

JOSHUA KENNEDY'S EXECUTORS ET AL., PLAINTIFFS IN
ERROR, v. LESSEE OF JONATHAN HUNT, JOHN HAGAN
ET AL., DEFENDANTS IN ERROR.

Forbes and Company obtained a grant of land in 1807 from Morales, Intendant-General under the Spanish government, which land was adjacent to Mobile, in West Florida. This grant purported to be, in part, the confirmation of a concession granted in 1796 and surveyed in 1802. The survey terminated at high-water-mark upon the river.

The grant of 1807 included the land between the then bank of the river and the high-water-mark of 1802.

This grant of 1807 was excepted from the operation of the act of Congress passed on the 26th of March, 1804, which annulled all Spanish grants made after the 1st of October, 1800, and was recognized as a valid grant by the act of 3d March, 1819.

An act of March 2d, 1829, confirmed an incomplete Spanish concession which was alleged to draw after it, as a consequence, certain riparian rights conflicting with those claimed under the grant of 1807.

A decision of a State court, giving the land covered by these riparian rights to the claimants under the grant of 1807, was only a construction of a perfected Spanish title, and cannot be reviewed by this court under the twenty-fifth section of the Judiciary Act. It did not draw in question an act of Congress or any authority exercised under the Constitution or laws of the United States.¹

THIS case was brought up from the Supreme Court of the State of Alabama, by a writ of error, issued under the twenty-fifth section of the Judiciary Act.

The facts in the case are sufficiently set forth in the opinion of the court.

It was argued by *Mr. John O. Sargent* and *Mr. Johnson*, for the plaintiffs in error, and by *Mr. Underwood* and *Mr. Sargeant*, for the defendants in error.

The points made by the counsel for the plaintiffs in error were the following.

*The action was ejectment brought by plaintiffs below in the Circuit Court for Mobile county, to recover [587 a piece of ground and ground covered with water, on Mobile River.

Plaintiffs gave in evidence the Spanish Orange Grove grant of 1807 to Forbes & Co., and the act of Congress entitled, "An act adjusting the claims to land, and establishing land-offices in the districts east of the island of New Orleans," passed 3d March, 1819. (3 Stat. at L., 528.)

Defendants gave in evidence a Spanish concession of 1798 to Thomas Price, and an act of Congress of 2d March, 1829,

¹ CITED. *Moreland v. Page*, 20 How., 523.

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entitled, "An act confirming the reports of the register and receiver of the land-offices for the district of St. Stephens, in the State of Alabama, and for other purposes," confirming said title by United States with surveys, location, certificate, report, and patent by United States to Joshua Kennedy, and the mesne conveyances from Price to defendants. (4 Stat. at L., 358.)

I. The right of the defendants to the land in controversy was asserted under the act of 1829, and the decision of the court below was against that right. This brings the case clearly within the twenty-fifth section of the Judiciary Act.

In 1798, Price prayed Governor Gayoso to grant him a tract of twenty arpens by thirty, bounded on the east by the lots in the town of Mobile, and the river of said town. The donation was ordered accordingly, November 10, 1796.

In 1806, it was confirmed by the commandant, according to a plan accompanying his petition, and the deputy surveyor was ordered to survey the tract and make the boundaries, according to a "copy from the surrounding survey."

This tract, thus bounded, was confirmed by the act of 1829.

The patent, plan, survey, &c., all show that the confirmation contemplated the original boundaries; one of which, on the east, was the River Mobile.

Defendants insist that they are still entitled to go to the river, as one of their eastern boundaries; that the act of 1829 operated to confirm the title of Price to the tract described in the concession of 1798.

The decision of the court below was against the title or right set up under this act.

II. The court below charged the jury that the construction of the plaintiffs' (Forbes & Co.) grant as confirmed would authorize them to go to the channel of the river; and that the boundaries of the plaintiffs' grant must be run and continued eastwardly till they reach the channel of the river.

Defendants excepted.

The grounds of exception are not specifically stated. It is *588] supposed that the exception lets in all legal objections of which the defendants could have availed themselves below. They appear in the record certified from the Supreme Court, and are alluded to in the opinion of the court. They set up the act of March 2, 1819, entitled, "An act to enable the people of the Alabama Territory to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States," as a bar to the plaintiffs' claim, by establishing

an outstanding title to the land in controversy in the State of Alabama. This is supposed to be a perfect defence. If the United States, on the 2d of March, 1819, dedicated the shore of Mobile River to Alabama, they could not grant it subsequently to an individual, or confirm an invalid Spanish grant to make it so operate. The court below decided, in effect, that the act in question did not vest the shore in Alabama, and that Congress could grant it to an individual. It is apparent on the record, that the construction of this statute was called in question, and that the judgment of the State court would not have been what it is, if there had not been a misconstruction of this statute to the injury of the defendants below, or a decision against the validity of the right, title, privilege, or exception set up under it; or, in other words, the question is necessarily involved in the decision, and the State court could not have given the judgment or decree which they passed without deciding it. (3 Pet., 398; 16 Pet., 285.)

