CHAPTER I.

English Law in India.

The law of British India is not a simple or uniform system. It is a composite or mixed law. And it is mixed in a way which, for seven or eight centuries—we may say, roughly speaking, from about the date of the Norman conquest—has ceased to be familiar in Europe. Nowadays, Europeans think of law as something determined by place, something which a man must take as he finds it in this or that country. We expect the courts of a civilized country to administer the same rules to all persons subject for the time being to their jurisdiction, of whatever nation and kindred they be. This expectation is not recognized in the East, except where European authority or influence has introduced it. Nay more, it is reversed.

Law of British India still not uniform.

Asiatic law is still essentially personal, not territorial. A man does not find law where he goes; he carries his own law with him. It was so in Europe all through the early Middle Ages. There was nothing anomalous in the early position of the East India Company's settlements as insulated

Asiatic law is personal.

regions of English law in India. Continental merchants, Lombard and Hanseatic, had been in the same position in England down to the 16th century. Yet in the first half of the 19th century this medieval conception of personal law, which is still in full force in the East, had so completely passed out of men's minds that Lord Brougham actually thought India was divided into territories of Hindu, Mahometan, and Buddhist law. He said, describing the variety of laws existing in different parts of the British Empire :—

"In our Eastern possessions these variations are, if possible, greater; while one territory is swayed by the Mahometan law, another is ruled by the Hindu law; and this, again, in some of our possessions is qualified or superseded by the law of Buddha, the English jurisprudence being confined to the handful of British settlers, and the inhabitants of the three Presidencies."[1]

This statement, like others of Lord Brougham's, was curiously and laboriously inaccurate. Asiatic laws and customs know nothing of this neat and exclusive geographical parcelling. So far as there is any one dominant law in this or that Indian State, it is dominant, not as the law of the land, but as the law of the ruling dynasty or clan. The reference to "the law of Buddha" would seem to signify that Lord Brougham had been told the

[1] Speeches, Edin. and Lond. 1838, vol. ii. p. 357; Cowell's Tagore Lectures, 2nd ed. 148.

Burmese were Buddhists, and assumed that at one time they must have been some sort of Hindus. As the first Burmese war was still recent, Lord Brougham's survey would have been incomplete without a few words to show that Burma had not escaped his omniscience.

Personal and public Law.

The received Asiatic principle, so far as there is any principle, appears to be that, except in matters of State revenue and other public service, and except in criminal jurisdiction over offences condemned in all systems of justice, every man is governed by his own personal law, whatever that is. Hence the Imperial Government's policy of impartially respecting all customs consistent with public order, and not manifestly repugnant to existing rules of morality common to all civilized nations, is not only just and expedient in itself, but strictly in accordance with all Asiatic tradition of good government.

Such was, before our time, the policy of Akbar, the wisest of Her Majesty's predecessors on the throne of India; an Asiatic Prince with a systematic genius for government and enlightened ideas of toleration which put him not only above other Asiatic rulers, but above most European Princes of his time. India has many holy places: Akbar's tomb at Sikandarah, where Hindu, Musalman, Sikh, and Englishman can alike bow the head in reverence for a great and just man, is perhaps the holiest of all. While Europe was dis-

tracted by religious wars, Akbar was framing his splendid dream—a dream, but still splendid—of the Tauhid-i-Iláhi. But even Akbar could not substitute an imperial for a personal rule in matters of faith and custom. His illustrious failure was hardly needful to teach us that such an attempt is beyond human power. We have not only foregone it, but pledged ourselves against anything of the kind. If change comes, as in fulness of time it may, it must come of itself.

Imperial departments of British Indian law.

The law of British India is, in principle, still a system of personal laws, with a certain number of departments in which general Imperial laws have been introduced, either by express legislation or by judicial usage. Those departments are important and extensive; they are in course of being further extended. But there is still no general law of British India in the sense in which there is a general law of England or France or Italy.

