Public Documents of Maine:

BEING THE

ANNUAL REPORTS

OF THE VARIOUS

PUBLIC OFFICERS AND INSTITUTIONS

FOR THE YEAR

1883.

VOLUME I.

AUGUSTA:
SPRAGUE & SON, PRINTERS TO THE STATE.
1883.

REPORT

OF THE

COMMISSIONER

OF

FISHERIES AND GAME,

OF THE

STATE OF MAINE.

1882.

AUGUSTA:
SPRAGUE & SON, PRINTERS TO THE STATE.
1882.

REPORT.

His Excellency HARRIS M. PLAISTED,
Governor of the State of Maine:

We have the honor to lay before you our report of the Department of Fisheries and Game for the year 1882.

We avail ourselves of the occasion to present to your notice an oversight in the legislation of 1880, by which the reports of the department were still left to be made annually, while the State elections and the terms of service of both the executive and legislative officers were changed to biennial. The object of these reports is to lay before the Executive the true state of each department of the government that in turn they may be presented to the Legislature to act upon in extending fostering care of amended laws, or passing new ones for further aid or more effective enforcement. We hope our being required, in obedience to the law governing annual sessions, to present a report last year when there was no Legislature in session to receive, read, or act upon it, may be a satisfactory reason for reiterating much of it in the present one we lay before you. We ask such an amendment of the law as will enable us to present our reports biennially.

We beg to present to the attention of the government that when the Department of Fisheries had the game of the State added to its charge, no additional provision was made for the increased care, time and expense. Fish wardens were made game wardens but no appropriation was made for more than doubled work and outlay. Under the present law $1,500 is allowed for the payment of all the wardens. As the fish wardens are now game wardens, this sum is to be divided among them all. On the present list of commissioned

wardens there are fifty-one persons. At the last session of the Legislature, by an oversight, the usual appropriation of $1,500 for wardens was omitted. An appropriation of $5,000 a year for the two ensuing years was made, or $10,000 *in toto*. From this is to be deducted salaries of wardens, $3,000, leaving $7,000 for expenses of Grand Lake Stream Works for land-locked salmon eggs, for Penobscot salmon eggs at Bucksport and Orland, for hatching eggs and distributing the progeny, for distributing black bass, holding hearings, making surveys for fishways and all its attendant expenses, inspecting rivers and ponds, defending suits before county commissioners, trial justices and county courts, and for employing detectives in defence of our fish and game laws. Every dollar that has been expended for the enforcement of the game laws has been just so many dollars taken from the protection and propagation of fish. The fisheries department has been sacrificed to the exact amount deducted for the protection of the game and the enforcement of the game laws. It is true that the two departments are inseparable by nature, and can never be economically administered as distinct offices. Every poacher unites the two. The salmon poacher is the river wrecker, the lumber stealer, the deer poacher, the trout poacher and occasional horse thief. Let the question be met openly and squarely. If we are to have charge of the two branches of the State property that united is of more direct benefit to the Commonwealth, and brings more wealth into our midst, and divides it more equally among all the people than any other interest, then make the requisite appropriation for its proper conduct, and the rigid enforcement of the laws. Do either this, or abolish it at once promptly.

The great money value of the fish and game to our State should make it a subject of fostering care and protective legislation. We append an item taken from a Portland paper:

WHAT THE SUMMER TRAVEL DOES FOR MAINE. The *Press* says: In conversation with one of the officers of one of our banks, Friday, the statement was made that few people have any idea of the amount of

money left in Maine by summer visitors who visit our watering places and country resorts. He said that up to six weeks ago it was difficult for a bank in Portland to get many large bills, and the pay rolls of the various companies required an active "shinning round" to secure the necessary amounts in fives and tens to meet them, in addition to those of their regular customers. Since that time, however, bills have been a glut in the bank and the deposits have included many large sized bills. This great increase is due to the summer visitors to Maine. Their money focuses in the Portland banks, and this officer's bank four weeks ago forwarded $60,000 in bills to New York, two weeks later, $30.000, and Friday, $50,000 more, or $140,000 in six weeks, and this bank is but one of six in Portland.

The point to be considered is how to make the most of this great State interest. It is a legitimate subject for legislative discussion as to how this great crop of our forests and streams can be most profitably managed to yield the Commonwealth the greatest return. So soon as our trout fishing commences in spring, all our best localities from Moosehead to Rangely, are infested by men fishing for the markets of neighboring States. Most of these men are from other States, who are reaping a crop for whose cultivation, propagation and protection they have not been taxed for, or paid one cent. We do not know what the net profit may be on fish thus taken, but there is one fact ever present before us, that these men bring nothing into the State, while every pound of trout thus taken is five dollars robbed from the people of the State. We believe five dollars is less than the minimum cost of every pound of trout taken at Moosehead or Rangely or Grand Lake stream by our summer visitors, or our own anglers. It is the same with the products of our forests and fields, in the matter of our game. It is no longer a matter of question or experiment that a stock of fish and game can be kept up to the full extent of the feeding power of the waters and forests of a given territory, by a stringent enforcement of laws of protection during their breeding and recuperating seasons. We can quadruple our stock of fishes and game; we can quadruple the present large travel to our State to share our field sports, but we must have better laws and the

means to offer adequate pay as inducements to qualified and efficient men as officers.

It is difficult to obtain legislation commensurate with the requirements of the evil. The laws are framed with such criminal negligence, or else so skilfully tampered with and emasculated by some interested friend to poaching, that it is almost impossible to convict under them. We can now recommend but one remedy, viz: that a rigid law be passed forbidding the exportation of any of our game or game-fishes from the State. Allow citizens of other States to come here and enjoy all the privileges of our forests and streams; to participate in reaping the crop that we have protected and cultivated, but demand that it be consumed on our own soil. If such a law can be constitutionally framed so that it can be enforced, this most difficult question will be solved, and we can exterminate the pestilent poacher whether in the garb of gentlemen or professional pot hunter. For a Maine man of so degraded a moral standard as to seek commendation for enterprise and energy exhibited in building poaching dens and opening accessible roads leading to them, to entice poachers from neighboring States to violate the laws of their own, we think no punishment too severe. The enterprise is as commendable as adorning and decorating a gambling den to attract and seduce and rob victims. But when among the poaching criminals the names of educated professional men, occupying positions of trust and honor are recorded, we are in doubt as to whether Smith of Tim ponds, or O. A. Hutchins of King and Bartlett lakes, are the seducers or the victims. Whichever be the correct view, all deserve signal punishment, and it shall be no fault of ours if all are not visited with it.

We hope no more commissions for taxidermists may be granted without the strictest scrutiny as to the objects of the applicants, and bonds required for the faithful adherence to the terms of the commissions under the statutes. It is less damage to the State to kill birds for the sale of their skins during close-time, than to kill for the sale of their bodies for

food? Our song birds in particular are most eagerly sought during the mating and nesting season, as they are then in their gayest plumage. We believe that among the very many commissioned taxidermists of the State, but few have sought the office for scientific purposes. Let our farmers, who are most intimately interested in the protection of insectiverous birds, look to this.

In response to urgent applications to open the Baskahegan river, by means of fishways, to salmon, an inspection of the river was made from Danforth to its junction with the Mattawamkeag, near Bancroft. The result was most unsatisfactory, so far as our ability to gratify the wishes of our petitioners was concerned. An immense amount of shingle waste was and had been in the past thrown into the river, which had formed islands and bars in the stream; upon these had stranded, for some considerable distance from the village, offal and carrion from the slaughter-house and other sources, making a most disagreeable stench. The presence of shingle waste and sawdust upon the bottom of rivers in large bodies, render it incapable of producing that class of insect life that is essential to the feeding of the young fry of the anadromous fishes. The driving capabilities of the upper St. Croix was so seriously threatened by the accumulation of shingle waste that legislation was granted for its protection. This will be essential for the Baskahegan.

