1964 *Present:* **Basnayake, C.J., and Herat, J.**

P. A. N. SOMASUNDERAM, Appellant, *and*
W. D. WIJERATNE, Respondent

S. C. 46/1959—D. C. Kalutara, 31518

Administration of estates—Power of an executor to sell immovable property belonging to the estate—Scope—Applicability of English law—Civil Procedure Code, ss. 518, 538, 540, 551-554, 712-739.

Where a testator dies owing no debts and leaving sufficient money for the payment of estate duty, the executor has no power to sell any of the immovable property that is left subject to the condition that the executor shall have the right only to take and enjoy all the rents and profits and shall not have the power to sell or mortgage or alienate the same and that, after his death, the property shall devolve on and vest in certain specified legatees.

Where, after his power of administration has come to an end, an executor sells immovable property which the Will does not authorise him to sell, the sale conveys no title to the purchaser as against a person who subsequently buys the same property from the heirs of the deceased and institutes a vindicatory action against the former purchaser. Even if his power of adminstration has not come to an end, the executor has power to sell only for the purposes of due administration.

APPEAL from a judgment of the District Court, Kalutara.

A testator devised all his immovable property to his heirs subject to a life interest in favour of his wife, who was appointed executrix under probate granted on 8th March 1928. The deceased left no debts and had sufficient money to meet the liabilities in respect of estate duty. The Will gave the widow no power to sell any of the property.

In the course of the administration, the executrix obtained a hypothecary decree against a debtor of the testator and bought the hypothecated lands on 1st March 1937. After she had filed final account on 7th September 1934 stating that she had carried out all the directions in the Will, and twenty-one years after the grant of probate, she mortgaged on 22nd April 1949 for a sum of Rs. 6,000 the lands which she had purchased on 1st March 1937. On 27th September 1949 she sold those lands, in her capacity as executrix, to the defendant-appellant for Rs. 9,000, out of which sum Rs. 6,000 was paid to the mortgagee. The sale took place pending proceedings for judicial settlement initiated by the heirs.

The executrix died on 13th October 1954. On 9th February 1956 the heirs of the testator sold to the plaintiff the above-mentioned lands which the executrix had sold to the defendant. The defendant, who was in possession of the lands, disputed the plaintiff's ownership. In

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the present action instituted by the plaintiff for a declaration of title and ejectment, the trial Judge gave judgment in favour of the plaintiff. The defendant thereupon filed the present appeal.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy, H. Mohideen* and *N. S. A. Goonetilleke*, for Defendant-Appellant.

N. E. Weerasooria, Q.C., with *H. W. Jayewardene, Q.C.*, and *N. R. M. Daluwatta*, for Plaintiff-Respondent.

Cur. adv. vult.

February 10, 1964. BASNAYAKE, C.J.—

The question that arises for decision on this appeal concerns the power of an executrix to sell property devised to the testator's heirs subject to a life interest in her.

Briefly the facts are as follows :—Mariano Leity Ramanaden by his Last Will (P2), after making certain religious bequests, left the rest of his property to his heirs subject to a life interest in favour of his wife in the following terms :—

"I do hereby give devise and bequeath all the rest of my property both movable and immovable of whatsoever kind or nature the same may be and wheresoever situate and lying including the several sums of money invested on bond or lying in deposit in the banks unto my wife Philippa Adaman subject to the following terms and conditions viz :—

(*a*) That my wife the said Philippa Adaman shall have the right only to take and enjoy all the rents and profits of the said immovable property and shall not have the power to sell mortgage or alienate the same and after her death the same shall devolve and vest in the children of Nathalia Canjemanaden wife of Emanuel Anandappa in equal shares.

(*b*) That my wife the said Philippa Adaman shall only use and take and enjoy the interest on the said monies during her life time and after her death the principal sums shall devolve and vest in the said children of Nathalia Canjemanaden in equal shares. My household furniture and jewellery shall be the absolute property of my said widow.

I do hereby constitute nominate and appoint my wife the said Philippa Adaman Executrix of this my Last Will and Testament."

