

MAINE STATE LEGISLATURE

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STATE OF MAINE.

REPORT

OF THE

ATTORNEY - GENERAL

FOR THE TWO YEARS ENDING

NOVEMBER 30, 1904.

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will necessarily fall on him and the real parties who are the most at fault will escape. The requirements of section 8 form the basis for the successful prosecution of any person under said law. This section, as the law now stands, must be complied with before prosecution can be commenced and the offense must be by reason of the infringement of the act and subsequent refusal to comply with the statutes, a double requisite, it will be noticed, which, as hereinbefore stated, amounts virtually to a nullity.

The words of section 5 of said law commencing with the tenth line, which read as follows: to wit, "The director of said experiment station is hereby empowered to prescribe the form of said tags and adopt such regulations as may be necessary for the enforcement of the law," seem to be sufficient to permit the director of the Maine Agricultural Station to cause to be printed upon the inspection tags furnished by him under article 5 of the act, an analysis of feed stuffs contained in the package to which said tag is to be affixed.

February 10, 1903.

SMELTS.

Paying duties in this State, and shipping smelts through the State. Sale of such smelts within the State of Maine. Warden's authority.

Hon. A. R. Nickerson, Commissioner of Sea and Shore Fisheries, Boothbay Harbor, Me.:

My Dear Sir:—I herewith submit to you my views in answer to the foregoing questions presented by you for my consideration.

The questions in order are as follows:

1. Can smelts be lawfully shipped from New Brunswick to Boston or New York, landed in Eastport, paying duties at Eastport, and then reshipped from Eastport to the above mentioned ports? Or can they be received from New Brunswick by a resident of Maine, and after paying duty, sold in the State or shipped out of the State?

2. Whether or not you have exceeded your authority as given you by section 71 of chapter 284 of the Public Laws of 1901, by sending a copy of the enclosed letter to violators of chapter 284 of the Public Laws of 1901?

Copy of letter presented.

3. Does a fish warden have power to arrest a violator on board of a lobster smack while she is under way, or must he wait until she is at anchor, and can he arrest a violator on board a smack without a warrant?

4. In any case on shore where a warden cannot get the man's name has he a right to hold him without a warrant until such time as he can get the correct name?

5. Does a warden appointed by the governor, and with my written order to operate in another county, have power to arrest a violator in the county to which he is sent?

6. How should illegal lobsters be disposed of after seizure?

These several questions are herewith answered in order.

First. Referring to section 48 of chapter 284 of the Public Laws of 1901, the law provides among other things as follows: "But no smelts caught in such weirs after the first day of April shall be sold or offered for sale in this State, nor shall smelts caught in any manner between the first day of April and the first day of October following be offered for sale, sold, or shipped from the State under a penalty of \$25 for each offence."

The words "in any manner" may refer wholly to the method of taking and not to the place of taking. If these words should be construed as referring entirely to the manner of taking, without regard to the place where taken, then the rest of the clause might govern the place; that is, "smelts caught in such weirs." Without doubt the weirs referred to are weirs within the limits of the State of Maine. Nevertheless, it would seem to be a violation of the law to offer for sale, sell or ship from the State any smelts taken between the first day of April and the first day of October whether such smelts come from New Brunswick or elsewhere, with the single exception which reads as follows: "Provided, however, that dip nets may be used between the first day of April and the first day of May, and all smelts caught by dip nets between said days, may be lawfully offered for sale and sold in this State." This proviso, however, does not provide that such smelts may be shipped from the State.

If, however, smelts are shipped in bond from a foreign state or country through this State, then I do not understand that the law applies. The having of smelts in possession by a shipper within said periods of time within this State is, to say the least, *prima facie* evidence that they are being illegally shipped, and

if this is persisted in, it would seem to be advisable to make a test case, for the words of the statute "or shipped from the State" are broad enough to cover in any and all smelts shipped within the said period of time from the State although they have come into the State from a foreign province. If it is lawful for the sale of New Brunswick smelts within this State for the purpose of shipping to New York or elsewhere out of the State, then it is lawful for the sale of smelts from New Brunswick to parties in this State anywhere. I do not believe that this point can be sustained. The only protection for shipping smelts from foreign territory through this State seems to be by shipping them in bond. When smelts are brought within the ports of Maine from foreign ports and sold within the State of Maine and thereafterwards are shipped out of the State, the whole intent of the statute seems to be violated.

