authorities in support of the whole blood's succession. But, as in the course of the argument, exception was taken to a decision of this Court (reported in Sutherland's Weekly Reporter, Volume II., page 151) which affirmed the principle that uterine and half-brothers succeeded equally to the undivided immoveable estate of the deceased brother, we have thought it right, as the question is one of considerable importance, to go into the authorities, and explain the law of the case more at length than in that decision.

We are of opinion, therefore, that in cases of property undivided and immoveable, which is the case disclosed by the pleadings in this special appeal, uterine and half-brothers succeed equally to the estate; but that, where there are no brothers living, the nephews of the whole blood have a preferential right of succession over those of the half-blood.

On this view of the law, Kylash Chunder, the special respondent, is entitled to succeed to his uncle's estate; and we accordingly confirm the order of the Judge, and dismiss this special appeal with costs.

With regard to the cross-appeal filed by Kylash Chunder, we observe that the finding of the Judge was one of fact on the evidence, and with this there is no interference possible in special appeal.

There remains the special appeal of Kylash Chunder, and on this point we think that the Judge was clearly wrong. He threw out a certain portion of the claim on the ground that it ought to have been included in the original suit brought by Goluck Monee; and that, as it was not so included, Kylash the son was barred by section 7 of Act VIII. of 1859 from preferring it.

On this we observe that, when Goluck Monee instituted the suit on behalf of Kylash, the latter was a minor; aud there is no law that prevents a minor, when he comes of age, suing in his own name for anything that his guardian, either through ignorance or negligence, has omitted to prosecute. If this were the law, no minor would be safe; and we do not see how Kylash, when he attained majority, was debarred from claiming, and that in the suit originally instituted by his guardian, such property as that guardian had omitted in the schedule of plaint.

On this objection, the case must be remanded in order that the Judge may try the question of Kylash's right to the extra property claimed, subject, of course, to the remarks on the nature of property claimable by nephews of the whole blood, preferentially to those of the half-blood noted in the body of our judgment in the appeal of Grees Chunder.

The 25th May 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Case No. 3717 of 1864.

Jurisdiction (of Small Cause Courts)—Limitation—Deduction of time of closing of Courts.

Special Appeal from a decision passed by the Principal Sudder Ameen of Behar, dated the 6th September 1864, affirming a decision passed by the Sudder Ameen of that District, dated the 16th January 1864.

Musst. Maneerun (Plaintiff), *Appellant,*

versus

Musst. Luteefun (Defendant), *Respondent.*

Messrs. R. E. Twidale and *C. Gregory* for Appellant.

Baboo Grish Chunder Ghose for Respondent.

Suit for contribution below 500 rupees, and also to set aside an alleged collusive sale by the defendant. Appeal dismissed, it being held that the addition in the plaint, regarding the cancelment of the sale, was mere surplusage only intended to evade the jurisdiction of the Small Cause Court, and to secure an appeal not permitted by law.

The time that the Courts are closed must be deducted in computing the period of limitation.

This was a suit by the special appellant (plaintiff in the Court below), as purchaser of a right of action, to recover a sum paid by her vendor in excess of his quota in respect of a decree passed against Ashruf Ali and the defendant jointly, and which decree the vendor Kulb Ali satisfied with his own funds. Special appellant claimed Rupees 320 odd on this account, and also to have cancelled a deed of sale under which the property of Luteefun had been collusively made over to a third party.

Both lower Courts held that the sale was valid, and that a decree could only be given against Luteefun personally. And the plaintiff appeals specially against that part of the lower Court's order which refuses to cancel the sale of the property.

An "*in limine*" objection is taken by the special respondent to the hearing of this appeal on the ground that the suit was pro.

perly one for contribution, and of a nature cognizable by a Small Cause Court, from which Court's order (the amount being under Rupees 500) no appeal would lie, and that the addition to the plaint for the cancelment of the sale was not included in the valuation of the suit, but is so much surplusage foisted in to take the suit out of the category of Small Cause Court cases.

To understand this objection, it is necessary to go somewhat into the details of the case.

It appears from the record that Ashruf Ali sued Shahadut Hossein, Luteefun his wife, Kaneej Fatmah his daughter, and one Kulb Ali, co sharers in the property, for their quotas of rent, which he, Ashruf Ali, had been obliged to pay to save the estate from sale.

Luteefun's defence was that she was not in possession of the property, and that neither her daughter Kaneej Fatmah, nor her husband Saahadut Hossein, had anything to do with the suit.

Ashruf Ali got a decree on the 6th of March 1861 against all the defendants, except Kaneej Fatmah and Shahadut, Luteefun's husband; and in the first instance took out execution against Luteefun's property.

He was met by the daughter Kaneej Fatmah, who objected to the sale, on the ground that the property had been conveyed to her by her mother without consideration, during the pendency of the former suit, on the 14th April 1860, that is:

Kaneej Fatmah's objection was allowed on the 6th November 1862, and Ashruf Ali's heirs proceeded immediately against the remaining judgment-debtor, Kulb Ali, from whom they recovered all that was due.

Kulb Ali, having thus satisfied the decree in full, and having thereby paid more than his quota, sold his right of action to recover the excess payment to the special appellant in this case, who now sues Luteefun personally, and also to have what she calls the collusive sale to Kaneej Fatmah set aside.

