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contract under which he would be primarily liable to pay 48 *per cent. per annum* for the loan.

Under the circumstances of this case, I am therefore of opinion that the decisions of the Court below are correct in treating the proviso in the bond as in the nature of a penalty ; and I also think that the lower Appellate Court has done substantial justice between the parties in awarding damages for the breach of contract by decreeing interest at the rate of 1 *per cent. per mensem* from the date of the bond, and I accordingly think that this special appeal should be dismissed with costs.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

TOOLSEEMONEY DOSSEE v. MARIA MARGERY CORNELIUS
 AND OTHERS.

1873
 May 27 & 28,
 §
 June 17.

Illegitimacy—Right to Bastard's Estate—Escheat—Non-assertion of Claim by Crown—Possession—Limitation—Estoppel—Tenant-at will—Wife's Equity to a Settlement—Account—Receiver.

M, the widow and administratrix of a bastard, who had died intestate and without issue, received a letter in 1841 from the Lords Commissioners of the Treasury stating that they did not deem it expedient to take any steps for the assertion of the rights of the Crown with regard to her late husband's estate. Previous to this *M* had obtained possession of that estate, and two months before the receipt of the letter, she had contracted a second marriage. No settlement was made upon this marriage, and since the time of the marriage, *M*'s second husband had had the exclusive management of the property. In execution of a decree against the husband, his right, title, and interest in and to a portion of the property were put up for sale, and purchased by the plaintiff. The plaintiff's right to possession was disputed by *M*, who contended that her husband took no interest in the two-thirds of the property which went to the Crown which could be attached and sold in execution. In a suit by the plaintiff to establish her rights over the the property :

Held, that the Crown would be estopped by the line adopted by the Commissioners of the Treasury in 1841 from asserting its claim to the two-thirds ; that *M* had a good title to the whole estate even as against the Crown ; and that the

rights of her husband extended over the whole estate, and were rights which could be seized in execution and sold.

Held further, that *M's* husband being without property and in great difficulties, and subsisting only on a life pension of Rs. 118 a month, *M* was entitled to a settlement.

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In execution of a decree of the High Court against the defendant John Cornelius, his right, title, and interest in and to the house and premises No. 116, South Colinga Street, in Calcutta, were put up for sale, and purchased by the plaintiff for Rs. 20. This house originally belonged to one Thomas Burt, an illegitimate son. About the year 1830, Burt married the defendant Maria Margery, and in 1838 he died intestate and without issue, and leaving his widow his sole representative. At the time of his death he was possessed, amongst other property, of the house in suit. Being illegitimate, the Crown was entitled to two-thirds of his estate, and Mrs. Burt to the remaining one-third. Letters of administration to Burt's estate were in December 1838 granted to the Ecclesiastical Registrar Mr. Dickens, and on the 11th of March 1841 these letters were recalled, and other letters were granted to Mrs. Burt, who thereupon took possession of her husband's estate. On the 12th October 1841, Mrs. Burt married the defendant John Cornelius. On the 7th of December 1841, the Lords Commissioners of Her Majesty's Treasury, in reply to a letter from Mrs. Burt, praying for a relinquishment by the Crown of the two-third parts of her late husband's estate to which the Crown had become entitled, wrote to her that they were advised that the property in question was not of sufficient value to render it expedient for them to take any steps for the assertion of the rights of the Crown. No settlement was made on the marriage of Mrs. Burt to John Cornelius, and from the time of the marriage the property had been under the exclusive management of Mr. Cornelius. He granted leases of the house in his own name; collected the rents, and some twenty years before the present suit he obtained from the Calcutta Municipality a renewal in his own name of the pottah of the ground on which the house was built. Upon the sale to the plaintiff Mrs. Cornelius claimed the property in dispute,

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and the plaintiff then obtained a rule calling on the defendants, Mr. and Mrs. Cornelius, to show cause why possession should not be given to her. Cause being shown by Mrs. Cornelius, the rule was discharged, and the plaintiff thereupon brought the present suit joining the secretary of State as a party defendant. She prayed that she might be declared entitled to an estate for the life of the defendant John Cornelius in the whole of the property, and for possession of the same, or, in case the Court should not consider her to be so entitled, then that she might be declared entitled to the above-mentioned estate in one-third of the property, and for possession thereof; or that a partition might be made, and such one-third share allotted to her in severalty for the life of John Cornelius, and that, if necessary, a receiver might be appointed, with power to pay to her such portion of the rents and profits as she might be declared entitled to, and for an account, and that the defendants, Mr. and Mrs. Cornelius, might be charged a fair occupation rent for the time during which they had been in possession; and that they might be restrained from further interference with the plaintiff's rights in the property.

The Secretary of State entered appearance, but took no further steps the suit.

The defendant John Cornelius did not appear:

Mrs. Cornelius in her written statement alleged *inter alia* that the decree against John Cornelius in execution of which the house was sold was for a debt incurred on his own account, and not in respect of any demand against, or for the benefit of, the estate of Thomas Burt; that the value of the house and premises was over Rs. 25,000; and that since June 1870, her husband had ceased to maintain her and her children.

It was in evidence that John Cornelius was possessed of no property; that he had a pension from Government of Rs. 118 a month which would die with him; and that he was much involved; and that, to escape his creditors, he had gone to live and was living at Chandernagore.

Mr. *Lowe* and Mr. *Evans* for the plaintiff.

Mr. *Kennedy* and Mr. *Bonnerjee* for Mrs. Cornelius.

Mr. Lowe.—John Cornelius was entitled for his life to one-third of the estate of Thomas Burt. As to the remaining two-thirds, the Crown relinquished its rights more than thirty years ago; and upon his marriage, John Cornelius took an estate therein for the joint lives of himself and his wife. He clearly had an interest in the whole estate which could be attached and sold in execution.

