much more permanent character and consequently of far greater value, caused a sale of the rights and interests of the judgment-debtor in the said shamilat talook to be put up for sale and purchased them himself, and was put into possession. Subsequently, on the plaintiff suing for the rents under the provisions of Act X. of 1859, the defendant intervened and claimed to be in the enjoyment of the rents in virtue of his purchase of the rights and interests of the judgment-debtor in the jote jumma. The rent-suit of the plaintiff was dismissed—hence this suit to establish his right to the shamilat talook purchased by him in satisfaction of his decree.

The Court of first instance gave the plaintiff a decree, holding that he had proved the existence of the shamilat talook, and the non-existence of any jote jumma. The Judge confirmed this decree, observing that "the plaintiff had not, in his opinion, caused "the re-sale with any intent to defraud the "malik (in this case the defendant), but "simply under a mistake of the character "and grade of the tenure." The Judge was satisfied that no such tenure as a jote jumma answering to the description of that purchased by the defendant existed; and that the defendant, who, from his position as owner of the parent zemindaree, ought to have known that no such jote jumma existed, purchased on speculation.

In special appeal it is contended that, the defendant having previously purchased the rights and interests of the judgment-debtor at a sale in execution of a decree held at the instance of the plaintiff, the re-sale and purchase of the same property by the plaintiff under a different denomination can neither avail the plaintiff, nor affect the title of the defendant.

We think that substantial justice has been done in this case. It is very clear that there is no such tenure as that purchased by the defendant for a nominal sum under the denomination of a jote jumma. The plaintiff, it is true, advertized the tenure under the above description; but of the fact of its non-existence, independently of the evidence adduced by the plaintiff, which has been found by both the Lower Courts to be satisfactory, we have the significant fact that the defendant, who is the zemindar, and who must have well known that no such tenure was recorded in his zemindaree serishtah, allowed his first purchase to fall through, and then purchased at a subsequent sale for a nominal sum.

The rights and interests of the judgment-debtor were alone sold, and nothing was guaranteed to the purchaser. The plaintiff acted "*bonâ fide*," and the defendant cannot be called an innocent purchaser for a valuable consideration, as he was in a position to know, and must have known, that no such tenure as that which he purchased under the denomination of a jote jumma had any real existence. His purchase was a purely speculative one.

The appeal is dismissed with costs and interest payable by the appellant.

The 3rd January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Lunatics (Suits for)—Hindoo Law of Inheritance—Sale—Arbitration—Alienation by managing owner.

Regular Appeals from a decision passed by Baboo Nurottum Mullick, Principal Sudder Ameen of Bhaugulpore, dated the 19th March 1866.

Case No. 195 of 1866.

Goureenath and another (Defendants), *Appellants,*

versus

The Collector of Monghyr and another (Plaintiffs), *Respondents.*

Baboos Dwarkanath Mitter and *Kishen Succa Mookerjee* for Appellants.

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Respondents.

Suit laid at Rupees 14,638-13-2-12.

Case No. 209 of 1866.

The Court of Wards of Monghyr, on behalf of Manick Ram and Salgram, the lunatics (Plaintiff), *Appellant,*

versus

Rughoobur Dyal and others (Defendants), *Respondents.*

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Appellant.

Baboos Dwarkanath Mitter and *Kishen Succa Mookerjee* for Respondents.

Case No. 211 of 1866.

Koer Sheopershad Narain (one of the Defendants), *Appellant,*

versus

The Collector of Monghyr and others (Plaintiffs), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Respondents.

A Collector, appointed under Section 11, Act XXXV. of 1858, to take charge of the estate of a lunatic, cannot sue himself on behalf of the lunatic, but must appoint a manager for the purpose.

Although, according to Hindoo Law, a lunatic has no rights of inheritance, he is not debarred from taking an estate duly conveyed to him.

If a person was in a fit condition to manage his affairs down to the time when the proceedings before an arbitrator in which he was interested were substantially concluded, the award will not be invalidated by reason of the person having become insane before the final publication of the award.

The incapacity of joint owners confers powers of alienation in certain cases of necessity upon the managing owner.

Markby, J.—THESE are three appeals in one suit brought on behalf of two persons, Manick Ram and Salgram, who are now lunatics, to recover various portions of landed property. The appeals have been argued together.

There is some confusion about the nature of these proceedings. Sometimes, the Collector of Monghyr is spoken of as plaintiff, and, at other times, the Court of Wards. But we conclude the fact to be that an application was made to the Civil Court under Section 3 of Act XXXV. of 1858 by some relation of the lunatics; and that, under Section 11, the Collector was appointed to take charge of the estate. The duty of the Collecter, however, is not himself to manage the estate, but to appoint a manager, who is to exercise the same powers in the management of the estate as might have been exercised by "the proprietor if not a lunatic." This would, of course, include the bringing of such actions as the present, and strictly, therefore, this action has not been properly brought. But, as this objection has never been taken, and, if taken, it might have been amended under Section 32 of the Civil Procedure Code, it does not appear to us to be necessary for this Court to consider it as fatal. We only notice it in order that it may not be supposed that the Court sanctions such an irregularity.

