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THE WASHINGTON FISHERIES CODE OF 1949; CONSTITUTIONALITY OF DISCRIMINATORY PROVISIONS

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One of the most important statutes enacted in the 1949 session of the Washington legislature is Chapter 112 of the 1949 Session Laws, which, with its complement, Chapter 107, forms the new Fisheries Code of the state, replacing the old provisions which had been in effect with variations since 1915.[1] The new Code is singular, not only in the very broad administrative powers given to the Director of Fisheries,[2] an office created by the Act, but also by virtue of the fact that certain of its licensing provisions were inserted in apparent defiance of three recent United States Supreme Court decisions,[3] raising certain doubts as to the constitutionality of such provisions. It is proposed to test in this comment Sections 63, 67, and 69 of that Code in the light of these decisions. The problems presented divide themselves into two natural divisions: (1) the validity of the licensing requirements of the new Code as applied to resident aliens, and (2) the validity of the licensing requirements of the new Code as applied to nonresidents of the state of Washington. They will be discussed in that order.

THE VALIDITY OF THE LICENSING REQUIREMENTS OF THE CODE AS APPLIED TO ALIENS

Section 63 of the new Code provides, in part, "No license provided for in this act shall be issued to any person who is not a citizen of the United States, or who has not in good faith declared his intentions of becoming a citizen of the United States. "[4] This prohibition of the

[1] REM. REV. STAT. §§ 5655-5780 [P.P.C. §§ 541 *et seq.*].

[2] The director, to cite a few examples, is given complete control over the hiring, management, and discharge of all department personnel, subject to the rules and regulations of the State Personnel Board as established in Wash. Laws 1945, c.35 § 42, in § 6 he is given power to promulgate rules and regulations for the taking of fish, (§ 7), to search without warrant any place which handles fish if it is not used exclusively as a private domicil, where he has reason to believe that food fish or shellfish are being kept or handled, where he has reason to believe that there is evidence of violation of the Code or any rule promulgated by the Department (§ 19).

[3] Oyama v. California, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 257 (1948), Takahashi v. Fish and Game Commission, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948) Toomer v. Witsell, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948).

[4] It may be that the writer is partaking of a somewhat extralegal activity in quoting these provisions of the new Code, for among the broad powers given the Director is the following, contained in § 16, "No person shall print or cause to be printed a booklet or pamphlet of the fisheries laws or regulations of the director or portions thereof without the approval of the director."

licensing of nondeclarant aliens is not new to the Washington Fisheries Law It had its origin in the Session Laws of 1907 and has been carried down in successive codes since that time.[5] The construction of this provision, or its variations, has been in issue in a few cases,[6] and its validity was upheld against direct attack in the case of *Lubetich v. Pollock*[7] in 1925.

That an alien is protected by the due process and equal protection clauses of the Fourteenth Amendment is now well recognized under the rule of *Truax v. Raich*,[8] which is that an alien may not be prohibited from earning a living in the common callings of life. Since the *Truax* case, the only discriminations by a state against aliens in cases involving the common callings to be upheld are those concerned with matters in which the state has a "proprietary interest" or over which it exercises a sort of "state ownership." Thus the Alien Land Laws were upheld in a series of cases in 1923,[9] among which was the Washington case of *Terrace v. Thompson*,[10] on the theory that the state, as ultimate owner of the land, has an interest in protecting its citizens in the exclusive use of that land. Laws prohibiting the employment of aliens on public works have been upheld on much the same theory,[11] and a law prohibiting an alien from practicing law was sustained on the theory that an attorney is an "officer of the court," which is a state office that can be reserved to state citizens.[12]

This "proprietary interest" doctrine is usually relied upon by states in seeking to preserve to their own citizens the use of fish and game and tideland resources. The doctrine as applied to the particular problem in hand is briefly this: that the state owns all the fish within its inland waters and within three miles of its coast as a trustee for all its citizens, and has power, as such trustee, to exclude any other group it desires, including aliens, who have, according to the theory,

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[5] Wash. Laws 1907, c. 247 § 1, REM. REV. STAT. § 5711 [P.P.C. § 545-26].

