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of Malabar does not remember a single instance of the question arising.

The late Sadr Court, following an investigation conducted by a very competent enquirer in which the opinions of skilled persons were taken, decided that the sum demandable in such a case is not the money advanced, but the value at the period of exercising the power of redemption.

We do not feel justified in altering a decree supported by authorities and based upon that enquiry and following the authorities on the other side.

The Special Appeal will be dismissed with costs.

[APPELLATE CIVIL JURISDICTION.]

Before HOLLOWAY and INNES, J. J.

Special Appeal No. 228 *of* 1876.

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CHINNA SUBBARAYA MUDALI AND 3 OTHERS (DEFENDANTS), SPECIAL APPELLANTS, *v.* KANDASVAMI REDDI (PLAINTIFF), SPECIAL RESPONDENT.

Sale of lands for arrears of "tirvai" (rent).—Petition under Insolvent Debtors' Act previously filed by the tenant.—Validity of sale as against Official Assignee.

Where a tenant of land, owing arrears of "tirvai" (rent), takes the benefit of the Insolvent Debtors' Act, 11 and 12 Vic., c. 21, the Official Assignee must elect, and express his election, to take the land *cum onere*, otherwise he acquires no interest in it. Where such election has not been made and a suit for possession is brought by a purchaser at an auction sale held by the revenue authorities for the arrears, the insolvent cannot plead a *jus tertii* in the assignee.

THE special respondent, plaintiff in the Court of first instance, sued the special appellants for recovery of certain lands, which he alleged that he had bought at an auction sale held by the Revenue authorities for arrears of "tirvai" (rent) due to the Izardars of the Zemin by the 1st, 2nd, and 3rd defendants.

First defendant pleaded that he and 2nd and 3rd defendants gave a notice of insolvency to the Izardars of Zemin in respect of that amount of "tirvai" for which the Revenue authorities held a sale, and obtained the benefit of the Insolvent Act. He further pleaded that he and 2nd and 3rd defendants sold the land to 4th defendant, and that the latter continued to enjoy the same.

2nd and 3rd defendants made no defence.

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4th defendant supported the allegations of 1st defendant.

The District Munsif (of Poonamallee) found that the arrears of "tirvai" in question had been included by the 1st, 2nd, and 3rd defendants in their schedule, and held that in consequence of the Insolvency proceedings, the Izardars had lost their right to recover the arrears, and that the sale of the lands was therefore invalid; and dismissed the suit with costs.

On appeal, the District Judge (of Chingleput) reversed the decision of the Court of first instance, holding that cases under the Insolvent Debtors' Act (11 and 12 Vic., c. 21) must be governed by English law, and that by English law a bankrupt is discharged from liability to pay rent accruing after, but not rent accruing before the filing of his petition, and that, as in the present case the rent had accrued before the filing of the petition, the landlord had a right to proceed under the Rent Recovery Act,* and the sale was therefore legal. With regard to the plea of sale to 4th defendant, he disbelieved it on the evidence.

The Advocate-General for the special appellants:—On the filing of their petitions, *all* the property of the insolvents, as I contend, vested in the Official Assignee, and consequently the subsequent sale of the lands for arrears of rent was null and void.

HOLLOWAY, J.—The case is one of conflicting lien. I am inclined to think that we should treat plaintiff's assignors', and therefore plaintiff's, right to the rent as what is called on the Continent a "privileged hypothec," and therefore unaffected by the vesting order; plaintiff thus having a superior lien on the property to that of the defendants, or, rather, of the Official Assignee.

The Advocate-General referred to s. 22 of the Insolvents' Act (11 & 12 Vict., c. 21), wherein it is enacted that after the vesting order has been made, "No distress for rent due before such vesting order shall be made upon the goods and effects of the insolvent," and contended that this showed that the sale of the lands in question, being a sale made for rent due prior to the vesting order, must be invalid.

