IN THE

SUPREME COURT

OF THE

STATE OF WASHINGTON

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

No.....
(Consolidated)

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

REPLY BRIEF OF APPELLANT

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ARGUMENT.

I

THE PROPER CONSTRUCTION OF THE TREATY.

The major portion of respondent's brief fails to touch the real questions which were argued

in our opening brief. Before the lower court counsel argued that this treaty was a reservation of an existing right. We answered this in our opening brief by showing to the court that if this was so, the Indians did not have this alleged right to reserve because they had no more rights in the wild game and fish in 1855 than did any white citizen of the territory, now state. (Brief, p. 14.) Respondent's brief fails entirely to meet this argument. Upon page 15 it is said:

> "Certainly this perpetual right of use and occupancy was as valuable as the naked title to the fee. It is idle then to assert that the Indians had no rights to grant or to retain. At the time of the treaty the government *conceded* to the Indians the unlimited and unrestricted right of taking fish, and the government had the undoubted right under the constitution to bind itself and its successors to recognize the right." (Italics ours.)

We are unable to reconcile this statement with the theory argued in the court below that section 3 of the treaty was a reservation of an *existing right* and not a grant by the government to the

Indians. If this be so, then by what logic can it be said that the government conceded to the Indians any such rights? The Indians were conveying these lands and in so doing—it was argued by counsel in the trial court—they reserved the rights to hunt and fish, such as they were. Certainly this reservation did not make that absolute which was before merely permissive. Our attention is not directed to any line of reasoning or to any authorities under which it might be concluded that the Indians were entitled to any more exemption from the operation of the police power in this respect in 1855 than were the white citizens of the territory. If this conveyance had been made by a white citizen to the government with the same reservation, no one would have contended that such a reservation operated to forever bar the government and its successor in interest, the state, from exercising this power which has always been considered an attribute of sovereignty. We have shown the court that

the Indians stood in no better position in 1855 in this respect than did the whites. We are answered by the statement that it is idle for us to assert this. No reasons are given why it is idle for us so to do and our argument is not answered. This may be a convenient way of disposing of an embarrassing contention but certainly it is no answer in law.

Counsel seems to assume that this right of occupancy, which is a private right and inferior even to the right possessed by the owner of a fee simple title, was by some mysterious logic a right which embraced in it the attributes of sovereignty and title to things which have always been considered as not a part of the fee. No reason is given for this conclusion except the alleged fact that the government was superior and the Indians inferior, which is no reason at all. Indeed, it would seem that this rather supports our contention than that of counsel, because it recognizes that the Indians even then were under

the dominion and sovereignty of the Federal government.

Furthermore, even if it be assumed that the Federal government, by section 3 of the treaty, attempted to grant to these Indians the absolute right of taking the wild fish and game, the treaty was ineffectual for that purpose because neither Congress nor a state legislature can barter away its police power or bind itself and its successors not to exercise that power. The courts have uniformly held that a grant is always considered as made subject to the exercise of the police power. This may be illustrated by a reference to a few decisions of the supreme court of the United States.

In the case of *Beer Company v. Massachusetts,* 97 U. S. 25, 24 L. Ed. 989, it was claimed that a corporate charter which granted to a corporation the right to sell intoxicating liquors was irrepealable by the state. The court answered that contention in the following language (p. 33):

"The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. *That discretion can no more be bargained away than the power itself.*" (Italics ours.)

And in the case of *Stone v. Mississippi,* 101 U. S. 814, 25 L. Ed. 1079, the court held that a state could not grant an irrepealable franchise to operate a lottery. In that case it was said (p. 817):

"All agree that the legislature cannot bargain away the police power of a state. 'Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the state; *but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.*'" (Italics ours.)

And again upon page 819 of the opinion the court said:

"No legislature can bargain away the public health or the public morals. The people them-

selves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

The same rule was again affirmed in the case of *Texas & N. O. R. R. Co. v. Miller,* 221 U. S. 408, where the court held that a statute granting a charter to a railroad company and which exempted the company from liability for death by negligence might be repealed. In that case it was said (p. 414):

"The doctrine that a corporate charter is a contract which the constitution of the United States protects against impairment by subsequent state legislation is ever limited in the area of its operation by the equally well settled principle that a legislature can neither bargain away the police power nor in any wise withdraw from its successors the power to take appropriate measures to guard the safety, health and morals of all who may be within their jurisdiction."

