Dessaunier, Garcon et al v. Murphy, Thornton D. 1858 St. Louis 398/8

Old Box 595/17

Garcon Dessaunier
& others Appelts
vs } In the Supreme Court
October Term 1857.
Thomas D. Murphy
Respt

The said Appellants come and assign the following Errors in the above case.

1st The court erred in overruling Plaintiffs motion for a New Trial
2d The verdict of the Jury was against the evidence & against law
3d The court allowed illegal testimony to go to the Jury
4th The court gave illegal and erroneous instructions to the jury

P. C. Morehead
for Appellts

And the said defendant in error comes & says, that there is no error in the proceedings & judgment of the court below in this case, as changed by the petn. in error. She prays the affirmance of said judgt. &c

A. Todd
Atty. for the Dft. in error

112 ~~129~~

No 299.

Garcon Dessaunier &
others Applts

vs } assignments of Errors

T. D. Murphy Respt

Filed 19 Oct. 1857.
Wm J Glanville
Ct.

Morehead for Applts

Dessaunier & others Appellants.

vs. } In the Supreme Court
} March Term 1858.

Thornton D. Murphy Respondent

Statement of Case

This is an action of Ejectment for possession of the undivided 3/15. of 29. 50/100. arps. in the Grand Prairie Common field being part of a tract of 2 1/2 by 40 arps granted to William Bizette in the year 1769. bounded north by widow ~~Bizette~~ Dodier south by widow Hebert—

Confirmed to William Bizette or his legal representatives by the act of Congress approved April 29th 1816. and surveyed for said representatives in 1838.— Survey No 1589.

The suit was instituted in September 1853. to the October Term of the St Louis Land Court

This trial was on the 11th March 1857.—

It was proved by the Plaintiffs.

That Charles Bizette & Marie Christine were married in the year 1774.—

Their Marriage Contract dated Jany 29th 1774.

That Charles Bizette acquired this land in 1775. and died in 1780. surviving him his wife and three children as follows

Mary Bizette born Jany 29th 1775.

Paul Bizette and Antoine Bizette twins born August 9th 1780.—

Marie Christine widow of Charles Bizette and John B. Provenchere were married in 1781

Marriage Contract dated Sept 1st 1781.

She died in 1819. he in 1824

They left two children John L. Provenchere

and a daughter who married Pierre Journeau —
That Mary Bizette daughter of Charles Bizette and Louis Boissy were married in 1795. — She died in 1813. he in 1819 after the 27th of October of that year. — They left five children as follows.
Louis Boissy ~~[illegible]~~ John B. Boissy. Margaret Boissy born May 26th 1796. Emily Boissy born May 23d 1799. and Louise Boissy born in 1803.
Margaret Boissy and Paschal Mallet were married in 1812. — Emily Boissy and John B. Gagnon were married June 22d 1818. and Louise Boissy and Francis Derrin were married October 27th 1819. — — John B. Gagnon died in 1835. Margaret his widow afterwards married Dessaunier and is now living —
Francis Derrin died in 1849. — Emily his widow is living — Margaret Mallet died in 1835. leaving her husband, who died in 1845. and children as follows. — Paschall — Louis — Charles — Francis. Mellier and Frederick — and a daughter who married one Beauchamp.
She died in St Louis leaving one child, which was taken by its father to France and has not been heard of for 8 or 10 years.
Frederick died without issue in 1853.
Plaintiffs claim title to 3/15 as legal representatives of William Bizette — The interests of Paul & Antoine Bizette & of Louis & John B. Boissy 12/15 are vested in defendant —
The answer traverses the allegations of the petition asserts ownership & title in fee in himself pleads specially the statute of limitations and admits possession —
Possession was also proved —

Defendant read in evidence

1. Archives 2371. dated Aug 8th 1781. A petition of the widow of Charles Bizette for sale of his estate to pay debts and for benefit of children, she being about to marry. — the inventory & appraisement thereof dated 18th May 1781.
includes this land appraised at 200. Livres

2. Archives 2590. dated Sept. 17th 1781. — "Sale this day of personal property. bids to be paid in Deer or Beaver Skins at value in all the month of Sept. 1782. — security required — J. B. Provencher guardian of the children — & inventory of sale"
(this land not included)

3. Archives 2054. Marriage contract between the widow of Charles Bizette & John B. Provencher dated Sept 1st 1781. —

4. Copy of a deed from John B. Provencher & wife to Joseph Brazeau dated May the 4th 1811. for this land. — recorded June 18th 1811. —
and a paper writing annexed purporting to be a discharge —
The deed recites in part. — "in consideration of forty dollars paid us by Joseph Brazeau we sell all the interest we have to the land which he was the purchaser of at Church door sale the deed of which has not been written out. — no recourse."
(does not furnish proof of execution)
The discharge is as follows.
"I the undersigned give a full discharge of Mr Brazo. of the sum he owes to the estate of the late Vizet for a piece of land which was sold to him at public sale.
St Louis of Illinois October 12, 1782 — 200 lives or $40.
mark of
+
Provencher — "

purport to be a copy (of a copy)

