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*Nov. 6, 7.
1894
*Feb. 20.

S. R. CLARK (DEFENDANT).....APPELLANT;

AND

ELIZA HAGAR (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Conveyance—Illegal or immoral consideration—Intention of grantor—Character of grantee—Pleading.

Under the judicature Act of Ontario an action for foreclosure is not to be regarded as including a right to recover possession of the mortgage premises as in ejectment, and the rule that in such action the plaintiff may obtain an order for delivery of possession does not apply to a case in which the mortgage sought to be foreclosed is held void and plaintiff claims title as original owner and vendor.

Under said Judicature Act, as formerly, the plea to an action on a contract that it was entered into for an immoral or illegal consideration must set out the particular facts relied upon as establishing such consideration.

Quære: Can the purchaser of the equity of redemption set up such defence as against a mortgagee seeking to foreclose or is the defence confined to the immediate parties to the contract?

A contract for transfer of property with intent by the transferor, and for the purpose, that it shall be applied by the transferee to the accomplishment of an illegal or immoral purpose is void and cannot be enforced; but mere knowledge of the transferor of the intention of the transferee so to apply it will not avoid the contract unless, from the particular nature of the property, and the character and occupation of the transferee, a just inference can be drawn that the transferor must also have so intended. Judgment of the Court of Appeal affirmed, Taschereau J. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Divisional Court in favour of the plaintiff.

The material facts of this case are fully set out in the judgment of the court and may be summarized as follows:—

*PRESENT:—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

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The plaintiff, Hagar, had sold a house to one Jennie O'Neill who was, to the knowledge of the plaintiff, a prostitute. A mortgage was given for part of the purchase money and plaintiff brought an action against said O'Neill and the defendant Clarke to whom the equity of redemption had been conveyed to foreclose it. At the trial defendants did not appear and judgment for possession of the land was given against them. Clarke then applied for and obtained a new trial on affidavits showing that part of the purchase money on the sale to O'Neill was for the good will of the house as a house of ill-fame and he claimed, therefore, that the mortgage was void to the extent of such immoral consideration. The present appeal was from a decision of the Court of Appeal holding the mortgage valid.

Clarke, appellant in person. The courts will not aid the enforcement of an immoral or illegal contract. *Harris* v. *Fontaine* (1); *Furlong* v. *Russell* (2); *Smith* v. *Benton* (3); *Peoples Bank* v. *Johnson* (4).

As to the right to plead illegality not appearing on the face of an instrument see *Collins* v. *Blantern* (5); *Bonisteel* v. *Saylor* (6); *Jones* v. *Merionethshire Building Soc.* (7).

The appellant referred also to *Windhill Local Board* v. *Vint* (8); *Sprott* v. *United States* (9); *Hanauer* v. *Doane* (10).

Armour Q.C. for the respondent. The acts constituting illegality should be set out in the defence. *In re Vallance* (11): *Gray* v. *Mathias* (12); *Hall* v. *Palmer* (13); *Waugh* v. *Morris* (14).

(1) 13 L. C. Jur. 336.
(2) 24 N.B. Rep. 478.
(3) 20 O. R. 344.
(4) 20 Can. S. C. R. 541.
(5) 1 Sm. L. C. 9 ed. 398.
(6) 17 Ont. App. R. 505.
(7) [1891] 2 Ch. 587; [1892] 1 Ch. 173.
(8) 45 Ch. D. 351.
(9) 20 Wall. 459.
(10) 12 Wall. 342.
(11) 26 Ch. D. 353.
(12) 5 Ves. 286.
(13) 3 Hare 532.
(14) L. R. 8 Q. B. 202.

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On the merits the learned counsel referred to *Taylor* v. *Bowers* (1); *Roberts* v. *Roberts* (2); *Pawson* v. *Brown* (3).

The judgment of the majority of the court was delivered by:

GWYNNE J.—This is an action for foreclosure of a mortgage instituted by the mortgagee against the mortgagor and the appellant, to whom the mortgagor sold and conveyed the premises, subject, however, expressly to the mortgage and to payment of the moneys thereby secured. The plaintiff, having at the trial waived all relief against the mortgagor, we may, under the circumstances, treat the appellant, who is solely seized of the equity of redemption, as the sole defendant. In his statement of defence he alleged that the consideration for the execution of the mortgage was illegal and immoral, and that therefore the mortgage was void and of none effect. To this the plaintiff replied, denying what was so alleged, and saying that if it should be found that the consideration was illegal the mortgagor was a party thereto, and that neither she nor the appellant, her grantee of the premises, could set up such a defence to plaintiff's claim. The case came down for trial in October, 1890, when the defendant applied for a postponement of the trial, upon grounds which did not appear to the learned trial judge to be sufficient. Thereupon the case proceeded, and no defence being offered judgment for foreclosure of the mortgage, as prayed by the plaintiff's statement of claim, was rendered for the plaintiff. Subsequently a motion for a new trial was made to the Chancery Division of the High Court of Justice, founded upon affidavits of the mortgagor and the appellant, to the

(1) 1 Q. B. D. 291.
(2) 2 B. & Ald. 367.
(3) 13 Ch. D. 202.

effect in substance that the mortgage was executed to secure payment of part of the purchase money of a dwelling house purchased from the mortgagee by the mortgagor, who was, as the mortgagee well knew, a prostitute, and that $2,000 of the purchase money for the house was in the contract of purchase and sale estimated as the value of the house as a house of prostitution, for the good-will, as it is called, of the house as a house used for purposes of prostitution. Upon these affidavits the court made an order that upon payment by the defendant to the plaintiff, on or before the 27th of February then next, of the full amount found due for debt, interest and costs by the judgment for foreclosure rendered in the action, less the interest not then yet accrued, and less the sum of $2,000 of principal money and the interest thereon, together with the costs of the motion to set aside the judgment, the judgment should be set aside, and the court thereby further adjudged that upon the said 27th of February there would be due to the plaintiff for balance of principal money $1,625, and for balance of interest $140.17, and for taxed costs up to judgment $206.02, and for subsequent costs $115.39, amounting together to $2,086.58, and the court did further order that upon payment of that sum to the plaintiff, on or before the said 27th day of February, the plaintiff should execute and deliver to the defendant a release of the mortgage, save as to the amount of $2,000, for principal and interest thereon from the 5th December, 1889, and the court did further order that upon such payment being made then a new trial should be had, and that in default of such payment the motion to set aside the judgment for foreclosure should be dismissed. Upon this order being made the now appellant paid the said sum of $2,086.58 in pursuance of the order, and the case came down again for trial in April, 1891, before Street

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J., when the mortgage was put in, and its execution being admitted the plaintiff's case closed, whereupon counsel for the defence opened the defence as follows, as stated in the appeal case as presented to us:—

> The contention (he said) is that this mortgage was given as part of the purchase money of the house No. 32 Albert St., Toronto. As a defence to this action the defendants set up that the house was bought to the knowledge of the plaintiff by the mortgagor for the purpose of carrying on a house of ill-fame—that part of the consideration was the good-will of the place as a house of ill-fame and therefore being an illegal consideration the plaintiff cannot recover. The amount paid is the full value of the place at the time it was bought and we say the amount in dispute now, $2,000, was for the good-will of the place.