Leity Ramanaden died on 8th June 1927 and his widow the executrix proved his Will in D. C. Colombo Testamentary Case No. 3449 and obtained Probate on 8th March 1928. The Probate (P3) was in the following terms :—

"Be it known to all men that on the 11th day of August, 1927, the Last Will and Testament of Mariano Leity Ramanaden deceased, a copy of which is hereunto annexed, was exhibited, read, and proved

before this Court, and administration of all the property and estate, rights, and credits of the deceased was and is hereby committed to Philippa Adaman of Jampettah Street in Colombo the Executor in the said Last Will and Testament named ; the said Philippa Adaman being first sworn faithfully to execute the said Will by paying the debts and legacies of the deceased Testator as far as the property will extend and the law will bind, and also to exhibit into this Court a true, full, and perfect Inventory of the said property on or before the 31st day of August, 1928, and to file a true and just account of her executorship on or before the 29th day of August, 1929.

And it is hereby certified that the Declaration and Statement of Property under the Estate Duty Ordinance have been delivered, and that the value of the said estate on which estate duty is payable, as assessed by the Commissioner of Stamps, amounts to Rs. 196,398·60.

And it is further certified that it appears by a certificate granted by the Commissioner of Stamps, and dated the 28th day of February, 1928, that Rs. 9,819·93 on account of Estate Duty (and interest on such duty) has been paid."

On 28th February 1929 Philippa Adaman filed an inventory and statement of the debts due to the deceased (P4). Among the debts shown therein is a debt of Rs. 12,000 due on bond No. 985 (P1) dated 16th September 1921 executed by Thomas Abraham Dias, Joseph Raphael Miranda, and John Nepomus Miranda for Rs. 12,000 hypothecating certain immovable property and undivided interests in immovable property.

On 7th March 1932 action was instituted against the obligors on the Bond for the recovery of the money. On that date a sum of Rs. 6,230 was due as interest. On 27th November 1933 decree (P5) was entered in a sum of Rs. 17,921·90 in the following terms :—

" That the Defendants jointly and severally do pay to the Plaintiff as Executrix as aforesaid the sum of Rs. 17,921·90 together with interest on Rs. 12,000 at the rate of 15 per centum per annum from the 3rd day of March 1932 to date hereof and hereafter on the aggregate amount of this decree at the rate of 9 per centum per annum till payment in full and costs of suit, within one month from the date hereof.

That the property described in the Schedule hereto together with all rights privileges easments servitudes and appurtenances whatsoever to the said premises belonging or usually held occupied used or enjoyed therewith and all the estate right title interest property claim and demand whatsoever of the Defendants in to out of or upon the same be and the same is hereby declared specially bound and executable for the payment of the said sum interest and costs on the footing of Mortgage Bond No. 985 dated 16th September 1921 attested by S. R. Amarasekere of Colombo Notary Public.

That, in default of payment of the said sum interest and costs within the said period, the said property declared specially bound and executable as aforesaid be sold by Public Auction by F. F. Krishnapillai, Licensed Auctioneer, or by some other licensed auctioneer named by Court, after such advertisement as the said auctioneer may consider sufficient upon conditions of sale approved by Court, the said auctioneer being directed and authorized to allow the Plaintiff or any one else on her behalf to bid for and purchase the said property at such sale and to do so upon such special terms as the Court may impose, if the Court imposes any, and, in the event of the Plaintiff becoming the purchaser thereof, to allow her credit to the extent of her claim and costs.

That the Secretary of this Court do execute the necessary conveyance in due form of law in favour of the purchaser or purchasers at such sale on his or their complying with the conditions of sale and on being satisfied, if the purchaser be the plaintiff, that she has been allowed credit, and, in the event of the purchaser or purchasers being a third party or parties, that the purchase money has been deposited in Court.

That the proceeds of such sale be applied in and towards the payment of the said sum interest and costs.

That, if such proceeds shall not be sufficient for the payment in full of the said sum interest and costs, the defendants jointly and severally do pay to the Plaintiff as Executrix as aforesaid the amount of the deficiency with interest thereon at the rate of 9 per centum per annum until realization.

