

City of Mobile Vs. Eslava

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Appellant : City of Mobile

Respondent : Eslava

Judgement :

City of Mobile v. Eslava - 41 U.S. 234 (1842)

U.S. Supreme Court City of Mobile v. Eslava, 41 U.S. 16 Pet. 234 234 (1842)

City of Mobile v. Eslava

41 U.S. (16 Pet.) 234

ERROR TO THE SUPREME

COURT OF ALABAMA

SYLLABUS

A lot of ground, part of the ground on which Fort Charlotte had been erected, in the City of Mobile, before the territory was acquired from Spain by the United States, had been sold under an act of Congress of 1818. The lot had been laid out

according to a plan by which a street called Water Street was run along the margin of Mobile River, and the street was extended over part of the site of Fort Charlotte. The lot was situated west of Water Street, but when sold by the United States, its eastern line was below high water mark of the river. The purchaser of this lot improved the lot lying in front of it, east of Water Street, having filled it up at a heavy expense, thus reclaiming it from the river, which at high water had covered it. When the lot east of Water Street was purchased, the purchaser could not pass along the street except with the aid of logs and other timber. Water Street was, in 1823, filled up at the cost of the City of Mobile. Taxes and assessments for making sidewalks along Water Street were paid to the City of Mobile by the owner of the lot. The City of Mobile had brought suit for taxes, and had advertised the lot for sale as the property of a tenant under the purchaser of the lot. On 26 May, 1824, Congress passed an act which declared in the first section that all the right and claim of the United States to the lots known as the Hospital and Bakehouse lots, containing about three-fourths of an acre of land in the State of Alabama, and all the right and claim of the United States to all the lots not sold or confirmed to individuals either by this or any former act, and to which no equitable title exists in favor of any individual under this or any other act, between high water mark and the channel of the river and between Church Street and North Boundary Street in front of the City of Mobile should be vested in the corporation of the City of Mobile for the use of the city forever. The second section provides

"That all the right and claim of the United States to so many of the lots east of Water Street and between Church Street and North Boundary Street, now known as water lots, as are situated between the channel of the river and the front of the lots, known under the Spanish government as water lots, in the said City of Mobile, whereon improvements have been made be and the same are hereby vested in the several proprietors and occupants of each of the lots heretofore fronting on the River Mobile,"

&c.; The City of Mobile claimed from the defendant in error the lot held by him, under the purchase from the United States, and the improvements before described, asserting that the same was vested in the city by the first section of the

act of 1824. *Held* that under the provisions of the second section of the act, the defendant in error claiming under the purchase made under the act of 1818 and under the act of 1824 was entitled to the lot.

The right relinquished by the United States was to the water lots,

"lying east of Water Street and between Church Street and North Boundary Street, now known as water lots, as are situated between the channel of the river and the front of the lots, known under the Spanish government as water lots, in the said City of Mobile, whereon improvements have been made."

The improvements refer to the water, and

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not to the front, lots. A reasonable construction of the act requires the improvements to have been made or owned by the proprietor of the front lot at the time of the passage of the act. Being proprietor of the front lot, and having improved the water lot opposite and east of Water Street, constitute the conditions on which the right under the statute vests.

The plaintiffs in error instituted an action called, in the language of the laws of Alabama, "a plea of trespass to try titles," against Miguel D. Eslava, the purpose of which was the recovery of possession and damages for the detention of a certain lot of ground, in the City of Mobile bounded north by ground in the possession of Thomas Terry, east by Commerce Street, south by Church Street, west by Water Street, and extending from the east side of Commerce Street to the channel of the river.

The cause was tried in the circuit court in November 1837, and a judgment on the verdict of a jury was rendered for the defendant. The plaintiffs took a bill of exceptions to the charge of the court, and afterwards prosecuted a writ of error to the Supreme Court of Alabama, where the judgment of the circuit court was affirmed. The plaintiffs took out this writ of error to the Supreme Court of the United States.

The bill of exceptions stated that the lot in controversy was held by the defendant under the following circumstances:

By an act of Congress passed in 1818, the lot of ground whereon Fort Charlotte, in the Town of Mobile, had been situated was directed to be surveyed and laid off into lots, with suitable streets and avenues conforming as near as may be to the original plan of the town, and the lots thus laid off were directed to be sold under the authority of the president of the United States. The lots were surveyed and laid off and were afterwards sold. By an original plan of the town, a street known as Water Street was run on the margin of Mobile River, continuous with and fronting the same. This street was run on part of the site of Fort Charlotte, where the lots are laid out; another street, known as Church Street, was laid off on the site of the fort. The lots were sold by the United States agreeable to the plan; no lots were laid off, and none was sold by the United States east of Water Street. Under the Spanish government, and while the United States held possession of Fort Charlotte, there was an open unobstructed

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space from high water mark on the river to the channel, except a wharf used for the commerce of the fort.

