

42.—FISHING IN THE NAVIGABLE WATERS OF THE UNITED STATES.*

The Committee on the Judiciary, to whom have been referred House bill 4690 and several petitions in favor of the passage of the same, have fully considered the same, and report as follows:

The proposed bill would give by act of Congress to the citizens of the several States of the Union equal right with the citizens of each State to fish for floating fish in the navigable waters and lakes of the latter. The question involved depends on the title to the waters and lakes referred to.

For purposes of navigation they are free to all the citizens of the several States alike, and the power of Congress to regulate commerce between the States includes the right to prevent any hostile legislation by any State against the equal rights with its own citizens of the citizens of all the other States; or it is forbidden by the clause of the Constitution which gives to the citizens of each State the privileges and immunities of citizens of the several States. (C. U. S., Art. 4, § 2.)

But it is right to inquire whether the citizens of a State acquire their right of fishing in its waters as a privilege derived from the grant of the State, or as vested in them by virtue of ownership as members of the body politic.

It has been settled by the highest authority in the English courts, that ever since Magna Charta, the crown cannot grant to a subject a several fishery in an arm of the sea, or in navigable waters, but that all such waters and the beds thereof are vested in the crown for the benefit of the subjects thereof, and not to be used in any manner to derogate from the right of navigation which belongs to the subjects of the realm. (*Free Fishery, &c., v. Gann*, 115 E. C. L. R., 803 House of Lords Cases, per Lord Chancellor Westbury and Lord Wensleydale (Baron Parke); *S. C. in Exch. Chamber*, 106 E. C. L. R., 853; *S. C.*, 103 E. C. L. R., 387 Common Pleas.)

This royal title held for the benefit of the subjects of the crown, which cannot be aliened to their detriment, has been thus recognized ever since Magna Charta.

In this country, by a series of decisions, the Supreme Court of the United States has settled the law in accordance with the English courts, that upon the Revolution the rights of the crown in navigable waters and inclusive of arms of the sea devolved upon each State as to all such waters within the territory of each of them. (*Martin v. Waddell*, 16 Peters; 367.)

In *Pollard v. Hagan* (3 Howard, 212) the same doctrine was maintained as to new States, as well as to the original States; and the right of the State fixed to all the beds of rivers below high-water mark.

* Report presented to the House of Representatives by Hon. J. R. Tucker, May 13, 1886.

In *Smith v. State of Maryland* (18 How., 71) the right of the State of Maryland to the shell-fish and floating fish in Chesapeake Bay was established as the sovereign right of the Commonwealth devolved upon her from the crown at the Revolution, a right which she could control without violation of the Constitution by such regulations as were needful to secure this public right without interfering with the navigation of the waters, Mr. Justice Curtis delivering the unanimous opinion of the court. (*Accord Mumford v. Wardwell*, 6 Wall., 436; *Weber v. Harbor Commissioners*, 18 Id., 66.)

In *McCready v. Virginia* (94 U. S. Reports, 391) the unanimous judgment of the court was delivered by Mr. Chief-Justice Waite, by which the right of Virginia to use and appropriate the navigable waters of Virginia for the benefit of her own people for the taking and cultivation of fish as a property right, and not as a privilege or immunity of citizenship, is established, though thereby the citizens of other States are excluded from the same rights. This right is one of property in the citizens of Virginia, and not a privilege or immunity of citizenship.

It is true the last decision, though in the opinion made to apply as well to floating fish as to shell-fish, only applied in fact to shell-fish; but your committee see no reason why the principle of these decisions should not apply to both.

Fish are *feræ naturæ*, and an absolute property in them can only be asserted when restrained of their liberty. This, it may be said, is the case with oysters, which, when planted, have no capacity to move, and distinguishes them from floating fish, which may move out of the reach of the State in whose waters they may temporarily be.

But upon this distinction of nature, no ground can be maintained for changing the decision applicable to the one when the case of the other is adjudicated.

In the case of *Riggs v. The Earl of Lonsdale* (1 Hurlst. & Norman, 923) it was decided in the Exchequer Chamber that the owner of land had a right of property in game killed on his land by a stranger. The fact that the game was *feræ naturæ* did not take from the owner of the land the property therein, even in favor of a stranger who hunted and killed it there.

This case was considered very fully in *Blades v. Higgs* (104 E. C. L. R., 50), where the decision of Justice Willes at *nisi prius*, overruling *Riggs v. Lonsdale*, was reversed by the court of common pleas; and on appeal to the Exchequer Chamber (106 E. C. L. R., 844) the court of common pleas was unanimously sustained; and the judgment of the Exchequer Chamber was affirmed by the House of Lords in S. C., 106 E. C. L. R., 866. The judgment in the House of Lords was sustained by the high authority of Lord Chancellor Westbury, with Lords Cransworth and Chelmsford, both ex-chancellors, concurring. That case decides clearly and distinctly that if A, a hunter, finds, kills, and carries

off in one continuous act, any game, *feræ naturæ*, on the land of B, the dead game is the absolute property of B, *ratione soli*.

That the same doctrine is applicable to fish caught and taken from the waters of the owner cannot be questioned; and the cases referred to by the judges in the discussion of the cases above cited mention fish as of the same character as animals and birds.

Your committee, therefore, being of opinion that the navigable waters within each State belong to it, subject to the paramount right of navigation, for the benefit of its own people, it has the right to secure the exclusive right of fishing in them to its own citizens by virtue of their common property in said waters, and that the citizens of other States have no constitutional right, nor can Congress confer any, to participate in fishing in them.

Your committee recommend that the bill referred do lie on the table, and the prayer of the petitioners be denied. All of which is respectfully submitted.

43.—OBSERVATIONS ON SALMON IN GERMAN RIVERS.*

By Prof. B. BENECKE.

We know but little about the salmon while ascending the different rivers, although this knowledge is of the greatest importance for the salmon fisheries and for the fixing of a rational season of protection. If we except the exceedingly valuable observations on the migration of the Rhine salmon by Miescher-Ruesch, no systematic investigation of this subject has anywhere been made. It is particularly astonishing that even in England, in spite of the great interest which the English take in the salmon fisheries, and in spite of the fact that there is a special inspector of salmon fisheries, and superintendents for every salmon stream, no one seems ever to have thought of subjecting this matter to scientific investigation.

Regular and exact observations have been made recently in the rivers Küddow and Rheda, which are small salmon streams of Germany, in which the circumstances are specially favorable.

The Küddow is a rapid and clear trout stream, which rises from the Vilm and Dolgen lakes near Neustettin, flows from north to south in many meanderings and with a strong current, and finally empties near Uszcz into the Netze, a well-known tributary of the Oder. In its middle course the Küddow has numerous spawning places of salmon; and since the reckless fishing which was formerly going on at its mouth, near Uszcz, and above, near Schneidemühl, has been checked, salmon ascend the Küddow regularly for the purpose of spawning. Our ob-

* "*Beobachtungen über den Aufstieg des Lachses in den Flüssen.*" From Circular No. 1, 1886, of the German Fishery Association, Berlin, March 4, 1886. Translated from the German by HERMAN JACOBSON.