

JEPHSON v RIERA

Privy Council

The Vice-Chancellor, Lord Commissioner Bosanquet, Mr. Baron Parke, the Chief Judge of the Court of Bankruptcy.

21 May 1835

English Law — application of to Gibraltar.

Note. The following extract from the judgment of the Judicial Committee is printed for its historical value. The common law and the rules of equity and certain English statutes now apply in Gibraltar, with certain qualifications, by virtue of section 3 of the Application of English Law Ordinance (Cap. 5, 1964 Ed.). Dower was abolished in Gibraltar in 1934 by section 50 (1) (c) of the Administration of Estates Ordinance (Cap. 1, 1964 Ed.).

Cases referred to in the judgment.

Campbell v Hall, (1774) 1 Cowp. 204; Lofft. 655.

Attorney General v Stewart, (1817) 2 Mer. 143.

Dr. Lushington and Campbell for the appellants.

Bickersteth, K.C., and Cleasby for the respondent.

3 July 1835: Judgment, of which the following is an extract, was delivered—

It has been argued, that as Gibraltar was a possession acquired by Great Britain by conquest from Spain, the law of Spain, and not the law of England, must be the criterion by which the rights of the inhabitants are to be determined, unless it can be shown that the former law has been altered by competent authority. It is further said that this has never been done, and that by the law of Spain the widow is not entitled to the dower she seeks, and therefore, that the judgment is erroneous.

The peculiar situation and character of Gibraltar, and the circumstances consequent upon its capture, render it difficult to ascertain how or when the alteration of its laws first took place. But it was admitted that, by some means, the law of England had in Gibraltar been substituted in many points for the law of Spain; and it is not denied that the eldest son alone inherits real property in Gibraltar, though by the law of Spain it would descend to all the children equally; and it seems to have been assumed by modern text-

writers upon colonial law, that the English, and not the Spanish law, is the law in actual force at Gibraltar. And their Lordships are of opinion that there is abundant evidence before them that this assumption is well founded.

The first charter of justice for Gibraltar was granted in the 7th year of the reign of George 1st, and it applied to personal property only. But by a charter under the Great Seal of Great Britain, in the 13th year of the reign of George 2nd, a new Court of Judicature was erected, and was thereby authorized to hold pleas of what nature or kind soever, between the inhabitants, "and to award and issue out warrants of execution under the seal of any one of the Judges for the time for putting the complainant into possession of *the houses, lands, tenements or other things* which should be specifically adjudged to them." And in a subsequent part of the same charter it is further provided thus: "But nevertheless our will is, that in all cases, *whether real or personal*, in which the right of us, our heirs and successors, shall be concerned or may be affected, or where they concern lands tenements or hereditaments, an appeal shall be allowed to us, our heirs and successors in Council, though the value be under the sum of 200*l.*" And a subsequent clause is in these terms, "And further, we will that the said Court may have power to do all things necessary for the administration of justice. But *nevertheless, we will that the laws of England be the measure of justice between the parties.*"

By a subsequent charter, made in the 26th year of the same reign, after reciting the former charter of George 1st, full power and authority is given to the Court to hold plea of and to hear and determine in a summary way, on complaint in writing, in such manner as was directed by the former charter concerning personal pleas, all pleas concerning *houses, lands and tenements*, and all other real pleas within the town of Gibraltar and the territories thereto belonging, and all kinds of terms, leases, and estates and interests therein." And by a subsequent charter, made in the 57th year of the reign of King George the Third, after reciting all these three charters, the King revokes them, and erects a new Court of Judicature; and, adopting the language employed in the charter of the 13 Geo. 2d, declares His Majesty's "will, that the laws of England be the measure of justice to be administered between the parties, as near as may be." Can there be any reasonable doubt that the purpose and object of these charters was to make the laws of England, as far as they were applicable to the situation of Gibraltar, the law of that place in all questions of property, whether real or personal?

But it was further urged by the learned counsel for the appellants, that the instruments referred to were merely charters under the Great Seal for regulating the administration of justice, and that the laws of a conquered country could only be altered by Order in Council, the existence of which it was incumbent on the respondent to prove. No authority, however, has been produced in support of this position, which rests upon the circumstance, that it is said in some of the books that the King may alter the law of a conquered country by Order in Council, and that it is nowhere said that he may do so by charter.

But this distinction is not alluded to in *Calvin's* case, or in the statement made by the Master of the Rolls, in *2 Peere Williams*, 75, or in the case of *Campbell v Hall*,¹ or that of the *Attorney General v Stewart*,² and the judges speak of this power as vested in the Crown, without any limitation as to the advice under which it may be exercised.

In the case of *Campbell v Hall*, the whole question turned upon the legal effect of letters patent under the Great Seal; and though the case was four times argued, no objection was suggested on the ground now insisted upon; and, in delivering the judgment of the court, Lord Mansfield declared the letters patent void, solely on the ground that the King had, before the date of those letters patent, by his proclamation and charter, precluded himself from the exercise of a legislative authority over the island of Grenada: and it is worthy of remark, as exhibiting the novelty of this objection, that though the earlier proclamation and charter relied on in that case were issued expressly under the advice of the Privy Council, that fact nowhere appears upon the face of the special verdict; and though Sir William Grant, in the case of the *Attorney General v Stewart*, intimates a doubt whether there had not been other acts and instruments more clearly expressive of the King's intention than the language of that proclamation, he raises no difficulty on the ground now suggested, although the master's report in that case also omitted to state that the King's proclamation and the charter of justice were issued by order of the King in Council.

A further objection was also insisted upon by the counsel for the appellants, that even if the law of England had been generally introduced into Gibraltar by competent authority, such parts of it only would be in force there as would be applicable to the situation and condition of the place, and that as there were no means in Gibraltar for apportioning or barring dower, the law of dower was wholly inapplicable. Whether there be any such officer in Gibraltar as a sheriff, upon whom the duty of assigning dower would devolve, in exact analogy with our own practice, does not appear in evidence; but if the right to dower exists, the powers given by the charters are quite large enough to supply the adequate remedy; and without assenting to the position, that the right of a widow to her dower cannot exist in any place where the means contrived in this country for barring that right cannot be employed, it is a sufficient answer to the objection to refer to the language of the charters already cited, under which all the powers exercised by the courts in England may in substance be employed for effecting all those settlements of real property that require the relinquishment of the wife's claim to dower.

Their Lordships are therefore of opinion, that as the charters of justice appear to have been issued under the Great Seal, and therefore under the advice of a known responsible minister of the Crown; and as the language plainly and explicitly declares the will of the King, that the English law shall

¹ (1774) 1 Cowp. 204; Lofft. 655.

² (1817) 2 Mer. 143.

be the measure of justice in Gibraltar; that the law of England has been lawfully substituted for the law of Spain in that place; and that ~~as~~ there is nothing in the nature of the plaintiff's claim of dower inapplicable to the situation of that part of the King's dominions, that the judgment of the court below is well founded, and should be affirmed with costs.