III. The court below refused to charge, that, if the jury believed the line of division between the Forbes and Price grants was drawn by authority of the United States, and surveyed and patented to Price's assigns, and being a United States survey and location of both tracts, such survey was binding on the plaintiffs, and the said two titles would cease where such survey ceased to the east, and the riparian rights would commence where such survey ceased, according to the front of each.

Defendants excepted.

The court below charged that the grant of the plaintiffs, being confirmed by the act of 1819 as a complete title, it could not be affected or limited by any survey made by the authority of the United States, and that the jury should find without any regard to any such survey.

Defendants excepted.

Defendants insist that the surveys in evidence were made by authority of the United States, under the acts of 1819 and 1829, and of other acts providing for the survey and location of claims to land in the township of Mobile.

*They further insist, that, by their charge, and their refusal to charge as requested, and their rejection of [*589 the United States surveys, the court ruled against the validity of an authority exercised under the United States.

IV. Both parties claim under acts of Congress; the defendants below under that of 1829, confirming the concession to Price; the plaintiffs under that of 1819, confirming the invalid Spanish grant to Forbes & Co. The decision could not but

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be against the right set up by the defendants under the one statute, if it was in favor of the right set up by the plaintiffs under the other.

The record sets out the title on each side, together with the facts and the charge of the court; from which it appears, that the decision of the State court of Alabama was opposed to the right of the plaintiffs in error, the judgment of the Circuit Court having been affirmed. The construction and application are called for of the acts of Congress on which the controversy depends.

In the *City of Mobile v. Eslava*, 16 Pet., 249, Mr. Justice Catron cites *Matthews v. Zane*, 4 Cranch, 382; *Ross v. Barland*, 1 Pet., 664; *Wilcox v. Jackson*, 13 Pet., 509; *Pollard's Lessee v. Kibbe*, 14 Pet., 353, as establishing the doctrine, that where both sides claim under acts of Congress, and come to this court under the twenty-fifth section for their construction, the court proceed upon the whole case, and for either side.

On the whole, it is manifest from the record that the judgment of the court below could not have been what it is, if there had not been a decision against the right and title set up by the defendants below under the act of 1829; or against the defence they set up under the act of the 2d of March, 1819; or against the validity of an authority exercised under the laws providing for the survey and location of claims in the township where the land in controversy lies.

The counsel cited the following authorities in support of the jurisdiction of the court.

Pollard's Lessee v. Kibbe, 14 Pet., 360; *Wallace v. Parker*, 6 Pet., 687; *Owings v. Norwood's Lessee*, 5 Cranch, 344; *Harris v. Dennie*, 3 Pet., 298; *Davis v. Packard*, 6 Pet., 48; *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet., 250; *Martin v. Hunter's Lessee*, 1 Wheat., 355; *Miller v. Nicholls*, 4 Wheat., 311; *Williams v. Norris*, 12 Wheat., 117; *Mobile v. Eslava*, 16 Pet., 249; *Craig v. State of Missouri*, 4 Pet., 427; *Chouteau v. Eckhart*, 2 How., 372; *Matthews v. Zane*, 4 Cranch, 382; *Ross v. Barland*, 1 Pet., 664; *Wilcox v. Jackson*, 13 Pet., 509.

590*] *Mr. Justice CATRON delivered the opinion of the court.

This case comes here by writ of error to the Supreme Court of Alabama, under the twenty-fifth section of the Judiciary Act of 1789, and the first question made by the defendants in error is, whether any matter presented by the record will authorize this court to exercise jurisdiction under the

twenty-fifth section. And to ascertain how far, if at all, the powers of this court can be called into exercise, the facts and the laws bearing on them must be stated in something of detail; as in this case, in common with many others, it is found much more difficult to settle the question of jurisdiction, and how far it extends, than it would have been to decide the merits of the controversy had the cause been brought here by writ of error to a court of the United States.