This latter is the special point for the purpose of establishing which the new trial was granted to the defendant, and after hearing all the evidence offered in support of this contention the learned trial judge set aside the evidence of the mortgagor as not worthy of belief when wholly unsupported by other evidence as he found it to be, and the learned judge found as a matter of fact that the market value of the house at the time of the sale was at least $5,000 at which sum it could readily have been sold to other persons, and that the character of the house formed no element in the consideration paid for it and that nothing took place to induce the belief that the purpose of the sale was other than that of turning $5,000 worth of land into that sum of money, and accordingly he rendered judgment for foreclosure in favour of the plaintiff. Against this judgment the appellant appealed, and the judgment having been maintained in the Ontario Courts the case comes before us upon appeal from the judgment of the Court of Appeal for Ontario.

Before entering into the case of the appellant, who argued his appeal in person, it will be convenient here to notice certain objections taken by the learned counsel for the plaintiff which if well founded go

to the root of the right of the appellant to be heard at all upon his appeal. His contention is that since the Administration of Justice Act of 1873, whereby the courts of law and equity were made auxiliary to each other, an action instituted as the present was against the mortgagor and the appellant as purchaser of the mortgaged premises subject to the mortgage had a threefold aspect, and was to be regarded as three separate actions, namely, besides being an action for foreclosure of the mortgage that it was at the same time an action against the mortgagor upon the covenant in the mortgage to pay the mortgage money and as against the appellant an action in the nature of ejectment for recovery simply of possession of the land mortgaged; but neither in the act of 1873 nor in the Ontario Judicature Act, nor in the rules passed by the judges under the authority of that act can I find anything in support of the contention. But on the contrary, rule 341 of the Supreme Court of Judicature puts the question beyond all doubt if any could exist. By that rule, which has the force of an act of the legislature, it is enacted that: No cause of action shall unless by a leave of a court or a judge be joined with an action for the recovery of land except a claim in respect of mesne profits or arrears of rent or double value in respect of the premises claimed or any part thereof and damages for breach of any contract under which the same or any part thereof is held, or for any wrong or injury to the property claimed. And although it is by subsec. (*a*), of that rule declared that the rule should not prevent a plaintiff in an action for foreclosure or redemption from asking for and obtaining judgment or an order against the defendant for delivery of possession of the mortgaged premises to the plaintiff, either forthwith, or on or after a final order for foreclosure or redemption, yet it is there expressly

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provided that such an action should not be deemed to be an action for the recovery of land within the meaning of the rule. Since the Judicature Act all the courts, no doubt, administer legal and equitable principles in all suits properly framed for the purpose, but the act countenances no such confusion of remedies and principles as the form of action in triplicate suggested would introduce. There are some observations of Lord Justice Cotton in *Clements* v. *Matthews*, (1) and *Joseph* v. *Lyons* (2) pertinent upon this point. In those cases it was decided that neither detinue nor an action for conversion would lie for the recovery of chattels acquired by a mortgagor after the execution of a chattel mortgage which professed in express terms to pass to the mortgagee after acquired chattels although, as decided in *Holroyd* v. *Marshall* (3), equity does give relief in such a case upon a suit properly framed. In the former of the above cases the Lord Justice said :—

> It is true that every court now administers and deals with the rights of parties having regard to law and equity but the legal position and the equitable position are still different and distinct.

And in the latter he says :—

> It was not intended that legal and equitable interests should be identical but that the court should administer both legal and equitable principles.

Such principles being those applicable to the case as framed.

The purpose for which the contention was made was in order to open to the plaintiff this further contention made by her learned counsel, viz. :—that although the plaintiff should fail in obtaining judgment for foreclosure of the mortgage upon the ground that the mortgage was void by reason of illegality in the consideration for which it was executed, still that she might and

(1) 11 Q. B. D. 814. (2) 15 Q. B. D. 286.
(3) 10 H. L. Cas. 191.

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should have in the action so failing a judgment to recover, as in ejectment, possession of the land comprised in the mortgage so adjudged to be void. This contention is rested upon the judgment in *Doe d. Roberts* v. *Roberts* (1), but obtains no support whatever from that judgment which as relied upon in the argument seems to me to have been misunderstood. That action was instituted in pursuance of an order of the Court of Equity Exchequer in *Roberts* v. *Roberts* (2). The bill there was filed by the devisee of one George Roberts for the purpose of setting aside a deed executed by the testator to the defendant and for a re-conveyance of the premises thereby demised. The deed was alleged in the bill to have been executed to the defendant for the consideration expressed therein of natural love and affection, but that it was in truth executed upon the express promise and assurance of the defendant that the deed when executed should be merely nominal and that as to any beneficial interest in the property the defendant would be a mere trustee of the testator. The bill then alleged that on the execution of the deed the testator delivered it to the defendant and though it had ever since been in his possession yet the testator retained all the title deeds and other writings relating to the property in his own possession, and that neither the defendant nor any other person had ever made use of the deed, nor was the defendant ever in occupation of any part of the property, nor did he in any way derive any advantage from the conveyance, the testator having continued in possession until the time of his death. The defendant in his answer alleged that being for many years much addicted to field sports and not being qualified to kill game he had been threatened with prosecutions, and that he therefore applied to the testator, who was his

(1) 2 B. & Ald. 367. (2) Daniel Eq. Ex. 143.