The lot in dispute was situated on the east side of Water Street, directly opposite to the lot sold by the United States, part of the site of the fort, within the open space between high and low water mark, and part of it within the boundary of the picket fence that formerly surrounded the fort. After the purchase of the lots laid out on the site of Fort Charlotte by "the lot company," a survey was made by the company, and a larger quantity of ground was included in the survey. The defendant held under a purchase from the lot company. There is a regular oceanic tide in the River Mobile, the ebb and flow of which is about eighteen inches. In 1822, Water Street and the lot in dispute were between high and low water mark. The City of Mobile, at the cost of the city, filled up Water Street to some extent, and confined the water at high tide to the eastern edge of Water Street. No evidence was offered to prove the lots in front of Fort Charlotte were known under

the Spanish government as water lots, on which improvements had been made.

The plaintiffs, in the circuit court, claimed title under the Act of Congress of 20 May 1824, entitled "an act granting certain lots of ground to the corporation of the City of Mobile, and to certain individuals in the said city." Considerable sums of money were expended by the purchasers of the lots on the site of Fort Charlotte, to fill up the lots between Water Street and low water mark, and the passage along Water Street could only be made, until it was filled up by the corporation of Mobile, by logs laid along the street. The lot in dispute had been filled up at a heavy expense, and the tenant of the defendant in error had, according to an entry on the books of the corporation, in 1823, filled up a stagnant pond at the end of Church Street, which had been occasioned by the improvement on the lot. One witness testified that the stakes in front of the lot, when sold by the United States, ran to the east of Water Street, so that a portion of the property, when purchased from the United States, would have been within the staked lines of the lot. Evidence was offered by the defendant to prove that in 1828 and for every year until 1836, taxes on the lot had been paid to the corporation of Mobile; that in 1833, the person in possession of the lot had been required

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by the Mayor of Mobile to fill up two places upon it with earth or shells, and about the same time the corporation had advertised the lot for sale for unpaid taxes, which were afterwards paid.

The Act of 20 May 1824, by its first section, declared,

"That the right and claim of the United States to the lots known as the Hospital and Bakehouse lots, containing about three-fourths of an acre of land, in the State of Alabama, and also all the right and claim of the United States to all the lots not sold or confirmed to individuals either by this or any former act, and to which no equitable title exists in favor of any individual, either by this or any former act, between high water mark and the channel of the river and between Church Street, and North Boundary Street, in front of the said city, be and the same are hereby

vested in the mayor and aldermen of the said city,"

&c.; The second section of the act declared

"That all the right and claim of the United States to so many of the lots east of Water Street, and between Church Street and North Boundary Street, and now known as water lots, as are situated between the channel of the river and the front of the lots known under the Spanish government as water lots, in the said City of Mobile, whereon improvements had been made, be and the same are hereby vested in the several proprietors or occupants of each of the lots heretofore fronting on the River Mobile, except in cases where such proprietor or occupant has alienated his right to any such lot now designated as a water lot,"

&c.;

Upon which the judge charged the jury that if the lots specified in the patents 10, 11, 12 &c., were proved to have been bounded by high water mark at the time purchased, then they came within the terms of "lots known under the Spanish government as water lots, as used in the act of Congress," and if proved that the lot claimed was east of Water Street and in front of the lots covered by the patents, and that it had been improved before the passage of the act, it was vested in the proprietors and occupants of the lots held under the patents, and this although Water Street did intervene between the lots claimed and those held under the patents.

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Mc LEAN, JUSTICE, delivered the opinion of the Court.

The plaintiffs brought an action to recover certain lots in the City of Mobile, bounded east by Commerce Street, south by Church Street, on the west by Water Street, and extending on the east side of Commerce Street to the channel of the river. They claim title under the Act of Congress of 26 May 1824, and the circuit court of the state, in which the action was first brought, decided against their title. That decision was removed to the supreme court of the state by writ of error,

where the judgment of the circuit court was affirmed. Under the 25th section of the Judiciary Act of 1789, the case is brought before this Court.

The first section of the above act declares

"That all the right and claim of the United States to the lots known as the Hospital and Bakehouse lots, containing about three-fourths of an acre of

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land, in the State of Alabama, and also all the right and claim of the United States to all the lots not sold or confirmed to individuals, either by this or any former act, and to which no equitable title exists in favor of any individual under this or any other act, between high water mark and the channel of the river, and between Church Street and North Boundary Street, in front of the said city, be and the same are hereby vested in the Mayor and Aldermen of the said City of Mobile for the time being, and their successors in office, for the sole use and benefit of the said city forever."

The defendant's title was acquired by purchase from the United States at a public sale in 1820. This sale was made under the Act of Congress of 20 April, 1818, which gave power to the President to sell the ground on which Fort Charlotte, at Mobile, stood. The ground was required to be laid off into lots, with suitable streets and avenues, conforming, as near as practicable, to the plan of the city. Ten squares and parts of squares were surveyed and divided into lots, streets &c.; By the original plan of the city, a street known as Water Street was run on the margin of the Mobile River, and this street, by the said survey, was extended over a part of the site of Fort Charlotte, along the margin of the river. No lots were sold east of this street. Lots 10, 11, 12 and 13, in square 1, lie immediately west of Water Street and are bounded by it. The lots in dispute lie east of Water Street and directly opposite the lots above numbered.

