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argument appears to us to be that by section 3 "suit" does not include an appeal, and there is nothing, therefore, in the Limitation Act which interferes with the full scope of section 55 of the Divorce Act. In this view, the appeal is out of time, and the application to have it admitted must be refused.

Attorneys for the plaintiff:—Messrs. *Little and Company.*

Attorneys for the defendant:—Messrs. *Crawford, Burder and Company.*

ORIGINAL CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Tyabji.

ABDUL RAZAK, PLAINTIFF, *v.* J. G. KERNAN, DEFENDANT.

1898.

February 11.

Insolvency—Official Assignee—Vesting order—Lease—Leasehold property—Right of Official Assignee to accept or disclaim—Effect of taking possession—Liability for rent.

In a Presidency town, the Official Assignee has the right to elect whether he will accept or repudiate onerous (*e.g.* leasehold) property belonging to an insolvent and as such vesting in the Official Assignee under the Indian Insolvent Act (Stat. 11 and 12 Vict., C. 21).

Except under exceptional circumstances, the taking of possession of leasehold property by the Official Assignee is proof of election on his part to take the lease.

A. held certain premises in Bombay from the plaintiff as a monthly tenant at a rent of Rs. 125, with liberty to either party to terminate the tenancy on giving one month's notice. On the 9th April, 1896, A. was adjudicated insolvent by the Court for the Relief of Insolvent Debtors at Madras, and on that day the usual vesting order was made vesting all his estate and effects in the defendant as Official Assignee. On the 20th August, 1896, the Sheriff, who had taken possession of the premises in execution of a decree passed against A., handed over possession of them to the agent of the defendant, who remained in possession until the 30th September, 1896, when he gave them up to the plaintiff. The plaintiff brought this suit against the defendant for the rent (Rs. 750) due from 1st April, 1896, to the 30th September, 1896.

Held, that the defendant was liable. By entering into possession on the 30th August, 1896, the defendant had elected to accept the lease and had thereby become assignee of it. The acceptance dated back to the vesting order, and the Official Assignee (the defendant) became liable for the rent during the period that he continued to be assignee, his liability ending when with the landlord's consent he surrendered the term.

* Small Cause Court Reference, No. 3036 of 1897.

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CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV of 1882), by C. W. Chitty, Chief Judge—

"1. This was a suit brought by the plaintiff to recover from the defendant a sum of Rs. 750, being the amount of rent due to him for certain premises situate in Apollo Street, Bombay, from the 1st April to the 30th September, 1896, at a monthly rental of Rs. 125, or, in the alternative, the same sum as compensation for use and occupation of the same premises during the said period.

"2. The defendant is the Official Assignee at Madras and, as such, the assignee of the estate and effects of one A. Sabhapatty Moodeliar, an insolvent.

"3. The facts of the case on which my decision was based and the reasons for that decision are fully set out in my judgment, a copy of which is hereto annexed, and to which for brevity's sake I crave leave to refer. I gave judgment for the plaintiff for the full amount claimed and costs, and at the request of the defendant's attorney made my judgment contingent upon the opinion of the High Court."

The following is the statement of facts referred to in the above paragraph, taken from the Chief Judge's judgment :—

"The plaintiff is the landlord of certain property in Apollo Street which he purchased in January, 1895. At the time of the purchase, a set of offices in the plaintiff's building was in the occupation of the firm of A. Sabhapatty Moodeliar and Co. as monthly tenants at a rent of Rs. 125, with liberty to either party to terminate the tenancy on giving one month's notice. The actual premises included in the lease consisted of one floor and a room on the floor above. Rent was paid regularly by the firm of A. Sabhapatty Moodeliar and Co. down to the 31st March, 1896. On that day the firm gave to the plaintiff a notice to determine the tenancy on the 30th April, 1896 (Exhibit A), but such notice was never acted on. Indeed the defendant was apparently unaware of it until it was produced in Court by the plaintiff's attorney. On the 9th of April, 1896, A. Sabhapatty Moodeliar (who was, as I understand, the manager of a joint Hindu family carrying on a family business in Bombay, Madras and elsewhere in that name) was adjudicated an insolvent by the Court for the Relief of Insolvent Debtors at Madras, and on the same day the usual vesting order was made vesting all his estate and effects in the defendant. On the 9th April, Sardarmal Jugonath obtained a decree against the insolvent in the High Court at Bombay and on the same day the Sheriff in execution of that decree attached property of the insolvent consisting of office furniture and books lying at the