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brother of the half blood, to qualify him which the testator agreed to do, and for that purpose executed the deed mentioned in the bill. The defendant denied however that the deed was executed for the sole purpose of affording him a qualification to kill game, but alleged that the testator in executing the same had it also in view to secure the property to the defendant after testator's decease. He admitted that no use had ever been made of the deed and that the property had always continued in the possession of the testator. From the evidence it clearly appeared that the intention of the testator in executing the deed was solely to give the defendant a qualification to kill game. The Lord Chief Baron during the argument said :—

If the deed be void the plaintiffs want no re-conveyance. They might defend themselves in ejectment and I can render them no assistance.

At the close of the argument he said :—

I do not think that I can interfere in this case without first referring it to a court of law. My present opinion is that it is not void at law.

Then pronouncing judgment on a subsequent day he said :—

It appears that the conveyance was made for the purpose of giving the defendant a qualification to kill game, and I feel myself at a loss to know in what manner I am to grant relief. I don't think the plaintiffs are entitled to a re-conveyance—the deed was executed maturely—the grantor knew the effect of it. There was no fraud between the brothers, with respect to them the whole transaction was perfectly fair. But it appears by the evidence that the object of the deed was to give to the defendant the appearance of a qualification and that it was executed for no other purpose. That was a fraud on the law and I cannot conceive what right that gives the plaintiffs to come to a court of equity to call for a re-conveyance. It is said nothing was done under the deed, but I cannot see the distinction.

And again :—

It appears to me that it is not in the power of equity to call back a deed so given. It has been urged that the deed is void at law and I will not shut out that question. If it be void the plaintiffs have a

complete defence at law and I have no objection to retain the bill for a year for the purpose of giving them an opportunity to try that question.

Accordingly a decree was made whereby the defendant in the equity suit was ordered to proceed to the trial of an action of ejectment which had been stayed by injunction in the equity suit until the hearing and this is the action of ejectment which is reported in 2. B. & Ald. 367. The only object of that trial and the sole question in it was whether or not the deed was void at law. The court entertained no doubt upon the point, and it is difficult to conceive that there could be any. The statute which required all persons killing game to have a certain qualification in real property did not declare any deed executed for the purpose of giving a qualification to kill game to be void; nor even that a deed giving an interest in real property sufficient to give the qualification should be void if executed in pursuance of an agreement that as between the parties to the deed it should be regarded as intended only to give the appearance of qualification for the purpose of protecting the grantee from prosecutions; but that for any other purpose, or as to any beneficial interest in the premises purported to be conveyed by the deed to the grantee, the deed should be deemed to be of no force or effect. As between the parties themselves to the deed it was perfectly good. It was competent to give a good qualification. The only fraud relied upon was one wholly collateral to the deed, namely, that although the deed was competent to give the qualification, yet there was a secret agreement between the parties that it never should be used except to prove the qualification and that it should not be regarded by the grantee as passing to him any beneficial interest, save only to prove his qualification to kill game. Holroyd J. held the case to be similar to that

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of *Hawes* v. *Loader* (1), wherein it was held that as between the parties to a deed it could not be avoided by showing that it was executed for the purpose of defeating creditors, such deeds being only by the statute made void as against creditors. Abbott C.J. proceeded wholly upon the case of *Montefiori* v. *Montefiori* (2), which he held to be expressly in point. Now that case was that a person who had given his brother a promissory note for a large sum of money for the purpose of promoting the brother's marriage by representing him to be a man of means, could not after the marriage maintain a bill to have the note given up, nor could he defend an action on the note by showing it was given without consideration. Lord Mansfield C. J. rested his judgment upon the following principle; he says:—

> The law is that where upon proposals of marriage third persons represent anything material in a light different from the truth even though it be by collusion with the husband they shall be bound to make good the thing in the manner in which they represented it. It shall be as represented to be.

Therefore, in *Doe Roberts* v. *Roberts* (3) the grantor having by the deed represented the grantee to be the owner of the property which constituted his qualification to kill game, "it shall be as represented to be," and the grantor is estopped from proving an agreement to the contrary effect, which if given effect to would be at variance with the deed. The grantee shall hold the property and the grantor shall not be permitted to say that it was agreed that the deed should not pass to the grantee the beneficial estate which it purported to pass. The principle upon which *Montefiori* v. *Montefiori* (2) proceeded and which Abbott C. J., made the foundation of his judgment in *Doe Roberts* v. *Roberts* (3), is thus stated by Lord Chancellor Thurlow, in *Neville* v. *Wilkinson* (4).

(1) Cro. Jac. 270; Yelv. 196.
(2) 1 W. Bl. 363.
(3) 2 B. & Ald. 367.
(4) 1 Br. Ch. Cas., 543.

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The Court, he says, proceeded upon the single ground that where one brother has given to another a note for £1,730, to enable him to make a contract of marriage, he could not revoke it. It amounted to a contract to perform what he had done.

And *Doe Roberts* v. *Roberts* (1) is thus referred to by Sir J. Plumer, Master of the Rolls in *Cecil* v. *Butcher* (2).

If the deed is complete whether it is a qualification to sit in Parliament or to kill game as in *Roberts* v. *Roberts*, (3) the party cannot be heard to allege his own fraudulent purpose, it being a fraud upon the law to attempt to give another a qualification without making him owner of the estate. He is estopped from confining the operation of the deed by averring that he had such a purpose.

That is, that the grantee, while having the property conveyed for the purpose of having a qualification, should not be the owner of the estate. The principle of *Doe Roberts* v. *Roberts* (1) as here explained is that a grantor is estopped from setting up a secret oral agreement to defeat the operation of the express terms of his own deed. In *Bessey* v. *Windham* (4) where it was decided that an assignment of goods in fraud of creditors is valid as between the parties to the deed, Lord Denman C. J., delivering judgment, proceeded upon the authority alone of *Doe Roberts* v. *Roberts* (1), while in the latter case, as already shown, Holroyd J., proceeded upon the authority of *Hawes* v. *Loader*, (5) wherein the same point was decided as in *Bessey* v. *Windham* (4). These cases, therefore, may well be held to be based upon the same principle, and that the principle of estoppel. So in *Phillpotts* v. *Phillpotts*, (6) which was the case of an action of covenant upon an annuity deed, wherein it was held that the defendants' executors were estopped from pleading that the deed was made fraudulently and collusively between the testator and the plaintiff, for the purpose of multiplying voices, in order to increase the electorate of certain

(1) 2 B. & Ald. 367.
(2) 2 J. & W. 565.
(3) Daniel Eq. Ex. 143.
(4) 6 Q. B. 166.
(5) Cro. Jac. 270; Yelv. 196.
(6) 10 C. B. 85.

