1872

DWARKANATH BYSAK v. MAHENDRANATH BYSAK.

the deceased—Dayabhaga, Ch. V, sl. 11. According to Hindu law, the brother's sons would, on Upurba Chandra's death, be heirs of Rajkrishna ; but if Mahendranath had been dead at that time, his son would not have inherited. The lunatic is civilly dead, he exists only for maintenance. Mahendranath's lunacy therefore has the same effect as his death would have had, *i. e.*, it excludes his son. In *Kalidas Das* v. *Krishna Chandra Das* (1), Peacock, C.J., clearly expresses his opinion that the son is entitled to take only where, if his father were dead, he would take as heir : " he does not inherit from every one who dies but only from every one of whom, according to the laws of inheritance, he is heir." [COUCH, C.J.—That was not the point decided by the Full Bench.] No. but the judgment proceeded on the assumption that the law is as I state it ; see the Mitakshara, Ch. II, s. 10, sl. 9. If, at the time of Upurba Chandra Dasi's death, both Gopallal and Dwarkanath had been dead, the lunatic Mahendranath could not have excluded their sons. Except, in the case of lineal descent, anything like representation or quasi-substitution is unknown in Hindu law ; and even in the case of lineal descent, it is known only to a limited degree. In collateral succession the nearer relative excludes the sons of others ; lineal descendants take *per stirpes* ; but in all cases of collateral descent, the succession is *per capita*. The case of *Braja Bhukan Lal Ahusti* v. *Bichan Dobi* (2) is a direct decision on the point of representa-

(1) 2 B. L. R., F. B., 103 ; see p. 169.

(2) *Before Mr. Justice Bayley and Mr Justice Kemp.*

BRAJA BHUKAN LAL AHUSTI *v.* BICHAN DOBI AND ANOTHERS.*

The 16th September 1870.

See also 15 B.L.R. 146.

Baboos *Anukul Chandra Mookerjee* and *Mahes Chandra Chowdhry*, and Munshi *Mahomed Yusaff* for the appellant.

Mr. *R. T. Allan* and Baboos *Annada Prasad Banerjee* and *Nil Madhab Sen* for the respondents.

KEMP, J.—This is an appeal on the part of Braja Bhukan Lal Ahusti, whose application to execute a decree, passed so far back as in April 1848, has been unsuccessful. The past history of this case

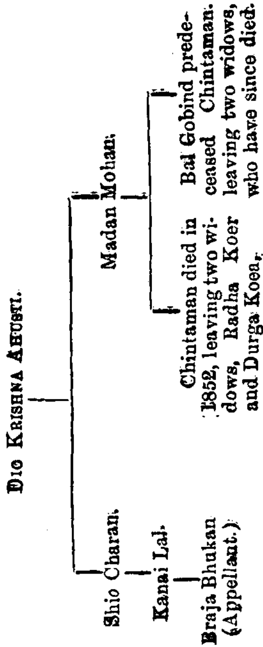
* Regular Appeal, No. 374 of 1870, from a decree of the Subordinate Judge of Gya, dated the 28th May 1870.

tion. [COUCH, C. J.—In that case the son sued as manager.] Can it be said that Mahendranath's son is heir to Rajkrishna?

1872

DWARKANATH BYSAK v. MAHENDRANATH BYSAK.

is briefly as follows. The family-tree stands thus, and is not disputed :—



In 1847, Kanai Lal brought a suit against Radha Koer and Durga Koer, claiming the estate of their husband Chintaman, on the allegation that the family was joint, and that he, Kanai Lal, was the nearest heir of Chintaman, and as such entitled to the immediate possession of the estate left by him, the right of his widows being limited to the receipt of a fitting maintenance.

The two widows of Chintaman, Radha and Durga, defended the suit, stating that a separation had taken place between Shio Charan and Madan Mohan, and therefore that they, the widows, and not Kanai Lal, were entitled to succeed to their husband's estate.

