

Handy v. Anthony.

\*JUDGMENT.—This cause came on to be heard, on the transcript of the record of the circuit court for the district of West Tennessee, and was argued by counsel: On consideration whereof, this court is of opinion, that the circuit court for the district of West Tennessee erred, in instructing the jury, that they might use the demarcation, in the bill of exceptions and opinion of the court mentioned, for the purpose of ascertaining the land contained in the grant under which the defendant claimed: It is, therefore, adjudged and ordered, that the judgment of the said circuit court in this case be, and the same is, hereby reversed and annulled. It is further ordered that the said cause be remanded to the said circuit court, with directions to issue a *venire facias de novo*.

HANDLY's Lessee v. ANTHONY *et al.*

*State boundary.*

The boundary of the state of Kentucky extends only to low-water mark on the western or north-western side of the river Ohio; and does not include a peninsula or island, on the western or north-western bank, separated from the main land by a channel or bayou, which is filled with water, only when the river rises above its banks, and is, at other times, dry.

When a river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when as in this \*case, one state (Virginia) is the original proprietor, and grants the territory on \*375] one side only, it retains the river within its own domain, and the newly-erected state extends to the river only, and the low-water mark is its boundary.<sup>1</sup>

ERROR to the Circuit Court of Kentucky.

March 4th, 1820. This cause was argued by the *Attorney-General*, for the plaintiff, and by *B. Hardin*, for the defendants in error.

March 14th. MARSHALL, Ch. J., delivered the opinion of the court.—This was an ejectment, brought in the circuit court of the United States for the district of Kentucky, to recover land which the plaintiff claims under a grant from the state of Kentucky, and which the defendants hold under a grant from the United States, as being part of Indiana. The title depends upon the question, whether the lands lie in the state of Kentucky, or in the state of Indiana?

At this place, as appears from the plat and surveyor's certificate, the Ohio turns its course, and runs southward, for a considerable distance, and then takes a northern direction, until it approaches within less than three miles, as appears from the plat, of the place where its southern course commences. A small distance above the narrowest part of the neck of land which is thus formed, a channel, or what is commonly termed in that country, a bayou, makes out of the Ohio, and enters the same river a small distance below the place where it resumes its westward course. This channel or bayou is about nine miles by its meanders, three miles and a half in a straight line, and from four to five poles wide. The circuit made by the river \*376] appears to be from \*fifteen to twenty miles. About mid-way of the channel, two branches empty into it, from the north-west, between six and seven hundred yards from each other; the one of which runs along

<sup>1</sup> Howard v. Ingersoll, 13 How. 381; Alabama v. Georgia, 23 Id. 505.

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the channel at low water, eastward, and the other westward, until they both enter the main river. Between them is ground, over which the waters of the Ohio do not pass, until the river has risen about ten feet above its lowest state. It rises from forty to fifty feet, and all the testimony proves, that this channel is made by the waters of the river, not of the creeks which empty into it. The people who inhabit this peninsula or island, have always paid taxes to Indiana, voted in Indiana, and been considered as within its jurisdiction, both while it was a territory, and since it has become a state. The jurisdiction of Kentucky has never been extended over them

The question whether the lands in controversy lie within the state of Kentucky or of Indiana, depends chiefly on the land-law of Virginia, and on the cession made by that state to the United States.

Both Kentucky and Indiana were supposed to be comprehended within the charter of Virginia, at the commencement of the war of our revolution. At an early period of that war, the question whether the immense tracts of unsettled country which lay within the charters of particular states, ought to be considered as the property of those states, or as an acquisition made by the arms of all, for the benefit of all, convulsed our confederacy, and threatened its existence. It was, probably with a view to this question that Virginia, in 1779, when she opened her \*land-office, prohibited the location or entry of any land "on the north-west side of the river Ohio." [377]

