The 25th May 1865.

Present:

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

Hindoo Law (succession)—Whole and Half-brothers and Nephews—Minors (Right of Suit by —Laches of Guardian.

Special Appeals from a decision passed by the Judge of Dacca, dated the 6th September 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 29th August 1862.

Case No. 3595 of 1864.

Kylash Chunder Sircar (Plaintiff), *Appellant,*

versus

Gooroo Churn Sircar and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Kishen Doval Roy* for Appellant.

Baboos Chunder Madhub Ghose and *Romes Chunder Mitter* for Respondents.

Case No. 3684 of 1864.

Gooroo Churn Sircar and others (Defendants), *Appellants,*

versus

Kylash Chunder Sircar and others (Plaintiffs, *Respondents.*

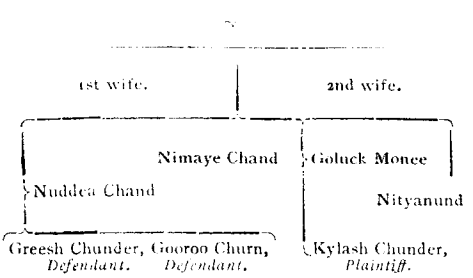
Baboos Onoocool Chunder Mookerjee and *Kalee Mohun Doss* for Appellants.

Baboos Sreenath Doss and *Kishen Dyal Roy* for Respondents.

In cases of property undivided and immoveable, uterine and half-brothers succeed equally. Where no brothers are living, the nephews of the whole blood have a preferential right to succeed over those of the half-blood.

A minor when he comes of age is not precluded from suing in his own name for anything that his guardian, either through ignorance or negligence, has omitted to prosecute.

THE accompanying genealogical table will assist the consideration of these cases :—



Gobind Pershad had two wives. By the first, he left a son named Nuddea Chand, who, in his turn, had two sons, Greesh Chunder and Gooroo Churn, the present special appellants.

By his second wife he had two sons, Nimaye Chand and Nityanund. Nityanund died childless in 1255 B S, and the present suit was brought by Goluck Monee, as mother and guardian of Kylash Chunder, the son of Nimaye Chand, for possession of the entire property left by Nityanund as nearest of kin.

Both lower Courts found that the plaintiff Kylash Chunder was a minor at the time the suit was instituted, and that his mother and guardian rightly brought the suit, and that, according to Hindoo Law, the uterine brother had a preferential right to succeed over the brother of the half-blood, and *pari passu* the son of such uterine brother. With regard to the share of a house, and of certain moneys claimed by the plaintiff, the Judge held the suit not to be proved.

Both sides appeal specially, the plaintiff under section 348 of the Civil Procedure Code, the defendants in the regular course.

We will consider the grounds of appeal urged by the defendants first. They are (1) that the question of the plaintiff's majority has been wrongly decided, and (2) that, according to Hindoo Law, the brothers of the half-blood would take equally with the brothers of the full blood any property left by one of their number, and that the same principle would apply to nephews.

The first objection may be disposed of very shortly. The Judge found as a fact, on the evidence, that the plaintiff was not of full age when his mother instituted the suit in his behalf; and, besides, whatever Goluck Monee's laches may have been in regard of time, her son has now attained majority, and has taken his mother's place, and the present suit has been regularly tried in his presence. Moreover, limitation would not be counted against a minor, because his guardian, either from neglect or ignorance, omitted to bring a suit within time during his minority. He would still, when arrived at majority, be entitled to bring a suit on his own account. In no point of view, therefore, are the defendants' (special appellants') objections on this head tenable.

In support of the second objection, the special appellants have produced a number of extracts from the works of Hindoo Commentators, which it will be as well to go through *seriatim*, joining with them those

authorities relied on by the special respondent, and thus bringing into juxtaposition all that is advanced by either side. The point involved is one of very great importance, and the grounds on which its decision rests should be distinctly referable to authority which no Hindoo can repudiate.

In support of the claim of brothers of the half-blood to succeed equally with uterine brothers to the property of a deceased brother, in all cases where the estate is joint and undivided—and in the present suit it is admitted on all hands that, when Nityanund died in 1255 B. S., the family was joint and undivided, separation not having taken place till 1258 B. S.—the following authorities are quoted :—

Vyavasta Durpana, page 187.

Colebrooke's Dyabhaga, Chapter XI., section V, para. I. "On failure of her (*i e.*, the mother) it (*viz.*, the inheritance) goes to the brothers."

And para. 10 holds that the term 'brothers' is applicable both to the whole and to the half-blood, thus—"The text of Yajvya Walcya also shows that the term 'brother' is applicable both to the whole and to the half-blood;" else if it intended only the uterine, and of course, whole brother, the author would not have specified that the "uterine brother should retain or deliver the allotment of his uterine relation;" for the whole blood would be signified by the single term "brother."

"Therefore, the succession of brothers, whether of the whole or of the half blood, is declared by the passage before cited."

Again, Yama, one of the most ancient Commentators, says: "The whole of the *undivided immoveable* estate appertains to all the brethren, but divided immoveables must, on no account, be taken by the half-brother."

"All the brethren" is explained in the next paragraph (para. 36, Dyabhaga, Chapter XI.) to mean all "whether of the whole blood or of the half-blood."

And the text is similarly explained in Colebrooke's Digest, Volume III., page 518, thus: The meaning is that, if any immoveable property of divided heirs, common to brothers by different mothers, have remained undivided, being held in co-parceny, the half-brothers shall have equal shares with the rest, but the uterine brother has the sole right to the *divided* property, moveable or immoveable."

Following this is a case quoted in Volume II., Macnaghten's Hindoo Law, page 66, wherein it is laid down as prevailing law, that, where the property is undivided, half-brothers share equally with whole brothers.

