1863. July 9. S. A No. 83 of 1863.

harmony with what they may consider the requirements of society. If they are wrong in their view of such requirements, as is by no means unlikely, the evil done is unmixed: if right, the mischief still predominates over the good, because it prevents that systematic reform from which alone good can result. Such systematic reform is for the legislature.

Finding, as I do, that positive rule in this case, the result is that, in my opinion, in this and all the other cases depending on the same question, the decrees below must be reversed and the original suits be dismissed with costs.

*Appeal allowed.*

NOTE.—This decision was followed in S. A No. 12 of 1862.

As to the *Aliya Santana* (from Karn. *Aliya* 'son-in-law' and Skr. *Santana* 'offspring') see Chamier's *The Land Assessment and the Landed Tenures of Canara*, Mangalore, 1853, p. 16, where it is stated that the rule was introduced into Canara about the beginning of the 13th century, and T. L. Strange's *Manual of Hindu Law*, 2d. ed. § 404. The work attributed to Bhutálapándiya, who is said to have lived in the beginning of the era of Sáliváhana (A. D. 78), though printed in Canarese, is still untranslated into English.

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ORIGINAL JURISDICTION *(a)*

*Original Suit No.* 84 *of* 1863.

LOGANÁDA MUDALI *against* RÁMASVÁMI and others.

Where a sale of landed property was made by a Hindu widow and administratrix to the estate of her deceased husband :—*Held* that she had power to dispose of the land for any purpose for which as administratrix she might properly do so.

*Held* also that an improper disposal of the property was not to be presumed against a purchaser from her, but that the sale must be taken to be proper and valid unless it appeared that to the purchaser's knowledge she was for an unlawful purpose converting the estate.

*Held* also that she having the right to sell as administratrix it could not be prosumed that she sold as widow.

1863. July 1 & 10. S. A. No. 84 of 1863.

THE quistion in this case was as to the validity of a sale of two gardens within the limits of Madras, which formerly belonged to one Appávu, by Kunram Shanmuga Ammál his widow and administratrix to his estate and also to that of his father Venkatáchalam. The plaintiff, the purchaser's administrator, sued for possession of the gardens and for an account and payment of the mesne rents and profits received by the first and third defendants, from the

*(a)* Present : Scotland, C. J. and Bittleston, J.

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

29th Augus t1859. The following translation of the instrument of sale was filed by the plaintiff and marked B.

"On the 26th day of the month of July of the year 1851, the bill of sale of gardens was written and given to Ponneri Periya Srinivása Mudali residing at Chennapattanam (Madras) by Kunram Shanmuga Ammál, who is residing at Vannára Pettai (or Washermen's Pettai) attached to the aforesaid Chennapattanam (Madras) and who has obtained administration to the estate of the deceased Kunram Chellapa Venkatáchala Mudali. If you ask what :—

The garden and bungalow which have number eight, and which are situated in Darmarája Kovil Street of Washermen's Pettai on the southern side of the garden of the aforesaid Darmarája Kovil (Pagoda) and my large garden which is situated in Ellaiya Mudali Street within these (namely) to the east of the garden of the aforesaid Ellaiya Mudali to the south of the garden of Chintáddiri Pettai Perumál Kovil (Pagoda) and to the north of the street of Nambulaiyan, I have this day finally sold to you for the sum of rupees 4,300. The sum of Rupees 4,200 is due to you by me in the matter of Mr. Johnson. And the sum of rupees 100 was this day received by me in ready money. Total rupees 4,300. I have received the same and delivered the aforesaid two gardens to you. Therefore you yourself are at liberty to use and enjoy the fruit-trees, wood-trees, water, treasure, stone and all others standing thereon from son to grandson and so on in succession. In this manner the bill of sale was written and given with my voluntary consent.

This † mark is the hand-mark of
KUNRAM SHANMUGA AMMÁL.

Witnesses to this

MUCHI PÁRTASÁRADI AYYANGÁR, I know.

K. TIRUVENGADA MUDALI, I know.

In this manner, this was written by Rajunàda Samuddiram Sesha Ayyangár."

The following issue was settled by BITTLESTON, J. :—On the 1st June 1863, the plaintiff affirm and the defendants second, third, fourth, fifth, sixth, seventh and tenth

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

deny that on or about the 26th July 1851, one Shanmuga Ammál in the plaint mentioned, sold and assigned to Ponneri Periya Srinivása Mudali for valuable consideration the two gardens in the plaint mentioned with the buildings thereon and afterwards on or about the 30th March 1855, by another instrument in writing, and also by her will of that date confirmed the said sale. The issue therefore is, whether the said gardens were so sold and assigned to the said sale so confirmed as in the plaint alleged.

On the 26th June 1863, the following additional issue was settled by Bittleston, J. :—"Whether the said Shanmuga Ammál at the time of the execution of the said assignment of the 26th day of July 1851, or at the time of the execution of the agreement and will of the 30th day of March 1855 had any right, title or interest in the said property which she could lawfully assign.

The evidence sufficiently appears from the judgment.

*Mayne*, for the plaintiff, contended that the Court would not presume against a purchaser from the administratrix that the land had been sold improperly. A third person, if there is no more in the transaction, is justified in assuming that the sale is for those purposes for which the law gives an executor or administrator the power of sale, *McLeod* v. *Drummond*(*a*), *Elliot* v. *Merriman*(*b*), *Scott* v. *Tyler* (*c*), Wms. Exors., 5th ed., 840. He also submitted that as the widow had a right to sell as administratrix, it would not be presumed that she sold as widow, in which capacity she was prohibited selling except for certain specified purposes.

*Branson*, for the defendants.

*Mayne*, replied.

