Prevost Vs. Gratz

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Appeal No. : 19 U.S. 481

Appellant : Prevost

Respondent : Gratz

Judgement :

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U.S. Supreme Court Prevost v. Gratz, 19 U.S. 6 Wheat. 481 481 (1821)

Prevost v. Gratz

19 U.S. (6 Wheat.) 481

APPEAL FROM THE CIRCUIT

COURT OF PENNSYLVANIA

SYLLABUS

To establish the existence of a trust, the *onus probandi* lies on the party who alleges it. In general, length of time is no bar to a trust clearly established to have once existed, and where fraud is imputed and proved, length of time ought not to

exclude relief.

But as length of time necessarily obscures all human evidence and deprives parties of the means of ascertaining the nature of the original transactions, it operates by way of presumption in favor of innocence and against imputation of fraud.

In what cases the lapse of time will bar a trust.

Effect of length of time in raising a legal and equitable presumption of the extinguishment of a trust, payment of a debt, &c.;

The lapse of forty years and the death of all the original parties deemed sufficient to presume the discharge and extinguishment of a trust proved once to have existed by strong circumstances by analogy to the rule of law, which after a lapse of time, presumes the payment of a debt, surrender of a deed, and extinguishment of a trust where circumstances require it.

This was a bill in chancery filed in the court below by the plaintiff, George W. Prevost, as administrator *de bonis non,* with the will annexed, of

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George Croghan, deceased, against the defendants Simon Gratz, Joseph Gratz, and Jacob Gratz, administrators of the estate of Michael Gratz, deceased, for a discovery and account of all the estate of G. Croghan, which had come to their hands or possession either personally or as the representatives of M. Gratz, who was one of the executors of G. Croghan, who died in August, 1782, having appointed M. Gratz, B. Gratz, T. Smallman, J. Tunis, and W. Powell, executors of his last will and testament. All the executors except W. Powell died before the commencement of the suit. B. Gratz died in 1800, and M. Gratz in 1811. W. Powell was removed from his office as executor in the manner prescribed by the laws of Pennsylvania after the death of M. Gratz, and the plaintiff was thereupon appointed administrator *de bonis non* with the will annexed. The bill charged M. Gratz and B. Gratz (the representatives of B. Gratz not being made parties) with

sundry breaches of trust in respect to property conveyed to them in the lifetime of the testator, and with other breaches of trust in relation to the assets of the testator after his decease, and also charged the defendants with neglect of duty in relation to the property and papers of G. Croghan which had come to their hands since the decease of M. Gratz.

The first ground of complaint on the part of the plaintiff related to a tract of land lying on Tenederah River in the State of New York which was conveyed by G. Croghan to M. Cratz, as containing 9,050 acres, by deed dated 2 March, 1770, for the consideration expressed in the

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deed of $1,800. The deed was upon its face absolute, and contained the covenants of general warranty, and for the title of the grantor, which are usual in absolute deeds. At the time of the execution of the deed, G. Croghan was in the State of New York, and M. Gratz was at Philadelphia. The land thus conveyed was, in the year 1795, and after the death of G. Croghan, sold by M. Gratz to one Lawrence in New York for a large sum of money. The plaintiff alleged that this conveyance made by G. Croghan to M. Gratz, though in form absolute, was in reality a conveyance upon a secret trust, to be sold for the benefit of the grantor, and he claimed to be allowed the value of the lands at the time the present suit was brought, upon the ground of a fraudulent or improper breach of trust by the grantee, or at all events to the full amount of the profits made upon the sale in 1795, with interest up to the time of the decree. This trust was denied by the defendants in their answer so far as respects their own knowledge and belief, and if it did ever exist, they insisted that the land was afterwards purchased by M. Gratz, with the consent of G. Croghan, for the sum of 850 15s. 5d, New York currency. It appeared from the evidence that G. Croghan and B. and M. Gratz were intimately acquainted with each other, and a variety of accounts were settled between them, from the year 1769 to a short period before the death of G. Croghan; that he was involved in pecuniary embarrassments, and extensively engaged in land speculations: and some portions of his property were conveyed to one or

both the Messrs. Gratz upon express and open trusts. It also appeared, that in an account which was settled at Pittsburgh in May, 1775, between B. and M. Gratz, and G. Croghan, there was the following item of credit:

August, 1774. By cash received of Howard

for 9,000 acres of land on Tenederah, sold

him for 8,50l. 15s. New York currency, is here . . 797. 12s. 6d.