premises in question. The Sheriff kept the property on the premises which he closed with his own lock. The Sheriff remained in custody from the 11th April until the 20th August, 1896. On the 15th April, Mr. Turner as constituted attorney of the defendant wrote to the Sheriff asking him to remove the attachment. As this request was not complied with, Mr. Turner on 6th May, 1896, took out a Judge's summons in the High Court to have the attachment removed. That summons was made absolute on the 11th August, 1896. The proceedings and the judgment are reported at length in I. L. R., 21 Bom., at p. 205. On the 20th August, 1896, the Sheriff handed over possession of the attached property to the defendant's agent, Mr. Turner. Mr. Turner gave up possession of the office premises to the plaintiff on the 30th September, 1896. It should be here stated that the room on the upper floor was before the date of insolvency and during all the six months for which rent is now claimed in the occupation of one J. A. Grant, who had originally entered as a sub-tenant of the insolvent. The delivering up of possession by Mr. Turner, the Official Assignee, on the 30th September, 1896, was by mutual agreement between him and the plaintiff. Before that date the plaintiff was able to secure new tenants on most favourable terms. He was able to let the office premises to the proprietors of the '*Advocate of India*' at Rs. 105, and to agree with Mr. Grant for the payment of rent direct to him for the upper room at Rs. 30, an advance on the whole of Rs. 10. It was also arranged that the new tenancies should commence from such date as the defendant should vacate, and they did actually commence from the 1st October, 1896. I mention these facts in order to dispose of the argument of the plaintiff's attorney that if the plaintiff really considered himself entitled to claim rent from the defendant he would also have assuredly claimed an extra month's rent in lieu of notice. It will be patent, from the facts stated, that such a claim, if made, could not have been substantiated. It would, in effect, be a claim for damages which the plaintiff admittedly has not suffered. On the 9th June, 1896, and again on the 24th July, 1896, the plaintiff's attorney wrote to the Sheriff demanding the rent which had on those dates accrued due, but no notice was taken of his demands. On the 17th September, 1896, plaintiff for the first time addressed Mr. Turner, and a lengthy correspondence ensued which eventually terminated in the filing of this suit."

The following were the questions referred to the High Court :—

(1) Whether in a Presidency town in India, in cases of onerous property (*e.g.* leasehold property) belonging to an insolvent and as such vesting in the Official Assignee under the Indian Insolvent Act, the Official Assignee has the right to elect whether he will accept or repudiate such property ?

(2) Whether the taking of, or remaining in possession of leasehold property by an Official Assignee is tantamount to an election on his part to accept the lease ?

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(3) Whether, on the facts stated, the defendant must not be deemed, in law, to have been in possession of the premises in question during the six months for which rent is claimed?

(4) Whether the defendant is not liable to pay to the plaintiff such rent?

(5) Whether, in the alternative, the defendant is not liable to compensate the plaintiff for use and occupation of the premises from 9th April to 30th September, 1896?

Lowndes for the defendant:—The notice of the 31st March, 1896, terminated the tenancy on the 30th April, 1896—Transfer of Property Act (IV of 1882), section 111; Woodfall's Landlord and Tenant (14th Ed.), p. 357. The continuing in possession was not a continuance of the tenancy. The Sheriff entered into possession on 11th April. The assignee is not liable till he elects. There was no election here—*Turner* v. *Richardson*(1); *Copeland* v. *Stephens*(2); Griffiths on Bankruptcy, Vol. I, p. 287; *Levi* v. *Ayers*(3); Statute 11 and 12 Vict., C. 21, sections 7 and 11; Stat. 1 and 2 William IV, C. 56; Bankruptcy Act, 1849, section 145; *Goodwin* v. *Noble*(4). Mere laches is not election. The possession of the Sheriff was not the possession of the assignee. There was no use and occupation before the 20th August—Woodfall's Landlord and Tenant, p. 567; Transfer of Property Act (IV of 1882), section 116; *Churchward* v. *Ford*(5); *Hyde* v. *Moakes*(6). The Sheriff was in possession. The assignee is not liable for use and occupation till he enters—*How* v. *Kennett*(7); *Jones* v. *Reynolds*(8); Woodfall's Landlord and Tenant, p. 569; *Edge* v. *Strafford*(9); *Sardarmal* v. *A. Sabhapathy*(10). He cited also Robson on Bankruptcy, p. 443; Atkinson on Sheriffs, p. 303; *Titterton* v. *Cooper*(11); Woodfall's Landlord and Tenant, Ch. VII, section 11.