5. Copy of a deed from Joseph Brazeau wife to Augustin & Louis Brazeau, his nephews for same land. — same date — May 4. 1811. recorded May 18th 1811. —

"says 4½ arps by 40. includes 2 by 40 acquired of widow Hebert estate in 1796. and 2½ by 40. acquired by us after the decease of Charles Bizette by deed this day granted to us by John B. Prowencher and wife" — possession to begin this day —

6. Copy of deed from A. & L. Brazeau to A. L. Langham dated Aug 13. 1818. for 2 by 40 arps. north by land owned by Langham. south by Kiercereau —

7. Copy of deed from United States to Brown Lozzen dated Oct. 15. 1831. for same land.

8. Copy of deed from A. L. Langham by Sheriff to Brown Lozzen for same land. dated Aug 1833.

9. Copy of deed from Brown Lozzen to Brunt & Day same land dated Aug 24. 1833. (mortgage release)

10. Copy of deed from Brown Lozzen to Edward Bates Trustee. same land dated March 4. 1834.

11. Deed from Edward Bates trustee to John C. Abbot same land dated March 2d 1836.

12. Deed from John C. Abbot to T. D. Murphy. same land dated July 4. 1838.

It was then proved by the defendant (in substance) That Langham went on the land in the fall of 1818. — commenced building a house and made enclosures around it. and that it had been claimed and possessed by him and those claiming under him from that time to this trial —

Defendant then proved by H. W. Williams as follows — "I came here in 1846. have been engaged in the examination of titles — making

Abstracts about my exclusive business — have taken abstracts of all Archives and a large portion of deeds — in my examinations have met with reference to sales of which I could not find the originals My attention has been kept up — In finding references in transfers to adjudication sales I have looked for adjudication sales & could not find it. G. Sarpy sold in Block 54. in his deed he says acquired of Savarné but I could not find deed to him in the Archives I have met with reference to judicial sales I could not find. only evidence I had of its existence was recitals in his deed.

Cr. Ex — I have examined all references and find no adjudication sale of real estate of Charles Bizette, but personal property —

Plaintiffs then in rebuttal read in evidence

1. Copy of deed from Louis Boissy Sr. & Paul Bizette to John L. Provenchere. their interest in same land dated March 13th 1817.
2. Copy of deed from Antoine Bizette to John Louis Provenchere his interest in same land dated Sept 11th 1817.
   recites that he had formerly contracted with John B. Provenchere for the sale thereof —
3. Copy of a deed from Jno L. Provenchere to A.L. Langham same land. dated March 13th 1817.
   says acquired of the heirs of Charles Bizette
4. Copy of deed from ~~Louis~~ L.J.B. Boissy to John L. Provenchere his interest in same land dated Aug 20. 1833.
5. Copy of deed from Louis Boissy Sr. to Brown Lozzen his interest in same land. dated Jany 1st 1833.
6. Copy of deed from A.L. Langham to Bank of Missouri same land. (mortgage) dated Aug 14. 1821. —
   recites acquired of Jno L. Provenchere by deed dated March 13th 1817. —

7. Copy of a deed from A. L. Langham by Sheriff on execution in favor of Bank of Missouri to G. F. Strother Agent of the United States same land dated Apl 30. 1827.

The following instructions were then given

1. For defendant —

If the Jury believe from the evidence that after the death of Charles Bizette and before October 12th 1782 the land in controversy in this suit was sold to Joseph Brazeau as a part of the estate of said Bizette under the authority of the Government then in Power in the County of St Louis, they should find for the defendant

Such an authorized sale may be shewn by circumstantial and indirect evidence as well as by direct evidence —

2 For Plaintiffs

The land in dispute was confirmed by act of Congress of the 29th April 1816. to be surveyed to the legal representatives of William Bizette, and if the Jury find from the evidence that said land was purchased by Charles Bizette on the 18th of February 1775. and that Charles Bizette died leaving three children his heirs, and that Louis Boissy married one of the daughters of said Charles Bizette and that he died leaving only five children his heirs, and that Emily Dessaunier and Louise Deroin two of the Plaintiffs were children of said Boissy — And that Paschall Mallet Louis Mallet Charles Mallet Frances Mallet and Melia Mallet the other Plaintiffs are the children of Margaret Boissy daughter of said Louis Boissy and Paschall Mallet her husband and that said Margaret and

and her husband are dead, then the Jury will find in favor of the Plaintiffs for 3/30 or 1/10. part of the land sued for

Added by the Court (Unless the Jury shall find for the defendant under the instruction given for defendant

~~[illegible]~~

~~[illegible]~~

Appellants insist

1. That the copy. purporting to be a copy of a receipt of date Oct 12. 1782. should have been excluded —

If the conclusion of the Court from an inspection of the receipt and the deed of Brazeau & wife should be that it was illegal evidence it should not have gone to the jury —