Interest on 7,97l. 12s. 6d. from August 1774,

to May 1775, is eight months, at 6 percent . . . . . 31. 18s. 1d.

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829. 10s. 7d.

Upon the back of another account between B. & M. Gratz and G. Croghan, which was rendered to the latter in December, 1779, there was a memorandum in the handwriting of G. Croghan in which he enumerates the debts then due by him to B. & M. Gratz, amounting to 1,220 1s. 2d., and then adds the following words:

"paid of the above 144 York currency, besides the deed for the land on the Tenederah River 9,000 acres patented, which memorandum appeared to have been made after the conveyance of the land to M. Gratz."

It also appeared that the value of the land, as fixed in the account of May, 1775, was its full value, which was proved by public sales of adjoining lands at the same period when Howard was asserted to have purchased the land. A counterpart of the account of 1775

was also in the possession of M. Gratz, in which the word Howard was crossed out with a pen, but so that it was still perfectly legible, and the name of Michael Gratz, in his own handwriting, written over it. M. Gratz continued in possession of the Tenederah land, paid great attention to it, and incurred great expenses in making improvements on it after the year 1786. The mother of the plaintiff was the heir of G. Croghan, and it was proved that his father had unreserved and frequent access to the papers of G. Croghan, and resided several years in Philadelphia with the view of investigating the situation of the estate, and finally abandoned all hopes of deriving any benefit from it. The account of May, 1775, from which the alleged trust was sought to be proved, was delivered over to him by the representatives of M. Gratz, among the other papers of G. Croghan.

The second principal ground of the plaintiff's complaint respected a judgment obtained by the representatives of one W. McIlvaine, against G. Croghan, which was purchased by B. Gratz, during the lifetime of G. Croghan, and was by him assigned to S. Gratz, one of the defendants, who, under one or more executions issued on that judgment, became the purchaser of certain lands belonging to G. Croghan. It appeared that on 30 March, 1769, G. Croghan gave his bond to W. McIlvaine for the sum of 400, which debt by the will of McIlvaine became on his death vested in his widow, who afterwards intermarried with J. Clark. A judgment was obtained upon the bond against G Croghan, in the name of W.

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Humphreys, executor of McIlvaine, in the Court of Common Pleas in Westmoreland County, Pennsylvania, at the October term, 1774, upon which a *fi. fa.* issued, returnable to the April term of the same court, in 1775. On 8 March preceding the return day of the *fi. fa.* Bernard Gratz purchased this judgment from Clark and received an assignment of it, for which he gave his own bond for 300 and interest. About this time, G. Croghan was considerably embarrassed and several suits were depending against him. Bernard Gratz, having failed to pay his bond, was sued by Clark, and in 1794 a judgment was recovered against him for 89 6s. 10d., the balance then due upon the bond, which sum was afterwards paid by M. Gratz. The judgment of Humphreys against G. Croghan was kept alive from

time to time until 1786, and in that year, on the death of Humphreys, J. Bloomfield was appointed administrator *de bonis non* with the will annexed of Humphreys, and revived the judgment, and it was kept in full force until it was finally levied on certain lands of G. Croghan. In the year 1800, B. Gratz assigned this judgment to his nephew, S. Gratz, one of the defendants, partly in consideration of natural affection, and partly in consideration of the above sum of 89 6s. 10d., paid towards the discharge of the bond of B. Gratz, by his (Simon's) father, M. Gratz. S. Gratz, having thus become the beneficial owner of the judgment, proceeded to issue execution thereon, at different times, between September, 1801, and November, 1804, caused the same to be levied on sundry tracts of land

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of G. Croghan in Westmoreland and Huntington Counties, of five of which he, being the highest bidder at the sale, became the purchaser. The tracts thus sold, contained upwards of 2,000 acres, and were sold for little more than $1,000. The title to some part of this land is still in controversy. Shortly after the assignment of the judgment to B. Gratz, on 16 May, 1775, G. Croghan, by two deeds of that date, conveyed to B. Gratz, for a valuable consideration therein expressed, about 45,000 acres of land. A declaration of trust was executed by B. Gratz on 2 June, 1775, by which he acknowledged that these conveyances were in trust to enable him to sell the same, and with the proceeds to discharge certain enumerated debts of G. Croghan, and among them the debt due on the McIlvaine bond, and to account for the residue to G. Croghan.

