REPORTS OF CASES

HEARD IN THE

HOUSE OF LORDS

UPON APPEALS AND WRITS OF ERROR,

And decided during the Session 1821,

2 GEO. IV.

ENGLAND.

(COURT OF CHANCERY *.)

SAMUEL WHALLEY, CHARLES HARRISON and ELIZABETH his wife, and CATHERINE GEORGIANA WHALLEY - - - - } *Appellants*;

JOHN WHALLEY and DANIEL WHALLEY - - - - - - - } *Respondents.*

THE purchase of a reversion, by a Nephew from an Uncle of very advanced age, for a price grossly inadequate, the deed of conveyance in the operative part, but not in the recitals, expressing that the grant was made partly in consideration of love and affection, not impeached on the ground of fraud under the circumstances.

A reversion, valued at 6,000*l.* and upwards, in consideration of annuities secured to be paid on the lives of two very old persons, and valued at less than 400*l.*, is conveyed by a deed executed by an Uncle, aged 80, in favour of a Nephew, who was so described in the deed. There was no recital that blood formed a part of the consideration; but in the operative part of the deed

* See the case in the Court below, 1 Meriv. 436.

the grant is expressed to be made in consideration "of love and affection," as well as the annuities.

The grantor had previously made a valid will, devising the reversion to his Nephew, the grantee; and after the execution of the will, and before the grant, had sold part of the reversion, and received the price. The attorney (a stranger to both parties) who drew the will upon his own suggestion, but by the instructions of the Uncle, and the deed upon the instruction of both parties, was dead.

The deed was executed in 1773: the grantor died in 1774, leaving an heir, who died in 1791, not having impeached the deed. In 1794 the heir of the heir filed a bill to set aside the deed, on the ground of fraud, which bill was dismissed for want of prosecution.

In 1812 the devisees of that heir filed a new bill for the same purpose.

Held,—That the description of the party as a relation was equivalent to a recital; that the making the will was evidence of the truth of the consideration of love and affection; that the absence of recital did not afford sufficient ground to presume fraud, which being denied by the answer, and not proved in the cause, no issue ought to be directed, as the court of equity had before it sufficient evidence to decide the case; and on these grounds, and under these circumstances, that the conveyance was rightly held valid, and the bill properly dismissed; but no costs having been given in the Court below upon the decree of dismissal, that no costs ought to be given on affirming the decree upon the appeal.

The cause of action within the meaning of the statute of Limitations arises when the party has the right to apply to a court of equity: As where a reversion, alleged to have been fraudulently purchased, descends in equity to the heir by the death of the ancestor. *Semb.* that the time of limitation begins to run from the time when the fraud is discovered, either in the life-time of the ancestor, or upon the descent.

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IN the year 1772 certain freehold and copyhold lands, (subject to a life-interest, vested in the widow of J. Eyre,) descended to Samuel Whalley, who was then eighty years of age.

In September 1772, a notice to let being affixed on premises, part of the estates in question, Daniel Whalley, the nephew of Samuel, called on Mr. Garth, a respectable solicitor, who had acted for Mr. Eyre, the former owner, and had the management of the estates for the widow, but with whom Daniel was before unacquainted, to treat with him, as the agent of the widow, for renting the premises. Mr. Garth, in the course of this treaty, having stated that the premises could only be let upon the contingency of the widow's life interest, as he had been unable to discover the heir of J. Eyre, Daniel informed him that his uncle Samuel was the heir; and having afterwards brought his uncle to the office of Mr. Garth, he was informed of his right, and advised to dispose of the reversion by a will being drawn up in the office upon the suggestion of Mr. Garth, and Samuel Whalley being asked to whom he would devise the reversion, answered, to his nephew Daniel, whereupon the will was accordingly filled up, and executed on the 25th of September 1772.