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counties at the parliamentary elections therein, and subject to a secret trust and condition that no estate or interest should pass beneficially to the plaintiff by the deed. Jervis C. J. says :—

It is to my mind exceedingly difficult to discover any distinction between this case and that of *Doe Roberts* v. *Roberts* (1). It may be that a deed may be bad so far as concerns the law of Parliament and yet as between the parties it may not be competent for either to set up its invalidity ; the very point was discussed where though the jury expressly found that the parties never intended anything to pass by the deed the Court of Queen's Bench held the deed to be operative to convey an interest in the goods upon the principle laid down in *Doe Roberts* v. *Roberts* (1).

And upon the same principle he maintained that the deed in *Phillpotts* v. *Phillpotts* (2) might be supported. Williams and Talfourd JJ. concurred that *Doe Roberts* v. *Roberts* (1) was conclusive upon the point that the defendants, executors of the grantor, were estopped from setting up the secret understanding that the deed should not operate beneficially to the grantee. The same doctrine was affirmed in *Bowes* v. *Foster* (3), where *Doe Roberts* v. *Roberts* (1) was put upon this ground that the transfer was made for the purpose of giving to the transferree a qualification to kill game, and the property therefore passed by the deed, and having passed it was not competent for the defendants claiming under the grantor to allege that the conveyance was made merely to give the semblance of a qualification but in reality upon a secret trust beneficially for the grantor, and that in such a case the transferree in violating the secret agreement was guilty only of a breach of honour and not of a legal obligation. The case of *Doe Roberts* v. *Roberts* (1) is plainly referable to the principle that to an action founded upon a deed which as between grantor and grantee passed the property the grantor and those claiming under him are estopped from setting

(1) 2 B & Ald. 367.
(2) 10 C. B. 85.
(3) 2 H. & N. 779.

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up that the deed was executed upon a secret agreement that it should not operate to give to the grantee the beneficial interest purported by the deed to be given. The principle applied was the same as that applied *inter partes* in the case of a deed of conveyance of property in fraud of creditors; it therefore can have no application where the defence if established is that the instrument upon which an action is founded was void *ab initio* as made in violation of the principles of the common law.

Then it was contended upon the authority of *Simpson* v. *Bloss* (1), and other cases which have proceeded upon the authority of that case as *Cannan* v. *Bryce* (2), *McKinnell* v. *Robinson* (3), and other cases of that class, that the test whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires any aid from the illegal transaction to establish his case; and the contention is, that as the plaintiff is not required in the present action to prove the consideration for the mortgage sought to be foreclosed, but upon proof of the mortgage establishes her case, she cannot be said to require any aid from the illegal transaction to establish it.

In *Simpson* v. *Bloss* (1) the action was in *indebitatus assumpsit* founded upon mutual promises, where the plaintiff had to prove, in support of his case, the consideration for defendant's promise sued upon. *Cannan* v. *Bryce* (2) was in like manner an action in *indebitatus assumpsit* founded upon mutual promises. At the trial a verdict was rendered for the plaintiff, subject to the opinion of the court upon a case stated wherein all the circumstances of the transaction were set out, by which it appeared that the defendant's promise to repay money lent was made upon an illegal consideration,

(1) 7 Taun. 246.

(2) 3 B. & Ald. 179.

(3) 3 M. & W. 434.

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without relying upon which the plaintiff could not recover, and so it was held that he could not recover. *McKinnell* v. *Robertson* (1) was also an action in *indebitatus assumpsit* for money lent, and on account stated; the defendant pleaded to the whole declaration that the money was lent for the purpose of the defendant illegally playing and gaming therewith at the illegal game of hazard. To this plea the plaintiff demurred upon the ground that the plea did not cover the count upon an account stated, but the plea was held to be good and judgment was given accordingly. But in *Taylor* v. *Chester* (2) the action was in detinue for half a £50 Bank of England note. Defendant pleaded that the half note was deposited as a pledge in security for a sum of money due from the plaintiff to the defendant, and which was still due and unpaid. To this plea the plaintiff was obliged to reply that the alleged debt in the plea mentioned in justification of detention of the half-note was incurred for wine and suppers supplied by the defendant in a brothel and disorderly house kept by the defendant, for the purpose of being consumed there, etc., etc. There Millar J., delivering the judgment of the court, says:—

> The true test for determining whether or not the plaintiff and defendant were *in pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium of the illegal transaction to which he was himself a party.

And he proceeds:

> Had no pleading raised the question of illegality a valid pledge would have been created and a special property conferred upon the defendant in the half-note, and the plaintiff could only have recovered by showing payment or tender of the amount due. In order to get rid of the defence arising from the plea which set up an existing pledge of the half-note the plaintiff had recourse to the special replication, in which he was obliged to set forth the immoral and illegal character of the contract upon which the half-note had been deposited. It was there-

(1) 3 M. & W. 434. (2) L.R. 4 Q.B. 309.

fore impossible for him to recover except through the medium, and by the aid, of the illegal transaction to which he was himself a party.

And so it was held that he could not recover being himself *in pari delicto*.

What is meant in this case, and in all cases as to the application of the test is, that in every case, whether in *indebitatus assumpsit* or in an action upon a bond, note or other instrument, it appears either by admission on the pleadings, or in the evidence given upon the issues joined upon the pleadings in the case, that the action is connected with an illegal transaction to which the plaintiff was a party, the question arises whether he can or cannot succeed in his action without relying upon the illegal transaction. If he cannot, the action fails; if he can, it prevails. But it never has been held, nor so far as I have been able to find hitherto contended, that in an action upon a note or other instrument in security for money requiring *primâ facie* no evidence of consideration the plaintiff is entitled to recover upon the mere production of the instrument, notwithstanding that the defence is that the instrument sued upon was executed for an illegal consideration in respect of a transaction to which the defendant was himself a party. Such a proposition could not be maintained without reversing a legion of cases from *Guichard* v. *Roberts* (1), down to *Windhill Board of Health* v. *Vint* (2), which establish that illegality in the consideration of an instrument, whether under seal or not, to enforce which an action is brought, not only may be pleaded, but if it does not appear upon the plaintiff's own pleading must be pleaded.