[6] State *ex rel.* Lacos v. Maybury, 136 Wash. 210, 239 Pac. 552 (1925), State v. Tomich, 143 Wash. 364, 255 Pac. 122 (1927), State v. Nelson, 146 Wash. 17, 261 Pac. 796 (1927).

[7] 6 F 2d 237 (W D. Wash. 1925).

[8] 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915). *cf.* Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

[9] Terrace v. Thompson, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255 (1923), Porterfield v. Webb, 263 U.S. 225, 44 S.Ct. 21, 68 L.Ed. 278 (1923), Webb v. O'Brien, 263 U.S. 313, 44 S.Ct. 112, 68 L.Ed. 318 (1923), Frick v. Webb, 263 U.S. 326, 44 S.Ct. 115, 68 L.Ed. 323 (1923).

[10] Note 9, *supra*.

[11] Heim v. McCall, 239 U.S. 175, 36 S.Ct. 78, 60 L.Ed. 206 (1915), People v. Crane, 214 N.Y. 154, 108 N.E. 427 (1915), *aff'd*, 239 U.S. 195 (1915).

[12] *Re* Admission to Bar, 61 Neb. 58, 84 N.W 611 (1900), *cf.* In re Yamashita, 30 Wash. 234, 70 Pac. 482, 59 L.R.A. 671 (1902).

no community interest in the fish. The doctrine was first announced and followed in the lower federal court case of *Corfield v. Coryell*[13] in 1823, and reached its full fruition as a United States Supreme Court holding in *McCready v. Virginia* in 1877.[14] In recent years however, though the doctrine may still be sound as to the rights of a state as proprietor over public works,[15] it has undergone considerable modification and criticism as regards the state's interest in its fish and wild game,[16] and in its tideland resources generally.[17]

In keeping with this trend, the cases of *Takahashi v. Fish & Game Commission*,[18] and *Oyama v. California*[19] have placed in doubt not only statutes which bar aliens from certain occupations, but also the Alien Land Laws which were so carefully distinguished from the *Truax* rule by the court in *Terrace v. Thompson*. The *Takahashi* case involved a Japanese-born resident of California who was ineligible for citizenship under federal naturalization laws.[20] Takahashi sought a writ of mandamus to compel the fish and game commissioner of California to issue him a commercial fishing license, which the commissioner refused to do because of a California statute[21] which prohibited the issuing of such a license to "any person ineligible to citizenship." On appeal to the United States Supreme Court it was held that the statute was repugnant to the "equal protection" clause of the Fourteenth Amendment, the court relying largely on *Truax v. Raich*.

The *Oyama* case involved the California Alien Land Law,[22] which provided that no person ineligible to citizenship could own or lease agricultural land, and that the taking of title to land in a minor citizen, when the consideration was paid by an adult alien, was presumptive evidence of an attempt to evade the law The statute provided for escheat proceedings by the state as penalty for any infraction or any attempted evasion of the law Kajiro Oyama, an ineligible alien, paid for two pieces of agricultural land and had the deeds executed to

[13] 6 Fed. Cas. 546, No. 3, 230 (E.D. Pa. 1823).
[14] 94 U.S. 391, 24 L.Ed. 248 (1877).
[15] Note 11, *supra*.
[16] Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641, 11 A.L.R. 984, (1920), Toomer v. Witsell, note 3, *supra*, and the discussion of that case, *infra*.
[17] United States v. California, 232 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947).
[18] Note 3, *supra*.
[19] Note 3, *supra*.
[20] 1 STAT. 103 (1790), 8 U.S.C. § 703 (1946), 16 STAT. 254, 256 (1870), 8 U.S.C. § 703 (1946), 54 STAT. 1137, 1140 (1940), 8 U.S.C. § 703 (1946), 57 STAT. 600, 601 (1943), 8 U.S.C. § 703 (1946), 60 STAT. 416, 8 U.S.C. § 703 (1946), which leave alien Japanese as one of the few remaining groups not eligible to citizenship.
[21] Cal. Stats. 1945, p. 660.
[22] CAL. GEN. LAWS, Act 261.

his American-born son. The state of California began escheat proceedings, claiming this was presumptively an attempt to evade the law, which contention the Supreme Court of California upheld.[23] On certiorari to the United States Supreme Court the decision was reversed on the narrow ground that the application of the presumption deprived the citizen son of the equal protection of the laws as guaranteed by the Fourteenth Amendment.

