipated by *Har Bhagwan* v. *Hukam Singh* (1922) 3 Lah. 242, 255.

p. [24], n. 124. In *Sudarshan* v. *Suresh* (sup.) illegitimate children of a woman shared her estate equally (sup., III, 218).

p. [24], n. 127. Similarly *Noor Jehan* (1940/1) 45 C.W.N. 1047, 1064.

p. [24], n. 128. Ayesha had already obtained an ex parte decree on principles of J.E.G.C. in Aug. 1929 (33 C.W.N. clxxxvii-cxc).

THE SUPREME COURT OF INDIA

A Socio-Legal Critique of its Juristic Techniques

By

RAJEEV DHAVAN

M.A. (Cantab); Ph.D. (London); LL.B. (Alld.)
Of the Middle Temple, Barrister-at-Law
Lecturer in Law, Brunel University (U.K.)
[Formerly, Lecturer in Jurisprudence, Queen's University, Belfast (U.K.)]
Advocate, High Court of Judicature at Allahabad

Foreword by

The Right Honourable Lord Denning
Master of the Rolls

BOMBAY
N. M. TRIPATHI PRIVATE LIMITED
1977

constitutional principles of delegation of power, the concept of equality and freedom of contract. The Court has not made any sustained effort to reassess these principles and apply them to an Indian context.[196] In a sense a critic's view that "the shadow of Dicey" has prevailed[197] appears to be right. The Court must realise that the law Courts are concerned with matters of jurisdiction, procedure, legality and *mala fides*, not with problems where they sit and review the decisions of those who are entitled to make them. It is natural that jurisdictional questions are themselves bound up with wider issues; but the Court must adjust its approach to these problems so as to make more possible the exercise of power rather than restrict it. As a High Court judge puts it:

> "Courts, which within strict limits have to essay social engineering are not the sanctuary of age-old but unwholesome (approaches) . . . even if they are not the refuge of social reformers. In the inevitable chemistry of social change, Courts are certainly not anti-catalysts."[198]

More recently an ex-Chief Justice of India[199] has admitted that the Supreme Court's interpretation of the Constitution had forced the Government to resort too frequently to Parliament's power to amend the Constitution. This admission is proof in itself of the Court's adherence to traditional patterns of interpretation.

4. The Formula of Justice, Equity and Good Conscience

Many legal historians have argued that the "Justice, Equity and Good Conscience" formula (hereafter equity formula) was used to introduce English law into India.[1] This thesis has been contested by an English writer, who pointed out that the intention was quite contrary: "It (the formula J.E.G.C.) was introduced in India by the East India Company under the influence of the theory that civil law was suitable to the Company's Courts in the Presidency since the Common

196. These are discussed at their appropriate places below.
197. Seervai: *The position of the judiciary under the Constitution of India* (1970) Chapter V.
198. V. R. Krishna Iyer J. in *Kunhu Mohd* v. *T. R. Umanayathi* (1969) *K.L.R.* 629 quoted by Derrett: *C.M.H.L.* (1970) 397 f.n. 2.
199. Gajendragadkar: Indian Parliament and Fundamental Rights (1971) Tagore Law Lectures as reported in National Herald Feb. 23, 1972, Feb. 26, 1972.

1. See M. C. Setalvad: *Common Law of India* (1960) pp. 53-60; 68-9; *The role of English in India* (1966) Chapter I generally; M. P. Jain: *Outlines of Indian History* (2d) 576-590; J. K. Mittal: *Indian Legal History* (1963) 252-256. For a general review on the reception of English law into India and elsewhere see: K. W. Patchett: English law in the West Indies (1963) *12 I.C.L.Q.* 9122; *The XIVth Report of the Indian Law Commission* 677-694; Lipstein: The reception of western law in India (1957) *UNESCO Int. Soc. Sci. Bull.* 85.

Law was not suitable to the conditions of the settlements there."[2] The author did not suggest that English law did not play an important role or that "between 1772 and 1840 numerous rules of personal law were refused application on the ground that they were unenforceable for various reasons including natural justice, but this process is poorly documented and the personal laws became virtually settled by the middle of the century."[3]

It would be wrong to assume that judges went headlong into the rules of English law without looking for alternatives, for the Regulations lay down quite clearly that the formula was only residual in nature and should be applied only where the fund of local law was exhausted.[4] In fact Gajendragadkar J. in *Murari Lal* v. *Devkaran*[5] has demonstrated that the Privy Council went out of its way not to enforce the English law. The Courts always made it a point to apply the statute if it was clear[6] and, except in the Punjab,[7] never refused to apply the local law on the grounds that it violated the equity formula unless there was a clear conflict in the personal laws.[8] Nor was the English law the only one to be consulted, and attempts were made to look at other laws also. The notable examples are Sir Ashutosh Mukherjea's research on the status of the posthumous son in *Kusum Kumari* v. *Dasrathi*,[9] Hidayatullah J.'s judgement in *Kantilal* v. *Balkrishna*[10] on the problem of death by negligence and Gajendra-

2. Prof. J. D. M. Derrett: Justice, Equity and Good Conscience in India (1962) *64 Bom. L.R. Jnl.* 129, 145.
3. Ibid at p. 130 f.n. 5.
4. *Regulation III* section 21 (1793 Bengal); *Regulation II* Section II(1802, Madras); *Regulation IV* (1827, Bombay); Section 26, *Bengal Civil Courts Act*, 1887; Section 31, *Madras Civil Courts Act*, 1873.[4] The best examples of this remain in those pointed out by Derrett i.e. *Ram Coomar Coondoo* v. *Chunder Coondoo* (1876) *4 I.A.* 23 at 50-1; *Bai Dahi* v. *Bai Santa A.I.R. 1961 Gujarat* 105 at 109 col. 1.
5. A.I.R. 1965 S.C. 225 at 228-9.
6. See Derrett's examples notably Chandavarkar J. refusing to romanise the Hindu law in *Kalgovada* v. *Somappa* (1909) *33 Bombay* 699. For an example of where there was a conflict of Hindu law texts see *Rakhalraj Mondal* v. *Debendranath A.I.R. 1948 Cal.* 356 at 358 col. 1; and on Mohommedan law see *Aziz Bano* v. *Muhammad Ibrahim Hussain* (1925) *47 All.* 823 at 837.
7. See *Punjab Laws Act* (IV of) 1872 Sections 5-6.
8. There were other cases where customs were in fact declared to be not in consonance with J.E.C.G., see for example Holloway J.'s view on the Islamic law of pre-emption in *Ibrahim Sahiv* v. *Muni Mir* (1870) *6 M.H.C.R.* 26; *Collector of Masulipatnam* v. *Cavaly Venkata* (1860) *8 M.I.A.* 500 and the discussion on this by Jain (*supra* f.n. 1. p. 582). See also Mayne: Hindu law and usage (11 d) 80-81 citing case law. For cases on the refusal to follow foreign law see f.n. 6.
9. *A.I.R. 1921 Calcutta* 487.
10. *(1950) Nagpur* 239. Note the reference to English, French, Germanic, Islamic and Roman law at 268-276; but note the dissent of Mudholkar J. who tries to find a fair solution to the problem even though he believes at p. 304 that "the Common Law modified by statute should be the guiding factor". The majority overruled the case of *Rakmabai* v. *Dhanraj A.I.R. 1921 Nag.* 102.

gadkar J.'s research into Hindu law on the clog on the equity of redemption.[11] More recently the absorption of the French and Portuguese possessions into India has led to the application of Portuguese and French law in these particular areas. This law has recently been reviewed in a recent American journal.[12]

In our present context the application of the equity formula is not important, because the situations in which it could apply are fast decreasing with increasing codification. We will examine *first*, the treatment of the formula by the Supreme Court in the three cases in which it has discussed it; and *secondly*, examine briefly the general attitude of Courts in India to English law as an aid to the construction of statutes based on the English model or framed in English or Anglo-American style.

(*a*) *The Supreme Court and the Formula*

The first case in which the Supreme Court discussed the equity formula was *Namdeo* v. *Narmada Bai*[13] in which the question was whether the formula could be used to introduce the principle in Section III(*g*) of the Transfer of Property Act, 1882, to a lease executed before the passing of the Act. Mahajan J. (for S. R. Das J. and himself) observed: "It is axiomatic that the Courts must apply the principles of Justice, Equity and Good Conscience to transactions which come up before them for determination, even though the statutory provisions of the Transfer of Property Act are not made applicable."[14]

The sole question to be decided was whether Section III(*g*) represented the equity formula. The learned judge took the view that the formula in fact represented English equity. He observed: "The insistence in Section III(*g*) . . . that notice should be given in writing is intrinsic evidence of the fact that the formality is merely statutory and that it cannot trace its origin to any rule of Equity. Equity does not concern itself with mere forms and modes of procedure . . . . Notice . . . by oral intimation . . . (would not) in any way distur(b) the mind of the Chancery Judge."[15]

He then briefly examined the origins of the rule in England[16] and showed that in India "there is a substantial body of authority for the proposition that in respect of leases made before the Transfer of

11. *A.I.R. 1965 S.C.* 225. (This case is discussed in detail later).
12. K. M. Sharma: Civil law in India (1969) *Washington University Law Journal* 1-40; See also V. S. Ramakrishnan: French law on Indian soil (1965) *Lawyer* 123-129; see also R. Whee: The Civil law and the common law (1915) *14 Mich. L.Rev.* 89 generally.
13. *A.I.R. 1953 S.C.* 148.
14. Ibid at pr. 16 p. 230.
15. Ibid pr. 17 p. 231.
16. Ibid pr. 18 p. 231.

Property Act forfeiture is incurred when there is disclaimer of title or . . . non-payment of rent."[17]

He concludes that the rule in the Act was one of procedure.[18] This rather strict application of the English Chancery Court approach may have been influenced by the fact that the lessee by his conduct was undeserving of notice. Mahajan J. observed: "It is clear that in this case the tenant is a recalcitrant tenant and a habitual offender. For the best part of 25 years he has never paid rent without being sued in Court. Rent has been in arrears at times for six years, at other times for three years and at other times for four years and so on. And every time the landlord had to file a suit for ejectment which was always resisted by false defences. No rule of Justice, Equity and Good Conscience can be invoked for (such a) tenant."[19]

This leaves us with an unsatisfactory picture of the contents of the equity formula and we are led to believe that they are in fact English equity plus individual discretion as conditioned by the facts of the case.

A totally different approach was adopted by Gajendragadkar J. in *Murari Lal* v. *Devakaran*.[20] Here the question was whether the principle that there must not be a clog on the equity of redemption (embodied in Section 60 of the Transfer of Property Act which did not apply to the State of Alvar when the mortgage in the instant case was in fact made) was a general principle in consonance with the equity formula. The Supreme Court reversed the view of the High Court and held that the document in the present case did purport to make the mortgagee the absolute owner on the failure of the mortgagor to redeem.[21] With the facts out of the way the Court proceeded to consider that the following of the rules of the equity formula implied.

His lordship referred to several Privy Council decisions to show that the early Privy Council had accepted the existence of mortgage by conditional sale in India[22] and that while the High Courts had maintained that unjust transactions will not be permitted, the approach of the High Courts had been frowned upon by the Privy Council in *Thumbuswamy Modelly* v. *Hossain Rowther*.[23] But the common

17. Ibid pr. 19 p. 231.
18. Ibid at pr. 23 p. 233 col. 1.
19. Ibid at pr. 31 p. 234.
20. *A.I.R. 1965 S.C. 225.*
21. Ibid at pr. 4 p. 227.
22. Ibid at pr. 7-8 pp. 228-9 citing the following cases: *Thumbuswamy Modelly* v. *Hossain Rowther* (1876) 1 Mad. 1 (P.C.); *Pattabhiramier* v. *Venkatarow Naicken* (1871) 13 M.I.A. 560; *Kader Moideen* v. *C. W. Nappean* (1899) 25 I.A. 241; *Mehrban Khan* v. *Makhana A.I.R. 1930 P.C. 142.*
23. *(1876) I Mad. 1 (P.C.)* The High Court cases are: *Venkata Reddi* v. *Parvati Ammal* (1863) 1 M.H.C.R. 460; followed in *Ramji* v. *Chinto Sakharam* (1864)

sense approach of the High Courts appealed to Gajendragadkar J. who examined the Hindu law texts to discover that the concept of mortgage by conditional sale was perfectly acceptable to Hindu jurisprudence.[24] Faced with the Privy Council and the Hindu law texts against him, the learned judge referred to Mahajan J.'s judgement in the 1953 case[25] we have discussed above and interpreted that judgement not as having decided that the equity formula in fact meant following the approach of English equity, but as having established as a commonsense principle. He observed: "These observations in substance represent the same traditional approach in dealing with oppressive, unjust and unreasonable restrictions imposed by the mortgagees on needy mortgagors, when mortgage documents are executed."[26] He found support in some High Court cases which had approved of Section 60 of the Transfer of Property Act as a just and equitable principle.[27]

This differs in style but not in approach from that of Mahajan J. The learned judge examined the local approach to the problem as well as the English law and evolved, as a general principle, a rule which was in consonance with common sense, as a general principle,[28] rather than expedient to meet the facts of the instant case. The principle in this case is much wider than one conceived by Mahajan J., and the reference to the earlier 1953 case is purely to establish a consistency.

