Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mulkah Do Alum Nowab Tajdar Bohoo, the Widow and an Heir of the late Secundur Hushmut General Sahib, a Mahomedan, deceased, v. *Mirza Jehan Kudr, Nowab Mirza, Zuman Ara Begum, and Rufaatoonissa Begum, from the Court of the Judicial Commissioner of the Province of Oude; delivered 29th March,* 1865.

Present:

LORD KINGSDOWN.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.

SIR LAWRENCE PEEL.
SIR JAMES W. COLVILE.

THIS is an Appeal by the widow of the late General Sahib against certain decisions which have been pronounced by the Judicial Commissioner in Oude on a claim preferred by her for dower against the estate of her late husband.

The marriage took place about the year 1838 of our era, and by the settlement made upon it, to which the father of the bridegroom was a party, the wife's dower was fixed at a crore of rupees, a sum equal to 1,000,000*l.* sterling.

The father of the bridegroom was a son of the King of Oude, and at that time heir-apparent to the Throne.

General Sahib came over to England after the overthrow of the Oude Dynasty and died here.

The Royal family of Oude were all Mahomedans.

The General left a son, an adopted son, and two

daughters surviving him. These persons claimed to be co-heirs with his widow to his property.

The widow claimed a right to have the whole amount secured by the deed as her dower treated as a debt due from her husband's estate, and paid *pari passu* with the debts of other creditors, and she disputed the titles of the other claimants as coheirs.

After some attempts to settle the matter by arbitration, which proved abortive, a suit was instituted, in order to determine the rights of the parties.

In the course of these proceedings an inquiry was directed with respect to the property which the General had left at his death, and in the result it appeared that it amounted in all to about 5 lacs of rupees. The claim of the Appellant alone in respect of her dower amounted to a crore or 100 lacs, exclusive of other debts which are represented to be of very trifling amount.

The effect, therefore, of allowing the Appellant's claim would be to a great extent to defeat the claims of the other creditors, and to sweep away the whole property from the heirs.

If such, however, be her legal rights, no Court of Justice can refuse to give effect to them on the ground of any inconvenience or hardship which may result from allowing them.

The case came first before two Assistant Commissioners in the Lucknow District Court in August 1859; then on appeal before Colonel Abbott, the Commissioner Superintendent of the Lucknow division, on the 2nd December, 1859; and lastly, before Mr. Campbell, the Judicial Commissioner of Oude, on the 23rd March, 1860. All these gentlemen were of opinion that the claim of the Appellant could not be allowed to its full extent, but must be modified with reference to the assets of the husband and the circumstances of his family; but they differed in some degree as to the mode in which, in the exercise of their discretion, the division between the widow and the other heirs should be made. By the last order, that of Mr. Campbell, made on the 23rd March, 1860, it was directed that the debts of the General should be first paid; that one-half of the remaining property should be paid to the widow, and the other half to the other heirs; but this decision was not to affect a sum of 110,000 rupees in Company's paper in the name of the Appellant,

which was to be retained by her as her absolute property. From this and the preceding orders the present Appeal has been brought.

Great trouble appears to have been taken by the Commissioners to ascertain the general Mahomedan law upon the subject, and opinions were obtained from the Courts of the several provinces of India, particularly with reference to the question whether, when extravagant sums far beyond the means of the bridegroom to satisfy were provided by settlement as dower, such sums were to be treated as *bonâ fide* debts to be paid *pari passu* with other debts on the death of the husband, though they might sweep away the whole property from the heirs, or whether they were to be treated as securities for an adequate provision for the wife. The Reports from the different Provinces were not uniform—some being in favour of treating the sum fixed as an absolute debt; others in favour of a modification of the demand with reference to what might be considered the proper dower of the woman.

It is not necessary, in the opinion of their Lordships, to decide the general question, because, whatever the general law may be, the mode in which contracts of this description are to be treated in Oude has been settled by specific regulations issued by competent authority, in the manner which we are about to state.

We take the facts as to the origin of these Regulations from a letter dated the 4th of February, 1856, from the Secretary-General of the Indian Government, containing instructions for the Government of Oude, addressed to Major-General Outram, who was appointed Chief Commissioner of the affairs of this Province.

The facts as appearing in this letter are these: in the year 1847–8 a few rules for civil judicature were drawn out by the Indian Government for the guidance of the officers employed in the Cis- and Trans-Sutlej States. Then these were in 1849 extended to the Punjaub, and it was left to the officers charged with the local administration, laying upon these the foundation of the judicial system, to improve, amend, and elaborate them as practical experience might suggest.

