December 21, 1920

To Honorable Guy H. Sturgis, Attorney General
Re: Private Licenses for Clam Digging

The enclosed letter from Dr. E. W. Gould of Rockland, one of the Sea and Shore Commission, was received this morning, and I understand it embodies in written form the subject matter of a conference between you and Dr. Gould in the office a few days ago. I have investigated the question involved sufficiently I believe to afford material for a general answer to the question presented, although, of course, a definite opinion would be impossible without the text of the particular bill which it is proposed to introduce.

In State vs. Leavitt, 105 Me. 76, the question of State control over fisheries, including shell fish, was considered at considerable length in an opinion by Mr. Justice Savage. It was then determined that, while under the common law of England, the Crown could not grant an exclusive right of fishery to a private individual, by virtue of the provisions of Magna Carta, this limitation on the royal prerogative did not abridge the power of Parliament, and upon similar principles the legislatures of the several States of the Union have a similar control over the subject matter and exercise over it not simply the right of sovereignty but the right of property. To quote from the opinion:

> "Although there are a few authorities which seem to hold that a public right of fishery is inalienable by the State, the great weight of authority and judicial expression is to the effect that the State in the exercise of its power of regulation and control may grant exclusive rights of fishery to individuals."

It was further specifically held that a statute of the State prohibiting the taking of clams from any shores or flats within a given town, but excepting from its operation residents of the town and hotel keepers within the town, did not violate the equality clause of the Fourteenth Amendment to the Constitution of the United States.

One of the leading cases on the Constitutional question involved is McCready vs. Va., 94 U.S. 391, involving the question whether the State of Virginia might grant to its own citizens the right to plant oysters in a tidal stream in that State, while denying the right to citizens of other States. The Courts specifically held that the public control over the fisheries of the State was a property right and that discrimination against non-residents was not in violation of any Constitutional guaranty of equality. While the question was not involved in that case, it was stated in the opinion as conceded that a State might grant to one of its citizens the exclusive use of a part of the common property.

A case quite closely in point is Phipps vs. State, 22 Md. 380. A statute of the State authorized any citizen of any county bordering on the waters of the State to locate and appropriate within the waters thereof any area not exceeding one acre, for the purpose of depositing and bedding oysters, upon certain conditions not material to this question. The constitutionality of the section was attacked on the ground that it afforded special and exclusive privileges inconsistent with and in derogation of the common right of free fishery in the waters of the State. In answering this contention the Court used the following pertinent language:

> "It is true that it contemplates several and exclusive privileges, and,it may be said, privileges that constructively abridge in some qualified sense, the common right of the public, although the abridgment of the public right does not constitute the main element of the privilege. The license simply proposes means for the protection of private rights, existing independently of the means. Oysters taken by one in the exercise of his common right of free fishery thereby become the property of the taker, and the whole scope of the privilege conferred appears to be nothing more than permission to use portions of the State lands covered by navigable water as places of deposit, where the title and possession of the property thus acquired may be continued and protected. As we construe it, this privilege subtracts nothing from the common right of fishery, nor can it be said to operate as a grant of several rights from the common right residing in the body of the people. The natural beds or deposits of the oyster do not extend to all the waters of the State, and, at most, the argument that the common right to fish for and take them is impaired by the artificial deposits here authorized would hold good only on proof that a natural bed or deposit is appropriated to the artificial use. It is settled that the lands of the State covered by navigable water may be granted, subject to the public right of navigation and fishery; and independent of the question as to the power of the legislature to restrict these rights by grants in severalty, it is clear that they may be aided by grants, conferring particular privileges. The power of the legislature to authorize the erection of wharves and the reclamation of land from the water for the purpose of encouraging navigation and commerce has never been questioned, notwithstanding the effect has been to confer privileges and advantages wholly private and exclusive in their character. And there appears to be no substantial reason why it may not, in like manner, grant privileges affording particular and exclusive benefits, for the purpose of increasing generally the

> product and value of the common right of fishery. The tendency of the privilege here conferred is undoubtedly in that direction. It affords the citizen enjoying the common right the means of preserving and increasing in value the fruits of his labor, - a result substantially enhancing the worth of the right enjoyed, and contributing also to the general comfort of the people and prosperity of the State. It is not necessary to decide in this case the very important, and perhaps delicate, question as to the power of the legislature to grant several or exclusive rights of fishery in navigable waters, and we forbear the expression of any opinion upon it. It is enough to say that the grant here objected to does not involve that question. We have examined with much care the authorities referred to in course of the argument, and in accordance with the general current do not hesitate in saying that the legislature did not exceed its power in granting the privilege here drawn in question."

A similar question arose in Payne vs. Providence Gas Company, 31 R.I. 295, decided in 1910, in which arose the question of the constitutionality of the legislation relative to the leasing of oyster grounds in that State, contention being made that the law was unconstitutional because it granted an exclusive fighery. The Court reviewed historically the limitations in connection with fisheries imposed upon the Crown by the provisions of Magna Carta, and concluded as did the Maine Court that the legislatures of several States had the powers both of the Crown and of Parliament with reference to the subject matter. In a lengthy opinion the Court quoted extensively from the case of State vs. Cozzens, 2 R.I. 561, in which was involved a system of legislation providing for leasing of flats for the purpose of oyster fishery, The following language from the earlier decision is pertinent:

> "We understand the object of this section is not the benefit of the lessee of the private beds, but by holding out motives to them to plant and cultivate oysters, to secure to the public a more abundant supply, in other words the constitutional right is so regulated as to reserve to the public the greatest benefit."

The Court also stated that prior to the adoption of the State Constitution the State had full authority to grant exclusive rights of fishery in the public waters of the State and in at least two instances have exercised the right. The conclusion of the Court in the Payne case is summed up in the following language:

> "Therefore the whole subject of fisheries, floating and shell fish, and all kinds of shell

> fish, lobsters, crabs, or fiddlers, or however, they may be known and designated and wherever situate within the public domain of the State of Rhode Island are under the fostering care of the General Assembly. It is for the legislature to make such laws, regulating and governing the subject of lobster-culture, oyster-culture, clam-culture or any other kind of pisciculture, as they may deem expedient. They may regulate the public or private fisheries. They may even prohibit free fishing for a time and for such times as in their judgment it is for the best interest of the State so to do. They may withhold from the public use such natural oyster beds, clam beds, scallop beds or other fish beds as they may deem desirable. They may make a close time within which no person may take shell fish or other fish, and generally they have complete dominion over fisheries and fish as well as all kinds of game. We find no limitation, in the Constitution, of the power of the General Assembly to legislate in this regard, and they may delegate the administration of their regulations to such officers or boards as they may see fit."

It would appear from Dr. Gould's letter that the object in view is a public one, viz: the fostering of the industry as a whole in the interest of the people, and that the benefit to be derived by individuals is incidental. It would seem to me to follow from the doctrine of these decisions that if legislation were carefully drawn and sufficiently disclosed the public end in view, it would not be invalid or unconstitutional merely on account of the fact that it contemplated the granting of exclusive rights to individuals in certain designated flats, through some reasonable leasing system.

If any further questions in connection with this matter come to your mind that you would like to have me investigate, please let me know.

Fred F. Lawrence
Deputy Attorney General