That the Deputy Fiscal, Kalutara, do deliver possession of the said property to the purchaser or purchasers thereof. "

The sale in execution of the decree did not take place, but on 1st March 1937 Thomas Abraham Dias, one of the parties to Bond No. 985 (P1), executed deed of sale No. 2798 (P6) attested by Samuel Robert Amerasekere, Notary Public, conveying to Philippa Adaman of Alutmawatte in Colombo, executrix of the Last Will and Testament of the late Mariano Leity Ramanadan and her successor or successors in office, for a sum of Rs. 12,500 " in full satisfaction of the claim and costs due upon the hypothecary decree entered of record in case No. 48088 of the District Court of Colombo " the lands and interests secured by Bond No. 985, and in respect of which the hypothecary decree was entered. The two Mirandas who were parties to the Bond and the hypothecary action were not parties to the deed. The material portion of the deed is as follows :—

" KNOW ALL MEN BY THESE PRESENTS that I THOMAS ABRAHAM DIAS presently of No. 194, Chekku Street in Colombo (hereinafter calling myself the " said Vendor ") for and in consideration of the sum of RUPEES TWELVE THOUSAND FIVE HUNDRED (Rs. 12,500) in full satisfaction of the claim and costs due upon the hypothecary Decree entered of record in case No. 48088 of the

District Court of Colombo to PHILIPPA ADAMAN OF Alutmawatte in Colombo, Executrix of the Last Will and Testament of the late MARIANO LEITI RAMANADEN (the receipt payment and application whereof I do hereby admit and acknowledge) have granted bargained sold assigned transferred and set over and do by these Presents grant bargain sell assign transfer and set over unto the said Philippa Adaman, Executrix of the Last will and Testament of the late Mariano Leity Ramanaden (hereinafter called and referred to as the "said Purchaser") and her successor or successors in office All those undivided shares of land and premises described in the schedule hereto together with all and singular the rights of way easements advantages servitudes and appurtenances whatsovever thereto belonging or in anywise appertaining or usually held occupied used or enjoyed therewith or reputed or known as part or parcel thereof and together with all the estate right title interest claim and demand whatsover of me the said vendor of into upon or out of the said undivided shares of the said lands and premises and every part thereof and together with all the title deeds vouchers and other writings therewith held or relating thereto."

On 22nd April 1949, twenty-one years after the grant of probate to her, Philippa Adaman, by deed No. 2326 (D1) attested by Henry Arnold de Abrew, mortgaged the lands conveyed to her by deed No. 2798 (P6) to Wadduwage Don Agos Singho Appuhamy of Pahala Neboda for a sum of Rs 6,000. She described herself therein as "widow and executrix of the Last Will and Testament of the late Mariano Leity Ramanaden". On 27th September 1949 by deed No. 2320 (D4) attested by Stanislaus Marcus Casimir de Soysa, Notary Public, Philippa Adaman describing herself as "Executrix of the Last Will and Testament of the late Mariano Leity Ramanaden of Aluthmawatte Road, in Colombo", sold the lands conveyed to her by deed No. 2798 (P6) to the defendant-appellant Perumal Arunasala Narayana Somasunderam of Neboda for Rs. 9,000 the lands described in the Schedule thereto. The Schedules in P6 and D4 do not tally. The former has eight items, the latter has six, and their descriptions are not the same. In his attestation the Notary States—

"Rs. 3,000 was paid in cash in my presence. Rs. 6,000 was paid to mortgagee on Bond No. 2326 of 22/4/49 attested by H. A. de Abrew Notary Public in settlement."

Philippa Adaman died on 13th October 1954. On 9th February 1956 Lawrence Benedict Roque Anandappa, Mary Clare Casie Chitty, Rose Angela Perumal, Anid Augusta Anandappa and Julia Anthonia Saverimuttu, all children of Nathalia Canjemanaden referred to in the Will of Leity Ramanaden by deed No. 843 (P7) attested by Chinnathamby Muthuvelu Chinnaiya, Notary Public, sold to the plaintiff Waduwage Don Wijeratne of Neboda for Rs. 8,000 the lands dealt with in Bond 985 (P1) and conveyed to Philippa Adaman by deed 2798 (P6). The defendant, who had a prior deed from Philippa Adaman and was in possession, disputed the plaintiff's ownership and hence this action.

The main dispute as to ownership rests on Philippa Adaman's power to sell the lands in question. If she had no power to sell, the defendant cannot succeed ; but if she had power to sell, he is entitled to a decree in his favour.

