IN THE

SUPREME COURT

OF THE

STATE OF WASHINGTON

13083

THE STATE OF WASHINGTON,
Appellant,
v.
ALEC TOWESSNUTE, *Respondent.*

No.....
(Consolidated)

APPEAL FROM THE SUPERIOR COURT
OF BENTON COUNTY
HONORABLE BERT LINN, JUDGE.

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BRIEF OF APPELLANT

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STATEMENT.

Upon May 14, 1915, four informations were filed in the superior court of Benton county against the respondent for violations of chapter 31, Laws of 1915, it being alleged: (1) That the respondent had taken salmon in the Yakima river with an appliance other than a hook and

line or set net contrary to section 25 of the act; (2) That the respondent had caught salmon without procuring a license so to do as provided in section 41 of said act; (3) That he had caught salmon within one mile of a certain dam across the Yakima river in violation of section 71 of said act; and (4) That he had snagged salmon with a gaff hook in violation of section 72. (Trans., pp. 1 to 8.)

Upon the 25th day of May a stipulation was entered into between counsel for the parties which provided that these four actions might be consolidated for purpose of trial. Said stipulation recited that the respondent is an Indian who still maintains his tribal relations with the Yakima tribe, which tribe was a party to a certain treaty between the Yakima nation and the United States, made June 9, 1855, and ratified by the Senate of the United States upon March 8, 1859. Paragraph 3 of this stipulation recites that the respondent caught salmon with a gaff hook in the waters of the Yakima river at a point

more than five miles from the boundaries of any Indian reservation, within one mile of a certain dam across said river and without having obtained any fishing license from the state of Washington. Paragraph 4 of said stipulation then recites:

"That said fishing place in said Yakima river at and in which said defendant fished and took fish as aforesaid, is and was one of the usual and accustomed fishing places of the members of the confederated tribes and bands of Indians known as the Yakima Nation and was such usual and accustomed fishing place of said Indians at and prior to the time of making the treaty aforesaid, and has been used and enjoyed by said Indians during the fishing season of each and every year since said treaty was made; that said fishing place has from time immemorial been used and enjoyed by said Indians and their ancestors and known by the Indian name of 'Top-tut.' "

Paragraph 5 of said stipulation provides:

"That said manner of taking fish is an ancient and accustomed method used from time immemorial by said Indians in catching fish."

It was further stipulated that the foregoing facts and circumstances might be deemed and

considered as alleged in the informations and that the demurrers of the respondent to said informations might be considered as running to such informations as so amended. (Trans., pp. 9 to 11.)

To these informations as amended by said stipulation, the respondent demurred upon the ground that they did not state facts constituting a crime as to the respondent (Trans., p. 12). After oral argument this demurrer was sustained by the trial court and an order entered to that effect (Trans., p. 13).

The appellant having elected to stand upon said informations, a judgment of dismissal was thereafter entered (Trans., p. 14). From such judgment this appeal is prosecuted.

ASSIGNMENTS OF ERROR.

1. The court erred in sustaining the demurrer of respondent to the informations herein.

2. The court erred in entering a judgment of dismissal herein.

3. The court erred in holding that the respondent is not subject to the provisions of chapter 31, Laws of 1915.

reservation, is, in general, amenable to the criminal statutes of the state to exactly the same extent as any other person, and that the state courts have full jurisdiction over such offenses.

State v. Williams, 13 Wash. 335;
State v. Howard, 33 Wash. 250;
State v. Smokalem, 37 Wash. 91;
Ex parte Tilden, 218 Fed. 920;
State v. Wolf, 13 Am. & Eng. Ann. Cas. 193.

Appellant's position then may be reduced to two general heads: (1) That section 3 of this treaty when properly construed was not intended to give to these Indians a right to fish beyond the boundaries of their reservation in violation of state law; (2) That if it was so intended it has since been repealed to that extent by the Enabling Act under which Washington was admitted into the Union.

I.

The Treaty Does Not Give This Right.

Referring to the language of the treaty heretofore set forth, the court will observe that an absolute right of fishing at all usual and accustomed places is not given to these Indians, but only the right to fish "in common with citizens of the territory." Within the boundaries of the reservation the exclusive right is attempted to be reserved. Without those boundaries, the Indian stands on a par with the citizens of the territory, now state, but the Indian does not possess rights which are denied to the citizens of the state. A reference to the circumstances under which this treaty was entered into is proper in this connection. The treaty was signed in 1855. At the time of its execution the Indians claimed the right of occupancy to practically all the lands in the northwest. The supreme court of the United States has held that this right was in no

this treaty was to impose a servitude upon the lands granted and nothing more. The rights of the sovereign were not contemplated by either party to the treaty.