The Principal Sudder Ameen, without deciding the question which was at issue between the parties, *viz.*, whether the family was joint or separate, held that, even admitting the separation, the two widows were entitled to only a life-estate; and that, as Kanai Lal had established that he was at that time the nearest heir to Chintaman, he would be entitled to possession of the estate of Chintaman after the death of both the widows, who were to remain in possession during the term of their respective lives, without power to alienate.

Kanai Lal remained content with this decree, which postponed his right, and made it entirely contingent on his surviving the widows.

The widow Radha died first, but Durga, the co-wife, survived her husband for many years, and died very lately in 1277 Fasli (1869-70).

When she died, Kanai Lal, who had obtained the decree, the substance of which has been already stated, was not under the Hindu law, entitled to inherit the estate of Chintaman, inasmuch as he had become insane.

The Subordinate Judge, being of opinion that the decree of 1848 was a declaratory decree, and that the *status* of the heir at the time the succession opened out to him must be looked to, and not the position of the parties at the time the decree was passed, held that the appellant, who had been appointed manager on behalf of his father Kanai Lal, under the provisions of Act XXXV of 1858, was not entitled to exe cute the decree.

It may also be observed that the object ors, respondents, are in possession of the property in dispute as purchasers of the rights and interests of the widow Durga Koer inexecution of a money-decree against her.

1872 | DWARKANATH BYSAK v. MAHENDRANATH BYSAK.

I submit that Ch. V of the Dayabhága altogether applies to lineal descent. The learned Counsel also referred to *Guru Gabind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (1).

Mr. *Lowe* for the respondent.—The plaint prays for an alternative decree; the relief asked for has been given, and the plaintiffs cannot appeal. The question of the dafendant's lunacy cannot be decided on the evidence of one witness. The plaintiffs ought to have produced the same amount of evidence as would in the first instance have been necessary to prove Mahendranath insane before a commission; they ought to have proved tangible and unmistakeable facts—*Tirumamagal Ammál* v. *Rámasvámi Ayyangar* (2). [MARKBY, J.—There is the fact that he had

We are of opinion that the Subordinate Judge's decision is correct, and that the appeal ought to be dismissed. We consider it unnecessary to discuss the points mooted in argument by the pleader for the respondents, which, we may observe, were not raised in the lower Court, as we hold that the decree obtained by Kanai Lal in 1848 cannot be executed by his son in his representative capacity.

Is has been pressed upon us that our duty is purely ministerial, and that we are bound to carry out the letter of the decree of 1848, however erroneous that decree may be. We think this a very limited view of the question and of our functions; which are to see the due execution of the decree, *i. e.*, according to law.

It is clear to us that the two widows of Chintaman set up a separation, and it was only on their being able to establish that allegation that they could succeed in remaining in possessien of their husband's estate; for failing proof of that allegation, they were entitled to nothing more are less than bare maintenance. The decision of the Principal Sudder Ameen must, in my opinion, be considered to be a declaratory decree. It permitted the widows to remain in possession as life-tenants, without power to alienate. Now, the position of a Hindu widow as a life-tenant is ordinarily that of a person who is entitled to enjoy the estate, but except under legal necessity, she is not entitled to alienate or to waste it, so as to destroy or threaten the destruction of the *corpus* of the estate. The decree of the Principal Sudder Ameen simply left the widows in that position. It further declared that, as the plaintiff Kanai Lal had established that he was then, as he undoubtedly was. the nearest heir to Chintaman, he would as reversioner be entitled to possession when the two widows were dead. As that event has occurred, we must look to the position of Kanai Lal now that the succession opened out to him. But it is the estate of Chintaman, which is in question, and we have therefore to see who is his heir. Now it is beyond all dispute that, when the succession opened out to Kanai Lal he was disqualified, being insane, and he therefore cannot inherit the estate of Chintaman. Whether his son can inherit or not is a question which we are not called upon to decide in this case. The son who is the appellant does not apply to execute the decree of 1848 as heir of Chintaman; but as representing Kanai Lal, and in the latter capacity (Kanai Lal not being the heir of Chintaman), his application must necessarily fail.

We dismiss this appeal with costs.