After the date of the will, part of the lands were sold by agreement between the tenant for life and Samuel the reversioner, and Samuel received his share of the price. In 1772 an agreement took place between Samuel and Daniel for the sale and purchase of the residue of the reversion, by which it was agreed that Daniel should secure to Samuel an annuity of 80*l.* to be paid to Samuel during his life, and an annuity of 20*l.* to be paid to Martha Linwood for her life, commencing from the death of Daniel Whalley; and that Daniel should convey the reversion to Samuel. The annuities were after-

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wards, upon the suggestion of Daniel Whalley, increased to 100*l.* and 30*l.* respectively, and thereupon deeds of lease and release were prepared in the office of Mr. Garth. The deeds were dated in December 1772, and executed in January 1773. The release, describing Daniel as the son of Samuel's brother, recited the contract for sale, the consideration of the annuities, and the security given for payment of them; and witnessed, that in consideration of the annuities so secured, and *in consideration of the* natural love and affection which Samuel then bore to Daniel Whalley, he granted, &c. the freehold, and covenanted to surrender the copyhold estates, subject to the life-interest.

The reversion of the copyhold lands was surrendered to the use of Daniel Whalley according to the covenant.

Samuel Whalley died in 1774, leaving Peter Whalley his heir-at-law and customary heir, who died in 1791, having devised his freehold and copyhold lands to the Appellants, who at that time were infants, but afterwards, and as stated in the bill, lately obtained administration of his personal estate as next of kin, he having died intestate as to his personal estate. Martha Linwood died in 1775. Rebecca Eyre, the tenant for life, died in 1782: from which time Daniel Whalley held possession of the lands under the conveyance until 1814, when he died. In 1794 a bill was filed in the Exchequer by the Appellant Samuel Whalley, as the customary and right heir of Samuel and Peter Whalley, to set aside the conveyance; which bill was dismissed for want of prosecution. In 1812 a bill was filed in

Chancery by the Appellants against Daniel Whalley, impeaching the sale and conveyance on the grounds of fraud, and gross inadequacy of price, stating the facts before mentioned, and praying an account of the rents and profits of the lands, and of waste done or permitted, from the death of Rebecca Eyre, the tenant for life, to the death of Peter Whalley, and a like account from that time, and a conveyance of the lands, &c.

This bill was afterwards amended, but not in any respect material to be noticed. The answer to the original and amended bill denied fraud; relied upon the consideration of love and affection, as expressed in the deed; and insisted upon the Statute of Limitations as a bar to the claim.

It appeared in evidence, by production of the bill of costs, upon the hearing in the Court below, and upon the appeal, that Daniel Whalley paid Garth for preparing the deed of conveyance, and the bonds to secure the annuities. By items of charge in the same bill, it appeared that Garth had managed the lands in question as steward or solicitor. It further appeared that the freehold lands, in 1773, according to a surveyor's valuation, were worth about 2,025*l.* and the copyhold about 4,200*l.* The defendant, by his answers, admitted that the reversion might at that time be worth 3,000*l.* It further appeared, by the valuation of an actuary, that the annuities were worth 389*l.* 14*s.* There was no direct proof of fraud.

The cause was heard at the Rolls, before Grant, M. R. who made a decree *, dismissing the bill

* See Meriv. *quâ. suprà*,

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without costs. This decree being signed by the Lord Chancellor, and enrolled, was now brought by appeal before the House of Lords.

For the Appellants, *Mr. Wetherell* and *Mr. Wakefield.*

On the part of the Appellants it was argued, that under the circumstances of the case the length of time since the right accrued was no bar * to the suit; that the conveyance ought to be set aside on account of the inadequacy of price, and the suspicious circumstances of the transaction †; that the consideration of love and affection inserted in the operative part of the deed was fraudulent, and the absence of recital on that subject was proof of the fraud, and ought to control the operation of the deed ‡; that an issue to try the validity of the deed ought, at all events, to be directed §.