The district attorney contended in the lower court, and we anticipate will renew that contention here, that the treaty was a reservation of rights by the Indians and not a grant to them by the government. Admitting this to be true for the sake of argument, and further assuming that his construction of the intent of the Indians is correct, we must still consider the question as to what, if any, rights the Indians had to reserve. To sustain the district attorney's construction of this treaty the court must find that these Indians had in 1855 an absolute right to take fish and game without interference by the sovereign power, in that case the territory, but to which the state has now succeeded. If that right was then subject to the police power of the territory or of Congress, then certainly its reservation in the treaty could not make absolute what was be-

fore permissive. It is elementary that even Congress could not bind itself or its successors not to exercise its police power.

An understanding of the nature of the right to take wild game and fish is therefore necessary before this question can be answered. If these Indians in 1855 had no property right in the fish, if the only right which they had was to go upon the banks of the streams and take the fish subject to the police power of the sovereign, then assuredly they do not now possess any greater rights by virtue of any reservations which they may have made in the treaty, a reservation which the district attorney said was a reservation of an existing right.

What right then does the individual have in wild game or fish? The last word upon this subject will be found in the opinion of Mr. Justice White in the case of *Geer v. Connecticut,* 161 U. S. 519. In that case Justice White reviewed both the civil and the common law upon the sub-

The territory of Washington was organized by the act of March 2, 1853 (10 Stat. at Large, p. 172). Section 6 of that act provided that "the legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States," subject, however, to the approval or disapproval of Congress. It then appears that in 1853 there was a sovereignty in which the title to the wild game and fish was vested in trust for the citizens of the territory, a territory which during the seventies exercised that power by the passage of an elaborate fish and game code (Code of 1881, ch. 94, p. 213).

Now if it be true, as was said in the *Geer* and *Tice* cases, *supra,* that no person has a property right in wild game or fish; if it be true that ownership of the land is not ownership of the game or fish found thereon; if it be a fact that the sovereign holds such game and fish in trust for the people, we are unable to understand how the Indians reserved this alleged right. They could

not reserve it because they did not have it. When the treaty was entered into they had exactly the same rights in this respect as did the citizens of the territory; namely, the right to take, if the legislative authority of the territory or Congress did not prohibit such taking. Not possessing an absolute right, certainly they could not make it absolute by an attempted reservation.

The lands included within the state of Washington were formerly a portion of what was known as Oregon Territory, and were acquired in part from France by the Louisiana purchase (8 Stat. 202), and in part by the treaty of June 15, 1846, with Great Britain (9 Stat. 869). Further, as was said in the case of *Schively v. Bowlby,* 152 U. S. 1, 38 L. Ed. 331 (p. 50):

> "The title of the United States to Oregon was founded upon actual discovery and actual settlement by citizens of the United States, authorized or approved by the government of the United States; as well as upon the cession of the Louisiana territory by France in the treaty of 1803, and the renunciation of the claims of Spain in the treaty of 1819."

In the case of *Geer v. Connecticut,* 161 U. S. 519, the court held that both the civil law which obtains in France, and the common law, which comes from England, recognized the rule that title to the wild game and fish is vested in the sovereign. The United States has succeeded to all the rights of France and England over this territory, and it is therefore proper to consider the nature of the title which those nations had. The complete answer to this will be found in the opinion of Chief Justice Marshall in the case of *Johnson v. McIntosh,* 8 Wheat. 542, 5 L. Ed. 681. Without quoting from this decision in detail, it is sufficient to say that Justice Marshall concluded that the European nations acquired the lands upon the American continent by right of discovery. With respect to the rights of the Indians, he said (p. 572):

"In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of

the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it."

Referring to France, Justice Marshall said (p. 575):

"France, also, founded her title to the vast territories she claimed in America on discovery."

Speaking of England, he said (p. 575):

"No one of the powers of Europe gave its full assent to this principle more unequivocally than England. The documents upon this subject are ample and complete."

He then concluded that the United States have succeeded to all the rights of these nations in this respect, saying (p. 587):

"The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold and assert in themselves, the title by which it was acquired. They maintain, as all

others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise. * * *"

"We will not enter into the controversy, whether agriculturists, merchants and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them."