The bill charged that the assignment of this judgment was procured by B. and M. Gratz, or both of them, after the death of G. Croghan, and that nothing was due upon the judgment, or if anything was due it was paid upon the assignment out of moneys belonging to the estate of G. Croghan. But the evidence disproved these charges and showed that the assignment was made to B. Gratz in the lifetime of G. Croghan and that the judgment never was paid or satisfied by G. Croghan, or out of his estate.

The defendants, in their answer, denied to their best knowledge and belief all the material charges of the bill, and upon replication the cause was heard in the court below upon the bill, answer, evidence,

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and exhibits, and a decree was pronounced dismissing the bill as to all the charges except that respecting the lands lying on Tenederah River, and as to this a decree was pronounced in favor of the plaintiff for all the profits made upon a sale of those lands by M. Gratz. From this decree, both parties appealed to this Court.

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MR. JUSTICE STORY delivered the opinion of the Court, and after stating the proceedings in the court below, proceeded as follows:

The first point upon which the cause was argued respects the tract of land on the Tenederah River. It appears from the evidence that this tract of land, containing 9,050 acres, was conveyed by Col. Croghan to Michael Gratz by a deed bearing date on 2 March, 1770, for the consideration expressed in the deed of 1,800. The deed is upon its face absolute, and contains the covenants of general warranty and for the title of the grantor, which are usual in absolute deeds but are unnecessary in deeds of trust. At the time of the execution of the deed, Col. Croghan was in the State of New York and Michael Gratz was at Philadelphia. The lands was, after the death of Col. Croghan and in the year 1795, sold by Michael Gratz to a Mr. Lawrence, in New York, for a large sum of money. The plaintiff contends that this conveyance made by Col. Croghan to Michael Gratz, though in form absolute, was in reality a conveyance upon a secret trust, to be sold for the benefit of the grantor, and in this view of the case he contends further that he is entitled to be

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allowed the full value of the lands at the time that the present suit was brought, upon the ground of a fraudulent or improper breach of trust by the grantee, or at all events to the full amount of the profits made upon the sale in 1795, with interest up to the time of the decree.

The attention of the Court will therefore be directed in the first place to the consideration of the question whether this was a conveyance in trust, and if so of what nature that trust was, and, in the next place, whether that trust was ever lawfully discharged or extinguished. If there be still a subsisting trust, there can be no doubt that the plaintiff is entitled to some relief.

It appears from the evidence that Col. Croghan and Bernard and Michael Gratz were intimately acquainted with each other, and a variety of accounts was settled between them from the year 1769 to a short period before the death of Col. Croghan. During all this period, Col. Croghan appears to have had the most unbounded confidence in them, and particularly by his will, made in June, 1782, a short time before his decease, he named them among his executors, and gave to Michael Gratz, in consideration of services rendered to him, five thousand acres of land, and to his daughter Rachel Gratz, one thousand acres of land on Charter Creek, with an election to take the same number of acres in lieu thereof, in any other lands belonging to the testator. The situation of the parties therefore was one in which secret trusts might probably exist from the pecuniary embarrassments in which

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Col. Croghan appears to have been involved, as well as from his extensive land speculations. And in point of fact, some portions of his property were conveyed to one or both of the Messrs. Gratz, upon express and open trusts.

Still, however, the burden of proof to establish the trust in controversy, lies on the plaintiff. The circumstances on which he relies are, in our judgment, exceedingly strong in his favor, and sufficient to repel any presumption against the trust drawn from the absolute terms of the deed. In an account which was settled at Pittsburgh

in May, 1775, between Bernard and Michael Gratz, and Col. Croghan, is the following item of credit:

August, 1774. By cash received of Howard for

9,000 acres of land, at Tenederah, sold him for

8,50l. 15s., New York currency, is here . . . . . 797 12s. 6d.