There remains now the question which was argued by the appellant with much ability, namely, whether he has pleaded and proved sufficient to establish

(1) 1 Wm. Black. 445. (2) 45 Ch. D. 351.

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his contention that the mortgage was void *ab initio* by reason of illegality in the consideration for which it was given.

In considering this question a point arises which in view of the very peculiar circumstances of this case cannot be overlooked. The defence is one of which it may be said that it is without a parallel in the reported cases. The appellant purchased from the mortgagor the property mortgaged at what he himself considered to be its fair market value such value being nearly $2,000 in excess of the amount for which the plaintiff had sold the property, and he paid to the mortgagor only the difference between the amount remaining upon the security of the mortgage and the amount so fixed by himself as the value of the property to him purchasing it as he admits he did upon speculation and in the expectation that by reason of the erection of a large public building for a city hall and other purposes of the city of Toronto in the immediate neighbourhood it would become much more valuable as other property which he had purchased in the neighbourhood and had sold at a large advance had proved to be a good speculation. He took from the mortgagor a conveyance of the property subject expressly to the mortgage and to the payment of the sum of $3,700 and interest which in the deeds under which the appellant claims title is stated to be due under the mortgage and by that deed he covenanted with the mortgagor his grantor that he would pay off and discharge the mortgage. By this deed the appellant acquired no legal estate in the mortgaged premises but an equity of redemption therein only, that is to say, the right, by paying the moneys secured by the mortgage, to acquire the legal estate. Upon an action being instituted by the mortgagee to foreclose this mortgage he sets up by way of defence and for the purpose of evading payment of

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the money secured by the mortgage that the consideration for the execution of the mortgage was illegal and immoral and that the mortgage therefore is void and of no effect. Now the deed executed by the mortgagee conveying the property in fee simple to the mortgagor constituted the consideration for the execution of the mortgage. If then the consideration for the execution of the mortgage was illegal and immoral and the mortgage therefore void, the deed and the estate thereby conveyed which constituted that consideration must be null and void; yet the appellant's argument before us was to the effect that his succeeding in establishing the mortgage to be void for the reason suggested would be to vest in him the land which he had purchased expressly subject to the mortgage discharged from the mortgage. The case therefore may truly he said to be one *sui generis* and without parallel in the reported cases. In *Holman* v. *Johnson* (1) Lord Mansfield lays down the principle upon which the court proceeds in respect of contracts that are immoral and illegal. As between the parties to the illegal contract, he says:

> The objection that a contract is immoral and illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of public policy which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say; the principle of public policy is *ex dolo malo non oritur actio.*

Now, here it is to be observed: 1st. That the language is applied as between the immediate parties to the illegal or immoral contract, who, in the case of such a contract, are *in pari delicto*, and the test as to the plaintiff's right of recovery where such a defence is set up by the other party to the contract is whether the

(1) Cowp. 341.

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plaintiff is or is not *in pari delicto* with the defendant. It does, I must say, seem to me to be an unwarranted extension of the rule so laid down by Lord Mansfield, not supported by any decided case, to apply it to the case of a mortgagee seeking to foreclose a mortgage given to secure purchase money of land sold by the mortgagee, against a *bonâ fide* purchaser for valuable consideration from the original vendee, whose deed of conveyance from such vendee subjects the premises and the estate therein transferred to such purchaser, in express terms, to payment of the mortgage and the moneys secured thereby. And it is to be observed, 2nd. That in order to procure the court to abstain from enforcing a contract upon its face perfectly good and for valuable consideration the objection must be taken by the defendant. Now, although when properly taken as required by the recognized course of proceedings in the particular action, and established by legal evidence, the court does not act in the interest of, or for the sake of, the defendant making the objection, but upon principles of public policy, by which the defendant may obtain an advantage over the plaintiff, contrary to the real justice of the case, and so by accident, as it were, yet before he can obtain such even accidental advantage against the real justice of the case he must take the objection by a plea specially stating the particular facts relied upon as constituting the immorality or illegality, so that the court may see upon the record that the facts pleaded, if proved, do constitute illegality in the contract or instrument sued upon; and also in order that the evidence offered in support of the plea may be confined to the particular facts so pleaded. No public policy would justify a court in withholding its aid to enforce a deed executed upon its face for good and valuable consideration, except upon its being shown by the facts specially pleaded and proved in the action

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wherein the deed is sought to be enforced, that it is void as illegal or immoral. Prior to the passing of the Judicature Act the invariable rule was that the facts relied upon as constituting the illegality relied upon as a defence to an action upon a contract must be specially pleaded. In *Colborne* v. *Stockdale* (1) it was held that a plea of illegality in a bond, that it was given for money won at play, ought to state at what game, that it was like a usurious or simoniacal contract where the agreement must be shown, for that it was matter of law and that the court should have the means of judging whether the facts stated constituted illegality; and in *Mazzinghi* v. *Stephenson* (2), it was held that a plaintiff was entitled to recover upon such a bond where the defendant failed to prove that the money for which the bond was given was won at the particular game stated in the plea, viz., "faro." To the like effect as to the necessity of particularity in the statement of the facts relied upon as constituting illegality are *Hill* v. *Montagu* (3); *Potts* v. *Sparrow* (4); *Martin* v. *Smith* (5); *Fenwick* v. *Laycock* (6); *Cooke* v. *Stratford* (7); *Allport* v. *Nutt* (8); and *Grizewood* v. *Blane* (9). In this latter case the court unanimously held that the facts relied upon as making the contract illegal must be specially pleaded; that illegality must not be stated by simple, inexplicit allegation, but that the plea should contain an allegation of facts which would enable the court to say whether or not they constituted illegality, and for that purpose that the facts should be expanded on the record.

Now the Judicature Act has made no difference in this respect for by rule 399 of the General Rules passed

(1) 1 Str. 493.
(2) 1 Camp. 291.
(3) 2 M. & S. 377.
(4) 6 C. & P. 749.
(5) 4 Bing N. C. 436.
(6) 1 Q.B. 414.
(7) 13 M. & W. 379.
(8) 1 C.B. 974.
(9) 11 C.B. 526.