Although there is no express enactment introducing the English Law of Executors and Administrators into this country, in a series of decisions which have been discussed in my judgment in *Malliya and others v. Ariyaratne* [1] this Court has held that by implication the Royal Charter of 1833 introduced the English Law on the subject. But those decisions are silent on the question whether the law to be administered is the English Law in force at the time when the question arises for decision or the English law in force in 1833. On the question whether the English statute law was also introduced by the Charter, the decided cases contain no definite pronouncement, but in the reported instances in which the English statute law was invoked the plea has been rejected. Learned counsel for the appellant however submitted that the law introduced was not only the common law in force at the time of the Charter, but also the statute law in force at that time. In my judgment in *Maliya and others v. Ariyaratne* (*supra*) I gave reasons for my being unable to agree with the view of the learned Judges of the past that the Charter had the effect of introducing the English law of Executors and Administrators. But, as successive judicial decisions have said so, and as the adoption of a view different to that followed since 1833 may have the effect of upsetting the basis on which the bench and the profession have so far acted, I shall, for the purposes of this judgment, proceed on the basis that the English Law of Executors and Administrators was introduced in 1833 and that the law that was introduced is the common and statute law in force in England in that year.

To ascertain the law in force in 1833 one has to resort to the legal treatises and judicial pronouncements of that period. There is a fair body of law applicable to executors in the Civil Procedure Code. In many respects that law follows the pattern of the English Law in force at the time the Code was enacted. It would be useful to examine that body of law. An executor is entitled to apply to have the will proved, and to have probate thereof issued to him (s. 518). Once probate is issued the executor is bound to take the oath of office, file in Court an inventory of the deceased person's property and effects with a valuation thereof verified on oath or affirmation, and if so required by the Court to enter into a bond with two sureties for the due administration of the deceased's property (s. 538). When no limitation is expressed in the grant, then the power of administration which is authenticated by the issue of probate extends to every portion of the deceased person's property movable and immovable within Ceylon, and endures for the life of the executor or until the whole of the said property is administered, according as the death of the executor or the completion of the administration first occurs (s. 540). An executor is entitled to compensation by way of commission on the property subject

[1] *(1962) 65 N. L. R. 145.*

to administration at rates prescribed in section 551. On or before the expiration of twelve months from the date on which probate issued to him, the executor is required to render a true account of his executorship verified on oath or affirmation with all receipts and vouchers attached and he may at the same time pay into Court any money which may have come into his hands in the course of his administration to which any minor or minors may be entitled (s. 553). An executor is also empowered at any time before the filing of the account required by section 553 (called the final account) voluntarily to file an intermediate account (s. 723). He can also be compelled at the instance of a creditor, a party interested, or the Court itself, to file an intermediate account (s. 724). An executor who fails to pay over to the creditors, heirs, legatees, or other persons the sums of money to which they are respectively entitled, within one year after probate, is liable to pay interest out of his own funds for all sums which he shall retain in his own hands after that period, unless he can show good and sufficient cause for such detention (s. 554).

Provision also exists in Chapters LIV and LV of the Civil Procedure Code for aiding and controlling executors and for the judicial settlement of their accounts. An executor may seek the intervention of the Court to discover property of the testator (ss. 712–716). An executor who has failed to file an inventory within the prescribed time can be compelled to do so (ss. 718–719). A creditor is entitled, at any time after twelve months have expired since the grant of probate, to seek the intervention of Court to compel the payment of his debt, and any person entitled to a legacy, or any other pecuniary provision under a Will, or a distributive share is entitled to seek the intervention of the Court to compel the payment or satisfaction of such legacy or pecuniary provision, or of its just proportional part, at any time after twelve months after the grant of probate (s. 720). The Court has power in the cases specified in section 725 to compel a judicial settlement of an executor's account on the application by a creditor or by any person interested in the estate or by any of the others specified in section 726. The executor himself may petition for a judicial settlement (ss. 729 and 732). The effect of a judicial settlement is that it is conclusive evidence against all parties who were duly cited or appeared and all persons deriving title from any of them at any time of the facts enumerated in s. 739.