In September 1780, congress passed a resolution, recommending "to the several states, having claims to waste and unappropriated lands in the western country, a liberal cession to the United States, of a portion of their respective claims, for the common benefit of the Union." And in January 1781, the commonwealth of Virginia yielded to the United States "all right, title and claim which the said commonwealth had to the territory north west of the river Ohio, subject to the conditions annexed to the said act of cession." One of these conditions is, "that the ceded territory shall be laid out and formed into states." Congress accepted this cession, but proposed some small variation in the conditions, which was acceded to; and in 1783, Virginia passed her act of confirmation, giving authority to her members in congress to execute a deed of conveyance. It was intended, then, by Virginia, when she made this cession to the United States, and most probably when she opened her land-office, that the great river Ohio should constitute a boundary between the states which might be formed on its opposite banks. This intention ought never to be disregarded, in construing this cession.

At the trial, the counsel for the defendants moved the court to instruct the jury, 1. That the lessor of the plaintiff cannot recover, the land in contest not being at any time subject to the laws of Kentucky, but to those of Indiana. \*2. Because the evidence does not show that the land is [378] within the limits of the state of Kentucky. The court instructed the jury, that, admitting that the western and north-western boundary of Kentucky included all the islands of the Ohio, and extended to the western and north-western bank of the Ohio, yet no land could be called an island of that river, unless it was surrounded by the waters of the Ohio at low-water mark; and to low-water mark only, on the western or north-western side of the Ohio, did the boundaries of the state of Kentucky extend. The counsel for the plaintiff excepted to this opinion, and then moved the court to instruct the jury, that if they found the land in question was covered by

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the grant to the lessor of the plaintiff, and that it was surrounded by a regular water-channel of the Ohio on the north-western side, and was, at the middle and usual state of the water in the Ohio, embraced and surrounded by the water of the Ohio, flowing in said channel, it was an island, and within the state of Kentucky. But the court refused to give the instructions aforesaid, but instructed the jury, that if the water did not run through said channel at low water, but left part thereof dry, it was not an island, nor within the state of Kentucky. To this opinion, also, the counsel for the plaintiff excepted. The jury found a verdict for the defendants, on which the court rendered judgment; which judgment is now before this court on a writ of error.

The two exceptions present substantially the same questions to the court, and may, therefore, be considered \*together. They are, whether <sup>\*379]</sup> land is properly denominated an island of the Ohio, unless it be surrounded with the water of the river, when low? and whether Kentucky was bounded on the west and north-west by the low-water mark of the river, or at its middle state? or, in other words, whether the state of Indiana extends to low-water mark, or stops at the line reached by the river when at its medium height?

In pursuing this inquiry, we must recollect, that it is not the bank of the river, but the river itself, at which the cession of Virginia commences. She conveys to congress all her right to the territory "situate, lying and being to the north-west of the river Ohio." And this territory, according to express stipulation, is to be laid off into independent states. These states, then, are to have the river itself, wherever that may be, for their boundary. This is a natural boundary, and in establishing it, Virginia must have had in view the convenience of the future population of the country.

When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one state is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created state extends to the river only. The river, however, is its boundary. "In case of doubt," says Vattel, "every country, lying upon a river, is presumed to have no other <sup>\*380]</sup> \*limits but the river itself; because nothing is more natural, than to take a river for a boundary, when a state is established on its borders; and wherever there is a doubt, that is always to be presumed which is most natural and most probable." "If," says the same author, "the country which borders on a river, has no other limits than the river itself, it is in the number of territories that have natural or indetermined limits, and it enjoys the right of alluvion." (Lib. 1, ch. 22, § 268.)