See:

Caldwell v. State, 1 Stewart & Porter (Ala.) 327;

Beecher v. Wetherby, 95 U. S. 517-525, 24 L. Ed. 440;

Buttz v. Railroad Co., 119 U. S. 55, 30 L. Ed. 330;

Schively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331;

Francis v. Francis, 203 U. S. 233, 51 L. Ed. 165;

United States v. Ashton, 170 Fed. 509.

If, then, the nations of Europe, through whom we trace our title, acquired their rights in these lands by discovery, upon what basis can it be contended that these Indians had, in 1855, a potential title to something which was to come into existence sixty years hence? The title to the wild game and fish, being an incident of sovereignty, passed first, to the European nations by right of discovery, then to the United States, and then to the state, just as did the land. Hence the Indians did not have this alleged right to reserve. As was said in the case of *Smith v. Maryland,* 18 How. 71, 15 L. Ed. 269, in referring to the title of the state to oysters found in the public waters of the state (p. 75):

"The state holds the property of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that en-

joyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. *This power results from the ownership of the soil, from the legislative jurisdiction of the state over it, and from the duty to preserve unimpaired the public uses for which the soil is held.*" (Italics ours.)

That this right of discovery carried with it the title to the wild game and fish in the territory discovered, we think is established by the opinion of Justice Taney in the case of *Martin v. Waddell,* 16 Peters 366, 10 L. Ed. 997. The court there held that the title to oysters situated in navigable waters, was vested first in the king and subsequently in the state in trust for the citizens of the state, and that a prior grant of land by the king did not carry with it the exclusive right of taking oysters from such lands. Justice Taney dismissed the rights of the Indians with the following remarks (p. 409):

"The English possessions in America were not claimed by right of conquest, but by right of discovery. For, according to the principles of in-

ternational law, as then understood by the civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute right of property and dominion was held to belong to the European nation by which any particular portion of the country was first discovered. Whatever forbearance may have been sometimes practiced towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe at their pleasure, as if it had been found without inhabitants."

See *McCready v. Commonwealth,* 27 Grattan (Va.) 985, affirmed in *McCready v. Virginia,* 94 U. S. 391.

Indeed, section 12 of the act of August 14, 1848, creating the territory of Oregon, provided that streams should not be obstructed so as to prevent salmon runs (9 Stat. 328). A clear indication, it would seem, that Congress took the view that title to the salmon was vested in it.

The logic of these decisions is that the title acquired by discovery carried with it title to the fish and game. It follows, therefore, that these

Indians had no rights in such fish and game, superior to the sovereign, to reserve in 1855, but only a limited right to take as permitted by the sovereign.

Neither will it aid respondent to invoke the rule enunciated in some of the decisions of the supreme court of the United States that Indian treaties must be construed "as that unlettered people understood them." This is no doubt true where the Indians were seeking to reserve something which they in fact possessed. To illustrate, they might have understood that they were reserving a right to commit murder or practice polygamy within the boundaries of their reservations. It will be admitted, we think, that such an understanding would be of no avail because they did not have the right to reserve. This is an extreme illustration, but the same principle is applicable. The only construction possible is that the Indians were seeking to protect themselves from discrimination and to reserve an easement to go upon the lands granted for the

purpose of fishing as permitted by the sovereign power. The treaty did and could not do more than this.

Indeed, this is the construction of the treaty which seems to have been adopted by the supreme court of the United States in the case of *United States v. Winans,* 198 U. S. 371, 49 L. Ed. 1089. In that case it appeared that the defendant, Winans, was the owner of certain lands adjoining an ancient and accustomed place of fishing of the Yakima Indians in the Columbia river. Winans erected a fish wheel at this place and refused to allow the Indians to go across his land for the purpose of fishing. The government, in behalf of the Indians, brought an action to enjoin this refusal and the court held that this provision of the treaty was intended to cover a situation of this nature. In the course of that opinion the court said (p. 381):

"The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a

right in the land; the right of crossing it to the river; the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty."

There was no question there involved of the power of the state to regulate the exercise of that right, neither does it appear that the Indians there sought to exercise the right in violation of state law. Indeed, the court was careful to make it clear that the treaty did not interfere with the police power of the state, as appears from that portion of the opinion where it said (p. 384):

"*Nor does it restrain the state unreasonably, if at all, in the regulation of the right.* It only fixes in the land such easements as enable the right to be exercised." (Italics ours.)

