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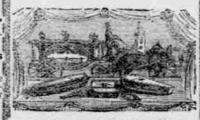
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A DECISION.

REGARDING THE RIGHTS OF OWNERS TO WATER FRONT PROPERTY.

Wilson and others vs. Welch and other Riparian Rights-Powers of the State.

The State cannot convey to any but a riarian property holder any part of a navig able stream between high and low water

THAYER, J. This appeal is from th reuit court for the county of Clatsop ndered in a sait commenced by the spondents against the appellants to sclare a trust in favor of the former in ertain tide-lands formerly conveyed by the state of Oregon to James Welch, an estor of the appellants. The respond cestor of the appellants. The respond-ents alleged in their complaint in the suit that said James Welch procured said deed from the board of commis-sioners for the sale of school lands, etc., on the eighteenth day of September, 1876; that in his application for the purchase thereof he fraudulently rep-resented that he was the owner of block it in the town of Astoria, which shorts esembed that he was the owner of block.

I, in the town of Astoria, which abuts
pon said tide-land, when in truth said
block did not belong to him; that he
not one Shively had, by deed bearing
ate June 3, 1846, conveyed it to John
Vilson, ancestor of the respondents,
and that the latter owned it at the time and that the latter owned it at the time said application was made and that no ootice of any kind was given to him, or to any one, by said Welch or said board, nor by any person, of the application; that both James Welch and John Wil-son had since died, and that the appel-lants and respondents are their respect-ive representatives and successors in interest,—the respondent Ann R. Wil-son, and the said Mary E. Wakeman, a daughter; that the former owns a dower ighter; that the former owns a dowe ght in said block 11, and the latte

was the remainder.
The respondents further alleged tha August 29, 1877, they commenced an tion against the appellants to recover e possession said block 11, and that on the possession said block 11, and that of March 27, 1878, they recovered a, judg ment against them, whereby it was adjudged that said John Wilson was thowner in fee of said block by virtue o said deed of June 3, 1816, until his death and that they then became the owner thereof as mentioned, and entitled to hereof as mentioned, and entitled to he possession. They alleged, also, that hey did not knew the exact amount of ourchase price paid by James Welch to he state of Oregon for said tide-lands, not offered to pay the same when ascer-ained by the court. The appellants lemed that said James Welch procured he deed from the state to the tide-land by the representation alleged; denied hat said block 11 abutted or fronted on he shore of the Columbia river; claimed tereof as mentioned, and entitled e shore of the Columbia river; claime at on said thirtieth day of June, 189 was above ordinary high-water mark at was above ordinary high-water mark but that since said time the water had gradually encroached upon the bank of the river, upon the north side of said block, and that the line of ordinary high tide had moved south until it then reached the north boundary thereof; that by said deed the said block thereby intended to be conveyed is bounded by metes and bounds, and the number and size of the lots expressly given, and that metes and bounds, and the number and size of the lots expressly given, and that the deed was made solely with reference to said parcel of land as a platted block and the parties intended it should no extend further on the north than the street known as "Wall Street," but which was by mistake designated it said deed as "Water Street," which his in front of the block, and between it and said tide-land; that in front of the block is a strip of land included within said s a strip of land included within sai treet which was above ordinary hig ide, and in front of the strip and of th side, and in front of the strip and of the street was a tide-flat, extending for a distance af 700 feet, susceptible of being easily reclaimed, which flat, at the date of the purchase of the block by said John Wilson, was of great value; that from the north side of the flat it was 600 feet to the ship channel of the Columbia river and that said there was valuable. STAR MARKET.

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REPECTFULLY CALL THE ATTENdates the public to the fact that the babove Market will always be supplied with a part of it into lots and blocks; that it had been duly platted and laid off into lots and blocks, with streets extending through the same, which fact said Wilson well knew at the time he purchased block 11; that about 1845 said James Welch bought of said James Welch, for more than 30 years, had paid taxes on the land as inheir private property, and had paid \$1.000 for street improvements.