And still later in the case of *Atlantic Coast Line Co. v. Goldsboro,* 232 U. S. 548, it was said (p. 558):

> "It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, or general welfare of the community; that this power can neither be abdicated nor bargained away, *it is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.*" (Italics ours.)

In other words, it is an implied part of every grant from the sovereign to an individual, that the grant is made subject to the exercise of what is known as the police power of the state. A grant which seeks to bind the sovereign not to exercise its police power is void. The reasons which actuated the court in the Stone case, *supra,* to hold that the power of the state to prohibit lotteries was not abrogated by a charter giving this right to a certain individual, apply with equal force to the case at bar. Certainly it is as

essential to the public welfare that the wild game and fish be conserved as it is that lotteries be forbidden. Congress being a body which can only exercise granted powers, can no more barter away any part of its sovereignty than can a state legislature.

We must therefore conclude that even though section 3 of the treaty be considered as a grant from the Federal government to the Indians, it was and could be but a temporary permit to take the wild game and fish until the sovereign power should prohibit that taking. To hold that the game code of this state is applicable in no way abrogates the treaty or repeals it. It was an implied condition of that treaty, just as in the corporate charters mentioned in the foregoing cases, that the sovereign might whenever it saw fit, regulate or prohibit the taking of wild game and fish. The state in the valid exercise of its police power now seeks to regulate this taking. That

action was contemplated by the treaty itself under the authorities just cited.

In our opening brief we pointed out that the title of the United States to the territory of Oregon, which then included the lands embraced in the state of Washington, was acquired by discovery, and from France and Great Britain by treaty, and that this right has always been deemed to include all the attributes of sovereignty either when original to the United States or conveyed to it by foreign nations. Counsel takes issue with this and says at page 19 of his brief that the title of the United States to the lands in question was not deraigned from any foreign nation. It is perhaps immaterial whether this be so or not. The right which the United States acquired by discovery does not differ from that acquired by European nations. We merely called the court's attention to the sources of title in order that it might not be claimed that a different rule should here obtain by reason of the

fact that such title might be traced to France and England. For the sake of accuracy, however, we call the attention of the court, and more particularly of counsel, to the case of *Schively v. Bowlby,* 152 U. S. 1, at page 50, where authority for our statement will be found.

Upon page 19 of respondent's brief it is said that it is not regarded of great importance in this discussion where the title to fish *ferae naturae* may be. We think it is very material when it is recollected that it is contended that section 3 of the treaty was a reservation of an existing right, for assuredly the Indians could not reserve a right which they did not have. If the fish and game were held by the government in trust for the people of the territory, the treaty did not operate to divest the government of that title or to prevent its successor in interest from administering the trust in a way most beneficial to the beneficiaries thereof.

It is also said upon page 19 that the cases cited in our brief do not hold that absolute title to the wild game and fish is vested in the state. We do not claim this to be so, but we do contend that such title is vested in the state in trust for the people of the state, and that it has never been and is not now vested in a private individual, white or Indian. We refer to pages 16 and 17 of our opening brief should the court have any doubt on this. This being so, the conclusion must follow that the only right which the Indians had to reserve in 1855 was the qualified right to take as permitted by the sovereign. They did reserve the right to go upon certain lands to exercise this qualified privilege, and that was the only reservation which the treaty made.

II

The Enabling Act.

Much labor has been expended by counsel in establishing these two propositions: (1) That a treaty is the supreme law of the land (Brief,

p. 9); (2) that a state can not pass an unconstitutional statute (Brief, p. 13). Both of these contentions may be admitted as so well understood as to be considered truisms in the law. We base our contention solely upon Federal statutes, treaties and decisions. It is not here claimed that a state may pass a law in conflict with a valid treaty, Federal statute or with the Federal constitution. We do claim: (1) That the treaty is not subject to the construction contended for; and (2) that in any event it has since been repealed by an *act of Congress; i. e.,* the enabling act.