The following pedigree shews the state of the family of the lunatics :—

Rutton Chand Sahoo Kullia.

Mussamut Bibee.

Gopal Lal, married Musst. Kumla Bibee, Jussodha Bibee
Bundhoo Koonwaree

Aujoodhia Bibee. Manickram, Roghoobur Dyal, Salgram.

It appears that Mussamut Bibee was entitled to a 12-annas share in a talook called Gudee Sumria and to the entire interest in a garden called Kunkur.

After the death of Mussamut Bibee, her son Gopal Lal claimed this property, and, after his death, his wife Bundhoo Koonwaree and her daughter Aujoodhia appear to have been in possession of it. In consequence, however, of a suit between Bundhoo Koonwaree and one Gopeenath, in which an opinion was expressed that the sons of Jussodha Bibee were the true heirs-at-law of Mussamut Bibee, a summary proceeding to obtain possession of the property was taken by or on behalf of these persons against Bundhoo Koonwaree and Aujoodhia, and was successful. These two ladies then brought a suit to establish their title, which suit was in the year 1852 referred to arbitration, and the decision of the arbitrator was given in December 1855. By the award the two properties were divided equally between Aujoodhia Bibee and the three sons of Jussodha Bibee respectively.

Bissessur Dyal Singh, the father of Manick Ram, Roghoobur, and Salgram, and his three sons were defendants in the suit brought by Bundhoo Koonwaree and her daughter, and were parties to the reference to arbitration.

The 3-annas share of the talook of Gudee Sumria awarded to Aujoodhia Bibee was sold by her to one Judoonath Sadye in the year 1860, and by him again sold to Koonwar Sheopershad Narain Singh. The first claim in the suit now brought on behalf of the lunatics is against the latter to recover this 3-annas share in the talook, on the ground that, by the Mitakshara Law, the lunatics and their brother Roghoobur were the sole heirs of Mussamut Bibee; that, at the time when their rights were disposed of in the suit which ended in an arbitration, they were either lunatics or minors; and, consequently, that the award of the arbitrator is not binding as to them. The Principal Sudder Ameen has decided upon this claim in favor of the plaintiff, and this decision is the subject of appeal No. 211.

This being the history of the property and the contention of the parties, we proceed to state our opinion on the facts of this case.

1. We find that Manick Ram has been an idiot from his birth. The father asserts this, and it is but feebly denied by the witnesses who gave testimony on behalf of the defendant. Moreover, it does not appear

that Manick Ram ever took any personal share whatever in the proceedings relating to the property.

2. We find that Salgram was 18 years of age in December 1851. The evidence is contradictory on this point, but the majority of the witnesses on both sides fix his age at the present time sufficiently high to bring him up to 18 years of age at the date mentioned.

3. We find that Salgram became a lunatic at some time subsequent to December 1852, but prior to December 1855. The father says that "for twelve years he has been utterly "insane," and that he was insane at that time; that "previously he used to be sense-"less, sometimes he used to get over the "disease now and then;" and it is admitted that he is insane now. Another witness says he has been insane 13 or 14 years. On the other hand, though several witnesses speak as to his sanity in December 1852, no one says anything of his being so subsequently.

The result of the *first* finding of fact as regards Manick Ram is peculiar. It, of course, renders all proceedings, so far as they depend on his consent for their validity, void. But it also follows from it, as is admitted on all hands, that, according to the Hindoo Law of Inheritance, which excludes born idiots, Manick Ram has, by inheritance, no rights at all. But, though he could not, as a lunatic, deprive himself of any right, this does not prevent his taking an estate duly conveyed to him, so that the 3-annas share in the property awarded to him by the arbitrator in 1855 was, we think, effectually vested in him.

The result of the *second* and *third* findings is that Salgram was of age, and fully competent at the time the suit brought by Jussodha and Aujoodhia was referred to arbitration. But, on the other hand, he became a lunatic before the final decision of the arbitrator was published. A difficult question, therefore, arises whether or no he was bound by the award. We think that this would depend on the exact time when Salgram finally lost his intellects. If he was in a condition to manage his affairs down to the time when the proceedings before the arbitrator were substantially concluded, we think it will not necessarily invalidate the award that he became insane before the time when it was finally published. We think that, the decision of the arbitrator (against which no suggestion of fraud is raised) having been subsequently affirmed by a Court of law and embodied in a decree, a strong presumption arises in its favor; and that the *onus* of proving with minuteness the state of Salgram's mind at this time lies upon the parties who seek to impeach the award. But the evidence on this point is far from satisfactory. It is extremely meagre and indefinite, and does not satisfy us that, throughout the proceedings before the arbitrator, Salgram was not in a condition of mind which would render him responsible for what was done in his name and with his sanction.

It appears to us, therefore, that we ought to give effect to the award of 1855; that the title of Aujoodhia to a 3-annas share of the talook founded thereon, and which is now vested in the defendant Koonwur Sheopershad Narain Singh, was a good and valid title; and that the decision of the Principal Sudder Ameen on this claim ought to be reversed.

