Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal, Gridhari Lall Roy v. *The Government of Bengal, from the High Court of Judicature at Fort William in Bengal; delivered on the* 17*th July*, 1868.

Present:

THE MASTER OF THE ROLLS.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.
THE LORD CHIEF BARON.

SIR LAWRENCE PEEL.

THE facts on which the determination of this Appeal depends are few and undisputed. Woopendro Chunder Roy, the owner of the zemindary and other property in dispute, died on the 7th of August, 1860, an infant and unmarried. He was of a family which had formerly come from the Upper Provinces, and, though settled in Lower Bengal, where the zemindary is situated, is admitted to have retained the ceremonial and other law of its original Habitat. There is, therefore, no dispute that any question touching the succession to Woopendro Roy is determinable by the law of inheritance current at Benares.

On Woopendro's death the Appellant, as the nearest male relative surviving him, performed his shraudh, claimed his property as heir, and shortly afterwards applied to have his own name substituted for that of the deceased as owner of the zemindary on the Collector's register. He is, however, but a remote kinsman of the deceased, being only the brother of his grandmother *ex parte paternâ*, or, to use the phraseology of the Mitacshára, his father's maternal uncle. And accordingly, at the time of this application for mutation of names, some question whether the Appellant was entitled to inherit, and whether the property did not pass for want of heirs to the Crown, was

raised. Thereupon the Board of Revenue consulted their adviser, the Legal Remembrancer, and on his opinion, fortified by that of a Pundit which he had procured through the Registrar of the High Court, determined to recognize the title of the Appellant, who accordingly was put into possession, or left in possession of the property, recorded as proprietor of the zemindary in the Collector's books, and continued to pay the Government revenue assessed upon it up to the date of the institution of this Suit.

In 1863, the Government authorities appear to have changed, for reasons which have not been explained, their view of the Appellant's title; and on the 3rd of August in that year the Suit out of which this Appeal has arisen was commenced against him in the name of the Government of Bengal, as representing the Crown, for the recovery of the real and personal property of Woopendro, on the allegation that upon his death it had escheated for want of heirs, to the Crown.

By a Decree dated the 30th of September, 1864, the Zillah Judge dismissed the Suit, holding that the Government was not entitled to oust the Appellant. The precise grounds of his Judgment it is unnecessary to examine.

On appeal to the High Court, this decision was reversed by two of the Judges of that Court, and the present Appeal has been preferred against their Decree.

The points ruled by the Judgment of the High Court were—

1st. That the Government was not estopped by the acts of its officers in 1861, when the Appellant applied for and obtained the mutation of names, from bringing this Suit.

2nd. That upon the true construction of the section in the Mitacshára, which will be hereafter considered, the Appellant, as the maternal uncle of the father of the deceased, was excluded from the class of "Bund'hus" capable of inheriting; and that consequently, as between him and the Government, he had no title to the property sued for.

Upon these findings the Court decreed that Government should obtain possession of all the real property admittedly in the Appellant's possession, with a certain specified exception, but that, for want of proof as to its value, their claim to the

moveable property should be dismissed; and the Judgment then proceeded as follows:—

"This Decree of Government against Gridhari is final, but it does not become absolute "until the claim of Sohun Loll Lall and Mohun "Lall, who represent themselves to be maternal "grandmother's sister's sons, and that of Harro "Bhoja Misser, the spiritual preceptor of the deceased, have been inquired into.

"The last-named person has filed no evidence, "but his claim cannot be determined until that of "Sohun Lall and Mohun Lall has been set at rest, "and they have filed no evidence at all. They, as "well as the Acharjee or spiritual preceptor, do "not oppose the Defendant Gridhari's claim, but "only prefer a claim in case his is declared to be "invalid; and if they prove themselves to be what "they allege that they are, they are undoubtedly "entitled to succeed as enumerated Bund'hus.

"The case must therefore be remitted to the "Judge, with instructions that he will without delay take up the case, and call on these parties and "any others who may appear to claim the property "of the deceased minor, within a reasonable time "to file their evidence. He will then examine it "thoroughly, and, guided by his estimate of it, "and by Hindoo law, he will either confirm the "present Order in favour of Government as against "them also, or pass in their favour whatever Decree "the law of the case seems to require."

The able arguments before this Committee have been principally addressed to the question raised by the second of the above findings, viz. whether under the law current at Benares the Appellant has not a title to inherit the property preferable to the claim of the Government by escheat; and that question their Lordships will first consider.

Its determination will ultimately be found to depend on the construction to be given to the first article of the sixth section of the second chapter of the Mitacshára. The absolute exclusion of the father's maternal uncle from the list of possible heirs, for which the Respondents contend, can rest on no other ground.

