Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sheo Soondary v. *Pirthee Singh and others, from the High Court of Judicature at Fort William, in Bengal; delivered* 3d *May* 1877.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THE single question in this appeal is whether in a joint family a brother of the half blood is entitled to succeed equally with a brother of the whole blood to the share of a deceased brother. It arises at the close of a long litigation, and in consequence of a remand which was made by Her Majesty, upon the recommendation of this Committee, on the hearing of a former appeal in this suit. It is not necessary to recount at any length the proceedings in the suit, because the determination of the above question will support either the decree of the subordinate Judge or the decree of the High Court which reversed that decision; but it may be stated that the action was brought by the present Respondent, Perthee Singh, against the Court of Wards, who were representing Sheo Soondary, to recover an estate called Talook Sunkra in Zillah Bhaugulpore. The estate had belonged to Soomaer Singh, the common ancestor of the Plaintiff and Sheo Soondary, and on the original hearing of the suit in India, and upon the former appeal here, it appeared that two only

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of his descendants were before the Court, namely, the Plaintiff and the Defendant. Pirthee Singh was one of the sons of Soomaer, and Sheo Soondary was a granddaughter of Manick, another son. Manick left an only son of the name of Durbijoy, and he had died leaving his daughter, Sheo Soondary, as his heir and representative.

The questions originally contested in the suit were whether Pirthee Singh was the legitimate or illegitimate son of Soomaer Singh, and an issue was directed to try that question. The other question was one of law, whether the law of primogeniture obtained in the family of Soomaer Singh or not. Those were the two questions upon the former appeal. It became, however, necessary to ascertain whether the family were governed by the law of the Mitakshara or by the law of the Dayabhaga, and how that was remained uncertain upon the record as it was brought up before this Committee. The result of the appeal was that their Lordships recommended that the cause should be remanded to try the following issues: "First: Whether Soomaer Singh left any and " what legitimate sons other than Manick Singh " in the pleadings mentioned, and the Respon- " dent; and, if so, whether they are living or " dead? And if any of them are dead, when " they respectively died, and whether they left " any and what male descendants." That issue was sent down, because upon the hearing of the appeal it appeared that there were other sons of Soomaer besides those who were the parties to the record, and their Lordships felt that it would not be right to give a decision disposing of this property without some inquiry being made respecting the other sons. The facts which appeared upon the trial of this issue have led to the question which is now before their

Lordships for decision. The second issue was, "Whether the estate of Soomaer Singh which "was formerly within the limits of Zillah Beer-"bhoom, having been transferred to Zillah "Bhaugulpore, the succession thereby becomes "liable to be regulated by the law of the "Mitakshara, or whether by reason of any local "or family custom such succession, notwith-"standing the transfer, continues to be governed "by the law of the Dayabhaga." The finding of both the Courts upon that issue was that this family is governed by the law of the Dayabhaga.

Upon the trial of the first issue it appeared that Soomaer left six sons by three wives; Manick the son of the eldest wife; four others, Durbar, Tiluk, Hurry, and Ghansi, sons by his second wife; the Plaintiff, Pirthee Singh, being the only son of the third. The question arose below whether Pirthee Singh, as a brother of the half blood, succeeded equally with Tilluk, brother of the whole blood, to the shares of Durbar, Ghansi, and Hurry, who are dead. The subordinate Judge held that he did not so succeed; that he was only entitled to his own share as one of the six sons of Soomaer, and, therefore, to only one sixth of the property. Upon an appeal to the High Court that decision, so far as it related to the share of Pirthee Singh, was reversed, and it was held that he was entitled altogether to six annas and eight pies share of this estate, made up of the shares to which they held him to be entitled as heir to his half-brother, and his own share.

Their Lordships have been referred to the Dayabhaga and the commentators upon the text of the Dayabhaga, and they have also been referred to a decision of the full bench of the High Court of Bengal, in which the question now to be determined was raised and very fully

considered. That decision is opposed to the judgment of the High Court in the case under appeal; but at the time this judgment was given, the decision of the full bench had not been delivered, and the High Court appear to have determined the question in this suit without going very fully into the doctrine. They probably acted upon certain decisions which have been given by Divisional Courts of the High Court of Bengal, which held that the half brother was entitled to share in the same way as a uterine brother. The cases which have so held are *Tiluk Chunder Roy* v. *Ram Luckhee Dossee*, 2nd Weekly Reporter, 41, *Kylash Chunder Sircar* v. *Gooroo Churn Sircar*, 3rd Weekly Reporter, 43, (in which the Court went fully into the text books and commentators,) and *Shib Narain Bose* v. *Ram Nidhee Bose*, 9th Weekly Reporter, 87. These decisions come near together in point of time. They are not decisions running over a long period of years, which might in that case be considered to have declared the law with regard to the succession to property, and which under such circumstances their Lordships would have been unwilling to disturb; but they are decisions of a recent date and coming very nearly together.