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under the authority of the act it is enacted that pleadings shall contain a concise statement of the material facts upon which the party pleading relies. Under a similar rule in England it was decided, in *Hanmer* v. *Flight* (1), that the facts from which the court is to judge the result must be stated. So a statement of claim which merely alleged that a good *donatio causa mortis* had been made to the plaintiff without stating the facts relied upon as constituting the donation was held bad (2). The form of setting up the defence as invariably used in practice under the Judicature Act appears from the statement of defence in *Windhill Board of Health* v. *Vint* (3).

The plea of the appellant which merely alleged that the consideration for the execution of the mortgage in the statement of claim mentioned was illegal and immoral was a bad plea as presenting no facts relied upon as constituting illegality or immorality. It is true that the plaintiff did not take any objection to the plea for this defect; but when after a regular judgment of foreclosure in favour of the plaintiff in the action the appellant applied to the court for a special indulgence to be granted to him, namely, that the regular judgment should be set aside and a new trial given to him to enable him to prove that $2,000 of the purchase money for the house sold by the plaintiff to the mortgagor, and for securing which the mortgage was given, was for what has been called the good-will of the house, or a value attached to it as a house of ill-fame, and that the residue of the purchase money or $2,000 was the agreed value of the premises irrespective of such so called good-will; and when he accepted the new trial upon condition of paying the balance of the

(1) 35 L. T. N. S. 127.
(2) *Towsend* v. *Parton* 45 L. T. N.S. 755.
(3) 45 Ch. D. 351.

money remaining due upon the security of the mortgage and availed himself of the special indulgence so granted to him, and went down to try the truth of the allegation as to the $2,000—part of the purchase money —and wholly failed to establish the matter alleged in respect thereof, no principle of law or public policy requires the court to entertain a further objection made *ore tenus*, not set out on the record, namely, that in the evidence offered to establish the contention to try which alone the appellant was granted the indulgence of setting aside a regular judgment, and in which he failed, it sufficiently appeared that the person to whom the house was sold by the plaintiff, and by purchase from whom the appellant claims, was to the knowledge of the plaintiff a prostitute, and that the plaintiff knew or had reason to know or believe that the purchaser of the house intended when the house should be conveyed to her to continue to lead therein her dissolute and immoral life. Whether these facts, assuming them to be established, would or would not make void the mortgage given to secure part of the purchase money *bonâ fide* agreed upon as being the fair marketable value of the house, I can see no principle of law or public policy requiring the court to relax the rules of law governing the mode of presenting a defence of that kind to an action upon a mortgage given for such purchase money for the purpose of permitting the appellant, after judgment against him upon the point upon which alone the court granted the new trial, to raise such new contention. In my opinion, however, the cases relied upon by the appellant do not support this new contention assuming it to be open to him.

In *Lloyd* v. *Johnson* (1), where the action was for work and labour bestowed by the plaintiff in washing clothes for a prostitute, which were used by her for

(1) 1 B. & P. 340.

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the purpose of appearing in public places in pursuit of her immoral calling, the plaintiff having knowledge of her being a prostitute, and of the purpose to which the articles washed were applied, it was held that such knowledge did not disentitle the plaintiff to recover for his work and labour.

In *Lightfoot* v. *Tenant* (1) the plea to an action on a money bond alleged that the bond was given for the price of goods sold by the plaintiff to the defendant for a purpose the facts of which were specially stated, and which were contrary to the provisions of an act of Parliament, and the plea being proved it was held that the plaintiff could not recover.

In *Paxton* v. *Popham* (2), to an action on a bond, a plea that the bond was given to cover the price of goods illegally (stating the facts constituting the illegality) contracted to be sold and shipped in contravention of an act of Parliament, was held upon demurrer to be a good plea in bar of the action.

In *Bowry* v. *Bennet* (3), in an action for the value of clothes furnished to the defendant, the defence was that the defendant was, as was well known to the plaintiff, a woman of the town and that the clothes were furnished to her for the purpose of enabling her to carry on her business of prostitution. Lord Ellenborough held that the plaintiff must not only be shown to have had notice of the defendant's way of life but that he had expected to be paid from the profits of defendant's prostitution, and that he had sold the clothes to enable her to carry it on, and the plaintiff recovered.

In *Hodgson* v. *Temple* (4) Lord Mansfield held that the mere selling goods knowing that the buyer would make an illegal use of them is not sufficient to deprive the vendor of the right of just payment.

(1) 1 B. & P. 551.
(2) 9 East 408.
(3) 1 Camp. 348.
(4) 5 Taun. 181.

In *Langton* v. *Hughes* (1) the case was of drugs sold with the knowledge that they were bought for the purposes of being used in a manner prohibited by act of Parliament, and it was held that as the act also expressly prohibited the causing or procuring the drugs to be so used, the sale with knowledge that the goods were bought for the purpose of being so used was a causing or procuring them to be so used within the prohibition in the act, and that therefore the plaintiff could not recover the price of goods so sold.

In *Cannan* v. *Bryce* (2) the plea was that the money sued for was lent for the express purpose of enabling the defendant to pay certain losses incurred in illegal stock jobbing transactions; and it was held that the plaintiff could not recover money lent for the express purpose of accomplishing an illegal object.

In *McKinnell* v. *Robinson* (3), *to* an action of *indebitatus assumpsit* for money lent, the plea was that the money was lent for the purpose of defendant illegally playing and gaming therewith at hazard. On demurrer the plea was held a good plea in bar, upon the principle, "not for the first time" (as said by Lord Abinger on delivering judgment) "laid down but fully settled in the case of *Cannan* v. *Bryce* (2) namely that the repayment of a sum of money lent for the express purpose of accomplishing an illegal object and of enabling the borrowers to do a prohibited act cannot be enforced.

In *Jennings* v. *Throgmorton* (4) the action was in assumpsit for the use and occupation of rooms let to defendant as weekly tenant. After the tenant entered the plaintiff became aware that she lived by prostitution. Abbott C. J. charged the jury that if the plaintiff after he became aware of the defendant's mode of living suffered her to occupy the premises for the express pur-

(1) 1 M. & S. 593.
(2) 3 B. & Ald. 179.
(3) 3 M. & W. 434.
(4) Ry. & M. 251.

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pose of continuing a life of prostitution, and that the demand sued for accrued afterwards, he could not recover.