Second. I have carefully read the letter which you enclosed to me and do not find anything in it whatever that appears contrary to the provisions of said section 71 of chapter 284 of the Public Laws of 1901.

The provision of the section seems to be specific wherein it sets out as follows, "and all offences under, or violations of the provisions of this statute, may be settled by the commissioner of sea and shore fisheries upon such terms and conditions as he deems advisable."

I take these words to mean that you may do just what your letter purports; that is, you may settle all offences under or violations of the provisions of said chapter, whether such offences and violations have been brought before the courts or not. In other words it is left with the commissioner to settle with the offending parties all offences and violations of said chapter as he deems for the best interest of the State so to do.

The giving of this power to the commissioner probably arose from the fact that there are a large number of seizures of small importance for violation of the laws where it is better for the commissioner to dispose of them without reference to the courts where he can properly do so, rather than to present them to the courts. Whether it is a wise policy is not the question raised here, although from the nature of the offences under said chapter it would seem to be for the interest of the State to grant this power to the commissioner as it has.

Third. A warden may arrest a violator of the law on any vessel within the three mile limit when he is able to get on the vessel so to do. He is not obliged to wait until the vessel is at anchor. There seems to be no reason why a vessel should be considered in any other light when within the three mile limit than though the offence occurred on land. The jurisdiction of this State extends to the three mile limit and while a State official has no right to seize or detain a vessel except under particular circumstances as set out in section 6 of chapter 284 of the Public Laws of 1901, nevertheless when it comes to arresting a violator of the law, the officer can do so the same on a vessel as upon the land; that is, within the officer's jurisdiction. Besides, section 6 of said chapter provides as follows: "The commissioner of sea and shore fisheries and fish wardens may, with or without warrant, enter upon any vessel, boat, receptacle for fish or lobsters, or any place or places used therefor, and seize and carry away all fish and lobsters liable to seizure found therein."

* * * *

This section provides that a search and seizure may be had without warrant where the commissioner or wardens have reason to believe that the law is being violated. As to the arrest of the violator of the law, then reference may be had to section 4 of chapter 133 of the Revised Statutes, which reads, in part, as follows: "Every sheriff, deputy sheriff, constable, city or deputy marshal, watchman, or police officer, shall arrest and detain persons found violating any law of the State, or any legal ordinance or by-law of a town, until a legal warrant can be obtained."

Section 5 of said chapter 284 makes the authority of the warden equally as extensive as that of sheriffs, deputy sheriffs, constables, etc., so far as his duties and powers as warden goes.

An officer may arrest without warrant if he comes upon a person while violating the law. In the case of a lobster smack, if the captain has on board short lobsters the possession of them is in violation of the law, as appears by section 21 of chapter 70 of the Public Laws of 1903, which reads as follows: "It is unlawful to catch, buy or sell, give away or expose for sale, or possess for any purpose, any lobster less than 10½ inches in length, alive or dead, cooked or uncooked." * * *

It is a continuous violation of the law to have illegal lobsters in possession and at any minute the officer can reach such vio-

lator of the law, he is entitled to arrest such person without warrant and immediately take him before the proper tribunal and procure a warrant, but the officer does not have authority to make search without a warrant.

Fourth. Again, if the captain of a vessel is found to be violating the law and is arrested by the warden but refuses to go with him, that is resists arrest, and takes advantage of the warden by sailing his vessel away instead of allowing the warden to proceed in his business, the warden may call upon members of the crew for aid, and if the captain still resists he would then be liable for obstructing the officer.

While the party arrested may refuse to give his name, nevertheless that fact amounts to nothing since he may be arrested just the same and taken before the proper tribunal, where, if he refuses to give his name, the court will have complaint issued against him in proper form. But it must be remembered that an arrest without a warrant cannot be made, unless at the time of the arrest the party is *found to be violating* the law.

Fifth. Section 6 of said chapter 284 provides that wardens shall not exercise jurisdiction in any other county than that from which they are appointed, unless so instructed in writing by the commissioner of sea and shore fisheries.