In 1822, Water Street and the property now in dispute were between high and low water mark. The corporation of the city, in 1823, expended \$400 in filling up Water Street, and by the improvement confined the water, at high tide, to the eastern

side of Water Street. It was proved on the trial that in order to reclaim one of the lots in square 2, east of Water Street, the owner had to fill up seven feet, and that he could not pass along Water Street at that time except with the aid of logs and other timbers. Another witness stated that he purchased the lot west of the lots in dispute, and that he had to fill up his lot before it could be occupied. And other evidence was given by defendant conducing to prove that the eastern line of the lots, at the date of the sale, was

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below high water mark, and that the company which purchased the lots at the sale of the government expended about \$3,000 for the common benefit of their property and to keep the water from it. It was also proved that after the purchase of one of the lots in controversy by Addin Lewis, under whom the defendant claims, he caused dirt to be hauled upon it, and timbers were laid to fence out the water and fit the lot for a timber yard. Charles Matthews, who owned one of the lots bounded by the water, expended \$1,000 in filling up his lot. And to show improvements on the lots in dispute before 1824, the defendant read from the book of the corporation the following entry, dated in 1823: "Charles S. Matthews having improved his lot by filling it up, and a stagnant pond being occasioned thereby at the end of Church Street, &c.;" In 1824, about one-half of the space between Water Street and Commerce Street was subject to be covered by water at the ordinary tides. Water Street was not opened as low as Church Street until 1824. It appeared that the defendant and those under whom he claims had paid taxes on the property to the corporation. That in 1824 or 1825, the defendant was required to pay for sidewalks around his lots upon the assessment of the corporation, and in 1833 he was required by the mayor of the city to fill up two places upon one of the lots with earth or shells. About this time the lot was advertised for sale as the property of Matthews, the defendant's tenant, for taxes due the corporation, which were afterwards paid, with the costs of advertising, &c.;

Upon these facts, the circuit judge charged the jury

"That if the lots specified in the patents 10, 11, 12 &c.; were proved to have been bounded by high water mark at the time purchased, then they came within the terms of 'lots known under the Spanish government as water lots' as used in the act of Congress, and if proved that the lots claimed were east of Water Street and in front of the lots covered by the patents, and that they had been improved before the passage of the act of 1824, they were vested in the proprietors and occupants of the lots held under the patents, and this although Water Street did intervene between the lots claimed and those held under the patents."

And the court further charged the jury that

"If the proof showed the property

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to have been assessed in 1823 by the city authorities at \$4,000, and recently at \$88,000, and that the improved value resulted from the labor of Charles Matthews; that if, in August 1823, the mayor and aldermen, in reference to one of the lots in dispute, had on their minutes used this language, *viz.*, whereas Charles Matthews has commenced to improve his lot by filling up, &c., and that a committee was organized to inquire into a nuisance connected with the lot, that in 1824 and 1825 of the years between that and the commencement of the suit, the city taxes had been assessed on the property and collected from Matthews, and that he had been required by an ordinance of the mayor and aldermen to make sidewalks along this lot, and had so done, that Matthews had, by a written notice issued by the mayor, been required to fill up some low places on said lot to abate a nuisance thereon, and that this property was advertised for sale as the property of Matthews in one of the city papers for the nonpayment of city taxes assessed thereon, and that subsequently Matthews had paid such taxes into the city treasury, that the facts estopped the plaintiff from asserting any preexisting title under the act of Congress."

The plaintiffs' counsel requested the judge to charge the jury

"That if they believed the facts were proved, as contended for by them, the plaintiffs were entitled to a verdict in their favor, which the judge refused to do."

In their opinion, the Supreme Court of Alabama did not give a construction of the act of 1824, under which the plaintiffs' right is asserted, but consider the respective rights and powers of the federal and state governments arising under the federal Constitution and the compact entered into on the admission of the State of Alabama into the Union. The power of the Spanish monarch over the soil and navigable waters when the territory was under his dominion is also considered and illustrated, and the doctrines of the common law as applicable to the subject are examined, and by this course of reasoning, the court, among other conclusions, decided that the act of 1824 is void, as Congress had no power to grant the property in dispute. The result of this investigation was the affirmance of the judgment of the circuit court. And so far as regards the question before us, it is immaterial by what process of reasoning the

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Supreme Court of Alabama came to this conclusion; its opinion constitutes no part of the record, and is not properly a part of the case; we must look to the points raised by the exceptions in the circuit court, as the only questions for our consideration and decision.

Both parties set up a right under the act of 1824. It is the foundation of the plaintiff's title, and the defendant relies upon it as sanctioning his claim. Now no construction of this act can favor the hostile pretensions of both parties, and if the true construction of it shall give no title to the plaintiffs, this controversy is at an end. And in this view it is unnecessary to inquire into the constitutionality of the act.