More recently the Court reverted to the view that English law must in fact be applied. This was in the recent tort case of *Khushru v. Guzdur*[29] where mention was made of the formula.[30] The case involved a conspiracy (of six persons) "to injure and harass the plaintiff . . . (by giving) perverse rulings to prevent him from getting elected to the trustees of the Parsi Zorastrian Anjuman." One of the defendants apologised and was released by the plaintiff. The question was: did this release operate to release the joint tortfeasors? The High Court thought it did, which appears to be the opinion of

---

1 B.H.C.R. 199 followed in *Bapuji Apaji* v. *Senavaraji* (1878) *2 Bom.* 231 (per Eestrop J. distinguishing the P.C. cases) *Ramasami Sastrigal* v. *Samiyappanayakam* (1882) *3 Mad.* 179 at 190 (F.B. decision by majority, Turner J. distinguishing the P.C. position).

24. Ibid at p. 230 referring to Kane: *III H.D.* 428; *Narada:* Mitakshara on *Yajnavalka* II 58; Ghose: *Law of mortgages in India* (T.L.I. 5d) Vol I, 56.
25. *Supra* f.n. 13 and the text corresponding to it.
26. Ibid at pr. 15 f. 231. See a similar conclusion at pr. 231.
27. See *Amba Lal* v. *Amba Lal A.I.R. 1957 Rajasthan* 321; *Sabh Raj* v. *Chunder Mal A.I.R. 1960 Rajasthan* 47; *Nainu* v. *Kishan Guju A.I.R. 1957 H.P. 46.*
28. On the use of this principle see Derrett (cited f.n. 2 *supra*) 148-52.
29. *A.I.R. 1970 S.C.* 1468.
30. Ibid at pr. 17 p. 1474.

the Indian High Courts on the subject.[32] But Sikri J. who read the judgement in the Supreme Court tried to show that though this was the law in England it was different in 1965[33] and that America followed a different rule.[34] Further he stressed that the English law did not accord release to joint tortfeasors where the offence was trespass to the person or involved injuries to property (real or personal) unaccompanied by conversion or change of possession.[35] He concluded: "It seems to us that the rule of Common Law prior to *Brown* v. *Wooton* . . . (1605) . . . adopted by the American Supreme Court is more in consonance with Equity, Justice and Good Conscience. In other words the plaintiff must have received full satisfaction or which the law must consider as such, from a tortfeasor, before other joint tortfeasors can rely on accord and satisfaction."[36]

In his opinion an apology by the defendant "cannot be treated to be full satisfaction for the tort alleged to have been committed by the defendants."[37]

The English law makes a distinction between a joint tortfeasor and several concurrent tortfeasors and lays down that a release discharges the joint but not concurrent tortfeasors.[38] The defendants were clearly joint tortfeasors and the position at Common Law is that the law will not allow one person to get off and make a deal in a conspiracy because in a concerted action of that nature it is very difficult to allocate the liability. The released party could have been the one most responsible. Sikri J.'s distinction, based on history in which he makes a reference to case law before 1605[39] and his following the "strict" Common Law, establishes a precedent for selective or elective use of English legal history. It is possible that the learned judge was in fact trying to do justice in the instant case and not allow the unapologetic defendants to get away. But the High Court judge, who was closer to the facts, may have thought it was the plaintiff who was

32. See *Makhan Lal* v. *Panchmal Sheoprashad A.I.R. 1934 Nagpur* 226 at 227; *Shiva Sagar Lal* v. *Mata Din A.I.R. 1949 All.* 105; the other cases where the plaintiff accords with one defendant and sues the others *(Ram Kumar Singh* v. *Ali Hasan* (1909) *31 All.* 173 at 175; *Har Krishna Lal* v. *Haji Quarban A.I.R. 1942 Oudh* 73) are distinguished by Sikri J. at pr. 15 p. 1474: "But in these cases the decree was not passed first against the tortfeasor admitting liability." Note also the more recent case of *V. E. Dachala* v. *Rangaraju A.I.R. 1960 Madras* 457 where the State recovered the proceeds from the illegal sale of diesel oil; the other person involved was deemed not liable (at pr. 14, 14(a), 15 pp. 461-2).
33. Ibid at p. 1473-4. The case in question is *Brown* v. *Wooton* (1605) *80 E.R.* 47.
34. Ibid at p. 1473 col. 1. See *Lovejoy* v. *Murray* (1865-7) *18 Lawyer Edn. 129.*
35. Ibid at pr. 14 p. 1472 col. 2.
36. Ibid at pr. 17 p. 1874.
37. Ibid at pr. 19 p. 1474-5.
38. See *Street on Torts* (4d) 487 and the following cases cited by him *Duck* v. *Mayeu* (1892) *2 Q.B.* 511 (C.A.); *Cutler* v. *McPhail* (1962) *2 Q.B.* 292; *Gardiner* v. *Moore* (1966) *1 All E. R.* 365.
39. *A.I.R. 1970 S.C. 1468* at 1471-2.

trying to drag on a case merely to make an example of the defendants, even after he had received a frank confession and an apology for the whole conspiracy? Once again a broad principle was enunciated to meet the needs of a particular case, but this time after strict adherence to the technical rules of English law.

It appears that the Supreme Court, in the 1953 and the 1970 cases, laid emphasis on following the English law (even though this might have been done to meet the needs of the two cases). A far more comprehensive approach to the problem of finding the content of the equity formula was that of Gajendragadkar J. in *Murari Lal* v. *Devkaran* where he suggested that other laws, particularly Indian law, be looked into, but the formula itself must be based on a common sense rule the object of which must be to prevent injustice. The approach of Sikri J. in *Kushru* v. *Guzdur* shows that judges, in moments of doubt, still find solace in the English law, sometimes without reference to Indian conditions.

(b) *Indian Courts' attitude to English law*

It is only natural that a large part of Indian law should receive its inspiration from English law. This is because Indian statute law is based on English law. But judges have been discerning in applying English law and stressed occasionally that it is not always applicable to India. Thus in two cases on the Workmen's Compensation Act the Courts refused to follow the English law.[41] Again in *J. C. Mehta* v. *P. C. Mody*[42] Chagla C.J. (for S. T. Desai J. and himself) refused to follow the English law in an insolvency matter as there was sufficient Indian precedent on the point. The same judges reiterated this approach in an Income Tax case in *I.T. Commissioner* v. *Donald Miranda*[43] and disapproved of the tribunal following the English law,[44] though later they did what they had disapproved earlier.[45] In *Chauthmal* v. *Sadarmal*[46] Jagat Narain J. emphasised that the English concept of forfeiture was wider than under the Transfer of Property Act. In *Ram Dial* v. *Sant Lal*[47] the Supreme Court, while inter-

41. Horwill J. in *Alagappa Mudaliar* v. *Veerappan A.I.R. 1942 Mad.* 116 at 117 col. 2 "I should have thought that there is very little reason to suppose that the Indian legislature had studied the corresponding English Act." *Bai Kokilbai* v. *Kisharlal Mangal Das* (1942) *Bom. 139* at 139-140; but on the same statute contrast the attitude of Harries C. J. in *Kamarhatty* v. *Abdul Samad A.I.R. 1953 Calcutta* 74 at pr. 9-13 p. 75 and the same bench in *N I & S Co.* v. *Monorma A.I.R. 1953 Cal.* at pr. 10 p. 144 in which note the reference to a New Zealand case.
42. *A.I.R. 1959 Bom.* 289 at pr. 4 p. 291.
43. *A.I.R. 1959 Bom.* 33.
44. Ibid pr. 1 p. 34.
45. Ibid see pr. 7-8 pp. 36-8.
46. *A.I.R. 1959 Rajasthan* 24 at pr. 9-10 p. 26.
47. *A.I.R. 1959 S.C.* 855 at pr. 8 p. 859.

preting the meaning of "undue influence in an election matter", took the view that the English statute was not *in pari materia* with the one before him. In *Bari* v. *Tukaram*[48] Mudholkar J. while considering the custom of removing earth from the soil, observed: "I do not think it proper that the expression 'immemorial origin' is to be understood in India in the same sense as in England."[49]

The same attitude is retained with respect to Easements. In *Keshav Sahu* v. *Dasrath*[50] the Court discussing the concept of privacy stressed: "The fact that there is no custom of privacy known to the law of England can have no bearing on the question whether there can be in India a usage or custom of privacy."[51] A recent article recounts the contribution of an Allahabad judge in this area.[52] However, one may contrast the attitude in *Madras* v. *Mohd. Ghani*[53] where it was admitted that English law does not know of the problem of riparian owners as it exists in India[54] but followed that law all the same.[55]

There are however many cases where the English law has in fact been followed. Thus in *Hotel Imperial* v. *Hotel Workers'*[56] *Union* Wanchoo J. follows the law on the master-servant relationship in an industrial dispute case. In *Saurashtra* v. *Memon Haji Ismail*[57] Hidayatullah J. follows the English law on "act of state" after some discussion.[58] In *Union* v. *Kishori Lal*[59] Subba Rao J. (for the majority) was constructing a deed; but despite his claim to be uninfluenced by authority[60] he regarded the English law on this point well settled[61] and followed it.[62] Even the dissenting judge (Sarkar J.) did not dispute the authority of the English case law.[63] In *I.T. Commissioner* v. *Jairam Valji*[64] the Court made extended use of English case law on an In-

48. *A.I.R. 1959 Bom. 54.*
49. Ibid at pr. 4 p. 55.
50. *A.I.R. 1961 Or.* 154.
51. Ibid at 155.
52. See Mr. R. K. Kapur: The Easement of Nuisance *A.I.R. 1968 Jnl.* 8, commenting on the following judgements of Dhavan J.; *Bhagwati* v. *Dwarika Prashad A.I.R. 1963 All.* 3; *Bankey Lal* v. *Kishanlal A.I.R. 1967* All. 43. Note the comments on judicial method at pr. 18 p. 9.
53. *A.I.R. 1959 Mad.* 464.
54. Ibid at pr. 6.
55. Ibid at pr. 13 p. 467.
56. *A.I.R. 1957 S.C.* 1342. The case law cited is: pr. 10 p. 1345 citing *Hanley* v *Pease Ltd.* (1951) *1 K. B.* 698; *Wallwork* v. *Fielding* (1922) 2 *K.B.* 66, and Indian case law.
57. *A.I.R. 1959 S.C.* 1383 pr. 20 p. 1390.
58. Ibid pr. 10-17 pp. 1387-88.
59. *A.I.R. 1959 S.C.* 1362.
60. Ibid at 1368.
61. Ibid at pr. 5 p. 1366-7.
62. Ibid at pr. 9 p. 1368.
63. Ibid at pr. 26 p. 1373.
64. *A.I.R. 1959 S.C.* 291.

come Tax point.[65] In *Maktul Bhai* v. *Man Bhai*[66] Gajendragadkar J. followed the English law of *stare decisis*.[67] The High Courts have followed the same course[68] and in the Madras case of *Sundaram Mills* v. *Union*[69] Ramakrishan J. (for himself and Sadasivan J.) preserved the Common Law doctrine that State dues must be paid first.

The Supreme Court has between 1950 and 1970 decided 172 cases on the Indian Contract Act, 1872, 31 on the Indian Trusts Act, 1882, 36 on the Specific Relief Acts of 1877 and 1963, 942 on Criminal Law and 20 (including *Kushru* v. *Guzder* which we have discussed above) on torts.[70] In all of these areas the English law has by and large been followed. But care has been taken not to offend the textual provisions of the statute in each case. Thus in *Satyabrata Mugneeram*[71] the Court stressed that while Section 56 of the Indian Contract Act did represent the doctrine of frustration in English law, the textual requirements did suggest some differences. The classic case on this is in fact the Privy Council case, in which they examined the text of Section 53A of the Transfer of Property Act, and declared that on the terms of the text, the doctrine of part performance which that Section embodied could only be used to defend and not to establish a right.[72] Again, the English law on offer and acceptance has not been followed, because of the terms of the Contract Act in cases of contract by telephone.[73]

But the Courts have also tried to evolve in some cases a different approach of their own. A good example of the influence of English law will be analysed in Chapter VII where we shall examine how the Supreme Court has discussed the doctrine of Crown privilege

65. Ibid at pr. 2 p. 292-3; pr. 8-9 p. 295; pr. 13 p. 296; pr. 20 p. 298; pr. 21 p. 299; pr. 22-3 p. 299.
66. *A.I.R. 1958 S.C.* 918.
67. Ibid at pr. 9 p. 922-3 quoting from the *Corpus Juris Secundum* and *19 Halsbury* (2d) 257 pr. 557.
68. See *Madras* v. *Mohd. Ghani A.I.R. 1957 Mad.* 464 at pr. 13 p. 467 (on Easements); *Kalappan* v. *Kunhi Raman* (1957) *Mad. 176* at 185. "It is to our mind clear that the (Indian) Statute enacts the same rule" (on Section 128 of the Indian Contract Act 1872); *Madras* v. *Ramalingam & Co. A.I.R. 1957 Madras* 212 (Contract) at pp. 217-8; 221-2, 224-7, 235-6 and result thereof.
69. *A.I.R. 1970 Madras* 190 at pr. 5 p. 192.
70. A list of all these cases was compiled from the *All India Reporter*. The list of Criminal law cases is taken from Soonavala: *The Supreme Court and Criminal law* (1968 Edn) pp. iv-xliii. It includes cases on the Indian Penal Code 1860, the Evidence Act 1872, the Criminal Procedure Act 1898 and the relevant provisions of the Constitution. The cases on the Contract Act, 1872, include cases on Agency.
71. *A.I.R. 1954 S.C.* 44.
72. *P. K. Das* v. *Dantmara Tea Estate Ltd. A.I.R. 1940 P.C.* 1.
73. See *Bhagwan Das* v. *Girdhari Lal & Co. A.I.R. 1966 S.C. 43* (per Shah J.) For another example of this see *Lakshmil Amma* v. *T. Narayana Bhatta A.I.R. 1970 S.C.* 1367 (on undue influence in Section 16 of the Contract Act 1872) and note the comments of G.M. San (1971) *13 J.I.L.I.* 127-134.

as embodied in Section 123 of the Indian Evidence Act, 1872. Another good example of the way the English law can be modified in an Indian context is *Sitaram* v. *Santanu Prashad*[74] in which the Court discussed the doctrine of vicarious liability in tort. Hidayatullah and Bachawat JJ. used the English law to hold that the owner of a taxi cab was not liable for an accident caused by his driver allowing the cleaner of the car to drive the car. Subba Rao J. also used the English law to make the absentee taxi car owner liable, thus extending the principles of vicarious liability, so that the person who could afford to pay the claim of the crippled man was made liable along with his insurance company.