Some argument is made in respondent's brief that a treaty is a contract, and from this the correlative conclusion is drawn that the state cannot impair it. (Brief, pp. 7-8.) Inasmuch as we do not claim that any *state laws* have abrogated this treaty, even if it is subject to the construction asked, but only that in such event it has been repealed *pro tanto* by an act of Con-

gress, it would seem that it is immaterial whether the treaty be considered as a contract or not. There is nothing in the Federal constitution which prohibits Congress from impairing the obligation of a contract if the subject-matter be within its jurisdiction. If counsel mean to doubt the power of Congress to repeal this treaty by the enabling act, we can do no more than to again refer to pages 35 and 36 of our opening brief and the authorities there cited.

Evidently fearful that the court would overlook it, counsel sets forth at page 34 of his brief, and again at page 37, certain language of Judge Rudkin in the case of *Seufert v. Olney,* 193 Fed. 200, where Judge Rudkin said:

> "In my opinion, therefore, the true construction of the treaty is this: The Indians are granted certain fishing rights and privileges in their ancient and accustomed places, which they are entitled to enjoy under and by virtue of the treaty, and of which they cannot be deprived by state laws or state regulations."

It is axiomatic that the language of a court should always be construed in the light of the particular facts before the court. That case involved a controversy between a halfbreed Indian and a shoreland owner with respect to the right to fish in certain waters of the Columbia river, under the same treaty here under consideration. The language of the court was addressed solely to the question of whether or not a conveyance of the shore lands by the state operated to destroy the private easement over the riparian lands which the treaty had secured to the Indians. The court concluded that under the *Winans* decision (198 U. S. 371), the state's grant did not have this effect. The court was not concerned with the question of the right of the state to regulate the taking of its own property.

Furthermore, it may be observed that the court there concluded that the particular fishing place involved was not an ancient and accustomed place of fishing within the terms of the treaty

and refused to issue an injunction. The remarks of the court, therefore, if counsel construes them properly, were *obiter dictum* pure and simple and unnecessary to the decision of the case.

Counsel argues this case largely upon certain alleged equities which are not in the record. Upon page 14 of the brief the idea is conveyed that the officials of the state are acting in a reprehensible manner because they are not content to accept the construction of the treaty announced by the learned trial judge. We cannot agree to this. Certainly no apology is necessary for asking this court to pass upon a question of this importance, especially when it is considered that the superior courts of Thurston and Whatcom counties have sustained our position in this matter. We would be negligent in our duties to the state if we did not ask for such an adjudication.

If this case is to be determined upon the equities *dehors* the record, instead of upon that record, as counsel asks this court to do, we would

call the attention of the court to the seriousness of the situation which may result should the court declare that the rights of the Indians in this respect are above the police power. The real question which is presented to this court by this case, and by the case of *State v. Alexis* to be argued this term, is the right of the Indians to fish for *commercial purposes.* The court takes judicial notice of the development of the fishing industry in this state and of the means which have been adopted to preserve this valuable food supply. The court knows that thousands of dollars have been spent with this end in view and that many hatcheries have been established for this purpose. Neither is the court ignorant of the object to be served by these various provisions of the statute. For instance, it is a matter of common knowledge that it is the habit of salmon, which is perhaps the most valuable species of food fish, to spawn in fresh water; and that at periodical times it is the habit of such salmon

to ascend the fresh water streams in large numbers in what are known as runs. It has been stated by competent authority that salmon at that time contain spawn varying from three hundred to eight hundred per pound of fish. The fish code recognized the existence of these things by various provisions designed to prevent any unreasonable obstruction of the passage of the fish up the rivers during the spawning season. We have referred to some of these provisions upon page 32 of our opening brief. Let us illustrate further. Section 71 of the act, which this respondent is charged with violating, prohibits the taking of salmon within a mile of any dam in any river. The reason for this is also a matter of common knowledge, but may well be illustrated by a statement of the situation which prevailed at Prosser last May, and which gave rise to this litigation. At that city the light and power company maintains a dam across the Yakima river which is too high for the salmon

