1863. *July* 1 & 10. O. S. *No.* 84 *of* 1863.

of any part of the property, obtained rthough her husband, in payment of her own debts, or for any other improper purpose.

The plaintiff, therefore, is entitled to possession of the property claimed in the plaint, and as a consequence, he is further entitled to an account of the rents and profits since August 1859.

It is certainly desirable for the interests of the parties that they should agree as to the amount of those rents and profits. And it is probable that they will do so, otherwise there must be a reference to the Commissioner to take the account.

The plaintiff is entitled to the costs of the suit so far.

APPELLATE JURISDICTION (*a*)

Special Appeals Nos. 382 *and* 383 *of* 1862.

MUHAMMAD MOHIDIN.....*Appellant.*

OTTAYIL UMMACHE and another.....*Respondents.*

He who would disaffirm a contract entered into by mistake must do so within a reasonable time and will not be allowed to do so unless both parties can be replaced in their original position.

A vendor legally conveying all his title cannot be sued for money had and received although the title prove defective.

Accordingly where the plaintiff bought two kánam claims and sued upon them unsuccessfully :—*Held* that he could not recover the purchase-money from his vendor's representatives on the ground that the consideration for the payment had failed.

1863. *July* 11. SS. *AA. Nos.* 382 *and* 383 *of* 1862.

THESE were Special Appeals from the decision of H. D. Cook, the Civil Judge of Calicut, in Appeal Suits Nos. 15 and 16 of 1861, affirming the decrees of the Sadr Amin of Calicut, in Original Suits Nos. 327 and 328 of 1859.

Ritchie for the appellant, the first defendant.

Brockman for the respondents, the first and second plaintiffs.

The facts appear from the following judgment, which was delivered by

HOLLOWAY, J. :—In these two cases the plaintiff alleges that he purchased two kánam claims of a woman named Ayesha whose representatives the defendants are alleged to

(*a*) Present : Phillips and Holloway, JJ.

1863. July 11. S.S. A.A. Nos. 382 and 383 of 1862.

be, and that he sued upon them and was defeated ; and he now seeks to recover the purchase-money with interest from the defendants.

The substantial defendants answered that the instruments of sale were not properly executed.

The Lower Courts found that they had been executed by the necessary parties ; but gave judgment for the plaintiff.

These two actions are in effect actions for money had and received, and the ground of them is that the consideration for the payment of money having entirely failed, the payer has a right to recover it. It is perfectly consistent with the plaintiff's allegations that the kánam claims of the vendor were perfectly valid, and it is at any rate clear that whatever title the vendee had, was conveyed to him, and that so far from disaffirming the cantract, he proceeded to sue as her assignee, and it is only when defeated that he seeks to recover in a suit shaped as this is.

The principle that he who would disaffirm a contract entered into by mistake must do so within a reasonable time, and will not be allowed to do so unless both parties can be replaced in their original position, is as well established as it is manifestly equitable. We approve of and adopt the rule at Wms. Saunders 269 *d*.

It is clear that this is not such a case. The assignor of this kánam has lost whatever cause of action she possessed by the suit of her assignee.

It is quite clear that such an action could not in English law be maintained. Lord Alvanley in *Johnson* v. *Johnson* (*a*), points to the real distinction. We by no means wish to be understood to intimate that where under a contract of sale, a vendor does legally convey all the title which is in him, and the title turns out to be defective, the purchaser can sue the vendor in an action for money had and received. Every purchaser may protect his purchase by proper coven-

(*a*)3, Bos. & Pul. 170, and see *Cripps* v. *Reads*, 6, T. R., 606 : *Bree* v. *Holbech*, *Doug.*, 654. That the purchaser cannot recover the purchase money in equity when the conveyance has been executed by all necessary parties, and he is evicted by a title to which the covenants do not extend. See *Serjt. Maynard's case*, Freem. C. C., 1 : *Anon.* ibid., 106 : *Thomas* v. *Powell*, 2, Cox, 394 and *McCulloch* v. *Gregory*, 1, *K.*& J., 291 per Wood, V. C.

1863. July 11. SS. AA. Nos. 382 and 383 of 1862.

ands: where the vendor's title is actually conveyed to the purchaser the rule of *caveate emptor* applies."

It is quite clear that this is just the case supposed.

If this were a mere technical matter of the form of the pleadings, we would not allow the objection to prevail: here however, it is manifest that the form of the action seriously affects the defence. It may well be, for anything here alleged, that the kánam is a perfectly valid one, that the vendee agreed to purchase it with all defects, and that the action in which he failed to get it established was fraudulently instituted. We are also sensible of the dangerous and demoralizing effect of proceedings which would sanction the litigious inhabitants of Malabar in speculating in the purchase of doubtful titles to litigate upon them and in feeling secure that even if they fail, they will be allowed to recover the whole of the nominal purchase money; for in all these cases long experience has satisfied us that the sum nominally paid is either entirely fictitious or greatly exaggerated.

We are satisfied that the rule of English law is as beneficial as it is plain, that the right to disaffirm the contract had been lost by the conduct of the plaintiff, that this action or the return of the purchase-money will not lie, and that the decrees of the Courts below must be reversed, but without costs.

Appeal alolwed.