Section 5 of said chapter provides that "deputy wardens may be appointed by the commissioner and that they shall be subject to all the laws pertaining to wardens appointed by the governor and council and have the same powers." This provision seems to put deputy wardens on the same footing with wardens within their jurisdiction, but it appears further by section 6, that the commissioner may issue written instructions to a warden and he thereupon may operate outside of his jurisdiction. The written authority provided for by the statute cannot be a general authority, because if it were, it would have been a piece of folly for the legislature to have delegated to the commissioner this authority, when it may as well have been done by the legislature itself. Hence the instructions contemplated to be given by a commissioner to a warden to operate outside of his jurisdiction must, it seems, be restricted and specific instructions, that is, instructions in relation to a particular case or a particular piece of work and not instructions which provide for him to

operate for an indefinite period of time in a general way in another jurisdiction than his own. The legislature scarcely would have delegated so large a power to the commissioner as to enable him to appoint wardens in writing to exercise generally throughout the State the powers which the State laws give them in their own jurisdiction. The largeness of the power is such, as has been said before, as the legislature would have exercised itself if deemed advisable. The authority to give written instructions to wardens seems to apply also to deputy wardens since section 5 of said chapter provides as follows: "Such deputy wardens shall be subject to all the laws pertaining to wardens appointed by the governor and council and have the same powers." This clause would seem to permit the commissioner to direct deputy wardens by specific written instructions to act outside of their individual jurisdictions as well as wardens, and in doing this under special written instructions I see no reason why he might not arrest a violator of the law in the county where he is sent other than that of his own jurisdiction.

Sixth. Section 29 of chapter 284 of the Public Laws of 1901, provides for the disposition of all lobsters seized, except those which are required by law to be liberated. This section states that such lobsters shall be appraised, that they shall be libeled, that the libel shall eventually be acted upon in court, and that if no one appears to claim the lobsters, or if appearing, are unable to show that they should not be seized, then they shall be confiscated by the State.

This section seems to provide fully for the disposition of all lobsters seized which are not required to be liberated. The officer, to protect himself, must have the lobsters appraised and libeled and the matter disposed of before the courts.

In case of mutilated lobsters, the provision of law is not so clear. The last clause of section 21 of said chapter reads as follows: "The possession of mutilated, uncooked lobsters shall be prima facie evidence that they are not of the required length." This section, as amended by the Public Laws of 1903, chapter 70, reads as follows: "The possession of mutilated lobsters, cooked or uncooked, shall be prima facie evidence that they are not of the required length." A further addition to the section is as follows: "All lobster meat so illegally bought, shipped,

sold, given away, exposed for sale, or transported, shall be liable to seizure and may be confiscated."

This last provision, it is evident, seems to have some other meaning than that set out under section 29 of the Public Laws of 1901, chapter 284. The words, "and may be confiscated," would appear to make the act of confiscation optional with the warden. However, this cannot be the exact and legal meaning, for the title and ownership of lobster meat, freed from the shell, cannot be gained by the State without being libeled. The State cannot gain title to the property of an individual without legal process. An officer seizing lobster meat, as set out in said section, would not be protected in his official acts if he did not have the same properly libeled. Hence the confiscation of lobsters of illegal length, and of mutilated lobsters, must be by the same process. It would appear somewhat, by the use of the words "and may be confiscated," as appears in the amendment, that the officer may use his judgment in the matter. That is, if it is necessary for the officer to libel the meat for his own protection, he should do so. That if the seizure is so small and inconsequential, that the libeling of the meat may be dispensed with, then he may dispose of it without confiscation but at his own peril. There seems to be no other distinction to be drawn. It apparently rests in the judgment of the officer as to which course he shall pursue for his own protection.

But the words "and may be confiscated," refer to lobster meat only. They do not apply to un-mutilated lobsters seized. The only absolutely safe course for the warden to pursue in the seizure of either un-mutilated lobsters or lobster meat, is to have the same properly libeled. Doubtless, there are very many instances where for one reason or another the warden does not find it necessary so to do. But this is a matter entirely within his own discretion and if he fails to libel in either case he takes the chances of suit for damages.

September 7, 1903.