(1) 5 B. L. R., 15; see p. 45,
(2) 1 Mad. H. C., 214.

been found a lunatic in 1854.] That is not conclusive evidence in this case, 1 Taylor on evidence, § 1487. There ought to have been the clearest evidence that the defendant was insane when the succession opened—*Issur Chandra Sein* v. *Ranee Dossee* (1). In Shamacharan Sirkar's Vyavashta Darpana, p. 1004, a "madman" is said to signify one insane from his birth. [MARKBY, J.—Then, what is an idiot?] A person deprived of the internal factualty, and incapable of discriminating right from wrong—Mitakshara, Ch. II, s. 10, sl. 2. In *Tirumamagal Ammàl* v. *Ràmasvàmi Ayyangàr* (2), Holloway, J., says:—"An idiot in Hindu law is one of unsound and imbecile mind who has been so from his birth." [COUCH, C.J.—A man may be born an idiot, but can you say that he can be born mad?] In 2 Macnaghten's Hindu Law, p. 135, the word "mad" is said to mean "one who is born mad." [Mr. *Kennedy*.—That is no authority; it is a mere note by the author.] Even if Mahendranath were found a lunatic, and as such incapable of inheriting, his son would take his father's share by substitution; see the judgment of Peacock, C.J., in *Kalidas Das* v. *Krishna Chandra Das* (3); 2 Macnaghten's Hindu Law, Ch. IV, pp. 129 and 130; 1 Strange's Hindu Law, Ch. VII, pp. 152 and 163. [COUCH, C.J.,—Sir Thos. Strange is there treating of direct inheritance.] It may be so in the latter portion of the chapter, but I submit that the first part of Ch. VII, is not so limited. See further the Dayabhaga, Ch. V, sl. 19; the Vyavashta Darpana, p. 1014; and Mr. Montriou's edition of the Dharma-Sastra, p. 46. The estate is charged with the father's maintenance, and the son succeeds. [COUCH, C.J.—It is not essential to the father's maintenance that the son should take the property.] I submit that in this case the son would take his father's share. There is one other point. The appeal is from the decree, and the order refusing a review; but no appeal will lie from such an order; and, on this ground alone, the present appeal ought to be dismissed.

Mr. *Kennedy* in reply.

Cur. adv. vult.

(1) 2 W. R., 125.

(2) 1 Mad. H. C., 214.

(3) 2 B. L. R., F. B., 103, at pp. 118 and 120.

1872

DWARKANATH BYSAK v. MAHENDRANATH BYSAK.

The judgment of the Court was delivered by

COUCH, C.J. (His Lordship, after stating the nature of the appellant's claim, and reading the portions of the judgment of Macpherson, J., from the words. "The question arises as to the defendant Mahendranath Bysak" to "whether, at the time of Upurba Chandra's death in October 1869, he was incurably insane (1)," and the words "I am not prepared to find as a fact that Mahendranath Bysak was in 1869 absolutely incurably insance within the meaning of the Hindu law, so as to be incapable of inheriting," continued)—Now the question is whether the proposition there put forward, and upon which the judgment is founded, that a party must be absolutely incurably insane in order to be incapable of inheriting, is in accordance with Hindu law. Most of the texts upon the subject are to be found in the Dayabhaga, Ch. V—the chapter as to exclusion from inheritance. The first is from Menu, which says :—"Impotent persons and outcasts are excluded from a share of the heritage ; and so are persons born blind and deaf; as well as madmen, idiots, the dumb, and those who have lost a sense (or a limb)." Another text is from Yajnyavalkya, which says —" An outcast and his issue, an impotent person, one lame, a madman, an idiot, a blind man, a person afflicted with an incurable disease (as well as others similarly disqualified) must be maintained, excluding them however from participation ; one who cannot walk is lame." And in the next clause there is a text of Devala :—" When the father is dead (as well as in his life time), an impotent man, a leper, a madman, an idot, a blind man, an outcast, the offspring of an outcast, and a person wearing the token (of religious mendicity), are not competent to share the heritage." The same text is in other books of authority as the Dayakrama Sangraha, were it is given thus :—" An outcast, his offspring, and impotent person, one lame, insane, or an idiot, a blind man, one inflicted with an incurable disease, should be supported, since they are excluded from the inheritance" (2). The words of the Mitakshara in Ch. II, s. 10, sl. 8, on exclusion from inherit-

(1) *Ante*, p. 201.