The defendant insists that his right is sanctioned by the second section of the above act, which provides

"That all the right an claim of the United States to so many of the lots of ground east of Water Street and between Church Street and North Boundary Street, now

known as water lots, as are situated between the channel of the river and the front of the lots known, under the Spanish government, as water lots, in the said City of Mobile, whereon improvements have been made, be and the same are hereby vested in the several proprietors and occupants of the lots heretofore fronting on the River Mobile, except in cases where such proprietor or occupant has alienated his right to any such lot now designated as a water lot,"

&c.;

This Court gave some consideration to the construction of this section in the case of [Pollard's Heirs v. Kibbe](#), 14 Pet. 353, and there was a diversity of opinion among the judges on the subject. It must be admitted that the section was loosely drawn and its meaning may be somewhat involved in doubt. Some doubt has been expressed whether the improvements required were to have been made on the front or water lot. But we think they must be made on the latter. The right relinquished by the United States was to the water lots lying

"east of Water Street . . . and between Church Street and North Boundary Street, now known as water lots, as are situated between the channel of the river and the front of the lots known under the Spanish government as water lots, in the said City of Mobile, whereon improvements have been made."

Now it will be observed that all the words between the words "water lots," first used in the

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above sentence, and the words "whereon improvements have been made" are only descriptive of the locality of the water lots to which the right was relinquished. And if this be the case, it follows that the improvements refer to the water, and not the front, lots. And we think a reasonable construction of the act requires the improvements to have been made or owned by the proprietor of the front lot at the time of its passage. Being proprietor of the front lot and having improved the water lot opposite and east of Water Street constitute the conditions on which the right, if any, under the statute vests. In his charge to the jury, the judge laid down these

conditions in clear terms and instructed the jury, if the facts brought the defendant within them, that they should find against the plaintiffs. The jury did so find, and this is conclusive as to the facts of the case, and the only inquiry remains whether by any possibly construction of the act in view of these facts, any right under it can be asserted by the plaintiffs.

A statute so badly drawn as to vest a right to the same property in hostile claimants would in itself be a nullity. Exceptionable and involved as the language of this statute may be, it is not obnoxious to this objection. The first section, under which alone can the plaintiffs pretend to have any color of right, excepts from its provision

"lots sold or confirmed to individuals, either by that or any former act, and to which an equitable title exists in favor of any individual, under that or any other act."

This exception embraces the right of the defendant as found by the jury, and shows that however obscure some points of the act may be, its provisions are consistent. As this is decisive of the case, it is unnecessary to notice the instruction prayed for by the plaintiffs in the circuit court, and which the court refused to give. It was asked in affirmance, generally, of the plaintiffs' right.

The judgment of the Supreme Court of Alabama, which affirms the judgment of the circuit Court of that state, is

Affirmed.

CATRON, JUSTICE.

This is a writ of error prosecuted to reverse the decision of the Supreme Court of Alabama in an action corresponding to an ejectment. The first question is has this Court jurisdiction

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under the 25th section of the Judiciary Act? Both parties claim under a Private Act of Congress of 26 May, 1824. It granted to the corporation of Mobile the lands

between high water mark and the channel of the river in front of the city; the premises sued for are included within the limits. The decision of the state court was against the right claimed on the part of the plaintiffs.

First. The defendant set up a claim under the second section of the same act because he had improved the premises before 1824, and when he was an alienee from the proprietors of the front lots west of Water Street.

Second. He insisted that the city was estopped to set up a claim under the act of Congress because the defendant had improved the lot and being recognized as owner by the corporation in various ways.

The plaintiffs, having read the act of Congress as a grant and proved the defendant in possession, asked the court to instruct the jury that if they believed the facts were proved, as contended for by them, they were entitled to a verdict, which instruction the court refused, and a verdict was rendered for the defendant and judgment given in the circuit court for him, to which a writ of error was prosecuted to the supreme court. One error assigned is "that the charge of the circuit judge denies that the United States had power to grant the premises in question." On this assignment there was a joinder -- that there was no error.

The plaintiff's title is set out in the record, and upon this title and upon the last assignment of error is the opinion of the Supreme Court of Alabama exclusively founded. The opinion is before us, and maintains that the act of 1824 is void, as did a most labored argument here on the part of the defendant in error. To meet the opinion this cause was avowedly brought into this Court, by the corporation of the City of Mobile; it is conclusive in the state courts against the title of the city and that of its alienees to a vast amount of property held under the act of 1824, and I think it is our duty to meet the question; if we do not, the decision will remain the law of Alabama. The whole title of both sides is forth in the record, and it was quite proper in the Supreme Court of Alabama to commence with the examination of the plaintiffs' first, and if found void, to declare

that the plaintiffs could only recover on the strength of their own title, and refuse to examine the adversary title of defendant. The charge of the circuit court on any other point was not noticed, nor do I see how, in another case, the corporation can more prominently present the question on the validity of the act of Congress so as to bring it before this Court for final decision. First or last, this is not to be avoided.

That the whole case is before this Court will be seen by reference to [Ross v. Borland](#), 1 Pet. 664. There, both sides derived title under an act of Congress. The defendant's claim was rejected on a construction given to the plaintiff's patent and entry. It recognized the case of [Matthews v. Zane](#), 4 Cranch 382, as having settled the doctrine that where both sides claim under acts of Congress and come to this Court under the 25th section of the Judiciary Act for their construction, the Court proceeds on the whole case, and for either side. The Court said

"The Third Article of the Constitution, when considered in connection with the statute, will give it a more extensive construction than it might otherwise receive. It is supposed that the Act (1789, 25) intends to give this Court power of rendering uniform the construction of the laws of the United States, and the decision of rights and titles claimed under those laws."

This decision was made in 1808.