We think no fishing with nets of any kind should be allowed above tide water. Hook and line, with fly or bait, should be alone permitted. A moment's reflection will teach, that if the same methods and freedom to fish above as on tide water are tolerated, the result will prove the utter destruction of all the fish that enter the river. Messrs. N. W. Foster and Charles G. Atkins, in their report for 1868, referring to the different methods of taking fish on our rivers, observe: "No drift nets should be allowed. Our reasons for this are that drift nets, owing to their modes of use, are exceedingly difficult to control, are destructive and wasteful in their operation, and if permitted, are capable of being multiplied to such

an extent as to be very detrimental. While weirs are stationary and seines can only be used in a few localities where the fishery officers will always be able to see their operations, the drifter, if permitted at all to pursue his mode of fishing, will find but little difficulty in eluding the vigilance of the wardens and extending his operations within forbidden limits. Again, an increase of the numbers of the fish would be a great inducement for many persons to engage in the drift-net fishery; so many as to render a limit to their numbers quite necessary. This limit would be difficult to maintain, since the nets are not stationary. We do not consider it desirable that fish should be caught in this way, for all that can be spared each year from the stock of breeding fish will be taken by the modes permitted. It is well argued by Mr. W. H. Venning, in his report on the fisheries of New Brunswick, that if while the shores are studded with weirs and set nets, the channel should also be occupied by drift nets, no fish could possibly ascend to their breeding grounds. The arguments generally urged in favor of drift nets are, that they are the poor man's mode of fishing and must therefore be allowed, and that they are not very destructive. Neither of these reasons do we think are valid. When shad are the fish caught, a drift net will kill many that do not weigh enough to hold them, fall to the bottom and are lost. As to the other argument, it is very certain that none but able-bodied men can drift, and for such there is sufficient employment of other kinds to be found."

Salmon.

The run of salmon for the year is reported good; large in numbers, but the average small in size. In the Dominion of Canada the run has been small, and at the usual period for taking them with the rod and fly on their most popular fishing resorts, they were unusually scarce, and the sportsmen returned home discouraged and disappointed. Later in the season a run of very good fish was reported, and those fortunate enough to be present, met with good success. With us

on the Penobscot, the run was both early and late, even down to October, when very large fish were daily seen at the water-works' dam. Several fish were taken during the season in tide water below the dam, on both fly and bait, by anglers, and gave fine sport and created much excitement and enthusiasm among fishermen. The summer's drouth has been very severe and long-continued, not broken even at the present date of Nov. 20th. The late run of fish have had but a poor chance of making their way to the spawning grounds. We hope these oft-recurring drouths, increasing in frequency with the wanton destruction of our forests, will lead to some legislation upon the subject and call the attention of our lumbermen to the supply of water as dependent upon the preservation of our forests. At least let us have stringent laws checking the gross carelessness of sportsmen and poachers in leaving camp fires unextinguished.

On the Dennys river the run of salmon has been unusually good and many fish were taken on the fly by anglers. Quite a revival has taken place since the local residents begin to realize the value of a costless production thoughtlessly destroyed. Mr. Lincoln, with his usual enterprise and public spirit, has constructed a salmon hatchery, and the Commissioner will most cheerfully supply all the salmon ova that the house will accommodate.

The great drouth of the season impeded the transit of the salmon to their spawning grounds on the upper sources of the river, and many fish were dipped in nets by public-spirited citizens below the dams and transported to the water above where they had a clear course. We anticipate a bright future for the beautiful village of Dennysville. Mr. Benjamin Lincoln attributes the increased run of salmon of the last two years to the contribution of salmon fry made to this river in 1876 and following year.

On the Androscoggin the two important fishways at Brunswick have proved a success, as will be seen by the annexed letter:

TOPSHAM, Nov. 20th, 1882.

Mr. Henry O. Stanley, Dixfield, Me.

Dear Sir: Your letter of the 12th to J. H. Tebbetts, Brunswick, was handed me a few days ago; and at your request, will give you the particulars in regard to the salmon seen at the foot of the rips on the Androscoggin river, on the Topsham side, near Jack's crossing, so called, by Mr. Johnson Clark of Topsham. Time, about the 20th of last month. He informs me that he was fishing with rod and line, when this large salmon, over three feet long, came to the surface, and he had a good view of him; could easily have shot him, as his loaded gun was lying by his side. He also informs me that he has heard of salmon being seen at the foot of Lisbon Falls this season.

I have not seen one this summer or fall at the lower falls at Brunswick and Topsham, although for three or four years previous I have seen quite a number, which is proof to me that they have found the way through the fishways at Brunswick and Topsham, and do not stop here as formerly.

Respectfully yours,

P. HALL, Topsham, Me.

On the Presumpscot, at its sources on Crooked river, a very great number of unusually large fish have been taken by the poachers for the two or three last years. The exceptional size and number of the fish has given increased incitement to the nefarious practice of spearing on the spawning bed. The very remarkable size of the fish and their unwonted number, warrant the conclusion that they are sea salmon planted by us in the head waters of the river at Norway and other tributaries of Sebago in the past years. The first salmon fry were planted in the Presumpscot in 1875. A large fish of thirteen pounds was taken below the dam at the outlet of Sebago last June with hook and line. A man named Paul is now under arrest for spearing a fish weighing twenty-four pounds on Crooked river the middle of October. Several others have been arrested for spearing fish and there are also many other cases which will be prosecuted in due course. We feel warranted in the conclusion that most of these fish are results of our planting sea salmon, not only from the reasons we have assigned above, but from the added fact that we have now a series of eight good fishways on the Presumpscot river from Cumberland Mills to Sebago.

On the Saco river we have planted many thousand young salmon within the last two or three years, at the earnest

solicitation of the leading and influential citizens of Saco and Biddeford, who have been petitioning in the long past for fishways which inadequate means have compelled us to defer until prior claims of an earlier date had been attended to. At the earliest opportunity this year surveys were made and plans furnished by Mr. Harry Buck, Engineer, and fishways ordered to be built by the owners and occupants of the several dams. After due notices had been served upon the respective parties, hearings held, and all the requirements of the statutes duly complied with, much to the surprise of the Commissioner his decision has been appealed from, and the constitutionality of the law of our own State denied. We hope for a favorable decision of the people's rights at an early day.

There has been distributed this season Penobscot salmon fry in the different rivers, as follows, viz:

Penobscot river	300,000
St. Croix river	267,000
Machias river	25,000
Kennebec river	200,000
Androscoggin river	200,000
Presumpscot river	140,000
Saco river	60,000
Total	1,192,000

Although lobsters are not strictly within our jurisdiction, yet we do not think that any citizen can notice the rapid deterioration in size, and the enhanced value of those brought to our markets, without feeling that their rapid extinction is in progress, and will result in extermination at an early day. Legislation has proved futile, and nothing but a law prohibiting canning and canning establishments, can save them and the rights of our citizens at large. Would not national laws, both in the United States and the Dominion of Canada, prohibiting the canning of lobsters and salmon, be warranted in defence of the rights of the people, and to prevent the utter destruction of an healthful article of food, that costs nothing

in the production, and the loss of which must enhance the cost of living to the masses? Allow us here to lay before you a letter from Prof. Baird to Hon. E. M. Stilwell:

Editor Whig and Courier: Allow me to call your attention to the annexed letter of Prof. Baird, U. S. Commissioner of Fish and Fisheries. It is suggestive of a new and important industrial and food producing interest for our State. I hope it may commend itself to the notice of all your exchanges and thus reach all our coast fishermen. In the matter of jurisdiction, the owner of the shore controls to low water mark. The State has jurisdiction for three miles from the shore. A special act of the Legislature would be requisite and easily attainable for any enterprise of this nature. The Commissioner of Fisheries has no authority in the premises.