These facts were in the main denied by the respondents in their reply. The proofs in the case show that said Shively, some time prior to the year 1846, cettled upon a tract of land including above Market will always be supplied with a part of it into lots and blocks; that Welch; that they surveyed and laid off a part of it into lots and blocks; that welch gave to Shively executed the deed for himself and said Welch to the said John Wilson, of June 3, 1846, to said June 3, 1846, to said June 3

Which will be sold at lowest rates, whole said John Wilson, of June 3, 1846, to said block 11; that after the passage of the Which will be sold at lowest rates, whole said and retail.

Special attention given to supplying from Welch of the undivided half instance. The said ships. B. B. Franklin, in the year 1860, obtained a patent to it; that after his entry and compliance with the provisions of that act, said Shively reconveyed to said Welch are portion of the claim in severalty, which conveyance included said block 11. The deed to Wilson of June 3, 1846, purports to convey a parcel of land in the town of Astoria, described as being a part of the settlement rights of said Shively, on which he had laid out and surveyed said town, and which premises consisted of lots numbered from 1 to 12; inclusive, forming block 11, which is described as being a part of lots numbered from 1 to 12; inclusive, forming block 11, which is described as being a part of lots numbered from 1 to 12; inclusive, forming block 11, which is described as being a part of lots numbered from 1 to 12; inclusive, forming block 11, which is described as being bounded north by Water street, east by Spence street, south by West which lots it states were east 50 feet which lots it states were east 50 feet front by 142% feet back: reference being had to the plat of said town of Astoria, so laid out as before mentioned by E. & J. Initiawa, of St. Louis, Missouri. The deed also contains a coverage privileges before as afterwards, and the right to protect his uplands from ant to have said plat recorded as soon right in ports and shores: First, as there should be an office provided by

law for that purpose. It also contains a covenant that the grantors will forever warrant and defend the fce-simple title to the premises, free from the claims of all persons whatever; also that the grantors, their heirs, executors, and administrators, will, at the expease of the grantee, his heirs or assigns, make a new and further deed, if the same should be required to vest a feesimple title, when they or either of them, shall demand the same. The deed was not acknowledged or proved so as to entitle the same to record until March, 1876, and was recorded in the office of the clerk of the county of Clatsop in April of that year.

It further appeared in proof that said James Welch did base his right to purchase said tide-land, when he made said application to purchase, upon the N THE STATE SUPREME COURT

ASTORIA, OREGON, FRIDAY, JULY 24, 1885.

chase said tide-land, when he made said application to purchase, upon the ground that he was the owner of said block II, upon which it abutted at that time; and it further appears that at said time, and for a long time prior thereto, he had claimed to be the owner thereof, and that the appellants continued to claim such ownership un II the affirmance of the judgment by this court recovered against them as before mentioned. Proof was also given tendcourt recovered against them as before mentioned. Proof was also given tend-ing to show that there had been a nar-row strip of highland adjoining said block it lon the north, within the street called "Water Street," but that it had been carried away by the action of the water; but at what date it disappeared is not shown.

The land in controversy includes less than half an acre. It was purchased by said James Welch of said board of comsaid James Welch of said board of com-missioners under the provisions of the act of the legislative assembly of the state to provide for the sale of tide and overflowed lands on the sea shore and coast, approved October 28, 1872, a-amended in 1874. That act provide-that the owner of any land abutting fronting, or bounded by the shore of any bay, harbor, or inlet on the sea-coast, shall have the right to purchase from the state all the tide-land belong-ing to the state in front of such owner or owners, subject to certain provisoor owners, subject to certain provisos which allow the owner of improvements upon such tide-lands to purchase the lands so improved for a certain period, and also allow outside parties to become such purchasers in case the owner or owners of the highland fail to make application for the purchase of the same owners of the highland fail to make application for the purchase of the same tor three years; but in the latter case, the board of commissioners for the sah of such lands must give the owners of the highland, having the preference in the purchase thereof, notice of such application to purchase the same, who thereupon have 60 days after the notice is given, in which to make application to purchase it. It was conceded in this case that the said board of commissioners gave no such board of commissioners gave no succeptive to said John Wilson or the re-

ondents. ondents.