The recent case in which the question came before the full Court for consideration is *Rajkishore Lahoory* v. *Gobind Chunder Lahoory* (1 Indian Law Reports, Calcutta Series, 27). That case is entitled to great authority from the manner in which it came before the Court. The question is precisely that which is raised in the present appeal, and upon the hearing before the Divisional Bench, the judges, upon being referred to the decisions in the Divisional Courts on the subject, felt considerable doubt whether they had been correctly decided; and the question being one of great importance,

they thought it right to refer the then appeal for decision to the full Court. That accordingly was done. Mr. Justice Macpherson gave the judgment of the Court, in which all the other Judges, being five in number, concurred.

It cannot be denied that the construction of the text in the Dayabhaga itself is not free from difficulty. In the early sections of the chapter in which it is discussed (the 11th chapter), the law appears to be laid down with tolerable clearness, that the half brother does not succeed to the share of his half brother's estate in the case of an undivided family which has never separated. But in clause 35, a doubt is thrown upon the certainty of the doctrine thus laid down by a citation from Yama, which runs thus: "The "whole of the undivided unmoveable estate "appertains to all the brethren; but divided "unmoveables must on no account be taken "by the half brother." This citation occurs in one of a series of paragraphs which discuss the effect of brothers becoming re-united after a separation; and it would appear that the law is different with regard to half brothers who, having once separated, are re-united, from that which governs the case of half brothers who have never separated.

Their Lordships do not think it necessary to discuss at length the different passages in the Dayabhaga and the commentaries of text writers upon them, because that has been done very fully in the able and well considered judgment of the High Court delivered by Mr. Justice Macpherson. It is a question of positive law, and finding the law expounded, and, as their Lordships think, correctly declared by the High Court, it is sufficient to say on the present occasion that they adopt the opinion of the High Court and the grounds upon which their judgment is founded. There is no doubt that the

brother of the whole blood stands with regard to religious offices in a higher position than the brother of the half blood. The brother of the whole blood offers three oblations to the ancestors of the deceased on the father's side, and three on the mother's; whereas the brother of the half blood offers three to the paternal ancestors only. Therefore, there are reasons peculiar to the Hindoo law of succession as expounded by the Dyabhaga, which may have led to the distinction in the mode in which the succession to brothers takes place. The High Court, having gone through the authorities, have declared what appears to them to be the result in the following sentences: "We thus have it that, (*a*) applying the principle which is the basis of the whole scheme of inheritance propounded in the Dyabhaga, the whole brother undoubtedly succeeds in preference to the half-brother: (*b*) In the Dyabhaga, s. 5, clauses 9, 11, and 12, it is expressly said that the whole brother succeeds before the half-brother; and elsewhere there are indications that the commentator accepted as a fact the superiority of the whole blood: (*c*) The son of a whole brother is expressly declared to rank before the son of a half-brother, and the principle upon which this is declared applies equally to the case of brothers and half-brothers:" "(*d*) When there has been a separation, a half-brother who becomes reunited gains by the reunion a better position than he otherwise would have had, and is brought up to the level of a whole brother who has not become reunited,—which proves that the original position of the half-brother was inferior to that of the whole." This last proposition seems to be well founded on the authority of the Dayabhaga. Section 35, which embodies the passage from Yama, is referred to and explained in the judgment as follows: "It is

" to be observed, and I think it is shown by " clause 36 that this is so,—that in the Dyab- " haga itself this text of Yama is introduced " only as being connected with the matter under " discussion, viz., the succession in cases of " separation with or without reunion, &c., and " there really is nothing to lead to the sup- " position that it was referred to save as bearing " on that matter, or that in quoting it in clause " 35 there was any intention of contradicting or " throwing doubt on the law as already distinctly " propounded by the writer himself in the earlier " portion of section 5." Their Lordships think that this construction reconciles the different parts of the Dayabhaga.

The result is that the judgment under appeal cannot be supported, and their Lordships will humbly advise Her Majesty to vary the decree of the High Court by declaring that Pirthee Singh is entitled to a sixth, that is to say, two annas and eight pies share of the estate instead of a six annas and eight gundas share. Inasmuch as the law had been declared in favour of the Respondent at the time the decree was passed, their Lordships think that it is not a case for costs.