The next appeal (No. 209) arises on a claim to set aside a sale which took place in the year 1859 of an 8-annas share in the Talook Gudee Sumria to the defendant Shumboonath Suhaye. At this time it is admitted that both Manick Ram and Salgram were lunatics, and on the face of the deed of sale Roghoobur avowedly acts as their "guardian." It is asserted, and we agree with the Principal Sudder Ameen in believing, that the sale was made to satisfy a decree for an ancestral debt which the decree-holder was about to execute against the property; and that the sale was one which a prudent person having management of the property would have sanctioned. The result of the award which we have upheld was to vest in Roghoobur and his brothers a joint estate in a certain share of the ancestral property, and of this property Roghoobur was the manager. It is true that he describes himself as "guardian," which he could have no pretence in a legal sense to be. But we think this misdescription is immaterial; and that the question is whether, as manager, Roghoobur had power to dispose of the property for the purposes above stated. Baboo Dwarkanath Mitter, who argued in support of the purchase, could quote no direct authority in his favour; but he relied on a passage in Colebrooke's translation of the Mitakshara, where it is said (page 257, para. 28): "Even a single "individual may conclude a donation, mort-"gage, or sale of immoveable property "during a season of distress for the sake "of the family, and specially for pious pur-"poses." In para. 29, it is said, "the

"meaning of the text is this: while the "sons and grandsons are minors and in- "capable of giving their consent to a gift "and the like; or while brothers are so "and continue unseparated; even one "person, who is capable, may conclude a "gift, hypothecation, or sale of immoveable "property, if a calamity affecting the "whole family require it, or the support of "the family render it necessary, or indis- "pensable duties, such as the obsequies "of the father or the like, make it unavoid- "able." It is true that no express mention is here made of lunatics; but it may be argued with considerable force that the *text* of the law is general, and relates to every kind of incapacity; and that the mention of minors in the *gloss* is merely by way of illustration. Moreover, it was admitted on the argument that a manager of a joint estate would have a power of alienation in such a case, if his joint owners, though capable, were absent—a power which can hardly be supported upon general principles of agency. There is a good deal, therefore, to show that the principle that the incapacity of joint owners confers powers of alienation in certain cases of necessity upon the managing owner is general, and in the absence, therefore, of any distinct authority upon the matter, we ought to affirm the validity of the alienation in this case. In this appeal, therefore, the decision of the Principal Sudder Ameen will be affirmed.

The next appeal (No. 195) arises on a claim to set aside a mortgage, made in the name of the father Bissessur Nath, and his three sons, Manick Ram, Roghoobur, and Salgram, of the garden Kunkur to Gobind Pershad and Juggernath Pershad, of whom the defendant Gobind Pershad is the survivor. As already stated, we have come to the conclusion that Manick Ram is an idiot from birth, and had, therefore, no rights by inheritance in this property, so that his concurrence in the sale is immaterial, and his incapacity is no ground for setting it aside. Salgram, on the other hand, was at this time sane and of sufficient age to render the transaction binding as against him. In our opinion, therefore, the decision of the Principal Sudder Ameen in favor of the plaintiff on this part of the case ought to be reversed.

The result is that our judgment in the appeal No. 195 will be for the appellant, the decision of the Principal Sudder Ameen as against him will be reversed, and the appellant will be entitled to his costs in this Court and in the Court below.

Our judgment in appeal No. 209 will be for the respondent, the decision of the Principal Sudder Ameen in his favor will be affirmed, and the appellant will have to pay to the respondent the costs of this appeal.

Our judgment in appeal No. 211 will be for the appellant, the decision of the Principal Sudder Ameen will be reversed, and the appellant will be entitled to his costs in this Court and the Court below.

The 3rd January 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Ejectment.

Case No. 1863 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 1st May 1866, affirming a decision passed by the Deputy Collector of that District, dated the 26th January 1866.

Kalee Churn Banerjee (Plaintiff), *Appellant,*

versus

Mahomed Hashem and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

No one for Respondents.

Where a decree under Sections 22 and 78, Act X. of 1859, for the ejectment of a ryot from three plots of land was executed against two of the plots—HELD that the pottah was not in force as regards the third plot also.

Seton-Karr, J.—THE decisions of both the Courts are erroneous. The plaintiff sued previously under Sections 22 and 78 of Act X. of 1859 for ejectment of the defendant from three plots. As to two of the plots, the decree was executed, and the plaintiff now sues for a kubooleut from the defendant for the third plot from which he did not eject the defendant. The Courts are quite wrong to hold that, because the former decree was not executed against the third plot of ground, therefore the old pottah is still in force. That pottah was expressly set aside by the former decision, and the defendant cannot be considered to be still holding under the said pottah.

The plaintiff, in law, has a perfect right to bring his present suit for a kubooleut; and setting aside the decisions of both the Courts on this head, we hereby declare him to have such a right, and we remand the case to the first Court to find under what terms the kubooleut should be granted.