Prevost *v.* Gratz *et al.*

Gratz *et al.* v. Prevost.

Proof of trust.—Presumption of extinguishment.

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.[1]

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

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 circumstanees require it.

Prevost *v.* Gratz, Pet. C. C. 364; s. c. 3 W. C. C. 434, reversed.

Appeal from the Circuit Court of Pennsylvainia.

This was a bill in chancery, filed in the court below, by the plaintiff, George W. Prevost, as administrator *be bonis non*, with the will annexed, of *George Croghan, deceased, against the defendants, Simon Gratz, [*482
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 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 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. Gratz, as containing 9050 acres, by deed, dated the 2d of March 1770, for the consideration expressed in the [*483
*deed of 1800*l.* 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.

[1] Oliver *v.* Piatt, 3 How. 333. But a court of equity will not interfere to establish a stale trust, except it be clearly proved, and the facts have been fraudulently and successfully concealed, by the trustee, from the knowledge of the *cestui que trust*. Badger *v.* Badger, 2 Wall. 87; s. c. 2 Chff. 137.

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*l.* 15*s.* 5*d.* New York currency.

It appeared from the evidence, that G. Croghan, and B. & 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
*484] 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. & M. Gratz, and G. Croghan, there was the following item of credit:

August, 1774. By cash received of Howard, for 9000 acres of land on Tenederah, sold him for 850*l.* 15*s.* New York currency, is here, ...	£797 12 6
Interest on 797*l.* 12*s.* 6*d.* from August 1774, to May 1775, is eight months, at 6 per cent.	31 18 1
	£829 10 7

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 enumerated the debts then due by him to B. & M. Gratz, amounting to 1220*l.* 1*s.* 2*d.*, and then added the following words: "paid of the above 144*l.*, York currency, besides the deed for the land on the Tenederah river, 9000 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
*485] 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 the 30th of March 1769, G. Croghan gave his bond to W. McIlvaine, for the sum of 400*l.*, 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. *Humphreys, executor of McIlvaine, in the court of common pleas in [*486
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 the 8th of 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*l.*, 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*l.* 6*s.* 10*d.*, 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*l.* 6*s.* 10*d.*, 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 *of G. [*487
Croghan, in Westmoreland and Huntingdon counties, or five of which he, being the highest bidder at the sale, became the purchaser. The tracts thus sold, contained upwards of 2000 acres, and were sold for little more than $1000. The title to some part of this land was still in controversy.

Shortly after the assignment of the judgment to B. Gratz, on the 16th of 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 the 2d of 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 judg-

ment ; 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 *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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February 28th. *Webster* and *D. B. Ogden*, for the plaintiff, argued : 1. That not only ought M. Gratz to be considered as a trustee of the Tenederah lands, but a decree ought to have been given for the value of the lands, at the date of the decree, instead of the amount for which the lands were sold by him. They insisted, that the original existence of the trust was fully proved by the evidence, and being thus clearly established, the burden of proof was on the defendants, to show how, and by what means, it had been discharged. M. Gratz being a trustee to sell, he could not buy. 10 Ves. 423 ; 1 Ves. sen. 9 ; 2 Bro. C. C. 400 ; 2 Johns. Ch. 252 ; 5 Ves. 794 ; 4 Ibid. 497 ; 6 Ibid. 631. This is the universal, inflexible rule of a court of equity : and even if the trust is to pay a debt due to the trustee himself, still he is a trustee for the surplus, subject to the same prohibition ; and in this case, never having sold the land in execution of the trust, he must now be regarded as still holding it, and ought to be accountable for its value at the present time, and not at the time of the pretended sale. If he now held the land, the court would compel him to account for its present value, *or to reconvey it ; but he does hold it, in equity, and no act of his ought to prejudice the *cestui que trust*. The lapse of time is nothing, unless it appear that he knew the purchase by the trustee, and must, therefore, be presumed to have acquiesced. 12 Ves. But here no such knowledge is proved, and therefore, no such acquiescence can be presumed.