The above are the statutory powers and obligations of an executor contained in the Civil Procedure Code. By virtue of section 540 the power of administration of an executor endures for the life of the executor or until the whole of the property of the deceased is administered. Although the executor's powers end on the occurrence of one or the other of the events specified in section 540 his liability for his acts does not end with either of those events. He can be called upon to answer for his acts at any time. But if there has been a judicial settlement of his account,

such judicial settlement is conclusive evidence against all parties who were duly cited or appeared and all persons deriving title from any of them at any time of the following facts and of no others :—

(*a*) That the items allowed to the accounting party for money paid to creditors, legatees, heirs and next of kin, for necessary expenses, and for his services are correct.

(*b*) That the accounting party has been charged with all the interest for money received by him and embraced in the account, for which he was legally accountable.

(*c*) That the money charged to the accounting party, as collected, is all that was collectible at the time of the settlement on the debts stated in the account.

(*d*) That the allowances made to the accounting party for the decrease, and the charges against him for the increase, in value of property were correctly made.

In the instant case the executrix died five years after the disputed sale on 27th September 1949. So the questions that arise for decision are whether, on 27th September 1949, twenty-one years after the grant of probate to the executrix, when she sold the land in dispute, she had administered the whole of the property of the deceased, and even if she had not, whether she had the power to sell the lands in question. Now, what is meant by administered the whole of the property of the deceased ? In order to answer this question it is necessary to examine the import of the word " executor ". An executor is one that is appointed by a man's Last Will and Testament to have the execution thereof after his decease and the dispensing of all the testator's substance according to the tenor of the Will. He is as such an *Heres Designatus* or *Testamentarius* in the Civil Law as to Debts, Goods and Chattels of the testator [Jacob's Law Dictionary, Vol. I (1739) Executor]. The execution of the duties of the office of executor is called administration both in our Code and in the English Law. His duties are to bury the deceased, to collect the estate, and, if necessary, convert it into money ; to pay the debts in their proper order, then to pay the legacies, and distribute the residue among the persons entitled thereto. Under our Code an executor is expected to do all these acts within a year from the grant of probate at the latest. Thereafter the executor becomes personally liable for the payment of interest on the unpaid legacies. A like period was prescribed in the English Law in force in 1833 [*see* Williams Vol. II (1832 ed.) p. 850].

On 7th September 1934 the executrix filed an account called the " final account ", which being in order, the Court ordered the payment to her of her commission. At this point of time she claimed that she had wholly administered the estate in the sense of collecting such debts

as had to be collected, paying the debts that had to be paid including estate duty, and carrying out the directions in the Will. After that she continued to draw through the Court the interest she was entitled to under the Last Will as life-interest holder. But on 6th December 1941 she moved, with the consent of the heirs, for an order of payment of Rs. 800 out of the money lying " to the credit of the case " for purchasing the property No. 592 Aluthmawatha Road, Mutwal, which was mortgaged to the deceased for Rs 12,500. That application was allowed. On 7th August 1947, fifteen years after the final account had been filed, the children of Nathalia Canjemanadan petitioned the Court for a judicial settlement of the account of the executrix. They alleged that the final account filed by the executrix was incorrect and that she had failed to prosecute the actions filed by her for the recovery of money due on bonds and promissory notes. They also alleged that by reason of her negligence the heirs had suffered loss. A citation was issued on the executrix. In answer to it, it was stated on behalf of the executrix that she abided by the account already filed. The petition was inquired into by the Court and the executrix was examined at length. On 18th March 1949 in answer to Court she said in regard to the disputed property (P8)—

" I remember I sued one T. A Dias on a mortage bond he had given to my husband (P3). In that case he transferred the properties to me. I know one of those properties. I do not know how many properties were transferred ; they were all mortgaged during my husband's lifetime. True the properties were transferred in 1937 but I never went to those properties. I know the existence of the lands. They are at Neboda. I did not get possession of the properties. It was not necessary for me to get possession ; they are boutiques and the rent is being paid. I used to get Rs 75 a month as rent. I have given a lease of those properties to a Tamil man called Markandan. Prior to him the lease was in the name of another person. I do not know how many lands ; there are some houses and one land.

I do not know how much money is due from T. A. Dias to the estate. I do not know the amount for which the properties were taken over from Dias, I have now forgotten. I know the principal amounts belong to the petitioners after my death. I know as executrix I got to look after that money. Everything is there ; I am only taking the profit and the interest.