The case of *Ross v. Borland* was this:

Borland claimed by a patent dated October 1820, founded on an entry of 1807. The defendant claimed under a patent dated in 1819. The state court adjudged the younger patent the better title; it was coupled with the entry, giving the title date from 1807. This Court said

"By the Constitution, the judicial power shall extend to all cases arising under the Constitution or laws of the United States and treaties made or to be made under its authority, and where the construction of a statute of the United States is drawn in question and the decision is against the right or title set up under it, the decision may be reexamined and reversed or affirmed by this Court."

The Court held that, as both parties claimed under the act of Congress, the case of *Matthews v. Zane* governed.

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The point was more prominently presented in [Wilcox v. Jackson](#), 13 Pet. 509. A preemption claimant took old Fort Dearborne, at Chicago. He got a certificate from the register of the land office; on this he sued in the state circuit court in Illinois. A special verdict set out all the facts. The defendant was a military officer in the fort. The United States resisted the claim, because it was insisted, the fort was appropriated land. On the special verdict and on the broad facts referred to the court by the jury, the circuit court gave judgment for the defendant. A writ of error was prosecuted to the Supreme Court of Illinois. That court gave judgment for the plaintiff. Then the United States, in the name of Wilcox, prosecuted a writ of error to this Court under the 25th section of the Judiciary Act. We examined the cause precisely as the Supreme Court of Illinois had done -- that is, on the entire record presented by the special verdict. On what ground the court below had founded its judgment we only knew by its opinion produced to us. We reversed the judgment and rendered one for the defendant. We declared the entry on which the plaintiff founded his action void on a construction of the acts of Congress governing the case, following, to some extent, [Martin v. Hunter](#), 1 Wheat. 305, [14 U. S. 355](#) .

In this case, the Supreme Court of Alabama declared the grant of the plaintiff void because the land, as they supposed, had vested previously in the state. Had the bill of exceptions been turned into a special verdict, and there would not be a shade of difference in the cases. On this point there was no doubt entertained in [Pollard's Heirs v. Kibbe](#), 14 Pet. 53.

With this explanation, we will proceed to the merits, and first inquire whether the claim of the defendant can be sustained under his title from the purchasers of the Fort Charlotte property.

By the Act of April 1818, 3 Stat. 465, the president was authorized to cause Fort Charlotte to be abandoned, and the land on which it stood to be surveyed and laid

off into lots, with suitable streets and avenues, conforming as near as might be to the original plan of the City of Mobile, and on the survey's being completed, a plot thereof was to be returned to the Secretary of the Treasury and another to be furnished

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to the officer authorized to dispose of the lots by the president; the lots were to be advertised and sold as other public lands of the United States, and a patent was to be issued for each lot.

The lots were laid off, as also the streets. Water Street was located next the bay, and the lots nearest the water fronted that street on the west; the lots were neither surveyed nor sold east of Water Street. High tide flowed up to the street and in part covered it, but east of it, there was a wide flat, covered, from a foot to eighteen inches deep, when the tide was in, but when out, free from water to the channel of the Mobile River. This flat was easily reclaimed by embankments and filling up, and was obviously the ground on which a great part of the city would soon be located. Reclaiming lands from the water through that section of country is the common practice, and was deemed a matter of course in this instance. The purchasers of the Fort Charlotte lots west of Water Street, foreseeing the value of the property east of it, seized on the flooded lands on the assumption that they were entitled to go to the channel of the river as riparian owners of the front on the shore, and on this assumption sold to Matthews the property in dispute, lying east of Water Street. The flat has since been filled up, and there are several streets east of Water Street. It is manifest the United States only sold the lots laid off (for each of which a patent was issued), reserving the land next the channel of the river, in regard to which the Supreme Court of Alabama said

"The defendant does not rely upon his riparian proprietorship as entitling him to the land east of Water Street, nor indeed could he insist on it with success, as the Fort Charlotte lots were not bounded by the river, but had other fixed metes and bounds."

Nor was it possible that the lands seized upon and sold to Matthews could follow as an incident to the patent, for two additional reasons:

First. Had the purchase been to the River or Bay of Mobile in terms, the boundary would have been limited to high water mark; such is the rule (as I think), beyond controversy, in regard to all our territory acquired from Spain. So the Supreme Court of Alabama held in *Hagan v. Campbell*, 8 Porter 24; so it has held in other cases; it is the established law of property in that state.

Second. Water Street was reserved next the bay, and being public property, all the incidents

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of accretion (had any accrued) would have belonged to the public, and not to the owners of lots west of the intervening street. On this point, the great *Batture* case, at New Orleans, turned. See *Daubigny's Expose* 22, 58-59. Gravier claimed to have purchased to the River Mississippi, and the claim was resisted on the ground that he had only purchased to the highway lying on the bank of the river. The question was who should have the accretions? The case was decided on the fact that Gravier's purchase of the Jesuits' property was bounded by the bank, and that the road ran over his property as an easement. 2 Hall's Law Journ. 295; 5 *id.* 1 and 113; Angel on Tidewaters, App'x 197, Mr. Livingston's argument. The fact that Water Street was reserved to the United States is undisputed in this case, and is conclusive of any claim, east of the intervening street, in the purchasers of the Fort Charlotte lots. The defendants' title can therefore derive no aid from this source.