The court in the *Takahashi* case did not depart entirely from the "proprietary interest" doctrine, though it was quick to recognize its recent limitations. The holding of the case on this point is summed up in the words of Justice Black, who delivered the opinion. "To whatever extent the fish in the three-mile belt off California may be 'capable of ownership' by California, we think that 'ownership' is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting others to do so." But it is to be noticed that the court in the case of *Toomer v. Witsell*,[24] which was handed down the same day as the *Takahashi* case and which will be discussed more fully later, described that doctrine as "but a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource." These two cases taken together have almost entirely destroyed the "state ownership" doctrine as applied to fish in the three-mile belt.

The *Oyama* case offers no help on that problem directly, but it is important to a discussion of the problem because of the light it sheds upon the attitude of the Supreme Court toward discrimination against aliens. Although the case was decided on the ground that the *presumption* was invalid, four justices indicated in concurring opinions that they would choose to declare unconstitutional the Alien Land Law itself.[25] The rest of the justices were so noncommittal upon that question as to indicate that at least one of them might be won over to declaring the law itself invalid should the question ever come directly before the court.

Applying these observations to the Washington Act, it would seem that if the provision alluded to were ever contested before the United States Supreme Court, it would certainly be stricken down. The court

[23] 29 Cal.(2d) 164, 173 P.(2d) 794 (1946).
[24] Notes 5 and 17, *supra*.
[25] Justices Black, Douglas, Rutledge, and Murphy.

in the *Takahashi* case has committed itself to a liberal application of the rule of *Truax v. Raich,* which is evidenced by the fact that the court in the *Truax* case expressly excluded from its holding any matters over which the state had a proprietary interest. The *Takahashi* decision, along with the attitude of the court reflected in the *Oyama* case, and the weakening of the "proprietary interest" doctrine which reached its culmination in *Toomer v. Witsell,* would seem to demonstrate the invalidity of Section 63 of the new Washington Code.

There is a distinction between the Washington Code provision against aliens and the California Act discussed in the *Takahashi* case, which might save the Washington provision should it ever be contested. The California exclusion has behind it a lurid history of racial bitterness and antagonism directed against the Japanese, which, as legislative records show,[26] led directly to the passage of the act. Indeed, two concurring justices in the *Takahashi* case, Justices Murphy and Rutledge, felt constrained to review this history in detail, and seemed willing to conclude from this history that the act was prima facie invalid. Although Washington has not had this very strong sentiment, there are indications that anti-alien feeling has crept into Washington legislation.[27]

Further there is the point that the decision in the *Takahashi* case was limited to a consideration of the state's interest in the three-mile marginal sea, and it might be seriously contended that the Washington provision would be valid as to its inland waters. But in attempting to make both of these distinctions, we are met again by the *Truax* rule, the *Oyama* dictum, and a constantly weakening theory of state ownership, which would make the validity of the Washington act, though not primarily directed at a particular nationality and even as to inland waters, very doubtful.

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[26] A 1943 amendment to § 990 of the CAL. FISH AND GAME CODE provided that no commercial fishing license should be issued to "alien Japanese." In 1945 this was changed to read "a person ineligible to citizenship" on the basis of a report given to the California legislature by their Senate Fact-Finding Committee on Japanese Resettlement. This report stated that the committee felt "that there is danger of the present statute being declared unconsititutional, on the grounds of discrimination, since it is directed at alien Japanese. It is believed that this legal question can probably be eliminated by an amendment which has been proposed to the bill which would make it apply to any alien who is ineligible to citizenship. The committee has introduced Senate Bill 413 to make this change in the statute."

[27] Note 7, *supra.* 24 WASH. L. REV. 162 (1949). Also notice House Joint Memorial No. 2, Wash. Laws 1911 p. 666, resolving, "that the Congress of the United States be requested to pass such restrictive legislation as will put a stop to this enormous influx of the most undesirable foreigners (southern and eastern Europeans and Western Asiatics) whose presence tends to destroy American standards of living."