Q : I put it to you the amount that T. A. Dias owes is more than Rs. 12,000 ? — I do not know. I remembered everything at that time, now I am forgetting.

Q : Are you incapable of looking after this estate as executrix ? Why ? — All this time I have been looking after it. Now I am taking what I am entitled to and I do not keep an account of those things.

Q : I am asking whether you can look after this estate ? — Yes.

In lieu of this Rs. 12,000 I am holding some lands. After my death those lands must go to the petitioners. Hereafter these lands must come into my possession.

Q : Why hereafter ? — Nowhere is it said that I must keep an account and I must show an account. I can enjoy all ; when I depart all will go to the petitioners. Before I depart all this property will not be lost.

Q : Who is in possession of these properties given to you by T. A. Dias ?— Marakandan.

This Markandan is at Neboda ; he is a man of Neboda. This place is 12 miles or so from Kalutara. Markandan is in the Neboda bazaar. He comes to see me once in two or three months and pays me the rent. The last time he came to pay rent was five or six months ago. I cannot remember whether I gave him receipt. I do not have a book from which to give receipts. I give receipts on loose sheets of paper. I never gave receipts for rent paid from a book. Even earlier no proper receipts were given to Dias. Receipts are given to tenants in the Colombo area; to tenants away from Colombo I do not give receipts. As he brings the money once in three or four months no receipts are given to Markandan. For the tenants in the Colombo area I have given receipts from a book. The Neboda tenants were not given receipts for a long time. I do not know where the title deeds of the Neboda properties are. I must search for the originals of the deed by which the Neboda properties were transferred to me. I know I am the executrix of this estate. I know I have to look after the properties belonging to the estate. I am not willing to give up the estate ; till I breathe my last I must carry on."

After several postponements on account of the illness of the executrix the inquiry came up for further hearing on 30th September, 1949. On that day, as the executrix appeared to be too ill to act in her office, her counsel informed the Court "the Executrix is not in a fit state of health for this inquiry to be continued ", and stated that he was willing to take steps to have letters, with Will annexed, issued to an attorney or to some other appropriate person. The Court thereupon made the following order—

"I accordingly make order that, pending such application by Mr. Wikremenayake's client or any person interested on her behalf, the grant already made to the Executrix be revoked."

Proceedings were adjourned for 1st December 1949.

On 19th June 1951 Laurence Benedict Roque Anandappa, who applied on 9th November 1949 for grant of Letters of Administration with the Will annexed on the revocation of the grant of probate to the executrix, was granted letters of administration.

The order of the Court into the inquiry into a judicial settlement of the account of the executrix was delivered on 29th September 1950. The portion of the judgment which relates to the land in question reads—

> " In dealing with these items 9 to 29, one item, namely, item No. 11 in schedule A requires further consideration. These relate to an action brought upon a bond against one T. A. Dias. The sale was stayed at the request of the plaintiff and by document E5, the judgment debtor conveyed eight lands in full satisfaction. E5 is the deed upon which this conveyance was made; a certified copy of the proceedings (P3) has been produced and the amount involved is Rs. 12,000. The executrix's position was that she has let these premises to a lessee and gets Rs 75 per month as rent. The executrix admitted that these premises which were transferred to her will go to the petitioners after her death. Learned Counsel who originally appeared for the executrix intended to call her proctor who he said will give evidence that she was holding these properties in trust. The proctor, however, was never called. These properties, the executrix appears to have sold on deed No. 2320 of 27th September 1949 after the proceedings in this case had commenced, to a third party. P16 is this deed of sale and the sale is for Rs. 9,000. The consideration is alleged to have been paid as follows: Rs. 3,000 in the presence of the Notary and Rs. 6,000 against a certain mortgage bond to the mortgagee. This money therefore the executrix is liable to make good to the estate."

There was an appeal from this order. It was dismissed on 23rd March 1954.