Such a conclusion in law was irresistible from the paper itself and its connections — suppose it had been offered without the deed, would any court have admitted it as legal evidence, or even as a paper susceptible of being corroborated by any possible conception of circumstantial facts —

It receives no force from the deed, as a document sufficient in law to base a presumption of title upon, on the contrary its plausibility is diminished by recitals in the deed

If the original paper had been produced then a foundation could have been had upon which to begin a presumption such may have been properly submitted and with corroborating circumstances enabled

the jury to arrive at a just conclusion of the fact. The paper is admitted unconditionally as evidence in the case, and must be regarded by a jury, whether affected by additional corroborating or diminishing circumstances as conclusive of the facts necessary to establish a title under the Spanish law in Joseph Brazeau such as the fact of an authorized sale of Charles Bizettes real estate including the land in dispute, the fact that it was formally bid off to Joseph Brazeau for the sum of 200 livres or $40. of the fact that Joseph Brazeau gave the proper security for payment in peltry, in all the month of September 1782 of the fact that he paid the purchase money at the time specified to the person authorized to receive it, and of the fact that a deed was then made in the manner required by law. upon the establishment of all these facts a jury very properly infer that the deed and proceedings of sale were lost and presume a conveyance, But the accompanying deed in evidence controverts all these facts

It is inferred from it that no deed was made before 1811. — That no money was paid before 1811. — That forty dollars was paid the grantors in the deed on the 4th of May 1811. for all the interest they had in the land without recourse,

Not that any money was paid on account of a legal purchase in 1782. and paid to the person authorized to receive it for the children but to the grantors for their interest

It might also be inferred from the paper itself if taken by the jury as evidence

that an original receipt signed by Provencher an ancient paper, dated October 12th, 1782 was really annexed to the deed from which the record was made. The paper itself negatives such a conclusion. The familiarity of the Court, with the laws and customs of this country as far back as 1782 will reject a presumption that the term dollars. (Spanish dalers) was then used. Provencher's own marriage contract 1781. uses no other term than livres —

Archive 2371. in the appraisement uses no other term — and this land was appraised at 200. livres (Spanish Libras) not dalers —

In Archive 2590. the only term used is livres — But in 1811. the American customs had so far advanced as to produce the usage of livres or dollars — The paper itself is too vague to authorize its admission as evidence for any purpose, and its connection with the deed does not help it — M.R. 22. p. 104 —

2. The instruction for defendant, is erroneous and illegal, — The reasons advanced against the admission of the receipt, apply with equal justness against this instruction — and the circumstances drawn from the subsequent evidence are conclusive against it —

If it were true that the law as applicable to the questions submitted in the instruction was proper. they are abstract propositions not predicated on the evidence in the case.

O'Fallon vs. Boismenu M.R. 3. p. 286.
Vaulx vs. Campbell M.R. 8. p. 224.

In the decision of the Court in this case

M. R. 22. p. 105. the court says — "In the present case the material fact beside the long continued possession is the alleged sale made, or completed by the guardian, or ancestor about 1782 and the payment at that time of the purchase money, evidenced by the receipt recited in the deed of 1811. —

And if this fact were established it might then be proper to advise a jury to presume a conveyance of the title - from any proper party. pursuant to and in confirmation of the sale, even against married women. It is presumed the Land Court meant by finding for the defendant that they must presume a conveyance from Bizettes estate to Brazeau and from Brazeau to Langham.

It does not however allude to the payment at that time of the purchase money

This was in connection with what was said a very essential requisite in the instruction, but very properly omitted as all should have been there being no evidence to authorize either —

The jury were left hypothetically to infer that this had been done as there was no evidence upon which to base such a conclusion

It was very evident the court in this decision did not understand the receipt recited by the deed of 1811. as establishing the fact of sale or payment and that it was required of the defendant to do this, aliunde by sufficient circumstantial proof.

There was no such evidence in the case

On the contrary the presumptions from the evidence were all against it —

In 1817. Antoine Bizette conveys his interest 1/3 to John L. Provencher, son of John B. Provencher.

and recites that he had previously contracted with John B. Provencher for the sale of his interest
In 1817 Paul Bizette conveys his interest 1/3 to John L. Provencher, John B. Provencher then living.
On the same day and year John L. Provencher conveys the same land to Langham reciting acquired of Bizettes heirs —
On this titles and none other Langham took possession in the fall of 1818 —
Is it reasonable to suppose that John B. Provencher would have purchased if he knew the title was in Brazeau.
Is it not reasonable to suppose that John B. Provencher would have informed his son of Brazeau title, and even Langham as the transaction was all done on the same day. —— They did not purchase of Bizettes five children, they were at that date minors their mother deceased — they took a deed from their father life estate same date.
In 1821. Langham conveyed the same land in mortgage to the Bank of Missouri reciting acquired of John L. Provencher in 1817. —— In 1818. Langham purchased the Hebert tract from A. & L. Brazeaus. to whom Joseph Brazeau had conveyed it with the tract acquired of John B. Provencher, he did not think enough of their title in the Bizette tract to purchase that. but that still remains in the Brazeaus.
~~This~~ it will be seen that Langham escheated the Brazeau title and took possession in 1818. under the ~~Brazeau~~ Bizette title.
There had been no previous possession by any one since the massacre of Edward Bizette by

