

Montgomery Vs. Portland

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Appeal No. : 190 U.S. 89

Appellant : Montgomery

Respondent : Portland

Judgement :

Montgomery v. Portland - 190 U.S. 89 (1903)

U.S. Supreme Court Montgomery v. Portland, 190 U.S. 89 (1903)

Montgomery v. Portland

No. 47

Argued April 9, 1903

Decided May 18, 1903

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ERROR TO THE SUPREME COURT

OF THE STATE OF OREGON

SYLLABUS

While section 12 of the Act of Congress of September 19, 1890, forbade the construction or extension of piers, wharves, bulkheads, or other works beyond the harbor lines established under the direction of the Secretary of war in navigable waters of the United States "except under such regulations as may be prescribed from time to time by him," it does not follow that Congress intended in such matters to disregard altogether the wishes of the local authorities. Under existing enactments, the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a state is not complete and absolute without the concurrent or joint assent of both the federal government and the state government. *Cummings v. City of Chicago*, [188 U. S. 410](#) , and *Willamette Bridge Co. v. Hatch*, [125 U. S. 1](#) , followed.

This writ of error brings up for review the final decree in a suit instituted in one of the courts of Oregon by the City of Portland and Port of Portland against James B. Montgomery, who died during the progress of the cause and was succeeded as defendant by his executrix, the present plaintiff in error.

The principal question in the case is whether, under the circumstances to be presently stated, Montgomery, as owner of land situated within the limits of Portland on the Willamette River, had the right to extend his wharves into the river beyond certain harbor lines established in 1892.

The City of Portland was authorized by its charter to regulate the building of wharves within its limits and to establish a line beyond which wharves should not be built nor piles driven. That provision was in force on and after February 19, 1891.

By an Act of the Oregon Legislature of February 18, 1891, the inhabitants of the Port of Portland were created a corporation

"to so improve the Willamette River at the cities of Portland, East Portland, and Albina, and the Willamette and Columbia Rivers between said cities and the sea, as that there shall be made and permanently maintained in said Willamette River

at said cities, and in the said Willamette and Columbia Rivers between said cities and the sea, a ship channel of good and sufficient width, and having a depth at all points at mean low water both at said cities and between said cities and the sea, of not less than 25 feet."

And, so far as was necessary to carry out that object, the corporation was given full control of those rivers at those cities and between them and the sea, to the full extent that the state could grant the same, and was authorized to remove such obstructions from them and erect such works in them as were found necessary or convenient in creating and maintaining the required channel. The power so conferred was to be exercised by a board of commissioners. Such a board had been appointed and organized prior to the institution of this suit.

A copy of the act incorporating the Port of Portland was sent to the Secretary of War, "who approved the same," and the work done by that port in improving the Willamette and Columbia Rivers was conducted in conjunction with the United States engineers in charge of those rivers, and who acted under instructions from the Secretary of War. The engineers annually reported to the Secretary the nature and amount of such work.

By the River and Harbor Act of July 13, 1892, amending the seventh section of the River and Harbor Act of September 19, 1890, it was provided:

" 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable

waters of the United States, under any act of the legislative assembly

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of any state until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill or in any manner to alter or modify the course, location, condition, or capacity of [any port, roadstead, haven, harbor, harbor of refuge, or enclosure within the limits of any breakwater, or of] the channel of said navigable water of the United States unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments or other works under an act of the legislature of any state, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such state."

26 Stat. 454; 27 Stat. 88, 110.

" 12. That section 12 * of the River and Harbor Act of August 11, 1888, be amended and reenacted so as to read as follows:"

"Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may and is hereby authorized to cause such lines to be established beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him, and any person who shall willfully violate the provisions of this section, or any rule or regulation made by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding one year at the discretion of the court, for each offense."

26 Stat. 426, 455.

On the 9th day of August, 1892, the Secretary of War, proceeding -- so the finding of facts states -- under section twelve of the act of 1890, caused certain harbor lines to be established in the Willamette River within the limits of Portland. And by an ordinance adopted December 12, 1892, the common council of the city adopted as its wharf lines the harbor lines so established.