Judges are keenly aware that the English law must not be blindly followed. This is very well illustrated by an incident related by a former Attorney-General recounting his argument in the case *Joeseph Vellukumel v. Reserve Bank of India.*[75] He observed:

> "(I) referred to American procedure which showed that even in the United States, the executive . . . could initiate the closure . . . of Banks. Justice Kapur was a member of the Bench. He was particularly well known for his fondness for English decisions, particularly those of the House of Lords. When I cited the American cases he interrupted: 'Mr. Attorney-General, why must you travel that far, cannot you find authorities nearer home?' I promptly replied 'Yes, my lord, the position is the same in Japan . . .'"[76] The whole Court, including Justice Kapur, laughed.

Indian Courts are becoming aware that they must no longer look to the Courts of law outside the country for precedents. But they are also aware that they must interpret the law while taking into account the law of England, because the law in India is based on English law. The facts of the case before them, the text of the statutes and local conditions have been brought to bear in the interpretation of statutes. Certainly the emphasis on English law will continue. But beneath this following of English law, the Courts are evolving precedents which, if read in the factual context of their respective cases, disclose a not so apparent but very real adaptation of English law to Indian situa-

74. *A.I.R. 1966 S.C.* 1697.
75. (1962) 3 (Supp.) S.C.R. 632.
76. Setalvad: *My Life* (1970) at 367. Note also the friendly but teasing comments made by S. R. Das C.J. about Justice Kapur (quoted by Setalvad at 367) ". . . Then comes my Brother Kapur, when an argument is in full swing, he distinctly remembers that there is a decision either of the House of Lords or of the Privy Council which is pat on the point under discussion but that decision he cannot for the moment unfortunately lay his hands on and all members of the Bar cannot find it until the case is over."

tions. There are, of course, as we have seen, numerous cases where the English law is referred to, and followed without much discussion. The breakaway process is naturally gradual *and formal adherence to English law continues.*

To *conclude,* the Supreme Court in interpreting the content of justice, equity and good conscience look to the English law, but it has been selective in examining what the English law on a particular point is in fact. They create precedents which are expressed in terms of English law, but applied to given Indian facts. The ratio of the cases is often confused and difficult to follow (as in the three equity formula cases above), but the approach is distinctly Indian. It will take some time for precedents illustrating this adaptation process to mature, as in America."[77] The process is slow, indirect, and confusing. A foreign observer commenting on the process of adaptation of English law in the West Indies makes the following remarks, which are appropriate in India's context:

> "At the present time it is premature to speak of West Indian law. For such uniformity of content and approach to be found among the fifteen different legal systems in the West Indies is largely a result of receiving and adopting English law. In some branches of law there has been a response to local needs, but too often perhaps it has taken the form of piecemeal amendment to English provisions, too rarely has it been from an inquiry into first principles. If there is ever to be a body of law which can realistically be called West Indian, it can only be achieved by a systematic re-thinking of the basic legal principles in the context of the West Indies through some collaborative effort between the territories concerned."[78]

5. The Supreme Court and the Use of Interveners

The presence of an intervener often widens the scope of the appeal because the intervener brings with him a point of view which may be different from that of the parties in the case.[1] So much so that intervention has been called the development of lobbying practice, but more decorous!

77. See for example Roscoe Pound: *Jurisprudence* (1959) on the fate of *Ryland* v. *Fletcher* in the United States.
78. K. W. Patchett: English law in the West Indies. 12 *I.C.L.Q.* 922 at 962.
1. On the importance of interveners see Philip B. Kurkland: Towards a political Supreme Court (1969) *37 Univ. of Chicago Law Review 19* at 34-6; R. Seidman: The judicial process reconsidered in the light of the role theory (1969) 32 *Mod. L. Rev. 516* at 525; Vose: Litigation as a pressure group activity *282 Annals 20,* 27-30; Harper and Ellington: Lobbyists before the Court (1953) *101 Univ. of Pa.L.Rev. 1172* Wiener: The Supreme Court's new rules (1954) *68 Har.L.Rev.* 20-80. Unfortunately very little has been written in India on the subject. See Agarwala & Datta: *Practice and Procedure in the Supreme Court of India* 157.

85

Outlines of Indian Legal History

M.P. Jain

(Second Edition)

Tripathi

OUTLINES OF INDIAN LEGAL HISTORY

www.vadaprativada.in

the better principle or policy. Diverse laws had grown in the country. The bulk of the Regulation Law was also unnecessarily bloated for even on a matter of common interest to all the three Governments there necessarily existed three separate Regulations when one Regulation enacted by some central authority might have met the exigencies of the situation.

JUSTICE, EQUITY AND GOOD CONSCIENCE

If on the particular point before the court there was no parliamentary law, no Regulation, and if it fell outside the heads for which Hindu and Mohammedan laws were prescribed, then the court was to decide the matter according to 'justice, equity and good conscience'. It has already been seen[1] that Warren Hastings' plan specifically laid down the law to be applied by the courts only for a few topics, *viz.*, inheritance, marriage, caste, and other religious usages and institutions. These topics did not exhaust the whole area of litigation with which the courts were confronted. No specific direction or sufficient guidance had been given either by Hastings' plan or even by the later Regulations regarding the law which the courts were to apply to the residuary heads of litigation. There was thus a serious gap. In this vacuum, the courts were to act according to 'justice, equity and good conscience.'

What did the maxim 'justice, equity and good conscience' mean? The maxim did not have any precise and definite connotation. In simple terms it meant nothing else but the 'discretion' of the judge. No way was specified, in the beginning, in which the judges had to exercise their discretion. They had full freedom to decide the causes coming before them in such a way as appeared to them to do substantial justice between the parties concerned. It was like legislation by the judges. The inevitable result of such a flexible state of law was bound to be confusion and uncertainty in the country's legal system. Discretion of one judge differed from that of another. The notions of equity, justice and fairplay varied from judge to judge. No one could thus be sure as to what legal principles would be applied by a particular judge to any particular factual situation to decide the matter.

The persons on whom devolved the function of administering justice in the initial era of the country's administration by the Company, were all without any legal training. They were Englishmen who were not acquainted with the people's language, customs

1. *Supra*, p. 90

and methods.[1] They were however provided with the assistance of Native law officers, kazis and pandits, who would expound to them the Hindu and Mohammedan laws and guide the judges in the task of adjudication of disputed questions. In this set up, a practice arose in the courts to apply the personal laws of the Hindus and Muslims, as the case might be, even in those matters in which the judges were not obligated to apply these laws, but had freedom to act according to their discretion. To exercise discretion in the light of the personal laws of the parties concerned was simple and convenient, as well as was consonant with the spirit and general tenor of the whole scheme of Warren Hastings and Impey. The Native law officers were near at hand, and the 'lay' judge, instead of groping in the dark to find out the principle of law to be applied to the case in hand, could very easily ascertain from the Native law officers what principles of the personal law concerned would cover the disputed point. Thus in matters of contract, it was possible for the court to apply, as a matter of good conscience, ascertainable principles of the Hindu or the Muslim law according as the parties were Hindus or Muslims, even though contract was not one of the subject-matters for which the courts were required to administer personal laws.[2] But it was not the whole law of contracts of the Hindus or Muslims that was applied. The rule of damdupat, it was held, did not apply to the Hindus and the court was not debarred from giving a higher rate of interest as contracted. The reason given for not enforcing the said rule was that it was not obligatory on the courts to apply the Hindu law of contracts in all cases in the mofussil.[3] Thus only as much of the personal law would be applied to matters not specifically mentioned in the scheme of 1772 as was not deemed inconsistent with justice, equity and good conscience. It was on the same basis that the Mohammedan law of gifts came to be applied to the Mohammedans. The Muslim law of pre-emption came to be recognised in U.P. and Bengal[4], on the grounds of equity.

1. *Supra*, p. 90.
2. *Mt. Khanum Jan* v. *Mt. Jan Beebee*, 4 S.D.A. Rep. 212 (1827); *Aiman Bibi* v. *Ibrahim Khan*, 5 S.D.A. Rep. 304 (1833); *Rajinder Narain Rae* v. *Bijai Govind Sing*, 2 M.I.A. 181.
3. *Deen Dayal Poramanick* v. *Kylas Chunder Pal Chowdhury*, I.L.R. 1 Cal 92. In the Bombay mofussil, the Rule of Damdupat was excluded partially and enforced partially. It was not applied in cases of usufructuary mortgage where the mortgage was required to render accounts of rents and profits received from the mortgage property: *Gopal Ramchander Li maye* v. *Gangaram Anand*, I.L.R. 20 Bom. 721.
4. *Gobind Dayal* v. *Inayattullah*, I.L.R. 7 All. 775 (1885).

In Madras, however, the High Court refused to enforce the law of pre-emption on the ground that it was not consistent with equity and good conscience because it was opposed to the principle administered in Madras, *viz.*, perfect freedom of contract.[1] Similarly, the Bombay High Court refused to apply the law of pre-emption in Bombay except Gujarat on the ground that the local conditions of U.P. and Bengal were not reproduced in the Bombay Presidency.[2]

Customs prevailing in the country formed another source upon which the courts could draw for the principles to decide cases within their 'discretion'. In the absence of any other more authoritative source, it was quite proper and legitimate for the courts to look to the customs of the parties, place, family, community, tribe or class to the extent it might be feasible in the particular case. Thus the Bombay High Court enforced a custom under which the burial ground was regarded as sacred and the relatives of the dead buried in the land had a right to perform rites of the Mohammedans.[3] However, there were not many customs outside the area of personal laws and the relation of custom with the personal laws will be reviewed later.[4]

In course of time, however, a new orientation began to be given to the maxim 'justice, equity and good conscience'. It came to mean English law so far as applicable to Indian situation. This trend was very much encouraged by two developments in the 19th century (1) firstly, by the advent of the High Courts in 1862[5] which consisted of the Englishmen as judges who were barristers and thus were trained in the English law. They had a natural bias in favour of their own system of law and, therefore, whenever they came across a situation which they had to decide according to 'justice, equity and good conscience', to which no custom was applicable, they invariably began to base their decisions on the rules of English law with which they were acquainted. (2) The second factor which helped this trend was the activisation of the Privy Council as the ultimate court of appeal from India from 1833 onwards.[6] The association of the Privy Council with the Indian judicature affected the latter very profoundly. The Privy Council consisted of senior and leading judges of England having a firm grounding and thorough training

1. *Ibrahim* v. *Muni Mi* , 6 Mad. H.C.R. 26 (1870).
2. *Md. Beg.* v. *Narayan*, A.I.R. 1929 Bom. 255.
3. *Ramrad* v. *Rustam Khan*, I.L.R. 26 Bom. 198.
4. *Infra*, under 'Development of Personal Laws'.
5. *Supra*, p. 407
6. *Supra*, Ch. XX

in the English law and, therefore, it was natural that these persons would, wherever possible interject their own notions of justice and equity into the Indian legal system and thus the process of reception of English law in India was stimulated. The Privy Council acted as a channel through which English legal concepts came to be assimilated with the body and fabric of the Indian law. As Setalvad has observed, emphasizing the role of the Privy Council in this respect, "As the Company's territories became gradually enlarged by settlement and conquest the Privy Council, as the highest court of appeal from the decisions of the Indian courts, became a growing influence in the application of the basic principles of English jurisprudence as the rules of decision all over the country. It was natural, perhaps, inevitable, that the eminent English judges, who presided over this tribunal should attempt to solve the problems that came before them wherever Indian regulations or statutes contained no provisions applicable to them by drawing upon the learning on which they had been brought up and the rules and maxims to which they had been accustomed for a lifetime. This explains why from the earliest times the decisions of this tribunal in appeals from India have resulted in a steady and continuous granting of the principles of common law and equity into the body of Indian jurisprudence."[1] In the words of Ilbert, "An Englishman would naturally interpret these words (justice, equity and good conscience) as meaning such rules and principles of English law as he happened to know and considered applicable to the case, and thus, under the influence of English judges, native law and usage were without express legislation, largely supplemented, modified, and superseded by English law."[2]

Thus slowly and gradually, step by step, the English law began to infiltrate into India. The wide door of 'justice, equity and good conscience' made it possible for the courts to fill in the vast gaps and interspaces existing in the substantive law of the country with the principles of English common and statute law. The process was inevitable with the domination of the Indian judicial scene by the English barrister-judges.

