

**Barney Vs. Keokuk**

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**Court :** US Supreme Court

**Decided On :** 1876

**Appeal No. :** 94 U.S. 324

**Appellant :** Barney

**Respondent :** Keokuk

**Judgement :**

Barney v. Keokuk - 94 U.S. 324 (1876)

U.S. Supreme Court Barney v. Keokuk, 94 U.S. 324 (1876)

**Barney v. Keokuk**

**94 U.S. 324**

*ERROR TO THE CIRCUIT COURT OF THE UNITED*

*STATES FOR THE DISTRICT OF IOWA*

## **SYLLABUS**

1. In order that the passageways of commerce and navigation might be subject to public authority and control, the title to the land under water and to the shore below ordinary high water mark, in navigable rivers and arms of the sea, was, by

the common law, vested in the sovereign for the public use and benefit.

2. In England, tidewaters only were regarded as navigable. Hence the rule as to property was often expressed as applicable to them only, although the reason of it would make it apply to all navigable waters.

3. The form, instead of the substance, of the rule has been adopted in many of the states of this country, and in them the public title to the beds and shores of navigable streams is confined to tidewater.

4. From the same cause, the admiralty jurisdiction of the United states was for a long period restricted to tidewater.

5.. Since the decision of this Court in [\*The Geneses Chief\*](#), in 1851, 12 How. 443, declaring all the great lakes and rivers of the country navigable that are really such, there is no longer any reason for thus restricting the title of the state except as a change in that respect might interfere with vested rights and established rules of property.

6. In Iowa, the true rule has been adopted, and it is held that the bed of the Mississippi River and its banks to high water mark belong to the state, and that the title of the riparian proprietor extends only to that line.

7. This rule applies as well where the land was granted to bound upon the river generally (as in the case of the Half-breed Sac and Fox reservation), as where it was granted according to surveys run along the bank by a meandering line. Hence it applies in the City of Keokuk, which is on that reservation.

8. The public authorities therefore have the right in Iowa to build wharves and levees on the bank of the Mississippi below high water, and make other improvements thereon necessary to navigation or public passage by railways or otherwise without the consent of the adjacent proprietor and without making him compensation.

9. Although no permanent obstruction like a depot building can be erected on the streets of a town, it is held in Iowa that they may, by public authority,

be occupied by railway tracks without the consent of the adjacent proprietor and without compensation, whether the fee of the streets be in him (as in the City of Keokuk) or in a third person.

10. There is no substantial difference between streets in which the legal title is in private individuals and those in which it is in the public, as to the rights of the public therein.

This was an action of ejectment brought by the plaintiff against the City of Keokuk and several railroad companies and a steam packet company, to recover the possession of certain premises occupied by them with railroad tracks, buildings, and sheds on the bank of the Mississippi River in the city aforesaid. The plaintiff in his petition described the premises as follows:

"All the land lying and being in front of lots 5 and 6, in block 3, in the City of Keokuk, Lee County, Iowa, and extending from the front line of said lots to the Mississippi River the full width of said lots."

The petitioner states that he is the owner in fee simple of the premises, subject only to the right of the public to use that part of them embraced within the limits of Water Street as a public highway, and is entitled to possession as against the defendants, that the City of Keokuk claims to be the proprietor, and the other defendants occupy as its tenants.

The city, by its answer, admitting that the plaintiff is owner of lots 5 and 6, in block 3, states, in substance, that all the land in front of them down to the Mississippi River was in 1840 dedicated to public use as a street and levee, and as such has been used and improved ever since under the possession and control of the city, by virtue of its charter and has, at its expense, been extended out about two hundred and fifty feet by depositing earth and stone in the river in order to make the wharf and levee more convenient, safe, and useful. Other defenses were interposed, which it is not necessary to specify.

The other defendants claim under authority of the city.

The cause was tried by the court, and a special finding of the facts and the law was made.