Respectfully yours,

E. M. STILWELL.

Bangor, Dec. 19, 1881.

WASHINGTON, D. C., Dec. 16, 1881.

Dear Mr. Stilwell: There is a very great promise of success in cultivating lobsters on a large scale by enclosing them in small salt water bays, where there is a free circulation of water, and the egress of the lobsters can be prevented by grating or netting. They can be fed, as I understand, very largely upon clams, and will not only grow very rapidly, under such circumstances, but carry on the propagation of the young. The young can either be kept in the enclosure or go out to sea and increase the supply in the vicinity. This is, by far, the most feasible way of solving the problem in regard to the depletion of the lobsters along the coast of Maine and the Provinces.

Is there any provision in the fishery laws of Maine by which an individual undertaking this work can prevent unauthorized persons from going in and reaping the benefit when the individual cultivator actually owns, or leases the adjacent shore? Of course no man will be willing to go into the business unless he can be protected, and if there is no provision in Maine, as there is in Massachusetts, by which the Fish Commissioners can lease a pond to particular individuals for the purpose of propagating fish and secure to them thereby exclusive rights in the waters, it would be well to have such a provision, with the understanding that it is to apply to salt waters as well as to fresh.

If the experiment proves as successful as I confidently anticipate and believe it will be, it will add enormously to the resources of the State, as there are hundreds of localities where such ponds could be established to the best advantage. Of course I suggest no interference with high seas navigation.

Very truly yours,

SPENCER F. BAIRD.

Live lobsters rejected by the canning establishments as too small for their use, can be purchased at the nominal price of $1 or $2 per hundred. Surely this can be made a profitable business by some enterprising persons on our sea coast. Oyster planting is remunerative for a large outlay of capital, why not lobsters?

We append one among many letters received by us upon the subject of abuses of the lobster law. We hope it may commend itself to the attention of our Legislature.

PORTLAND, Me., Nov. 9th, 1882.

MR. STANLEY—*Dear Sir:* As you are the Fish Commissioner, I take the liberty of addressing you in regard to the Lobster Law, which is being violated all through the State, especially here, by the dealers. I take this method of writing to you to see if there can't be a stop put to it; there are thousands a day of those very small lobsters destroyed and most of them brought to this market.

And another point. They (the fishermen) commence to car these kind all of two months before the canning factories begin—that is, before the law is off, (April 1,) and a large portion of them die in the cars. This thing should be stopped, and the present law continued the year round and enforced, or our lobstering will soon be annihilated.

Hoping to hear from you soon, I am yours, &c.

LAND-LOCKED SALMON.

Our work in planting land-locked salmon has been amply repaid to us this year in the exhibition of most gratifying results at Moosehead, at Enfield, and at Rangely. At Moosehead they have been captured on the fly, from time to time, for the last two years. At Enfield, fish estimated at most exaggerated weight, were seen on the spawning bed this year, but in all probability fairly estimated by one accustomed to judge correctly of the weight of fish in the water, fully equalling ten or twelve pounds. At Rangely considerable numbers have been taken by anglers for several years past. In Rangely lake alone, over fifty of two pounds weight and over, were taken by anglers last June. More or less were also taken in the lakes below. Quite a number were seen by the Commissioner on the spawning beds in Rangely stream in October, some of them very large and estimated

by him and others at not less than ten or twelve pounds. All this is the more encouraging, as it indicates that we shall be enabled in the early future, to take spawn at Enfield and Rangely for the further stocking yearly of these waters. It must be borne constantly in mind by our Legislature, that a given field of water or earth, will but produce food sufficient of fish or wheat, for a given number of persons. The waters of Maine are now fished by a large population from all the United States. How many, your railroad officers and your hotel keepers will inform you. Our fields must be yearly planted and sowed for the mouths that the natural production is not sufficient to feed. When the very inadequate supply of means in resources to procure the ova to stock the very wide area of waters, we are expected to plant, is borne in mind; when it is remembered that the fair supply of fish fry to one acre is set down by experienced fish culturists at 5,000 to one acre of water, or 1,000 one pound fish, the pleasure experienced by us in our success with our meagre resources, will be participated in by all our brother Commissioners.

Land-Locked Salmon Eggs.

Our return for our subscription of $300 to the Grand Lake stream fund, was sixty-nine thousand eggs, which were divided equally between Moosehead, Rangely and Enfield.

GAME.

Deer have been unusually plenty. Notwithstanding very inadequate means and very weak and faulty wording of the statutes, and the consequent imperfect enforcement of the law, the increase within the last two years has been very marked. The slaughter of deer has been greater than for very many years. The law forbidding the hunting of deer with dogs has been utterly disregarded. There can be no such sport in our State as coursing deer with hounds. Our ponds and lakes dot almost every square mile of our territory. It is simply driving the poor, timid, scared brute into one of our thousand ponds, where the murderous poacher in his canoe, awaits the fear-paralyzed victim with either knife to cut its throat, or deliberate cold-blooded gun shot at close quarters. Killing sheep in a slaughter house, or butchering calves in a pen, is soul-stirring heroism in comparison.

There can be no adequate protection with such legislation as gives us the following silly law, viz: "No person shall hunt, kill or destroy with dogs, any deer or caribou within this State, under a penalty of forty dollars for every such deer or caribou so *killed* or *destroyed*." The same wording fatal to the efficiency of the law, is employed in the statute for the protection of moose. The same old poaching hand has emasculated the law, that formerly doctored the salmon and trout laws.

No penalty for *hunting* deer, or caribou, or moose, with dogs! The warden, without pay, must follow the dogs and see the deer killed, and then establish the ownership of the dogs, and then prosecute the parties, and then returns home a rich man from the accumulated wealth of *one-half the penalty*. Every man who takes dogs into the woods, should be held to have killed every deer traced to his possession,

and every man in every cabin where dogs are sheltered or kept, should be held responsible and fined for hunting and killing deer with dogs. Much destruction of moose is perpetrated by Indians from Dominion borders in spring, within our State. Some of our own poachers act in complicity with them by exchanging moose hides for peltries that they can sell here without fear of arrest. These hides all come back here in due course. The poacher has become a dangerous criminal, whom the lumberman who owns cabins in the forests, or timber lands, or aught else that can be destroyed, fears to offend. The safety of the public demands his speedy punishment and suppression. He is but the deserter, the bounty jumper of the late war, back again in the haunts from whence he sprung. He picks a few cranberries before they are ripe, for fear the honest farmer may fairly obtain them; he nets white perch in our ponds; he poaches salmon on forbidden ground and in forbidden seasons; he nets and spears trout on the spawning beds; he even steals from his brother poacher, hounding deer, by watching and killing the deer driven by the dogs of some brother thief. His arrest and conviction and punishment, will rid society of an expensive blight, the cause of burdensome taxation for the punishment of crime.