On 30th September 1949 the Court revoked the grant of probate to her. It is not clear under what provision of the Code it was done. But it is not necessary to decide that point for the purpose of the present appeal. The executrix, who also had a life interest in the property left by the testator, had, at the time she filed the final account, carried out the directions in the Will. As the testator regarded the loans secured by bonds as investments which were to devolve on his legatees after the death of his wife, the life-interest holder, and as the deceased left no debts and had sufficient money to meet the liabilities in respect of estate duty, the recalling of these investments was not necessary for the due administration of the estate. There was nothing left for her to do as executrix in the way of administration. The Will gave her no power to sell any of the property that was left to the legatees, subject to a life interest in her favour. Apart from the powers conferred by the Will, an executor has no more power than an administrator. Williams states—

> " The office of an administrator, as far as it concerns the collecting of the effects, the making of an inventory, and the payment of debts, is altogether the same as that of an executor: But as there is no will,

(except the administrator be *cum testamento annexo*,) to direct the subsequent disposition of the property, at this point they separate, and must pursue different courses." (1832 ed. Vol. II. p. 905).

" After the administration is granted, the interest of the administrator in the property of the deceased, is equal to and with the interest of an executor. Executors and administrators differ in little else than in the manner of their constitution " (1832 ed. Vol. I. p. 411).

In the instant case the Will did not authorise the sale of the property which was left to the legatees. Nor was a sale necessary for the payment of the debts.

Learned counsel for the appellant referred us to certain *dicta* of the English Courts in support of his submission that an executor has an absolute power of sale and that property sold by him cannot be followed into the hands of the purchaser. As would appear from the passages from Williams (1832 ed.) cited below, those *dicta* refer to the sale of movable property, as the English Executor had no power over immovable property in 1833.

" The general rule is, that all goods and chattels, real and personal, go to the executor or administrator. By the laws of this realm, says Swinburne, as the heir hath not to deal with the goods and chattels of the deceased, no more hath the executor to do with the lands, tenements and hereditaments. In other words it may be stated, that, both at law and equity, the whole personal estate of the deceased vests in the executor or administrator." (Vol. I. p. 411).

" It is a general rule of law and equity, that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate; and that they cannot be followed by creditors, much less by legatees, either general or specific, into the hands of the alienee. The principle is, that the executor or administrator, in many instances, *must* sell in order to perform his duty in paying debts, etc. and no one would deal with an executor or administrator if liable afterwards to be called to account " (Vol. II. p. 609).

" But in equity it seems to be now established, (in contradiction, as it should appear, to some former cases), that the executor or administrator can make no valid sale or pledge of the assets as a security for, or in payment of his own debt : on the principle that the transaction itself gives the purchaser or mortgagee notice of the misapplication, and necessarily involves his participation in the breach of duty.

If the executor be also specific legatee, a sale or mortgage from him of the specific legacy for satisfaction of his private debt will be safe, unless it can be shown that the purchaser or mortgagee knew there were debts unpaid.

Where there exists such collusion as to render the dealing invalid, not only a creditor, but a legatee, whether general or specific, is entitled to follow the assets. But they must enforce their right within a reasonable time, or it will be barred by their acquiescence." (Vol. II. p. 612).

This Court had decided that in Ceylon the property of the testator, subject to the terms of the will, vests in the heirs. In the case of *Silva v. Silva* [1], which is a decision of a Bench of three Judges, Hutchinson C.J. observed—

"I do not find any enactment vesting the immovables in the executor or administrator . . . . . and in fact it has been held by the Full Court in *De Kroes v. Don Johannes* [2], following an earlier case, that no assent on the part of the executor is required to pass to the devisee the immovable property specifically devised by the will."

After referring to the cases of *Fernando v. Dochchi* [3], *Ram* (1866) p. 195, *Ram.* (1867) p. 273 *Gavin v. Hadden* [4], Vanderstraaten's Reports p. 273, *Fernando v. Perera* [5], *P. Chettiar v. C. Pandary* [6], *Tikiri Menika v. T. M.* [7], *Tikiri Banda v, Ratwatte* [8], *Moysa Fernando v. Alice Fernando* [9], *Gunaratne v. Hamine* [10], *Ponnamma v. Arumugam* [11], Hutchinson C.J. stated in his conclusion thus—

"And in my judgment the cases which I have quoted establish that a conveyance by the heir or devisee of his share of the immovable property of the deceased is not void. The personal representative still retains power to sell it (with the special authority of the Court, if the terms of the grant of administration so require) for the purposes of the administration; but his non-concurrence in the conveyance does not otherwise affect its validity." In the same case Grenier A.J. stated—

"In applying therefore the English Law of Administration we must, in the absence of special legislation as there is in South Africa, take into account certain conditions relating to the Common Law rights of the heirs of an intestate, more especially those rights which accrue by succession and inheritance."