The position became established through a number of judicial pronouncements of the High Courts and the Privy Council that 'justice, equity and good conscience' meant the rules of English law. A few of these cases may be noted here. In *Varden Seth Sam* v. *Luckpathy*[3], decided in 1862, the Privy Council pointed out that the

1. *The Common Law in India*, pp. 31-32 (1960).
2. Ilbert, *op. cit.*, p. 360.
3. 9 M.I.A. 303.

Company's courts did not have any prescribed general law to which their decisions must conform; that they were directed to proceed generally according to justice, equity and good conscience; that although the English law was not obligatory upon these courts in the mofussil, they ought, in proceeding according to justice, equity and good conscience, to be governed by the principles of the English law, applicable to a similar state of circumstances. The facts of the case were somewhat as follows : a Mohammedan created a charge on his property by depositing the title deeds with the plaintiff, an Armenian Christian. Later the Mohammedan gentleman transferred the property to a Hindu who transferred it to one who was a Christian and a British subject. The plaintiff, the Armenian Christian, sued all these persons. The Madras Sadar Adalat dismissed the suit on the ground that the "doctrine of constructive notice" was not applicable to the circumstances of the country, where, very commonly, old deeds connected with land did not exist. The matter then came before the Privy Council which reversed the Sadar Adalat's decision observing that that decision "appears to have proceeded upon the ground that the principles of the English law applicable to a similar state of circumstances ought not to govern the decision of that suit in those courts. This was correct if the authoritative obligation of that law on the Company's courts were insisted on." The Privy Council applied the test to the decision appealed against whether it "violates" the direction to act according to 'justice, equity and good conscience' or not. The Privy Council held that there was no law forbidding validity of the lien. The parties did not contract with reference to any law. The parties were not of the same race or creed. There was in existence no local law, *lex loci rei sitae*, forbidding the creation of a lien by the contract and deposit of deeds and that by the English law, the deposit of the title deeds as a security would create a lien on lands of an equitable nature which could be defeated only by a subsequent purchaser for value, bona fide, without notice. Thus to decide the case, the Privy Council applied a rule of English law, or rather of English equity. In *Daba* v. *Babaji*[1], the Bombay High Court considering a question of specific relief, held the *Varden* case as an "authority of the highest court of appeal that, although the English law is not obligatory upon the courts in the mofussil, they ought in proceeding according to 'justice, equity and good conscience', to be governed by the principles of the English law applicable to a similar state of circumstances." "Now, having to administer justice, equity and good conscience", said Sir Barnes Peacock in 1868, "where are we to look

1. 2 Bom. H.C.R. 36 (1865).

for the principles which are to guide us? We must go to other countries where equity and justice are administered upon principles which have seen the growth of ages, and see how the courts act under similar circumstances; and if we find that the rules which they have laid down are in accordance with the true principles of equity, we cannot do wrong in following them."[1]

In 1872, while proposing the enactment of the Indian Contract Act, Sir James Stephen, the Law Member, stated, "Though justice, equity and good conscience are the law which Indian judges are bound to administer, they do in point of fact resort to English law books for their guidance on questions of this sort, and it is impossible that they should do otherwise, unless they are furnished with some specific rules as this Act (Contract Act) will supply them with."[2] Judicially, the point was settled more specifically by the Privy Council in 1887 in *Waghela Rajsanji* v. *Shekh Masludin*.[3] The question which arose for consideration was with respect to the power of a guardian to enter into an agreement so as to bind the minor ward. A guardian had covenanted for herself and her infant ward to indemnify the purchaser of the ward's estate against any claims by the Government for revenue. Later the Privy Council had to consider the question whether this covenant was binding personally on the ward. Lord Hobhouse, delivering the judgment of the Privy Council, remarked that "equity and good conscience" had been "generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances." Regarding the facts of the instant case, he pointed out that there was not in the Indian law any rule which gave a guardian and manager greater power to bind the infant ward by a personal covenant than existed in the English law. "Their Lordships are not aware of any law in which the guardian has such a power, nor do they see why it should be so in India. They conceive that it would be a very improper thing to allow the guardian to make covenants in the name of his ward, so as to impose a personal liability on the ward."

Many decisions in the twentieth century, too numerous to mention, emphasized and reiterated the position stated above. The trend to apply the principles of English law so far as relevant to Indian conditions continued unabated and any number of illustration can be given of this process. In *Lopez* v. *Muddhu Mohan Thakur*,[4] the English law was applied to a fact situation where land had been submerged and

1. *Saroop* v. *Trylakhonath*, 9 W.R. 230, 232 (1868).
2. *Supplement to the Gazette of India*, May 4, 1872, p. 535.
3. 14 I.A. 89, 96 (1887).
4. 13 M.I.A. 467.

partially washed away by the Ganges but then later the water receded and land reformed on the original site. It was held that the land regained belonged to the owner. The principle, the Privy Council said, was not merely of English law, but was founded in universal law and justice. Similarly, as a 'principle of natural equity, which must be universally applicable', the Privy Council applied the rule[1] that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can show that either the buyer had notice of the real title or that there existed circumstances which ought to have put him on an inquiry as to the title of the seller.

Collector of Masulipatam v. *Cavaly Vencata*[2] is an interesting case where principles of English law were applied in preference to the Hindu law. On the death of a zemindar, his widow took a widow's estate in the zemindary. She died and there were no heirs of her husband to inherit the zemindary. The zemindar was a brahmin. It was argued that according to the Hindu law, property of a brahmin never escheated to the king. The Privy Council held that this question could not be determined wholly and merely by the Hindu law. On the death of a Hindu, his heirs would be ascertained by the Hindu law. But as regards escheat, the Privy Council held that the Crown had a general right to take by escheat the land of a Hindu subject, even though a brahmin, dying without heirs.

The process continued even in the twentieth century whenever a principle of law was not clearly available in India. As for instance, in *Maharban Khan* v. *Makhana*[3], the Privy Council applied to an Indian case the English rule against the clog on the equity of redemption. In *Mohd. Reza* v. *Abbas Bandi*[4], the Privy Council applying the English rule held that a restriction forbidding alienation of property to strangers, but leaving the transferee free to make any transfer within the family was only partial and not absolute and hence was valid.

From the above discussion, it would be wrong, however, to gather the impression that each and sundry principle of the English law was made applicable to India without any judicial discrimination. It was not so. The touchstone to apply a principle of the English law

1. *Ram Coomar* v. *Macqueen* (1872), I.A. Suppl. 40.
2. 8 M I.A. 500. Also, *Ranee Sonet Kowar* v. *Mirza Himmut*, 3 I.A. 98.
3. 57 I.A. 168.
4. 59 I.A. 236.

was whether it was suitable to Indian conditions, and the courts concluded in quite a few cases that many principles were not so conducive or adaptable and so refused to apply them. A few illustrations will exemplify the point. The English rule laid down in *Tweddle* v. *Atkinson*[1] barring a third party to contract from suing was not applied in India on the ground that the English rule was based on special writ procedure relating to assumpsit. First, the High Court of Calcutta developed this point of view[2] and later it was accepted by the Privy Council in *Mohd. Khan* v. *Husaini Begum*.[3] In this case, an agreement was entered into between the plaintiff's father and the defendant, plaintiff's father in law, in which he agreed to give Rs. 500/- p.m. to her for her marriage with his son. The plaintiff was minor at the time. She was held entitled to enforce her claim although not a party to the contract. The Privy Council observed that "in India and among communities circumstanced as the Mohammedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements and arrangements entered into in connection with such contracts." Similarly, the rule of English law which prohibited an action for damages for oral defamation unless special damage was alleged, was not adopted in the mofussil as the court held that it was founded on no reasonable basis.[4] In this connection, it may be worthwhile to note that in the Calcutta town the English rule of special damages was strictly enforced.[5] There was thus a dichotomy between the mofussil and the presidency towns on this point. Again, in a case where the Privy Council was adjudicating upon the claim of the Shias that they had a right to take out a religious procession on a public highway in Aurangabad, it was observed, "The distinction between indictment and action in regard to what is done on a highway is a distinction peculiar to English law and ought not to be applied in India." In this connection, the Privy Council disapproved a number of High Court decisions which were based on English authorities.[6] The Bombay Court refused to apply the English law relating to superstitious uses in the case of Hindu religious endowments.[7] The Privy Council

1. (1861) 1 B & S 393.
2. *Deb Narayan Dutt* v. *Chunilal*, I.L.R. 41 Cal. 137; *Kshirodebehari* v. *Mangobinda*, I.L.R. 61 Cal. 841.
3. 37 I.A. 152.
4. *Parvathi* v. *Mannar*, I.L.R. 8 Mad. 175 (1884).
5. *Supra*, p. 536.
6. *Manzur Hasan* v. *Muhammad Zaman*, 52 I.A. 67.
7. *Khusal Chand* v. *Mahadevgiri*, 12 B.H.C.R. 214 (1875).

held in a number of cases that a resulting trust was regarded as having been created when there was a benami transaction and the property was sought to be purchased in the name of the wife or son, and it would not be regarded as an intended advancement as it was in England. The rule was applied equally to the Hindus as well as to the Muslims.[1] The criterion in such cases was to consider from what source the purchase-money came. "The presumption is that purchase made with the money of A, in the name of B, is for the benefit of A; and that, from the purchase by a father, whether Mohammedan or Hindu, in the name of his son, you are not at liberty to draw the presumption which the English law would draw, of an advancement in favour of that son." The reason given for deviating from England in this respect was that there was a widespread and persistent practice prevailing among the natives for benami transactions for no apparent purpose. But the same rule was held applicable to the Englishmen residing in India.[2] There the English law was applied; in such a case, a *prima facie* presumption of advancement arose except when there was evidence to rebut the presumption.

In *Norendra Nath Sircar* v. *Kamal Basini*,[3] the Privy Council gave a warning against the use of English cases to interpret wills of people of India. "To search and sift the heaps of cases on wills which encumber our English law reports, in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life, seems almost absurd." In another case, the court declared, "The principles of English feudal law are clearly inapplicable to a Hindu zemindar."[4]

A very important point to note is that in India there was never any separation maintained between courts administering law or equity. In India, law and equity were treated as a part and parcel of one and the same system of law. Thus the courts combining both law and equity jurisdiction brought about a fusion of law and equity much before the same could be achieved in England. What was applied in India was therefore common law as liberalised by equity. Thus the Indian law did not recognise any dichotomy between legal and equitable estates or interests.[5] In India, therefore, there could

1. *Gopeekrist Gosain* v. *Gungapersaud Gosain*, 6 M.I.A. 53; *Moulvie Sayyud Uzhur Ali* v. *Beebee Ultaf Fatima*, 13 M.I.A. 232.
2. *Kerwick* v. *Kerwick*, 47 I.A. 275.
3. 23 I.A. 18.
4. 3 I.A. 92.
5. *Tagore* v. *Tagore*, (1872) I.A. Suppl. 47, 71; *Webb* v. *Macpherson*, 30 I.A. 238.

be but one owner and if the property was vested in a trustee then he was the owner.[1]

In *Pattabhiramier* v. *Vencatarow Naicken*[2], the Privy Council refused to apply the English rule of equity of redemption in Madras on the ground that it was never applied by the courts and the ancient Hindu law did not recognise any such rule. "Such a doctrine was unknown to the ancient law of India ; and if it could have been introduced by the decisions of the courts of the East India Company, their Lordships can find no such course of decision. In fact, the weight of authority seems to be the other way."

Till 1858, the Madras Sadar Adalat had followed the rule that the mortgage came to an end in accordance with the intention of the parties and that in India there was no principle analogous to the English principle of equity of redemption. In 1858, the current of decisions changed suddenly and the adalat started applying the principle of equity of redemption. In *Pattabhiramier* case, noted above, the Privy Council refused to accept such a change in judicial opinion. In *Thumba Sawmy Mudelly* v. *Mahomed Hossein Rowthen*[3], the Privy Council again criticised this change in judicial opinion. It said that the judges took upon themselves, in contravention of the law of India, as declared and enforced by the decisions of their predecessors, to apply for the first time the principles of equity of redemption. But as many titles in land had come into existence on the basis of the new position, the Privy Council reluctantly accepted the new law with respect to the post-1858 transactions.

It has been seen in earlier pages that the English law of maintenance and champerty was not made applicable in the presidency towns.[4] The same position was obtained in the mofussil, but after some confusion and change of judicial opinion. In 1852, the Sadar Adalat held an agreement between a pauper plaintiff and a third person to give half of the property in consideration of money advanced to prosecute the appeal, as savouring strongly of gambling.[5] Till 1849, the view was held that champerty was illegal and no such agreement could be enforced. This was in accord with the English law.[6] But then the current of opinion underwent a marked change.

