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*JAMES DONNELLY, Plff. in Err., [708
v.
UNITED STATES.

(See S. C. Reporter's ed. 708–712.)

Evidence — judicial notice — navigability.

1. Federal courts cannot take judicial notice that a stream is navigable in fact because of an apparently irregular traffic

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in times of high water only, employing Indian canoes, dugouts, and at certain times small steamboats and gasolene launches,—especially in the face of a declaration by the legislature that such stream is not navigable.

[For other cases, see Evidence, I. d, in Digest Sup. Ct. 1908.]

Appeal — rehearing — error in original opinion.

2. The error, if any, on the part of the Federal Supreme Court in holding, when affirming a conviction in a Federal circuit court for the murder of an Indian at or near the edge of the Klamath river within the extension of the Hoopa Valley Indian Reservation, that title to the bed of such river was vested in the United States as riparian owner on a non-navigable stream by Cal. Acts of April 13, 1850, February 24, 1891, and March 11, 1891, does not require the granting of a petition for a rehearing, where the state of the record did not entitle the plaintiff in error to call upon the Supreme Court to decide the merits of the question of the navigability of the river, and its effect upon the jurisdiction of the circuit court over the homicide.

[For other cases, see Appeal and Error, X., in Digest Sup. Ct. 1908.]

[No. 97.]

Submitted May 31, 1913. Decided June 9, 1913.

ON PETITION for rehearing of an affirmance of a conviction in the Circuit Court of the United States for the Northern District of California for the murder of an Indian within the extension of the Hoopa Valley Indian Reservation. Denied.

See ante, 820.

The facts are stated in the opinion.

Mr. John F. Quinn in support of the petition. Mr. L. F. Puter was on the brief:

The decision of the court to the effect that a murder, by a white citizen, of an Indian on an Indian reservation within the limits of a state, is punishable under §§ 2145 and 5339 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 3627, is erroneous in that it is contrary to the long-established rule of this honorable court for interpreting Federal statutes, to wit,—"Where the language of an act is general, and broad enough to include wrongful acts without and within the constitutional power of Congress, the unconstitutional parts cannot be rejected and the constitutional parts retained in order to give effect to the statute; that words of limitation cannot be introduced into a penal statute to make it specific when, as expressed, it is general only."

United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 646; United States v. Reese, 92 U. S. 218, 23 L. ed. 565; Trade-Mark Cases, 100 U. S. 82, 98, 99, 25 L. ed. 550, 553, 554; Allen v. Louisiana, 103 U. S. 80, 84, 26 L. ed. 318, 319; United States v. Harris, 106 U. S. 629, 641, 642, 27 L. ed. 290, 294, 295, 1 Sup. St. Rep. 601; Poindexter v. Greenhow, 114 U. S. 270, 302, 29 L. ed. 185, 197, 5 Sup. Ct. Rep. 903, 962; Baldwin v. Franks, 120 U. S. 678, 685, 689, 30 L. ed. 766, 768, 769, 7 Sup. Ct. Rep. 656, 763; Smiley v. Kansas, 196 U. S. 447, 455, 49 L. ed. 546, 550, 25 Sup. Ct. Rep. 289; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; Chicago, M. & St. P. R. Co. v. Westby, 102 C. C. A. 65, 178 Fed. 632; Brooks v. Southern P. Co. 148 Fed. 995; Howard v. Illinois C. R. Co. 148 Fed. 1003; McCabe v. Atchison, T. & S. F. R. Co. 109 C. C. A. 110, 186 Fed. 987; Cella Commission Co. v. Bohlinger, 8 L.R.A.(N.S.) 537, 78 C. C. A. 467, 147 Fed. 425; Karem v. United States, 61 L.R.A. 437, 67 C. C. A. 486, 121 Fed. 260.

The decision to the effect that it is the law of the state of California that no rivers in California are navigable except those enumerated in the act of March 11, 1891, chap. 92 (Political Code, § 2349), of said state, and that the riparian owner takes to the center of stream on all rivers not enumerated in said act, thereby giving the United States title to the bed of said Klamath river, is erroneous for three reasons, to wit:

(a) That it is contrary to the rules laid down by the supreme court of California, in the cases of People ex rel. Ricks Water v. Elk River Mill & Lumber Co. 107 Cal. 224, 48 Am. St. Rep. 125, 40 Pac. 531, and Forestier v. Johnson, 164 Cal. 24, 127 Pac. 156, which rules are that the state legislature cannot make a stream navigable by merely enacting a law declaring it to be such; and that the question of navigability always remains "open as a question of fact" in California.

See also Southern R. Co. v. Ferguson, 105 Tenn. 552, 80 Am. St. Rep. 908, 59 S. W. 343; Little Rock, M. R. & T. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277; Martin v. Bliss, 5 Blackf. 35, 32 Am. Dec. 52.

(b) That it is contrary to the rule laid down in People ex rel. Harbor Comrs. v. Kerber, 152 Cal. 731, 125 Am. St. Rep. 93, 93 Pac. 878, in which the same court declared that where the public use is abandoned, such as the use of navigable waters

Note.—As to what waters are navigable—see note to Willow River Club v. Wade, 42 L.R.A. 305.

On judicial notice—see note to Olive v. State, 4 L.R.A. 33.

as a public highway, the title to the property is not lost to the state, but the state holds the same as a proprietor, even though it no longer holds the same as a public agent or sovereign in charge of a public use.

See also Chicago, B. & Q. R. Co. v. Porter, 72 Iowa, 426, 34 N. W. 288; Serrin v. Grefe, 67 Iowa, 196, 25 N. W. 227; Steele v. Sanchez, 72 Iowa, 65, 2 Am. St. Rep. 233, 33 N. W. 367; Wood v. Chicago, R. I. & P. R. Co. 60 Iowa, 456, 15 N. W. 285.