Hunt, Hagan, and others, sued in ejectment Kennedy's executors and other tenants in possession, for about ten acres of land lying in the city of Mobile, in the State Circuit Court. The plaintiffs claimed title to the premises sued for under a grant made to John Forbes & Co. in 1807, by Morales, Intendant-General under the Spanish government in the province of West Florida, Spain being then in possession of the province and exercising jurisdiction. The grant, by its recitals, purports to be, in part, the confirmation of a concession, and survey founded on it, of earlier dates; say 1796 and 1802, in favor of Panton, Leslie, & Co., to which firm Forbes & Co. were successors. The concession was surveyed in 1802 by Collins, an authorized surveyor under the Spanish government, and its eastern boundary terminated on the bank of the Mobile River, at high-water-mark; the survey contained two hundred and sixty-three acres, equal to about three hundred arpens. To the extent of Collins's survey there is no controversy, but Forbes & Co. solicited the Intendant-General in 1807 to grant them the flowed land lying east of the eastern boundary of the survey, and between the same and the channel of the river, and which the Intendant proceeded to do, in the following terms:—"And as the distance that is observed in the map from the river to the boundary-lines of the land, which was left vacant at that time in consequence of its having been impassable, has since become of great use to the claimants, having constructed levels and the necessary drains, in consideration of which it has been granted to them as a compensation for their labor thereon invested, with the reserve such as necessary to allow a free passage along the bank of the river, without altering the figure of the tract on either of the other sides. Wherefore, using and exercising the powers which the king our lord—God preserve him!—has conferred on me, I do *in his royal name confirm [*591 and ratify to the aforesaid John Forbes & Co. the possession of the three hundred and ten arpens, seventy-seven perches and one eighth, already mentioned, and which are contained in the map (No. 1809), with the corrections made by the surveyor-general, in order that they may own and pos-

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sess the same, sell and alienate the land at their own and entire pleasure, without prejudice to any third person who may have a better right, on condition that they should observe and fulfil the requisitions of the land regulations formed and published by the intendancy on the seventeenth of July, 1799, as far as the local situation and quality of the land will permit."

According to Spanish usages and regulations, the grant to Forbes & Co. was a perfect title, and as such binding on the government of Spain, although made in 1807, after that government had parted with its power to grant, according to our construction of the treaty of 1803, the limits of which were claimed by this government to extend east to the River Perdidó, and which claim has been upheld and established by the political and judicial departments of the United States. The first conclusive step was taken by Congress as early as 1804, when, by the act of March 26th of that year, it was declared that all grants made by the Spanish authorities after the 1st day of October, 1800, (the date of the treaty of St. Ildefonso,) should be held and deemed to be void. But the act excepted from its operation "any *boná fide* grant made agreeably to the laws, usages, and customs of the Spanish government, to an actual settler on the lands so granted for himself and for his wife and family"; and also excepted "any *boná fide* act or proceeding done by an actual settler agreeably to the laws, usages, and customs of the Spanish government, to obtain a grant for lands actually settled on by the person or persons claiming title thereto, if such settlement, in either case, was actually made prior to the 20th day of December, 1803." Some restrictions were imposed on actual settlers in regard to quantity, that have no application to the grant of Forbes & Co.

The Spanish grant recites that Forbes & Co. had been settled on the land granted, and that it had been occupied and cultivated by them since the year 1796, and up to the date of the grant, and such was the proof made before our commissioner, and therefore the "proceeding" by which the imperfect title of Forbes & Co. was completed was within the second exception of the act of 1804. That the grant made by the Intendant-General Morales, in 1807, was in itself, unaided by the sanction of Congress, a valid title, we *592] do not *assert; but being reported on by the commissioner as a title complete in form, according to the usages and laws of Spain, and recognized and sanctioned by Congress as a perfect title by the act of 1819, the courts of justice are concluded by the action of the political department, and bound to pronounce the grant to Forbes & Co. a

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perfect title in substance as well as form, because the claim was within the exclusive jurisdiction of the political department in 1819, when Congress acted on it. Such is the well-established doctrine of this court, as will be seen by the cases of *Chouteau v. Eckhart*, 2 How., 344; *Mackay v. Dillon*, 4 Id., 421; and especially that of *Les Bois v. Bramell*, 4 Id., 461.

Nor did the grant of Forbes & Co. require any further step to perfect its boundary. This being the *prima facie* condition of Forbes & Co.'s grant, the next inquiry is whether those claiming under Kennedy's title were in a condition, on the trial in the State court, to call the plaintiffs' title in question.

The defendants below claimed by virtue of an act of Congress, passed March 2, 1829, confirming an incomplete Spanish concession made to Thomas Price. By the fourth section of the confirming act of 1829, it is provided, "that the confirmations of all the claims provided for by this act shall amount only to a relinquishment for ever, on the part of the United States, of any claim whatever to the tracts of land and town lots so confirmed, and that nothing herein contained shall be construed to affect the claim or claims of any individual or body politic or corporate, if any such there be."