1. *Chhatra Kumari Debi* v. *Mohan Bikram Shah*, 58 I.A. 279.
2. 13 M.I.A. 560 ; Also, *Forbes*, v. *Ameeronissa Begum*, 10 M.I.A. 348.
3. 2 I.A. 241.
4. *Supra*, p. 542.
5. *Ram Gholam Sing* v. *Keerut Singh*, 4 Sel. Rep. 12.
6. *Brij Narain Sing* v. *Teknerain Singh*, 6 Sel. Rep. 131; *Zuhooroonissa Khanum* v. *Russick Lal Mitter*, 6 Sel. Rep., 298 ; *Andrews* v. *Maharajah Shree Chunder Rae*, S.D.A. (1849) Beng. 340

In 1852, the Sadar Adalat held that champerty was not *per se* illegal. There was no law in India, said one of the judges, "which lays it down to be illegal for one party to receive and another to give funds for the purpose of carrying on a suit on promise of certain consideration in the form of a share of the property sued for, if decreed to the plaintiffs."[1] The view thus came to be held that the statute of champerty was not applicable in the mofussil. On this point, the law in the presidency towns was brought at par with the law in the mofussil[2], the Privy Council observing, "It would be most undesirable that a difference should exist between the law of the towns and the mofussil on this point. Having regard to the frequent dealings between dwellers in the towns and those in the mofussil, and between native persons under different laws, it is evident that difficult questions would constantly arise as to which law should govern the case."

It would therefore be seen that the impact of the maxim 'justice, equity and good conscience' on the development of Indian law was tremendous. The decisions of the Indian courts proved to be a prolific source of the incorporation of English principles into Indian jurisprudence. In many areas, as for example law of torts, the Indian courts lifted bodily the whole mass of English law and transplanted it into India. As there was nothing in India to fall back upon for the courts in this area, they followed the trail of the English courts and the law. This process was nothing short of judicial legislation. Throughout the nineteenth century, the influence of English law in India continued to expand, not only in the presidency towns where the English Law had been applied from the very beginning, but even in the mofussil, the interior of the country, which had been kept for long insular from the impact of the English law.

The process of reception of the English law through the agency of judiciary had both its strong as well as weak points. Its advantages lay in the fact that it helped in the development of a number of different branches of law in India for which perhaps there was no precedent in the indigenous law. Many new patterns of human relationship were developing in the country under the impact of new economic and social forces. No guidance was to be had from the personal laws either of the Hindus or the Muslims or from the

1. *Kishen Lal Bhoomick* v. *Pearee Soondree*, S.D.A. (1852) Beng. 394. Followed in *Panchcouraee Mahtoon* v. *Kalee Churn*, 9 Suth. W.R. 490.
2. *Ram Coomar* v. *Chunder Kanto*, 4 I.A. 39 (1876-7); *Supra*, p. 542; Acharya, *Codification in British India*, pp. 130-131.

customs prevailing in the country ; or even if there were indigenous rules they were archaic and primitive and not suitable to the new emerging social structure and conditions and, therefore, in this context, the English law did provide a valuable source of legal principles. The fact that the English law was to be the reservoir to draw upon, somewhat controlled the otherwise extremely broad discretion conferred upon the judges by the maxim of 'justice, equity and good conscience', and instead of borrowing legal principles at random from any where, and from any legal system, the judges were required to look to one source only, and this introduced some element of certainty in an otherwise uncertain and fluid legal system. The reception of the English law in the mofussil through the judicial process also reduced that dichotomy of law which existed between the presidency towns and the mofussil during the days of the Supreme Courts. Be it noted however that this dichotomy was substantially reduced, but was not completely eliminated. To take an example, in Calcutta the rule applied was that in case of defamatory words, a plaintiff can claim damages only if he suffered some special damages[1]. In the mofussil, on the other hand, it was not necessary to prove any special damages and the plaintiff was entitled to recover damages if defamatory words had been used against him.[2] Similar was the case with respect to the rule of damdupat which was applied to the Hindus in the presidency towns, but not in the mofussil[3]. In one case,[4] the High Court thought it anomalous that there should be one rule in the Calcutta town and another outside it in the matter of interest chargeable by the Hindus, but the court could not help as it was bound to apply the Hindu and Muslim law of contracts while there was no such obligation on the mofussil adalats. In one case, the Calcutta High Court asserted that what was applicable in the mofussil as a rule of justice and equity need not be applicable in Calcutta as a matter of course. The point involved was somewhat like this : A Hindu widow sold some property; the purchaser built a house on it; it was held that the reversioners were entitled to get back the property sold by the widow, but the question was whether the purchaser could claim compensation or could remove the materials. In the mofussil, on the basis of justice and good conscience this right had been conceded to the purchaser.[5] In the presidency town of Calcutta, the High

1. *Bhooni Moni Dasi* v. *Natowar Biswas*, I.L.R. 28 Cal. 452 (1901).
2. *Sukkan* v. *Bipad*, I.L.R. 34 Cal. 48.
3. *Supra*, p. 550 ; *Surjya Narain Singh* v. *Sirdhary Lal*, I.L.R. 9 Cal. 825.
4. *Nobin Chander Bannerjee* v. *Romesh Chander*, I.L.R. 14 Cal. 781.
5. *Thakoor Chunder Paramanik's case*, B L.R. suppl. vol. 595.

Court thoguht that such a rule would be very inconvenient ; it ruled that it was not a case of succession but accession to property and was thus governed not by the Hindu law but by the English law.[1] As such, therefore, the purchaser was neither entitled to compensation, nor to remove the materials. Thus, differences between the mofussil and the presidency towns were many even after the English law began to be imported into the mofussil.

The process of thus receiving English law through the judicial process, suffered from several drawbacks and weaknesses.

As the scheme of law envisaged, there was to be a selective and discriminating adoption of the rules of English law by the courts. That is what was envisaged for the presidency towns under the requirement that only such English law as was extant in 1726 was to apply as suited the Indian conditions. And the same concept was inherent in the maxim 'justice, equity and good conscience', as already discussed. Thus, it was not to be an uncritical or automatic application of any principle of the English law into India. It has been seen already that quite a few principles of this law were refused to be applied both in the presidency towns and the mofussil on the ground of their unsuitability to local conditions. But it was not always that the courts in India brought to bear upon the question a discriminating attitude towards the adoption of English law in India. With the result that not only those rules of this law which were suitable to India, but also some of those which were of a technical nature, or were the product of the peculiar conditions of England, were made applicable. Many rules of English law which were not consistent with the genius, customs, traditions, habits and institutions of the Indians thus found their way into the country. Judicial selectivity of the principles of law to be applied was not always careful, judicious and discriminating. It was this aspect of the matter on which Maine commented in the following words : "In British India judicial legislation is, besides, in the long run, legislation by foreigners, who are under the thraldom of precedents and analogies belonging to a foreign law, developed thousands of miles away, under a different climate, and for a different civilization".[2] In course of time, it was found to be extremely necessary and desirable that introduction of the technical rules of English law be checked in some way and for this purpose codification of the law was thought to be the most effective expedient. "The only way of checking this process of borrowing English rules from the recognised English authorities is by substituting for those rules a system of codified law, adjusted to the best Native

1. *Juggut Moohinee Dossee* v. *Dwarka Nath Bysack*, I.L.R. 8 Cal. 582.
2. *Minute of the Sir H. S. Maine*, dtd. 17th July, 1879.

customs and to the ascertained interests of the country."[1] According to Rankin, "The urgency of the work lay partly in the need to prevent Indian courts from filling up gaps in the law by borrowing haphazard from England rules which had grown up in the special context of English history."[2]

A system of law which depends too much for its foundation, development and exposition mainly on case-law can scarcely be satisfactory. The reasons are obvious. A large number of points will necessarily be left unsettled under such a system till the highest tribunal have had an opportunity to adjudicate on them. Further, the judicial pronouncements on similar points are not always uniform or coherent ; quite often they are likely to differ because the judges being human are influenced by their own notions, whims and fancies. The evils of divergence of judicial views have a tendency to increase rather than diminish. Views in the same court may undergo a change in course of time about a legal proposition[3]. As the conflicting precedents go on accumulating, the task of ascertaining the law applicable to a particular case becomes relatively more and more difficult. And, when the right to appeal is allowed to two or more courts, the uncertainty of law becomes overwhelming and necessarily entails great embarrassment to the course of proper administration of justice, because the highest court in India had made a pronouncement on a point of law, it did not always set the doubt at rest. There were a number of occasions when the Privy Council differed from the High Courts on the applicability or non-applicability to India of a particular piece of English law.

All this involved extra expense and delay in disposal of cases. Sir Henry Maine said of judicial legislation that "it is haphazard, inordinately dilatory, and inordinately expensive, the cost of it falling almost exclusively on the litigants."[4]

There were in 1833, a number of Chief Courts in India, subject to the legislative power of the local governments in the presidencies, some established by the royal charters, and others deriving their authority from the Company. Each of these tribunals was independent of the other and could thus put its own construction on the law. A uniform interpretation of the law could not be expected from them always. Under such a scheme of things, it was inevitable that there would arise a number of decisions diametrically opposed

1. *Despatch from Lord Salisbury*, Secretary of State for India, to the Govt. of India, dtd. Jan. 20, 1876.
2. *Background to Indian Law*, p. 20.
3. As for example, maintenance and champerty, *supra*, pp. 542, 585.
4. *Minute, op. cit.*

to each other, but all of equal authority, thus making the law bulky, uncertain, contradictory and inconsistent. The remedy out of the morass in the legal system was codification. Said Sir James Stephen, "Well designed legislation is the only possible remedy against quibbles and chicanery. All the evils which are dreaded... from legal practitioners can be averted in this manner and in no other. To try to avert them by leaving the law undefined, and by entrusting judges with a wide discretion, is to try to put out the fire by pouring oil upon it. Leave a judge with no rule, or with one of those leaden rules which can be twisted in any direction, and you at once open to the advocate every sort of topic by which the discretion of the judge can be guided. Shut the lawyers' mouth, and you fall into the evils of arbitrary government."[1]

LAW OF NON-HINDUS AND NON-MUSLIMS

The rule of 'justice, equity and good conscience' had one other ramification also besides the process of reception of the English law discussed above. Besides the Hindus and Muslims, there were many other classes of people in the mofussil. The early Anglo-Indian administrators perhaps failed to perceive this and thought wrongly that the Indian Native population comprised only of two broad categories, Hindus and Muslims. They did not know that there were others also like Protuguese, Armenians, Christians, Parsees, Sikhs, Jews, etc. The result of this was omission to prescribe any law for these various groups. In Madras and Bengal, while Hindus and Muslims were given the advantage of their personal laws in family and religious matters, no provision was made for decision of cases arising between members of these various communities ; nor was it prescribed that the courts would administer to these people their peculiar usages, customs and laws even though in many cases the usages were connected with their respective religious creeds.[2]

By the time the Elphinstone Code was on its anvil in Bombay, the British administrators had come to have a better appreciation of the Indian scene ; they had a better realisation and knowledge of the customs, divisions and distinctions among the Indians. A provision was therefore made in the code for applying 'customs of the country' and the 'law of the defendant', which phrases were not necessarily limited to Hindus and Muslims alone but covered all the various classes of people.[3]

1. *Gazette of India suppl.*, May 4, 1872, p. 529.
2. *Supra*, p. 90 ; *infra*, Ch. XXV.
3. *Supra*, p. 566.

This formal distinction in the phraseology of the Regulations in Bengal and Madras, on the one hand, and of Bombay, on the other, made no difference in effect as regards the law applicable to the various groups, for the adalats in all the three provinces developed a uniform practice to apply their peculiar laws and customs. In Bombay this was done under the provisions of the Regulation; in Bengal and Madras, the same position was obtained under the maxim of justice, equity and good conscience; in exercise of the discretion thus conferred on the judges, they were entitled, even though not obliged, to give to the people other than Hindus and Muslims, the benefit of their special laws, and they did so. The courts taking a benevolent view of their functions, tried to ascertain the laws and customs of the various groups and classes of people and give effect to them in family matters. A few cases will illustrate the position obtained.

In *Durand* v. *Boilard*,[1] the Calcutta Sadar Adalat decided a question of succession amongst the French in accordance with the French law. In *Joanna Fernandez* v. *Domingo de Silva*[2], where the parties were Portuguese, a question of succession of property was decided according to the customs and usages of the native Portuguese in India and the court took evidence to ascertain the Portuguese law of succession. *Avielick Ter Stefanoos* v. *Khaja Michael Aratoon*[3], a case of intestate succession to the property of an Armenian dying intestate, was disposed of according to the Armenian law. Even as late as 1842, in a case between Armenians, the Sadar Adalat applied the Armenian law and usage and consulted for this purpose the Vicar of the Armenian Church at Calcutta.[4] In *Beglar* v. *Dishkhoon*[5], it was held that cases arising between Armenian parties must be decided according to the Armenian law, and that the established practice of referring, for the opinion of Armenian ecclesiastics, points of law and usage arising from Armenian cases pending decision in the Company's courts must be adhered to, until altered by some Act of legislature.

Cases arising among the Parsees were decided according to the Parsi law. Thus in *Furidoonjee Shapoorjee* v. *Jumshedjee Nowshirwanjee*,[6] it was held, according to an award of the Dastur, that among the

1. 5 Beng. Sad. Rep. 176.
2. 2 Beng. Sad Rep. 227.
3. 3 Beng. Sad. Rep. 9.
4. Sevestre's S.D.R., p. 168, cited in *Musleah* v. *Musleah*, *infra*.
5. *Mor. Dig.*, I, 522. Also, *Aratoon* v. *Aratoon*, I.D. (O.S.), VIII, 469.
6. *Mor. Dig.*, I, 349.

