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UPFILL *v.* WRIGHT.Dec. 16, 17.

*Landlord and Tenant—Lease—House let to kept Woman—Immoral Purpose—
Right to recover Rent.*

The plaintiff by his agent let a flat to the defendant for a term of three years. The agent knew that the defendant was the mistress of a certain man, and he assumed that the rent would come through her being a kept woman and would come from the man whose mistress she was; and he knew that the man went constantly to the flat to visit her. After the expiration of the term the defendant continued as tenant from year to year. In an action to recover the rent:—

Held, that as the flat was let for an immoral purpose the plaintiff was not entitled to recover.

APPEAL from the Clerkenwell County Court.

The action was brought to recover 72*l.* 10*s.*, being a half-year's rent of a flat in Southampton Row, London, in the following circumstances:—By an agreement in writing, dated July 4, 1901, the plaintiff, through his agent, who managed the property for him, agreed to let the flat to the defendant, who was a spinster, for the term of three years from June 24, 1901, at the yearly rent of 145*l.*, payable by equal quarterly payments on the usual quarter days. The defendant agreed not to permit the premises to be used for any unlawful or immoral purpose; and there was a proviso for re-entry without any notice to quit upon breach of any of the tenant's agreements. After the expiration of the three years the defendant continued as tenant from year to year. On December 8, 1909, the agent gave the defendant notice to quit, the notice expiring on June 24, 1910. The rent for the half-year ending June 24, 1910, not having been paid, the plaintiff brought this action.

The defence, so far as material to this report, was that the flat was to the knowledge of the plaintiff's agent taken for an immoral purpose, and that therefore the plaintiff could not recover. The plaintiff's agent in his evidence stated that at the time when he let the flat to the defendant he was told that she was the mistress of a certain man, who was one of her references, and he supposed that the rent would come through her being a kept woman; that he knew that the man

constantly came to the flat, and he supposed that the man was finding the money for the rent. He further stated that he did not know that the defendant was a prostitute or was intending to use or was using the flat as a prostitute until the date when he gave her notice to quit. The defendant in her evidence stated that she told the agent that she was a prostitute and was taking the flat for the purpose of receiving men there. The county court judge accepted the evidence of the plaintiff's agent as true, and in his judgment, after saying that the contention on the part of the defendant was that, as the plaintiff's agent was aware when he let the flat that the defendant intended to receive there for an immoral purpose the man who kept her, and as he believed that the rent was in effect to be provided by him, the position was the same as if she was to his knowledge intending to use the premises for prostitution generally, said: "I have consulted the authorities, and in particular the well-known case of *Pearce v. Brooks* (1), where a claim against a prostitute for the hire of a brougham failed, and there is no doubt that if a man or his agent knowingly lets a house to a prostitute and he also knows that she intends to take or receive men there (not if she intends to use it merely as her residence), the rent is irrecoverable. But I am being asked to go a great deal further than any decided case, and I am not prepared to go to the length of holding that in the present case the rent is irrecoverable." He accordingly gave judgment for the plaintiff.

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Dec. 16. *Clarke Hall*, for the defendant. The plaintiff's agent knew that the flat was being taken for an immoral purpose and therefore cannot recover the rent: *Pearce v. Brooks*. (1) It is not necessary as a defence to prove that the defendant was a prostitute and took the flat to the knowledge of the agent for the purposes of prostitution. It is sufficient if the agent knew that the defendant was an immoral woman who took the flat in order to use it for an immoral purpose. He knew that the defendant was the mistress of a certain man who was going to find the money to pay the rent, so as to be able to visit her at the flat for an immoral purpose. The claim for the rent

(1) (1866) L. R. 1 Ex. 213.

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is affected by the taint of immorality and is not enforceable: *Smith v. White.* (1) No doubt both those cases related to common prostitutes, but the degree of immorality is immaterial. Further, the plaintiff's agent knew when he gave the notice to quit on December 8, 1909, that the defendant was a prostitute using the flat as such, and upon that ground he cannot recover the rent for the half-year ending June 24, 1910: *Jennings v. Throgmorton.* (2) The agreement contained a stipulation by the defendant not to permit the premises to be used for any immoral purpose, and there was a proviso for re-entry upon breach of any of the tenant's agreements without notice to quit. The plaintiff might have re-entered on December 8, 1909, and he cannot recover the rent accrued due since that date.