From these findings, it appears that the City of Keokuk is situated upon a tract of land lying between the Mississippi and

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the Des Moines Rivers, in Lee County, Iowa, known as the "Half-breed Sac and Fox reservation," which, by treaty with the Sac and Fox tribes of Aug. 4, 1824, 7 Stat. 229, was granted to the half-breeds of those tribes, to be by them held in the same manner as other Indian titles are held. The fee, with power of alienation, was subsequently vested in them. Numerous parties became interested in the tract by purchase, and a town was laid out and lots sold as early as 1837, but no regular town plat, having the requisites of the town plat law of 1839, seems to have been filed or recorded in the recorder's office of the county. One Galland, who seems to have been a part owner, made out such a plat, and filed it, but there is no proof that he had authority for his acts from the other proprietors. In 1840, suit for a partition of the tract was commenced, and regular proceedings were had resulting, in October, 1841, in a final decree of partition, made according to the report of commissioners and embodying a plat or map of the Town of Keokuk. Said lots 5 and 6, in block 3, are exhibited on this map and were drawn by the parties under whom the plaintiff claims title. In its findings of fact, the court sets forth portions of the decree, and, amongst other things, the following:

"In describing each of said shares, the commissioners appointed by the court say, among other things: 'The lots upon Water Street include all the land in front of them to the Mississippi River.'"

"And, after describing all the shares, they say:"

" In describing the boundary of the town lots situated on Water Street in the Towns of Keokuk and Nashville, we have made them to include all the land in front of

them to the Mississippi River, by which we mean in front of them, facing the river, parallel with the streets running from Fourteenth Street to Water Street."

"And in describing the plat of Keokuk, the commissioners' report, among other things, says:"

" Plat of Keokuk, in the County of Lee, Territory of Iowa, upon the half-breed tract, the outlines of which were designated and marked by Jenefer T. Spring in his survey as town reservation, . . . Water Street is of unequal and irregular width at the points where the dotted lines pass across the same."

" The street is of the width in feet as is represented by the figures set on said lines. . . . Water Street extends the whole front on river side of the town, or from the intersection of Orleans Street with the

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Mississippi River, down the right bank of the river, with the meanders thereof, to the intersection of Cedar Street with the Mississippi River."

The Galland map was produced on the trial, also a fragment of another map, which bears date August, 1840, found in the recorder's office. By these as well as the map embodied in the decree, the space between the front of the lots and the river is designated as Water Street, and appears to have been, at that time, about one hundred feet wide.

As to the occupation of Water Street in front of the plaintiff's lots, and its extension on the river side, the court found:

"The City of Keokuk has, since the year 1865, caused the space originally covered by water on the river side of Water Street, in front of said lots, to be filled in with earth and stone for a space of over two hundred feet beyond the original water line to ordinary high water mark, and about three hundred and fifty-two feet to low water mark, said filling having been done by said city. That part of the space between the front of said lots and the river at ordinary high water mark is occupied as follows:"

"1. By the freight house or depot of the defendant, the Keokuk and Des Moines Railway Company, . . . a permanent and substantial frame building. It has been standing a good many years, . . . is used for storing freight by said railroad company, is two hundred and three feet long and twenty feet wide, and one story high, and covers the whole of the front of said lots 5 and 6, block 3."

"2. By the railroad tracks used by the defendants, the Keokuk and Des Moines Railway Company, the Mississippi Valley and Western Railway Company (now St. Louis, Keokuk, and Northwestern Railway Company), the Toledo, Peoria, & Warsaw Railway Company, and the Toledo, Wabash, and Western Railway Company. Altogether, there are ten railroad tracks between the front of said lots and high water mark."

"3. By the building known as the Keokuk Northern Line Packet depot, . . . a permanent and substantial building, one hundred feet long and fifty feet wide, formed of substantial timbers and about fourteen or fifteen feet high. It was built by said packet company for its own use in carrying on its business as a common carrier by steamboats on the Mississippi River, and is used by it in connection with its transportation business for the temporary storage of freight

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carried or to be carried by said company, and also for the business offices of said company at Keokuk. Said building has five large doors through which teams are driven in delivering or receiving freight, and which doors are closed at night. The building is one and a half stories high, with office rooms on second floor, and the ground floor is of heavy two-inch lumber laid on sills about two feet apart."

The map shows that this building stands on the newly made ground below original high water.

The court further found:

"That none of the defendants so occupying said ground, nor the city, has caused any condemnation, nor asked or obtained the permission of plaintiff, nor paid him

any damages in compensation for the use of said ground. But they all and severally hold the same under the license or permission of the City of Keokuk only."