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2. They insisted, that S. Gratz had no right to purchase the lands sold at the sheriff's sale under the McIlvaine judgment ; but under the circumstances of the case, ought to be considered as holding them in trust for the plaintiff. This being a proceeding without any notice to the party interested, cannot be sustained. The notice given by the *scire facias* was only to B. Gratz, the executor of G. Croghan : that is, the owner of the judgment revived it, by notice to himself. It is a settled principle, that an executor cannot purchase the property of his testator (2 Johns. Ch. 252), and the purchaser of an equity takes it subject to all claims. Besides, this is a judgment which the law would presume to be satisfied from length of time ; which is attempted to be executed by the judgment-creditor, who has in his own hands the funds with which it was to be satisfied, and thus attempts to convert a legal right into an instrument of injustice, which forms a strong ground for equitable relief. 3 Ves. 170.

Pinkney and *Sergeant*, contrà, contended: 1. That the present plaintiff had no right, alone, to call the defendants to account for the alleged trust *as to the Tenederah lands, nor jointly with other parties, as the administrator *de bonis non*, with the will annexed, or G. Croghan. [*490 Equitable estates descend as well as legal estates. Mrs. Prevost, the heir of Croghan, died, while the supposed trust existed, leaving several children, besides the plaintiff, who ought also to have been made parties, if he is to be considered as suing as a parcener. The sale of the trust-estate, indeed, extinguishes the right of the heirs to the land, but it entitles them to the money for which it was sold, which now represents and stands in the place of the land. Nor has Croghan's will any effect upon the matter. The will empowers a majority of his executors (of whom B. Gratz during his life was always to be one) to sell such of his lands as they should think fit, for the payment of his debts. It does not devise to the executors to be sold, but gives them a naked authority to sell and convey. Even admitting that the Tenederah lands fell within the authority, the executors could only have sold the equitable estate of Croghan, which, on his death, descended to his heir. But this supposes that very equitable estate, for the existence of which we contend. But the executors did not sell that equitable estate. M. Gratz, though one of those executors, did not sell under the will; he sold, not the equitable interest merely, but the whole estate, and threw the equitable claimants under Croghan, upon the surplus of the proceeds which he could not appropriate. To sell under the will, he must have had the sanction of the other executors, which he had not; and the plaintiff, as administrator *de bonis non*, *could not have authorized it, because he did not become administrator, until M. Gratz had rendered a sale, by his orders or [*491 consent, impossible. The will, therefore, did not reach the case, and cannot now, in any degree, control it. Nor does the interest which creditors may have in the proceeds, make it personal estate in Croghan, or subject it to the control of his administrator *de bonis non*.

2. The counsel argued, that there was no sufficient proof of the existence of any such trust, as that alleged respecting the Tenederah lands, but that M. Gratz became the absolute owner of the lands, with the knowledge and consent of Croghan. Fraud is never to be presumed, especially, after such a lapse of time; and even if the trust ever existed, equity will rather presume it to be satisfied, than indulge a presumption of fraud, where the parties are dead, and the evidence respecting the transaction is lost. 12 Ves. 261, 374; 2 Ibid. 581; 3 P. Wms. 266; 2 Atk. 67; 3 Ibid. 105; 3 Bro. C. C. 640; 2 Sch. & Lef. 41, 71. Even if there was here a trust to sell, it was a trust to sell for a fixed price, created by a person of full age, and full knowledge of the circumstances, for the benefit only of the trustee and himself. The reason of the rule, that a trustee cannot purchase, is, that the trustee might be tempted from his duty, and buy at an inadequate price. Where the power is general, or, where other persons are interested in the execution of the trust, it may be conceived to be a salutary rule, though sometimes operating severely. But where the trustee is a creditor, *where the price is fixed, and no one else is interested, it would be difficult to [*492 assign any good reason why the trustee might not be the purchaser.

3. As to the McIlvaine judgment, they principally relied upon the same grounds which are stated in the opinion of the court below (*infra*, p. 507 n.).