Interest on 797l. 12s. 6d., from August 1774,

to May 1775, is eight months, at 6 percent . . . . . 31 18s. 1d.

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829 10s. 7d.

There is no question of the identity of the land here stated to be sold to Howard with the tract conveyed to Michael Gratz by the deed in 1770. If the conveyance to Michael Gratz had been originally made for a valuable consideration then paid, it seems utterly impossible to account for the allowance of this credit upon any sale at a subsequent period. It seems

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to us, therefore, that the only rational explanation of this transaction is that the conveyance to Michael Gratz, though absolute in form, was in reality a trust for the benefit of Col. Croghan. What the exact nature of this trust was, it is perhaps not very easy now to ascertain with perfect certainty. It might have been a trust to sell the lands for the benefit of Col. Croghan and to apply the proceeds in part payment of the debts due from him to Bernard and Michael Gratz, or it might have been a sale of the lands directly to Michael Gratz, in part payment of the same debt, at a price thereafter to be agreed upon and fixed by the parties, and in the meantime, there would arise a resulting trust in favor of Col. Croghan by operation of law.

Time, which buries in obscurity all human transactions, has achieved its accustomed effects upon this. The antiquity of the transaction -- the death of all the original parties, and the unavoidable difficulties as to evidence, attending all cases where there are secret trusts and implicit confidences between the parties, render it perhaps impossible to assert with perfect satisfaction, which of the two conclusions above suggested, presents the real state of the case. Taking the time of the credit only, it would certainly seem to indicate that the trust was unequivocally a trust to sell the land. But there are some other circumstances which afford considerable support to the other conclusion. Upon the back of an account between B. & M. Gratz and Col. Croghan, which appears to have been rendered to the latter in December, 1769, there is a memorandum

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in the handwriting of Col. Croghan, in which he enumerated the debts then due by him to B. & M. Gratz, amounting to 1,220 1s. 2d., and then adds the following words: "paid of the above 144 York currency, besides the deed for the land, on the Tenederah River, 9,000 acres patented." This memorandum must have been made after the conveyance of the land to M. Gratz, and demonstrates that the parties intended it to be a part payment of the debt due to B. & M. Gratz, and not a trust for any other purpose. The circumstance too, that the word "paid" is used strongly points to a real sale to M. Gratz, rather than a conveyance for sale to any third person. And if the sale was to be to M. Gratz, at a price thereafter to be fixed between the parties, the transaction could not be inconsistent with the terms of the credit, in the account of 1775. It will be recollected that M. Gratz resided at Philadelphia, and the conveyance was executed by Col. Croghan at Albany. There is no evidence that the consideration stated in the deed of 1,800, or any other consideration, was ever agreed upon between the parties, and the circumstance that no sum is expressed in the memorandum of Col. Croghan, shows that at the period when it was made, no fixed price for the land had been ascertained between the parties. If then it remained to be fixed by the parties, whenever that value was agreed upon, and settled in account, the resulting trust in Col. Croghan would be completely extinguished. It is quite possible, and certainly consistent with

the circumstances in proof, that B. & M. Gratz might not have been acquainted with the

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real value of the land or might be unwilling to take it at any other value than what, upon a sale, they might find could be realized. From the situation of Col. Croghan, his knowledge of the lands, and his extensive engagements in land speculations, ignorance of its value can scarcely be imputed to him. If, therefore, M. Gratz afterwards sold it to Howard and Col. Croghan was satisfied with the price, there is nothing unnatural in stating the credit in the manner in which it stands in the account in 1775. It would agree with such facts, and would by no means repel the presumption, that the land was not originally intended to be sold to M. Gratz. It would evidence no more than that the parties were willing that the sale so made, should be considered the standard of the value, and that M. Gratz should, upon his original purchase, be charged with the same price for which he sold. Upon this view of the case, the resulting trust would be extinguished by the consent of the parties, and no want of good faith could be fairly imputed to either.