Any gradual accretion of land, then, on the Indiana side of the Ohio, would belong to Indiana, and it is not very easy to distinguish between land thus formed, and land formed by the receding of the water. If, instead of an annual and somewhat irregular rising and falling of the river, it was a daily and almost regular ebbing and flowing of the tide, it would not be doubted, that a country bounded by the river would extend to low-water mark. This rule has been established by the common consent of mankind. It is founded on common convenience. Even when a state retains its dominion over a river which constitutes the boundary between itself and another

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state, it would be extremely inconvenient, to extend its dominion over the land on the other side, which was left bare by the receding of the water. And this inconvenience is not less, where the rising and falling is annual, than where it is diurnal. Wherever the river is a boundary between states, it is the main, the permanent river, which constitutes that boundary ; and the mind will find \*itself embarrassed with insurmountable difficulty, in attempting to draw any other line than the low-water mark. [\*381]

When the state of Virginia made the Ohio the boundary of states, she must have intended the great river Ohio, not a narrow bayou into which its waters occasionally run. All the inconvenience which would result from attaching a narrow strip of country, lying on the north-west side of that noble river, to the states on its south-eastern side, would result from attaching to Kentucky, the state on its south-eastern border, a body of land lying north-west of the real river, and divided from the main land only by a narrow channel, through the whole of which the waters of the river do not pass, until they rise ten feet above the low-water mark.

The opinions given by the court must be considered in reference to the case in which they were given. The sole question in the cause respected the boundary of Kentucky and Indiana ; and the title depended entirely upon that question. The definition of an island, which the court was requested to give, was either an abstract proposition, which it was unnecessary to answer, or one which was to be answered according to its bearing on the facts in the cause. The definition of an island was only material, so far as that definition might aid in fixing the boundary of Kentucky. In the opinion given by the court, on the motion made by the counsel, for the defendants, they say, that "no land can be called an island of the Ohio, unless it be surrounded by the waters of that river at low-water mark." We \*are not satisfied, that this definition is incorrect, as respected the subject before the court ; but it is rendered unimportant, by the [\*382] subsequent member of the sentence, in which they say, "that to low-water mark only, on the western and north-western side of the Ohio, does the state of Kentucky extend."

So, in the motion made by the counsel for the plaintiff, the court was requested to say, that if the waters of the Ohio flowed in the channel, in its middle and usual state, it was not only an island, but "within the state of Kentucky." If the land was not within the state of Kentucky, the court could not give the direction which was requested. The court gave an instruction substantially the same with that which had been given on the motion of the defendant's counsel.

If it be true, that the river Ohio, not its ordinary bank, is the boundary of Indiana, the limits of that state can be determined only by the river itself. The same tract of land cannot be sometimes in Kentucky, and sometimes in Indiana, according to the rise and fall of the river. It must be always in the one state or the other. There would be little difficulty in deciding, that in any case other than land which was sometimes an island, the state of Indiana would extend to low-water mark. Is there any safe and secure principle, on which we can apply a different rule to land which is sometimes, though not always, surrounded by water ?

So far as respects the great purposes for which the river was taken as the boundary, the two cases \*seem to be within the same reason, [\*383]

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and to require the same rule. It would be as inconvenient to the people inhabiting this neck of land, separated from Indiana only by a bayou or ravine, sometimes dry for six or seven hundred yards of its extent, but separated from Kentucky by the great river Ohio, to form a part of the last-mentioned state, as it would for the inhabitants of a strip of land along the whole extent of the Ohio, to form a part of the state on the opposite shore. Neither the one nor the other can be considered as intended by the deed of cession.

If a river, subject to tides, constituted the boundary of a state, and at flood, the waters of the river flowed through a narrow channel, round an extensive body of land, but receded from that channel at ebb, so as to leave the land it surrounded at high water, connected with the main body of the country; this portion of territory would scarcely be considered, as belonging to the state on the opposite side of the river, although that state should have the property of the river. The principle, that a country bounded by a river, extends to low-water mark, a principle so natural, and of such obvious convenience as to have been generally adopted, would, we think, apply to that case. We perceive no sufficient reason, why it should not apply to this.

