*Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of the Collector of Masulipatam* v. *Cavaly Vencata Narainapah, from Madras, delivered July* 30, 1860.

Present:

Lord Justice Knight Bruce.
Sir Edward Ryan.
Lord Justice Turner.
Sir John Taylor Coleridge.

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Sir Lawrence Peel.
Sir James W. Colvile.

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OF the various questions that have arisen in this case, the only one which appears to have been argued in the Court of Sudder Dewanny Adawlut at Madras—certainly the only one decided by that Court—is, whether, on the death of a Brahmin without heirs, the Sovereign power in British India is entitled to take his estate by escheat. The decision of the Sudder Court upon this question strikes at the root of the Appellant's title; and its correctness is therefore the first thing to be now considered.

The learned Judges of the Sudder Dewanny Adawlut have treated the question as one to be determined merely by Hindu law; and, recognizing the general right of the Crown or other ruling power by escheat when there is a failure of heirs, have adopted and enforced an exception as to the property of Brahmins, which is supposed to result from certain texts in Menu and other ancient authorities. The arguments addressed to us have also assumed the applicability of the Hindu law;

and their Lordships therefore propose to deal primarily with the question, whether that law, as it now obtains in British India, has, if applicable to the case, been properly held to be fatal to the Appellant's title.

For the exposition of the Hindu law on the point, it is unnecessary to go back further than the "Mitacshara." That treatise, the highest authority on the law of inheritance in the part of India where the zemindary, the subject of this suit is situate, comprises, amongst other authorities, the passage of Menu which is principally relied upon. It is, however, from the consideration of the whole chapter of the work, and of the different authorities which are there collected, taken together, that we are most likely to arrive at a right conception of the law.

The important passages are in Articles 3, 4, and 5, of Chapter II, section 7.

From these it would appear that the beneficial enjoyment of a Brahmin's property ought not on his death without heirs to pass to the King; that it ought, in some way or another, to pass to other Brahmins. But the texts also show that it is not to pass to Brahmins generally, or even to any definite or well-ascertained class of them. The persons to take the beneficial interest are to be Brahmins having certain spiritual qualifications; they are to be pure in body and mind, and are to have read the three Vedas. If this be the law, it seems to imply a power of selection; and a right of possession, at least intermediate, of the property in somebody. It cannot be supposed that the first Brahmin who could lay hands upon the property of a member of his caste dying without heirs was to hold it, subject, perhaps, to the condition of showing that he possessed the personal qualifications which the law requires.

It appears to their Lordships that the passage quoted by the Mitacshara from Nareda, in the very section which cites the prohibition of Menu, shows what the law in its utmost strictness was. That passage is—"If there be no heir of a Brahmana's wealth, on his demise it must be given to a Brahmana, otherwise the King is tainted with sin." In other words, the King is to take the property, but to take it subject to the duty, which he cannot

neglect without sin, of disposing of it at his discretion amongst Brahmins of the kind contemplated by the preceding texts.

If this be so, it appears to their Lordships that, according to Hindu law, the title of the King by escheat to the property of a Brahmin dying without heirs ought, as in any other case, to prevail against any claimant who cannot show a better title; and that the only question that arises upon the authorities is, whether Brahminical property so taken is, in the hands of the King, subject to a trust in favour of Brahmins. In this suit, where the issue is between the Government claiming the property (whether subject to a trust or not), by escheat, and a party claiming by an adverse title, it is unnecessary to decide whether the duty imposed upon the King is one of imperfect obligation, or a positive trust affecting the property in his hands, or whether, if a trust, it is or is not one incapable of enforcement by reason of the uncertainty of its objects. It is also unnecessary to decide on the arguments addressed to us concerning a distinction or supposed distinction between the Brahmins who have been called "sacerdotal Brahmins" and the ordinary members of the caste. For assuming that the Appellant's title is to be governed by Hindu law, and assuming that there is no valid distinction in this matter between sacerdotal and other Brahmins, their Lordships, for the reasons above stated, would be unable to concur in the judgment under review.

Their Lordships, however, are not satisfied that the Sudder Court was not in error when it treated the Appellant's claim as wholly and merely determinable by Hindu law. They conceive that the title which he sets up may rest on grounds of general or universal law.

The last owner of the property in question in this suit derived her title under an express grant from the Government to her husband, a Brahmin, whom she succeeded as heiress-at-law. If, upon her death, there had been any heirs of her husband, those heirs must have been ascertained by the principles of the Hindu law; but by reason of the prevalence of a state of law in the Mofussil which renders the ascertainment of the heirs to take on the death of an owner of property, a question substantially dependent on the *status* of that owner.