For the Respondents, *Mr. Hart,* and *Mr. Buck.*

If this were a case of mere bargain, being the sale of a reversion, the transaction, if it had been impeached in due time, might have been assailable on the ground of inadequacy of price. But in this case there was a mixture of considerations, price and

* *Morse* v. *Royal,* 12 Ves. 374; *Pickering* v. *Lord Stamford,* 2 Ves. jun. 280.

† *Gowland* v. *De Faria,* 17 Ves. 20; *Peacock* v. *Evans,* 16 Ves. 512; see also *Bowes* v. *Heaps,* 3 V. & B. 117; *Roche* v. *O'Brien,* 1 Ba. & Be. 330; *Blennerhasset* v. *Day,* 2 Ba. & Be. 104; *Dunbar* v. *Tredennick,* ib. 310.

‡ *Oliver* v. *Daniell,* Rolls, 16th May 1814; 1 Meriv. 500. See p. 729.

§ *Filmer* v. *Gott,* 4 B. P. C. 230.

blood. No Court can apportion what belongs to each. With what justice to the Respondent could an issue now be directed after a lapse of forty years, when the witnesses are dead who could have explained the transaction. There is no evidence of fraud; and the answer denies it. There is therefore no ground for an issue. In *Filmer* v. *Gott* the issue was directed upon a clear presumption of fraud, and the jury found that love and affection formed no part of the consideration. The grantor in this case died in 1774, and his heir must then have been apprised of the fact that he was disinherited by the will.

The Lord Chancellor:—Is the will of Peter proved?

For the Respondents:—It was not thought material; because if the Appellants could not claim as devisees of Peter, one of them claimed as his heir-at-law.

Lord Chancellor:—It is material in this view, if the claim is by the heir-at-law; he, in 1794, filed a bill to set aside the conveyance, and suffered that bill to be dismissed for want of prosecution.

For the Respondents:—From 1782, when the tenant for life died, to 1791, when Peter Whalley died, no claim was made by him. Long delay, where no legal disability exists, is fatal to the claims of a suitor in a court of equity. Mr. Garth, the

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only person acquainted with the particulars of the transaction, died in 1792. How are the Respondents now to produce evidence to show absence of fraud, (if such evidence ought to be required,) but by the transaction itself? Part of the property was sold by the grantor; that is a proof of free-agency. He left abundant assets, which shows that he was not in a state of necessity: and that he was not in a state of imbecility is proved by the surrender of the copyhold.

This is not a case of direct trust, in which it may be admitted, as a general proposition, that length of time is no bar; this is a case where a party is to be declared a trustee upon the effect of evidence and constructive inference from the acts of the parties. In such cases courts of equity, by their own rules, give great effect to length of time. The statute has given the measure, and furnished the rule in equity, not merely in difficult cases, like the present, but even in cases where fraud is manifest *. Mrs. Eyre, the tenant for life, died in 1782; the reversion then fell into possession. There is no proof that Peter Whalley was then abroad; the cause of action then arose, and the time of limitation began to run from that hour; an ejectment could not have been brought after 1802, and the bill was not filed till 1812. The recitals are not a necessary part of the deed; they may be used to explain the intention of

* *Bonny* v. *Ridgard*, 1 Cox, 149; *Andrews* v. *Wrigley*, 4 B. C. C. 124; *Townsend* v. *Townsend*, 1 B. C. C. 550; *Gregory* v. *Gregory*, Cooper, 201; *Hovenden* v. *L. Annesley*, 2 S. & L. 607, where the authorities on this head are collected and discussed.

the parties, if it is doubtful in the operative part, but they have no distinct operation *.

If fraud is to be implied from the absence of recital as to love and affection forming part of the consideration, it would be easy for persons intending fraud to have provided against such inference, by inserting a recital to that effect.

Lord Redesdale :—It is recited that Daniel, the grantee, is the son of John, the brother of the grantor.

Mr. Wetherell, in reply :—The time had not elapsed, according to the rule; it began to run only when the reversion fell in.

