

13FED.CAS.—21

Case No. 7,185.

JAMES v. STOOKEY.

{2 Wash. C. C. 139.}<sup>1</sup>

Circuit Court, D. Pennsylvania.

April Term, 1808.

EJECTMENT—RECITALS—EVIDENCE.

Although the recitals in a warrant to another than a party to the suit may not be evidence of the fact stated in them, yet when they are corroborated by circumstances, such as the antiquity of marks on the ground, and by the correspondence between the marked lines and those stated in the warrant the jury may consider the recital, that a previous warrant for the land had issued, as true; the papers of the surveyor general, to whom the original warrant may have been returned, having been destroyed by fire.

[Cited in *Doolittle v. Galena & C. U. R. Co.*, 14 Ill. 381.]

The lessor of the plaintiff claimed under a warrant, dated the 10th of July, 1762, to William Hockley, which recited that a warrant had issued for the same land, to the same person, in 1755, which had been surveyed, but that the survey had not been returned. The warrant is for five hundred acres, lying above Snake Spring, adjoining Thomas Croyle. The title is regularly deduced

JAMES v. STOOKEY.

from Hockley to the plaintiff, for one-half of the land. The warrant was surveyed in 1767, by Jacobs, under a special order from the surveyor general. This survey, which was objected to and disallowed by the court on the former trial, was now admitted; the whole proceedings, upon the caveat of the plaintiff and Smith, against the assignee of Dougherty, being now produced; in which case, judgment was given for the caveator, and a patent ordered to issue for the land in question. From the blocking of the trees, found in the lines of this tract by the surveyor, who surveyed it under the order of this court, there was strong evidence, that this tract had been surveyed previous to the year 1760; and the location of it then, as laid down by the survey in this cause, was proved by very strong evidence. A survey made for George Croghan, of an adjoining tract of land, in 1755, and patented in 1763, calls for a line of this tract, as Hockley's land, by course and distance. A recovery, in ejectment, by Robert Elliott, against Devenbaugh, in 1793, was also offered as additional proof of the boundaries of the land; which evidence was admitted by the court, in the light, and in the degree of hearsay evidence, as stated on the former trial. Evidence was also given, that the surveyor general's house had been burned, before 1762. The defendant claimed under a warrant dated the 7th of July, 1762, surveyed in 1766: but the location of the land did not appear to the court to interfere with the tract, as claimed by the lessor of the plaintiff.

WASHINGTON, Circuit Justice, charged the jury that the recital, in the warrant of 1762, to Hockley, was, as between these parties, no evidence that a warrant had issued, and been surveyed in 1755; yet, taken in connexion with the antiquity of the marks on the line and corner trees; and the call made by course and distance, of one of the lines of this tract, as Hockley's land, in Croghan's survey, made in 1755; the jury might consider the existence of Hockley's warrant in 1755, as proved; particularly, as the burning of the surveyor general's house accounts for the non-production of the papers, and for the issuing of the second warrant, on the 10th of July, 1762. Should this be the opinion of the jury, then they ought to find for the plaintiff; since the defendant does not set lip a title which commences earlier than the 7th of July, 1762. Should the jury not feel themselves warranted in considering the plaintiff's title to have commenced before the 10th of July, 1762, which is three days later than that set up by the defendant; they will then inquire whether the location of the tract under the warrant of the 7th of July, interferes or not with that of Hockley's warrant. To the court, it appears that the survey did not interfere; and if this should be the opinion of the jury, their verdict will, on this ground, be for the lessor of the plaintiff, for an undivided moiety of the land in the declaration mentioned.

Verdict for plaintiff for a moiety.

{See Cases Nos. 7,181 and 7,184.}

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<sup>1</sup> [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.]

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