Both Hutchinson C.J. and Grenier A.J. quoted with approval the case of *Tikiri Banda v. Ratwatte* [12], where Lawrie and Withers JJ. expressed the opinion that it was competent for the heirs-at-law to alienate the

[1] *(1907) 10 N. L. R. 234 at 239.*
[2] *(1905) 9 N. L. R. 7.*
[3] *(1901) 5 N. L. R. 15.*
[4] *(1871) 8 Moore's P. C. Cases (N. S.) 90.*
[5] *(1887) 8 S. C. C. 54 (F. B.).*
[6] *(1889) 8 S. C. C. 205.*
[7] *(1890) 9 S. C. C. 63.*
[8] *(1894) 3 C. L. R. 70.*
[9] *(1900) 4 N. L. R. 201.*
[10] *(1903) 4 N. L. R. 299.*
[11] *(1905) 8 N. L. R. 223.*
[12] *(1894) 3 C. L. R. 70.*

property pending the administration of the estate, and that such alienation vested good title in the alienee, subject only to be defeated by any disposition of it by the administrator in due course of administration. This view was re-iterated in *Horne v. Marikar* [1]—

> " It is settled law that title to immovable property belonging to the estate of a person dying intestate does not vest in the administrator but passes to his heirs, but that the administrator retains the power to sell the property for the purposes of administration."

Under our law an executor is not the owner of the property left by the deceased. So was it in the English Law in 1833. Williams (1832 ed. Vol. I p. 400) states the law thus :

> " The interest which an executor or administrator has in the goods of the deceased is very different from the absolute, proper, and ordinary interest which every one has in his own proper goods : For an executor or administrator has his estate as such in *auter droit* merely, viz. as the minister or dispenser of the goods of the dead. "

An executor's absolute power to dispose of the testator's assets under the English Law is subject to the qualification that he may do so for the general purposes of the Will (Williams 1832 ed. Vol. II. p. 610). The following passage in Williams (1832 ed. Vol. II. p. 609) :—

> " It is a general rule of law and equity, that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate ; and that they cannot be followed by the creditors, much less by legatees, either general or specific, into the hands of the alienee "

must be read subject to our law and the principle that the power to sell is only for the general purposes of the will. Under the system of law as obtaining in Ceylon, an executor is a person who exercises such powers as are conferred by the Will, by the Civil Procedure Code, and by our law of executors. Anything done outside those powers is void and of no effect. In the instant case as the executrix's power of administration had come to an end, she had no power to sell the property in question. Even if the power had not come to an end, she had power to sell only for the purposes of due administration. Here the sale was not for such purposes. The purchaser of land from a person who has no power to sell does not become its owner. The question that arises is whether the plaintiff's remedy is a claim for damages alone, or for a declaration of title and ejectment of the person in unlawful possession of the land. As the sale was by a person who had no power to sell at the time she sold the property, both as she was *functus officio* and the sale was neither authorised by the Will nor by law, the purchaser from the executrix did not become the owner. What a person with limited authority is not

[1] *(1925) 27 N. L. R. 185 at 188.*

empowered to do, he is by implication prohibited from doing. A person who purchases immovable property from a person with limited authority is under a duty to see that the person from whom he is purchasing the property is acting within his authority. The plaintiff having obtained a conveyance from those in whom the property had vested is entitled to ask that his title be vindicated in these proceedings. The learned District Judge has in our opinion rightly granted the plaintiff's prayer for a declaration of title and ejectment.

In regard to the amount of compensation allowed by the trial Judge, we see no reason to interfere. The award is not unreasonable and has been made though no compensation has been claimed in the answer.

The learned District Judge was therefore right in giving judgment for the plaintiff who purchased the lands in dispute from the rightful owners.

We accordingly dismiss the appeal with costs.

HERAT, J.—I agree.

Appeal dismissed.