THE VALIDITY OF THE LICENSING REQUIREMENTS OF THE CODE AS APPLIED TO OUT-OF-STATE RESIDENTS

On the reasoning of the "state ownership" doctrine it was formerly held that a state could prohibit any taking of its fish or game by citizens of other states.[28] With the partial abandonment of the doctrine however, and with a more liberal interpretation being given the Fourteenth Amendment, the validity of state statutes seeking to effect this result, or to impose heavier burdens on out-of-state fishermen, seems highly doubtful. In the more recent cases, whenever the statute is found not to be a bona fide conservation measure, it has been stricken down on one theory or another, largely upon the commerce and equal protection clauses.[29]

The latest and most important case on the problem is *Toomer v. Witsell, supra,* which was decided in June of 1948. That case involved a statute of South Carolina which imposed a license fee of $25 upon the shrimp-fishing boats of South Carolina residents, and $2,500 upon the boats of out-of-state shrimp fishermen who fished in South Carolina waters.[30] It further provided that all shrimp caught in the three-mile South Carolina marginal sea should be landed at a South Carolina port, unloaded, packed, and stamped before shipment into another state. This latter provision was apparently inserted to insure to the state the collection of a one-eighth cent per pound tax levied on all green shrimp taken in the maritime belt.[31] The shrimp sought to be "protected" by the South Carolina statute are largely of a migratory type, swimming south toward Florida in the late summer and returning to the Carolinas in the spring. It was the desire of the fishermen of that coastal region to follow the shrimp according to the season, which was made financially impossible for most of them not residing in South Carolina by the statute of that state. Accordingly, suit in equity was brought against certain South Carolina officials by five Georgia fishermen individually to enjoin them from enforcing the statute on the ground that it was a violation of the privileges and immunities clause of Art. IV, Sec. 2 of the Constitution, and the "equal protection" clause of the Fourteenth Amendment. The Supreme Court,

[28] Corfield v. Coryell, note 13, *supra;* McCready v. Virginia, note 14, *supra.*

[29] Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147 (1928), Pavel v. Pattison, 24 F Supp. 915 (W.D. La. 1938), Pavel v. Richard, 28 F Supp. 992 (W.D. La. 1938), Van Camp v. Dept. Natural Resources, 30 F.(2d) 111 (S.D. Cal. 1929).

[30] S.C. CODE, § 3379 (1942), as amended by ACT 281 § 1, (Supp. 1947).

[31] S.C. CODE, § 3414 (1942).

through Chief Justice Vinson, upheld the plaintiffs' first contention, stating that the discrimination was a violation of Art. IV, Sec. 2. The commerce clause was relied upon by the court in invalidating that section of the South Carolina law which required the shrimp to be landed in South Carolina ports. As previously mentioned, the court was not impressed with the "state ownership" argument, and it indicated at the end of its consideration of the problem that whatever the extent of that doctrine is, it is subject to the privileges and immunities clause of Art. IV, Sec. 2.

Less than a year after the rendering of the *Toomer* decision, the Washington State legislature passed the new Fisheries Code, which contains provisions which differ from those in the South Carolina Act only in degree. The Washington Code is broader in scope than the South Carolina Code referred to, in that it includes all types of fishing, rather than a particular type. But, like the South Carolina Code, it has a taxing provision for all fish landed in the state,[32] and imposes higher license fees upon nonresidents than upon Washington residents.[33] These discriminatory fees are contained in Sections 67 and 69 of the Code. Section 67 requires every fishing guide to be licensed. The fee: $10 for residents, $50 for nonresidents. Section 69 provides for resident license fees for each particular article of fishing equipment used, ranging from $5 to $50, but in every case, save for purse seines and lampara or round haul nets, the license fee for nonresidents is set at a figure exactly five times as high as that required of the local fishermen.

There is some evidence that these provisions were not inserted into the new Code in ignorance of the decision in *Toomer v. Witsell.* When the law was originally introduced as Senate Bill 216, it contained a provision, similar to that invalidated in the *Toomer* case, to the effect that all fish should be landed in Washington ports. The purpose of this provision, too, was apparently to guarantee to the state the collection of the "catch" fees prescribed in Chapter 107 of the 1949 Session Laws. Somewhere in the devious legislative channels this provision was deleted from the bill, and it may not be overly rash to suggest that this was done with an eye to the *Toomer* case. Assuming this to be the reason, why were the discriminatory license charges retained?