What, then, are these Imperial departments? Broadly speaking, they are Criminal Law, Commercial Law, and what may be called the individualist parts of Civil Law. They answer pretty much, apart from Criminal Law, to what English lawyers call collectively the "law of personal property," omitting, however, all that has to do with succession to property on the owner's death. To these we have to add the whole law of Procedure and certain legislation (of which the chief example is the Succession Act) provided for the benefit and ease of people not under any recog-

nized personal law. These heads of general law, which constitute, so far as they extend, an inchoate Common Law of British India,[1] have been created in two kinds of ways :—

1. Direct legislation, notably the body of statutes known as the Anglo-Indian Codes.

2. Judicial introduction of English law where no other specific rule is applicable. Legislation

We have no occasion to dwell here on the legislative powers and machinery of the Government of India. The Imperial Parliament is the ultimate source of all legislative authority now exercised in British India, and the principal Imperial statute now in force on the subject is the Indian Councils Act, 1861, with the earlier enactments which it confirms. We shall have to consider in more or less detail various parts of the Anglo-Indian Codes, and more especially the Contract Act (IX. of 1872).[2]

The judicial introduction of English law calls for some further remark. Judicial introduction of English law.

The statutory and specific jurisdiction of the old Presidency Courts to administer English law expressly as such was confined to British subjects, whoever might be included in that description.

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[1] The Common Law itself was originally the law of the King's courts, not excluding a variety of local and even personal customs. The peculiar conditions of England enabled the King's judges and ministers to develop the primacy of the King's law into exclusive sovereignty much sooner than in other European countries.

[2] As to the application of the Contract Act to all persons in British India, notwithstanding anything in earlier Acts and charters, see *Madhub Chunder Poramanick* v. *Rajcoomar Das* (1874), 14 B.L.R. 76.

The power to administer the same justice in civil matters to all sorts of people within the jurisdiction seems to go back to Regulation III. of 1793.[1] The material sections are as follows :—

Ben. Reg. III. of 1793.

S. 7. All natives, and other persons not British subjects, are amenable to the jurisdiction of the zillah and city courts.

S. 8. The zillah and city courts respectively are empowered to take cognizance of all suits and complaints respecting . . . . debts, accounts, contracts, partnerships . . . . claims to damages for injuries, and generally of all suits and complaints of a civil nature, in which the defendant may come within any of the descriptions of persons mentioned in Section 7.

S. 21. In cases coming within the jurisdiction of the zillah and city courts for which no specific rule may exist, the judges are to act according to justice, equity, and good conscience.

It will be observed that even this was still applicable only to "natives and other persons not British subjects." The Regulation was finally repealed by the Bengal Civil Courts Act (VI. of 1871), which, however (S. 24), substantially re-enacts the provision in question.

"Equity and good conscience" had already appeared in the Charter of 1683, but this was confined to the Company's own people. It was a

[1] This Bengal Regulation was soon afterwards copied in the other Presidencies.

regulation only for the local and personal jurisdiction, in fact it was of the medieval type of which we have already spoken. We now have to see what was meant by the "justice, equity, and good conscience" prescribed in the Bengal Regulation as the general guide in cases of doubt.

"Justice, equity, and good conscience."

Let it be remembered that "natural" justice has never existed, and cannot exist, in a civilized country. It is not compatible with either certainty or equality in the administration of justice—perhaps the two most fundamental qualities of civilized law. One of the first demands of men living in any settled form of society is for a rule of law to secure them against mere caprice on the part of those in authority. They expect the decisions of the magistrates to be guided by some sort of fixed principles; that is, justice must at least aim at being certain. Likewise they expect the magistrate not to show arbitrary favour or disfavour to persons. There may be, in Eastern countries there always have been, different rules for different classes and conditions of men, but within the same class the rule has to be the same for one person as for another. Justice must at least aim at being equal. The really natural justice for Englishmen governing in India was to follow the rules they were best acquainted with. The only "justice, equity, and good conscience" English judges could and did administer, in default of any other rule, was so much of English law and usage

as seemed reasonably applicable in this country. Hindu and Mahometan law not affording any specific rules, or certainly none that were practicable for a mixed population, in a large part of the common affairs of life outside religion and the family, there was only English law to guide them. Thus the law of civil wrongs (among other branches) was practically taken from the common law of England; just as, if Germans had been set to do similar work, their basis would have been the Roman law received in modern German practice. We did profess in the mofussil, for a considerable time, to administer Mahometan criminal law. Macaulay's introduction to the first draft of the Penal Code records the difficulties of the attempt.

I have said that part of our subject-matter is covered by the Contract Act. But this Act only states in authentic form the results of exactly the same judicial process applied to the law of contract. Hence, we have to do strictly and wholly with Anglo-Indian law. Such principles or results as may be found in Hindu or Mahometan books are matter of pure ornament and curiosity.

Authorities on position of English law in British India.