March 13th, 1821. STORY, Justice, 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 9050 acres, was conveyed by Col. Croghan to Michael Gratz, by a deed bearing date on the 2d of March 1770, for the consideration expressed in the deed of 1800*l.* 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 land 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,
*493] that he is entitled to be *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 embar-
*494] rassments in which *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:

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August, 1774. By cash received of Howard, for 9000 acres of land, at Tenederah, sold him for 850*l.* 15*s.* New York currency, is here, ...	£797 12 6
Interest on 797*l.* 12*s.* 6*d.*, from August 1774, to May 1775, is eight months, at 6 per cent.	31 18 1
	£829 10 7

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 *to us, therefore, that the only rational explanation of this transaction is, [*495 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 mean time, 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 *in the handwriting of [*496 Col. Croghan, in which he enumerated the debts then due by him to B. & M. Gratz, amounting to 1220*l.* 1*s.* 2*d.*, and then adds the following words: "paid of the above 144*l.*, York currency, besides the deed for the land on the Tenederah River, 9000 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 1800*l*, 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
*497] B. & M. Gratz might not have been acquainted with the *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 one 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,
*498] length of time ought not, *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 practised, is rather an aggravation of the offence, 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 incumbered. 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, *and soften the harshness of the imputation as much as we please, it cannot escape [*499 our attention, that if the plaintiff's case be made out, there was a meditated breach of trust, and a deliberate fraud practised by M. Gratz, or Bernard Gratz, with the assent of M. Gratz, upon Col. Croghan. If the sale to Howard was merely fictitious, it is 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 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 fact. What reason is there to suppose, that Col. Croghan did not know who Howard was? He had a deep interest in *the value of the property, and could not be presumed to be indifferent to such inquiries, as every considerate man [*500 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 *bonâ 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 rescision 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 *was fixed, was, that the price should [*501 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 practising 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 any such hope, and must have dissolved every dream of speculation. So far, then, as we can investigate motives, by referring to the general principles of human actions, there does not seem to have been any motive for disguise or concealment, on the part of Michael
*502] *Gratz towards Col. Croghan. The reasonable conclusion, therefore, would certainly be, that no such disguise or concealment was practised.

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 abadoned, it is not unnatural, that M. Gratz should, after the event, have communicated the fact to Colonel 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
*503] year 1786, and his diligent attention to it, it leads to the *conclusion, that he always considered himself as the real *bonâ fide* owner. His posssession 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 the 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 *question is, whether such knowledge can be [*504 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 for ever. 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 Ves. 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 *situation must, for the [*505 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 repects the McIlvaine bond and judgment. On the 30th of March 1769, Col. Croghan gave his bond to Wm. McIlvaine, for the sum of 400*l.* 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 1875. On the 8th of 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*l.* 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 judg-
*506] ment *was recovered against him for 89*l.* 6*s.* 10*d.*, 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 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 Col. Croghan, as hereafter stated. Some time 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*l.* 6*s.* 10*d.* 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 Huntingdon counties, of five of which he, being the highest bidder at the sale, became the purchaser. The tracts so sold, contained upwards of 2000 acres, and were sold for little more than $1000. 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 the 16th of May 1775, Col. Croghan (probably, having knowledge
*507] of the assignment, though the fact does not appear), *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 the 2d of 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 neces-
*508] sary in this court.(*a*) It is observable, that the bill charges that *the assignment of this judgment was secretly procured by Bernard or

(*a*) The following is that part of the opinion of Mr. Justice WASHINGTON in the court below, here alluded to:—

"Upon these facts, it is contended by the complainant's counsel, that B. Gratz ought to be considered by this court, as having purchased the above judgment with

Michael Gratz, or both of them, after the death of Col. 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 [*509

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the trust funds, and consequently, for the benefit of G. Croghan; and that even if it was purchased with his own money, still, being a trustee for Croghan, the purchase should be considered as having been made for his benefit, entitling B. Gratz to claim no more than the sum which he actually paid, and to retain the same out of G. Croghan's estate, the whole of which is charged with the payment of his debts. That Simon Gratz, being an assignee of this judgment, with notice of the trust, and without a valuable consideration paid for the same, can stand in no better situation than the assignor did, and ought, therefore, to be treated as a trustee for the estate of G. Croghan, of the lands which he purchased under the executions issued on that judgment, and be entitled to claim merely the sum actually paid by B, Gratz, with interest. It is to be observed, in the first place, that there is not the slightest evidence on which to ground a presumption, that this judgment was purchased with trust funds. B. Gratz gave his own bond for the 300*l.*, at which time he and M. Gratz were considerably the creditor of G. Croghan; and it further appears by the exhibits in the cause, that the accounts between these parties, were regularly settled from time to time, leaving at each settlement a balance against G. Croghan. Neither did any funds arise from the trust property, no part of the same having at any time been sold by the trustee.