Parsis if a son dies in his father's life time, the father was entitled to the son's property because he paid the funeral expenses. In *Modee Kaikhooscrow Hormusjee* v. *Coover Bhaee*[1], a case which reached the Privy Council, it was held that the question of the power of a Parsi to dispose of his property by a will must be decided by a reference to the custom of the Parsis. In a case concerning the right of a Parsi husband to contract a second marriage, the Parsi law was applied.[2] In many cases, the adalats consulted the Parsi panchayat as to the Parsi law applicable to a matter before them.[3]

It is interesting to note that in early days, even the Sikhs were given the benefit of the Sikh law as distinguished from the Hindu law. Thus in *Juggomohan Mullick* v. *Saum Coomar Bebe*[4], a case of a Sikh dying intestate was decided by applying the Sikh law. When in a case the right of a Jain by inheritance was involved, the court sought the solution of the disputed points of the Jain shastra, which arose, by referring them to the Hindu law officer of the court and the Jain pandits.[5]

Another important category of persons for whom no law had been prescribed were the East Indians—descendants of an European and a Native, half-caste as they were called. These persons followed in all matters the usages and customs of the English residents in India. In the common bond of union in religion, customs, and manners, the East Indians approached the class of British subjects. On the basis of justice, equity and good conscience, the Company's adalats administered to these persons the English law. This course was evidently a just and proper exercise of the discretion entrusted to the courts. Elucidating the point, the Privy Council observed in the leading case of *Abraham* v. *Abraham*[6], "The English law, as such, is not the law of those courts. They have, properly speaking, no obligatory law of the forum, as the Supreme Courts had. The East Indians could not claim the English law as of right; but they were a class most nearly resembling the English, they conformed to them in religion, manners and customs, and the English law as to the succession of movables was applied by the courts in the mofussil to the succession of the property of this class." But in *Barlow* v.

1. 6 M.I.A. 448.
2. *Mihirwanjee Nushirwnjee* v. *Anawar Baee, Mor. Dig.*, I 299; also, *Kaoosjee Ruttunjee* v. *Awan Baee, Mor. Dig.*, I, 299.
3. *Burjorjee Bheemjee* v. *Ferozshaw Dhunjushaw, Mor. Dig.*, I, 299.
4. *Mor. Dig.*, I, 350; II, 43.
5. *Maharaja Govindnath Rai* v. *Gulal Chand*, 5 S.D.A. Rep. 276.
6. 9 M.I.A. 240.

Orde[1], a case of an Anglo-Indian having no religion, the Privy Council applied justice, equity and good conscience to the interpretation of his will rather than the principles of English law. The facts of the case were such that it would have been inequitable to apply English law. Skinner, an illegitimate child himself, being the child of a native woman by an European father, left behind large property and a large number of illegitimate children. He was resident in Delhi. In his will he bequeathed the property to 'my children' and the question was whether the 'children' included illegitimate children or not. In the English law there is a technical rule of construction that 'children' in a will do not include illegitimate children. The Privy Council had to decide whether this rule should be applied to Skinner's will. The Privy Council held that there was no *lex loci* of the province in which Skinner was domiciled; therefore, the law of succession depended on his personal status, which again mainly depended on his religion. As a general rule, succession of an East Indian Christian was regulated by the English law, "but in every case, for the purpose of determining the *status personalis*, regard was to be had to the mode of life and habits of the individual, and to the usages of the class or family to which he belonged." In the absence of any specific rule, judges were to act according to "justice, equity and good conscience." There was little evidence of Skinner's personal status except that he was an illegitimate Anglo-Indian following no religion. In the circumstances, the court refused to apply the English rule of interpretation and held that the word 'children' should include illegitimate children.

Courts applied to the English people residing in the mofussil the principles of English law.

Another category of persons for whom no law had been specifically provided were the Native Christians. Their position was very typical. These people belonged originally to either the Hindu or the Mohammedan stock, and thence became converted. A question often arose in the courts as to how to decide their cases of inheritance and succession. Were they to be governed by the law of their old religion or was some other law to be applied to them? The most important case in which this question was elaborately discussed by the Privy Council is *Abraham* v. *Abraham*[2] which went on appeal from the Sadar Adalat of Madras to the Privy Council. The case throws a flood of light on the exercise of discretion vested in the

1. 13 M.I.A. 277.
2. 9 M.I.A. 240.

courts with respect to the matter under discussion and so it may be mentioned in some details.

The main question in *Abraham* v. *Abraham* pertained to the separate property of a deceased Christian whose ancestors were Hindus. The deceased had married an Anglo-Indian wife. There were children of this marriage and he conformed in all respects to the language, dress, manners and habits of the English people till the time of his death. The question arose what law should be applied to the property left behind by him. The Madras Sadar Adalat enunciated the rule in the following words: "Such questions can only be rightly pronounced upon, on consideration of the usage of persons situated as the parties who are described as Christians whose ancestors are of Hindu stock, and the usage in their particular family as indicated by the acts of the parties and their predecessors, in respect of their property since they have belonged to the Christian community." The court took the view that there was no *lex loci* in India; that the court was to act according to justice, equity and good conscience in cases of parties circumscribed as those in the suit, and so the rule of law must be according to the customs and usages of the class to which the parties belonged, and the usage in each particular family which was to be ascertained by evidence. This could be taken to be the general approach of the courts to the cases of those persons whose cases had to be decided on the basis of 'justice, equity and good conscience'. In the instant case, voluminous evidence was taken by the court; many witnesses were examined and then the Adalat ruled that the Hindu law of co-parcenery was to be applied to the facts of the case. At this stage, the matter went on appeal to the Privy Council. Being the first case in which the Privy Council had occasion to consider the question of law applicable to the Christians, it gave its opinion *in extenso* in an elaborate judgment.

Considering the question of law applicable to a member of a Hindu family who became convert to Christianity, the Privy Council approved the course pursued in India in such cases of referring the decision to the usage of the class to which the convert might have attached himself, and of the family to which he might have belonged, as "most consonant both to equity and good conscience". As soon as a Hindu became a convert to Christianity, he at once became severed from the family, and was regarded by the family as an outcast. So far as he was concerned, the tie which bound the family together was not only loosened but dissolved. The Hindu law ceased to have any continuing obligatory force upon the convert. He might renounce the old law by which he was bound as he had renounc-

ed his old religion, or if he thought fit, he might abide by the old law, notwithstanding that he had renounced the old religion. Applying the maxim of justice and good conscience to the case, the Privy Council held that "the course which appears to have been pursued in India in these cases, and to have been adopted in the present case, of referring the decision to the usage of the class to which the convert may have attached himself, and of the family to which he may have belonged, has been most consonant to equity and good conscience." The profession of Christian religion released the convert from the trammels of the Hindu law, but it did not, of necessity, involve any change of the rights and relations of the convert in matters with which Christianity had no concern, such as his rights and interests in property. Though the convert was not bound in such matters, either by the Hindu law or by any other positive law, yet he might by his course of conduct after conversion show by what law he intended to be governed in these matters. He might do so either by attaching himself to a class which as to those matters adopted and acted upon some particular law, or by himself observing some family usage or custom. Nothing could be more just than that the rights and interests in his property, and his powers over it, should be governed by the law adopted or observed by him.

The Privy Council found that Native Christians had amongst them subordinate divisions forming distinct classes ; some adhered to the Hindu customs and usages as to property ; others retained them in a modified form, while others had wholly abandoned them and adopted different rules and laws as to the property. It was also found that these were not immutable divisions as a Christian in one class could change to another class. In the instant case, it was held on the basis of the evidence that the deceased belonged to the third class ; he was not subject to the Hindu law as by his conduct he had cut himself off completely from it. He had assumed the English dress, had outwardly conformed to all the habits of the English and had been received by the Anglo-Indians into their society and treated as one of them. The Madras Adalat's decision was therefore reversed.

The above judgment illustrates in rather a telling manner the extreme fluidity of the law as the convert could voluntarily choose the law applicable to him. Thus the Christians were not subject to a single law uniformly, but were under different laws and usages, and at least five different laws applicable to them could be identified : Hindu law, Mohammedan law, modified Hindu law, modified Mohammedan law, some other law and customs; and even the last category was amorphous. The court had to decide the question of

law applicable to a particular Christian by taking evidence on his conduct and mode of living after conversion which only produced extreme uncertainty of law which prolonged the litigation.

Abraham's *case* also illustrates in a remarkable manner the methods adopted by the mofussil courts to decide cases arising among sections of people for whom no specific law had been prescribed. There was no uniformity of law as every case had to be discussed on its own merits. The courts tried to ascertain the law of the parties coming before them[1], and they did this not with reference to any codes or law books, but by taking evidence to ascertain the customs governing the specific point that arose for decision. Commenting on the practice, the First Law Commission in its report of 1840 stated, "The mofussil courts had to decide some cases, though hitherto probably very few, in which they have felt that the equity they are to administer must follow some law", and, therefore, "the doctrine they have adopted is that there is no *lex loci* in British

1. In *Musleah* v. *Musleah*, Ind. Dec. (O. S.), III, 147, the Supreme Court of Calcutta doubted whether such a practice prevailed in the mofussil courts. Colville, C. J., said that there was no definite and fixed practice that land belonging to the Jews in the mofussil should descend according to the Mosaic law. He said that the course of decisions did not support the general principle of decision that "the law of the domicile or origin is to be adopted" was followed consistently by the adalats. Commenting on some of the cases, it was pointed out that in *A.T. Stefanoos* v. *Aratoon* (*supra*, p. 591) though the adalat did consult the Armenian Bishop, yet the final decision was according to the supposed equity and good conscience of the particular case, rather than according to the Armenian law; the case proceeded upon the contract of, and the non-applicability of that part of the English law which related to the disabilities of coverture to, an Armenian woman, but "it treats the law relating to Armenians as of the most unsettled character, and repudiates the old practice of ascertaining it by consulting Armenian ecclesiastics." Puller, J., another judge, also spoke in the same strain. He said that though the mofussil adalats might have in one or two cases adopted the law of the domicile of origin, yet they had not followed the principle as a substantive inflexible rule. When once a court had such a wide discretion as to decide according to 'justice and equity', said the judge, "it is almost impossible to speculate upon what considerations in any particular case may most strongly influence its judgments." The third judge, Jackson, J., however, asserted that the adalats did apply the law of the domicile—the Portuguese law to a Portuguese and the Armenian law to the Armenians.

The above observations only show that the system of law was extremely fluid and uncertain. The Law Commissions, as noted above, however held that the practice followed was to apply the personal laws of the parties concerned.

India, and their practice has been to ascertain in the best manner they could, what was the law of the country of the parties before them." That this practice prevailed as late as 1863 is clear from the following statement of the Third Law Commission : "A practice has grown up in the country courts of administering to every person, not being a Hindu or a Mohammedan, in all cases not specifically provided for, the substantive law of the country of such person, or of the country of ancestors of such person whenever such substantive law is not inconsistent with equity and good conscience", and that "it is chiefly in matters of inheritance and succession and to personal relations that the country courts endeavour to observe and apply the substantive law of the country of the suitor."

Needless to say that such a state of affairs could not be conducive to a proper administration of justice. The fact that the courts applied all kinds of law—French, Parsi, Armenian, Jewish—produced a very peculiar state of affairs: "five men each under a different law may be found walking or sitting together." The position of the law was extremely anomalous as the decisions fluctuated with the status of the parties concerned and so the law varied from person to person.

In the words of the Third Law Commission : "As regards those matters in which the country courts have endeavoured to apply the substantive law of the country of the origin much inconvenience has arisen". In some cases, like Armenians and Parsis, it was difficult to ascertain the law of the country of their origin, as many of such persons could not be connected with the country of origin either because of illegitimacy or because of their failure to prove the pedigree. Great difficulties arose in such cases. Left to their own notions of what was fair when the mofussil courts failed to find any law of succession to the intestate's class, some of the judges proceeded to apply their own notions of just distribution, others the English law. In cases where the special law was not in doubt, the courts might be called upon to decide a matter according to any system of law in the world. This involved not only ascertainment of any law in the world, but also ascertainment and investigation into the pedigree of the parties to find out what law could appropriately be applied to them. And in some cases, the conflict of different laws might have to be ascertained. This placed not only a heavy strain and pressure on the courts—perhaps heavier than any borne by any court anywhere in the world—but it also gave an enormous scope to the personal discretion, attitude and approach of the individual presiding judge. It was not always easy to ascertain the content of the customs and usages of the parties applicable to the disputed question. For this

purpose, the courts might have to take voluminous evidence. Foreign systems were not always easy to ascertain and there was no established machinery to pronounce what these customs were. The courts were thus loaded with work for they had to decide not only disputed facts in a case, but even the law in the same way as questions of fact. This also created uncertainty about the law, and made the course of decision indefinite, for till the highest court had pronounced on the question, no one could be sure as to what the applicable law in a particular case was. *Abraham* v. *Abraham* is a case in point. There the Sadar Adalat applied, after taking bulky evidence, the Hindu law of coparcenery, but, on appeal, the Privy Council applied the English law for it held on scrutinising the evidence that the deceased had repudiated the old law by conduct. The system of law in the country was thus vague, indefinite, uncertain and anomalous.

Two points may however be noted in this connection. In the first place, the doctrine of applying the personal law was confined to a few matters only like marriage, inheritance, succession and family relations—precisely the topics for which Hindu law and Mohammedan law were made applicable to the Hindus and Muslims respectively. In other cases, the position was the same as in case of the Hindus and Muslims. The courts would apply the local customs or the principles of English law under justice, equity and good conscience. Questions of land revenue depended more on the Regulations, and failing them, on the local customs. Questions of contract could be resolved by reference to customs of the trade or the English law.