Lord Chancellor :—The cause of action arose when the party had a right to apply to a court of equity to set aside the deed. Peter had that right immediately after the death of Samuel.

Reply :—Where the subject of fraud is a reversion, the time has been reckoned from the falling into possession. Peter Whalley died abroad; and from the frame of the bill in 1794, it appears that nothing was known of the fraud. As to the respectability of the solicitor employed, the same argument might have prevailed in *Purcell* v. *Macnamara* †, and *Hudson* v. *Beauchamp* ‡. In those cases the deeds were prepared in respectable offices.

* Bath and Montague's case, 3 Cases in Ch. 101. *Oliver* v. *Daniel* is misreported, 1 Meriv. 500. It is corrected in the *addenda*, p. 729.

† 14 Ves. 91.

‡ Not reported. See the note at the end of this case.

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Lord Redesdale:—You forget that Garth had the means of knowledge, which might not be the case in those offices. Garth let the estates, and must have known the value. The agreement for the leases of the house and farm show his knowledge.

Lord Chancellor:—He had the management of the farm. As to the annuities, the answer represents that 80 *l.* was required by Samuel the grantor, and that 100 *l.* was proposed by Daniel the grantee of the reversion.

Reply:—The neutrality of the solicitor, in not interfering to prevent an unfair transaction raises no presumption of fairness.

Lord Redesdale:—You are to make out that the words "love and affection" were fraudulently introduced into the deed.

Lord Chancellor:—*Filmer* v. *Gott* ought to have been decided without an issue. In that case there was not only no evidence that love and affection formed part of the consideration, but the contrary.

Lord Redesdale:—I observe that there is no charge in Garth's bills for taking instructions.

Lord Chancellor:—What has become of *Hudson* v. *Beauchamp*.

Reply:—It is still in the Ecclesiastical Court. That testimony has perished is an accident which ought not to affect the right of a claimant.

The *Lord Chancellor*:— The question in this case is, whether a deed, executed in December 1772, is to be considered fraudulent, upon a suit instituted in 1812.

There are two points:—1. On length of time. 2. On the nature of the transaction. But if, from the nature of the transaction, the deed is not to be considered as fraudulent, it is unnecessary to discuss the question of length of time.

It appears that J. Eyre, who was entitled to the reversion in fee of the estate in dispute, died in 1772; Rebecca Eyre, who was tenant for life, died in 1782.

It also appears that in the transactions forming the subject of this suit, Mr. Garth, a very respectable man, was employed as the attorney; but undoubtedly his respectability cannot be used as evidence of the fairness of the transaction. There are attornies and conveyancers who do not think it their duty to decide what parties ought to do, but attend only to their instructions, and carry them into execution. That remark may apply to the cases of *Purcell* v. *Macnamara*, and *Hudson* v. *Beauchamp*, where highly respectable solicitors were employed in the transactions which formed the subjects of those causes; yet the Court thought, from the relation of the parties, the nature of the conveyances, and other suspicious circumstances, furnishing a presumption of fraud, that investigation was necessary. I can recollect the time when counsel, being consulted, thought it a part of their duty to point out the propriety or impropriety of the transaction submitted to their consideration. But in this case it will be more satisfactory to consider the

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nature of the advice given by Mr. Garth, as bearing upon the transaction, than the respectability of his character.

It appears that Samuel Whalley was ignorant that the reversion had descended to him, until he was informed of the fact, in consequence of the application made by Daniel Whalley to Mr. Garth. The reversion was expectant upon a life-estate, vested in a person aged fifty-four, and S. Whalley was then eighty-three years of age. The estate, therefore, was not likely to be productive to him, unless it should be immediately converted into money.

Samuel Whalley died in 1774, leaving Peter Whalley his heir at law, who died abroad in 1791. But it does not appear by the answer, or by proof, whether, in the interval between his ancestor's death and his own, he resided abroad or in England permanently or occasionally.