These rules thus amended were in 1854 reduced

into a printed form, and circulated amongst the Judges of the Punjaub. They are entitled "Abstract Principles of Law, circulated for the guidance of Officers employed in the Administration of Civil Justice in the Punjaub. To which is appended a proposed Form of Procedure."

This Code, as its title imports, contains a statement—1. Of the principles of law to be adopted by the Judges; and 2. Of the rules of procedure to be followed. It lays down the ordinary rules of Mahomedan and Hindoo law on the principal subjects which were likely to come before the Courts, and both in the rules of law and forms of procedure introduces some alterations into the laws prevailing in the older Provinces.

This Code thus introduced into the Punjaub had, in the opinion of the Government, been found to work well.

In February, 1856, the King of Oude was deposed by the Indian Government, and the whole administration, civil and military, of the kingdom was assumed by its officers under its authority. To provide for the administration of justice a number of Commissioners and Assistant Commissioners were appointed to act for different districts into which the country was to be divided, and the general rules to be observed in the administration of justice, as well as in the ordering of the Province in other respects, are laid down in the letter to which we have referred.

The intention to assimilate, as far as possible, the Government of Oude to that of the Punjaub appears in several passages of the letter. In paragraph 21, it is said,—

"It has been already intimated to you that the administration of Oude is to be conducted as nearly as possible in conformity with the system which has been introduced into the Punjaub."

After explaining the advantages which had arisen in that Province from the introduction of the New Code, and observing that the Kingdom of Oude resembled very closely in its population, language, creeds, and customs the North-West Provinces, the letter proceeds, "There is, therefore, every reason to believe, and none to doubt, that the system of administration as modified for the Punjaub, and divested of all those forms and technicalities

which delay justice and are specially distasteful to a people unaccustomed to technical litigation, will be acceptable to the people of Oude, and more completely suited to the Province itself than it was to the Punjaub, where, nevertheless, its success is undeniable."

After dealing with financial and some other matters, the letter, in paragraph 43, proceeds to give instructions for the administration of civil justice, with respect to which it observes that very material assistance is derived from the results of experience acquired in the Punjaub.

Then follow the paragraphs on which the question as to the introduction of these rules into Oude mainly depends.

The 44th section, after giving the history of those rules which we have already read, proceeds thus:—

> These rules now, for the most part, guide the proceedings of the Judicial Courts in the Punjab, and they have been found so well fitted to the requirements of a new province and a simple people, so easy in their application, so acceptable to the population, no less than to the officers themselves, and so beneficial in their results, that the Governor-General in Council advises that they should be made the groundwork of the civil judicial system in Oude Several printed copies of these "Rules" will shortly be furnished to you for distribution.
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> 45. There appears to be no reason whatever for supposing that the Rules of Procedure will not be as applicable to the Civil Courts in Oude as to those in the Punjab, and there can be no objection to their immediate introduction. It is believed also the "Principles of Law" will be found sufficient, in the first instance, to guide the judicial officers in dealing with the various questions which will come before them in this branch of their duty. But it will not escape your observation that, in the preparation of the rules under notice, much attention has been given to the *lex loci*, and that, especially in matters relating to inheritance, marriage, divorce, and adultery, adoption, wills, legacies, and partition, as well as in all commercial transactions, a due regard to local usage has been enjoined. It cannot, of course, be supposed that the *lex loci*, or local custom, in provinces differing so widely as the Punjab and Oude is in all, or even in many, respects identical, and it follows that those provisions of the "Rules" which rest on the *lex loci* in the Punjab cannot, with any propriety or without risk of injurious failure, be extended to the Province of Oude.

It appears to their Lordships that the effect of these Clauses is, that the principles of law as well as the rules of procedure laid down in the Punjaub Code are to be adopted as the basis of the administration of justice in Oude, and to be applied as far as they may appear to the Commissioners to be not

unsuited to the circumstances of the country; but that, as far as they are founded upon local customs, varying the general law, whether Hindoo or Mahomedan, they are not to be applied to Oude, where the local customs would probably differ from those of the Punjaub.

