

T H E

AMERICAN LAW REGISTER.

~~~~~  
SEPTEMBER, 1858.  
~~~~~

SOLICITOR AND CLIENT—GIFT BY WILL.

Few doctrines of the Court of Equity are more useful than that which prevents persons, standing in certain fiduciary relations towards others, from obtaining, by means of the influence arising from their position, any undue advantage for themselves. The application of this doctrine to the relation existing between solicitor and client we have always thought extremely beneficial, and founded upon principles incontrovertibly just. A strange anomaly, however, seems to have been introduced by a recent decision upon this subject; for although it is clear that a gift *inter vivos* from a client to his attorney may be set aside upon the presumption of undue influence, a gift to the attorney by will, even though he may have drawn it in his own favor, will, in the absence of the proof of fraud or undue influence, be supported. The proposition with regard to a gift *inter vivos* is supported by the case of *Tomson vs. Judge*, 3 Drew. 306.¹ There a client conveyed real property to the defendant, his solicitor, by a *deed* which purported to be a conveyance, in consideration of 100*l.*, which was duly acknowledged in the body of the deed to have been received, and there was the usual receipt endorsed on the deed. The sum of 100*l.* never was in reality paid, nor was the conveyance intended to be a sale, but a gift “for his services, and out of friendship.” The value of the property was admitted to be at least 1200*l.*

¹ Consult Hill on Trustees, p. 160 Am. Ed's. note 3rd Ed. 1857.—*Eds. Am. L. Reg.*
41

Sir R. T. Kindersley, V. C., after an elaborate examination of the authorities, came to the conclusion that the transaction could not stand, observing, "I am of opinion, that, according to the rule of this court, a solicitor cannot, while the relation subsists—while, to use the language of lord Thurlow, the 'client is or may be under the *crushing influence* of the solicitor'—by way of gift, take a benefit." The learned judge was also of opinion, that *à fortiori* the transaction was bad, as the solicitor who took a benefit therefrom had misstated in the instrument the circumstances under which it took place. But his honor also most positively and clearly stated, that "even if the deed had been in consideration of obligations by the client to the solicitor, or in consideration of a desire to benefit him, and the deed had been expressly and clearly stated to be for those considerations, it could not stand."

The doctrines laid down in *Tomson vs. Judge*, were in the case of *Hindson vs. Weatherill*, 5 De G. Mac., & G. 301, held to be inapplicable to gifts by will. In that case a solicitor, by the directions of his client, prepared a will, by which a gift *inter vivos* of a promissory note from the client to the solicitor was confirmed, and a devise also made to him of an interest in real estate. It was held by the lords justices of the Court of Appeal, reversing the decision of Sir J. Stuart, V. C., 1 Sm. & G. 604, that the circumstance of the solicitor preparing for his client a will containing dispositions in his own favor did not of itself take away the right of the solicitor to be, for his own benefit, a devisee or legatee. The decision might have been more satisfactory if the learned judges of the appellate court had given better reasons for arriving at such a conclusion. Sir J. L. Knight Bruce, L. J., however, with reference to the cases which had been cited to the court, showing that gifts *inter vivos* to solicitors from their clients were void, merely says, "as to the authorities cited, they seem to me all consistent with a conclusion in the defendant's favor, it being *impossible* that a *testamentary* gift by a client to a solicitor can, against the latter, be liable to *all* the same considerations as a gift to him *inter vivos* would have been though it may be open to some of them."

Now, with great deference to the learned judge, we think it is a fallacy to assume, that because *all* the same considerations which

apply to a gift from a client to his solicitor by a deed *inter vivos* may not or do not apply to a testamentary gift to him, the principles according to which such transactions are set aside in one case should not apply in the other. The real question is, not whether *all*, but whether the material considerations are equally, or to a sufficient degree, applicable in both cases; for if we refuse to follow a clear and well-defined principle in one case, merely because it differs in some respects or particulars from another in which it has been acted upon, our laws would soon be made up of arbitrary rules and startling anomalies.