We give below the return of the number of carcasses of deer and venison shipped by the American Express Company. Large as is the amount, it constitutes but a small item of the slaughter that has taken place thus far this year. We have heard of some nineteen carcasses of deer, spoiled by too long keeping, thrown into the river at Rockland. All this should have been consumed by sportsmen in our own State. As it now stands it was mostly killed by non-taxpaying men from other States, for profit, and returns to our own State hardly one cent. No one should be allowed to give up work as a citizen, and make a living by killing and selling what belongs equally to all, and what is intended and should be protected as a healthful recreation and holiday pastime for all. A law, somewhat similar to one in force in Nova Scotia,

should be passed, forbidding the killing of more than two or three moose or deer or caribou by any one person. The laws in New Brunswick and Nova Scotia and other Provinces of the Dominion, requiring the payment of $25 or $30 for permission to hunt or shoot within their boundaries, by every non-resident, has had the effect to precipitate upon our State an unusual number of hunters, mostly for market:

AMERICAN EXPRESS COMPANY,
North Eastern Division, Nov. 22, 1882.

Number of saddles of venison and carcasses shipped by American Express Company from Oct. 1st to Nov. 23d, inclusive:

Bangor, (and one caribou and bear,)	42
Piscataquis route, (and one caribou,)	7
Mattawamkeag,	4
Lincoln,	39
Forest,	8
Olamon,	47
Winn, (and one caribou,)	46
Ellsworth,	62
Costigan,	34
Machias,	26
Milbridge,	93
	408.

BIRDS.

Wild ducks are rare and to be seen but in limited numbers, owing to the wide-spread crime of baiting and netting. Farmers who like to vary the monotonous fare of their tables by an occasional duck or bit of venison, must aid us in fearlessly testifying in all cases of infractions of our game laws that come to their knowledge. If we had the means of employing competent detectives, we would soon root out this great evil of poaching, which now bids fair to exterminate the fish and game of our State. Woodcock and plover and many of our young ruffed grouse, in close-time, are still shot for market, along our lines of railway by our own and outside poachers.

Our insectivorous birds require protection. There is a statute forbidding their being killed, but as there is no penalty attached, it is valueless.

We solicit close attention to the two important cases we publish as an Appendix to this Report. The first, of "William E. Barrows *vs.* John M. McDermott," defining the law governing the rights of the public of access to and of fishing in ponds of more than ten acres. The second, a test game law decision of the "People *vs.* Magnum." These two cases will probably govern the decisions of our courts in future on all matters pertaining to their respective subjects.

Respectfully submitted.

HENRY O. STANLEY.

December 1st, 1882.

LIST OF FISHERY OFFICERS OF DOMINION OF CANADA AND UNITED STATES.

Dominion of Canada.

W. F. Whitcher, Commissioner, Ottawa, Ontario.
Samuel Wilmot, Superintendent of Fish Culture for Canada.

New Brunswick.

W. H. Venning, Inspector of Fisheries, St. John.

Nova Scotia.

W. H. Rogers, Inspector, Amherst.

Prince Edward Island.

J. H. Duvar, Inspector, Alberton.

British Columbia.

A. C. Anderson, Victoria.

United States.

Prof. Spencer F. Baird, Washington, D. C.

Alabama.

C. S. G. Doster, Prattville.
D. B. Huntley, Courtland.

Arizona.

John J. Gosper, Prescott.
Richard Rule, Tombstone.
Dr. J. H. Taggart, (Business Manager) Yuma.

Arkansas.

John E. Reardon, Little Rock.
James H. Hornibrook, Little Rock.
H. H. Rottaken, Little Rock.

California.

S. R. Throckmorton, San Francisco.
J. D. Farwell, Niles, Almeda county.
W. W. Traylor, San Francisco.

Colorado.

Wilson E. Sisty, Idaho Springs.

Connecticut.

Dr. Wm. M. Hudson, Hartford.
Robert G. Pike, Middletown.
George N. Woodruff, Sherman.

Delaware.

Enoch Moore, Jr., Wilmington.

Georgia.

J. T. Henderson (Commissioner of Agriculture and *ex-officio* Commissioner of Fish and Fisheries), Atlanta.
Dr. H. H. Cary, Superintendent, La Grange.

Illinois.

N. K. Fairbank, President, Chicago.
S. P. Bartlett, Quincy.
S. P. McDoel, Aurora.

Indiana.

Calvin Fletcher, Spencer, Owen county.

Iowa.

B. F. Shaw, Anamosa.
A. A. Mosher, Assistant, Spirit Lake.

Kansas.

Hon. D. B. Long, Ellsworth.

Kentucky.

Wm. Griffith, President, Louisville.
Hon. John A. Steele, Versailles.
Dr. Wm. Van Antwerp, Mount Sterling.
A. H. Goble, Catlettsburg.
Hon. C. J. Walton, Munfordville.
Dr. S. W. Coombs, Bowling Green.
John B. Walker, Madisonville.
P. H. Darby, Princeton.
Hon. J. M. Chambers, Independence, Kenton county.
W. C. Price, Danville.

Maine.

E. M. Stilwell, Bangor.
Henry O. Stanley, Dixfield.

Maryland.

Thomas Hughlett, Easton.
G. W. Delawder, Oakland.

Massachusetts.

E. A. Brackett, Winchester.
Asa French, South Braintree.
F. W. Putnam, Cambridge.

Michigan.

Eli R. Miller, Richland.
A. J. Kellogg, Detroit.
Dr. J. C. Parker, Grand Rapids.

Minnesota.

1st District—Daniel Cameron, La Crescent.
2d District—Dr. William M. Sweney, Red Wing.
3d District—Dr. Robert Ormsby Sweeny, St. Paul.
4th District—No appointment until January.
5th District—No appointment until January.

Missouri.

Dr. J. G. W. Steedman, Chairman, 2803 Pine street, St. Louis.
John Reid, Lexington, Lafayette county.
Dr. J. S. Logan, St. Joseph.

Nebraska.

W. L. May, Fremont.
R. R. Livingston, Plattsmouth.
B. E. B. Kennedy, Omaha.

Nevada.

Hon. Hubb G. Parker, Carson City.

New Hampshire.

Edward Spalding, Nashua.
Luther Hayes, Milton.
Albina H. Powers, Grantham.

New Jersey.

Dr. Benjamin P. Howell, Woodbury.
Maj. Edward J. Anderson, Trenton.
Theodore Morford, Newton.

New York.

Hon. R. Barnwell Roosevelt, 76 Chambers street, New York.

Edward M. Smith, Rochester.

Richard U. Sherman, New Hartford, Oneida county.

Eugene G. Blackford (Fulton Market, New York City), 809 Bedford avenue, Brooklyn.

North Carolina.

S. G. Worth, Raleigh.

Ohio.

Col. L. A. Harris, President, Cincinnati.

Charles W. Bond, Treasurer, Toledo.

Halsey C. Post, Secretary, Sandusky.

Pennsylvania.

Hon. H. J. Reeder, Easton.

Hon. B. L. Hewit, Hollidaysburg.

James Duffy, Marietta.

John Hummel, Selingsgrove.

Robert Dalzell, Pittsburgh.

G. M. Miller, Wilkesbarre.

Rhode Island.

Alfred A. Reed, Providence.

Newton Dexter, Providence.

John H. Barden, Rockland.

South Carolina.

A. P. Butler, Commissioner of Agriculture and *ex-officio* of Fish and Fisheries, Columbia.

C. J. Huske, Superintendent, Columbia.

Tennessee.

W. W. McDowell, Memphis.

H. H. Sneed, Chattanooga.

Edward D. Hicks, Nashville.

Texas.

R. R. Robertson, Austin.

Utah.

No appointment since the death of Prof. J. L. Barfoot in April last.

Vermont.

Hiram A. Cutting, Lunenburg, Essex county.
Herbert Brainerd, St. Albans.

Virginia.

Col. M. McDonald, Berryville.

West Virginia.

Henry B. Miller, President, Wheeling.
C. S. White, Secretary, Romney.
N. M. Lowry, Hinton.

Wisconsin.