The case is certainly not without its difficulties; but in great questions which concern the boundaries of states, where great natural boundaries are established, in general terms, with a view to public convenience, and the avoidance of controversy, we think, the great object, where it can be distinctly perceived, \*ought not to be defeated, by those technical perplexities which may sometimes influence contracts between individuals. The state of Virginia intended to make the great river Ohio, throughout its extent, the boundary between the territory ceded to the United States and herself. When that part of Virginia, which is now Kentucky, became a separate state, the river was the boundary between the new states erected by congress in the ceded territory, and Kentucky. Those principles and considerations which produced the boundary, ought to preserve it. They seem to us to require, that Kentucky should not pass the main river, and possess herself of lands lying on the opposite side, although they should, for a considerable portion of the year, be surrounded by the waters of the river flowing into a narrow channel.

It is a fact of no inconsiderable importance in this case, that the inhabitants of this land have uniformly considered themselves, and have been uniformly considered, both by Kentucky and Indiana, as belonging to the last-mentioned state. No diversity of opinion appears to have existed on this point. The water on the north-western side of the land in controversy, seems not to have been spoken of, as a part of the river, but as a bayou. The people of the vicinage, who viewed the river in all its changes, seem not to have considered this land as being an island of the Ohio, and as a part of Kentucky, but as lying on the north-western side of the Ohio, and being a part of Indiana.

\*The compact with Virginia, under which Kentucky became a state, \*385] stipulates, that the navigation of, and jurisdiction over, the river, shall be concurrent between the new states, and the states which may possess the opposite shores of the said river. This term seems to be a repetition

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of the idea under which the cession was made. The shores of a river border on the water's edge.

Judgment affirmed, with costs.

## LA AMISTAD DE RUES : ALMIRAL, Libellant.

## Neutrality.—Restoration.—Damages.

*Quare?* Whether, where a prize has been taken by a privateer fitted out in violation of our neutrality, the vessels of the United States have a right to re-capture the prize and bring it into our ports for adjudication?

In cases of marine torts, the probable profits of a voyage are not a fit rule for the ascertainment of damages.

In cases of violation of our neutrality, by any of the belligerents, if the prize comes voluntarily within our territory, it is restored to the original owners by our courts; but their jurisdiction for this purpose, under the law of nations, extends only to restitution of the specific property, with costs and expenses, during the pendency of the suit, and does not extend to the infliction of vindictive damages, as in ordinary cases of marine torts.

Where the original owner seeks for restitution in our courts, upon the ground of a violation of our neutrality by the captors, the *onus probandi* rests upon him, and if there be reasonable doubt respecting the facts, the court will decline to exercise its jurisdiction.

APPEAL from the District Court of Louisiana. \*This was the case of a Spanish ship, captured by the Venezuelan privateer La Guerriere, on the high seas, in November 1817, and afterwards forcibly taken possession of, near the mouth of the Mississippi, by a detachment from the United States ketch Surprise, and brought into the port of New Orleans.

A libel was there filed in the district court, in behalf of the original Spanish owners, claiming restitution of the property, upon the ground (among other things), that the privateer had augmented her crew in the United States, during the cruise, and before the capture. A claim was given in by the original captors, denying the allegations in the libel, and praying restitution of the property, as lawfully captured. At the hearing in the district court, the cause turned almost entirely upon the question of the augmentation of the crew, and the court decreed restitution of the property to the original Spanish owners, with damages, which were ordered to be ascertained by assessors; the assessors reported damages as follows:

To the owners of the ship, for loss by plunder,	\$625 00
And to the owners of the cargo, for loss of market by the capture,	4000 00
and loss by plunder,	575 00
In the whole,	<hr/> \$5200 00

The report was confirmed by the court, and damages decreed accordingly. From this decree, the captors appealed to this court.

\*March 8th. *C. J. Ingersoll*, for the appellants, argued upon the facts, to show that there was no sufficient evidence to prove that the privateer had augmented her force in the ports of the United States. He insisted, that the burden of proof to establish this fact rested with the original Spanish owners, who claimed restitution upon it; and that they had not shown, beyond all reasonable doubt, to the satisfaction of the court,