In the lower court counsel for the respondent argued that the above quotation was only intended to apply to the power of the state to regulate fishing by white persons. We cannot appreciate the force of this argument. The only right with which the court was concerned was the right of the Indians to fish, and when the court

said that the treaty did not restrain the state in the regulation of that right we think the court meant exactly what it said. Far from being authority in support of respondent, the Winans decision is direct authority in favor of appellant. That decision holds that the only thing contemplated by either party to this treaty was to prevent discrimination against the Indians and to place them upon an equal footing with the owners of lands bordering fishing streams, and that the treaty was not intended to restrict the power of the state to regulate this taking.

The oral opinion of the learned trial judge was based to a large extent upon the case of *United States v. Taylor,* 3 Wash. Terr. 88. Although the language of that decision is somewhat broad, we find nothing in the facts there before the court which had to do with the right of the state in the premises. The facts in that case were exactly the same as in the *Winans* case. That was an action for an injunction brought by the United States government in behalf of the Yakima In-

dians to enjoin the defendant, Taylor and others, from interfering with or preventing the Indians from fishing at their usual and accustomed places. Taylor and his grantees claimed the right to do this for the reason that they were the fee simple owners of the riparian lands across which it was necessary for the Indians to pass in order to reach said fishing stations. The question in the case was stated very clearly by Judge Hoyt upon page 96, where he said:

"From the above stipulation, it will at once be seen that the single question now to be determined is that of the rights of the appellants under said treaty as against the appellee, as owner of the land by title acquired from the United States subsequent to said treaty under the homestead laws and other acts of Congress."

The court will therefore readily see that in that case, as in the *Winans* case, the power of the state, then territory, under its police power, was in no way involved. Judge Hoyt therefore very properly concluded that the Indians had an easement across these lands and the decision goes no further than to so hold.

Upon its face this case perhaps does not appear to be of great importance. Viewed superficially and from a sentimental standpoint it may seem that the state is not in an equitable position when it seeks to prevent these Indians from taking a few salmon. The case, however, is of vaster importance than shown by this record. This treaty provision is common to all the Indian treaties in the state so far as we are informed. It covers practically every usual and accustomed place of fishing in the state. Times have changed since these treaties were entered into. Commercial fishing has developed upon a scale not then dreamed of. New and improved methods of taking fish by mechanical appliances and in vast quantities have been discovered. The conservation of this valuable food supply has become a matter of great importance to the public welfare as is shown by the session laws of every legislature. In the western portion of this state, at least, the Indians have not been deaf to the call of produce. Many of the western tribes now

treaty should be construed in the manner contended for by respondent, we contend that it has since been repealed to that extent by the Enabling Act under which this state was admitted. Section 8 of the Enabling Act in part provides:

> "And if the constitutions and governments of said proposed states are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed states which have adopted constitutions and formed state governments as herein provided shall be deemed admitted by Congress into the Union, under and by virtue of this act, *on an equal footing with the original states, from and after the date of said proclamation.*" (Italics ours.)

The court should bear in mind that a treaty is not a contract. While it is the supreme law of the land it may be repealed by Congress either expressly or by necessary implication. Neither does a separate rule obtain with respect to Indian treaties. As was said in the case of *Chero-*

kee Tobacco v. United States, 11 Wall. 616, 20 L. Ed. 227 (p. 621):

"A treaty may supersede a prior act of Congress * * *, and an act of Congress may supersede a prior treaty. * * * In the cases referred to, these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. *They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered.*" (Italics ours.)

Or as was said in the case of *Lone Wolf v. Hitchcock,* 187 U. S. 553, 47 L. Ed. 299 (p. 566):

"But, as with treaties made with foreign nations * * *, the legislative power might pass laws in conflict with treaties made with the Indians."

and in the same year the petitioner Race Horse, a member of the Bannock tribe, was arrested and charged with killing elk upon unoccupied land of the United States in violation of this statute. The case went by *habeas corpus* to the supreme court of the United States, which court held that the admission of Wyoming upon an equal footing with the original states operated *pro tanto* to repeal the treaty in so far as it might be construed to restrict the power of the sovereign state to regulate the taking of wild game. In the course of its opinion the court said (p. 511):

> "The act which admitted Wyoming into the Union, as we have said, expressly declared that that state should have all the powers of the other states of the Union, and made no reservation whatever in favor of the Indians. *These provisions alone considered would be in conflict with the treaty if it was so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority.* But the language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule." (Italics ours.)

