previous suits were based, and is not in my opinion barred. It is a fresh ground of claim which the plaintiff was not bound to join with his previous suits and which hitherto he has not based any claim upon. The defendants have no defence on the merits to this claim. The Munsif found that the plaintiff offered to pay the whole amount of the original kanam and that the defendants were entitled to a certain sum for improvements less purapad, and there was no appeal against his decree as to those findings.

I would, therefore, reverse the decree of the Subordinate Judge and restore that of the District Munsif with costs in this and in the lower Appellate Court.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Benson.

THASI MUTHUKANNU AND OTHERS (DEFENDANT AND HER LEGAL REPRESENTATIVES), APPELLANTS,

1905. March 23, 24, 30.

v.

SHUNMUGAVELU PILLAI (PLAINTIFF), RESPONDENT.*

Contract Act IX of 1872, s. 23—Immoral consideration, assignment of mortgage for—Right of one in pari delicto to set aside executed contracts—Completed gift cannot, but transfer for consideration may be set aside—Raising new points in second appeal.

In 1898 the plaintiff, who was then young and inexperienced, assigned to the defendant, a dancing girl, a mortgage for Rs. 1,500, the consideration stated in the deed being payments in cash and jewels to the plaintiff and the discharge by the defendant of debts due by the plaintiff. The plaintiff sued in 1901 to set aside the assignment on the ground that no consideration passed as recited therein but that the real consideration was the future continuance of immoral relations between himself and the sister of the defendant. The defendant contended that the consideration stated in the deed actually passed, and further that the plaintiff

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* Second Appeal No. 514 of 1903, presented against the decree of F. D. P. Oldfield, Esq., Acting District Judge of Tanjore, in Appeal Suit No. 98 of 1902, presented against the decree of M.R.Ry. P. Adinarayaniah, District Munsif of Shiyali, in Original Suit No. 23 of 1901.

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who admitted that the assignment was for an immoral consideration, could not sue to set it aside.

Both the lower Courts found that there was no consideration for the deed and set it aside.

On second appeal to the High Court it was contended that the transaction being for an immoral consideration and completely executed, the plaintiff as a person *in pari delicto* could not sue to set it aside:

Held that, where the transaction amounted to a voluntary gift, it cannot be set aside; but, where the transaction, though completed, was intended to be for consideration, it can be impeached if the consideration is immoral, and it makes no difference whether the transaction is executed or executory.

Ayerst v. *Jenkins*, (L.R., 16 Eq., 275), distinguished.

Whether what has been transferred has been transferred by way of gift or not will depend on the intention of the parties and the facts of the particular case; and the form of the transaction will be material in determining the question.

Phillips v. *Probyn* ((1899) 1 Ch.D., 811 at pp. 816 and 817).

Held also, that on the facts, the transaction was between the plaintiff on the one hand and the defendant, as the managing member of a joint family of dancing girls consisting of the defendant and her sister, on the other.

Kamakshi v. *Nagarathnam*, (5 M.H.C.R., 161), referred to.

Held further, that considering the age and inexperience of the plaintiff and that he had no independent advice, he was not *in pari delicto*.

A point not taken in the lower Courts, on which no issue was raised, and on which the parties had no opportunity of adducing evidence cannot be urged in second appeal.

SUIT to set aside an assignment of a mortgage for Rs. 1,500 in favour of the defendant by registered deed, dated 24th June 1898. The deed recited that the consideration for the assignment was a payment to the plaintiff in cash of Rs. 250, and in jewels of Rs. 940, the discharge by the defendant of certain debts due on promissory notes by the plaintiff, and Rs. 44 paid to the defendant as a reward for taking the transfer. The plaintiff's case was that he, being young and inexperienced, was introduced by some of her friends to the defendant and her sister, Ammakannu, who were dancing girls living by prostitution; that the assignment was made in consideration of future illicit intercourse with the defendant's sister, and under the influence of the defendant and her friends; that he had had no independent advice; that shortly after the transfer was executed Ammakannu ceased, at the instance of the defendant and her friends to have further intercourse with him. The plaintiff denied that the consideration mentioned in the deed passed to him. The defendant denied any fraud or deceit, and pleaded that the consideration mentioned in the deed was actually paid to the plaintiff.