The Governor, *ex-officio*, Madison.
Philo Dunning, President, Madison.
C. L. Valentine, Secretary and Treasurer, Janesville.
J. V. Jones, Oshkosh.
John F. Antisdel, Milwaukee.
Mark Douglas, Melrose.
Christopher Hutchinson, Beetown.

Wyoming Territory.

Dr. M. C. Barkwell, Chairman and Superintendent, Cheyenne.
Otto Gramm, Secretary, Laramie.
Hon. N. L. Andrews, Johnson county.
Hon. E. W. Bennet, Carbon county.
Hon. P. J. Downs, Uinta county.
Hon. T. W. Quinn, Sweetwater county.

APPENDIX.

AN IMPORTANT MAINE DECISION.

Mr. Wm. E. Barrows, a citizen of Connecticut, having acquired by purchase all of the land around and enclosing a body of water known as Grindstone pond, near Monson, Me., posted notices forbidding any person fishing in the pond. Several parties persisted in so doing, and among them was a young man named John M. McDermott, who fished there after the forbiddal of Barrows during the summer of 1880. Barrows brought action of trespass. The pond contains more than ten acres, and is a natural pond. The land was a part of the public domain of the Commonwealth of Massachusetts prior to A. D., 1647, and all of the land around this pond is common, with no fences or enclosure of any kind. The Supreme Court of Massachusetts has decided in several instances that a natural pond of more than ten acres is free to the public for fishing and fowling, by virtue of the Colony ordinance of 1641 and the amendment to said ordinance of 1647. The Supreme Court of Maine has held that the ordinance of 1641 is the common law of Maine, and the counsel for McDermott claimed that if this is so it follows that the amendment is also the common law of that State. By the amendment of 1647, large and important rights were conferred upon the people, for by it was granted the right of passage over all lands lying in common adjacent to natural ponds of more than ten acres, providing they did not pass over any man's cornfield or meadow. These were the questions involved in the case:

1. Are natural ponds of more than ten acres free to the public for fishing and fowling?

2. If so, are the public allowed free passage on foot over adjoining lands where no annual crops are growing?

As this was the first time that these identical questions had arisen in the courts of Maine, the decision of the Court was looked for

with some eagerness, for if Grindstone pond could be closed up and monopolized then there are thousands of others in northern and eastern Maine which may be shut up in the same manner.

WILLIAM E. BARROWS *vs.* JOHN M. MCDERMOTT.

Piscataquis. Opinion May 27, 1882. Fishing. Great ponds. Trespass.

The colonial ordinance of 1641 more particularly defined in 1647, and declaring among other things a common right of free fishing and fowling on great ponds of more than ten acres in extent, lying in common, has been so long and so uniformly accepted and acted upon in this State that it constitutes in all its parts a portion of the common law of the whole State without regard to the question whether it was ever extended by legislative authority to localities not embraced within the precincts of the colony of Massachusetts Bay.

Any person has the right to go to such a pond on foot, through uninclosed woodlands belonging to another, and to take fish there; but the privilege must be exercised as it is conferred by the ordinance, and he must see to it that he trespasses on no man's corn or meadow, tillage or grass land.

On report. Trespass *qu. cl.* submitted to the court upon agreed statement of facts which are substantially stated in the opinion. Lebroke & Parsons, attorneys for plaintiff; J. F. Sprague and H. Hudson, attorneys for defendants.

BARROWS, J. The substance of the admitted facts upon which this case is presented for decision is as follows: In the summer of 1880, the plaintiff held as proprietor a tract of land in the township of Howard, containing a natural pond covering about twenty acres called Grindstone pond, surrounded by wild and uncultivated land with the exception of a single piece of about two acres which had been cleared and cultivated, adjacent to the pond, but upon which no crops were raised or grass cut in 1880. To protect and increase the propagation of fish in this pond the plaintiff had forbidden all persons from entering on his land surrounding the pond or fishing in its waters, by posting on the cleared piece above mentioned and elsewhere around and on the shore of the pond conspicuous notices to that effect painted upon boards in legible letters.

But the defendant in defiance of the prohibition on divers days in the summer of 1880, went there, as all who wished had been accustomed to do for thirty-five years before the notices were posted, and caught and carried away fish from the pond without permission from the plaintiff, passing for that purpose over and through the cleared piece of land adjoining the pond, no part of which was enclosed by a fence of any kind. Hence this action of trespass *quare clausum*, alleging in proper form the above facts with the exception of the posting of the plaintiff's prohibitory notices. The case is hereupon submitted to the court for judgment according to the legal rights of the parties, the damages, if the plaintiff is found entitled to prevail, being agreed to be one dollar.

The defendant bases his justification of the acts here complained of as trespasses, upon the Massachusetts Bay Colonial Ordinance of 1641 as amended in 1647, which is an early declaration of common rights and liberties, and some rules and principles respecting the tenure and proprietorship of certain kinds of real estate, adopted by the Massachusetts Bay colonists soon after the settlement there was effected. It declares among other things the right of free speech within due and orderly limits at public assemblies, the right of free fishing and fowling for all in and upon any great pond lying in common and containing more than ten acres in extent with the incidental right to "pass and repass on foot through any man's property for that end so they trespass not upon any man's corn or meadow"—the right of property to low water mark in the owner of lands adjoining the salt water where the sea doth not ebb above a hundred rods, and no more where it ebbs further, subject to the right of passage of boats or vessels—and the free right of removal from the colony "provided there be no legal impediment to the contrary." Anc. Chart. and Laws of Mass. Bay, chap. LVIII, p. 148.

The plaintiff's counsel strikes at the root of this defence in an elaborate effort, exhibiting not a little historical research, to show that those who framed this ordinance had no jurisdiction over the *locus*, and that it never was law for such portion of this State as falls within the limits of the ancient Acadia.

It may well be that the ordinance has no force by virtue of positive enactment by any legislative body having jurisdiction at the time of such enactment over what is now the county of Piscataquis, and that its operation has never been extended there by any specific act of legislation since; and it is quite true that when under the charter of William and Mary, the great and general court of Assembly of the Province, in 1692, acting for the three united colonies of Massachusetts Bay, Plymouth, and Maine, re-enacted "all the local laws respectively ordered and made by the late Governor and company of the Massachusetts Bay and the late government of New Plymouth" it was done on such terms that they continued in force only "in the respective places for which they were made and used" so that the ordinance under consideration was never in terms extended to the Plymouth colony or to Maine under any legislative sanction. See Anc. Charters, &c., pp. 213, 229.

But it has been so often and so fully recognized by the courts both in this State and in Massachusetts as a familiar part of the common law of both, throughout their entire extent, without regard to its source or its limited original force as a piece of legislation for the colony of Massachusetts Bay, that we could not but regard it as a piece of judicial legislation to do away with any part of it or to fail to give it its due force throughout the State until it shall have been changed by the proper law making power. When a statute or ordinance has thus become part of the common law of a State it must be regarded as adopted in its entirety and throughout the entire jurisdiction of the court declaring its adoption. Barker *v.* Bates, 13 Pick. 255; Commonwealth *v.* Alger, 7 Cush. 53, 76, 79.

It is not adopted solely at the discretion of the court declaring its adoption, but because the court find that it has been so largely accepted and acted on by the community as law that it would be fraught with mischief to set it aside.

It is not here and now a question whether this ordinance shall be adopted with such modifications as might he deemed proper under the circumstances of the country. It has been long since adopted in all its parts, acted upon by the whole community and its adoption declared by the courts; and now the argument of the plaintiff's counsel aims to have us declare either that it has not the force of law in certain parts of the State, or that the court may change it if satisfied that it does not operate beneficially under present circumstances. We cannot so view it. That which has the force of common law in one county in this State has the same force in all.