In *Gas Light Co.* v. *Turner* (1) in an action upon the covenant in a lease for payment of rent the plea was that the premises were demised for express purpose of violating an act of Parliament in the manner specially stated in the plea—upon demurrer the plea was held to be good, Tindal C. J. saying:—

> The allegation that the tenements and premises were demised to the defendant for the express purpose, &c., &c., necessarily implies and even in a more especial manner declares that the express purpose was the purpose of the party who made the demise viz., the plaintiff.

And with reference to an argument urged on behalf of the plaintiff that if the defendant should succeed on the plea the consequence would follow that he could hold the premises for the whole term granted by the lease free from rent he answered:—

> If an ejectment were brought by the lessors to recover possession on the ground that the lease was void it would be difficult for the lessee to maintain his right to hold under the lease after having pleaded in the present action that the indenture was void and obtained the judgment of the court in his favour on that plea.

In *Ritchie* v. *Smith* (2) the action was in assumpsit for the use and occupation by the defendant of certain premises under a written agreement; plea that the agreement, setting it out at length, was made for the express purpose of enabling one of the defendants, party to the agreement, to contravene the provisions of a statute passed for the protection of public morals, showing the manner of contravention. The facts alleged in the plea being proved it was held that the plaintiff could not recover, Williams J. saying:—

> This is an agreement by which the plaintiff co-operated with other persons for the avowed purpose of contravening and evading the pro-

(1) 5 Bing. N.C. 666. (2) 6 C.B. 462.

visions of an act having for its object the protection and advancement of public safety and morals.

In *Smith* v. *White* (1) the question arose in relation to a lease of premises which had been used as a brothel. Kindersley V. C., proceeded upon the cases of *Jennings* v. *Throgmorton* (2) and *Bowry* v. *Bennet* (3), in which latter case, however, he is erroneously reported to have said that the plaintiff was held to be not entitled to recover. In his judgment, however, he rests upon the same principle which enabled the plaintiff to succeed in *Bowry* v. *Bennet* (3) and the defendant in *Jennings* v. *Throgmorton* (2). He there says —

It cannot be doubted that in the present case the plaintiff knew that the means of paying the high rent which was to be paid for the premises would be derived from the profits of the immoral trade carried on in the house, and although he had no lien on these profits he expected to be paid out of them, and knew that unless the tenant carried on such trade he would not be able to pay the rent.

In *Feret* v. *Hill* (4), with reference to a lease of premises acquired by a lessee with the intention of using the premises as a brothel, it is said that no intention existing in the lessee's mind could make the lease void.

In *Pearce* v. *Brooks* (5), in an action for the use of a brougham had under an agreement between plaintiff and defendant for the purpose, the plea was that the agreement was made for the supply of a brougham to be used by her as a prostitute, which she was known to the plaintiff to be, and to assist her, as the plaintiff also well knew, in carrying on her immoral vocation. The question was as to whether the evidence supported the plea. At the trial Bramwell B., put the case to the jury thus :—

That in some sense everything which was supplied to a prostitute is supplied to her to enable her to carry on her trade, as, for instance, shoes sold to a street walker, and that the things supplied must not be

(1) L.R. 1 Eq. 626.
(2) Ry. & M. 251.
(3) 1 Camp. 348.
(4) 15 C.B. 207.
(5) L.R. 1 Ex. 213.

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merely such as would be necessary or useful for ordinary purposes, and also be applied to an immoral purpose, but that they must be such as would, under the circumstances, not be required except with that view.

And he submitted certain questions to the jury which they answered by finding that the brougham was used by the defendant as part of her display to attract men, and that the plaintiff knew it was supplied to be used for that purpose. Upon this finding a verdict was entered for the defendant, with leave for the plaintiff to enter a verdict for him for 15 guineas. Upon the argument of a motion to that effect it was held that the finding of the jury supported the allegation in the plea that the brougham was supplied to the defendant to be used by her as a prostitute, and to assist her in carrying on her immoral vocation. During the argument Bramwell B., after stating what his charge had been, as above, added:

The jury, by the mode in which they answered the question, showed that they appreciated the distinction, and on reflection I think they were entitled to draw the inference which they did. They were entitled to bring their knowledge of the world to bear on the facts proved. The inference that a prostitute (who swore that she could not read writing) required an ornamental brougham for the purpose of her calling, was as natural a one as that a medical man would want a brougham for the purpose of visiting his patients, and the knowledge of the defendant's condition being brought home to the plaintiffs, the jury were entitled to ascribe to them also the knowledge of her purpose, which, being established, was sufficient to support the allegation in the plea, to the effect that the brougham was supplied by the plaintiffs to the defendant to be used by her as a prostitute, and to assist her in carrying on her immoral vocation.

So regarding the case Pollock C. B. says (1):—

If evidence is given which is sufficient to satisfy the jury of the fact of the immoral purpose and of the plaintiff's knowledge of it and that the article was required and furnished to facilitate that object, it is sufficient.

And Martin B. says:—

(1) P. 218.

The real question is whether sufficient has been found by the jury to make a legal defence to the action under the third plea.

Then stating the substance of that plea he adds :—

If therefore there is evidence that the brougham was to the knowledge of the plaintiffs hired for the purpose of such display as would assist the defendant in her immoral occupation the substance of the plea is proved and the contract was illegal.

And he added :—

As to *Cannan* v. *Bryce* (1) I have a strong impression that it has been questioned to this extent that if money is lent the lender merely handing it over into the absolute control of the borrower, although he may have reason to suppose that it will not be employed illegally he will not be disentitled from recovering. But no doubt if it were part of the contract that the money should be so supplied the contract would be illegal.

This language implies that the learned Baron considered that the evidence that the plaintiff knew that the defendant was a prostitute and that she hired the brougham to be used by her in attracting men and in assisting her to carry on her immoral vocation, for which purpose alone in her condition in life she could have been supposed to require such an article, was equivalent to a contract for the letting by the plaintiff of the brougham to her for that purpose. And so Pollock C.B., agreeing with what had fallen from Martin B. as to the case of *Cannan* v. *Bryce*, (1) says (2) :—

If a person lends money but with a doubt in his mind whether it is actually to be applied to an illegal purpose it will be a question for the jury whether he meant it to be so applied, but if it were advanced in such a way that it could not possibly be a bribe to an illegal purpose and afterwards it was turned to that use neither *Cannan* v. *Bryce* (1) nor any other case decides that this act would be illegal.