The appellants' counsel claims that is strip of high and did exist north of lock it on June 3, 1816, so that the charf privileges remained in Shively and Welch after the execution and de and Weich after the executian and de-livery of the deed of that date, suc-right, and, as he claims, the consequent right to purchase the tide-lands in from of that strip, would not be divested out of Weich and vested in Wilson by the act of the washing away of such strip of land before the passage of the said act. He also claims that the effect of the descriptive part of said deed, in which the lots in said block are con-veyed by number and dimension, resveyed by number and dimension, respectively, and then the block bounded specifically by streets between which is es, is sufficient and conclusive evidence hat it was the intention of the grante mit the grant to the land contain within the exterior boundary lines of the block, and to reserve the whar-rights and privileges between the north line of said Water street and the ship line of said Water street and the ship channel. The decision of this court in Wilson v. Shively, 4 Pac. Rep. 324, at the March term, 1884, was adverse to the points raised by the counsel; still, as I view the question, they are very important matters. A shore-owner upon tidewatert, or upon a navigable stream, possesses rights which, of late, are conceded to be property. Yates v. Milwaukee 10 Wall. 597. They are not rights, as has often been supposed, that were derived from the state, though held and enjoyed in subordination to the rights of the public. Dalaplaine v. Chicago & N. W. Ry. Co. 42 Wis. 214; Lorman v. Benson, 8 Mich. 18.

The embarrassing feature of this subject has arisen out of a misunderstand-

pet has arisen out of a misunderstand-ing of the nature of the state's owner-ship of land between high and low waship of land between high and low water upon navigable streams. It has been
spoken of as an ownership in fce, and
an erroneous impression has been conveyed. The state does own the channel
of the navigable rivers within itboundaries, and the shore of its bays,
harbors, and inlets between high and
low water, but its ownership is a trust
for the public. It has no such proprietorship in them as it has in its property torship in them as it has in its property and public buildings. It cannot self them so as to deprive the public of their enjoyment, (Steam-engine Co. v. Steam-ship Co. 12 R. I. 318;) nor can it take away riparian rights, except for public lass, and by civing just convensation. away riparian rights, except for public use, and by giving just compensation. Gould, Waters, 2 150. The New York courts have taken a different view, and which has been followed by an Iowa decision, (Tontin v. Dubuque, etc., R. Co. 32 Iowa, 106.) but it is repudiated by the federal and most of the state tribunels. If, then, the riparian rights referred io, such as wharfage privileges, are property, they may be sold, or reserved to the owner of highland upon which the tide-land abuts. There is no reservation in terms in the deed of June 3, 1846, but if the riparian rights belonging to Shively and Welch were not conveyed, which was the case if there was a strip of highland between said block II and the tide-land in question not conveyed by the deed, they necessarily remained in them, and I do not see how they could be divested out of them without their consent, unless such rights are