the Indians upon the land in 1780.—
Joseph Brazeau never had possession, nor did he or his vendees ever present their claim before any board for confirmation
Then are all circumstances against the validity of the receipt, against the instruction and against the verdict— and warrant with other evidence in the case the instruction asked by the Plaintiffs, without the qualification of the court—
In 1833. Louis Boisy, Jr conveyed to John L. Provencher and John B. Boisy to Brown Lozzeau. who had then acquired Langham's title
Doubtless the remaining interests would have been applied for. but two of them, Mrs Dessaunier (then Gagnon) and Mrs Mallet were non residents— and the evidence does not explain why Mrs Deroin did not sell.
The Bank conveyed to the United States
The United States to Lozzeau.
Lozzeau to Bates Trustee
Bates to Abbot
Abbot to Murphy. defendants—
The title of Bizette is therefore complete in the defendant from Bizette's heirs and none other, except 3/15 in Plaintiffs
The defendant ingeniously begins his paper title from the United States. leaving the previous title for presumption— we have supplied it for him—
The latter part of the instruction is also exceptionable as it in effect directs the jury to the receipt as such circumstantial evidence there being no other evidence of that character in the case.

3. Presumption of title cannot arise in this case. there was no possession upon which to base a presumption in favor of Brazeau and no priority of title between Langham and Brazeau to authorize it in favor of Langham or the defendant.

1. Greenl. secs 46. 47. 48.

1. Cowen & Hill notes 355. note 311.

Can the defendant avail himself of a presumption of an outstanding title in Brazeau when he sets up in his answer ownership and title in fee in himself and specially pleads the statute of limitation on his own possession and when Brazeau never was in possession

The possession of Langham under Bizeth is the possession of Plaintiffs as against Brazeau. — They are tenants in common.

It may be argued that as the deed from A & L. Brazeau to Langham for the Hebert tract calls for Langham on the north its an admission of Langhams title. see answer from all circumstances if true that its an admission of Langhams title under Bizeth —

But that deed does not call to bind on its north by the Bizeth tract it will be seen from the Plat that the widow ~~Bizeth~~ Hebert, tract is 3 by 40. bounded north by Bizeth and south by Kiercereau, The deed from A & L Brazeau to Langham is for 2 by 40. bounded south by Kiercereau, north by Langham leaving forty arps. or 1 by 40. between that tract and the Bizeth tract — It does not follow therefore

as the instruction recites. that if the Jury believe from the evidence that Joseph Brazeau purchased the land lawfully in 1782. that (for that only) they should find for defendant — although there was no evidence to authorize such a belief or to authorize a verdict for defendant

P.C. Morehead for
Appellants.

White Rec. 19.
1. Greenl Ev. 46. 47. 45
+ 1. Comen & Hills notes 355. 356. note 311.
+ 4. J. J. Marshall ~~XXX~~. 527.
+ 11. Howard. 329.
7. Wheaton 109.
+ 5. Barn & Ald 232
6. Bingham 174.
6. Comen 706
Phillips Ev. 121.

+ when Langham took possession Plffs were under disability & continued —

Dessaunier & others
vs
Supreme
Court.
Murphy

Statement & Brief
of Appellants under
the rule.

Filed 8th April 1858.
Wm S Glanville
Cl.

Morehead for Appts

a grant will never be presumed unless the facts & circumstances show that the party to whom it is directed to be proved is legally or equitably entitled to it, and the possession must be shown to be consistent with the facts offered to be presumed
6. Comen 706. Phillips Ev. 121. — 6. Bingham 174) 7. Wheaton 109

- In the Supreme Court -
- March Term 1858 -

Dessaunier et al. ~~pffs. in Error~~ appets.
vs
Murphy - ~~deft. in Error~~ Respdt.

Statement & points of ~~defendant in Error~~ respondent -

For a statement of the facts in this case, (excepting the evidence of H. W. Williams for defendant & those facts produced by the plaintiffs below on the trial in re-buttal of the defendant's evidence) the Court is referred to the statement published for this case, when formerly before this Court, & to be found on page 95 & following of 22 Mo. Rep -

For the defendant below H. W. Williams testified, that since 1846 his business had been that of investigator of titles in St. Louis, during which time he had taken abstracts of all the Archives & a large portion of the deeds in the office of the recorder, & that he had met with references to Judicial sales, of which he could find no evidence, except recitals in deeds -

The plaintiffs below in rebuttal introduced a number of deeds ~~to wit~~ of this property to wit:

A deed of Louis Boisey & Paul Bizet, as heirs at law of Charles Bizet, to John Louis Provenche, dated March 13. 1817 - Consid $100 -

Deed of said Provenche to Angus L. Langham, of the date of the last, & referring to it - Consid. $230 -

Deed of Antoine Bizet, as heir of Charles Bizet to said Provenche, for $33 33/100, dated Sept. 11. 1817 -