The District Munsif found that the consideration recited in the deed never passed to the plaintiff and set aside the deed of assignment.

The defendant appealed, and the District Judge dismissed her appeal.

The defendant preferred this second appeal.

T. Rangacharior and *T. Natesa Ayyar* for second and third appellants.

V. Krishnaswami Ayyar for respondent.

JUDGMENT.—The plaintiff sued to set aside an assignment made by him to the defendant on the 24th June 1898 of his right under a simple mortgage deed executed to him on the 24th February 1898 by one Veerappa Padayachi for the sum of Rs. 1,500 due to the plaintiff by Veerappa. The District Munsif and the District Judge decreed the claim, the ground for the decree being that the consideration for the assignment recited in the instrument of transfer and relied on by the defendant in her defence, viz., payment of Rs. 250 to the plaintiff by the defendant, discharge by the latter of debts due by the former to the extent of Rs. 265, and the delivery of jewels of the value of Rs. 940 never passed from the defendant to the plaintiff.

On behalf of the defendant, it was for the first time contended in this Court that according to the plaintiff's own case the transaction was entered into for an immoral purpose and the plaintiff as a person *in pari delicto* was not entitled to ask for the relief prayed for having regard especially to the fact that the transaction was one completely executed. The substance of the plaintiff's case, with reference to the point thus raised on behalf of the defendant, was this: The plaintiff who was at the time young and inexperienced was introduced to the defendant and her sister Ammakannu, dancing women living by prostitution, by certain individuals referred to in the plaint who had immoral relations with them; that the transfer in question was made expressly in consideration of future illicit intercourse between the plaintiff and Ammakannu; that the transfer was executed while the plaintiff was under the influence of the said persons acting in the interests of the women without the plaintiff having had opportunity of being properly advised in the matter; and that shortly after the execution of the instrument the defendant and her partisans caused the connection between the plaintiff and Ammakannu to be

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broken off. This case was supported by the evidence given by the plaintiff himself and is uncontradicted except it be by the defendant's case that the consideration recited in the instrument of transfer did actually pass, which, however, as already stated, has been negatived by the concurrent findings of the lower Courts.

The question then for determination is, whether upon the facts spoken to by the plaintiff, the decrees of the lower Courts are sustainable. In dealing with this question we proceed on the footing, that though the instrument of assignment purported to be between the plaintiff on the one hand and the defendant on the other, yet the transaction was intended for the benefit of both the sisters who, according to the law governing them, were members of a joint family, the defendant being the elder member and manager (*Kamakshi* v. *Nagarathnam*(1)). Mr. Rangachariar on behalf of the defendant, did not question (as he could not) that the promise or expectation of future illicit cohabitation is an unlawful consideration, and that an agreement founded on it, is void. He contended, however, that the rule on the subject is confined only to executory contracts, and, as in the present instance, the transaction was one which had been carried out, whereby the mortgage interest possessed by the plaintiff became fully vested in the defendant, the lower Courts should have refused the relief prayed for. He strongly relied on *Ayerst* v. *Jenkins*(2) in support of his contention. Now, that the doctrine laid down by Lord Selborne there is confined to cases where according to the intention of the parties the transaction is a gift absolutely completed, is made clear throughout the judgment and particularly by the following passages. At page 283 of the report his Lordship observes:—"In the present case relief is sought by the representative, not merely of a *particeps criminis*, but of a voluntary and sole donor, on the naked ground of the illegality of his own intention and purpose; and that, not against a bond or covenant or other obligation resting *in fieri*, but against a completed transfer of specific chattels, by which the legal estate in those chattels was absolutely vested in trustees, ten years before the bill was filed, for the sole benefit of the defendant. I know no doctrine of public policy which requires, or authorises, a Court of Equity to give assistance to such a plaintiff under such circumstances." Again in the same page he says:—"A

(1) 5 M.H.C.R., 161. (2) L.R., 16 Eq., 275.