And by the fifth section of said act, the register and receiver of the land-office at St. Stephens were invested with power, within their district, to direct the manner in which all claims to lands and town lots which had been confirmed by that act should be located and surveyed; having reference to the laws, usages, and customs of the Spanish government on the subject, and also to the mode adopted by the government of the United States, pursuant to the act of March 3, 1803. And by section sixth, certificates of confirmation and patents were ordered to be granted for all lands and town lots confirmed by the act.

According to the act, the claim of Joshua Kennedy (representative of Thomas Price) was duly surveyed on the 2d of February, 1836, and in May, 1837, a patent was taken out by Kennedy for the land described in the survey. The calls in the patent, having any connection with the present controversy, are as follows:—"Thence north, 69° 5' east, 15 chains 44 links, to the ancient margin of the River Mobile, being *34½ links west of the south angle of St. Louis and Water Streets; thence north, 66° west, nine chains [*593 and seventy-six links, to the southeast corner of the Orange Grove tract granted to John Forbes & Co." The next line runs north, 82° west, with the southern boundary of Forbes & Co.'s tract.

The southeast corner of the Orange Grove tract is an iron-

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bound stake, well known, and from which the Spanish survey made by Collins runs due north, and from that line east to the channel of the river the land was added by the grant of the Intendant-General Morales, in 1807.

The line of Kennedy's grant fronting towards the river runs 66° west of north, and it is contended that Kennedy, as a front proprietor, is entitled to claim a riparian right to the channel of the river, according to lines drawn at right angles to the front line and from each terminus thereof, unless some other claim shall interfere; and it is insisted that the addition made to Forbes & Co.'s grant in 1807 cannot hinder the assertion of Kennedy's riparian right, because the addition was made after Spanish authority ceased, and for so much the grant of 1807 is void, and being out of the way, Forbes & Co. can only claim as front proprietors, riparian rights in like manner that Kennedy himself claims; and to extend Forbes's southern line east, and Kennedy's lines at right angles, as above stated, would produce a conflict of riparian rights incident to the respective grants, the lines crossing each other at the iron-bound stake, forming an acute angle at the stake, and widening towards the channel of the river; and this angle, it is assumed by those claiming under Kennedy's grant, should be divided between the two grants, but in what proportions we are not informed. This assumption the State court rejected, and held that Forbes & Co.'s grant took all the land to the channel of the river north of a direct extension of its southern boundary, and thereby cut off the pretension of Kennedy to the incident of alluvion.

Suppose it to be true that the addition made to Forbes & Co.'s grant in 1807 was void, for want of authority in the Spanish government, or for any other reason, and that Kennedy's grant was entitled to divide the alluvion as an incident to it, and that the State court improperly rejected his claim, and wrongfully adjudged the land to Forbes & Co.;—conceding all these assumptions, can this court revise and reverse the decision of the State court? The controversy respecting the alluvion drew in question no act of Congress, nor any authority exercised under the Constitution or laws of the United States, and therefore the decision of the State court could not be opposed either to the laws, or to any *594] authority exercised under the laws, *of the United States. For the established construction and application of the twenty-fifth section of the Judiciary Act, we refer to the cases of *Crowell v. Randell*, 10 Pet., 391, 398; *McKinney v. Carroll*, 12 Pet., 68; and *Armstrong v. Treasurer of Athens County*, 16 Pet., 284. In this case, as in that

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of *McDonogh v. Millaudon*, 3 How., 693, the State courts were called on to construe a perfected Spanish title, and to settle its limits by applying the local law, and having done so, this court has no authority to revise the judgment; nor can we see how the case would have been different had Forbes & Co.'s grant been an elder patent emanating from the United States directly; as in such a case a controversy concerning the incidents of alluvion would not have drawn in question an act of Congress, or a survey made according to an act of Congress.

We deem it useless to examine in detail the instructions proposed by the defendants below, and rejected by the court. The only one worthy of notice was that which rejected Weakly's survey of Forbes & Co.'s grant, made and approved in 1835. It could not change the grant, nor affect its validity in any degree, and could only be read to establish boundary as a matter of fact; and neither its admission nor rejection, when offered for such purpose, could give this court jurisdiction, no matter which side should be injured; and so this court, in effect, held in the case of *Mackay v. Dillon*, 4 How., 447. The survey was an *ex parte* proceeding for the purposes of the land-office, and immaterial to Forbes & Co.'s title.

On careful examination, we are of opinion that no one question was raised and decided in the State courts that gives this court jurisdiction to revise such decision; and that, therefore, the case must be dismissed for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be and the same is hereby dismissed, for want of jurisdiction.

JACOB HUGG AND JOHN M. BANDEL, PLAINTIFFS, [*595
v. THE AUGUSTA INSURANCE AND BANKING COM-
PANY OF THE CITY OF AUGUSTA.

In an insurance upon freight, there is no total loss of a memorandum article as long as the goods have not lost their original character, but remain in