Mr. Forsyth, indeed, argued strongly against the right of the Appellant to inherit, on the assumption that he was not entitled to offer the funeral obla-

tions. But is this assumption well founded? There is evidence, the uncontradicted evidence of the family Priest and others, that the Appellant did, in point of *fact*, perform the shradh of Woopendro; and he seems, in the judgment of the Priest, properly to have performed that function in the absence of any nearer kinsman. It is, however, unnecessary to determine whether this act of the Appellant was regular or not. The issue in this case is not between two competing kinsmen, but between a kinsman of the deceased and the Crown. Let it be supposed, for the sake of argument, that the nearest existing relative of Wopendro at the time of his death had been, not the Appellant but a natural-born son of the Appellant. It is admitted that, on the strictest interpretations of the Mitacshára, such a person is a Band'hu; that the three classes of Band'hus must be exhausted before the King can take for want of heirs; and therefore that the title of the Appellant's son would prevail against the Crown. Now such a Band'hu either is competent to perform the shradh of the deceased, offering some kind of funeral oblation, or he is not. If he be incompetent, it follows that his right to inherit is wholly independent of the doctrine of spiritual benefits derivable from funeral oblations, and is determined solely by kinsmanship. If he be competent, it follows *à fortiori* that his father, who would have been one degree nearer akin to the deceased, would also have been competent; and that *his* exclusion from the line of inheritance, *if* it exists, depends upon some other principle.

It is impossible to read the second chapter of the Mitacshára without remarking the extreme jealousy with which the Hindoo law regarded the right of the King to take on a failure of heirs. The 7th section refuses altogether to recognise that right where the property was that of a Brahman. Admitting it as to the property of the other castes or classes, it expressly says, "*if there be no relations* of the deceased, the preceptor, or on failure of him, the pupil;" and again, "if there be no pupil, the fellow-student is the successor." It thus exhausts the relatives and then interposes between them and the King three classes of heirs not connected with the deceased by blood, or participation in funeral oblations. The title of the King is afterwards

stated affirmatively, thus, "The King may take the estate of a Cshatriya, or other person of an inferior tribe, on failure of heirs down to the fellow-student." So Menu ordains: "But the wealth of the other classes, on failure of all (heirs), the King may take." So far, then, the law would seem to be clear that the King cannot take the property to the prejudice either of a maternal uncle, or a maternal grand-uncle, each of whom is obviously "a relation" of the deceased. What grounds, then, does the sixth section afford for the hypothesis that these two relations are arbitrarily excluded from the list of possible heirs? That section begins by stating broadly, "On failure of gentiles, the Band'hus (rendered by Mr. Colebrooke 'cognates') are heirs." Much has been said about this word "Band'hu." It seems (see note at p. 350 of Mr. Colebrooke's translation of the Mitacshára) to be sometimes used as equivalent to "kinsmen" generally. But in this particular section it may be taken, as defined elsewhere by the Mitacshára itself, to import kinsmen springing from a different family (and therefore opposed to "gotraya" or "gentiles") and connected by funeral oblations. From this class the maternal uncle, or the father's maternal uncle (assuming their connection with the deceased by funeral oblations) can be excluded only by some arbitrary definition. Such a definition the Respondents contend is found in the passage which immediately follows the last citation from the Mitacshára. But is that necessarily so? The author of that treatise goes on to state, "Cognates (Band'hu) are of three kinds; related to the person himself, to his father, or to his mother, as is declared by the following text." And then follows, as a quotation, a more ancient text, (the authorship of which seems, from Mr. Colebrooke's note, to be uncertain), which says, "The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle, must be reckoned amongst his mother's cognate kindred."

This subdivision of Band'hus into three classes is possibly a consequence of that part of the definition already referred to, which treats them as kinsmen connected by funeral oblations. It may be that the Bund'hus of the parent, though connected with him by funeral oblations, would, by reason of remoteness of kinsmanship, not be so connected with the son.

If, for the determination of the question under consideration, their Lordships were confined to the four corners of the Mitacshára, they would feel great difficulty in inferring, from the omission of "the maternal uncle" and "the father's maternal uncle" from the persons enumerated in this text, that either of those relatives is incapable of taking by inheritance the property of a deceased Hindoo in preference of the King. Such an inference, in the teeth of the passages which say that the King can take only if there be no relatives of the deceased, seems to be violent and unsound. For the text does not purport to be an exhaustive enumeration of all Band'hus who are capable of inheriting, nor is it cited as such, or for that purpose, by the author of the Mitacshára,—it is used simply as a proof or illustration of his proposition that there are three kinds or classes of Band'hu; and all that he states further upon it is the order in which the three classes take, viz. that the Bund'hus of the deceased himself must be exhausted before any of his father's Bund'hus can take, and so on.

Again, further doubt is thrown upon the theory of exhaustive enumeration by the passage of the Mitacshára, which is not found in that portion of the Treatise which was translated by Mr. Colebrooke, but has been translated for the purposes of this Suit, and is stated at page 97 of the Record. The general effect of that passage is to introduce, in the case of a trader dying abroad, a new class of remote heirs, viz. his returning co-traders. But this provision is preceded by an enumeration of preferable heirs, which includes among Bund'hus the maternal uncle. Here, then, is a passage, written by the author of the Mitacshára himself, which treats the maternal uncle as capable of inheriting. The learned Judges of the Court below meet this authority by suggesting that the heirship of the maternal uncle, as well as that of the co-trader, may be ex-

ceptional, and confined to the case of the trader dying abroad. Their Lordships, however, cannot admit the reasonableness of this hypothesis, and think that even on the Mitacshára the question under consideration is at least uncertain. That question, however, is not to be governed by the Mitacshára alone. Adhering to the principles which this Board lately laid down in the Ramnad case, their Lordships have no doubt that the Viromitrodaya, which by Mr. Colebrooke and others is stated to be a treatise of high authority at Benares, is properly receivable as an exposition of what may have been left doubtful by the Mitacshára, and declaratory of the law of the Benares school.