voluntary gift of part of his own property by one *particeps criminis* to another, is in itself neither fraudulent nor prohibited by law." And at page 284 he adds:—"I think it consistent with all sound principle, and with all authority, to recognise the importance of the distinction between a completed voluntary gift, valid and irrevocable in law (as I hold the transfer of the shares to the defendant's trustees to be), and a bond or a covenant for an illegal consideration, which has no effect whatever in law." In short the precise point established by the case is, borrowing the words of Sir Frederick Pollock, that "an actual transfer of property which is on the face of it 'a completed voluntary gift valid and irrevocable in law' and confers an absolute beneficial interest, cannot be afterwards impeached by the settlor or his representatives, though in fact made on an unlawful consideration." (Pollock on 'Contracts,' 7th edition, at p. 304.) Where therefore the transaction, though completed, was not intended to be a gift but a transfer for consideration, in such a case, if the consideration is shown to be unlawful on the ground of its immoral character that must necessarily make the transaction void, and the question whether reliefs should be given or refused to a *particeps criminis* will have to be decided on principles different from that on which *Ayerst* v. *Jenkins*(1) proceeds. This is in a way implied in the observation of Lord Selborne that "where the immediate or direct effect of an estoppel in equity against relief to a particular plaintiff might be to effectuate an unlawful object, or to defeat a legal prohibition, or to protect a fraud, such an estoppel may well be regarded as against public policy." The effect of the authorities would seem to be that save the case of gifts of the kind upheld in that case, transactions having for their consideration future illicit cohabitation, whether the transaction be executory or executed, are, on grounds of public policy, liable to be impeached even at the instance of a *particeps criminis* as will be seen from the statement of the law on the point in Pollock on 'Contracts,' 7th edition, page 386, and where the learned author expresses himself thus:—"A wider exception is made, as we have seen above, in the case of agreements of which the consideration is future illicit cohabitation between the parties." Apart from this particular class of cases, it is submitted, that the rule and its

(1) L.R., 16 Eq., 275.

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qualifications may be stated to this effect:—"Money paid or property delivered under an unlawful agreement cannot be recovered by, nor the agreement set aside at the suit of either party, unless nothing has been done in the execution of the unlawful purpose beyond the payment or delivery itself, and the agreement is not positively criminal or immoral; or unless the agreement was made under such circumstances as between the parties that, if otherwise lawful, it would be voidable at the option of the party seeking relief; or in the case of an action to set aside the agreement, unless, in the judgment of the Court, the interests of third persons require that it should be set aside." And *Wootton* v. *Wootton* referred to and distinguished by Lord Selborne in *Ayerst* v. *Jenkins*(1) is a decisive instance against the Courts laying down broadly that relief will never be given to a plaintiff *in pari delicto* in cases of completed transactions having for their consideration future illicit cohabitation.

Turning now to the present case, the transfer was undoubtedly not a voluntary gift as in *Ayerst* v. *Jenkins*(1). That neither of the parties to it intended it as such is obvious from the fact that it was considered necessary to introduce recitals as to consideration, which if true, would have made the transaction in effect a sale. And as already shown, according to the plaintiff who is uncontradicted, the assignment by him was a transfer for a specific return, viz., the future association of Ammakannu with him as his concubine. No doubt recitals as to consideration such as those in the present case are not conclusive as to the real character of the transaction intended. On the other hand, the form in which the transaction is embodied cannot be treated as immaterial; for, suppose in order to secure future illicit cohabitation, a man transfers to the woman his property by way of lease on a very favourable rent, it would be impossible to contend in such a case that the relation intended to be created by the instrument was not that of lessor and lessee in spite of the fact that, the lease on those terms, was for the purpose of securing to the woman the difference between the income of the property and the rent reserved. Again, suppose the transaction is made to take the form of a pure usufructuary mortgage. It would be equally impossible to speak of such an arrangement as a donation though the real effect of it would be to

(1) L.R., 16 Eq., 275 at p. 284.