Peter Whalley devised all his real and copyhold estates to the Appellants.

In the year 1794 a bill was filed in the Exchequer, by the Appellant S. Whalley, praying that this deed might be set aside as fraudulent.

The cause of action arose at the moment when the deed was executed, or as soon after as the parties interested were apprised of the facts. Suppose that Samuel Whalley was not aware of the fraud alleged, and died in such ignorance; whether Peter, his heir, was or was not informed of the state of things does not appear by evidence; but at least Peter knew that he was the heir of Samuel, and he must have known the connexion of Samuel with John Eyre.

In this case my judgment will not proceed upon the doctrine cited, as to express or constructive trusts, or the distinction between them; nor shall I rely upon the lapse of time.

Those doctrines deserve serious consideration when cases arise which require it. In all cases, delay of suit, where parties are cognizant of their rights, and under no legal disability, must affect a tardy claim, as importing a conscious acquiescence in what they have supposed to be an adverse right.

In the case of *Filmer* v. *Gott*, the transaction purported to be a sale of the property, and upon the recital of the deed it appeared to be simply a sale; but in the operative part of the deed, love and affection was expressed as part of the consideration, and in fact there was blood enough to support that consideration. But in that case the grantor filed the bill to set aside the conveyance. There was no question as to length of time. It was contended, on the part of the Defendant, that the deed imported a consideration of blood, as well as money, and *primâ facia* it was so; but the House of Lords (superfluously perhaps) sent the cause to be tried upon the question, whether love and affection formed any part of the consideration. It was considered, even in that case, that unless there was presumption, or proof, to destroy the effect of a consideration expressed in the deed, and to prove that there was nothing but pecuniary payment, though otherwise asserted in the deed, the Court was not at liberty to refuse to give effect to that which was expressed; but in fact, in *Filmer* v. *Gott* the issue was unnecessary. It was manifest that the Defen-

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dant considered himself a mere purchaser, and until the bill was filed he never thought of the consideration of love and affection. The grantor was in a state of partial incapacity, never intending to give any thing from love and affection; nor was it so considered by either party.

In questions of this kind it is necessary to look to the difference of facts and circumstances.

In this case it appears, that upon the death of John Eyre, from whom the reversion descended, it was unknown to Garth, who managed the property, who was entitled to the reversion as heir at law.

The information is obtained accidentally from Daniel Whalley, that his uncle Samuel is the heir; and he, upon being introduced to Garth fairly, as represented by the answer, devises the property to his nephew. The personal property is distributed under the administration of Peter, the Appellant's father, among the next of kin, and at that time no complaint is made of the deed. Upon the answer, unimpeached by other proof, the Defendant is entitled to credit; at least the Plaintiff must prevail by admissions in the answer, or proof in the cause, that the deed was obtained by fraud, or that the consideration expressed in it of love and affection was not founded in fact. But the answer represents that Samuel Whalley, the grantor, lived on terms of great intimacy and affection with Daniel his nephew, the grantee, and that he was offended with and averse to Peter, the Appellant's father, and his family; and those representations are not falsified by proof to the contrary.

With respect to the transaction in obtaining the will, it is to be watched with jealousy; but it ap-

pears, from the statement of the conversation between Garth and Samuel Whalley, that the reversion was willingly devised to Daniel. Garth attested the will; and if the testator had died the day after the execution, the validity of the will could not have been affected by the interposition of Garth; and in that view the will gives countenance to the subsequent deed.

In *Filmer* v. *Gott* the aunt had devised her estate to near relations, and had no intention to sell or give it to the nephew.

Here, at the date of the will, the old man had the intention to give the property to his nephew. The mode of selling for annuities was not impolitic for a man of eighty-one expecting a reversion subject to a life of fifty-four; and he had in fact joined with the tenant for life in selling a part of the property. He could not, therefore, be ignorant of his right and power to sell, nor entirely so of the value.