2. Did he derive title by force of the act of 1824? The court below held that the law was inoperative for want of power in Congress to pass title to the lands between Water Street and the channel of the river, and the corporation of the City of Mobile, being the plaintiff, could not recover (as actor) for want of title. That the United States acquired the title to lands flowed by tides by the treaty with Spain is, of course, admitted. That they had power to grant, up to the adoption of the Constitution of Alabama in 1819, is also admitted in the opinion under review. That

the Spanish King could grant lands under tidewater, is free from doubt, and the United States acquired by cession all his owners over the vacant soil. But the lands flowed by the tides are claimed for the State of Alabama as a part of her sovereign rights.

To comprehend the nature of the claim, some laws and facts must be stated. When the Alabama Territory, in 1819, proposed to form a state government, Congress passed an act (ch. 171) to authorize the formation of a state constitution, and proposed several conditions for the adoption of the convention which were adopted as part of the constitution, and amongst others it was agreed with the United States

"That the people of Alabama forever disclaim all right and title to the waste or unappropriated lands lying within the state, and that the same shall remain at the sole disposition of the United States. "

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"2. That all the navigable waters within the state shall forever remain public highways and free to the citizens of that state, and the United States, without any tax, duty or impost, or toll therefor, imposed by that state."

The Constitution of Alabama was presented to Congress for recognition, and on 14 December 1819, it was resolved

"That the State of Alabama shall be one and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever."

By the acceptance of the conditions on part of the United States, it is considered clear, says the Supreme Court of Alabama,

"That the navigable waters of this state have been dedicated to the common use of the people of the United States, but perhaps it may be considered as questionable what extent of soil is embraced by the dedication. We think it must be so much ground as is covered with water not only at low but at high tide."

The court then proceeds further to declare:

"That the act of 1824 vested no title in the corporation of Mobile, for the reason, that the State of Alabama was admitted into the Union on the footing of the original states. That the original states, by their colonial charters, had the right of property in bays and arms of the sea; this they retained, and it can only be interfered with by the federal government, under the right to regulate commerce, so far as to preserve a free navigation. The United States then may be said to claim for the public an easement for the transportation of merchandize &c.; in the navigable waters of the original states, while the right of property remains in the states."

"The original states possessing this interest in the waters within their jurisdictional limits, the new states cannot stand upon an equal footing with them as members of the Union if the United States still retain over their navigable waters any other right than is necessary to the exercise of its constitutional powers."

"To recapitulate, we are of opinion:"

"First, that the navigable waters within this state have been dedicated to the use of the citizens of the United States, so that it is not competent for Congress to grant a right of property in the same."

"Second, the navigable waters extend not only to low water, but embrace all the soil that is within the limits of high water mark."

"Third, by the acts of Congress

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regulating the survey and disposal of the public lands, the federal government has renounced the title to the navigable waters and the soil covered by them; consequently, the plaintiffs cannot recover, on the ground of a dedication to the uses of the city, under the act of 1824, which is an enactment of a later date."

"Fourth, the original states, in virtue of their royal charters, are entitled to the right of property in the navigable waters within their territory, while the public are only

entitled to an easement, to be provided for under that provision of the federal Constitution which authorizes Congress to regulate commerce, &c.; Alabama is admitted into the Union on an equal footing with the original states, and, of consequence, is entitled to the right of property in the tidewaters within its limits."

"Fifth, by the admission of Alabama into the Union, without a reservation of the right of property in the navigable waters, the state succeeded to all the right of the United States, except so far as it was reserved by the federal Constitution, in some of its grants, or its retention was necessary to enable the federal government to exercise its delegated powers. Having attained these conclusions, it will follow, that the act of 1824 is inoperative, and confers no title upon the plaintiffs."

That the original states acquired by the revolution the entire rights of soil, and of sovereignty, is most certain. And if it be true that Alabama was admitted on an equal footing in regard to the rights of soil with the original states, she can hold the high lands equally with the land covered by navigable waters, and so can nine other states equally hold, to the utter destruction of all claim to the lands heretofore indisputably recognized as belonging to the United States, as being a common fund of the Union.

The clause inserted into the Constitution of Alabama, reserving the rights of property to the United States as a compact with them, embraces lands under water as emphatically as those not covered with water; but if no stipulation saving the interest of the United States had been made, they would have had just as much right to their private property as an individual had to his. They hold, as a corporation, an individual title.

The Constitution of the United States provides

"That the Congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging

to the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular state."

This is the paramount law of the land, by force of which the public domain in Alabama was held and governed, and which needed no aid.

Neither did Congress cede it by stipulating that the navigable waters should be highways. That such rivers are common for the purposes of navigation and commerce, in the widest sense, is free from doubt; that Alabama has jurisdiction and power over them the same as the original states have over their navigable waters is equally clear. Yet it does not follow that the fee of the shores, banks, and soils under water is in the State of Alabama. The United States, as owner, can do no act to obstruct the free public use of the waters, more than a private owner of the soil under water could obstruct the navigation. The individual owner in fee of the bottom of a navigable river can cultivate and take out the shell fish or the minerals from the bed; nor can it be doubted that the United States may pursue veins of silver, tin, lead or copper under the bottom of a bay, the River Mississippi, or a great lake, although they could not impede in any degree their navigation. So may the assignees or lessees of the United States do the same.