Secondly, there was a dichotomy between the laws applicable to non-Hindus and non-Muslims residing in the presidency towns and the mofussil. In the presidency towns, as we have already seen, the English law was the *lex loci* and was thus applied to all except the Hindus and the Muslims. In the mofussil as we have seen, the personal law of the parties was sought to be applied. This made matters worse, for each of the various communities became divided into two parts—one part being subject to the English law, the other being subject to the personal law. Now a Parsi might die leaving behind property both in the mofussil and the presidency town; the property would then follow two different courses of devolution. The communities themselves were not satisfied with this situation—some of them did not want to be under the English law at all, *e.g.* the Parsis, while others did not want to be under their own archaic personal law. In 1836, the Armenians of Bengal presented a petition to the Governor-General, in which, after stating the destitution of their legal condition, they added, "As Armenians have ceased to be a nation since the year of our Lord 1375, and no trace of their own law is now to

be discovered, your petitioners humbly submit that the law of England is the only one that can, upon any sound principle, be allowed to prevail."[1]

In the beginning, the number of these persons—non-Hindus and non-Muslims—was small, and from a practical point of view, perhaps, the question of ascertaining the law for them might not have been important or pressing. But as the years rolled by, more and more foreigners came to settle in India. The Charter Act of 1833 threw open India to the Englishmen and Europeans. The number of Indian Christians also increased considerably due to the efforts of the missionaries. There were the great bodies of domiciled communities—East Indians, Eurasians, now called 'Anglo-Indians', and the number of Parsis, Jews etc. was also getting larger and larger. It was no longer politic or advisable to maintain the confused and the totally inadequate state of the law concerning these communities in matters of succession and inheritance. The effort to give them a law thus began from 1840 onwards, but they bore fruit only in 1865 when the Indian Succession Act and other Acts were enacted by the Indian Legislature. That was the important result of another phase in the Indian Legal History—the movement for Codification of the Indian laws which began to take shape with the passage of the Charter Act of 1833. This development forms the theme of the next chapter.

1. Ilbert, *op. cit.*, p. 360,

111

same with the other evidence to come to the conclusion that the appellant was the person responsible for the crime.

24. The appeal therefore fails and the conviction and sentence are upheld.

1969 (1) Supreme Court Cases 358

(From Allahabad)

[BEFORE S. M. SIKRI AND R. S. BACHAWAT, JJ.]

KHUSHRO S. GANDHI AND OTHERS .. Appellants ;

Versus

N. A. GUZDER AND OTHERS .. Respondents.

Civil Appeal No. 632 of 1962 decided on 27th November, 1968

Tort—Suit against several tortfeasors for damages—Decree passed against one in view of unconditional apology tendered by him and accepted by plaintiffs—whether amounts to release of joint tortfeasors.

Civil Procedure Code—Section 115—Revision against order for payment of deficit court fee—Whether High Court competent to decid other issues.

Civil Procedure Code, Section 24—Consent of parties whether confers jurisdiction on the High Court.

The plaintiffs filed a suit for damages against six defendants alleging that they were jointly and severally liable. The sixth defendant entered into a compromise with the plaintiffs by tendering an unconditional apology which was accepted by the plaintiffs and a decree was passed in terms of the compromise. The Trial Court held that the court fee paid by the plaintiffs was insufficient and directed them to make good the deficiency. The plaintiffs applied for amendment of the plaint without paying the court fee as directed and the trial court allowed the amendment. The defendants filed a revision in the High Court. The High Court directed the plaintiffs to pay the deficit court fee and decided another issue (*viz*) what was the effect of the compromise between the plaintiffs and the sixth defendant as against the rights of the other defendants, which was not a subject-matter of the revision. The defendants appealed to the Supreme Court. (Paras 1 to 7)

Held, that the High Court has no power to decide the issue in revision and that consent of parties does not confer jurisdiction on the High Court. Section 24 of the Code of Civil Procedure does not give any such power to the High Court. But the Supreme Court decided the issue as it thought that if the case was remanded to the Trial Court, it might feel bound by the opinion given by the High Court on this issue. (Para 8)

On the question as to the effect of the compromise on the other defendants, the Supreme Court held that it did not amount to a covenant not to sue and this was not full satisfaction for the tort alleged to have been committed by the defendants. This was an election on the part of the plaintiffs to pursue the several remedies against the sixth defendant and that the plaintiffs must have received full satisfaction before the other joint tortfeasors can rely on accord and satisfaction. (Para 18)

Love Joy v. *Murray*, 18 Led 129, 132-133, 134, *applied*.

Ram Kumar Singh v. *Ali Hussain*, ILR (1909) 31 All 173, 175.

Har Krishnalal v. *Haji Qurban Ali*, (1942) 17 Luck 284, *distinguished*.

Brooms (Brown) v. *Wooton*, 80 HR 47.

Goldrei Foucard & Sons v. *Sinclair and Russian Chamber of Commerce in London*, (1918) 1 KB 108, 192.

Bruismead v. *Harrison*, (1871-72) LR 7 CP 547.

Egger v. *Viscount Chelmsford*, (1965) 1 QBD 248-264.

Makhanlal Lolaram v. *Panchamal Sheoprasad*, AIR 1934 Nag 226-227.

Shivasagar Lal v. *Matadin*, AIR (1949) All 105.

Duck v. *Mayew*, (1892) 2 QBD 511.

Dharni Dhar v. *Chandrasekhar*, (1952) 1 All 759 (FB).

Merry Weather v. *Nixon*, (1799) 8 TB 186.

Brake v. *Michell*, 3 East 258 Referred to. Winfield on Tort (8th Edition) p. 661.

Gatley on 'Libel and Slander' (6th Edn.) 367 Fn. Williams 'Joint Tort & Contributory Negligence, p. 35 Fn., *cited*.

The Judgment of the Court was delivered by

SIKRI, J.—This appeal by special leave is directed against the judgment of the Allahabad High Court (Dhavan, J.) allowing the revision under Section 115, C. P. C., and dismissing the suit brought by the appellants—hereinafter referred to as the plaintiffs.

2. The relevant facts for the purpose of appreciating the points raised before us are as follows: The four plaintiffs, out of which three are appellants before us the fourth having died, brought a suit for damages against the six defendants (one defendant had in the meantime died and four are respondents before us). The allegations in the plaint, in brief, were that the plaintiffs and the defendants were members of an association called Parsi Zoroastrian Anjuman, that the defendants, along with some other members of the association, formed a group and each of them conspired among themselves to injure and harass the plaintiffs and a few others in various ways; that at a meeting held on May 5, 1954, in connection with the election of Trustees, when defendant N. A. Guzder occupied the chair, he gave a ruling that the plaintiffs Khushro S. Gandhi and B. T. J. Shapoorji, since deceased, were unfit candidates for the office of Trustees and thus prevented them from seeking election, and contrary to the rules of the Anjuman and without taking votes declared the defendant, F. J. Gandhi and one A. J. Cama, duly elected. It was further alleged that on July 3, 1954, another meeting of the Anjuman was held when the plaintiffs Khushro S. Gandhi and Framroze S. Gandhi were candidates for election to the office of the trustees, and defendant, F. J. Gandhi gave a perverse ruling rejecting the nominations of the above plaintiffs and after taking votes declared G. T. Shappoorjee as duly elected trustee, that by the aforesaid rejections the plaintiffs had suffered an injury for which defendants Nos. 1 to 6 were jointly and severally liable and the plaintiffs were entitled to recover damages from the defendants.

3. The plaint was filed on January 21, 1955. Before any written statement was sumbitted, on February 13, 1955, the sixth defendant S. Rabadi, entered into a compromise with the plaintiffs. The terms of the compromise were:

> "1. I, Shavak Dorabjee Rabadi, defendant No. 6, have considered the subject-matter of the suit and am sincerely sorry and apologise to the plaintiffs unconditionally for whatever I have done. I realise that I was in error and was misguided.

113

2. The plaintiffs above named accept the apology tendered by Shri Shavak Dorabjee Rabadi defendant No. 6 and the suit against him may be disposed of treating the aforesaid apology and its acceptance by the plaintiffs as a settlement of the dispute between the plaintiffs and the defendant No. 6.

3. The plaintiffs do not claim any costs against the defendant No. 6 and defendant No. 6 will bear his own costs.

It is therefore prayed that the claim against defendant No. 6 may be disposed of in terms of the above settlement."

A decree was passed in terms of this compromise against defendant No. 6.

On May 14, 1955, the other defendants filed a written statement and *inter alia* alleged :

"That the release of defendant No. 6, Shri S. Rabadi, an alleged joint tortfeasor and the compromise entered into behind the back of the answering defendants with him in full settlement of their suit for damages, appears to be collusive and dishonest and the release by the plaintiffs of defendant No. 6 from his joint liability as a tortfeasor has in law extinguished the plaintiffs rights to sue the others remaining defendants and claim damage from them."

It was further alleged that "the four plaintiffs could not be legally allowed to totalise the sum of their individual damage, alleged to have been suffered, and thereby procure the trial of the suit in the court of higher jurisdiction, and that the suit had been purposely overvalued.

4. In a statement dated March 17, 1956, the plaintiffs clarified that the "damages are being claimed by the plaintiffs in respect of all the facts mentioned in the plaint and particularly as a result of the facts that have been mentioned in paragraphs 17 and 19 of the plaint", and further "that on account of all the facts complained of each plaintiff is entitled to claim Rs. 10,100 as damages but the plaintiffs have claimed only Rs. 10,100 and have given up rest of the claim."

Two of the issues framed by the Civil Judge, may be set out :

"Issue No. 5. What is effect of the compromise between plaintiffs and defendant No. 6, as against rights of the other defendants? Is the suit not maintainable against other defendants? Issue No. 11. Is the court-fee paid by the plaintiffs insufficient?"

5. By order, dated September 18, 1956, the Civil Judge held that the court-fee paid by the plaintiffs was insufficient and that there was a deficiency of Rs. 905/12/- in the court-fee which the plaintiffs had to make good. The plaintiffs were given 15 days time to make good the deficiency. Instead of paying the money the plaintiffs applied under Order VI Rule 17 C. P. C., for amendment of the plaint. The plaintiffs stated in this application that they would in consideration of the order of the Court split the amount of Rs. 10,100 into two portions claiming Rs. 5,050 each in respect of the two separate incidents dated July 3, 1955, and May 5, 1955, respectively. The defendants filed an application contending that as the plaintiffs had failed to make good the deficiency in the court-fee within the time given, the plaint should be rejected in view of the provisions of the Order VII, Rule 11, C. P. C. and Section 6, U. P. Court Fees Act. By

order, dated November 28, 1956, the Civil Judge allowed the plaintiffs' application for amendment on payment of Rs. 30 as costs, and also rejected the defendants' application. Against this order, the defendants filed a revision.

6. Dhavan, J., first dealt with the point whether the plaintiff could renounce a part of the claim instead of making good the deficiency in court-fee. He came to the conclusion that the suit contained four causes of action, and that the plaintiffs had to pay court-fee on four separate causes of action of the value of Rs. 2,525/- each. As the learned counsel for the plaintiffs had given an undertaking to make good any deficiency in court-fee, Dhavan, J., directed the plaintiffs to pay court-fee on the four separate causes of action valued at Rs. 2,525 each. He also directed an amendment to be made in the plaint.

7. The learned Judge felt that it would be in the interest of justice that the question covered by issue No. 5 being one of law should be decided by him in the revision. It appears that the counsel for both parties conceded that the Court had power to decide the issue as the entire record was there, although the learned counsel for the plaintiffs felt that the decision should be left to the Trial Court.

8. The learned counsel for the appellants contends before us that the High Court had no jurisdiction to decide issue No. 5 in a revision. He says that the subject-matter of the revision was the order of the Civil Judge, dated November 28, 1956, and the High Court could not decide any other point and convert itself into an original court. The learned counsel for the respondents tried to justify the decision regarding jurisdiction of the High Court under Section 24, C. P. C. This section, *inter alia*, provides that the High Court may withdraw any suit, appeal or other proceeding pending in any court subordinate to it and try and dispose of the same. We are unable to appreciate how the order of the learned Judge can be justified under Section 24. He has not purported to withdraw any suit and try the same. What he has done is to try an issue arising in a suit in a revision arising out of an interlocutory order. It seems to us that the High Court, even if the parties conceded, had no power to decide the issue. But if we set aside the order of the High Court and remit the case to the Civil Judge to try it according to law, the Civil Judge would feel handicapped in deciding the case properly because he will feel bound to follow the opinion given by the learned Judge on issue No. 5. Under the circumstances we heard arguments on the issue.

Dhavan, J., following the English Common Law, held that the decree against Rabadi was complete accord and satisfaction and the cause of action against all the defendants being one and indivisible, the decree operated as a bar against further proceedings against the remaining joint wrong-doers.

9. Winfield on Tort (8th edition) 661 states the English Law thus :

> "The liability of joint tortfeasors is joint and several, each may be sued alone, or jointly which some or all the others in one action; each is liable for the whole damage, and judgment obtained against all of them jointly may be executed in full against any one of them. At common law, final judgment obtained against one joint tortfeasor released all the others, even though it was wholly unsatisfied. This

115

was established in *Brinsmead* v. *Harrison*,[1] and the reason put by Blackburn, J., was, *interest reipublicae ut sit finis litium*. Kelly C. B. urged that if the rule were otherwise, then in a second action the second jury might assess an amount different from that in the first action and the plaintiff would not know for which sum he should levy execution. The rule was abolished by the Law Reform (Married Women and Tortfeasors) Act, 1935.