For the other side, it is contended that the weight of authority is in favour of the uterine brother's preferential right, and the following precedents are quoted :—

Macnaghten's Hindoo Law, Volume I., page 26.

"In default of father and mother, brothers inherit:—*first*, the uterine associated brethren; *next*, the unassociated brethren of the whole blood; *thirdly*, the associated brethren of the half-blood; and *fourthly*, the unassociated brethren of the half-blood."

Elberling's Treatise on Inheritance, page 76, in which precisely the same words are used.

Dya Krama Sangraha, page 15, para. 5—"Where uterine and half-brothers compete, and both were associated with the deceased, the associated whole brother exclusively takes the inheritance."

Special respondent also refers to page 187 of the Vyavasta Durpana, and quotes Dyatotwa, page 54—"The uterine brother is, however, first to inherit: for, although brothers of the whole and half-blood are begotten by the same father, yet, as the uterine brother offers oblation cakes to six ancestors of the deceased, the succession first devolves on him exclusively, and not on the brother of the half-blood who offers oblation cakes to three ancestors only."

In these quotations there is, no doubt, a great *primâ facie* conflict of authority. But a careful examination of the texts adduced by the special respondents shews, we think, that the preferential right to succession by brothers of the whole blood depends altogether on the nature of the estate; and that as there is no specific mention in those texts that the estate, the succession of which is in question, is an *undivided immoveable* one, it is only a fair deduction that, as other texts of superior authority distinctly limit the uterine brother's preferential right to property divided and moveable, to hold that the authors of the Dyatotwa and Dya Krama Sangraha refer to that description of estate, and do not claim for uterine brothers a larger right than for brothers of the half-blood when the property is undivided and immoveable. And this interpretation is consonant with reason and natural law. The property being ancestral and undivided, the deceased brother's share represents something that descended to him from his father, and was not acquired by any exertions of his own. It

was emphatically the father's property; and, as all the brothers, both uterine and of the half-blood, stood in the same degree of relationship to the original owner of the property, it is but reasonable that any part of that property, which circumstances may cause to be divided, should be apportioned equally amongst all the sons.

But, were the difficulty of reconciling the apparently contradictory texts above quoted insuperable, the question would still remain as to the relative weight of authority. Now, the Dyabhaga is the leading Law Commentary of Bengal; its authority is supreme, and no Hindoo of the Lower Provinces would venture to call it in question. Again, the text of Yama is entitled to every respect. He was one of the twenty sages who composed the *Sanhitas* from which the "*Dhurma Shastra*," or general body of the law, was compiled. These sages were, and are believed by the Hindoos to have been, divinely inspired, and their expounding of the law is held everywhere, where the Bengal Law prevails, to be indisputable.

So that, even if the authorities quoted on the other side do refer to cases of undivided immoveable estates of which there is no proof, still, as they are opposed to the texts of much higher authority, they would have to be put aside

In a word, therefore, as the highest authorities on ancient Hindoo Law expressly state that both uterine and half-brothers succeed equally to a deceased brother's share when the estate is undivided and immoveable, and as the other authorities quoted to prove the contrary do not mention the description of estate to which the brothers of the whole blood would have the preferential right to succeed, we are of opinion that the latter texts refer to estates which are not undivided and immoveable, or to cases where all the brothers were not associated, and that, therefore, the brother of the half-blood of Nityanund, Nuddea Chand, would, had he survived, have been entitled to succeed equally with the uterine brother Nimaye Chand.

There remains the question touching the inheritance of the brother's sons. Admitting that uterine and half-brothers succeed equally to undivided immoveable estate, do their sons stand in the same category, or has one a preferential right over the other?

On this point all the Commissioners seem to agree; and we have been unable to find, nor has the special appellant's pleader been able to show us, any authority for extending to sons of half-brothers equal rights with those of brothers of the whole blood.

In support of the preferential right of sons of a brother of the whole blood, we find in the Dyabhaga the following passage:—

"Among these (*i. e.*, the nephews) the succession devolves first on the son of a uterine brother; but, if there be none, it passes to the son of the half-brother, for the text expresses 'an uterine brother shall retain or deliver the allotment of his uterine relation.' Indeed, the son of the half-brother, being a giver of oblations to the father of the late proprietor, together with his own grand-mother, to the exclusion of the mother of the deceased owner, is inferior to the son of a whole brother who is a giver of oblations to the grand-father in conjunction with the mother of the deceased." (Dyabhaga, section 6, para. 2, pages 212-13.)

So also the Dya Krama Sangraha, section 8, page 15—

"In default of brothers, the brother's son of the whole blood is the successor, and not a nephew of the half-blood who confers less benefits compared with the brother's son of the whole blood, since the mother and grand-mother of the deceased owner do not participate in the oblations presented by the nephew of the half-blood to the father and grand-father."

Para. 6 is even stronger on the same point: "Where two nephews were either associated or unassociated with the deceased, one of the whole, the other of the half-blood, then, in both instances, the succession devolves on the nephew of the whole blood."

Again, Colebrooke, in his Digest, Volume III., page 524, remarks: "In respect of immoveable undivided property, no author has said that nephews of the whole and half-blood have equal claims by parity of reasoning as in the case of brothers, and the text of the Legislator is not explicit on this point."

It would appear from these authorities—authorities which have not been controverted—that there is, under Hindoo Law, no analogy between whole and half-brothers and their respective sons; and that, whilst there are some authorities which might, at first sight, seem to make the whole brothers succeed in preference to those of the half blood, all are agreed that, when the succession devolves on nephews, those of the whole blood permptorily exclude those of the half-blood.

Taking this view of the case, we might have contented ourselves with citing the

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-