But it is said that there is no proof that any such purchase was ever made by Howard, and the trust being once established, the burden of proof is shifted upon the other party, to show its extinguishment, and if this be not shown, the trust travels along with the property and its proceeds down to the present time.

It is certainly true that length of time is no bar to a trust clearly established, and in a case where fraud is imputed and proved, length of time ought not,

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upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practiced is rather an aggravation of the offense, and calls more loudly upon a court of equity to grant ample and decisive relief. But length of time necessarily obscures all human evidence, and as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates

by way of presumption, in favor of innocence, and against imputation of fraud. It would be unreasonable, after a great length of time, to require exact proof of all the minute circumstances of any transaction or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be encumbered. The most that can fairly be expected in such cases, if the parties are living, from the frailty of memory, and human infirmity, is that the material facts can be given with certainty to a common intent, and, if the parties are dead, and the cases rest in confidence, and in parol agreements, the most that we can hope is to arrive at probable conjectures, and to substitute general presumptions of law, for exact knowledge. Fraud or breach of trust ought not lightly to be imputed to the living, for the legal presumption is the other way, and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave unless the evidence of fraud be clear, beyond a reasonable doubt.

Now disguise the present case as much as we may,

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and soften the harshness of the imputation as much as we please, it cannot escape our attention, that if the plaintiff's case be made out, there was a meditated breach of trust, and a deliberate fraud practiced by M. Gratz, or Bernard Gratz, with the assent of M. Gratz, upon Col. Croghan. If the sale to Howard was merely fictitious, it was an imposition upon Col. Croghan, designed to injure his interest, and violate his confidence. If the fraud were clearly made out, there would certainly be an end to all inquiry as to the motives which could lead to so dishonorable a deed between such intimate friends. But the fraud is not clearly made out; it is inferred from circumstances in themselves equivocal, and from the absence of proofs, which it is supposed must exist if the sale were real, and could now be produced.

In the view which the court is disposed to take of this case, it must consider that Howard was a real, and not a fictitious person. It is then asked why are not the facts proved who Howard was, where he lived, and the execution of the deed to

him. It is to be recollected that this proof is called for, about forty years after the original transaction, when all the parties, and all who were intimately acquainted with the facts, are dead. It is called for, too, from persons some of whom were unborn and some very young at the period to which they refer. They cannot be supposed to know and they absolutely deny all knowledge of the facts. What reason is there to suppose that Col. Croghan did not know who Howard was? He had a deep interest in

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the value of the property, and could not be presumed to be indifferent to such inquiries, as every considerate man would be likely to make, in such a case. And after this lapse of time, it is fair to presume that he did know the purchaser, and was satisfied with the purchase. But it is said that no deed is produced. Now it does not necessarily follow that if a sale was made to Howard that the contract was consummated by an actual conveyance of the land. If M. Gratz was the *bona fide* owner of the land, he might sell it to Howard by an executory contract, and take a bond or other security for the purchase money, and from a failure to comply with the contract, M. Gratz might afterwards have refused to give a deed to Howard. And in this case, if in the intermediate time the settlement was made with Col. Croghan, the credit must have been allowed in that account as it stands, and having been once allowed, M. Gratz could not, on a recession of the sale, have been entitled to countermand that credit. He would have been bound to take the land at the sum which he had elected to allow for it, and for which he had sold it. On the other hand, supposing a deed actually to have passed to Howard the latter may have become dissatisfied with his bargain, or have failed to pay the consideration money, and have yielded it back to Gratz, and dissolved the purchase. But this circumstance could not have varied the situation of Gratz in respect to the settlement with Col. Croghan. All that was important, or useful, or necessary, as between them upon the supposition that the trust was merely a resulting trust, until the price

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was fixed, was that the price should have been satisfactorily ascertained and agreed to between them. In this view of the transaction, there could be no ground to impute fraud to M. Gratz, nor could his conduct involve a violation of trust. In the absence of all contrary evidence, is it not just, is it not reasonable, to presume such to have been the reality of the case? That there is no evidence to the contrary may be safely affirmed.