HOLLOWAY, J.—The two cases are quite dissimilar; you cannot argue from the one to the other. The one is a remedy which the person is himself entitled to use without any judicial

* VIII. of 1865 (Madras).

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process; the other can only be obtained through the instrumentality of a court of justice.

Advocate-General.—I submit that plaintiff had to make out a valid sale to him of the land, as against the Official Assignee; and that he has not done so.

HOLLOWAY, J.—As far as plaintiff's case is concerned, it seems to me that he has nothing to do with the bankruptcy. According to your argument it comes to this, that the only person interested in this property is the Official Assignee, and he is not before us.

Advocate-General.—Then, if the Official Assignee ought to have been the party sued, instead of the present defendants, I submit that, this suit, being a suit in ejectment, must fail.

Miller, for the special respondent, contended that no case for appeal had been made out. All that these defendants were entitled to was an annual putta, as to these lands; and they made default in payment of "teervah," and were in arrear for several years. If the land vested in the Official Assignee by the vesting order at all, it vested in him subject to the "teervah" charge, and was liable to be sold for non-payment thereof when in his hands just as much as in the hands of defendants.

HOLLOWAY, J.—I am not at all satisfied that the Official Assignee ought not to have been made a party.

HOLLOWAY, J., gave judgment as follows:—There would be no doubt about the question as to these conflicting claims if it arose in Scotland, or on the Continent, for there a charge in the form of rent is in itself a hypothec, and a hypothec too which takes precedence of all others. But I think the point is not near so clear that the proceedings of the Insolvent Court here can be treated like those of a foreign Insolvent Court as I thought at the outset. It is not, however, necessary to debate that question any further, for, as it appears to me, no interest in the particular property in question vested in the Official Assignee by the vesting order. The interest of the puttah-holder is one dependent upon his payment of rent, and if he does not pay, his right to hold ceases and becomes saleable for whatever it is worth for the arrears. It is a case of a contract—a contract of letting; and the Official Assignee must have expressed his election to take it, and must have taken it *cum onere*, otherwise he acquired no right or interest in the land. The question, then, is, has he elected to

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take this contract? I think he has not. The point is, not whether the land has become his, but whether the right of *usus* subject to payment of rent, has become his. There is an absolute want of evidence of an *actus interveniens* on the part of the Official Assignee, and we are able to decide according to the right and justice of the case and not compelled to give assent to this supposed *jus tertii*, which according to the case of the special appellant himself never existed.

INNES, J.—Concurred.

Special appeal dismissed with costs.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 522 of 1875.

1875. Dec. 22.

CHINNA NAGAYYA, SPECIAL APPELLANT (PLAINTIFF), *v.* PEDDA NAGAYYA, SPECIAL RESPONDENT (DEFENDANT).

Adoption—Mother's Sister's Son—Sudras.

Adoption of the mother's sister's son is valid among Sudras. The rule prohibiting the adoption of one with whose mother, in her maiden state, the adopter could not have legally intermarried, is not binding on Sudras.

THE plaintiff sued for a declaration that he was the adopted son of one M. Venkayya, to whom he stood in the relationship of mother's sister's son.

The District Munsif (of Masulipatam), who first heard the case, decided that the adoption was an illegal one. His decision was reversed by another Munsif, who heard the case on review. The decision of the latter Munsif was, in its turn, reversed by the Subordinate Judge (of Masulipatam), who held the adoption to be invalid.

The following is an extract from the Subordinate Judge's Judgment:—"It is obvious from the foregoing texts" (Dattaka Chandrika II., 1, and I., 17; Dattaka Mimamsa II., 74, 107, 108) "that whilst the daughter's son, sister's son, and the son of the mother's sister are expressly excepted from adoption among the regenerate classes, the two former only, *i. e.*, a daughter's son and sister's son, are expressly declared to be affiliated by Sudras, whilst the two authors are silent about the third exception as applicable to Sudras. The District Munsif from whose decision