(c) That it is contrary to the Constitution of the state of California, directly applied in People ex rel. Harbor Comrs. v. Kerber, supra, which provides that no gift of any state property can be made by the legislature, which would result if, by repealing an act declaring a stream navigable, the riparian owners would be given the title to the bed of the stream, which before belonged to the state.

Mr. Justice **Pitney** delivered the opinion of the court:

A petition for rehearing is presented, which we permit to be filed in order to determine whether it ought to be entertained. 709] *The petition raises several points, only one of which is deemed worthy of mention; and that is the insistence that the court, in basing its decision herein (228 U. S. 243, 262, etc., ante, 820, 828, 33 Sup. Ct. Rep. 449) upon the California acts of February 24, 1891, chap. 14, and of March 11, 1891, chap. 92 (Political Code, § 2349), and the decision of the supreme court of that state in Cardwell v. Sacramento County, 79 Cal. 347, 349, 21 Pac. 763, to the effect that the enumeration of the navigable rivers of the state, as made by the legislature, is exclusive, and that no other rivers are navigable under the laws of California, overlooked the effect of the decisions of the supreme court of California in other cases (People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co. 107 Cal. 221, 224, 48 Am. St. Rep. 125, 40 Pac. 531; Forestier v. Johnson, 64 Cal. 24, 127 Pac. 156; and People ex rel. Harbor Comrs. v. Kerber, 152 Cal. 731, 125 Am. St. Rep. 93, 93 Pac. 878), and that our decision respecting the navigability of the Klamath river and state ownership of the bed thereof is so serious in its ulterior consequences that it ought not to be adhered to without further argument.

The judgment affirming the conviction of the plaintiff in error can be sustained, however, without regard to the question thus raised. It is conceded that whether the Klamath is navigable at the place where the homicide occurred is a question of fact. Of course the tide ebbs and flows at the river's mouth, but the *locus in quo* is approximately 25 miles from the mouth, and quite beyond any possible influence of the tide. As the opinion points out, there was evidence tending to show that the stream is navigable in fact at certain seasons from Requa (near its mouth), up to and above the *locus in quo*. But the evidence was by no means conclusive. It showed an apparently irregular traffic, in times of high water only, employing Indian canoes, "dug-outs," and at certain times small steamboats and gasolene launches. In this state of the evidence, the trial court could not, nor can *we, take judicial notice of the stream [710 as being navigable in fact; especially in the face of a declaration by the legislature of the state that it is not navigable. United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 698, 43 L. ed. 1136, 1139, 19 Sup. Ct. Rep. 770.

Upon the argument, the government cited and relied upon the acts of February 24th and March 11th, 1891, and the decision in Cardwell v. Sacramento County, as showing that the state had abandoned any claim it might have had to the bed of the stream, and surrendered such rights to the riparian proprietors,—in this case to the United States, for the benefit of the Indians. Counsel for plaintiff in error did not in his brief (nor, so far as we recall, in the oral argument) make any reply to this contention, nor challenge the authority of Cardwell v. Sacramento County, or the effect of that decision upon the matter in controversy. Being unable to find that the case had been overruled or questioned, we accepted it as authoritative upon the question of state policy, with the result of concluding, upon the whole matter, that whether the river were or were not navigable in fact, its bed was to be deemed as included within the extension of the Hoopa Valley Reservation.

But the record shows that upon the trial, the plaintiff in error did not request or suggest that the question of the navigability of the river at the *locus in quo* should be considered as a question of fact, and disposed of accordingly. At the close of the evidence for the government, counsel moved for a dismissal of the action upon the ground that it had not been shown that the alleged offense happened within the limits of the Reservation. And at the close of all the evidence the trial court was requested to instruct the jury that the river was not within the limits of the Reservation, and that if the alleged crime was committed upon the river, the evidence had failed to establish the jurisdiction of the court to try the defendant. This insistence was repeated in different forms, but in each in-

711]stance *the court was in effect requested to rule as a matter of law that the Klamath river was not within the reservation. This contention was as properly attributable to the theory that the territorial limits as described in the Executive order of President Harrison, dated October 16, 1891, did not in terms include it, as to the theory that the river was not navigable. It was upon the former theory that plaintiff in error principally relied in this court. If the suggestion of excluding the river from the Reservation on the ground that it was navigable was intended to be made the subject of exception at the trial, this point should have been clearly raised; and it was not. Moreover, even assuming that the requests were intended to point to the question of navigability, they at best called upon the court to decide that question as a question of law, and not to determine it, or to have the jury determine it, as a question of fact.

The state of the record, therefore, did not entitle the plaintiff in error to call upon this court to decide the merits of the question of the navigability of the river and its effect upon the jurisdiction of the circuit court over the homicide. In discussing the merits we assumed (in favor of plaintiff in error) that the question was raised by the record. But since it is now suggested that in so doing we have passed upon a question that was not adequately argued, and which in its consequences involves important interests, other than those of the plaintiff in error, we prefer to and do recall so much of the opinion as holds that "by the acts of legislation mentioned, as construed by the highest court of the state,—(a) the act of 1850, adopting the common law, and thereby transferring to all riparian proprietors (or confirming in them) the ownership of the non-navigable streams and their beds; and (b) the acts of February 24 and of March 11, 1891, declaring in effect that the Klamath river is a non-navigable stream,—California has vested in the United States, as riparian owner, *the title to the bed of the[712 Klamath, if in fact it be a navigable river." That matter, therefore, we leave undecided.

But since, as already shown, the conviction of the plaintiff in error may properly stand without regard to that question, we deem that no useful purpose would be served by further oral argument.

Rehearing denied.