Then Pigott B. said :—

I think that the jury were entitled to call in aid their knowledge of the usages of the day to interpret the facts proved before them. If a woman who is known to be a prostitute wants an ornamental brougham there can be very little doubt for what purpose she requires it. It can-

(1) 3 B. & Ald. 179. (2) P. 221.

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not be necessary that the plaintiff should look to the proceeds of the immoral act for payment, the law would indeed be blind if it supported a contract where the parties were silent as to the mode of payment, and refused to support a similar contract in the rare case where the parties were imprudent enough to express it. The plaintiff knew the woman's mode of life and where the means of payment would come from.

These observations were applied to an allegation in the plea, that the agreement for letting the brougham was made by the plaintiffs in the expectation that the defendant would pay the plaintiffs the moneys to be paid by the agreement out of her receipts, of which expectation being entertained by the plaintiffs there was no express evidence, but as it would seem, sufficient evidence in the opinion of the learned Baron from which that inference if it had been necessary might have been drawn. The judgment in this case does not extend the principle involved in *Cannan* v. *Bryce* (1), *The Gas Light Co.* v. *Turner* (2), or any other of the cases above cited. It merely lays down the rule that for the purpose of proving an allegation in a plea that an article for the price or use of which an action is brought was supplied by the plaintiff to the defendant to be used by her in the pursuit of an illegal and immoral purpose, and to assist her in accomplishing such illegal and immoral purpose, the jury should take into consideration the nature of the article supplied and the condition in life of the person to whom it was supplied, and the question whether the article supplied was such as under the circumstances in evidence might be required for some necessary purpose other than the illegal purpose, or on the contrary could only be required for such illegal purpose, and that in order to enable them to draw a proper inference from the facts in evidence they were entitled to apply their knowledge of the world as bearing upon those facts, and, it having been proved that

(1) 3 B. & Ald. 179.

(2) 5 Bing. N. C. 666.

the plaintiffs knew the defendant to whom they had let an ornamental brougham to be a prostitute, were, in the exercise of their knowledge of the world, justified in finding that the plaintiffs who supplied the brougham to the defendant knew that it was supplied by them to be used by her as part of her display as a prostitute and to attract men. The judgment of the court in the case is that such finding proved the plea, and so in effect was equivalent to an express finding that the brougham was let as alleged in the plea to be so used, that is to say for the purpose of being so used by the defendant, and so the case came within *Cannan* v. *Bryce* (1), *Gas Light Co.* v. *Turner* (2), and other similar cases.

In *Fisher* v. *Bridges* (3) in the Exchequer Chamber it was pleaded and proved that the bond upon which the action was brought was given to secure payment of the consideration money for lands sold and conveyed by the plaintiff to the defendant for the express purpose of being sold, and upon an express agreement entered into between the plaintiff and the defendant that the lands so conveyed should be sold, by the defendant by lottery in contravention of two acts of Parliament by which not only were all lotteries prohibited, but all sales of houses, lands, &c., by lottery were declared to be absolutely void.

Now the principles involved in, and to be collected from, all of the above cases are as it appears to me—

1st. That a plea setting up as a defence to an action upon a contract entered into or an instrument under seal or in writing without seal executed by the defendant, that the contract or instrument upon which the action is founded was executed for an illegal or immoral purpose or consideration must state the particular facts relied upon as establishing the illegality or immorality, and must not merely make the inexplicit allegation

(1) 3 B. & Ald. 179. (2) 5 Bing. N. C. 666.
(3) 2 E. & B. 118; 3 E. & B. 642.

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that the contract was entered into or the instrument executed upon or for an illegal or immoral purpose or consideration.

2nd. That all contracts entered into between a plaintiff and defendant and all instruments executed for the purpose of passing property from the former to the latter, with the intent and for the purpose, operating in the mind of the transferor, that the property transferred shall be applied by the transferree in the accomplishment of a purpose which is in contravention of the principles of the common law or the provisions of a statute, are void and incapable of being enforced by either of the parties against the other upon the illegality being made to appear in due form of law in an action upon the contract or instrument, and that an instrument executed by the transferee for the purpose of securing to the transferor payment of the consideration money for the property so transferred is in like manner void and incapable of being enforced by the transferor against the transferree upon the illegality being made to appear in like manner.

3rd. Knowledge in the mind of the transferor that the transferee intended to apply the property when transferred to him to an illegal purpose will not avoid a contract between the parties or an instrument which transfers the property from the one to the other unless, having regard to the particular nature of the property transferred, and to the condition in life and occupation of the person to whom it is transferred, a just inference can be drawn from the facts in evidence that the property was so transferred with the intent and for the purpose, operating in the mind of the transferor, that the property when transferred should be applied by the transferee to the illegal purpose alleged in the plea.

Applying these principles to the present case I am of opinion, for all of the reasons above stated, that the

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appellant has wholly failed in establishing that the deed executed by the plaintiff to the appellant's grantor, and which constitutes the consideration for the execution of the mortgage sued upon and the root of the appellant's title to the premises mortgaged, is void. If the contention of the appellant should prevail I cannot see that it would be possible for any of these unfortunate creatures who lead a life similar to that led by the appellant's grantor to enter into any contract with any person knowing her character for the purchase in fee of a house to shelter her or for the purchase of any of the necessaries of life; and the golden rule laid down in *Pearce* v. *Brooks* (1) upon which case the appellant so much relied would be utterly ignored and set at naught, namely—that it is necessary in cases like the present to distinguish between such things as, while being necessary or useful for the ordinary purposes of life, may also be applied to an immoral purpose, and those which are such as under the circumstances in evidence would appear not to be required except for an immoral purpose. No such principle has yet been laid down, or is sanctioned, by any of the decided cases, and there is not in my opinion any principle of law or of public morals or of christian morality which could sanction the affirmation of such a principle.

The appeal must be dismissed with costs.

TASCHEREAU J.—The appellant has, in my opinion, made a strong, a very strong case. Mr. Justice Meredith's remarks in the Divisional Court, also, it seems to me, support the appellant's legal propositions. I dissent.

Apppeal dismissed with costs.

Appellant in person: *R. S. Clark.*

Solicitors for respondent: *Mowat & Smyth.*

(1) L. R. 1. Ex. 213.