Nor can it be otherwise in regard to the occupation of the lands between high and low water mark. The delta of the Mississippi, the greater part of East Florida, much of Alabama, and also of the State of Mississippi, have lands covered slightly with the flow of high water; these lands are subject to be redeemed by embankments; they amount to some millions of acres; many of them are of the best rice, indigo, and even sugar and cotton lands on this continent. Immense bodies of lands are flowed by the Great Lakes and subject to be redeemed, and yet more, many parts of the shores of the great River Mississippi, from the mouth of the Missouri to the ocean, are annually flowed by a tide of its own, and the lands are redeemed by levees from the water, until the vessels on its surface float above redeemed plantations that have been submerged for months every year, and that were submerged in 1819, when it is supposed the United States, by implication, ceded all the flowed lands within her limits to Alabama. Embankments to exclude the water are almost as common on the banks

of the Mississippi River, and in the delta of country embraced by its mouths, as are fences, in other parts of the country, to protect the crops from animals, and it is not in the reach of probability, or of belief, that Congress, by an oversight, surrendered all flowed lands to the states in which they lie, or that it was intended to cede to the new states the right to prohibit the construction of forts and defenses by the United States, on the public lands below the high water mark. I imagine it has never occurred to anyone that a purchase of the soil from the State of Louisiana was necessary, before works within the flow of tidewater could be constructed for the defense of the mouths of the Mississippi River. The idea is new, and the assumption leading to such a consequence, startling. It is certainly not so in Alabama. To cut off every pretense of the kind, Congress asked Alabama when she entered the Union to disclaim all right and title to the unappropriated and waste lands lying within the state, and that the same should remain at the sole disposition of the United States, and to this Alabama bound herself in the most solemn manner by her constitution. The claim set up for her on this ground, has, therefore, no just foundation.

The Supreme Court of Alabama also holds, that by the several acts of Congress, regulating the survey of the public lands, it is provided, those which border on navigable waters shall not include within their lines any part of the shore, and therefore the federal government has renounced the title to the navigable waters and the soil covered by them.

The United States has surveyed the shore of the tidewaters, Great Lakes, and certainly the banks of the great rivers, to a wide extent. From the first, shores and banks of rivers have been the boundaries of fractional sections; large quantities of land have been sold, and are now in the market, within the high water mark; many even on the Alabama River. On the Mississippi, most of the fractions are partially overflowed. Towns and villages on the banks of the rivers are partly within the high water mark, resting on patents from the United States, or on confirmed French and Spanish claims. Scarcely any are exempt from this supposed infirmity of title, when situated on tidewater, or on the larger rivers, and this is especially so, in

regard to the towns on the Mississippi, within the range of country sold out by the

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United States. Indeed, one town, at the mouth of the Ohio, is entirely below high water mark, and secured by embankment, so that it is idle to adduce the practice of the government as proof of abandonment. The United States reserved the lands under water and between high and low water mark in many instances for public use, and subject to grant by special acts of Congress.

That this is so, we need go no further than the City of Mobile for evidence. The British government made a grant to William Richardson in 1767, fronting on Mobile River, one hundred and forty poles, but bounded by the river. In 1807, the Spanish governor at Pensacola confirmed the same to John Forbes & Co., extending to the channel of the river. This grant was void, for want of authority in the governor to make it; the country having been ceded to the United States. [*Garcia v. Lee*](#), 12 Pet. 511. The act of 1819 (Land Laws 748) granted it by confirmation to John Forbes & Co. It lies at the city, is two hundred and sixty-three acres on the high land, and was adjudged a good title in *Hagan v. Campbell* by the Supreme Court of Alabama. 8 Porter 1-25. So, in [*Pollard v. Kibbe*](#), 14 Pet. 355. The cause came to this Court from the Supreme Court of Alabama. That Court held that the act of 1824, above referred to, conferred the better title on the defendant. This Court reversed the decision because the land in dispute was excepted from the act; and declared that the Private Act of 2 July, 1836, vested the title in fee in Pollard's heirs, the plaintiffs in the suit. They are now in as grantees, by force of the private act, under the sanction of our decision. The land lies east of Water Street, and was covered with water at high tide, the same as the land in controversy.

If Congress had no power to grant, the act of 1836 is void, and our decision wrong, as was that of the Supreme Court of Alabama in the same case, for they held the previous act of 1824 was a valid grant. Many of the flowed lands must have private owners. The old states are in the constant habit of granting them; in some, they are supposed to be of almost equal value with all the high lands; so it was confidently asserted in the argument of the cause of *Martin v. Waddell*, in regard

to New Jersey. The great oyster banks are certainly worth many millions of dollars in that state, and are fast becoming private property. If the

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United States cannot make titles, the new states must make them. The City of Mobile, on the riverfront, two squares deep, is without title, if it be true, that the act of 1824 is void for want of power in the United States to give title. I think it clear that the assumption of abandonment, because of the mode of surveying the public lands, cannot be maintained.

