

MAINE STATE LEGISLATURE

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THE LEGISLATURE

OF THE

STATE OF MAINE,

DURING ITS SESSION

A. D. 1839.

VOL. 2.

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1839.

NINETEENTH LEGISLATURE.

NO. 39.

HOUSE.

R E P O R T

OF THE

COMMITTEE ON THE FISH LAWS.

[SMITH & ROBINSON,.....Printers to the State.]

STATE OF MAINE.

HOUSE OF REPRESENTATIVES, }
March 6, 1839. }

This Bill having been read twice, was laid on the table, and 300 copies of the Bill, with the accompanying Report, ordered to be printed for the use of the Legislature.

GEO. ROBINSON, *Clerk.*

REPORT.

THE Joint Select Committee to which was referred an order to inquire into the expediency of repealing all laws in relation to Fish, and an order in relation to fishways through all dams, have had the same under consideration, and ask leave to

REPORT,

That this State has adopted from Massachusetts the alterations made by the statute law of that State, of the common law. The Legislature has assumed the regulation of the protection and passage of Fish in streams not navigable, and have undertaken to give to towns or others, by statute, what, without such statute, would belong in common to all. These regulations and statutes have gone on increasing every year, till every stream and pond within the State seems destined to become the subject of a separate law, and some, at least one of our rivers, must have a law every year for its especial benefit. These laws and regulations have served to take up the valuable time of the Legislature, and to swell our statute books with many frivolous, if not useless laws. The number of statutes relating to the tak-

ing and preserving of Fish in the various rivers, bays, ponds and streams, exceed one hundred. Many of the laws and provisions are arbitrary, and differ materially from each other as applied to the different rivers and streams, though the circumstances are in their own nature the same. This has arisen from the cupidity of individuals who have applied for these enactments, or from the more or less liberal views of those who framed them. It may not be at this time an open question, whether it was wise for this State to imitate Massachusetts, in departing upon this subject, from the common law. But it may not be improper here to recur to the law as laid down by Chancellor Kent, in his elaborate treatise, which is, perhaps, as high authority as any we have. He says: "The conclusion on this subject is, that a right of fishery in navigable or tide waters, below *high water* mark, is a common right; and if one or more individuals set up an exclusive right to a free or several fishery, it must be clearly shown by prescription or positive grant." A very considerable number of the statutes provide for granting to the towns in their corporate capacity, the right to the fishery within their borders in tide waters; and prohibiting all to whom the towns have not sold the right, from taking any fish under severe penalties. This is clearly against common law, if not against common right. Its expediency may be more than doubted, Another

numerous class of statutes relate to prohibition from taking fresh water fish in ponds and streams. In rivers and streams not navigable, every one has a right to fish on his own land, and by the earliest usage in this country all have a prescriptive right of a common of fishery. Are these statutes, prohibitory of common rights, advantageous to the general good? Such laws are usually passed at the instigation of particular individuals, and for their own special accommodation. They usually restrict the taking of pickerel or trout, for a certain number of years, and prohibit their being taken by nets, traps, or by spearing. It has generally been considered that labor saving machines should be encouraged not prohibited. If it is easier to catch pickerel and trout with spears and nets, than with hook and line, why enact laws with penalties to prohibit it? No man ever made money by fishing for pickerel or trout with hook and line, and if any thing can be done by taking them in other modes, it would seem to be more wise in the Legislature to allow it. But if a statute prohibitory is required for one stream or pond, why should it not apply equally to all? Why should Joe. Chandler's mill pond and Joel Bean's mill pond be protected, and John Doe and Richard Roe's mill ponds go unprotected? Why should McCurdy's pond, and Cochnewagan pond be surrounded with the terrors of pains and penalties, and other ponds, with names equally euphonious, be left

to the eel-pots and spears of the destroyer? The enchanted stream has as good right to protection as the crooked stream. Your committee are of opinion that all laws relating to fish in streams, brooks and ponds, should be repealed.

The subject of the salmon, shad and alewife fishery is one of more difficulty. In tide waters, or in waters navigable with rafts and boats, no one has a right to erect a dam without permission, by law, from the Legislature. It is believed that no such permission is granted without a provision to have proper fishways, in the clause, and as the power of altering such grant is retained by the Legislature, if the provision is not sufficient, it can be easily altered. As the right to erect a dam, is a special grant, the restriction is easily introduced. The right to put up weirs, between high and low water mark, is another matter within the power of the Legislature to regulate, and one which requires attention. But your committee are of opinion, that this should be regulated by a general law, and that the provisions and penalties being applicable to circumstances similar in their nature, should be alike throughout the State. The same penalties that would answer for Tunk River will answer for the Penobscot; and what will do for the Sheepscot will do for the Mousum River. What is good for Great River is good for Little River; and Goose River has the same right to protection as Royal's River. Scarce

a single session of the Legislature has passed without the passage of “an act, in addition to the several acts for the preservation of Fish in the Penobscot River and Bay, and the several streams emptying into the same,” and in the same sessions, there have been more than one act in addition to said act. The pains and penalties have gone on increasing every year, and in 1836, one of the two acts passed in addition to that act, and one of the twenty that have been passed, prohibits the taking of Fish within certain limits of a fishway, under pain of imprisonment. This is little short of the tyrannical game laws of England. A general law, framed with a view to the interests of all, is what is required. The committee ask leave to submit a bill, embracing the views herein set forth.

