1897.

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less a different intention is expressed or necessarily implied. No such intention is expressed in the sale-deed; but it is argued that it is necessarily implied because the trees had been prior to the sale mortgaged to the defendant and no mention of the mortgage is made in the deed of sale. We do not think that from this any necessary inference arises that the intention of the parties was that the vendor's interest in the trees should not pass to the plaintiff.

We must, therefore, reverse the decree of the lower appellate Court and restore that of the Court of first instance. Costs in this and the lower appellate Court to be on the defendant Bhimrav. The six months' time allowed for redemption will run from this date.

Decree reversed.

MATRIMONIAL JURISDICTION.

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

A (HUSBAND), PLAINTIFF, *v.* B (WIFE), DEFENDANT.*

1898.
January 11.

Divorce—Decree absolute—Appeal, right of—Limitation for such appeal—Indian Divorce Act (IV of 1869), Secs. 55, 56 and 57 (1)—Section 7, construction of—Limitation Act (XV of 1877), Art. 151.

Under the Indian Divorce Act (IV of 1869) an appeal lies from a decree absolute although the decree *nisi* has been left unchallenged.

An appeal against a decree absolute must be filed within twenty days from the date of decree, that being the period prescribed for appeals from decrees made on the original side of the High Court under the law for the time being in force (see section 55 of the Divorce Act (IV of 1869).)

* Suit No. 514 of 1896.

(1) Indian Divorce Act (IV of 1869), Secs. 55, 56 and 57:—

"55. All decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed from, in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under the laws, rules and orders for the time being in force:

"Provided that there shall be no appeal from a decree of a District Judge for dissolution of marriage or of nullity of marriage: nor from the order of the High Court confirming or refusing to confirm such decree.

"Provided also that there shall be no appeal on the subject of costs only.

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The principles and rules referred to in section 7 of Divorce Act (IV of 1869) are not mere rules of procedure such as the rules which regulate appeals, but are the rules and the principles which determine the cases in which the Court will grant relief to the parties appearing before it or refuse that relief—rules of *quasi*-substantive rather than of mere adjective law.

SUIT for divorce. The husband had obtained a decree *nisi* on the 30th November, 1896, which was made absolute on the 14th June, 1897.

On the 9th December, 1897, a memorandum of appeal was presented by the wife. The officer of the Court refused to accept it, being of opinion that it was barred by limitation. Next day it was presented in Court, and leave was obtained to move as of that date for the admission of the appeal. The questions which arose were (1) whether in divorce suits an appeal lay from the decree absolute and (2) as to the limitation for such appeal.

Inverarity for the intending appellant (the wife):—We have presented an appeal, but the officer of the Court has refused

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"56. Any person may appeal to Her Majesty in Council from any decree (other than a decree *nisi*) or order under this Act of a High Court made on appeal or otherwise,

and from any decree (other than a decree *nisi*) or order made in the exercise of original jurisdiction by Judges of a High Court or of any Division Court from which an appeal shall not lie to the High Court,

when the High Court declares that the case is a fit one for appeal to Her Majesty in Council.

XIII.—Re-marriage.

"57. When six months after the date of an order of a High Court confirming the decree for a dissolution of marriage made by a District Judge have expired,

or when six months after the date of any decree of a High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction,

or when any such appeal has been dismissed,

or when in the result of any such appeal any marriage is declared to be dissolved,

but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death:

Provided that no appeal to Her Majesty in Council has been presented against any such order or decree.

When such appeal has been dismissed, or when in the result thereof the marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death."

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to receive it on the ground that it is barred by limitation. The decree *nisi* was passed on the 30th November, 1896, but the decree was not made absolute until the 14th June, 1897. Our memorandum of appeal was presented on the 9th December, 1897, *i.e.* within six months of the passing of the decree absolute. We contend that the Limitation Act (XV of 1877) does not apply to divorce suits, and that under section 57 of the Divorce Act (IV of 1869) six months is the time given for appeal. The time runs from the decree absolute. The decree *nisi* does not dissolve the marriage. He referred to sections 7, 45, 55, 56 and 57 of Act IV of 1869; *Abbott* v. *Abbott*[1]; Browne on Divorce, p. 377; Statute 44 and 45 Vict., C. 68, Sec. 10; Stat. 20 and 21 Vict., C. 85; Stat. 23 and 24 Vict., C. 144; Stat. 31 and 32 Vict., C. 77; *Warter* v. *Warter*[2].

Lang (Advocate General) *contra*:—The appeal is too late, and being an appeal from a decree absolute ought to be to the Privy Council. See section 56 of the Divorce Act (IV of 1869). He referred to sections 7, 16 and 55 of that Act, and to Stat. 31 and 32 Vict., C. 77.