The Court took time to consider, and on the 10th July its judgment was delivered by

SCOTLAND, C. J. :—In this case, the plaintiff sues as the administrator of the estate of P. Srinivása, his deceased father, for possession of the gardens in the plaint mentioned and alleged to have been sold and assigned to the said P. Srinivása by Shanmuga, on the 26th July 1851. The

(*a*) 7, Ves. 152. (*b*) 14, Ves. 353, 360 ; 17, Ves. 153, 154.
(*c*) 2, Atk. 41.

plaint also prays an account of the rents and profits from 29th August 1859.

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

The title of the plaintiff, as far as documentary evidence is concerned, excepting the agreement for the cocoanut trees, depends upon the assignment ; and it was not disputed at the hearing, (though in the defendants' written statement it is expressly denied) that in point of fact, Shanmuga did execute the bill of sale marked B to Srinivasa. The contention was, that nothing passed by that instrument, as Shanmuga had no right nor title which she could so convey.

It appears to be agreed that these gardens were originally the property of Venkatáchalam, the grand-father of Appávu ; and that upon Venkatáchalam's death the property vested in Appávu. Appávu died in November 1845, within a month after the death of Venkatáchalam, and in the year 1848 administration was granted to Shanmuga the widow of Appávu, first, of Venkatáchalam's estate in the month of March, and, secondly, of Appávu's estate in July. So that it is clear that at the time of the sale to Srinivása, this property was held by Shanmuga in her representative capacity ; and she had authority to dispose of it for any purpose for which, as administratrix, she might properly do so. Further, an improper disposal of it is not to be presumed against a purchaser from her. On the contrary, the sale must be taken to be proper and valid, unless it appears that to the knowledge of the purchaser, the administrator was for an unlawful purpose, such as the payment of the executor's own debt, converting the estate into money. As put by Sir William Grant in *Hill* v. *Simpson*(*a*) : "It is true that executors are in equity mere trustees for the performance of the will; yet in many respects and for many purposes, third persons are entitled to consider them absolute owners. The mere circumstance that they are executors will not vitiate any transaction with them ; for the power of disposition is generally incident, being frequently necessary; and a stranger shall not be put to examine whether, in the particular instance, that power has been discreetly exercised. But from the proposition that a third person is not bound to look to the trust in every respect and for every purpose, does it

(*a*) 7, Ves. 166.

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

follow that dealing with the executor for the assets he may equally look upon him as absolute owner and wholly overlook his character as trustee *when he knows the executor is applying the assets to a purpose wholly foreign to his trust* ?"

The question here is, whether upon the evidence as it now stands, we can say that this was at all a case of application of the assets, not as administratrix and to a purpose foreign to the trust ?

As to the instrument itself, it seems to us that it would be very unsafe to draw from its language the same inferences as might reasonably enough be drawn from similar expressions in an English conveyance, and because the document B expresses the consideration to be in part a past debt "due *by me to you* in a matter of Mr. Johnson" to hold, therefore, that the sale of the gardens was in satisfaction of her own personal debt.

Of the real facts of the transaction, we know little or nothing.

Parttasáradi Ayyangar, who was present at the execution of B, states that on that occasion, Shanmuga said, "I owe money to Srinivása, I have written a document and sold my gardens to him. I owed money to Johnson, and Srinivása undertook to pay and has paid it." But not in this statement, any more than in the document itself, can we attach any weight to the use of the personal pronoun ; and the evidence of Andiyappa Mudali, so far as it goes, tends to show that she was probably paying off debts due from the estate—for he says that Appávu died largely in debt, and that a person named Johnson actually received rupees 15,000, on account of Appávu's debts. Whether these debts were incurred by Appávu himself, or devolved upon him as a charge on the property, we are not called upon to consider.

It is true that Andiyappa says, that the money paid by Srinivása was in respect of Evatt's action, and that he had nothing to do with the payment of the rupees 15,000 to Johnson. But to rely upon that statement, in opposition to the words of the instrument, which apparently connects Srinivása with the debt due to Johnson, would be very un-

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

satisfactory there being no suggestion of more than one debt of Johnson's, and no evidence of the particular circumstances attending the payment of Johnson's debt; and whether the debt due to Srinivása was on account of money paid to Johnson, or on account of money paid to Evatt, it seem not improbable that it was in either case in respect of a debt due from the estate.

It is not to be forgotten that under this sale, according to the evidence, Srinivása and his brother continued in possession of the property down to August 1859,—and bearing this alone in mind, we think that at this distant time it would be a very rash presumption from anything which appears in evidence before us, to infer that the sale by Shanmuga was in violation of her duty as administratrix. She describes herself in the deed as the administratrix of Venkatáchalam, as in truth he was; but we do not think that any unfavourable inference can be drawn therefrom, nor do we think that the omission to describe herself in the instrument as the administratrix of Appávu can deprive that instrument of effect if, in fact, she had authority, as the administratrix of Appávu's estate, to sell and assign the property. There is no ground for supposing that she, in fact professed to assign in any other right than the representative character which really belonged to her—(for all the circumstances were probably just as well known to Srinivása as to herself); and, certainly, the description of herself in the instrument as administratrix of Venkatáchalam, (her husband having survived Venkatáchalam only one month), is opposed to the supposition that she was selling the property in her own independent right as owner?

Further, as a matter of presumption, we cannot infer that, having the right to sell as administratrix, she sold, not in that capacity, but as widow, in which latter capacity the law prohibited her from selling; and it was not necessary to the validity of the assignment by her, that the instrument should describe the character in which she assigned. So far as we can judge the transaction may have been, and probably was, a perfectly legitimate one by her as administratrix, and no attempt has been made in this case, by evidence on the part of the defendants to show that she was disposing

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.

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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.