Nor has Alabama a better founded or more plausible claim to the lands between high and low water mark, on the ground that she was admitted into the Union on the equal footing with the original states. What was the condition of these states (the old thirteen) when they entered the Union? In Massachusetts (including what is now Maine), all the right of soil to lands, so far as the sea ebbed and flowed, by the colonial charter (to the extent of one hundred rods), was in the owners of the shores, and although the charter was annulled, the right was maintained as the common law of the state, at the revolution. The law and decisions are found in *Angel on Tide Waters* 108, and in *Dane's Abr.* 694, 698.

So, in New York, lands were held under tidewater, especially about the city, by individual titles. *Mayor v. Scott*, 1 Caines 543.

So it was in *West New Jersey* -- and to a great extent, in Pennsylvania and Maryland. The authorities will be found in *Martin v. Waddell*, decided at this term (post, [41 U. S. 367](#)). It was only in those states where the royal charters had been surrendered or forfeited to the Crown, and in which no grants to flowed lands had been made (if any such there were), that they devolved on the state as a consequence of the revolution. That mud flats were then held in private property, in every state of the Union, can hardly be doubted. If one was in this condition, it is enough for our purpose. In Massachusetts, they were all thus held. If Alabama came in "on the same footing" with Massachusetts; then all the mud flats may be held in private property also in Alabama.

The stipulation in the ordinance of 1787, and which is repeated in the resolution admitting Alabama, guaranteeing to the new state equal rights with the old, referred to the political rights and sovereign capacities left to the old states, unimpaired by the Constitution of the United States, and which were confirmed to them by that instrument. Whilst territories, the people inhabiting the

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countries now composing the new states, were subject to the will of Congress; unrestrained further than restrictions were imposed by the federal Constitution, and by compact, where the lands had been ceded by an original state, or by treaty, when acquired from a foreign nation. The power of Congress was, and now is, in the territories, almost absolute. From this power, the territory is withdrawn, to the same extent, on entering the Union, that the original states were exempt, when they formed the Constitution, having equal capacities of self-government with the old states, and equal benefits under the Constitution of the United States. This is the extent of the guarantee. That each and all of the states have sovereign power over their navigable waters, above and below the tide, no one doubts. And it is just as free from doubt, that the shores and banks of such waters, and the mud flats flowed by them, are the subject of private ownership. The property cannot be appropriated, to the obstruction or injury of the public use in the water, further than the state government permits, and if it is attempted, the obstruction may be abated as a nuisance. Whether the Bay of Mobile has been obstructed is not a matter of inquiry; no one pretends that it has been. The question is could the flat between high water mark and the channel of the river be granted by the individual owner, the United States? That it could is, I think, free from doubt, and that the act of 1824 is valid and passed the title to the corporation of Mobile unless the defendant's premises were excepted from the grant by the act.

The first section vests in the mayor and aldermen all the lands between high water mark and the channel of the river in front of the city that lie below North Boundary Street and above Church Street. From which general grant are excepted, by the second section, lots on which improvements had been made, lying east of Water Street and fronting the water lots, during the Spanish government, lying west of

Water Street. The improved property was, by the act, vested in the proprietor or occupant of the lot fronting and opposite on the west of the street, or in the purchaser of the new lot from the owner of the old one.

That the improvement must have been on the eastern and new water lot is, to my mind, plain from the reading of the act, so it has been held by the courts of Alabama, as appears by the case

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of Pollard's heirs; that this has been the construction of the act by the parties interested, is manifest, from all the controversies in regard to this property, and those at whose instance the act was passed are the best judges of its meaning.

[25 U. S. 12](#) Wheat. 200. The old lots were only referred to, to give locality to the new, in case of existing improvements east of Water Street. If the proprietor (which means owner) of the old lot had improved on the flat in front of it, then he was entitled, by the act, to an equal width, extending to the channel of the river, as compensation for his improvement. The Fort Charlotte lots were sold to a company, and they improved, before 1824, in front of six of them, and sold to Charles L. Matthews, who continued improving in 1823 and 1824, and has occupied the premises since; and he and his tenants defend the suit. The property was valued, for the purpose of taxation, at \$88,000 at the time of the trial; it was worth only \$4,000 in 1823, and it was proved the increased value resulted from the labor of Charles Matthews.

The circuit court charges the jury (amongst other charges)

"That if the lot specified in the patents 10, 11, 12, &c., were proved to have been bounded by high water mark at the time of the purchase, then they came within the terms of lots known under the Spanish government as water lots, as used in the act of Congress,"

and if it was proved that the lot claimed was east of Water Street and in front of the lots covered by the patents, and that it had been improved before the passage of the act, it was vested in the proprietors and occupants of the lots held under the

patents, and this although Water Street did intervene between the lots claimed and those held under the patents. The charge is deemed correct. The objection that the lands in front of the Fort Charlotte lots did not pass by the act of 1824, has nothing in it. The first and second sections refer to the same premises; the first covers all the lands between high water mark and the channel of the river and lying between Church Street to North Boundary Streets; of this there can be no doubt; and the exceptions in the second section apply to every part of the grant, made by the first. On these grounds, the judgment should be affirmed.

Judgment affirmed.

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