As to the argument predicated upon the admission, that the purchase was made upon the credit and with the funds of B. Gratz, I hold it to be altogether untenable. B. Gratz became the purchaser, some months before the date of the conveyances to him, of the 45,000 acres of land, and I am yet to learn, upon what principle of equity it is, that a creditor, who, after he is so, becomes a trustee for his debtor, does by that act impair or affect rights which he had antecedently acquired against him. I admit the soundness of the doctrine laid down by the complainant's counsel, that if a trustee, executor or agent buy in debts due by his *cestui que trust*, testator or principal, for less than their nominal amount, the benefit gained thereby belongs not to him, but to the person for whom he acted. A court of equity will not permit a person, acting as a trustee, to create in himself an interest opposite to that of his *cestui que trust* or principal. But this doctrine is inapplicable to the case of a fair *bonâ fide* creditor, who became so, prior to the assumption of his fiduciary character. In such a case, he is entitled to claim the full amount of what was due from his *cestui que trust*, &c., and the latter has no right to inquire how much the former paid for it; so too, the trustee, &c., may pursue all legal remedies for enforcing payment of the debt, which would have been open to him if he had not become a trustee.

It is said, however, that the declaration of trust of the 2d of July 1775, contains a promise to discharge this very debt, out of the trust property, as soon as the same could be disposed of. But it was not disposed of, and there are the strongest reasons for believing that it was altogether unsalable. Independent of the doubts which clouded the title, it would seem sufficient to observe, that B. Gratz had the strongest temptations to sell, and even to sacrifice, this property, if it had been possible to dispose of it upon any terms.

It is further contended, that the power of attorney given by G. Croghan, to B. & M. Gratz, dated the 10th of July 1772, constituted them trustees of all his lands, with unlimited power to sell them, and to pay off his debts. It is in this part of the case, that I experience the difficulty of deciding satisfactorily to myself, in consequence of the antiquity of these transactions, and the death of all those who might have explained them. What became of this power of attorney, and why it was never acted upon, are questions which no evidence in the cause enables me to resolve. There are, however, strong reasons for presuming, that the powers vested in these agents, were found unproductive of any useful results; and that the instrument which bestowed them was afterwards delivered back to G. Croghan, or remaining with the Gratzs, was considered

of Col. Croghan. The bill *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 *was made to Bernard Gratz, in the *511] 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 pretence 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 the 10th of July 1772, Col. Croghan constituted Bernard and Michael Gratz trustees of all his lands, with unlimited power to sell them and pay of his debts. But this grounnd 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.

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by all the parties as a blank paper. This conjecture is strongly countenanced by the fact, that this paper, as well as the deeds of May 1775, was found among the papers of G. Croghan, after his death. These very deeds furnish themselves the most persuasive evidence in support of this presumption. For if the general power to sell the whole of G. Croghan's lands, continued in force up to the year 1775, there could have been no necessity for giving to one of those agents, an authority to sell a part of them. The fact, that no part of those lands was sold by the agents, or by Croghan himself, without a complaint having been uttered by the latter, that appears, is nearly conclusive to prove that they were unsalable.