The deed *primâ facia* is a grant, not only for a money-consideration, but for love and affection.

It is open to proof, that love and affection formed no part of the consideration; upon such proof it would be considered as a mere money bargain. It is urged, that the want of recital affords presumptive proof; but the deed in the description of the parties shows the relationship.

In *Filmer* v. *Gott*, if I had heard the case in the Court below, I should have decided without directing an issue, upon the ground that the answer did not set up the consideration of blood.

In this case the Defendant, by answer, insists that the grant was made upon the consideration of love as well as money; and the oath of the Defen-

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dant must prevail in the absence of proof to the contrary. The witnesses who could explain the transaction are dead; and it would be unjust to the grantee to submit the case now to a jury, at the risk of deciding against the judicial presumptions arising from the expressions of the instrument, the oath of the Defendant in his answer, and the absence of other evidence to affect the answer.

Lord Redesdale:—It would be attended with infinite mischief if courts of equity were to hesitate in deciding questions, when sufficient evidence is before them. In such cases they are more competent than a jury. Issues are usually, (or ought only to be,) directed in those cases where evidence is wanting; and it is only in those, because the mode of examination is more effectual at common law, that issues are directed in equity. Here, according to the answer, the attorney was employed by both parties; and in such cases it is at least gross negligence of duty in the attorney not to see that the transaction is fair.

To suppose that Garth, without instructions, inserted the consideration of love and affection, is to impute to him gross misconduct. The transaction cannot be impeached without charging him with fraud. He knew the value of the reversion, and that the annuities were not a compensation; and if he considered the transaction as a mere bargain of sale and purchase, when he inserted the words importing consideration beyond money, he acted fraudulently.

The objection arising from length of time is important in this as in other cases. It is the policy

of the statute to prevent the discussion of questions upon title when evidence has perished. In this case Garth, if living, could have decided the question.

If he had deposed that he inserted the words to give colour to the deed, that would have been a ground to rescind it; if he confirmed the representations made in the answer of the Defendant, the deed must have been supported. Those representations must now be presumed true, because the Appellants, by their delay, have deprived the Respondents of the evidence of Garth.

Under such circumstances length of time, if it had been less, would have been a sufficient ground for rejecting this application to Equity. Courts of Equity have always followed the statute of limitations; they are bound to act according to the spirit of that statute; and even in cases where it is not too late to maintain an ejectment, courts of equity have refused to interfere, because evidence has been lost.

The lapse of time is fatal to the claim of the Appellants. The parties having a claim were bound to proceed while the evidence of Garth was to be had, unless his death had happened very soon after the transaction.

Samuel Whalley, the grantor, had a right to impeach the deed, if fraudulent. The cause of action then existed; and thirty-nine years having since elapsed it would be grossly unjust now to rescind the deed, unless there were some evidence of fraud upon the face of the instrument.

The only ground stated by the Appellant is the

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absence of recital as to the consideration of love and affection; but the grantee is described as the son of John, the brother of the grantor, and that is equivalent to such a recital. There is no internal evidence of fraud, and the will proves decisively that such a consideration in part existed; what ground is there to impeach the will? There is, therefore, positive evidence of the existence of the consideration, and nothing to rebut it.

As no costs were given below, that is a circumstance always regarded in the decision of appeals; and therefore no costs ought to be given here in this case.

Decree affirmed 7th February 1821.

Reg. Lib. 1819, A. 1745.

HUDSON *v.* BEAUCHAMP.

