

MAINE STATE LEGISLATURE

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October 13, 1947

JK

To Richard E. Reed, Commissioner
Department of Sea and Shore Fisheries

I have your inquiry in regard to the enforcement of the provisions of Section 87 of Chapter 34 of the Revised Statutes of 1944 as amended by Chapter 137, Section 2, of the Public Laws of 1947; and you call my attention to an opinion written by my predecessor in office, Frank I. Cowan, dated May 17, 1941, wherein he gave his opinion as to the constitutionality of Chapter 230 of the Public Laws of 1937.

In this connection I wish to state that Chapter 230 of the Public Laws of 1937 has been amended twice by the legislature, by Chapter 280, P. L. 1941 and Chapter 137, P. L. 1947, and the statute was revised in 1944 and Chapter 230 of the Laws of 1937 was incorporated in Section 87 of Chapter 34, R. S. 1944, amended by Chapter 332, P.L. 1947.

I note that Mr. Cowan stated in his opinion that the provisions of Chapter 230, P. L. 1937, were invalid, and he cited State vs. Mitchell, 97 Maine 66. I have examined the case of State vs. Mitchell in 97 Maine, and it has no relation whatsoever to the Sea and Shore Fisheries acts or their enforcement, as it has to do with ordinances passed under the hawkers' and peddlers' act enacted by the legislature in 1931, which discriminated between those who paid taxes of \$25 or more on their stock in trade and those who paid a lesser amount, exempting the former from paying license fees, while requiring the latter to pay license fees. The Court in the case held that that was an arbitrary discrimination. In my opinion that case is not in point in this matter. In the case of State vs. Leavitt, 105 Maine, page 76, which Mr. Cowan also cited in his opinion, the Court held that Chapter 317 of the Private and Special Laws of 1903 was a constitutional exercise of the legislative power. This act forbade the taking or digging of clams on any of the shores or flats of Scarborough from the first day of April to the first day of October in each year by any person except inhabitants or residents of the town, hotel keepers, etc., The Court stated in 105 Maine at page 85, State vs. Leavitt, as follows:

"Since it must be assumed that the public interest required some limitation upon the right of clam fishing, it does not seem to us that it is unreasonable or arbitrary for the State having a proprietary interest as well as a governmental power all for the public benefit to give the preference to those whom the law for more than two hundred and fifty years has given a preference, and who were enjoying a preference when the Fourteenth Amendment was adopted, namely, the inhabitants of the town within which the fisheries are located. . ."

You will note in the last paragraph of Mr. Cowan's opinion of May 17, 1941, that he stated as follows: "You understand, of course, that Acts of the Legislature are regarded as valid until declared invalid by the courts." Therefore it is my considered opinion that the provisions of Section 87 of Chapter 34, R. S. 1944, as amended by the Public Laws of 1947, Chapter 137, and also re-enacted in Section 95 of Chapter 332, P. L. 1947, are constitutional and that the legislature under its police powers was not violating the provisions of the Constitution when it provided that no person, firm or corporation shall, between the first day of June and the first day of October following, ship, transport, offer for shipment or transportation, either directly or indirectly, any clams; quahogs or mussels, either in the shell or shucked, taken from the clam flats of Washington, Hancock, Knox and Waldo Counties beyond the limits of the State or to the counties of Sagadahoc, Cumberland, Lincoln and York, provided, however, that an exception shall be made for clams, quahogs or mussels which have been canned, packed or barreled between the first day of October and the first day of June.

Ralph W. Farris
Attorney General

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