the jus privatum, or right of property or franchise; second, the jus publicium, or public right of passage and navigation; and, third, the jus regium, or governmental right. The state could not, by any sale of the shore of a body of water below high tide, deprive itself of the latter right; nor, as before suggested, could it thereby deprive the public of the right of passage or navigation. What, then can such a sale of that character of thereby deprive the public of the right of passage or navigation. What, then, can such a sale of that character of iide-land amount to? I doubt very much whether a sale in such a case much whether a sale in such a case could be made to an outside party that would deprive the riparian owner of any right to the enjoyment of the land. It was held in the case of People v. Cowell, 60 Cal. 400, that lands within the flow of ordinary tides, the cost of reclaiming which would greatly exceed their value when reclaimed for any agricultural purpose, were not acquirable under a statute authorizing a sale of reclaimable lands. The state might authorize a sale, doubtless, of tide-flats, and the purchaser have the right to reclaim them and devote them to private and the purchaser have the right to re elaim them and devote them to private use, where no right of public passage or navigation is infringed; but to attempt to sell a part of the channel of a naviga-ble stream below any ordinary stage of high water, occasioned either by tides or freshets, is absurd. But if I am mistaken in this view, and the state has an absolute ownership in such cases, as some of the authorities would seem to indicate, how can the respondents mair ain their suit to declare a trust in their avor in the land in controversy? The nor their ancestors, never owned it legally nor equitably. Conceding their lowaership of block 11, and that the jide-land abutted upon it, that certainly gave them no ownership of the latter, it he title was in the state. The act of 1872 graciously gave them, in that case the title was in the state. The act of 1872 graciously gave them, in that case a preference in the purchase, but it prescribed conditions upon which the purchase can only be made. The respondints do not allege or show that they nave ever attempted to comply with hese conditions. It may be inferred hat they consider the purchase by Welch, based upon his claim to be the owner of said block 11, made it unnecessary for them to apply; but how does the court know that they would have purchased the land if Welch had not? The act provides for a regular sale of such lands. Section 3 says that the applicant shall, with his application, present to the officer or officers who are or shall be authorized to sell such lands, evidence of his title to land which abuts. vidence of his title to land which abut te, upon such tide-lands; and section ays that the value of such tide-land says that the value of such tide-lands shall be appraised at a certain sum per cre, which shall not be less than \$1.25 for each acre of such land; provided hat the board having in charge the sale of such lands shall have power to set uside any appraisement on evidence aken of the true value of the same, and

aken of the true value of the same, and -hall make another and true appraisement, based on such evidence.

The act did not contemplate that the applicant should get the land for less han its true value in any case, and the legal privilege in favor of the shore-owner, was merely to buy the land for what it was actually worth. In such cases many shore-owners might not be cases many shore-owners might not be what it was actually worth. In such cases many shore-owners might not be nellined to attempt to make such purhase. Whether the respondents would ave been so disposed is left entirely to conjecture; and yet they now claim that Weich's title should inure to their benefit. I can readily understand that where one has the equitable title to real property, the legal title to which is outstanding, another person wrongfully buys in such legal title, a court of equity could decree that the legal title so purchased should inure to the benefit of the equichould mure to the benefit of the equitable owner. To grant such relief, however, in favor of one who never had the equitable title,—who had merely an option to purchase the property upon such terms as might be agreed upon with the owner, and who had never proposed to make the purchase, or indicated any intention of that character,—would be carrying the destrine to an unjustif. d mure to the benefit of the any intention of that character,—would be carry jog the doctrine to an unjustifi-able extent. I think the respondent's remedy in this case, under the theory hat the state had the absolute title to the property in question, and had con-veyed it to James Welch, was to have the state commence an action for the the state commence an action for the purpose of vacating the patent or deed executed to him, as provided in section 55 of the Civil Code; and when a judgment has been obtained annulling it make their application for the purchase

make their application for the purchase of the land.

But, as before suggested, I do not think the sale affected the rights of the owners of the lands upon which the tide-land abutied. The main question in the case, as I regard it, is to whom these rights belonged. If, by the terms of the deed of June 3, 1846, from Shively and Welch to John Wilson, they were reserved to the former, then they are rightfully in the appellants; but if no such reservation was made in that instrument, then the respondents succeeded to them whenever they became shore-owners. The rights which at tached to the narrow strip, which counsel for the appellants; claims was not conveyed by the deed, and which existed as a mere incident of that parcel of land, were lost, when it was washed away. The courts have usually held. of the land. away. The courts have usually held, where the question has arisen, that where a lot or block is bounded in a deed by a street, the deed operates to convey the land to the center of the street. Under such a construction it is (Concluded on fourth page.)

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