The bill in this case was filed by Humphrey Hudson, as sole next of kin of Anne Hudson, whose maiden name was Beauchamp, stating, that he had procured letters of administration to her effects; that she, when living, was possessed of large property in the public funds; that she was of very advanced age, and in a state of imbecility and decrepitude; that Messrs. Ransom and Morland were her bankers, and had the entire management of her property; and that the defendant, Robert Farthing Beauchamp, (no relative,) but a stranger to Anne Hudson, who had lately assumed the name of Beauchamp, being a clerk in that banking-house, and having thereby become acquainted with the extent of her property, and her inability to manage or dispose of it, had, under pretence of being in love with her, and deluding her with a promise of marriage, obtained an improper influence over her weak

mind; had taken her away from her residence at Twickenham, and secluded her from intercourse with her relatives, friends and acquaintance; had treated her as a child, and exercised an uncontrolled dominion over her imperfect faculties; that shortly after her removal from Twickenham, the defendant, by undue means, upon his own suggestion, and by direct instigation, prevailed on Anne Hudson to transfer all her stock in the public funds into the joint names of herself and the defendant, to execute a deed of gift to him of all her estate and effects, and, moreover, to make a will bequeathing all her personalty, except two small legacies, to the defendant; that the plaintiff had commenced proceedings in the Ecclesiastical Court against the defendant to recall the probate of the will; upon these allegations the bill prayed, that the deed might be delivered up to be cancelled, and an injunction to restrain the defendant from transferring the stock or receiving the dividends.

To this Bill a demurrer was in the first instance put in, upon the ground, that the plaintiff had, by his own shewing, proved the title to be in the defendant, who, as he stated in his bill, had obtained probate of the will. This demurrer was afterwards abandoned.

On the 20th of July 1820, upon a motion before the Lord Chancellor, supported by affidavits, stating the facts before mentioned, and various instances of imbecility on the part of Anne Hudson, and of influence and coercion on the part of the defendant, an injunction was granted according to the prayer of the bill, until answer or further order.

In delivering his opinion upon the motion, the Lord Chancellor considered the accumulation of the will upon the deed of gift as a badge of fraud. He seemed to doubt the validity of instruments, obtained under the circumstances appearing in the affidavits, and dwelt particularly on the impropriety of the transfer of the stock into the

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joint names, which deprived Ann Hudson of the power to deal with it.*

The suit instituted in the Ecclesiastical Court was pending till 1823, when a sentence† was pronounced by Sir J. Nichol in favour of the will. In Michaelmas Term 1823, on the application of the defendant, stating that the answer had been put in denying all the plaintiff's equity, the injunction was dissolved.

One of the points made by the answer to rebut the charge of fraud was, that the instruments were prepared in the office of respectable solicitors.

* For the account above given of what passed on the hearing of the motion, the editor is indebted to Sir George Hampson and Mr. Wilbraham, who were opposed to each other as counsel in the cause.

† [In delivering judgment, Sir J. Nichol made the following general observations.]

The case set up in argument was a case of fraudulent circumvention, practised on an impaired capacity. This is a case which certainly may exist. It is a mixed case, consisting of two ingredients, namely, weakened capacity and fraudulent circumvention; and the quantity and degree of each of these ingredients must therefore be examined into. If the degree of capacity is important, if very much reduced, slighter evidence of fraud and deception would be sufficient; whereas if the capacity was quite perfect, or nearly perfect, more clear proof of fraudulent circumvention would be required. Faculties so impaired as to be liable to imposition, is a proposition extremely loose and indefinite. No person, much passed the very prime of life, has not suffered in some degree a deterioration in respect of some of the faculties, and no capacity, even the most perfect, is completely safe against the practice of extreme cunning and artifice. Upon the question of capacity or incapacity, the Court relies but little in opinion, it looks for facts and conduct, in order to ascertain the boundary between testamentary capacity, and the absolute want of capacity, but any opinion that a person is liable to be imposed on by artful and designing persons, is of all species of evidence the most unsatisfactory that can be resorted to. Hence it becomes necessary for the Court to examine, with some degree of caution and carefulness, the conduct of the deceased. First, the degree of capacity or incapacity to which she was reduced, and then to see what evidence there is of fraudulent circumvention being practised upon her. The learned judge then entered into a minute statement and discussion of the facts, after which he pronounced the judgment above mentioned.