A. Powell, K.C. (*A. S. Poyser* with him), for the plaintiff. With regard to the last point, the plaintiff did all he could to make the defendant give up possession of the flat, and was obliged to give the notice to quit. He could not have recovered possession sooner if he had treated the term as forfeited and brought an action to recover possession.

With regard to the main question, all the cases cited are cases of common prostitutes. There is a great difference between letting a house to a common prostitute for the purposes of prostitution and letting a house to a woman who happens to be the mistress of a certain man. The flat was taken for the purpose of providing a home for the defendant, and the fact that the man might use it occasionally for the purpose of visiting the defendant for an immoral purpose is not sufficient to prevent the plaintiff from recovering the rent. The flat was not let for the purpose of immorality being committed there. There is no finding to that effect. The flat was let to the defendant in the ordinary way, though the plaintiff's agent knew that she was the mistress of a certain man. As was pointed out in *Crisp v. Churchill* (3), which is cited in *Lloyd v. Johnson* (4), a prostitute must have a lodging. If the defendant's contention is correct, a person who let a house before the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), to a man who had gone through the form of

(1) (1866) L. R. 1 Eq. 626.

(2) (1825) Ry. & M. 251.

(3) Unreported.

(4) (1798) 1 Bos. & P. 340.

marriage with his deceased wife's sister, for the purpose of their living there, could not recover the rent. The plaintiff, therefore, is entitled to recover.

Cur. adv. vult.

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Dec. 17. DARLING J. This case raises a point which does not seem to have been exactly decided before, and therefore we thought it right to take a short time to consider it. The action is brought by the landlord of a flat which he had let to an immoral woman. The flat was let through the landlord's agent, and the county court judge has found that the agent at the time when he let the flat to the defendant knew that she was an immoral woman, being the kept mistress of a certain man, and that he knew or supposed that the rent of the flat would be paid with the money of the man who kept her. The money would be given to her as the price of her immorality. that is to say, as the price of her allowing the man to visit her in the flat and to commit fornication with her there, and she would hand over the amount of the rent to the plaintiff's agent. That was the object with which the flat was taken, and for that purpose the man was willing to find the money for the rent.

There is ample authority to the effect that if articles are sold or something is hired to a prostitute for the purpose of enabling her to carry on her prostitution, neither the price of the articles sold nor the rent of the thing hired can be recovered. The county court judge recognized that, but decided in favour of the plaintiff upon this ground: "I have consulted the authorities, and in particular the well-known case of *Pearce v. Brooks* (1), where a claim against a prostitute for the hire of a brougham failed, and there is no doubt that if a man or his agent knowingly lets a house to a prostitute and he also knows that she intends to take or receive men there (not if she intends to use it merely as her residence), the rent is irrecoverable. But I am being asked to go a great deal further than any decided case, and I am not prepared to go to the length of holding that in the present case the rent is irrecoverable." He accordingly gave judgment for the plaintiff.

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It does not seem to me to be necessary to go through the authorities, because the law is clear and is well stated by Pollock C.B. in *Pearce v. Brooks* (1): "I have always considered it as settled law that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, *Ex turpi causa non oritur actio*, and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of that maxim, and the effect is the same; no cause of action can arise out of either the one or the other." Applying the law so laid down to the present case one has to see whether the flat was let either for an illegal or for an immoral purpose, for if so the rent cannot be recovered. The flat was let to the defendant for the purpose of enabling her to receive the visits of the man whose mistress she was and to commit fornication with him there. I do not think that it makes any difference whether the defendant is a common prostitute or whether she is merely the mistress of one man, if the house is let to her for the purpose of committing the sin of fornication there. That fornication is sinful and immoral is clear. The Litany speaks of "fornication and all other deadly sin," and the Litany is contained in the Book of Common Prayer which is in use in the Church of England under the authority of an Act of Parliament. Further, fornication is immoral, so that Courts of law take cognizance of the fact that it is immoral. The statute 13 Edw. 1, st. 4, called the Statute de Circumspecte Agatis, enacts as follows: "The King to his judges sendeth greeting. Use yourselves circumspectly in all matters concerning the Bishop of Norwich and his clergy, not punishing them if they hold pleas in Court Christian of such things as be meer spiritual, that is to wit, of penance enjoined by prelates for deadly sin, as fornication, adultery, and such like, for the which sometimes corporal penance and sometime pecuniary is enjoined, specially if a freeman be convict of