Scott, for plaintiff:—There was a waiver of notice. Any act showing an intention to continue the lease is a waiver of notice.

(1) 7 East, 335.
(2) 1 B. and Ald., 593 at p. 604.
(3) 3 Ap. Ca., 842.
(4) 27 L. J. (Q. B.), 204.
(5) 2 H. and N., 446.
(6) 5 C. and P., 42.
(7) 3 Ad. and El., 659.
(8) 7 C. and P., 335.
(9) 1 Cr. and J., 391.
(10) I. L. R., 21 Bom., 205.
(11) 9 Q. B. D., 473.

See Act IV of 1882, section 113, illustration. The lease vested at once in the Official Assignee as part of the personal estate of the insolvent He might disclaim it. Abandonment is not equivalent to disclaimer. He referred to Stat. 49 Geo. III, C. 121, Sec. 19; Stat. 5 Geo. IV, C. 98, Sec. 73; English Bankruptcy Act, 1869, sections 23 and 24; *Aga Mohomed* v. *Koolsom Beebee* [1]; *Exparte Dressler* [2].

FARRAN, C. J.:—We agree with the Chief Judge of the Small Cause Court that the first question should be answered in the affirmative. Before us it was not argued that the Official Assignee was bound to take upon himself against his will the liabilities arising out of a leasehold vested in the insolvent at the date of his insolvency. That contention was not, we think, open to the plaintiff after the decision of the Privy Council in *Levi* v. *Ayers* [3], which recognises the general law as settled by *Turner* v. *Richardson* [4] and other cases to be that "assignees in bankruptcy are not bound to accept a *damnosa hæreditas* and that they have consequently an option to accept or repudiate property which is or may be injurious to the estate."

The argument for the plaintiff was confined to the contention that the right of the Official Assignee was to disclaim the lease, or rather that he was bound by the lease, unless or until he expressed his intention by words or acts not to take it as part of the assets of the insolvent. In our opinion that contention cannot be supported. The earlier cases upon the question cited to us were *Bourdillon* v. *Dalton* [5]; *Wheeler* v. *Bramah* [6]; *Turner* v. *Richardson* [4]; *Copeland* v. *Stephens* [7]. Though loose expressions such as "*abandonment*" by the assignees are used by Judges at *nisi prius*, the considered judgments make it, we think, quite clear that a lease was not considered to vest in the assignees unless they accepted it. In the last cited case Lord Ellenborough delivering the judgment of the Court says at p. 604 of the report: "We are of opinion that the general assignment of a bankrupt's personal

(1) L. R., 24 Ind. Ap., 196.
(2) 9 Ch. D., 252.
(3) 3 Ap. Ca., 842.
(4) 7 East, 335.
(5) 1 Esp., 233.
(6) 3 Camp., 340.
(7) 1 B. and Ald., 593.

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estate does not vest a term of years in the assignees unless they do some act to manifest their assent to the assignment, as it regards the term, and their acceptance of the estate, and upon this ground alone our judgment in the present case is given." The whole judgment places the question beyond doubt. This view of the law was recognised by the Legislature in 5 Geo. IV, C. 98, Sec. 73, and was always acted upon in England until the law was altered by the passing of the Bankruptcy Act of 1869 —*Ex parte Dressler*(1); *Titterton* v. *Cooper*(2). In our opinion it is now the law in the Presidency towns in India.

2. The taking of possession of leasehold property of an insolvent by the Official Assignee has always been regarded as proof of election on his part to take the lease. This has been laid down in the earliest cases, *Turner* v. *Richardson*, *Copeland* v. *Stephens*, and was re-stated by the Judges in *Ex parte Dressler* and *Titterton* v. *Cooper*. In the latter case, Brett, L.J., says: "It is not easy to enumerate what may be called unequivocal acts, but I may mention the taking of possession of the premises demised by the lease;" and Cotton, L.J., in the same case says: "It is true that in many of the cases possession is referred to; but possession of leasehold property is the very strongest proof that a person to whom a conveyance has been made has accepted it, and has become assignee of the lease." The Judges in *Ex parte Dressler* are equally emphatic upon the effect of possession. *Goodwin* v. *Noble*(3) was much relied upon in this and the next branch of the case. The circumstances in that case were very peculiar. The landlord was informed of the purpose for which the asignees wished to remain in possession, and the Court was of opinion that he could not reasonably have inferred, from what the defendants did, that they meant to take to the lease. Our answer to the second question will be that, except under exceptional circumstances, the taking possession by the Official Assignee of leasehold property is tantamount to an election on his part to accept the lease. As to the Official Assignee remaining in possession we do not see how the question arises.