(2) Ch. III., sl. 7.

ance, are :—" The author states an exception to what has been said by him respecting the succession of the son, the widow, and other heirs, as well as the re-united parcener, an impotent person, on outcast and his issue, one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others (similarly disqualified) must be maintained, excluding them however from participation," being the same text as is in the Dayabhaga. I may also notice that, in Elberling on Inheritance, s. 151, it is said :—" As succession takes place in consideration of the benefit conferred on the deceased by the funeral offerings, those who cannot, either for a general or special cause, or those who will not perform the ceremonies, are necessarily excluded from becoming heirs ; " and he refers to s. 189, where it is said :—" The being impotent, or born blind and deaf, or having lost a sense or a limb, or being a madman, an idiot, or dumb, because these defects are considered as a punishment for crimes committed in a former state." The texts speak of incurable disease, but madness is a separate head of disqualification to which incurabilty is not attached. They do not support the proposition that a person must, as Macpherson, J., says, be absolutely incurably insane. That goes beyond what the texts warrant.

The evidence in the case with regard to the state of mind of Mahendranath Bysak was the deposition of Dr. Payne, who said :—(his Lordship read Dr. Payne's evidence and proceeded.) It appears to us that this evidence shows a state of madness for a long period of time, and certainly, if not without an absolute possibility of cure, without a probability of it. It is not necessary to show by clear and positive evidence the absolute impossibility of a cure. There is no authority for that either in the texts or decisions. According to Dr. Payne's evidence, this person might well be described as a madman ; and in 1869, when the succession fell in, he was certainly a madman, and was not at that time in a condition to offer the funeral oblations, which is given as the reason why such a person should be excluded from inheritance. For that reason we think the decree of the learned Judge cannot stand, and that part of it which relates to the share of Mahendranath Bysak

1872

DWARKANATH BYSAK *v.* MAHENDRA-NATH BYSAK.

must be set aside. The texts which exclude a madman from inheritance declare that he is entitled to have maintenance; and this was not questioned in the argument before us. It must therefore be referred to one of the Judges of this Court (unless the parties can agree on it, which they will probably be able to do) to ascertain what is a proper sum to be allowed for Mahendranath Bysak's maintenance from his share of the property. The parties will respectively bear their own costs of this appeal to be taxed as between attorney and client on scale No. 2.

Appeal allowed.

Attorneys for the appellants: Messrs. *Gray & Sen.*

Attorneys for the respondent: Messrs. *Swinhoe, Law, & Co.*

1872
Aug 29

Before Mr. Justice Macpherson.

S. M. PRANKUMARI DASI AND ANOTHER *v.* ABINASH CHANDRA MOOKERJEE.

Costs, Payment of Plaintiff's, by Stranger to suit.

The Court will not order a person not on the record to pay the costs decreed against the defendant, when the latter is a real and not a sham defendant and himself did the wrongful act on which the suit was based, and has an interest in the subject-matter of the suit, and when the plaintiff knew before the trial the circumstances under which the afterwards sought to to make such third person responsible for the costs, and might have added him as a defendant on the record. (1)

ON 5th August 1872 the *Advocate-General* (*offg.*) obtained a rule calling on Krishnalal Gosain to show cause why he should not pay to the plaintiffs their costs of this suit payable to them by the defendant Abinash Chandra Mookerjee under the decree in the suit. The rule was obtained on the decree and on affidavits of the defendant Abinash Chandra Mookerjee and of Mr. Carruthers, one of the attorneys for the plaintiffs. It appeared from these affidavits that the suit had been instituted to obtain pos session of a house and premises No. 12, Old Post Office Street,

(1) See *Srimati Bamasundari Dasi* v. *Ramnarayan Mitter*, 8 B.L.R., (App.) 65