To show that this ordinance has been long and constantly regarded as law in this State reference may be had to the following decisions: Storer *v.* Freeman, (Cumberland county,) 6 Mass. 435, 438; Codman *v.* Winslow, (Cumberland, 1813,) 10 Mass. 146; Lapish *v.* Bangor Bank, 8 Maine, 85, 93; Emerson *v.* Taylor, 9 Maine, 43; Knox *v.* Pickering, 7 Maine, 106, 109; Parker *v.* Cutler Milldam Co., 20 Maine, 353; Deering *v.* Long Wharf, 25 Maine, 51, 64; Winslow *v.* Patten, 34 Maine, 25; Partridge *v.* Luce, 36 Maine, 19; Moulton *v.* Libbey, 37 Maine, 472, (where the effect of the ordinance upon rights to fisheries is considered,) Clancey *v.* Houdlette, 39 Maine, 451, 456; Hill *v.* Lord, 48 Maine, 83.

It must be regarded as settled that the public have such rights to fish in the waters of Grindstone pond, and such way of approach to it for that end as the ordinance gives them unless the right has been abridged by subsequent legislation. It may be true that our ideas of "great ponds" are not precisely similar to those which our ancestors brought from England—that there no longer exists the same necessity for free fishing and fowling to enable men to get the means of sustenance, which existed in 1641—that the right is now chiefly exercised by pleasure seekers and idle tramps who might be more profitably employed, and who cause more loss and destruction in timber and woodlands than their pursuits yield advantage in the way of pleasure or profit—that their outgoings and incomings are attended by constant trespasses upon the farms which lie in their way, and in short that it would be for the general good to restrict the privileges they have heretofore enjoyed. But these are considerations to be addressed to the Legislature rather than to the court, whose power is to be exercised in ascertaining and declaring the law, and in applying the old principles unchanged to the ever varying circumstances of new cases presented and sometimes to the newly developed industries of the age (as the Massachusetts court applied this ordinance, in West Roxbury *v.* Stoddard, 7 Allen, 158.) but not in setting aside its plain doctrines because they are not in accord with our own views of what it should be, when the Legislature, which is properly charged with the duty of pro-

moting the public good and preventing mischief so far as law making will do it, has not seen fit to intervene.

Has there been any legislation which affects the rights of these parties? In the R. S., c. 40, § § 51-53 inclusive, as amended by c. 170, laws of 1874, we find provisions which would give to those who establish within their own premises the means and appliances for the cultivation of useful fishes an exclusive right to fish the waters thus used; and this wherever it is applicable would limit the common right so long as the proprietor of the pond took the steps necessary within the purview of the statute for the artificial breeding and cultivation or maintenance of such fishes.

But neither the allegations nor the proof bring this case within these provisions. All the plaintiff seems to have done "to protect and forward the propagation of fish," (and even this is not alleged in the writ, but only that the defendant hindered and delayed their propagation,) was to post his prohibitory notices to prevent so far as he could thereby, indiscriminate poaching upon what he proposed to make a private preserve. But he does not seem to have done anything for the regular and systematic cultivation or maintenance of the fish, and without this the prohibition was without avail. He could not thus abridge the common right without doing anything which the statute impliedly requires to give him peculiar privileges.

The Legislature has power over the whole subject so far as public and common rights are concerned, and may by statute impose penalties upon the taking of fish by any one except under certain restrictions, even in the waters contiguous to his own land. Nickerson *v.* Brackett, Hancock county, 10 Mass. 212; Burnham *v.* Webster, Cumberland county, 5 Mass. 266, 269; and it cannot be doubted that they may also abridge the common right in favor of the proprietor when they are satisfied that the interests of the public will be best served by an ampler recognition of the right of private property.

The Legislature of Massachusetts have already changed the definition of a "great pond" as given in the colonial ordinance so that those only which contain more than twenty acres, instead of those exceeding ten, are subject to the public right of fishing conferred thereby. Mass. St. of 1869 c. 384, § 7; Com. *v.* Tiffany, 119 Mass. 300. But in the absence of any such enactment limiting the public right in this State, we must continue to regard natural ponds exceeding ten acres in extent, and which have not been devoted by the proprietors to the artificial cultivation or maintenance of useful fishes, as "great ponds," the fish in which may lawfully be taken by any one who can and does obtain access to the pond in the manner recognized as lawful in the colonial ordinance. In the outset the right seems to have been conferred only upon householders of the town where it was to be exercised, and under the proviso that "no man shall come upon another's propriety without their leave" which would, of course, restrict the right, not only with respect to the persons who might lawfully exercise it, but to such ponds as could be reached without committing a technical trespass by going upon another man's land without

license; but, by the further definition, the right of free fishing and fowling on "great ponds lying in common" was extended to all, with the right to "pass and repass on foot through any man's property for that end, so they trespass not upon any man's corn or meadow," and this we think gave the fisherman the right to approach the pond through uninclosed woodlands to whomsoever belonging, but not to cross another man's tillage or mowing land.

One common law limitation of these fishing rights, excluding the public from unnavigable streams where they flow through another's land, was well recognized in Waters *v.* Lilley, 4 Pick. 145; and various *dicta* in different cases cited indicate that the courts have no disposition to extend the privilege so as to justify or excuse any unwarranted interference with the rights of the owners of land lying on the margin of such waters.

The case shows that some two acres upon the shore and adjacent to the pond had been cleared and cultivated. From this it may be fairly inferred that it was in a condition to produce grass, and the fact that none was actually cut there in 1880, does not rebut the inference. *Non constat* but the intrusions of defendant and others upon like errands, may have made it worthless. The location and fact of previous cultivation, in the absence of proof that it had reverted to a state of nature, fairly indicate that it ought to be classed with the land denominated in the colonial ordinance "meadow," and it was, by the very terms of the ordinance on which he relies, incumbent on the defendant to see to it that he did not trespass on it. It appears, on the contrary, that he passed over and through this cleared and cultivated piece of land. There is nothing in the case which suggests the acquirement of any right so to do by prescription, and the idea of license is expressly negatived.

Judgment for plaintiff for $1.00 damages.

APPLETON, C. J., VIRGIN, PETERS, LIBBEY and SYMONDS, JJ., concurred.

A TEST GAME LAW DECISION.

"THE PEOPLE VS. MAGNER."

Action was brought against one Magner, a Chicago game dealer, in January, 1880, for selling quail out of season, and judgment obtained in the Justice's Court and in the Criminal Court of Cook County. Upon appeal the case was taken to the Supreme Court of Illinois, last March, and the decision of that court has just been handed down sustaining the decisions of the lower courts.

The Magner case was an important one because it had purposely been made a test of the constitutionality of the Illinois game law. The published report of the case states that by an agreed statement of facts the following points were covered:

"In case No. 1, the defendant bought and sold quail, during the prohibited season, the entire transaction taking place within the State, and confined to citizens of Illinois. In case No. 2, the defendant bought one box of quail in the State of Kansas during the open season, had said case shipped to Chicago, and sold the same during the prohibited season to a citizen of Illinois. Case No. 6, same as No. 2, except that defendant sold the package to a citizen of the State of New York. Case No. 10, defendant sold quail at Chicago during the prohibited season, to citizen of New York, said quail having been killed in Kansas, and shipped to defendant in Chicago. These three cases were so framed to test the authority of the State to pass the law. Cases No. 3, 4, 7 and 9 contained the same statement of facts, except that the game was purchased in Kansas during the close or prohibited season by the laws of that State, and raised the question of the right of a citizen to deal in goods, when the law of the place of contract has forbidden such dealings. Cases No. 5, 8 and 9 represented similar facts, except that goods were sold in smaller parcels than original shipment, thereby raising the question, that as the original packages had been broken, the quail had become 'merged in the mass of property of the State,' and the State could then regulate its sale, even if it could not regulate inter-State commerce.