After reviewing many authorities in respect to this general rule, the court continued (p. 514):

"The power of all the states to regulate the killing of game within their border will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the state of Wyoming, that state would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the state. Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other states of the Union, a power resulting from the fact of statehood and incident to its plenary existence. Nor need we stop to consider the argument advanced at bar, that as the United States, under the authority delegated to it by the constitution in relation to Indian tribes, has a right to deal with that subject, therefore it has the power to exempt from the operation of state game laws each particular piece of land owned by it in private ownership within a state, for nothing in this case shows that this power has been exerted by Congress. The enabling act declares that the state of Wyoming is admitted on equal terms with the other states, and this declaration, which is simply an expression of the general rule, which presupposes that states, when admitted into the Union, are endowed with pow-

ers and attributes equal in scope to those enjoyed by the states already admitted, repels any presumption that in this particular case Congress intended to admit the state of Wyoming with diminished governmental authority. The silence of the act admitting Wyoming into the Union, as to the reservation of rights in favor of the Indians, is given increased significance by the fact that Congress in creating the territory expressly reserved such rights. Nor would this case be affected by conceding that Congress, during the existence of the territory, had full authority in the exercise of its treaty making power to charge the territory, or the land therein, with such contractual burdens as were deemed best, and that when they were imposed on a territory it would be also within the power of Congress to continue them in the state, on its admission into the Union. Here the enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the state, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission."

We propose briefly to compare the facts in that case with those in the case at bar. First, as to the territorial act. In the *Race Horse* case the territorial act provided that the organization of such territory should not be deemed destruc-

tive of any treaty rights of the Indians. The act of Congress of March 2, 1853 (10 Stat. at Large, page 172), which organized the territory of Washington, contains a similar provision with respect to Indian treaties. Second, as to the treaties. In the *Race Horse* case the provision of the treaty was that the Indians should have the right to hunt upon all unoccupied lands of the United States so long as game might be found thereon and so long as peace subsisted. In the present case the treaty under consideration gives the Indians the right to hunt upon all open and unclaimed lands (a provision identical with the Bannock treaty), and in addition the right to fish at all usual and accustomed places. Third, the Enabling Act. The Wyoming enabling act admitted Wyoming into the Union "on an equal footing with the original states in all respects whatever." The Washington enabling act provides that the states named therein "shall be deemed admitted by Congress into the Union, under and by virtue of this act, on an equal foot-

ing with the original states." The phraseology is somewhat different but the effect is the same.

It will thus be seen that in their material facts there is no difference between the *Race Horse* case and the case at bar. This court is bound by the decisions of the United States supreme court with respect to the construction of Federal statutes and treaties with Indian tribes, and upon the authority of that case alone the judgment of the trial court must be reversed.

Neither is there anything inconsistent with that decision in the subsequent case of *Winans v. United States,* 198 U. S. 371, 49 L. Ed. 1089. The question of the power of the state was not there involved. That was merely a controversy between the Indians and a riparian owner who sought to exclude the Indians from taking advantage of a servitude imposed upon the land by the United States, which was the original proprietor and owner of the land. Indeed, the *Race Horse* case is nowhere mentioned in that decision. We think that the court knows that it is not the

custom of the supreme court of the United States to overrule its own prior decisions without reference to the decision overruled. If the court will turn to the resume of the brief of the solicitor general in that case as set forth in the official report, it will observe that the *Race Horse* case was cited in support of the government's contention. The *Race Horse* case has since been cited in subsequent decisions of that court, to which we shall hereafter refer.

Furthermore, it is submitted that necessity compels this conclusion. A careful study of the decisions of the supreme court of the United States will show that Congress was without power to admit the state of Washington into the Union shorn of the right to protect its wild game and fish upon lands and waters, otherwise subject to its jurisdiction.

The power of Congress to impose binding limitations upon the sovereignty of new states is not an unlimited power. The existence of a new state as an independent sovereignty imports cer-

constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the Union; and, second, that such new states might not exercise all of the powers which had not been delegated by the constitution, but only such as had not been further bargained away as conditions of admission.'' (Italics ours.)

The final conclusion of the court is then summarized upon page 573 of the opinion, where the court said:

"The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, *which would not be valid and effectual if the subject of congressional legislation after admission.''* (Italics ours.)

Among the authorities cited in support of this statement is the case of *Ward v. Race Horse,* 163

U. S. 504, *supra,* clearly indicating that the court intended the rule to be applicable to limitations imposed by prior treaties as well as those inserted in enabling acts. And again, upon page 576 of the opinion, the court referred to the *Race Horse* case in the following language:

> *"In Ward v. Race Horse, 163 U. S. 504, 41 L. Ed. 244, 16 Sup. Ct. Rep. 1076, the necessary equality of the new state with the original states is asserted and maintained against the claim that the police power of the state of Wyoming over its wild game had been restricted by an Indian treaty made prior to the admission of the state of Wyoming."* (Italics ours.)