JOHN OTIS, Per Order.

STATE OF MAINE.

IN THE YEAR OF OUR LORD ONE THOUSAND EIGHT HUNDRED
AND THIRTY-NINE.

AN ACT to regulate the taking of Fish and for
the preservation thereof in the several rivers and
streams emptying into rivers in this State.

SEC. 1. *Be it enacted by the Senate and
2 House of Representatives in Legislature
3 assembled,* That the Governor with the advice
4 of Council is hereby authorized and directed to
5 appoint and commission during his pleasure, in
6 each County in this State, where Salmon,
7 Shad and Alewives are taken, three suitable
8 persons as County Fish Wardens, and before
9 entering upon their offices, they shall be sworn
10 to the faithful discharge of the duties thereof.
11 And it shall be the duty of the County Fish
12 Wardens to have the care of enforcing the regu-
13 lations for taking and preserving the fish afore-
14 said in all rivers, streams and bays where they
15 may deem it for the general good; and for every
16 day that they may be necessarily engaged in the
17 services herein provided, they shall be paid two
18 dollars to each in full for such service, by the

19 County Treasurer of the County for which they
20 were commissioned.

SEC. 2. *Be it further enacted*, That the
2 County Fish Wardens shall from time to time
3 examine all dams and obstructions in rivers and
4 streams emptying into rivers, where Salmon,
5 Shad and Alewives are found, and determine,
6 after due notice in writing to the parties inter-
7 ested and a hearing thereon, what would be a
8 suitable passage-way for fish in such dam or
9 obstruction, and after their determination and
10 notice thereof in writing to the owner or owners
11 of such dam to build a sufficient passage-way,
12 and to keep the same open, and the refusal or
13 neglect of such owner or owners to prepare and
14 open such passage-way, then the County Fish
15 Wardens may, and it shall be their duty to have
16 prepared and opened a sufficient passage-way
17 for fish through such dam or obstruction at the
18 expense of the owner or owners thereof; and
19 in case of the refusal of the owner of such dam
20 or obstruction to pay the expenses incurred in
21 opening such passage-way within thirty days,
22 the same shall be paid by the County Treasurer,
23 and the said Fish Wardens shall cause an action

24 to be commenced in the name and for the use
25 of the County within which such expense was
26 incurred, and the damages recoverable shall be
27 the sum paid and interest thereon at the rate of
28 twenty per cent. as a penalty for such neglect.

SEC. 3. *Be it further enacted,* That the
2 County Fish Wardens shall meet on the first
3 Wednesday of April in each year, at the Court
4 House or other central place within their
5 County, and determine upon the days in a week
6 when a free passage for fish shall be allowed,
7 through all rivers; and the days when persons
8 shall be prohibited from taking the same with
9 seines, nets, or in any other manner; and the
10 days when the passage-ways in dams and ob-
11 structions shall be kept open, the time not to
12 begin before the first day of May nor to extend
13 beyond the fifteenth day of July; and notice
14 thereof shall be published in one or more news-
15 papers in the County or in the adjoining County,
16 and the days determined upon shall be the same
17 throughout the season.

SEC. 4. *Be it further enacted,* That any
2 person desirous of erecting a weir, on his own
3 premises, or on ground leased of others, in tide
4 waters, shall first apply to the County Fish

5 Wardens for a license, which shall be renewed
6 each year, and the license shall describe the
7 manner of construction so as to give a free pas-
8 sage at all times to the young fish, the length to
9 which it may extend into the river, and any
10 other provision deemed necessary by the Fish
11 Wardens for the general good; and any person
12 who may now have a weir shall take out a
13 license for keeping up the same in manner afore-
14 said; and any person who shall violate any of
15 the provisions of his license, or who shall disre-
16 gard the published regulations of the Fish
17 Wardens, shall be liable to lose his license; and
18 no person shall have a right to erect or keep up
19 a weir in tide waters without such license, and
20 it shall be the duty of the Fish Wardens to re-
21 move all weirs, which may be erected or kept
22 up without a license, and of all weirs kept up
23 by persons who have violated the provisions of
24 their license or disregarded the regulations of the
25 Fish Wardens; and each person shall pay fifty
26 cents for a license, to the Fish Wardens, who
27 shall pay the same into the County Treasury;
28 and any person desirous of fishing with a seine
29 shall in like manner first take out a license

30 therefor and pay twenty-five cents for the same
31 to the use of the County, and in case any such
32 person shall violate his license or disregard
33 the published regulations of the Fish Wardens,
34 he shall forfeit his license and his seine; and
35 any person who shall erect or keep up a weir
36 or fish with a seine without license, shall forfeit
37 and pay a sum not exceeding fifty dollars nor
38 less than twenty dollars, to be recovered in an
39 action of debt to the use of the County.

SEC. 5. *Be it further enacted*, That all
2 acts and parts of acts in relation to the taking
3 and preserving pickerel and trout in ponds and
4 streams, be, and the same are hereby repealed;
5 and that all acts and parts of acts giving to
6 towns in their corporate capacity the right to
7 sell the fishery within such town, where the
8 same is not held by grant or in some other way
9 than by such acts, be and the same are hereby
10 repealed; and that all acts and parts of acts
11 heretofore existing in this State in relation to
12 the taking and preservation of Salmon, Shad
13 and Alewives in rivers and streams, be and the
14 same are hereby repealed; and this act shall
15 take effect and be in force from and after its
16 approval by the Governor.