Now, the principle upon which the court acts in setting aside gifts *inter vivos* from clients to solicitors has been stated by lord Eldon—an authority to whom most persons in questions of equity jurisprudence are willing to defer—to be “the danger from the influence of attornies over their clients while having the care of their property; and whatever mischief may arise in *particular* cases, the law, with a view of preventing *public* mischief, says they shall take no benefit derived under such circumstances.” See ——— vs. *Downes*, 18 Ves. 127. Now, the “public mischief” is surely in both cases the same; the “crushing influence” may be used in the case of a will, as well as in the case of a deed. Indeed, as wills are often made when persons are drawing near the end of life, and do not take effect until death, it appears to us that if the doctrine which applies to donations *inter vivos* be right, (as we doubt not that it is,) *à fortiori* should it be applied in the case of gifts by will, in making which persons are often more liable to be affected by undue influence, not only from the weakening of the mental powers towards the close of life, but also because they generally estimate at little or no value property which they cannot themselves any longer enjoy. It is true that a will is revocable at law, which ordinary deeds are not; but it is difficult to see why this should afford any material distinction between the two cases; for assuming a person to have made a will under undue influence, be it express or implied, his not having revoked the will (in which event only the aid of a Court of Equity would be required) shows that the effect of the influence remained the same until the last. Sir G. J. Turner, L. J., who concurred in the conclusion to which Sir J. L. Knight Bruce, L. J., had arrived,

thought that there "was obviously a great distinction between the jurisdiction of the Court of Chancery as applied to contracts and as applied to testamentary dispositions." "For," he added, "in the case of a written contract, the court can direct the instrument to be delivered up to be cancelled, but it has no such jurisdiction with respect to a will." Now, this objection appears one of a purely mechanical character, because, although the court of equity has no jurisdiction to cancel a will, it can attain the same end by fixing a trust upon a devise unduly obtained in a will, as was done upon the interest which a professional adviser took as executor in the case of *Segrave vs. Kirwan*, 1 Beat. 157, the authority of which, although apparently doubted by Sir G. J. Turner, L. J., was fully recognized by Lord Eldon in the house of lords when delivering his judgment in the important case of *Bulkley vs. Wilford*.

It is true that Sir G. J. Turner, L. J., says that the case of *Segrave vs. Kirwan*, 1 Beat. 157, is clearly distinguishable from *Hindson vs. Weatherill*. But still the question is, whether the distinction is material. His Lordship says, "in *Segrave vs. Kirwan* the testator had no intention to benefit Kirwan, the counsel. He appointed him his executor, but did not know that the effect of the appointment would be to give him a beneficial interest. He intended however, to appoint him to be executor, and it may be doubted, therefore, whether the Ecclesiastical Court could have interfered. There was in that case *no intention* of the testator in favor of the legatee. It was not a case in which the testator intended to give a beneficial interest to Kirwan, for he was ignorant that he had done so."

All that this observation amounts to is merely this—the cases are so far distinguishable that the equities are different. In *Segrave vs. Kirwan*, the equity to hold the executor, who was the counsel who drew the will, a trustee of what he took as executor, was, that it was his duty to have pointed out to his client that a benefit would accrue to him from the instrument that he had prepared; and having neglected, although from ignorance of the law, to do so, he was justly deprived of it. In *Hindson vs. Weatherill*, the equity (assuming it to be such) arose from the attorney taking a gift from his client during the existence of the relation between them.

If an equity arose in the latter as well as in the former case, any difference in their natures, or whether one depended upon the intention of the testator, while the other did not do so, appears to us to be immaterial; the result in both cases should be the same.

Sir G. J. Turner, L. J., expressed some alarm at the consequences of the doctrine contended for by the plaintiff, observing that it was obvious that "if such a doctrine could be applied to the relation of solicitor and client, it must be to that of guardian and ward." Now, we must confess that we should feel no alarm at such an extension of the doctrine, for however deserving the conduct of a guardian may have been, if he, before the connexion between himself and his ward was completely broken off, drew up a will in his own favor, though from the instructions of his ward, it would, we conceive, but be consistent with sound public policy that such a gift by will should be set aside, as it would undoubtedly be set aside if it were by deed.

It is to be regretted, that upon the appeal the reasons given by Sir J. Stuart, V. C., in his very able judgment in the court below, were not more fully discussed. The decision of the Court of Appeals, though apparently anomalous, may nevertheless be right, unsupported though it be by reasoning such as carries conviction to ordinary minds.

Solicitors are not, in general, underpaid for the performance of their professional duties; and even if occasional hardship may occur, by laying down as a general rule that a solicitor shall not, by a will drawn by himself, take any benefit from his client during the continuance of the relation between them, it would, on the whole, be a rule which would operate most beneficially, and, in the words of Sir G. J. Turner, L. J., "check dealings of this kind between solicitor and client"—dealings which we fear, though much to be reprobated, are far from unfrequent. Undue influence in the case of wills, as in the case of deeds, should, with regard to gifts between such persons, be presumed, not because in all instances the presumption would be correct, but because, in the majority of instances in which undue influence doubtlessly exists, it would be almost impossible to substantiate it by proof.¹

¹ London Jurist.