

Case No. 7,454.

JONES v. BACHE.

[3 Wash. C. C. 199.]¹

Circuit Court, D. Pennsylvania.

April Term, 1813.

BOND CONDITIONED FOR DELIVERY OF A GOOD TITLE—ACTION ON—PRIOR SURVEY—EVIDENCE—EFFECT OF ENTRY AND SURVEY.

1. Debt on bond, conditioned for the delivery of a good and lawful title to land in Virginia; to which the defendant pleaded performance.
2. The surveyors of the county, who officially know that certain lands are covered with prior surveys, are competent witnesses to prove the same.
3. A connected map of a number of surveys, which had been recorded in the county, is evidence, accompanied by the explanations of the surveyors, without producing the separate surveys.
4. An entry and survey do not, in Virginia, convey the legal estate in lands out of the commonwealth.

Action on a bond, dated 23d April, 1798, with condition that the defendant should procure, within eighteen months, and deliver to the plaintiff, a good and lawful grant from the state of Virginia, free and clear of all disputes and encumbrances whatsoever, for 1000 acres of land in Virginia, described in the condition. Upon oyer, the defendant pleaded performance, generally. Replication, that the defendant has not procured and delivered a good and lawful patent, free and clear of all disputes and encumbrances; that true it is, he did deliver a patent, but he says that the legal title to the land was not in Virginia at the time it issued, but was vested in one H. B. by treasury warrants, on which surveys were duly made and returned, and thereupon patents were granted to the said H. B. prior to the patent made to the plaintiff. Rejoinder, that the legal title was not in H. B. when the patent to the plaintiff was issued, and that no patent had issued to H. B. prior thereto. On this rejoinder, issue was taken. The plaintiff gave in evidence a patent issued to him as assignee of the defendant, for 1000 acres, dated 7th July, 1797, by metes and bounds; and then proved, by depositions, that this land was entirely covered by the prior entries and surveys of H. B. in the pleadings mentioned. The witnesses are the surveyor and deputy surveyor of the county in which the land lies; who annex to their depositions a connected map of the surveys of H. B. recorded in their office, to show the position of his land, and that they cover the land granted to the plaintiff; and add, that they believe that patents had issued to H. B. or others, for those lands. This testimony was objected to.

BY THE COURT. The witnesses profess to speak from their own knowledge of these lands, in their capacity of surveyors, as well as officially as to surveys recorded in their office; and they annex a connected map of certain surveys so recorded, to show the situation of the land; and they swear that the land contained in this map, covers the land in question. This is certainly good evidence, without producing the separate surveys,

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which could of themselves afford no information. Their belief as to patents having issued, is not evidence; as the patents should be produced.

The plaintiff having closed his evidence, the defendant moved for a nonsuit, the matter in issue not being proved.

WASHINGTON, Circuit Justice. The material matter for the plaintiff to have averred in his replication, was, that a good and lawful title, clear of all difficulties and encumbrances, had not been made to him—which he could have supported by the evidence. But the replication unnecessarily alleges, that the legal estate was in H. B., and that patents had issued to him; which averments, the defendant, by his rejoinder, has selected to form the subject of the issue; and issue is accordingly taken on them. But the evidence is against the plaintiff; for there is no proof that patents have ever issued to H. B. or any other; and an entry and survey do not pass the legal estate out of the commonwealth, according to the laws of Virginia. The plaintiff suffered a nonsuit

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