As conclusions of law under the foregoing facts, the court found:

"1. There was no completed statutory dedication of Water Street under the town plat act of 1839 prior to the decree of partition, for the reason, among others, that all of the proprietors, *i.e.*, the half-breed owners and their grantees, did not join in making a plat, or in selling lots according to the Galland or other plat. What was done prior to the decree was at most a common law dedication by those who platted or recognized the plat, and it was therefore competent for the decree of partition to provide, as it did, 'that the lots on Water Street should include all the land in front of the lots to the Mississippi River.'"

This leaves the fee of the land constituting Water Street in the plaintiff, subject to the rights of the public.

"2. The additional ground made by filling in Water Street outside of the original water line partakes of the same character as the original street. The fee of the newly made ground in front of the plaintiff's lots is in the plaintiff, but it is subject to the same public uses as the original street."

"3. Under the law of Iowa, as construed by the supreme court of the state, railroad companies, certainly, with the assent of the municipal authorities, have the right to lay down their tracks in the streets of a city, whether they were dedicated under the statute or as at common law -- that is, whether the fee is in the city or in the adjoining proprietor. "

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"4. This, however, does not give the railway company, even with the assent of the municipality, the right to erect a permanent and substantial depot building in the street."

"5. In view of the location and situation of Water Street and the presumed intention of the dedication thereof to the public, and guided by the view of the supreme court of the state in this regard in *Haight v. City of Keokuk*, and the power of the city as to wharves, and the use of Water Street for that purpose, given to the City of Keokuk by the act of the legislature of 1853, Water Street may be used for levee and wharf purposes under municipal management and control."

"The building erected by the packet company under the contract with the city, of March 28, 1870, for the purposes therein mentioned, for the receipt and temporary shelter and storage of goods, &c.;, subject to municipal control, is a reasonable use of Water Street as a wharf or levee as incidental to the requirements of navigation and shipping, and does not infringe the plaintiff's rights."

The provisions of the charter of the City of Keokuk, which bear upon the case, are set out in the opinion of the Court.

There was a judgment for the defendants, and the plaintiff sued out this writ of error.

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MR. JUSTICE BRADLEY, after stating the case, delivered the opinion of the Court.

We agree with the court below that the dedication of the streets of Keokuk was a dedication at common law, and not under the statute, and that, in making this dedication, the original proprietors of the tract reserved the title to the soil in the street, particularly in Water Street, and that this title went with the several lots fronting on the street, and extended to the Mississippi River. Whether, under the laws of Iowa, it also attached to the new ground formed by filling in upon the bed of the river is not so clear. It appears to be the settled law of that state that the title of the riparian proprietors on the banks of the Mississippi extends only to ordinary high water mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the state. This is also the common law with regard

to navigable waters, although, in England, no waters are deemed navigable except those in which the tide ebbs and flows. In this country, as a general thing, all waters are deemed navigable which are really so; and especially it is true with regard to the Mississippi and its principal branches. The question as to the extent of the riparian title was elaborately discussed in the case of *McManus v. Carmichael*, 3 Ia. 1. The above conclusion was reached, and has always been adhered to in that state. *Haight v. City of Keokuk*, 4 Ia. 199; *Tomlin v. Dubuque Railroad Co.*, 32 *id.* 106.

The peculiar origin of the title to the "Half-breed Sac and Fox reservation" in the peninsula lying between the Rivers Mississippi and Des Moines did not take it out of the general rule. This was so held in *Haight v. City of Keokuk, supra*.

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That case was nearly identical with the present as respects the claim of the adjoining proprietor to the title of the land in Water Street and on the river bank. Haight contested the right of the city to control the wharf along said street, claiming, by virtue of his fee simple title, the right to erect a private wharf and to receive the emoluments thereof. His claim was overruled, and on the question of title the court said:

"According to the case of *McManus v. Carmichael*, then, Haight owns the soil to high water only. But here is interposed the argument that this land is not held under the United states by the usual manner of grants -- that is, by patent, after a survey, and described by section, town, and range. This is true, but yet it will not affect the extent of the complainant's right. The grant to the half-breeds was to them as persons and not as a political body. The political jurisdiction remained in the United states. Had the grant been to them as a political society, it would have been a question of boundary between nations or states, and then the line would have been the *medium filum aquae*, as it is now between Iowa and Illinois. . . . The grant was to them as individuals -- as tenants in common -- and is to be construed as any other grant or sale to individuals."