In addition to this, it may be asked whether M. Gratz had any adequate motive for practicing a deception in this case. Men do not usually act under circumstances such as are imputed to M. Gratz, unless from some strong inducement of interest. It cannot be presumed that any man of fair character, such as M. Gratz is proved to have been, could perpetrate a fraud or deception without some motive that should overbalance all the ordinary influence of prudence and honor. If there be anything beyond all doubt established in this case, it is that the value of the land, as fixed in the account of 1775, was its full value. It is proved by public sales of adjoining tracts, at the very period when Howard is asserted to have purchased the land, and so far from there being any chance of an immediate rise in value, the state of the country, on the very eve of the Revolutionary War, forbade the indulgence of every such hope, and must have dissolved every dream of speculation. As far, then, as we can investigate motives, by referring to the general principles of human action, there does not seem to have been any motive for disguise or concealment on the part of Michael

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Gratz towards Col. Croghan. The reasonable conclusion, therefore, would certainly be that no such disguise or concealment was practiced.

There is one circumstance also which has been thought to have thrown some cloud over this part of the case, that upon the opinion already indicated, would admit of a favorable exposition. It is this: in the possession of M. Gratz, a counterpart of the account of 1775 is found, in which the word "Howard" is crossed out with a pen, but so that it is perfectly legible, and the name of "Michael Gratz" is, in his own handwriting, written over it. The writing seems to be of great

antiquity, and supposing that there was a real sale to Howard which was afterwards abandoned, it is not unnatural that M. Gratz should, after the event, have communicated the fact to Col. Croghan, and with his consent, altered the account, so as to conform to it. Or, the interlineation might have been made in the account, after the failure of the contract with Howard in order to show against which of the firm of B. & M. Gratz this sum ought to be charged, in the adjustment of their partnership concerns. It adds some force to these considerations, that Col. Croghan continued, during the residue of his life, to entertain the same friendship and confidence in M. Gratz, and this, at least, demonstrated his belief that the Tenederah lands had not been unjustly sacrificed by him.

If we look to the subsequent conduct of M. Gratz, in relation to the Tenederah lands, his great expenses in making improvements on it, after the year 1786, and his diligent attention to it, it leads to the

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conclusion that he always considered himself as the real *bona fide* owner. His possession of it must have been known to the parents of the plaintiff, whose mother was the heir of Col. Croghan, and it is proved that his father had the most unreserved and frequent access to the papers of Col. Croghan, and that he actually resided several years in Philadelphia, with the express view of examining the estate, and finally abandoned all hopes of deriving any benefit from the fragments that were left of it. The very account now produced by the plaintiff, by which this trust is brought to light, was delivered over to him by the representatives of M. Gratz, among the other papers of Col. Croghan, and yet if there had been anything false or foul in the transaction, it seems almost incredible that M. Gratz, into whose possession it came as early as 1782, should have suffered it to remain as a monument of his own indiscretion, and an evidence of his want of good faith.

If, on the other hand, the trust is to be considered as a trust to sell, and apply the proceeds to the payment of the debt due to B. & M. Gratz, most of the considerations already stated will apply with equal force. If the sale was real and Howard did not comply with the terms of sale, Col. Croghan having knowledge of

the fact, might have been well satisfied to let M. Gratz hold the land, at the price thus fixed by the sale. To him it must have been wholly immaterial who was the purchaser if the full value was obtained, and that it was obtained, in Col. Croghan's own judgment seems undeniable. The only

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question is whether such knowledge can be inferred, and after such a length of time, under all the circumstances of this case, we are clearly of opinion that it ought to be inferred. Col. Croghan had it in his power to make inquiries on the subject; if he did and was satisfied, his acquiescence was conclusive; if he did not, he considered that the sale, as between himself and Gratz, was consummated when the price was fixed, and was willing that the trust should be deemed extinguished forever. If, after the lapse of forty years and the death of all the original parties, we were to come to a different conclusion, it would be pressing doubtful circumstances with uncommon "rigor" against unblemished characters, where the confidence reposed was so intimate, that the whole evidence could not be presumed to be before us. We should indulge in opinions which might be erroneous, and might, in an attempt to redeem the plaintiff from a conjectural fraud, inflict upon others the most gross injustice. We think, therefore, that the true and safe course is to abide by the rule of law, which, after a lapse of time, will presume payment of a debt, surrender of a deed, and extinguishment of a trust, where circumstances may reasonably justify it. The doctrine in *Hillary v. Waller,* 12 Vez. 261, 266, on this subject, meets our entire approbation. It is there said that general presumptions are raised by the law upon subjects of which there is no record or written instrument not because there are the means of belief or disbelief, but because mankind, judging of matters of antiquity from the infirmity and necessity of their