A mortgage to the Bank in by Langham

Deed of said Langham by the Sheriff to George H. Strother for the United States dated April 30. 1827 -

Deed of Louis Boissy to Brown Cozzens for $35, dated January 31. 1833 -

Deed of Jno. B. Boissy, as son of Louis Boissy & Marie Biset to John L. Provenche for $5. dated Aug. 20. 1833

- Point 1 -

The receipt of Provenche to Brazeau of date of October 12. 1782, in connection with the deed of Provenche & wife to Brazeau, was admissable evidence. The deed refers to it, as annexed thereto. The execution of the deed is duly acknowledged, with this receipt annexed thereto, & referring to it as annexed. The deed, so acknowledged, with the receipt annexed thereto, was filed for record, with the receipt so annexed, June 18. 1811 & duly recorded together with the receipt. It was, therefore, a part of the deed & the admissibility of the certified copy of the deed is not denied.

— Point 2 —

The Court did not err in giving the instruction on behalf of the defendant, or in refusing a new trial.

22 Mo. Rep. p. 95. Dessaunier et al vs Murphy.

Cow. & Hill's notes on pp 358 & following — } 19 Mo. Rep. pp 99-100
6 Har. & John. p 336-361 — Beall vs Lynn } 12 " " p. 254 —

A. Todd
Atty. for Respondent,

No. 112

Sup. Court

Dessaunier et

Appelts

vs

Murphy

Respdt

Statement & Points

of Respondent.

A. Todd

Atty. for Respondt.

22 Mo. Rep. p. 95.
Cow & Hill & Note p 358 & following
6 Har. & John p. 336-361.
19 Mo. Rep p 99 & 100 Vasquez & Richardson
12 " " p 254-259.

Filed 16 April 1858

Wm L Glanville
Ch

- Sup. Court -

- Dessaumier et al. vs Murphy -

- Point 2 of Respondent with argument -

The court did not err in giving the instruction on behalf of defendant -

22 Mo. Rep. p. 95 - Dessaumier et al vs Murphy -

- Argument -

For the defence it was insisted that an authorized sale of this land had been made to Joseph Brazeau after the death of Charles Bizette, prior to October 1782 -

Perfect direct proof of this sale did not exist, but evidence thereof did exist from which the defendant claimed, that such a sale might be lawfully inferred and this claim of the defendant the Court, by this instruction, submitted to the decision of the jury under all the evidence in the case - If they found the fact of an authorized sale, then title passed by virtue thereof.

The evidence produced, for this inference, is not merely a long continued adverse, actual ~~possession~~ + highly public possession in constant view of most of the parties interested against its claim, if not lawfully founded - to wit for 35 years before the commencement

of this suit, & ~~which~~ in favor of which possession time had been running, under the statute of limitations, against these plaintiffs & those they derive from, for nearly twenty years next before the commencement of this suit. This evidence is given only as corroborative of the evidence in the case of an actual & lawful sale, to wit:

1st. The petition of widow Bizette for an inventory & sale of the property of the estate of Charles Bizette deceased, her husband, for the purpose of paying debts & maintaining the children

2d. The grant of the prayer of this petition, as shown by the ~~act of~~ proceedings of Governor Cruzat, refering to the petition, in making the inventory, & which included this land, & in beginning the sale of the property in the inventory in the usual way to wit: by a public sale of the personalty at the house of the deceased.

3d. The appointment of Prouche as ~~guardian~~ curator of the infant children of said Charles Bizette, as shown by the record of the proceeding placing in his hands all the property of said estate not already sold & the amounts of that already

sold -

4th - The receipt of Provenche to Brazo of Oct. 1782 together with the deed of himself & wife, the widow of said Charles Bizette, dated 2 May 1811, in which they state that this land was sold to Brazeau at public sale at the Church & for which he had paid the bid therefor, as evidenced by said receipt, thus designating the land meant in the receipt, but because no deed had been made to him therefor, they then execute to him said deed - But a deed was not necessary -

19 Mo. Rep. p. 100 -

Now the facts 1st - 2d & 3d, show that the debts of Charles Bizette deceased & the wants of his infant children, required a sale of the property of his estate - that such a sale was legally authorized & begun in the usual way, as early as September 1781 - that Provenche, as ~~guardian~~ curator of the children was entrusted with all the property not sold, on the day of the sale, & there is no evidence that the reasons for the sale already authorized, & begun - to wit: unpaid debts of the estate, & the wants of the infant children - had ceased, &

by consequence, that the authority to sell had ceased.