The court then goes on to refer to various cases to show that the government cannot convey the land between high and low water on the public or navigable rivers, but that this space belongs to the state, citing *Mayor of Mobile v. Eslava*, 9 Port. 578; [41 U. S. 16](#) Pet. 234; [Pollard's Lessee v. Hagan](#), 3 How. 212.

It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each state decides for itself. By the common law, as before remarked, such additions to the land on navigable waters belong to the crown; but as the only waters recognized in England as navigable were tidewaters, the rule was often expressed as applicable to tidewaters only, although the reason of the rule would equally apply to navigable waters

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above the flow of the tide, that reason being, that the public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience. The confusion of navigable with tidewater, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas, and under the like influence it laid the foundation in many states of doctrines with regard to the ownership of the soil in navigable waters above tidewater at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several states themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in [Martin v. Waddell](#), 16 Pet. 367, [Pollard's Lessee v. Hagan](#), 3 How. 212, and [Goodtitle v. Kibbe](#), 9 How. 471. These cases related to tidewater, it is true, but they enunciate principles

which are equally applicable to all navigable waters. And since this Court, in the case of *The Genesee Chief*, 12 *id.* 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are in the strictest sense entitled to the denomination of navigable waters and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this Court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the states in which the lands were situated. In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject.

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The exhaustive examination of this question by the Supreme Court of Iowa in 1856 in the case of *McManus v. Carmichael*, 3 Ia. 1, really leaves nothing to be said. The precise point was directly before the court -- namely whether the title of the riparian proprietor extends below high water, in the Mississippi River; and it was decided that it does not. This decision has been followed by subsequent cases, especially the cases of *Haight v. City of Keokuk*, 4 *id.* 199; and *Tomlin v. Dubuque Railroad Co.*, 32 *id.* 106.

But whatever may be the true rule on this vexed question, and whether we rightly comprehend the Iowa decisions or not, we have no doubt that the city authorities of Keokuk, representing the public, had the right to widen and improve Water Street to any extent on the river side, by filling in below high water, and building wharves and levees for the public accommodation. By the charter of the city, passed Dec. 13, 1848, it was provided:

"SEC. 14. That the city council shall have power . . . to establish and constitute landing places, wharves, docks, and basins in said city, at or on any of the city

property, and fix the rates of landing, wharfage, and dockage of all steamboats, boats, rafts, and other watercrafts, and of all goods, wares, merchandise, produce, and other articles that may be moored at, landed on, or taken from any landing, wharf, dock, or basin belonging to said city."

"SEC. 16. That the city council shall have power . . . to license and establish ferries across the Mississippi River from said city to the opposite shore, to fix the rates of the same. . . ."

"SEC. 22. The city council shall have exclusive power to establish and regulate the grade of wharves, streets, and banks along the Mississippi River, within the corporate limits of said city."

And by a supplement, passed Jan. 22, 1853, it was provided:

"SEC. 7. The said City of Keokuk shall have the power to establish and regulate wharf or wharves in said city, and more particularly to use the whole of Water Street for said purpose. . . ."

Although it should be conceded that the title of the plaintiff attached to the ground reclaimed and filled in by the city outside of the original high water, it was a bare legal title, subject to the public easement and use, not only for street purposes,

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but for the purposes of wharves, landings, and levees. A street bordering on the river, as this did, according to the plan of the town adopted by the decree of partition, must be regarded as intended to be used for the purposes of access to the river, and the usual accommodations of navigation in such a connection. This subject is discussed in Haight's case, where the court said:

"One further thought, presented by the petitioner, should be noticed. It is that if this ground is dedicated to the public, it is as a street only, and that if his rights are subject to the public uses, they are so subject to the use of it only as a street or highway, and not as a wharf, and that it is named and called a street and not a wharf. He claims that the object of a street is for passage, for traveling over, and

not to land or deposit goods upon. This is taking a very narrow and close view. The streets of a town are fairly subject to many purposes to which a highway in the country would not be. More regard should be paid to the object and purpose than to the name. The ways of a town would be of comparatively little use if the citizens and traders could not deposit their goods in them temporarily, in their transit to the storehouse, and so of other things, and so it is of the wharf. If goods cannot be deposited upon it in preparation for shipping them, or unladen upon it from boats and vessels, why is a town located near the river upon land which, in other respects, is inconvenient, and is expensive to grade, to bring into form and order, and to keep in repair, instead of upon an even prairie, requiring no such trouble and outlay?"