secure to the woman the payment of the sum of money mentioned in the instrument as the mortgage amount. The question whether what is transferred has in truth been transferred by way of gift or not must depend on the actual intention of the parties and the facts of the particular case. Compare *Phillips* v. *Probyn*(1) a case of settlement by a man on his deceased wife's sister where North, J., distinguishes that case from *Ayerst* v. *Jenkins*(2) on the ground that in the former "the deed was not expressed to be a voluntary "one, but as made for a consideration (viz., marriage) which under "the circumstances could not legally take effect and which must "continue to be illegal so long as the parties lived" (*Phillips* v. *Probyn*(1)). In this view it would follow that the present case is not governed by *Ayerst* v. *Jenkins*(2) and that the plaintiff is not precluded from getting the relief sought for, on the simple ground of his participation in the illegal compact.

Even if this conclusion were not right it must be held that the case of the plaintiff is hardly one in which he can be said to be *in pari delicto*. At the date of the transaction he was a youth of about 20 years of age. The assignment was brought about at the nstance of persons referred to by the plaintiff in his evidence, acting in complicity with the defendant and her sister, and who led the plaintiff into evilways. That during this time the plaintiff was not in a position to obtain proper advice from those interested in him, and capable of protecting him from being imposed upon, is also spoken to by him. And the circumstance that he was induced to execute the document when at a distance from the station, which was the place of residence of both the parties, tends strongly to corroborate the view distinctly put forward by him that, when he was led to transfer a mortgage worth Rs. 1,500 advantage was taken of his youth and inexperience to induce him to accept a consideration which could at any time be rendered valueless for the future and which, as the event showed, did fail after a short time.

It was lastly urged that the lapse of time between the date of the transfer in June 1898, and the institution of the suit which was on the 5th March 1901, was fatal to the successful maintenance of the suit. No doubt, the District Munsif observes that the plaintiff had satisfactorily accounted for the delay, but this observation of

(1) (1899) 1 Ch.D., 811 at pp. 816, 817. (2) L.R., 16 Eq., at p. 275.

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the Munsif was not made with reference to the argument now suggested. As the defendant contented herself with relying on an untrue case as to the consideration for the transfer, no issue was raised as to whether the inaction of the plaintiff in the interval relied on, amounted to such an acquiescence as would estop him from obtaining the relief sought. And no evidence was adduced on either side, and the plaintiff had not any opportunity of offering such explanation in the matter as he could. In these circumstances the defendant cannot be allowed to rely on the present ground of objection.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1905. March 17.

IBRAHIM KHAN SAHIB (SEVENTH DEFENDANT), APPELLANT,

v.

RANGASAMI NAICKEN AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 TO 6), RESPONDENTS.*

Abkári Act I of 1886 (*Madras*), *s.* 28, *Sale for arrears under—Effect on prior encumbrances—'As if they were arrears of land revenue,' meaning of—Limitation.*

A sale for arrears of abkári revenue of immoveable properties belonging to the defaulter under section 28 of Act I of 1886 has not the effect of discharging encumbrances created prior to the sale.

Ramachandra v. *Pitchaikanni*, (I.L.R., 7 Mad., 434), followed.

The words 'as if they were arrears of land revenue' in the new Act have the same meaning as the words 'in like manner as for the recovery of arrears of land revenue' in the old Act.

Chinnasami Mudali v. *Tirumalai Pillai and the Right Honourable the Secretary of State for India*, (I.L.R., 25 Mad., 572), followed.

Kadir Mohideen Marakkayar v. *Muthukrishna Ayyar*, (I.L.R., 26 Mad., 230), followed.

Where lands subject to mortgage are sold under section 28 of Act I of 1886, the mortgagee's suit to enforce his mortgage right against the purchaser does not fall within article 12 of schedule II of the Limitation Act, when the plaint contains no prayer for setting aside the sale.

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* Second Appeal No. 477 of 1903, presented against the decree of F. D. P. Oldfield, Esq., Acting District Judge of Tanjore, in Appeal Suit No. 1003 of 1901, presented against the decree of M.R.Ry. P. Narayanachariar, District Munsif of Kumbakonam, in Original Suit No. 36 of 1901.