The most obvious answer to this question is that it was probably contemplated that since the charge for nonresidents was not so patently

[32] Wash Laws 1949, c. 107
[33] Wash Laws 1949, c. 112 §§ 67, 69.

discriminatory or prohibitive as it was in the *Toomer* situation, it would be upheld. It is to be remembered in this connection that there is nothing to prevent a state from discriminating against citizens of other states where valid and independent reasons exist therefor.[34] The inquiry as to the validity of any discriminatory statute, therefore, will resolve itself into a consideration of these reasons and the degree of correlation between them and the discrimination sought to be introduced by the statute. Thus one student writer has suggested that where such increased license fees for nonresidents will only result in their contributing their share of the cost to the state in the regulation or propagation of the resource involved, the discrminatory fees should be upheld,[35] and the cases seem to bear this out.[36] This argument would apply, of course, only where such cost was borne by the state's general fund, and not in situations where the cost of such regulation or propagation was paid for directly out of the funds derived as license fees or taxes in the particular enterprise.[37]

In this consideration lies the only hope for the continued validity of the discriminatory provisions. The "privilege" fees which Chapter 107 provides shall be paid by those engaged in the fishing industry in this state are levied upon all canners, curers, freezers, wholesale fish dealers, retail fish dealers, or fish by-products manufacturers of food fish or shellfish who deal with the fish as "original receivers,"[38] meaning by the latter term the "person first receiving, handling, dealing in, or dealing with the fresh or frozen food fish or shellfish within the State of Washington."[39] The "catch" fees are to be paid by the person taking the fish from the waters,[40] and these fees are to be collected by having the "original receiver" deduct them from the total price he pays the fisherman for his fish, and remit them, along with his own "privilege" fees to the Director of Fisheries to be paid into the general fund.[41] Remembering that the requirement originally contained in Section 19 of Senate Bill 216, that all fish be landed in this state, was not enacted into law, it will be seen that out-of-state processors and

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[34] Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927), Wisconsin v. J. C. Penney Co., 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267 (1940).

[35] Note, 47 MICH. L. R. 113 (1948).

[36] Bourjois v. Chapman, 301 U.S. 183, 57 S.Ct. 691, 81 L.Ed. 1027 (1937), note 34, *supra.*

[37] By § 25 of the new Code, all moneys collected as license fees are to be paid into the general fund.

[38] Wash. Laws 1949 c. 107 § 1 (1), (2).

[39] Wash. Laws 1949 c. 107 § 1 (5).

[40] *Id.*

[41] *Id.*, Wash Laws 1949 c. 112 § 25.

fishermen have a distinct advantage over those within the state. The processors, being without the state, will not have to pay the "privilege" fees, and the nonresident fishermen will very likely not have to pay the "catch" fees, for there is no method prescribed for the collection of these fees other than by having the "original receiver" deduct them from the price paid the fishermen. If the nonresident fishermen land their fish in another state then they will be as a practical matter exempt from the fees.

Why the deletion of Section 19 from Senate Bill 216 was made is conjectural, but its ultimate result is that it has provided a plausible argument for the validity of the discriminatory license charges, for, since the nonresident fishermen will now pay nothing into the general fund save their license fees, it is only reasonable to require higher license fees of them to match the contributions that resident fishermen make to that fund by way of general state taxes, resident license fees, and the "privilege" and "catch" fees. But it is to be borne in mind that this entire argument is based on the supposition that what the nonresident fishermen pay by way of increased license fees is not highly in excess of that necessary to reimburse the state for the cost of the added regulation and for the benefits derived by these nonresidents from the state propagation of the fish.[42] Also it seems from a dictum in the *Toomer* case that the burden would be on the state to show that discriminatory fees were in fact just and reasonable.[43]

However, there are two classes of fishermen as to which the line of argument advanced in support of the discriminatory fees would be inapplicable. The first of these classes is comprised of those out-of-state fishermen who choose to land their fish in this state. Since by hypothesis the reason for the discriminatory license charges is that the nonresident fishermen will not have to pay the "catch" fee, that reason vanishes when the fishermen do in fact land their fish in this state, for then they are subject to this fee, and would be making a double contribution. The higher license charges would be, as to them, unreasonable and of questionable validity

[42] The statement of the court in Wisconsin v. J. C. Penney Co., not 36, *supra,* is apropos. "The simple but controlling question is whether the state has given anything for which it can ask return."