Another point insisted upon by the complainant's counsel, under this head, is, that G. Croghan was not in reality a debtor to McIlvaine, inasmuch as there was found amongst Croghan's papers, a bond of McIlvaine to him, dated the 5th of March 1769, with condition that McIlvaine should by a certain day recover to Croghan, certain lands lying in Virginia, which Croghan had conveyed to McIlvaine, in trust for the payment of a particular debt, or in case it should not be in his power to make such conveyance, then to pay to Croghan the sum of 400*l.* It was contended, that this bond being found uncancelled amongst the papers of the obligee, proves that neither of the conditions had been performed. The short, but conclusive, answer to this argument is, that the condition of this bond was to be performed in the year 1770, and that if it was broken by the failure of McIlvaine to make the re-conveyance, McIlvaine became, in that year, a debtor to G. Croghan, in the sum of 400*l.* the equivalent; yet Croghan suffered judgment to pass against him, and execution to issue, in the year 1775, after which he lived about seven years, without having brought a suit on the bond, or asserted, in any manner whatever, a right to the money. If, after a lapse of so many years, and under these strong circumstances, the court is not bound to presume against the existence of this debt, I know of no instance in which such a presumption ought to be made. If, in truth, the debt was really due, the charge of neglect is fairly imputable to Croghan, but not to his executors. Upon the whole, I am of opinion, upon this point, that the complainant is entitled to no relief." Pet. C. C. 372.

But there is not the least evidence in the cause, to show, that any of the lands *conveyed by either of these deeds ever turned out productive. [*512 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 *of Col. Croghan's affairs; [*513 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 *bonâ 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, *came on to be heard [*514 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 should have passed, it is farther 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.

Bowie *v.* Henderson *et al.*

Statute of limitations.

The third section of the act of congress, of March 30th, 1803, for the relief of insolvent debtors in the District of Columbia, does not create any express or implied exception to the operation of the statute of limitations, by making the insolvent a trustee for his creditors, in respect to his future property, or by making any demand, included in the schedule of his debts, a debt of record.

The including of a demand in the schedule of the insolvent's debts, is sufficient evidence to sustain an issue on a replication of a new promise to the plea of the statute of limitations, if the period of limitation has not elapsed after the date of the schedule.[1]

*515] Appeal from the Circuit Court of the District of Columbia. *This suit was instituted by the appellant against the respondents, on the chancery side of the circuit court of the district of Columbia, for the county of Alexandria, under the local law giving a process in chancery in the nature of a foreign attachment.

The bill charged a debt due on bills of exchange, from the defendant, Henderson, to the complainant; that the debtor was an absentee; that he had funds in the hands of the defendant Auld; and prayed a condemnation of those funds, to answer the complainant's demand. The defendant, Henderson, pleaded the statute of limitations, *non assumpsit infra quinque annos.* To this plea, the complainant filed the following replication:

And the said W. Bowie saith, that he ought not to be precluded from having and maintaining his bill aforesaid, by any thing alleged by the defendant, Henderson, in his plea aforesaid; because he saith, that the said A. Henderson, on the 8th of May 1806, in the county of Alexandria, before N. F., one of the judges of the district of Columbia, did take the benefit of the act for the relief of insolvent debtors within the district of Columbia, and did then and there give a schedule of his estate, and a list of his creditors; and in the said list of his creditors so given in, he, the said Henderson, did state, that the said complainant was a creditor of his, to the amount of $4586.39; which said list of creditors, so given in, he, the said Henderson, did state, was entered of record in the clerk's office of the court of the county of Alexandria, as by reference to the records of the said court
*516] will fully and at large appear, and which said debt *so given in, is the debt for which the complainant has instituted his suit aforesaid.

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[1] Bryan *v.* Willcocks, 3 Cow. 159. Contrà, Christy *v.* Flemington, 10 Penn. St. 129; Brown *v.* Bridges, 2 Miles 424; Georgia Insurance and Trust Co. *v.* Ellicott, Taney's Dec. 130; Ex parte Kingsley, 1 Lowell 216; Ex parte Ray, 2 Ben. 61. This is so, upon principle, because the debtor does not make out his schedule with any view to the payment, but to the discharge of his debts; and besides, the creditors have a right to plead the statute as well as he, and they are not bound by his schedule. Richardson *v.* Thomas, 13 Gray 381; Roscoe *v.* Hale, 7 Id. 274; Stoddard *v.* Doane, Id. 387; Ex parte Kingsley, 1 Lowell 221. So, in the Georgia Insurance and Trust Co. *v.* Ellicott, *ut supra*, Chief Justice Taney says, such admission cannot, upon any just construction, be held to imply that the defendants are willing or intend to pay the debt to its full extent; on the contrary, the very object of the petition, and of the list of debts and other papers that accompany it, is to be discharged, without full payment.