

**McGowan Vs. Columbia River Packers' Assn.**

**McGowan Vs. Columbia River Packers' Assn.**

**SooperKanoon Citation :** [sooperkanoon.com/92514](http://sooperkanoon.com/92514)

**Court :** US Supreme Court

**Decided On :** Dec-17-1917

**Appeal No. :** 245 U.S. 352

**Appellant :** McGowan

**Respondent :** Columbia River Packers' Assn.

**Judgement :**

McGowan v. Columbia River Packers' Assn. - 245 U.S. 352 (1917)

U.S. Supreme Court McGowan v. Columbia River Packers' Assn., 245 U.S. 352 (1917)

**McGowan v. Columbia River Packers' Association**

**No. 78**

**Argued November 22, 23, 1917**

**Decided December 17, 1917**

**245 U.S. 352**

*APPEAL FROM THE CIRCUIT COURT OF APPEALS*

*FOR THE NINTH CIRCUIT*

## SYLLABUS

As decided by this Court in *Washington v. Oregon*, [211 U. S. 127](#) ; [214 U. S. 205](#) ; Sand Island, in the Columbia River, is part of the Oregon, the boundary between that state and Washington being the ship channel north of the Island.

An alleged nuisance consisting of nets connected with buoys and heavily anchored to the bottom of the Columbia River between the line of extreme low tide and the channel, in Oregon, \* is not subject to abatement by the district court sitting in the Western District of Washington; assuming that concurrent jurisdiction "on the Columbia" is enjoyed by the Washington in virtue of the act organizing Washington Territory (c. 90, 21, 10 Stat. 179) and the act admitting Oregon into the Union (c. 33, 2, 11 Stat. 383), such jurisdiction does not reach the bed of the stream in Oregon.

Plaintiff filed its bill in the Western District of Washington to abate a nuisance on the Columbia River, assuming *bona fide* and not without some reason that the *locus in quo* was within that state and district, but later, before taking proofs and before final hearing, moved to dismiss without prejudice because of an intervening decision of this Court which fixed the locus in Oregon. The motion having been refused and the case retained upon the ground that Washington had concurrent jurisdiction over the river, *held* (1) that, in face of the doubt concerning the power to abate the nuisance as prayed, the district court erred in refusing the motion, and (2) that the possibility of granting relief against the defendants *in personam* did not justify retaining the case against the plaintiff's will.

When a decree dismissing a bill is meant to be without prejudice, the better practice is to express it so.

219 F. 365 affirmed.

The case is stated in the opinion.

Page 245 U. S. 353

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the appellee, the Columbia River Packers' Association, as lessee from the United States of fishing sites and riparian rights on Sand Island in the Columbia River, to compel the appellants to remove certain obstructions placed by them upon the bottom of the channel of the river in front of the plaintiff's premises, and to refrain from longer maintaining them there. Upon a bond being given, a restraining order was issued on July 7, 1908; answers and a cross-bill were filed in the following August, and a demurrer to the cross-bill was overruled on October 21 of the same year. The suit had been brought in the Western District of Washington upon the belief that Sand Island was in Washington and subject to the jurisdiction that that state exercised in fact. But, on November 16, 1908, it was decided by this Court that the boundary between Oregon and Washington was the ship channel north of Sand Island, and that Sand Island belonged to the former state. [\*Washington v.\*](#)

Page 245 U. S. 357

*Oregon*, [211 U. S. 127](#) ; [214 U. S. 214](#) U.S. 205. Thereupon, in June, 1909, the plaintiff filed a petition that the suit be dismissed without prejudice for want of jurisdiction, since it turned out that the land concerned was not within the district for which the court sat.

The district court dismissed the petition and retained jurisdiction of the cause on the ground that, by the Act of Congress of March 2, 1853, c. 90, 21, 10 Stat. 172, 179, organizing the Territory of Washington, and by the Act of February 14, 1859, c. 33, 2, 11 Stat. 383, admitting Oregon into the Union, concurrent jurisdiction on this part of the river was reserved to Washington when it subsequently became a state. The plaintiff then filed a supplemental bill in which again it prayed that the suit might be dismissed without prejudice if the court had no jurisdiction; the case proceeded to the taking of evidence and final hearing, the temporary injunction was dissolved, an injunction was issued against the plaintiff's interfering with the defendants' appliances, and a final decree for damages caused by the temporary injunction was entered in favor of the defendants. The plaintiff appealed to the

circuit court of appeals, and that court, being of opinion that the bill should have been dismissed on the plaintiff's petition, reversed the decree and ordered the bill to be dismissed. 219 F. 365.

The nuisance complained of consisted of set nets, each anchored by a stone weighing about three hundred pounds to which was attached a short cable which was clamped to a wire rope about twenty-five feet long, to which in its turn was attached a buoy of large timbers. The nets were placed between the line of extreme low tide and the channel of the river; they were alleged to interfere with the exercise of the plaintiffs' rights, and an abatement of the obstruction was prayed for in the bill. We agree with the circuit court of appeals that, assuming for the purposes

Page 245 U. S. 358

of decision that the Washington had concurrent jurisdiction "on the Columbia," in the words of the statute (Act 1859, c. 33, 2), *Nielsen v. Oregon*, [212 U. S. 315](#) , [212 U. S. 319](#) , the jurisdiction did not extend to the removal of such a nuisance as this. It did not reach the bed of the stream, and the officers of the state would have had no authority to intermeddle with the defendants' nets anchored to the bottom. See *Wedding v. Meyler*, [192 U. S. 573](#) , [192 U. S. 585](#) . This was an important part of the relief that the plaintiff sought, and when it found that it could not have it, it naturally endeavored to dismiss the bill.

It ordinarily is the undisputed right of a plaintiff to dismiss a bill before the final hearing. *Carrington v. Holly*, 1 Dickens, 280. *Cummins v. Bennett*, 8 Paige, 79. *Kempton v. Burgess*, 136 Mass.192. The discussions have been directed more to the question of costs. When a bill was filed under a mistake common to both parties and in other like cases, the plaintiff was allowed to dismiss his bill without costs. *Lister v. Leather*, 1 DeG. & J. 361, 368 (1859). *Broughton v. Lashmar*, 5 My. & Cr. 136, 144 (1840). Here, the decision of this Court put the plaintiff in an unexpected position. The question before the district court was not whether the bill ought to be retained for a decree *in personam* if the plaintiff so desired, or even one of costs, but whether it should be retained against the plaintiff's will for a trial

that could not, or at least very possibly might be held unable to, give it what it asked. Upon this point also, we are of opinion that the circuit court of appeals was right. Its decree, of course, meant that the bill was dismissed without prejudice, as prayed, but it is better that it should express the fact, and, with that modification, it is affirmed.

*Decree affirmed.*

\* The place was on the south side of Sand Island.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**