The passage cited from that commentary at p. 15 of the Record, and more fully in 9 Sevestre's Reports of Cases in the High Court, p. 552, is explicit. After stating that the term "Sakulya," or distant kinsman, found in the text of Menu, comprehends the three kinds of cognates, the commentator goes on to say,—"The term cognates (Band'hus) in the text of Jogishwara must comprehend also the maternal uncles and the rest, otherwise the maternal uncles and the rest would be omitted, and their sons would be entitled to inherit, and not they themselves, though nearer in the degree of affinity, a doctrine highly objectionable." The passage, as translated at p. 15 of the Record, has "*then* they themselves" in place of "*not* they themselves." If this be the correct reading, it would follow that even if the exclusion of the maternal uncle and others not mentioned in the text relied upon by the respondents from the list of Band'hus were established, they would still, as relations, be heirs, whose title would be preferable to that of the King. But the passage on either view of it declares that they are not so excluded; and it is therefore unnecessary to consider whether the title of any remote relation who could not be brought within the category of Band'hus, or other class of heirs specified by the Mitacshára would prevail against that of the Crown. The learned Counsel for the respondents remarked that this passage of the 'Viromitrodaya' goes no further than to affirm the right of a maternal uncle, and that it says nothing of a maternal grand-uncle. But to say nothing of the use of the term "and the rest," the text

is at least an authority for the proposition that a maternal uncle is a Band'hu. The maternal uncle of the father is therefore a Band'hu of the father, and it is admitted that, failing the Band'hus of the deceased, the Band'hus of the father are entitled to inherit.

This view of the law is confirmed by the majority of the consulted Pundits; it seems also to make the law of the Benares school consistent on the point in question with that of Bengal; and the concurrence of opinions of Mitra-misra, the author of the 'Viromitrodaya,' with Jimuta Vahana, the author of the 'Daya Bhaga,' is not unimportant, since they are stated by Mr. Colebrooke (Preface, p. viii.) to differ on almost every disputed point of Hindoo law.

Their Lordships do not think it necessary to consider at any length the decided cases which are cited in the Judgment under review. It is admitted that there is no case precisely in point; and the authority of those cited, in so far as they go to support the theory that the enumeration of Band'hu, in the text quoted in the Mitacshára, is to be taken as exhaustive, has been shaken, if not altogether overruled, by the decision which, we are informed, has been recently passed by the High Court of Bengal in the case of *Amrito Rumari* v. *Luckynarain Chuckerbutty*. The question under consideration must therefore be held to be an open one even in the Courts of India.

Their Lordships, then, have come to the conclusion that, according to the law by which this case is to be governed, the Appellant was capable of inheriting the property in dispute, and that his title thereto is preferable to that of the Crown; and therefore, without adopting the reasons given for his Judgment, they think that the Zillah Judge did right in dismissing the Suit. This conclusion necessarily disposes of this Appeal. Their Lordships, however, deem it right to add that, even had they agreed with the learned Judges of the High Court in their view of the law of inheritance, they could not have concurred in the Decree under appeal. Their Lordships do not impugn the correctness of the conclusion to which both the Courts below came on the question whether the proceedings in 1861 estopped the Government from bring-

ing this Suit. But the effect of these proceedings was to determine, if it were previously doubtful, the fact of possession. The Respondents, therefore, were in the position of Plaintiffs in an ordinary suit in the nature of an ejectment. They could only recover by the strength of their own title. Accordingly, it lay upon them to prove at least *prima facie* that Wopendro died without heirs; and, on the other hand, the Appellant was entitled to defend his possession not only by proof of his own title, but by setting up any *jus tertii* that might exist. By an alternative plea he did set up such a bar to the Respondents' suit; and the title of those persons who, he says, are, failing himself, the heirs to Wopendro, has never yet been determined. The Decree under appeal would remit the cause to the Judge, in order to allow those persons who, according to the practice in India, have intervened as objectors, to litigate their title with Government, casting, apparently, the burden of proof on them. But it seems to deprive the Appellant of his right to defend his possession, on the ground of an existing *jus tertii*.

It is unnecessary, however, to say more on this point, since the conclusion to which their Lordships have come on the Appellant's own title obliges them humbly to recommend to Her Majesty that the Decree of the High Court be reversed, and that in lieu thereof it be ordered that the Appeal to the High Court from the Decree of the Zillah Judge be dismissed with Costs. The Respondents must pay the costs of this Appeal.