"The argument upon the part of the State was briefed to evidence the following propositions, viz:

First, That game of all kinds is the property of the State, and that the State has full power to protect its property by statute, even to the affecting of commercial relations between the various States, and that such law will not be unconstitutional, unless the opposition between it and the constitution be clear and plain.

Second, Showing that the highest courts in the States of New York and Missouri have decided a similar law to be constitutional.

Third, That the power of Congress, under the constitution, to regulate commerce among the several States, is not exclusive.

Fourth, That Congress having for over a century failed to pass a game law, it may reasonably be inferred that a 'national rule' is not required, and in such a case the State may act.

Fifth, That the States having always protected fish and game, the acquiescence of the Federal Government admits their rights so to do.

Sixth, That the States can better control this question than Congress.

Seventh, That Congress has no power over the subject.

Eighth, That this law can be upheld under the police power of the State.

Ninth, That goods contraband *lex loci contractu* cannot be the subject of a legal contract elsewhere.

Tenth, That the comity of States requires each to assist the other in preserving its game.

Eleventh. That game and fish are of great importance to the country.

Twelfth. That the quail were bought in Kansas when such purchase was then and there prohibited should not be received as a defense in the courts of this State.

Thirteenth. That the practice has become general by which courts of justice examine into and enforce contracts made in other States, and carry them into effect, according to the laws of the place where the transaction took its rise; subject only to the exception that such contract should not, either in itself, or in the means used to give it effect, work an injury to the inhabitants of the country where it is attempted to be enforced.

Fourteenth. That even if another State was bound to permit the sale of the subject of contract in the hands of the importer, it is not bound to furnish a market for it, nor abstain from the passage of any law which it may deem necessary to guard the health or property of its citizens, although the effects of such legislation might discourage importation."

The opinion rendered by the Supreme Court sustains these arguments. It is so comprehensive and so important that we publish it entire as printed in a Chicago paper:

STATE OF ILLINOIS. Supreme Court, Northern Grand Division.

At a Supreme Court, begun and holden at Ottawa, on Tuesday, the seventh day of September, in the year of our Lord one thousand eight hundred and eighty, within and for the Northern Grand Division of the State of Illinois.

Present: Hon. T. Lyle Dickey, chief justice; Pinkney H. Walker, justice; Benj. R. Sheldon, justice; Alfred M. Craig, justice; John Scholfield, justice; John M. Scott, justice; John H. Mulkey, justice; James K. Edsall, attorney general; Rufus C. Stevens, sheriff; Everell F. Dutton, clerk.

Be it remembered, that afterward, to wit: on the third day of February, A. D. 1881, the opinion of the Court was filed in the clerk's office of said court in words and figures following, to wit:

James Magner *vs.* The People of the State of Illinois. Appeal from Criminal Court of Cook County.

Opinion by SCHOLFIELD, J.:

The grounds upon which it is argued the judgment below should be reversed are:

1st. Because the statute does not condemn the possession or sale of quail taken and killed beyond the limits of the State, which is subsequently shipped into the State for sale.

2d. Because, if the statute shall be held to condemn such possession and sale, then in its enactment, so much of § 13, Art. 4, of the State Constitution as requires that the subject of every act shall be expressed in its title, was disregarded, and hence it is not law.

3d. Because, if the statute is free of all other objections, but shall be held to condemn the possession and sale of quail taken and killed beyond the limits of the State, it is void and not law, for the reason that it is in contravention of the 3d clause of § 8, of Art. 1 of the Constitution of the United States, which confers upon Congress power to regulate commerce with the foreign nations and among the several States.

They will be examined in the order stated.

1st. The first section of the statute under consideration makes it unlawful for any person to hunt, pursue, kill or trap, net or ensnare, or otherwise destroy any quail or ruffed grouse between the 1st day of January and the 1st day of October of each and every year.

The second section makes it unlawful for any person to buy, sell, or have in his possession any of the wild fowls, birds, etc., mentioned in section one, at any time when the trapping, netting or ensnaring of such wild fowls, birds, etc., shall be unlawful, which shall have been entrapped, netted or ensnared contrary to the provisions of the Act. This is manifestly but equivalent to saying that it shall be unlawful to buy, sell or have in possession, between the 1st day of January and the 1st day of October, in each and every year, any of the wild fowls, birds, etc., specified in section one, which shall have been entrapped, netted or ensnared contrary to the provisions of that section. Very clearly this section has reference only to wild fowls, birds, etc., within this State.

But section six is more comprehensive in its language than either section one or section two. It is: "No person or persons shall sell or expose for sale, or have in his or their possession, for the purpose of selling or exposing for sale, any of the animals, wild fowls or birds mentioned in section one of this act, after the expiration of five days next succeeding the first day of the period in which it shall be unlawful to kill, trap or ensnare such animals, wild fowls or birds," etc. No exception whatever is made with reference to the time when or the place where such "animals, wild fowls or birds" shall have been killed, trapped or ensnared; but the language as plainly as language can, includes *all* animals, wild fowls and birds.

That this was intended, is further manifest from the language of the seventh section, which declares: "The provisions of this act shall not be

construed as applicable to any express company, or common carrier, in whose possession any of the animals, wild fowls or birds herein mentioned shall come, in the regular course of their business, for transportation, while they are in transit through this State from any place without this State, where the killing of said animals, wild fowls or birds shall be lawful," thus, in effect, declaring that but for this qualification the provisions of the act would be applicable to express companies and common carriers.

But, it is argued, this cannot be the correct construction, because such a prohibition does not tend to protect the game of this State. To this, there seem to be two answers. *First*, the language is clear and free of ambiguity, and in such case there is no room for construction. The language must be held to mean just what it says. *Second*, it cannot be said to be within judicial cognizance that such a prohibition does not tend to protect the game of this State. It being conceded, as it tacitly is, by the argument, that preventing the entrapping, netting, ensnaring, etc., of wild fowls, birds, etc., during certain seasons of the year, tends to the protection of wild fowls, birds, etc., we think it obvious that the prohibition of *all* possession and sales of such wild fowls or birds, during the prohibited seasons, would tend to their protection in excluding the opportunity for the evasion of such law by clandestinely taking them beyond the State and afterward bringing them into the State for sale, or by other subterfuges and evasions.

It is quite true that the mere act of allowing a quail netted in Kansas to be sold here does not injure or in anywise affect the game here, but a law which renders all sales and all possession unlawful, will more certainly prevent any possession or any sale of the game within the State, than will a law allowing possession and sales here of the game taken in other States. This is but one of the many instances to be found in the law, where acts which in and of themselves alone are harmless enough are condemned because of the facility they otherwise offer for a cover or disguise for the doing of that which is harmful.

A similar objection to the construction of the Act, it seems, was raised in Whitehead vs. Smithers (2d C. P. D. 553), 21st Moak 458; but Lord Coleridge, C. J., said: "I am of the opinion that that argument is not well founded. It is said, it would be a wrong thing for the Legislature of the United Kingdom to interfere with the rights of foreigners to kill birds. But it may well be that the true and only mode of protecting British wild fowl from indiscriminate slaughter, as well as of protecting other British interests, is by interfering indirectly with the proceedings of foreign persons. The object is to prevent British wild fowl from being improperly killed and sold under pretence of their being imported from abroad." In that case, the wild fowl was shown to have been of a consignment of dead plovers, received by a poulterer from Holland, and it was held that its sale was prohibited by general language, like that of the section under consideration, prohibiting all sales of such fowl.