The prayer of the petition was for a general sale, & there is no evidence of any limitation in the authority to sell. It is reasonable, & natural, then, to suppose, that the authority, already given to sell, passed with the property unsold, to Provenche, as ~~guardian~~ curator as aforesaid. And if so, & he exercised it, the sale of this land by him would be at a time subsequent to the sale, begun as aforesaid, & also, according to the practice of those times, at another place to wit. the Church ⊛ A ~~guardian~~ curator could sell the property of his wards under such an authority (See 1 White Recop. p. 16.) And if he so sold this land to Brazo & Brazo paid for it, said receipt, if genuine, would be a usual, & proper evidence of the sale, & voucher of payment, & its date would be a consistent fact. And if it was his duty to report the sale, to make a record of it, its non-production

⊛ The Court will please remark, that the report of the sale of the property at the residence, ends by saying, "we, concluded the present sale", thus implying the necessity for another sale, as is well known was necessary for the realty, as that had to be sold at the Church.

should not affect Brazo's right, as evidenced by the receipt, because Provenche may have omitted to report, & if so, this would be neither Brazo's fault, or his duty to see to - or, he may have reported, & the record now be lost, as ~~the~~ William's evidence shows may have been the fact - ⊛

These facts, then, show, that an authorized sale of this land was not only not improbable, but was very ~~lik~~ probable - And if the receipt, given in evidence, was genuine, & made at the date of it, it should satisfy every mind that such a sale was made - Whether it was genuine, & made at its date, was a fact for the jury's decision, & its decision ought to be conclusive of the fact with this Court -

But, as the appellants seem to suppose it their right to discuss this fact in this Court, the respondent submits the following remarks upon it -

Its internal evidences, upon its inspection, show its genuineness, & making at its date -

It spells the name of Bizette, as it

⊛ And in point of fact no evidence is found, that Provenche ever did report, or account for his curatorship - Yet, the records prove that he was curator, & took charge of the property as such. Hence it should not be argued, that there was no such sale, because no record report thereof by him was produced -

Besides, no law is known requiring a report in such a case in those times - nor any deed upon such a sale - In fact the sale could be proved as a fact in pais under the then law.

was used at his death & in the inventory - to wit: "Vizet" -
It also, uses the term of "Mr. Brazo" for "Joseph Brazeaux" -
It omits to describe the real estate - but calls the thing sold "a piece of land" -
These show simplicity & innocence & genuineness.
If the paper was a fabrication at the date of the deed of 1811, it would, at least, have described the land, & have correctly & fully designated the name of "Joseph Brazeau" - Nothing would conflict with this -
In the deed of 1811, Provenche designates "Brazo" as "Joseph Brazeaux" & "Vizet" Charles Bisset -
And while the apparently vague designation of the land in the receipt goes to show its genuineness, it is, notwithstanding, certain, because it can be made certain - For, the inventory, which embraces all the estate, sets forth only three pieces of realty -

Vasquez vs Richardson 19 Mo. Rep. p 100 -

A stone house with 2 lots valued at 2000 Lwis.
A barn ——— " " 200 "
2 1/2 arpents in Grand Prairie - - " " 200 "

The ~~latter~~ last, in common parlance, would be called "a piece of land", & neither of the others would land, the receipt states the sum at which it was valued.
Of the sale, also, the receipt says, it was ~~at~~ sold to him "at public sale" omitting "at the

Church door". If fabricated, it would have inserted this. For, that was the place of public judicial sales of realty. And in the deed of 1811, the sale is thus fully described. But if the receipt was genuine, & made at its date, it was natural enough to omit this, because all, then & there, would understand it so. Suppose an ordinary receipt given, at this day, for the payment of a bid for land sold at Sheriff's sale, it would not be likely to state ~~that~~ it was made at the Court-House during the setting of a proper Court in term time. This would be understood, because the universal practice, & the only lawful way.

And the statement of the sum received, both in Livres, & Dollars, by their respective symbols of "£" & "$" is an internal evidence for, & not against the genuineness of the receipt. For, if fabricated, it would have stated it only in livres, because this was the common practise, as it seems, at the date of the receipt. But, it should be borne in mind, that, ~~when this receipt was dated~~ at the date of this receipt, this country had

been Spanish for nearly ~~ten~~ 20 years, & St. Louis had had a Spanish Commandant over it for over ten years. French & Spanish words, as is natural, were becoming mixed, both in conversation, & deeds &c. The archives prove this, if proof were needed. Now, the dollar is a Spanish denomination. We derive the dollar from the Spanish mint. This feature of the receipt, therefore, ought to be in fact conclusive of its genuineness. For, it is the fruit of a natural but a rare process, that would not be likely to be produced only ~~at~~ during the time of the process, & no fabricator would be likely to ~~see~~ think of it, at least in such a small transaction as this, in 1811. The deed of 1811 in expressing this consideration for it, calls it only dollars. The sole term then in use, for money, being dollars. It is, therefore, insisted, that if the evidences of the sale stop here, they should be deemed enough to warrant the conclusion of a legal sale, there appearing no possession in the heirs of Bizette adverse to the claim under the sale.

But, corroborative evidences are given of the most convincing, ~~at least, persuasive~~ character.