Mr. Kennedy.—On the death of Burt intestate and without issue, two-thirds of his estate escheated to the Crown. The Crown never made any grant to Mrs. Burt, and may still assert its rights since no length of time will bar it. If therefore this suit be in the nature of an action of ejectment it must fail, because there is an outstanding legal estate. Until assignment of dower, Mrs. Burt could have no right of entry whatever, inasmuch as it was uncertain what part of the estate she should have for dower, 1 Co Litt., lib. 1, c. 5, s 43. As regards the Crown, Mrs. Burt was a mere intruder, her position being analogous to that of a disseisor, as to which see Bacon's Abr. Title Disseisin, B. Her marriage with Cornelius in no way altered the property. It may be that, after the letter from the Commissioners of the Treasury, the Crown could not have treated her as a trespasser, but even then she and her husband would be mere tenants-at-will, and therefore possessed no assignable estate—1 Co. Litt., lib. 1, c. 8, s. 71. [MACPHERSON, J.—The estate would be not assignable as against the landlord only.] I submit that it would not be assignable at all; any alienation would determine the estate. If John Cornelius could not assign his interest, neither could the Court do so. With respect to the one-third to which Mrs. Burt was entitled as dower, the plaintiff seeking equity must do equity. Mrs. Cornelius is entitled to a settlement—*Sturgis v. Champneys* (1), *Lady Elibank v. Montolieu* and *Murry v. Lord Elibank* (2), *Freeman v. Fairlie* (3) and *Duncombe v. Greenacre* (4).

Mr. Lowe in reply.

Cur. adv. vult.

(1) 5 My. & Cr., 97.

(3) 11 Jur., O. S., 447.

(2) 1 Wh. & Tu., L. C. (3rd ed.),
381 and 383.

(4) 2 De G. F. & J., 509; S. C.
7 Jur., N. S., 175.

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MACPHERSON, J. (who, after stating the prayer of the plaint and the facts, continued).—I think there can be no doubt whatever on the facts proved and admitted by Mrs. Cornelius that her husband became absolutely entitled to receive the rents and profits of the property during the joint lives of himself and his wife. It is contended on behalf of Mrs. Cornelius that her husband, John Cornelius, took no interest in that portion of the property which went to the Crown which could be attached and sold at a sheriff's sale. It is argued that the Crown had still a claim to two-thirds, and that Mrs. and Mr. Cornelius are merely tenants-at-will as regards these two-thirds, and that a tenancy at will is not assignable, and therefore could not be attached and sold by the sheriff. But it seems to me that the position of Mrs. Cornelius with respect to the two thirds is not that of a tenant-at-will. She has a good title as to these two-thirds against the Crown; because even if on the naked question of limitation the Crown would not be barred, it would practically now be estopped, by the line adopted by the Commissioners of the Treasury in 1841, from asserting its claim to these two-thirds. I do not think the Crown could now possibly be heard to claim these two-thirds: and in my opinion, Mrs. Cornelius has a good title to the whole property even as against the Crown, and the rights of Mrs. Cornelius extend over the two-thirds as well as the one-third, and are rights which could be seized in execution and sold.

It was further contended on behalf of Mrs. Cornelius that, if the plaintiff succeeds to any extent, some settlement should be made on her. I think she certainly is entitled to a settlement. It is in evidence that her husband is much involved, and lives at Chandernagore in great difficulties; and he has no property, subsisting only on a pension of Rs. 118 per month from Government, which pension will die with him. Although the plaintiff is declared entitled to an interest in the whole property for the life of John Cornelius, it is subject to a reference as to what will be a proper settlement to make on Mrs. Cornelius and her children. The plaintiff is entitled to an account from the filing of the plaint, but not anterior to it. The plaintiff's interest being a life-interest, the proper course will be to

appoint a receiver of the property for the life of John Cornelius.
I order that the Court Receiver be appointed receiver for the
life of John Cornelius.

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Decree for plaintiff.

Attorney for the plaintiff: Mr. *Watson*.

Attorneys for Mrs. Cornelis: Messrs. *Judge* and *Gangooly*.

Attorney for the Secretary of State: Mr. *Chauntrell*.

PRIVY COUNCIL.

CHOWDRY WAHED ALI (DEFENDANT) v. MUSSAMUT JUMAE
(PLAINTIFF).*

P. C.*
1872
May 10, 11, 22
&
June 14

[On appeal from the High Court of Judicature at Fort William in Bengal.]

*Act XXIII of 1861, s. 11—Decree...Representatives—Act VIII of 1859,
s. 203.*

The decree of the High Court affirmed under the ^{circumstances of the case} ~~circumstances of the case~~ Bench:—where a decree but *held* (contrary to the opinion of the majority, ^{s.} and ^{been} properly passed, and a decree against a person in a representative capacity, if the execution against the party in his proceedings have been taken under it to obtain a suit with respect to any question representative character, he is a party to such suit, parties relating to the execution of which may arise between him and the other all of 1861, s. 11. the decree within the meaning of Act XXIII of 1861, s. 11.

This was an appeal from a ^{the} decision of a Full Bench of the High Court given on the 13th ^{of} August 1868, in which a decree of the Principal Sudder Ameen ^{dated} the 27th July 1867 was affirmed by a majority of the ^{of} Judges.

The circumstances under ^{which} the case came before and was decided by the Full Bench ^{are} fully detailed in the report of the case before the High Court (1).

* Present:—THE RIGHT HON^{BLE} SIR JAMES W. COLVILLE, SIR MONTAGUE E. SMITH, AND SIR ROBERT P. COLLIER.

(1) 2 B. L. R., F. B., 73.