FARRAN, C. J.:—The question before us is whether the appeal in this case should be admitted. The Prothonotary has refused to accept it as out of time.

The decree *nisi* was made on the 30th November, 1896. The decree absolute was pronounced on the 14th June, 1897, and the appeal was presented to the Prothonotary on the 9th December following, that is to say, within six months of the pronouncement of the decree absolute.

Section 55 of the Indian Divorce Act (IV of 1869) gives a general right of appeal from all decrees in suits or proceedings under the Act under the laws, rules and orders for the time being in force. "Decrees" in this section include, we think, both decrees *nisi* and decrees absolute, as, throughout the Act, when it is intended to distinguish between these two classes, they are distinguished in appropriate language. See *e.g.* sections 44, 56 and 57. When no such distinguishing language is used, "decree" includes both classes. It might be thought that no appeal

(1) 4 Beng. L. R. (O.J.), 51.

(2) 15 Pro. D., 152.

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would be allowed from a decree absolute in cases where the decree *nisi* was left unchallenged upon questions peculiarly within the purview of the decree *nisi*, but looking to the history of legislation upon this branch of the law no support is to be found for the supposition. In the Act of 1860 (23 and 24 Vict., C. 144), which introduced the practice of granting decrees *nisi* in the first instance, an appeal was given to the House of Lords from the decree absolute and not from the decree *nisi*. This was the state of the law in England when the Indian Divorce Act was passed, save that in 1868 it had been provided by 31 and 32 Vict., C. 77, section 3, that in suits for a dissolution of marriage no respondent or co-respondent not appearing and defending the suit on the occasion of the decree *nisi* being made should have any right of appeal to the House of Lords against the decree when made absolute unless the Court upon application made at the time of the pronouncing of the decree absolute should see fit to permit an appeal. In 1881 by the Judicature Act of that year (44 and 45 Vict., C. 68, section 10) it was enacted that "No appeal from an order absolute for dissolution * * * of marriage shall henceforth lie in favour of any party who having had time and opportunity to appeal from the decree *nisi* on which such order may be founded, shall not have appealed therefrom." This was the case here. The appellant allowed the decree *nisi* to be made in her absence. It was faintly contended by the Advocate General for the respondent that, therefore, no appeal lies in this case, because by section 7 of the Indian Divorce Act it is enacted that, subject to the provisions contained in the Act, the High Court shall in all suits and proceedings thereunder act and give relief on principles and rules which in the opinion of the said Court are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial causes in England for the time being acts and gives relief. The principles and rules here referred to, are not, we think, mere rules of procedure including rules which regulate appeals which are laid down in the subsequent sections (45 and 55) of the Act, but are the rules and principles which determine the cases in which the Court will grant relief to the petitioner appearing before it or refuse that relief—rules of *quasi*-substantive rather than mere

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adjective law. Exactly the same language was used in giving the Matrimonial Court in England jurisdiction to deal with cases over which the Ecclesiastical Courts had theretofore such jurisdiction: see 20 and 21 Vict., C. 85, Sec. 22. The above was the view taken in *Abbott* v. *Abbott*[1], and is, we think, the correct view.

The main contention, however, of the Advocate General was based upon the language of section 55 of the Indian Divorce Act itself, which provides that all matrimonial decrees * * may be appealed from under the laws, rules and orders for the time being in force. The laws and rules which impose a limit upon the time within which an appeal can be brought are doubtless within the scope of that section. At the time when the Act was passed, a rule of the Bombay High Court made twenty days the limit of the time for appealing from a decree. This rule was, however, superseded by the Limitation Act (XV of 1877), Schedule II, Art. 151, which now by reason of section 4 governs the presentation of appeals in the High Court's original jurisdiction, and the former rule finds no place in the rules of the Bombay High Court published since the passing of the Limitation Act. Hence it is contended that there is no rule for the limitation of the presentment of original side appeals except that laid down in the Limitation Act, and that the Limitation Act, section 1, enacts that nothing contained in Parts II and III applies to suits under the Indian Divorce Act. We cannot, however, it is said, have recourse directly to that enactment to determine within what time a party to a matrimonial suit is bound to appeal. Indirectly, however, the Advocate General contends that an out-of-time matrimonial appeal is prohibited, since section 55 places such an appeal under the laws, rules and orders for the time being in force for other original side decrees, and original side decrees must be appealed from within twenty days (we omit the provisions as to obtaining copies, as it does not affect the argument) from the time when they are made. Mr. Inverarity on the other hand contends that the above provision of the Limitation Act, which is later in point of time, virtually repeals so much of section 55 of the Divorce Act as is inconsistent with it. The short answer to that

(1) 4 Beng. L. R. (O.J.), 51.

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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.