On the general question as to the rights of the public in a city street, we cannot see any material difference in principle with regard to the extent of those rights, whether the fee is in the public or in the adjacent landowner, or in some third person. In either case, the street is legally open and free for the public passage, and for such other public uses as are necessary in a city, and do not prevent its use as a thoroughfare, such as the laying of water pipes, gas pipes, and the like, and, according to the laws of Iowa (which must be taken to govern the case), it may be occupied by those improved iron ways for public passage which modern skill has devised, and which the advance of general improvement requires. It cannot be

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denied that horse railroads have contributed immensely to the public convenience in furnishing a rapid, cheap, and convenient means of communication between different parts of large towns and have greatly promoted their increase and growth in wealth and population. By the accommodation which they afford, the citizen can reside miles from his shop or place of business. Though attended with some inconveniences, they have greatly added to the efficiency of the public thoroughfares and have more than doubled their capacity for travel and transportation.

So other railways coming to cities add greatly to their population and wealth, and furnish greatly increased facilities of communication with other portions of the country.

In Iowa, by the act called the "Right of Way Act," found in the Code of 1851, sec. 735, it is declared that:

"The county court may also grant licenses for the construction of any canal or railroad, or any macadamized or plank road, or any other improvement of a similar character, or any telegraph line, to keep the same up for a period not exceeding fifty years, and to use for this purpose any portion of the public highway or other property, public or private, if necessary, *provided* such use shall not obstruct the highway."

Iowa Revision of 1860, p. 206.

By the construction given to this act by the supreme court of the state, railroads, especially when located and constructed under municipal regulation and control, are not regarded as obstructions to a highway in the legal sense, nor as creating, when laid thereon, any injury to the proprietors of the adjacent lands, for which they are entitled to compensation. The cases referred to by the circuit court (which are given below) abundantly demonstrate this conclusion, and no elaborate discussion of the subject is required from us. See *Milburn v. Cedar Rapids*, 12 Ia. 249, 260; *Clinton v. Cedar Rapids & Mo. Railroad Co.*, 24 *id.* 455; *Tomlin v. Dubuque Railroad Co.*, 32 *id.* 106; *Chicago, Newton & S. W. Railroad Co.*, 36 *id.* 299; *Cook v. City of Burlington, id.*, 357; *Clinton v. Clinton & Lyon Railroad Co.*, 37 *id.* 61; *Ingraham v. Chicago, Dubuque & Minn. Railroad Co.*, 38 *id.* 669.

The cases cited, it is true, are generally those in which the fee of the streets was in the cities respectively, as is commonly

the case in Iowa. But in *Haight's Case*, in 4 Ia., the very street now in question was under consideration, and the plaintiff had the same title as that of the plaintiff in the present case, and the principles laid down in all the later cases apply as well where the title of the soil is in the adjacent proprietor as where it is in the city or a third party. And, as before remarked, we can perceive no well founded difference in principle between the one and the other as to the rights of the public.

The circuit court is clearly correct, however, in holding that the construction of a permanent freight depot in Water Street was an unauthorized and improper occupation of that street. It was a total obstruction of the passage, and this, as we have said, cannot be created or allowed. It is subversive of and totally repugnant to the dedication of the street, as well as to the rights of the public.

We also concur in the view taken by the circuit court as to the reasonableness of the erection of the packet depot in the place where it is located. It is a necessary adjunct to the steamboat landing, and the use of the wharf and levee for the purposes of navigation, and does not occupy any portion of the original street. It is a public use of the river bank, which is absolutely necessary to the use of the river as a navigable water. The erection of levees, wharves, and other accommodations on the very ground appropriated to such purposes by the original plot of the town, or, stronger still, on ground made and reclaimed from the bed of the river adjoining the street thus appropriated, and in enlargement thereof, is clearly within the powers of the city authorities as laid down in the cases referred to.

*Judgment affirmed.*

MR. JUSTICE MILLER did not sit in the case, nor take any part in deciding it.