We regard this statement as absolutely decisive of the case at bar. In substance it holds that it is not competent for Congress to impose upon a sovereign state limitations upon its police power with respect to its wild game upon lands not included in an Indian reservation, by treaties with the Indian tribes; and that however valid those treaties might have been in their inception, they are of necessity repealed to that extent by the admission of the state. This statement is

Withers v. Buckley, 20 How. 84, 15 L. Ed. 816.

Tested by the rule enunciated in the *Coyle* case, *supra,* we think it apparent that Congress could not have, even had it so desired, admitted this state into the Union subject to this limitation, and that the act of admission, being the last action by Congress upon the subject, must control. Bearing in mind the rule enunciated upon page 573 of the *Coyle* decision that no limitations upon state sovereignty are valid "which would not be valid and effectual if the subject of congressional legislation after admission," and bearing in mind the further fact that this rule is equally applicable to prior treaties as to enabling acts, the question is presented of whether or not it would now be competent for Congress to pass an act allowing Indians to fish at all usual and accustomed places in this state free from state regulation. Unless the court can answer this in the affirmative, it must hold that there is an irre-

vocable conflict between the treaty and the enabling act. We find it unnecessary to argue that question in detail. The *Race Horse* case, *supra,* when read in connection with the *Coyle* case, *supra,* is an absolute answer to the question. It is true that Congress does possess the power to control the conveyance of Indian lands and to protect the Indians. We think, however, that even counsel would not contend that Congress could now pass an act allowing Indians to maintain nuisances beyond the borders of their reservations in violation of state law. Yet if this court adopt this construction it will have this effect because section 40, chapter 31, *supra,* declares that fishing appliances used in violation of the act shall be deemed public nuisances and subject to abatement. We think that it will be admitted that Congress cannot now, under the guise of protecting the Indians, declare that these Indians may hunt and fish at any time and any place regardless of state law. The power to protect the Indians does not authorize Congress

an altogether different proposition from the power of the state to protect and preserve its own property. The reason for these decisions is well stated in the case of *United States v. Sandoval,* 231 U. S. 28, *supra,* page 38, where the court in referring to the effect of the admission of the state upon congressional legislation designed to protect the Indians from intoxicating liquors, said (p. 38):

> "That this was done in the enabling act, and that the state was required to, and did, assent to it, as a condition to admission into the Union, in no wise affects the force of the congressional declaration, *if only the subject be within the regulating power of Congress.*" (Italics ours.)

The court then quotes the rule laid down in the *Coyle* case, *supra,* and concludes that since it was competent for Congress to pass legislation of that character *after* admitting the same, it might be done by a provision in the enabling act. Or as was said in the case of *Perrin v. United States,* 232 U. S. 478, 58 L. Ed. 691 (p. 482);

"The power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation, wheresoever situate, * * * whether upon or off a reservation and whether within or without the limits of the a state, does not admit of any doubt. It arises in part from the clause in the Constitution investing Congress with authority 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,' and in part from the recognized relation of tribal Indians to the Federal government."

In other words, the court concluded that since the matter was one which only concerned the government, the existence of state sovereignty was immaterial. It is apparent, we think, that this situation is not presented when these Indians, instead of seeking protection, seek an unlimited right to take something which they do not own. Indeed the court in the *Perrin* case, *supra,* recognized limits even to this power, as appears from page 486 of the opinion, where it said:

"As the power is incident only to the presence of the Indians and their status as wards of the

III.

Recapitulation.

1. The treaty was not intended to give to these Indians the right to fish free from state regulation and control, but was merely intended to fix a servitude upon the land bordering the fishing places, by which the Indians might exercise such right as the state permitted upon an equal basis with *all* citizens of the state.

2. If the treaty be construed as reserving this right, it has since been repealed to that extent by the enabling act for two reasons: (a) Because of an irreconcilable inconsistency between the treaty, as thus construed, and the enabling act; (b) Because Congress was without power to impose any such limitation upon the exercise of the police power by a sovereign state.

The judgment of the lower court was erroneous and should be reversed.

Respectfully submitted,

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Service of the within brief is hereby admitted by the receipt of three copies thereof, this 19th day of August, 1915.

Francis P. Garrecht

Attorneys for Respondent.