to jump at low water. At one end of the dam a narrow fishway has been constructed of perhaps some ten or twelve feet in width. This way is covered by a wooden platform which is only a few feet from the water and there is no practical method for the salmon to ascend the river except through this way and under this platform. At the time this prosecution was instituted a run was in progress which was one of the largest known in the history of the river, and at one time the salmon were so numerous that they touched each other as they passed through the fishway. The respondent, with thirty or forty other Indians, was engaged in the slaughter of these fish in wholesale quantities. Many Indians were stationed upon the top of the fishway and were gaffing salmon by the dozens as they attempted to ascend the river. It needs no argument to demonstrate that the allowance of such a practice will ultimately be to virtually destroy the Yakima river as a spawning ground, and will

work irreparable injury not only to the fishing industry but eventually to the Indians themselves. The same situation will doubtless prevail in other streams of the state.

We anticipate that counsel will say that these facts are not of record in this action. This indeed is true. We think, however, that we are justified in calling them to the court's attention as showing facts which might exist, so that if this action be decided upon the equities rather than the law, the court will not assume that the equities are all with the respondent.

Cotemporaneous construction of a statute or treaty is sometimes useful. It is worthy of comment that according to the newspapers of last summer a band of Indians from the same tribe were prevented from hunting on lands in the National Park by officers of the Federal government, although this treaty gives them the right to hunt "upon open and unclaimed land." We do not know whether this is a fact, but if it be

so—and we have never seen any denials—it would seem that the Federal authorities adopt a different rule where the rights of the Federal government are involved than in cases where the powers of the state are in controversy. We can see no reason why the same rule should not be applied in both cases.

Another illustration is furnished by the history of the fishing industry in Alaska. Sections 3621 to 3640, volume 2, United States Compiled Statutes of 1913, provide an elaborate fish and game code for Alaska, many of the provisions being substantially identical with portions of chapter 31, *supra*. No exception is made in this code in favor of the Indian tribes of Alaska. After a thorough investigation we have been unable to find any treaty in which any Alaska Indian tribe has ever relinquished to the Federal government any hunting or fishing rights. Now, if the Yakima Indians had an unlimited right to hunt

and fish in 1855, we should like to be informed by what authority it is competent for Congress to deprive the Alaska Indians of the same right without their consent? Nevertheless we are informed that it has been the practice of the Federal government in Alaska to uniformly and rigorously enforce its game and fish laws against the Indians. Indeed, that enforcement appears to have been so rigorous that Mr. E. Lester Jones, deputy commissioner of fisheries, in a report upon Alaska fisheries made in 1914, says at page 114 of the report that the government should change its policy in this regard and allow the Indians the right to take fur-bearing animals under proper restrictions. And again upon page 38 of the report Mr. Jones recommends that the Ankow river be closed for all commercial fishing, but at the same time observes that it would be proper to allow the Indians to fish "under certain restrictions and without any of the catch being utilized for commercial purposes."

These matters are perhaps immaterial. We have submitted them, however, in view of the implication conveyed by page 14 of counsel's brief that the position of the state in this case is in some way a continuance of the alleged dishonorable practices which have violated the rights of the Indians in the past. It would appear that the same dishonorable practice, if we gather counsel's meaning correctly, has been practiced by the Federal government with respect to the Alaska Indians. When it is remembered that counsel is an officer of the Federal government, this inconsistency, we think, is apparent.

Respectfully submitted,

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State of Washington,)
) ss.
County of Thurston.)

L. L. Thompson, being first duly sworn, on oath deposes and says: that he is one of the attorneys for appellant in the within action; that he duly served three copies of the within brief upon Francis A. Garrecht, attorney for respondent herein, upon the 22d day of November, 1915, by placing three copies of said brief in a sealed envelope addressed to Francis A. Garrecht, Federal Building, Spokane, Washington, with postage fully prepaid thereon, and depositing the same in the Federal post office at Olympia, Washington.

L. L. Thompson

Subscribed and sworn to before me this 22d day November, 1915.

Roscoe P. Fullerton.
Notary Public in and for the State of Washington, residing at Olympia, Washington.