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situation must, for the preservation of their property and rights, have recourse to some general principle, to take the place of individual and specific belief, which can hold only as to matters within our own time, upon which a conclusion can be

formed from particular and individual knowledge. In our judgment, the trust in the Tenederah lands, such as it was, must be now presumed to have been extinguished by the parties, in the lifetime of Col. Croghan. There is no ground, then, for relieving the plaintiff as to this part of his claim.

The remaining point in this case respects the McIlvaine bond and judgment. On 30 March, 1769, Col. Croghan gave his bond to Wm. McIlvaine, for the sum of 400, which debt, by the will of McIlvaine, became, on his death, vested in his widow, who afterwards intermarried with John Clark. A judgment was obtained upon this bond against Col. Croghan, in the name of Wm. Humphreys, executor of McIlvaine, in the Court of Common Pleas, in Westmoreland County, in Pennsylvania, at the October term, 1774, upon which a *fi. fa.* issued, returnable to the April term of the same court in 1775. On 8 March preceding the return day of the *fi. fa.,* Bernard Gratz purchased this judgment from Clark, and received an assignment of it, for which he gave his own bond for 300 and interest. About this period, Col. Croghan appears to have been considerably embarrassed in his pecuniary affairs, and several suits were depending against him. Bernard Gratz having failed to pay his bond, was sued by Clark, and in 1794, a judgment

was recovered against him for 89 6s. 10d., the balance then due upon the bond, which sum was afterwards paid by M. Gratz. The judgment of Humphreys against Col. Croghan was kept alive from time to time until 1786, and in that year, on the death of Humphreys, Joseph Bloounfield was appointed administrator *de bonis non,* with the will annexed, of Humphreys, and revived the judgment, and it was kept in full force until it was finally levied on certain lands of Col. Croghan, as hereafter stated. Sometime in the year 1800, Bernard Gratz assigned this judgment to his nephew Simon Gratz, one of the defendants, partly in consideration of natural affection, and partly in consideration of the above sum of 89 6s. 10d. paid towards the discharge of the bond of Bernard Gratz, by his (Simon's) father, Michael Gratz. Simon Gratz having thus become the beneficial owner of the judgment, proceeded to issue executions on the same, and at different times between September, 1801, and November, 1804, caused the same

executions to be levied on sundry tracts of land of Col. Croghan, in Westmoreland and Huntington Counties, of five of which he, being the highest bidder at the sale, became the purchaser. The tracts so sold, contained upwards of 2,000 acres, and were sold for little more than $1,000. The title to some part of the land so sold appears to be yet in controversy.

Shortly after the assignment of the McIlvaine judgment to Bernard Gratz, on 16 May, 1775, Col. Croghan (probably having knowledge of the assignment, though the fact does not appear)

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by two deeds of that date, conveyed to B. Gratz, for a valuable consideration expressed therein, about 45,000 acres of land. A declaration of trust was executed by Bernard Gratz on 2 June, 1775, by which he acknowledged, that these conveyances were in trust to enable Bernard Gratz to sell the same, and with the proceeds to discharge certain enumerated debts of Col. Croghan, and among them, the debt due on the McIlvaine bond, and to account for the residue with Col. Croghan.