Thus the property being originally, and remaining, alienable, might have passed by acts *inter vivos* in succession to British subject, to foreign European owner, to Armenian, to Jew, to Hindu, to Mahometan, to Parsee, or to any other person, whatever his race, religion, or country. According to the law administered by the Provincial Courts of British India, on the death of any owner, being absolute owner, any question touching the inheritance from him of his property is determinable in a manner personal to the last owner. This system is made the rule for Hindus and Mahomedans by positive regulation; in other cases it rests upon the course of judicial decisions. But when it is made out clearly that by the law applicable to the last owner, *there is a total failure of heirs*, then the claim to the land ceases (we apprehend) to be subject to any such personal law; and as all property not dedicated to certain religious trusts must have some legal owner, and there can be, legally speaking, no unowned property, the law of escheat intervenes and prevails, and is adopted generally in all the Courts of the country alike. Private ownership not existing, the State must be owner as ultimate lord. Consequently, the claim of the Government, in the present instance, might have been considered with reference to this principle.

In the case of the East India Company *v.* the Mayor of Lyons (1 Moore, East Indian Appeals), the question arose whether an alien could hold lands in British India. Some of those lands were without the bounds of a Presidency town. It was decided, on appeal here, that that part of the law of England which disabled an alien from holding land against the claim of the Crown had not been introduced into India; but the reasons and principles of the decision do not appear to their Lordships to be inconsistent with the view that they take of the present controversy.

In the present case, if the Hindu law had expressly provided that, upon the death of a Brahmin without heirs, ordinarily so-called, his property should pass to some definite person or class of persons; if, for instance, it admitted, in the case of a Brahminical succession, collaterals more remote than it would admit in the case of succession to a Sudra,

there would be ground for excluding the title of the Crown, because there would, by Hindu law, be some person in the nature of an heir capable of succeeding; but here the Court of Sudder Dewanny Adawlut rests its decision on what it terms "the primary declaration of Menu that the property of a Brahmin shall never be taken by the King." That declaration is contained in an article (see Menu, 1 and 189) which, assuming a complete failure of heirs, negatives the King's right to Brahminical property, whilst it affirms his title to the wealth of all other classes in such circumstances. In so dealing with the question, the Sudder Court was, we think, applying the actual or supposed Hindu law, in derogation of the general right of the British Sovereignty.

Their Lordships' opinion is in favour of the general right of the Crown to take by escheat the land of a Hindu subject, though a Brahmin, dying without heirs; and they think that the claim of the Appellant to the Zemindary in question (subject or not subject to a trust) ought to prevail, unless it has been absolutely, or to the extent of a valid and subsisting charge, defeated by the acts of the widow Lutchmedavummah in her lifetime. In the latter case, the Government will, of course, be entitled to the property subject to the charge.

It follows that the decree of the Sudder Adawlut cannot stand. The manner in which it ought to be varied depends upon the decision of the questions which have been raised on this appeal touching the effect of the acts of Lutchmedavummah in her lifetime. On none of these has the Sudder Adawlut adjudicated. On some of them, as, for instance, the effect of the Collector's acts in 1841, it is particularly desirable to have the judgment of that Court. Again it appears to their Lordships very doubtful whether the present record affords the materials requisite for the satisfactory decision of some of those questions. There is little, if any, legal evidence of the nature of the advances made to the widow, or of the necessity for them. It may also be material to know what was the nature and what the effect of the proceedings by which the execution of the Razeenameh was suspended. In these circumstances their Lordships, though they would have been glad to determine, if they

could, this long litigation by a final decree, do not feel that they can safely do more than remit the appeal to the Sudder Adawlut for further hearing, with a declaration that the general right of the Government by escheat (subject or not subject to a trust) has been established. It is right, however, to state further their Lordships' opinion that the proceedings of the Sudder Adawlut, under the dates of the 27th of October, 1853, and the 21st of October, 1854, at pp. 32 and 34 of the Appendix, do not constitute any bar to the title of the Appellant in this suit; but that they do amount to an award of possession, with which, in the present state of the cause, and until its final adjudication, their Lordships will not interfere.

Their Lordships desire again to suggest, for the consideration of the parties, that some arrangement for the surrender of the Zemindary to Government, upon payment of what is due to the Respondent for the advances actually made, would probably meet the real justice of the case, and save both parties from protracted litigation.