1st. By the marriage contract between Charles Bizette & Mrs. Prouache, his widow, she, upon his death, be=

came entitled to half of this land-
Yet, she joins in the deed of 1811 with her then husband Provenche, without any new consideration, but for the, supposed consideration of Brazeau's bid, paid to the estate in 1782-
If Brazeau was not entitled, by virtue of the facts set forth in the receipt, she would not have conveyed her half of this land to him for nothing -

2d. Provenche, the sworn curator of the infant children, joins in the deed-
If there had been no such sale, as claimed, ~~then by their act~~ they would have known it, & also, if there had been. If there had not been, then, by this deed, a mother attempted to cheat her children, & their guardian, joining in the attempt, committed perjury-
This is not probable, or credible -

3d. Joseph Brazeau conveys, this land to his nephews, with other land, with a covenant of warranty, + a statement of its derivation from said sale
These deeds were made in May 1811, & recorded in June 1811-
And were made, & recorded in the French language, being the vernacular of all the parties in interest-

although no deed is found from Auguste & Louis Brazeau to Langham of this land, yet, a deed of said Aug. & Louis to Langham, dated August 13, 1818, of a tract of land next ~~South~~ North - to wit: ~~that of~~ the Herbert tract, states that Langham is on the North of it - Aug. & Louis acquired both of these tracts by one, & the same deed from Joseph Brazeau - to wit - said deed of 1811 - This is evidence, that they had already conveyed the Bizette tract to Langham.

4th - After this deed - in the fall of 1818 - the evidence shows, that Langham took an actual possession of this land - built ~~a house~~ his residence upon it - enclosed & cultivated a part of it - Ever since then its actual possession has been continued in him, & those deriving through him & that this possession has been all along accompanied with a natural progress of improvements, by extended cultivation - costly erections - without interruption, showing the fullest confidence in the possessors in their title, & this confidence, ~~that~~ thus displayed, continued in any serious way unchallenged down to the commencement of

this litigation in 1853 - accompanied, also, with the use of this property by Langham as a security to others, as in the instance of his mortgage to the Bank - also, with its sale, as his, under executions & changes of possessions in permanence - also with private sales with like changes - most of them of. To all this is the fact, that the parties now claiming in this suit, were in the eve of being barred under the statute of limitations, when they began this suit.

Now, how can this acquiescence be accounted for, except upon the supposition, that they, in some way, knew, that they had no right to this property?

And what they had so long acquiesced in, a jury might well find to mean a ~~belief~~ knowledge in them of their having no title to this land - a knowledge that their ancestors, who knew the truth of the matter, had acted honestly - that their sworn curator, ancestor, in law, was guiltless of perjury -

If the evidence be credited, the conclusion, for a legal sale, is irresistible. It was for the jury to judge of this -

The taking of deeds from parties claiming, as heirs, is no sufficient rebuttal. If it tends to rebut, it is fairly ~~refus~~ denied such an effect, by the consideration, that it is a common thing for parties to do this, when, they have a good title in fact, but which is affected by the lap of proof, or, uncertainty of ~~proof~~ evidence, or, when they prefer to pay some small sum for peace to suffering the vexations of litigation. It is lawful for a man to buy his peace of an unjust assailant.

Lowndes & Perkins 12 Mo. Rep. p 259.

Neither is it much evidence, either in rebuttal, or against the presumption of a sale, that there appears no evidence of Brazeau's taking possession, or of any possession being taken under his claim until 1818 by Langham. For, this evidence operates against the appellants, as much as against the ~~defend~~ respondent. For, if a right to the land should cause, as a matter of course, an actual possession in him, who has the right, ~~then~~ so that, without such possession, the claimant of the right should be presumed not to have it, then this presumption exists against the appellants & those they claim through. For, actual possession

in no one is shown since the death of Charles Bizette, until that by Langham in 1818 -

This fact, then, stands indifferent between the parties -

It is therefore respectfully submitted, that the judgment in this case should be affirmed -

A. Todd

Atty. for respdt.

No. 112

Sup. Court

Dessaunier et al

v

Murphy

Argument by respondent upon Point 2 of his brief.

A. Todd

for respondt.

Filed April 21, 1858

Desmarais & others v. Murphy

As we understand the facts of this case, it is not one in which a Court could presume a conveyance or direct a jury to presume one. It does not fall within any class of cases in which such presumptions have been indulged. The presumption is invoked here, not to sustain an ancient possession held under the title sought to be aided by the presumption, but to make out an outstanding title, adverse to that under which the defendants hold & under which the plaintiffs claim.

Langham took possession in 1818 under deeds from the heirs of Bizette. The Brazeau title, derived through Prouncheve, after being traced to the two nephews of Brazeau in 1811, disappears, & no traces of it are seen afterwards. No possession had ever been held under it, beyond all doubt, up to this time, although nearly thirty years had elapsed. The first possession of the land, since the death of Charles Bizette, is found in Langham in 1818, under the Bizette title, & that possession has continued to the present day.