On or about May 21, 1898, Montgomery applied to the Secretary of War to have the above harbor lines relocated or located farther out in front of certain water lots belonging to him, his complaint being that, as established in 1892, those lines were too far inland. By order of the Secretary, a public hearing was had on this application. A number of the leading businessmen of Portland attended and made protests against the proposed relocation. An account of this meeting, with all the papers relating to it, was sent to the chief of engineers, who made a report to the Secretary of War favorable to Montgomery's application. A map accompanied that report showing the proposed new line. Under date of September 23, 1898, Mr. Meiklejohn, Acting Secretary of War, approved Montgomery's application and assented to the proposed change or relocation of the harbor line.

Having been notified by the local United States engineer that the War Department had approved the new line, Montgomery began the construction of a wharf by the driving of piles partly outside of the line of 1892 and in front of his lots, but wholly inside of the relocated line as indicated on the above map. He did not drive any piles or place any obstruction in the river outside of the relocated line.

On or about November 2, 1898, the board of commissioners of the port took official action about the new line and Montgomery's construction of wharves beyond the line of 1892. They declared of record that the extension of wharves into the river outside of the line of 1892 would greatly damage the port and its shipping interests, and they ordered Montgomery and those acting under him to cease the construction of any wharf beyond that line and at once to remove any piling or other obstruction that he may have placed in the river in front of his

property and

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beyond such wharf line. Subsequently, on November 23, 1898, the port commissioners took further action and declared that the wharf proposed by said Montgomery would interfere with the navigation of the river by creating shoal places in its now navigable waters, and obstruct the work of making and maintaining a channel in the river twenty-five feet in depth, as provided for in the act incorporating the Port of Portland.

Of this action by the local authorities Montgomery and those in his employment were notified in writing.

The suit was brought to prevent the continuance of the work upon which Montgomery entered. The defendant resisted the relief asked, and insisted that the action of the Secretary of War gave him complete authority to proceed despite any objections urged by the City and Port of Portland. The defense was sustained by a decree of the court of original jurisdiction, and the bill was dismissed. But that decree was reversed by the Supreme Court of Oregon, its conclusions of law being that the wharf lines established on the 12th day of December, 1892, were then and ever since have been the legal and authorized wharf lines of the Port of Portland, and that the respondent had no right to drive piles or extend any wharf beyond the wharf lines so established. The respondent, her attorneys, agents, servants, and employees were, by final order, enjoined from driving piles or putting any structure in the river outside of the wharf lines so established, and commanded to remove all piles driven or structures of any description erected therein, beyond said wharf lines. *Portland v. Montgomery*, 38 Or. 215.

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MR. JUSTICE HARLAN delivered the opinion of the Court.

This case cannot be distinguished in principle from *Cummings v. Chicago*, [188 U. S. 410](#) , decided at the present term. In that case, it appeared that the Secretary

under the Act of September 19, 1890, and other legislation of Congress, had given his assent to the rebuilding of a certain dock in Calumet River, within the limits of Chicago, which river, being one of the navigable waters of the United States, had been surveyed by the direction of the government, and for its improvement Congress had made appropriations from time to time. When that action was commenced, there was in force an ordinance of the City of Chicago, enacted under the authority of the state, forbidding the construction of any pier, dock, or other structure in navigable waters within the limits of that city without first obtaining a permit from its Department of Public Works. And the question was whether, under the acts of Congress, including that of 1890, the above ordinance was of any avail as against the permit of the Secretary.