These are the facts of the case, and on them the special respondent contends that the suit is one coming under section 3 of Act XLII. of 1860, and not appealable, as the amount sued for is under 500 rupees. She designates the claim to have the sale to Kaneej Fatmah annulled as a misjoinder, inasmuch as, until special appellant got a decree for the excess quota claimed, she would have no right to contest the summary award of the Moonsiff at all. Special respondent adds that, even were the two claims to be considered as forming one and the same ground of action, the special appellant would be unable to contest the latter, as the time allowed by law for a suit to reverse a summary decision had passed.

With respect to the latter part of this objection, we observe that a suit brought to reverse the Civil Court's order would not have been barred by limitation: for, although the order allowing the sale was dated on the 6th of November 1862, it appears from the records of this Court that the Civil Courts were closed till the 22nd November 1863, and that this suit was brought on the first open day, *viz.*, the 23rd, so that limitation would not apply.

But on the principal question we are of opinion that the special appellant has mixed up two different causes of action; and that, for the purposes of this appeal, we ought only to look to the substantive claim to recover the excess payment from Luteefun personally, and not to a property which was never mortgaged for the debt, nor in any way connected with it.

The special appellant sued to obtain a money decree, valuing her claim at the amount sought to be recovered, and, until she obtained that, could have no possible right to object to an order releasing Kaneej Fatmah's property from attachment. If, after getting the decree, she had chosen so to object in another suit, with a view to satisfy that decree, by the sale of the property which she believed to be her judgment-debtor's, it would have been a different thing; but when she started this case, she had not only got no decree for the money, but had nowhere shewn that the cancelment of the sale was necessary to her getting the amount of any decree that might be passed in her favour, nor that Luteefun had not other and sufficient funds to satisfy such decree when obtained. It is nowhere pleaded, moreover, that the property released as being Kaneej Fatmah's was Luteefun's share of the estate on which a quota of revenue was due, and there is no reason for supposing that the addition to the plaint was anything more than intentional surplusage, the object of which was in the

event of the suit being dismissed or only partially decreed, to evade the jurisdiction of Act XLII. of 1860, and to secure an appeal not permitted by law.

The suit was properly a simple one for contribution, and, as such, one that would be decided by a Small Cause Court; and, as the amount claimed was under 500 rupees, no appeal lies.

We, therefore, dismiss this special appeal with costs.

The 25th May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Execution of decree (Immoveable property in occupancy of ryot).

Case No. 2488 of 1864.

Special Appeal from a decision passed by the second Principal Sudder Ameen of Hooghly, dated the 27th May 1864, modifying a decision passed by the Moonsiff of that District, dated the 5th August 1863.

Soobhudra Dossee (Plaintiff), *Appellant,*

versus

Gooroo Dyal Singh (Defendant), *Respondent.*

Baboo Otool Chunder Mookerjee for Appellant.

Baboo Mohendro Lall Shome for Respondent.

Procedure to be followed in the execution of a decree for immoveable property in the occupancy of a ryot.

It appears that one Goluck Monee was in possession of certain property as the heir of her husband, and it is alleged by the special appellant, Soobhudra Dossee, that a mokurruree pottah was granted by her to one Gholam Sufdar, who conveyed it to her son; and that, after her son's death, she was in possession of the same. After Goluck Monee's death, Banee Madhub Bhadooree and his two brothers, who were sons of her husband's brothers, succeeded to the property. Banee Madhub, it appears, conveyed the whole property to one Ram Lal, whereupon his two brothers sued for their 10 annas share of the property, making Soobhudra Dossee, the third party, defendant. Plaintiffs obtained a decree against Ram Lal, Soobhudra getting her costs. The plaintiffs then sold their rights under the decree to one Gooroo Dyal, who ousted Soobhudra from her ryotee land. She then, under section 230 of Act VIII of 1859, petitioned to have an enquiry made as to her dispossession, and the Court dismissed her claim as regards 10 annas of the property, but decreed her claim as to 5 annas of it and gave her damages in proportion. On appeal the Judge affirmed the lower Court's decree, with this exception that it rejects her claim to damages, inasmuch as Ram Lal, the owner of the 5 annas of the property, had not claimed them.

Plaintiff now appeals specially, urging that, as she admittedly was a ryot in possession, section 224, and not 230, was applicable to the matter; that she should have been retained in possession as ryot, and should not, in a suit for title, when, by her being made a defendant, her possession as tenant was admitted, be ousted by an enquiry under section 230; that consequently the Court, as she was admittedly a defendant, quash the proceedings under section 230, and direct that she be retained in possession, leaving the parties, who have obtained a decree, to bring any other suit against her that they may be inclined to bring.

We think that, on the facts of this case, the enquiry under section 230 was altogether illegal, and that plaintiff, who was sued as a ryot in possession, should have been retained in possession, and possession to the decree-holders given in the mode suggested in section 224 of Act VIII. of 1859. Under this view the whole proceedings under section 230 are quashed. The special appellant, the ryot in possession, will be retained in possession, and the decree holders obtain possession in the mode laid down in section 224 of Act VIII. of 1859, and the costs of this special appeal will be borne by special respondent.