[43] 68 S.Ct. 1156, 1163 (1948). "In this connection appellees mention, without further elucidation, the fishing methods used by nonresidents, the size of their boats, and the allegedly greater cost of enforcing the laws against them. Nothing in the record indicates that nonresidents use larger boats or different fishing methods than residents, that the cost of enforcing the laws against them is appreciably greater, or that any substantial amount of the State's general funds is devoted to shrimp conservation."

The second class as to which the argument would be inapplicable is composed of those fishermen who, although resident in the state in good faith, do not fulfill the definition of "resident" prescribed in the Code. Section 1 provides that "a 'resident' shall be construed to mean a person who for the preceding ninety (90) days has maintained a permanent place of abode within the state with the intent to permanently reside within the state." Thus under this definition a person who moved into this state with a bona fide intention permanently to reside here, but who had not resided here for the required ninety days, could not receive a resident's license. The provision would be sufficient to deprive him of such a license, in some cases, until the following fishing season.

It was early held by the United States Supreme Court that any citizen of the United States is entitled to become a citizen of any state he chooses, providing he has the intent required to establish his domicil there,[44] and it would seem, therefore, that the attempted definition of what shall constitute a resident would be invalid as to any person who moved into this state with that intent. Certainly it is anomalous to argue that although the person may be a citizen of the state under these decisions of the Supreme Court, and although he may actually be residing in the state, he is nevertheless not a resident for the purpose of obtaining a commercial fishing license.

It is to be remembered also that the rule of the *Toomer* case was limited to a discussion of free-swimming shrimp in the marginal sea and did not include the inland waters. Indeed, there were statutes regulating shrimp-fishing in the inland South Carolina waters which were not contested. Further, the court was particularly concerned with the fact that the shrimp were migratory in character, placing the state's claim to ownership on a shaky foundation. Thus it might be contended that the Washington discriminatory license fees are valid as to nonresidents who fish in Puget Sound, or the upper waters of the Columbia,[45] and other inland areas, and are also valid as to the more stationary crustaceans. But if the *Toomer* case is read in context with other decisions which have come down in recent years, it seems to be a part of an expanding civil rights movement, and assuming this

[44] Cassies v. Ballon, 31 U.S. 761, 6 Pet. 761, 8 L.Ed. 573 (1832), Morris v. Gilmer, 129 U.S. 315, 9 S.Ct. 289, 32 L.Ed. 690 (1889), Stockyards Nat. Bank of South Omaha v. Bragg, 293 F 879 (C.C.A. 8th 1923). As to the necessity of the intent element, Shelton v. Tiffin, 47 U.S. 163, 6 How. 163, 12 L.Ed. 387 (1848), Sharon v. Hill, 26 F 337 (C.C.D. Cal. 1885).

[45] Washington and Oregon have concurrent jurisdiction over the lower waters of the Columbia, and different rules apply.

interpretation to be true, the rule of the *Toomer* case would probably be extended to include the inland waters of a state and any type of "fish."

Conclusion

In attempting to make any prediction as to the future of the sections of the new Code tested in this comment, then, the following factors should be kept in mind: (1) a growing tendency of the court to regard as *per se* unreasonable any discrimination against aliens as such, (2) a constantly weakening theory of "proprietary interest" or "state ownership", (3) the tendency of the court to extend the protection of the Fourteenth Amendment and the privileges and immunities of Art. IV, Sec. 2 to keep abreast of expanding civil rights concepts; and (4) procedurally, the disposition of the court to place the burden of proof upon the state enacting the discriminatory legislation of the type mentioned. Although, as suggested, there are arguments which might save the provisions, they are largely based upon the antique "proprietary interest" doctrine, and abound more with technicality than with justice and reason. It is therefore to be expected that should these provisions ever be contested before the Supreme Court, they will be held unconstitutional.