

1810.

JUNE.

Cockey  
vs  
Smith

COCKEY'S LESSEE VS. SMITH.

APPEAL from Baltimore county court. Ejectment for a tract of land called *Franklin's Neglect and Cockey's Discovery*, lying in Baltimore county. The defendant, (now appellee,) took defence on warrant, and plots were made.

In an action of ejectment it is incumbent on the plaintiff to show a grant of the land for which the action is brought. To prove such grant he must produce the grant, or a copy under seal. This is the general rule, and must be generally adhered to. The cases in which this general rule has been deviated from, and in which secondary evidence has been resorted to for presuming a grant, rest on strong facts and circumstances, evincing an equitable right to the land—an incipient title from the proprietary, and length of possession in conformity thereto—mesne conveyances and wills transmitting the right from the taker-up to the plaintiff.

The producing the grant is the first step in deducing title; if that is wanting, and inferior testimony is resorted to for presuming a grant, the foundation must be laid by stating and combining all the facts and circumstances existing in the case, on which the court are to direct the jury to presume and find a grant.

To repel the plaintiff's title, the defendant must produce an antecedent grant, or give evidence that such grant had existed; or show an incipient title, or proof that the records of the land office were lost or destroyed, and show a rightful possession accompanying the defendant's title.

Length of possession is the great and leading fact in presuming grants and deeds, and without which no grant or deed can be presumed.

A deed from C to F, (under whom the defendant claimed,) for land which did not appear to have been previously granted, was offered in evidence, and there was no evidence that C was ever in the possession of the land—*Held*, that if C was ever in possession, he was an intruder, and his deed could not operate to transfer any right to the land; and the entry and possession of F was an intrusion, the land being vacant; and that the deed from C to F, and the certificate of the receipt for the alienation fine endorsed thereon, are not legal and competent evidence.

It is the exclusive right of the court to decide on the legality and competency of all testimony offered to the jury.

Where two papers, purporting to be copies, made (not under seal,) between 1746 and 1759, by a former register of the land office, of certificates of surveys of two tracts of land, one surveyed in 1695, and the other in 1710, and stated to have been taken from particular record books of that office, but which books could not be found in the office, were offered in evidence, with proof of 40 years exclusive possession of the lands, by the defendant and those under whom he claimed—*Held*, that the copies, not having been certified by the register under the seal of the land office, and being without date, cannot be read in evidence.

It belongs to the court to determine on the legal sufficiency of facts and circumstances which will warrant the jury in presuming and finding a grant.

Where the proof was insufficient in law for the court to direct the jury to presume a grant of the land in question from the Proprietary,

1. The plaintiff at the trial gave in evidence the certificate and patent of a tract of land called *Franklin's Neglect and Cockey's Discovery*, surveyed on the 14th of January 1802, for, and granted to, *John Cockey*, the lessor of the plaintiff, on the 23d of April 1803. He also gave in evidence that the said tract of land is truly located by him, as his claim and pretensions, on the plots. The defendant gave in evidence that the tracts of land called *Gibson's Forest* and *Warner's Chance*, for which she takes her defence, began, as located by her on the plots, and that the black letter A on the plots, is the termination of the third line of *Lord Baltimore's* manor. And also that for forty years now last past, *Thomas Franklin*, whose heir at law the defendant is, and those claiming under him, down to the defendant, to the present time, have been in the actual possession and occupation of parts of the said lands, as located on the plots, claiming the whole, and using and cultivating the parts so located, and that no person, except *Franklin*, and those claiming under him, has ever been known to possess or claim any part of the lands until the lessor of the plaintiff caused the certificate of *Franklin's Neglect and Cockey's Discovery* to be made and returned. She also gave in evidence, that the lands on the west side of the said two tracts as located, were