In Phelps vs. Racey, 60 N. Y. 10, the language of the statute was substantially the same as that of the 6th section. The defence there was that the bird—a quail—had been killed in the proper season, but had been kept, by a process for preserving game, until after the season expired, and then offered for sale. The Court said: "The penalty is denounced against the selling or possession after that time, irrespective of the time or place of killing. The additional fact alleged that the defendant had invented a process of keeping game from one lawful period to another, is not provided for in the Act, and is immaterial."

2d. The title of the act is "An Act to revise and consolidate the several acts relating to the protection of game, and for the protection of deer, wild fowls and birds." We think this fully expresses the subject of the Act. From the views expressed under the first point, it follows that we are of opinion that the prevention of the possession and sale of *all* game during the periods designed to protect the same in this State from being taken or killed, may reasonably be regarded as a means necessary to the effectual protection of the game of this State. It was unnecessary to state the mode by which the game was to be protected, or the reasons which influenced the Legislature in making the enactment.

Fuller vs. The People, 92 Ills. 182. People *ex. rel.* vs. Lowenthal *et al.*, 93d Id. 191. Johnson vs. The People, 83d Id. 431.

3d. No one has a property in the animals and fowls denominated "game" until they are reduced to possession. 2d Kent's Com's (8th Ed.) 416 *et seq.* Cooley on Torts, 425. While they are untamed and at large, the ownership is said to be in the Sovereign's authority—in Great Britain, the King, 2d Blackstone's Com's (Sharswood's Ed.) 409–10; but with us in the people of the State. The policy of the common law was to regulate and control the hunting and killing of game, for its better preservation; and such regulation and control, according to Blackstone, belong to the police powers of the government. 4th Com's (Sharswood's Ed.) 174.

So far as we are aware, it has never been judicially denied that the government, under its police powers, may make regulations for the preservation of game and fish, restricting their taking and molestation to certain seasons of the year, although laws to this effect, it is believed, have been in force in many of the older States since the organization of the Federal Government. On the contrary, the constitutional right to enact such laws has been expressly affirmed in regard to fish by Massachusetts, in Burnham vs. Webster, 5 Mass. 266, Nickerson vs. Brackett, 10 Id. 212, and by Indiana, in Gentile vs. The State, 29 Ind. 409; and in regard to game by New York, in Phelps vs. Racey, *supra*; and by Vermont, in State vs. Norton, 45 Vermont, 258; and upon principle the right is clear.

The ownership being in the people of the State—the repository of the sovereign authority—and no individual having the property rights to be affected, it necessarily results that the Legislature, as the representative

of the people of the State, may withhold or grant to individuals the right to hunt or kill game, or qualify and restrict it, as in the opinion of its members will best subserve the public welfare. Stated in other language, to hunt and kill game is a boon or privilege granted, either expressly or impliedly by the sovereign authority—not a right inhering in each individual; and consequently nothing is taken away from the individual when he is denied the privilege, at stated seasons, of hunting and killing game. It is, perhaps, accurate to say that the ownership of the sovereign authority is in trust for all the people of the State, and hence, by implication, it is the duty of the Legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the State. But in any view, the question of individual enjoyment is one of public policy and not of private right.

Our attention has been called to no law of Congress, and we are aware of none, in regard to the transportation of game; still, if this law may be regarded as a restriction upon inter-State commerce, that is of no importance, for it was held in Welton vs. The State of Missouri, 91 U. S. (1st Otto) 275, that the non-exercise by Congress of its power to regulate commerce among the several States is equivalent to a declaration by that body that such commerce shall be free from any restriction. The inquiry then arises, Is the prohibition of the possession and sale of game as enacted in this State a restriction of inter-State commerce?

In Gibbons vs. Ogden, 9 Wheaton, at page 203, Chief-Justice Marshall classifies as belonging to and forming a portion of that "immense mass of legislation, which embraces everything within the territory of a State, not surrendered to a general government, all which can be most advantageously exercised by the States themselves," "inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc." And he adds: "No direct general power over these objects is granted to Congress, and consequently they remain subject to State legislation." So in the Daniel Ball, 10 Wallace 564, the Court said: "There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce 'among the several States,' with foreign nations, and with the Indian tribes. This limitation necessarily excludes from Federal control all commerce not thus designated, and of course that which is carried on entirely within the limits of a State, and does not extend to or affect other States." And upon this principle, in the United States vs. Dewitt, 9 Wallace 41, it was held that a statute of the United States, making it a penal offence to mix naphtha and illuminating oils, was beyond the legislative authority vested in Congress, and it was said: "But this express grant or power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States."

In the celebrated license cases, 5 Howard 504, laws prohibiting sales of liquor except in large quantities and under stringent regulations, were

sustained as within the police power, notwithstanding they interfered indirectly with inter-State commerce. Ch. J. Taney said: "These State laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and becomes a part of the general mass of property in the State. These laws may, indeed, discourage imports and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and permit the sale by the importers of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such a law may discourage importations or diminish the profits of the importers, or lessen the revenue of the General Government.

So, upon like principle, it has since been held that as a measure of police regulation looking to the preservation of public morals, a State law entirely prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States. Bootmeyer vs. Iowa, 18 Wall, 129. Beer Co. vs. Massachusetts (97 U. S.) 7 Otto 25.

Very clearly this law relates only to the internal commerce of the State in the article of game. As in the license cases, it acts altogether upon the retail or domestic traffic within the State, and as there said so it may be said here: "The State is not bound to furnish a market" for game; and by parity of reasoning it is not bound to furnish game for a market.

And it would seem to be a legal truism, if a State may constitutionally prohibit the killing and possession of game during certain seasons, the prohibition of the transportation of game killed and possessed in violation of such prohibition, cannot be unconstitutional. There cannot be a constitutional right to transport property which cannot legally be brought into existence.

The principle finds sanction in Munn vs. Illinois, 94 U. S. (4 Otto) 113. Slaughter-house cases, 16 Wallace 36. Fertilizing Co. vs. Hyde Park, 97 U. S. (7 Otto) 659.

The birds which are here admitted to have been brought from Kansas, as appears by the laws admitted in evidence by the agreement of the parties, were there killed and possessed in violation of a law of that State, and hence never legitimately became an article of commerce.

There is no question here of discrimination in favor of the game of this State as against that of another State, so as to apply the doctrine of Welton vs. the State of Missouri, *supra*, and kindred cases. Nor is there in R. R. Co. vs. Husen, 95 U. S. (5 Otto) 465, and other like cases, any question of the right to transport commerce from one State to another. For the 7th section of the statute expressly provides that: "The provisions of this act shall not be construed as applicable to any express company or common carrier into whose possession any of the animals, wild

fowls or birds herein mentioned shall come, in the regular course of their business, for transportation, while they are in transit through this State from any place without this State, where the killing of said animals, wild fowls or birds shall be lawful."

And herein our statute is directly opposite of the 6th section of the Kansas act, which was held unconstitutional in the State vs. Saunders, 19 Kansas 127. There the prairie chickens were lawfully killed and lawfully became an article of commerce, and their transportation prohibited. Here the quail were unlawfully taken and killed, and their possession and sale in this State were unlawful. But had they been lawfully taken and killed, their transportation to a place where they might be lawfully sold could not be interfered with by the statute.

The questions we have been considering were all raised in Phelps vs. Racey, *supra*. The opinion in that case, by the late Chief Justice of the Court of Appeals, is well considered and reaches the same conclusion at which we have arrived.

The judgment is affirmed.