The subject of the McIlvaine judgment was very minutely considered in the court below by the learned judge who decided the cause, and the principal grounds on which the plaintiff relied for a decree were so fully answered there that a complete review of them does not seem to be necessary in this Court. It is observable that the bill charges that

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the assignment of this judgment was secretly procured by Bernard or Michael Gratz, or both of them, after the death of Col. Croghan, and that nothing

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was due upon the judgment; or if anything was due, it was paid upon the assignment out of moneys belonging to the estate of Col. Croghan. The bill

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asserts no other ground for relief on this subject. The proof in the cause completely establishes the material charges in the bill to be false. The assignment

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was made to Bernard Gratz, in the lifetime of Col. Croghan; the judgment never was paid or satisfied by Col. Croghan, or out of his estate, and no fraud is pretended in the bill to have taken place in the levy of the judgment on Col. Croghan's lands, independently of the legal inference to be deduced from the facts charged in the bill. If Bernard Gratz was not, at the time, in the situation of a trustee of Col. Croghan, there is no pretense to say that he might not rightfully and lawfully purchase the judgment. And there are very strong reasons to believe that it was purchased with the knowledge and for the relief of Col. Croghan. It was somewhat insisted upon in the court below that by a power of attorney of 10 July, 1772, Col. Croghan constituted Bernard and Michael Gratz trustees of all his lands, with unlimited power to sell them and pay off his debts. But this ground has not been insisted upon here, and, indeed for the best reasons. There is the strongest presumptive evidence that this power was never acted upon, or was revoked and held a nullity before the time of the assignment in question.

The ground that has been principally relied upon here is that Bernard Gratz having taken the two trust deeds in 1775, already referred to, in trust for the payment of this very debt out of the proceeds of the sale of the lands conveyed by those deeds, could not proceed to satisfy the judgment out of any other lands, without notice to Col. Croghan, or his representatives. But there is not the least evidence in the cause to show that any of the lands

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conveyed by either of these deeds ever turned out productive. And there are the strongest presumptions in the case, and it seems, indeed, to be on all sides conceded, that either the title to these lands wholly failed, or became altogether unsalable. There is no reason to suppose that these facts lay more peculiarly in

the knowledge of one party than the other, and if the trust became utterly frustrated and inert, there could not be any necessity of giving a formal notice that Bernard Gratz must look to other property, and particularly to the property in Westmoreland County, upon which alone it is understood by the laws of Pennsylvania, the lien of the judgment attached.

There is no proof that any assets ever came to the hands of Bernard Gratz or Michael Gratz out of which this judgment was or could be satisfied. Bernard Gratz was alone interested in it, and it was kept alive from time to time, until the levies in question were made. It will be recollected also that even if Michael Gratz were disposed to connive, after the death of his brother, in the levies of his son Simon William Powell, who was another executor, had no such motive. And, it is not shown that, by any law or usage in Pennsylvania, any notice is required to be given to any other persons than the personal representatives of the deceased, of the execution of any such judgment on lands, so that laches could be fairly imputed to the executors for neglect to give notice to the heirs of Col. Croghan of the sale. The very length of time during which this judgment remained unsatisfied, is evidence of the desperate state

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of Col. Croghan's affairs, and the record abounds with corroborations of the great embarrassments attending all his concerns, and of apparent insolvency at the time of his decease. No evidence has been submitted to us to establish that the levies on the lands, under the judgment, were fraudulently conducted by the sheriff, or that they did not sell for the full value of the title, such as it was, which Col. Croghan had in them. It appears that the title, as to some part of them, is still in controversy. And Simon Gratz, the judgment creditor, had as much right, if the sale was *bona fide* conducted, to become the purchaser, if he was the highest bidder, as any other person.

Upon the whole, the majority of the Court entirely concurs in the opinion of the circuit court upon this part of the case. But as to the decree respecting the proceeds of the Tenederah lands, we are all of opinion that it ought to be reversed.

If the court had felt any doubts as to the merits, it would have been proper to have given serious consideration to the very able argument made at the bar, respecting the defect of proper parties to the bill. But, as upon the merits, the court is decidedly against the plaintiff, it seemed useless to send back the cause upon this objection, if it should be found tenable, when, after all, the case furnished no substantial ground for relief in equity.

DECREE. These causes, being cross appeals,

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came on to be heard at the same time, and were argued by counsel. On consideration whereof, it is ORDERED and DECREED that the decree of the Circuit Court for the District of Pennsylvania in the premises be and the same is hereby reversed. And this Court proceeding to pass such decree as the said circuit court should have passed, it is further ORDERED and DECREED that the complainant's bill, as to all the matters contained therein, be and the same is hereby dismissed, and that a mandate issue to the said circuit court, to dismiss the same accordingly, without costs.