The contention of the plaintiff was that Congress, by its appropriations for the improvement of Calumet River, had taken such complete possession of that stream as to deprive the local authorities of all power in respect of the building or maintenance of structures in that river. In determining that question, the Court took into consideration various enactments, including the tenth section of the River and Harbor Act of March 3, 1899, c. 425 (passed after the present suit was brought), as follows:

"That the creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited, and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States outside established harbor lines, or where no harbor lines have been established except on plans recommended by the chief of engineers and authorized by the Secretary of War, and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, canal, lake, harbor or refuge or enclosure within

the limits of any breakwater, or of the channel of any navigable water of the United States unless the work has been recommended by the

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Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

30 Stat. 1121, 1151.

In that case, we recognized the doctrine as long established that the authority of a state over navigable waters entirely within its limits was plenary, subject only to such action as Congress may take in execution of its power under the Constitution to regulate commerce among the several states. After referring to *Lake Shore & Michigan Railway v. Ohio*, [165 U. S. 365](#) , [165 U. S. 366](#) , [165 U. S. 368](#) , we said that if Congress had intended by its legislation, prior to that decision,

"to assert the power to take under national control, for every purpose, and to the fullest possible extent, the erection of structures in the navigable waters of the United States that were wholly within the limits of the respective states, and to supersede entirely the authority which the states, in the absence of any action by Congress, have in such matters, such a radical departure from the previous policy of the government would have been manifested by clear and explicit language. In the absence of such language, it should not be assumed that any such departure was intended. We do not overlook the long-settled principle that the power of Congress to regulate commerce among the states 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' [Gibbons v. Ogden](#), 9 Wheat. 1, [22 U. S. 196](#) ; [Brown v. Maryland](#), 12 Wheat. 419, [25 U. S. 446](#) ; *Brown v. Houston*, [114 U. S. 630](#) . But we will not at this time make any declaration of opinion as to the full scope of this power or as to the extent to which Congress may go in the matter of the erection or authorizing the erection of docks and like structures in navigable waters that are entirely within the territorial limits of the several states. Whether Congress may, against or without the expressed will of a state, give affirmative

authority to private parties to erect structures in such waters, it is not necessary in this case to decide. It is only necessary to say that the act of 1899 does not manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce, and thereby to supersede the original authority of the states. The effect of that act, reasonably interpreted, is to make the erection

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of a structure in a navigable river, within the limits of a state, depend upon the concurrent or joint assent of both the national government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent, the structure cannot be erected by them. But, under existing legislation, they must, before proceeding under such an authority, obtain also the assent of the state acting by its constituted agencies."

There is nothing in the present case to distinguish it from the *Cummings* case. While section 12 of the act of 1890 forbade the construction or extension of piers, wharves, bulkheads, or other works beyond the harbor lines established under the direction of the Secretary of War in navigable waters of the United States "except under such regulations as may be prescribed from time to time by him," it does not follow that Congress intended in such matters to disregard altogether the wishes of the local authorities. Its general legislation so far means nothing more than that the regulations established by the Secretary in respect of waters, the navigation and commerce upon which may be regulated by Congress, shall not be disregarded even by the states. Congress has not, however, indicated its purpose to wholly ignore the original power of the states to regulate the use of navigable waters entirely within their respective limits. Upon the authority, then, of *Cummings v. Chicago*, and the cases therein cited -- to which we may add *Willamette Bridge Co. v. Hatch*, [125 U. S. 1](#), we hold that, under existing enactments, the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a state cannot be said to be complete and absolute without the concurrent or joint assent of both the general and state governments. Of course, the right of the government to erect public

structures in a navigable water of the United States rests upon different grounds.

In this view, it is unnecessary to consider the general question discussed at the bar whether Congress has or not, by some of its enactments relating to structures in navigable waters, committed to the Secretary of War the determination of matters

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that are legislative in their nature, and which, under the Constitution, could only be determined, in the first instance, by Congress. It is sufficient now to say that the legislation upon which the defendant relies to justify the construction of the works in question does not, when reasonably interpreted, indicate any purpose upon the part of Congress to assume such complete and absolute control of the navigable waters of the United States as will make of no avail the action of the states in respect of the erection by private parties of structures in waters wholly within their respective limits.

The judgment of the Supreme Court of Oregon is

Affirmed.

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"SEC. 12. Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may and is hereby authorized to cause such lines to be established beyond which no piers or wharves shall be extended or deposits made except under such regulations as may be prescribed from time to time by him."

25 Stat. 400, 425, c. 860.