(1) L. R. 1 Ex. at pp. 217, 218.

such things In all cases afore rehearsed the spiritual judge shall have power to take knowledge, notwithstanding the King's prohibition." Although the Bishop of Norwich is specially mentioned in the statute, it is stated in 2 Phillimore's Ecclesiastical Law, 2nd ed., p. 832, citing 2 Co. Inst. 487, that the Bishop of Norwich is put there only for example, for the statute extends to all the bishops within the realm. (1)

That statute was passed because prohibition would lie to an Ecclesiastical Court which claimed to exercise jurisdiction in matters which did not belong to it, but of which the King's Courts took cognizance, and it commanded the King's justices to allow the bishop in his Ecclesiastical Court to punish the offender, and not to punish the bishop for punishing the offender. There is also the Ecclesiastical Suits Act, 1787 (27 Geo. 3, c. 44), which provides in s. 2 that "no suit shall be commenced in any Ecclesiastical Court for fornication or incontinence after the expiration of eight calendar months from the time when such offence shall have been committed; nor shall any prosecution be commenced or carried on for fornication at any time after the parties offending shall have lawfully intermarried." The reason of that enactment I believe to be this. Parliament wished to prevent the Ecclesiastical Courts from punishing for fornication a woman who had been delivered of a bastard child. In such a case the woman, being unmarried, must have committed fornication. To effect its object the Act provided that no suit should be commenced after eight calendar months from the time of the commission of the offence, nor should any prosecution be commenced or carried on after the parties had intermarried. Fornication, however, remained an offence punishable in the Ecclesiastical Courts, and it was recognized in the statutes of the realm as an offence so punishable. Fornication is therefore illegal in the sense that it is contrary to the law as recognized in various statutes, and it is immoral.

I am of opinion that this flat was let for an immoral purpose,

(1) "HILLARY. That is not a Y. B. 19 Ed. III. (A.D. 1345) (ed. statute sealed.—WILLOUGHBY. No, Pike, 1906) 292. the Prelates made it themselves:"

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and the fact that the rent was to arise out of the letting made it clear that the landlord participated in the illegal or immoral act and in the immoral gains of the defendant. Therefore the case comes within the rule that out of a forbidden or immoral act no cause of action can arise. The appeal must be allowed and judgment entered for the defendant.

BUCKNILL J. This is an unusual case, the question being whether the plaintiff is entitled to recover two quarters' rent under an agreement for a lease. The county court judge held that the plaintiff was entitled to recover, and he clearly meant to base his judgment upon the fact that there was a difference between the case of a house let to a prostitute for the purpose of her prostitution and a house let to a woman who was the mistress of one man. The landlord's agent, in his evidence, which the county court judge accepted, stated that at the time when the agreement was made he knew that the defendant was a certain man's mistress; that he did not know that the defendant was a prostitute, and that until he gave notice to quit on December 8, 1909, he did not know that she was a prostitute or was using the premises as a prostitute; and that he only knew that she was that man's mistress and that the man constantly went there, and he supposed that the man, who was one of her references, was finding the money for the rent. In that state of things the question is whether this contract is affected by the taint of immorality. That is the expression which is used by Kindersley V.-C. in *Smith v. White* (1), and I adopt it. It seems to me to be clear that it is affected by the taint of immorality. If a woman takes a house in order to live in it as the mistress of a man and to use it for that purpose, and the landlord at the time when the lease is executed knows that it is taken for that purpose, the landlord cannot recover the rent. He could not obtain specific performance of an agreement for a lease in such a case, nor could he sue upon it, as the law will not allow a contract which is tainted with immorality to be enforced. It was urged that prostitution is one thing, and living as one man's

(1) L. R. 1 Eq. 626.

mistress is quite a different thing. They may differ in degree, but they both stand upon the same plane.

An argument has been addressed to us on behalf of the plaintiff which I wish to notice. It is said that our decision will cover the case of a man and a woman living together under a marriage which is void, as was the case of a man going through the form of marriage and living with his deceased wife's sister under the law as it existed before the Deceased Wife's Sister's Marriage Act, 1907, was passed. That seems to me to be wholly unlike this case. Judgment must therefore be entered for the defendant.

Appeal allowed.

Solicitors for plaintiff: *Futvoye & Baker.*

Solicitors for defendant: *Arthur Newton & Co.*

W. F. B.

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