The question to what extent English law has been received in British India, so as to become a law generally binding, is not without illustration from authority. It was much discussed in 1836, in *Mayor of Lyons* v. *East India Co.*[1] (the case of General Martin's charitable foundation at Luck-

[1] 1 Moo. Ind. App. 175; 3 St. Tr. N.S. 647.

now). Although the decision itself was limited to holding that certain specific parts of the English jurisdiction of the law of property were not and never had been binding in the jurisdiction of the Supreme Court of Bengal, the reasons given, and the arguments which prevailed, involve the conclusion that English law has never been imported into India as a whole; and that whatever parts of it are applicable must be so by virtue of some express legislation or specific principle appropriate to the matter in hand.

In a later case[1] an agreement had been made within the local jurisdiction of the Supreme Court of Madras, and as to land in the Presidency beyond those limits, between parties of whom some were Hindus, some Mahometans, one an Englishman, and one, it seems, an Armenian, and it was not shown that these parties had contracted with reference to any particular law. The Judicial Committee held that they could only be presumed to have contracted according to English law, being the law of the place where the contract was made, and not being inconsistent with any special local law of the place where the property in question was. This judgment was said in the High Court of Bombay, a few years later, to be "an authority of the highest Court of Appeal that, although the English law is not obligatory upon the Courts in

[1] *Varden Seth Sam* v. *Luckpathy Royjee Lallah* (1862) 9 Moo. Ind. App. 303, 321.

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."[1] With great respect for the learning and discretion of the Bombay Court, I am unable to see that the authority, as a positive authority, goes to any such extent. But I have already endeavoured to show that the "justice, equity, and good conscience" of the old Regulations could not in practice, if there was to be any settled system of justice, mean anything else than the analogies of English law. Doubtless, it was convenient that this reasonable and necessary tendency should, in course of time, be explicitly approved by a superior court; and the approval does not lose much, if anything, of its intrinsic value by professing to rest upon a judgment of the ultimate court of appeal which was really of less general scope.

The historical fact, in any case, was quite explicitly recognized not long ago in the Judicial Committee, where it was said that "equity and good conscience" had been "generally interpreted to mean the rules of English law, if found applicable to Indian society and circumstances."[2]

NOTE.—The preface to Smoult and Ryan's "Rules and Orders of the Supreme Court of Judicature at Fort William in Bengal,"

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[1] *Dádá Hónáji* v. *Bábáji Jagushet* (1865) 2 Bom. H.C. 38.

[2] *Wághelá Rájsinji* v. *Sheikh Masludin* (1887) L. R. 14 Ind. App. 89, 96; I. L. R., 2 Bom. 551, 561.

Calcutta, 1839, p. ix, gives a list, taken from an earlier preface by Mr. Longueville Clarke, of all the heads to which the law administered by the old Supreme Court may be referred. The introduction of English law, common and statute, so far as Europeans are concerned, and within that jurisdiction, is attributed to the United East India Company's Charter of 1726, and this is stated to be the received opinion. And see Cowell's Tagore Law Lectures, 2nd ed. p. 13, and Sir James Stephen's "Nuncomar and Impey," vol. ii., ch. 9, where the introduction of English criminal law is discussed.

The case of *Borrodaile* v. *Chainsook Buxyram*, Hyde's Bengal High Court Reports, 51, where this list is cited (at p. 61), illustrates the troubles of working a system of personal laws in a modern commercial community. The Court held that it was not open to a Hindu defendant in a civil cause to rely on the Statute of Frauds; "The laws and usages of the defendant being laid down by 21 George III. c. 70, s. 17, as the rule to be followed in causes 'where only one of the parties shall be a Mahometan or Gentû.'" This was not quite ten years before the Contract Act superseded all reference to personal laws in matters coming within it, and abrogated the Statute of Frauds altogether for British India so far as relates to suits on contracts.

Discussion of the "substantive law to which all persons in the mofussil not subject to Hindu or Mahometan civil law should be subject" may be found in the Special Reports of the Indian Law Commissioners, Parl. Papers (H.C.), 30 May, 1843, B. No. vii. The conclusion of the Commissioners, after an elaborate review of the history and authorities, was that "so much of the law of England as is applicable to the situation of the people," and not inconsistent with express legislation, was and ought to be the *lex loci* of the mofussil. This report (which ignored the fundamental difference already pointed out between Asiatic and modern European ideas of law and jurisdiction) does not, of course, possess any legal authority. An attempt made in 1845 to carry out its recommendations by an Act was ultimately abandoned.