The 46th section is in these words :—

46. While, then, the Governor-General in Council directs your attention to this collection of principles of law as calculated to afford material assistance in the absence of any better or more appropriate treatise, he refrains from requiring the strict observance of them until it can be ascertained how far they are applicable to the peculiarities of the province and the customs of its people. With this end in view, his Lordship in Council desires me to suggest that all the Commissioners and District Officers, and the most experienced of the Assistants, should be required to study the "Principles of Law" in their daily application to the business brought before the Civil Courts, and, after the lapse of a twelvemonth or more, as may be hereafter determined, to report to the Judicial Commissioner the opinions which they may have formed of the applicability of the "Rules of Law" to the people of Oude, and to offer, at the same time, any remarks and suggestions which may have occurred to them. It may, perhaps, be advisable also to invite the opinions and observations of a few of the native Extra Assistants, whose past career and official knowledge, and more immediate contact with the people, may have qualified them to form a judgment on those points which touch upon native customs, and to give sound advice. On receipt of all these reports, it will be the duty of the Judicial Commissioner to study the suggestions which they contain, and to recast the collection of Rules of Law. It is not anticipated that the Rules of Procedure will call for much, if any, alteration, but it will rest with the Judicial Commissioner to give his consideration to these also at the same time, and to introduce such modifications as may appear advisable, provided they do not tend to introduce those complications and technicalities, the removal of which is the main as it is the most acceptable feature of the system successfully followed in the Punjab.

This section is perfectly consistent with those which precede, and shows that the rules were to be generally acted upon, though strict obedience to them was not required until it had been ascertained how far they were applicable to the peculiarities of the Province and the customs of its people. With this view, its application is to be carefully watched by those who administer it, who, after a certain period, are to make a Report upon the subject, with any suggestions which may occur to them for amending it.

The Indian Mutiny, which broke out in the following year, would probably prevent any report being made by the Commissioners, in compliance

with the directions of the 46th section, as early as was there contemplated; but, after the restoration of the British authority, we find in the official Report of the Administration of the Province of Oude for the year 1859-60 that the Punjaub Code is stated to be the basis of the Civil Law of the country, and allusion is made to some modifications which have been introduced in it, but it does not appear that any such modification related to the subject now in controversy.

On the whole, their Lordships entertain no doubt that the Articles of the Punjaub Code generally were in force at the time of the date of these Orders, the first of which was made on the 25th August, 1859, and the last on the 23rd March, 1860.

Then on what grounds is the application of these rules to be excluded from the present case? If they are to be excluded, it must be on the ground that there is some *lex loci*, or special custom, in Oude by which the law of dower in that country differs from the general Mahomedan law. But no such custom is pretended. The argument for the Appellant rests entirely on the general Mahomedan law.

The next question is, do the rules of the Punjaub Code warrant a departure from the strict law, if law it be, by which in all cases a sum fixed as dower is to be enforced as an absolute debt? Upon this question no doubt can be entertained. They provide for a modification of the dower mentioned in a marriage-contract both in the case of a divorce and of the death of the husband.

The 10th clause, section VI, is in these words:—

"By the Hindoo and Mahomedan law, the dower of a married woman, if not entirely paid up at the time of marriage, is claimable by her at any subsequent time, and especially in the event of a divorce. Among Mahomedans it is usual, as a safeguard against capricious divorces, to stipulate for an amount of dower far beyond the means of the bridegroom to pay. Such contract, if enforced by a Court, would ruin a defendant who had divorced his wife without reflecting on the liability to which he was subject. Still, although the full amount need not be decreed, yet, in the event of a divorce without a valid cause, heavy damages will be awarded to the wife in proportion to the means of the husband."

The 11th section provides for the event of the husband's death :—

"At the husband's death, the dower is treated as a debt, and takes precedence of the claims of heirs, but not of other debts—it stands on the same footing with them. In this case, the Court would possess the modifying power of clause 8, and award to the widow a fair sum, with reference to the assets of the estate and the circumstances of the heirs."

The reference to clause 8 is either a mistake or a misprint for clause 10.

It appears, by the proceedings in this case, that these rules have been and are acted upon in the Punjaub in dealing with cases of dower, and, by the orders to which we have referred, they have been extended to Oude.

It was suggested that this was only to apply to future contracts, and not to contracts previously made. But their Lordships think it clear that these sections provide for the mode in which all contracts of this description which might come before the Courts were to be treated. Upon the whole, their Lordships are of opinion that the Commissioners were bound to apply the provisions of this Code to the case before them, and were at liberty to exercise a discretion in the division of the property in dispute between the widow and the heirs. As to the manner in which that discretion should be exercised, the Commissioner whose Judgment is appealed from must be more capable of forming a correct Judgment than their Lordships can be.

It may be proper to notice an objection which was taken, that in one of the orders appealed from, a provision was made out of the estate for an adopted son, though it was admitted by the Commissioner making the order that such son was not properly one of the heirs. But this will be corrected by the decision of Mr. Campbell, which directs the division to be amongst the co-heirs other than the Appellant; and at all events it is a matter which relates to a fund in which she has no interest.

Their Lordships will humbly advise Her Majesty to affirm the order of Mr. Campbell of the 23rd March, 1860; but as the case is one of novelty and some difficulty, they will not give any costs.