(1) 9 Ch. D., 252. (2) 9 Q. B. D., 473.
(3) 8 E. and B., 587.

3. Upon the third question, we do not think that the defendant must be deemed, in law, to have been in possession of the premises during the six months for which rent is claimed.

4. The fourth question must, we think, be answered affirmatively to the effect that the defendant is liable for the rent. On the 9th April, Moodeliar, the lessee of the premises, was declared an insolvent. He had some furniture and books on the leasehold premises. These the Sheriff attached on the 11th of April entering into possession and putting his lock on the doors. The Official Assignee took steps to remove the attachment, which he succeeded in doing on the 11th August. Down to this time the Official Assignee had done nothing to show an election to take over the lease. On the 20th August, the Sheriff made over the attached property to the Official Assignee, who on the same day entered into possession of the premises. He did not inform the plaintiff, the landlord, that he entered with any limited object or for any special purpose. There is nothing to distinguish the case from the ordinary one of an Official Assignee entering into possession of leasehold premises and thus consenting to become assignee of the lease. Having made the election the usual consequences follow. The acceptance of the lease dates back to the vesting order and the Official Assignee becomes liable for the rent during the period that he continues to be the assignee of the lease—his liability ending when with the landlord's assent he surrenders the term—*Titterton* v. *Cooper*[1], or otherwise gets rid of his obligation.

It was contended for the defendant that the notice given on the 31st March, 1896, terminated the lease on the 30th April and that the tenancy came to an end on that day. It has, however, been found as a fact that that notice was not acted on or in other words was waived. It does not appear to us that we have been asked whether what took place really amounted to a waiver. I have asked the Chief Judge whether he intended us to consider that question and he replied that he stated the notice and its waiver merely as facts in the history of the case. The waiver of the notice, he said, was not contested before him.

(1) 9 Q. B. D., 473.

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5. It is not necessary to answer this question.

Costs costs in the case.

Attorney for the plaintiff:—Mr. *K. D. Shroff.*

Attorneys for the defendant:—Messrs. *Craigie, Lynch and Owen.*

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Parsons.

1897. *January* 19.

MARTAND BALKRISHNA BHAT AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* DHONDO DAMODAR KULKARNI (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage—Mortgage by manager of undivided family—Redemption—Sale of mortgaged property under money decree obtained by mortgagee in respect of other debts—Purchase by mortgagee at Court sale—Right of member of family to redeem—Transfer of Property Act (IV of 1882), Sec. 99—Civil Procedure Code (Act XIV of 1882), Sec. 294.

Shankraji, his son Shridhar and his grandson the plaintiff Dhondo (son a predeceased son) were undivided. In 1875 Shankraji mortgaged the property in dispute to Hamirmal with possession. After Shankraji's death in 1877 Shridhar managed the whole estate. In 1878, during Dhondo's absence from his native village, Hamirmal sued Shridhar as the heir and representative of Shankraji in respect of other debts and, obtaining a money decree against him, attached the mortgaged property in execution of the decree. After the attachment, Hamirmal without notifying or disclosing his mortgage lien caused several of the properties to be sold and, without obtaining leave from Court to bid at the sale, purchased some of them in the names of his dependants at an under value and *benami* for himself. In 1892 Dhondo brought this suit against Hamirmal, Shridhar and the *benami* purchasers to redeem the properties so bought by Hamirmal. The lower Courts found that the money decree which Hamirmal obtained, and the execution proceedings thereon, bound the estate.

It was contended that the execution sales had not been objected to under section 294 of the Civil Procedure Code and were, therefore, valid, and that the plaintiff, consequently, could not redeem.

Held, that the plaintiff might redeem although he had not taken proceedings under section 294. The fact that the mortgagee Hamirmal had sold the property in execution of a money decree did not free him from the liability to be redeemed as mortgagee. The sale was rendered nugatory, not by the provisions

* Second Appeal, No. 172 of 1896.