× × × ×

It has long been settled that the release of one joint tortfeasor releases all the others, because the cause of action is one and indivisible. This rule has not been affected by the Act of 1935. It applies to a release under seal and to a release by way of accord and satisfaction, and probably to nothing else. A mere covenant or agreement not to sue, as distinguished from an actual release, does not destroy the cause of action, but merely prevents it from being enforced against the particular tortfeasor with whom it is made."

That was not the law in England in the beginning. The history of the law on this point is set out in William's 'Joint Torts and Contributory Negligence' (p. 35 footnote) as follows :

"In Y. B. (1305) 33-35 E. 1, R. S. 7, it was apparently held that in trespass against four, a verdict against two did not of itself prevent continuance against the other two. The verdict may not, however, have been embodied in a judgment. The former rule appears more clearly from Y. B. (1342) 16 E. 3, 1 R. S. 171, where judgment against one did not bar the action against the others. That the parties were joint tortfeasors appears plainly from the note from the record, *ibid*, 175 n. 7. *See* also Y. BB. (1370) p. 44 E. 3, 7*b*, pl. 4 ; (1412/13) H. 14 H. 4. 22*b*, pl. 27 ; in the latter it is said that in trespass against two, if one be condemned and the plaintiff has execution against him with satisfaction, he shall be barred against the others—thus implying that the mere judgment would not bar. Cp. *Hickman* v. *Machin*, (1605) 1 Ro. Ah. 896(*F*) 4, 7, from which case, however (sub-nom. *Hickman* v. *Payns*), a different inference is drawn in *Broome* v. *Mooton*, (1605) Yelv. 67, 80 E. R. 47. The first discussion of the question in the Year Books is in Y. B. (1441) M. 20 H. 6, 11*a*, pl. 24, where X had first sued A, B, and C in trespass and obtained judgment against A, who alone appeared to the writ ; later X, not having levied execution under this judgment, sued B. Paston and Fulthorpe expressed opinions that he was not barred by the first judgment, but Newton, C. J., thought that he was. In Y. B. (1495) M. 11 H. 7. 5*b*, pl. 23 (Bro. Trespass 428) it was said that one can release one joint tortfeasor after judgment against another without affecting that other ; such a release would have been unnecessary if the judgment had discharged all other joint tortfeasors. Cp. Y. BB. (1474) T. 14 E. 4. 6*a*, pl. 2 ; (1475) T. 15 E. 4. 26*b*, pl. 3. The rule was not settled in 1584, for it was then made a question whether even satisfaction following on judgment would discharge the others (above 19 N. 2) ; and see *Cocke* v. *Jennor*, (n. d.) Hob. 66, 80 E. R. 214, where it was said that if joint tortfeasors be sued in several actions, satisfaction by one would discharge the others ; it was not said that judgment against one would discharge."

The Common law rule was first established by the case of *Broome* (*Brown*) v. *Mooton*,[2] and the only reason given was that *transit in rem judicatum*.

1. (1871-72) LR 7 CP 547. 2. 80 HR 47.

10. In *Coldrei Foucard and Sons* v. *Sinclair and Russian Chamber of Commerce in London*,[3] Sargant, J., regarded the rule in *Brinsmead* v. *Harrison*,[4] highly technical.

The rule was changed in England by legislation vide The Law Reform (Married Women and Tortfeasors) Act, Part II (25 and 26 Geo. 5, c. 30). Section 6(1)(*a*) and (*b*) of that Act read as follows :

> "Where damage is suffered by any person as a result of a tort (whether a crime or not) :
>
> (*a*) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage ;
>
> (*b*) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given ; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action."

This provision has been adopted in other parts of the Commonwealth.

11. Recently in *Egger* v. *Viscount Chelmsford*,[5] Lord Denning, M. R., observed :

> "I cannot help thinking that the root of all the trouble is the tacit assumption that if one of the persons concerned in a joint publication is a tortfeasor, then all are joint tortfeasors. They must therefore stand or fall together. So much so that the defence of one is the defence of all ; and the malice of one is the malice of all. I think this assumption rests on a fallacy. In point of law, no tortfeasors can truly be described solely as *joint tortfeasors*. They are always *several tortfeasors* as well. In any joint tort, the party injured has his choice of whom to sue. He can sue all of them together or any one or more of them separately. This has been the law for centuries. It is well stated in Serjeant Williams' celebrated notes to Saunders' Report (1845 ed.) of *Cabell* v. *Vaughan*, (1669) (1 Saund. 291 f-g). 'If several persons jointly commit a *tort*, the plaintiff has his election to sue all or any number of the parties ; because a *tort* is in its nature the separate act of each individual.' Therein lies the gist of the matter. Even in a joint tort, the tort is the separate act of each individual. Each is severally answerable for it ; and, being severally answerable, each is severally entitled to his own defence. If he is himself innocent of malice, he is entitled to the benefit of it. He is not to be dragged down with the guilty. No one is by our English law to be pronounced a wrongdoer, or be made liable to be made to pay damages for a wrong, unless he himself has done wrong ; or his agent or servant

3. (1918) 1 KB 180, 192.
4. (1871-72) LR 7 CP 547.
5. (1965) 1 QBD 248, 264.

has done wrong and he is vicariously responsible for it. Save in the case where the principle respondent superior applies, the law does not impute wrong doing to a man who is in fact innocent."

12. Gatley on 'Libel and Slander' (Sixth Edition), in a footnote at p. 367, remarks regarding the approach of Lord Denning in *Egger* v. *Chelmsford*[6] :

"His approach is also not easy to reconcile with the law on the release of joint tortfeasors."

13. In the United States of America, in an early decision, *Lovejoy* v. *Murray*,[7] the United States Supreme Court refused to follow the English Common Law. Miller, J., speaking on behalf of the Court, observed, after referring to *Brown* v. *Mooton*, and other cases :

"The rule in that case has been defended on two grounds, and on one or both of these it must be sustained, if at all. The first of these is, that the uncertain claim for damages before judgment has, by the principle of *transit in rem judicatum*, become merged into a judgment which is of a higher nature. This principle, however, can only be applicable to parties to the judgment ; for as to the other parties who may be liable, it is not true that plaintiff has acquired a security of any higher nature than he had before. Nor has he, as to them, been in anywise benefited or advanced towards procuring satisfaction for his damages, by such judgment.

This is now generally admitted to be the true rule on this subject, in cases of persons jointly and severally liable on contracts ; and no reason is perceived why joint trespassers should be placed in a better condition. As remarked by Lord Ellenborough, in *Drake* v. *Mitchell*, 3 East, 258, "A judgment recovered in any form of action, is still but a security for the original cause of action, until it be made productive in satisfaction to the party ; and, therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have."

The second ground on which the rule is defended is, that by the judgment against one joint trespasser, the title of the property concerned is vested in the defendant in that action, and therefore no suit can afterwards be maintained by the former owner for the value of that property, or for any injury done to it.

This principle can have no application to trespassers against the person, nor to injuries to property, real or personal, unaccompanied by conversion or change of possession. Nor is the principle admitted in regard to conversions of personal property. Prior to *Brown* v. *Mooton*, Cro. Jac. 73, the English doctrine seems to have been the other way, as shown by Kent, in his Commentaries, 2 Kent. Com. 388, referring to Shepherd's Touchstone, Title, Gift ; and to Jenkins, p. 109, case 88.

We have already stated the only two principles upon which it rests. We apprehend that no sound jurist would attempt, at this day, to defend it solely on the ground of *transit in rem judicatum*. For while this principle, as that other rule, that no man shall be twice vexed for the same cause of action, may well be applied in the case of a second suit against the same trespasser, we

6. (1965) 1 QBD 248, 264.
7. 18 Led 129, 132-133, 134.

do not perceive its force when applied to a suit brought for the first time against another trespasser in the same matter.

But in all such cases, what has the defendant in such second suit done to discharge himself from the obligation which the law imposes upon him, to make compensation? His liability must remain, in morals and on principle, until he does this. The judgment against his co-trespasser does not affect him so as to release him on any equitable consideration. It may be said that neither does the satisfaction by his co-trespasser, or a release to his co-trespasser do this; and that is true. But when the plaintiff has accepted satisfaction in full for the injury done to him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected, until he has received full satisfaction, or that which the law must consider as such.

We are, therefore, of opinion that nothing short of satisfaction, or its equivalent, can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser, who was not party to the first judgment.

14. In India the English law has been generally followed. The learned counsel for the appellant relies on *Ram Kumar Singh* v. *Ali Hussain*.[8] The facts in that case in brief were as follows: The plaintiff sued several defendants jointly to recover damages (Rs. 325/-) in respect of an alleged assault committed on him by the defendants but entered into a compromise with one defendant and accepted Rs. 25/-representing his proportionate share of damages. The High Court held:

> "The fact that one of several tortfeasors in the progress of a suit admits his liability as well as that of the other defendants and agrees to pay a sum of money in satisfaction of his liability does not exonerate the other defendants, who may be found responsible for the acts complained of from liability. In the case of *Brinsmead* v. *Harrison*,[9] one of the tortfeasors was sued for damages for trover of a piano and damages were recovered as against him. In that case it was held that a suit against the other tortfeasor could not be sustained for the same cause of action, notwithstanding the fact that the judgment already recovered remained unsatisfied. That is a very different case from the case before us. In the case before us all the tortfeasors were sued in one and the same suit and judgment was not recovered only against the party who had admitted his liability in the progress of the suit and had agreed to pay a sum of money in satisfaction of his liability."

This case was followed in *Har Kishna Lal* v. *Haji Qurban Ali*.[10] But in these cases the decree was not passed first against the tortfeasor admitting liability.

15. The learned counsel for the respondent relies on *Makhanlal Lolaram* v. *Panchamal Sheoprasad*.[11] It was held in that case that "an accord and satisfaction in favour of one joint tortfeasor operates in favour of them all". Vivian Bose, A. J. C., observed:

> "An accord and satisfaction in favour of one joint tortfeasor operates in favour of them all; 9 Q B 819, 11 A & E 453 and 6 Bing

8. ILR (1909) 31 All 173, 175.
9. (1871-72) LR 7 CP 547.
10. (1942) 17 Luck 284.
11. AIR 1934 Nag 226, 227.

119

(N C) 52, Odgers On Libel and Slandar, Edn. 6, p. 521, Ratanlal On Torts, Edn. 10, p. 71. The basis of these decisions is that where the injury is one and indivisible it can give rise to but one cause of action. Consequently if satisfaction is accepted as full and complete and against one person it operates with respect to the entire cause of action."

16. In *Shiva Sagar Lal* v. *Mata Din*,[12] the facts as stated in the head-note, in brief, were :

"Plaintiff filed a suit to recover damages for malicious prosecution against five defendants of whom defendant 1 was a minor. It was alleged that the other defendants had instigated defendant 1 to make a complaint against the plaintiff. Subsequently, the plaintiff filed an application that there had been a settlement between him and defendant 1 and he had consequently released him. The application was allowed and defendant 1 was discharged."

Following *Duck* v. *Maveu*,[13] it was held that the discharge of defendant 1 amounted merely to a covenant not to sue him and not to a release of all the joint tortfeasors. The English Courts adopted this line of reasoning in order to soften the rigour of the common law, but in the present case it cannot be said that the compromise amounted to a covenant not to sue, as a decree was passed.

17. It seems to us, however, that the rule of common law prior to *Brown* v. *Mooton*,[14] and the rule adopted by the United States Supreme Court is more in consonance with equity, justice and good conscience. In other words, the plaintiff must have received full satisfaction or which the law must consider as such from a tortfeasor before the other joint tortfeasors can rely on accord and satisfaction. This rule would recognise that the liability of tort-feasors is joint and several.

What is full satisfaction will depend on the facts and circumstances of the case. For example, the acceptance of Rs. 25 in the case of *Ram Kumar Singh* v. *Ali Hussain*,[15] would not be a case of full satisfaction.

18. In this case an apology was received from the defendant Rabadi and accepted and embodied in a decree. This cannot be treated to be a full satisfaction for the tort alleged to have been committed by the appellants-defendants. But this must be treated as an election on the part of the plaintiffs to pursue his several remedy against the defendant Rabadi.

19. The learned counsel for the appellants urges that if a decree is passed against them for damages, the defendant Rabadi, who compromised, would be liable to contribute in accordance with the rule laid down in *Dharni Dhar* v. *Chandra Shekhar*,[16] in which it was held that the rule in *Merryweather* v. *Nixon*,[17] did not apply in India. It is not necessary to decide whether the Full Bench decision of the Allahabad High Court lays down the law correctly, because even if it is assumed that this is the law in India it would not affect the rights of the plaintiffs.

20. In the result the appeal is allowed, the judgment and decree of the High Court set aside and the case remitted to the Trial Court. He shall dispose of the suit in accordance with this judgment and law. No order as to costs.

---

12. AIR 1949 All 105.
13. (1892) 2 QBD 511.
14. 80 HR 47.
15. ILR (1909) 31 All 173, 175.
16. ILR (1952) 1 All 759 (EB).
17. (1799) 8 TB 186.