The nephews of Brazeau, who held what is here termed the Brazeau title, originally derived from Prouncheve, & conveyed to them by their uncle in 1811, conveyed to Langham an adjoining tract in 1818 & in referring to the tract now in controversy spoke of it as belonging to Langham. No allusion is made to their title to this tract in the deed. It would be a violent presumption to infer from this that they had previously made a conveyance to

Langham, as it is perfectly easy to account for such language without making such an inference. Langham was in possession of the land by deeds under the Bizette title. The Brazeans may have considered their title worthless. The recital, that the adjoining tract belonged to Langham is just as ~~consistent~~ true, if Langham's title was derived from Bizette as it would be, if it had been derived from them. Besides, the recital, ~~[illegible]~~ whatever it may imply, cannot bind the present plaintiffs, who claim under the Bizette title, & are no way concerned ~~in~~ or affected by the deed from the Brazeans for an adjoining tract of land.

At all events, no ~~such~~ deed from the Brazeans to Langham appears in this case, & neither the court or jury were asked to presume one. We may assume then, that no such deed existed, & ~~&~~ consequently Langham derived no title to the premises in controversy from the Brazeans.

The jury then in this case, were permitted to infer from circumstances a valid sale of the land to Brazeau in 1782, not to protect a possession acquired under such sale – but to defend a possession acquired under the heirs of Bizette against a claim of one of the heirs.

The doctrine of presuming conveyances

mainly rests upon long & uninterrupted possession in the owners of the title, in favor of which the presumption is indulged. Where a defendant in ejectment takes shelter ~~but~~ under an outstanding title, as he may do, he must take it as he finds it, & it will be treated by the Court as it would be, if its owners were asserting it as plaintiff. Could the Brazeaus or their representatives claim the assistance of presumption in a suit against the present defendants? If they could not, then the defendants, resorting to it for protection, cannot strengthen it or cure its defects by connecting with it their possession under another & adverse title.

So far as mere presumptions of fact are concerned, they would seem to be rather against the validity of the title of ~~Provencheres~~ Brazeau - if we consider the acts of those who held this title as entitled to much weight in determining its value. No possession was ever taken under it by any one. The Provencheres, both father & son, & Langham & the Brazeaus did not appear to regard the title as valuable from 1811 up to 1818. Langham was busy in buying up branches of the Bizette title, & did not think it worth while to buy the Brazeau title to this tract, although he must have been aware of it by his purchase of an adjoining tract, the title of which had the same origin & the same owners. It would seem that John L. Proven-

there had no confidence in the Brazeau title, since ~~the~~ it was through him that Langham derived a portion of the Bizette title, Provencher could hardly be ignorant of the existence & character of the Brazeau title, as it originated in a supposed sale made by his father.

If indeed we could presume, that Langham in 1818, when he went into possession of this land, had previously acquired a conveyance from the two Brazeaus, the case would ~~be~~ present entirely another ~~diff~~ aspect. But the case was not tried upon any such hypothesis. The jury did not pass upon any such fact. We must suppose that no such deed existed, as no such deed was shown — & no reference to any such deed is to be found in any of the conveyances made of this land or their recitals.

The deed of 1811 from Provencher to Brazeau is certainly evidence to show that at that date, Brazeau considered his purchase available — yet he immediately transferred the title to his nephews, & they never took possession. Nothing further is ever heard of it, in all the subsequent acquisitions of title by Langham to this & adjoining tracts of land, in all of which the Provencher's & Brazeau's were concerned. This

title is now resuscitated, after a lapse of nearly forty years, to protect the interest of those who hold under the Bizette title, but who, it seems, did not acquire the whole title.

We do not wish to be understood as aperting that an owner or claimant of land prejudices his title by buying up outstanding claims. ~~[illegible]~~ Such ~~[illegible]~~ purchases are common, & altogether commendible, & ought not to ~~have~~ create any prejudice against the title which proves to be available. If Langham had been the owner of the Brazeau title, his subsequent purchases from the heirs of Bizette ought not to have any influence in impairing the value of his original title. But we have seen that Langham & his assignees do not occupy this position.

We concede the force of the reasoning, by which the counsel for the defendant has maintained the genuineness of the receipt of 1782. The argument was certainly ingenious, perhaps conclusive. We think the paper was a genuine one & ~~[illegible]~~ that the jury were well warranted in coming to this conclusion; but it is not pretended that this paper alone makes out a valid sale in 1782 to Joseph Brazeau ~~[illegible]~~. If a possession had been taken under this receipt or the deed following it, then a court or a jury might well be permitted to presume that every thing necessary under the law to be done towards passing the title to Brazeau ~~[illegible]~~

had been done. Every legal presumption will be made to sustain long & ancient possession - but the possession must go along with the title whose deficiencies are sought to be covered up. As neither the defendants nor those from whom they derived title & possession ever held under the title they now seek to set up, they have no other protection against the claim asserted in this case, except such as their possession under the statute of limitations gives them.

As the case was not tried upon this defence, of limitation, we have not looked into the facts with any view to see what result would be produced by the statute of limitations. We shall therefore remand the cause.

The other judges concurring judt. revd.

W. B. Napton

112

Desarmier v. Murphy

Opinion of the Court

Napton

Filed 24 June 1858.
W. L. Leavenwell Cl.

X