

Case No. 7,184.

JAMES V. STOOKEY ET AL.

{1 Wash. G. O. 330.}¹

Circuit Court, D. Pennsylvania.

Oct. Term, 1806.

EJECTMENT—EVIDENCE—RECORD AS PROOF—SURVEYS—DIAGRAM OF LANDS.

1. The declarations of a person exercising authority, that he possesses it, can never be received as evidence of the fact of his authority.
2. If a record be produced to prove a fact, and is found to be deficient or imperfect, it cannot be assisted by evidence de hors the same; but the perfect record must be produced.
3. Surveys of lands in Pennsylvania, made by order of the commissioners of property, have been supported in Pennsylvania.
4. A diagram made of the tract of land in dispute, and of the adjoining land, offered to show the boundaries of the land, cannot be given in evidence; because it was not made under the order of the court.
5. The court refused to admit in evidence, a verdict and judgment, given in the supreme court of the state, in a case where the person who had lands called for by the warrant; because it was between different persons, and upon a different question.

This was an ejectment for a tract of land in Berks county. The plaintiff [lessee of James] claimed under a warrant to Richard Hockley, and others, dated in 1762, which recited, that a former warrant had issued to the same persons for this land, and had been surveyed, but not returned. He then offered in evidence a survey of this land, or rather a re-survey made by one Jacobs, who was not an authorized or commissioned surveyor; in virtue of a letter to him from the surveyor general, in which he stated; that, at the request of Mr. Peters, who had an interest in the land, the governor had instructed him to direct the said Jacobs to make the survey. This being objected to as an unauthorized survey, since the surveyor general had no right to appoint a deputy, without the approbation of the governor or proprietary, as appeared by his commission; the plaintiff offered in evidence, a decision of the board of property, in a caveat filed by

the assignee of Clark v. Dougherty [unreported], stating the survey returned; that it should be received and confirmed, and directing a patent to issue. The plaintiffs, in this case, claimed under Hockley and others, by mesne conveyances. They also insisted, that, on the former trial of this cause, in May last, when a juror was withdrawn, that this survey was read, and not objected to. They contended, that the declaration of the surveyor general, that the direction was given by order of the governor, was sufficient evidence of his approbation; and, that the order of the board of property, accepting and confirming the survey, cured any defect in the appointment. The motion was for a nonsuit.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

WASHINGTON, Circuit Justice. This direction of the surveyor general, is not given to an officer duly appointed and commissioned; and, it is clear, that, according to the authority given by the proprietary to the surveyor general, he had no authority of himself, to make such a deputation as this, without the approbation of the governor; and such seems to have been the common understanding and practice, so far as I can collect; for, strange as it may seem, no judicial opinion on the point has been given, or it would have been referred to. But circumstances, to show the approbation of the governor, may be resorted to; and, on this ground, the plaintiff relies upon the statement of this fact, in the letter of the surveyor general, and the order of the board of property. As to the first, the regulation of the proprietary, that no deputy should be appointed without his approbation, would be quite nugatory; if the bare declaration of this officer, that this approbation had been obtained, would give validity to his appointment. This, then, per se, will not do. As to the judgment on the caveat; this might be very important, if it appeared to us judicially, that that judgment referred to this survey. An attempt was made to establish this fact, by an agreement between Anderson, who styles himself agent for Dougherty & Smith, and James; stating the existence of the caveat, and referring to this land. But, the court refused to hear that paper; because, if part of a record be produced to prove a fact, and is deficient, you cannot help it out by evidence de hors the record, but must produce the whole record. I find, from [Fothergill v. Stover] 1 Dall. [1 U. S.] 6, that surveys have been supported, made upon special orders from the commissioners of property; but that was a source of authority, much higher than the surveyor general, for the governor was a member of that board. We must then decide, that this survey is inadmissible; that it forms a necessary link in the plaintiff's title; and, of course, that he must be nonsuited. At the same time, the objection is clearly a surprise upon him, in consequence of its having been read at the former trial, and not then objected to; if it had been, he might probably have proved enough to satisfy us, that the governor had approved the declaration of this fact by the surveyor general. The whole record in the caveat, and other papers, might have answered.

PETERS, Judge, concurred in directing the nonsuit; but we afterwards set it aside on the ground of surprise.

In the progress of the cause, the following objections were made by the defendants' counsel, to papers offered by the plaintiff.

First; a diagram of this and the adjoining lands, made by George Woods, was offered, and objected to.

BY THE COURT. This, not being made under the authority of this court, and being intended to show the boundaries and situation of the lands, is inadmissible.

Second; a verdict and judgment in the supreme court of this state, between Lukins & Lytle v. Thomas Croyle [unreported], the person whose land the plaintiffs' warrant called for, to show the boundaries of Croyle's land to be adjoining the plaintiffs', as he claims, and to prove the claim of Croyle to it. This THE COURT overruled, as being between different persons, and upon a different question.

{See Cases No. 7,181 and 7,185.}

¹ [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]